

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No.206 of 2014

Date: 18 October, 2016

CORAM:

Shri Azeez M. Khan, Member
Shri Deepak Lad, Member

In the matter of
Petition of MSEDCL seeking refund of Rs. 50.44 Cr. paid by the Petitioner in
pursuance of tripartite Energy Purchase Agreement and Rs.8.79 Cr. towards balance
Cross Subsidy Surcharge for FY 2012-13.

Maharashtra State Electricity Distribution Company Limited (MSEDCL)Petitioner
V/s

Sai Wardha Power Ltd. (SWPL) ...Respondent

Present during the hearing

For the Petitioner : Shri G.Saikumar (Adv)

For the Respondent : Shri Anand K. Ganesan (Adv)

Daily Order

Heard the Advocates for the Petitioner and Respondent.

1. Advocate for MSEDCL submitted that :-

- (1) The Commission vide Order dated 28 August, 2013 in Case No. 117 of 2012 held that SWPL had not fulfilled the Captive Generating Plant (CGP) criteria as per the Rule 3 (2) of Electricity Rules, 2005 in FY 2012-13. The same was also upheld by ATE in its Judgement dated 17 May, 2016 in Appeal No. 316 of 2013. Hence, the amount of Rs. 50.44 Crores paid to the Respondent, SWPL, by MSEDCL towards purchase of surplus energy in pursuance of the Energy Purchase Agreements (EPA) in FY 2012-13, needs to be refunded.
- (2) MSEDCL had wrongly levied Rs. 56.41 Crores on the captive consumers of SWPL towards Cross Subsidy Surcharge (CSS) for FY 2013-14, which was objected to by SWPL which filed a Petition in Case No. 164 of 2013 for refund of CSS. The Commission disposed of the Petition vide Order dated 17 January, 2014 and held that the matter may be resolved by mutual discussion amongst the Parties.

- (3) SWPL thereafter filed a Review Petition in Case No. 34 of 2014 seeking refund of Rs.56.51 Cr. That Petition was disposed of by the Commission vide Order dated 26 March, 2014, which held that the Order dated 17 January, 2014 in Case No 164 of 2013 is very specific, and directed MSEDCL to stop levying CSS monthly, and mutually discuss the issue of inadvertently recovered CSS and to treat the issues of over- injected units and CSS separately.
- (4) The Commission's Order dated 20 August, 2014 in Case No. 101 of 2014 held that SWPL has met the CGP criteria in FY 2013-14. The ATE Judgment in Appeal No.252 of 2014 has also upheld that, in FY 2013-14, SWPL has qualified as a CGP and hence CSS is not applicable to its consumers in FY2013-14.
- (5) SWPL filed a Petition in Case No.74 of 2014 seeking renewal of Open Access w.e.f. 1 April, 2014. In pursuance of the Order of the Commission in that Case, SWPL deposited Rs.2.45 Cr with MSEDCL. Accordingly, MSEDCL had granted Open Access permission for FY 2014-15 to SWPL.
- (6) The present Petition has been filed by MSEDCL in pursuance of the Commission's direction in its Order dated 2 May, 2014 in Case No. 74 of 2014 for adjustment of the amount paid towards purchase of surplus energy for FY 2012-13 against the CSS amount recovered from SWPL's consumers inadvertently for FY 2013-14.
- (7) Subsequently, SWPL had filed a Writ Petition before the High Court of Bombay, Nagpur Bench, seeking refund of the CSS collected by MSEDCL in FY 2013-14. MSEDCL had subsequently refunded that amount.
- (8) \Hence, only the issue of refund of amount paid by MSEDCL against purchase of surplus energy needs to be adjudicated.
- (9) MSEDCL had entered into EPAs with SWPL for purchase of surplus energy on the basis that SWPL would meet the requirements for being a CGP as provided in Rule 3 (2) of the Electricity Rules, 2005. Purchase of surplus energy by entering into EPAs was a promotional measure exclusively for CGPs. This promotional activity was undertaken by MSEDCL in terms of its Commercial Circular No. 170 dated 13 June, 2012. In case of IPPs, such over-injected units are treated as lapsed.
- (10) Clause 1.1 read with Clause 1.0 of the EPAs provides that SWPL is obliged to meet the CGP qualifications envisaged in the Electricity Rules, 2005 and the Electricity Act, 2003, and is liable for all consequential actions including but not limited to payment of CSS with retrospective effect.
- (11) Clause 9.4 of the EPAs provides that purchase of over-injected units shall be subject to the commercial interests of the Petitioner.

- (12) In the Open Access permission letter for FY 2012-13, it is also specifically mentioned that the permission was issued on the presumption that all criteria for captive user as specified under the Act, Rules, and Regulations are satisfied by the captive user. If, in future, it is observed that the captive user is not satisfying any of the requirements with regard to captive use, the Open Access permission shall be treated as granted as per Section 10 of the Electricity Act, 2003 from the date of its commencement.
- (13) The Commission, vide its Order dated 28 August, 2013 in Case No. 117 of 2012, held that SWPL did not fulfill the requirements of being a CGP in FY 2012-13. Thus, the amount of Rs. 50.44 Crores paid by MSEDCL in pursuance of the EPAs in FY 2012-13 is required to be refunded since, without these EPAs, all over-injected units would have lapsed and no payment/adjustment would have been given by MSEDCL to SWPL. Thus, SWPL is liable to refund a sum of Rs.50.44 Cr.

2. SWPL submitted that :-

- (1) Neither the Electricity Act, 2003 nor the Electricity Rules, 2005 nor EPAs have any specific provision for the refund of the amount paid for the over-injected units, if the criteria as stipulated in the Electricity Rules, 2005 for a CGP are not fulfilled.
- (2) MSEDCL had levied CSS on the captive consumers of SWPL on monthly basis in FY 2013-14 considering them as a non captive. Article 1.1 of the EPAs provides that SWPL is obliged to meet CGP qualifications envisaged in the Electricity Rules, 2005 and is liable for consequential actions of payment or refund of CSS only.
- (3) Article 9 of the EPAs stipulates the provisions for events of defaults and terminations. However, it does not have any provisions for the refund of the payment for over-injected units.
- (4) Clauses 7.6.1 & 7.6.2 of Commercial Circular No. 170 also does not have any provision for the refund of amount paid for over-injected units.
- (5) The status of a party changes at the end of year. In respect of such changes, the Contract Act does not provide any relief. The captive arrangement is between the Generator and consumer. The surplus energy has been injected into the grid and has been utilised by MSEDCL. Hence MSEDCL has paid for it.
- (6) The Supreme Court in its Judgment in Civil Appeal No. 321 and 322 of 1956 ruled that, if a party to a contract has rendered service to the other not intending to do so gratuitously and the other person has obtained some benefit, the former is entitled for compensation for the value of the service rendered by him.

3. Advocate of MSEDCL submitted that the two Supreme Court Judgments cited by SWPL are not relevant in this Case as the Commercial Circular No.170 and Open Access permission stated that SWPL is obliged to meet the CGP criteria envisaged in the Electricity Rules, 2005 and is liable for all consequential actions, if they are not fulfilled.
4. Upon the request of SWPL, the Commission allows it to submit a list of Judgments issued by various courts within a week's time.

Case is reserved for Order.

**Sd/-
(Deepak Lad)
Member**

**Sd/-
(Azeez M. Khan)
Member**