

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
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Case No. 24 of 2017

Dated: 2 May, 2017

**CORAM: Shri. Azeez M. Khan, Member
Shri. Deepak Lad, Member**

In the matter of Petition filed by Maharashtra State Electricity Distribution Co. Limited under section 86 of the Electricity Act 2003 read with Article 13 (Change in Law) of PPAs under Case 1 stage 1 and Article 10 (Change in Law) of PPAs under case 1 stage 2.

Maharashtra State Electricity Distribution Company Limited. (MSEDCL)Petitioner

Adani Power Maharashtra Limited. (APML)Respondent No. 1
JSW Energy Limited (JSWEL)Respondent No. 2
RattanIndia Power Limited (RIPL)Respondent No. 3
GMR Warora Energy Ltd (GMR)Respondent No. 4

Appearance:

Representatives for MSEDCL:	Adv. Kiran Gandhi
Representative for APML:	Shri. M.R.Krishna Rao
Representative for JSW:	Adv. Aman Anand
Representative for RIPL:	Adv. Vishrov Mukerjee.
Representative for GMR:	Shri. Alok Shankar

Daily Order

Heard the Representatives and Advocates of the Petitioner and the Respondents.

Advocate of MSEDCL stated that the Petition has been filed for recognition of Reserve Bank of India (RBI) Notifications regarding change in banking rates as a Change in Law with regard to the PPAs. The RBI introduced Benchmark Prime Lending Rate (BPLR) system from 2003. As per the subsequent Circular/Guidelines of RBI, the Base Rate system replaced the BPLR system with effect from July 01, 2010 and all categories of loans were to be priced only with reference to the Base Rate. SBAR is defined in the PPAs and Change in Law is also defined under Stage 1 and Stage 2 Competitive Bidding PPAs. The issue of change in the basis of rates is relevant to the rate applicable to delayed payments, i.e. Late Payment Surcharge, under the PPAs.

Further, RBI has issued fresh directions on 3 March, 2016 stating that all rupee loans sanctioned and credit limits renewed with effect from April 01, 2016 shall be priced with reference to the Marginal Cost of Funds Based Lending Rate (MCLR) which will be the internal benchmark for such purposes.

SBI is publishing Base Rate (Historical Data) with effect from 01.07.2010 till date on its corporate website, and from April 2016 onwards, SBI is also publishing MCLR rates besides the Benchmark Prime Lending Rate (Historical Data) on its website.

The Base Rate Guidelines and MCLR Guidelines are applicable for new loans and for those old loans that come up for renewal. BPLR rate will continue for these old loans till their maturity and which do not come for renewal. The provisions/directions of the circulars apply to every scheduled commercial bank.

He stated that, under the MYT Regulations, 2011, Regulations 35.3 (b) and 35.4 (b) are regarding rate of interest on working capital which shall be equal to the State Bank Advance Rate (SBAR) of SBI as on the date on which the Application for determination of tariff is made. Further, as per Regulation 13.9 of MERC MYT (Third Amendment) Regulations, 2011 for computation of FAC component of Z- factor charge, the component 'C' is considered as carrying cost for any under recovery/ over recovery on account of change in fuel cost of own generation and cost of power purchase, computed at the SBAR prevailing at the beginning of the month.

Now, as per the MYT Regulations, 2015, Regulations 31.1 (f), 31.2 (b) and 31.3 (b) are regarding rate of interest on working capital which shall be on normative basis and equal to the Base Rate as on the date on which the Petition for determination of tariff is filed, plus 150 basis points.

The Commission, in the MYT Regulations, 2015, has adopted the Base Rate system.

Advocate of APML stated that it has already replied to the Petition. BPLR is still in existence and SBI is publishing it regularly. Vide letter dated 14 March, 2017, APML has informed MSEDCL regarding the change in SBAR from 14.50% to 14.00% w.e.f January, 2017, and further from 14.00% to 13.80% w.e.f April, 2017. Only if BPLR does not exist, is it required to come to the Commission with a mutually agreed rate.

The MYT Regulations are applicable only for the Tariff determined under Section 62, whereas the PPA is signed under Section 63 of EA, 2003. Therefore they are not relevant in this case. MSEDCL cannot pick and choose the Regulations from out of the MYT Regulations which are for section 62 PPA.

Advocate of JSWEL stated that the MYT Regulations stipulate the absolute nos. for Late Payment Surcharge as per Regulation 36.1 i.e., 1.25% per month and particular benchmark is specified. Also, under Regulation 36.3 of the MYT Regulations, 2015, Delayed Payment

Charge and Interest on Delayed Payment earned by the Generating Company or the Licensee shall not be considered under its Non-Tariff Income. MSEDCL has not prayed for amendment in or reopening of the PPAs, and hence the Petition may not be admitted.

Advocate of JSWEL further submitted that MSEDCL has filed the Petition against 5 individual Generators, who have independent and separate PPAs with the MSEDCL. The Petition as such is not maintainable in its present form and suffers from the vice of misjoinder of Parties (both Stage 1 and Stage 2 Competitive Bidding PPAs having been included) and causes of actions. In its Petition, MSEDCL has not sought amendment or modification of the PPA, and effect of the Change in Law would be extraneous to the PPA. The definition of SBAR in the PPA states that, in absence of SBAR, it shall be the rate mutually agreed rate by the Parties. However, MSEDCL never approached it for discussion, and while entering into the PPA, both parties were agreed on SBI PLR. MSEDCL has admitted in the Petition that the benchmark rates are still being published. As per Art 13.2 of the PPA, as a result of Change in Law, MSEDCL has to provide the details of any decrease in revenue or increase in expenses, which shall be payable only if such decrease or increase is in excess of 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

Advocate of RIPL stated that only events under Article 10.1.1 constitute Change in Law and the payments received due to Change in Law cannot be treated as income or expenditure for the Company arising out of the business. The fact is that MSEDCL is not even paying for the power purchased. He stated that MSEDCL has been accepting the bills till date as per the PPA, and is now claiming Change in Law. Such act of MSEDCL is barred by limitation. Payment of Late Payment Surcharge is not part of the normal course of transactions under the PPA, but in the nature of penal charges which arise only if the payments have not been made for the invoices by the due date, and hence the rate applicable as interest for this event of default cannot be treated as Change in Law under the PPA. Under Art 8.3.5 of the PPA, Late Payment Surcharge is payable at the rate of 2% in excess of the applicable SBAR per annum.

Advocate of GMR stated that it is an Inter- State Generator, and jurisdiction of the CERC has already been decided in such issues in various Judgments, and the Commission may reject the Petition on the basis of maintainability. MSEDCL has not included Coastal Gujarat Power Ltd. (CGPL) in this Petition, being an inter-state Generator, whereas GMR has been made a party. MSEDCL has not approached CERC for its claim of Change in Law for CGPL. Article 10.2 of the PPA deals with the applicability and principles for computing the impact of Change in Law, and can be invoked only to compensate the affected party and restore it to the same economic position as if such Change in Law had not occurred. Moreover, the RBI Circulars from 2010, but have not been raised by MSEDCL till now.

The PPA has been executed as per the Standard Bidding Documents issued by the Ministry of Power and cannot be amended or modified subsequently through a Change in Law Petition. Under Article 10.3.2 of the PPA, the compensation for any decrease in revenue or increase in

expenses to the Seller shall be payable only if it is in excess of 1% of the value of the Letter of Credit in aggregate for the relevant Contract Year.

The Case is reserved for the Order.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M. Khan)
Member