

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 5 of 2016

Date: 11 May, 2017

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

Petition of M/s Topworth Urja and Metals Ltd. for appropriate directions / Orders to MSEDCL in relation to Orders / directions issued by the Commission's Order dated 8 September 2004 in Case No. 55 of 2003 & 56 of 2003 and for its enforcement Energy Purchase Agreement signed with MSEDCL.

M/s Topworth Urja and Metals Ltd.

..Petitioner

Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) Respondent

Present during the hearing

For the Petitioner : Ms. Deepa Chawan, (Counsel)

For the Respondent : 1. Shri Ashish Singh, (Adv)
2. Shri Y.K.Prasad (Rep)

Daily Order

Heard the Advocates of the Petitioner and the Respondent.

1. The Petitioner stated that:

- (i) The Commission vide its Order dated 8 September, 2004 in Case No. 55 and 56 of 2003 has granted a special dispensation to Captive Power Plant (CPPs) for certain specific cases allowing self consumption of minimum 25% and sales to the Distribution Licensee's upto 75% of the installed capacity for a period of upto three years. The Commission had taken into account the genesis of CPPs and considered it is an opportunity to harness excess saleable capacity with CPPs to meet the growing power deficit in the State.
- (ii) It has commissioned 30 MW CPP on 1 July, 2010 primarily to meet the electricity requirement for its sponge iron plant, steel melting shop and rolling mills. For better utilisation of excess energy of the CPP, it decided to sell excess power to Respondent (MSEDCL) under the special dispensation considering Low capacity utilisation and proposed capacity expansion, as stipulated in the Commission's Order and entered into Energy Purchase Agreement (EPA) with

MSEDCL on 21 August 2010 for supplying 15 MW from 1 July, 2010 to 30 June, 2011.

- (iii) After approval from MSEDCL, it has started injecting 7 MW more power on RTC basis. The EPA was amended on 20 May, 2011 for supplying 22 MW (15 original + 7 additional) from 1 July, 2011 to 31 March, 2012. On 20.03.2013 it entered into a second EPA with MSEDCL for sale of 22 MW power from 1 April, 2012 to 31 March, 2013. On 19 June, 2013, it entered into third EPA with MSEDCL for sale of up to 30 MW power from 1 April, 2013 to 31 March, 2014
- (iv) On 28 April, 2014, Superintending Engineer, Nagpur Rural Circle (Nodal Officer) informed the Chief Engineer (Commercial) MSEDCL that Petitioner had fulfilled its CPP eligibility criteria for FY 2013-14 for sale of power. However, Chief Engineer (Commercial) vide letter dated 9 September, 2014 informed the Petitioner, that due to non-fulfilment of CPP criteria, it should not export power unless an EPA is executed for FY 2014-15. Accordingly, Superintending Engineer, Nagpur Rural Circle informed the Petitioner on 16 October, 2014 that it has failed to meet the CPP eligibility criteria of minimum self-consumption of 51% and maximum sale of 49% of the power generated, hence i) its request for execution of an EPA for FY 2014-15 is denied. ii) power supplied over and above 49% of the generation to MSEDCL is treated as lapsed and any payments made by MSEDCL towards procurement of such power above 49% shall be recovered by MSEDCL iii) it shall be liable to pay Cross Subsidy Surcharge (CSS) on the self-consumed units by it during FY 2013-14.
- (v) The main issue in the Petition is the interpretation of the time limit of 3 years for the relaxation of CPP eligibility criteria under the CPP Order. It should be a calendar year and not the financial year. However, MSEDCL has considered the first year as calendar year from 01.07.2010 to 30.06.2011, and subsequently the second (1.7.2011 to 31.3.2012) and third years (01.04.2012 to 31.03.2013) as a financial year. MSEDCL has retracted the procurement of power and the basis of assessing the CPP's special status retrospectively. The period of 3 years in the CPP Order has to be construed in terms of calendar years, as originally construed by MSEDCL itself.
- (vi) There was no communication from MSEDCL before 31 March, 2013 regarding non-fulfilment of CPP criteria. Had it been informed by MSEDCL well within the time, it would have taken appropriate action well in advance to fulfil the CPP eligibility criteria.
- (vii) After approval of MSEDCL, the Petitioner, in a bona-fide manner, continued to supply power in FY 2014-15. Only vide letter dated 9 September, 2014 received on 15 October, 2014 did MSEDCL direct to stop supplying power. MSEDCL is duty bound to compensate for the power supplied to it. The provisions of the Contract Act, 1872 may also be seen. In this context, the Supreme Court in its Judgment dated 12 November 2007 in Civil Appeals No 7400 of 2000 with No 2540 of 2002 has ruled that *"a person who does work or who supplies goods under a contract, if no price is fixed, is entitled to be paid a reasonable sum for his labour and the goods supplied. If the work is outside the contract, the terms*

of the contract can have no application; and the contractor is entitled to be paid a reasonable price for the work as was done by him.” In its case, power is a commodity and Petitioner is entitled to be compensated. However, MSEDCL belatedly and as an afterthought unilaterally refused its claims for the power injected.

- (viii) For the period 1 July, 2010 to 30 June, 2013, it has met the CPP eligibility criteria in terms of the special dispensation provided under the Commission’s CPP Order. Thereafter, for the period 1 July, 2013 to 31 March, 2014 i.e. post completion of the three year period of special dispensation, the Petitioner has met the normal CPP eligibility criteria by maintaining its power exports below 49% of its generation. However, contrary to this correct interpretation and its own earlier understanding, MSEDCL has subsequently taken a diametrically opposite stand and concluded that the Petitioner has failed to comply with the CPP eligibility criteria for the period of FY 2013-14. As a consequence, of MSEDCL has belatedly levied CSS to the tune of Rs. 20,18,62,538.50/- for FY 2013-14, and sought refund of Rs. 2,58,14,676/- paid by MSEDCL for the power sold in excess of 49% generation. The Commission may quash MSEDCL’s letter dated 30 December, 2015 regarding payments of CSS and refund for excess sale of power of Rs.22.76 Cr.

2. Advocate of MSEDCL stated that:

- (i) Regarding the provisions of the Contract Act, mentioned by the Petitioner, the Appellate Tribunal for Electricity (ATE) in its Judgment dated 16 May, 2011 Appeal No 123 of 2010 has stated that “*Section 70 and 72 of the Contract Act, 1872 will not be applicable, as present case is governed by the Electricity Act, 2003 which is a complete code in itself.*”
- (ii) The Commission’s CPP Order dated 8 September, 2004, allows CPPs to sell up to 75% of the total generation in first 3 years in certain circumstances. The Petitioner has claimed captive status for FY 2013-14, and has prayed for execution of EPA with MSEDCL for FY 2014-15 and release of outstanding dues against energy purchase bill for the relevant period of FY 2014-2015. For FY 2013-14, the self consumption of Petitioner was 47.59%. Thus, the Petitioner cannot avail the relaxation provided under the special dispensation. Petitioner has failed to comply with the eligibility criteria for CPP in FY 2013-2014, and hence EPA for the subsequent year FY 2014-2015 was not executed with it.
- (iii) The Petitioner was earlier informed vide letter dated 03 April, 2014 that the purchase of surplus power for FY 2014-15 shall be subject to fulfillment of CPP eligibility criteria in FY 2013-14. Accordingly, based on the verification of the documents submitted by the Petitioner, it was informed that the eligibility criterion for FY 2013-14 was not met and consequently the Petitioner was liable to pay CSS for the power consumed during FY 2013-14, and the power sold to MSEDCL above 49% would be treated as lapsed. In spite of this, the Petitioner injected the power unlawfully without valid permission.
- (iv) The intent of the CPP Order is with respect to the selling of power and not for the fulfilment of CPP criteria. The limit of 3 years is for the purchase of power and to give some relaxation but not for establishment of CPP criteria. Also,

special dispensation in the CPP Order applies only in specific cases and not in the general case. No generation and consumption data has been provided by the Petitioner to establish that it meets CPP criteria.

- (v) Post issuance of the CPP Order, there have been subsequent developments like Electricity Rules, 2005 notified on 08 June, 2005 which state the eligibility criteria for a CPP, i.e > 51% self consumption. Also, as per the Electricity Rules, 2005, the annual determination shall be based on a financial year. The Ministry of Power, vide letter dated 07 October, 2010, have issued the clarification of annual basis. The COD of the Petitioners CPP was on 1 July, 2010. Thus as per the clarification issued by MoP, the period of the first three years ends on 31 March, 2013. As the applicability of the special dispensation ends on 31 March, 2013, Petitioner has to fulfil the normal condition of > 51% self consumption from FY 2013-14, i.e. from 1 April, 2013 onwards. Due to non fulfilment of the captive eligibility criteria by the Petitioner, the supply from its power plant to its destination of use shall be treated as if it is supply of electricity by a non-CPP generating company, and thus the Petitioner is liable to pay CSS for such supply to the host Distribution Licensee, i.e. MSEDCL in this case.
3. The Commission observed that, considering the special nature of CPPs and optimisation of the resources available, the special dispensation for three years in certain circumstances has been stipulated. The Commission asked MSEDCL as to why it had not applied the principle of 49% and 51% in 2011-12 or 2012-13 and why three months period (April to June, 2013) is separated from the earlier dispensation for three years. MSEDCL stated that it had committed a mistake and is rectifying it. The Commission asked MSEDCL as to what criteria it had applied and how it has interpreted the CPP Order in case of other CPPs. MSEDCL stated that it will examine the same and submit it to the Commission.

The Case is reserved for Order.

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

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