

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005.
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.merc.gov.in/www.mercindia.org.in

CASE No. 23 of 2017

In the matter of

**Petition of Maharashtra State Electricity Distribution Co. Ltd. proposing Bank
Guarantee / Letter of Credit equivalent to Cross-Subsidy Surcharge and Additional
Surcharge from Captive Generators as payment security before providing Open
Access**

Miscellaneous Application No. 7 of 2017

**Application of Captive Power Producers Association for intervention in Case No. 23 of
2017**

Miscellaneous Application No. 8 of 2017

**Application of Sai Wardha Power Generation Ltd. for intervention in Case No. 23 of
2017**

Miscellaneous Application No. 13 of 2017

Application of OPGS Power Gujarat Pvt. Ltd. for intervention in Case No. 23 of 2017

Miscellaneous Application No. 14 of 2017

Application of JSW Energy Ltd. for intervention in Case No. 23 of 2017

Coram

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

Maharashtra State Electricity Distribution Co. Ltd.

.....Petitioner

1. Captive Power Producers Association
2. Sai Wardha Power Generation Ltd.
3. OPGS Power Gujarat Pvt. Ltd.
4. JSW Energy Ltd.

.....Applicants

Appearance

- | | |
|--|---|
| For the Petitioner | : Shri Ashish Singh (Adv.)
Shri A. W. Mahajan (Rep.) |
| For Applicant 2 | : Shri Anand K. Ganeshan (Adv.) |
| For Applicant 3 | : Shri Hemant Singh (Adv.) |
| For Applicant 4 | : Shri Suraj D. Guru
Shri Prafulla Katiyar |
| For Tata Power Co. Ltd. (Distribution) | : Smt. Swati Mehendale |
| For Reliance Infrastructure Ltd. | : Shri Ghansham Thakkar |
| For Authorised Consumer Representative | : Dr. Ashok Pendse, TBIA |

ORDER

Date: 17 January, 2018

1. Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) has filed a Petition on 25 January, 2017 citing Regulations 36 and 37 of the MERC (Distribution Open Access) Regulations ('DOA Regulations'), 2016 and Rule 3 of the Electricity Rules, 2005 seeking in-principle approval to a pre-condition of furnishing Bank Guarantee/Revolving Letter of Credit as a payment security mechanism, equivalent to the Cross Subsidy Surcharge (CSS) and Additional Surcharge applicable to an Open Access consumer, from an entity which claims to be a Captive or Group Captive Power Plant (CPP/ GCPP) before grant of Open Access.
2. MSEDCL's prayers are as follows:-
 - i. *"Allow the present Petition/application of the Petition.*
 - ii. *Hold that payment security mechanism in the form of bank guarantee/revolving letter of credit equivalent to future CSS and other applicable charges are a pre-requisite to avail open access for any CPP.*
 - iii. *Allow by issuing directions that captive power producers cannot apply for short term open access permission for captive consumption during the financial year..."*

3. The Petition states as follows:
 - 3.1 In-principle approval is sought for imposing a pre-condition of furnishing Bank Guarantee/Revolving Letter of Credit as a payment security mechanism, equivalent to the CSS and Additional Surcharge applicable to an Open Access consumer, by an entity which claims to be a CPP or GCPP before grant of Open Access.
 - 3.2 The determination of captive status of a Generating Plant is done only at the end of the financial year. The Distribution Licensee has to verify the shareholding pattern, the generation data of the Plant and self-consumption data of the Captive Users as per the provisions of the Electricity Rules, 2005. If the Generating Plant does not fulfill the CPP status at the end of financial year, the Distribution Licensee may face the brunt of loss of CSS and Additional Surcharge.
 - 3.3 If CSS and Additional Surcharge are not paid by the Captive Users of the CPP, the amount has to be borne by other consumers of the Distribution Licensee. In the past, disputes pertaining to CPP status determination have gone up to the Supreme Court. Such delays in the recovery of CSS and Additional Surcharge put a financial burden on the common consumers of Distribution Licensees like MSEDCL.
 - 3.4 It has been observed that Captive Users routinely apply for Short Term Open Access (STOA) permissions on month to month basis. The shareholders at the time of STOA application in each month are different, i.e. the shareholding pattern of such claimed CPPs keeps changing. Hence, at the end of financial year when the CPP status of such Plants is determined, MSEDCL has to rigorously follow up with their individual consumers for recovery of CSS and Additional Surcharge in case they fail to satisfy the criteria as per the Rules.
 - 3.5 The past history of such CPPs also indicates deliberate manipulation in complying with the criteria laid down under Rule 3 of the Electricity Rules, 2005, leading to unwarranted litigation and causing loss to the Distribution Licensee.
 - 3.6 In FY 2015-16, some CPPs have applied for STOA permission for 1 month for captive consumption. The permission was availed on monthly basis. As per the Rules, MSEDCL had not levied CSS and Additional Surcharge assuming that such CPP had complied with all the criteria. However, at the end of FY 2015-16, the CPP status was not established, and accordingly CSS and Additional Surcharge were levied on its captive consumers.
 - 3.7 There is an element of uncertainty in the timing and determination of the captive status of many CPPs. Determination of the captive status at the end of the financial year, especially in case of STOA permissions, may result in financial loss to the Distribution Licensees due to non-fulfillment of captive status as a result of frequent changes in shareholding, non-self use of 51% of total generation, non-creditworthy captive consumers etc.

- 3.8 Contrarily, if the Distribution Licensee charges the CSS and Additional Surcharge upfront, it would have to refund this amount along with interest at the end of the financial year if the Generating Plant fulfils the captive status criteria. In this process, other consumers of the Distribution Licensee would be burdened with additional interest cost.
- 3.9 Bank Guarantee / Revolving Letter of Credit is an effective payment security mechanism since it would cast a responsibility on the CPP and the Captive Users to comply with the CPP criteria. Non-compliance of CPP status would reduce the burden on the Distribution Licensee since it can invoke the Bank Guarantee/ Letter of Credit and recover the CSS and Additional Surcharge without being forced to take recourse to different courts of law. It is a win-win situation for all the stakeholders as it is a guaranteed and secure mechanism to safeguard their financial interests. Further, it is a well-established business practice to furnish Bank Guarantee or Revolving Letter of Credit to secure payments.
- 3.10 Thus, on account of uncertainty in the CPP status of Generating Stations in case of both STOA and Medium-Term Open Access (MTOA), the Commission may give in-principle approval for obtaining Bank Guarantee/ Revolving Letter of Credit as payment security equivalent to CSS and Additional Surcharge applicable to an Open Access consumer from any entity which claims to be a CPP/GCPP before grant of Open Access.
- 3.11 Alternatively, the Commission may direct that captive consumers shall not have the option of STOA which creates technical problems since the captive status can only be determined at the end of the financial year end as per the Electricity Rules, 2005. Hence, only MTOA permissions would be accorded for captive consumption, which would reduce the financial risk for the Distribution Licensees.
4. In its Miscellaneous Application (No. 7 of 2017) dated 12 April, 2017 seeking to intervene in Case No. 23 of 2017, the Captive Power Producers Association (CPPA) has stated as follows:
- 4.1 A CPP which meets the criteria under Rule 3 of Electricity Rules, 2005 of 26% of equity contribution and 51% consumption for self-use is exempt from payment of CSS.
- 4.2 In fact, CPPs reduce the burden on MSEDCL of Transmission and Distribution Losses and pay Electricity Duty. The Government of Maharashtra (GoM), vide its Policy of 1993, has encouraged setting up of CPPs.
- 4.3 MSEDCL is unable to supply uninterrupted power to the industry at large, which necessitated the setting up of the CPPs in order to avoid loss of production and ensure timely and effective supplies as per the business terms.
- 4.4 The entire investment of setting up of the Plant and associated infrastructure of the plant is done by the CPP holders.

- 4.5 Instead of creating a conducive atmosphere for smooth operation of CPPs, MSEDCL keeps discouraging them, firstly, by withdrawing banking facility, and now abruptly stopping power purchase from them inspite of Power Purchase Agreements (PPAs) and delaying approvals of temporary Open Access applications, causing loss of business.
- 4.6 The present Petition praying for a Bank Guarantee or Revolving Letter of Credit is unwarranted and illegal as CPPs are exempted from payment of CSS. Further, the mechanism for payment for temporary Open Access is already in place and is operating very well.
5. Sai Wardha Power Generation Co. Ltd. (SWPGCL) also filed a Miscellaneous Application (No. 8 of 2017) on 17 April, 2017 seeking to intervene in the matter.
6. At the hearing on 18 April, 2017:
- 6.1 MSEDCL reiterated the submissions made in its Petition.
- 6.2 The Commission mentioned that it had received Applications from CPPA and SWPGL seeking to intervene in the matter. MSEDCL stated that it had no objection, and that it would also upload a copy of the Petition on its website. The Commission allowed both the Applications.
- 6.3 MSEDCL also stated that it would ensure service of the Petition to other Distribution Licensees.
- 6.4 To a query of the Commission, MSEDCL stated that its Petition covered CPPs as well as Group CPPs. However, it would re-examine whether both are to be included and, if necessary, revise its Petition accordingly. The matter may be heard after considering the submissions from the Interveners and other Distribution Licensees.
- 6.5 CPPA also stated that MSEDCL may re-examine whether its proposal is only for Group CPPs or for CPPs as well. It would file its Reply to the Petition thereafter.
- 6.6 SWPGL stated that it would also analyze the issues in the Petition and file its Reply.
- 6.7 Dr. Ashok Pendse, for Thane-Belapur Industries Association (TBIA), an Authorized Consumer Representative, stated that Captive Generators and consumers are of 3 types, viz. Group CPPs with a large number of shareholders (such as SWPL), Group CPPs with a small number of shareholders (say, two or three), and CPPs with only the same entity as consumer for self-use. The issues involved may be more specifically addressed accordingly.
- 6.8 The Commission directed MSEDCL to submit its revised Petition, if required, within two weeks and upload it on its website, and to serve the other Distribution Licensees, the Interveners and the Authorized Institutional Consumer Representatives. Replies may be filed within two weeks thereafter.

7. In its submission dated 11 May, 2017, MSEDCL stated that, pursuant to the Daily Order of 18 April, 2017, it had re-examined its Petition and observed that most of the issues regarding verification of captive status pertain to Group CPPs and Inter-State CPPs. Accordingly, it has decided to limit its Petition only to them. The CPPs located within the State and with 100% CPP ownership are being excluded from the ambit of the Petition.
8. In its Reply dated 4 July, 2017, SWPGL stated as follows:
- 8.1 SWGPL is a Generating Company which has established a 540 MW Thermal Generating Station in Maharashtra comprising 4 Units of 135 MW each. Units 3 and 4 are intended for captive supply to its designated consumers in Maharashtra.
- 8.2 The prayers of MSEDCL are not supported by law, and in fact are contrary to the provisions of the Electricity Act (EA), 2003 and are, therefore, liable to be rejected.
- 8.3 Captive generation and consumption is prevalent in most States, and no obligation is imposed on Captive Users to provide Bank Guarantee, etc. to the extent of the CSS and Additional Surcharge. There is no unique feature in Maharashtra for a different dispensation as sought by MSEDCL.
- 8.4 Neither the EA, 2003 nor the Commission's Regulations provide for furnishing a Bank Guarantee as a pre-requisite for Open Access. MSEDCL's prayers are contrary to the whole purpose of the EA, 2003, namely, to promote captive generation and consumption of electricity.
- 8.5 The basic purpose of exempting Captive Users from paying CSS, Additional Surcharge, etc. is to encourage captive generation, which is in the consumer interest.
- 8.6 The claim for Bank Guarantee from such Captive Users would entail imposition of financial obligations on such Users which are not contemplated by the EA, 2003. It would also affect their financial viability and would discourage the development of captive generation and captive consumption.
- 8.7 Section 47 of the EA, 2003 provides for the securities that the Distribution Licensees are entitled to from consumers, which are for the following two purposes:
- a. Security towards the consumption of electricity from the Distribution Licensee; and
 - b. Security towards provision of any line or plant or meter that is to be provided for supplying electricity by the Licensee to the consumer.

The EA, 2003 does not contemplate or provide for any other purpose for which security is to be provided to the Distribution Licensees by the users of the system. The EA, 2003 having specifically provided for the types of securities that can be taken from the consumers, any other form of security is naturally excluded.

- 8.8 MSEDCL has sought an amendment in the DOA Regulations and/or for invocation of its provisions for removal of difficulties.
- 8.9 There is no difficulty that has arisen in the implementation of the Regulations, and hence the provision for removal of difficulty does not arise. That provision is to be invoked only if the Regulations cannot be applied. It is not to cater to any alleged difficulty of any person.
- 8.10 Further, the scope and purpose of the “removal of difficulties” provision in law is well settled. Such power is provided only for the limited purpose of removing inconsistencies that may arise while giving effect to any law. It is part of the quasi-legislative process and such provisions cannot be invoked to address alleged difficulty of any person or parties. In this regard, the Supreme Court (in *Madava Upendra Sinai and Ors v. Union of India and Ors*, (1975) 3 SCC 765) has held as under:

“40. Now let us turn to clause (7) of the Regulation. It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a “difficulty” is the sine qua non for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this clause cannot be invoked at all. Again, the “difficulty” contemplated by the clause must be a difficulty arising in giving effect to the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act, etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.”

- 8.11 Any other interpretation would result in the Regulation itself being otiose or meaningless as it would provide an omnibus power to change or make additions/alterations/deletions to any provision in the Regulations. This is not permissible.
- 8.12 Even the alleged difficulties sought to be pointed out by MSEDCL are speculative and erroneous. MSEDCL has not pointed out any particular instance where any difficulty has arisen.
- 8.13 MSEDCL has made vague claims of facing difficulties while recovering CSS from non-Captive Users without specifying the actual difficulty faced by it, if any. The whole intent of MSEDCL is to discourage Open Access even after the repeated directions of the Commission to grant Open Access without any restrictions. Further, the contention of MSEDCL that there is an element of uncertainty in the timing and determination of the captive status of a Generating Plant due to alleged non-creditworthy captive consumers is wrong and denied. No captive consumer can

manipulate the compliance criteria laid down in Rule 3 of the Electricity Rules, 2005 because of the fact that the Commission, after prudence check and due diligence, determines the captive status of a Generating Plant at the end of the financial year, as prescribed by the EA, 2003 and the Electricity Rules.

- 8.14 The Commission has already in the past given directions regarding intimations to be given to Distribution Licensee on changes in shareholding, etc. In these circumstances, the allegations made by MSEDCL on changes in shareholding, manipulation, etc. are baseless.
- 8.15 Generally, all captive consumers are also consumers of MSEDCL. There is already a security that is given by the consumers and the estimated CSS, Additional Surcharge etc. are only a portion of the invoice amount for consumption of electricity by consumers.
- 8.16 The EA, 2003 provides for sufficient safeguards and the action that can be taken by the Licensee in case of default by consumers. No consumer can afford to be disconnected from the grid. In these circumstances, there is no occasion for MSEDCL to have any apprehensions based on speculation.
- 8.17 Further, MSEDCL's prayer that captive consumers should only be allowed to take MTOA and not STOA is contrary to the provisions of the EA, 2003 and the Open Regulations. There is no such restriction in the EA, 2003 or the Regulations. It is the discretion of the users of the system to take Open Access in the desired manner.
- 8.18 The STOA consumers making the choice of taking Open Access on short-term basis take the risk of system availability on margins. There are also some captive consumers who take MTOA. However, this is the choice of the consumers and such choice cannot be restricted to MTOA only.
- 8.19 The alternative prayers made by MSEDCL have no relation to each other. This itself establishes the real motive of the Petition, which is to place unreasonable restrictions on captive consumers.
- 8.20 MSEDCL is seeking the entire quantum of Bank Guarantee for the year as a condition precedent. The Bank Guarantee can only relate to the quantum of electricity supplied, which would be reconciled in a periodic manner, say on a quarterly basis. Further, this would arise only if the supply is below 51% of the generation on a periodic basis and if the supply is not within the limits of proportionate consumption.
- 8.21 Further, the security can only be from those consumers who do not follow the proportionality principle and not from all consumers, including those who follow the same. All these issues need to be considered even if the case of MSEDCL is to be accepted.
- 8.22 There is no merit in the present Petition and it should be dismissed as the relief sought by MSEDCL is contrary to the provisions of the EA, 2003.

- 8.23 The grounds stated in the Petition are wrong and denied. It is wrong and denied that if the Group CPP does not fulfill the CPP status at the end of the year, MSEDCL is burdened with loss of CSS and Additional Surcharge. If the Group CPP fails to fulfill the required criteria as per the Electricity Rules, 2005, CSS is levied; in case there is any delay in payment of CSS by non-captive consumers, interest is always levied. It is wrong and denied that hardship is faced by the MSEDCL in collecting CSS from consumers and that Group CPPs manipulate the compliance criteria laid down under Rule 3 of the Electricity Rules, 2005. In any event, mere hardship is no ground for asking for a Bank Guarantee when it is not permissible by the law.
- 8.24 No Group CPPs can manipulate the compliance criteria laid down in Rule 3 of the Electricity Rules, 2005 as the Commission, after prudence check and due diligence, determines the captive status on an annual basis. It is wrong and denied that the CPPs routinely apply for STOA only. They apply for STOA as per the EA, 2003 and the Regulations framed by the Commission.
- 8.25 There is no element of uncertainty in the timing and determination of the captive status of a Generating Plant, as such determination is undertaken by the Commission.
- 8.26 With regard to the claim of payment of interest on CSS wrongly charged by MSEDCL, interest is charged on the refund of CSS wrongfully levied on captive consumers even after the repeated directions of the Commission not to levy CSS on captive consumers upfront. Therefore, now MSEDCL cannot claim relief based on its own wrongdoing. It is wrong and denied that Bank Guarantee or Revolving Letter of Credit is an effective security mechanism and that it is a win-win situation for all the stakeholders. Furnishing Bank Guarantee or Letter of Credit will put an extra burden on the Open Access consumers as well as Captive Users, and will defeat the whole purpose of captive use and Open Access under the EA, 2003.
9. OPGS Power Gujarat Pvt. Ltd. (OPGS) also filed a Miscellaneous Application (No. 13 of 2017) on 4 July, 2017 seeking to intervene in Case No 23 of 2017. A similar Miscellaneous Application (No. 14 of 2017) was received from JSW Energy Ltd. (JSW) on 5 July, 2017.
10. At the hearing on 6 July, 2017, the Commission mentioned that it had received two more Applications for intervention, from OPGS and JSW. MSEDCL raised no objection, and the Commission allowed both Applications.
- 10.1 MSEDCL stated that:
- i. Pursuant to the hearing held on 18 April, 2017, MSEDCL has re-examined the scope of its Petition. Vide its letter dated 11 May, 2017, MSEDCL has informed the Commission that it has limited the scope of the Petition only to Group CPPs and Inter-State CPPs. Intra-State CPPs are now excluded from the Petition. MSEDCL has also uploaded the Petition and its letter on its website.

- ii. To a query of the Commission regarding Inter-State CPPs, MSEDCL stated that there could be several Units of the CPP holder in different States, and this may lead to difficulty in verifying its CPP status.
- iii. MSEDCL would not be pressing prayer 'c' of its Petition which sought to debar CPPs from availing STOA.
- iv. Regulation 25 of the DOA Regulations, 2016 provides for a payment security mechanism for Long-Term (LTOA) and MTOA in the form of an Irrevocable Revolving Letter of Credit in favour of the Nodal Agency to the extent of the estimated amount of the various charges payable for a period of two months. It needs to be seen whether this provision can be applied to Group CPPs.
- v. To a query of the Commission regarding MSEDCL's readiness to bear the cost of Bank Guarantee/ Revolving Letter of Credit along with interest if the CPP status is confirmed at the end of the year, MSEDCL stated that it would ascertain the cost of such a mechanism and submit its response accordingly.

10.2 Tata Power Co. Ltd. (Distribution) (TPC-D), a Distribution Licensee, stated that:

- i. Regulation 14.9 of the DOA Regulations, 2016 provides that the Distribution Licensee may require the Consumer, Generating Station or Licensee to furnish an additional security deposit for wheeling equivalent to one month's billing for Wheeling Charge, CSS and Additional Surcharge. In case of STOA, the Distribution Licensee shall collect an additional security deposit for wheeling commensurate with the duration of the Open Access instead of on the basis of one month's billing.
- ii. There should be some payment security mechanism, which may be a Bank Guarantee effective at the end of year, so as to avoid the associated cost in the intervening period. However, TPC-D is not sure whether such Bank Guarantee could be provided.

10.3 Reliance Infrastructure Ltd. (Distribution) (R Infra-D), another Distribution Licensee, stated that:

- i. The Ministry of Power (MoP) has settled the Rules for the determination of captive status.
- ii. The Commission can decide a time-bound process after the close of the financial year for determination of the captive status of a claimed Group CPP, fixing roles and responsibilities.

10.4 SWPGL stated that:

- i. It supports the stand of RInfra-D that there should be a time-bound process for determination of the captive status of the GCPP.

- ii. To a query of the Commission, SWPGL stated that it is ready to discuss with the Distribution Licensees, staff of the Commission, and the Maharashtra State Load Despatch Centre (MSLDC) regarding such time-bound process for the determination of captive status of GCPP at the end of the year.
- iii. The Electricity Rules, 2005 stipulate that the final CPP status would be determined at the end of financial year considering fulfillment of the eligibility criteria of shareholding etc. There is no need to put any obligation on the Group CPP in the meantime through Bank Guarantee, etc. which is an additional cost
- iv. The power to remove difficulties under the DOA Regulations cannot be invoked in the present Case. There cannot be a distinction between CPPs and Group CPPs for this purpose.

10.5 JSW stated that:

- i. 2 weeks may be given to file its submission.
- ii. To a query of the Commission, JSW replied that it operates on a Group CPP model and is supplying five captive consumers.

10.6 OPGS stated that:

- i. 2 weeks may be given to file its submission.
- ii. OPGS is an Inter-State Group CPP. Section 2(15) of the EA, 2003 defines the consumer as one who is connected to a Distribution Licensee, and hence the definition of consumer does not include CPP Users.
- iii. The CPP Users and consumers are two separate and distinct entities. Group CPPs are Captive Users, and hence do not come under the jurisdiction of the Commission. Therefore, Distribution Licensees cannot impose any obligations on them.
- iv. The Petition is not within the jurisdiction of the Commission.

10.7 TBIA stated that there could be issues with some of the Group CPPs, but MSEDCL should not treat all the CPPs/ Group CPPs in the same manner by stretching the issue too far. A methodology needs to be formulated for the determination of the status of Group CPPs. He also pointed out the indirect cost of providing Bank Guarantees in the form of opportunity cost of funds and the effect on the provider's credit limits.

10.8 The Commission asked OPGS and JSW to file their Replies within two weeks and MSEDCL to file its Rejoinder, if any, within a week thereafter.

11. In its Reply dated 31 July, 2017, JSW stated as follows:

- 11.1 The Petition is not maintainable as it seeks amendment of the DOA Regulations, 2016. The Regulations are subordinate legislation; therefore, they cannot come through a process of judicial orders. To make or amend Regulations, the procedure stipulated in the parent statute has to be followed.
- 11.2 The Petition is inconsistent with the provisions of the EA, 2003, the Electricity Rules, 2005 and the DOA Regulations, 2016, and is hence bad in law and deserves to be dismissed.
- 11.3 MSEDCL has filed its Petition under Regulation 36 (power to amend) and Regulation 37 (power to remove difficulties) of the DOA Regulations, 2016. However, it has failed to mention and/or explain the difficulty that has arisen in giving effect to the provisions of the Regulations. Moreover, there is no prayer to amend the Regulations in its Petition.
- 11.4 The Proviso to Section 42(2) of the EA, 2003 exempts levy of CSS and Additional Surcharges on a Captive User of electricity generated from its CPP. Hence, MSEDCL's prayer cannot be granted as any such direction by the Commission would be against the exemption guaranteed under the EA, 2003.
- 11.5 The Captive Users have to ensure a minimum percentage of captive consumption in order to retain Captive status. The computation of energy consumed from a CPP will be done at the end of the financial year, which means that the captive status would be decided at end of year and not at the beginning. Accordingly, the question of application of CSS and Additional Surcharge will arise only if (i) the CPP User fails to meet the criteria prescribed under Rule 3 of the Electricity Rules, 2005 and (ii) the same would be decided only at the end of the financial year only and not before that. Hence, the prayer of MSEDCL for a Bank Guarantee/Revolving Letter of Credit upfront as a payment security mechanism from CPPs or Group CPPs before grant of Open Access is against the provisions of the Act.
- 11.6 In addition, the apprehension of MSEDCL is premature. Moreover, MSEDCL has every right to recover the money along with applicable charge if Captive User(s) fail to comply with the Electricity Rules, 2005. Therefore, it is not the case that, if a Captive User fails to comply with the provisions of the Rules, MSEDCL would suffer irreparable loss and would not be in a position to recover the lawful dues/charges. In any case, applicable surcharges will be levied on the Captive User(s) and not on the Generator. Therefore, MSEDCL's prayer is baseless and against the law.
- 11.7 MSEDCL has not pointed out any difficulties which have arisen in giving effect to the provisions of the DOA Regulations, 2016. Also, the power to remove difficulty does not contemplate removal of hardship that may arise as a result of giving effect to the Regulations. The Supreme Court, in its Judgment in *M. U. Sinai Vs Union of India* (1975) 2 SCR 640, has held that, in order to obviate the necessity of approaching it for

removal of every difficulty encountered in the enforcement of a statute, the Legislature sometimes thinks it expedient to invest the executive with a very limited power to make minor adaptations and peripheral adjustments in the statute for making its implementation effective without touching its substance.

- 11.8 The Supreme Court has held that the objects of a statute cannot be defeated in an indirect manner. This principle applies fully to the present matter. When the Principal Act (EA, 2003) itself exempts CPP users from any surcharges, the demand for Bank Guarantee or Letter of Credit in advance as a security mechanism amounts to indirectly charging the CPP Users, which defeats the very object of the Act.
- 11.9 The objectives of stipulating liberal provisions, i.e. exemption to Captive Users (small and medium industries), are cost-effectiveness, fast and efficient growth of industry and creation of employment opportunities. Hence, if the Commission allows the present Petition, the very object of the provisions of the EA, 2003 will be defeated. It is a known fact that the power sector is facing financial constraints and other challenges. Allowing this Petition would add a further financial burden on CPP Users which will hamper industry growth and creation of employment opportunities and ultimately defeat the legislative intent.
- 11.10 The grounds are contradictory to each other, untenable and baseless. In ground (a), MSEDCL states that, if the CPP user fails to comply with Rule 3 of the Electricity Rule, 2005, the Distribution Licensee may face the brunt of loss of CSS and Additional Surcharge; whereas in ground (d), it states that, in case of failure to comply with Rule 3, the CSS and Additional Surcharge will be levied on the captive consumers of such entity.
- 11.11 In case any consumer fails to pay a bill to MSEDCL, appropriate remedies, including disconnection of supply, are provided for under the EA, 2003. Therefore, it is not the case that MSEDCL is remediless in case a Captive User fails to satisfy the criteria under the Electricity Rules, 2005. Moreover, the contention of MSEDCL that, in the present regime, deliberate manipulation in complying with the criteria set out under Rule 3 leads to unwarranted litigation also does not support its case because, in the proposed scheme, litigation regarding invocation of Bank Guarantee, etc. will also arise, apart from the litigation pertaining to adjudication of the status of CPP Users.
- 11.12 MSEDCL has very vaguely presented its case without any supporting data and percentage of defaulting Captive Users. None of the Captive Users of JSW had made any default in the past leading to levy of CSS and Additional Surcharge and thereby causing loss to MSEDCL. In the absence of any sustainable data, rightful Generators/Captive Users should not be penalized at the whim of MSEDCL.
- 11.13 The requirement of furnishing Bank Guarantee/ Letter of Credit as payment security mechanism will have huge implications on the stakeholders, as elaborated below:

- a. As per the tentative consumption pattern, JSW is liable to furnish Bank Guarantee of about Rs. 752 crore for supply of about 2716 MU on annual basis (CSS @ Rs 1.66/KWh and Additional Surcharge @ Rs 1.11/KWh), which will block its significant credit limits with its Bank and will have a huge impact on day to day operations and will also affect its endeavor to participate in new opportunities /tenders etc. for expansion of business.
 - b. The margin money requirement for issue of Bank Guarantee is in the range of 10% to 100% which varies from Bank to Bank and is dependent on the credentials and creditworthiness of the applicant. For furnishing Bank Guarantee to this extent, JSW would have to create a Fixed Deposit of Rs. 338 Crore (45% of the Bank Guarantee value) as margin money, which is nothing but an opportunity loss for JSW which would have otherwise utilized this money in other business opportunities /entail additional cost due to additional borrowing, with current borrowing cost of around 10% -11% p.a.
 - c. Further, for issuing Bank Guarantee of this magnitude, JSW would have to pay Stamp Duty of Rs. 1.50 crore (0.2% of the Bank Guarantee value) and Bank charges/ Bank Guarantee commission of Rs. 3.55 crore per annum (0.472% of the Guarantee value), which is an additional financial burden with no possibility of recovery.
- 11.14 MSEDCL cannot force any Captive User(s) to make apply only for MTOA. Such discriminatory and arbitrary compulsion is against the provisions of the EA, 2003.
- 11.15 Further, the requirement of Open Access by a Captive User is also depended on its nature of business and its power requirement during the month. Mandatory application for MTOA as sought by MSEDCL will have an additional burden of over Rs. 39 crore per annum on JSW and its Captive Users.
- 11.16 The Petition is not maintainable, and in any event devoid of any merit, and as such is liable to be dismissed with exemplary costs.
- 12.** In its Reply dated 4 August, 2017, OPGS has stated as follows:
- 12.1 There is no mention of the term ‘‘Captive User’’ anywhere in the EA, 2003. It is referred to in Rule 3 of the Electricity Rules, 2005. This means that there is a reason why the Central Government has carved out a special category of electricity consumers, called Captive Users. Had this not been so, ‘Captive User’ would have been defined and made part of the parent Act. Both the entities (consumer and Captive User) are distinct and separate categories, with Captive Users falling outside the scope of Section 2 (15) of the EA, 2003 to the extent of availing captive power, and other consumers of electricity falling within that provision.
 - 12.2 If a Captive User is also connected to the works of a Licensee, then to the extent of his capacity/quantum in an agreement with the Licensee, he would be a consumer as per Section 2(15), and for any quantum which is separately under a captive arrangement, he would not be a consumer in terms of this Section.

- 12.3 The Electricity Rules, 2005, define the term ‘‘Captive User’’ as a person who avails electricity for his own use from his CPP. Further, the Captive User and the CPP have to comply with the conditions specified in Rules 3(1) (a), which are that the Captive Users have to own a minimum of 26% of the equity share capital, and consume a minimum of 51% of the electricity generated by the CPP. Therefore, if these conditions are fulfilled, the person availing electricity is termed as a ‘‘Captive User’’ and not a ‘‘consumer’’ as per Section 2(15) of the EA, 2003, thereby being exempt from payment of CSS and Additional Surcharge under Section 42(4).
- 12.4 Rule 3 further provides that, if a Captive User defaults in fulfilling the conditions specified in Rule 3(1)(a), such person is deemed to be a consumer availing electricity from a Generating Plant (Independent Power Producer (IPP)). In such an event, the consumer has to pay CSS in accordance with the 4th proviso of Section 42(2) of the EA, 2003. Therefore, unless a Captive User fails to meet the conditions in Rule 3 of the Electricity Rules, 2005, it is a distinct consumer entity as compared to any other consumer falling within Section 2(15) of the EA, 2003.
- 12.5 Hence, a Captive User has been envisaged as a special category of consumer which is beyond the jurisdiction of the Commission qua imposition of any tariff or any other financial condition.
- 12.6 A Captive User can only be imposed with any levy or Regulation which is strictly permitted by the EA, 2003, and not otherwise. Further, the Legislature has consciously provided that a Captive User is on a completely separate footing with the sole aim of incentivizing or promoting industries to develop their own CPPs so that the burden on the Distribution Licensees is reduced, and the industries are able to secure their energy needs more efficiently and cheaply than the rates at which a Distribution Licensee provides power.
- 12.7 There is no provision which gives powers to the Commission to impose any restrictions or levy or to make any Regulations for Captive Users. In other words, by virtue of the Electricity Rules, 2005, the Regulatory Commissions cannot regulate Captive Users in any other manner whatsoever;
- 12.8 The Legislature has consciously created the Electricity Rules, 2005, through Section 176, so as to provide for regulation of Captive Users, and not given these powers to the Commissions to regulate.
- 12.9 Since Captive Users are a separate category of consumers falling outside the scope of Section 2(15) of the EA, 2003, as per the proviso to Section 86(1) (a) such Captive Users are only subject to the provisions relating to CSS and wheeling charges;
- 12.10 As per the 4th proviso of Section 42(2), Captive Users are exempted from payment of CSS. As per the 1st proviso of Section 42(2), they are only liable to pay wheeling charges if the Transmission/Distribution System of a Licensee is used for wheeling of power. Hence, the Regulatory Commission have been expressly barred from exercising

any jurisdiction over Captive Users, other than levy of wheeling charges, as provided under the 1st proviso of Section 42(2) read with the proviso of Section 86(1)(a). The Regulatory Commissions and Distribution Licensees are, at best, are only enabled to verify, at the end of a financial year, whether a CPP has maintained its captive status. It is only when the Plant loses its captive status (by defaulting on the conditions specified under Rule 3(1)(a)) that the role of Regulatory Commissions and Distribution Licensees comes into play with respect to imposition of CSS as per the 4th proviso of Section 42(2) of the EA, 2003.

- 12.11 In view of the above, the present Petition is beyond jurisdiction of the Commission as such directions cannot be issued keeping in mind the provisions and scheme of the EA, 2003 and the Electricity Rules, 2005. When, except for wheeling charges, these do not envisage any other requirement for a Captive User to avail Open Access from a Distribution Licensee to source power from its own CPP, there can be no requirement of furnishing any Bank Guarantee/Revolving Letter of Credit.
- 12.12 Apart from the above, it was argued on behalf of MSEDCL that Regulation 25 of the DOA Regulations, 2016, gives powers to the Commission for allowing the prayer (b) of the present Petition. This argument is without any merit, and is liable to be rejected.
- 12.13 Section 47 of EA, 2003 is applicable to the person who receives electricity from a Distribution Licensee pursuant to section 43. Section 43 only deals with Universal Supply Obligation (USO) of a Distribution Licensee. Thus, Section 47 is applicable to persons who maintain a contract demand and avail power from a Distribution Licensee. Captive Users are a category of consumers falling outside the scope of Section 2(15) of the EA, 2003 and resultantly also falling outside the scope of Section 43. In case a Captive User also maintains a separate contract demand with a Distribution Licensee, such Licensee can only claim payment security to the extent of such contract demand and any charges pursuant thereto. Surely, CSS does not fall under Section 47 and, therefore, a Captive User, being a category of consumer expressly exempted from payment of CSS, cannot be made to furnish any payment security to the extent of the power consumed for captive use.
- 12.14 Another argument advanced by MSEDCL for prayer (a) of the Petition is that, if a Captive User fails to achieve captive status, then such person or the CPP initiates regulatory/court proceedings. This ground cannot be accepted since legal recourse is provided by the parent Act itself, and no party can be prejudiced on account of its right to avail legal remedy.
- 12.15 In view of the above, the Petition is liable to be dismissed. Even otherwise, there is no sense in seeking Bank Guarantee/Revolving Letter of Credit by a Captive User so as to secure payment of CSS upon such Captive User losing its captive status. This is for the reasons that (i) prayer (b) is speculative and based upon a future event of failure of a CPP failing its captive status, and (ii) in the event that CSS is not paid, the Distribution

Licensee can stop Open Access as well as the power tied up by such person under its contract demand with the Distribution Licensee. In view of the above, it is apparent that the intent of MSEDCL is not to seek security towards realization of CSS, but to make it difficult for entities to avail captive power under the provisions of the EA, 2003 read with Electricity Rules, 2005. As such, the Petition is an abuse of the process of law, frivolous and is liable to be dismissed with costs.

Commission's Analysis and Ruling

- 13. MSEDCL has proposed that Group CPPs and Inter-State CPPs furnish a Bank Guarantee or a Revolving Letter of Credit as payment security equivalent to the CSS, Additional Surcharge, etc. that would become payable if they are eventually found not to have met the CPP criteria, as a pre-condition for granting Open Access. It has now excluded Intra-State non-Group CPPs from its proposal. MSEDCL is also not pressing for CPPs not to be allowed STOA.**
- 14. MSEDCL has justified such a payment security mechanism as follows:**
 - i. Earlier disputes regarding CPP status determination have gone upto the Supreme Court, result in delay in the recovery of CSS and Additional Surcharge by MSEDCL and a corresponding financial burden on consumers of the Distribution Licensee such as MSEDCL.**
 - ii. The shareholding pattern of captive consumers of Group CPPs keeps on changing. Hence, at the end of financial year when the CPP status of the Generator is determined, MSEDCL has to follow up with each of its consumers for recovery of CSS and Additional Surcharge in case they fail to satisfy the CPP criteria in the Electricity Rules, 2005.**
 - iii. Manipulation is observed in showing compliance with the criteria prescribed in the Rules, leading to unwarranted litigation and causing wrongful loss to the Distribution Licensee.**
- 15. The Commission notes that, under the 4th Proviso to Section 42 (2) of the EA, 2003 governing the provision of Open Access by Distribution Licensees, CPP Users are not liable to payment of CSS:**

“...such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.”

As explained most recently in the MSEDCL Multi-Year Tariff (MYT) Order dated 3 November, 2016 in Case No. 48 of 2016, CPP Users are also not required to pay Additional Surcharge, if any. Accepting MSEDCL's proposal would amount to requiring a payment security at the initial stage of giving permission

for Open Access instead of awaiting the CPP status verification after the close of the year, notwithstanding these statutory exemptions.

16. As regards the period for assessment of CPP status, the Electricity Rules, 2005 provide as follows:

“3. Requirements of Captive Generating Plant -

...(2) It shall be the obligation of the Captive Users to ensure that the consumption by the Captive Users at the percentages mentioned in sub-clauses (a) and (b) of sub-rule (1) above is maintained and in case the minimum percentage of captive use is not complied with in any year, the entire electricity generated shall be treated as if it is a supply of electricity by a generating company....”

Thus, the status of a Generating Plant as a CPP is to be determined for the financial year, depending on whether or not it has met the CPP requirements under the EA, 2003 and the Rules, which can be done only after that year is over and not at the beginning. This has also been reiterated in Orders of APTEL and the Commission. If it is found after the end of the year that the Plant has not fulfilled these criteria, CSS and Additional Surcharge for that year would be payable, along with interest. Hence, the interests of the Distribution Licensee are also protected.

17. Moreover, as has been brought out during these proceedings, providing a payment security in the form of a Bank Guarantee or Revolving Letter of Credit is not costless to the Users and/or Generating Plant: it entails substantial costs in terms of blocking of funds, availability of working capital, margin money requirements, Stamp Duty, Bank charges, etc. MSEDCL is silent on whether it would be ready to bear these costs if the CPP status is confirmed after the close of the year.
18. In view of the foregoing, requiring a Bank Guarantee or Revolving Letter of Credit as payment security from claimed Group CPPs and Inter-State CPPs prior to verification of their status after the close of the year, as sought by MSEDCL, is not tenable.
19. During these proceedings, the need for setting a time frame along with roles and responsibilities for the process of determining CPP status was also referred to. The Commission is of the view that this is necessary in order to systematise the process and give greater clarity and comfort to both sides. As the Commission has observed in its earlier Orders in Case Nos. 117 of 2012 and 101 of 2014, and considering the provisions of the Electricity Rules, 2005, the claimed Group CPP must declare any change in the shareholding pattern of Captive Users at the start

of the financial year and any subsequent changes during the year, along with the applications for Open Access from the Licensee, without which the concerned entity would not be considered as a Captive User. In this background, the Commission is setting out the following modalities to be followed by the Distribution Licensees and the entities claiming to be CPPs:

- a) At the outset, when Open Access is first sought, details of the shareholding pattern of the claimed CPP shall be submitted in the context of the provisions of the Electricity Rules, 2005, supported by a Chartered Accountant (CA)'s Certificate. In the event of any change in the shareholding pattern during the financial year, the revised shareholding should be intimated to the concerned Distribution Licensee(s) within 10 days, with CA certification. The CA's Certificate should contain details of all shareholders, including the Captive Users, and their voting rights. In case there is no change in the shareholding pattern during the financial year, the Generators should provide an undertaking to that effect along with the CA Certificate as at the end of the year.
- b) Each CPP Generating Unit shall have a separate Special Energy Meter (SEM) as per the specifications in the Central Electricity Authority (CEA) (Installation and Operation of Meters) Regulations, 2006 as amended from time to time. The monthly reading data at the Generation Transformer EHV level, outgoing feeder level and that of auxiliary consumption should be submitted to the Distribution Licensee(s) and to MSLDC in hard and soft versions. Downloading of monthly data of all these meters shall be jointly undertaken by the Generator and Distribution Licensee(s), and the State Transmission Utility (STU) (if relevant). Similarly, the sealing of the respective meters, their testing, etc. should also be jointly undertaken by the Generator, Distribution Licensee(s) and the STU (if relevant), and appropriately certified. The general practice adopted for any HT consumer monthly meter reading should be followed.
- c) The SEM meters should be tested periodically as per the prescribed testing procedures.
- d) Tripping events of the CPP Generating Unit should be informed to the Distribution Licensee(s) and MSLDC along with the period of outage. Power from the non-CPP Units shall not be injected into the grid without appropriate permissions of the respective authorities.
- e) By the 30th of April, the Generator shall submit all the relevant data required for establishing its CPP status in the previous financial year. The data shall include the quantum of generation at the Generator Terminal, auxiliary consumption, consumption recorded at the EHV side of the Generator Transformer, the consumption recorded at the outgoing feeders and the

consumption of captive consumers grossed up at the Generator Terminal level (along with the necessary computations). This data shall be provided for each month of the financial year, in Excel format.

- f) The Distribution Licensee(s) shall seek clarifications, if any, and confirm the CPP status or otherwise by 31 May. In case any clarifications required are not received or are inadequate, the Distribution Licensee(s) shall jointly decide on the CPP status and inform the Generator accordingly.
- g) If the Generator is not satisfied with the status as determined by the Distribution Licensee(s), it may approach the Commission by 15 June. In that event, the Distribution Licensee(s) shall not levy CSS and Additional Surcharge, if any, till the final decision of the Commission.
- h) If the Generator does not approach the Commission by 15 June with any dispute regarding its CPP status, the Distribution Licensee(s) may proceed to levy the CSS and Additional surcharge, if any, with applicable interest. This shall be without prejudice to the Generator's statutory right to approach the Commission for adjudication of its dispute after that date.

The Petition of Maharashtra State Electricity Distribution Co. Ltd. in Case No. 23 of 2017 and Miscellaneous Application Nos. 7, 8, 13 and 14 of 2017 stand disposed of accordingly.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M Khan)
Member


(Ashwani Kumar Sinha)
Secretary

