

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 318 of 2018

**Case of Maharashtra State Electricity Distribution Co. Ltd. for review of the
Commission's Order dated 4 May, 2018 in Case No. 36 of 2017**

Coram

**Anand B. Kulkarni, Chairperson
I. M. Bohari, Member
Mukesh Khullar, Member**

Maharashtra State Electricity Distribution Co. Ltd,Petitioner

Vs

Classic City Investment Pvt. Ltd.Respondent

Appearance:

For the Petitioner : Shri Ashish Singh, (Adv.)

For the Respondent : Shri. N.M.Kumar, (Rep.)

ORDER

Dated: 18 December, 2018

Maharashtra State Electricity Distribution Co. Ltd. ("MSEDCL"), has filed this Petition under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 ("COB Regulations") read with Section 94 (1) (f) of Electricity Act, 2003 ("EA") for review of the Commission's Order dated 4 May, 2018 in Case No. 36 of 2017.

2. MSEDCL's main prayers are as follows:

- a. *Review the order dated 04.05.2018 passed in Case No. 36 of 2017 to the extent as prayed herein and more specifically Para 10.11 of the order under review;*
- b. *Declare that the Respondent is not entitled to any relief as has been awarded in Para 10.11 of the order under review;*

- c. *Hold and declare that the Respondent/Generator cannot inject power into the grid without a valid permission/open access.*
- d. *Condone the delay in filing of the Review Petition as per the explanation given in Para 8 hereinabove;*

3. The Petition states as follows:

3.1 MSEDCL has raised following issues in the Review Petition:

- (i) Whether the Order passed by the Hon'ble Commission is correct in the specific facts and circumstances of the case?
- (ii) Whether the Hon'ble Commission has rightly appreciated the discrepancies in the Respondents' own Medium Term Open Access (MTOA) application.
- (iii) Whether the Respondent moved the Hon'ble Commission immediately after denial of MTOA i.e on 10.01.2017?
- (iv) Whether the Hon'ble Commission has appreciated that the Petition was only filed on 28.02.2017 i.e only after the power for the month of February had flown in the system without valid permission?
- (v) Whether the Respondent after rejection of MTOA for the period December, 2016 to March, 2017, applied for Short Term Open Access (STOA) for the month of December, 2016 and January, 2017 only which was accordingly granted?
- (vi) Whether the Respondent after rejection of MTOA for the period December, 2016 to March, 2017, applied for STOA for the month of February, 2017 which was rejected due to incomplete application?
- (vii) Whether the Respondent applied for STOA for the month March, 2017 and if not then what stopped it from doing so?
- (viii) Whether the bonafides of the Respondent is completely defected by his own conduct in view of moving a Petition before the Hon'ble Commission at a belated stage that too not even after applying for STOA for the month of December, 2016, January, 2017 and February, 2017 and not for the remaining month i.e. March, 2017?
- (ix) Can the Respondent keep injecting power into the grid without valid open access permission and can he get the benefits of the same at a later date?

- (x) Whether this Hon'ble Commission has time and again reiterated that there can be no injection of power into the grid by a generator/consumer without valid open access permission.

3.2 MSEDCL has raised following grounds in the review Petition:

- (i) The Commission's Order is vitiated by error apparent as the Commission has failed to correctly appreciate that the documents submitted by the Respondent along with its MTOA application were itself incomplete.
- (ii) Assuming without admitting that even if old formats for open access could have been used by the Respondent; still it cannot proceed to file incomplete applications i.e. without SEM report, inconsistent consumer and generator details and no details of usage of multi generator open access. Such incomplete applications cannot be allowed in any case.
- (iii) Open Access being operated in a regulated manner cannot leave any room for mistakes. However, the MTOA filed by the Respondent had glaring deficiencies which could not have been allowed by MSEDCL.
- (iv) It is the responsibility of a person seeking permission or making an application to complete all formalities and any defects in completing the formalities would then have its own consequences which such person shall have to face. The Respondent at this belated stage cannot shift his defaults and wrongdoings on MSEDCL.
- (v) The application of STOA for the month of December, 2016, January, 2017 and February 2017 clearly proves that the Respondent was aware of its rights to avail open access through separate mechanism i.e. STOA, and there was nothing stopping him from making further STOA applications for the month of March, 2017 which it did not do for reasons best known to the Respondent.
- (vi) The Commission's Order is vitiated by error apparent as the Commission has failed to correctly appreciate that the Respondent approached the Commission belatedly after the cause of action was already over. The Respondent only filed a petition on 28.02.2017 whereas it was communicated on 10.01.2017 about denial of MTOA. This clearly reflects on the conduct of the Respondent.
- (vii) The conduct of the Respondent can be gauged from the fact that it applied for STOA for the months of December, 2016, January, 2017 and February 2017 wherein February 2017 application was incomplete and so was rejected but did not apply for any Open Access be it STOA for the month of March, 2017. This clearly suggests that the power which has flown into the grid has flown inadvertently which the Respondent now seeks to take benefit of at this belated stage citing faults with MSEDCL.

- (viii) The Commission's Order is vitiated by error apparent as the Commission has failed to correctly appreciate that there is no explanation given by the Respondent as to why it applied for STOA for the month of February, 2017 with incomplete application and did not apply for STOA for the months of March, 2017 when it kept injecting power into the grid through its generator without a valid permission.
- (ix) The Commission's Order is vitiated by error apparent as the Commission has failed to correctly appreciate that a generator/consumer cannot keep injecting power into the grid without a valid open access permission/consent/knowledge of the Distribution Licensee. It is a matter of fact that the Respondent injected the power into the grid for the month of February, 2017 and March, 2017 without a valid open access permission/consent/ knowledge of the Distribution Licensee.

3.3 In view of the above, MSEDCL has filed the Review Petition.

3.4 There is delay of 132 days in filing the review petition. The delay is neither deliberate nor intentional and has occasioned mainly on account of several Orders being uploaded/passed by the Commission in a very short span of time during the month of April and May, 2018. This took the concerned department a little time to meticulously study all such Orders and move appropriate approval notes for perusal and necessary directions from the competent authority. Moreover, some delay has also occasioned on account of MTR Petition being decided by the Commission in the intervening period.

4. In its Reply dated 28 November, 2018, Classic City Investment Pvt. Ltd (CC IPL) has stated as below:

4.1 The power to review Tariff Order is as provided in Section 94 (1) (f) of the EA which is the same power as provided for in the Civil Procedure Code. This is as provided for in Order 47 Rule 1 of the Civil procedure Code, which is limited to error apparent on the face of the record, new evidence not available later or reasons analogous thereto Review is not to correct an error (even assuming) which is to be found out by detailed arguments and which does not strike on the face of record. Review cannot be an appeal in disguise.

4.2 The extremely limited scope of review has been settled by the Supreme Court in following cases:

(i) N. Anantha Reddy Vs Anshu Kathuria & Ors. (2013) (15 SCC 534)

(ii) Parsion devi & Ors. Vs Sumitri Devi & Ors , (1997) 8 SCC 715

- 4.3 The present review Petition does not even mention the error apparent on the face of record, apart from only making bald allegations that there are errors apparent on the face of Record. There is no error apparent on the face of record and hence the present review Petition is liable to be dismissed.
- 4.4 There is also a substantial delay of 132 days in filing the Petition for review which has sought to explain in vague and cursory manner. MSEDCL has still not implemented the directions given by the Commission in Case No. 36 of 2017.
- 4.5 There is no error apparent in Para 10.11 of the Order dated 4 May, 2018 in Case No. 36 of 2017. The findings rendered by the Commission in Para 10.11 are absolutely correct and cannot be read in isolation. The Commission has come to a categorical finding in paras. 10.5 and 10.6 of the Order, despite having been asked for the reasons for delay in processing the MTOA application, the Respondent did not give any response.
- 4.6 The Commission had held in Para 10.11 of the Order that in absence of any reaction from MSEDCL on CCIPL's MTOA application, CCIPL applied for STOA which was granted by MSEDCL. In view of this, the Commission has rendered the findings in Para. 10.11 by no stretch of imagination can this be an error apparent on fact of record.
- 4.7 The issue before the Commission was the validity of the circular issued by MSEDCL on 31.12.2016 and the wrongful rejection of MTOA applications of CCIPL. In view of the inordinate delay in processing the MTOA application by MSEDCL, CCIPL was forced to apply for STOA. The manner or time period for STOA application was not an issue at all before the Commission and is completely irrelevant to decide the matter.
5. At the hearing held on 6 December, 2018, the Advocate of the Petitioner stated the Petition is filed to review Para. 10.11 specifically as the Petitioner had injected the power into the grid without valid open access permission and hence is not entitled for benefits as directed by the Commission in Para. 10.11 of the impugned Order. Representative of the Petitioner, on the other hand, stated that there is no error apparent in Para. 10.11 of the impugned Order.

Commission Analysis and Ruling:

6. Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004 specifies as follows:

"Review of decisions, directions, and Orders:

85. (a) Any person aggrieved by a direction, decision or Order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or Order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such Order, within forty-five (45) days of the date of the direction, decision or Order, as the Case may be, to the Commission.”

7. As far as delay in filing the present review Case is concerned, MSEDCL has stated that there is a delay of 132 days in filing the review which is neither deliberate nor intentional. This is mainly on account of several Orders passed by the Commission in a very short time and meticulous study of these orders took considerable time. Also delay is on account of ongoing process of Multi-Year Tariff Review Petition taken place during the same time. Considering these circumstances in the interests of justice, the Commission condones this delay.
8. MSEDCL in the instant review Petition has averred that CCIPL is not entitled to any relief as has been awarded by the Commission in Para. 10.11 of the impugned Order as CCIPL had applied for STOA for February, 2017, which was rejected as the application was incomplete and the fact that no STOA was applied for March, 2017 by CCIPL. The power injected into the grid by the generator for CCIPL is thus, without any STOA permissions. MSEDCL has also contended that the Commission has failed to correctly appreciate that a generator/consumer cannot keep injecting power into the grid without a valid open access permission/consent/knowledge of the Distribution Licensee and hence, the impugned Order is vitiated by error apparent as the Commission in Para. 10.11 of the impugned order directed MSEDCL to issue the Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and to give adjustment for these units in the ensuing billing cycle.
9. At the hearing held on 6 December, 2018, MSEDCL has stated that request for review is limited to Para. 10.11 of the impugned Order. Para. 10.11 reads as follows:

10.11.As CCIPL has availed STOA (for December, 2016 and January, 2017) instead of MTOA (not granted by MSEDCL), the Commission is not inclined to direct any compensation to it for these two months. However, the Commission directs MSEDCL to issue the Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and to give adjustment for these units in the ensuing billing cycle.
10. CCIPL, on the other hand, has contended that there is no error apparent in Para. 10.11 of the impugned Order as the findings rendered by the Commission in Para. 10.11 are

absolutely correct and cannot be read in isolation. The Commission has come to a categorical finding in Paras. 10.5 and 10.6 of the impugned Order and has held that in the absence of response from MSEDCL regarding reasons for delay in processing the MTOA application, CCIPL applied for STOA which was granted by MSEDCL.

Para 10.5 and 10.6 of the impugned Order are as under:

10.5 Vide Daily Order dated 23 May, 2017, the Commission asked MSEDCL for the reasons for delay in processing the MTOA application, the level at which the delay and error in response took place and the purpose and propriety of such denial on the basis of absence of SEM report when MSEDCL had given OA in several earlier periods, presumably on the basis that SEM had been installed. In its reply dated 5 June, 2017, MSEDCL has not submitted any reasons for the delay in the processing of MTOA and on the issue of denial of Open Access for want of the SEM report.

10.6 The Commission does not find any merit in MSEDCL citing the application being in the old formats as a ground for delaying or rejecting it. The Commission notes that Regulation 4.1 of the DOA Regulations, 2016 required MSEDCL to provide the detailed formats and procedures on its website within 30 days, i.e. by 30 April, 2016, which it did not do. It sent a draft to the Commission several months later. The proviso to Regulation 4.1 provides that, in the absence of the new formats, the old formats shall continue to be used, and any inconsistency between them and the new Regulations shall be harmoniously construed.

11. The impugned Order sets out the respective contention of the parties with regard to denial of MTOA for the period of December 2016 to March 2017. The Commission in the impugned Order stated that it does not find any merit in MSEDCL citing the application being in the old formats as a ground for delaying or rejecting of CCIPL's MTOA. Hence, the Commission directed MSEDCL to issue the Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and to give adjustment for these units in the ensuing billing cycle. However, in the impugned Order, Commission did not consider any compensation for December 2016 and January 2017 as CCIPL has availed STOA for these months instead of MTOA.
12. Para. 10.10 of the impugned Order is as follows:

10.10 In the absence of or pending any response from MSEDCL, CCIPL applied for STOA for parts of the same period. The Commission finds it surprising that these

applications were approved while the MTOA application was not responded to and thereafter rejected. On the other hand, MSEDCL has been constantly complaining of consumers seeking STOA when they intend to avail power from other sources for longer periods and ought to avail MTOA instead, and its consequences for MSEDCL. (Emphasis added)

13. The Commission in the impugned Order stated that in the absence of or pending any response from MSEDCL, CCIPL applied for STOA for parts of the same period. However, CCIPL's submission in this review Petition states that in the absence of response from MSEDCL regarding reasons for delay in processing the MTOA application, CCIPL was forced to apply for STOA and time period and manner for STOA application was irrelevant for deciding the matter by the Commission.
14. The Commission notes that CCIPL has not brought the fact that its STOA permission for February, 2017 was rejected and that it had not applied for STOA permission of March, 2017. MSEDCL, on the other hand, in this review Petition has brought this fact before the Commission and hence has sought review of Para. 10.11 in the impugned Order.
15. The Commission observes that the directions given to MSEDCL in Para. 10.11 of the impugned Order have to be read jointly with Para 10.10 wherein the Commission was of the view that CCIPL had applied for STOA for the same period for individual months (December, 2016, January, February and March, 2017) as was applied earlier for MTOA (December, 2016 to March, 2017) and hence, the Commission assumed/considered in the impugned Order that STOA permission was granted to CCIPL for February and March, 2017 as well. The fact that CCIPL's STOA permission for February, 2017 was rejected by MSEDCL and CCIPL never applied for STOA permission for March, 2017 was not before the Commission during the proceedings of Case No. 36 of 2017. Hence, considering/assuming that CCIPL had a valid STOA permissions for February and March, 2017, the Commission in Para. 10.11 of the impugned Order directed MSEDCL to issue the Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and to give adjustment for these units in the ensuing billing cycle.
16. Regulation 5.9 of DOA Regulations, 2016 provides as below:

5.9 The grant of Connectivity shall not by itself entitle an Applicant to interchange any power through Open Access unless it obtains approval for Open Access in accordance with the provisions of these Regulation

17. Hence, the Regulation is very clear that no generator/consumer can inject power into the grid without a valid Open Access permission of the Distribution Licensee. Since, CCIPL

injected the power into the grid without STOA permission, it is not entitled for Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and adjustment for these units in the ensuing billing cycle. It is a well settled principle that DOA Regulations being in the nature of subordinate legislation, an Order issued in contravention of these Regulations is not tenable. Hence, the impugned Order has error apparent in Para 10.11 of the impugned Order, wherein the Commission had directed MSEDCL to issue the Generation Credit Notes for the energy injected (if any) by the Generator for CCIPL in February and March, 2017 and to give adjustment for these units in the ensuing billing cycle considering that CCIPL had STOA permissions for February and March, 2017. The citations quoted by CCIPL are distinguishable. There is no dispute that review cannot be allowed as an appeal in disguise.

18. With the above findings and observations, and having considered the submissions of MSEDCL, the impugned Order has error apparent and as such necessitate review. Accordingly, Para. 10.11 in the impugned Order is set aside. Hence the following Order:

ORDER

- 1. The delay caused in filing the present review Case is condoned.**
- 2. The Case No. 318 of 2018 is allowed.**
- 3. Generation credit note ordered to be issued under Para 10.11 of the impugned Order dated 4 May, 2018 in Case Nos. 36 of 2017 is cancelled.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

Sd/-
(Anand B. Kulkarni)
Chairperson


(Abhijit Deshpande)
Secretary


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