

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 196 of 2019

Case of Maharashtra State Electricity Distribution Company Limited for removal of difficulties in implementation of MERC (Distribution Open Access) Regulations, 2016 and MERC (Distribution Open Access) (first amendment) Regulations, 2019.

MA No 34 of 2019 in Case No 196 of 2019

Intervention Application of Indian Wind Power Association – Maharashtra State Council in Case No. 196 of 2019

Coram

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

Maharashtra State Electricity Distribution Co. Ltd.Petitioner
Indian Wind Power Association – Maharashtra State CouncilIntervenor

Appearance:

For Petitioner : Shri. Sunil Deshpande (Rep.)
For Intervenor : Smt. Dipali Sheth (Adv.)

ORDER

Dated: 13 November 2019

1. Maharashtra State Electricity Distribution Co. Ltd (**MSEDCL**) has filed this Case seeking removal of difficulties in implementation of MERC (Distribution Open Access) Regulations, 2016 (**DOA Regulations, 2016**) and MERC (Distribution Open Access) (first amendment) Regulations, 2019 (**DOA First Amendment Regulations, 2019**).
2. MSEDCL's main Prayers are as follows:
 - a) *To clarify whether the amendment in Banking provisions as mentioned in DOAAR 2019 are applicable to existing OA transactions form date of notification of DOAAR 2019;*
 - b) *To allow applicability of Regulation 20 as amended in DOAAR 2019 uniformly to all the OA transactions from date of notifications of DOAAR 2019.*
3. **MSEDCL's Case is as follows:**
 - 3.1. The DOA (First Amendment) Regulations, 2019 needs further clarification in terms of Banking of Renewable Energy (**RE**) generation. Therefore, it has sought clarification in Regulation 38.3 of that First Amendment Regulations, 2019.
 - 3.2. The Banking Provisions as per DOA Regulations, 2016 are as under:

20. Banking of Renewable Energy generation

20.3. The banking year shall be the financial year from April to March.

20.4. Banking of energy shall be permitted during all twelve months of the year:

Provided that the credit for banked energy shall not be permitted during the months of April, May, October and November, and the credit for energy banked in other months shall be as per the energy injected in the respective Time of Day ('TOD') slots determined by the Commission in its Orders determining the Tariffs of the Distribution Licensees;

3.3. The Commission has amended the above said Regulation 20 of DOA Regulations, 2016 in its DOA (First Amendment) Regulations, 2019 as under:

14. Amendment in Regulation 20 of the Principal Regulations:

C. The existing Regulation 20.3 shall be deleted.

D. The existing Regulation 20.4 shall be renumbered as 20.3 and amended as under:

20.3. Banking of energy shall be permitted only on monthly basis.

Provided that the credit for banked energy shall not be permitted to be carried forward to subsequent months and the credit for energy banked during the month shall be adjusted during the same month as per the energy injected in the respective Time of Day ('TOD') slots determined by the Commission in its Orders determining the Tariffs of the Distribution Licensees;

3.4. The provisions of Regulation 38 relating to Repeal and Savings as per DOA Regulations, 2016 are as under;

38. Repeal and Savings

38.3. Consumers, Generating Stations or Licensees, as the case may be, availing Open Access to the Distribution System in Maharashtra on the date of coming into force of these Regulations under an existing agreement or contract shall be entitled to continue to avail such access on the same terms and conditions as stipulated under such existing agreement or contract:

Provided that the provisions of these regulation relating to Banking under Regulation 20, the definition of Billing Demand, change in injection or drawal point under Regulation 26 and revision in Contract Demand under Regulation 4.2 shall be applicable to existing Open Access Agreements or contracts;

Provided further that a Consumer, Generating Station or Licensee who has applied for Open Access to the Distribution System in Maharashtra under the repealed Regulations and whose Application is under process on the date of coming into force of these Regulations, need not reapply, and such Applications will be processed under the provisions of these Regulations.

- 3.5. The Commission has also amended the above said Regulation 38 of DOA Regulations, 2016 in its DOA (First Amendment) Regulations, 2019 as under:

16. Amendment in Regulation 38 of the Principal Regulations:

The provisos of existing Regulation 38.3 shall be amended as under:

*“Provided that the provisions of these regulation, as amended from time to time relating to Banking under Regulation 20, the definition of Billing Demand, change in injection or drawal point under Regulation 26 and revision in Contract Demand under Regulation 4.2 **with amendments thereof shall be applicable to existing Open Access Agreements or contracts;***

Provided further that provision relating to Banking of the Principal Regulations shall continue to apply for existing Open Access Agreements or contracts as on date of notification of the first amendment of the Principal Regulations, till the expiry of the approved period for such OA transactions, beyond which provision relating to Banking under Regulation 20 of the first amendment of the Principal Regulations shall apply.

Provided further that a Consumer, Generating Station or Licensee who has applied for Open Access to the Distribution System in Maharashtra under the Principal Regulations and whose Application is under process on the date of coming into force of these amendments, need not reapply, and such Applications will be processed under the provisions of these amended Regulations.”

- 3.6. The Commissions has also issued Statement of Reason (SoR) for DOA (First Amendment) Regulations, 2019 with the following relevant para as regard the amendment of Regulation 38:

22. Regulation 38: Repeal and Savings

The Commission notes that several objections have been received highlighting legal tenability of making proposed amendments related to banking, revision in contract demand, eligibility conditions etc. to be applicable for the ongoing transactions. In this context, the Commission would like to highlight principles laid down for applying changes to existing contract; as can be assessed from perusal of Hon’ble Supreme Court Case (CERC Vs PTC) (2010) 4 SCC 603 (Paras 58, 60 and 66). Supreme Court has ruled that contract across the board can only be interfered with by framing of Regulations. The relevant extract of the said Order is reproduced as under:

“58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. Instead of fixing a trading margin (including capping) on a case-to-case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognised, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in

the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j).”

It is also noted that KERC Order trying to change banking with retrospective effect was quashed by APTEL citing supreme court case of CERC Vs PTC saying that interfering with existing contracts can be done through Regulations and that too with prospective effect. APTEL while doing so has relied on the afore mentioned Supreme Court Judgment.

It may be noted that the changes proposed herein with respect to Banking, eligible capacity, Contract demand reduction, etc., are proposed thorough suitable amendments to Regulations and the changes can be made squarely applicable to new as also existing contracts albeit with prospective effect. Therefore, Commission has decided to apply the amendments prospectively to new and existing OA transactions. However, it is clarified once again that applicability of the amended regulations for ongoing transactions shall be purely on prospective basis and shall not affect past settlements made under the said transactions. Further, as clarified in the earlier paragraphs, that banking provision as per the Principal DOA Regulations, 2016 shall continue to apply for existing OA transactions till expiry of the approved period for such OA transactions. The revised banking related provisions as per the present amendment shall apply thereafter.

- 3.7. The Commission in its DOA (First Amendment) Regulations, 2019, at Regulation 38 para 1, has mentioned that the provisions of amended regulations relating to Banking under Regulation 20, the definition of Billing Demand, change in injection or drawal point under Regulation 26 and revision in Contract Demand under Regulation 4.2 shall be applicable to existing Open Access Agreements or contracts. Further the Commission, at Regulation 38 para 2, has also mentioned that the provision relating to Banking of DOA Regulations, 2016 shall continue to apply for existing Open Access Agreements or contracts as on date of notification of the first amendment of the Principal Regulations, till the expiry of the approved period for such OA transactions, beyond which provision relating to Banking under Regulation 20 of the first amendment of the Principal Regulations shall apply.
- 3.8. The Commission in its SoR of DOA (First Amendment) Regulations, 2019 has directed that changes proposed herein with respect to Banking, eligible capacity, Contract demand reduction, etc., are proposed through suitable amendments to Regulations and the changes can be made squarely applicable to new as also existing contracts albeit with prospective effect. While in that SoR the Commission has further clarified that applicability of the amended regulations for ongoing transactions shall be purely on prospective basis and shall not affect past settlements made under the said transactions. It is also mentioned that banking provision as per the Principal DOA Regulations, 2016 shall continue to apply for existing OA transactions till expiry of the approved period for such OA transactions.
- 3.9. There are many existing LTOA transactions wherein the validity of said OA transaction is more than twenty (20) years and clarity is needed as to how the provisions of said amendment are to be applied to such transactions. In its SoR of DOA (First Amendment) Regulations, 2019, the Commission has referred to

Hon'ble Supreme Court Case (CERC Vs PTC) (2010) 4 SCC 603 (Paras 58, 60 and 66) wherein the Hon'ble Supreme Court of India has directed that a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. The Hon'ble Supreme Court of India has further directed that a regulation under Section 178 is a subordinate legislation and can even override the existing contracts including power purchase agreements.

- 3.10. MSEDCL, considering all above, has filed the present clarification Petition before the Commission.

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4. During the hearing held on 30.08.2019 the Commission allowed Indian Wind Power Association – Maharashtra State Council (IWPA) to be impleaded as an Intervenor in the matter and directed MSEDCL to serve pleadings upon the Applicant. IWPA accordingly, vide its Application dated 23.09.2019 has stated as follows;

- 4.1. IWPA is a registered association of wind power producers in India which has about 1500 members with a combined installation of around 13500 MWs wind power capacity spread all over India. It has an aim for development of wind energy sector in India by engaging with all stakeholders, policy makers, state government and other multi-lateral agencies. All the members of the Applicant are promoted, owned, controlled by citizens of India.
- 4.2. IWPA has filed its Application under Sections 42, 86(1)(a) and 86(1)(k) of the Electricity Act, 2003 (**EA, 2003**) and Regulations 64, 92 and 94 of the MERC (Conduct of Business) Regulations, 2004 (**CBR, 2004**).
- 4.3. The Commission in the DOA (First Amendment) Regulations, 2019 (Regulation 14) has reduced the banking period from one (1) year to one (1) month for RE generators. Further, it has been provided that the unutilised banked energy at the end of the month, limited to only 10% of the actual total generation by the RE generator in such month shall be considered as deemed purchase by the Distribution Licensee. Further, Regulation 16 of the Amendment Regulations also provided for a prospective application of those Regulations to the existing OA agreements and contracts.
- 4.4. Regulation 96 of the CBR, 2004 provides for removal of difficulties by the Commission. MSEDCL has approached the Commission seeking clarification regarding the applicability of Regulation 14 relating to banking of RE of the Amendment Regulations retrospectively by way of amending the notified Regulation 16 of the Amendment Regulations. The Amendment Regulations is very clear that the provisions of the Principal Regulations would be applicable to the existing OA agreements and contracts. Further, the Commission has unambiguously in its SoR provided that the amendments as brought by the Amendment Regulations would be applied prospectively to existing OA transactions.
- 4.5. MSEDCL in the guise of a clarificatory Petition is seeking an amendment in the Amendment Regulations. Such act of MSEDCL seeking an amendment is not permissible by way of such clarificatory petition. Under Section 181 of the EA, 2003 any amendment to the Regulations requires prior publication and consultation. Needless to state that the amendment sought in disguise of the clarification will have

far reaching effects on IWPA's members and other RE generators in the State of Maharashtra. Therefore, the Petition deserves to be dismissed.

- 4.6. IWPA and other wind generators had set up the wind projects at a time when banking provisions were made available to the RE generators. Many members of the Applicant have valid open access permissions. The members of the Applicant had entered into contract with their consumers when the provisions of banking were available throughout the year by the then applicable laws and regulations. Hence any retrospective application of Amendment Regulations will cause grave harm, prejudice and losses to the members of the Applicant with valid contracts with their consumers and with valid open access permissions. This retrospective amendment as sought by the Petitioner would be grossly against the provisions of the existing contracts and against the principle of Promissory Estoppel.
 - 4.7. Appellate Tribunal for Electricity (**APTEL**) vide Order dated 29.03. 2019 in Appeal No. 42 of 2018 had quashed the retrospective application of the provisions of banking on the principles of natural law, equity and fairness after due consideration of the judgment of the Hon'ble Supreme Court of India in *Civil Appeal No. 3902 of 2006* in case of *PTC India Ltd. Versus Central Electricity Regulatory Commission*. This has been cited by MSEDCL in the present Petition. The Commission only after duly considering the facts of both the cases, has provided for prospective application of the banking provisions. The same has been recorded in the paragraph 22.3 of the Commission's SoR. In view of above IWPA has prayed for dismissal of MSEDCL's Petition.
5. At the hearing held on 23.10.2019, the Representatives of the Petitioner and Intervenor reiterated their submissions.

Commission's Analysis and Ruling:

6. MSEDCL in the present Petition has sought clarification of Regulation 16 of the DOA (First Amendment) Regulations, 2019 (i.e. Amendment in Regulation 38 of the Principal DOA Regulations 2016) in terms of RE banking and sought for removal of difficulties in implementation of the said Amendment Regulations, 2019. MSEDCL contends that the dispensation/directions of the Commission at proviso 1 and 2 of Regulation 16 of DOA (First Amendment) Regulations, 2019 are in contradiction with each other. MSEDCL further states that the clarifications provided in SoR of DOA (First Amendment) Regulations, 2019 (as cited earlier in this Order) are also in contradiction with each other. As such MSEDCL has sought clarity as to whether the amendment provided for RE banking in DOA (First Amendment) Regulations, 2019 is applicable to the existing OA Agreements/contracts/ transactions (existing MTOA and LTOA) from the date of notification of the said Amendment Regulations, 2019 or not. IWPA on the other hand has objected to above contentions of MSEDCL stating that the Amendment Regulations is very clear and amended banking provisions are not applicable for existing agreements/contracts. MSEDCL in the guise of a clarificatory Petition is seeking an amendment in the Amendment Regulations and hence it deserves to be dismissed.
7. The Commission vide its Public Notice dated 11.03.2019 had published the Draft DOA (First Amendment) Regulations, 2019 on its website with Explanatory Memorandum and had sought suggestions and objections on the same. As regards the RE banking provisions following amendments were proposed in the Draft Amendment Regulations, 2019;

17. Amendment in Regulation 38 of the Principal Regulations:

The first and second provisos of existing Regulation 38.3 shall be amended as under:

*“Provided that the provisions of these regulation, **as amended from time to time** relating to Banking under Regulation 20, the definition of Billing Demand, change in injection or drawal point under Regulation 26 and revision in Contract Demand under Regulation 4.2 **with amendments thereof** shall be applicable to existing Open Access Agreements or contracts;*

*Provided further that a Consumer, Generating Station or Licensee who has applied for Open Access to the Distribution System in Maharashtra under the repealed Regulations and whose Application is under process on the date of coming into force of these Regulations **or its amendments**, need not reapply, and such Applications will be processed under the provisions of these Regulations **or under the amended provisions of these Regulations respectively.**”*

(Emphasis added)

The Commission notes that several objections were received to the draft amendment regulations, highlighting legal tenability of making proposed amendments related to banking, revision in contract demand, eligibility conditions etc. to be made applicable for the ongoing/existing contracts/ transactions. The Commission notes that while MSEDCL vide its letter dated 08.04.2019 had submitted its objections and suggestions on the proposed draft DOA (First Amendment) Regulations, 2019, it chose not to offer any specific comments on the above mentioned proposed amendment in Regulation 38 of the Principal DOA Regulations, 2016. These facts are undisputed.

8. MSEDCL in the instant Case has contended that a Regulation framed under Section 178 is a subordinate legislation and can even override the existing contracts including power purchase agreements. In this regard, the Commission however notes that MSEDCL is selectively reading the SoR (as cited earlier in this Order) of DOA (First Amendment) Regulations, 2019 and suitably ignoring the Commission’s complete reasoning on the same. On the issue of applicability of amendments provided for RE banking in DOA (First Amendment) Regulations, 2019 to the existing OA Agreements/contracts/ transactions (existing MTOA and LTOA), the Commission in its SoR for DOA (First Amendment) Regulations, 2019 has conspicuously held and observed as below;

*It may be noted that the changes proposed herein with respect to Banking, eligible capacity, Contract demand reduction, etc., are proposed thorough suitable amendments to Regulations and the changes can be made squarely applicable to new as also existing contracts albeit with prospective effect. Therefore, Commission has decided to apply the amendments prospectively to new and existing OA transactions. **However, it is clarified once again that applicability of the amended regulations for ongoing transactions shall be purely on prospective basis and shall not affect past settlements made under the said transactions. Further, as clarified in the earlier paragraphs, that banking provision as per the Principal DOA Regulations, 2016 shall continue to apply for existing OA transactions till expiry of the approved period for such OA transactions. The revised banking related provisions as per the present amendment shall apply thereafter.***

(Emphasis added)

9. Thus, after considering all the comments/suggestion, objections, with the above clarity and reasons the Commission while notifying the DOA (First Amendment) Regulations, 2019 has decided to retain the provisions of draft DOA First Amendment Regulations with following additional proviso as modification.

16.

.....
Provided further that provision relating to Banking of the Principal Regulations shall continue to apply for existing Open Access Agreements or contracts as on date of notification of the first amendment of the Principal Regulations, till the expiry of the approved period for such open access transactions, beyond which provision relating to Banking under Regulation 20 of the first amendment of the Principal Regulations shall apply.

(Emphasis added)

Thus, there is no ambiguity on the issue of applicability of amendments provided for RE banking in DOA (First Amendment) Regulations, 2019 as regards the existing OA Agreements/contracts/ transactions. With above clear reasoning, the Commission has notified DOA (First Amendment) Regulations, 2019 on 08.06.2019.

10. In view of the foregoing discussion, the Commission deems it fit to reject MSEDCL's contentions as raised in this clarificatory Petition. In accordance with 2nd Proviso to Regulation 16 of DOA (First Amendment) Regulations, 2019 the Commission clarifies once again that the provision relating to banking of the Principal DOA Regulations, 2016 shall continue to apply for the existing OA Agreements or contracts till the expiry of the approved period for such OA transactions/contracts/agreements. After expiry of the approved OA period, the provision relating to banking under Regulation 20 of the first amendment of the Principal DOA Regulations, 2016 shall apply.

11. Hence following Order:

ORDER

- 1. The Case No. 196 of 2019 of Maharashtra State Electricity Distribution Co. Ltd. along-with MA No. 34 of 2019 filed by Indian Wind Power Association – Maharashtra State Council, thereunder, is disposed of in terms of Para 10 above.**
- 2. The provision relating to banking of the Principal DOA Regulations, 2016 shall continue to apply for the existing OA Agreements or contracts till the expiry of the approved period for such OA transactions/contracts/agreements. After expiry of the approved OA period, the provision relating to banking under Regulation 20 of the first amendment of the Principal DOA Regulations, 2016 shall apply.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

Sd/-
(Anand B. Kulkarni)
Chairperson


(Abhijit Deshpande)
Secretary

