

**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  
E-mail: mercindia@merc.gov.in  
Website: www.mercindia.org.in/ www.merc.gov.in**

**CASE No. 46 of 2017**

**In the matter of**

**Petition of Maharashtra State Electricity Distribution Co. Ltd. for modification of directives of the Commission dated 1.3.2017 to refund FAC of Rs. 369.54 for April to October, 2016 to its consumers**

**And**

**Miscellaneous Application No. 21 of 2017**

**Application of GMR Warora Energy Ltd. for intervention in Case No. 46 of 2017**

**Coram**

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

Maharashtra State Electricity Distribution Co. Ltd.

Petitioner

GMR Warora Energy Ltd.

Intervention Applicant

**Appearance**

For the Petitioner:

Smt. Deepa Chawan (Adv)  
Shri. Ashish Singh (Adv.)

For Intervention Applicant:

Shri. Amit Kapoor (Adv)

For Consumer Representatives:

Shri. Raghunath Kaparathi (CMIA)  
Shri. Chhabiraj Rane (MCCIA)  
Shri. Pratap Hogade (MCCIA)

## ORDER

**Dated: 23 March, 2018**

1. The Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) has filed a Petition on 17 March, 2017, citing Regulations 85 and 94 of the MERC (Conduct of Business) Regulations, 2004, for modification of the directives of the Commission dated 1 March, 2017 for refund of FAC for the period from April to October, 2016 amounting to Rs.369.54 crore to consumers. GMR Warora Energy Ltd. (GWEL), 701/704, 7th Floor, Naman Centre, A Wing, BKC, Bandra, Mumbai has filed an Application (Miscellaneous Application (MA) No. 21 of 2017) dated 9 November, 2017 for impleadment.
2. MSEDCL's prayers are as follows:
  - a) *"To admit the petition;*
  - b) *To stay the directives of refund of FAC adjustment amount of Rs 369.54 crores till final disposal of present case.*
  - c) *To modify/withdraw the FAC refund of Rs 369.54 Crs. directives for the period of Apr to Oct 16 so that the FAC for the period of Apr to Oct 16 may be adjusted at the time of truing up for FY 16-17;*
  - d) *To apply the revised methodology for computation of FAC from 1<sup>st</sup> Nov 2016 instead of retrospectively from 1<sup>st</sup> April 2016; or*
  - e) *To allow petitioner to adjust shortfall in energy charges for the period from Apr to Oct 16 against the FAC for the period from Apr to Oct 2016; or*
  - f) *To allow the petitioner to recover PP cost variation paid to MSPGCL and other generators during the period Apr-Oct 16;..."*
3. The Petition states as follows:

### A. Background

- 3.1. The Commission in its Multi Year Tariff (MYT) Order dated 3 November, 2016 for MSEDCL in Case No 48 of 2016 directed as follows:

*"8.35 Vetting of Fuel Adjustment Charge levied on consumers*

*The levy of ZFAC charged to different consumers and the under-recovery/over recovery of the corresponding costs will be vetted by the Commission on a post-facto basis, considering the submissions made by MSEDCL. However, for the first month after the issue of the present MYT Order, MSEDCL should obtain the Commission's prior approval for levy of ZFAC, to ensure that it is being levied*

*correctly. MSEDCL should submit the ZFAC computations and details of under-recovery/over-recovery of fuel cost variations on a quarterly basis, within 60 days of the close of each quarter, for post-facto approval.”*

- 3.2. Till the issue of the MYT Order on 3 November, 2016, MSEDCL has levied FAC upto July 2016 of FY 2016-17. The earlier MYT Order dated 26 June, 2015 in Case No. 121 of 2014 was prevailing till the new MYT Order dated 3 November, 2016 came into force. As such, vide its letter dated 24 November, 2016, MSEDCL requested the Commission to allow levy of FAC for the months of August, September and October, 2016, being the months before the 1<sup>st</sup> month of the new MYT Order.
- 3.3. Accordingly, MSEDCL calculated the FAC of August, 2016 and issued Circular No. 237 on 1 December, 2016 for levy of such FAC of August, 2016 to the consumers in the billing month of November, 2016.
- 3.4. However, the Commission, vide its letter dated 1 December, 2016, rejected this proposal and also mentioned that, in order to enable MSEDCL to recover accumulated FAC as on October, 2016, it had accorded its approval for the following-

*“MSEDCL is allowed to include accumulated FAC at the end of Oct 16 which is yet to be levied to the consumers in the FAC calculation for the month of Nov 16 (1st month of tariff order). Before such inclusion, MSEDCL should recalculate the accumulated FAC (APR to OCT 16 ) based on the revised Power Purchase Cost approved in the tariff order dated 3rd Nov 2016.”*

- 3.5. Meanwhile, MSEDCL had already started the billing for November, 2016, in which the FAC of August, 2016 was included. Thereafter, the office of the Commission, by e-mail dated 2 December, 2016 communicated to MSEDCL as under:

*“From the web site of MSEDCL it is observed that Circular no 2137 issued on 1<sup>st</sup> Dec 16 for levying FAC to the consumers for billing month of Nov 16. MSEDCL has not taken any prior approval of the Commission of before levying such FAC.”*

MSEDCL was also asked to submit the reasons for the above, and to take corrective steps in this regard.

- 3.6. On receipt of the e-mail, MSEDCL immediately stopped the levy of FAC and submitted to the Commission vide letter dated 6 December, 2016 as under:

*“By the time MSEDCL receives the letter from MERC regarding rejecting of MSEDCL proposal, MSEDCL has already calculated FAC for Aug 16 and*

*started levy of the same to the consumers in the billing for Nov 16. However, as per the direction from Hon'ble Commission, MSEDCL has withdrawn the circular no 237 dated 1.12.16 and also the FAC made zero for the billing month of Nov 16, Dec 16 and Jan 17, however the accumulated amount will be considered while calculating FAC for the month of Nov 16 i.e. 1<sup>st</sup> month after issuance of new tariff order which will be levied to the consumers in the billing after prior approval from MERC.”*

- 3.7. Vide its vetting report dated 10 January, 2017 for the period from July to October, 2016, the Commission has accorded post facto approval to MSEDCL for charging to its consumers the FAC for the months of July,2016 to October,2016 and directed as under;

*“Since FAC for the period of April 16 to Oct 16 has been calculated based on the power purchase cost approved for FY 2015-16, in the prevailing tariff order dated 26.6.15, MSEDCL shall recalculate FAC for this period after considering the power purchase cost approved for FY 2016-17 in the Tariff Order dated 3rd November, 2016 in Case No. 48 of 2016 and shall adjust the resultant FAC amount which remains to be recovered/ refunded in the next FAC billing process.”*

- 3.8. In this regard, MSEDCL has submitted a representation to the Commission on 15 February, 2017 highlighting the following facts and concerns:

- a. As the new MYT Order dated 3 November, 2016 is applicable from 1 November, 2016, MSEDCL is not able to collect revenue at the new tariff for April to October, 2016.
- b. As per the approved Tariff Schedule appended to the MYT Order, these tariffs supersede all tariffs so far in force. Further, it is also mentioned that FAC as may be approved by the Commission from time to time shall be applicable to all categories of consumers and be in addition to the base tariff.
- c. Similar provisions also existed in the earlier MYT Order dated 26 June, 2015 (in Case No.121 of 2014).
- d. As the previous MYT Order dated 26 June, 2015 was in force prior to 1 November, 2016, MSEDCL has computed monthly FAC for April to October, 2016 on the basis of the then prevailing MYT Order dated 26 June, 2015. Such calculation of FAC is in accordance with the requirement of the Regulations and the applicable MYT Order.
- e. The Commission has already accorded post facto approval for FAC calculation of MSEDCL for April to October, 2016 as per the prevailing MYT Order.

- f. If, as per the direction of the Commission, the FAC for the period April to October, 2016 is re-calculated, MSEDCL would not only be deprived of its legitimate revenue from FAC for this period but it also will also have adverse impact on its revenue amounting to Rs 922.64 crore. It may further worsen the financial position of MSEDCL. In such case, MSEDCL has to arrange funds by borrowing working capital from banks, the interest on which is not allowable in view of the Commission's stand in the MYT Order in this regard.
- g. Further, there will not be matching of revenues with that of power purchase cost incurred by the MSEDCL for the period of April to October,2016.

3.9. With the above concerns, MSEDCL made the following submission to the Commission on its directives for recalculation of FAC and its adjustment in next FAC Billing:

- a. *“Hon’ble Commission may approve the FAC for the month of Nov 16 (being the first month after the tariff order) considering the impact of accumulated FAC for the month Aug 16 to Oct 16 being the month for which MSEDCL has not levied FAC to the consumers instead of insisting recalculation of FAC from April 16 to Oct 16.*
- b. *Hon’ble Commission may consider any Short fall or surplus considering the request as proposed in ‘a’ above, in actual Revenue vis-à-vis the Approved revenue requirement at the time of true- up in the MTR, as specified in the MYT Regulation 2015.*
- c. *If the above submission of MSEDCL is not agreeable to Hon’ble Commission then MSEDCL submits that-*
  - 1. *Hon’ble Commission may please permit MSEDCL to recover FAC/ variation in PP cost paid to Generators including State, Central and IPPs from Apr 16 to Oct 16.*
  - 2. *Else, the Hon’ble Commission may please allow the interest on resultant borrowed amount at the time of true-up to be passed on to consumers.”*

3.10. The Commission has accorded prior approval of FAC computation for the month of November, 2016 vide vetting report dated 1 March, 2017. The Commission has dealt with the issues raised by MSEDCL and has informed as under:

- a. MSEDCL has contended that, due to delay in issuance of the MYT Order, it has not been able to recover revenue at the revised tariff during the period of April to October, 2016. The Commission in this regard stated that one of the reasons

for such delay was the late filing of MYT Petition by MSEDCL, as set out in the MYT Order dated 3 November, 2016.

- b. FAC mechanism allows pass-through of variation in power purchase cost of a Distribution Licensee to its consumers. Power purchase quantum and cost approved in the MYT Order applicable for the period under consideration is used as the reference for calculating such variation in power purchase cost.
- c. MSEDCL has calculated FAC for April to October, 2016 as per the earlier MYT Order dated 26 June, 2015 (which was for FY 2015-16). Subsequent to issue of the present MYT Tariff Order dated 3 November, 2016, the approved power purchase cost for FY 2016-17 became available. At the time of true-up of FY 16-17, the power purchase cost approved in the new MYT Order will be used as reference for arriving at the deviation in actual power purchase cost.
- d. Therefore, if the FAC for April to October, 2016, which was calculated based on the 2015 MYT Order is not re-calculated, at the time of true-up of FY 2016-17 (based on the 2016 MYT Order) there would be a large difference between revenue collected through FAC and the variation in power purchase cost. This may result in burdening the consumers/Licensee with carrying cost at the time of true-up. Hence, vide FAC vetting order dated 10 January, 2017, the Commission has directed MSEDCL to recalculate the FAC of April to October, 2016 based on the new MYT Order dated 3 November, 2016. Therefore, the resultant re-calculated FAC needs to be passed on to the consumers without waiting for true-up of FY 2016-17.
- e. As far as MSEDCL's request of allowing recovery of FAC paid to the Generators, including the State, Central and Independent Power Producers (IPPs) concerned, the Commission stated that Central Sector Generating Plants are not regulated by it. Also, IPPs are governed by the Power Purchase Agreements (PPAs) signed by the parties. Maharashtra State Power Generation Co. Ltd. (MSPGCL) is governed by the MYT Regulations, 2015 which allows (Regulation 48) it to bill the energy charges based on actual cost of generation subject to normative parameters. Hence, modification in the FAC of MSPGCL would not reduce the total pay-out of MSEDCL towards the energy charge as the same has been raised based on actual cost of generation.
- f. Further, MSEDCL's request to allow the interest on the resultant borrowed amount to be passed on to the consumers at the time of true-up can only be dealt with as per provisions of MYT Regulations, 2015 at the time of true-up of FY 2016-17.

- g. In view of the above the Commission was of the opinion that it would not be prudent to consider MSEDCL's request to adjust the refundable FAC for the period of April to October, 2016 at the time of true-up of FY 2016-17 instead of refunding it now.
- h. The Commission has scrutinized the submission of MSEDCL and directed it to refund Rs 369.54 crore to consumers in 7 equal instalments with holding cost as it pertains to the period of 7 months of April to October, 2016. The first instalment of Rs 52.79 crore along with holding cost of Rs 3.09 crore is considered in the FAC calculation for the month of November, 2016 by the Commission while according prior approval of FAC of November, 2016.

B. MSEDCL's contentions in present Petition

- 3.11. The Commission has revised the tariff for MSEDCL with effect from 1 November, 2016. Hence, MSEDCL could recover revenue at revised tariff only from November, 2016 onwards and it has not been able to collect revenue at the new tariff for the period April to October, 2016.
- 3.12. MSEDCL has been authorized to recover FAC in addition to applicable tariff from consumers in view of the express provision in the earlier MYT Order dated 26 June, 2015 in Case No. 121 of 2015. FAC calculation made by MSEDCL on the basis of the prevailing MYT Order for the period of April to October, 2016 is in accordance with the requirement of the Regulations and the MYT Order.
- 3.13. MSEDCL has actually paid the FAC and variation in power purchase cost to Generators during April to October, 2016, which cannot be restricted from recovery from consumers.
- 3.14. The directions for such retrospective adjustment on account of FAC have not been given to MSPGCL which might have been passed on to MSEDCL. It is unfair if MSPGCL is not directed to recalculate the FAC and pass it to MSEDCL for that period. Moreover, the Commission is silent about the power purchase variation paid to Central Sector Generators and IPPs. Without addressing these issues, the direction of the Commission for refund of FAC to consumers seems to be unfair.
- 3.15. If the direction of the Commission is considered, there will be mis-matching of revenues with the actual power purchase cost incurred by MSEDCL for April to October, 2016. MSEDCL will face a serious financial crunch to fulfill its working capital needs. Further, if working capital loan is availed from banks, interest on such working capital is not being allowed by the Commission. The directions of the

Commission will further worsen the precarious financial condition of MSEDCL as the amount of refund of Rs. 369.54 crore is considerable.

- 3.16. The Commission has revised the Energy Charges upwards from 1 November, 2016. If adjustment on account of FAC is done in isolation without considering recovery through Energy Charges, it would lead to under-recovery on account of Energy Charges for April to October, 2016. This would, in effect, be tantamount to only a notional benefit of higher base tariff for the same period as no actual realization would take place until the truing-up exercise carried out at the year end. Retrospective application of the revised approved power purchase cost only for FAC calculations and not for Energy Charges will result in an anomaly and call for avoidable truing-up for loss or under-recovery of Energy Charges for those months.
- 3.17. All costs should be considered for the relevant period only and not retrospectively as is sought to be done by the Commission's directions. Applying FAC retrospectively is without any basis.
- 3.18. It would be very unfair to MSEDCL if it is required to refund the notional surplus of FAC amount for the period from April to October, 2016 to the consumers:
  - a. Without receiving any refund on account of FAC/power purchase variation paid to MSPGCL and other Generators for April to October, 2016;
  - b. Without being compensated for higher basic Energy Charges paid to MSPGCL for September and October, 2016 while MSEDCL tariff revision is made applicable in November, 2016.
  - c. Without any compensation for the shortfall in basic tariff charges for the period of April to October, 2016 which has not been allowed to be charged in the billing to the consumers.
- 3.19. In a similar matter in Case No. 18 of 2005 (filed by Reliance Energy Ltd. (REL)), the Commission has modified its decision and allowed adjustment of impounded FAC at the time of truing-up.
- 3.20. Hence, the Commission may to grant similar relief to MSEDCL and modify its direction dated 1 March, 2017 for refund of FAC and consider it at the time of truing-up of FY 2016-17.
4. At the hearing held on 25 April, 2017, MSEDCL requested an adjournment as its Counsel was not available. While allowing the adjournment, the Commission expressed its



displeasure at MSEDCL's conduct of not implementing its directions under the garb of pendency of the Petition.

5. In its submission dated 25 April, 2017, Chamber of Marathwada Industries and Agriculture (CMIA), an Authorised Consumer Representative, has stated as follows:
  - 5.1. The Petition has been filed under Regulations 85 (1) and 94 of the MERC (Conduct of Business) Regulations, 2004. Regulation 85(a) relates to review of decisions, directions and orders. However, MSEDCL is seeking modification of a direction. Hence Regulation 85 (a) is not applicable. Similarly, Regulation 94 is applicable where no Regulations have been framed. As Regulations for FAC have been framed, Regulation 94 is also not applicable.
  - 5.2. Power purchase cost approved in the MYT Order dated 3 November, 2016 for FY 2015-16 (Rs. 3.62/kWh; Rs. 3.79 /kWh including Power Grid Corporation of India Ltd. (PGCIL) charges) and FY 2016-17 (Rs. 3.61/kWh; Rs. 3.79 / kWh including PGCIL charges) are the same.
  - 5.3. Cumulative actual power purchase cost in April to December, 2016 was Rs. 3.62 /kWh as against the approved cost of Rs. 3.60/kWh. Thus, there is not much difference in the power purchase cost for this period, and hence MSEDCL cannot impose any FAC for this period. However, MSEDCL has imposed a very large amount of FAC.
  - 5.4. The Commission in its prior approval of FAC dated 1 March, 2017 directed MSEDCL to refund FAC of Rs. 119.88 crore for November, 2016 and 1<sup>st</sup> instalment of re-calculated FAC (for the period of April to October, 2016) of Rs. 55.88 crore. However, MSEDCL has refunded only Rs. 119.88 crore and not refunded the 1<sup>st</sup> instalment of re-calculated FAC. MSEDCL is liable to pay these amounts including carrying cost to the consumers.
  - 5.5. While recalculating FAC, the Commission by mistake did not consider the refund of Rs. 79.80 crore relating to FAC of July, 2016 and holding cost on it. The Commission may suo-moto correct this mistake and direct MSEDCL to refund Rs. 79.80 crore pertaining to July, 2016 along with holding cost.
6. Vide its letter dated 6 May, 2017, MSEDCL submitted that:
  - 6.1. During the hearing of the Case, the Commission stated that it could only be heard after MSEDCL complies with its directives. As such, MSEDCL will refund FAC of Rs. 369.55 crore along with holding cost to consumers as per the schedule below:

<u>Billing Month</u>	<u>Apr-17</u>	<u>May-17</u>	<u>Jun-17</u>	<u>Jul-17</u>	<u>Aug-17</u>	<u>Sep-17</u>	<u>Oct-17</u>	<u>Total</u>
Refund	52.79	52.79	52.79	52.79	52.79	52.79	52.79	369.55
Holding Cost	4.09	3.61	3.13	2.64	2.16	1.68	1.19	18.50
<b>Final Instalment</b>	<b>56.89</b>	<b>56.40</b>	<b>55.92</b>	<b>55.44</b>	<b>54.95</b>	<b>54.47</b>	<b>53.98</b>	<b>388.05</b>

6.2. Further, MSEDCL will recover / adjust the FAC or power purchase variation cost paid to Generators to the extent of the FAC refund against their respective energy bills of April, 2017 as below:

<u>Generator</u>	<u>Amt in Rs. crore</u>
MSPGCL	141.76
Adani Power Maha. Ltd	163.04
Rattan India Power Ltd	22.45
EMCO Power (now GMR)	42.30
<b>Total</b>	<b>369.55</b>

7. At the next hearing held on 22 June, 2017:

7.1. MSEDCL stated that:

- a. Subsequent to the last hearing, vide its letter dated 6 May, 2017, MSEDCL has communicated to the Commission that it has started refunding the FAC amount to the consumers as directed in the Vetting Report dated 1 March, 2017. It has already refunded 2 out of 7 instalments with holding cost to the consumers. Thus, MSEDCL is complying with the order of the Commission.
- b. In these circumstances, MSEDCL is in the process of amending its Petition for covering all relevant issues in a holistic manner. Therefore, instead of proceeding further in the matter, MSEDCL is requesting time for amending / modifying its Petition.

7.2. Maharashtra Chamber of Commerce, Industry and Agriculture (MCCIA), an Authorised Consumer Representative, stated that:

- a. Subsequent to filing of the Petition on 18 March, 2017, two hearings have been held. In compliance of the Commission's directives, MSEDCL has started refunding the FAC amount. At this stage, amendment in the Petition may not serve any purpose.

- b. If desired, MSEDCL may withdraw this Petition with liberty to file a fresh Petition. Amendment / modification of the present Petition should not be allowed.
- 7.3. The Commission allowed 3 weeks to MSEDCL for its additional submission or addendum, to which the Consumer Representatives could file their Rejoinder, if any, within a week thereafter.
8. On 10 October, 2017, MSEDCL submitted its amended Petition stating as follows:
  - 8.1. The Commission's directive of re-computing the FAC for the period April to October, 2016 after taking into consideration the power purchase cost as per the MYT Order dated 3 November, 2016 and despite the FAC approval dated 14 December, 2016 for the period from April to June, 2016, is contrary to the applicability of the MYT Order dated 3 November, 2016 in Case No. 48 of 2016.
  - 8.2. Communications of a State Regulatory Commission cannot modify or alter the applicability of the MYT Order which has been passed and duly notified under the provisions of Section 86(1)(a) read with Sections 61, 62 and 64 and other provisions of the Electricity Act (EA), 2003.
  - 8.3. The impugned directives failed to take into consideration the fact that the FAC is computed and levied on a monthly basis as per Regulation 10.2 of the MYT Regulations, 2015.
  - 8.4. The factual matrix of the matter reveals that the Commission has approbated and reprobated at the same time in terms of the consideration of power purchase cost as per the earlier MYT Order dated 26 June, 2015 in Case No. 121 of 2014 on the one hand and the MYT Order dated 3 November, 2016 in Case No. 48 of 2016 on the other.
  - 8.5. The Commission, after notifying the applicability of the MYT Order dated 3 November, 2016 in Case No. 48 of 2016 from 1 November, 2016, inadvertently applied the Order retrospectively only on one component, namely, the FAC calculation.
  - 8.6. The computation of FAC can only be done on the approved cost vis a vis the actual cost and not the contrary.
  - 8.7. The Commission has inadvertently overlooked the concept of "ongoing business" in its directives dated 1 December, 2016, 10 January and 1 March, 2017.

- 8.8. The impugned directives fail to take into consideration that the refund directed to be effected by MSEDCL of the FAC amounts from the billing month of April, 2017 impacts MSEDCL financially in term of working capital in hand and other aspects, besides being contrary to statutory Regulations inasmuch as the same is effected without any true-up.
- 8.9. The Commission has revised the tariff of MSEDCL from 1 November, 2016. Hence, MSEDCL could recover revenue at the revised tariff only from November, 2016 onwards and has not been able to collect revenue at the new tariff for the period of April to October, 2016.
- 8.10. MSEDCL has been authorized to recover FAC in addition to the applicable tariff from consumers in view of the express provision in the MYT Order dated 26 June, 2015 in Case No. 121 of 2015 under the ‘Approved Tariff Schedule’ appended thereto:

*“General*

*...8. FAC as may be approved by the Commission from time to time shall be applicable to all categories of consumers and be in addition to the base tariff on the basis of the formula specified by the Commission and computed on monthly basis.”*

Before 1 November, 2016, the MYT Order dated 26 June, 2015 was in force and, since FAC is required to be computed on monthly basis, the monthly FAC calculation made by MSEDCL on the basis of the existing MYT Order for the period April to October, 2016 (MYT Order dated 26 June, 2015) is in commensurate with the requirement of the Regulations and the MYT Order.

- 8.11. MSEDCL has actually paid the FAC and variation in power purchase cost to Generators during April to October, 2016, which it cannot be restricted from recovering from consumers in view of the provisions of Regulation 10 of the MYT Regulations, 2015.
- 8.12. The directions for such retrospective adjustment on account of FAC have not been given to MSPGCL which might have been passed on to MSEDCL and other Generating Companies are not envisaged by the Commission. It is unfair if MSPGCL is not directed to re-calculate the FAC and pass it to MSEDCL for the said period. Moreover, the Commission is silent about the power purchase variation paid to Central Sector Generators and IPPs. Without addressing these issues, the direction of the Commission for refund of FAC to consumers is contrary to law. Also, the Commission is silent on the higher basic energy rate paid to MSPGCL for

September and October, 2016, whereas MSEDCL's tariff revision has been made applicable from 1 November, 2016.

- 8.13. If the direction of the Commission is considered, there will be mismatching of revenues with that of actual power purchase cost incurred by MSEDCL for the period April, 2016 to October, 2016. MSEDCL will face serious financial crunch to fulfill its working capital needs. Further, if working capital loan is availed from banks, interest on such working capital is not being allowed by the Commission.
- 8.14. Moreover the Commission had restricted MSEDCL from levying legitimate amount of FAC for the period August to October, 2016, which has already weakened the cash flows of MSEDCL.
- 8.15. The Commission has revised the Energy Charges upwards from 1 November, 2016. If adjustment on account of FAC is done in isolation without considering recovery through Energy Charges, then it would lead to under-recovery on account of Energy Charges for the period from April to October, 2016. This would, in effect, be tantamount to only a notional benefit of higher base tariff for the same period as actual realization would not take place until a truing up exercise at the year end. Retrospective application of the revised approved power purchase cost only for FAC calculations and not for Energy Charges will result in an anomaly and call for avoidable truing up for loss or under recovery of Energy Charges for those months.
- 8.16. MSEDCL is filing the present Petition without prejudice to its rights to claim carrying cost / interest on the amounts which have been refunded since the billing month of April, 2017 pursuant to the impugned directives dated 1 December, 2016, 10 January, 2017 and 1 March, 2017.
- 8.17. Accordingly, MSEDCL has prayed as follows:
- a) *“Admit the present Petition expeditiously as the Petitioner has already commenced refund of the FAC amounts from the billing month of April 2017, in view of the proceedings in the present matter under the un-amended Petition an any delay in consideration of the present case would be contrary to justice and equity.*
  - b) *The impugned directives dated 01.12.2016, 10.01.2017 and 01.03.2017 to the extent the same direct re-computation of FAC and consequential refund be set aside.*
  - c) *Pending the hearing and final disposal of the present Petition, the implementation, operation and effect of the impugned directives dated 01.12.2016, 10.01.2017 and 01.03.2017 be stayed.*

*d) Pending the hearing and final disposal of the present Petition, the implementation, operation and effect of the impugned directives dated 01.12.2016, 10.01.2017 and 01.03.2017 to the extent of the refund passed on to the consumers from the billing month of April 2017 be stayed.*

*e) Ad-interim relief in terms of prayer Clause (c) and (d)..."*

9. In its MA No. 21 of 2017 dated 9 November, 2017, GWEL has stated as follows:

9.1 GWEL (formerly EMCO Energy Ltd.) is a Generating Company which has developed a coal-based Thermal Power Plant with an installed capacity of 600 MW in Warora Taluka, District Chandrapur, Maharashtra. GWEL and MSEDCL executed a PPA for sale and supply of electricity to MSEDCL from the Project.

9.2. At para. 8.35 of its last MYT Order dated 3 November, 2016, the Commission stipulated the methodology of vetting FAC [as quoted at para. 3.1 earlier in this Order]. On In January, 2017, in furtherance of the MYT Order, the Commission issued a FAC vetting report for July to October, 2016 and directed MSEDCL to recalculate the FAC and adjust the resultant FAC amount which remained to be recovered/ refunded in the next FAC billing process.

9.3. In February, 2017, MSEDCL submitted the recalculated FAC amounting to Rs. 533.04 crore to be refunded to consumers, and requested that the FAC be adjusted in truing-up of FY 2016-17 instead of directing refund right away; or it may be allowed to recover FAC/variation in power purchase cost paid to the Generators from April to October, 2016.

9.4 On 1 March, 2017, the Commission rejected MSEDCL's request to defer refund of FAC of Rs. 369.54 crore and directed it to refund the amount in 7 instalments to consumers. The Commission also rejected MSEDCL's prayer for recovery of the amount from Generators, with observations at para. 2.4.6 of its letter [quoted at para. 13 subsequently in this Order].

9.5 On 30 June, 2017, MSEDCL wrote to GWEL stating that, in line with the Commission's directions dated 1 March, 2017, MSEDCL had started to refund Rs.369.55 crore to consumers. Therefore, an amount of Rs. 42.30 crore was being withheld from GWEL's bills, subject to the final decision of the Commission on this Petition. The GWEL bill was towards compensation for Change in Law events from March, 2014 to December, 2016, amounting to Rs. 68.26 crore. On 7 July, 2017, MSEDCL again wrote to GWEL stating that Rs. 42.30 crore will be withheld in installments along with carrying cost, resulting in total deduction of Rs. 44.42 crore.

9.6 On 10 July, 2017, GWEL wrote to MSEDCL seeking release of the withheld amount of Rs. 44.42 crore, stating that MSEDCL's action was illegal and transgressed the provisions of the PPA. GWEL also stated that the Commission had not passed any direction to recover amounts towards refund of FAC from GWEL, which is an IPP. MSEDCL has not responded to GWEL's letter.

9.7 In light of the above, GWEL is a necessary and proper party for the adjudication of the present Petition. In this regard, GWEL has cited Order 1 Rule 10 (2) of the Code of Civil Procedure, 1908, under which the Court has the power to add necessary and proper parties to a suit; and the Judgment of the Supreme Court in the case of Competition Commission of India v. SAIL ((2010) 10 SCC 744 (paras 108-111)) reiterating the concept of necessary and proper parties to be an accepted norm of civil law.

10. At the next hearing held on 15 November, 2017:

10.1. MSEDCL stated that

- a. Subsequent to the last hearing, MSEDCL has amended its Petition. Although MSEDCL is seeking review of the Commission's direction of refunding FAC of Rs. 369.54 crore to consumers, it has already complied with that direction by refunding the FAC amount in 7 instalments.
- b. The Commission's direction to refund Rs 369.54 crore on the basis of recalculation of FAC for the period of April to October, 2016 by considering the power purchase cost approved in MYT Order dated 3 November, 2016 is inconsistent with the date of applicability of the Order, which is from 1<sup>st</sup> November, 2016.
- c. MYT Order dated 3 November, 2016 was made applicable from 1 November, 2016. By directing recalculation of FAC, the Commission has in fact applied it from 1 April, 2016. The applicability of the Order cannot be changed by a letter from the Commission. Further, such applicability has been changed only for one component of ARR, i.e. power purchase expenses.
- d. During the period of April to October, 2016, the MYT Order dated 26 June, 2015 was applicable. Accordingly, MSEDCL has calculated FAC for these months based on the power purchase cost approved in that Order. Further, as per Regulation 10 of the MYT Regulations, 2015, post applicability of the revised Tariff from 1 November, 2016, MSEDCL had submitted FAC calculations for November, 2016 for prior approval of the Commission in February, 2017. Thereafter, MSEDCL is submitting FAC submissions for post facto approvals.

- e. The Commission's direction to recalculate FAC for April to October, 2016 by applying the revised power purchase expenses approved in MYT Order dated 3 November, 2016 is not consistent with law and hence needs to be reviewed.

10.2 GWEL, Intervention Applicant, stated that:

- a. The Commission in its FAC vetting report dated 1 March, 2017 has rejected MSEDCL's request to defer refund of FAC of Rs. 369.54 crore and directed it to refund this amount in 7 installments to consumers. The Commission also rejected MSEDCL's prayer of recovering this amount from Generating Companies, including IPPs.
- b. Nevertheless, MSEDCL has withheld Rs. 42.30 crore from the bill raised by GWEL towards compensation for Change in Law events from March, 2014 to December, 2016, stating that the amount is withheld subject to the final decision of the Commission in the present Case.
- c. As per provisions of the PPA, MSEDCL cannot unilaterally withhold GWEL's payments. Further, the withheld amounts cannot be more than Rs. 5 crore per annum.
- d. Thus GWEL is a necessary and proper party for the adjudication of the present Petition.

10.3 With regard to the Intervention Application, MSEDCL suggested that the Commission may first decide its Review Petition, and thereafter the issue of GWEL can be dealt with appropriately.

#### **Commission's Analysis and Rulings:**

**11. MSEDCL has sought that the Commission stay, review and reverse the direction, given in its FAC vetting approval letter dated 1 March, 2017, to refund the re-calculated FAC amount for April to October, 2016. However, during these proceedings, MSEDCL has now refunded the re-calculated FAC of Rs. 369.54 crore, along with interest, to consumers in seven 7 instalments starting from the FAC computation for the months of January to July, 2017 (refunded/ levied in the billing months of April to October, 2017).**

**12. Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004 governing review 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.”*

Thus, the ambit of review is limited, and MSEDCL’s Petition has to be evaluated accordingly.

13. MSEDCL has raised issues regarding the retrospective applicability of the MYT Order dated 3 November, 2017, non-application of the same principles of re-calculation of FAC to its contracted Generators, and the adverse financial impact on MSEDCL of refunding the re-calculated FAC amount to consumers. The Commission notes that all these issues have been addressed in its FAC vetting approval letter dated 1 March, 2017 as follows:

*“2.4 With reference to above request of MSEDCL, the Commission observes as follows:*

*2.4.1 MSEDCL has contended that due to delay in issuance of Tariff Order, it has not able to recover revenue at revised Tariff during the period of April to October, 2016. The Commission observed that one of the reasons for such delay was late filing of MYT Petition by MSEDCL. The same has been described in Tariff Order dated 3 November, 2016 as follows:*

*“Regulation 5.1(a) of the MYT Regulations, 2015 required filing of MYT Petitions for the 3rd Control Period by 15 January, 2016. However, considering difficulties raised by various Utilities, the Commission vide Order dated 15 January, 2016 had extended the time up to 15 February, 2016, including for MSEDCL.*

*Vide letter dated 11 February, 2016, MSEDCL sought further time, but the Commission rejected any further extension. Thereafter, on 3 March, 2016, MSEDCL filed its original MYT Petition, including a prayer for condonation of the delay in filing the Petition. The first TVS was held on 21 March, 2016. Thereafter, a second TVS was held on 29 April, 2016 in which MSEDCL was directed to submit pending replies to data gaps within a week, and to file its revised Petition incorporating its replies to the data gaps and the issues*

*raised during the TVS. However, MSEDCL submitted its revised Petition only on 7 June, 2016 which was admitted by the Commission on 10 June, 2016 for further regulatory process.”*

*2.4.2 FAC mechanism allows pass-through of variation in power purchase cost of Distribution Licensees to its consumers. Power purchase quantum and cost approved in Tariff Order applicable for period under consideration is used as reference for calculating such variation in power purchase cost.*

*2.4.3 For the FY 2016-17, the Commission has issued Tariff Order on 3 November, 2016 and made it applicable from 1 November, 2016. Thus for the period of April to October, 2016, Tariff which was approved for FY 2015-16 through earlier MYT Order dated 26 June, 2015 were in force.*

*2.4.4 Accordingly, for the period of April to October, 2016 (which is part of FY 2016-17), MSEDCL had calculated FAC based on the old Tariff Order dated 26 June, 2015 (which is for FY 2015-16). Subsequent to issuance of Tariff Order dated 3 November, 2016, approved power purchase cost for FY 2016-17 becomes available. At the time of true-up of FY 2016-17, power purchase cost approved in Tariff Order dated 3 November, 2016 will be used as reference for arriving at deviation in actual power purchase cost.*

*2.4.5 Therefore, if FAC for the period of April to October, 2016 which was calculated based on 2015 Tariff Order is not re-calculated, then at the time of true-up of FY 2016-17 (which would be based on 2016 Tariff Order) there would be large difference between revenue collected through FAC and variation in power purchase cost. This may result in burdening the consumers / Licensee with carrying cost / holding cost at the time of true-up. Therefore, vide FAC vetting Order dated 10 January, 2017 the Commission has directed MSEDCL to re-calculated FAC for the period of April to October, 2016 based on Tariff Order dated 3 November, 2016. Therefore, resultant re-calculated FAC needs to be passed on to the consumers without waiting for true-up of FY 2016-17.*

*2.4.6 As far as MSEDCL's request of allowing recovery of FAC paid to the Generators including State, Central and IPPs are concerned, it is observed that Central Sector Generating Plants are not regulated by this Commission. Also, IPPs are governed by PPAs signed between the parties. MSPGCL is governed by MYT Regulations, 2015 which allows (Regulations 48) it to bill the energy charges based on actual cost of generation subject to normative performance parameters. Hence, modification in FAC of MSPGCL would not reduce the total payout of MSEDCL towards the energy charge as same has been raised based on actual cost of generation.*

*2.4.7 Further, MSEDCL's request of allowing interest on resultant borrowed amount to be passed on to the consumers at the time of true-up can only be dealt with as per provisions of MYT Regulations, 2015 at the time of true-up of FY 2016-17.*

*2.5 In view of the above the Commission is of the opinion that it would not be prudent to consider MSEDCL's request of adjusting refundable FAC for the period of April to October, 2016 at the time of true-up of FY 2016-17 instead of refunding it now.*

*2.6 The Commission has scrutinised the submissions of MSEDCL and found that FAC of Rs 369.54 Crore is to be refunded to the consumers for the period of April to October, 2016 (Annexure-1). The Commission directs MSEDCL to refund Rs 369.54 crore to its consumers in seven equal instalments with holding cost, as it pertains to the period of seven months (April to October, 2016)."*

Thus, the Commission, in its FAC vetting approval letter, had provided the basis and detailed reasoning for its decision. As set out below, there is no mistake or error apparent on the face of the record, or any other sufficient reason, to review the Commission's decision. In fact, the Petition is an appeal against that decision in the guise of a claim for review.

14. The FAC mechanism has been devised in pursuance of Section 62(4) of the EA, 2003 to enable Distribution Licensees to pass through variations in power purchase cost to consumers regularly during the year without waiting for tariff revision. This is beneficial to both Distribution Licensees as well as consumers. When power purchase costs decline, the FAC mechanism enables the benefit to be passed on to consumers at regular and short intervals, without the carrying cost that Distribution Licensees would have to otherwise pay. Similarly, when such costs are increasing, it helps Distribution Licensees to maintain financial liquidity by recovering all or part of the impact without subjecting consumers to large carrying cost and a possible tariff shock at the time of the next regular tariff revision. Except for prior approval for the first month of the Tariff Order, the FAC levied by the Licensees is vetted by the Commission ex post facto. This expedites the process of pass-through of actual variations in power purchase costs. Any error found during post facto vetting is corrected by adjustment in the next month's FAC computations. The variation in power purchase costs also undergoes prudence check in the true-up undertaken in the subsequent Tariff proceedings. At that stage, the revenue collected through FAC is also considered in the total revenue of the Distribution Licensee before determining the Revenue Gap or Surplus for the relevant year based on approved expenditure.
15. For computing FAC on a monthly basis, the actual power purchase cost is compared with the approved power purchase cost. Such levy of FAC on monthly basis helps reduce the gap between the actual and the approved power purchase expenses at the time of annual true-up. In the present case, prior to the MYT Order dated 3

November, 2016, MSEDCL had calculated the FAC for the months of April to October, 2016 based on the power purchase expenses approved in the earlier MYT Order dated 26 June, 2015. Although the subsequent MYT Order dated 3 November, 2016 is applicable from 1 November, 2016, the Commission in that Order had revised and approved all expenses, including power purchase expenses, from April, 2016 for FY 2016-17. In the same Order, the Commission addressed the issue of under-recovery of revenue on that account as follows:

*“The Commission has determined the revenue from the revised tariffs as if they were applicable for the entire year. Any shortfall or surplus in actual revenue vis-à-vis the approved Revenue Requirement will be true-up in the MTR, as specified in the MYT Regulations, 2015.”*

Thus, there is no merit in MSEDCL’s contention that, by considering the revised power expenses from April to October, 2016, the Commission has in effect modified the date of application of the MYT Order to 1 April, 2016 (i.e. the start of FY 2016-17) instead of 1 November, 2016. The FAC mechanism, being applicable to power purchase expenses, is bound to take into consideration the revised power purchase cost which would be used as the reference cost at the time of true-up.

16. In support of its contentions, MSEDCL has cited the Commission’s Order dated 3 August, 2005 in Case No. 18 of 2005 on REL’s Petition for review of directions on FAC. The Commission notes that the context and factual matrix of that Case were different. In that Order, the Commission had ruled (at para 8.(c)) that any over-recovery on account of the previous tariff was to be refunded to consumers. However, considering the relatively large amount of FAC to be refunded (around Rs 111 crore) in a month when the monthly approved revenue was only Rs. 187 crore, and considering the fact that the next Tariff Petition had already been filed, the Commission allowed REL to adjust the surplus revenue on account of FAC during the true-up process. In the present case, although the total FAC amount in question is Rs. 369.54 crore, the Commission has allowed MSEDCL to refund it in 7 equal instalments with carrying cost, i.e. around Rs. 55 crore per month. Considering the average monthly approved revenue of MSEDCL of Rs. 4940 crore for FY 2016-17, this FAC refund amounts to only 1.11% of its monthly ARR (and has now also been refunded). Hence, the dispensation given in the Commission’s Order in Case No. 18 of 2005 is not relevant to the circumstances of the present matter.
17. MSEDCL has also cited the financial burden of refunding the FAC amount to consumers as directed. While refunding it, MSEDCL has, in turn, deducted the corresponding amounts from the bills of its contracted Generators. In this regard,

the FAC amount which a Distribution Licensee can recover from consumers is computed based on the power purchase cost approved in its ARR. Power purchase cost includes Capacity Charge and Energy Charge. In order to understand the financial impact on MSEDCL for April to October, 2016 on account of deviation in power purchase cost, the Commission has computed the impact (Capacity Charge + Energy Charge) with reference to the earlier MYT Order dated 26 June, 2015 (and considering the details given in the FAC submissions) as tabulated below:

Particulars	Unit	April 2016	May 2016	June 2016	July 2016	Aug 2016	Sept 2016	Oct 2016	Total
Weighted Average Actual Power Purchase rate	Rs./kWh	3.68	3.60	3.80	3.90	3.78	3.63	3.33	3.67
Weighted Average Approved Power Purchase rate as per MYT Order dated 26 June, 2015	Rs./kWh	3.72	3.72	3.72	3.72	3.72	3.72	3.72	3.72
Variation in rate of power purchase	Rs./kWh	-0.04	-0.12	0.08	0.18	0.06	-0.09	-0.39	
Net Power Purchase	MU	9956	9722	8716	7955	8533	8705	9262	
Change in power purchase cost	Rs. Crore	-40	-116	67	140	48	-78	-360	-340

18. From the above, it can be seen that, as against the average power purchase cost (APPC) of Rs. 3.72 /kWh approved in the 2015 MYT Order, MSEDCL has actually incurred a lower APPC of Rs. 3.67 /kWh during that period. MSEDCL's claim that it should be allowed to recover the accumulated FAC for April to October, 2016 from consumers or, alternatively, to deduct it from Generators is because it has computed FAC for this period by considering only the variation in the Energy Charge of its Generators. The MYT Regulations, 2011 and 2015 provide for computation of FAC considering the deviation in the power purchase cost (Capacity + Energy Charge). In April to October, 2016, MSEDCL has actually incurred lower power purchase expenses than approved in the MYT Order. Upon re-calculation based on the revised power purchase cost approved in the latest MYT Order dated 3 November, 2016, as against the refund of Rs. 340 crore, the FAC amount for that period is Rs. 397.38 crore recoverable from consumers. However, as MSEDCL has already recovered the excess amount of FAC from the consumers by computing it only on the variation in Energy Charge of Generators, the Commission has directed MSEDCL to refund the net amount of Rs. 369.54 crore to consumers. Hence, the retention by MSEDCL of certain amounts from the Generators' energy bills for adjusting it against the FAC refund to consumers has no basis and is not tenable.

**Hence, the Commission directs MSEDCL to release the retained amount to the concerned Generators, with applicable interest till it is paid.**

The Petition of Maharashtra State Electricity Distribution Co. Ltd. in Case No. 46 of 2017 and GMR Warora Energy Ltd.'s Miscellaneous Application No. 21 of 2017 stand disposed of accordingly.

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

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

  
**(Ashwani Kumar Sinha)  
Secretary**

