

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO.138 OF 2014**

**Dated: 07<sup>th</sup> October, 2015**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of :**

**M/s Linde India Limited** )  
Plot. No.T-8, MIDC Industrial Area, )  
Taloja, Dist. Raigad, )  
Navi Mumbai – 410 208 )  
 ) ... **Appellant**

**Versus**

1. **Maharashtra Electricity** )  
**Regulatory Commission** )  
Through the Secretary )  
World Trade Centre, Centre No.1, )  
13<sup>th</sup> Floor, Cuffe Parade )  
Mumbai – 400005. )

2. **Maharashtra State Electricity** )  
**Distribution Co. Ltd.** )  
Through the Chief Engineer )  
(Commercial), )  
Prakashgad, Bandra (East), )  
Mumbai – 400051. )

... **Respondents**

Counsel for the Appellant(s) : Mr. Pradeep Dahiya

Counsel for the : Mr. Buddy A. Ranganadhan  
Respondent(s) Mr. D.V. Raghuvanshy for R.1

Mr. G. Sai Kumar  
Mr. Nitish Gupta &  
Mr. Sowmya Sai Kumar for R.2

## **J U D G M E N T**

### **PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI - CHAIRPERSON**

**1.** The Appellant is a consumer of Respondent no.2, the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL). The 1<sup>st</sup> Respondent is the Maharashtra Electricity Regulatory Commission (the State Commission). In this appeal, the Appellant has impugned order dated 11.4.2014 passed by the State Commission.

**2.** The factual background of the case needs to be stated to understand the grievance of the Appellant. The Appellant was granted open access by MSEDCL vide letter dated 21.2.2013 for 6.5 MW capacity from the coal based generator Top Worth Urja & Metals Ltd. from the date of commencement of open access till 31.3.2013.

**3.** On 19.11.2013, the Appellant made an application to MSEDCL for grant of distribution open access through Indian Energy Exchange (IEX) for 5.5 MW for their plant at Taloja Distt. Raigad, Navi Mumbai.

By its letter dated 6.12.2013, MSEDCL informed the Appellant that it is facing some practical difficulties in allowing the open access through Energy Exchange. The letter further stated that the MERC (Distribution Open Access) Regulations 2005(Regulations 2005) do not provide for open access transaction through Energy Exchange.

**4.** Aggrieved by the action of MSEDCL, the Appellant filed a petition under Section 38, 42 (2), 142, 146 & 149 of the Electricity Act, 2003 (the Electricity Act) for seeking penal action, for non-compliance of orders passed under the Electricity Act. Following are the prayers made by the Appellant.

- i. Action as per Section 142 & 146 of the Electricity Act, 2003 : We appeal to initiate punishment for non-compliance of orders or directions given in this Act against the erring officials of the respondent. And penalty as defined in the Act should be continued till failure to comply with Section 38 & 42 of the Electricity Act 2003 for allowing non-discriminatory open access.
- ii. Section 149 of the Electricity Act 2003 for offence by companies: To take action as per this Act against the company, every person who at the time the offence was committed was in charge of and

responsible to the company for conduct of the business of the company.

**5.** The State Commission by the impugned order disposed of the petition. The State Commission observed that MSEDCL is not against open access but it has denied the open access through IEX to its consumers on account of operational and financial difficulties and those cannot be ignored while granting Open Access permission by MSEDCL. The State Commission concluded that MSEDCL has not breached the Electricity Act or the regulations; that there is no wilful or deliberate violation of provisions of the Electricity Act or the regulations and therefore it is not inclined to take any action as per Sections 142, 146 & 149 of the Electricity Act. Being aggrieved by the said order, the Appellant has approached this Tribunal.

**6.** We have heard Mr. Dahiya, learned counsel appearing for the Appellant. We have perused the written submissions filed by him. The gist of the submissions of learned counsel is as under:-

a. The Statement of Objects and Reasons of the Electricity Act states that there is need to provide for newer concepts like power trading and open access. Section 2 (47) defines open access. Section 42 casts a duty on the distribution licensee to provide open access to

consumers. It also casts a duty on the State Commission to introduce open access in phases. Section 60 casts an obligation on the Appropriate Commission to issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company abuses its dominant position which is likely to cause an adverse effect on competition in electricity industry. Section 86 (2) (i) of the Electricity Act casts an obligation on the Appropriate Commission to ensure promotion of competition, efficiency and economic activities in the electricity industry. The State Commission has failed to take note of the important provisions of the Electricity Act.

- b. In Case no.68 of 2010, the State Commission considered the issue of open access and vide its order dated 15.06.2012 held that regulations are not a pre-condition to effectuate a right which is otherwise provided in law and right to open access is provided in Section 2(47) read with section 42(2) and Section 42(3). In that case, the State Commission took into consideration MSEDCL's contention that regulations do not provide for sourcing of power through Power Exchanges and relying on two orders of the Bombay High Court, it held that the said issue does not prevent the State Commission from disposing of applications for open access for selling power through Power Exchanges till the State Commission frames appropriate regulations.

- c. Two judgments of the Bombay High Court **Writ Petition No.666 of 2011 dated 4.5.2011 – Maharashtra State Electricity Distribution Company Limited v. The Maharashtra Electricity Regulation Commission and Writ Petition No.1552 of 2011 dated 11.10.2011 – Maharashtra State Electricity Distribution Company Limited v. The Maharashtra Regulatory Commission & Ors** are relevant.
- d. By judgment dated 28.7.2011, in Appeal no. 36 of 2011, this Tribunal has held that the State Commission can direct the MSEDCL to grant open access in the proceedings related to Section 142 of the Electricity Act.
- e. MSEDCL's stand that it was facing some practical difficulties in allowing open access through Energy Exchange conveyed vide its letter dated 6.12.2013 is false because MSEDCL has granted open access through IEX even in August, 2013 to M/s Vorrac Engg. Pvt. Ltd., Aurangabad and M/s Videocon Industries Ltd., Aurangabad without there being any directions from the State Commission. Thus, the State Commission is guilty of discrimination.
- f. The State Commission accepted the contention of MSEDCL about operational and financial difficulties even without mentioning and discussing those difficulties.

- g.* Because of the failure of MSEDCL to grant open access to the Appellant, the Appellant has suffered huge loss of more than two crores. MSEDCL is guilty of unjust enrichment and Appellant needs to be compensated for the same. In this connection, counsel relied on **Enviro Legal Action v. Union of India and Ors.**<sup>1</sup>
- h.* It is clear from the record that the MSEDCL is guilty of discrimination. The Appellant has been adversely discriminated against by MSEDCL and hence necessary directions be issued against MSEDCL.

**7.** We have heard Mr. G. Saikumar, learned counsel appearing for MSEDCL. We are perused the written submissions filed by him. Gist of the written submissions is as under:-

- i.* The Appellant sought open access through IEX under the Regulations, 2005. The said regulations do not cover open access transactions related with purchase of power from Energy Exchanges.
- ii.* It is the duty of MSEDCL to provide non-discriminatory open access; however the same has to be in consonance with the regulations framed by the State Commission. Since, the Regulations, 2005 do not contemplate open access through Power

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<sup>1</sup> (2011) 8 SCC 161

Exchanges, the permission to grant open access through Energy Exchanges should have been kept in abeyance till the new regulations were finally notified.

- iii. Open access as a feature and right under the Electricity Act is subject to operational constraints. MSEDCL is not against open access nor is it discriminating against the consumers. Denial of open access through Power Exchange is because of the fact that Regulations 2005 do not cover it and because there were operational constraints.
- iv. MSEDCL granted open access permission to some consumers sourcing power through IEX as directed by the State Commission upon the consumers filing petitions in the State Commission. Observing the trend & directions of the State Commission, MSEDCL granted open access through IEX to M/s Vorrac Engineering Pvt. Ltd. & M/s Videocon Industries Ltd., though there were no orders of the State Commission. This action of MSEDCL cannot be construed as discrimination as MSEDCL only observed the directions of the State Commission and followed the same in similar cases. No further permissions have been granted. In any case grant of these permissions would not create any right in favour of the Appellant.
- v. Assuming grant of open access to the said two consumers was an error, error cannot be perpetuated **(Kastha Niwark Grahnrman**

**Sahakari Sanstha Maryadib, Indore v. President, Indore Development Authority**.<sup>2</sup>

- vi. The circumstances under which open access could not be given to the Appellant through Power Exchange clearly demonstrate the *bonafides* of MSEDCL and hence there is no question of abuse of dominant position and consequently there is no need to issue any directions under Section 60 of the Electricity Act.
- vii. As open access through Power Exchange could not be granted on account of operational constraints and also because the Regulations, 2005 did not provide for it alleged loss suffered by the Appellant is not relevant for the purpose of adjudication of the issues involved in the present appeal. The Appellant has not made out any case for grant of any relief. The appeal deserves to be dismissed.

**8.** We have heard Mr. Buddy A. Ranganadhan, learned counsel appearing for the State Commission. We have perused the written submissions filed on behalf of the State Commission. The gist of the submissions of the State Commission is as under:

- a) The State Commission has declined to take any action under Section 142 of the Electricity Act because there were operational difficulties while granting open access for purchase of power from

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<sup>2</sup> (2006-2 SCC 604)

the Power Exchanges. On the day on which the impugned order was passed, the State Commission disposed of 28 other matters in some of which the same grievance was made. The State Commission went into the question of operational difficulties. In Case No. 172 of 2013 in the matter of **Pepsico Holdings**, the State Commission enumerated broad heads of operational difficulties. The said reasoning is clearly applicable to the Appellant's case.

- b) Having upheld the stand of MSEDCL that it was justified in not granting open access for exchange transactions, the State Commission could not have initiated proceedings under Section 142 of the Electricity Act against MSEDCL in the Appellant's case. Since the State Commission found that the operational difficulties of the MSEDCL are sufficient justification for non-grant of open access, there can be no question of any wilful or deliberate violation of Section 42 (2) of the Electricity Act.
- c) Even under Section 42 (2) the grant of open access is subject to operational constraints. The allegation of discrimination has been repelled by the State Commission in the **Pepsico Holdings** order, which will be applicable to the present case as well.

d) In Appeal No. 36 of 2011, which was decided by this Tribunal on 28.07.201,1 two issues were involved, they are as under:

***i) Whether the Commission had the jurisdiction to direct grant of open access in a petition under Section 142; and***

***ii) Whether the Commission, at all, had the jurisdiction to entertain that consumers petition or did the matter have to go the Consumer Grievance Redressal Forum under the Act.”***

On both counts, this Tribunal upheld the State Commission's order. This judgment was confirmed by the Supreme Court. However, the issue in the present matter is not whether the State Commission has jurisdiction to direct grant of open access in a petition under Section 142 but whether the State Commission could take action under Section 142 or pass any directions therein having accepted the operational difficulties of MSEDCL.

e) Reliance placed on two judgments of the Bombay High Court and the Supreme Court is misplaced. The issue in those matters was ex-facie, completely different from the present matter.

f) The State Commission has with effect from 25.06.2014 notified the Distribution Open Access Regulations 2014 (Regulations 2014). The said regulations provide for regulation of open access

transactions through the Power Exchange. Any grant of open access after that date would have to be in terms of and as per the said Regulations 2014. Hence to that extent the present appeal has become infructuous.

g) In the circumstances the impugned order does not call for any interference and the appeal be dismissed.

**9.** Before we deal with the rival contentions certain admitted facts need to be stated. The Appellant sought open access through IEX under Regulations 2005. Regulations 2005 did not cover grant of open access through IEX. Regulations 2005 have been repealed and have been replaced by Regulations 2014. In this appeal the Appellant has prayed that MSEDCL be directed to grant open access to the Appellant through IEX. Regulations 2014 provide for regulation of open access transactions through Power Exchange. Any grant of open access through Power Exchange after coming into operation of Regulation 2014 will have to be in terms of and as per Regulations 2014. Therefore to that extent the present appeal has become infructuous. The only prayer which needs to be considered is regarding direction to MSEDCL to pay exemplary costs to the Appellant for its alleged failure to perform its statutory duty.

**10.** Importance of open access in power system can hardly be underestimated. The statement of Objects & Reasons of the Electricity Act, Section 2(47), Section 42 and Section 86(1)(a) of the Electricity Act give clear idea about the concept of open access and its functioning. Section 42 casts a duty on the State Commission to introduce open access in phases. Counsel for the MSEDCL has acknowledged the importance of open access, the duty cast on the State Commission in that behalf and the role which the distribution licensee has to play in that connection. Counsel however submitted that open access through IEX could not be granted to the Appellant as Regulations 2005 did not provide for it and there were financial and operational constraints. We need to examine whether this submission is correct because that will provide answer to the question whether MSEDCL has failed to perform its statutory duty as alleged by the Appellant.

**11.** The relevant provisions of the Electricity Act to which we have made reference indicate that operational constraints is a vital consideration which has to be taken into account while considering the prayer for grant of open access. In the impugned order the State Commission has accepted the contention of the MSEDCL that there were operational and financial difficulties due to which open access through Power Exchange could not have been granted. But the State

Commission has not elaborated on this issue. It has not given any reasons as to why it has come to this conclusion. To that extent grievance of Mr. Dahiya learned counsel for the Appellant is justified. In this connection learned counsel for the State Commission has drawn our attention to the order of the State Commission in Case No.172 of 2013 in the matter of **Pepsico Holdings**. That order was passed on the same day on which the impugned order was passed. Counsel submitted that in fact on that day 28 other matters were listed before the State Commission in which MSEDCL's non-grant of open access for purchases from the Power Exchange was in issue. This fact is not disputed by the counsel for the Appellant. A copy of the hearing schedule of the State Commission which is produced in this Tribunal confirms the fact that such matters were listed before the State Commission. Order of the State Commission in **Pepsico Holdings** is placed before us. We find that in that order the State Commission has succinctly discussed the operational difficulties. They are enumerated as under:

***(i) Disruption of supply by the Generator;***

***(ii) Network congestion;***

***(iii) Gaming : switch on/switch off;***

***(iv) If the purchases are from a generator which is not a state Pool Participant in the FBSM, the crediting of energy will be on actual basis; If there are multiple consumers***

*taking power from such a generator calculation of energy to be credited is on prorata basis. It will be a complex task.*

*(v) Impact on the grid management;*

*(vi) The information of scheduled injection etc for the next day is made available to the distribution companies only at 6pm the previous evening and this leads to power management problems for the distribution companies.*

**12.** Having perused this order we are convinced that MSEDCL's case of operational difficulties is not untrue. We wish however that the State Commission had briefly referred to the said operational difficulties in the impugned order or at least referred to its order in **Pepsico Holdings** and not given such laconic reasoning. However, since there is no denial by the Appellant about the specific contention raised by the State Commission in its reply that the State Commission had held a combined hearing of all the cases in which the same issue was raised, in the written submissions filed by the Appellant or by filing a rejoinder, we find no difficulty in concluding on the basis of **Pepsico Holdings** that MSEDCL really faced operational constraints at the relevant time.

**13.** Now the next question is whether MSEDCL is guilty of discrimination. It is admitted by MSEDCL that it has granted open access through IEX as directed by the State Commission to eight

consumers and it has granted open access through IEX to two consumers without there being any orders of the State Commission directing them to do so. It appears that all the eight applications where open access through IEX was granted by the State Commission were covered by Regulations 2005. It is not understood why case of operational constraints was not considered in those cases. If it is the case of the State Commission that there was no provision for open access through IEX in Regulations 2005 and therefore the Appellant's application could not have been granted, we fail to understand how these eight applications were granted. However, since these orders are not before us we do not want to go into that aspect and give any final opinion thereon.

**14.** So far as open access through IEX granted by MSEDCL to two other consumers is concerned MSEDCL has submitted that observing the trend and direction of the State Commission in the past towards the consumers seeking open access through IEX MSEDCL granted the said open access and has not granted any open access through IEX post 27.8.13 when one of the said two consumers was granted such open access. It appears that this cut off date was then set by MSEDCL.

**15.** We feel that MSEDCL should have been more careful while dealing with the applications of the said two consumers. When there were no orders from the State Commission there was no need for MSEDCL to grant open access through IEX. Such conduct is bound to attract criticism and allegation of discrimination. Both the State Commission and MSEDCL have displayed a very casual approach. However, since we do not find any *malafides* in their conduct we leave the matter at that. We only hope that such situations do not occur in future. We reject the contention that the Appellant was discriminated against.

**16.** Counsel for the Appellant has also relied on order of the State Commission in Case No.68 of 2010 where it is held that regulations are not a precondition to effectuate a right which is otherwise available in law. In this connection it is pointed out to us that in Writ Petition No.1552 of 2011 filed in the Bombay High Court MSEDCL's prayer 'b' was that the State Commission be restrained from disposing of applications for open access through Power Exchanges till such time as the State Commission decides the issues raised before it by framing regulations. In view of the statement made by the Additional Solicitor General that MSEDCL's grievance would be considered by the State Commission MSEDCL did not press prayer 'b'. Considering this, in Case No.68 of 2010 the State Commission observed that till such time

as the new regulations are framed transactions through Energy Exchanges would continue. MSEDCL has contended that MSEDCL therefore granted NOC in the past for open access through Energy Exchanges, however the issue as to operational constraints resulting from open access transactions through Energy Exchanges is still alive. Assuming that regulations are not necessary to effectuate a right granted in law, the issue of operational constraints cannot be ignored or obliterated. If there are operational constraints the right cannot be effectuated, till the operational constraints are removed. Decision of State Commission in Case No.68 of 2010 therefore does not help the Appellant. Similarly, Bombay High Court's orders on which reliance is placed by the Appellant has no relevance to the present case.

**17.** Our attention is drawn to the judgment of this Tribunal dated 28.7.2011 in Appeal No.36 of 2011 (**MSEDCL v. Maharashtra Electricity Regulatory Commission and Ors**) where this Tribunal has taken a view that the State Commission has jurisdiction to direct grant of open access in a petition under Section 142 of the Electricity Act. It is pointed out that the said view was confirmed by the Supreme Court. In our opinion the said judgment has no relevance to the present case because here we have come to a conclusion that open access through IEX could not be granted because there were operational constraints and because there was no provision for it in

Regulations 2005. In our opinion in this case there is no wilful default on the part of MSEDCL. There was no intention to contravene any provisions of the Electricity Act. Hence, there is no question of issuing any penal directions. We also do not find that MSEDCL has abused its dominant position. Consequently, Section 60 of the Electricity Act is not attracted to this case.

**18.** So far as prayer for grant of open access through IEX is concerned we have already noted that since new Regulations 2014 are in place, any application for open access through IEX has to be filed and processed according to the provisions contained therein. That prayer has therefore become infructuous.

**19.** The Appellant has contended that because of the action of the Respondents it has suffered huge losses. MSEDCL is guilty of unjust enrichment and hence the Appellant should be compensated. We have discussed in depth the reasons why the Appellant could not be granted open access through IEX. The case of operational constraints is accepted by us. It is not possible to hold that MSEDCL is guilty of unjust enrichment. Judgment of the Supreme Court in **Indian Council for Enviro Legal Action** is not applicable to this case. Prayer for compensation is therefore rejected.

**20.** In view of the above we find no merit in the appeal. The appeal is dismissed.

**21.** Pronounced in the Open Court on this 07<sup>th</sup> day of October, 2015.

**I.J. Kapoor**  
**[Technical Member]**

**Justice Ranjana P. Desai**  
**[Chairperson]**

✓ **REPORTABLE/~~NON-REPORTABLE~~**