

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No. 169 of 2014

Dated: 22nd April, 2015

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member

In the matter of:

Green Energy Association
Sargam, 143, Taqdir Terrace
Dr. E. Borjes Road, Parel (E),
Mumbai – 400 012

...Appellant(s)

Vs

1. The Maharashtra Electricity Regulatory
Commission
World Trade Centre No.1
Cuffe Prade, Colaba
Mumbai – 400 001

...Respondent(s)

2. Maharashtra State Electricity
Distribution Co. Ltd.
5th Floor, Prakashgad
Bandra (E), Mumbai – 400 051

Counsel for the Appellant (s) :

Mr. M.G. Ramachandran
Ms. Anushree Bardhan
Ms. Dipali Sheth
Ms. Poorva Saigal

Counsel for the Respondent(s):

Mr. Buddy A. Ranganadhan
Mr. Raunak Jain
Mr. G. Sai Kumar
Mr. Varun Pathak
Mr. Aditya Dewan
Ms. Pooja Priyadarshini

**Ms. Somya Saikumar
Mr. Ravi Prakash
Mr. Sameer Malik**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Whether a consumer can be prohibited to procure power from more than one source through open access is the issue raised in the present Appeal.

2. The Appellant is a non-profit organisation with the objective of solar power development. Members of Appellant Association have set up solar power projects across the country with the objective of supplying power for self use (captive) and to the third parties with whom they have entered into Power Purchase Agreements (“PPA”). The Appellant is aggrieved by the order dated 06.05.2014 passed by Maharashtra Electricity Regulatory Commission (“State Commission”) whereby the petition filed by the Appellant seeking directions against Maharashtra State Electricity Distribution Company (“MSEDCL”) to issue open access permission to the members of the Appellant that were being withheld for an inordinately long time was disposed of.
3. The brief facts of the case are as under:
 - a) The consumers of the members of the Appellant made the requisite applications to MSEDCL, the Respondent no.2 herein, seeking open access well in advance.
 - b) However, MSEDCL kept the applications pending for inordinately long periods of times ranging in some cases upto 423 days. The distribution company neither granted nor denied open access. In

the meantime the power generated from the renewable sources of energy was getting injected into the grid.

- c) Consequently, the Appellants filed a petition before the State Commission seeking directions against MSEDCL to grant the open access and give credits to the Appellants for the energy injected into the MSEDCL's distribution system.
 - d) Initially the matter was not listed before the State Commission. Hence, the Appellant was compelled to approach this Tribunal by filing O.P. No. 3 of 2014. In the proceedings before this Tribunal, the State Commission claimed a deficiency in payment of requisite court fee as the reasons for not taking up the matter. The Tribunal vide order dated 24.03.2014 directed the Appellant to deposit the requisite court fee and directed the State Commission to hear the petition after receipt of the said court fee and dispose of the same as early as possible.
 - e) The Appellant complied with the direction of the Tribunal. Thereafter the State Commission heard the Appellant and the Respondent no. 2 and passed the impugned order dated 06.05.2014. The State Commission denied open access to the members for availing power from more than one source or generating company on the ground that the Respondent no.2 may face certain operational and billing difficulties.
 - f) Aggrieved by the impugned order dated 06.05.2014 of the State Commission, the Appellant has filed this Appeal.
4. Subsequent to the passing of the impugned order, the State Commission has notified Open Access Regulations, 2014 prohibiting the consumers to procure power from more than one source through

open access except to the extent of fulfilling Renewable Purchase Obligation specified under Section 86(1)(e) of the Electricity Act. These open access regulations came into effect from 25.06.2014. However, the period under consideration in the present Appeal is from March 2013 till the date when the Open Access Regulation, 2014 came into effect, i.e. period prior to the notification of the Open Access Regulations, 2014.

5. The Appellant has made the following submissions:
 - a) Had the Respondent no.2 acted in accordance with law, the Appellant's members would have been provided open access under the provisions of the Open Access Regulations, 2005 for the period from March 2013 onwards. The Appellant would have been entitled to transfer the power including the issue of credit notes in respect of the Solar Projects. The Respondent no.2 is required to compensate the Appellant Members for its default.
 - b) The Open Access Regulation, 2005 does not in any manner prohibit sourcing from different generators and also one generator selling electricity to multiple procurers.
 - c) There cannot be any such restriction in view of the provisions of the Electricity Act, 2003.
 - d) The option of availing supply from a single generator or multiple generators rests with the open access consumer.
 - e) The reason given in the impugned order that the prohibition is necessary on account of the operational and billing difficulties is without any merit. The energy account can be clearly maintained.
 - f) The Respondent no.5 in the past allowed certain consumers to avail power from numerous wind generators for many years.

- g) The interpretation made by the State Commission would result in rendering the open access concept provided in the Electricity Act very restrictive, namely restricting to fulfilling the Renewable Purchase Obligation ('RPO'). If it were the intention that the open access consumer could avail supply from a single source the RPO cannot be fulfilled for renewable energy which are to be sourced from different generators employing different types of renewable energy sources i.e. both solar and non-Solar. The Renewable Purchase Obligation categorically requires satisfaction by the obligated entity from both Solar and non-Solar generators and/or respective Renewable Energy Certificates ("REC"). Hence, if the interpretation of the State Commission is held correct, then no entity in the State would be able to fulfill its RPO.
- h) The narrow interpretation as contemplated by the Respondents shall lead to wider ramifications for various obligated entities who clearly cannot remain within the purview of one regulation without trespassing the other, creating grimmer consequences for the renewable energy generation within the State and will lead to deterioration in development of green and clean energy in the State of Maharashtra.
- i) The Open Access Regulations, 2014 also permit sourcing of power from multiple sources only to the extent of compliance with renewable purchase obligation and hence, to the extent of compliance of RPO, it seems that there is no operational and billing difficulty which itself substantiates dubious stand of the Respondents.

- j) The present Appeal relates to the period prior to notification of Open Access Regulations 2014 and hence, the said period is governed by Open Access Regulations, 2005
6. The distribution company, Respondent no.2, in reply has submitted as under:
- a) The present Appeal is not maintainable since the same has been filed by the Appellant whose members are engaged in generation of power from Solar PV plants and not by any consumer and as such have no locus under the Regulations. No consumer has challenged the impugned order. In terms of the impugned order, restriction on providing open access operates only when a consumer is seeking power from multiple sources and not when a generator is seeking open access for supplying power to multiple consumers. From the language of Distribution Open Access Regulations, 2005 ("Open Access Regulations, 2005) which were prevalent at the relevant time, it is manifest that it is the consumer who has to apply for open access.
 - b) The Open Access Regulations 2005 do not permit open access from multiple sources. Regulation 5, 7, 8 and 9 also mentioned "a supplier/a generating company."
 - c) 2005 Regulations for open access have now been repealed and replaced by 2014 Regulations. The case of members of the Appellant, therefore, can now only be considered under the 2014 Regulations and not under 2005 Regulations. It is pertinent that under the 2014 Regulations, open access from multiple generating companies has been permitted to the extent of meeting the RPO as specified in RPO Regulations, 2010. In view

of this, reliance on any provision of 2005 Regulations by the Appellant is misconceived.

- d) Though the distribution company has been allowing open access permissions to the consumers availing power supply from renewable sources such as wind, bagasse, biomass, small hydro power generators in accordance with the directions of the State Commission, in the absence of any guidelines regarding open access through solar generator, there was no clarity whether to pass the benefits such as energy banking, non-reduction of contract demand, applicability of Time of Day (TOD) tariff benefits, concessional cross subsidy surcharge given to renewable energy projects to solar projects also. The distribution company, therefore, found it unworkable to treat the open access consumers intending to source power from solar generators at par with other renewable energy sources. In such a scenario, if open access is permitted for procuring power from multiple sources (including solar power), say with one conventional source and other renewable energy source, the same would pose insurmountable operational and billing difficulties for the distribution company, as the treatment of these two types of energy sources would be different.
7. The State Commission in its counter affidavit has submitted that the State Commission has notified the new Open Access Regulations, 2014 on 25.06.2014, wherein the relevant provision granting open access through more than one source has been brought in which has duly taken care of the concerns of the Appellant in the present Appeal.

- Therefore, the Appeal may be disposed of in light of the same by passing necessary order/direction.
8. We have heard Mr. M.G. Ramachandran, Learned Counsel for the Appellant, Shri Buddy A. Ranganadhan, Learned Counsel for the State Commission and Shri G. Sai Kumar, Learned Counsel for the Respondent no.2.
 9. On the basis of the submissions made by the parties, the following issues arise for our consideration:
 - a) **Whether the Appeal is maintainable in view of notification of the Open Access Regulations, 2014?**
 - b) **Whether the Appellant being a generator is an aggrieved person when the impugned order denies open access to the consumer from more than one source and not a generator supplying power to multiple consumers?**
 - c) **Whether the State Commission has erred in not allowing open access to a consumer from more than one source in violation of its 2005 Regulations for the period prior to notification of the 2014 Regulations?**
 10. The first two issues are related to maintainability of the Appeal and are being dealt with together.
 11. In our view, the Appeal is maintainable due to the following reasons:
 - a) The Open Access Regulations, 2014 are effective from 25.06.2014. Prior to the notification of the 2014 Regulations, 2005 Regulations were effective. The period in question is from March 2013 till the effective date from which 2014 Regulations have been made applicable. For the period in question the 2005 Regulations will be applicable.

- b) The members of the Appellants have been affected by the impugned order as the energy injected by some of the members into the distribution system of the Respondent no.2 during the period in question has not been fully accounted for.
 - c) No action was taken by the Respondent no.2 on the open access applications of the members of the Appellant. These applications were not rejected by the Respondent no.2 on the ground that only the consumer is entitled to seek open access. On the other hand the Respondent no.2 kept the open access applications pending.
 - d) The open access Regulation, 2005 applicable for the period under consideration in the present case permit open access from a generating company to a consumer. The State Commission has in the impugned order has also directed MSEDCL to continue the procedure followed for allowing Open Access permissions through RE generators during the previous year. The direction has not been challenged by MSEDCL.
 - e) The Electricity Act, 2003 also permits non-discriminatory Open Access to a generating company.
12. Let us examine the third issue.
13. The findings of the State Commission in the impugned order are summarized as under:
- a) Open Access is the right of the consumers and it is casted upon by the Electricity Act, 2003. The Electricity Act, 2003 has defined the Open Access as non discriminatory provision for use of transmission lines or distribution system or associated facilities by any licensee or consumer or person engaged in generation.

- b) The plain reading of Section 2(47) and Section 42 (2) of the Electricity Act, 2003 indicates that MSEDCL cannot discriminate amongst different RE sources. Energy is coming from whatever source, it is injected in the system as a Unit. The Commission observes that MSEDCL has allowed open access permission for sale of solar energy to Utility (BEST) for certain period. The Commission disagreed with MSEDCL's submission that it delayed the Open Access permission due to absence of guidelines/policy for Open Access through solar generator.
- c) In view of above the Commission directs MSEDCL to allow the Open Access through solar generator as single source. The Commission also directs MSEDCL to continue the procedures followed for allowing Open Access permissions through RE generators during previous financial year.
- d) The Commission further directs MSEDCL to issue credit notes immediately for the previous months, if not done earlier as per timelines as stipulated in its Citizen Charter.
- e) MSEDCL submitted that MERC (Distribution Open Access) Regulations, 2005 do not provide for wheeling of power under Open Access from more than one generating company/source. MSEDCL submitted that there are operational and billing difficulties for allowing Open Access from more than one source.
- f) The Commission observed that MSEDCL has denied Open Access permission for sourcing power from more than one source on the ground of operational and billing difficulties which cannot be ignored.

- g) The operational and billing difficulties of the distribution company need to be addressed by providing Regulation for the same as the same is not covered under the 2005 Regulations.
 - h) In view of above, it is not appropriate to allow open access permission through more than one source without considering all relevant factors including operational and billing difficulties involved in it. The Commission is in the process of amendment of the existing 2005 Regulations and will expedite the process of amendment after incorporating the concerns raised by the stakeholders.
 - i) In view of above the Commission directs MSEDCL to allow Open Access through solar generator as single source. The Commission also directs MSEDCL to continue the procedure through RE generators during previous financial year.
 - j) The Commission is of the opinion that in the present circumstances it is not appropriate to allow open access permission through more than one source without considering all relevant factors including operational and billing difficulties involved in it and framing proper regulatory mechanism. The Commission shall endeavour to expedite the process of amendment of Open Access Regulations, 2005 after incorporating the concern of the stakeholders.
14. Thus, while the State Commission allowed open access through RE generator it restricted it to as single source for a consumer in view of operational and billing difficulties. We find that the State commission has not analysed the operational and billing difficulties faced by MSEDCL. The State Commission has reproduced the relevant

- provision of Open Access Regulation, 2005 but has not held that open access from more than one source is not permissible.
15. Let us examine the relevant Clause of Open Access Regulation, 2005 which is reproduced below:

“3.2 The Commission shall allow open access to the distribution system of a Distribution Licensee to a Generating Company or a Licensee, other than such Distribution Licensee, to give supply of electricity to a consumer or person, whose premises are situated within the area of supply of the Distribution Licensee, from the date on which such consumer or person, to whom such supply is to be given, becomes eligible for open access in accordance with Regulation 3.1 above.

Provided that the application for open access under this Regulation 3.2 shall be made by the eligible consumer or person, whose premises are situated within the area of supply of the Distribution Licensee, to whom supply is intended to be given by such Generating Company or Licensee.”
 16. The Open Access Regulation ,2005 does not restrict open access from a single source. The use of ‘a Generating Company’ or ‘a licensee’ in singular form in the above Regulation does not mean that open access cannot be obtained from more than one generator unless there is a specific provision disallowing the open access through more than one source.
 17. There cannot be a restriction in view of the provisions of the Electricity Act, 2003.
 18. Section 2(47) of the Electricity Act, 2003 defines open access as under:

“(47) “open access” means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;

19. Section 42(2) of the Electricity Act, 2003 provides as under:

“The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints.

.....

“Provided also that the State Commission shall, not later than five years from the date of commencement of the Electricity (Amendment) Act, 2003 by regulations, provide such open access to all consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one megawatt.”

20. There is no restriction on a consumer from sourcing power from more than one source in the Electricity Act or Regulations. In fact the RPO Regulations of the State Commission provides for fulfillment of Solar and non-Solar sources by the obligated entities including open access consumers and the same cannot be complied with without sourcing power from more than one source.
21. In view of above we have come to the conclusion that the State Commission has wrongly restricted the open access to consumer to one source in violation of its own Open Access Regulations 2005. Therefore, the impugned order is set aside. MSEDCL shall adjust the

- energy injected by the members of the Appellant till the date of application of Open Access Regulation, 2014.
22. The Appeal is allowed. The State Commission is directed to pass consequential order regarding adjustment of energy injected by the members of the Appellant till the date from which the open Access Regulation, 2014 are applicable within 3 months of issuance of this judgment. No order as to cost.
23. Pronounced in the open court on this 22nd day of April, 2015.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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