IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 366 OF 2017 & IA NO. 933 OF 2017

Dated: **28th November, 2018**

Present: **HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER**
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF

Maharashtra State Electricity Distribution Company Ltd,
5th Floor, Plot No. G-9, Station Road,
Prakashgard, Bandra (East),
Mumbai 400 051
Through its Managing Director **…. Appellant(s)**

VERSUS

1. **Maharashtra Electricity Regulatory Commission**
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade, Colaba,
Mumbai 400 005
Through its Secretary

2. **M/s Ultra Tech Cement Limited**
(Unit: Hotgi Cement Works)
Hotgi, District – Solapur,
Maharashtra – 413215
Through its Managing Director **…. Respondents**

Counsel for the Appellant … Shri G. Saikumar
Ms. Saumya Saikumar
Ms. Rimali Batra
Ms. Shruti Awasthi
Shri Varun Aggarwal

Counsel for the Respondent(s)… Respondent No.1
Served unrepresented

Shri Pradeep Dahiya
Ms. Rheal Luthra for R-2

J U D G M E N T

PER HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER

1. Maharashtra State Electricity Distribution Company Ltd., Mumbai (in short, ***'the Appellant'***) questioning the legality, validity and proprietary of the impugned Order dated 11.08.2017 passed in Case No. 139 of 2016 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai (in short, ***'first Respondent/State Regulatory Commission'),*** wherein, directing the Appellant to correct the bills of 23 open access consumers (including M/s Ultra Tech Cement Limited/second Respondent herein) within a period of two months holding that, in-firm renewable energy units are to be adjusted after the adjustment of firm captive units in open access mechanism under multiple sources of supply. The first Respondent/State Regulatory Commission has passed an erroneous and non-reasoned order without detailing the reasons for such a dispensation without assigning the valid and cogent reasons. Therefore, the impugned Order passed by the first Respondent/State Regulatory Commission is liable to be set aside. Further, the Appellant has sought to pass such other order(s) that this Tribunal may deem just and proper in the interest of justice and equity and presented this appeal before this Tribunal.

BRIEF FACTS OF THE CASE:

2. The Appellant is a Company constituted under the provisions of Government of Maharashtra General Resolution No. PLA – 1003 / C. R. 8588 dated 25th January 2005 and is duly registered with the Registrar of Companies, Mumbai on 31st May 2005. The Respondent Company is functioning in accordance with the provisions envisaged in the Electricity Act, 2003 and is engaged, within the framework of Electricity Act, 2003, in the business of distribution of electricity to its consumers situated over the entire State of Maharashtra, except Mumbai City & its suburbs (excluding Mulund & Bhandup)

3. The first Respondent/State Regulatory Commission which has been created under the Electricity Act, 2003 and which has passed the impugned order.

4. On 30.03.2016, the first Respondent/State Regulatory Commission has notified the MERC (Distribution Open Access) Regulation, 2016.

5. On 19.10.2016, M/s Ultra Tech Cement Limited (in short, ***"the second Respondent"***), being a consumer of the Appellant, seeking open access from multiple sources (Captive as well as renewable energy) from June, 2016 onwards, filed a petition before the first Respondent/State Regulatory Commission for:

(i) Issuance of open access procedure in line with the MERC (Distribution Open Access) Regulation, 2016;

(ii) Remove billing error by adopting correct practice of set off open access power i.e first conventional OA power and then RE power;

and seeking action against the Appellant/MSEDCL for non-compliance of the Regulations and incorrect monthly billing methodology in the absence of approved procedure and contended that, as per Regulation 4.1 of the DOA Regulations, 2016, the Distribution Licensee is required to provide the information requirements, procedure, etc. in downloadable format on its internet website within 60 days. However the Appellant/MSEDCL has not uploaded any approved procedure for Distribution Open Access (OA) after issue of the Regulations.

6. As per Regulation 20 of the DOA Regulations, 2016 provides for banking of Renewable Energy (RE) Generation; and for the surplus energy from non-firm RE Generating Stations, after set-off, to be banked with the Distribution Licensee.

7. It is the case of the second Respondent/UTCL that the second Respondent is a Medium Term Open Access (MTOA) user and wheeling power from its Group Captive Power Plant (CPP) Unit M/s Ultra Tech Cement Ltd. (Unit: Awarpur Cement Works), Dist. Chandrapur,

Maharashtra (Intra-State from July, 2013). Its power consumption from captive generation is as per the following Table along with Renewable Purchase Obligation (RPO):

Financial Year	Captive Consumption (KWh)	Non-Solar obligation	Solar obligation	RE Consumption (KWh)	REC Purchased (Nos.)
2013-14	2,85,94,324	8.5%	0.5%	0	2401
2014-15	4,71,96,142	8.5%	0.5%	0	4214
2015-16	6,72,56,649	8.5%	0.5%	0	6088

8. The second Respondent/UTCL has met the above RPOs and compliance reports have been submitted to Maharashtra Energy Development Agency (MEDA) from time to time. The second Respondent/ UTCL had applied to the Appellant for OA permission for purchase of Wind Power from M/s ICC Reality (India) Pvt. Ltd. and received approval for Short Term Open Access (STOA) for the month of June, 2016. The second Respondent had started consuming RE Power (in-firm) from 01.06.2016 along with CPP scheduled power (firm power) as per its production plan. It received the OA bill for June, 2016 on 19.07.2016 and observed that the CPP scheduled power was considered as over-injected by 7,36,583 units. After examining the detailed billing calculation method, it observed that the credit mechanism of Generation Units was changed by the Appellant, as below:

Over-injected Units = Total consumption – (Minus) – RE Generation (Non-Firm) – (Minus) – Captive Generation (Scheduled power)

9. The second Respondent/UTCL sent a letter to the Chief Engineer (CE) (Commercial), MSEDCL for correction in the credit mechanism of generation units: first the scheduled CPP (conventional) power should be credited, and, thereafter, the non-scheduled RE power (infirm power). The full amount of the electricity bill was paid under protest to avoid unpleasant action from the Appellant. However, the second Respondent/UTCL has still not received any reply from CE (Commercial). The second Respondent/UTCL had also filed an online complaint on Appellant's website on 07.08.2016, but not received any response.

10. The Appellant has revised the Generation Credit mechanism without issuing any Circular or OA operating procedure, and, hence, the second Respondent/UTCL was not aware about the revised credit mechanism which had resulted in a large financial impact due to the increase in over-injected units. Rs. 29 lakh was the additional financial impact for June, 2016. From July, 2016 onwards, the second Respondent/UTCL also commenced OA for Solar-based RE power as per Appellant's/MSEDCL's NOC. The bill of July, 2016 also repeated the same mistake, which resulted in-over-injection as shown in the bill of 6,05,465 units. The additional financial impact on the second Respondent/UTCL was Rs.26.27 lakh. The Appellant/MSEDCL failed to take any corrective action on second Respondent's/UTCL's letter dated 25.07.2016 but continued to

make the same error in the bill of August, 2016 by showing over-injection of 4,71,657 units. The Appellant/MSEDCL has still not issued its standard operating procedure and monthly billing methodology after notification of the DOA Regulations, 2016. Tata Power Co. Ltd. (TPC-D) and Reliance Infrastructure Ltd. (RInfra-D) have their procedure in place in which the scheduled power (firm) is credited first and non-scheduled power is adjusted thereafter. The procedure issued by the other two Distribution Licensees is in consonance with the DOA Regulations, 2016 so as to enable banking of RE power. By adopting a different procedure, the Appellant/MSEDCL has eliminated the scope for banking of RE power.

11. The new procedure was to be made effective from the date of implementation of the DOA Regulations, 2016 i.e. from 01.04.2016 so as to get the billing error corrected. The procedure must also specify the sequence to set off different types of OA power, the first priority being given to conventional power and, thereafter, to non-conventional power. This would allow for banking of RE power. Taking all relevant facts and circumstances that the Appellant/MSEDCL has failed to consider the grievances made out by the Appellant, the second Respondent/UTCL has filed the petition before the first Respondent/State Regulatory Commission seeking appropriate reliefs, as stated supra.

12. Upon service of notice, the Appellant/MSEDCL represented through its counsel has fled his reply contending that, the detailed procedure regarding application for OA has been uploaded on Appellant's web portal as stipulated under the DOA Regulations, 2016. Vide emails dated 02.06.2016 and 06.09.2016 and letter dated 08.09.2016, the Appellant had explained its difficulties in finalizing the procedure within the specified time limit and requested the first Respondent/State Regulatory Commission for extension of time for uploading it. Under the earlier DOA Regulations, 2014, installation of SEM was mandatory for RE OA, and the credit of energy was to be given on 15 minute time block basis. Further, OA through multiple Generators was allowed only to the extent of fulfilment of RPO. The energy injected through different Generators (i.e. conventional as well as infirm RE) had to be credited only in 15 minutes time block.

13. Further, it is the case of the Appellant/MSEDCL that, the matter coae up for hearing on 16.02.2017 before the first Respondent/State Regulatory Commission, wherein, the first Respondent/State Regulatory Commission directed the Appellant to file its detailed reply on the following:

(i) MSEDCL clarify whether this is the only one such case, or whether there are many more cases, up to November, 2016.

(ii) Procedure it has followed from 2005 to 2014 for the credit adjustment of billing for the banking of RE power when Open Access was availed.

(iii) Basis for adjusting the unscheduled RE power first, and for asking consumers to give Generator preference in case of sourcing of power from multiple Generators

Accordingly, the Appellant/MSEDCL has filed its additional reply/submissions on 11.04.2017 complying with the directions issued by the first Respondent/State Regulatory Commission on 16.02.2017 and prayed that the petition filed by the second Respondent/UTCL may be dismissed as devoid of merits.

14. The said matter had come up for consideration before the first Respondent/State Regulatory Commission on 11.08.2017 and after hearing the learned counsel appearing for the Appellant and after perusing the relevant material available on record has passed the impugned Order dated 11.08.2017 directing the Appellant/MSEDCL to correct the billing methodology in the true spirit of the DOA Regulations, 2016 as discussed at para. 12 of the impugned Order so as to remove the ambiguity regarding the adjustment of units, incorporate it in its OA procedure and host it on its website within a month. Further, the Appellant/MSEDCL shall also correct the bills of all such OA consumers accordingly within two

months and report the action taken to the first Respondent/State Regulatory Commission. With these observations, the petition filed by the second Respondent/UTCL stands disposed of. Being dissatisfied with the impugned Order passed by the first Respondent/State Regulatory Commission, the Appellant/MSEDCL has preferred this Appeal before this Tribunal.

Shri G. Saikumar, learned counsel for the Appellant submitted the following submissions for our consideration:

15. The learned counsel for the Appellant submitted that, concept of the banking has been introduced in Open Access Regulation, 2016 and is defined as surplus renewable energy injected in the grid and credited with the Distribution Licensee after set off with consumption in the same time of day slot as specified in Regulation 20.

16. Further, in terms of Regulation 20.2 of the Open Access Regulation, 2016, such surplus energy from renewable energy generating station after set off shall be banked with the Distribution Licensee. Further, in terms of regulation 20.3 and 20.4 banking of energy shall be permitted during all 12 months of the financial year from April to March but, credit of banked energy shall not be permitted during April, May, October and November and the credit of energy banked in other months shall be as per energy injected in respective time of day slots. As per Regulation 20.5, there

would be banking charges of 2% of the energy banked. In terms of Regulation 20.6 the unutilized banked energy at the end of the financial year limited to 10% of the actual total generation by such renewable energy generator in such financial year shall be considered as deemed purchase by the distribution license provided that such deemed purchase shall not be counted towards the Renewable Power Obligation of the distribution licensee and generating station would be entitled to the renewable energy certificates to that extent.

17. The counsel for the Appellant, vehemently submitted that, the cogent reading of the provision relating to banking in the Open Access Regulation, 2016 brings out unambiguously that the credit of surplus banked energy with the distribution licensee is in favor of the renewable energy generating station as the deemed purchase at the end of the financial year is from the generating station and not from the Open Access consumers. Therefore, the logic of looking at banking from the perspective of Open Access consumers is faulty and, therefore, the direction of the first Respondent/State Regulatory Commission in the impugned Order of setting off conventional power first and then the renewable energy so that it may be banked is faulty and liable to be set aside.

18. The learned counsel for the Appellant, further, contended that, the permission for Open Access for renewable energy has been sought by the

second Respondent/UTCL on the short term basis which is upto one month, whereas, the conventional power from its own captive power plant is sourced on MTOA the period of which is upto 3 years. He, further, submitted that, the MTOA of the conventional power sourced from it's CPP is schedulable power and could easily be planned and scheduled so as to meet the 51% consumption requirement necessary to retain its status as a captive in a financial year. Therefore, the reasoning of the first Respondent/State Regulatory Commission in the impugned Order is erroneous, contrary to the relevant Regulations, hence, liable to be set aside.

19. With respect to the billing procedure of STOA for intra-state transactions, the learned counsel for the Appellant submitted that, the charges shall be payable to the distribution licensee in advance within 3 days of approval of STOA or before the commencement of transaction whichever is earlier, whereas, for the MTOA the invoice would be raised in the succeeding month for the previous month. Further, banked energy in terms of the above definition is "surplus energy injected into the grid after set off". The second Respondent/UTCL is not the only consumer for the renewable energy generating station (ICC Reality (India) Pvt. Ltd.) as there could be many others who are connected to the grid and purchasing power from the said renewable energy generating station. The surplus energy available for banking can only be determined after set off against

all power purchase agreement entered by ICC Reality (India) Pvt. Ltd and the same will be credited to the said renewable energy generating station. Therefore, the direction of the first Respondent/State Regulatory Commission is liable to be set aside. Also, the submission of the second Respondent/UTCL that, costly renewable power should be set off later has no logic as such renewable power has to be consumed in any event for meeting the renewable energy obligation of the second Respondent/UTCL.

20. It is clear, as referred above, that the procedure adopted by the Appellant/MSEDCL in giving effect to the STOA agreement in setting off the renewable energy power first and then setting off the scheduled power under MTOA, which could be easily planned to meet both the requirement of power for the month as well as to meet the minimum requirement criteria for retaining the status of captive for the financial year was correct in terms of the DOA Regulations, 2016 and, therefore, the impugned Order is liable to be vitiated on this ground also.

21. Further, the learned counsel submitted that, the observation of the first Respondent/State Regulatory Commission in the impugned Order regarding publication of procedure for availing Open Access not containing the methodology of billing, in terms of regulation 4, it is the duty of the distribution licensee on its internet website information

requirements, procedures, application forms and fees in downloadable format necessary for applying for connectivity or Open Access to its distribution system and in terms of regulation 27 which gives the details of such information, it's the duty of the distribution licensee to publish the form of application, procedure and manner of making application, and the fee required the form of OA agreement, the form of connection agreement, the applicable wheeling and cross subsidy surcharge and other incidental information. It is relevant to refer that the regulation does not require the distribution licensee to publish the billing methodology in terms of which generator should be set off first when open access is taken from multiple generators.

22. Finally, he respectfully submitted that, the first Respondent/State Regulatory Commission in a subsequent Order dated 22.12.2017 in Case No. 76 of 2016- Bajaj Finserv Limited (Renewable Energy generating company) wherein, there was a dispute raised in respect of the monthly energy bill raised by the Appellant/MSEDCL on one of the Open Access consumer of Bajaj Finserv being M/s. Mukund Limited held that the billing methodology being adopted by the Appellant/MSEDCL from the month of June 2016 setting off the renewable energy purchased first is the correct method and approved the procedure as being in line with the provisions of DOA regulations 2016 as given in para 10(5) at page 25 of the rejoinder, internal page 11 of the said order. Further, he submitted that, without

considering the relevant facts, as stated supra, into consideration nor appreciating the stand taken by the Appellant/MSEDCL in its reply before the first Respondent/State Regulatory Commission, a very cryptic order has been passed by the first Respondent/State Regulatory Commission. Therefore, he humbly submitted that, the impugned Order passed by the first Respondent/State Regulatory Commission is liable to be set aside at threshold with costs in the interest of justice and equity.

Per-contra,

Shri Pradeep Dahiya, learned counsel for the second Respondent submitted the following submissions for our consideration:

23. The learned counsel, Shri Pradeep Dahiya, appearing for the second Respondent/UTCL, fairly submitted that, the billing methodology adopted by Appellant/MSEDCL is erroneous, arbitrary and, hence, illegal as it resulted into making a scheduled firm conventional power as over-injected power, which is contrary to characterization of Over-injection under Regulation 19.3 of DOA Regulations, 2016. As per Regulation 19.3 of DOA Regulations, 2016 provides for settlement of deviations from schedule. It provides for settlement of deviations between the schedule and the actual injection in respect of open access by a generating company or a trading licensee on behalf of a Generating Company shall be settled as follows:

"19.3.1 <u>Over-injection</u>

a) In case injection exceeding that scheduled by the Generating Company results in benefit to the grid, such over injection shall be settled either at the UI charge applicable under the Inter-state ABT mechanism, or the SMP plus other incidental charges or any other intra-state ABT settlement charges or at the weighted average cost of long-term power purchase sources including meeting renewable purchase obligation, secluding liquid fuel-based generation, of the distribution licensee, whichever is lower.

b) If such over-injection is detrimental to the grid, the open access generating company shall pay to the state pool either the UI charge applicable under the Inter-state ABT mechanism or the SMP plus other incidental charges or any other intra-state ABT settlement charges under the mechanism operating in Maharashtra, whichever is higher.

Thus, from the above it is very clear that appellant by way of revised credit mechanism/billing methodology has made the scheduled CPP power of respondent as over-injected, which is not possible as per the very definition of “Over-injection” as provided under Regulation 19.3 of the DOA Regulations, 2016. Even if, the regulations do not require the distribution licensee to publish the billing methodology as contended by the learned counsel for the Appellant/MSEDCL in its written submissions, then also the first

Respondent/State Regulatory Commission has jurisdiction to decide that whether the billing methodology as adopted by the Appellant is in consonance with the DOA Regulations, 2016 or not and, if the first Respondent/State Regulatory Commission finds that the same is in contradiction or defeats the provisions of said regulations, the first Respondent/State Regulatory Commission is within its rights to declare the same illegal and can direct the Appellant/MSEDCL to adopt the correct procedure as per relevant Regulations. Therefore, he submitted that, the Appellant/MSEDCL has failed to make out any case to interfere in the impugned Order passed by the first Respondent/State Regulatory Commission."

24. Further, he submitted that, the Appellant/MSEDCL by way of revised credit mechanism/billing methodology has altogether made Regulation 20 of DOA Regulations, 2016 redundant as when the RE power is adjusted first and then scheduled power from total power consumption, then all the RE power of the RE Generating Station shall be adjusted and there shall be no banking available of such RE power with the RE Generating Station. Regulation 20 undisputedly provides for banking of Renewable Energy generation and Regulation 20.1 in clear terms provides that Regulation 19.3 shall not be applicable in case an open access consumer obtains supply from a RE Generating Station identified as 'non-firm power'. "Banking" is defined under Regulation 2.1(4) as the surplus renewable

energy injected in the grid and credited with the Distribution Licensee after set off with consumption in the same Time of day slot as specified in Regulation 20.

Thus, over-injection or under-injection shall not be applicable in case an open access consumer obtains supply from a RE Generating Station. Neither the RE Generating Station nor its consumer shall be liable for any kind UI charges or any other charges as provided under Regulations 19.3.1 or 19.3.2. Moreover, the DOA Regulations, 2016 contemplate and permit injection of surplus renewable energy in the grid and its credit with the distribution licensee without any liability for any kind UI charges or any other charges as provided under Regulations 19.3.1 or 19.3.2. Further, Regulation 20.2 provides that the surplus energy from a 'non-firm' RE Generating Station after set-off shall be banked with the Distribution Licensee. Also Regulations 20.3 and 20.4 respectively provide that banking year shall be the financial year from April to March and banking shall be permitted during all twelve months of the year.

25. The learned counsel submitted that, Regulation 20.6 also provides that unutilized banked energy at the end of the financial year, limited to 10% of the actual total generation by such Renewable Energy generator in such financial year, shall be considered as deemed purchase by the Distribution Licensee at its pooled cost of Power purchase for that year. Therefore, he submitted that, in view of the above stated regulations of

DOA Regulations, 2016, the banking of surplus RE power injected in the grid is permissible and it shall be credited with the distribution licensee and in the manner as provided in Regulations 20. However, when the same is set off first from the total consumption of the open access consumer, then the provision of banking of RE power would be of no effect and use, which is why the revised credit mechanism/billing methodology adopted by appellant shall make Regulation 20 totally redundant for the open access consumer like it has happened in the respondent's case and not only that it would make the scheduled power as over-injected as submitted above. Thus, it would amount to double jeopardy for the second Respondent.

26. Regarding submission of the learned counsel for the Appellant/MSEDCL wherein, he contended that, the first Respondent/State Regulatory Commission has looked at banking from the perspective of open access consumers, the first Respondent/State Regulatory Commission, in para 12, has concluded only that the DOA Regulations, 2016 provide only for banking of RE and not conventional power. The first Respondent/State Regulatory Commission nowhere in the impugned order has considered the banking from the perspective of open access consumers. Therefore, the contention of the learned counsel for the Appellant suffers from conjectures and surmises. The first Respondent/State Regulatory Commission has only held that the captive

power in this case is schedulable, being firm conventional power, while the RE power is non-firm and must run, hence, if the conventional power is not adjusted first, it may lapse since it cannot be banked. This does not mean that the first Respondent/State Regulatory Commission has held that RE power shall be banked with the open access consumer. Banking of RE power shall be only as per the Regulation 20. Thus, the contention of the learned counsel for the Appellant is baseless and is liable to be rejected at threshold.

27. The learned counsel for the second Respondent, further submitted that, the contention of the learned counsel for the Appellant that the second Respondent can schedule the CPP power could be easily planned and scheduled so as to meet the 51% consumption requirement to retain its status as a captive in a financial year is of no consequence as the second Respondent has already planned and scheduled its CPP power in such a way that it is not deviating from the schedule and at the same time meeting its renewable purchase obligation (RPO). However, due to erroneous methodology adopted by Appellant, the scheduled power has become over-injected. If the CPP power is adjusted first and then RE power, there would be over-injection of power in the grid at the respondent's end and he would not incur any additional financial liability and the same time shall meet its RPO. In case there is any surplus RE power after such set off, then the same shall be banked with the

Appellant/MSEDCL as per the provisions of Regulation 20. The Appellant/MSEDCL has simply failed to appreciate this simple aspect of the matter and has filed a frivolous appeal on vague, presumptive and untenable grounds. Hence, the instant appeal filed by the Appellant/MSEDCL is liable to be dismissed.

28. The learned counsel for the second Respondent, further submitted that, the learned counsel for the Appellant contended that the second Respondent is not the only consumer for RE Generating Station as there could be many others who are connected to the grid and purchasing power from the said RE Generating Station. The surplus energy available for banking can only be determined after set off against all power purchase agreement entered by ICC Reality India Pvt. Ltd. and the same will be credited to the said renewable energy generating station. Therefore, the contention is totally fallacious as when the Appellant/MSEDCL by adopting the revised credit mechanism/billing methodology would set off entire RE power first, then no RE energy would be left for banking. The Appellant's submission is self-defeating and beyond any logic. It is only when there would be any surplus RE power left after adjusting CPP power first and the RE power, then only banking provision would come in play and same would be banked with the distribution licensee, i.e. the Appellant/MSEDCL, which it does not want and want to make Regulation 20 only a paper regulation and of no

consequence. Therefore, he submitted that, there is no substance in the submission of the learned counsel for the Appellant/MSEDCL.

29. The impugned Order dated 11.08.2016 passed by the first Respondent/State Regulatory Commission in Case No. 139 of 2016 is a well reasoned order and does not call for any interference by this Tribunal on the ground that the first Respondent/State Regulatory Commission after thoroughly analyzing the facts in detail in paras 8 to 11 and giving cogent reasons of the ruling in para 12 has rightly held that, "The DOA Regulations, 2016 provide only for banking of RE and not conventional power. Moreover, in this Case, the consumer is a captive consumer. The basis for establishing a CPP is primarily for its own use. That being the case, the captive supply needs to be adjusted first from the total consumption of the captive consumer and the rest of the sources thereafter. Besides, the captive power in this case is schedulable, being firm conventional power, while the RE power is non-firm and 'must run'. Hence, if this conventional power is not adjusted first, it may lapse since it cannot be stored". Therefore, the reasons assigned by the first Respondent/State Regulatory Commission are correct interpretation and application of relevant provisions of DOA Regulations, 2016. The Appellant/MSEDCL has not been able to point out even a single illegality in the reasoning assigned by the first Respondent/State Regulatory Commission and has raised only vague and impalpable grounds without

any reference to general or specific provisions of DOA Regulations, 2016. Therefore, interference by this Tribunal does not call for.

30. The learned counsel for the second Respondent, further submitted that, the Order dated 22.12.2017 passed by the first Respondent/State Regulatory Commission in Case No. 76 of 2016 - Bajaj Finserv Limited, as mentioned in the written submissions, has no application in the present case as the issue in the present appeal has neither been raised and decided by the first Respondent/State Regulatory Commission in that case. In the said Order, the first Respondent/State Regulatory Commission nowhere has held that if the open access consumer is sourcing power from CPP and RE generator, then the RE power has to be adjusted first and then CPP power. This aspect is not at all been dealt with the first Respondent/State Regulatory Commission in that case. Therefore, there is no substance in the submission of the learned counsel for the Appellant nor the same is applicable to the facts and circumstances of the case in hand.

31. To substantiate his submission, the learned counsel for the second Respondent placed reliance on the judgment of the Hon'ble Apex Court in the case of *Tamil Nadu State Electricity Board v. Tamil Nadu Electricity Regulatory Commission* 2011 SCC OnLine APTEL 38 in paras 18 & 19. In addition to the above, the Appellant in its own reply dated 15.02.2017 in

Case No. 139 of 2016 filed before the first Respondent/State Regulatory Commission admitted that the banking provision was reintroduced in the Open Access Regulations, 2016 and open access through multiple generators without any restriction. Therefore, by the revised credit mechanism/billing methodology, the Appellant/MSEDCL has made the banking provision under Regulation 20 totally redundant for the open access consumer like it has happened in the second Respondent's case.

32. Lastly, the learned counsel for the second Respondent/UTCL vehemently submitted that, the concept of banking has been introduced for the sole purpose to encourage generation of electricity through renewable sources available in the state and utilize it when needed. Since, renewable sources of energy are not available at all hours of the time and in order to maintain efficient supply of power, the consumers are supplied electricity generated from conventional sources of energy. It is mandatory for all consumers to consume a percentage of their total consumption as fixed by the Appropriate Commission from renewable sources of energy. However, irrespective of whether the set target is achieved or not the distribution licensee cannot force the consumers to continue to use the power generated through renewable sources of energy first. It is at this point of time when the banking provision becomes operative and the distribution licensees is required to bank the energy and supply it in the time of need. It is the case of the second Respondent that other

distribution licensee such as TATA Power Co. Ltd. and Reliance Infrastructure Limited have their procedure in line with the Open Access Regulations, 2016, wherein the scheduled power (Firm) is credited before the non-scheduled power. This is for the sole reason that scheduled firm power cannot be stored.

33. The learned counsel for the second Respondent/UTCL submitted that, it is the case of the second Respondent that since Regulation 20 of the Open Access Regulations, 2016 only deals with banking of renewable energy and not conventional energy it is implied that conventional energy needs to be adjusted first. Since, the Respondent is a captive consumer, the captive supply needs to be adjusted prior to the rest of the sources from the total consumption. Besides, the captive power in the present case is schedulable and firm conventional power while the renewable energy is non-firm and must run. Hence, if conventional power is not consumed first the same may lapse leading to great financial losses.

34. The learned counsel for the second Respondent/UTCL submitted that, taking all these facts, as stated above, the first Respondent/State Regulatory Commission has rightly justified by passing just and proper order in the interest of justice and to safeguard the interest of the second Respondent/UTCL and the other similarly situated RE generators. Therefore, the learned counsel for the Appellant/MSEDCL has failed to

make out any case to point out any error, illegality, infirmity or perversity in the impugned Order passed by the first Respondent/State Regulatory Commission. Hence, the instant appeal filed by the Appellant/MSEDCL is liable to be dismissed as misconceived with costs.

OUR CONSIDERATION AND ANALYSIS:

35. After careful consideration and evaluation of the entire relevant material available on record and the submissions of the learned counsel for the Appellant/MSEDCL and learned counsel for the second Respondent/UTCL and on the basis of the pleadings available on the file, the only issue that arise for our consideration is:

> ***Whether the impugned Order dated 11.08.2017 passed in Case No. 139 of 2016 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai is sustainable in law?***

36. The petition filed by the second Respondent/UTCL had come up for consideration before the first Respondent/State Regulatory Commission on 11.08.2017 vide Case No. 139 of 2016. The first Respondent/State Regulatory Commission, after thoughtfully considering of the case made out by the Appellant/MSEDCL and the second Respondent/UTCL and after critically analyzing the oral as well as documentary evidences available on the file has passed well reasoned order and does not call for

any interference by this Tribunal on the ground that the first Respondent/State Regulatory Commission after thoroughly analyzing the facts and circumstances of the case as discussed in detail in paras 8 to 11 by assigning cogent reasons of the ruling in para 12 has rightly held that, "The DOA Regulations, 2016 provide only for banking of RE and not conventional power. Moreover, in the instant case, the consumer is a captive consumer. The basis for establishing a CPP is primarily for its own use. That being the case, the captive supply needs to be adjusted first from the total consumption of the captive consumer and the rest of the sources thereafter. Besides, the captive power in this case is schedulable, being firm conventional power, while the RE power is non-firm and 'must run'. Hence, if this conventional power is not adjusted first, it may lapse since it cannot be stored". Therefore, the reasons assigned by the first Respondent/State Regulatory Commission are correct interpretation and application of relevant provisions of DOA Regulations, 2016. The Appellant/MSEDCL has not been able to point out any error or illegality in the reasoning assigned by the first Respondent/State Regulatory Commission in the impugned order except raised only vague and impalpable grounds without any reference to general or specific provisions of DOA Regulations, 2016. The reason assigned by the first Respondent/State Regulatory Commission in the impugned Order which read thus:

> *"12. The DOA Regulations, 2016 provide only for banking of RE and not conventional power. Moreover, in this Case, the consumer is a captive consumer. The basis for establishing a CPP is primarily for own use. That being the case, the captive supply needs to be adjusted first from the total consumption of the captive consumer and the rest of the sources thereafter. Besides, the captive power in this case is schedulable, being firm conventional power, while the RE power is non-firm and 'must run'. Hence, if this conventional power is not adjusted first, it may lapse since it cannot be banked."*

37. The learned counsel for the second Respondent/UTCL vehemently submitted that, the billing methodology adopted by Appellant/MSEDCL is erroneous, arbitrary and, hence, illegal as it resulted into making a scheduled firm conventional power as over-injected power, which is contrary to characterization of Over-injection under Regulation 19.3 of DOA Regulations, 2016. As per Regulation 19.3 of DOA Regulations, 2016 provides for settlement of deviations from schedule. It provides for settlement of deviations between the schedule and the actual injection in respect of open access by a generating company or a trading licensee on behalf of a Generating Company. The submission of the learned counsel for the second Respondent has rightly pointed out that, in case injection exceeding that scheduled by the generating company results in benefit to the grid, such over injection shall be settled either at the UI charge applicable under the Inter-state ABT mechanism, or the SMP plus other

incidental charges or any other intra-state ABT settlement charges or at the weighted average cost of long-term power purchase sources including meeting renewable purchase obligation, secluding liquid fuel-based generation, of the distribution licensee, whichever is lower. If such over-injection is detrimental to the grid, the open access generating company shall pay to the state pool either the UI charge applicable under the Inter-state ABT mechanism or the SMP plus other incidental charges or any other intra-state ABT settlement charges under the mechanism operating in Maharashtra, whichever is higher. It is manifest that the appellant by way of revised credit mechanism/billing methodology has made the scheduled CPP power of respondent as over-injected, which is not possible as per the very definition of “Over-injection” as provided under Regulation 19.3 of the DOA Regulations, 2016. Even if, the regulations do not require the distribution licensee to publish the billing methodology as contended by the learned counsel for the Appellant/MSEDCL in its written submissions, then also the first Respondent/State Regulatory Commission has jurisdiction to decide that whether the billing methodology as adopted by the Appellant is in consonance with the DOA Regulations, 2016 or not and, if the first Respondent/State Regulatory Commission finds that the same is in contradiction or defeats the provisions of said regulations, the first Respondent/State Regulatory Commission is within its rights to declare the same illegal and can direct the Appellant to adopt the correct

procedure as per relevant Regulations. Therefore, the Appellant/MSEDCL has failed to make out any case to interfere in the impugned Order passed by the first Respondent/State Regulatory Commission.

38. Regulation 20.6 also provides that unutilized banked energy at the end of the financial year, limited to 10% of the actual total generation by such Renewable Energy generator in such financial year, shall be considered as deemed purchase by the Distribution Licensee at its pooled cost of Power purchase for that year. In view of the above stated regulations of DOA Regulations, 2016, the banking of surplus RE power injected in the grid is permissible and it shall be credited with the distribution licensee and in the manner as provided in Regulations 20. However, when the same is set off first from the total consumption of the open access consumer, then the provision of banking of RE power would be of no effect. Therefore, the revised credit mechanism/billing methodology adopted by appellant shall make Regulation 20 totally redundant for the open access consumer like it has happened in the respondent's case and not only that it would make the scheduled power as over-injected as submitted above. Thus, it would amount to double jeopardy for the second Respondent.

39. The learned counsel for the Appellant has contended that, the first Respondent/State Regulatory Commission has looked at banking from the perspective of open access consumers, the first Respondent/State Regulatory Commission, in para 12, has concluded only that the DOA Regulations, 2016 provide only for banking of RE and not conventional power. The first Respondent/State Regulatory Commission nowhere in the impugned order has considered the banking from the perspective of open access consumers. The contention of the learned counsel for the Appellant suffers from conjectures and surmises on the ground that the first Respondent/State Regulatory Commission has only held that the captive power in this case is schedulable, being firm conventional power, while the RE power is non-firm and must run, hence, if the conventional power is not adjusted first, it may lapse since it cannot be banked. This does not mean that the first Respondent/State Regulatory Commission has held that RE power shall be banked with the open access consumer. Banking of RE power shall be only as per the Regulation 20. Thus, the contention of the learned counsel for the Appellant has no merit, hence, it is liable to be vitiated

40. The submission of the learned counsel for the Appellant that, the second Respondent can schedule the CPP power could be easily planned and scheduled so as to meet the 51% consumption requirement to retain

its status as a captive in a financial year is of no consequence as the second Respondent has already planned and scheduled its CPP power in such a way that it is not deviating from the schedule and at the same time meeting its renewable purchase obligation (RPO). However, due to erroneous methodology adopted by the Appellant/MSEDCL, the scheduled power has become over-injected. If the CPP power is adjusted first and then RE power, there would be over-injection of power in the grid at the respondent's end and he would not incur any additional financial liability and the same time shall meet its RPO. In case there is any surplus RE power after such set off, then the same shall be banked with the Appellant/MSEDCL as per the provisions of Regulation 20. The Appellant/MSEDCL not appreciated this simple aspect of the matter and has filed the instant appeal on vague, presumptive and untenable grounds. On this ground also, the instant appeal filed by the Appellant/MSEDCL is liable to be dismissed

41. The counsel for the Appellant contended that, the second Respondent is not the only consumer for RE Generating Station as there could be many others who are connected to the grid and purchasing power from the said RE Generating Station. The surplus energy available for banking can only be determined after set off against all power purchase agreement entered by ICC Reality India Pvt. Ltd. and the same

will be credited to the said renewable energy generating station. Therefore, the contention is totally fallacious as when the Appellant/MSEDCL by adopting the revised credit mechanism/billing methodology would set off entire RE power first, then no RE energy would be left for banking. The said submission of the counsel is self-defeating and beyond any logic. It is only when there would be any surplus RE power left after adjusting CPP power first and the RE power, then only banking provision would come in play and same would be banked with the distribution licensee, i.e. the Appellant/MSEDCL, which it does not want and want to make Regulation 20 only a paper regulation and of no consequence. Therefore, we are of the considered view that, there is no substance in the submission of the learned counsel for the Appellant/MSEDCL.

42. As rightly pointed out by the The learned counsel for the second Respondent that, the Order dated 22.12.2017 passed by the first Respondent/State Regulatory Commission in Case No. 76 of 2016 - Bajaj Finserv Limited, as mentioned in the written submissions by the counsel for the Appellant/MSEDCL, there is no application in the present case as the issue in the present appeal has neither been raised and decided by the first Respondent/State Regulatory Commission in that case. In the said Order, the first Respondent/State Regulatory Commission nowhere

has held that, if the open access consumer is sourcing power from CPP and RE generator, then the RE power has to be adjusted first and then CPP power. This aspect is not at all been dealt with the first Respondent/State Regulatory Commission in that case. Therefore, the submission of the learned counsel for the Appellant is neither applicable nor sustainable to the facts and circumstances of the case in hand.

43. It is significant to note that, the concept of banking has been introduced for the sole purpose to encourage generation of electricity through renewable sources available in the state and utilize it when needed. Since, renewable sources of energy are not available at all hours of the time and in order to maintain efficient supply of power, the consumers are supplied electricity generated from conventional sources of energy. It is mandatory for all consumers to consume a percentage of their total consumption as fixed by the Appropriate Commission from renewable sources of energy. However, irrespective of whether the set target is achieved or not the distribution licensee cannot force the consumers to continue to use the power generated through renewable sources of energy first. It is at this point of time when the banking provision becomes operative and the distribution licensees is required to bank the energy and supply it in the time of need. It is the case of the second Respondent that other distribution licensee such as TATA Power Co. Ltd. and Reliance Infrastructure Limited have their procedure in line with the Open Access

Regulations, 2016, wherein the scheduled power (Firm) is credited before the non-scheduled power. This is for the sole reason that scheduled firm power cannot be stored. It is pertinent to note that, since Regulation 20 of the Open Access Regulations, 2016 only deals with banking of renewable energy and not conventional energy it is implied that conventional energy needs to be adjusted first. Since, the second Respondent, being a captive consumer, the captive supply needs to be adjusted prior to the rest of the sources from the total consumption. Besides, the captive power in the present case is schedulable and firm conventional power while the renewable energy is non-firm and must run. Therefore, if conventional power is not consumed first the same may lapse leading to great financial losses. Taking a balanced approach keeping in view the object and reasons of the Electricity Act and relevant Regulations which are applicable to the facts and circumstances of the case, the first Respondent/State Regulatory Commission has rightly justified in passing the impugned Order. Therefore, we are of the considered view that the learned counsel for the Appellant/MSEDCL has utterly failed to make out any case to point out any error, illegality or legal infirmity or perversity in the impugned Order passed by the first Respondent/State Regulatory Commission, Mumbai. Hence, we hold that the instant Appeal filed by the Appellants, is liable to be dismissed as devoid of merits. Accordingly, we answered the issue against the Appellant.

O R D E R

For the foregoing reasons, as stated supra, the instant Appeal, being Appeal No. 366 of 2017, filed by the Appellants, is dismissed as devoid of merits.

The impugned Order dated 11.08.2017 passed in Case No. 139 of 2016 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai is hereby confirmed.

IA NO. 933 OF 2017

In view of the Appeal No. 366 of 2017 on the file of the Appellant Tribunal for Electricity, New Delhi being dismissed, the relief sought in the IA, being IA No. 933 of 2017, does not survive for consideration.

Parties to bear their own costs.

PRONOUNCED IN THE OPEN COURT ON THIS 28TH DAY OF NOVEMBER, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

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