

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.134 OF 2019

Dated: 29.10.2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

**MAHARASHTRA STATE ELECTRICITY
DISTRIBUTION COMPANY LTD.**

(Through Director Operations)

5th Floor, Plot No. G-9,
Station Road, Prakashgad,
Bandra (East), Mumbai - 400051

... Appellant(s)

Versus

**1. MAHARASHTRA ELECTRICITY
REGULATORY COMMISSION**

Through its Secretary

World Trade Centre,
Centre No. 1, 13th Floor,
Cuffe Parade, Colaba,
Mumbai – 400005

2. INOX AIR PRODUCTS PVT. LTD.

(Through its General Manager)

7th Floor, Ceejay House,
Dr. Annie Besant Road,
Mumbai – 400018

E-mail:- dipali@eternitylegal.com

3. SAI WARDHA POWER GENERATION LIMITED

(Through its Director)

8-2-293/82/A/431/A Road No. 22,
Jubilee Hills,
Hyderabad – 500033

Email:- sreekanth_a@ksk.co.in /
prabhjitsingh.s@ksk.co.in

4. RAMSONS INDUSTRIES LIMITED

A-301, Neeti Gourav,
Central Bazar Road,
Ramdasepth, Nagpur,
Maharashtra – 440010
(Through its Director)

5. RAMSONS CASTING PVT. LTD.

A-301, Neeti Gourav,
Central Bazar Road,
Ramdasepth, Nagpur,
Maharashtra – 440010
(Through its General Manager)

6. PUDUMJI PAPER PRODUCT LTD.

Thergaon, Pune,
Maharashtra,
(Through its Director)

7. MAHINDRA CIE AUTOMATIVE LTD.

Dr. PK Kurne Chowk,
Worali, Mumbai – 400018
(Through its Director)

8. ACG ASSOCIATED CAPSULE PVT. LTD.

131, Kandawali Industrial Estate,
Kandawali West, Mumbai,
Maharashtra – 400067
(Through its General Manager)

9. ASAHI INDIA GLASSES LIMITED

Plot No. T-7, Talaj MIDC Industrial Area,
Taloja Dist. Raigad,
Maharashtra – 410208
(Through its Director)

10. HINDALCO INDUSTRIES LIMITED

Century Bhavan, 3rd Floor,
Dr. Anibesent Road,
Worali, Mumbai – 400030
(Through its Director)

**11. The Chief Engineer
MAHARASHTRA STATE ELECTRICITY
TRANSMISSION CO. LTD.**

“Prakashganga’, MSETCL,
Plot No. C-19, E-Block,
BandraKurla Complex,
Bandra (East), Mumbai – 400051
Email:- AGMCA@mahatransco.in

... Respondents

Counsel on record for the Appellant(s) : Samir Malik
Rimali Batra
Nikita Choukse
Manuj Kaushik
Lakshay Mehta
Tushar Mathur
Himani Yadav

Counsel on record for the Respondent(s) : Anand K. Ganesan
Swapna Seshadri
Utkarsh Singh
for Res. 3

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Maharashtra State Electricity Distribution Company Limited (MSEDCL), is in appeal before us against the order dated 04.05.2018 passed by 1st respondent Maharashtra Electricity Regulatory Commission (hereinafter referred to as "the Commission") in case No.76/2017 filed by 3rd respondent M/s Sai Wardha Power Generation Limited (in short "SWPGL").

2. The appellant is in the business of distribution of electricity to its consumers in the entire State of Maharashtra except Mumbai city and its suburbs and is functioning in accordance with the provisions of the Electricity Act, 2003.

3. The 3rd respondent, SWPGL is a generating company with installed capacity of 540MW (4X135MW) at Baroda District Chandrapur, Maharashtra. It has entered into a long-term Bulk Power Transmission Agreement (BPTA) dated 28.02.2012 with the transmission licensee i.e. Maharashtra State Electricity Transmission Company Limited (MSETCL) for open access on long term basis for a period of 25 years. As per practice,

the appellant MSEDCL approves the open access on a year-on-year basis. Units 3&4 of the generating station of SWPGL are intended to be used for captive purposes to its designated consumers.

4. The respondent Nos.2 & 4 to 10 are consumers of electricity having contract demand with the appellant. They also seek open access through captive power plant of the 3rd respondent.

5. On 08.04.2017, the 3rd respondent applied to the appellant for grant of short-term open access for all its captive power plant consumers i.e. respondent Nos. 2 & 4 to 10. However, it appears that instead of granting short-term open access (STOA) to the 3rd respondent, the appellant cancelled STOA already granted to the 3rd respondent for the period from 23.03.2017 to 31.03.2017 on retrospective basis. The appellant, further curtailed the open access capacity for supply by 3rd respondent to respondent Nos.2,6,8 & 10 while refusing open access to respondent Nos.7, 8 (other unit), 9 and 10 (other unit).

6. Accordingly, the 3rd respondent SWPGL approached the Commission by way of petition No.76/2017 with the following prayers: -

“(a) Quash the retrospective cancellation of the short term open access for the period from 23/03/2017 to 31/03/2017

for supply the Petitioner to the Respondents No. 1 to 6 and quash any consequent action taken by MSEDCL including reallocation of such power supplied by the Petitioner to Respondents No. 1 to 6;

(b) Hold and direct that the reduction of quantum of short-term open access and nonapproval of short-term open access for supply by the Petitioner to Respondents No. 3 to 9 on account of alleged metering system constraints is illegal, incorrect;

(c) Pass urgent interim orders for grant of short term open access for the full quantum of short term open access applied for by the Petitioner for supply to its consumers subject to the total drawal by the consumers from all sources shall not exceed the contract demand and the metering system capacity;

(d) Award costs of the present proceedings;”

7. The petition has been disposed off by the Commission vide impugned order dated 04.05.2018 thereby setting aside the retrospective cancellation of STOA of all the seven consumers of 3rd respondent by the appellant and further holding that the appellant ought not to have reduced or denied the open access quantum that was sought by the 3rd respondent for its

consumers only on unilateral presumption that it was in addition to the contract demand of the respective consumers. The Commission also held that open access can be granted with additional condition that the total power flow from MSEDCL and open access shall be restricted to the quantum of total technical / metering constraints upon obtaining undertaking from OA applicants / respondents that the total drawl from MSEDCL and OA sources would not exceed their MSEDCL contract demand.

8. We may note that the Commission had framed following two issues for its consideration: -

“Issue I: Curtailment of Open Access capacity on account of alleged system constraint issues:

Issue II: Retrospective Cancellation of Short Term Open Access”

9. With regards to issue No.I, the Commission has observed in Paragraph No.20.1 and 20.2 of the impugned order as under:-

“20.1 The issue is whether application for Open Access by a consumer is to be treated as if the quantum is over and above the Contract Demand or whether such quantum is

subsumed in the Contract Demand. This will have the following implications:

In the first scenario:

Total power quantum = CD with the Licensee + OA Quantum

In the second scenario:

Total power quantum = CD with the Licensee = OA Quantum + balance power requirement from the Licensee against the CD,

i. e., while retaining the original Contract Demand with the Licensee (if not reduced by the applicant) the Open Access quantum gets subsumed in the Contract Demand.

20.2 MSEDCL on its own presumed that the quantum of Open Access applied for by SWPGL's consumers would be over and above the Contract Demand which is to be met by it. In pursuance of this presumption, MSEDCL reduced the quantum of Open Access in case of 4 consumers, and

rejected Open Access to the other 4 consumers, citing system constraints.”

10. And thereafter, held as under: -

“20.14 In the light of the above, MSEDCL ought not to have reduced or denied the Open Access quantum that was sought only on its unilateral presumption that it was in addition to the Contract Demand of the respective consumers. The consumers could then have taken a call on their power requirements vis- a- vis the purported infrastructure constraints, and planned their power arrangements accordingly. Had it exercised due diligence on this count, MSEDCL would have come to know that the quantum of Open Access sought was not over and above the Contract Demand but was subsumed within it, as has been submitted. Hence, the Commission had suggested that undertakings be taken in this regard.

20.15 Thus, the Distribution Licensee shall grant MTOA or STOA if the resultant power flow can be accommodated in

the existing distribution system, and shall intimate the applicant of any upgradation of the distribution system that is required. As a matter of abundant caution, Open Access applicants may be advised to clarify, where necessary, their Open Access power requirement vis-à-vis their Contract Demand. The Distribution Licensee may also take an undertaking from such applicants in this regard so as to have a better understanding of the effective load requirement.”

11. In arriving at the above extracted findings, the Commission has referred to and quoted regulation 8.10 of Maharashtra Electricity Regulation Commission (Distribution Open Access) Regulations, 2016 (hereinafter referred to as DOA Regulations, 2016) and Practice Directions issued by it on 19.10.2016 with regards to processing of open access applications.

12. The appellant is aggrieved by these findings of the Commission on the said issue No.I.

13. We have heard learned counsel for the appellant and learned counsel for 3rd respondent. None of the other respondents has contested the appeal.

We have also perused the impugned order as well as the written submissions filed by the learned counsels.

14. Referring to the Regulations 2.1(2), 8.4, 8.10, 9.3, 9.4, 13.2 and 29 of DOA Regulations, 2016, the learned counsel for the appellant argued as under: -

- (i) As per the statutory regulations, the Short Term or for that matter the Medium Term Open Access are provided in the surplus capacity available after meeting the requirements of the distribution licensees and the Long Term Users in the said order of priority, provided that the Distribution licensee will have the highest priority for its requirement, whether it is long term or medium term or short term basis.
- (ii) By virtue of the above, the Short Term Open Access can be applied for and be granted only if there is a surplus capacity available i.e. only if there is a possibility of the resultant power being accommodated on the distribution system without constraints after the distribution system has met all the requirements of the distribution licensee to maintain supply to the consumers at large

and thereafter of Long Term Open Access Users and Medium Term Open Access Users. There shall not be any augmentation of the capacity on account of Short Term Open Access sought for. If the entire capacity available on the system is required for the distribution licensees and after meeting the need of the distribution licensees or to the Long Term Users/Medium term Users, the Short Term Open Access Users will not have any right to demand Open Access.

- (iii) It is always open to the consumers to apply for Long Term Open Access and require augmentation of the system. Had the Open Access Applicant applied for Long Term Access, MSEDCL could have considered augmentation required for accommodating the requirements. However, the Open Access Applicant has chosen not to apply for long term access and therefore the request has to be considered as per the existing capacity. Further the distribution licensees and long term open access users contribute to the capital cost of the transmission line as well as for its upgradation. The short term open access users do not contribute towards capital cost. By its very nature, the short term users will be given open access only

for the margin available after meeting the requirements of distribution licensee and thereafter the long term users and subject to the priority of even the medium term users.

- (iv) The Open Access Applicant cannot claim the substitution of contract demand quantum for the open access quantum. The Open Access Regulations do not permit such substitution. So long as a consumer has a contract demand with the distribution licensee, the distribution licensee has an obligation to supply power to the consumer. Even if such consumer avails open access, the obligation of distribution licensee to supply power against the contract demand would not be affected unless such contract demand is surrendered.

- (v) The contract demand and open access quantum have different implications. The supply of electricity under the contract Demand is based on the entity being a consumer of the distribution licensee and the distribution licensee having the obligation to be ready at all times to supply to the extent of Contract Demand. The transmission and distribution system are firstly for the use by the distribution licensee to cater to the supply of electricity against the Contract Demand of its consumers. The open access demand is to be

considered separately. This is made clear in the Allotment of Priority under Regulation 13.2 of the Open Access Regulations. In case a person surrenders the Contract Demand or reduces the quantum of Contract Demand, the capacity so surrendered or reduced becoming surplus is to be used for the requirements of other consumers of the Distribution Licensee. It cannot be that a person can ask for substitution of such capacity for open access. Such a course will be in complete violation of the priority provided in the Open Access Regulations.

- (vi) Accordingly, the fact that Consumer has sought an open access for consumption of power does not terminate the obligation of the distribution licensee to supply power up to the contract demand of Consumer and the other consumers and therefore the network capacity for such supply would not be considered surplus. As per the Open Access Regulations, the distribution licensee for retail supply of power has the highest priority. Even assuming that there are no other consumers of the distribution licensee, the priority over the network capacity would be for the long term open access first,

then medium term open access consumers and lastly for short term Access applicants.

- (vii) Even technically, the supply of power from the distribution licensee cannot be substituted by open access power for the purposes of transmission of electricity. It is submitted that if such a claim is accepted, then all Contract Demand in the State of Maharashtra as well as other States can be substituted with Open Access and there would not be any network constraint. This will lead absolute chaos in the operation if the distribution system primarily for short term open access.

- (viii) In view of the above, there can be no substitution of contract demand with open access. Otherwise, every consumer with contract demand can seek substitution with open access and there can be no constraint in the network irrespective of where the injection point is. This would lead to chaos in the transmission and distribution system as power flow cannot be then controlled by operation of the generating station of the distribution licensee or otherwise by varying the injection point.”

15. Learned counsel appearing for respondent No.3 supported the impugned order of the Commission in its entirety while submitting that it does not suffer from any factual or legal infirmity. He also repelled each and every submission made by appellant's counsel.

16. We note that DOA Regulations, 2016 were notified by the Commission on 30.03.2016. Regulation 4 is regarding the processing of applications for distribution open access and connectivity. Regulation 4.2 and 4.3 are material for the purposes of deciding this appeal and are quoted hereinbelow: -

“4.2. Revision of Contract Demand

The Contract Demand of a Consumer availing LTOA or MTOA shall be governed by the provisions of the Electricity Supply Code and the Regulations of the Commission governing Standards of Performance: Provided that a Consumer availing STOA shall not be eligible to revise his Contract Demand with the Distribution Licensee during the tenure of the STOA, but may do so at the time of applying for Open Access.

4.3. Completion of Works

Where the grant of Open Access is agreed to but requires the completion of works relating to extension or augmentation of lines, transformers, metering arrangements, etc., or the commissioning of new Sub-Stations, the Distribution Licensee shall complete such works within the time limits specified in the Regulations of the Commission governing Standards of Performance.”

17. Regulation 8.10 provides that the nodal agency shall grant medium term or short term open access if the resultant power flow can be accommodated in the existing distribution system or the distribution system under execution.

18. It appears that open access applicants were facing difficulties with regard to the processing of their applications for open access by distribution licensee in terms of these regulations and accordingly need was felt by the Commission to issue clarifications by way of practice Directions dated 19.10.2016. Practice Direction at Sl. No.3 is relevant and is extracted hereinbelow: -

“3. Under Regulation 4.2 of the DOA Regulations, the matter of Contract Demand is to be governed by the provisions of the Electricity Supply Code and the Standards of Performance Regulations, and does not provide for any revision in Contract Demand by the consumer as a condition for grant of Open Access. Hence, an Application for Open Access shall not be rejected on the ground that the consumer has not increased or otherwise revised his Contract Demand, which is entirely at his option. However, the Regulations also provide that the Distribution Licensee verify the availability of necessary infrastructure and capacity of the distribution system, and grant Medium or Short-Term Open Access only if the resultant power flow can be accommodated in the existing distribution system. If the existing distribution and metering system requires any augmentation or upgradation before Open Access to the extent applied for can be provided, it shall intimate the Applicant accordingly, in writing and in the stipulated time, and follow the procedure specified in the Electricity Supply Code and Standards of Performance Regulations.”

19. Regulation 4.2, in very clear terms, envisaged that the contract demand of the consumers availing open access shall be governed by the provisions of Electricity Supply Code and the Regulations of the Commission governing standards of performance. Proviso attached to the said regulation states that a consumer availing STOA shall not be required to revise his contract demand with the distribution licensee during the tenure of STOA. Thus, we do not find anything in the said regulation or in any other regulation requiring revision in contract demand by a consumer as a condition precedent for grant of open access. Even though, we do not find any ambiguity in this regard in these regulations, the confusion or difficulty, if any, faced by either the open access applicant or the distribution licensee was removed by the Commission by way of Practice Directions issued on 09.10.2016, the relevant portion of which has already been extracted hereinabove. Therefore, there remains no doubt with regards to the legal position that an application for open access cannot be rejected on the ground that the consumer has not increased or otherwise revised his contract demand, which is entirely at his option. However, it is for the distribution licensee to assess whether resultant power flow in pursuance to the grant of

open access can be accommodated in the existing distribution system and in case, the system requires any upgradation, the same shall have to be intimated accordingly.

20. The arguments put forth by appellant's counsel appear to be figment of imagination of appellant's mind only as those are not supported by any regulation. In fact, all the submissions advanced by learned counsel for the appellant are contrary to the regulations and hence are meritless.

21. Considering this view of the matter, we concur with the observation of the Commission in the impugned order that MSEDCL ought not to have reduced or denied open access quantum sought by the 3rd respondent only on its assumption that it was in addition to the contract demand of the respective consumers, as well as on the ground of system constraint issues. We affirm that the open access power cannot be treated over and above the contract demand and the same subsumes in the contract demand. Therefore, the directions issued by the Commissions in Para No.20.15 of the impugned order, with which the appellant feels aggrieved, cannot be faulted with.

22. Hence, we find the impugned order of the Commission perfectly sound which does not call for any interference from this Tribunal. The appeal is devoid of any merit and is accordingly dismissed.

Pronounced in the open court on this the 29th day of October, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~

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