IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APL NO 319 OF 2018 & IA NO 1534 OF 2018,
APL NO 288 OF 2019 &IA NO 1997 OF 2019,
APL NO 377 OF 2019
AND
APL NO 378 OF 2019

Dated: 27th April, 2021

Present: Hon'ble Mr. Ravindra Kumar Verma, Technical Member
Hon'ble Mr. Justice R.K. Gauba, Judicial Member

In the matter of:

APL NO 319 OF 2018 & IA NO 1534 OF 2018

ROHA DYECHEM PRIVATE LIMITED .... Appellant(s)
JJT House, A 44/45, Road No.2,
M.I.D.C., Andheri East, Mumbai 400093
Maharashtra

Vs.

1. **Maharashtra Electricity Regulatory Commission,**
Through its Secretary,
World Trade Centre,
Centre No.1,13th Floor, Cuffe Parade, ... Respondent No.1
Colaba, Mumbai - 400005.

2. **Maharashtra State Electricity Distribution Company Limited,**
Through its Managing Director,
5th Floor, Prakashgad,
Bandra (East),
Mumbai – 400 051. .... Respondent No.2

3. **Maharashtra Energy Development Agency**
Through itsChairman
MHADA Commercial Complex, II Floor,
Opp. Tridal Nagar, Yerwada,
Pune – 411006 .... Respondent No.3

Counsel for the Appellant (s) : Ms. Dipali Sheth
Ms. Vinita Melvin
Ms. PriyaPandey

Counsel for the Respondent (s) : Mr. Ashish Singh
Mr. Anup Jain for R-2/MSEDCL

APL NO 288 OF 2019 &IA NO 1997 OF 2019

Arvind Cotsyn (India) Ltd., ... Appellant(s)
Arvind House,
Plot No.30, Old Indl. Estate, Ichalkaranji
416 115

Vs.

1. **Maharashtra State Electricity Dist. Company Ltd.**
Through Chief Engineer (Commercial)
Prakashgad, 5th floor, A. K. Road,
Bandra (E), Mumbai-51. .... Respondent No.1

2. **Government of Maharashtra**
Through Chief Secretary,
Energy Industry & Labour Department
Mantralaya, Mumbai .... Respondent No.2

3. **Maharashtra Energy Development Corporation**
Through Director General,
Mhada Commercial Complex,
IInd Floor, Opp.Tridal Nagar,
Yerwada- Pune. .... Respondent No.3

4. **Maharashtra Electricity Regulatory Commission**
Through Secretary
World Trade Centre, Centre No. 1,
13th Floor, Cuff Parade
Colaba - 400005 .... Respondent No.4

Counsel for the Appellant (s) : Mr. Anand K. Ganesan

Counsel for the Respondent (s) : Mr. Ashish Singh
Mr. Anup Jain for R-2/MSEDCL

APL NO 377 OF 2019

Jsons Foundry Private Limited .... Appellant(s)
Plot No. G-13, Kupwad Block, M.I.D.C.,
Sangli – 416436. Maharashtra (India)

Vs.

1. **Maharashtra Electricity Regulatory Commission,**
Through its Secretary,
World Trade Centre,
Centre No.1,13th Floor, Cuffe Parade,
Colaba, Mumbai - 400005. .... Respondent No.1

2. **Maharashtra State Electricity Distribution Company Limited,**
Through its Managing Director,
5th Floor, Prakashgad,
Bandra (East), ... Respondent No.2
Mumbai – 400 051.

Counsel for the Appellant (s) : Mr. M.G. Ramachandran, Sr. Adv
Ms. Dipali Sheth,
Ms. ShubhamArya
Ms. Vinita Melvin

Counsel for the Respondent (s) : Mr. Ashish Singh
Mr. Anup Jain for R-2/MSEDCL

APL NO 378 OF 2019

Western Precicast Private Limited .... Appellant(s)
Gat No.170, VillageSavali,
Near MIDC Kupwad
Sangli – 416410

Vs.

1. **Maharashtra Electricity Regulatory Commission,**
Through its Secretary,

World Trade Centre,
Centre No.1, 13th Floor, Cuffe Parade,
Colaba, Mumbai - 400005. …. Respondent No.1

2. Maharashtra State Electricity Distribution Company Limited
Through its Managing Director,
5th Floor, Prakashgad,
Bandra (East), **…. Respondent No.2**
Mumbai- 400051

Counsel for the Appellant (s) : Mr. M.G. Ramachandran, Sr. Adv
Ms. Dipali Sheth
Ms. Shubham Arya
Ms. Vinita Melvin

Counsel for the Respondent (s) : Mr. Ashish Singh
Mr. Anup Jain for R-2/MSEDCL

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

This is a batch of following four appeals.

1. Appeal No. 319 of 2018

This Appeal is filed against the order dated 12.07.2018 passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as **"the State Commission/MERC")** in the Case No.119 of 2018 whereby the State Commission rejected the prayer of Appellant for open access to the extent of 10 MW.

i) Roha Dyechem Private Limited (hereinafter referred to as **"the Appellant/Roha")** is a company incorporated under the Companies Act, 1956, is engaged in the business of

manufacturing and distributing synthetic and natural colours for the food, pharmaceuticals and cosmetics industries and has various manufacturing facilities in India.

ii) The Respondent No. 1, Maharashtra Electricity Regulatory Commission is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

iii) The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as **"MSEDCL"**), is a distribution licensee in the State of Maharashtra.

iv) The Respondent No.3, Maharashtra Energy Development Agency (hereinafter referred to as "**MEDA"**), is a governmental body established for the purpose of harnessing and developing alternate/renewable energy in the State of Maharashtra.

v) **Prayer of the Appellant**

a. Allow the appeal and set aside the Impugned Order passed by the State Commission in Case No. 119 of 2018;
b. Direct MSEDCL to grant OA to the Appellant to the extent of 10 MW from March, 2018 onwards;
c. Award costs of this appeal against MSEDCL and in favour of the Appellant;
d. Pass such other Order(s) as this Tribunal may deem just and proper.

2. Appeal No. 288 of 2019

i) This Appeal has been filed against the order dated 18.04.2019 passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as **"the State Commission/MERC")**in the Petition No. 19 of 2019 whereby the State Commission rejected the petition filed by the Appellant against the unilateral action of Maharashtra State Electricity Distribution Company Limited **(MSEDCL)** in reducing the open access capacity of the Appellant and also the adjustment of the electricity on 15 minute time block basis and not ToD basis.

ii) Arvind Cotsyn (India) Ltd.(hereinafter referred to as **"the Appellant/Arvind")** is a company incorporated under the Companies Act, 1956, is engaged in the business of spinning, weaving and finishing of textiles, having its manufacturing premises at Mumbai in the State of Maharashtra.

iii) The Respondent No. 1, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "**MSEDCL"**), is a distribution licensee in the State of Maharashtra

iv) The Respondent No. 2, Government of Maharashtra Maharashtra, Energy Industry and Labour Department.

v) The Respondent No. 3, Maharashtra Energy Development Corporation.

vi) The Respondent No. 4, Maharashtra Electricity Regulatory Commission is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

vi) **Prayer of the Appellant**

a. Allow the appeal and set aside the order dated 18/04/2019 passed by the State Commission to the extent challenged in the present appeal.
b. Pass such other Order(s) and this Tribunal may deem just and proper.

3. Appeal No. 377 of 2019

i) This Appeal has been filed against the order dated 09.09.2019 passed by the Maharashtra Electricity Regulatory Commission in the Case No. 119 of 2019 whereby the State Commission allowed the Appellant's prayer in terms of wrongful denial of open access, however, rejected the Appellant's prayer for retrospective curtailment of open access and also relief pertaining to banked energy over and above the contract demand.

ii) Jsons Foundry Private Limited is the Appellant(hereinafter referred to as **"The Appellant/Jsons"),**is a company incorporated under the Companies Act, 1956.

iii) The Respondent No. 1, Maharashtra Electricity Regulatory Commission (hereinafter referred to as **"the State Commission/MERC"),**is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

iv) The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "**the Respondent No.2/MSEDCL"**), is a distribution licensee in the State of Maharashtra

v) **Prayer of the Appellant**

a. Allow the Appeal and set aside the Impugned Order dated September 9, 2019 passed by the State Commission/Respondent No. 1 in Case No. 119 of 2019 to the extent challenged herein;
b. Direct Respondent No. 2 to grant MTOA made vide Application No. 7880 for Unit I for 1.6 MW and Application No. 7882 for Unit II for 0.92 MW from April 1, 2019 till March 31, 2022;
c. Direct Respondent No. 2 to restore MTOA Quantum to 3.40 MW for Unit I and 3.42 MW for Unit II w.e.f. October 1, 2018 and compensate the Appellant for the banked energy from October 1, 2018 till full open access quantum as sought by the Appellant is granted;
d. Award costs of this Appeal against Respondent No. 2and in favour of the Appellant; and

e. Pass such other Order(s) as this Tribunal may deem just and proper.

4. Appeal No. 378 of 2019

i) This Appeal has been filed against the order dated 09.09.2019 passed by the Maharashtra Electricity Regulatory Commission (hereinafter referred to as **"the State Commission/MERC")**in the Case No. 118 of 2019 whereby the State Commission allowed the Appellant's prayer in terms of wrongful denial of open access, however, rejected the Appellant's prayer for retrospective curtailment of open access and also relief pertaining to banked energy over and above the contract demand.

ii) Western Precicast Private Limited(hereinafter referred to as **"the Appellant/Western Precicast")** is a company incorporated under the Companies Act, 1956, is a manufacturer of the corrosion resistant grade castings in stainless steel series and high nickel super alloys having their foundry unit situated at Gat No.170, Village Savali, Near MIDC Kupwad, Sangli – 416410, Maharashtra (India).

iii) The Respondent No. 1, Maharashtra Electricity Regulatory Commission is the State Electricity Regulatory Commission for the State of Maharashtra exercising powers and discharging functions under the provisions of the Electricity Act, 2003.

iv) The Respondent No. 2, Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as "**MSEDCL"**), is a distribution licensee in the State of Maharashtra

v) **Prayer of the Appellant**

a. Allow the Appeal and set aside the Impugned Order dated September 9, 2019 passed by the State Commission/Respondent No. 1 in Case No. 118 of 2019 to the extent challenged herein;
b. Direct MSEDCL to grant MTOA made vide Application No. 7881 for 0.8 MW from April 1, 2019 till March 31, 2022;
c. Direct MSEDCL to restore MTOA Quantum to 3.55 MW for its Unit w.e.f. October 1, 2018 and compensate the Appellant for the banked energy from October 1, 2018 till full open access quantum as sought by the Appellant is granted;
d. Award costs of this Appeal against Respondent No. 2and in favour of the Appellant; and
e. Pass such other Order(s) as this Tribunal may deem just and proper.

5. During the hearings, the learned counsel on all sides agreed and requested that this batch of four appeals be heard together, as the issues involved are principally the same as well as the Respondents in the appeals are also the same. In view of the submissions all the four appeals were clubbed and heard together.

6. Since the issues involved in the Appeals are principally the same as well as the Respondents in all of the four appeals are also the same, a common judgment is being rendered. However, for the sake of brevity, specific figures and impugned order, etc., of Appeal No.377 of 2019 will be referred to by us.

7. **Facts of the case in Appeal No. 377 of 2019 are as under:**

8. The Appellant is a consumer of MSEDCL and maintains contract demands for its Units as follows:

Unit No. I - 2000 KVA (consumer no. 279249004477); and
Unit No.II -1495 KVA (consumer no. 279249007650).

A. The Appellant owns windmills ("Wind Power Projects") as follows:

Sr. No.	Project Site	Metering Point	Location No.	Capacity
1.	Chavaneshwar, Satara	0000009283	9283	1.6 MW
2.	Nigade, Satara	0000007269	GP 101, GP 102 Dev. No. 7269	1.2 MW
3.	Shirshi, Sangli	0244057401	GP 31	0.6 MW
For Consumption in Unit I			TOTAL	3.40 MW
4.	Patan, Satara	0000005143	5143	0.92 MW
5.	Jamade, Dhule	0098011404	k-239	1.25 MW
6.	Valve, Dhule	0098012402	K-289	1.25 MW

For Consumption in Unit II		TOTAL	3.42 MW

9. The windmill of 1.6 MW which is situated at Chavaneshwar, Sataraat Location No. 9823 ("Chavaneshwar Project") was established solely for the purpose of self-use by the Appellant and power generated by this Chavaneshwar Project is being consumed (for self-use/captive consumption) by the Appellant from the date of commissioning of this Project i.e. from March 31, 2010.

10. The windmill of 0.92 MW which is situated at Mhatrewadi, Kale-Patan, Satara at location No. 5143("Patan Project") was established solely for the purpose of self-use by the Appellant and power generated by this Patan Project is being consumed (for self-use/captive consumption) by the Appellant from the date of commissioning of this Project i.e. from November 21, 2001. Subsequent to the commissioning of the Wind Power Projects, the Appellant sought open access for self-use from time to time. The MSEDCL granted open access for self-use of the Appellant for the consumption of its power for Unit-I and Unit-II. The below table captures all of the details of last MTOA permissions:

Sr. No.	Project details & Quantum of MTOA	Date of MTOA permission	Period of MTOA	Unit for which self-use permission was sought
1	Chavaneshwar 1.6 MW, CH-142 & CH-143	16.02.2016 (05204)	01.04.2016 to 31.03.2019	279249004477
2	Nigade, Satara 1.2 MW, GP-101 & GP-102	09.06.2017 (14236)	01.05.2017 to 30.04.2020	279249004477

3	Shirshi, Sangli 0.6 MW, GP-31	09.06.2017 (14235)	01.05.2017 to 30.04.2020	279249004477
4	Mhatrewadi, Satara 0.92 MW, JF 1,2,3,4	16.02.2016 (05205)	01.04.2016 to 31.03.2019	279249007650
5	Jamade, Dhule 1.25 MW, K-239	09.06.2017 (14237)	01.05.2017 to 30.04.2020	279249007650
6	Valve, Dhule 1.25 MW, K-289	09.06.2017 (14238)	01.05.2017 to 30.04.2020	279249007650

11. Vide application dated October 3, 2018, the Appellant sought open access for self-use from Chavaneshwar and Patan Projects for the period of April 01, 2019 to March 31, 2022 for its Units I and II, respectively.

The Appellant was using the MTOA hassle free until the MSEDCL vide emails dated October 29, 2018 intimated the Appellant that as per the Maharashtra Electricity Regulatory Commission Wind Tariff Order dated November 24, 2003 and Maharashtra Electricity Regulatory Commission order dated July 12, 2018 in Case No. 119 of 2018 in the matter of *Roha Dyechem Private Limited* ("Roha") *versus Maharashtra State Electricity Distribution Company Limitedand Anr.* considering the total contract demand of the Appellant the maximum MTOA quantum allowed to the Appellant is 2.041 MW in respect of Unit I (consumer no.279249004477) and 2.041 MW in respect of Unit II (consumer no.279249007650) retrospectively w.e.f. October 1, 2018. Pursuant to aforesaid email, the MSEDCL revised the MTOA quantum and reduced it to 2.041 MW from 3.40MW in respect of

Unit I and 2.041 MW from 3.42 MW in respect of Unit II retrospectively with effect from October 01, 2018.

12. Aggrieved by this decision of the Respondent MSEDCL the Appellant approached the State Commission by filing Petition, Case No. 119 of 2020, which was disposed of by the State Commission by passing the Impugned Order Dated 09/09/2019 (common order in Case No. 118of 2019 and Case No. 119 of 2019).

Impugned Order dated 09/09/2019

13. The State Commission in their Impugned Order dated 09/09/2019 has inter-alia recorded as under:

"15.3 The Commission in RohaDyechem Order, SEP Energy Order and thereafter ArvindCotsyn Order had accepted the MSEDCL submission regarding reduction of open access contract demand. The relevant para of ArvindCotsyn Order is reproduced as under:

"…….

9.11 In the instant Case, Petitioner has a contract demand of 2400 kW whereas it has installed capacity of 7650 kW from wind generation for captive use. MSEDCL considering the margin for resultant power flow of 10 % has allowed Petitioner to draw upto 3636 kW of power. Installing such captive generation capacity which is more than double the contract demand is clearly not meant to be used for adjusting the infirm energy by invoking banking provisions

which are essentially to be used for adjusting excess generation only on margin. Hence, the Commission is of the view that dispensation given by the Commission in RohaDyechem Order and SEP Energy Order is squarely applicable to the instant Case also. Thus, the Commission is not inclined to accept the contentions of Petitioner on this issue.

9.12 Also, as regards the directives of examining the issue afresh in the holistic manner, the Commission is of the view that MSEDCL has complied with the directives of the Commission in this regard, which can be inferred from the very fact that MSEDCL had considered a margin above the CD (in the instant case it has kept a margin of 1.246 MW (3.646 MW minus 2.4 MW) by taking into account the banking provisions and loss load factor and existing metering infrastructure arrangement. Thus, in windy season the generators are sufficed with the margin that they are allowed under the banking provisions of DOA Regulations, 2016.

……..

9.15 The Commission observes that MSEDCL has envisaged the changing scenario as regards the heavy penetration of infirm generation above the contracted capacity has well justified locus since the excessive generation from these wind generators beyond the scope of allowed banking can be detrimental to the grid. The grid cannot be put to ransom and the safety and security of the grid cannot be compromised and has to be given paramount importance.

9.16 In view of the discussions in Para 9.6 to 9.11, the Commission is of the view that there is no merits in the contentions of the Petitioner as regards the unilateral reduction of CD and allowing open access with the excess installed capacity as it was allowed prior to RohaDyechem Order. Also as discussed above in Para. 9.12 to 9.15, the Commission is also of the view that MSEDCL has taken a holistic view by balancing the interests of the common consumers (optimum power purchase planning) as well as the RE generators (considering 10 % banking as allowed in Wind Tariff Order as well as DOA Regulations, 2016). [Emphasis added]"

15.4 The Commission in the above Order has explained in detail rationale regarding the changing scenario as regards the heavy penetration of infirm generation above the contracted capacity and has held that MSEDCL has taken a holistic view by balancing the interests of the common consumers (optimum power purchase planning) as well as the RE generators (considering 10 % banking as allowed in 2003 Wind Tariff Order as well as DOA Regulations, 2016).

15.5 In the instant Cases:

Westin Preci cast has a CD of 1800 kVA whereas it has installed capacity of 3550 kW from Wind Generation for its captive use. MSEDCL considering the margin for resultant power flow of 10% has made revisions to enable drawal of 2735 kW of power.

For Jsons foundry:

a. Unit I has CD of 2000 kVA which MSEDCL revised to 2041 kW for drawing RE , whereas the installed capacity of 3440 kW of Wind Generating Unit.
b. Unit II has CD of 1495 kVA which MSEDCL has revised to 2041 kW whereas the installed capacity is of 3420 kW of Wind generation for captive use.
c. MSEDCL has revised the same after considering the margin for resultant power flow of 10%.

The Commission observes that installing such captive generation capacity which is more than double the contract demand is clearly not meant to be used for adjusting the infirm energy by invoking banking provisions which are essentially to be used for adjusting excess generation only on margin. Hence, the Commission is of the view that dispensation given by the Commission in RohaDyechem Order, SEP Energy Order and ArvindCotsyn Order is squarely applicable to the instant Cases also. Thus, the Commission is not inclined to accept the contentions of both Petitioners on this issue.

15.6 As regards the contentions of both Petitioners that MSEDCL has revised OA retrospectively, the Commission in ArvindCotsyn Order has held that:

"…….

9.13 The Commission further observes that the stand taken by MSEDCL while providing the margin as discussed above is in tandem with the heavy penetration of the wind

generators during the windy seasons which has resulted in increase of power purchase cost to MSEDCL during the off windy seasons. This can be explained from the fact that Wind generators inject the large amount of energy in the grid in windy seasons and banked the same with Distribution Licensees. At this time, the demand of the Distribution Licensees is also low and it has to back down its thermal power generations. However, during the summer period, when the wind generation is also low the Distribution Licensees too have their peak demand. Also, during this period, the wind generators intend to use their banked power. Due to peak demand of Distribution Licensees, it has to purchase high cost of power which disturbs the power purchase planning of the Distribution Licensees.

9.14 The Commission further observes that one of the reasons to deviate from its schedule by the State is due to high penetration of wind and solar power which impacts the common consumers of MSEDCL. In the instant Case if the Petitioner is allowed to inject the energy upto its installed capacity i.e 7.650 MW for balancing CD of 2.4 MW the excessive generation during the windy seasons contributes to State deviation. Also, considering the deviation due to infirm nature of Wind and Solar Power , the Central Electricity Regulatory Commission (CERC) vide its notification dated 6 May, 2016 has amended the CERC (Deviation Settlement Mechanism and related matters) (Third amendment) Regulations, 2016 and had increased

deviation limit capacity for RE rich State .The Relevant para. is produced as below:

2"(m-i) Renewable Rich State means a State whose minimum combined installed capacity of wind and solar power is 1000 MW or more ……..

Annexure III

Deviation Limits for Renewable Rich States

Sr.No.	*States having combined installed capacity of Wind and Solar projects*	*Deviation Limits (MW)"L"*
1	*1000 – 3000 MW*	*200*
2	*> 3000 MW*	*250*

9.15 The Commission observes that MSEDCL has envisaged the changing scenario as regards the heavy penetration of infirm generation above the contracted capacity has well justified locus since the excessive generation from these wind generators beyond the scope of allowed banking can be detrimental to the grid. The grid cannot be put to ransom and the safety and security of the grid cannot be compromised and has to be given paramount importance. [Emphasis Added]"

14. The State Commission by the Impugned Order dated 09/09/2019 has rejected the claim of the Appellant for the banked energy over and above the contract demand (upto the limit of eligible drawal as

per the available metering infrastructure). Aggrieved by this decision of the State Commission the Appellant has filed this Appeal.

Submission by Appellant

15. The Order dated July 12, 2018 pronounced in Case No. 119 of 2018 referred to by the MSEDCL for the revision and curtailment of the MTOA is not be applicable to the Appellant as the matter in which the said Order dated July 12, 2018 was pronounced was for seeking open access permission from its solar photovoltaic project whereas the Appellant's projects are wind power projects. Therefore, the said Order dated July 12, 2018 is not be applicable to the Appellant as the Appellant has Wind Power Projects. Hence, the curtailment of the Appellant's MTOA permissions on the basis of a matter with no identical facts as specified above is unreasonable, arbitrary and unjustified as such order was not an order in rem.

16. The Appellant vide its letters both dated November 1, 2018 replied to the Respondent No.2/MSEDCL's emails dated October 29, 2018 and explained that the analogy of Order dated July 12, 2018 in Case No. 119 of 2018 being made applicable to Appellant's Wind Power Projects is incorrect. The Appellant further stated in the said letter that though such banking facility is available, the Appellant has been consuming wind power generated from its projects in full since November 2001. Unit I is consuming power generated from its 3.40 MW Wind Power Projects in full since May 2016 and Unit II is also consuming power generated from its 3.42

MW Wind Power Projects in full since May 2016. Further the Appellant called upon the Respondent No. 2 to restore the MTOA permissions to 3.40 MW in respect of Unit I and 3.42 MW in respect of Unit II from October 1, 2018.

17. The solar power may reach to the highest capacity during certain time of day and the generation of power may exceed the contract demand whereas in case of wind is not the same. Therefore, the said Order dated July 12, 2018 in Case No. 119 of 2018 cannot be made applicable to the wind power generators i.e. the Appellant in the instant case.

18. The Appellant had sought open access from its Wind Power Projects with capacity of 3.40 MW in respect of Unit I and 3.42 MW in respect of Unit II. The capacity utilization factor (CUF) of such windmills being old is only 17% as is evident from the details of generation for past 3 years. Even in Order dated November 24, 2003, the CUF of Group III Projects was benchmarked at 20%. The contract demand of the Appellant in respect of Unit No. I is 2000 KVA (consumer no. 279249004477) equivalent to 2.0 MW and Unit No. II is 1495 KVA (consumer no. 279249007650) equivalent to 1.495 MW, therefore, the wind power generated will be within such contract demand at benchmark CUF (3.4 MW x 20% = 0.68 MW and 3.42 MW x 20% = 0.684 MW). If actual CUF is considered, the wind power generated will be further lowered to the tune of only 0.578 MW for Unit I and 0.5814 MW for Unit II, which is well within contract demand. Therefore, the contention of MSEDCL that the resultant power flow cannot be accommodated is incorrect as irrespective of the source the Appellant is entitled to

consume till its contract demand which is 2.0 MW for Unit No. I and 1.495 MW Unit No.II. Since the open access is well below such contract demand it is easily subsumed therein and was clarified in various letters and emails sent by the Appellant to the Respondent No. 2/MSEDCL.

19. The State Commission vide Order dated June 27, 2017 in the case of Miscellaneous Application No. 12 of 2017 in Case No. 76 of 2017 in the matter of *Sai Wardha Power Generation Limited versus MSEDCL* directed MSEDCL to rectify the MTOA granted by it with reduction of contract demand while observing as follows:

> *"…. OA can be granted with the additional condition that the total power flow from MSEDCL and OA shall be restricted to the quantum of the technical/metering constraint*."

20. It is submitted that the salient scheme of the Electricity Act, 2003 is to liberalize generation, provide open access and captive generation. It is pertinent to note that open access was not allowed under the earlier regime. This position stands completely changed under the current the Electricity Act, 2003 which made provisions for open access and subsequently framed open access regulations. Therefore, non-granting of the MTOA is contrary and in gross violation of the provisions of the EA, 2003.

21. The term "open access" is defined under section 2(47) of the EA, 2003 to mean 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. Therefore, Respondent No. 2 being the Distribution Licensee is required to provide non-discriminatory MTOA to the persons applying for the same in accordance with the provisions of the Electricity Act, 2003 read with Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016 ("DOA Regulations") and therefore, the curtailment of the MTOA permission and denial is arbitrary and unjust. The only role of a Distribution Licensee is to ensure provision of non-discriminatory open access through use of their transmission lines or distribution system or associated facilities to wheel the power from a generator who is other than the Distribution Licensee to a consumer.

22. Section 42 of the Electricity Act, 2003 pertains to the duties of a Distribution Licensee and open access. Section 42 of the Electricity Act, 2003 is reproduced below for ready reference:

> *"Section 42. Duties of distribution Licensee and open access*
>
> *(1) It shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply and to supply electricity in accordance with the provisions contained in this Act.*
> *(2) 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 that such open access may be allowed before the cross subsidies are eliminated on payment of a surcharge in addition to the charges for wheeling as may be determined by the State Commission:

Provided further that such surcharge shall be utilised to meet the requirements of current level of cross subsidy within the area of supply of the distribution licensee:

Provided also that such surcharge and cross subsidies shall be progressively reduced and eliminated in the manner as may be specified by the State Commission:

Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.

(3) Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access.

(4) Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee

arising out of his obligation to supply……."

23. The Appellant submits that by unjustly curtailing MTOA quantum of the Appellant, Respondent No. 2 has failed in performing its duties under Section 42 of the Electricity Act, 2003 and is in violation of the provision thereof.

24. The Electricity Act, 2003 and the DOA Regulations framed thereunder and also the orders of the State Commission specifically provide for the option and freedom to the generators to supply electricity to any person including for self-use. The Electricity Act, 2003 and the Policies and Regulations framed there under enable consumers to get electricity supply through open access as per the open access regime introduced by the State Commission. Therefore, simpliciter curtailing the MTOA and denying the MTOA on the basis of some order which is not based on identical facts is unjustified and arbitrary. Without prejudice to the contention of the Appellant that the cap of 10% on banked energy is only for sale to MSEDCL, it is submitted that the Respondent No. 2 has not been able to establish single instance where the Appellant's Wind Power Project banked more than 10% of the energy at the end of each Financial Year, since May 2016 (the date from which MTOA and STOA to the extent of 3.40 MW for Unit I and 3.42 MW for Unit II is availed).An excel sheet detailing power generated by windmills for past 3 years and power consumed by the Appellant, which justifies two aspects i.e. (a) the Appellant has not exceeded its contract demand from 2000 KVA in respect of Unit I and 1495 KVA in respect of Unit II; and (b) in any financial year the Appellant has not banked more than 10% of the

wind power generated from May 2016 when it started availing open access to the tune of 3.40 MW for Unit I and 3.42 MW for Unit II.

25. The average consumption of Appellant in respect of Unit I is 35% more than the generation of its 3.40 MW Wind Power Projects and in respect of Unit II is 18% (for last 2 years it is more by 30%)more than the generation of its 3.42 MW Wind Power Projects, during last 3 years.

26. The Appellant submits that MTOA to the Distribution Licensees' network and other networks is an option or right of the consumer. The Ministry of Law and Justice further opines that entities opting for open access have to merely give notice of their intention of use of network and upon such notice the distribution companies are duty bound to provide non-discriminatory open access to its network.

27. The Respondent No. 2 granted permission for the MTOA to the Appellant for 3.40 MW Wind Power Projects for Unit I and 3.42 MW Wind Power Projects for Unit II for self-use as specified above which was curtailed to 2.041 MW for Unit I and 2.041 MW for Unit II vide the Respondent No. 2's emails dated October 29, 2018 and the revision was made applicable retrospectively w.e.f. October 01, 2018. The curtailment was on the basis of the Order dated July 12, 2018 in Case No. 119 of 2018 which is not applicable in the present matter as the Appellant being a wind power generator has completely different generation pattern than the petitioner therein who has solar power plant. It is submitted that retrospective

curtailment of MTOA is unheard of and unjustified. The revision in the MTOA quantum of the Appellant is unjust which will cause grave harm and losses to the Appellant.

28. The Appellant vide letters dated November 1, 2018 stated their grief and non-acceptance of the revision of the MTOA quantum by MSEDCL. The Appellant clearly put forth the contention that the curtailment of the MTOA which was based on the Order dated July 12, 2018 will not be applicable to the wind power generator as it is only applicable to solar. However, instead of restoring the MTOA to 3.40 MW for Unit I and 3.42 MW for Unit II, MSEDCL vide its email dated March 6, 2019 rejected MTOA application nos. 7880 and 7882 both dated October 3, 2018 on the alleged grounds that the open access contract demand sought is exceeding the allowable open access contract demand in view of Order dated July 12, 2018 in Case no. 119 of 2018 read with Order dated November 24, 2003 of the Respondent No. 1.

29. The Appellant vide its letters dated March 11, 2019 replied to the aforesaid emails of MSEDCL in denial and explained that the analogy of Order dated July 12, 2018 in Case No. 119 of 2018 being applicable to wind power plants is incorrect. The Appellant further explained that even the 10% ceiling in the Order dated November 24, 2003 is for purchase of power by MSEDCL of banked power and by no stretch of imagination a cap on any generator to bank the power. The Order dated November 24, 2003 provides that any banked power beyond 10% at the end of financial year shall be purchased by the Utility at a rate equivalent to the weighted average fuel cost for the year. The relevant portion

of and the Order dated November 24, 2003 is reproduced below for ready reference:

> *"Banking of energy delivered to the grid for self-use and or sale to third party shall be allowed any time of the day and night subject to the condition that surplus energy (energy delivered into the grid but not consumed) at the end of the financial year shall not be carried over to the next year.*
>
> *Surplus energy at the end of the year, limited to 10% of the net energy delivered by the developer to the grid during the year shall be purchased by the Utility at the lowest TOD slab rate for HT energy tariff applicable on the 31st March of the financial year in which the power was generated.*
>
> *In the event of unforeseen and force majeure conditions, surplus energy at the end of the year in excess of the 10% limit specified above shall be purchased by the Utility at a rate equivalent to the weighted average fuel cost for the year as determined by the Commission in the Tariff Order.*
>
> *The payment of surplus energy shall be made to the developer/owner and not to consumer in case of third party sale."*

30. The Appellant further stated in the said letters that though such banking facility is available, the Appellant has been consuming wind power generated from its projects in full since May 2016. Furthermore, the Appellant called upon the Respondent No. 2 to process the MTOA Application ID 7880 and issue MTOA permission for 1.6 MW capacity w.e.f. April 01, 2019 in respect of Unit I and to process the MTOA Application ID 7882 and issue MTOA Permission for 0.92 MW Capacity w.e.f. April 01, 2019 in respect of Unit II. The Appellant thereafter vide its letters dated

April 21, 2019 once again called upon MSEDCL to grant MTOA permissions as sought from April 1, 2019 and also highlighted that the Chavaneshwar and Patan Projects were set up specifically for self-use.

31. The Respondent No.2/MSEDCL vide its email dated May 8, 2019 informed the Appellant that during scrutiny of the MTOA Application ID 7880 it was found that the SEM installed at wind generation end is at the feeder end with other wind generators connected on the same feeder and not individual SEM and that, as per Regulation 17.1 of DOA Regulations, all open access consumers and generating stations shall install Special Energy Meters ('SEM's), thereby rejecting MTOA Application ID 7880.

32. Immediately on issue of Circular dated November 28, 2018 bearing no. CE/COM/OA/SEM/ 27786, the Appellant undertook to install such individual SEMs and called upon MSEDCL to provide meter specifications and other details.

33. The Respondent No. 2 thereafter took inspection of the Appellant's site only on April 4, 2019. Thereafter vide letter dated April 12, 2019 MSEDCL's head office provided details for installation of meter to MSEDCL's circle office vide Format I dated April 4, 2019. Immediately on receipt of Format I, the Appellant accepted the proposal of Shree Dhananjay Electricals vide their letter dated April 5, 2019 and also made payments to the vendor for the meter.

34. It is submitted that such curtailment as well as denial is unjustified, arbitrary and not in consonance with applicable laws.

35. The State Commission vide its Order dated April 5, 2019 in the matter of ArvindCotsyn (India) Limited i.e. Case No. 34 of 2019 held that MSEDCL will grant open access till installation of SEM in view of the difficulties and time involved for installation of SEMs. The relevant portion of the said Order dated April 5, 2019 of the Respondent No. 1 is reproduced for ease of reference:

ORDER

1. *Case No.34 of 2019 is partly allowed.*

2. *In Case, consumer/generator opts for installation of Special Energy Meter by the Maharashtra State Electricity Distribution Company Ltd. at former's cost, latter shall install the same as per provisions of the DOA Regulations, 2016 within a period of six months.*

3. *In the intervening period till installation of Special Energy Meter, Maharashtra State Electricity Distribution Company Ltd. shall not deny Open Access to such consumer/generator.*

36. Considering the fact and circumstances of the instant matter it is obvious that the Appellant had already taken reasonable steps towards installation of SEM's and the delay cannot be attributed to the Appellant. Therefore, the Respondent No. 2 ought not to have denied open access to the Appellant and the Appellant is entitled to reliefs sought herein.

37. It is submitted that the Practice Directions dated October 19, 2016issued by Respondent No. 1 on processing the MTOA applications ("Practice Directions, 2016")inter alia deals with the

issue of restricting open access to the extent of contract demand. The relevant extract from Practice Directions, 2016 is reproduced below for ready reference:

> "……. the DOA Regulations do not limit the quantum of power to be sourced through Open Access to the consumer's Contract Demand. *Regulations 8.10, 12.1 and 12.2 of the DOA Regulations specify that the Distribution Licensee has to verify the feasibility of infrastructure/capacity of the distribution system, and grant Medium or Short Term Open Access if the* resultant power flow can be accommodated in the existing distribution system. If the existing distribution system/metering system requires any augmentation or upgradation, the Licensee has to communicate it to the Open Access Applicant and follow the procedure specified in the Commission's Electricity Supply Code and Standards of Performance Regulations. Under Regulation 4.2 of the DOA Regulations, whether or not to seek an increase, decrease or retain his level of Contract Demand is entirely left to the consumer and is governed by the relevant provisions of the Supply Code and Standards of Performance Regulations"

38. Even Regulation 8.10 of the DOA Regulations provided that the Nodal Agency cannot deny open access if the resultant power flow can be accommodated in the system. Regulation 8.10 of the DOA Regulations is reproduced below:

> *"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."*

39. In view thereof, unless the Respondent No. 2 can by documentary evidence prove that the power sought under open access cannot be accommodated the permission for open access cannot be

denied. It is evident from the submissions of the Appellant that there is no constraint in accommodating such power since May 2016 i.e. from the date the Appellant started consuming power from its 6 Wind Power Projects (3 each for Unit I and Unit II) under open access. Therefore, the stance of the Respondent No. 2 is arbitrary, unjustified and contrary to the applicable laws.

40. The Appellant submits that Issue (C) of the Practice Directions dated March 8, 2017 issued by the Respondent No. 1 on processing of open access applications ("Practice Directions, 2017")further dealt with restriction of open access up to the current / potential transformer ("CT/PT") capacity of consumer metering. Issue (C) of the Practice Directions, 2017 is reproduced below for ready reference:

> *"a) The earlier Practice Directions dated 19.10.2016 had reiterated the provisions of the Regulations, namely that they do not restrict the quantum of power to be sourced through Open Access to the Consumer's Contract Demand, subject to availability of the necessary infrastructure and capacity of the Distribution System (which would include the CT/PTparameters of Consumer metering) …….*
> *Hence, Open Access permission may be required by a RE Generator for a capacity much higher than the stated drawal requirement of the Open Access Consumer. The DOA Regulations provide for banking of RE generation in excess of that requirement. While the drawal of such RE power by the Consumer would be limited to his stated requirement, any excess power that is generated is absorbed by the Distribution Licensee and may be drawn subsequently by the Consumer through the facility of banking and be adjusted accordingly. In these circumstances, CT/PT augmentation will not be required unless the existing Metering*

arrangement is not adequate for the stated STOA/MTOA drawal requirement of the Consumer.
b) In case it is not adequate, the Distribution Licensee is expected to inform him of the augmentation or upgradation required so that he may consider doing so in future."

41. It is submitted that in view of the above, the Appellant being a generator of renewable energy power is eligible for the MTOA permissions for the capacities which were sought in its application. It is also submitted that the Respondent No. 2 has not called upon the Appellant to augment CT/PT or upgrade metering system. The Appellant's Unit I is availing open access to the tune of 3.40 MW since May 2016 and Unit II is availing open access to the tune of 3.42 MW since May 2016 without any metering or CT/PT constraints and therefore, it is clear that there is no such constraint as alleged.

42. It is submitted by the Appellant that in view of the unambiguous Practice Directions issued by Respondent No. 1, the curtailment on the part of Respondent No. 2 in the MTOA permissions granted to the Appellant from October 1, 2018 is arbitrary and unjustified and with the ulterior motive to harass the Appellant.

43. It is submitted that in Order dated May 04, 2018 in Case No.76 of 2017 in the matter of *Sai Wardha Power Generation Limited versus MSEDCL*, the State Commission held as under:

"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.

44. The Appellant submits that in Order dated May 04, 2018 in Case No. 36 of 2017 in the matter of *Classic Citi Investments Private Limited versus MSEDCL*, the State Commission reiterated as under:

> *"11.12 …… MSEDCL ought not to have reduced or denied the Open Access quantum only on its unilateral presumption that it was sought in addition to the Contract Demand. CCIPL could have then taken a call on its power requirement vis- a- vis the purported infrastructure constraints, and planned its power arrangements accordingly. Had MSEDCL exercised due diligence on this count, it 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 CCIPL has submitted. Hence, the Commission had suggested that an undertaking be taken from CCIPL in this regard"*

45. The Appellant submits that in light of the directions of the Respondent No. 1 in the abovementioned cases, the Respondent No. 2 is bound to restore MTOA permission to the Appellant for the applied capacity of 3.40 MW for Unit I and 3.42 MW for Unit II from October 1, 2018 as well as for future period as the total power drawn by it through MTOA will be sufficient and the Appellant shall not exceed its total contract demand. It is repeated and reiterated

that the power generated and consumed by the Appellant clearly establishes that except for F.Y.2016-17 for Unit II (power banked in this F.Y. was 4.24% but no Bill/Invoice raised on MSEDCL for balance 4.24% units as is permissible by DOA Regulations) there is no power banked on financial year basis.

46. It is submitted that due to such defiant acts of the Respondent No. 2, RE generators such as the Appellant are deprived of their right to seek adequate MTOA and the power injected in the grid is consumed free of cost by Respondent No. 2. The Appellant submits that the stand adopted by the Respondent No. 2 for curtailing the MTOA quantum of the Appellant is causing grave harm, irreparable loss and injury to the Appellant.

47. The Respondent No. 1 vide its Order dated July 12, 2018 directed the Respondent No. 2 to examine the issue afresh in a holistic manner and moreover such order was an order in personam and not an order in rem. Hence the curtailment and denial of MTOA of the Appellant is unjustified and is to be examined considering the demand, type of generation and need of the MTOA consumer. It is submitted that, Respondent No. 2 cannot apply a straight jacket formula to the Appellant without considering the facts which are completely different from that in Case No. 119 of 2018. Without prejudice to the foregoing, if the consumer agrees to subsume open access demand in contract demand there cannot be any metering constraint as alleged since the consumer i.e. the Appellant herein if not granted open access power it will still consume power from MSEDCL till contract demand with the same metering arrangement. Therefore, curtailing OA on some

presumptions is unjustified arbitrary and contrary to the principles of open access as envisaged under the EA, 2003.The Respondent No. 2 has not been able to cite any instance since May 2016 if the Appellant has ever exceeded the contract demand.

48. It is further submitted that assuming but not admitting that the wind power plants of the Appellant generate more than CUF, the injection of such wind power is at generating sub-station at 33 KV, (which is a part of Western Grid), has adequate capacity to absorb such power. The 'Drawl Point' at which power is drawn by the Appellant (which is also a part of Western Grid) has the CT/PT of adequate Capacity (as technically specified by the Circle Office of MSEDCL Sangli at the time of installation of this CT/PT) and the Appellant has been drawing power through the same CT/PT since May 2016. Further the Appellant has been at the same time availing open access to the tune of 3.40 MW for Unit I and 3.42 MW for Unit II from its Wind Power Projects without any technical constraints. The banking of power is mere accounting and therefore, the resultant power flow at the drawl point is to be determined only on the basis of consumption of the Appellant at drawl point, which has not exceeded the contract demand since May 2016, the period from which the Appellant is availing open access to the tune of 3.40 MW for Unit I and 3.42 MW for Unit II from its Wind Power Projects. Therefore, the assumptions of the Respondent No. 2 to deny MTOA and curtail the same is unjustified, arbitrary and not in consonance with applicable laws.

49. It is submitted that despite various meetings and aforesaid letters dated November 1, 2018, March 6 and April 21, 2019, the

Respondent No. 2 has till date neither replied to such letters nor even considered the submissions of the Appellant and therefore, the Appellant was constrained to approach the Respondent No. 1 for redressal of its grievances in Case No. 119 of 2019.

50. It is submitted that there were developments that transpired after filing of the Petition (Case No. 119 of 2019). The Commission through its Notification dated June 08, 2019 amended the existing DOA Regulations and inserted additional clause 17.8 (a) the extract of which is reproduced below as follows:

> *"A new clause 17.8(a) shall be inserted below the existing Regulation 17.8 and above the existing Regulation 17.9 as follows:*
>
> *17.8(a). Generating Stations having multiple generating units wherein one or more units are contracted under captive route or third party route, such Generating Company, shall install at their cost, Special Energy Meters, separately for each generating unit, within six months from the notification of these Regulations,*
> *in accordance with requirements stipulated by the Nodal Agency and/or MSLDC.*
>
> *Provided that the installed Special Energy Meters shall be available for inspection by the Distribution Licensee or the MSLDC at any time:*
>
> *Provided that if generator opts for installation of Special Energy Meter by the Distribution Licensee at the former's cost, latter shall install the same. In the intervening period till*

installation of Special Energy Meter, Distribution Licensee shall not deny Open Access to such consumer/ generator.

Provided further that such Generating Stations connected to Transmission or Distribution System, as the case may be, shall bear the cost of communication arrangements, for its integration into Control Centre as per the technical specifications stipulated by the Distribution Licensee and/or MSLDC".

51. It is submitted that in view of the above amendment, the Appellant addressed letters dated July 1, 2019 in respect to the Application IDs 7880 and 7882 requesting the Respondent No.2 to grant MTOA to the Appellant till the installation of SEM is completed in view of the recent amendment. The Appellant also requested Respondent No. 2 to give adjustment of banked units and paid the bills under protest. The Appellant and Respondent No. 2 filed their reply and rejoinders on July 9 and 25, 2019, respectively. Thereafter the hearing was held on August 9, 2019.

52. It is submitted that vide letters dated August 14, and August 23, 2019, Appellant requested MSEDCL to grant MTOA permission and also intimated about payment made under protest. Respondent No.2 granted such MTOA permission dated August 9, 2019 for application No. 7880 only to the extent of 0.24 MW which was received by Appellant only on August 23, 2019.

53. The Appellant brought such facts to the notice of State Commission including the audacious approach of MSEDCL to not

only curtail open access but also change the quantum of open access applied by the Appellant vide its additional submissions dated September 3, 2019.

54. The Appellant submits that vide Impugned Order dated September 9, 2019, the reliefs sought for in Case No. 119 of 2019 were partially allowed in respect of the open access which was wrongfully denied for want of installation of SEM, while the reliefs sought for in respect of banking of power as well as wrongful curtailment were rejected by Respondent No. 1.

55. In the facts and circumstances mentioned above, the Appellant has preferred the present Appeal against the Impugned Order dated 09.09.2019 passed by the State Commission.

Submissions of the Respondent No.2

56. MSEDCL/the Respondent No.2submitted that the Appellant herein filed Case No. 119 of 2019 before the MERC on three (3) issues which are reproduced as under:

(I) Banking and its concept

(II) Alleged curtailment of contract demand on the philosophy of open access contract demand being added to MSEDCL contract demand

(III) Denial of open access on the issue of individual SEM metering

57. MSEDCL submits that on the above three (3) issues the. MERC passed the impugned Order holding the first two (2) issues in favour of MSEDCL and the last issue in favour of the Appellant herein. Being aggrieved out of the first two (2) issues held against it, the Appellant has preferred the present Appeal

(I) Banking and its concept:

(i) The *Wind Tariff Order dated 24 November, 2003* passed by the MERC states that a generator cannot bank any excess power more than 10% generation from the plant "At any point in time".

(ii) For the sake of convenience, the relevant portion of the *Wind Tariff Order dated 24 November, 2003* as relied upon by MSEDCL is reproduced as under:

> *"…2.4.3 ……*
>
> *A developer who opts for self-use/sale to third party is expected to limit the project size such that the energy provided can be availed by him in full. However, inability to consume the energy fed into the grid fully due to factors beyond control cannot be ruled out, especially since the generation of wind power is to some extent unpredictable due to its dependence on nature. ……..*

The Commission understands that the developers generally plan the size of their wind projects after taking into account their own energy requirement as well as that of the third party purchaser if it is contemplated. Therefore, under normal circumstances, the developer will not have to bank a substantial portion of the energy with the utilities. Even if the developer had to bank substantial portion in one month, he could use it in the next month. This would mean that it would be reasonable to assume that more than 10% of total energy generation from the project will not be banked with the utility at any point of time. Therefore, the Commission has decided that upto 10% of total energy generation from the project banked with the utility will be purchased by the utility at the rate specified by the Commission."

(iii) It is pertinent to note that in the entire Petition filed by the Appellant before the MERC there was no detail or evidence attached that it does not or had not banked any excess power more than 10% generation from the plant "At any point in time".

(iv) Needless to state that Banking happens on 15 minute time block basis which means that the Appellant would

have to evidence that its generation for a given 15 minute time block and banking which it avails for such time block does not exceed 10% “At any point in time”.

(v) The Appellant has chosen to once again agitate the *Wind Tariff Order dated 24 November, 2003* without understanding the true meaning and intent of the said order. MSEDCL submits that the Appellant has conveniently chosen to forget that “Banking” as a concept was only introduced by the MERC vide the *Wind Tariff Order dated 24 November, 2003.* It is an un-disputed fact that the Appellant being a renewable generator also avails the facility of “Banking”. Hence, once the Appellant is amenable to “Banking” and takes the benefit of banking then it cannot in any manner selectively rely upon the *Wind Tariff Order dated 24 November, 2003*.

(vi) It is further most respectfully submitted that that the Appellant has also tried to distinguish the Order dated 12.07.2019 passed by the MERC in Case No. 119 of 2018 *(“Roha Dychem Pvt. Ltd. Vs MSEDCL”)* and Order dated 14.02.2019 in Case No. 367 of 2018 *(“SEP Energy Pvt. Ltd Versus MSEDCL”)* by stating that such orders only apply to “Solar” Projects and not “Wind Energy Projects”. However the Appellant has conveniently forgotten the order dated 18.04.2019 in Case No. 19 of 2019 (Arvind Cotsyn) which was a “Wind Energy Generator”, which also emphasizes the same

principles of Banking. MSEDCL most respectfully submits that the concept of (i) Banking, (ii) In-firm nature of projects recognized as renewable energy eligible for banking clearly proves the following:

(a) That banking is allowed on account of in-firm nature of renewable projects.
(b) If a renewable project is allowed banking then it cannot be treated as firm power.
(c) The Appellant has been availing the benefit of banking meaning thereby that it is in-firm power.
(d) Once facility of banking is availed then mandatory rules of banking framed by the MERC has to be followed.
(e) If at the end of financial year, any banked energy over and above 10% of generation is lapsed then the Commission's mandate that more than 10% energy shall not be banked "At any point in time" also needs to be followed as both the mandates evolves from the same *Wind Tariff Order dated 24 November, 2003*.
(f) As per *Wind Tariff Order dated 24 November, 2003* Project size of a generator should be limited to its utilization/consumption. However, in the present case, the project size is more than double the quantum of utilization.
(g) Time and again through various orders passed by the Commission on the above issues for "Solar and Wind Generators" and as recently as on 18.04.2019

vide order in Case No. 19 of 2019 (ArvindCotsyn) which was a "Wind Energy Generator", the MERC has reiterated and confirmed the principles of the *Wind Tariff Order dated 24 November, 2003* on the issue as (i) Excess project size, and (ii) Philosophy of Banking.

(vii) In view of the above, MSEDCL would like to rely upon the Order dated 12.07.2019 in Case No. 119 of 2018 *("Roha Dychem Pvt. Ltd. Vs MSEDCL")* wherein the MERC has categorically held as under:

> *16. In the present Case, the Commission notes that the Contract Demand of RDPL is 2266 kVA with MSEDCL and it has applied for Open Access of 10 MW from its Solar PV project for self-use. If the CUF of Solar PV Project is considered as 19% (On an annual basis), the Open Access Demand becomes 1.9 MW. But the actual generation from this Solar PV Project may reach up to 7 to 8 MW during highest radiation time of day, i.e. in the Noon (Considering 70 to 80% efficiency of the Solar Panels). In this Case the Open Access generation will become 8 MW for particular instant, which is much more than the Contract Demand of the RDPL.*
>
> *17. The Commission notes that in such scenario there could be actual utilisation approximately 8*

MW of the transmission/ distribution corridor for wheeling the power. As against the contract demand, this is clearly an excessive resultant power flow. In such cases, where excessively generated RE power cannot be fully availed, generator has provision of banking such excess RE power.

18. *The Commission notes that the issues are related to the banking facility available to Wind Projects in the Wind Tariff Order dated 24 November, 2003:*

> *"…2.4.3 ……*
>
> *A developer who opts for self-use/sale to third party is expected to limit the project size such that the energy provided can be availed by him in full. However, inability to consume the energy fed into the grid fully due to factors beyond control cannot be ruled out, especially since the generation of wind power is to some extent unpredictable due to its dependence on nature. ……..*
>
> *The Commission understands that the developers generally plan the size of their wind projects after taking into account their own energy requirement as well as that of*

the third party purchaser if it is contemplated. Therefore, under normal circumstances, the developer will not have to bank a substantial portion of the energy with the utilities. Even if the developer had to bank substantial portion in one month, he could use it in the next month. This would mean that it would be reasonable to assume that more than 10% of total energy generation from the project will not be banked with the utility at any point of time. Therefore, the Commission has decided that upto 10% of total energy generation from the project banked with the utility will be purchased by the utility at the rate specified by the Commission."

(viii) It is pertinent to mention that in view of above dispensation *("Roha Dychem Pvt. Ltd. Vs MSEDCL")* passed by this Commission, MSEDCL granted OA (permission allowable limit) beyond CD and never restricted OA permission to the extent of Contract Demand. The entire allegation of the Appellant that MSEDCL has restricted open access permission to the tune of its contract demand is absolutely false, incorrect and baseless. The below table would clearly evidence the said fact:

S.NO	Unit	Project Size (MW)	Contract Demand (KVA)	Open Access allowed (MW)
1.	Unit-1	3.40	2000 KVA	2.041
2.	Unit-2	3.42	1495 KVA	2.041

(ix) It is pertinent to mention that the views expressed by the MERC vide Order dated 12.07.2019 in Case No. 119 of 2018 *("Roha Dychem Pvt. Ltd. Vs MSEDCL")* was once again reiterated and affirmed by the MERC vide Order dated 14.02.2019 in Case No. 367 of 2018 *("SEP Energy Pvt. Ltd Versus MSEDCL").* The relevant excerpts of the said Order dated 14.02.2019 in Case No. 367 of 2018 *("SEP Energy Pvt. Ltd Versus MSEDCL")* is reproduced as under:

> *19. The Commission observes that in the instant Case, SEP Energy has applied for Open Access for more than its contract demand. Also, SEP Energy has raised the issue that banking facility would not be available to it, if such applied open access quantum is allowed at par with its contract demand. The Commission observes that both these issues raised by SEP Energy were also raised in the Roha Dyechem Order. Commission has clearly ruled in that case that the provision relating to banking of infirm wind energy is to ensure that instead of lapsing any*

excess generation due to climatic conditions, it could be made available for use subsequently when the generation falls short due to the same climatic conditions. However, such adjustment of wind energy generation through banking route is available only on the margin of its contract demand. The regulation does not intend that an excessive capacity should be built by consumer over and above its contract demand so as to use banking facility to adjust over generation due to oversized generation plant against the total contract demand with the MSEDCL. Therefore, Commission intended that the banking facility is intended to be used for adjusting the infirm injection only at its margin. Petitioner has a contract demand of 1.6 MW whereas he has installed capacity of 4.225 MW from wind generation for captive use. MSEDCL considering the margin for resultant power flow of 10 % has allowed petitioner to draw upto 2.514 MW of power. Installing such captive generation capacity which is more than double the contract demand is clearly not meant to be used for adjusting the infirm availability on margin. Hence, the Commission is of the view that dispensation given by the Commission in Roha Dyechem Order is squarely applicable to the instant Case also. Thus, the Commission is not inclined to accept the contentions of SEP Energy.

(x) This State Commission vide order dated 18.04.2019 in Case No. 19 of 2019 (Arvind Cotsyn) which was a "Wind Energy Generator" clearly held as under:

9.10 The Commission observes that in RohaDychem Order and thereafter in SEP Energy Order it had accepted the MSEDCL submission regarding reduction of open access contract demand. The relevant paraof the SEP Energy Order is reproduced as under:

19. The Commission observes that in the instant Case, SEP Energy has applied for Open Access for more than its contract demand. Also, SEP Energy has raised the issue that banking facility would not be available to it, if such applied open access quantum is allowed at par with its contract demand. The Commission observes that both these issues raised by SEP Energy were also raised in the RohaDyechem Order. Commission has clearly ruled in that case that the provision relating to banking of infirm wind energy is to ensure that instead of lapsing any excess generation due to climatic

conditions, it could be made available for use subsequently when the generation falls short due to the same climatic conditions. However, such adjustment of wind energy generation through banking route is available only on the margin of its contract demand. The regulation does not intend that an excessive capacity should be built by consumer over and above its contract demand so as to use banking facility to adjust over generation due to over sized generation plant against the total contract demand with the MSEDCL. Therefore, Commission intended that the banking facility is intended to be used for adjusting the infirm injection only at its margin. Petitioner has a contract demand of 1.6 MW whereas he has installed capacity of 4.225 MW from wind generation for captive use. MSEDCL considering the margin for resultant power flow of 10 % has allowed petitioner to draw upto 2.514 MW of power. Installing such captive generation capacity which is more than double the contract demand is clearly not meant to be used for

adjusting the infirm availability on margin. Hence, the Commission is of the view that dispensation given by the Commission in RohaDyechemOrder is squarely applicable to the instant Case also. Thus, the Commission is not inclined to accept the contentions of SEP Energy. [Emphasis added]

9.11 In the instant Case, Petitioner has a contract demand of 2400 kW whereas it has installed capacity of 7650 kW from wind generation for captive use. MSEDCL considering the margin for resultant power flow of 10 % has allowed Petitioner to draw upto 3636 kW of power. Installing such captive generation capacity which is more than double the contract demand is clearly not meant to be used for adjusting the infirm energy by invoking banking provisions which are essentially to be used for adjusting excess generation only on margin. Hence, the Commission is of the view that dispensation given by the Commission in Roha Dyechem Order and SEP Energy Order is squarely applicable to the instant Case also. Thus, the Commission is not inclined to accept the contentions of Petitioner on this issue.

9.12 Also, as regards the directives of examining the issue afresh in the holistic manner, the Commission is of the view that MSEDCL has complied with the directives of the Commission in this regard, which can be inferred from the very fact that MSEDCL had considered a margin above the CD (in the instant case it has kept a margin of 1.246 MW (3.646 MW minus 2.4 MW) by taking into account the banking provisions and loss load factor and existing metering infrastructure arrangement. Thus, in windy season the generators are sufficed with the margin that they are allowed under the banking provisions of DOA Regulations, 2016.

9.13 The Commission further observes that the stand taken by MSEDCL while providing the margin as discussed above is in tandem with the heavy penetration of the wind generators during the windy seasons which has resulted in increase of power purchase cost to MSEDCL during the off windy seasons. This can be explained from the fact that Wind generators injects the large amount of energy in the grid in windy seasons and banked the same with Distribution Licensees. At this time, the demand of the Distribution Licensees is also low and it has to back down its thermal power generations. However, during the summer period, when the

wind generation is also low the Distribution Licensees too have their peak demand. Also, during this period, the wind generators intends to use their banked power. Due to peak demand of Distribution Licensees, it has to purchase high cost of power which disturbs the power purchase planning of the Distribution Licensees.

9.14 The Commission further observes that one of the reasons to deviate from its schedule by the State is due to high penetration of wind and solar power which impacts the common consumers of MSEDCL. In the instant Case if the Petitioner is allowed to inject the energy upto its installed capacity i.e 7.650 MW for balancing CD of 2.4 MW the excessive generation during the windy seasons amounts contributes for State deviation. Also, considering the deviation due to infirm nature of Wind and Solar Power , the Central Electricity Regulatory Commission (CERC) vide its notification dated 6 May, 2016 has amended the CERC (Deviation Settlement Mechanism and related matters) (Third amendment) Regulations, 2016 and had increased deviation limit capacity for RE rich State .

9.15 The Commission observes that MSEDCL has envisaged the changing scenario as regards the heavy penetration of infirm generation above the

contracted capacity has well justified locus since the excessive generation from these wind generators beyond the scope of allowed banking can be detrimental to the grid. The grid cannot be put to ransom and the safety and security of the grid cannot be compromised and has to be given paramount importance.

9.16 In view of the discussions in Para 9.6 to 9.11, the Commission is of the view that there is no merits in the contentions of the Petitioner as regards the unilateral reduction of CD and allowing open access with the excess installed capacity as it was allowed prior to Roha Dyechem Order. Also as discussed above in Para. 9.12 to 9.15, the Commission is also of the view that MSEDCL has taken a holistic view by balancing the interests of the common consumers (optimum power purchase planning) as well as the RE generators (considering 10 % banking as allowed in Wind Tariff Order as well as DOA Regulations, 2016).

(ii) Alleged curtailment of contract demand on the philosophy of open access contract demand being added to MSEDCL contract demand:

(xi) It is most respectfully submitted that reliance placed by the Appellant on the Order dated 27.06.2017 passed in

M.A No. 12 of 2017 in Case No. 76 of 2017 in the matter of "Sai Wardha Power Generation Limited versus MSEDCL" is absolutely incorrect and baseless more so in view of the following facts:

(a) Order dated 27.06.2017 passed in M.A No. 12 of 2017 in Case No. 76 of 2017 was applicable to "Conventional Power/Firm Power".

(b) Issue in dispute was whether the open access quantum gets subsumed in contract demand or whether open access quantum was to be treated over and above contract demand as was interpreted by MSEDCL.

(c) In the present case, no such scenario or interpretation is there.

(d) The present case simplicitor rests on the concept of "Banking" and the "Permissible limit of open access" to be granted to "Renewable Generators".

(xii) MSEDCL most respectfully submits that it has not curtailed the open access quantum of the Appellant based on the above concept which stands clarified by MERC but has allowed open access even beyond the contract demand as per the dispensation granted by this Commission vide Order dated 12.07.2019 in Case No. 119 of 2018 *("RohaDychem Pvt. Ltd. Vs MSEDCL"),* Order dated 14.02.2019 in Case No. 367 of 2018 *("SEP Energy Pvt. Ltd Versus MSEDCL")* and Order dated

18.04.2019 in Case No. 19 of 2019 (Arvind Cotsyn) which was a “Wind Energy Generator”.

(xiii) MSEDCL most respectfully submits that taking into consideration the above facts the MERC passed an Order in favour of MSEDCL on the above two (2) issues. MSEDCL craves leave of this Tribunal to rely and refer on the applicable parts of the impugned Order passed by the MERC during the course of the proceedings.

Finding and Analysis

58. We have heard the Appellants and the Respondent and have gone through their written submissions and also the material placed before us by all the parties. The issue of curtailment of open access quantum, sought by the Appellant, revolves around the interpretation of the Wind Tariff Order 2003.

59. The Respondent DISCOM has interpreted the provision of banking given in the Wind Tariff Order 2003 in a manner that a RE generator cannot bank excess power more than 10% of the energy generated by the plant at any point in time. Based on this interpretation the DISCOM has curtailed the Open Access quantum sought by Appellant to contract demand with 10% margin.

60. The State Commission in their Impugned Order has decided that Installing such captive generation capacity which is more than

double the contract demand is clearly not meant to be used for adjusting the infirm energy by invoking banking provisions which are essentially to be used for adjusting excess generation only on margin of contract demand.

61. The Appellant has submitted that such interpretation made by the Respondent is wrong and erroneous and State Commission should not have accepted such interpretation and should not have passed the Impugned Orders based on this interpretation.

62. The Appellant has submitted that the State Commission in their Wind Tariff Order, 2003 has decided that the RE Generators can bank the energy generated by them any time during day and night and balance at the end of the financial year will not be carried over to the next year and surplus energy at the end of the financial year, limited to 10% of the energy (kWh) fed into the grid during the financial year, will be purchased by the utility. The Appellant has submitted that the as per Wind Tariff Order 2003, banking period is one year and therefore the interpretation made by the Respondent is wrong and needs to be rejected.

63. We observe that the main issue in Appeal is as under:

Issue: Whether the provision of the banking as provided by the State Commission in their Wind Tariff Order dated 24.11.2003 passed by the State Commission are essentially to be used for adjusting excess generation only on margin?

64. The provision of banking of energy generated RE Projects has been made because of the infirm nature of RE Projects. It is important to have an understanding of infirm nature of RE project.

Infirm nature of RE Generation and concept of banking

65. All these appeals revolve around the concept of banking of energy generated by renewable energy sources. These renewable energy sources which include solar and wind are infirm sources of generation as they depend on the availability of wind and sunlight.

66. In the case of Solar Generators, on a normal sunny day, generation starts with the rising of the sun, and increases as the day progresses and generates at rated capacity at noon time and then starts reducing during the afternoon and stops generating with the setting of sun. During night, there being no sunlight there is no generation of electricity from solar plants. Even during the day, the generation may not always have the same pattern but may be affected with the presence of clouds and at times dipping to suddenly to low levels or even suddenly recovering to the pre-cloud conditions. During monsoon season the solar generation will be affected due to presence of clouds/ rains and would vary as per the availability of sunlight. As such its periodic, seasonal and intermittent and an infirm source of power.

67. In the case of wind generator also the generation of electricity happens only during the time when the adequate wind velocity is available. This adequate wind velocity is available only during few months in the year, called high wind season when the generation

of wind energy is maximum. Also, the wind generation may not be same throughout the day but varies as per the availability of wind. As such the wind generation is not same throughout the day and throughout the year. It varies as per the availability of wind, being maximum generation during the high wind season for few months in the year and at other times being either no generation or low generation. The wind generation is also periodic, seasonal and intermittent and is infirm source of power.

68. In the case of conventional plants (Non renewable Energy Sources) i.e., coal-fired, gas-fired etc. the generation follows the load which means the generation of electricity is in accordance with the requirement of load, if the load is more generation is increased to match with the load and when the load is less than the generation is reduced to match with the load. This is achieved by controlling the fuel injection as per the load requirement.

69. However, in case of renewable energy sources the situation is different as the generation depends on the availability of wind and solar which means that the RE Generators generates only and only when the adequate wind and sunlight is available so much so that the RE Generator generates electricity during periods when it is not required by the captive user.

70. The electricity has to be consumed as and when it is generated. Although there are technologies where the electricity can be stored in a small quantum however the technology for storing electricity

on large-scale on commercial basis is still under development. It is for this reason the provision of banking of energy generated by the RE Generators has been made.

71. This Tribunal has explained the concept of banking in its judgment in the matter of Tamilnadu State Electricity Board -v- Tamil Nadu Electricity Regulatory Commission, Appeal No. 98 of 2010 dated 18.03.2011; 2011 SCC OnLine APTEL 38 : [2011] and the relevant portion of the judgment reads as under:-

> ***"18.*** *Before getting into the merits of Appellant Board's arguments, on this issue let us understand the very concept of Banking of Electrical Energy. Banking of energy is analogous to small saving bank account in a financial bank. A person deposits his surplus amount in a saving bank account. He can withdraw his money from bank any time according to his requirement. For this deposited money, he earns some interest. The bank in turn gives loan to some other needy customer at a higher rate of interest. In this process, saving account holder as well as bank is benefited. Now come to electricity banking. Electricity is a commodity which cannot be stored. It is to be consumed at the very instant it is produced. Generation by Wind Energy Generators solely depends upon availability of wind at a particular velocity. In other words it is periodical in nature. Its generation is not constant even during a period of 24 hours of a day. It could be possible that it generates electricity when captive user does not require it. In such a case energy generator banks it with distribution licensee who supplies this energy to its consumers at applicable tariff. However, for returning the banked energy, Licensee may have to procure additional electricity from other sources. Unlike the Banks which pay interest to saving account holder, here the licensee, banker of electrical energy, earns interest on this banked energy. Thus banking rate electrical energy should be nominal. In the light of above fact situation, we would now examine the*

merits of Appellant Board's contentions vis-a-vis findings of State Commission on this issue.

.....”

Wind Tariff Order, 2003

72. The State Commission in their Impugned Orders has referred to its Wind Tariff Order, 2003 issued on 24/11/2003. This order starts with a para on Background wherein it has been recorded as under:

1. BACKGROUND

In 1996, the Government of Maharashtra announced its Policy for development of renewable energy projects. However, this policy failed to attract the private sector investment into the sector. Therefore, on March 12, 1998, the Government of Maharashtra issued revised policy based on Ministry of Non-Conventional Energy Sources (MNES), Government of India (GoI) guidelines for the wind power projects.

Banking of Energy: 100% delivered energy to MSEB grid from wind farm project could be banked for a period of 1 year. Any balance banked units will not be carried forward to the next year but these units would be purchased by MSEB at the prevailing power purchase rate.

The MSEB revised its policy for power generation projects based on wind and solar energy vide its circular No.Co.ord/cell/CPP/Gen./NCSE/37702 dated 5th October

2001. This revised policy of MSEB deviated from the policy of GoM in many respects. [Annexure-1 gives the deviation of MSEB policy from that of GoM and GoI.

73. At Para No. 2.4.3 the State Commission deals with the of the issue arising out of the policy of MSEB according to which the MSEB is not liable to purchase any energy once the producer opts for sale to third party. This para reads as under:

> ***2.4.3 Banking : Permitted any time of the day & night; balance at the end of year will not be carried over to next year; surplus energy at the end of the year not exceeding 10% of the net energy delivered to the grid during the year shall be purchased by the MSEB at the lowest TOD slab rate applicable on 31st March of the financial year in which the energy was banked***
>
> *MCCIA, Pune have stated that surplus energy at the end of the year (unavailed energy) should be purchased by MSEB.*
>
> *ShriShriramMadhukar Sane has stated that the TOD concept should be made applicable for the energy to be banked.*
>
> *REDAM, In WEA and The Indian Wind Turbine Manufacturers' Association, Chennai have stated that, while energy generation and supply from wind power projects would be normal for the period of project life, the same can not be true for the third party purchaser. The possibility of the purchaser not availing the delivered energy in full for reasons beyond control cannot be ruled out. Therefore, the balance quantum of surplus energy at the end of the year should be treated as sold to MSEB, and MSEB should pay the owner/developer for this energy at applicable rates without any ceiling limit either on quantum or on rate, particularly since MSEB would get additional revenue through sale of such energy every month.*

REDAM have further stated that the surplus energy at the end of the year should be to the account of developer/owner and not to the account of consumer.

In WEA have proposed that purchase of surplus energy at the end of the year in excess of 10% at a different rate may be considered, which will be fair to the producer and the utility.

Dr. Ashok Pendse, Mumbai Grahak Panchayat has proposed that banking should be allowed as per MSEB policy.

Commission's Ruling

The Commission notes that banking of energy is involved in case of self-use and sale to a third party. The MSEB, in the past, have adopted a policy according to which the MSEB is not liable to purchase any energy once the producer opts for sale to third party. Any surplus energy at the end of the year gets lapsed, and the producer of the energy does not get any compensation for it.

While the Commission shares the view of the MSEB that banking facility is being provided for the benefit of the developer and/or third party purchaser, and also that is infirm power which the MSEB can not schedule and optimally utilize, the Commission does not agree with the treatment mooted by the MSEB for the banked energy.

A developer who opts for self-use/sale to third party is expected to limit the project size such that the energy provided can be availed by him in full. However, inability to consume the energy fed into the grid fully due to factors beyond control cannot be ruled out, especially since the generation of wind power is to some extent unpredictable due to its dependence on nature. Matching of load and generation may not be possible. Further, the Commission's decision to allow settlement of energy on the basis of TOD time slots may create problems for matching load and generation. Any need to change third party purchaser may take time, during which the energy will be continually fed

into the grid and consumed by consumers for which the MSEB would be collecting revenue. Therefore, the Commission is of the view that it would not be prudent to allow this energy to get lapsed.

The Commission understands that the developers generally plan the size of their wind projects after taking into account their own energy requirement as well as that of the third party purchaser if it is contemplated. Therefore, under normal circumstances, the developer will not have to bank a substantial portion of the energy with the utilities. Even if the developer had to bank substantial portion in one month, he could use it in the next month. This would mean that it would be reasonable to assume that more than 10% of total energy generation from the project will not be banked with the utility at any point of time. Therefore, the Commission has decided that upto 10% of total energy generation from the project banked with the utility will be purchased by the utility at the rate specified by the Commission.

Further, the Commission feels that, under force majeure conditions, surplus energy in excess of 10% may be purchased by the Utility at a rate less than the rate applicable for the 10% limit as the Utility derives commercial advantage from such energy by selling each consumer.

In view of these considerations, the Commission has taken the following decisions:

i) Banking of energy will be permitted at any time of the day and night

ii) Balance at the end of the financial year will not be carried over to the next year

iii) Surplus energy at the end of the financial year, limited to 10% of the energy (kWh) fed into the grid during the financial year, will be purchased by the utility at the lowest TOD slab rate for HT energy tariff applicable on 31st March of the financial year in which the energy was banked.

iv) Surplus energy in excess of 10% of the energy fed into the grid during the year due to force majeure conditions shall be purchased by the utility at a rate equivalent to the weighted average fuel cost as determined by the Commission in the tariff order and in force from time to time.

v) The payment for surplus energy should be made to the developer/ owner and not to the consumer in case of third party sale.

74. From the reading of the Wind Tariff Order, 2003 we observe as under:

i) 100% delivered energy to MSEB grid from wind farm project could be banked for a period of 1 year. As such the period of banking is one year.

ii) The State Commission has permitted banking any time during the day and night.

iii) At para 2.4.3 the State Commission is dealing with the issue arising out of the policy of MSEB according to which the MSEB is not liable to purchase any energy once the producer opts for sale to third party.

iv) The State Commission has decided that Surplus energy at the end of the financial year, limited to 10% of the energy (kWh) fed into the grid during the financial year, will be purchased by the utility at the lowest TOD slab rate for HT energy tariff applicable on 31st March of the financial year in which the energy was banked.

v) From the narration of the State Commission wherein the Commission has discussed the plant size and also the need for making provision for procurement of unutilized energy generated by the Distribution company it is apparent that the whole discussion is primarily aimed at making an assumption regarding the extent of unutilised energy which will remain as balance at the end of the year. The whole discussion of energy generation, its utilisation and banking of unutilised energy is in terms of annual energy.

vi) The Commission understands that the developers generally plan the size of their wind projects after taking into account their own energy requirement as well as that of the third party purchaser if it is contemplated. Therefore, under normal circumstances, the developer will not have to bank a substantial portion of the energy with the utilities. Even if the developer had to bank substantial portion in one month, he could use it in the next month.

vii) Though there is no explanation for the use of the term '10%' of total energy however, it is evident that it is based on the assumption, that the State Commission has made, that normally unutilised energy will be of the order of 10% only. On the basis of this assumption the State Commission has decided that DISCOM should purchase this balance energy limited to the extent of 10%. Nevertheless one thing is very clear that the use of "10% of total energy" is in the context of total energy that will be generated by the RE generator during one full year. This fact is also apparent at many places from the Wind Tariff Order.

75. At para No. 16 and 17 of the Tariff Order the State Commission has recorded as under:

16. In the present Case, the Commission notes that the Contract Demand of RDPL is 2266 kVA with MSEDCL and it has applied for Open Access of 10 MW from its Solar PV project for self use. If the CUF of Solar PV Project is considered as 19% (On an annual basis), the Open Access Demand becomes 1.9 MW. But the actual generation from this Solar PV Project may reach up to 7 to 8 MW during highest radiation time of day, i.e. in the Noon (Considering 70 to 80% efficiency of the Solar Panels). In this Case the Open Access generation will become 8 MW for particular instant, which is much more than the Contract Demand of the RDPL.

17. The Commission notes that in such scenario there could be actual utilisation approximately 8 MW of the transmission/ distribution corridor for wheeling the power.As against the contract demand, this is clearly an excessive resultant power flow. ***In such cases, where excessively generated RE power cannot be fully availed, generator has provision of banking such excess RE power.***

76. The State Commission himself has noted that in cases where excessive generated RE power cannot fully availed, generator has provision of banking such excess RE power.

77. In view of the fact that the whole discussion, as given in the Wind Tariff Order, 2003 is about energy generation by the RE Generators, it's consumption for self-use/third party sale and the procurement of the balance energy is all in terms of annual energy generation and not in terms of instantaneous generation, it would be wrong to infer that the limitation of 10% is on banking of excess energy generated instantaneously by the RE generator. This is more so in view of the provision of banking of energy generated by

RE generator because if that be so then it would defeat the very purpose of provision of banking. As such we are of the opinion that the finding of the State Commission that the provision of the banking as provided by the State Commission in their Wind Tariff Order dated 24.11.2003 passed by the State Commission are essentially to be used for adjusting excess generation only on margin is wrong.

78. We have noted that the Practice Directions dated October 19, 2016 issued by Respondent No. 1 on processing the MTOA applications ("Practice Directions, 2016") *inter alia* deals with the issue of restricting open access to the extent of contract demand.

DOA Regulations do not limit the quantum of power to be sourced through Open Access to the consumer's Contract Demand. Regulations 8.10, 12.1 and 12.2 of the DOA Regulations specify that the Distribution Licensee has to verify the feasibility of infrastructure/capacity of the distribution system, and grant Medium or Short Term Open Access if the resultant power flow can be accommodated in the existing distribution system.

If the existing distribution system/metering system requires any augmentation or upgradation, the Licensee has to communicate it to the Open Access Applicant and follow the procedure specified in the Commission's Electricity Supply Code and Standards of Performance Regulations. Under Regulation 4.2 of the DOA Regulations, whether or not to seek an increase, decrease or retain his level of Contract Demand is entirely left to the consumer and is governed by the relevant provisions of the Supply Code

and Standards of Performance Regulations"

79. Even Regulation 8.10 of the DOA Regulations provide that the Nodal Agency cannot deny open access if the resultant power flow can be accommodated in the system. Regulation 8.10 of the DOA Regulations provide 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.

80. We have noted the submission of the Appellant that there is no constraint in accommodating such power since May 2016 i.e. from the date the Appellant started consuming power from its 6 Wind Power Projects (3 each for Unit I and Unit II) under open access.

81. We have noted that issue (C) of the Practice Directions dated March 8, 2017 issued by the Respondent No. 1 on processing of open access applications ("Practice Directions, 2017") further deals with restriction of open access up to the current / potential transformer ("CT/PT") capacity of consumer metering. Issue (C) of the Practice Directions, 2017 is reproduced below for ready reference:

> *"a) The earlier Practice Directions dated 19.10.2016 had reiterated the provisions of the Regulations, namely that they do not restrict the quantum of power to be sourced through Open Access to the Consumer's Contract Demand, subject to availability of the necessary infrastructure and capacity of the Distribution System (which would include the CT/PTparameters of Consumer metering) …….*
> *Hence, Open Access permission may be required by*

a RE Generator for a capacity much higher than the stated drawal requirement of the Open Access Consumer. The DOA Regulations provide for banking of RE generation in excess of that requirement. While the drawal of such RE power by the Consumer would be limited to his stated requirement, any excess power that is generated is absorbed by the Distribution Licensee and may be drawn subsequently by the Consumer through the facility of banking and be adjusted accordingly. In these circumstances, CT/PT augmentation will not be required unless the existing Metering arrangement is not adequate for the stated STOA/MTOA drawal requirement of the Consumer.
b) In case it is not adequate, the Distribution Licensee is expected to inform him ofthe augmentation or upgradation required so that he may consider doing so in future."

82. We have noted that the Respondent No. 2 has not called upon the Appellant to augment CT/PT or upgrade metering system. The Appellant's Unit I is availing open access to the tune of 3.40 MW since May 2016 and Unit II is availing open access to the tune of 3.42 MW since May 2016 without any metering or CT/PT constraints.

83. We have noted the submission made by the Appellant that in Order dated May 04, 2018 in Case No. 36 of 2017 in the matter of *Classic Citi Investments Private Limited versus MSEDCL*, the State Commission reiterated as under:

"11.12 …… MSEDCL ought not to have reduced or denied the Open Access quantum only on its unilateral presumption that it was sought in addition to the Contract Demand. CCIPL could have then taken a call on its power requirement vis- a- vis the purported infrastructure constraints, and planned its power arrangements accordingly. Had MSEDCL

exercised due diligence on this count, it 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 CCIPL has submitted. Hence, the Commission had suggested that an undertaking be taken from CCIPL in this regard"

84. We have also noted the submission of the Appellant that except for F.Y.2016-17 for Unit II (power banked in this F.Y. was 4.24% but no Bill/Invoice raised on MSEDCL for balance 4.24% units as is permissible by DOA Regulations) there is no power banked on financial year basis.

85. It is clear from the reading of the open access regulations and the practice directions on open access that the only test to be applied by Distribution licensee is to verify the feasibility of infrastructure/capacity of the distribution system so that the resultant power flow can be accommodated in the existing distribution system. It further provides that if the existing distribution system/metering require any augmentation or upgradation the licensee has to communicate it to the open access applicant and follow the procedure specified in the Commission electricity supply code and standard performance of regulation.

We have noted that prior to this impugned order wherein open access quantum sought by the Appellant has been curtailed, the Appellant was enjoying the open access as sought by it without any difficulty. The distribution company has not intimated any inadequacy in terms of distribution infrastructure, any augmentation required to strengthen the distribution infrastructure.

In that view of the facts It is apparent that the system is adequate and therefore there is no reason to not allow the open access quantum as sought by the Appellant.

Conclusion

86. To sum up we would say that the whole issue of curtailment of open access quantum sought by the Appellant revolves around the interpretation of the Wind Tariff Order 2003. The Respondent Discom has placed reliance on this Tariff Order and has interpreted the decision of the State Commission regarding limited procurement of unutilized banked energy to the extent of 10% as a limitation on the installed capacity.

The Respondent Discom has also interpreted the statement of the State Commission wherein the State Commission has recorded that the developer will be expected to limit the size of the plant as per its requirement of energy. By this statement the Respondent Discom has interpreted that banking can only be allowed on the margins of the contract demand only and therefore the open access can be decided and limited on the basis of the contract demand.

The State Commission has accepted this contention of the Respondent Discom and has rejected the claim of the Appellant to direct the Respondent Discom to grant the open access to the Appellant as sought by them.

The State Commission in their Wind Tariff Order, 2003 has decided that banking of energy will be permitted at any time of the day and night and balance at the end of the financial year will not be carried over to the next year. Surplus energy at the end of the financial year, limited to 10% of the energy (kWh) fed into the grid during the financial year, will be purchased by the utility at the lowest TOD slab rate for HT energy tariff applicable on 31st March of the financial year in which the energy was banked. The Commission has also decided that the Surplus energy in excess of 10% of the energy fed into the grid during the year due to force majeure conditions shall be purchased by the utility at a rate equivalent to the weighted average fuel cost as determined by the Commission in the tariff order and in force from time to time. The payment for surplus energy should be made to the developer/ owner and not to the consumer in case of third party sale.

The State Commission has by this Tariff Order has decided that the period of banking of energy by RE Projects is one year and the banking can be done any time during day and night. Use of expression '10% of the energy (kWh) fed into the grid' is only in the context of limited procurement of unutilised banked energy at the end of financial year by the distribution utility and cannot be interpreted in any other manner and cannot be the basis for curtailment of open access quantum.

The State Commission as such has committed an error in interpreting the Wind Tariff Order, 2003, the Distribution Open Access Regulation, 2016 and also the practice directions dated 19.10.2016.

88. Having regard to the factual and legal aspects of the matter, as stated supra, the instant Appeals filed by the Appellants are allowed. The impugned orders passed by the Maharashtra Electricity Regulatory Commission dated 12.07.2018 in the Case No.119 of 2018, dated 18.04.2019 in the Petition No. 19 of 2019, dated 09.09.2019 in the Case No. 119 of 2019 and dated 09.09.2019 in the Case No. 118 of 2019 are hereby set aside to the extent challenged in the Appeals.

The matter stands remitted back to the first Respondent, MERC with the direction to pass the appropriate order in the light of the observations made in the preceding paragraphs in accordance with law as expeditiously as possible within a period of three months after receiving the copy of this judgement. The Appellants and the Respondents herein are directed to appear before the first Respondent, MERC personally or through their counsel without notice on 04.05.2021.

89. The appeals and the pending applications are disposed of in above terms. No order as to costs.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCE ON THIS 27th DAY OF APRIL, 2021.

(Justice R.K. Gauba)
Judicial Member

(Ravindra Kumar Verma)
Technical Member

√

REPORTABLE/NON-REPORTABLE

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