

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

**DFR NO. 378 OF 2022 &
IA NOS. 1469, 1470 & 1471 OF 2022**
&
**DFR NO. 449 OF 2022 &
IA NOS. 1727, 1728 & 1729 OF 2022**

Dated: 17.03.2023

**Present: Hon'ble Mr. Justice Ramesh Ranganadhan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

**DFR NO. 378 OF 2022 &
IA NOS. 1469, 1470 & 1471 OF 2022**

IN THE MATTER OF:

Sanyo Special Steel Manufacturing India Private Limited
Jagdish Nagar,
Khopoli Taluka, Khalapur
Raigarh -410216
Maharashtra.

...Appellant

Versus

1. Maharashtra Electricity Regulatory Commission,
Through Its Secretary,
World Trade Centre,
Centre No.1, 13th Floor, Cuffe Parade,
Colaba, Mumbai - 400005.
2. Maharashtra State Electricity Distribution Company Limited,
Through Its Managing Director,
5th Floor, Prakashgad,
Bandra (East),
Mumbai – 400 051.

3. Sai Wardha Power Generation Limited,
Through its Sr. Deputy General Manager,
8-2-293/ 82/ A/ 431/ A,
Road No.22, Jubilee Hills,
Hyderabad – 500033.
4. Tata Power Company Limited-Distribution
Through its Chairman and Managing Director
Bombay House, 24, Homi Mody Street,
Fort, Mumbai- 400001.
5. Chief Executive Officer (Stu)
Through The Chief Engineer (State Transmission Utility),
Maharashtra State Electricity Transmission Company Limited
4th Floor, 'A' Wing, Prakashganga,
Plot No.-19, E-Block, BKC,
Bandra (East), Mumbai- 400051.
6. Maharashtra State Load Despatch Centre
Through The Chief Engineer,
Kalwa, Thane-Belapur Road,
Airoli, Navi Mumbai- 400708.

...Respondents

- Counsel for the Appellant(s) : Ms. Dipali Seth
Mr. Keyur Talsania
Mr. Shubham Mehta
Ms. Surbhi Gupta
- Counsel for the Respondent(s) : Mr. S. K. Rungta, Sr. Adv.
Ms. Pratiti Rungta for R-1
- Mr. G. Sai Kumar
Ms. Nikita Choukse
Mr. Deepanshu Latka for R-2
- Mr. Anand Kr. Srivastava
Mr. Shivam Sinha
Mr. Ankit Bhandari
Ms. Shruti Kanodia
Mr. Prabhat Kr. Srivastava

Mr. Anuj Jain
Ms. Ishita Jain
Mr. Nilesh Panda
Ms. Amrita Bakhshi
Ms. Rishika Garg
Mr. Atharva Koppal for R-4

DFR NO. 449 OF 2022 &
IA NOS. 1727, 1728 & 1729 OF 2022

IN THE MATTER OF:

Inox Air Products Private Limited
Through Its Head – Energy Management (EHS)
A – 2, TTC Industrial Area,
Off Thane Belapur Road Pawane,
Navi Mumbai Thane,
Maharashtra- 400710

...Appellant

Versus

1. Maharashtra Electricity Regulatory Commission,
Through Its Secretary,
World Trade Centre,
Centre No.1, 13th Floor, Cuffe Parade,
Colaba, Mumbai - 400005.
2. Maharashtra State Electricity Distribution Company Limited,
Through Its Managing Director,
5th Floor, Prakashgad,
Bandra (East), Mumbai – 400 051.
3. Sai Wardha Power Generation Limited,
Through The Resolution Professional/ Director,
8-2-293/ 82/ A/ 431/ A,
Road No.22, Jubilee Hills,
Hyderabad – 500033
4. Tata Power Company Limited-Distribution
Through Its Chairman & Managing Director
Bombay House,

24, Homi Mody Street,
Fort, Mumbai- 400001.

5. State Transmission Utility (STU)
Through Its Chief Executive Officer,
Maharashtra State Electricity Transmission Company Limited
4th Floor, 'A' Wing, Prakashganga,
Plot No.-19, E-Block, BKC,
Bandra (East), Mumbai- 400051.

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Mr. Deepanshu Latka for R-2

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Mr. Nilesh Panda
Ms. Amrita Bakhshi
Ms. Rishika Garg
Ms. Ankita Bhandari
Mr. Atharva Koppal for R-4

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned appeals along with interlocutory applications for stay and application for condonation of delay have been filed by M/s. Sanyo Special Manufacturing India Private Limited (in short "SSMIPL" or "Appellant-1") and M/s. INOX Air Products Private Limited (in short "IAPPL" or "Appellant-2") challenging the order dated February 02, 2022 ("Impugned Order") passed by the Maharashtra Electricity Regulatory Commission (in short the "State Commission") in Case No. 116 of 2018 *inter alia* claiming that the State Commission has not complied with the judgment dated September 02, 2021 ("remand judgment") rendered by this Tribunal in Appeal No. 78 of 2019 and batch remanding the matter to the State Commission for the determination of the captive status of M/s Sai Wardha Power Generation Limited (in short "SWPGL") with other directions relating to refund of the deposit (which included cross subsidy surcharge (CSS), additional surcharge (ASC), interest and other charges by MSEDCL with interest on the said deposit made by the Appellants.

2. The Appellants are also assailing the decision of the State Commission while directing to refund the aforesaid deposits, in compliance to the directions passed in appeal no. 78 of 2019 and batch matters, through twelve (12) monthly instalments and upholding that the injection of 23.29 MUs as units deemed drawn from distribution licensee.

3. Further, submitted that MSEDCL has raised separate Supplementary Bills dated December 12, 2022, towards alleged unscheduled units supplied from IPP

unit of SWPGPL for FY 2018-19, to the tune of Rs.3,44,45,991 (Rupees Three Crores Forty Four Lakhs Forty Five Thousand Nine Hundred and Ninety One Only) and of Rs. 91,54,223 (Rupees Ninety One Lakhs Fifty Four Thousand Two Hundred and Twenty Three Only) on the Applicants in Appeal No. 378 of 2022 and 449 of 2022, respectively, with the condition that the payments towards Supplementary Bills have to be made within fifteen (15) days i.e., on or before December 27, 2022.

4. During the hearing held on IA, it was argued that the only issue which require adjudication is treatment of 23.29 Mus as units deemed drawn from distribution licensee, which is one of grievances filed for interim stay, as other issues have been settled by the State Commission in compliance to the remand, as such, grant of stay will be same as disposing of the issue on its merit, therefore, with the consent of the contesting parties, it was decided to adjudicate the appeal itself.

5. The Appellants (Appellant-1 and Appellant-2) are the private limited company incorporated under the Companies Act, 1956, engaged in the business of manufacturing and are consumers of MSEDCL, the distribution licensee, however, draws power from SWPGL also as captive users to meet their energy requirements.

6. 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 (in short "Act").

7. The Respondent No. 2; MSEDCL is Government Company vested with the functions of distribution of electricity as a licensee in the State of Maharashtra.

8. The Respondent No. 3; Sai Wardha Power Generation Limited (“SWPGL”) is a generating company within the meaning of Section 2(28) the Act, having established a 540 MW thermal generating station in the state of Maharashtra comprising of 4 units of 135 MW each, out of the four (4) generating units of SWPGL, power generated by Unit 1 and 2 was supplied to third party consumers whereas power generated by Unit 3 and Unit 4 was supplied to captive users.

9. The respondent No. 4; Tata Power Company Limited- Distribution (in short “TPC-D”) is also a distribution licensee operating in the State of Maharashtra in a specified licensed area.

10. The Respondent Nos. 5 and 6 are the State Transmission Licensee and the State Load Despatch Centre of the State of Maharashtra respectively.

11. The questions of law and the factual matrix in the two captioned appeals are identical, therefore, the two are dealt together and the first captioned appeal i.e. DFR 378 of 2022 is taken up for adjudicating the issues raised in these appeals.

12. It is submitted that, SWPGL, vide an application dated 25.12.2017 i.e. prior to the expiry of the Open Access (in short “OA”) permission for the FY 2017-18, has applied to MSEDCL for Medium Term Open Access (in short “MTOA”) for the captive users of its generating plant for the period commencing from April, 2018 to March 2021, however, MSEDCL responded only on March 03, 2018 seeking

certain clarifications by way of an email *inter alia* raising queries regarding the shareholding pattern of the captive users, immediately thereafter, SWPGL submitted an application for Short Term Open Access (in short “STOA”) on behalf of the Appellants and other captive users vide an application dated March 08, 2018.

13. Simultaneously, SWPGL, vide letter dated March 22, 2018, replied to MSEDCL’s queries raised earlier by MSEDCL and intimated its intention to supply power to the Appellants from Unit 3, the already identified captive unit of the generating plant in the MTOA/ STOA applications, also clarifying that the shareholding pattern of the captive users meet the requisite criterion of shareholding i.e. holding not less than 26%.

14. However, MSEDCL vide its letter dated March 26, 2018 informed SWPGL that the Open Access applications cannot be processed under Section 9 of the Act as the identification of the captive units was not furnished in advance, in response SWPGL vide a letter dated 27.03.2018 reiterated that the supply of power to the captive users shall be from Unit 3 which qualifies as captive unit and requested MSEDCL to grant Open Access so that continuous supply to its captive users is ensured from 01.04.2018.

15. Notwithstanding the clarifications provided by SWPGL, MSEDCL granted the Open Access, however, treating the supply of electricity as from an Independent Power Producer (in short “IPP”) instead of from captive power plant/unit effective from 01.04.2018, the Appellants submitted that MSEDCL erred in granting such an approval under Section 10(2) of the Act despite SWPGL providing the Chartered Accountant’s Certificate dated 19.04.2018,

consequently, levied CSS and ASC on the Appellants even after the necessary clarifications were furnished by it inter alia ascertaining the captive status.

16. Being aggrieved by the decision of MSEDCL, the SWPGL filed petition being Case No. 116 of 2018, assailing the decision before the State Commission which was disposed of by the State Commission vide order dated 15.02.2019 (in short "Original Order") holding that the generating plant of SWPGL is not a CGP for the FY 2018-19.

17. The Original Order was challenged by the SWPGL and the Appellants by filing a batch of appeals including the Appeal No. 78 of 2019 before this Tribunal, though the Appellants were not the parties to the proceeding before the State Commission, but these being aggrieved parties filed the batch of appeals against the Original Order to avoid the consequential impact of paying CSS and ASC.

18. This Tribunal vide an Interim Order dated 03.04.2019 in IA No. 354 of 2019 filed in the Appeal No. 78 of 2019 directed all users of SWPGL to deposit 50% of the bills raised or to be raised by MSEDCL for FY 2018-19 subject to the outcome of the Appeal, the relevant extract of the aforesaid Order is reproduced hereunder:

"Having regards to the facts and circumstances of the case, as stated above, 2nd Respondent/MSEDCL is hereby directed not to take any coercive action in pursuance of the impugned Order dated 15.02.2019 passed in Case No. 116 of 2018 on the file of the Maharashtra Electricity Regulatory Commission, Mumbai until further orders.

The consumers of the Appellant are hereby directed to deposit 50% of the bills raised or to be raised by the 2nd Respondent/MSEDCL subject to the outcome of this Appeal.”

19. Pursuant to the Order dated 03.04.2019, MSEDCL raised bills dated 10.04.2019 for an amount equivalent to the 50% of the outstanding amount including the CSS, ASC, other charges and interest on such amounts and further issued disconnection notice on 25.04.2019 *inter alia* directing the Appellants to pay 50% of the outstanding amount within fifteen days failing which Appellants would be disconnected for non-payment of dues.

20. In compliance to this Tribunal interim order dated 03.04.2019 and the claim made by MSEDCL, the Appellants immediately made the requisite payments under protest.

21. Thereafter, this Tribunal vide its judgment dated September 02, 2021 (in short “Tribunal’s Order”) disposed of the Appeal by setting aside the Original Order passed by the State Commission and remitted the above captioned matter for determination of captive status of SWPGL observing that the State Commission has erred by upholding actions of distribution licensee of determining captive status of the plants at the start of the year, the relevant extract of judgment is reproduced below for ready reference:

“10. We note that it is not in dispute that each of the four units of the power plant of the appellant Sai Wardha Power Generation

Limited has a separate meter installed. Though there are certain doubts raised with reference to the fact of common injection point, the fact remains that the compliance with the second requirement of consumption up to the specified extent by the captive consumers can be determined only at the end of the financial year and not at the beginning of the period for which such relief is sought. From this perspective, the approach of the State Commission in the impugned order is found to be wholly incorrect and inappropriate. The conclusions contrary to the interest of the party which had approached for relief could not have been drawn on the basis of facts which pertains to the previous financial year. It is not in dispute, we may repeat, that metering system has been in position concededly since August, 2017 and, therefore, it can be safely assumed that there would have been continuity. Of course, the actual injection, drawl and consumption is a matter which would require scrutiny, albeit at the end of the period and not at the beginning.

...

13. For the forgoing reasons and considerations, the impugned order is set aside. The matter is remitted to the State Commission for further proceedings and fresh decision in light of above discussion and observations.”

(emphasis supplied)

22. In compliance to the remand, the State Commission held hearings in the matter on September 13, 2021, October 12, 2021 and November 16, 2021.

23. The Appellant filed its written submissions vide submissions dated November 12, 2021 before the State Commission, the State Commission on the basis of all the submissions put forth by the parties involved, passed the Impugned Order wherein the State Commission has held that SWPGL meets the requirements of Rule 3 of the Rules, 2005 and qualifies as a GCGP for FY 2018-19 in respect of Unit No.3.

24. The State Commission also directed the distribution licensees to refund the amount deposited towards CSS for FY 2018-19 in twelve (12) equal monthly instalments starting from March, 2022, however, there was no clear direction for refund of ASC or interest on such amount provided, however, holding that the 23.29 million units are injected as unscheduled units and the same have to be treated as have been drawn from the respective Distribution Licensees, therefore, such units were to be treated 'in accordance with law'. The relevant portions of Impugned Order are reproduced below for ready reference:

“ORDER

1. Sai Wardha Power Generation Limited meets the conditions as per Rule 3 of Electricity Rules, 2005 and qualifies as a Group Captive Generating Plant in FY 2018-19 in respect of its Unit No. 3 and accordingly, its Captive Users are entitled to the consequential dispensations, including exemption from payment of Cross Subsidy Surcharge (CSS).

2. Distribution Licensees are directed to refund deposits of Captive Users, if any, on account of CSS for FY 2018-19 in twelve (12) equal monthly instalments starting from March 2022.

3. The injection of 23.29 Million Units (MUs) from the non-captive units is unscheduled and cannot be accounted for as power supplied from Captive Generating Plant and the power drawn by the Captive Users to that extent is deemed to have been drawn from the respective Distribution Licensees. Hence, the Distribution Licensees shall treat this unscheduled power in accordance with the applicable provisions of the Electricity Act, 2003 and the relevant Rules and Regulations.

...”

25. Being aggrieved, the Appellant filed review petition being Case No. 81/RC/2022 before the State Commission seeking review of Impugned Order to the extent of Impugned Order not directing any exemption from payment of ASC *inter alia* refund of amounts deposited and instead giving liberty to distribution licensees for refunding amounts in instalments, additionally treating the 23.29 MUs of power as unscheduled power and denial of payment of applicable interest by distribution licensees on the amounts deposited earlier.

26. The State Commission vide its Order dated August 15, 2022 (“Review Order”) in review proceedings dismissed the review petition of the Appellant, consequently, aggrieved by the Impugned Order, the Appellant filed this Appeal.

27. It is important to note that the State Commission has passed the Impugned Order under remand proceedings directed by this Tribunal and is bound to adhere to such directions passed in the judgment remanding the matter to the State

Commission, this Tribunal in its Judgment (in short the “Remand Judgment”) dated 02.09.2021 in Appeal No. 78 of 2019 and batch has held as under:

“9. During the course of hearing the learned senior counsel appearing for the State Commission fairly agreed that the scrutiny as to whether the requirements of the Electricity Rules 2005 vis-a-vis captive power plant have been fulfilled or not can be ascertained on annual basis only “at the end of the financial year”. The impugned order is clearly not in sync with the view taken by same Commission in above-quoted earlier order. In this context, it is also essential to take note of the findings returned by this tribunal in Appeal No. 131 of 2020 titled Tamil Nadu Power Producers Association Vs. Tamil Nadu Electricity Regulatory Commission & Ors. decided on 07.06.2021. It is pertinent to quote the observations in para 11.19 to 11.21 of the said decision which read as under:

“11.19 The short question which arises next is, when verification under Rule 3(1)(a)(ii) has to be done along with the verification mandated under Rule 3(1)(a)(i), then whether this process has to be undertaken annually i.e. at the end of Financial Year or not?

11.20 To answer this question, we see the decision in Appeal No. 02 and 179 of 2018 titled as “Prism Cement Limited v. MPERC & Ors.,” wherein this Tribunal had the occasion of considering the said issue, as to whether the twin requirements under Rule 3 have to be determined at the end of the financial year together or only the requirement under Rule 3(1)(a)(ii) can be so determined with

the exception of Rule 3(1)(a)(i) which can be verified at any given point of time. At para 9.6 of the said judgment, the following has been held by us:

“9.6 It is clear from the Act, and Rules as also from the above cited Judgment of Hon’ble Supreme Court that to qualify as ‘captive generating plant’ under Section 2(8) read with Section 9 of the Act and Rule 3 of the Rules, a power plant has to fulfil two conditions;

- a) firstly, 26% of the ownership of the plant must be held by the captive user(s); and*
- b) secondly, 51% of the electricity generated in such plant, determined on annual basis, is to be consumed for captive use by the captive user.*

Upon fulfilment of the aforesaid conditions determined on an annual basis, the power plant qualifies as a captive generating plant. It is also clear that the Rules provide for determination of the status of the CGP on an annual basis at the end of the financial year. Rule 3 itself recognizes that the status of a power plant is dynamic i.e. a power plant can be a CGP in a particular year but can lose such status in any subsequent year if the twin conditions are not satisfied and thereafter again qualify as a CGP if the twin-conditions under Rule 3 are satisfied in any particular year.”

11.21 *This Tribunal has taken a decision in the aforesaid case of Prism Cement Limited (Supra). In terms of this decision, we see that the verification of the tests contemplated under Rule 3(1)(a)(i) and Rule 3(1)(a)(ii) can only be done annually, i.e. with respect to the shareholding existing at the end of the financial year. We have to give mandate to the legislative intent as well as the law settled by us on the said issue.”*

10. *We note that it is not in dispute that each of the four units of the power plant of the appellant Sai Wardha Power Generation Limited has a separate meter installed. Though there are certain doubts raised with reference to the fact of common injection point, the fact remains that the compliance with the second requirement of consumption up to the specified extent by the captive consumers can be determined only at the end of the financial year and not at the beginning of the period for which such relief is sought. From this perspective, the approach of the State Commission in the impugned order is found to be wholly incorrect and inappropriate. The conclusions contrary to the interest of the party which had approached for relief could not have been drawn on the basis of facts which pertains to the previous financial year. It is not in dispute, we may repeat, that metering system has been in position concededly since August, 2017 and, therefore, it can be safely assumed that there would have been continuity. Of course, the actual injection, drawl and consumption is a matter which would require scrutiny, albeit at the end of the period and not at the beginning.*

11. *We do find some merit in the submissions of the learned senior counsel for the State Commission that the existence of facts concerning extent of*

shareholding must also be examined at the threshold, though it would also require scrutiny at the end of the financial year when the rights and obligations are to be finally determined. When asked, the learned counsel for the appellants, Sai Wardha Power Generation Limited, fairly submitted and agreed that a better proof and certification from the concerned quarters (including the Chartered Accountant) would be placed before the State Commission so that there are no doubts left in its mind while considering grant of the necessary relief.

*12. The impugned order, for the above reasons, will have to be set aside. At the same time, it cannot be ignored that the FY 2018-19 to which this dispute relates has already come to an end. In terms of the interlocutory orders passed in these appeals some of the captive consumers who are appellants before us had made certain deposits towards their liability on account of cross subsidy surcharge, without prejudice to their contentions awaiting consideration herein. Since we are inclined and intend to set aside and vacate the impugned order, the learned Counsel of all parties agree that it would be just, proper and more convenient that the State Commission now instead of considering the matter for grant of permission at the beginning of the FY 2018-19 considers it as a matter requiring scrutiny at the end of the financial year. The permission for open access for captive generating plant would be granted, subject to all requirements being fulfilled in the further scrutiny as indicated above, as a post facto approval. Needless to add that in case the generator viz. **Sai Wardha Power Generation Limited succeeds in establishing its claim, the deposits made by the captive consumers on account of cross-subsidy surcharge will have to be directed to be refunded forthwith in accordance with law. Conversely, if the said generator fails in establishing its case, the amounts***

deposited as above will be appropriated properly and the appellants will be duty bound to account for the remainder of the liability on that score.”

28. As seen from the above, this Tribunal in the above quoted Remand Judgment has held that “***Sai Wardha Power Generation Limited succeeds in establishing its claim, the deposits made by the captive consumers on account of cross-subsidy surcharge will have to be directed to be refunded forthwith in accordance with law”*** i.e. the deposits made by the captive consumers on account of **Cross-Subsidy Surcharge (CSS)** will have to be directed to be refunded forthwith in accordance with law, in case SWPGL succeeds in establishing its claim for captive generating plant status, on the other hand, if the said SWPGL fails in establishing its case, the amounts deposited will be appropriated and the consumers shall be liable for any additional liability to be accounted for.

29. Therefore, the matter was remanded to the State Commission with specific directions to the extent of reconsidering the issue for determining the captive status of the generating station of SWPGL and the grant of Open Access permission subject to fulfilment of the requirements of Rule 3 of Electricity Rules, 2005 based on the further scrutiny as a post facto approval inter alia issuing appropriate directions for the remand of deposit made by the Appellant in lieu to CSS.

30. The State Commission in the Impugned Order has held that unit 3 of SWPGL categorizes as Captive Unit under the provisions of the Electricity Rules, 2005, the relevant extract is quoted as under:

“33.89. The Commission has also verified the Unit Wise data submitted by SWPGL with the generation data for SWPGL certified by MSLDC for station as a whole. The Commission observes that Unit Wise data submitted by SWPGL is same as MSLDC certified data.

33.90. In view of the above, SWPGL’s Unit No. 3 satisfies the CGP criterion of at least 51% consumption in accordance with the Rule 3 of the Electricity Rules.”

31. Accordingly, the State Commission, in compliance with the directions given in the Remand Judgment, decided that captive users of SWPGL are entitled to the consequential dispensations, including exemption from payment of CSS inter alia directing the Distribution Licensees to refund any deposits made by Captive Users on account of CSS for FY 2018-19 in accordance with the relevant Regulations.

32. Further, the State Commission, in reference to the amount deposited by the Appellants in compliance with the direction as rendered by this Tribunal, has held as under:

“33.93. The Commission notes that the Hon’ble Supreme Court in its Judgment dated 10 December, 2021 in Civil Appeal No 5074-5075 of 2019 in respect of refund of Additional Surcharge by Distribution Licensees has held as follows:

“16. However, considering the fact that there shall be huge liability on the appellant – distribution licensee if they have to

now refund the amount of additional surcharge recovered at a stretch, we direct that the additional surcharge already recovered from the captive consumers/captive users shall be adjusted in the future wheeling charges bills.”

33.94. The Commission notes that Captive Users were directed by the Hon’ble ATE to deposit certain amount of CSS with the concerned Distribution Licensee. To refund the said amount of CSS recovered at a stretch will put burden on Distribution Licensees. Accordingly, in line with the spirit of direction of the Hon’ble Supreme Court in Civil Appeal No 5074-5075 of 2019, the Commission directs that the amount deposited by Captive Users shall be refunded in twelve (12) equal monthly instalments starting from March 2022.”

33. Accordingly, the State Commission passed the Impugned Order with the directions that:

“34. Hence, the following Order.

ORDER

- 1. Sai Wardha Power Generation Limited meets the conditions as per Rule 3 of Electricity Rules, 2005 and qualifies as a Group Captive Generating Plant in FY 2018-19 in respect of its Unit No. 3 and accordingly, its Captive Users are entitled to the consequential dispensations, including exemption from payment of Cross Subsidy Surcharge (CSS).*

2. ***Distribution Licensees are directed to refund deposits of Captive Users, if any, on account of CSS for FY 2018-19 in twelve (12) equal monthly instalments starting from March 2022.***
3. *The injection of 23.29 Million Units (MUs) from the non-captive units is unscheduled and cannot be accounted for as power supplied from Captive Generating Plant and the power drawn by the Captive Users to that extent is deemed to have been drawn from the respective Distribution Licensees. Hence, the Distribution Licensees shall treat this unscheduled power in accordance with the applicable provisions of the Electricity Act, 2003 and the relevant Rules and Regulations.*
4. *Case No. 116 of 2018 in accordance with Hon'ble Appellate Tribunal for Electricity's common Judgment dated 2 September 2021 in Appeal Nos. 78 of 2019 and batch stands disposed of accordingly."*

34. We are satisfied that the Impugned Order has been passed in compliance with the Remand Order except declaring injection of 23.29 Million Units (MUs) from the non-captive units as unscheduled and holding that these cannot be accounted for as power supplied from Captive Generating Plant.

35. Accordingly, the Impugned Order to the above extent is found to be in order except the issue of 23.29 Mus and is upheld to that extent.

36. Further, the Respondent No. 2, MSEDCL, during the hearing, submitted that the deposits made by the captive users in compliance to the directions

passed by this Tribunal shall be refunded in 12 equal monthly installments as directed by the State Commission, therefore, any other issue related to the provisional deposits made by the Appellants stand resolved by the Impugned Order.

37. However, the Appellants raised the issue of interest on such deposits, as claimed by them before the State Commission, the same was not part of the proceedings held in Appeal No. 78 of 2019, as such the decision of the State Commission in compliance to the Remand Judgment cannot be found foul of the directions issued.

38. The Appellants are also aggrieved by the aforesaid decision, claiming that the 23.29 Mus are as per schedule for the Captive Generating Plant and therefore, should not be considered as supply from distribution licensee.

39. The Appellant submitted that the treatment of power supplied from IPP should not be considered unscheduled power vis-à-vis consumption as consumption was always less or equal to schedule and hence, the excess consumption which derived as difference between scheduled power and generated power cannot be treated as deemed consumption by the Appellant particularly when the Appellant has neither exceeded its contract demand nor exceeded its schedule.

40. We fail to understand the above submission, as any power generated and injected into the grid without any contract has to be treated as unscheduled power, similarly, any power consumed by an open access consumer, beyond its scheduled open access power, has also to be treated as power deemed to be

drawn from the grid i.e. from the distribution licensee to the extent it is not scheduled from the open access source i.e. SWPGL in this case.

41. The Appellant also submitted an excel sheet summarising the implemented schedule by SWPGL and based on which MSEDCL evidencing the over injection of power supplied to the Appellant for months of April, 2018 to October, 2018, the excel sheet indicating the drawl by Appellant-1, is reproduced below:

Month	Total Drawal Units	Units @ MSEDCL Tariff - Units consumption from MSEDCL	Units @ Temp. Tariff	Consumption units from SWPGL	Consumption units from Renewable Source - Wind	Over Injected units / Under Drawal by MSSSPL - Not considered as Consumption units
	A = C+D+E+F	C	D	E	F	G
April'18	16879690	8456199	0	7759088	664403	779933
May'18	15172619	5045278	130	8926544	1200667	1126753
June'18	14779990	4671280	0	8107587	2001123	1207681
July'18	15284590	4700741	200	7595443	2988206	1143028
August'18	17958630	6535040	80	8701606	2721904	1006713
September'18	15920859	6287268	0	8689111	944480	477193
October'18	16067699	14978527	0	838829	250343	720
Total	112064077	50674333	410	50618208	10771126	5742022

42. Further, the power injected by the Captive Generator i.e. SWPGL is also submitted by the Appellants, which is reproduced as under:

Month	Actual Schedule by SWPGL	Schedule implemented by MSEDCL after adjustment of distribution losses	SSSMIPL consumption - Credit by MSEDCL	Over Injection	Equivalent consumption at SWPGL end after adjustment of
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					distribution losses
April'18	8887408	8539021	7759088	779933	8075654
May'18	10463465	10053297	8926544	1126753	9290741
June'18	9695325	9315269	8107587	1207681	8438370
July'18	9094995	8738472	7595443	1143028	7905331
August'18	10104413	9708320	8701606	1006713	9056625
September'18	9479115	9166308	8689111	477193	8985633
October'18	868200	839552	838829	720	867452
Total	58592920	56360240	50618208	5742022	52619807
			13.6%		10%
			10.2%		

43. The Appellant-1 submitted that its consumption is 13.6 % less than the actual schedule by SWPGL and 10.2 % less than the schedule implemented by MSEDCL after considering normative losses, further, its equivalent consumption at SWPGL end (at injection point) after adjustment of distribution losses is 10 % less than actual schedule.

44. Based on above, the Appellant-1 submitted that the distribution licensees seem to have not issued correct bills and billed the consumers on schedule which is in violation of applicable laws, added that MSEDCL has in its Commercial Circular No. 169 dated June 13, 2012 bearing no. CE/Comm/CP/Open Access/General/16410 has provided billing mechanism, quoted as under:

“6.5.3 Partial Open Access:

In case of partial open access consumer where partial demand is met through open access, the consumption shall be charged as below:

Entire generated units corresponding to the generation schedule (which in any case should not be more than the capacity mentioned in open access permission) shall be off set / adjusted against the consumption units. Balance consumption units, if any, thereafter shall be adjusted against the units permissible as per MSEDCL contract demand.

The units permissible as per MSEDCL contract demand shall be charged as per the tariff applicable to the respective consumer category as per prevalent MERC order from time to time. The balance consumption units, over and above of generation units plus those permissible as per MSEDCL contract demand, shall be charged at temporary tariff as per applicable Rules and Regulations".

45. The Appellant-1 also invited our attention to the procedure prescribed under Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016 ("DOAR, 2016") read with Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 stating that units generated by SWPGPL have to be first supplied to captive consumers and then for third-party sale, further, the Regulation 19.3.1 and 19.3.2 of MERC (Distribution Open Access) Regulations, 2016 which provides that over-injection is calculated as difference between the schedule and actual generation and when the distribution licensee bills the consumer, how such over-injection is treated and that treatment in case of under injection which is the case as per Impugned Order.

46. On the contrary, MERC argued that it has carried out detailed analysis, even observing that there are discrepancies in the data submitted by the Appellants. The relevant extracts of the analysis and conclusion recorded in the Impugned Order are reproduced as under:

“33.80. SWPGL has stated that the total generation of electricity from Unit No.3 during the FY 2018-19 was 466.78MUs. The captive consumers have consumed 455.16MUs of electricity from the said Unit No.3 during FY 2018-19, which constitutes 90% of the total generation from the said generating unit.

33.81. In support of the claim, SWPGL has submitted 15-minute data of generation for all the units and schedule of captive users for FY 2018-19. As already mentioned herein above, in view of the finding of the Hon’ble ATE, the Commission is relying on the data submitted by SWPGL and MSLDC to examine the generation and consumption data for FY 2018-19.

33.82. The Commission, on scrutiny of the generation and consumption data submitted, sought clarification from SWPGL on the following issues:

- Whether power from IPP was scheduled to CGP Consumers. If yes whether that was with the due permissions from competent authorities.*
- SWPGL in the Petition has submitted that power supplied to captive consumers is from Captive Unit 3 only. Petitioner to confirm whether during any tripping / outage of Unit -3, the power was supplied from IPP –Unit 4 or Unit 1 to captive consumers. Also, Petitioner to provide the details of Parties/Captive Users to whom the power is supplied from Unit 1 & Unit 4 in FY 2018-19.*
- SWPGL to submit consumer wise actual/schedule consumption [Excel sheets] for all consumers/captive users as mentioned in Auditors Certificate and Unit-wise generation on 15-minute time block basis separately for Captive and IPP Units along with details of scheduling of power to*

consumers and date wise revision of schedules on 15-minute time block basis are absolutely critical/ essential for assessing/ determining the captive status of Unit No. 3 of a generator.

- SWPGL to provide Unit wise MRI data (dump data) for the Unit No.3 and Unit No. 4.
- Reconciliation of the entire Net Generation on 15-minute time block basis from Captive Units vis-s-vis scheduling of power to Captive Consumers for FY 2018-19 is required to be provided in Excel Sheet.
- The normative loss adopted by SWPGL for certain consumers to calculate the Consumption at injection point needs to be revisited due to certain error
- The Commission in its Order in Case No. 117 of 2012 has examined the CGP Status based on Gross Generation and Captive consumption grossed up by Auxiliary consumption. Please clarify why the present Petition is based on Net Generation.

33.83. SWPGL submitted the reply in response to the data gaps on 29 October, 2021 and 8 November, 2021. The submission of the SWPGL alongwith the Commission's observation is outlined in the following table:

Table 6: Reply of Data Gaps by SWPGL

Data Gaps	Reply	Commission's
Any CPP Unit has been tripped	None of the CGP unit had tripped during FY 2018-19.	As per MSLDC submission, Unit No. 3 has tripped in FY 2018-
<ul style="list-style-type: none"> • Whether power from IPP was scheduled to CPP Consumers • Details of power supplied from Unit No. 3 & 4 to CPP and any other parties in 15 minutes time block 	No power from IPP units was scheduled to CGP consumers and difference to be treated as FBSM	As per analysis, during some time blocks, actual generation from Unit No. 3 is lower than power scheduled to Captive Users.
To provide Unit wise MRI data (dump data) for the Unit 3 and Unit 4	15 min time block provided as Annexure C	In July 2018, drawal was higher than the injection which was subsequently rectified by SWPGL in revised submission.

Reconciliation of the entire Net Generation on 15-minute time block basis from Captive Units vis-s-vis scheduling of power to Captive	Reconciliation provided as Annexure E	-
The normative loss adopted by SWPGL for certain consumers to calculate the Consumption at injection point needs to be revisited due to certain error	The revised consumption at injection point was provided by SWPGL	The resultant revision in the consideration of normative loss has resulted into revision in injection of power for consumers at injection point from 455.15 MU to 453.85 MU.
The Commission in its Order in Case No. 117 of 2012 has examined the CGP Status based on Gross Generation and Captive consumption. Please clarify why the present Petition is based on Net Generation.	The present petition is based on Net Generation. There would be no difference whether the CGP Status arrived on Gross Generation or Net Generation as Net Generation and Captive Consumption will be grossed up to arrive CGP status on Gross generation and consumption basis.	The Commission has observed that more than 90% of the Net Generation (after auxiliary consumption) is consumed by the Captive Users.

33.84. As per the said submissions, the observations of Commission are as follows:

33.85. Tripping / outage of the unit

a) MSLDC has certified the trippings/outage of all the Units of SWPGL. However, as captive status of Unit No. 3 is to be examined, the monthly tripping/outages of SWPGL Unit No. 3 as reported by SWPGL to MSLDC for FY 2018-19 is given below:

Table 7: Details of Outage of Unit No.3–SWPGL - Unit No. 3 outages during FY 2018-19				
Tripping Date	Time	Synchronisation Date	Time	Reason for Outages / Shut down
27-04-2018	00:31	01-05-2018	03:16	Boiler Tube Leakage
24-05-2018	15:03	24-05-2018	17:41	Electrical Fault
24-05-2018	21:00	24-05-2018	23:32	Electrical Fault
08-08-2018	15:25	10-08-2018	22:41	ID Fan Vibration
24-08-2018	22:58	25-08-2018	08:47	Station Blackout
25-08-2018	13:51	25-08-2018	16:20	Wet Coal

05-10-2018	06:20	07-10-2018	09:20	ID Fan Vibration
14-10-2018	18:14	14-10-2018	19:32	ID Fan Vibration
01-11-2018	00:28			Annual Overhaul

b) SWPGL had informed to MSLDC at the time of tripping of CGP unit and also sent revised schedule to MSLDC.

c) It was noticed that in certain time blocks where the plant had tripped or was under outage i.e. on 1 May, 2018, 24 August, 2018 and 5 October, 2018, the power was scheduled to the Captive Users.

33.86. Discrepancy in Data

a) MSEDCL and TPC-D in their submission have highlighted the discrepancy in the Consumption details at injection point as provided by SWPGL such as variance in 15-minute schedule with 15-minute MRI data of generation meter, difference in the MRI data as provided by SWPGL for net generation of Unit No. 3 on a monthly basis to TPC-D and the data provided by the SWPGL in the Petition and the response to data gaps dated 26 October, 2021.

b) With respect to the discrepancy in the consumption details at the injection point, the Commission while reviewing the details as provided by SWPGL in Annexure B has observed that SWPGL has grossed up the consumption of the Captive Users at consumer end (as per Bills raised by Distribution Licensee) with the normative transmission and distribution losses to derive the consumption of the Captive Users at the injection point. However, while applying the formula for grossing up the energy at the injection point, in certain consumers, there was an arithmetical error in consideration of the normative losses and the same was highlighted by the Commission in the data gaps. Accordingly, SWPGL has rectified the same in its reply to data gaps dated 27 October, 2021 whereby the consumption at injection point was revised to 453.85 MU from 455.16 resulting in a difference of 1.31 MUs.

c) Commission also observed the variance between the Generation data provided under 15 Minute schedule with 15-minute MRI data and the clarification was sought from SWPGL for the same. Accordingly, on 8

November, 2021, SWPGL replied that with regard to unit wise generation data provided in MRI, the generation data provided is of the meter located after “Unit (generator) Auxiliary Consumption” and before Station Auxiliary consumption. It was noticed that under Monthly Generation Data, SWPGL has allocated Auxiliary consumption of the Station in proportion to the gross generation from Unit No. 3 and 4 however under MRI schedule, the Auxiliary consumption has been bifurcated into unit wise Auxiliary consumption and station auxiliary consumption. Also, Commission notes that net generation in both the scenario remains the same which is outlined in the following table:

Table 8: Details of Generation as per MRI data and Schedule (MU)

Particulars	Unit 3	Unit 4	Total Unit 3 & 4	Aux. Consumption	Total Actual
As per MRI	495.55	348.87	844.42	38.21	809.24
As per	522.19	382.64	904.83	95.68	809.24
Difference	26.64	33.76	60.40	57.47	-

d) Accordingly, the Commission notes that certain discrepancy was due to the rectification in the arithmetical error undertaken by SWPGL in response to the data gaps raised by the Commission and due to difference in methodology of accounting of the auxiliary consumption.

33.87. Power scheduled to Captive Users from IPP unit

a) The Commission has analysed the 15-minute time block wise data submitted by SWPGL. It was observed that power has been supplied to Captive Users from IPP Units i.e. from other than Unit No. 3, which is designated as CGP. To compute power supplied from other sources than Unit No.3, the Commission has considered the following 15-minute time block wise data as provided by SWPGL:

1. Actual net generation of Unit No.3
2. Power sold to IEX/Third Party other than Captive Users from Unit No. 3
3. Power scheduled to Captive Users

b) Accordingly, the month wise power supplied by SWPGL IPP Units to Captive Users in FY 2018-19 (as computed under 15-minute time block) is as outlined below:

Table 9: Monthwise Summary of Power Supplied from Non-CGP Unit

Month	Excess Consumption (MUs)
Apr-18	1.23
May-18	4.93
Jun-18	1.30
Jul-18	5.84
Aug-18	5.31
Sep-18	3.13
Oct-18	1.54
Total	23.29

c) **As is evident from the above table, total quantum of 23.29 MUs is supplied from the IPP (non-CGP) Units to Captive Users during FY 2018-19.**

d) **SWPGL and Captive Users have contended that difference between the schedule and the under-injection in any time block from Unit No. 3 is necessarily to be treated in terms of the deviation settlement mechanism and there is no supply of electricity being claimed from Unit No. 3 to such extent. The Commission is of the view that this issue has already been addressed by the Hon'ble ATE in its Judgment dated 26 November, 2021 in Appeal No 106 of 2018 and batch wherein the Hon'ble ATE has upheld the Order of the Commission in Case No 159 of 2016 that the quantum of power supplied from non-captive units is to be considered as deemed to be drawn from the Distribution Licensees. Accordingly, the Commission, disallows the quantum of 23.29 MUs from the total sales to Captive Users of 453.85 MUs (Consumption at injection point) in FY 2018-19.**

e) **Consequently, since the injection of 23.29 MUs from the non-captive unit is unscheduled and cannot be accounted for as CGP power. The power drawn by the Captive Users to that extent is deemed to have been drawn from the respective Distribution Licensees. Hence, the Distribution**

Licensees shall treat this unscheduled power in accordance with the applicable provisions of the EA and the relevant Rules and Regulations.”

47. After detailed deliberations, it is observed that the State Commission has arrived at the above conclusion after due diligence and detailed analysis of the data/ information placed before it, also noting and analysing the data gaps which occurred due to discrepancies in the data, as recorded in the above quoted Impugned Order.

48. It is observed from there that the State Commission after analysing the 15 minutes block generation of SWPGL's unit 3 and the consumption made by the captive users has found that there are periods when there was no generation or lower generation from unit 3 as against the consumption made by the captive users, it indicates that during such periods, the electricity consumed has been drawn from the distribution grid or deemed to have been drawn from the distribution licensee.

49. This Tribunal has already held that the quantum of power supplied from non-captive units is to be considered as deemed to be drawn from the Distribution Licensees.

50. We are convinced that the analysis and outcome of such analysis is just and reasonable. We find, thus, merit in the contention of the State Commission, the Impugned Order is upheld to this extent.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeals filed by the Appellants i.e. DFR No. 378 of 2022 and DFR No. 449 of 2022 are devoid of merit and are dismissed.

The Impugned Order dated 02.02 2022 passed by the Maharashtra Electricity Regulatory Commission in Case No. 116 of 2018 is upheld to the extent as concluded in the foregoing paragraphs.

All the IAs, if pending, are also disposed of accordingly.

PRONOUNCED IN THE OPEN COURT ON THIS 17th DAY OF MARCH, 2023.

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice Ramesh Ranganadhan)
Chairperson**

pr/mkj