

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE NO. 55 of 2015

In the matter of
Petition of Shah Promoters & Developers for purchase of its Wind Energy by
Maharashtra State Electricity Distribution Co. Ltd. for April, 2012 at APPC rate

Coram

Shri Azeez M. Khan, Member
Shri Deepak Lad, Member

M/s Shah Promoters and Developers

Petitioner

V/s

Maharashtra State Electricity Distribution Company Ltd.

Respondent

Appearance

For Petitioner

Ms. Dipali Sheth, Advocate

For Respondent

Shri Ashish Singh, Advocate

ORDER

Dated: 31 May, 2016

1. M/s. Shah Promoters and Developers (SPD), AST-1, Success Chambers, 1232, Apte Road, Deccan Gymkhana, Pune, has filed a Petition on 31 March, 2015 under Sections 42 and 86(1) (f) of the Electricity Act (EA), 2003 seeking purchase of Wind Energy by the Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) for the month of April, 2012, and related issues.
2. SPD's prayer is as follows:

“a) To give necessary direction to MSEDCL to purchase power for the period 1 April 2012 to 30 April 2012 at APPC rate.”

3. The facts as stated in the Petition are summarized below:

- a) SPD commissioned its Wind Power Project of 12 MW (800 X 15) on 31 March, 2011 and 11 August, 2011 at Chavaneshwar, District Satara. The entire electricity generated from the Project is sold to third party and MSEDCL.
- b) SPD submitted an Open Access (OA) application for sale of its wind power to M/s Jindal Poly Films Ltd, Nashik ('Jindal') on 19 September, 2011 for the period from 31 March, 2011 to 30 March, 2012. MSEDCL granted OA permission on 25 October, 2011.
- c) For the period from 1 April, 2012 to 31 March, 2013 (i.e. FY 2012-13), on 9 November, 2012 SPD submitted an OA application for sale of its wind power to M/s EON Kharadi Infrastructure Pvt. Ltd ('EON Kharadi'), Pune. On 6 December, 2012, SPD requested MSEDCL for a change in the OA period to 1 October, 2012 to 31 March, 2013, which was granted by MSEDCL on 14 February, 2013.
- d) SPD applied for sale of its wind power to MSEDCL at the preferential tariff for the period 1 May, 2012 to 30 September, 2012 on 6 December, 2012, for which MSEDCL issued permission on 1 August, 2013. SPD has not sought sale of power to MSEDCL at the preferential tariff for the month of April, 2012 as it has already claimed Renewable Energy Certificate (REC) for that period.
- e) Since the power flow in April, 2012 was not covered anywhere and SPD had claimed REC for it, vide letter dated 10 December, 2012 SPD requested MSEDCL to purchase that power at the Average Pooled Power Purchase Cost (APPC) rate.
- f) Vide letter dated 25 August, 2013, SPD requested MSEDCL to issue OA for April, 2012 to EON Kharadi. In its reply dated 25 September, 2013, MSEDCL informed that permission for sale to MSEDCL cannot be granted since SPD has claimed REC benefit for the month of April, 2012 and application for sale to third party cannot be considered due to enormous delay.
- g) Vide letter dated 15 October, 2013, SPD again stated that OA permission for April, 2012 had been inadvertently left out and that, hence, MSEDCL may consider its application for sale of power at APPC rate or sale of power to the third party, Jindal.
- h) Vide letter dated 25 August, 2014, SPD brought the following facts to the notice of MSEDCL:
 - i. SPD had received OA permission for third-party sale of power on 25 October, 2011 for the period 31 March, 2011 to 30 March, 2012. However, due to some ongoing policy issues, power adjustment had been stopped from 23 December, 2011. After the issues were resolved, MSEDCL continued to give such adjustment.
 - ii. Meanwhile, MSEDCL stopped issuing new permissions for further periods till the policy matters were resolved. During this time, SPD claimed REC for the period of April, 2012 and stopped claiming REC from May, 2012 onwards. SPD

received permission on 1 August, 2013 for sale of power to MSEDCL from 1 May to September, 2012.

- iii. The matter of approximately 12 lakh Units for the period of April, 2012 is not addressed by MSEDCL in any of its OA permissions, which has resulted in financial loss to SPD. SPD requested MSEDCL to issue third party sale permission or to purchase power at the APPC rate or at the preferential tariff for that month.
- i) Vide letter dated 24 September, 2014, MSEDCL declined to purchase the power at the preferential tariff due to the claim of REC for April, 2012.

4. In its Reply dated 1 January, 2016, MSEDCL has stated that:-

- a) SPD's claim for issue of NOC for the month of April, 2012 is barred by limitation and liable to be rejected in limine. No reason has been given by SPD to explain the delay of more than 3 years in filing the Petition. The Petition may be dismissed for delay and laches.
- b) SPD had not disclosed the important fact that it has already claimed REC for April, 2012 and is now seeking adjustment of energy for that period, which is contrary to the MERC (Renewable Purchase Obligation (RPO) and Implementation of REC Framework) Regulations ('RPO Regulations'), 2010.
- c) SPD's claim for adjustment of energy for April, 2012 is without a valid Energy Purchase Agreement (EPA). SPD has generated and injected the alleged energy during that period at its own risk and cost without the consent and a valid EPA with MSEDCL, for which MSEDCL cannot be held liable.
- d) As per the State Grid Code, SPD, as a Wind Generator, could have stopped injection into the MSEDCL grid in the absence of valid OA permission. In fact, it appears that SPD has violated the Grid Code conditions by continuing injection of its wind generation without valid OA permission.
- e) MSEDCL has purchased Renewable Energy (RE) for fulfillment of its RPO. Further, the RPO compliance of MSEDCL for the period FY 2012-13 has already been verified and settled by the Commission vide its Order dated 12 March, 2014 in Case No. 180 of 2013. Purchase of wind energy at the APPC rate is not eligible for meeting RPO. Therefore, MSEDCL cannot be bound to purchase wind energy injected by SPD.

5. At the hearing held on 5 January, 2016, SPD reiterated the submissions in its Petition. SPD stated that OA permission was stalled by MSEDCL for various reasons. Being a RE Generator, SPD had, therefore, requested MSEDCL vide letter 4 July, 2012 (which was not with the Petition but submitted at the hearing) to purchase its power at the APPC rate for the period from April, 2012 to March, 2013 (i.e. FY 2012-13). Since SPD did not receive any response from MSEDCL, it applied for OA for the period of FY 2012-13. After hearing MSEDCL, The Commission asked it to file a written submission on the following:

- a) Whether MSEDCL had received SPD's application dated 4 July, 2012.
- b) Reasons for delay in replying to SPD's various applications.
- c) Reasons for rejecting SPD's application to purchase power for the period 1 April to 30 April, 2012 at the APPC rate.
- d) Whether EPAs have been signed with all RE Generators whose power is being purchased for the purpose of RPO.

6. In its Rejoinder dated 19 January, 2016, SPD stated as below:

- a) SPD denies the contentions of MSEDCL regarding admissibility. The Petition was filed within 3 years. Part X of the Limitation Act stipulates that the period for filing a suit/petition is 3 years from when the right to sue accrues. SPD's right to sue arose in April, 2012 and the Petition was filed within 3 years, i.e. on March 27, 2015. Hence the Petition is not barred by limitation. The main reason for the delay in filing the Petition, albeit within the period of limitation, was that SPD was trying to resolve the issue amicably and settle the issue with MSEDCL.
- b) MSEDCL's contention that SPD had not disclosed the fact that it had already claimed REC for the April, 2012 and was seeking adjustment for energy for that month contrary to the RPO Regulations, 2010 is false. MSEDCL was made fully aware of the REC claimed for April, 2012 through SPD's letter dated July 4, 2012.
- c) MSEDCL's contention that, because SPD had claimed REC, no adjustment of power at APPC rate can be given is also untenable as the Commission's RPO Regulations, 2010 read with CERC's REC Regulations, 2010 clearly state that REC can be issued to a Generating Company only if the power is sold to the Distribution Licensee of its area at the APPC rate.
- d) SPD denies MSEDCL's submission that the adjustment of the energy for April, 2012 cannot be done in the absence of EPA and that SPD has generated and injected energy during that month at its own risk and cost and without consent. In fact, MSEDCL does not have an EPA with any Wind Generator for purchase of unadjusted units or banked units. Hence, the alleged non-existence of EPA is not a tenable reason for not purchasing the power.
- e) MSEDCL had stopped issuing OA permissions for the said period. There were many litigations in respect of some arbitrary Circulars issued by MSEDCL in FY 2011-12, i.e. Circular Nos. 147 and 155 dated September 30, 2011 and January 23, 2012, respectively. Due to such pending litigation, there was no clarity in the OA regime. By virtue thereof, no new permissions were granted for that period, SPD was left with no choice as MSEDCL did not issue permission to adjust the power for sale under the OA regime and, therefore, SPD had to offer the power to MSEDCL at APPC rate as SPD had already claimed REC for the month of April, 2012.
- f) SPD did not continue to claim RECs from May, 2012 onwards since it received OA permission from May 1 to September 30, 2012.

- g) Vide letter dated 4 July, 2012. SPD in the first instance and thereafter vide letter dated 10 December, 2012 had sought adjustment of wind energy and had been following up since then, but there was no response from MSEDCL.
- h) Vide letter dated 25 August, 2014, SPD had further given an option to MSEDCL for sale of power for the month of April 2012, and was also ready to surrender its REC if MSEDCL bought the power at the preferential tariff.
- i) SPD is a Generator and not a consumer, and hence the Commission is the only regulatory body empowered to deal with the issues in the present proceedings.

7. In its further submission dated 18 February, 2016, MSEDCL stated that:

- a) At the hearing held on 5 January, 2016, SPD submitted a letter dated 4 July, 2012 for sale of its wind power at the APPC rate under the REC mechanism for the period 1st April, 2012 to 31 March, 2013. A search was conducted by MSEDCL: for that letter but it is not traceable at its office. The letter shows the inward stamp of the MSEDCL office but it is not signed by the person concerned, and hence the authenticity of the copy of the letter is uncertain. Therefore, the Commission may not take cognizance of the copy of the letter submitted at the hearing.
- b) Wind OA transactions had come to a halt when the Commission stayed operation of Commercial Circulars No. 147 dated 30 September, 2011 and No. 155 dated 23 January, 2012 regarding RE OA on 23 February, 2012 during the proceedings of Case Nos. 8, 18 & 20 of 2012 filed by Wind Energy Associations and Wind OA consumers. The situation changed after issue of the Interim Order dated 27 April, 2012 by the Commission.
- c) Accordingly, MSEDCL issued OA permissions to around 201 wind OA consumers (self use and third party sale) in June-July, 2012, and further issued 40 permissions to Wind Generators exercising the option of sale to MSEDCL at the same time. Thus, the issue of permissions to eligible Wind Generators/ consumers was taken up by MSEDCL on priority during that time.
- d) Till then, MSEDCL had not issued a single permission for purchase of wind energy at APPC rate because purchase at that rate was not eligible for RPO. Thus, the application was anyway liable to be rejected as per the then policy of MSEDCL. Hence, the application of SPD dated 4 July, 2012, though not admitted to have been received by MSEDCL, might have not been processed in a reasonable time.
- e) However, SPD subsequently submitted another application on 19 November, 2012 seeking OA permission for third party sale to EON Kharadi for the entire period of FY 2012-13.
- f) SPD again changed its stand and submitted another application on 6 December, 2012 requesting change in the OA period to October, 2012 to September, 2013.

- g) Vide letter dated 10 December, 2012, SPD further requested MSEDCL to purchase the wind energy at APPC rate under the REC mechanism for the month of April, 2012.
- h) The OA application was then duly processed by MSEDCL and the permission was granted as per the revised application for third party sale vide letter dated 14 February, 2013 for the revised OA period from October, 2012 to September, 2013. The OA permission was issued in due course of time and was not delayed.
- i) Vide letter dated 6 December, 2012, SPD further requested MSEDCL to purchase wind energy for the period from May, 2012 to September, 2013 at the applicable preferential tariff. However, that letter was received by MSEDCL on 13 March, 2013. In its letter dated 25 August, 2013, SPD also admitted that the letter was submitted after receipt of OA permission to it, i.e. only after 14 February, 2013.
- j) Thereafter, permission for sale to MSEDCL was issued on 1 August, 2013 for the period from May to September, 2012 after approval from the Competent Authority.
- k) Thus, the permissions were granted by MSEDCL as per the request of SPD with retrospective effect and, thus, MSEDCL had ensured that there was no loss to SPD whatsoever due to the so-called delay on its part in issuance of permissions.
- l) Vide its letter dated 25 August, 2013, SPD requested MSEDCL to consider power generated in April, 2012 for third party OA, inter-alia demanding settlement of wind energy against the OA consumer EON Kharadi after a lapse of 16 months and after the end of FY 2012-13. In response, vide letter dated 25 September, 2013, MSEDCL informed SPD that its request for sale to MSEDCL (at the preferential tariff) could not be considered because SPD had claimed REC benefit for that period. SPD was further informed that, due to enormous delay (16 months), its application could not be considered for grant of OA for the month of April, 2012.
- m) In spite of these clear remarks, SPD kept on submitting applications with similar requests. Finally, MSEDCL again clarified its stand vide letter dated 24 September, 2014 in response to SPD's letter dated 14 July, 2014.
- n) MSEDCL has addressed all the due requests of SPDs within reasonable time and there was no willful delay. SPD was also informed that MSEDCL was not inclined to purchase the (brown) power injected in April, 2012 against which it had claimed REC and, therefore, such purchase could not have been accounted for against MSEDCL's RPO.
- o) As per Regulation 15 of the RPO Regulations, 2010, if a RE Generator sells its RE to the host Distribution Licensee at the APPC rate, the RE Generator can claim REC for such sale. The Distribution Licensee cannot get the RE component or REC representing environmental attributes of RE generation, which means that such purchase will not be accounted against its RPO.

- p) Alternatively, the purchase of wind energy at the Commission-determined tariff can be accounted for meeting the RPO target. Admittedly, SPD had already sought REC for April, 2012 and hence could not sell the wind energy to MSEDCL at the Commission-determined tariff.

(Vide letter dated 18 February, 2016, SPD has requested the Commission not to consider this submission of MSEDCL since it was filed 27 days after the hearing and not within 10 days as was directed and recorded in the Daily Order. However, the delay is being condoned by the Commission and the submission is being considered for a fuller understanding of the matter.)

Commission's Analysis and Ruling

- 8. On 9 November, 2012, SPD initially applied for OA permission for sale of its wind power to a third party, EON Kharadi, for the entire FY 2012-13 period. However, through two separate applications dated 6 December, 2012, SPD instead**
- (a) sought a revised OA period of October, 2012 to March, 2013 instead of the entire period of FY 2012-13 (which was granted by MSEDCL in February, 2013); and**
- (b) proposed that MSEDCL purchase the power injected from May to September, 2012 at the preferential tariff (which MSEDCL agreed to in August, 2013, having ostensibly received that application only in March, 2013).**
- 9. Thus, the revised applications of 6 December, 2012 left out the month of April, 2012. SPD has stated that there were certain ongoing OA policy issues regarding which the Commission restored the status quo ante through an interim Order at the end of April, 2012. Since it had initially sought to avail of the REC mechanism for that month instead of pursuing its application of November, 2012 for OA sale to EON Kharadi for the entire FY 2012-13, it also did not seek purchase at the preferential tariff for April, 2012 in those applications.**
- 10. However, the Commission notes that, the power flow in April, 2012 not having been covered anywhere, including in third-party sale, on 10 December, 2012 asked MSEDCL to buy the power injected during that month at the APPC rate, to which MSEDCL did not immediately respond.**
- 11. That being the position, on 25 August, 2013 SPD requested MSEDCL for OA permission for April, 2012 for sale to EON Kharadi. On 25 September, 2013, MSEDCL informed SPD that sale to MSEDCL could not be accepted since SPD had claimed REC benefit for that month; and that OA permission for sale to EON Kharadi could also not be given due to inordinate delay. Subsequently, on 15 October, 2013, reiterating that the month of April, 2012 was inadvertently left out, SPD again sought purchase of its power at the APPC rate or, alternatively, for OA permission for sale to another third party, Jindal.**

12. At the hearing and in its Rejoinder (but not the Petition), SPD has referred to a letter dated 4 July, 2012 to MSEDCL seeking power purchase for the entire period of FY 2012-13 (including April, 2012) at the APPC rate under the REC mechanism. MSEDCL has reservations on the authenticity of that letter purportedly bearing the stamp of the Commercial Department and as having been received on 5 July, 2012, and could not locate it in its office. The Commission notes that that there is a distinct difference in the manner in which that letter has been acknowledged by MSEDCL as against the other documents. Moreover, it was first cited only at the hearing and then in SPD's Rejoinder, and not in the Petition. Considering these uncertainties, it would not be prudent to rely on that letter.
13. The sequence of letters and applications shows that SPD has been changing its stand and the permissions sought from time to time. Nevertheless, it is not disputed that SPD also wrote to MSEDCL on 10 December, 2012 asking it to purchase the power injected in April, 2012 at the APPC rate. While MSEDCL entertained and approved the two applications made only four days earlier (dated 6 December, 2012) for OA from October, 2012 to March, 2013 and for purchase at the preferential tariff for May to September, 2012, MSEDCL remained silent on the request to buy the power of the remaining month of April, 2012 at the APPC rate. It was only in September, 2013, i.e. 8 months later, that MSEDCL rejected that request stating that REC had been claimed for that month, thus foreclosing any other option SPD might have considered had a timely reply been given; nor did it agree to OA permission sought in August, 2013 for sale to EON Kharadi for April, 2012 citing inordinate delay and the absence of an EPA. The Commission notes that the CERC Regulations require sale of power to the Distribution Licensee at the APPC rate or third-party OA sale for the issue of RECs, but both were denied by MSEDCL and hence SPD could not avail of RECs either. The Commission does not find merit in the grounds cited by MSEDCL as to why, when it was prepared to grant, retrospectively, OA permission for October, 2012 to March, 2013 at the fag end of that period, and to agree to purchase the power injected from May to September, 2012 at the preferential tariff after the financial year was over (and without requiring an EPA, which was another reason cited), it could not agree to purchase the power for April, 2012 at the APPC rate in the circumstances of this Case set out above, and which it denied several months later.
14. Considering the foregoing, the Commission allows SPD's prayer and directs MSEDCL to purchase the power injected in April, 2012 at the APPC rate.

The Petition of M/s Shah Promoters and Developers in Case No. 55 of 2015 stands disposed of accordingly.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M. Khan)
Member