Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976
Email: mercindia@merc.gov.in
Website: www.merc.gov.in

Case No. 92 of 2020

Case of Indian Wind Power Association (Maharashtra Council) seeking relaxation of Regulation 20.3 of the MERC (Distribution Open Access) Regulations, 2016 by granting an extension of the banking period and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22 on account of the Force Majeure situation prevailing in Maharashtra State due to COVID-19 outbreak and lockdown situation

Coram

I. M. Bohari, Member
Mukesh Khullar, Member

Indian Wind Power Association -Maharashtra Council .....Petitioner

V/s

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) ……. Respondent

Appearance:

For the Petitioner : Ms. Dipali Sheth (Adv.)

For MSEDCL : Shri Ashish Singh (Adv.)

ORDER

Dated: 4 July 2020

1. Indian Wind Power Association (Maharashtra Council) **(IWPA / Petitioner)** has filed a Case through Email dated 14 May 2020 under Sections 42, 86(1)(e) and 86(1)(f) of the Electricity Act, 2003(**EA**) and Regulation 39 of MERC (Distribution Open Access) Regulations, 2016 (**DOA Regulations, 2016**) , seeking relaxation of Regulation 20.3 of DOA Regulations, 2016 by granting an extension of the banking period and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22 on account of the Force Majeure situation prevailing in Maharashtra State due to COVID -19 outbreak and lockdown situation.

2. **IWPA's main prayers are as follows:**

a. Exercise its power under Regulation 39 of DOAR, 2016 to relax the provisions of DOAR, 2016 by granting an extension of the banking period provided under Regulation 20.3 of DOAR, 2016 and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till end of FY 2021-22;

b. Direct MSEDCL to issue generation credit notes for power banked during the period of lockdown (i.e. from March 22, 2020 till lockdown is lifted completely in the State of Maharashtra) and direct MSEDCL to adjust such credit notes in the bills of the consumers of Petitioner's members in terms of prayer (a);

c. Grant ex-parte ad-interim reliefs by permitting banking of units generated by the members of the Petitioner till disposal of the Petition;

d. Grant interim and Ad-interim reliefs in terms of prayer (c) above.

3. **IWPA has stated as follows:**

3.1 IWPA is a registered body of wind energy developers having more than thirteen hundred (1300) members all over India. Due to lockdown, the consumers who avail power under open access from its member generators are under shutdown and therefore their electricity consumption is zero. Further, even after lifting of lockdown partially in May, 2020, the power generated by the wind power plants will not be consumed fully as the production activities have completely halted since 22 March, 2020 and will be resumed at miniscule level once lockdown is lifted.

3.2 The details of waiver provided by various agencies/ organizations due to COVID -19 outbreak and lockdown situation are as under:

i. With an intention to curb the spread of COVID-19 pandemic, the Ministry of Home Affairs (MHA) vide its Order dated 24 March, 2020 declared a nationwide lockdown for a period of twenty-one days. The Government of Maharashtra had implemented lockdown with effect from 23 March, 2020. Hence, IWPA's members' Units were under complete shutdown from 22 March, 2020.

ii. Under the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017 and MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2019, wind power plants have been given "MUST RUN" status.

iii. Ministry of New and Renewable Energy (**MNRE**) vide its Office Memorandum dated 1 April, 2020 and 4 April, 2020 has clarified that the 'MUST RUN' status given to RE generating stations shall remain unchanged during the period of lockdown.

iv. The Ministry of Finance (**MOF**) vide Office Memorandum dated 19 February, 2020, much prior to the declaration of lockdown, had stated that the disruption of supply chains due to spread of corona virus in China and any other countries would be covered under the Force Majeure Clause (FMC) of the Manual for Procurement

of Goods, 2017. The MOF further clarified that the spread of corona virus should be considered as a case of natural calamity and in view thereof FMC may be invoked, wherever considered appropriate.

v. Pursuant to the aforesaid Office Memorandum (OM) issued by MOF, MNRE also issued an OM dated 20 March, 2020 (prior to declaration of lockdown) wherein it inter alia stated that any disruption of the supply chains due to spread of coronavirus in China or any other country be treated as Force Majeure.

vi. MHA vide an Order dated 14 April, 2020, extended the lockdown in all parts of the country upto 3 May, 2020. The lockdown was further extended for a period of two weeks i.e. upto 17 May, 2020 by MHA vide another Order dated 1 May, 2020.

vii. In the backdrop of this extended lockdown and representations received by it with respect to allowing rollover of banked electricity, MNRE vide an OM dated 16 April, 2020 *inter alia* directed that the Power/Energy Departments and DISCOMS of Andhra Pradesh, Karnataka and Tamil Nadu may consider permitting rollover of banked electricity from Open Access Renewable Energy (RE) Generating stations of FY 2019-20 and FY 2020-21 to FY 2021-22.

viii. The Hon'ble Delhi High Court in its Order dated April 20, 2020 in O.M.P. (I) (COMM) & I.A. 3697/2020 *Halliburton Offshore Services Inc. Vs Vedanta Limited & Anr*, opined that the lockdown prima facie is in the nature of a Force Majeure.

3.3 Due to pandemic and its cascading effect, the demand has reduced substantially and therefore, even after lockdown is lifted the demand to pick up fully will take a long time. The electricity consumption of members of IWPA will attain normalcy only after a few months. In such a scenario when the industries and commercial establishments are already hit on account of stoppage of work for reasons not within their control, to deprive IWPA of the energy unutilized during lockdown would severely affect its sustainability.

3.4 May to September being high wind season, a strict adherence to Regulation 20.3 of DOA Regulations, 2016 which restricts banking to one month would be highly detrimental to IWPA and such other wind generators in this turbulent time. 70% of the yearly wind generation happens during the high wind season and all this power will lapse much to the disadvantage of the IWPA. In view of the fact that IWPA's generating Units have not resumed normalcy till date on account of lockdown, and hence lockdown be considered as a force majeure event as has been considered by the aforesaid various Governmental authority notifications and the Hon'ble Delhi High Court's order and certain relaxations be provided to DOA Regulations, 2016.

3.5 As wind power plants are MUST RUN, IWPA's Wind Power Plants have been injecting power into the grid during the lockdown period. MSEDCL shall sell such power to its consumers and recover revenue out of it, whereas members of IWPA, who are generators, would not benefit in any way which will cause grave harm, and irreparable loss. Hence, IWPA be allowed to carry forward the full energy banked from 22 March, 2020 onwards till the end of lockdown and the Units resume normalcy. It is therefore requested that banked units during such entire period of lockdown be allowed to be adjusted in the bills which shall be raised subsequent to the lifting of lockdown without any restrictions.

3.6 Under Regulation 39 of the DOA Regulations, 2016, the Commission is empowered to relax the provisions of DOA Regulations, 2016.

4. **MSEDCL in its submission dated 25 May 2020 has stated as under:**

4.1 Non-joinder of Necessary parties:

IWPA has not joined the other Distribution Licensees (Adani Electricity, Tata Power, BEST, Deemed Distribution Licensees) as well as SLDC and MSETCL as Respondent parties to the present proceedings which are essential and important parties to whom the MERC DOA Regulations, 2016 and the First Amendment Regulations, 2019 strictly applies. Hence, joining the above parties as Respondents is essential for proper adjudication/determination of the present Petition.

4.2 Powers to relax" cannot be exercised ex-parte and without hearing all "affected parties":

"Power to Relax" cannot be exercised ex-parte and without hearing all the affected Parties as the provision itself prohibits the same. Hence, any prayer of an ex-parte relief under "Power to Relax" is not only ill founded but legally untenable.

4.3 Another attempt to somehow extend facility of "banking" throughout the year taking shelter under covid-19:

The present Petition is nothing but another attempt by Parties with vested interest to somehow extend the period of "Banking" throughout the year. IWPA have approached the Hon'ble High Court for the same purpose challenging the DOA First Amendment Regulations, 2019. However, IWPA have not been able to secure any favorable Order till date in matters pending before the Hon'ble High Court and hence are now trying to make out a bogus and false case for extension of "Banking" throughout the year.

4.4 Banking and its concept:

The Order dated 24 November, 2003 in Case Nos. 17(3), 3, 4 & 5 of 2002 (Wind Tariff Order, 2003) states that a generator cannot bank any excess power more than 10% generation from the plant "At any point in time". Thus, "Banking" as a concept has been provided considering the unique and in-firm nature of Wind and Solar Energy.

4.5 DOA First Amendment Regulations, 2019*:*

The Commission vide its Order 19 July 2018 passed in Case No. 147 of 2018 has considered the negative impact of the unchecked Banking. DOA First Amendment Regulations, 2019 was notified in the backdrop of difficulties highlighted by MSEDCL and a dispensation provided by the Commission and the same is highlighted in the Statement of Reasons (SOR) of DOA First Amendment Regulations, 2019.

4.6 MSEDCL's initiative in view of COVID-19 and acknowledging the Must Run Status:

i. Taking into account the Must Run status and the difficulty of COVID-19, MSEDCL on its own decided to open "Option of Short Term Sale to MSEDCL" by all willing "Wind and Solar Generators" through online portal @ Rs. 2.52 Per Unit and @ Rs. 2.50 Per Unit respectively. The said option was provided by MSEDCL as early as on 27 March 2020 through online web portal and same was also informed through emails

and SMS to all RE Generators whose Email Id's and mobile numbers are registered with MSEDCL. A total of 589 Generators totaling quantum of 868.62 MW also availed the said facility in supplying power to MSEDCL. Out of which 574.23 MW of RE power from 411 generators have already been procured and further MSEDCL will also procure 294.39 MW from 178 generators once the requisite documents are submitted by them. It is noteworthy that through the said facility, MSEDCL has allowed application to be made by intending Generators only one (1) day prior to sale of power rather than mandatory period of one (1) month.

ii. Even after the above dispensation and knowing fully well that its open access consumer will not be able to consume power, IWPA still continued to apply for open access which is a "Pure Commercial Call and Risk" of the Petitioner.

4.7 Improper and malicious conduct of IWPA**:**

i. IWPA through the present Petition is seeking to adjust under the provisions of "Banking", all power injected into the "Grid" when in effect there has been no consumption during such time. That is not the intent to "Banking" facility which has been completely misunderstood by the Petitioner. The intent of "Banking" is to adjust unadjusted power which after consumption remains in surplus. The onus of consuming power under open access in on the open access consumer once open access is granted.

ii. It is noteworthy to take strict note of the fact that while the open access consumers have reduced their contract demand with MSEDCL during the times of COVID-19, they still have continued under open access with the same quantum of open access. Not a single open access quantum has been reduced the Contract Demand meaning that the Petitioners only have one agenda i.e. to somehow derive windfall margins.

iii. IWPA were fully aware of the fact that its open access consumers would not be able to consume any power under open access. The bonafide and prudent thing for the Petitioner would have been to surrender their open access till the time of COVID-19 and explore other possibilities of sale of power.

4.8 Must Run Status not in dispute:

i. The notifications referred to on the issues of "Must Run" is misleading as the same was issued on account of the fact that some States were backing down renewable generation which is not the case in Maharashtra and MSEDCL never backed down any renewable generation.

ii. There is no dispute about the "Must Run" status of the Petitioner. However, "Must Run" status does not give a right to Petitioner to manipulate the system to achieve its malicious intent at the cost of common consumers.

iii. When during the time of COVID-19, MSEDCL opened the option to sale "Short Term Power" to MSEDCL for all Generators, there arises no occasion for the Petitioner to claim any "loss" occasioned on account of "Must Run". All alternate options were available to the Petitioner which were not exercised by them after taking a "Pure Commercial Call and Risk" to avail open access.

4.9 No Force Majeure when open access in fact is availed:

i. The entire case of the Petitioner is based on COVID-19 acting as "Force Majeure" and preventing open access. There is no "Force Majeure" w.r.t MSEDCL and Petitioner. The Generator has sought open access and supply of power to open access consumer which has been provided by MSEDCL as per law even during the tie of COVID-19.

ii. Open Access is availed by the Petitioner after taking a "Pure Commercial Call and Risk" during the time of COVID-19 after knowing fully well the applicability of MERC DOA Regulations, 2016 and the First Amendment Regulations, 2019.The Petitioner was fully aware of the fact that its open access consumers would not be able to consume any power under open access. Hence, there is no applicability of "Force Majeure" in the specific facts of the present case when in fact open access has been availed in full.

4.10 "Force Majeure" a subject matter of dispute between Generator and Consumer:

i. The issue of "Force Majeure" is subject to "Contract/Agreement" between Parties. The "Contract/Agreement" for open access is between the "Generator" and the "Consumer". Such commercial contract is not within the scope/jurisdiction of the Commission. Whether an event is a "Force Majeure" event or not has to be seen in specific facts of each case based on the terms of the contract. Moreover, through the present Petition an event of "Force Majeure" is sought to be argued on behalf of open access consumers which is strictly amendable to the jurisdiction as per the "Contract/Agreement" entered between the "Generator" and the "Consumer".

ii. When a commercial "Contract/Agreement" for open access is between the "Generator" and the "Consumer" then appropriate measures w.r.t "Force Majeure" would also have been envisaged under the said contract "Contract/Agreement" , which could have factored unforeseen circumstances like the present one. Rather than taking recourse to the said provisions and acting accordingly, the Petitioner is willfully and maliciously trying to take the benefit of "Rollover of Banking". This is in fact even after knowing all the difficulties and open access is availed by the Petitioner after taking a "Pure Commercial Call and Risk". After taking a prudent decision, it is not open for the Petitioner to retrospectively fit a case of blatant misuse of law.

iii. The onus to consume power once open access is granted, is on the open access consumer. In fact, even after knowing all the difficulties, open access is availed by the Petitioner after taking a "Pure Commercial Call and Risk". Hence, it is not open for the Petitioner to retrospectively fit a case of blatant misuse of law.

4.11 Notifications/Judgments as relied in Petition on the issue of "Force Majeure" not applicable:

i. The OM dated 16 April 2020 issued by MNRE has no bearing on the present matter as it is not a mandate but only a suggestion. Moreover, the said suggestion is only directed towards some States which approached the MNRE in view of specific facts and difficulties. Further the said notification was issued on a unilateral representation without considering the representation of other stakeholders. Hence such OM dated

16.04.2020 can only be termed as ill-conceived and in no manner, whatsoever be applied to Maharashtra. Further, MSEDCL provided an option to RE Generators for sale "Short Term Power" to MSEDCL through online portal to facilitate them during the time of COVID-19, which was never an option provided by such States which lead to issuance of such an OM.

ii. The notifications/judgments etc. as relied upon by the Petitioner on the issues of "Force Majeure" does not aid the Petitioner in any manner, as the conduct of Petitioner in still availing open access after knowing fully well that the power would not be consumed by the consumer clearly shows that there was no "Force Majeure" event.

iii. Even if there is a "Force Majeure" event, then it is between the Generator and the Consumer the relationship of which is governed by a separate contract. In fact the notifications/judgments etc., as relied upon by the Petitioner on the issues of "Force Majeure" clearly establishes that a "Force Majeure" has to be construed strictly as per the terms of a contract and between the Parties to contract and not otherwise.

4.12 Dispensation provided by MSEDCL in view of Pandemic to change contract demand once in a billing month

i. Keeping in view of the difficult times caused by the Pandemic, MSEDCL has already provided a dispensation in accordance with Regulation 4.14 of the MERC (SOP Regulations) 2014 which fixes a upper time frame for reduction of "Contract Demand" before the expiry of the second billing cycle. MSEDCL has sent out email communications to all industrial consumer allowing "Change of Contract Demand once in a billing cycle" keeping in view the difficult times caused by the Pandemic. This is a special measure which ensures that industrial consumers take the benefit of proper load planning and are allowed to change the "Contract Demand" once in a billing cycle, in case their load planning is affected.

ii. The Commission has already provided various relaxations:

a. As per practice directions issued on 26th March 2020, meter reading (except automated meter reading) and physical bill distribution work has been suspended and bills are being issued on average usage basis till the current crisis gets subsided.

b. Further, moratorium on payment of fixed charges for three billing cycles for commercial and industrial consumers is put in place.

c. Moreover, as per the said Practice Directions, only a token amount based on 10 % of the average energy consumption would be billed to Industrial and Commercial consumer premises under Lockdown. Additionally, holding charge (@ rate of one-month MCLR of SBI applicable on date of billing) would be payable by utilities to the consumers on the excess money recovered. Also Delayed Payment Charges on the unpaid amount would be reduced to 50 % if the recovery is 80% and above of the bill amount. These all measures are already in place for Industrial and Commercial consumers which will help them to mitigate the impact of COVID-19 to a large extent. However, these measured will definitely have adverse financial impact on MSEDCL.

d. Hence, it can be seen from the above that a lot of benefits have already been provided by the Commission. During challenging times like the present, more robust and balancing act is required to safeguard interest of all consumers. It is in that view of the matter that the Commission while extending several benefits to the Petitioner through its "Practice Direction" as well as subsequent clarifications has ensured that such temporary benefits operate on a principle of "Restitution" and does not cause any long term loss to common consumers. The Commission has made sure that the impact of under-recovery is temporary and not permanent.

e. However, through the present petitioner what the Petitioner in effect is seeking is "Taking out money from the pocket of common consumers and filling its own pocket" without there being any mechanism for "Restituting" the common consumers on a later date. Such kind of reliefs in all fairness cannot be granted.

5. **IWPA in its Rejoinder dated 29 May 2020, has stated as under**:

5.1 Vide the present Petition, IWPA is seeking reliefs for itself in the capacity as a generator as well as consumer who falls within the jurisdiction of MSEDCL and hence there is no need to add any of the other Distribution Licensees to the present proceedings. Thus, the reliefs sought are in personam and not in rem.

5.2 IWPA has approached the Hon'ble High Court challenging MERC DOA First Amendment Regulations, 2019. The present Petition is on account of the Force Majeure situation prevailing in entire country wherein the State of Maharashtra is most affected due to the COVID-19 pandemic wherein all the industrial and commercial units including the IWPA's member's units have been under shut down since 22 March, 2020. However, as wind power plants are Must Run, IWPA has been generating power and injecting into the grid.

5.3 The 10% ceiling in Wind Tariff Order, 2003 is a cap on the purchase of banked power by MSEDCL and by no stretch of imagination is a cap on any generator to bank the power. There is no express bar to bank power more than 10% as the Wind Tariff Order, 2003 clearly states that upto 10% of total energy generated from the project banked with the Utility will be purchased by the Utility at the rate specified by the State Commission. Further it also provides that in case of Force Majeure (factors beyond control) the utility may purchase even beyond 10% and therefore, there is no doubt that the banking can be for more than 10%.

5.4 The Wind Tariff Order, 2003 did recognize the inability to consume the entire RE power fed into the grid on account of its infirm nature and factors beyond the control of the generators. The lockdown imposed on account of COVID-19 and the graded relaxation granted by the Central and State Government is not within the control of the generators or consumers. Further, any violation of the lockdown amounts to a criminal offence for which stringent punishment as prescribed under the Disaster Management Act, 2005 is applicable. Thus, the present lockdown squarely falls within the unforeseen and Force Majeure conditions as envisaged under the Wind Tariff Order, 2003.

5.5 The 'option of short-term sale to MSEDCL' was not floated with the intention to

mitigate the problems of wind power generators but was in fact a step taken by MSEDCL to fulfill its Renewable Energy Obligation (RPO) targets. Though MSEDCL in its Reply is trying to portray a picture that a lot of RE generators responded to its option of short term supply, it is also equally true that MSEDCL has admitted the lack of response to competitive bidding by the wind generators and has approached the Commission vide Case No. 21 of 2020 for waiver of penalty for non-fulfilment of RPO compliance till 2022-23. In addition, for availing this option, the generator inter alia needs to submit an undertaking that it shall not avail Renewable Energy Certificate (REC) for the applied period despite the fact that the tariff offered by MSEDCL for such short term sale is not preferential tariff. Further, a generator opting for short term sale to MSEDCL also needs to submit an undertaking that it shall not avail OA for the applied period and in case there exists an OA permission for the said period then the energy injected during the over lapping period shall lapse.

5.6 Members of IWPA have applied for OA permissions in December 2019 which is much prior to announcement of lockdown, hence the option of short -term sale was not applicable. No one envisaged such prolonged lockdown due to COVID-19. Further, all odds being in favour of MSEDCL, it is difficult to believe that such an option was given by MSEDCL in view of the difficulty of COVID 19 to help out the generators. RE generators who availed the option of short-term supply to MSEDCL are the ones whose Power Purchase Agreements with MSEDCL had expired and did not have any other avenue for sale.

5.7 The contention of MSEDCL that the present issue is a manufactured one is incomprehensible at a time when MSEDCL's office itself is functioning only with skeletal staff on account of the lockdown and not even able to process and issue OA permissions on time. It is highly unlikely that the operations of members of IWPA will be restored to its full capacity in the coming few months and the lockdown will have far reaching ramifications. In such a scenario when the industries and commercial establishments are already majorly hit on account of stoppage of work for reasons not within their control and reeling in losses, to deprive IWPA of the energy generated but unutilized during lockdown on account of Force Majeure would severely affect its sustainability.

5.8 It is denied that once the OA is granted the onus of consuming the power is on the OA consumer especially in such force majeure scenario. Even assuming such a tenuous argument to be valid, principles applicable during normal times would not apply in its strict sense during the present situation caused by the COVID-19 pandemic which admittedly does not qualify as a normal circumstance. MSEDCL granted unsigned OA permissions on 27 April, 2020 for period effective from 1 April, 2020.

5.9 MSEDCL is aiming at deriving wind fall gains as all the RE power injected by members of IWPA can be availed free of cost by MSEDCL if the reliefs sought by IWPA are not granted. As far as IWPA having known that it would not be able to consume the OA power is concerned, OA applications were not submitted subsequent to the imposition of lockdown but much prior to it. In unprecedented times like the present when IWPA has approached the Commission for reliefs to be able to survive

the lockdown and its impact. Therefore, the contention of MSEDCL to surrender valid OA permissions availed much prior to the imposition of lockdown as a 'pure commercial call and risk' is highly careless.

5.10 The OM dated 1 April, 2020 and 4 April, 2020 issued by MNRE are very much relevant in this time of lockdown as they took into consideration the impact of lockdown implemented in the wake of COVID-19 on the industries and commercial establishments consuming power from RE sources and the impact it would have on banked energy.

5.11 The consumer also enters into OA agreement with MSEDCL and the OA permission granted by MSEDCL is in nature of contract between generator, consumer and MSEDCL which is governed by DOA Regulations, 2016 (in present case generator and consumer being same entity). 'Force Majeure' is an event which cannot be anticipated or controlled and which impedes the performance of the contract. In such event, the party affected is excused of performance during the Force Majeure. As present scenario is Force Majeure, the Petitioner is excused from performance of its obligations under the OA permission to certain extent.

5.12 The notifications/ judgment relied upon by it indicates the benevolent approach taken by the Governmental authorities and the Hon'ble Courts in this time of crisis. Many of the customers of the Petitioner have claimed force majeure and therefore, there is no recovery of dues.

6. **MSEDCL in its Reply to Rejoinder (Sur -Rejoinder) dated 8 June 2020 re-iterated the similar submissions as mentioned in Para. 4 above. The additional points in MSEDCL's Sur-Rejoinder are as below:**

6.1 The Prayers in the Petition are amply clear. The same is made for "Granting Extension" w.r.t Banking period. It is without doubt that exception, even if created, can only be done for all and not for a few. Even the Prayer does not say so or prays for the same i.e. "Grant of Extension" w.r.t Banking period only w.r.t Petitioner and its members and not for entire Maharashtra.

6.2 Assuming without admitting that the Commission would allow tweaking of Prayers by IWPA at this belated stage to mean that the Prayers are made only w.r.t IWPA and its members, then the basic details of its members and open access contracts of each member is missing in the Petition. In view of such details being not provided, the Petition in any way cannot be adjudicated.

6.3 Incorrect appreciation of a binding Order passed by Commission has its own consequences which the Petitioner would face in view of the operative part of the said Order which clearly lays down the rules and intent of "Banking". The Commission again through several Orders i.e Order dated 14 February 2019 in Case No. 367 of 2018 ("SEP Energy Order) or Order dated 18 April 2019 in Case No. 19 of 2019 (Arvind Cotsyn Order) or in the matter of (Roha Dychem Order) has explained about the injection excessive banked power into the grid by OA consumers/Generators beyond its contract demand. In the present case not only excessive capacity beyond contract demand is sought to be banked but all generated power is sought to be banked

after knowing fully well that not even a single unit would be consumed under open access as consumer have already informed Petitioners about its inability to consume power since 24 March 2020.

6.4 The Wind Tariff Order 2003 clearly states that in "Force Majeure" conditions more than 10% of banked energy could be purchased by MSEDCL at APPC rate. However, the said fact is neither the case nor the Prayer which is pleaded by IWPA. Moreover, even the above dispensation does not give IWPA any right to carry forward and adjust the entire banked energy in consumer's subsequent bills.

6.5 IWPA submitted five sample copies which are annexed with the Rejoinder to evidence that some consumers applied for MTOA in December, 2019 only. However, it is to be noted that the open access permissions are issued for the period commencing 1 April 2020. As per the Petitioner own case, its consumer started claiming "Force Majeure" since 24 March 2020. Even after being fully aware that consumers were not able to consume power under open access, IWPA chose to still be under open access rather than requesting for cancellation of the said permission. After cancellation of open access IWPA could have sold power to MSEDCL immediately. However IWPA took a conscious decision after evaluating the "Financial aspects and risk" of sale under open access vis a vis sale to MSEDCL and hence now wants to turn the clock back to rectify its misadventures that too at the cost of common consumers.

6.6 IWPA throughout the entire Petition as well as the Rejoinder has not provided the list of its Generators and Consumer with open access details. This clearly proves that there are hidden facts which the Petitioner does not want to disclose. IWPA should be directed to furnish list of all its Generators and Consumer alongwith the details of their respective open access.

6.7 Moreover, IWPA is conveniently silent on STOAs being repeatedly applied even during the time of lock-down. It is not IWPA's case that none of its members are under STOA. Rather one such example of a STOA itself is mentioned in the Rejoinder to prove a point that lockdown created so many difficulties even for MSEDCL that it was forced to give open access permission on email, that too without signatures. MSEDCL even during lockdown did not claim any "Force Majeure" and did not reject open access permission. Hence MSEDCL performed all its duties diligently even during lock-down considering the mandate of open access. Whenever open access was sought the same was granted as per the mandate of MERC DOA Regulations, 2016 and the First Amendment Regulations, 2019.

6.8 It is worth noting that even during lock-down, huge RE capacity was under STOA as well as MTOA. Such capacity was deliberately left under open access so as to manufacture a situation like the present one to create sympathy towards large number of private parties and cause larger public loss by defeating the larger public good and intent of provisions of Banking for which reason the MERC DOAR, 2016 was amended by the First Amendment Regulations, 2019.

6.9 It is an admitted position which is also confirmed by the Rejoinder filed by IWPA that "Force Majeure" cannot be applied without a valid contract and has to be strictly

construed in view of contract between the Parties. As per IWPA's contention, open access granted to IWPA is the contract between MSEDCL, Generator and Consumer. However, no "Force Majeure" clause is relied upon by IWPA with respect to the said purported open access contract as claimed by the Petitioner to substantiate its Petition.

6.10 Moreover, IWPA has itself agreed that even if there is a contract, such contract would be governed under DOA Regulations, 2016 and the First Amendment Regulations, 2019. However no such provision is relied upon by IWPA under the DOA Regulations, 2016 and the First Amendment Regulations, 2019 to evidence that the reliefs as prayed for can be granted as a "Force Majeure" w.r.t to MSEDCL under DOA Regulations, 2016 and the First Amendment Regulations, 2019.

7 **At the e-hearing through video conferencing, held on 9 June 2020, Advocate of IWPA re-iterated its submissions as made out in the Petition and Rejoinder and sought 3 days to file their written submissions. Advocate of MSEDCL re-iterated their submissions as made out in its reply and sur-rejoinder and sought 3 days to file additional written submissions in the matter. Accordingly, the Commission directed IWPA and MSEDCL to file their written submission by 12 June 2020**.

8 **MSEDCL in its additional written submission dated 12 June 2020 has re-iterated the similar submissions as mentioned in Para. 4 and 6 above.**

9 **IWPA in its additional written submission (SUR SUR Rejoinder) dated 15 June 2020 has re-iterated the similar submissions as mentioned in Para. 3 and 5 above. The additional points in its SUR SUR Rejoinder are as under:**

9.1 <u>Filing of Sur Rejoinder by MSEDCL</u>

a. IWPA once again lodges its strong objection in filing of Sur Rejoinder by MSEDCL few hours before the hearing. MSEDCL had enough opportunity to file Reply to the Petition which it availed and therefore, filing multiple pleadings should not be permitted. MSEDCL by filing Sur Rejoinder and then Written Arguments dated 12 June, 2020 is adding certain aspects which were afterthought.

b. Regulations 61 to 63 of MERC (Conduct of Business) Regulations, 2004 provides for the procedures in respect of filing of reply and rejoinder. The said provisions limit themselves only to the point of Rejoinder and do not venture beyond, hence the filing of the Sur Rejoinder is not a matter of right. Furthermore, Regulation 61 is quite unambiguous and states that any ***additional facts***, which may be important for the said case should also be incorporated in the reply by MSEDCL.

c. Order 8 Rule 9 of the Civil Procedure Code, 1908 (**CPC**) states that if the party is desirous of filing any subsequent pleadings, then the leave of the court has to be taken before filing the same.

d. Section 94(1) of EA provides that the Commission for the purpose of any proceedings under EA, 2003 shall have the same powers as are vested in a civil court under CPC.

e. The Hon'ble Madras High Court in *Nanjan v. Selai and Ors.* ***AIR 1958 Mad 383***

held that a party seeking to file additional written statement has to firstly file a petition stating the reasons as to why he failed to state these pleas in the original written statement, pursuant to which the other side has to be given a chance to oppose the said petition and thereafter, the court has to decide to either admitting the same or not.

f. The Hon'ble Delhi High Court in *Sayed Sirajul Hasan Vs Sh. Syed Murtaxa Ali Khan Bahadur and Ors. 1991 SCC OnLine Del 425*, also held that the party seeking to file additional written statement has to show to the court the circumstances as to why it has failed to raise the pleas in the original written statement and the same cannot be claimed as a matter of right. The court in exercise of its discretion, may or may not grant leave to present a fresh pleading.

g. In view of the aforesaid, MSEDCL should have sought leave of the Commission before filing the Reply to IWPA's Rejoinder. In the absence of any reasons submitted by MSEDCL that why at the time of filing Reply on 25 May, 2020 the additional facts it proposed to file in the Reply to Rejoinder could not be filed and no such permission categorically sought from the Commission. Hence the filing of such Reply to Rejoinder cannot be taken on record. IWPA objects to the same being taken on record and requested the Commission that pleadings in the Reply dated 8 June, 2020 not be taken into consideration.

h. Even if such leave is sought to file Reply to Rejoinder, it may be noted that no new facts were brought on record by the Petitioner in the Rejoinder which warrants MSEDCL to file further submissions. Hence, filing of such Reply is impermissible under the law and the question of any leave being granted for filing further submissions does not arise at all.

9.2 OA cannot be effected without permission of MSEDCL. Further the OA agreement governs availing of OA by the consumer. Therefore, the contention of MSEDCL that there can be no force majeure vis-à-vis OA is incorrect.

9.3 Force majeure is manufactured issue:

MSEDCL has failed to take cognizance of fact that COVID-19 is a pandemic affecting the world at large. It is also a fact that if there was no COVID-19 and lockdown announced by the Government, IWPA would not have filed the present Petition. Therefore, putting blame on IWPA for consequence of a force majeure is ghastly.

9.4 Dubious stance of MSEDCL

On one hand MSEDCL started disconnecting windmills vide email dated 13 May, 2020 on the ground that it had enough power and excess power without power purchase agreement and without OA will cause harm to the grid. On the other hand, MSEDCL floated tender to purchase power under short term and also purchased power from Indian Energy Exchange. Therefore, the short-term tender floated by MSEDCL was not to assist generator to mitigate losses that may arise because of COVID-19 but to meet its power demand and also comply with its RPO.

9.5 The prayers sought by IWPA vide the present Petition is specific and with respect to the members of IWPA only. It is the discretion of the Commission whether it desires to issue a generic direction in this regard with respect to all affected parties or to restrict its direction to only the members of IWPA who approached the Commission. IWPA would like to point out that vide Case No. 139 of 2016 when Ultra Tech Cement (Petitioner therein) had approached the Commission seeking action against MSEDCL for incorrect billing methodology followed by MSEDCL, the Commission had realized the gravity of the issue involved and while allowing the prayer of the Petitioner therein had directed MSEDCL to correct the bills of all OA consumers who were similarly placed.

9.6 Further, vide Case No. 82 of 2020 when a group of High Tension (**HT**) consumers had approached the Commission seeking directions for modification of MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2014 (**SOP Regulations 2014)** with respect to revision/ change in contract demand (**CD**) in the present unprecedented circumstances of COVID-19, the Commission realizing the importance of such a relaxation had vide Order dated 21 May, 2020 not only allowed HT industrial and HT commercial consumers to revise their CD thrice in a billing month but also suo-moto provided similar reliefs to LT consumers also.

9.7 Thus, the discretion as to whether any dispensation granted by the Commission would be applicable only to the persons approaching the Commission or to make is applicable to other similarly placed consumers is with the Commission alone and there is no need for MSEDCL to be mulling over it. There is absolutely no need to amend the prayers of the present Petition as claimed by MSEDCL.

9.8 The contention of MSEDCL with respect to details of the members of the Petitioner and their OA contracts is an afterthought as no such objection was taken by MSEDCL in its Reply dated 25 May, 2020. It is denied that the Petition cannot be adjudicated without such details. The copy of the list of all affected members of the Petitioner along with the OA permissions granted to such members of the Petitioner is enclosed as Annexure.

9.9 The present case is not on the issue of reduction of OA contract demand by MSEDCL or resultant power flow that can be accommodated in the existing grid unlike the Orders cited by MSEDCL in the paragraphs under reply which dealt with these issues. It is denied that excessive capacity beyond CD is sought to be banked by the members of the Petitioner.

9.10 None of its members have received any email or SMS from MSEDCL with respect to this online portal for short term sale of power. It has been reliably learnt that such emails were sent only to Group III projects whose Energy Purchase Agreements (**EPAs**) had expired. Further, assuming but not admitting even if such an option was available, there was no assurance that such power that was applied for would be purchased by MSEDCL. Therefore, even if any generator wanted to opt for the option of short term sale of power then they had to first cancel their Medium Term Open Access (**MTOA**) approval for entire period as there was no option to curtail MTOA

only for a specific period.

9.11 All OA permissions of the members of the Petitioner were sought prior to lockdown and no OA applications were made during the course of the lockdown. For instance, the OA permissions granted to two of the members of IWPA i.e. Giriraj Enterprises and D.J. Malpani for supplying power to Fiat India Automobiles Private Limited were granted way back in March, 2018 for the period from 1 April, 2018 to 31 March, 2021. There was no option to curtail MTOA for a specific period and resume the same after elapse of the lockdown period.

9.12 The Petitioner denies that its members deliberately sought to seek OA knowing fully well that it would not be able to consume any power. Assuming but not admitting that MSEDCL offered to purchase power on short term basis, absence of OA for the said period was a prerequisite for opting to sell short term power to MSEDCL and also there was no option to curtail MTOA for a specific period and resume the same after lockdown period. Hence, the surrendering an existing MTOA would not be practical as MSEDCL is contending, as neither there was assurance of purchase of power by MSEDCL nor option of curtailing MTOA period only for lockdown. The Petitioner denies that it aims to gain windfall gains.

9.13 Before the Commission, by way of the Petitioner are a group of wind generators who were supplying power to their consumers under OA permissions which existed prior to the lockdown or were applied prior to the lockdown and are now facing tremendous financial stress as their consumers have scaled down their demand and the DOAR, 2016 does not provide carrying forward of banked power beyond the same month.

9.14 Regulation 6.1 of the DOA Regulations, 2016 categorically provides that an OA agreement shall be entered into on grant of MTOA. Further, Clause 8 of the draft of OA agreement given under Annexure V of DOA Regulations, 2016 provides for a Force Majeure Clause. Thus, MSEDCL's contention that contract/ agreement for OA is only between the generator and consumer is false. It is imperative to note that even after contract between generator and consumer, the OA cannot be in effect without permission of MSEDCL. The consumer also enters into OA agreement with MSEDCL and the OA permission granted by MSEDCL is in nature of contract between generator, consumer and MSEDCL which is governed by DOA Regulations, 2016.

9.15 As present scenario is Force Majeure, IWPA, its members and consumers are impaired from consuming the power generated in same month. Consequently, the contention of MSEDCL that the Force Majeure is only vis-a-vis generator and consumer is untenable.

9.16 The applicable laws recognize the inability to consume the entire RE power fed into the grid on account of its infirm nature and factors beyond the control of the generators. Thus, the present lockdown squarely falls within the unforeseen and force majeure conditions. Therefore, the reliefs sought by the Petitioner is on account of the inability of its member's consumers to consume power due to such force majeure situation.

Commission's Analysis and Ruling:

10 IWPA is an association of Wind Power Generators (Maharashtra Council) having its 16 members affected in the instant Case (13 members for MTOA and 3 members for STOA) who applied for MTOA in December 2019 and for STOA in March 2020 to MSEDCL and are availing the granted open access. Due to lockdown of industries in the wake of COVID-19, IWPA's members' consumers could not consume the power contracted and generated on must run status from IWPA members' wind power generators, which are falling within the jurisdiction of MSEDCL.

11 The main issue raised by IWPA in the instant Case is relaxation and extension of monthly banking period as specified under Regulation 20.3 of DOA Regulations 2016 i.e., seeking permission for adjustment of the banked units of FY 2019-20 and FY 2020-21 till end of FY 2021-22, considering the force majeure clause due to lockdown of industries in the State of Maharashtra in the wake of COVID-19. They have stated that the monthly banking period under the Regulations would be highly detrimental to members of IWPA as picking up of electricity demand of consumers and resumption of normalcy after lifting of lock down would take some time and the contracted supply of wind generator being must run would inject 70% of its generation into grid during high wind season (May to September), which can be used by MSEDCL for sale to its consumers under the mechanism of banking. Hence, on account of the force majeure, it requested to relax the monthly banking period under Regulation 39 of DOA Regulations 2016 for the aforesaid period.

12 In support of its claim, IWPA mainly contends that:

a. MNRE has issued OM on 16 April 2020 and directed to the Power/Energy Departments and DISCOMS of Andhra Pradesh, Karnataka and Tamil Nadu to consider permitting rollover of banked electricity from Open Access RE Generating stations of FY 2019-20 and FY 2020-21 to FY 2021-22. The OM dated 1 April, 2020 and 4 April, 2020 issued by MNRE are also relevant as they took into consideration the impact of lockdown implemented in the wake of COVID-19 on the industries and commercial establishments consuming power from RE sources and the impact it would have on banked energy.

b. The lockdown imposed on account of COVID-19 and the graded relaxation granted by the Central and State Government is not within the control of the wind generators or open access consumers of IWPA and hence the present lockdown squarely falls within the unforeseen and Force Majeure conditions. The option of short-term sale to MSEDCL can not be exercised as surrendering of existing OA would not be practical and without having an option to curtail OA for specific lockdown period.

c. DOA Regulations, 2016 specifies OA agreement to be entered between consumer and MSEDCL which provides for Force Majeure Clause. OA permission granted by MSEDCL is in the nature of contract between generator, consumers and MSEDCL, which is governed by DOA Regulations 2016. Even after contract

between generator and consumer, OA cannot be in effect without OA permission of MSEDCL and hence MSEDCL is also part of the contract.

d. Wind Tariff Order, 2003 did recognize the inability to consume the entire RE power fed into the grid on account of its infirm nature and factors beyond the control of the generators. Thus, the present lockdown squarely falls within the unforeseen and force majeure conditions as envisaged under the Wind Tariff Order, 2003.

13 MSEDCL opposed the contentions of IWPA and contends that power to relax cannot be exercised without hearing all the affected Parties and exception to be created for all and not for a few. In its support it further contends as under:

a. The OM dated 16 April 2020 issued by MNRE is not a mandate but only a suggestion and the said suggestion is only directed towards some States and not applicable to Maharashtra. The OM dated 1 April, 2020 and 4 April, 2020 issued by MNRE are also not applicable/relevant in the present case.

b. The consumers/members of IWPA were fully aware of the fact, relating to provisions of DOA Regulations 2016 and First Amendment Regulations 2019, that their open access consumers would not be able to consume any/full power under open access due to lockdown of industries in the awake of COVID -19 outbreak and still they have taken the commercial call on their own risk in continuing sale under OA rather than the option of cancellation or reduction of OA quantum and short term sale to MSEDCL.

c. There is no Force Majeure with respect to MSEDCL and IWPA as the commercial contract/agreement of sale of power under open access is entered between the consumer and the Generator and hence no force majeure is applicable in the instant case. Appropriate measures with respect to Force Majeure would have been envisaged under contract/agreement of sale of power between consumer and generator considering unforeseen circumstances like present one. No Force Majeure is applicable when open access is availed in full as per DOA Regulations 2016.

d. Wind Tariff Order 2003 clarifies that a generator cannot bank any excess power more than 10% of generation from the plant at any point in time and the intent of Banking is to adjust unadjusted infirm power which after consumption still remains in surplus. Recent SEP Energy and Arvind Cotsyn and Roha Dychem Orders have also laid down the rules and intent of banking. The 2003 Wind Tariff Order also stated that in case of force majeure condition more than 10% of banked energy could be purchased by MSEDCL.

14 In the present Petition, the Commission observes that IWPA is necessarily seeking permission to bank the power contracted and generated by its member wind power generators, which are operated as a must run as per applicable Regulations, during the lock down period in the wake of COVID-19 Pandemic, and later allow adjusting such banked power over a period of two years i.e., FY 2020-21 and FY 2021-22. This entails permitting banking period of over two years. It is worth highlighting that vide

DOA (First amendment), Regulations 2019 notified on 7th June 2019, the banking period was reduced to 'one month' from 'one year' as specified under the Principal DOA Regulations, i.e., the DOA Regulations, 2016. The detailed rationale for such reduction in banking period is provided in the Explanatory Memorandum published as part of the pre-publication of amendment Regulations and in the subsequently published Statement of Reasons to the said amendment Regulations. Aggrieved by such reduction in banking period among other issues, IWPA has filed a Writ Petition before the Hon'ble Bombay High Court where the matter is sub-judice.

15 Based on these grounds/contentions and having heard the Parties and after taking on record the various submissions filed by all Parties, the Commission frames following issues for its consideration in the present matter for addressing the prayers raised in the Petition:

a) ***Issue 1: Whether Waiver provided by MNRE due to COVID -19 outbreak and lockdown situation is applicable in the present Case?***

b) ***Issue 2: Whether short-term power sale option offered by MSEDCL to wind generators was an alternate recourse available to the petitioners during the lockdown period?***

c) ***Issue 3: Whether Force Majeure clause under DOA Regulations 2016 is applicable in the present Case that allows rollover of banking as sought by IWPA?***

d) ***Issue 4: Applicability of must run status under RE Tariff Regulations and influence of the deviations due to schedule***

e) ***Issue 5: Whether the request of IWPA for Relaxation and Extension of the banking period provided under Regulation 20.3 of DOA Regulations, 2016 and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till end of FY 2021-22, is to be allowed or not?***

The Commission has dealt with all the above issues in the following paragraph

Issue 1: Whether Waiver provided by MNRE due to COVID -19 outbreak and lockdown situation is applicable in the present Case?

16 The various notifications/OMs issued by MNRE, Govt. of India for providing waiver due to COVID-19 outbreak and lockdown situations are as under:

a. Dated 20 March 2020:

"3. This issue has been examined in the Ministry and in line with the above referred O.M. dated 19.02.2020 of Government of India, it has been decided that:

All Renewable Energy implementing agencies of the Ministry of New & Renewable Energy (MNRE) are hereby directed to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any

other country, as Force majeure.

……

(d) The State Renewable Energy Departments (including agencies under Power/ Energy Departments of States, but dealing in renewable energy) are also requested to treat delay on account of disruption of the supply chains due to spread of coronavirus in China or any other country, as Force Majeure and issue their own instructions on the subject."

b. Dated 1 April , 2020

"(a) Must-Run Status to RE Projects:

Renewable Energy (RE) Generating Stations have been granted 'must-run' status and this status of must-run' remains unchanged during the period of lockdown.

c. Dated 4 April, 2020

"2. Since, some of the DISCOMS are still resorting to RE curtailment without any valid reason i.e. grid safety; it is once again reiterated that Renewable Energy (RE) remains 'MUST RUN' and any curtailment but for grid safety reason would amount to deemed generation."

d. Dated 16 April 2020:

"2. Due to nationwide lock-down in the wake of COVID-19, industries and commercial establishments using electricity generated directly as well as through banking, from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale, are running their operations at their lowest and consequently their demand of electricity has reduced to minimum since mid March'20. Due to this, the generated and banked units in previous months could not be utilized by such consumers. The lapse of such banked units or purchase thereof at APPC rate would severely affect the profitability of both the developers and consumers associated with such Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations. This situation is likely to continue for another few months (FY 20-21) till the pandemic is controlled and the industrial production and commercial footfalls return to normal.

……

4. Accordingly, the undersigned is directed to convey to Power/Energy Departments and DISCOMs of Andhra Pradesh, Karnataka and Tamil Nadu that they may consider permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22."

17 From the above notifications issued by the MNRE, the Commission observes that MNRE has issued the OM dated 20 March 2020 for providing suitable time extension in Scheduled Commissioning Date of RE Projects considering disruption of the supply chains due to spread of coronavirus in China or any other country as Force Majeure. The said notification being for extension of Scheduled Commissioning Date of RE Projects does not mention anything related to the already Commissioned Projects nor about the banking provisions.

18 Further, the advisory notification of MNRE dated 16 April 2020 of permitting Rollover of banked electricity (from Solar PV Rooftop Projects and Open Access Renewable Energy Generating Stations under Captive and Third-Party Sale) of FY 2019-20 and FY 2020-21 to FY 2021-22 is observed to be made applicable only to Andhra Pradesh, Karnataka and Tamil Nadu. The said advisory notification has not been made applicable to Maharashtra. Moreover, the notification is addressed to the Principal Secretaries of the three States.

19 As regards the notification of MNRE with respect to 'Must Run' status as cited by the IWPA, the Commission however notes that there is no dispute on the Must Run Status of the RE Generating stations during lockdown period and it is applicable as per the provisions of MERC RE Tariff Regulations 2019.

20 In view of the above, the Commission is of the view that waiver related communications from the MNRE due to COVID -19 outbreak and lockdown situation are not applicable in the present Case.

Issue 2: Whether short-term power sale option offered by MSEDCL to wind generators was an alternate recourse available to the petitioners during the lockdown period?

21 The Commission notes the submission of MSEDCL regarding acknowledging the must run status of RE Generators and the option provided to wind generators for selling their power on short term basis which was reported to be available during the lock down period (i.e., on 27th March 2020). However it is noted that this option was available only to Group-III wind projects whose EPA had expired, were not selling under open access and were not availing RECs. Since neither of the Parties has made any submission as to how many wind generators connected with the present Petition qualified to participate in this route, the Commission does not want to make any categorical observation on the matter. However, Prima facie, it appears that this option was available to many such wind generators who were under open access sale and were meeting the criteria specified by MSEDCL. Moreover, it is worthwhile to note that most of the wind generators who have entered into open access route could be Group-III projects whose EPA period with MSEDCL had got over and they had moved to open access subsequently. As such, from cost recovery point of view, such projects may not be financially affected a great deal during the lock down period except for the cost relating to Operation &Maintenance and Interest on Working Capital. For such generators, the option of purchase on short term basis by MSEDCL appears to be an alternate recourse available to the projects to recover the associated

operations cost, at least during the lock down period. There is no denying the fact that such option was not available to projects other than Group-III projects and thus they could not have taken this benefit. Despite this, it is noteworthy that 589 wind generators with 868.62 MW have availed or made submission to avail such option with MSEDCL. Thus, this appears to have been a short-term option that could have provided interim relief for such wind power generators who continued to contract under the OA sale route and that too without reducing any open access quantum or cancellation of open access. Hence contention of MSEDCL that not availing short term sale option by members of IWPA is at their own commercial risk and call is correct and valid.

Issue 3: Whether Force Majeure clause under DOA Regulations 2016 is applicable in the present Case that allows rollover of banking as sought by IWPA?

22 IWPA has cited notification by the MNRE, Judgement of Delhi High Court, etc., which specifies the COVID-19 situation as 'Force Majeure' condition. However, it is critical to review the 'Force Majeure' condition of the Open Access Regulations and the Open Access Agreement/Contract governing Open Access Regulations and to understand the type and extent of relaxation that is possible by invoking such clauses. This would help in deciding on whether at all the present request for relaxing the monthly banking period can be permitted by relying upon 'Force Majeure' clause in the DOA Regulations 2016 and Open Access Agreement/Contract.

23 DOA Regulations 2016 provides following provisions which are relevant in the present Case:

(a) Provisions relating to OA agreement**:**

"2

…….

(13)"Connection Agreement" means the agreement to be entered into on approval of grant of Connectivity between a Distribution Licensee and Generating Station or a captive generating plant or a Consumer or a Licensee, as the case may be

….

(28) "Open Access Agreement" means an agreement for use of the Distribution System of a Distribution Licensee for Medium and Long Term Open Access

(i) entered into between the Distribution Licensee and a person whose premises are situated within its area of supply, where such person requires supply of electricity from a Generating Company or Licensee other than that Distribution Licensee; or

(ii) entered into between the Distribution Licensee and a Generating Company or another Licensee for the purpose of giving supply of electricity to such person as referred to in (i) above by using the Distribution System of the Distribution Licensee for wheeling of electricity; or

(iii) entered into between the Distribution Licensee and a person whose premises are situated within its area of supply, where such person requires supply of electricity from a Power Exchange, established under the relevant CERC Regulations; in accordance with these Regulations;

5.8The Applicant and the Distribution Licensee shall enter into a Connection Agreement upon grant of Connectivity in the format provided in Annexure II:

……

6.1An Open Access Agreement shall be entered into upon grant of Medium or Long Term Open Access in the format provided in Annexure V.

…….

ANNEXURE V

This Agreement is made on the _____ day of _____ 20__ between,

Distribution Licensee (Nodal Agency) [Name], a company incorporated under the Companies Act, 1956 having its registered office at _____(Address);

Company A, [Name], a company incorporated under the Companies Act, 1956 having its registered office at _____(Address);

Company B, [Name], a company incorporated under the Companies Act, 1956 having its registered office at _____(Address);

Company C, [Name], a company incorporated under the Companies Act, 1956 having its registered office at _____(Address); . .

…….

A) Whereas [Long/Medium] Term Open Access Parties are desirous to avail [Long/Medium] Term Open Access in accordance with Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2016 hereinafter referred to as "Regulations" made by Maharashtra Electricity Regulatory Commission hereinafter referred to as Commission and Electricity Act 2003 (including their amendments, if any) to the Distribution System for transfer of power from the respective places of generation or consumption as per the details contained in the Annexure-

……..

8. The Parties shall ensure due compliance with the terms of this Agreement. However, no Party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such a failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lock out, fire, flood, forces of nature, major accident, act of God, change of law and any other causes beyond the control of the defaulting party. But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an

event and give written notice of 30 days to the other party to this effect. Transmission/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist.

(b) Force Majeure Clause in DOA Regulations 2016:

" 33. Force Majeure

33.1 Nothing contained in these Regulations shall be taken as requiring a Distribution Licensee to grant Connectivity or consent for Open Access if it is prevented from so doing by the occurrence of any Force Majeure event. Force Majeure events are:

(i)Natural phenomena, including but not limited to floods, cyclone, droughts, earthquake and epidemics.

(ii)War (whether declared or undeclared), mutiny, invasion, armed conflict or act of a foreign enemy, in each case involving or directly affecting India, revolution, riot, insurrection or other civil commotion, act of terrorism or sabotage in each case within India.

(iii)nuclear explosion, radioactive or chemical contamination or ionizing radiation directly affecting the Generating Station, captive generating plant or Consumer, Inter-State or Intra-State Transmission System or any facility or system that is integral to and substantial for the performance of obligations.

(iv)any event or circumstances of a nature analogous to any events set forth above, within India.

Provided that the Distribution Licensee shall, within 15 days from the occurrence of a Force Majeure event, notify the Applicant or Open Access Consumer, Generating Station or Licensee, as the case may be.

33.2. Notwithstanding anything to the contrary in these Regulations, the Distribution Licensee shall not be liable for any loss or obligations due to the occurrence of Force Majeure events."

[Emphasis Added]

24 From the above referred Clause 8 of the model Open Access Agreement annexed as part of the DOA Regulations, 2016 and its critical review/examination shows that it relieves every party from any liability for any claim on account of loss or damage arising out of Force Majeure events stated in the clause therein which also mentions 'any other' causes beyond the control of the defaulting party (COVID-19 could qualify as 'any other cause'). In this context, even the Distribution Licensee who is the nodal agency as well as signatory to the agreement should also be spared from any liability lodged by any other party (in the present case, Wind Generator) for any loss of the Generator. By way of seeking permission or relaxation to roll over Banking for more than the permitted 'one' month period and adjustment of such banked energy over more than 2 years in the present case, will definitely cause commercial liability on the Distribution Licensee. This additional liability can be envisaged in the form of cost of procurement of power to supply the OA consumers at the

time when wind generation is not available. The extent of liability on Distribution Licensee would depend on the rate of power procured for adjusting against the banked power for such OA consumers. In this context, strict interpretation of the Clause 8 of the open access agreement should spare every party including the Distribution Licensee out of the unforeseen Force Majeure event. In this context, the rollover of banking as sought by the IWPA cannot be allowed.

25 It is clear from the Regulation 33 of DOA Regulations 2016, that under Force majeure as envisaged under DOA Regulations 2016, the concerned Distribution Licensee is exempted from granting the connectivity or consent for Open Access if it is prevented from doing so by the occurrence of any Force Majeure. Considering the fact that the OA permission has already been granted to the Petitioner, this clause is irrelevant to the present case. Hence, the Petitioner cannot rely on this clause while seeking rollover of banking facility citing the force majeure.

26 The Petitioner has cited the Order dated 20 April, 2020 passed by the Hon'ble Delhi High Court in *O.M.P. (I) (COMM) & I.A. 3697/2020 Halliburton Offshore Services Inc. Vs Vedanta Limited & Anr,* contending that the Hon'ble High Court in the aforesaid Order, opined that the lockdown prima facie is in the nature of a Force Majeure.

27 However, upon perusal of the Order, it is seen that there existed a contract between the Petitioner and Respondent therein and Force majeure clause of that contract had been invoked by one of the Parties therein. The Commission notes that the Force majeure clause is generally included in a contract to take care of situations which may arise beyond the reasonable control of the Parties. These situations can be general, referring to events that are beyond the reasonable control of the parties such as flood, war, fire or similar events or combination of both which sometimes tend the performance of the contract, impossible. However, even if it is admitted that the present situation is a force majeure event, the relief under force majeure can be claimed only in terms of the relevant clauses in the contract. As mentioned in the earlier part of the Order, the force majeure clauses as mentioned in the model Open Access Agreement and also DOA Regulations, 2016 are not supportive to the claims of Petitioner for seeking its relief.

Issue 4: Applicability of must run status under RE Tariff Regulations and impact of deviations from the schedule

28 RE Tariff Regulations specifies Must Run Status to RE generators. Must run status means RE Generators are not subjected to MOD principles, i.e. least cost dispatch principles would not be followed and irrespective of economics, RE generators would be allowed to generate and injected into the grid. However, the must run status of RE generators is subject to the provisions of IEGC and State Grid Code (i.e. scheduling and despatch code).

29 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 has stipulated the deviation limit capacity for

RE rich States (Maharashtra is one of these States) as 250 MW. There is a substantial capacity of wind generation in the State. One of the reasons for deviation at State level is high penetration of wind and solar power. In the instant Case, if the Petitioner is allowed the relaxation of banking as sought and if all such wind generators are allowed to inject power without any offtake from their consumers at other end, SLDC may find it difficult to manage the load generation balance in real time leading to vulnerability to maintaining grid security and this may also lead to deviation at State level.

30 The MERC Forecasting and scheduling Regulations 2018 (MERC F & S Regulations) have been notified in order to ensure grid security due to increasing penetration of Wind and Solar generators and these Regulations provide for the deviation charges if the solar and wind Generators deviate from their respective schedules. The objective of these Regulations is to introduce scheduling discipline as envisaged in the grid code. If the Wind generators are encouraged to generate without offtake at their consumers' end, the basic intent of the grid discipline and grid security behind the MERC F & S Regulations, would get defeated.

31 In absence of any consumption /drawal from the consumers, this RE generation is unwanted from grid point of view and as held by Appellate Tribunal for Electricity (**ATE**) in its Judgment dated 16 May 2011 in M/s Indo Rama Synthetics Vs MERC, an unwanted generation can jeopardize the security of the grid and hence should not be allowed.

32 Thus, in the opinion of the Commission, the excessive generation from these wind generators beyond the scope of allowed banking (i.e monthly banking) can be detrimental to the grid operations. The grid cannot be put to risk and the safety of grid is of paramount importance. Therefore, to maintain grid discipline and grid security, such excessive injection beyond the monthly banking mechanism as stipulated under DOA First Amendment Regulation needs to be discouraged.

33 The Commission further notes that if the prayer as sought by the Petitioner is granted, it may have adverse financial impact on the Distribution Licensees such as MSEDCL and their consumers due to additional power purchase cost to be borne by the Distribution Licensees. The Wind generators inject a substantial quantum of energy into the grid in particular months i.e. June to September. During these months, the demand is generally low and hence the power is available at a cheaper rate. If such excessive energy beyond the consumption requirement is allowed to bank with Distribution Licensees, since the demand of the Distribution Licensees is also low, Distribution Licensee would be required to back down its cheaper thermal power generation. Further, it may happen that during the summer period which are peak period, the banked energy would need to return to the Open Access consumers. However, during such period, the Distribution Licensees too have their peak demand and the price of power available in market is very high as compared to off-peak months. Hence, the Distribution Licensees may be forced to purchase high cost of power which may disturb the power purchase planning of the Distribution Licensees. Also it would result in financial stress on the Distribution Licensees which ultimately would pass on to the common consumers in ARR/Tariff determination.

34 During extra-ordinary situations like the present pandemic, balancing act is required to safeguard interest of all parties. The present situation has adverse impact on MSEDCL and other distribution Licensees as well with their revenue going down significantly due to reduction in consumption, continued liability of Fixed cost of contracted power and also due to reduction in collection of billed energy. Hence, while considering any dispensation to the Petitioner as sought, it is necessary to ensure that such dispensation provided to any party on a principle of "Restitution", does not cause any long term loss to other party. As held in para. 33 above, there may be financial implications on the Distribution Licensees and their consumers if relief as sought is allowed.

Issue 5: Whether the request of IWPA for Relaxation and Extension of the banking period provided under Regulation 20.3 of DOA Regulations, 2016 and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till end of FY 2021-22, is to be allowed or not?

35 The Wind Tariff Order, 2003 explain the concept of banking and states that a generator cannot bank any excess power more than 10% generation from the plant at any point in time. The relevant para. of the Wind Tariff Order dated 24 November, 2003 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."*
>
> *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"*
> *……..*
>
> **[Emphasis Added]**

36 The Commission observes that wind Tariff Order 2003 clearly explains the concept of banking and provides that the developer will not bank a substantial portion of the energy with the utilities. The Wind Tariff Order clearly provides 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.

37 However, as seen from the aforesaid Order, banking of energy is allowed in case of self-use and sale to a third party. Any surplus energy after self-use and/or third party sale may be banked with the Distribution Licensee for certain period (for one year as per the Wind Tariff Order and for one month as per the DOA amendment Regulations). In present case, it is a fact admitted by the Petitioner itself, that due to present lockdown situations, there is no consumption, thus there is no third party sale possible for the power generated from the members of the Petitioner. In absence of any consumption, the entire contracted generation cannot be treated under banking since the banking was envisaged as the surplus energy after self-use.

38 The Wind Tariff Order further stated that under force majeure conditions, surplus energy in excess of 10% may be purchased by the Distribution Licensee, however, this does not provide that the entire generated power can be banked in the force majeure conditions. Further, the Order provides that in "Force Majeure" conditions, more than 10% of banked energy could be purchased by MSEDCL at APPC rate. However, the said fact is neither the case nor the Prayer which is pleaded by IWPA.

39 Further, technical consideration associated with Grid operation also is major factor that has to be given due care. In this context, it is worthwhile to note that the Wind Tariff Order further stipulates that while supplying the energy by Wind power generator/projects, the wind power generator/projects must follow grid discipline. The relevant para. of the Order is reproduced as under:

> *1.6.4 Purchase of Energy Purchase of energy from wind power projects by the MSEB and other utilities/ licensees shall be in the nature of infirm purchase of energy. As regards supply of energy by wind power projects to the MSEB/ Utilities/ licensees is concerned, there shall be no limitation, except for force majeure, on the maximum or minimum quantum of energy to be supplied by wind power projects. <u>However, wind power projects must follow grid discipline.</u>*
>
> **[Emphasis Added]**

40 This concept of provision of monthly banking has been further elaborated by the Commission in Statement of Reasons (SOR) of MERC DOA First Amendment Regulations 2019. The relevant para of the SOR is as under:

> *<u>"20.3 Analysis and Commission's Decision</u>*
>
> *The detail rationale for the proposed amendment in banking provision has been elaborated in the Explanatory Memorandum published along with the Draft amendment to DOA Regulations.*

The Commission observes that the annual banking facility for the variable RE projects, has continued in the State over last so many years as a promotional measure. One of the main reasons for promoting the renewable sources of energy was its high cost of generation, compared to the cost of generation from conventional power plants, which discouraged the Distribution Licensees to purchase power from the RE sources. The RE sector over the past few years has undergone substantial change. With advancement of technology, rapid growth in RE capacity additions, economies of scale resulting in substantial reduction in Capital Cost, coupled with competition, as well as, ease of access to low cost financing, have resulted in huge reduction in levellised cost of variable RE sources. The price discovered through bids from the wind and solar projects developers in the country today is below Rs 3.00 per unit. The same is considerably lower than the cost of generation from the new conventional power plants. Thus, today the RE sources, especially, wind and solar, are in a position to compete with the conventional power plants in terms of tariff. Hence, the Commission opines that promotional nature of banking facilities in the manner provided by distribution licensees as per the extant regulations is no longer necessary. Banking is still provided for a period of one month, basically to adjust on the margin the variations in generation by RE sources.

[Emphasis Added]

41 DOA First Amendment Regulations 2019 explains the rationale for considering the monthly banking that substantial changes in RE sector , advancement of technology, rapid growth in RE capacity additions, economies of scale resulting in substantial reduction in Capital Cost, coupled with competition, as well as, ease of access to low cost financing, have resulted in huge reduction in levelized cost of variable RE sources and the lower price discovered through competitive bids from the wind and solar projects developers.

42 The Commission further notes that during the period of lock down of industries the open access consumers have reduced their contract demand with MSEDCL and they still have continued under open access with the same quantum of open access. The Commission further observes that MSEDCL has also provided the option of short-term purchase of RE power during the lockdown period. The Commission has already taken various steps through its Tariff Order dated 30 March 2020, Order dated 21 May 2020 in Case No. 82 of 2020 and Practice directions dated 9 May 2020. Thus, this Commission has always been proactive to provide assistance to consumers and Distribution Licensees to minimize the adverse impact of COVID-19 pandemic.

43 The ATE in its Judgement dated 20 September, 2012 in Appeal No. 189 of 2011 has enumerated the principles relating to the exercise of power of relaxation. The relevant extract is as follows:

"29. The principles relating to the exercise of power of relaxation laid down in the above decisions referred to above are as follows:

(a) The Regulation gives judicial discretion to the Commissions to relax norms

based on the circumstances of the case. Such a case has to be one of those exceptions to the general rule. There has to be sufficient reason to justify relaxation which has to be exercised only in the exceptional case <u>where non-exercise of the discretion would cause hardship and injustice to a party</u>.

(b) If there is a power to relax the regulation, the power must be exercised reasonably and fairly. <u>It cannot be exercised arbitrarily to favour some party and to disfavour some other party</u>.

(c) The party who claims relaxation of the norms shall adduce valid reasons to establish to the State Commission that it is a fit case to exercise its power to relax such Regulation. In the absence of valid reasons, the State Commission cannot relax the norms for mere asking. …"

44 Thus, the power to relax can be exercised only in exceptional case where there is likely of any hardship and injustice to a party if such power is not exercised. The Commission is of the view that present case does not fulfil these criteria as the Petitioner, inspite of being aware of present circumstances and the requirements laid down under DOA Regulations, has taken a conscious call to continue with the Open Access. Hardship, if any happening to the Petitioner, is purely on account of its own action and same cannot be attributed to the provisions of Regulations. Further, the power of relax Regulations cannot be exercised arbitrarily to favour of some party and to disfavour some other party. As mentioned earlier, if the relaxation as sought by the Petitioner is allowed, it would be detrimental to the Distribution Licensees like MSEDCL.

45 The Commission in the **above Paras 21 to 41** has analysed the applicability of force majeure clause and the consideration/ intentions of banking as envisaged under the Wind Tariff Order 2003 and the DOA First Amendment Regulations 2019. In view of the foregoing the Commission is not inclined to accept the contentions of IWPA as regards the extension of the banking period provided under Regulation 20.3 of DOA Regulations, 2016 and permitting adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22.

46 Since the contentions of IWPA are not accepted as discussed above, the Commission neither finds it necessary to invoke its powers under Regulation 39 of the DOA Regulations, 2016 of 'Power to relax' for relaxing any provisions of the said Regulations, nor is issuing any direction to MSEDCL as per prayers of the present Petition.

47 The Petitioner, while filing its sur sur rejoinder, has objected to the sur-rejoinder filed by MSEDCL stating that MSEDCL ought to have sought the Commission's permission first for filing the sur-rejoinder. The Petitioner has further stated that since the Petitioner did not bring any new fact on record through its rejoinder, sur-rejoinder from MSEDCL was not warranted. The Petitioner has requested that such pleadings should not be taken on record by the Commission.

48 In this context, the Commission notes that the sur-rejoinder had been filed by MSEDCL before the date of hearing. Further, at the time of hearing, all the points as

covered in its reply as well as sur-rejoinder were raised and argued by MSEDCL during the hearing. The arguments of both the parties are already a part of record. Further, the sur sur rejoinder filed by the Petitioner have also been taken on record. The Commission, after hearing held on 9 June, 2020, had allowed both the Parties to file their respective written submissions. In view of this, the Commission has taken on record all the submissions (written as well as oral submissions) made by both the Parties while deciding the present case.

49 Hence the following Order:

ORDER

Case No. 92 of 2020 is dismissed.

Sd/-	**Sd/-**
(Mukesh Khullar)	**(I. M. Bohari)**
Member	**Member**

(Abhijit Deshpande)
Secretary