

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 93 of 2020

Case of Ghatge Patil Industries Limited seeking waiver of fixed demand charges, reduction of Contract Demand and relaxation under MERC (Distribution Open Access) Regulations, 2016 on the banking issue due to Force Majeure situation prevailing in Maharashtra State due to COVID-19 outbreak and lockdown situation

Coram

**I. M. Bohari, Member
Mukesh Khullar, Member**

Ghatge Patil Industries LimitedPetitioner

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: 8 July 2020

1. Ghatge Patil Industries Limited (**GPIL**) has filed a Petition 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 waiver of fixed demand charges and reduction and reinstatement of Contract Demand immediately at its request. GPIL has also prayed for relaxation of Regulation 20.3 of the DOA Regulations, 2016 by way of extension of the banking period. As per GPIL, situation prevailing in Maharashtra State on account of COVID-19 outbreak and lockdown, amounts to Force Majeure event and hence, the

Commission should permit adjustment of the banked units from its Generating Units during FY 2019-20 and FY 2020-21 till the end of FY 2021-22.

2. GPIL'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 Petitioner in terms of prayer (a);*
- (c) Direct MSEDCL to waive off the fixed demand charges, during the period of lockdown (i.e. from March 22, 2020 till lockdown is lifted completely in the State of Maharashtra) and the operations in the Units resume normalcy;*
- (d) Direct MSEDCL to permit reduction in the contract demand at the request of Petitioner and permit reinstatement thereof immediately upon request;*
- (e) Grant ex-parte ad-interim reliefs by permitting banking of units generated by the Petitioner's wind power plants till disposal of the Petition;*
- (f) Grant interim and Ad-interim reliefs in terms of prayers (d) above*

3. GPIL has stated as follows:

- 3.1 GPIL is engaged in the business of foundry, manufacturing of graded grey iron and modular iron castings. Its two plants are located at Kolhapur District. GPIL has also installed Wind Generating Plant of 15 MW at Sakri, Dhule District.
- 3.2 GPIL is a self-use partial open access consumer sourcing power from its wind generating plant. GPIL maintains a contract demand of 10 MVA and 15 MVA for its two consumers located at Uchegaon plant and at Kagal plant (District Kolhapur) respectively.
- 3.3 On 24 December 2019, GPIL submitted Medium Term Open Access (MTOA) applications for the period of 1 April, 2020 to 30 September, 2020. MSEDCL has not processed the applications in time which were required to be processed by 22 February 2020 i.e. sixty (60) days from the date of the application.
- 3.4 GPIL vide emails dated 2 April, 2020 and 19 April, 2020 followed up with MSEDCL for processing its MTOA Applications and requested MSEDCL to grant the MTOA with effect from 1 April, 2020. Further, as GPIL was unable to consume the power generated by its Wind Power Plants as its Units were shutdown pursuant to the Lockdown Order issued by Ministry of Home Affairs (MHA), Government of India. GPIL also requested MSEDCL that the unused power be banked and the same be allowed to be adjusted in later months on account of the prevailing Force Majeure.
- 3.5 Subsequently, MSEDCL vide an E-mail dated 27 April, 2020, belatedly approved the MTOA applications for the period from 1 April, 2020 to 30 September, 2020, however,

MSEDCL did not address the issue of extension of banking period in the aforesaid email or any subsequent emails.

- 3.6 The average monthly consumption of the Uchgaon Plant and Kagal Plant is about 25,00,000 units and 45,00,000 units, respectively. The wind power generated in April 2020 from Wind Power Plant at location nos. XX1, AD1 and BB5 at Dhule from which Uchgaon Plant avails open access was about 7,00,000 units and Wind Power Plant located at C5, L11, BH01 to BH08 and A5 at Dhule from which Kagal Plant avails open access was about 14,00,000 units
- 3.7 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, GPIL was 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.

- 3.8 Due to pandemic and its cascading effect, the demand has reduced substantially and therefore, even after lockdown is lifted, it will take a long time for the demand to pick up fully. The electricity consumption of GPIL may also resume normalcy only after a few months. In such a scenario when the industries and commercial establishments are already adversely hit on account of stoppage of work for reasons not within their control, to deprive GPIL of the energy unutilized during lockdown would severely affect its sustainability.
- 3.9 The months from 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 GPIL 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 GPIL. In view of the fact that GPIL'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.
- 3.10 As wind power plants are must run, Wind Power Plants have been injecting power into the grid during the lockdown period. MSEDCL shall sell such power to its consumers and earn revenue out of it, whereas GPIL, who are generators, would not benefit in any way which will cause grave harm, and irreparable loss. Hence, GPIL be allowed to carry forward the energy banked from 22 March, 2020 onwards till the end of lockdown completely.
- 3.11 Due to lockdown of industries and considering aforesaid financial facts, fixed demand charges for the entire period of lockdown also should be waived and the Petitioner should also be allowed to reduce its contract demand as per its application under Regulation 4.14 of the MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2014 (SOP Regulations, 2014) for certain period till situation normalizes and reinstate immediately at the request of GPIL, once the Units resume their operations to its full capacity.
- 3.12 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 GPIL has not joined 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 apply.

Hence, joining the above parties as Respondents is essential for proper adjudication/determination of the present Petition.

- 4.2 “Power to Relax” cannot be exercised ex-parte and without hearing all the affected Parties as the provision itself prohibits the same.
- 4.3 The present Petition is nothing but another attempt to extend the period of “Banking” throughout the year. GPIL has approached the Hon’ble High Court for the same purpose challenging the DOA First Amendment Regulations, 2019. However, GPIL has not been able to secure any favorable Order till date from the Hon’ble High Court. GPIL is now trying to make out a false case for extension of “Banking” throughout the year.
- 4.4 It is a cardinal rule of pleading that “Prayers for which no proper pleading/ground is made cannot be granted”. No ground is pleaded in the Petition to support the above Prayers as sought by GPIL. Moreover, even the proper provisions under which such Prayers could be sought are not invoked. Admittedly such Prayers are made by GPIL in the capacity of a consumer. Hence, proper pleading to support its case in the capacity of a consumer is essential for determination of such relief
- 4.5 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”.
- 4.6 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.
- 4.7 MSEDCL has taken following initiative in view of COVID-19 and acknowledging the Must Run Status:
 - i. Taking into account the Must Run status and the present situation due to Covid 19 pandemic, 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 Ids 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 has 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, GPIL still continued to apply for open access which is a “Pure Commercial Call and Risk” of the Petitioner.

- 4.8 GPIL through the present Petition is seeking to adjust under the provisions of “Banking”, all power injected into the “Grid” when in fact, 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 is on open access consumer once it is granted.
- 4.9 It is noteworthy fact that while the open access consumers have reduced their contract demand with MSEDCL during the times of COVID-19, they have continued under open access with the same quantum of open access. Not a single open access quantum has been reduced for the Contract Demand meaning that the Petitioner only has one agenda i.e. to somehow derive windfall margins.
- 4.10 GPIL was 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 GPIL would have been to surrender their open access till the time of COVID-19 and explore other possibilities of sale of power.
- 4.11 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. MSEDCL never backed down any renewable generation.
- 4.12 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.
- 4.13 When during the time of COVID-19, MSEDCL created the option to sell “Short Term Power” to MSEDCL for all Wind Generators, there arises no occasion for GPIL to claim any “loss” occasioned on account of “Must Run” status. All alternate options were available to GPIL which were not exercised by it after taking a “Pure Commercial Call and Risk” to avail open access.
- 4.14 The entire case of GPIL is based on COVID-19 acting as “Force Majeure” and preventing open access. There is no “Force Majeure” w.r.t MSEDCL and GPIL. 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 COVID-19 pandemic.
- 4.15 Open Access is availed by GPIL 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. GPIL 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.
- 4.16 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”.

- 4.17 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/Agreement”, which could have factored unforeseen circumstances like the present one. Rather than taking recourse to the said provisions and acting accordingly, GPIL 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 GPIL after taking a “Pure Commercial Call and Risk”.
- 4.18 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 GPIL after taking a “Pure Commercial Call and Risk”. Hence, it is not open for GPIL to retrospectively fit FMC as it would be a case of blatant misuse of law.
- 4.19 Notifications/Judgments as relied in Petition on the issue of “Force Majeure” are not applicable in present Case:
- 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 their specific facts and difficulties. Further the said notification was issued on a unilateral representation without considering the representation of other stakeholders. Hence invoking such OM dated 16 April 2020 can only be termed as ill-conceived and in no manner, whatsoever be applied to Maharashtra.
 - ii. The notifications/judgments etc. as relied upon by GPIL on the issues of “Force Majeure” does not aid GPIL in any manner, as the conduct of GPIL 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 so 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 GPIL 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.
- 4.20 Following dispensations have been provided by MSEDCL in view of Pandemic to change contract demand once in a billing month:
- i. Keeping in view 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.

4.21 Following dispensations have been provided by the Commission in the interest of consumers:

- a. A moratorium on payment of fixed charges for three billing cycles for commercial and industrial consumers is put in place.
- b. 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 measures will definitely have adverse financial impact on MSEDCL.
- c. 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 GPIL 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.
- d. However, through the present petition, what GPIL 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. **GPIL in its Rejoinder dated 29 May 2020 has stated as under:**

- 5.1 Vide the present Petition, GPIL 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 GPIL denies that it has approached the Hon’ble Bombay High Court challenging the DOA first Amendment Regulations 2019. The present petition is filed considering the force majeure conditions as its units are under complete shutdown and the electricity consumption in April is very less and relatively higher in May 2020. As the wind power is must run and the generator injects the power into the grid, the power generated /injected from its unit may be lapsed.
- 5.3 The grounds for seeking relief in respect of prayers regarding “*waiving off fixed demand charges during the period of lockdown*” and “*reduction of contract demand*”

have been pleaded in paragraph Nos. 18, 19 and 22 of the Petition. It has been pleaded about the detrimental effects of the pandemic and its cascading effect on its Units and consequently on its finances and in view thereof has sought relief with respect to waiver of fixed demand charges and reduction of contract demand. It has made proper pleading to support its case made in the capacity of a consumer

- 5.4 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%.
- 5.5 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.
- 5.6 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 fulfil 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.
- 5.7 GPIL has 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.

- 5.8 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 GPIL 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 adversely on account of stoppage of work for reasons not within their control and reeling in losses, to deprive GPIL of the energy generated but unutilized during lockdown on account of Force Majeure would severely affect its sustainability.
- 5.9 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.
- 5.10 MSEDCL is aiming at deriving wind fall gains as all the RE power injected by GPIL's generator can be availed free of cost by MSEDCL if the reliefs sought by GPIL are not granted. As far as GPIL 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 GPIL 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.
- 5.11 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.
- 5.12 The consumer also enters into OA agreement with MSEDCL and the OA permission granted by MSEDCL is in the nature of contract between generator, consumer and MSEDCL which is governed by DOA Regulations, 2016 (in present case generator and consumer being the 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, GPIL is excused from performance of its obligations under the OA permission to certain extent.
- 5.13 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 GPIL have claimed force majeure and therefore, there is no recovery of dues.

- 5.14 GPIL has received E-mail dated 25 April, 2020 which allowed “Change of Contract Demand once in a billing cycle”. As the communication from MSEDCL was received in the later part of the month of April, 2020, GPIL was able to file its application for seeking reduction of the contract demand only around 29 April, 2020. Further due to MSEDCL’s delayed communication, the application for reduction of contract demand was delayed for the month of April 2020 and could not be applied from the date of commencement of lock down. Further, MSEDCL did not permit the reduction in contract demand below OA contract demand as GPIL is OA consumer for its Units. Further, only pursuant to Order dated 21 May , 2020, MSEDCL vide E-mail dated 26 May, 2020 is allowing “Change of Contract Demand thrice in a billing cycle” . Therefore, as the Units of GPIL have resumed miniscule activity since May, 2020, GPIL has again applied for revision of the contract demand on 28 May, 2020. There should be no discrimination between partial OA consumer and consumer consuming 100% power from MSEDCL. In view of the above assertion, MSEDCL should permit GPIL to reduce its contract demand from April 2020 as sought by it, in line with the Practice Directions dated 21 May 2020 issued by the Commission.
- 5.15 The moratorium granted is only for a period of three (3) billing cycles and will not help the affected consumers of MSEDCL such as the lockdown is being extended periodically and the effects of the lockdown will be seen much after the lockdown is lifted. Even after the lockdown is lifted production activities shall be resumed only at miniscule level. In a situation where the industrial and commercial units are cash strapped on account of stoppage of work, it is only reasonable that the demand charges be waived until the lockdown is completely lifted.
6. **At the e-hearing through video conferencing, held on 9 June 2020, Advocate of GPIL 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 sought 3 days to file written submissions in the matter. Accordingly, the Commission directed GPIL and MSEDCL to file their written submission by 12 June 2020.**
7. **MSEDCL in its Reply to Rejoinder (Sur-Rejoinder) dated 12 June 2020 re-iterated the similar submissions as mentioned in Para. 4 above. The additional points in MSEDCL Sur-Rejoinder are as below:**
- 7.1 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 GPIL and not for entire Maharashtra.
- 7.2 Incorrect appreciation of a binding Order passed by Commission has its own consequences which GPIL 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.

- 7.3 The Wind Tariff Order 2003 clearly 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 GPIL.
- 7.4 GPIL has applied for open access in December 2019. However, it is to be noted that the open access permissions are issued for the period commencing 1 April 2020. As per GPIL’s 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, GPIL chose to still be under open access rather than requesting for cancellation of the said permission. After cancellation of open access GPIL could have sold power to MSEDCL immediately. However GPIL 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.
- 7.5 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.
- 7.6 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.
- 7.7 It is an admitted position 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 GPIL’s contention, open access granted to GPIL is the contract between MSEDCL, Generator and Consumer. However, no “Force Majeure” clause is relied upon by GPIL with respect to the said purported open access contract as claimed by the Petitioner to substantiate its Petition.
- 7.8 Moreover, GPIL 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 GPIL 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.

8. **MSEDCL in its additional written submission dated 12 June 2020 has re-iterated the similar submissions as mentioned in Para. 4 and 7 above.**
9. **GPIL 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 Filing of Sur Rejoinder by MSEDCL

- a. GPIL objects to the Sur Rejoinder filed by MSEDCL. 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 are 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 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 the EA 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 it 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 GPIL'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. GPIL 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, GPIL would not have filed the present Petition. Therefore, putting blame on GPIL 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 GPIL vide the present Petition is specific and with respect to itself 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 GPIL only.

9.6 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.

9.7 The option of surrendering OA permissions and availing option of short term to MSEDCL was informed by MSEDCL by emails to selected generators only and not to all. Hence many generators could not avail this option Further, assuming but not admitting even if such an option was made 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 MTOA approval for entire period as there was no option to curtail MTOA only for a specific period available. GPIL was not offered such option to sale. Further GPIL is self-use consumer and hence consuming its own power is also

economical vis-à-vis MSEDCL.

- 9.8 GPIL denies that it has 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, 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.
- 9.9 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 effected 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.
- 9.10 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 GPIL is on account of the inability to consume power due to such force majeure situation.

Commission's Analysis and Ruling:

10. GPIL is a captive open access consumer who had applied for MTOA for the period of 1 April, 2020 to 30 September, 2020 in December 2019 to MSEDCL and is availing the granted open access. Due to lockdown of industries in the wake of COVID-19, GPIL could not consume the power contracted and generated from its wind power generators, which are falling within the jurisdiction of MSEDCL.
11. GPIL, through present Petition is seeking following reliefs:
- Relaxation of Regulation 20.3 of DOA Regulations 2016, extension of monthly banking period as specified under the Regulations for adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22.
 - Directions to MSEDCL to issue Generation Credit Notes for energy banked during the period of lockdown and its adjustment in the bills of Petitioner.
 - Directions to MSEDCL for waiver of fixed demand charges for the entire period of lockdown.

- d. Directions to MSEDCL for reduction in its contract demand and reinstatement of the same at the request of Petitioner.
12. After going through the submissions of the Parties, as regards to prayers (a) and (b) above, i.e. relaxation of Regulation 20.3 of DOA Regulations 2016 on the banking issue and prayer for directions to MSEDCL for issuance of Generation Credit Notes and its adjustment, the Commission notes that identical prayers had been made by Indian Wind Power Association (Maharashtra Council) (**IWPA**) in Case No. 92 of 2020. Also, the identical grounds/contentions /arguments had been made by IWPA as are made in the present Petition by GPIL. MSEDCL's defense in that Case was also same as is there in present Petition. Hence, the Commission is of the view that Ruling in Order dated 4 July, 2020 in Case No. 92 of 2020 squarely applies to the present Case as far as prayers related to banking adjustment and issuance of Generation Credit Notes are concerned. The Commission, in Case No. 92 of 2020, has held as follows:
- “ 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.”**
13. In light of the above, GPIL cannot be granted the prayer for relaxation of Regulation 20.3 of DOA Regulations 2016, extension of monthly banking period as specified under the Regulations for adjustment of the banked units of FY 2019-20 and FY 2020-21 till the end of FY 2021-22. Also, GPIL's prayer for seeking directions to MSEDCL for issuance of Generation Credit Note and its adjustment in the bills of the Petitioner cannot be granted as a fallout of above.
14. As regards prayer (c) regarding waiver of fixed demand charges for the entire period of lockdown, the Commission notes that GPIL has contended that the moratorium allowed by the Commission is just for a period of three billing cycles and this won't help the consumers. The lockdown is being extended periodically and the impact of the lockdown will be seen a lot, after the lockdown is lifted. In such circumstances it is sensible that the demand charges be waived until the lockdown is totally lifted. MSEDCL has contended that no ground has been made by GPIL to support its prayer on this issue.
15. The Commission notes that GPIL has cited mainly its financial difficulties as the ground for seeking relief of waiver of fixed demand charges. It is further observed

that vide MYT Orders dated 30 March, 2020, the Commission has approved moratorium on payment of fixed charges of the electricity bill by consumers under Industrial and Commercial category for next three billing cycles beginning from the lockdown date of 25 March, 2020. Such relief was given considering the hardships being faced by Industrial and Commercial consumers on account of lockdown and shutdown of industrial and commercial activities. However, there is no waiver of the fixed demand charges as sought by GPIL in present Case. Moratorium for three months has been given balancing the interest of the consumers as well as the Distribution Licensees. However, complete waiver for the entire period of lockdown would result in socialising this amount which in turn will result in additional recovery from the other consumers of MSEDCL. The pandemic has impacted all the consumers and the Commission cannot consider the request of GPIL since the same entails additional recovery from other consumers. Further in case socialising is not permitted, the result would be permanent monetary loss to the Distribution Licensees which cannot be made good in future and the same cannot be granted under the Regulatory regime. In the extra-ordinary situations like the present pandemic, balancing act is necessary 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 revenue collection. Thus the Commission does not accept the request of GPIL for complete waiver of Fixed Charges. While considering any further dispensation to the Petitioner as sought, it is also necessary to ensure that such dispensation provided to any party on a principle of “Restitution”, should not cause any loss to other party. Hence, the Commission is not inclined to grant the prayer regarding waiver of Fixed (Demand) Charges for the entire period of lockdown. Similarly, extending the moratorium on payment of fixed charges for a further period until lockdown is completely withdrawn or the situation returns to normalcy would also not be in the interest of power sector as a whole. The entire supply chain of power supply is dependent on payment to the generators, transmission companies and others. If concessions on the lines sought by Petitioner are granted, how will the supply be sustained. Therefore, the concession was given only during the acute period of lockdown which has now substantially been relaxed and as admitted by Petitioner also, electricity consumption has also increased in May compared to April and would be increasing in future months.

16. As regards the prayer (d) pertaining to contract demand reduction, GPIL has stated it had received MSEDCL’s E-mail allowing the “Change of Contract Demand once in a billing cycle” only on 25 April, 2020. Hence, due to MSEDCL’s delayed communication, the application for reduction of contract demand was delayed for the month of April 2020 and could not be applied from the date of commencement of lock down. Further, MSEDCL did not permit the reduction in contract demand below OA contract demand as GPIL is OA consumer for its Units. Pursuant to Order dated 21 May, 2020 passed by the Commission in Case No. 82 of 2020, MSEDCL vide its E-mail dated 26 May, 2020 allowed “Change of Contract Demand thrice in a billing cycle”, however, there should be no discrimination between partial OA consumer and

consumer consuming 100% power from MSEDCL. GPIL has stated that MSEDCL should permit GPIL to reduce its contract demand from April 2020 as sought by it, in line with the Practice Directions dated 21 May 2020 issued by the Commission.

17. On this issue, the Commission notes that vide its Order dated 21 May 2020 in Case No. 82 of 2020, the Commission has allowed revision of contract demand for HT and LT Industrial and Commercial consumers more than once, considering the situation of lockdown of industries. Also, the practice direction has been issued with prospective effect on 21 May, 2020 under Regulation 22 of the MERC Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 (**Supply Code Regulations**).
18. GPIL has stated that there should not be any discrimination between OA consumers and rest of the consumers of Distribution Licensees on the issue of Contract Demand reduction. In this context, the Commission notes that under DOA Regulations, 2016, the revision in contract demand for LTOA and MTOA consumers is governed by provisions of Supply Code and Standards of Performance Regulations. The relevant extract of the DOA Regulations is reproduced as under::

“4.2. Revision of Contract Demand

The Contract Demand of a Consumer availing LTOA or MTOA shall be governed by the provisions of the Electricity Supply Code and the Regulations of the Commission governing Standards of Performance:

19. GPIL is a MTOA consumer. Its request would be governed by the Supply Code and SoP Regulations and therefore, GPIL would be entitled to dispensation for contract demand revision as per the Practice Directions dated 21 May, 2020. The extent of contract demand revision including reduction in contract demand below OA quantum would be governed by the relevant provisions of DOA Regulations. GPIL has further stated that MSEDCL should permit GPIL to reduce its contract demand from April 2020 as sought by it, in line with the Practice Directions dated 21 May 2020 issued by the Commission. The Commission is of the view that same cannot be allowed as the Practice Direction dated 21 May, 2020 cannot be made applicable retrospectively manner for the month of April, 2020.
20. 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.
21. In this context, the Commission notes that the sur-rejoinder had been filed by MSEDCL after the hearing in the matter. At the hearing held on 9 June 2020, all the points as covered in its reply as well as sur-rejoinder were raised and argued by MSEDCL. The arguments of both the parties are already a part of record. Further, the sur sur rejoinder filed by the Petitioner has 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.

22. Hence the following Order:

ORDER

1. Case No. 93 of 2020 is partly allowed.
2. The prayers of Ghatge Patil Industries Limited seeking relaxation of the provisions of MERC (Distribution Open Access) Regulations, 2016 on the issue of extension of the banking period and issuance of Generation Credit Notes and its adjustment in the bills of the Petitioner are rejected for the reasons recorded at Para. 12 and 13 above.
3. The prayers of Ghatge Patil Industries Limited for waiver of the fixed demand charges is rejected for the reasons recorded at Para. 14 and 15 above.
4. Ghatge Patil Industries Limited would be entitled to dispensation for contract demand revision in line with the Practice Directions dated 21 May, 2020, however, the extent of contract demand revision including reduction in contract demand below OA quantum would be in accordance with the applicable provisions of MERC (Distribution Open Access) Regulations, 2016.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member


(Abhijit Deshpande)
Secretary

