

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 45 of 2020

Case filed by Maharashtra State Electricity Distribution Co. Ltd. seeking approval for recovery of carrying cost/Delayed Payment Charges on the claims towards Change in law events such as NCDP, SHAKTI Policy and Cancellation of Lohara Coal Block approved by the appropriate Commission in respect of Petitions filed by Generators.

Coram

I.M.Bohari, Member
Mukesh Khullar, Member

Maharashtra State Electricity Company Limited (MSEDCL)Petitioner

Appearance

For Petitioner: Shri. Ashish Singh (Adv.)

ORDER

Date: 29 August, 2020

1. Maharashtra State Electricity Company Limited (**MSEDCL**) has filed this Petition on 28 January, 2020 under Section 94 (1) (g) of the Electricity Act, 2003 read with Regulation 92 of MERC (Conduct of Business) Regulations, 2004 and Regulation 102 of MERC (Multi Year Tariff) Regulations, 2015, seeking approval for recovery of carrying cost/ Delayed Payment Charges (DPC) on the claims towards Change in law events such as New Coal Distribution Policy (NCDP), Scheme for Harnessing and Allocating Koyala (Coal) Transparently in India (SHAKTI) Policy and Cancellation of Lohara Coal Block approved by the appropriate Commission in respect of Petitions filed by Generators.
2. MSEDCL's main prayers are as under:
 - (i) *Allow Carrying cost/DPC attracted on balance claim amount to be considered as MSEDCL's expense and allow recovery for the same from consumers through FAC or ARR.*

- (ii) Allow to approach Hon'ble Commission with the financial reconciliation and allow recovery of balance amount and carrying cost from consumers/ pass through to consumer pursuant to final judgement once these issues attain the finality and the amounts are frozen.

3. MSEDCL in its Petition has stated as follows:

3.1 MSEDCL has entered into four Power Purchase Agreements (PPAs) totaling to 3085 MW contracted capacity with Adani Power Maharashtra Limited (APML). MSEDCL has also entered into PPA for 200 MW with GMR Warora Energy Limited (GMR).

3.2 This Commission has passed Orders in the following matters in respect of APML for approval of various claims under change in Law.

Sr. No.	Subject Matter	The period of Impact	Case No.	Date of order
1	NCDP policy as Change in law	June 2013 to 31.03.2017 i.e. 4 years	Case No. 189/2013 and 140/2014	07.03.2018
2	SHAKTI policy as Change in Law	Since 01.04.2017 till date i.e. 2.5 years	Case No. 290/2018	07.02.2019
3	Cancellation of Lohara Coal Block as Change in Law	From Date of commissioning till date i.e. 5 years	Case No. 68/2012	06.09.2019
4	Carrying Cost	June 2013 to 31.03.2017 i.e. 4 years	Case No. 295/2018	18.12.2018

3.3 Further, the Central Electricity Regulatory Commission (CERC) has passed Order dated 16 May 2019 in Case No 284/MP/2018 in respect of GMR and has allowed NCDP and SHAKTI Policy as change in law along with carrying cost.

3.4 The above Orders have allowed relief to APML and GMR for the past period from 2013 to 2019. Subsequent to the Orders of the Commission, APML has raised claims in the respective matters. The details of claims are as follows.

Change In Law Event	Claim Type	Claims in Rs. Cr.
NCDP	Main Bill	3094.00
	Carrying Cost	1442.88
SHAKTI	Main Bill	2351.57
	Carrying Cost	242.00
Cancellation Lohara Coal Block	Main Bill	3227.57
	Carrying Cost	2406.00
Total		12764.02

Similarly, GMR has raised following claims under Change in Law:

Change In Law Event	Claim Type	Claims in Rs. Cr.
NCDP & SHAKTI	Main Bill	74.62
	Carrying Cost	40.46
Total		115.08

- 3.5 MSEDCL has challenged the Commission's Order dated 07 February 2019 in Case No. 290 of 2018 (SHAKTI) and Order dated 06 September 2019 in Case No. 68 of 2012 (Lohara Coal Block) before the Appellate Tribunal for Electricity (APTEL). Further, APML has challenged the Commission's Orders dated 07 March 2018 in Case No. 189 of 2013 and Case No. 140 of 2014, Order dated 07 February 2019 in Case No. 290 of 2018 and Order dated 06 September, 2019 in Case No. 68 of 2019 before APTEL. MSEDCL has also challenged CERC Order dated 31 May 2019 in Case no. 284/MP/2018 before APTEL.
- 3.6 As the above-mentioned matters are sub judice before APTEL, the finalization of exact amount of specific payment to be made against the claims submitted by generators is difficult. Further, APTEL has not granted any stay on the said Orders. Hence, MSEDCL is liable for making payment against these orders.
- 3.7 In subsequent parallel developments, Rajasthan Electricity Regulatory Commission (RERC) vide Order dated 17 May 2018 allowed NCDP as change in Law to Adani Power Rajasthan Limited (APRL). Rajasthan Discom filed appeal before APTEL and APTEL by interim order in Appeal No. 202 of 2018 passed the directives to Rajasthan Discoms to make payment of 70% of the compensation claims to APRL. Rajasthan Discoms filed a Civil appeal against APTEL Order before Hon'ble Supreme Court bearing no. 10188 / 2018. The Supreme Court vide its Order dated 29 October 2018 directed Rajasthan Discoms to make payment of 50% of claim amount to APRL within two months from the date of Order.
- 3.8 In line with this Supreme Court Order, MSEDCL with its best efforts has made partial payment towards claims of Generators. Accordingly, to avoid carrying cost burden, Rs. 2466 Cr. is paid to APML and Rs. 43.79 Cr is paid GMR as against their Change in Law claim by recovering the said amount through FAC mechanism. To comply with condition of 50% payment, MSEDCL had included balance amount of Rs.4192 Crs. in its MYT Petition filed before the Commission for control period FY 2020-21 to FY 2024-25.
- 3.9 MSEDCL has made partial payment to APML and GMR. Outstanding amounts will attract carrying cost/DPC. Payment of such carrying cost/DPC for these claims need to be considered as expense and be allowed as pass through in FAC or Annual Revenue Requirement (ARR).
- 3.10 It is pertinent to mention that MSEDCL has challenged the aforesaid Orders with the genuine reason of protection of consumer's interest and not for its own benefit. Therefore, in case APTEL issues Order against MSEDCL, the principle of passing of benefit to consumers' needs to be equally applied in the matter of passing increased carrying cost/late payment surcharge for the period of pendency of appeal before APTEL.
- 3.11 Therefore, the Commission is requested to allow MSEDCL to consider carrying cost/DPC on above said Change in Law claims as expense and allow it to pass through in FAC or Annual Revenue Requirement (ARR).

- 3.12 It is submitted that, once these issues attain the finality, the impacted amounts will be finalized and frozen. MSEDCL at such time will approach the Commission to allow recovery/pass through to consumer pursuant to final Judgment and reconciliation of amounts. In case, APTEL issues judgment in favor of MSEDCL the amount paid to the generator shall be recovered with interest and will be returned to consumer.
4. At the time of E hearing dated 11 August 2020 MSEDCL reiterated the submission made in the Petition. During the hearing, MSEDCL has referred to Commission's Order allowing impact of Change in Law relating to imposition of Safeguard Duty to Solar Project Developers over the tenure of the PPA and requested the Commission to consider similar relief in present matters.

Commission's Analysis and Ruling

5. The Commission notes that through present Petition, MSEDCL is primarily seeking pass through of Delayed Payment Charges on outstanding Change in Law compensations relating to change in NCDP, SHAKTI Policy and Lohara Coal Block cancellation claimed by Generators. However, following provisions of MERC (Multi Year Tariff) Regulations, 2019 prohibit such passthrough in ARR:

“36.4 Such Delayed Payment Charge paid or payable by the Distribution Licensee to the Generating Company or the Transmission Licensee shall not be allowed as an expense for such Distribution Licensee.”

In view of above clear provision of the Regulations, MSEDCL has filed present Petition under Regulation 102 of the MYT Regulations i.e. 'Power to Remove Difficulty' and requested to allow DPC on outstanding Change in Law claim as stated above.

6. While justifying its request, MSEDCL has mainly submitted that impact of these Change in Law is pertaining to past 3 to 5 years which has been claimed by Generator through supplementary bill post approval of Change in Law by the appropriate Commission. MSEDCL has also stated that these Orders of the Commission are under challenge before the APTEL and even though APTEL has not stayed these Orders, correct impact of Change in Law can be quantified only once these Appeals are decided. Further, to avoid carrying cost, it has paid some amount to generators and included part of such claim in MYT Petition so that 50% of the amount claimed by Generators can be paid. As any outstanding amount will attract DPC as per provisions of PPA, MSEDCL has requested the Commission to pass through such DPC as it has challenged these Orders before APTEL in the interest of consumers.
7. In this regard, the Commission notes that as per provisions of PPA which are based on Standard Bidding Document notified by the Central Government under Section 63 of the

EA 2003, Change in Law claim is to be raised through supplementary bill and due date for payment of such bill is 30 days from date of receipt of bill, failing which Delayed Payment Charge is attracted. As per provisions of PPA, affected party has to notify other party about Change in Law event in reasonable time and thereafter Commission has to allow impact of such Change in Law event, if found appropriate.

8. In the normal circumstances, this process takes a few months. But the issue of change in law event due to coal shortage on account of change in NCDP has taken several years to finalize. This is because dispute relating to coal shortfall was finally resolved by the Hon'ble Supreme Court by its judgment dated 11 April 2017 in Energy Watchdog matter wherein it has been held that the modification in NCDP is a Change in Law event and affected party needs to be restored to same economic position as if the change in law had not happened. Subsequent to such Judgment of Supreme Court, based on remand order from the APTEL, this Commission and CERC have issued Consequential Orders, in the Petitions filed before them, allowing compensation on account of change in NCDP. Similar relief has been granted on account of SHAKTI Policy and cancellation of Lohara Coal block. The reliefs have been granted after 3 to 5 years from date of occurrence of Change in Law event and the Generators have claimed the amount through supplementary bill(s) for all these past years, all together.
9. When any Generator raises Supplementary Bill for Change in Law compensation, Distribution Licensee needs to pay it within due date and include such increased expense of fuel cost in the FAC computation so that such impact is recovered from consumers without waiting for next tariff revision. Such pass through of increase expenses protects the consumers from carrying cost which would accrue till the next tariff revision and also enables Distribution Licensee to pay increased expenses within due date and avoids DPC.
10. However, in the present case, as against total supplementary bill of Rs. 12879 Crs claimed by Generators, MSEDCL has paid Rs. 2509 Cr. and Rs. 4192 Cr. has been included in MYT Petition thus ensuring that around 50% of claimed amount is being considered for payment through recovery from tariffs. The Commission in its MYT Order dated 30 March 2020, allowed the request of MSEDCL and included Rs. 4192 Cr. in expenses for MYT period thereby spreading such recovery over the 5 years of MYT Control Period i.e. from FY 2020-21 to FY 2024-25. The Commission notes that still a balance of 50% claimed amount has not been factored in the ARR of MSEDCL and this amount will be subject to change depending on the result of the pending appeals before the APTEL and crystallization of the exact amount determined after scrutiny of the claims. MSEDCL always has the option of paying such supplementary bills to generator and recover the increased expenses from consumers through FAC mechanism subject to the provisions of the Regulations. In such a situation, it would not be possible to recover the full amount immediately from the consumers as ceiling on FAC rate would restrict such recovery. Beside such continuous record up to the ceiling limit for amounts pertaining to past 3-5 years will subject the consumers to hardships and the Commission doesn't think it fair.


11. Alternatively, MSEDCL could pay such amount by taking Working Capital loan from Financial Institutions and settle the dues of the generator. Thereafter, MSEDCL could submit and justify the cost of such finances through ARR over and above normative interest on working capital by providing adequate justification at the time of truing-up. This dispensation could be considered seeing the exceptional circumstances of this case. Thus, though the Commission, considering the provisions of the Regulations, can not allow DPC on outstanding amount of Change in Law as passthrough in ARR or FAC, the interest on working capital loan could be considered during MTR/MYT process subject to due diligence.
12. During the hearing, MSEDCL has also referred to Commission's dispensation of spreading Change in Law impact of imposition of Safeguard Duty on Solar panel/module over the tenure of PPA and requested similar relief in present matter. In this regard, the Commission notes that imposition of Safeguard Duty has occurred during construction of the solar project and hence option was given to MSEDCL to pay such compensation in lumpsum or over tenure of the PPA. Whereas PPA under consideration in present case provides for revision in fixed charges for impact of any Change in Law during construction period where the impact could be spread over the tenure of PPA. But events of shortfall in Coal on account of change in NCDP, SHAKTI Policy and cancellation of Lohara Coal Block has occurred during operation period and provision of spreading such impact of operational period over the tenure of PPA doesn't seem tenable.
13. However, considering the fact that impact of Change in Law for last 3 to 5 years have been claimed all together, Distribution Licensee may face difficulties in raising finance for the same. Even if it is able to do that, all such cost would be levied to and recovered from the consumers through FAC mechanism subjecting consumers to increased FAC levy. All these can be avoided if Distribution Licensee and Generators mutually agree for payment of such accumulated claims through installments, which may be equal to months for which such claim has accumulated by compensating Generators for such deferred payment. As Generators would have to arrange for working capital during this deferred payment period, they can be compensated by allowing carrying cost at rate of interest applicable for Working Capital in MYT Regulations. Under this mechanism, Generators could get their dues plus carrying cost for deferred payment; Distribution Licensee get flexibility to raise finance for paying such accumulated dues and consumers will be protected from sudden tariff increase. In the opinion of the Commission this mechanism would protect interest of all stakeholders and could be adopted whenever such situation of accumulated claims of relatively higher amount arises.
14. Generators are not made party in the present case. Without hearing them, the Commission cannot decide on possibility of allowing deferred payment of accumulated claims. Therefore, the Commission directs MSEDCL to discuss possibility of payment plan as stated in para 13 above with Generator and file separate Petition for approval of such payment mechanism.
15. Hence following Order

ORDER

1. Case No 45 of 2020 is partly allowed.
2. Delayed Payment Charges cannot be allowed as pass-through in expenses of Distribution Licensee.
3. However, considering the fact that impact of Change in Law for the past 3 to 5 years have being claimed all together, Distribution Licensee and Generators can mutually agree for payment through installments by compensating Generators for such deferred payments. If MSEDCL can work out such proposal with its Generator, then it is at liberty to file separate Petition for approval of such payment mechanism.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member


(Abhijit Deshpande)
Secretary

