

**Before the  
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION  
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**Case No. 158 of 2020**

**Case of M/s Adlabs Entertainment Limited seeking waiver of maximum demand threshold limit penalty applied to Open Access transaction under DOA First Amendment Regulations 2019 due to COVID-19 outbreak and lockdown situation**

**Coram**

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

Adlabs Entertainment Limited (AEL) .....Petitioner  
V/s  
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) .....Respondent

**Appearance:**

For the Petitioner :Shri.Mohan Borole(Rep.)  
Ms. Sheetal Pednekar (Rep.)  
For MSEDCL :Shri Ashish Singh (Adv.)

**ORDER**

**Dated:16 October,2020**

1. Adlabs Entertainment Ltd. (**AEL**) has filed a Case under the Regulation 3.2, 35, 36 ,37 and 39 Distribution Open Access Regulations 2016 (**DOA Regulations 2016**) and Distribution Open Access First Amendment Regulations 2019 (**DOA First Amendment Regulations 2019**) for waiver of Maximum Demand (**MD**) threshold limit penalty applied to Open Access transaction under DOA First Amendment Regulations 2019 due to COVID-19 outbreak and lockdown situation.
2. **Petitioner's main prayer are as follows:**
  - (a) *To accept and admit the Petition through email and grant urgent hearing and issue interim temporary orders for the period of COVID-19 Lockdown.*

- (b) *To direct MSEDCL to waive off the penalty levied Rs. 2051343.36 under Clause No. 3.2 DOAR 2016 and refund it in subsequent Energy bill of the consumer under invocation of Force Majeure clause due to COVID-19 Lockdown.*
- (c) *To direct MSEDCL to extend the Relaxation for Clause No. 3.2 of DOAR 2016 until the Lockdown is over.*

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

- 3.1. Adlabs Entertainment Ltd. (**AEL**) is having commercial establishment that carries the business of Hotel, Restaurant and Entertainment at Raigad district.
- 3.2. AEL is a commercial HT consumer of MSEDCL and availing Open Access (**OA**) from Renewable Energy (**RE**) Sources under the DOA Regulations 2016 and DOA First Amendment of DOA Regulations, 2019.
- 3.3. The highest recorded demand for the month of April and May 2020 are 675 KVA and 655 KVA, respectively.
- 3.4. MSEDCL levied penalty of Rs. 2051343.36 in the month of May 2020 to AEL for non-compliance of Regulation 3.2 of DOA First Amendment Regulations 2019.
- 3.5. The COVID- 19 (Corona virus) pandemic affected their businesses due to lockdown.
- 3.6. Various circulars and notifications have been issued by the Central and State Government mandating social distancing, cancellations of travels, lockdowns, curfews, and closure of our business as a consequence of the COVID 19.
- 3.7. Hence, it is impossible to meet qualifying requirement for consumption / Maximum Demand as per Regulation 3.2 of DOA First Amendment Regulations 2019 during these months of Lockdown as business were not allowed to operate.
- 3.8. The pandemic has had an unforeseen and extremely adverse impact on the entire Hotel, Restaurant and Entertainment business and these circumstances have also been defined as “Force Majeure” circumstances.
- 3.9. Under Force Majeure situation, which is beyond control, AEL requested to give relaxation for aforesaid provisions of DOA First Amendment Regulations 2019 and waive off the penalty levied and extend the relaxation till the lockdown is over.

**4. MSEDCL in its submission dated 21 August, 2020 has stated as under:**

- 4.1. AEL has filed the present Petition under the provisions of Regulation 35 (Issue of Orders and Practice Directions), Regulation 36 (Power to Amend) and Regulation 37 (Power to Remove Difficulties) claiming relaxation in Regulation 3.2 of the MERC (Distribution Open Access) Regulations, 2016 and amendment thereof.
- 4.2. Regulation 37 of DOA Regulations 2016 stipulates for Power to Remove Difficulties. “Power to remove Difficulties” cannot be exercised without hearing all the affected Parties. Moreover, it can only be exercised to give effect to the provisions of the Regulations. It should be exercised in a manner consistent with the scheme and essential provisions of the Regulations/Act and for the purpose for which it is

conferred and not to dilute a binding provision of a Regulation which is notified after rigorous public consultation process. Further it does not contemplate removal of individual hardships that may arise as a result of giving effect to the Regulations. Moreover, such power can only be exercised in case there is any difficulty arising to give effect to the provisions of the parent Act. The Hon'ble Appellate Tribunal for Electricity (ATE) vide its Judgment dated 6 May 2011 in Appeal No. 170 of 2010 has explained regarding the applicability of exercise of the power to remove difficulty.

- 4.3. It is by pure individual choice and commercial decision that AEL chose to be under OA and decided to take the benefits of OA. Having once opted for the commercial decision, AEL at this belated stage cannot seek a different dispensation.
  - 4.4. The applicability of Demand Charges equal to two times wheeling charges in event of not fulfilling the threshold limit Demand is clearly envisaged in Regulation 3.2 of DOA First Amendment Regulations, 2019, which is well known to AEL as well.
  - 4.5. AEL could have very well reduced/surrendered its OA and could have opted for normal HT billing by MSEDCL. But still it continued its OA with full quantum which was a pure commercial call and risk taken by the Petitioner.
  - 4.6. A consumer in any circumstance (lockdown or normal circumstance) is expected to calculate its load vis a vis its consumption and then apply accordingly to MSEDCL. Surely AEL miscalculations cannot be saddled on MSEDCL.
  - 4.7. When AEL contracts under OA, MSEDCL reserves the transmission corridor with MSETCL by paying the charges to MSETCL on MW basis in accordance with the mandate of DOA Regulations. However, while recovering the same from RE-OA consumers, MSEDCL recovers the same on per unit of energy injected/wheeled. The CUF of RE plant being low, MSEDCL is paying considerably more charges than it is recovering from RE-OA consumers. A RE-OA consumer contracting for OA quantum and not utilizing same result in more financial loss to MSEDCL and hence Regulation 3.2 is put in place to balance the interest of consumers as well as MSEDCL.
- 5. At the e-hearing through video conferencing held on 9 October, 2020:**
- 5.1. Representatives of AEL re-iterated their submissions as made out in the Petition and further stated that Medium Term Open Access (MTOA) was continued as it was not possible to alter the permission in April and May, 2020 itself. In subsequent months i.e. June and July, 2020, when the lockdown was relaxed, it has managed to consume above threshold limit.
  - 5.2. Advocate of MSEDCL re-iterated their submissions as made out in the reply and further stated that Petition is based on several issues such as COVID-19 and in this regard the Commission has recently dealt such issues in Case Nos. 92 and 93 of 2020. Thus this Petition on the same issue should also be similarly dismissed.
  - 5.3. In its rejoinder, the representative of AEL stated that the Orders in Case Nos. 92 of 2020 and 93 of 2020 (Non-consideration of banking or CD Relaxations due to COVID) are not applicable in the instant Case as petitioner is mainly asking for waiver

of penalty which is not a revenue to MSEDCL and it will not impact the respondents financially. He further requested to consider its Petition under Regulation 39 (Powers to Relax) of the DOA Regulations First Amendment 2019 even if this relief now prayed for was not made part of the Petition.

**Commission’s Analysis and Ruling:**

6 After analyzing the submission of the Parties, the Commission notes that the limited issue to be adjudicated in the present Case is the waiver of the penalty of Rs. 20,51,343/- as the recorded Maximum Demand (MD) of AEL for the month of April and May 2020 which was below the 70% the threshold level, the eligibility criteria for Open Access under Regulation 3.2 of DOA Amendment Regulations 2019. In its support AEL has stated that COVID- 19 lockdown has affected their business operation and hence it was impossible to meet 70% threshold level as specified in the Regulations for utilisation of the MD for these months.

7 In this context, it is imperative to examine the relevant provisions of the DOA First Amendment Regulations, 2019. The relevant paras. are reproduced as under:

*“3.2. Subject to the provisions of these Regulations, a Consumer having Contract Demand of 1 MVA and above with a Distribution Licensee shall be eligible for Open Access for obtaining supply of electricity from one or more*

.....  
.....

*Provided also that the Maximum Demand of such Consumer or person in each financial year subsequent to its being granted Open Access shall be equal to or greater than seventy (70) percent of the threshold level at which it has become eligible for Open Access ;*

*Provided also that, if the Consumer fails to achieve the Maximum Demand in two consecutive months, the Distribution Licensee shall be entitled to a penalty equal to two times the wheeling charges for the financial year or part thereof for which he the Consumer failed to achieve such Maximum Demand ;*

*Provided also that, if such Consumer or person has not complied with the above proviso in 3 consecutive months, the Distribution Licensee may initiate the process of reassessment and reinstatement or reduction of Contract Demand.”*

**[Emphasis Added]**

8 The above Regulations clearly stipulate the levy of penalty as two times the wheeling charges for the financial year when recorded maximum demand for consecutive 2 months fails to achieve seventy (70) percent of the threshold level of eligibility of OA. In the instant case the recoded maximum demand for the month of April and May was 675 kVA and 655 kVA and hence MSEDCL has duly levied penalty to AEL as per the extant regulatory provisions.

- 9 The intent of providing penalty to such OA consumers has been explained in the Explanatory Memorandum of DOA First Amendment Regulations 2019. The relevant para. of Explanatory Memorandum is (EM) reproduced as under:

*“6.7. Minimum threshold demand (Issue c):*

*6.7.1 In Regulation 3.2 of the principal Regulations, the 5th and 6th proviso provides penal action against an Open Access consumer who defaults in achieving its Maximum Demand equal to or more than 70% of the threshold limit at which he becomes eligible for Open Access. Further, in the existing framework, there exists a penal framework to check default of the above condition. However the present condition is important from the point that only really eligible consumers avail Open Access.*

*6.7.2 The Commission has examined the data sought from the DISCOMs for the OA consumers having maximum demand less than 700 kVA for three consecutive times. It was, observed that, there were no large number of such instances. However as a matter of principle only truly eligible Consumers should be availing open access and any attempt of gaming should be avoided. In view of the same, it is proposed that the present provisions should be made more stringent.*

**[ Emphasis Added]**

- 10 Further, as per the Statement of Reasons (SOR) for First Amendment to DOA and TOA Regulations 2019, the Commission has already analyzed the possible hardship for the consumers and provided certain relief by increasing minimum period of avoiding threshold limit upto 2 months. The relevant para is as follows:

*Some of the objectors have pointed out that consumption of commercial consumers (e.g. Consumption of Malls, Hotels, Offices reduces in winter) has seasonal variations. Due to such seasonal variations, MD of such consumers may not be maintained with respect to minimum threshold limit in one particular month. The Commission has noted the objections and points raised by stakeholder with respect to genuine difficulties for maintaining minimum threshold limit in any particular month. The Commission observes that it has to strike balance between addressing genuine cases or difficulties and at the same time provision should not be prone to gaming. Hence, in view of suggestions received as well as to avoid the instances of gaming, Commission has decided to modify the condition for minimum threshold limit and increase the period from any Month to 2 Months.*

**[ Emphasis Added]**

- 11 Thus, Commission notes that the aforesaid provisions has been provided in the Regulations to point out that only the true eligible OA consumers , whose requirement is more than 1 MVA and above , should avail OA and that the non eligible consumers should be discouraged from seeking Open Access so as to prevent any possible gaming

attempt. The necessity of this provision of the Regulations is also explained in SOR and EM of DOA First Amendment Regulations 2019. The Commission further notes that in absence of penalty clause in these Regulations or dilution of penalty clause in these Regulations the possibility of a non-eligible OA consumers getting benefitted cannot be ruled out. The Regulations have been framed in order to strike the balance of promoting the OA for eligible consumers and at the same time restricting the non-eligible OA consumers (through appropriate economic signal by way of levy of penalty) from availing OA.

12 Further, upon perusal of the Exhibit I and II submitted along with Petition (Electricity Bills for the month of April and May 2020), following details on Contract Demand, MD and OA are observed:

(i) For April 2020:

- (a) Total Contract Demand (CD) - 7500 kVA
- (b) OA - 2343 kVA from Non -Solar Sources and 5800 kVA from Solar Sources  
(Total OA-8143 kVA beyond its CD)
- (c) Maximum recorded Demand – 675 kVA

(ii) For May 2020:

- (a) Total CD – 1300 kVA (revised from 7500 kVA)
- (b) OA – 5100 kVA from Solar Sources
- (c) Maximum recorded Demand – 655 kVA

13 From the perusal of above details, it is observed that considering the lockdown situation AEL has revised the CD from 7500 kVA to 1300 kVA and sought OA of 5100 kVA. The recorded maximum demand for the months of April and May 2020 were 675 kVA and 655 kVA respectively, which are much below the eligibility conditions of OA contract demand. It further appears from the data above that the consumer may not have been actually eligible for being an OA consumer for April and May 2020. AEL always had an option of restating the Contract Demand and the OA Demand. In fact, this option was used by AEL in the month of May 2020 where it did reduce the CD and the OA Quantum. Considering the uncertainty of load requirement in the pandemic scenario, the Consumer also had a choice of opting as a HT consumer of MSEDCL. The Commission opines that AEL has taken a considered commercial decision and hence the risk associated with the decision are also to be owned up by them.

14 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 where non-exercise of the discretion would cause hardship and injustice to a party.*

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

*(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. ...”*

**[ Emphasis Added]**

- 15 Thus, the power to relax can be exercised only in exceptional case where there is likelihood of any hardship and injustice caused 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, in spite of being aware of present circumstances and the requirements laid down under DOA Regulations and its amendment thereof, has taken a conscious call to continue with the Open Access. Thus the hardship caused to the consumer, if any, is purely on account of its own action and the same cannot be dispensed with by relaxing the provisions of Regulations. Further, the power of relax for Regulations cannot be exercised arbitrarily to favour some of the parties at the cost of other parties. As mentioned earlier, if the relaxation as sought by the Petitioner is allowed, it would be detrimental to the Distribution Licensees like MSEDCL.
- 16 As regards the issue raised by the AEL during the hearing that penalty levied to them is not part of revenue and hence the Orders relating to non-allowing of banking relaxation in Case Nos. 92 and 93 of 2020 are not applicable in the instant case. In this context, the Commission notes that any penalty levied to the consumers is a part of the revenue of the Distribution Licenses and is never treated as return on any part of its business profit or gain outside the ambit of Annual Revenue Requirement. Further the penalty provision is for the dual purpose of disciplining the operations, ensuring that only eligible consumers apply for OA and also to partly recover the loss to the other party occurring due to default of the non-eligible party. It is reiterated that the threshold penalty recovered from OA consumers is a part of Revenue in ARR determination process and helps to reduce the Tariff of rest of the consumers.
- 17 The Commission also notes that the Regulations mandate the Distribution Licensee to book the transmission Corridor in advance on MW basis for which payment is required to be made irrespective of the actual corridor utilised. This amount is paid for by the consumers of the Distribution Licensees through Tariff. This aspect also needs to be considered and it will be improper to further burden the other consumers of the Distribution Licencee by the additional amount of penalty waiver as sought by the petitioner. Wheeling charges levied on OA users do not recover the full costs of provisioning of distribution grid.

- 18 In view of the above, the Commission does not find merit to consider waiving off the penalty levied for April and May 2020 on account of non-achievement of 70% maximum demand threshold level for OA. The Commission is not inclined to grant any relief regarding the prayer to relax Regulation 3.2 of DOA Regulations due to COVID-19 situation for the reasons stated above.

**ORDER**

**Case No. 158 of 2020 is dismissed.**

**Sd/-  
(Mukesh Khullar)  
Member**

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

