

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 179 of 2020

Case of WinIndia Ventures Private Limited against Maharashtra State Electricity Distribution Company Limited for non-compliance of the Order dated 3 July 2020 in Case No. 24 of 2020.

Coram

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

WinIndia Ventures Private Limited

.....Petitioner

V/s

Maharashtra State Electricity Distribution Company Limited.Respondent

Appearance

For the Petitioner
For the Respondent

:Shri Gaurav Mitra (Adv.)
:Shri Harinder Toor (Adv.)

ORDER

Date: 17 November 2020

1. M/s WinIndia Ventures Private Limited (**WIVPL**) has filed this Case dated 31 August 2020 against Maharashtra State Electricity Distribution Company Limited (**MSEDCL**) for non-compliance of the Order dated 3 July 2020 in Case No. 24 of 2020.
2. **Main Prayers of WIVPL are as follows:**
 - a) *Hold and declare that MSEDCL has not complied with the directions contained in Order dated 03.07.2020 passed in Case No. 24 of 2020 passed by this Hon'ble Commission;*
 - b) *Direct the Respondent to pay the amounts for FY 2014-2017 immediately, as per the Order dated 03.07.2020 passed in Case No. 24 of 2020 by this Hon'ble Commission*

alongwith interest @ 18% for each day of delay in compliance of the Order dated 03.07.2020 passed in Case No. 24 of 2020;

- c) *Initiate appropriate action against the Respondent under Section 142, 146 and 149 of the Electricity Act, 2003 for deliberate and willful non-compliance of Order dated 03.07.2020 passed in Case No. 24 of 2020;*

3. WIVPL in its Petition has stated as under:

- 3.1 This Petition is filed against MSEDCL for contempt/non-compliance of Order dated 3 July 2020 in Case No. 24 of 2020. The Commission in operative part of the said Order has ruled as under:

- 1. The Case No. 24 of 2020 is partly allowed.*
- 2. Maharashtra State Electricity Distribution Company Limited cannot be compelled to sign Energy Purchase Agreement with WinIndia Ventures Private Limited for its 1.5 MW wind project.*
- 3. Maharashtra State Electricity Distribution Company Limited is directed to compensate WinIndia Ventures Private Limited for the energy injected from 1.5 MW wind project during FY 2014-15 to FY 2016-17 which has already been considered by it for fulfilment of non-Solar RPO targets, at Average Power Purchase Cost (excluding Renewable Energy) plus floor price of non-solar REC applicable for respective years. Such compensation would be without any carrying cost.*
- 4. WinIndia Ventures Private Limited is not entitled to claim any compensation for the energy injected by it since April, 2017 onwards from its 1.5 MW project in the absence of any valid Energy Purchase Agreement.*

- 3.2 MSEDCL till date has not complied with the said Order passed by the Commission. The continuous defaults and non-compliance of MSEDCL makes it liable to pay interest at 18% on the outstanding amount, as non-payment of amounts once the same is directed to be paid as per said Order would surely attract penal interest. MSEDCL even after expiry of more than 50 days has not complied with the order.

- 3.3 WIVPL through several emails dated 6 July 2020 and 16 July 2020 has requested MSEDCL to pay the outstanding amounts in compliance with the said Order. However, such requests have neither been answered nor been complied with by MSEDCL. The non-compliance of the directions in the said Order is a deliberate and willful act without any valid reasons.

- 3.4 The direction contained in the said Order, to pay for 3 years i.e. FY 2014-2017 is based on the confirmation of MSEDCL that it has utilized the power injected by WIVPL for fulfillment of RPO. Having once admitted and confirmed the said fact, there can be no reasons on account of which MSEDCL can deny payment of said amounts more so when there is a specific direction for the same to be paid.

3.5 No Court of law till date has either stayed the operation of directions in the said Order or declared the relevant portion of the Order directing MSEDCL to pay the amounts, to be bad in law. Moreover, MSEDCL till date has not even challenged the said Order.

4. **MSEDCL in its reply dated 8 October 2020 has stated that:**

4.1 WIVPL have already challenged the said Order before the APTEL, seeking the following reliefs:

“(a) Allow the present appeal and set aside the impugned order dated 03.07.2020 passed by the Ld. MERC in Case no. 24/2020 to the extent challenged herein; and or

(b) Direct MSEDCL to enter into an Energy Purchase Agreement with Appellant @ Rs.5.70 w.e.f 11.11.2014 for a period of 13 years honoring the mandate of GOM NEW RE POLICY, 2015 and Methodology for Installation of Projects under the NEW RE Policy, 2015; and or

(c) Hold and declare that in any event, any compensation as awarded by Ld. MERC shall be alongwith interest/carrying cost.

4.2 As per the MERC (Conduct of Business) Regulations, 2004, at Regulation 41 (b), it is obligated for the deponent to furnish information on Affidavit with regard to any proceeding pending in any court of law/ tribunal or arbitrator or any other authority, wherein the deponent is a party and where issues arising and/or reliefs sought are identical or similar to the issues arising in the matter pending before the Commission. WIVPL on affidavit has submitted that, there are no proceedings pending in any court of law/ tribunal or arbitrator or any other authority, wherein WIVPL is a party and where issues arising and/or reliefs sought are identical or similar to the issues arising in the matter pending before the Commission.

4.3 WIVPL is denying any pending legal proceeding when WIVPL has approached the APTEL in DFR No. 230 of 2020 with following submissions:

1.2 The Appellant is challenging the Impugned Order dated 03.07.2020 as the Ld. MERC has not erroneously considered the following

i. Erroneous, unilateral and illegal reliance/consideration of "purported information "submitted by MSEDCL on the issue of" consideration of energy injected by Appellant for fulfillment of RPO by MSEDCL only for FY 2014-2015 to 2016-2017" when such fact was never part of the proceedings nor the said fact was ever disclosed to the Appellant before the passing of the impugned Order.

ii. Erroneous awarding of compensation at lower side i.e. APPC rate along with floor price of nonsolar REC's that too only for three (3) years i.e.(FY 2014-15 to 2016-17)

iii. Erroneous awarding of compensation on lower side that too only for three (3) years i.e. (FY 2014-15 to 2016-17) without carrying cost by holding that carrying cost is not payable as there is no fault of MSEDCL.

- 4.4 WIVPL at one side has challenged the very basis of the monetary relief granted by the Commission along with various other observations made in the said Order, before the APTEL and on the other side, WIVPL is seeking implementation/execution of the said Order impugned before the APTEL, which is impermissible in law.
- 4.5 It is a well settled position of law that no party can accept and reject the same instrument. Further, it is also a well settled proposition of law that a man having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. This concept very well fits in the present case as well, as at one end WIVPL is challenging the very basis of monetary relief given in impugned Order and at the same time is also praying for the execution of the same relief.
- 4.6 WIVPL is trying to take benefit of a judgment as being good and the appeal against it as being bad. There is a catena of judgments which holds that a party cannot blow hot and cold at the same time. MSEDCL rely upon the judgement of Hon'ble Supreme Court in *Bhau ram vs. Baijnath Singh and Ors*; [AIR 1961 SC 1327] and Hon'ble Patna High Court in the matter of *Ignatia Kujur and Ors. vs. National Insurance Co. Ltd. and Ors.*[1998 2 PLJR 138]. Assuming without accepting, if WIVPL wants and is ready and willing to accept money as allowed by the Commission in the said Order, then he should withdraw the Appeal filed before the APTEL, otherwise the Petition deserves to be rejected under the above mentioned principles of law.

Further, WIVPL contends that MSEDCL has not challenged the said Order, without prejudice to whatever is stated herein above, it is settled position of law that any injection of power into the grid without a valid and subsisting EPA/PPA or agreement is void-ab-initio and thus, there could not be any question of compensation as determined by the Commission in the impugned Order. Accordingly, MSEDCL has also partially challenged the Order in dispute before the APTEL, only with respect to compensation allowed by the Commission.

5. WIVPL in its Notes of Arguments dated 20 October 2020 has stated as under:

- 5.1 The Commission in the past has strictly decided Non-Compliance/Contempt Proceedings based on the said principles and has only laid off its hands in proceeding in the matter if there is a "Stay" on the order of the Commission by any higher Court.
- 5.2 In the present Case, there is no stay in favor of MSEDCL and hence, the Non-Compliance/Contempt Proceedings needs to be initiated against MSEDCL. There are several Orders of the Commission on the said principle adopted by the Commission.
- 5.3 WIVPL through its Appeal (DFR No. 230 of 2020) has only partly challenged the impugned Order. The Appeal on the grounds mentioned therein is for the following:
- i) EPA of 13 years needs to be signed at "Preferential Tariff".
 - ii) Dehors the issue of EPA, compensation shall be till 28.05.2020 (Date of illegal disconnection)

- iii) The compensation allowed for FY 2014- 2017 has to be at “Preferential Tariff”
- iv) The compensation allowed for FY 2014- 2017 should be with interest/carrying cost.
- 5.4 The Order clearly states that the Petition is “Partly Allowed”. Hence, there is no reason for WIVPL to challenge what is partly allowed in its favor. What is “Partly Challenged” by WIVPL before the APTEL is the fact that WIVPL needs to be allowed more than what it has already been partly granted. Had WIVPL challenged the entire Order then there was no requirement to state “to the extent challenged herein”.
- 5.5 WIVPL in its appeal has categorically stated that compensation was restricted only for FY 2014-2017 in view of communication between the Commission and MSEDCL after closure of proceedings. Limiting the period of compensation to 3 years i.e. for FY 2014-2017 based on such communication was legally not correct when facts prove that power was injected as late as on 28 May 2020. Hence, WIVPL deserves more than what it has got from the Commission and it is for this additional claim that the Appeal proceeds along with other issues.
- 5.6 The Appeal nowhere states that WIVPL is not ready to accept what is partly allowed under the said Order. The Appeal clearly states that it only assails what is not allowed in the said order and does not assail what is already partly allowed. Hence WIVPL is not blowing hot and cold but is blowing hotter.
- 5.7 MSEDCL in its reply admits that it has also partly challenged the Order. The use of the words “Also” clearly means that WIVPL has also challenged the Order partly only. If according to MSEDCL such “Part Challenge” is not allowed then how MSEDCL has challenged the same Order partly and is also partly taking shelter under the Order to deny legitimate claims of WIVPL.
- 5.8 In any case, the Appeal of WIVPL even if dismissed in entirety by the APTEL would not absolve MSEDCL from paying the compensation as awarded which clearly means that the appeal is only partly challenging the Order and not the portion which is already awarded in favor of WIVPL.
- 5.9 The Appeal and present Petition are no way related to one another and hence the question of disclosure of the same is not at all required as discourses are made for identical pending proceeding wherein similar reliefs are claimed. In fact, no relief has been sought by WIVPL before the APTEL for claiming the compensation for FY 2014-2017 as partly allowed in said Order. The present Petition and Appeal are for different reliefs which are being pursued by WIVPL before two separate forums.
- 5.10 MSEDCL seeks to rely upon a ‘Constitution Bench’ ‘Minority Judgment’ of the Supreme Court in ‘Bhau Ram Vs Baij Nath Singh & Ors’’, which is not the law and cannot be treated as a precedent. The majority judgment of 4 judges decides the issue ‘whether a person’s right to statutory appeal is taken away if the person takes benefit under the same judgment and then seeks to challenge it on a later date’. Majority judgment is in favor of

the WIVPL not only on facts but also on law as it lays down each and every eventuality under which the claim of the WIVPL is justified.

- 5.11 The Commission is aware of the paucity of finances of the WIVPL which has time and again been brought out in several recent proceedings before the Commission. It is a matter of record that since 11 November 2014 till date, MSEDCL has not paid a single penny to WIVPL leading it to the brink of bankruptcy.
6. At the e-hearing through video conferencing held on 22 October 2020, the Advocate of WIVPL reiterated its submission in the Petition and in Notes of Arguments. It has also relied upon commission's Order dated 20 July 2020 (Case No. 90 of 2020) issued in similar circumstances. The Advocate of MSEDCL reiterated its submission in the reply.

Commission's Analysis and Ruling:

7. The Commission notes that earlier WIVPL had filed Case No.24 of 2020 seeking signing of EPA for its 1.5 MW WTG from the date of commissioning of WTG and registering it as per Methodology for registration of projects dated 9 September 2015 issued by the GoM. The Commission by its Order dated 3 July 2020 had partly allowed the Case. The operative part of the said Order is reproduced at para No 3.1 of this Order. Aggrieved by the said Order WIVPL had approached the APTEL vide DFR No. 230 of 2020 on 9 July 2020 and challenged the Commission's said Order.
8. (i)Subsequently, the instant Case has been filed by WIVPL on 30 August 2020 for non-compliance of the said Order by MSEDCL. The Registry of the Commission issued notice on 4 September 2020 seeking reply from MSEDCL within 15 days. WIVPL filed Original Petition (**OP**) No. 351 of 2020 in APTEL seeking direction against the Commission for listing of matter for hearing. Meanwhile, MSEDCL filed its Reply on 8 October 2020. The matter was heard in APTEL on 9 October 2020, the Counsel of the Commission apprised the APTEL about steps taken by it for scheduling the instant Case. The APTEL in its Daily Order dated 9 October 2020 has ruled as under:

In the resumed hearing, the learned counsel for the first Respondent/the State Commission submits that notice was issued on petition of the Applicant/Petitioner by the State Commission on 04.09.2020 requiring reply to be filed within fifteen days. She submitted that the matter could not be listed for want of reply earlier though reply by the other Respondents has since been filed. Upon Instructions from the State Commission, she informed that the case in question of the Applicant/Petitioner is being listed for being heard by the State Commission on 22.10.2020.

The learned counsel for the Applicant/Petitioner submitted that given the above information furnished by the counsel representing the State Commission, the present petition is not pressed for any further directions and may be disposed of accordingly.

The original petition along with other pending applications by stands disposed of accordingly.

(ii) The Commission notes that WIVPL has statutory right to approach appropriate forum for redressal of its grievance. Accordingly, WIVPL has exercised the same by approaching the APTEL. The Commission has noted the sequence of events between the Order issued by the Commission and the filing of appeal in para 8(i) above mentioned paragraph. From the sequence it is clear that there has been no lapse or delay in following the routine procedure for listing of cases. Also, the Commission has not understood the likely loss or the urgency or the irreparable harm that was caused to WIVPL during the time of filing the reply by MSEDCL and the listing of case. The Commission is aware that WIVPL had filed the original case for compensation from 2014 onwards after a period of more than 5 years. Though there is nothing illegal on part of WIVPL in approaching the APTEL for requesting the listing of cases, it is fairly expected that burdening of Higher Forums or for that matter of any forum could have been avoided especially when the laid down procedure is known to the petitioner and the cases are listed by the Commission by following the same. The forums including this Commission are trying to hear maximum possible cases by adopting possible technological solutions during the ongoing Covid 19 pandemic. In the present case, the Commission in any case would have scheduled the petitioner's case also after receiving the reply from MSEDCL and that though this fact was known to WIVPL, it chose to approach the APTEL for directions to Commission to list the case. The Advocates of the Commission in APTEL were directed to check with the Commission and inform the APTEL about the date on which the hearing will be scheduled. Deviating from the normal procedure, the Commission orally informed the APTEL through its lawyers about scheduling the case on 22 October 2020. In the opinion of the Commission this was an avoidable action on the part of WIVPL wherein Hon'ble APTEL was required to intervene.

9. WIVPL in the instant Case has contended that even after continuous follow-up, MSEDCL has failed to pay the compensation granted by the Commission in the said Order dated 3 July 2020. For non- payment of such amount, MSEDCL is liable to pay interest at 18 % and appropriate action under Section 142, 146 and 149 of EA in case of deliberate non-compliance of the said Order should be initiated against MSEDCL. While opposing the contentions of WIVPL, MSEDCL has stated that on one hand WIVPL is seeking relief under the said Order in which some monetary benefits/compensation is granted by the Commission and on other hand the same Order is challenged by WIVPL before APTEL and seeking preferential tariff for 13 years which is not permissible as per Law. WIVPL cannot accept and reject the same instrument. MSEDCL has further stated that WIVPL in the instant Case has not disclosed its pending proceeding before the APTEL on the same issue.
10. Based on submissions made by parties, the Commission frames following issues for its consideration:
 - a. Whether present Petition seeking compliance of Order is maintainable when Petitioner itself has challenged the same Order before the APTEL?
 - b. If maintainable, what relief can be granted in the present matter?
 - c. Whether interest at rate of 18% be allowed for delay in payment of compensation?

The Commission is addressing these issues in subsequent paragraphs.

11. Issue a: Whether present Petition seeking compliance of Order is maintainable when Petitioner itself has challenged the same Order before the APTEL?

- 11.1 WIVPL has stated that it has only partly challenged the said Order before the APTEL. WIVPL has not challenged the compensation which is partly allowed by the Commission in its favour. WIVPL has stated that it has filed the Appeal seeking the enhancement of what has been granted by the Commission particularly for enhancing the compensation for 3 years (FY 2014 to FY 2017) till 28 May 2020 at preferential tariff along with carrying cost and EPA should be signed for entire 13 years at preferential tariff. WIVPL in its Appeal nowhere mentioned that it is not ready to accept what is partly allowed by the Commission in the said Order. WIVPL has further stated that no stay has been granted on the said Order till date and even if the Appeal is dismissed MSEDCL is bound to pay the compensation granted by the Commission.
- 11.2 MSEDCL has opposed the contention of WIVPL by stating that it is settled proposition of law that a man having accepted a benefit given to him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. WIVPL is challenging the very basis of monetary relief given in impugned Order and at the same time is also praying for the execution of the same relief. MSEDCL has relied upon the judgement of the Supreme Court in *Bhau ram vs. Baijnath Singh and Ors*; [AIR 1961 SC 1327] and Hon'ble Patna High Court in the matter of *Ignatia Kujur and Ors. vs. National Insurance Co. Ltd. and Ors.*[1998 2 PLJR 138] for this purpose.
- 11.3 The Commission notes that MSEDCL has relied upon para 18 & 19 of *Bhau ram vs. Baijnath Singh and Ors*; [AIR 1961 SC 1327], which are paras from minority judgment. Majority judgment in the same matter has held as follows:

“7. It seems to us however, that in the absence of some statutory provision or of a well-recognised principle of equity, no one can be deprived of his legal rights including a statutory right of appeal. The phrase "approbate and reprobate" is borrowed from Scotch Law where it is used to express the principle embodied in the English doctrine of election, namely, that no party can accept and reject the same instrument (per Scrutton, L. J., in Verschures Creameries v. Hull and Netherlands Steamship, Co.,(4). The House of Lords further pointed out in Lissenden v. C. A. V. Bosch, Ltd. (5) that the equitable doctrine of election applies only when an interest is conferred as an act of bounty by some instrument. In that case they held that the withdrawal by a workman of the compensation money deposited by the employer could not take away the statutory, right of appeal conferred upon him by the Workmen's Compensation Act.

.....
12. It seems to us that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in Tinkler's case (1) to cases like the present. In our judgment it must be limited only to those cases where a person has elected to

take a benefit otherwise than on the merits of the claim in the lis under an order to which benefit he could not have been entitled except for the order. Here the appellant, by withdrawing the preemption price has not taken a benefit de hors the merits. Besides, this is not a case where restitution is impossible or inequitable. Further, it seems to us that the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. In the case before us there was no such choice before the appellant and, therefore, his act in withdrawing the preemption price cannot preclude him for continuing his appeal. We., therefore, overrule the preliminary objection. The appeal will now be set down for hearing on merits. The costs of this hearing will be costs in the appeal.”

In the above judgment, Hon’ble Supreme Court has held that under certain circumstances, even after taking benefit of order, person has right to appeal against the same order. However, this judgment decides on rights of appeal, whereas in present matter issue before the Commission is whether person can file appeal and simultaneously seek implementation of the same order against which appeal has been filed. Therefore, above judgment is not directly applicable considering the facts of the present case.

- 11.4 Similar to the above judgment of Supreme Court, judgment of Hon’ble Patna High Court in the matter of *Ignatia Kujur and Ors. vs. National Insurance Co. Ltd. and Ors.*[1998 2 PLJR 138] also deals with the right of appeal post taking benefit under original order. Therefore, this judgment also is not applicable in the present case.
- 11.5 WIVPL has relied on the Order of the Commission dated 20 July 2020 in Case no. 90 of 2020 (Petition of MSEDCL). It has claimed that there is similarity between the two cases. In that proceeding, MSEDCL had sought implementation of Commission’s Order even though it has challenged the part of that Order before the APTEL. Other parties to that case have also challenged that Order before the APTEL and hence opposed MSEDCL’s prayer seeking implementation of that Order. Relevant part of that Order is reproduced below:

“

TPC-D’ Submission

.....

14.2 MSEDCL has also challenged the Order in Case No. 297 of 2018 before the Hon’ble ATE alongwith other utilities. The FCR principles laid down in the Order and also the direction for considering the Power Exchange Prices and CPP prices for WASMP computation are under challenge before the Hon’ble ATE. Therefore, it is an admitted position that this Order has not attained finality. MSEDCL’s action of filing the Appeal against the Order in Case No. 297 of 2018 and then approaching the Commission under the present Petition for ad-hoc implementation of an Order is an attempt to abuse the process of law.

.....

MSEDCL’s rejoinder

14.7 There is no denying the fact that the Order in Case No. 297 of 2018 has been challenged by MSEDCL, TPC-D as well as AEML-D, however there is “No Stay” till date in any of the Appeals. Hence, mere filing of Appeals is no ground to claim “That the Order has not attained finality”. It is also denied that the Commission has become “Functus Officio”

Commission’s Analysis and Ruling

14.8 The Commission notes that MSEDCL has rightly contended that even though Commission’s Order in 297 of 2018 has been challenged before Hon’ble ATE by MSEDCL, TPC-D and AEML-D, but there is no stay in any of the Appeals. Further, the Commission is of the opinion that in the absence of any stay from the ATE, the Order in Case No. 297 of 2018 is in force.

14.9 Further, the Commission is of the view that mere pendency of the Appeal before higher Court should not be the reason for non-implementing the Order of the lower Court, if no stay has been granted to such an Order. The affected Party can always seek its appropriate remedy before the Court if the Order is not implemented within the stipulated timeframe.

14.10 In view of the above, there is nothing illegal in the MSEDCL’s action in approaching the Commission through present Petition during pendency of the Appeals before the ATE seeking its remedy in view of non-implementation of the Order in Case No. 297 of 2018 within the timeframe stipulated in the Order.” [emphasis added]

The Commission notes that in the above Order, this Commission has ruled that although Order has been challenged by parties, if there is no stay granted by higher courts, the said Order needs to be implemented. However, factual aspect of the present matter is not identical to above quoted Order. In above referred Order, original issue before the Commission was computation of FBSM liabilities of concerned stakeholders based on its ABT Order. In the said original Order, the Commission had laid down principle of computation and directed SLDC to finalise such computation on priority. Various stakeholders were aggrieved by one or other principle stipulated in that original Order and hence challenged the Order on such issues before the Hon’ble APTEL. Pending appeal before the APTEL, MSEDCL in above referred case approached the Commission to direct SLDC to compute liabilities as per principle stipulated in Order as there is no stay on that Order. The Commission has allowed the same.

- 11.6 As against above factual aspect of Order dated 20 July 2020 summarized above wherein multiple stakeholders were involved and issue was related to principles of computation of FBSM liabilities as per ABT Order, present matter is bilateral dispute between two parties i.e. WIVPL and MSEDCL. WIVPL in its Case No. 24 of 2020 had mainly prayed for the following:

“f) Direct MSEDCL to enter into an EPA with Petitioner w.e.f 23.12.2014 i.e. date of commissioning of the project and comply with the GOM RE Policy and Methodology, 2015 in true letter and spirit.

g) In the alternative direct MSEDCL to compensate the Petitioner to the tune of Rs. 13,64,78,327/- for the period 23.12.2014- December, 2019 (Principal Amount- Rs. 10,02,24,374 + 15% Interest Amount- Rs. 3,62,53,953/-) for the power injected by it only after a valid consent and the permission to commission dated 03.11.2014 and commissioning certificate dated 23.12.2014 issued by MSEDCL;”

However, as against prayer for execution of EPA and seeking compensation for energy supplied as per generic tariff rate, the Commission in its Order dated 3 July 2020 has rejected request of EPA and granted compensation for limited period till FY 2016-17 and that too not at generic tariff but at APPC rate plus floor price of non-solar REC. Thus, although the Commission has allowed partial relief to WIVPL vide its Order dated 3 July 2020, said partial relief was not in accordance with relief prayed for by WIVPL. Then also, after issuance of Order, vide its email dated 6 July 2020, WIVPL requested MSEDCL as follows:

“b. In that view of the matter, we most humbly request your good self to release payment to us, on priority, in accordance with the directions contained in the Order dated 03.07.2020 passed by the Hon'ble MERC as reproduced above.

c. We would also request you to kindly communicate the basis of calculation of amount as would be arrived by you to avoid any difference/dispute in final amount calculation.”

Thus, WIVPL has requested the MSEDCL to make payment based on the principles approved by the Commission in Order dated 3 July 2020.

- 11.7 While seeking payment as per Order of the Commission, WIVPL has also challenged the same order before the APTEL on 9 July 2020. In the said appeal amongst other, WIVPL has contended that compensation granted by the Commission (based on which WIVPL has requested MSEDCL to release payment) in on lower side and without any basis. Relevant part of WIVPL's Appeal is reproduced below:

“9.1 That the Ld. MERC has considered the ‘purported information’ submitted by MSEDCL on the issue of ‘consideration of energy injected by Appellant for fulfillment of RPO by MSEDCL only for FY 2014-2015 to 2016-2017’ when such fact was never part of the proceedings nor the said fact was ever disclosed to the Appellant before the passing of the impugned Order. On this count alone the impugned Order is liable to be set aside as material information on which the impugned Order is based was never provided to the Appellant and in fact has been obtained unilaterally by the Ld. MERC after the matter was reserved for Orders.

.....

9.7 That the Ld. MERC has erroneously allowed compensation at lower side i.e. APPC rate along with floor price of non-solar REC's that too only for three (3)

years i.e. (FY 2014-2015 to 2016-17) without carrying cost when power injected by Appellant was in fact deliberately and with full knowledge utilized by MSEDCL. Hence, arriving at APPC rate along with floor price of non-solar REC's was without any basis when facts clearly evidence illegal denial of EPA at 'Preferential tariff' even after MEDA accounting the Appellant project under the 1500 MW reserved capacity for fulfillment of RPO under the 1500 MW reserved capacity for fulfillment of RPO under the GOM NEW RE POLICY, 2015 and its Methodology for installation of Projects under the NEW RE Policy, 2015. In fact the impugned Order of the Ld. MERC is self-contradictory wherein the Ld. MERC on one hand held that payments cannot be made in view of no valid contract and on the other hand has allowed payment only for three (3) years i.e. (FY 2014-15 to 2016-17) without there being a valid contract in place.

9.8 The Ld. MERC has allowed compensation at lower side i.e. APPC rate along with floor price of non-solar REC's that too only for three (3) years i.e. (FY 2014-15 to 2016-17) without carrying cost, without comprehending the facts of the case, conduct of parties as well as without understanding the of GoM NEW RE POLICY 2015 and its Methodology for installation of Projects under the NEW RE Policy, 2015. Awarding APPC rate along with floor price of non-solar REC's that too only for three (3) years i.e. (FY 2014-15 to 2016-17) is without any basis and is only a means to justify MSEDCL's illegal action of accounting Appellant power for RPO without agreeing to honor the mandate of GOM NEW RE POLICY, 2015 and its Methodology for Installation of Projects under the NEW RE Policy, 2015" [emphasis added]

Thus, it is noticeably clear that in Appeal before the Hon'ble APTEL, WIVPL has challenged very basis on which compensation has been allowed by the Commission in its Order dated 3 July 2020. Additionally, WIVPL in present Petition, which has been filed seeking compliance of direction to pay compensation, has not made mandatory disclosure that it has challenged the Order and it is pending before the APTEL. On the objection of MSEDCL on this issue, WIVPL has only contended that it has not challenged the Order but is only seeking higher compensation. After going through grounds of appeal which cover all aspects of the impugned order, some of which are reproduced above, the Commission cannot accept such argument of WIVPL.

- 11.8 Further, after filing above said Appeal, challenging very basis on which the Commission has allowed such compensation, WIVPL continued to persue with MSEDCL for payment of compensation. In continuation of its earlier email dated 6 July 2020 seeking compensation, WIVPL vide email dated 16 July 2020, sent reminder to MSEDCL seeking payment of compensation and providing to it the basis of calculation. No further communication between parties is part of proceeding. These communication reveal that although WIVPL sought payment of compensation from MSEDCL as per Order of the Commission, it has not raised any invoice/bill for the same. This might be because, WIVPL is waiting for MSEDCL to provide the calculations. One cannot deny the responsibility of MSEDCL to share the computation as it had fairly accepted that such energy has been used by it. But at the same time, WIVPL which is generator in present case, must be well aware of the energy injected by it during that period and hence it

would have easily raised the invoice for the same. Instead of doing so, it has chosen to file present Petition seeking compliance of the Order and further filed original petition before the Hon'ble Tribunal for directions to the Commission to list the matter on urgent basis. Petitioner could have used that time to firm up its demand as per its own calculations in terms of the impugned order. It is also important to note that WIVPL in its Original Petition has also requested the Hon'ble APTEL as follows:

“4. The Petitioner is also filing the present Petition seeking direction from this Hon'ble Tribunal against MSEDCL for payment of amount as directed by Ld. MERC vide Order dated 03.07.2020 passed in Case No. 24/2020.....”

Thus, even when identical prayer was pending before this Commission in present Petition, WIVPL in its original petition before APTEL, chose to seek same relief. Although, Hon'ble APTEL in its Order on Original Petition (reproduced at para 8 above) did not deal with this issue, such conduct of WIVPL clearly establishes its intent of forum shopping.

- 11.9 The Commission also notes that MSEDCL has also challenged the Order dated 3 July 2020 granting compensation to WIVPL on the ground that as there was no EPA, energy injected without EPA does not warrant any compensation.
- 11.10 In view of the above facts of the present matter and that the petitioner has challenged the impugned order including the methodology based on which the compensation was awarded and that the payments go back to 2014 which were never pressed before commission until the recent petition, the Commission is of the opinion that balance of convenience in the present case requires the parties to wait till Hon'ble APTEL decides the appeals filed against order dated 3 July 2020.
- 11.11 Hence, at this point of time, the Commission is not inclined to grant any relief as prayed for in this matter.
12. In view of above rulings, issues framed at 'b' and 'c' need not to be decided.
13. Hence, the following Order:

ORDER

- 1. The Case No. 179 of 2020 is rejected.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member

