

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 157 of 2020

Case of Aurangabad Electricals Ltd. seeking revised generation credit adjustment as per correct billing methodology for wind units injected during May, 2016 to September, 2016 and December, 2016 and seeking direction for credit adjustments/payment of wind units injected from July,2017 to September, 2017, April, 2018 and from October, 2017 to March 2018 due to delay in issuance of Generation Credit Notes

Coram

I. M. Bohari, Member
Mukesh Khullar, Member

Aurangabad Electricals Ltd. (AEL)Petitioner

V/s

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

Appearance:

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

For MSEDCL :Shri Ashish Singh (Adv.)

ORDER

Dated: 9 February 2021

1. Aurangabad Electricals Ltd. (AEL/ **Petitioner**) has filed a Case under Sections 42, 86(1)(e), 86(1)(f), 86(1)(k) of Electricity Act 2003 (**EA**) , MERC (Distribution Open Access) Regulations,2016 (**DOA Regulations 2016**) and MERC (Conduct of Business) Regulations, 2004 seeking revised generation credit adjustment as per correct billing methodology for wind units injected during May, 2016 to September, 2016 and December, 2016. Also, AEL is seeking credit adjustment /payment of wind units injected from July,2017 to September, 2017 , April , 2018 and from October, 2017 to March ,2018 due to delay in issuance of Generation Credit Notes (**GCNs**).

2. Petitioner's main prayers are as follows:

- (i) Direct MSEDCL to give credit for all wind units injected into the grid by the Petitioner for the period from May, 2016 to September, 2016 and December, 2016 in the ensuing bills of the Petitioner with consumer No.490019007461;*
- (ii) Direct MSEDCL to recalculate the over injected units for the period from May 2016 to September 2016 in accordance with the billing methodology laid down by this Hon'ble Commission in Case No. 139 of 2016 while adjusting power sourced from multiple sources;*
- (iii) Direct MSEDCL to issue corrected and revised bills as applicable for the period of May,2016 to September, 2016;*
- (iv) Direct MSEDCL to compensate for the loss incurred by the Petitioner on account of alleged over-injected units which occurred due to incorrect billing methodology followed by MSEDCL in the ensuing bills;*
- (v) Direct MSEDCL to credit the differential amount of Rs. 28,83,505 (Rupees Twenty Eight Lakhs Eighty Three Thousand Five Hundred Five Only) for the total of 11,44,248 units injected into grid at the rate of Rs. 2.52/- (Rupees Two and Fifty-two paise) per unit for the period from July 2017 to September 2017 and April 2018;*
- (vi) Direct MSEDCL to give credit for the wind units injected into the grid by the Petitioner for the period from October 2017 to March 2018 and adjust the same in ensuing bills of the Petitioner with consumer No. 490019007461;*
- (vii) Award costs of these proceedings against MSEDCL and in favour of the Petitioner."*

3. AEL's Case states as under:

3.1 AEL is a consumer of MSEDCL located at Aurangabad and maintains Contract Demand of 2700 kVA with MSEDCL. It has also two windmills of 2 MW located at Ahmednagar District. It has raised following issues in the instant Case:

3.2 Issue I: Failure of MSEDCL to give credit for all wind power units injected by AEL and following wrong credit mechanism from May, 2016 to September, 2016 and December, 2016:

- (i) AEL had applied for Medium Term Open Access (**MTOA**) of 2 MW for self-use from its Wind Power Plant from 1 April, 2016 to 31 March, 2019.
- (ii) Further, AEL additionally had also sought Short Term Open Access (**STOA**) of 1.1 MVA conventional power from OPGS Power Gujarat Private Limited (**OPGS**) from May, 2016 to September, 2016.

- (iii) AEL had cancelled its MTOA of 2 MW from April 2017 for self- use as it intended to supply power generated by the Wind Power Plant to a third party consumer.
- (iv) AEL noticed that from May, 2016 to September, 2016 only conventional Open Access (OA) quantum was considered for credit adjustment and the RE MTOA quantum of 2 MW was not considered by MSEDCL.
- (v) Further, even from October, 2016 to March, 2017, MSEDCL has not considered RE power for credit adjustment.
- (vi) AEL had regularly followed up with MSEDCL with respect to failure to provide credit adjustment of the units injected by the Wind Power Plant from May, 2016 to March, 2017.
- (vii) Vide letter dated 4 December 2018, the Superintending Engineer (OA) (SE-OA), MSEDCL had directed the Superintending Engineer (O&M) Aurangabad (R) Circle to verify the generation from the Wind Power Plant from May, 2016 to March, 2017 and had sought clarification as to why AEL should not be given credit adjustment with respect to the units injected by the Wind Power Plant.
- (viii) Subsequently on 28 December 2018, MSEDCL issued revised bills for the period from May, 2016 to March, 2017. However, it was noticed that in the revised bills raised by MSEDCL for the months of May, 2016 to September, 2016 and December, 2016, the credit adjustment of units generated by the Wind Power Plant was not as per credit notes issued by MSEDCL. Further, for the period from May, 2016 to September, 2016 there was an increase in the over injected units reflected in the bill.
- (ix) AEL brought this mistake to the notice of MSEDCL vide letters dated 7 February, 2019 and requested MSEDCL to adjust the pending units in the next month's bill. However, vide letter dated 11 July, 2019, MSEDCL rejected AEL's request on the ground that the unadjusted units are over injected units and not banked units, hence they cannot be adjusted.
- (x) AEL once again vide its letter dated 23 July, 2019 explained to MSEDCL the two issues involved with the revised bills i.e. full credit not being given to the wind power units in the revised energy bills as the credit given to the Petitioner for the months of May, 2016 to September, 2016 and December, 2016 did not match with the units specified in the Credit Notes issued by MSEDCL and considerable increase in the over injected units reflected in the revised bills. However, MSEDCL vide its letter dated 16 August, 2019 once again rejected AEL's claim. MSEDCL stated that earlier it had considered only the OA for drawing conventional power from OPGS under STOA and had not considered the RE MTOA. However, in the revised bills it had considered both OA permissions and

hence there is an increase in the over injected units, which cannot be adjusted as they are not banked units.

- (xi) AEL vide letter dated 14 July, 2020 once again called upon MSEDCL to inter alia issue revised bills from May to September 2016 and December, 2016 after giving differential credit of 4,30,278 units for the said period and recalculating the over injected units from May, 2016 to September, 2016. However, there was no response from MSEDCL.
- (xii) The Commission vide its Orders dated 11 August 2017 in Case No. 139 of 2016 and 23 October 2018 in Case No. 71 of 2018 have dealt with the issue of adjustment of energy in case of power being drawn from multiple sources and it has explained that firm conventional power may be adjusted first and RE power later as RE power can be banked.

3.3 Issue II: Loss of AEL due to delay in issuance of Generation Credit Notes (GCNs) by MSEDCL:

- (i) AEL has executed an agreement for the third-party sale of wind Power under OA from its 2 MW Windmills to Kanakia Hospitality Private Limited (**KHPL**) in February 2017 and it has started supplying power to KHPL from April, 2017 onwards.
- (ii) For April 2017 to June, 2017, MSEDCL has issued GCNs after a delay of almost three months on account of which AEL was forced to delay its billing to KHPL. This in return resulted in delay of payments to AEL. The details of AEL billing and receipt of payment for the period from April, 2017 to June, 2017 is as follows:

Month of power generation	Month when KHPL got credit	Month when the AEL raised the bill	Month when AEL received payments
April 2017	August 2017	September 2017	March 2018
May 2017	September 2017	October 2017	March 2018
June 2017	October 2017	November 2017	March 2018

Issue of purchase of power for the month of July 2017 to September 2017 and April 2018:

- (iii) Due to delay in the issuance of GCNs by MSEDCL to AEL, it had not supplied power to its third-party consumer (i.e., KHPL) from July, 2017 to September, 2017.
- (iv) Hence, AEL vide letters dated 21 February, 14 April, 17 May and 25 July, 2019 had repeatedly requested MSEDCL for NOC for the period from July 2017 to September 2017 and April 2018 to sell power under short term sale to MSEDCL.

The joint meter reading reports provided by AEL indicate that total 11,44,248 units were injected into the grid by the Wind Power Plant of AEL from July, 2017 to September ,2017 and April ,2018.

- (v) MSEDCL vide its letter dated 11 July, 2019 rejected the AEL's request and directed AEL to apply online as offline applications are not considered for short term sale. Further, MSEDCL also informed AEL that the request for purchase of wind power on short term basis for past period i.e. July, 2017 to September, 2017 and April, 2018 at MERC tariff rate cannot be considered for procurement.
- (vi) As per the CERC (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. On account of the MUST RUN status, Wind Power Plant of AEL has injected power into the grid from July, 2017 to September 2017 and April, 2018. MSEDCL has enjoyed this wind power fed into the grid and sold it to its consumers. This has also realized the revenue for the energy injected by the AEL. The said energy was not meant to be gratuitous and hence, failure to give credit for the 11,44,248 units injected into the grid from July, 2017 to September ,2017 and April, 2018 and non-payment for the same is invalid. Section 70 of the Indian Contract Act, 1872 provides for obligation of person enjoying benefit of non-gratuitous act.
- (vii) AEL has incurred a loss of Rs.28,83,505/- on account of non-payment for the energy injected into the grid from July, 2017 to September, 2017 and April ,2018.

Delay in issuance of GCNs from October, 2017 to March, 2018 for third party OA and credit adjustment/payment of the units injected in the bill of AEL:

- (viii) After a break for a couple of months, AEL continued supplying power under third party OA to KHPL from October 2017 to March, 2018. However, the delay on the part of MSEDCL in issuing GCNs has been continued.
- (ix) AEL vide letter dated 4 May 2018 requested MSEDCL to issue credit notes for the period from October 2017 to March, 2018 at the earliest. AEL also pointed out that due to the delay in receiving the credit notes, it was unable to process the bills for the respective months.
- (x) The credit notes (dated 13 November, 2017, 7 December ,2017, 4 January ,2018, 8 February, 2018 and 6 April, 2018) for the period from October, 2017 to March, 2018 were received by AEL belatedly in the month of February, 2019. However, on account of the inordinate delay in issuing credit notes, KHPL was no longer interested in purchasing that power from AEL.
- (xi) As per the Citizens Charter published by MSEDCL under the head of time frame for disposal of proposals at field office, MSEDCL has unambiguously stipulated

the time frame for issuance of credit notes and credit adjustment thereafter which is as follows:

<i>Sr. No.</i>	<i>Particulars</i>	<i>No. of working days</i>
1.	<i>Issuance of Generation Credit Notes (GCN) in respect of Wind and Open Access Decisions</i>	15
2.	<i>Credit Adjustment after receipt of GCN- in respect to Wind and Open Access Decisions</i>	10
3.	<i>Payment to generators having EPA with MSEDCL.</i> <i>Note: In respect of CPPs, in line with term and condition mentioned in the EPA</i>	<i>Within 60 days from receipt of Invoice in Circle Office</i>

(xii) MSEDCL has not adhered to these timelines stipulated in its Citizens Charter which has resulted in losses to AEL.

(xiii) On account of the loss caused to AEL because of the delay in issue of GCNs by MSEDCL, AEL vide its letter dated 23 December, 2019 requested MSEDCL for permission to apply for short term sale of power to MSEDCL through online portal from October, 2017 to March, 2018 to which there has been no response from MSEDCL.

Present Petition is not barred by limitation:

(xiv) With respect to the claim for wind units injected from May, 2016, it may be noted that letter dated 4 December, 2018 sent by SE-OA to SE-(O&M) Aurangabad (R) Circle amounts to an acknowledgement of the fact that the wind units generated by the Wind Power Plant were accidentally not accounted in the energy bills raised on AEL. Such a written acknowledgment initiates a fresh period of limitation to be computed from that date onwards in accordance with Section 18 of the Limitation Act, 1963.

(xv) Further, vide letter dated 18 December, 2018, the Office of Chief Engineer (Commercial), MSEDCL makes it unambiguous that AEL is entitled to credit adjustment for the period from May, 2016 to March, 2017.

(xvi) The lockdown imposed by the Government of Maharashtra from 23 March, 2020 on account of COVID -19 has undeniably affected all day to day activities. Hence, delay, if any, was unintentional and inadvertent and the same be condoned. In its support, AEL has referred to the following Supreme Court Judgments :

(a) *Collector, Land Acquisition, Anantnag & Anr. V. Mst. Katiji & Ors.*(1987)
2 SCC 107

(b) *State of Nagaland Vs. Lipok Ao* (2005) 3 SCC 752 ,

(c) *Ram Nath Sao & Ors. Vs. Gobardhan Sao & Ors.* (2002) 3 SCC 195

(d) The Hon'ble Supreme Court vide Suo Moto Writ Petition (Civil) No. 3 of 2020 has extended the limitation period on account of the COVID-19 and resultant difficulties that may be faced by the litigants across the country for filing of the suits and other proceedings within the period of limitation prescribed under the general law of limitations or under Special Laws.

4. MSEDCL's Reply dated 7 October 2020 stated as under:

4.1 For Prayer (i) to (iv) is concerned, MSEDCL has followed the correct billing practices and revised the bill of AEL. The effect of all adjustments has already been granted to the AEL in the revised bill issued in the month of December, 2018.

4.2 The discrepancy in the billing occasioned on account of AEL availing STOA and MTOA from two different sources at the same time i.e. (i) Through OPGS conventional power and (ii) Through AEL's windmill at Ahmednagar.

4.3 The bill has been revised by MSEDCL in December, 2018 in consonance with the directions of the Commission vide Orders in Case No. 139 of 2016 and in Case No. 71 of 2018.

4.4 However, the said issue can be mutually resolved between parties with an opportunity of reconciliation, wherein MSEDCL would be able to exactly demonstrate to AEL, the billing methodology followed by it.

4.5 In Prayer (v), AEL has claimed payment for the months of July, 2017 to September, 2017 and April, 2018. AEL has himself admitted that he deliberately took a break under OA and did not supply power for these months to its OA consumers.

4.6 However, there is no question of reimbursing AEL for energy injected in the grid without prior consent/energy purchase agreement by MSEDCL. AEL has not detailed out any steps taken prior to the months of July, 2017 to September, 2017 and April, 2018 to sale its power to MSEDCL.

4.7 It is only at this belated stage that too after expiry of almost 2 years that AEL took up the issue with MSEDCL.

4.8 As regards the contention of AEL regarding the must-run status of Renewable Energy (RE) generating stations, the must run status is given by Indian Electricity Grid Code / State Electricity Grid Code and is applicable for the plants which are legally connected to the grid and having an agreement to supply energy to any entity. The Commission and other adjudication bodies including Hon'ble APTEL have ruled that without any

agreement to supply energy, generating stations cannot inject electricity. Further, the Commission vide its Order dated 1 July 2020 in the Case No.28 of 2020 has clearly ruled that Generator cannot continue to inject energy without valid EPA.

- 4.9 It is clear from the above judgement that AEL has injected the energy to the grid illegally without valid EPA and hence the same cannot be compensated.
- 4.10 As regards to Prayer (vi), AEL has claimed payment from October 2017 to March 2018 when it was under OA with its consumer. It is clear that AEL has availed OA from October, 2017 to March, 2018 and credit notes were in fact issued by MSEDCL for the said consumer.
- 4.11 Having once availed the option of OA which was duly granted by MSEDCL and also availed by the consumer of AEL, AEL cannot claim the benefit for any future period. It is not clear why the consumer does not want credit from October 2017 to March 2018 when in fact he has availed OA and power has flown under OA. It is the sole prerogative of AEL and its consumer and MSEDCL is not privy to such bilateral contract between them.
- 4.12 The entire case of AEL is based on its own wrongs committed which it now wants to shift on MSEDCL. It is stated that:
- (i) From July, 2017 to September, 2017 and April, 2018, AEL did not avail OA for reasons best known to him. In fact, AEL knowing that it is not under OA, kept injecting power into the grid without consent or valid EPA from MSEDCL. AEL did not take the permission of MSEDCL for injecting the power in the grid.
 - (ii) For October 2017 to March 2018, AEL availed OA. Credit Notes were issued by MSEDCL. But AEL's consumer refused to accept the benefits of OA for the said periods for reasons best known to the consumer. AEL rather than prosecuting MSEDCL should avail its remedy under its bilateral agreement with its consumer to prosecute the consumer who after availing OA is running away from its liability.
 - (iii) For October 2017 to March 2018, MSEDCL cannot be forced to purchase any power as such power has been supplied by AEL to its OA consumer for which credits have been issued accordingly. MSEDCL cannot retrospectively purchase power which has already flown to an OA consumer.
- 4.13 The conduct of AEL in making a baseless case can further be gauged from the fact that almost after a period of 2.5 years or more than that AEL has suddenly realized that a wrong has been committed against it. Further, from October, 2017 to March, 2018, AEL had sought permission for sale of power to MSEDCL but now makes a completely different prayer for the said period.

5. AEL's Rejoinder dated 15 October 2020 stated as follows :

- 5.1 The revised bills raised by MSEDCL on 28 December, 2018 for the months of May 2016 to September 2016 and December 2016, credit adjustment of units generated by the AEL's Wind Power Plant, was not as per credit notes issued by MSEDCL and requested MSEDCL to provide differential credit notes. .
- 5.2 The issue of adjustment of energy in case of power being drawn from multiple sources, has been already decided by the Commission vide Orders in Case Nos. 139 of 2016 and 71 of 2018, and same was upheld by the Hon'ble APTEL. MSEDCL now requested for an opportunity for the reconciliation of the units in these adjudicatory proceedings and same is untenable. MSEDCL had ample opportunity to reconcile but MSEDCL failed and neglected to do the same. Therefore, AEL requested to grant reliefs as sought by it as the issue has already been settled by the aforesaid Orders.
- 5.3 As regards to 'Prayer (v)' of the contention of MSEDCL in its Reply that AEL has deliberately took a break in OA from July, 2017 to September, 2017 and April, 2018 and did not supply power to its OA consumer is wrong and erroneous as same was on account of delay on part of MSEDCL in issuing the GCN.
- 5.4 MSEDCL is now trying to take advantage of its own wrong and the same will amount to unlawful gains for MSEDCL at the cost of AEL. Therefore, MSEDCL should not be allowed to unjustly enrich itself at the cost of AEL. The Hon'ble Supreme Court in the matter of *Indian Council for Enviro – Legal Action v. Union of India & Ors*, (2011) 8 SCC 161 held that *No one can take advantage of his own wrong. Unless courts disgorge all benefits that a party has availed by obstruction or delays or non-compliance with judgements or orders of courts, there will always be incentive for non-compliance with judgements or orders of courts, and parties are ingenious enough to come up with all kinds of pleas and other tactics to achieve their end because they know that in the end the benefits will remain with them.*
- 5.5 MSEDCL is relying on the Order in Case No. 28 of 2020 (Case of Bothe Windfarm) is sub judice before the Hon'ble APTEL in Appeal No. 119 of 2020. Hence, relevance of the Case No. 28 of 2020 in the present is baseless and erroneous. The matter at hand is completely different than the issues involved in the Case No. 28 of 2020. MSEDCL is trying to digress from the issues involved in the present matter with the aforesaid Order which is irrelevant for present proceedings. It is evident from the above that the AEL had customer but only due to delays in issuing credit notes by MSEDCL, the AEL could not realize the revenue for such power generated. Therefore, MSEDCL cannot be allowed to enjoy the power of AEL free of cost and take advantage of its own wrongs.
- 5.6 AEL has received the credit notes for the period from October, 2017 to March, 2018 belatedly in the month of February, 2019 i.e. after lapse of more than eleven (11) months. MSEDCL has not adhered to the timelines stipulated in its Citizens Charter which has resulted a loss to AEL.

- 5.7 Further, on account of the inordinate delay in issuing credit notes, KHPL was unable to avail credits from its distribution licensee and hence, KHPL was no longer interested in purchasing that power from the AEL. Hence, AEL vide its letter dated 23 December, 2019 requested MSEDCL for permission to apply for short term sale of power to MSEDCL through online portal for the period of October, 2017 to March, 2018 to which there has been no response from MSEDCL.
- 6 **At the e-hearing through video conferencing held on 5 January 2021, Advocate of AEL and MSEDCL re-iterated their submissions as made out in the Petition and Reply, respectively. On the issue of the calculation of the over injected units for the period from May, 2016 to September, 2016 in accordance with the billing methodology as per the Commission's Order in Case No. 139 of 2016, advocate of AEL stated that she is also ready to mutually resolve the issue subject to the consent of her client.**

Commission's Analysis and Ruling:

- 7 Based on the submissions of AEL and MSEDCL, arguments made at the hearing and the material kept on the record, the Commission frames following issues for its consideration in the present matter for addressing the prayers of AEL:

Issue I: Re-computation of over injected wind units by AEL from May 2016 to September 2016 and December 2016 in accordance with the billing methodology specified in Commission's Order in Case No. 139 of 2016.

Issue II: Credit for the differential amount of wind units injected into the grid for the period from July 2017 to September 2017 and April 2018 due to delay in issuance of GCNs for the period April 2017 to June 2017.

Issue III: Credit adjustment in the bill of AEL or for purchase of the wind units injected into the grid from October 2017 to March 2018 due to Delay in issuance of GCNs.

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

Issue I: Re-computation of over injected wind units by AEL from May, 2016 to September, 2016 and December 2016 in accordance with the billing methodology specified in Commission's Order in Case No. 139 of 2016 :

- 8 AEL has sought OA through two different sources at the same time i.e conventional OA and captive RE Wind OA from May, 2016 to March, 2017. AEL has contended that initially MSEDCL had not considered its 2 MW RE wind OA power for billing adjustment and only conventional OA power was adjusted while adjusting power sourced from two different sources. On repeated request, MSEDCL revised the bill as per the methodology specified in the Commission's Order in Case No. 139 of 2016. However, there were discrepancies in calculations of the over injected units for the period from May, 2016 to September, 2016 and December, 2016 and hence AEL has requested MSEDCL to correct the same.

However, MSEDCL rejected its request on the ground that unadjusted units are over injected units and not banked units and hence cannot be adjusted.

- 9 MSEDCL's contention is that the discrepancy in the bill has been caused on account of AEL availing OA from two different sources at the same time. The bill has been revised by MSEDCL in December 2018 as per the Commission's directions vide Orders in Case No. 139 of 2016 as well as in Case No. 71 of 2018. MSEDCL further stated that the said issue can be mutually resolved between the parties and an opportunity of reconciliation may be given wherein MSEDCL would be able to exactly demonstrate to AEL that the billing methodology has been followed by MSEDCL as per Commission's Orders.
- 10 The Commission notes that vide Orders in Case No. 139 of 2016 and Case No. 71 of 2018 it has provided the methodology for billing adjustment when OA is sought from multiple sources. In the said Orders, it has ruled that the conventional power be adjusted first and then RE power as the conventional power is not adjusted first then it may lapse since it cannot be banked.
- 11 The Commission notes that at the hearing in the instant case, Advocate of AEL also showed readiness to mutually resolve the issue subject to the consent of AEL client. Further, MSEDCL has also sought an opportunity of reconciliation for demonstrating the billing methodology followed and it is ready to resolve this issue between the parties.
- 12 The Commission further notes that there is no dispute on the principle of the adjustment of units for OA and only the dispute is with respect to reconciliation of the over injected units from May 2016 to September 2016 and December, 2016, for which MSEDCL has sought an opportunity of reconciliation.
- 13 Considering submission of the Parties as above, the Commission directs both parties to sit together and resolve the issue of adjustment of units from May 2016 to September, 2016 and December, 2016, amicably in true spirit of the methodology specified by the Commission in its Orders in Case No. 139 of 2016 and Case No. 71 of 2018.

Issue II: Credit for the differential amount of wind units injected into the grid for the period from July, 2017 to September, 2017 and April 2018 due to delay in issuance of GCNs for the Period April 2017 to June 2017 :

- 14 AEL has contended that MSEDCL has delayed issuance of GCNs for its 2 MW wind mill third party OA transaction for April, 2017 to June, 2017. Hence, there was delay in getting payment for injected units from the OA consumer (i.e KHPL). Further, because of delay in issuance of GCNs of about 3 months, AEL could not supply its power to the third-party OA consumer from July 2017 to September 2017 and April 2018 and did not avail OA. Due to this delay in issuance of GCNs by MSEDCL, AEL has injected the wind power into grid for the aforesaid period and hence it has sought that MSEDCL should give the credit for the units injected into the grid for this period as a must run generating plant. MSEDCL has enjoyed this injected wind power and Section 70 of the Indian Contract Act, 1872 provides for obligation of person enjoying benefit of non-gratuitous act.

- 15 MSEDCL contends that AEL was fully aware that the generated power was not tied up under OA but it kept injecting power into the grid without consent or valid EPA. MSEDCL further stated that Hon'ble APTEL in various Judgments has ruled that entity injecting any energy into the grid without a valid contract need not be compensated. AEL has not taken any steps prior to July, 2017 to September, 2017 and April, 2018 to sell its power to MSEDCL under short term sale. AEL only at belated stage after expiry of almost 2 years took up the issue with MSEDCL. Further, Must-run status of RE generating stations as per Indian Electricity Grid Code / State Electricity Grid Code is applicable to the plants having an agreement to supply energy to any entity. MSEDCL further relied on Commission's Order dated 1 July 2020 in the Case No.28 of 2020 which clearly stipulates that Generator cannot continue to inject energy without valid EPA. Hence, there is no question of reimbursing AEL for energy injected in the grid without prior consent/EPA by MSEDCL.
- 16 AEL further in its Rejoinder contends that reliance of MSEDCL on the Order in Case No. 28 of 2020 regarding injection of the power into the grid without valid EPA is sub-judice before APTEL and same is irrelevant for the present proceedings. Also, AEL had an OA consumer but due to delay in issuance of GCNs by MSEDCL, it could not realize revenue of injected power.
- 17 In this context, the Commission notes that Hon'ble APTEL in its Judgment dated 16 May 2011 in Appeal No. 123 of 2010 (M/s Indo Rama Synthetics Vs MERC) has explained the importance of PPA for injecting power into the Grid and thereafter held that no compensation shall be payable for energy injected without agreement. It also held that Section 70 of the Indian Contract Act 1872 will not be applicable as the Case of electricity injection into the grid is governed by the EA which is complete code in itself. Relevant part of the APTEL Judgment is reproduced below:

"11 In our opinion the Section 70 and 72 of the Indian Contracts Act, 1872 will not be applicable in the present case. The present case is governed by the Electricity Act, 2003 which is a complete code in itself. In the electricity grid, the SLDC, in accordance with Section 32 of the Act is responsible for scheduling and dispatch of electricity within the state, to monitor the grid operations, to exercise supervision and control over the intrastate transmission system and to carry out grid control and dispatch of electricity through secure and economic operation of the State Grid. All the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid. Moreover, in this case the injection of electricity was without the consent or knowledge of the distribution licensees and the energy generated by the appellant was booked to the distribution licensees for balancing the energy generated/injected with energy consumption in the energy accounting. Accordingly, the decision in Haji Mohammed Ishaq WD. S.K.Mohammed and others vs. Mohamad Iqbal and Mohamed Ali & Co.

Reported in (1978) 2 SCC 493 relied upon by the appellant will also not be of any relevance.

13 Thus, we do not find any substance in the claim of the appellant for compensation for the power injected into the grid without any schedule and agreement”.

- 18 The above APTEL Judgment clearly rules that a generator cannot inject the power into the grid without having valid OA permissions/schedule /contract agreement. The Commission notes that in order to maintain the grid discipline, the injection of energy without any valid EPA or a contract needs to be discouraged and it should not get any compensation.
- 19 Regarding the issue raised by AEL that Section 70 of the Indian Contract Act, 1872 provides for obligation of person enjoying benefit of non-gratuitous, the Commission notes that the above APTEL Judgment also held that generators have to generate power as per the schedule given by the SLDC and the grid code is in the interest of secure and economic operation of the grid. Further, the Electricity Act, 2003 is a complete code in itself and hence Section 70 and 72 of the Indian Contracts Act, 1872 will not be applicable in the present case relating to electricity injection into the grid.
- 20 Further, the Hon’ble APTEL in its Judgment dated 8 May 2017 in Appeal No 120 of 2016, has concluded as follows:

“iv. The Respondent No. 1 had also quoted two more judgements of this Tribunal in appeal nos. 267 of 2014 and appeal no. 68 of 2014. In the judgement dated 15.4.2015 in appeal no. 267 of 2014 this Tribunal has held that the Appellant (M/s Cauvery Power Generation Pvt. Ltd.) is not entitled to claim payment of infirm power injected into the grid without the approval from the Respondent (TANGEDCO) for specific duration as mentioned in the judgement till TANGEDCO conveyed its consent to purchase infirm power. In the judgement dated 30.5.2016 in appeal no. 68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant (M/s OPG Power Generation Pvt. Ltd.) till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC. The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.”

- 21 The above APTEL Judgment also concludes that a generator cannot inject electricity into the grid without having consent/ contractual agreement with the Distribution Licensee. In the instant Case, the Commission observes that due to the delay in issuance of GCNs for earlier period (i.e. April 2017 to June 2017), AEL has not supplied power under OA and injected power into the grid from July,2017 to September, 2017 and April, 2018 without any contractual agreement with either OA Consumer or MSEDCL and after lapse of more

than 2 years of wind injected units into the grid (i.e., post facto basis), it has sought that units for this period require to be purchased by MSEDCL at the rate of Rs. 2.52 /unit, which is not tenable. .

22 The Commission further notes that there was a clear requirement of contractual agreement between AEL and MSEDCL for sale/purchase of any power before injecting any power into the grid. AEL should have taken appropriate steps to deal with the situation at an appropriate time. Ignorance of the provisions of the appropriate regulations does not absolve AEL from its wrongdoing of injecting wind power without any contract. The Commission further notes that AEL has pumped power into the grid without knowledge/obtaining prior approval of the SLDC and without any valid agreement/ contract with MSEDCL. If every generator starts injecting power into the grid without prior approval of the grid operators/ LDCs and without valid contractual agreements this may jeopardise secure grid operations and may lead to catastrophe. The action of AEL is not justified and moreover pleading that injected the power into the grid due to delay in issuance of GCN is also not tenable. Hence, the Commission is of the view that AEL, on the pretext of delay in issuance of GCNs by MSEDCL, has sought direction for credit adjustment or purchase of wind injected units on post facto basis which without any contractual agreement is against the law and MSEDCL cannot be asked to act on the same. It is in fact AEL which has acted against the law. Therefore, delay in issuance of GCNs for earlier period cannot be basis for injections of the power into the grid without any valid contract or EPA.

23 AEL has stated that reliance of MSEDCL on the Order in Case No. 28 of 2020 regarding injection of the power into the grid without valid EPA is sub-judice before APTEL and same is irrelevant for the present proceedings. In this context, the Commission notes that Hon'ble APTEL in its Judgment dated 1 December 2020 in DFR No. 421 of 2020 & IA No. 1672 of 2020 held as under:

“8.It has to be borne in mind by all concerned that an order passed by a statutory authority remains binding and continues to be operative and enforceable so long as it is not set aside, vacated, modified or stayed by superior authority in the hierarchy of the institutions established by the law. The Commission has failed to bear in mind that there is no stay against the operation of the impugned order. Mere challenge by appeal could not be construed as an automatic stay of operation of the order. If that were to be accepted as a practice it would result in chaos.”

24 The Hon'ble APTEL in above Judgment clearly ruled that an order passed by a statutory authority remains binding and continues to be operative and enforceable so long as it is not set aside, vacated, modified or stayed by superior authority in the hierarchy of the institutions established by the law. Hence, the argument of AEL that the Commission's Order in Case No. 28 of 2020 is not applicable in the instant matter is null and void.

25 As regards the issue raised by AEL that it has injected power into the grid from July 2017 to September 2017 and April 2018, on account of the MUST RUN status of Wind Power Plant as per the provisions of RE Tariff Regulations and that such power was utilized by

MSEDCL, the Commission in its recent Order dated 4 July 2020 in Case No. 92 of 2020 held as under:

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

29 The Central Electricity Regulatory Commission (CERC) vide its notification dated 6 May, 2016 has amended the CERC (Deviation Settlement Mechanism and related matters) (Third amendment) Regulations, 2016 and has stipulated the deviation limit capacity for RE rich States (Maharashtra is one of these States) as 250 MW. There is a substantial capacity of wind generation in the State. One of the reasons for deviation at State level is high penetration of wind and solar power. In the instant Case, if the Petitioner is allowed the relaxation of banking as sought and if all such wind generators are allowed to inject power without any offtake from their consumers at other end, SLDC may find it difficult to manage the load generation balance in real time leading to vulnerability to maintaining grid security and this may also lead to deviation at State level.

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

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

26 In view of the foregoing, it is clear that though the wind generators have must run status, however, these generators need to follow the grid discipline and cannot operate as per their convenience and inject power without valid EPA or OA. Hence, argument of AEL that wind generator has ‘must run’ status and hence it has injected the power into the grid is not tenable. Therefore, the Commission does not find any merit for the credit for the differential amount of wind units injected into the grid from July, 2017 to September, 2017 and April 2018 as sought by AEL.

Issue III: Credit adjustment in the bill of AEL or for purchase of the wind units injected into the grid from October, 2017 to March, 2018 due to Delay in issuance of GCNs.

27 AEL has contended that :

- a) For the months of October 2017 to March, 2018, AEL has supplied power under OA to third party Consumer i.e., KHPL (KHPL -OA Consumer connected to AEML-D).
- b) MSEDCL has issued the GCNs for the above period belatedly in February 2019, after lapse of more than 11 months.
- c) As MSEDCL delayed issuance of GCNs, KHPL was unable to avail credit notes for the aforesaid period and it was no longer interested in purchase of power from AEL (AEL-Wind Generator located at Ahmednagar District and connected to MSEDCL).
- d) Hence AEL through its prayer (vi) has prayed for MSEDCL to give credit for the wind units injected into the grid by AEL for self-use (AEL-Consumer located at Aurangabad District in MSEDCL area) for the above period and adjust the same in ensuing bills of AEL.
- e) AEL further vide letter dated 23 December 2019 has requested for permission for sale of power for the aforesaid period.

28 MSEDCL in its counter arguments has stated that:

- a) AEL has claimed payment for the months of October 2017 to March 2018 when it was under OA with its Consumer (KHPL) for this period and credit notes were issued by MSEDCL for the said consumer. Also, the power has flown under OA to the Consumer.
- b) Once availed the option of OA by the consumer of AEL, AEL cannot claim the benefit for any future period retrospectively.
- c) It is the dispute between AEL and its OA consumer and MSEDCL is not aware of such bilateral contract between them.
 - a) As AEL was under OA agreement with Consumer, MSEDCL cannot be forced to purchase any power without any contract retrospectively due to delay in issuance of GCN.

29 The Commission observes that third party OA transactions for the period from October 2017 to March 2018 had taken place between the AEL (Wind Generator- connected to MSEDCL) and OA consumer (KHPL-connected to AEML-D). Now, belatedly AEL has prayed for adjustment of the units for self-use (i.e., AEL being captive Consumer of MSEDCL) as its OA Consumer did not accept the credit notes from AEL due to delay in issuance of GCNs by MSEDCL. Further, AEL has also sought for the purchase of the wind injected power from October, 2017 to March, 2018 by MSEDCL. In this context, the Commission notes that the primary cause of action for the claim of AEL is that its OA

consumer has rejected the purchase of power of power from AEL (i.e., GCNs for wind injected units) from October 2017 to March 2018 though there was OA agreement between AEL and OA Consumer (i.e., KHPL). Had the OA consumers accepted the GCNs as per their bilateral agreement, this issue would not have arisen. Hence it is clearly a bilateral dispute between the OA consumer and AEL. It cannot force MSEDCL, who has granted OA on its distribution network, for the adjustment of the power for self- use or purchase of the power for the period from October 2017 to March 2018 retrospectively.

- 30 Further, the Commission notes that AEL has contended, as explained at **Para 3.3 of this Order**, that due to delay in issuance of GCNs by MSEDCL for the power supplied to third party OA Consumer (i.e., KHPL) for April 2017 to June 2017 it was forced to delay its billing to KHPL which resulted in delay of payment to AEL. In this context, the Commission finds that MSEDCL has issued GCNs for the month of April 2017 in August 2017 and AEL has raised its bill in September 2017. However, AEL has received the payment in March 2018 for April 2017 power generation supply for which GCNs were issued in August 2017. This clearly shows that there is also delay of about 6 months in receiving payments from KHPL under third party OA agreement, in addition to delay of 3 months in issuance of GCNs by MSEDCL.
- 31 The Commission also notes the submission of the AEL that there was delay of about 11 months in the issuance of the GCNs by MSEDCL for the period from October 2017 to March 2018. Further, MSEDCL has issued the GCNs for 2 MW windmill of AEL for the disputed period in February, 2019 which have been accepted by the AEL without protest at that point of time. Hence, raising the issue of delay of issue GCNs by MSEDCL after refusal of the same by OA Consumer is an afterthought. On the issue of delay in issuance of GCNs, the Commission in its Order dated 14 September 2019 in Case No. 260 of 2019 has ruled as under:

“10.2 MSEDCL has contended that it has developed a portal for submitting percentage breakup for windmill developers/generators to facilitate issuing Generation credit notes. MSEDCL is issuing credit notes only after the % breakup is submitted on portal by the developer/generator. MSEDCL has already issued credit notes till May-2019 to KEIL’s Project. The developer for the project under said Petition is M/s. Vestas who has not submitted the % breakup on the portal for the June-2019. MSEDCL can issue credit notes only after the % breakup is submitted on portal. KEIL has submitted the percentage breakup for the period from the month of July, August & September 2019 on portal on 14 October, 2019, thus the process for creation of generation credit note for the month of July, August & September, 2019 immediately got initiated & credit notes are issued on 16 October, 2019.

10.3 The Commission notes the submission of MSEDCL where-in it has submitted the factual position on issuance of credit notes to KEIL and has also specified the process of issuance of such credit notes. Hence the Commission finds merits in the submission of MSEDCL and accordingly rules that there is no delay on part of MSEDCL in issuing the credit notes. In fact, the Commission notes and appreciates

that a web based process is being uniformly followed by MSEDCL and that MSEDCL has issued the credit notes in two days after the generator/developer uploaded the breakup of generation.”

- 32 The Commission in the above Order has emphasised the need for meeting the basic requirements for the issuance of the GCNs and responsibilities of the Generator as well as MSEDCL in this regard. However, from the submission of AEL in the Petition it is not clear whether AEL has submitted all the required information to MSEDCL for the issuance of GCN complete in all respect. Further, it is a fact that AEL has accepted the GCNs issued by MSEDCL without any protest. Hence, agitation of the issue belatedly with retrospective effect is not tenable. The Commission further notes that MSEDCL has not submitted the reasons for the delay of issuance of GCNs. In the absence of any such submission, the Commission is not inclined to allow the prayer of AEL in this regard. However, MSEDCL is required to adhere to the provisions of the timeframe for the issuance of GCNs in future to avoid unnecessary litigations.
- 33 In view of the foregoing, the Commission is not inclined to grant prayers of AEL for the adjustment of wind injected units for the self-use or purchase of units for the period from October 2017 to March 2018 by MSEDCL.
- 34 Hence the following Order

ORDER

- 1. Case No. 157 of 2020 is partly allowed.**
- 2. The Parties are directed to sit together and resolve the issue of adjustment of units from May 2016 to September 2016 and December 2016, amicably in true spirit of the methodology specified by the Commission in its Orders in Case No. 139 of 2016 and Case No. 71 of 2018.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member


(Abhijit Deshpande)
Secretary

