

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 191 of 2020

Case of SEP Energy Pvt. Ltd. seeking relaxation for applicability of monthly Banking provisions under MERC (Distribution Open Access) First Amendment Regulations 2019 on lapsed wind injected units in the month of July, 2019.

Coram

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

SEP Energy Pvt. Ltd. (SEPL)

.....Petitioner

V/s

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

2) Adani Electricity Mumbai Ltd. -Distribution (AEML-D)

.... Respondents

Appearance:

For the Petitioner

:Ms. Sowmya Saikumar (Adv.)

For MSEDCL

: Shri Ashish Singh (Adv.)

For AEML-D

: Shri Abhaji Naralkar (Rep.)

ORDER

Dated: 6 March 2021

1. SEP Energy Pvt. Ltd. (**SEPL/ Petitioner**) has filed this Case on 28 September 2020 as per Sections 9, 42, 86 of Electricity Act, 2003 (**EA**), read with Regulation 39 of Distribution Open Access First Amendment Regulations 2019 (**DOA First Amendment Regulations**),

2019 / amended DOA Regulations 2019) seeking relaxation for applicability of monthly Banking provisions on the lapsed wind injected units in the month of July 2019.

2. SEPL's main prayer is as follows:

“Relax the Open Access Regulations under Regulation 39 and allow the Petitioner relief as prayed for under this Petition by allowing a one-time adjustment for 5,24,859 units which lapsed for the Petitioner in the month of July 2019;”

3. SEPL's Case states as follows:

3.1 SEPL is a Captive Wind Generator located/connected in MSEDCL area. SEPL has applied to sale its 3.025 MW wind power under Open Access (**OA**) for the month of July 2019 to its captive consumer located/connected in AEML-D area.

3.2 SEPL is seeking relaxation to the applicability of monthly banking provisions under DOA First Amendment Regulations, 2019 for adjustment of lapsed units in the month of July 2019 on the following grounds:

- a) The Commission issued the Draft DOA First Amendment Regulations, 2019 on 11 March 2019. SEPL had submitted its comments to the draft OA Regulations on 31 March 2019. It was not clear as to when the OA Regulations would be amended or as to what extent the suggestion and comments of the stakeholders would be accepted or included with modifications.
- b) DOA First Amendment Regulations, 2019 were notified by the Commission on 8 June 2019. However, applicability of the Regulations was not intimated to the Stakeholders including SEPL.
- c) As per Distribution Open Access (**DOA**) Regulations, 2016, the last date for filing Short Term Open Access (**STOA**) for the month of July, 2019 was 10 June, 2019. Accordingly, SEPL has filed the application on 8 June 2019 within time.
- d) The DOA First Amendment Regulations, 2019 came into effect immediately from the date of notification i.e. 8 June, 2019 and it was not possible for generator to plan for selling its banked units within one working day.
- e) Due to lack of time, generator could not sell energy which became surplus, and a major portion of this energy lapsed, as the monthly banking provision was made applicable under the DOA First Amendment Regulations, 2019 instead of annual banking as per DOA Regulations, 2016. Thus, SEPL has lost total 5,24,859 units at the consumer side. The Commission should have provided adequate time to the generators and OA consumers to make suitable adjustments.

3.3 The additional units of SEPL are duly reflected in the bills raised by AEML-D. As there was not enough time for SEPL for adjustments of the banked units and therefore SEPL has requested to relax the DOA First Amendment Regulations 2019 by way of adjustment

of the lapsed units of SEPL for the month of July 2019 by paying / purchasing at Average Power Purchase Cost (**APPC**) rate as per DOA Regulations, 2016.

3.4 SEPL has also stated that the banking charges were levied on lapsed units by AEML-D.

4 AEML-D's reply dated 20 October 2020 stated as follows:

4.1 SEPL is Wind Generator of 3.025 MW located in MSEDCL area and the energy generated from the same power plant is consumed through OA by a captive consumer M/s Meringue Hotels Pvt Ltd .(**MHPL**) located in AEML licence area.

4.2 DOA First Amendment Regulations, 2019 became effective from 8 June 2019. Subsequently in July 2019, under OA billing/credit, certain units from SEPL's power plant lapsed, which were beyond 10% limit as per the provisions of the DOA Regulations,2016.

4.3 SEPL sought the relief on the ground that sufficient time was not provided for decision making regarding the new STOA application filed by it for July, 2019. Also, there was insufficient window available with it to take decisions about re-routing of power due to changes in banking provisions as per the DOA First Amendment Regulations 2019. As the DOA First Amendment Regulations 2019 came into force on 8 June 2019, while the STOA application, under the previous DOA Regulations was to be filed by 10 June 2019 by SEPL for the OA of July,2019.

4.4 The DOA First Amendment Regulations 2019 provides that it shall come into effect from the date of publication in Official Gazette i.e from 8 June 2019 and hence the Distribution Licensees were duty bound to apply the amended Regulations from the effective date for all future applications of OA. Further, AEML-D has applied the DOA First Amendment Regulations 2019 similarly for all its OA consumers and there was no separate treatment in case of SEPL. Also, the billing and banking settlement is undertaken as per the Regulation 20 of DOA First Amendment Regulations 2019 for July,2019.

4.5 From the Online Application Portal, it is observed that all three applications totaling ~3.025 MW were submitted on 10 June, 2019 at around 1400 hrs by SEPL. Hence, the contentions of SEPL that it has filed the application on 8 June, 2019 as per the old DOA Regulations 2016 is not true. It is therefore clear that the OA Applications were submitted by SEPL after notification of the DOA First Amendment Regulations, 2019 and there is no question of considering the same as per DOA Regulations, 2016.

4.6 AEML-D has followed the provisions of the DOA First Amendment Regulations, 2019. Any dispensation given to SEPL will have wider implications as it will be applicable to all STOA Consumers of AEML-D as well as other Distribution Licensees. Further, it would significantly compound the magnitude of the issue.

4.7 Further, banking charges were correctly levied by AEML-D as per the provisions of the DOA Regulations 2016.

5 MSEDCL's submission dated 27 October 2020 stated as follows:

- 5.1 The present Petition is an abuse of process of the Commission. SEPL has tried to camouflage the Petition by filing it under various provisions of the EA but in effect is seeking an amendment to the notified DOA First Amendment Regulations, 2019.
- 5.2 DOA First Amendment Regulations, 2019 were notified by the Commission after following the due public consultation process. All the timelines related to publication process were in public domain. SEPL also participated in the "Public Consultation Process" and now it has filed the Petition to agitate an already decided issue.
- 5.3 Further, the amended provisions of the DOA First Amendment Regulations, 2019 are already challenged before the Hon'ble Bombay High Court vide WP Nos. 2565 of 2019, 2594 of 2019 and 481 of 2020 on various issues. Hence, SEPL is free to either join the said Petitioners before the Hon'ble Bombay High Court or file a separate Petition challenging the same.
- 5.4 In consonance with the above submission, the Commission has taken a similar view in Case No. 229 of 2019 (*Case of SEPL v/s MSEDCL and Ors for protecting small wind energy generators by providing a suitable banking mechanism*), wherein the Commission vide Order dated 31 December, 2019 has held that it would not be fair to have two parallel proceeding on the same issue and no useful purpose would be served by continuing with this proceeding when the Hon'ble Bombay High Court was already seized of the issues raised by the Petitioner. The Commission in the said Order further provided liberty to Petitioners to approach afresh, if it so desires depending on the outcome of the Writ Petition Nos. 2565 of 2019 and 2594 of 2019. Hence, the Commission needs to take a similar view in the present matter and direct SEPL to approach the Hon'ble Bombay High Court for redressal of its grievances.
- 5.5 Further, the Commission vide its Order dated 4 July 2020 in Case No. 92 of 2020 (*Case of Indian Wind Power Association (Maharashtra Council) v/s MSEDCL*) has categorically held that the power to relax can be exercised only in exceptional case where there is likelihood of any hardship and injustice to a party if such power is not exercised. Hence, the present Case does not fulfill said criteria, as SEPL in spite of being aware of present circumstances and the requirements laid down under DOA Regulations, has taken a conscious call to continue with the OA. Hardship, if any happening to SEPL, is purely on account of its own action and same cannot be attributed to the provisions of amended DOA Regulations. Further, the power of relax Regulations cannot be exercised arbitrarily in favour of some party and dis-favour other party. If the relaxation as sought by SEPL is allowed, it would be detrimental to the Distribution Licensees like MSEDCL.
- 5.6 Hence, being the Regulatory Authority, the Commission has notified the DOA First Amendment) Regulations, 2019. The past Orders issued by the Commission as referred above clearly prove that the Commission through the DOA First Amendment Regulations 2019 has tried to balance the interest of all stakeholders by curtailing profiteering by OA consumers at the behest of common consumers.

- 5.7 Further, the Commission in the amended DOA Regulations 2019 has also taken care that the existing contracts which were already active and the same are not affected by amendment and accordingly has directed that the existing contracts as on date of amendment shall be continued to be operated as per DOA Regulations 2016. Only after expiry of existing contracts, the DOA First Amendment Regulations, 2019 will be applicable to that consumer and generator.
- 5.8 The difficulty being pleaded by SEPL is a resultant effect of its own commercial decisions as it decided to be under OA under consecutive months since April 2019 for its own commercial benefits even after knowing very well the “Provisions in the Draft DOA Regulations.
- 5.9 The Statement of Reasons (SOR) published by the Commission provides the suggestions, objections and final consideration of the issues as agitated by SEPL in its Petition and hence there is no requirement for another relook at the Petition.
- 5.10 MSEDCL is not responding to the issues raised by SEPL in its Petition at this stage and craves leave to rely upon the SOR notified by the Commission.
- 6 SEPL in its Rejoinder / additional submissions dated 9 January 2021 and 21 January 2021 re-iterated the submission as made out in the Petition with the following additional points:**
- 6.1 EA prescribes special treatment to be given to RE generators as reflected in Part VII and X of the EA under Sections 61, 62 and 86. EA has cast a duty upon the appropriate Commission that while specifying the terms and conditions for determination of tariff, they have to be guided amongst others, to promote cogeneration and generation of electricity from renewable sources of power.
- 6.2 If one time relaxation is given by the Commission to SEPL, the same would not be applicable to other STOA customers as such a relaxation as being sought by SEPL is granted on case-to-case basis.
- 6.3 Averment of MSEDCL that the Petition ought to be dismissed on the basis that that the amended provisions of the DOA First Amendment Regulations, 2019 are already under challenge on various issues before the Hon’ble Bombay High Court. SEPL is not challenging the vires of the DOA Regulations and rather it is praying to the Commission for exercising its discretionary powers under Regulation 39 in the interest of justice. The prayers sought in the present Petition under Regulation 39 can only be granted by the Commission and not by approaching the Hon’ble Bombay High Court. Hence, reliance of MSEDCL on the Commission’s Order dated 31 December, 2019 in Case No. 229 of 2019 is misplaced.
- 6.4 SEPL denied that the application was submitted after the notification of the DOA First Amendment Regulations, 2019. The applicability of the DOA First Amendment Regulations, 2019 came to the knowledge of SEPL on 13 June, 2019 when STOA was not considered despite it having been filed in time as per the unamended DOA Regulations,

2016. Therefore, there is no question of considering the same under the DOA First Amendment Regulations, 2019. The details of chronologies of the events of filing STOA are as under:

- (a) On 5 June, 2019 SEPL tried to apply for STOA however it was unable to do so as there was a technical issue with the website because of which when SEPL was validating the consumer account number there was a message on the screen which stated, “consumer had been disconnected”.
- (b) SEPL vide e-mail dated 5 June, 2019 annexed a screen shot of the issue being faced and requested AEML-D to resolve the issue immediately so that SEPL could submit its applications.
- (c) Subsequently, on 7 June, 2019 when SEPL once again tried to submit the applications on the website of AEML-D. However, the issue was still unresolved as the same message stating, “consumer had been disconnected” was appearing on the screen.
- (d) SEPL vide e-mail dated 7 June, 2019 once again intimated AEML-D about the issue and requested for an alternative solution.
- (e) As the technical issue was unresolved hence SEPL vide e-mail dated 8 June, 2019, intimated AEML-D that due to a technical error SEPL was unable to submit the application and hence the application and the supporting documents were being sent by e-mail with a request to consider the same. However, an e-mail from Mail Delivery System was received stating that the message could not be delivered to one or more recipients.
- (f) Therefore, SEPL addressed another e-mail to AEML-D informing them the above-mentioned events and mentioned that a copy of STOA application was being sent only for July, 2019 and the other documents would be sent by courier. AEML-D contacted SEPL and told SEPL to apply again on the web portal on 10 June, 2019 once the web portal started working.

6.5 Further, there is not a whisper in the Replies filed by the Respondents that the surplus energy was not utilized and sold to their customers. It is a presumption that 5,24,859 units were sold, and the financial benefit accrued to AEML-D. Thus, so as to balance the convenience in the present case it is prayed that a one-time relaxation for the units that lapsed in the month of July, 2019, due to the amended provisions being enforced with immediate effect, ought to be granted to SEPL.

6.6 The Order in Case No. 92 of 2020 relied by MSEDCL is different to the facts in the present case. In Case No. 92 of 2020, the Petitioner was seeking a relaxation of Regulation 20.3 for two financial years i.e., FY 2019-20 and FY 2020-21 due to Covid-19 pandemic whereas SEPL in the present case is seeking a one time adjustment of 5,24,859 units which lapsed due to paucity of time as the amended regulations were made effective immediately. Consequently, SEPL suffered a loss due to not having any time to make the necessary

provisions with regard to the units that lapsed. Further, it is imperative to mention that Para 43 and 44 of the Order dated 4 July 2020 in Case No. 92 of 2020 relied upon by the MSEDCL favor SEPL also.

- 6.7 In the present case, if the relief sought by SEPL is granted then the power would be exercised reasonably and fairly as the 5,24,859 units that were sold and the financial benefit accrued to AEML-D would rightly be passed to SEPL. If the relief is not granted the same would result in unfairly favoring the Respondents and disfavoring SEPL. Further, the para 44 of the Order dated 4 July, 2020 in Case No. 92 of 2020 provides for the applicability of power to Relax Regulations.
- 6.8 Therefore, under the facts and circumstances in this case, the instant Case is the ideal case for the Commission for use of its discretionary power to relax under Regulation 39 and ought to grant the prayer for adjustment of banked energy only for July, 2019.
- 6.9 The submission of MSEDCL that the difficulty being pleaded by SEPL is a resultant effect of its own commercial decision is devoid of merit. It is pertinent to mention that it was not clear as to when the OA Regulations would be amended or as to what extent the suggestion and comments of the stakeholders would be accepted or included with modifications. In the event the SEPL would have had the slightest of idea that the DOA First Amendment Regulations 2019 would be notified and would be brought into effect immediately on 8 June 2019 then it would have made the necessary arrangements and would not be before the Commission praying for relaxation by way of the present Petition.
- 6.10 CERC vide Order dated 1 March 2019 in Petition No. 120/MP/2017 (*India Wind Power Association v. Nodal Officer, REC Mechanism*) (**CERC Order**) had exercised its power to relax and had granted the Petitioner (IWPA) relaxation as prayed. Thus, the instant case is a fit case for exercising Commission's power to relax and grant the relief as prayed for by SEPL. The Commission may take into consideration that the decision may not be quoted as a precedent as the Order passed would be based on the facts and circumstances of the present case.
7. **At the e-hearing through video conferencing held on 11 January 2021, Advocate/ Representatives of Petitioner, MSEDCL and AEML-D re-iterated their submissions as made out in the Petition and Reply, respectively.**

Commission's Analysis and Ruling:

8. SEPL in the instant Case has sought relaxation of monthly banking provisions under Regulation 39 of DOA First Amendment Regulations, 2019 by allowing one-time adjustment of wind injected lapsed units through purchase at APPC rate for July 2019.
9. SEPL has contended that the Commission has notified the DOA First Amendment Regulations, 2019 on 8 June 2019 which has amended the banking provisions from annual banking to monthly banking. However, the Commission has not intimated the said amendment to the stakeholders including SEPL. SEPL has submitted its comments/suggestions to the Draft DOA first Amendment Regulations 2019 but it was

unaware to what extent its suggestions would be accepted. SEPL has filed the STOA for July 2019 on 8 June 2019 (through email due to web-portal difficulties) within the timelines specified under DOA Regulations 2016. However, there were technical difficulties in filing online/web portal STOA applications for July 2019 from 5 June 2019 to 10 June 2019. Since there was lack of time, it was not possible for SEPL to plan for sale or adjustment of surplus/banked units. In the absence of enough time for sale/adjustment of its surplus/banked units, SEPL has lost total 5,24,859 units at the consumer side for July 2019. The applicability of DOA First Amendment Regulations came to knowledge to SEPL on 13 June 2019. In case SEPL would have had slightest idea of amendment of DOA Regulations with immediate effect, it would have made necessary arrangements and would not have sought relaxation by way of present Petition. Therefore, SEPL has requested to relax the monthly banking provisions of Regulations and allow it one-time adjustment for lapsed unit of July 2019 by way of purchasing at APPC rate. SEPL further stated that the banking charges are levied on lapsed units by AEML-D. In its support of relaxation prayer, SEPL further stated that there is special treatment given to RE Generators and such duty is cast upon the Appropriate Commission under the EA. SEPL further stated that CERC Order dated 1 March 2019 has provided a Case specific relaxation to IWPA as prayed and the present Case is a fit Case for exercising such relaxation as prayed by SEPL. Further SEPL has sought one-time relaxation for only one month July 2019 and the same is different from the fact in Order in Case No. 92 of 2020. SEPL also stated that it is not challenging the vires of DOA First Amendment Regulations 2019, rather it is seeking relaxation under Regulation 39 and hence reliance of MSEDCL on the Commission's Order in Case No. 229 of 2019 is misplaced.

10. AEML-D has contended that DOA First Amendment Regulations, 2019 came in force from 8 June 2019 and it has applied such amendment from its effective date for all future OA applications/ consumers. SEPL had submitted three OA applications totaling 3.025 MW on 10 June 2019 (i.e after the notification of DOA First Amendment Regulations, 2019) and hence there was no question of considering/ granting the same under DOA Regulations 2016. The billing and banking settlement of July 2019 for SEPL is undertaken as per Regulation 20 of DOA First Amendment Regulations 2019 and hence certain units of SEPL power plant lapsed as these units were beyond 10% limit as per the provisions of DOA Regulations 2016. Further, any dispensation given to SEPL will have wider implications as it will be applicable to all STOA Consumers of AEML-D and other Distribution Licensees. Therefore, SEPL's application cannot be treated for banking provisions as per the DOA Regulation, 2016. AEML-D has correctly levied banking charges as per the provisions of the DOA Regulations 2016.
11. MSEDCL has contended that SEPL is seeking an amendment to the notified DOA First Amendment Regulations, 2019, which was notified after following due public consultation process. SEPL also participated in such public consultation process and SoR published by the Commission provided the final consideration of the issue as agitated by SEPL in its Petition and hence there is no requirement for re-look on the issue raised in the instant Case. The Commission through notification of DOA First Amendment Regulations 2019 tried to balance the interest of all Stakeholders. Further, DOA First Amendment

Regulations 2019 is already challenged before the Hon'ble Bombay High Court and the Commission in its Order in Case No. 229 of 2019 has held that no useful purpose will be served when the Hon'ble Bombay High Court is seized of the issues and hence SEPL may be directed to approach Hon'ble Bombay High Court for redressal of its grievance. The Commission in the Order in Case No. 92 of 2020 has held that the power to relax regulation can be applicable in exceptional cases. The hardship caused to SEPL is on account of its own action/decision of continuing under OA since April 2019 in spite of being aware of provisions of the Draft DOA amendment Regulations and hence same cannot be attributed to amendment of DOA Regulations. If such relaxation is allowed, it would be detrimental to Distribution Licensees like MSEDCL. Further, the amended DOA Regulations has protected the existing OA contracts and same are not affected by such amended Regulations as provisions of DOA First Amendment Regulations 2019 will be only applicable after expiry of existing contracts.

12. The Commission notes that it has published the Draft DOA amended Regulations 2019 on 11 March 2019 which has proposed the changes in the banking provisions from annual to monthly. The relevant paras. of the Explanatory Memorandum (EM) and Draft DOA amended Regulations 2019 are read as under:

Provisions of EM:

“5.3 Proposed Amendment

Therefore, the Commission has proposed the amendments to Regulation 20 of the Principal DOA Regulations, 2016 as shown below

.....

20.3. Banking of energy shall be permitted only on monthly basis.”

Provisions of Draft DOA amended Regulations 2019:

“14. Amendment in Regulation 20 of the Principal Regulations

.....

D. The existing Regulation 20.4 shall be renumbered as 20.3 and amended as under: “20.3. Banking of energy shall be permitted only on monthly basis”

13. Thus, while seeking suggestions/objections from the Public on the Draft DOA Amended Regulations 2019, the Commission has provided clear indications of changes of banking provision i.e., from annual banking to monthly banking. Further, the Commission in its SoR of notified DOA First Amendment Regulations 2019 has also provided the rationale for providing monthly banking and held that Banking provided for a period of one month, basically to adjust on the margin the variations in generation by RE sources. SEPL in its submission also mentioned that he came to know about the applicability of DOA First Amendment Regulations 2019 (notified on 8 June 2019) on 13 June 2019 (i.e., 5 days after the notified amendment) which clearly shows that SEPL recognizes that its STOA

application for July 2019 would be processed and granted considering the monthly banking. The Commission has also perused the comments submitted by SEPL to Draft DOA First Amendment Regulations 2019 which also shows that it has not provided the comments on the Applicability of amended Regulations. Further, in spite of knowing proposed changes, SEPL has continued to be under OA since April 2019. Considering the above these facts, the Commission observes that SEPL was aware about the proposed provisions of monthly banking and it was an active consumer since the publication of draft DOA amended Regulations. Hence, in spite of knowing the proposed amendment to the Regulations, availing the STOA for July 2019 for three OA applications having 3.025 MW RE Capacity, was own commercial decision of the SEPL.

14. Further, in its Judgment dated 23 September 2020 in the batch of Civil Appeals Nos. 3249 of 2020 and others (*in the matter of Union of India Vs M/s G S Chatha Rice Mills & Anr.,*) Hon'ble Supreme Court on the notification of Regulations in Gazette ruled as under:

“32.A Notification, which is made by the Executive, must indeed be made known. Ordinarily this is made known by being published in the Gazette. In this regard, it is profitable to refer to what this Court laid down in the decision reported in B.K. Srinivasan v. State of Karnataka 41:

“15. ... It is, therefore, necessary that subordinate legislation, in order to take effect, must be published or promulgated in some suitable manner, whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation. Where the parent statute prescribes the mode of publication or promulgation that mode must be followed. Where the parent statute is silent, but the subordinate legislation itself prescribes the manner of publication, such a mode of publication may be sufficient, if reasonable. If the subordinate legislation does not prescribe the mode of publication or if the subordinate legislation prescribes a plainly unreasonable mode of publication, it will take effect only when it is published through the customarily recognised official channel, namely, the Official Gazette or some other reasonable mode of publication. There may be subordinate legislation which is concerned with a few individuals or is confined to small local areas. In such cases publication or promulgation by other means may be sufficient [Narayana Reddy v. State of A.P., (1969) 1 Andh WR 77].”

[Emphasis Added]

15. It is a fact that, the Commission, after following previous public procedure Rule notified by Ministry of Power, Govt. of India dated 9th June 2005 under Section 181 (3) of the EA (Electricity (Procedure for Previous Publication) Rules, 2005), has notified the DOA First Amendment Regulations, 2019 in Official Gazette (Regulation 1.2 of DOA First Amendment Regulations 2019) on 8 June 2019. Further, SEPL was continuous OA consumer since April 2019 during the proposed changes and was also well aware about

the proposed amendment to the DOA Regulations, 2016. Also, the Amended DOA Regulations were uploaded on the Commission's website. SEPL has also admitted that it became aware of 8 June 2019 notified DOA First Amendment Regulations 2019 on 13 June 2019 (i.e., after 5 days after the gazette notification). Hence, contention of the SEPL that it was not aware about such amendment is not tenable argument. Further, the STOA of SEPL for July 2019 is granted as per provisions of DOA First Amendment Regulations 2019. Hence, SEPL after availing OA for July 2019 cannot seek the adjustment or purchase of the OA lapsed units as per the provisions of the DOA Regulations, 2016. Thus, in the opinion of the Commission, AEML-D has correctly applied the DOA First Amendment Regulations 2019 for July 2019 from date of notification for adjustment of billing energy on monthly banking basis.

16. Further, Regulation 16 of the amended DOA Regulations, 2019 has provided the provisions in respect of the applicability of banking provisions for the existing OA transactions. The Commission in its Order dated 13 November 2019 in Case No.196 of 2019 on the issue of applicability of DOA First Amendment Regulations 2019 to the existing OA agreements and contracts has ruled as follows:

“----

10. In view of the foregoing discussion, the Commission deems it fit to reject MSEDCL's contentions as raised in this clarificatory Petition. In accordance with 2nd Proviso to Regulation 16 of DOA (First Amendment) Regulations, 2019 the Commission clarifies once again that the provision relating to banking of the Principal DOA Regulations, 2016 shall continue to apply for the existing OA Agreements or contracts till the expiry of the approved period for such OA transactions/contracts/agreements. After expiry of the approved OA period, the provision relating to banking under Regulation 20 of the first amendment of the Principal DOA Regulations, 2016 shall apply.—”

[Emphasis Added]

17. It is clear from the aforesaid Regulations 16 of DOA First Amendment Regulations 2019 and the Commission's above Order that annual banking as specified in DOA Regulations, 2016 shall continue to apply for existing valid OA transactions till expiry of the approved period for such OA transactions. Further, the revised monthly banking provisions shall apply thereafter as per amended DOA Regulations. In the instant Case, it is evident that due to technical difficulty SEPL has applied (webportal) for STOA of July 2019 on 10 June 2019. Hence, on the date of notification of the amended DOA Regulations, 2019 (8 June 2019), SEPL did not have any valid OA agreement or contract for which the DOA Regulations, 2016 would be applicable. Hence, the contention of the SEPL that it has filed STOA application on 8 June, 2019 and it has tried to apply from 5 June, 2019 but failed because of webportal/online system problem has no significance. In any case SEPL's STOA applications should have been processed as per the provisions of the DOA First Amendment Regulations, 2019 which has monthly banking provisions as SEPL did not

have any valid OA agreements or contracts before the DOA amended Regulations came in force (i.e., 8 June 2019).

18. Further, SEPL has sought for a one-time adjustment for the month of July 2019 under Power to relax Regulation 39 of DOA First Amendment Regulations 2019. In this regard, the Commission notes that the Hon'ble 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 nonexercise 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]

19. From the above Judgement of the Hon'ble ATE it is amply clear that the power to relax can be exercised only in exceptional case where there is likelihood of any hardship and injustice to a party if such power is not exercised. Firstly, it is not the fact that SEPL was not aware about the changes in the provisions of banking mechanism when STOA for July 2019 was to be commenced. Secondly the power of relaxation cannot be exercised arbitrarily to favour some party and to disfavor some other party. If the Commission would allow the prayer of SEPL, then the same benefits would need to be passed on to the other OA consumers, which would impact/ disfavor the Distribution Licensees like AEML-D and MSEDCL. It is worthwhile to note that there are many RE Generators in the Maharashtra which are selling the power under OA and who availed the banking provisions as per the DOA Regulations, 2016. The Distribution Licensees such as TPC-D, AEML-D, MSEDCL need to give the uniform treatment for all the OA consumers / Generators strictly as per the DOA Regulations and its amendments. Hence, allowing the prayer of the SEPL will be amounting to discrimination among the OA consumers / Generators across the State. AEML-D /MSEDCL has followed the Commission's amended DOA Regulations, 2019 uniformly without any discrimination among the OA consumers /Generators including SEPL. Hence, the Commission is of the view that present

case does not fulfill these criteria as the Petitioner, in spite of being aware of the provisions relating to banking clearly laid down under DOA First Amendment Regulations 2019, has taken a conscious call to continue with the OA. Hardship, if any happening to the SEPL, is purely on account of its own decision of seeking July STOA for 3.025 MW RE capacity and same cannot be attributed to the provisions of Regulations. It is clear that the prayer of the SEPL is based on its own assumptions and interpretation contradictory to the provisions of the DOA First Amendment Regulations ,2019. The Commission further notes that under the disguise of the relaxation of the DOA first amendment Regulations, 2019, SEPL is seeking the amendment to the Regulations for July 2019 when DOA First Amendment Regulations 2019 came in force, which is not acceptable.

20. On the contention of SEPL that RE generator is provided with special treatment and promotion under the EA and hence it is entitled for relaxation, the Commission notes that the power to relax is a discretionary power and has to be exercised judicially and only when the circumstances so call for it. The SEPL has failed to establish the existence of such circumstances, which would warrant the exercise of the power to relax. Merely because SEPL is a RE generator cannot be ground for relaxation when the DOA Regulation of banking is specifically applicable to the RE generator.
21. The Commission further notes that the CERC Order referred and relied by the SEPL while praying for granting the relaxation to the Regulations, is based on the ground of the procedural delay for submitting the energy injection report and uploading of the REC documents by Distribution Licensee. However, in the instant Case of SEPL, there is neither any default nor any delay on the part of Distribution Licensees in the process of STOA for July 2019. In fact, the relaxation if allowed would put hardship to the Distribution Licensees. Hence, the aforementioned CERC Order is not relevant in the present Case. The Commission further notes the contentions of SEPL that the Commission may take into consideration that the decision may not be quoted as a precedent as the Order passed would be based on the facts and circumstances of the present case. In this context, the Commission notes that if the benefits /relief granted in the instant case to SEPL then it will be required to pass to similarly placed other generators/OA consumers also and cannot be applied only to SEPL, otherwise this will lead to the discrimination among the generators/OA consumers. Thus, CERC Order relied upon by SEPL does not support its case.
22. As regards the contention of SEPL that banking charges for July 2019 are levied on lapsed units, the Commission notes that SEPL has neither elaborated the issue in detail nor provided any calculations in its support. Further, SEPL has not substantiated this issue in its Rejoinder on the submission of AEML-D that it has levied banking charges as per the provisions of DOA Regulations, 2016. In this context, the Commission notes that DOA Regulations 2016 stipulates that banking charges shall be adjusted in kind @ 2% of the energy banked. In case SEPL has any grievance on clarity issues of levy of banking, SEPL may approach AEML-D to clarify the issue of levy of banking charges on lapsed units.
23. In view of foregoing discussion and facts and circumstances involved, the Commission is not inclined to grant prayer of SEPL to relax Regulation 39 of DOA First Amendment

Regulations, 2019 and one-time adjustment or purchase of lapsed units for the month of July 2019.

24. Hence the following Order:

ORDER

Case No. 191 of 2020 is dismissed.

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

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


**(Abhijit Deshpande)
Secretary**

