

**Before the**  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
**World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005**  
**Tel. 022 22163964/65/69 Fax 22163976**  
**Email: mercindia@merc.gov.in**  
**Website: [www.merc.gov.in](http://www.merc.gov.in)**

**Case No. 71 of 2021**

**Case of Shree Tatyasaheb Kore Warana Sahakari Sakhar Karkana Ltd. seeking directions to Maharashtra State Electricity Distribution Company Ltd. to issue eligibility certificate to its Bagasse based Co-generation Renewable Energy Generating Plant.**

Shree Tatyasaheb Kore Warana Sahakari Sakhar Karkana Ltd.	..... Petitioner
Maharashtra State Electricity Distribution Company Ltd.	..... Respondent No. 1
Maharashtra State Electricity Transmission Company Ltd.	..... Respondent No. 2
Maharashtra Energy Development Authority	..... Respondent No. 3

**Coram**

**Sanjay Kumar, Chairperson**  
**I.M. Bohari, Member**  
**Mukesh Khullar, Member**

**Appearance**

For the Petitioner	: Smt. Deepa Chavan (Adv.)
For the	
Respondent No. 1	: Shri. Rahul Sinha (Adv.)
Respondent No. 2	: Smt. Sunanda Tilekar (Rep.)
Respondent No. 3	: Shri. Manoj Pise (Rep.)

**ORDER**

**Date: 13 October 2021**

1. Shree Tatyasaheb Kore Warana Sahakari Sakhar Karkana Ltd. (**STKWSSKL**) has filed this Petition on 31 May 2021 seeking directions to Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**) to issue eligibility certificate to its Bagasse based Co-generation

Renewable Energy Generating Plant. STKWSSK has filed the present Petition under Section 86 (1) (e) & (f) read with Section 62 of the Electricity Act, 2003 (EA) and MERC (Renewable Purchase Obligation, its Compliance and Implementation of REC Framework) Regulations, 2010 (**RPO-REC Regulations 2010**) and MERC (Terms and Conditions for determination of RE Tariff) Regulations, 2010 (**RE Tariff Regulations 2010**).

**2. STKWSSK's main prayers are as follows:**

*(a) Direct the Respondent No. 1, MSEDCL as the Competent Agency under the Government Resolution dated 31.01.2014 to issue the eligibility certificate to the Petitioner's RE Generating Plant, for availing the exemption of tax on purchase of sugarcane for the period October 2012 - September 2013, during which time the Petitioner's plant was under / seeking / had sought connectivity, synchronization, testing including testing at full capacity and after taking into consideration the sugarcane purchase year, as applicable in the State;*

*(b) Declare that electricity generated by the Petitioner during the synchronization and testing period prior to commissioning is an infirm power and that sale of such infirm power cannot be equated with normal sale of electricity;*

**3. STKWSSL in its Case has stated as follows:**

- 3.1. On 14 August 2008, STKWSSKL entered into Project Development Agreement with Urjankur Shree Tatyasaheb Kore Warana Power Company Limited (USTKWPCCL) for setting up the Cogeneration Plant having installed capacity of 44 MW on BOOT basis in the premises of STKWSSKL.
- 3.2. On 14 October 2008, the Government of Maharashtra (GoM) issued policy vide its notification for Bagasse based co-generation project granting 100% exemption on tax for purchase of sugarcane by the co-operative sugar factories for the period of 10 years.
- 3.3. On 3 August 2009, the GoM vide its notification amended certain provisions of the notification dated 14 October 2008. The GOM with its amendment allowed the co-generators to sell 100% power to any distribution licensee or any consumer within the State.
- 3.4. On 28 August 2012, USTKWPCCL requested MSEDCL for granting approval on the temporary provision basis for evacuation of power of 9.5 MW through 33 kV system from their co-generation plant at Warananagar for the period of 3 to 4 months. The evacuation of power at 110 kV/132 kV could not be done by USTKWPCCL as the power evacuation system was not ready due to RoW problems faced during the construction of the line.

- 3.5. On 12 November 2012, Chief Engineer (Comm), MSEDCL informed the USTKWPCCL that the Competent Authority has accorded approval for grid connectivity for temporary evacuation of 9.5 MW power at 33 kV level from Co-gen plant of USTKWPCCL subject to conditions as stated therein. The conditions clearly stated that the grid connectivity was for evacuation of power on temporary basis for a period of six (6) months.
- 3.6. On 27 December 2012, Reliance Energy Trading Limited (RETL) informed USTKWPCCL that it is in position to purchase 9.5 MW (on infirm basis) RE Power from USTKWPCCL bagasse based co-generation power plant at Warananagar for onward sale to BEST to fulfil their renewable purchase obligation for the year 2012-13 for the period from 29 December 2012 to 31 March 2012 at the rate of Rs. 4.75/unit.
- 3.7. On 5 January 2013, MSEDCL granted Open Access permission to USKTWPCL for wheeling of 9.5 MW power on infirm basis to BEST through the Trader RETL from the date of commencement of Open Access upto 31 March 2013 subject to the terms and conditions.
- 3.8. On 8 January 2013, USTKWPCCL's 44 MW bagasse based co-generation plant was synchronized with the grid on 33 kV level.
- 3.9. On 11 March 2013, RETL informed USTKWPCCL that RETL will off take 31 MW (on infirm basis) power from the bagasse based cogeneration power plant of USTKWPCCL for onward sale to BEST.
- 3.10. On 4 March 2013, 15 March 2013 and 2 April 2013 raised invoice to RETL for the months of January 2013 to March 2013 along with bill payable towards the export of power on infirm basis.
- 3.11. On 15 March 2013, MSETCL granted grid connectivity to USTKWPCCL subject to installation and commissioning of SCADA.
- 3.12. On 23 March 2013, USTKWPCCL's 44MW bagasse based co-generation plant was synchronised with the grid on 110 kV level.
- 3.13. On 2 April 2013, USTKWPCCL informed Chief Engineer (Commercial), MSEDCL of declaring COD and commissioning of the 44 MW Baggase based Cogeneration Plant of USTKWPCCL, Warananagar, Panhala, Dist – Kolhapur effective from 3 April 2013 at 15:00 hrs. The power would be exported through 110 (132) KV power Evacuation system at EHV substation at Wathar, Kolhapur.

- 3.14. On 4 April 2013, MSEDCL informed USTKWPCCL that competent authority has accorded approval for procurement of power from MSEDCL 44 MW Cogen Project on BOOT basis located in the premise of STKWSSKL, Post Warananagar, Tal. Panhala, Dist Kolhapur and to submit consent on the conditions mentioned in the letter.
- 3.15. On 8 April 2013, USTKWPCCL's letter to the Chief Engineer, MSLDC wherein inter alia it is clearly recorded that "The Project was synchronised with the 132 kV MSETCL grid on 22 March 2013 and has been exporting power to BEST till March 31, 2013" and further "the Project has declared the commissioning (COD) from April 03, 2013". The letter sets out that the Plant has exported power during the 72 hrs. continuous trial run on an average as follows:
- a) April 01, 2013 – 20.99 MW (67% of the Maximum export)
  - b) April 02, 2013 – 23.60 MW (76% of the Maximum export)
  - c) April 03, 2013 – 24.54 MW (79% of the Maximum export)
- 3.16. On 21 June 2013, EPA entered between USTKWPCCL, STKWSSKL and MSEDCL. The EPA executed between the parties clearly recorded that:
- "AND WHEREAS, the Generator has declared COD on April 03, 2013"***
- 3.17. During the next few years, the parties duly proceeded on basis of the agreed COD of the generating plant as being 3 April 2013. Accordingly, on the basis of the PPA and the complete knowledge and transparency of COD amongst all stakeholders, STKWSSKL continued to be paid its invoices for the electricity supplied in accordance with the COD being 3 April 2013. STKWSSKL, since the date of commissioning of the project (i.e.) 3 April 2013 has been exporting 100% surplus power to MSEDCL.
- 3.18. The accounting year in respect of the Sugar Factory is considered from October to the September, as an illustrative case from October 2012 to September 2013.
- 3.19. On 31 January 2014, the GoM in furtherance of it's the then new Renewable Energy Generation Policy dated 14 October 2008 passed a further Resolution giving concession from the year 2006-07 to RE projects generating energy to the extent of 6 MW and above from Sugarcane Purchase Tax.

One of the conditions under the GR states that the sugar factory establishing the co-generation plant will be entitled to exemption from sugarcane purchase tax provided

- i) It generates energy of 6 MW (75,00,000 units or in excess thereof)
  - ii) It enters into an Agreement with MSEDCL and supplies energy to it
- 3.20. On 14 March 2014, MSEDCL certified USTKWPCCL that 44 MW bagasse based co-generation plant of USTKWPCCL was synchronised on 8 January 2013 with the grid on 33 kV level at 19.59 Hrs. and on 22 March 2013, 44 MW bagasse based co-generation plant of USTKWPCCL was synchronised at 110 kV level at 23.50 Hrs.
- 3.21. On 16 January 2015, SLDC issued power evacuation certificate to USTKWPCCL as per the GoM Policy dated 31 January 2014 for exporting 100% power of 113.5847 MU to MSEDCL for the period of April 2013 to March 2014 in the State of Maharashtra as per the EPA.
- 3.22. On 3 March 2018, STKWSSK requested MSEDCL to issue the eligibility certificate for the period 2012-13 in order to receive 100% exemption from tax on purchase of sugar cane by it.
- 3.23. On 31 May 2018, MSEDCL informed STKWSSK that its application for issuance of certificate cannot be considered. This letter considered the date of commissioning of the project as 22 March 2013. It therefore erroneously came to the conclusion that “STKWSSK was exporting power to BEST utility from commissioning of the project till March 2013”.
- 3.24. On 9 September 2019, the Commission passed Order in Case No. 159 of 2019 in the matter of USTKWPCCL on non-compliance of RE Tariff provisions and the EPA provisions.
- 3.25. On 17 September 2019, STKWSSK requested MSEDCL to consider application and issue certificate for availing exemption from sugar cane purchase tax for the season 2012-13. However, on 17 October 2019, MSEDCL informed STKWSSKL that the application for issuance of certificate cannot be considered.
- 3.26. On 30 March 2020, Assessment order under Section 7 of Maharashtra Purchase Tax on Sugarcane Act, 1962 passed by Deputy Commissioner of State Tax for the period 1 October 2012 to 30 September 2013 to STKWSSKL.
- 3.27. On 17 February 2021, Office of the Deputy Commissioner of State Tax issued demand notice to STKWSSK under Section 178 and 267 of the Maharashtra Land Revenue Code, 1966 for the outstanding dues for the year 2012-2013, 2018-2019 and 2019-2020 amounting to Rs. 28,30,48,854/-, which included a demand towards VAT and CST for the years 2018 and 2020. The demand towards Sugarcane Purchase Tax for the year 2012-13

is Rs.26,43,87,964/- (Rupees Twenty Six Crore Forty Three Lakhs Eighty Seven Thousand Nine Hundred Sixty Four).

- 3.28. On 1 March 2021, STKWSSK requested MSEDCL for issuance of certificate for availing exemption from sugar cane purchase tax for the season 2012-13 by drawing the attention of MSEDCL to para 14 on Pg. 12 of the Order dated 9 September 2019 in Case No. 159 of 2019 passed by the Commission wherein it had given a clear finding that “sale of infirm power cannot be equated with normal sale of electricity”.
- 3.29. On 30 March 2021, MSEDCL informed STKWSSK that the request for issuance of certificate for availing exemption from sugar cane purchase tax for the season 2012-13 cannot be considered it has not fulfilled the terms and conditions of GoM notification dated 31 January 2014.
- 3.30. The denial by MSEDCL of the request of the Petitioner to issue the exemption certificate for sugar cane purchase tax for season 2012-13 results in modification / amendment of the GR dated 31 January 2014 issued by GoM, in as much as a condition relating to infirm power which is an integral part of commissioning of generating plant is sought to be inserted by the Nodal Agency, appointed under the GR to issue the said certificate.
- 3.31. MSEDCL has exceeded the authority conferred on it as a Nodal Agency under the GR dated 31 January 2014, by imposing conditions relating to infirm power which are not contemplated under the said GR.
- 3.32. Treatment of infirm power is not contemplated under the GR and as such, MSEDCL cannot impose any terms and conditions in respect of the infirm power generated by STKWSSK.
- 3.33. The power sold to BEST Undertaking through RETL is admittedly an infirm power. There is no prejudice or hardship being caused to MSEDCL due to the issuance of the subject exemption certificate.
- 3.34. The Government Resolution does not restrict or limit the scope of the concession only post commissioning of the RE Generating Plant. It merely imposes the condition that the surplus power has to be sold to MSEDCL thereby imposing the conditionality which is post commissioning of the plant. The GR is completely silent on the treatment to be meted out to the infirm power.
- 3.35. STKWSSK was entitled to inject infirm power into the grid in accordance with the provisions of the CERC (Grant of Connectivity Long Term Access and Medium Term Open Access) Regulations, 2009 during testing including full load testing before the COD

for a period not exceeding six (6) months from the date of first synchronization after obtaining the prior approval of the SLDC. This right conferred on STKWSSK under law is not in any manner dealt with or reflected in the GR dated 31 January 2014. Therefore, the inherent right of the generator prior to commissioning cannot be diluted. If the said right ensures to the generators, then as consequence, it follows that the sugarcane used towards ultimate commissioning and sale of power to MSEDCL from commissioning, is entitled to the concessional benefit granted under the Resolution.

3.36. MSEDCL has wrongly considered that STKWSSK has not exported 100% surplus power to the MSEDCL by misconstruing the nature of infirm power during the season October 2012 to September 2013.

3.37. The inaction on the part of MSEDCL for non-issuance of the eligibility certificate for availing the exemption of tax on the purchase of the sugarcane for the period October 2012 to September 2013 has saddled STKWSSK with the issuance of the demand notice from the office of State Tax for an amount of Rs. 26,43,87,964/-.

**4. MSEDCL made the following submissions dated 29 July 2021:**

4.1. The present Petition has been filed invoking Sections 86(1)(e) and 86(1)(f) read with Section 62 of the Electricity Act, 2003 (“Electricity Act”). However, the relief’s sought by the Petitioner herein does not fall within the ambit of the Sections under which the present petition has been filed

4.2. The functions of the State Commission does not cover the issue raised by STKWSSKL in the present Petition. STKWSSKL vide the present Petition is primarily seeking a direction against the MSEDCL to issue the eligibility certificate to its RE Generating Plant, for availing the exemption of tax on purchase of sugarcane for the seasonal period between October 2012 to September 2013. The exemption of tax on purchase of sugarcane under the GR dated 31 January 2014 is the prerogative of the GoM and is thus, not within the powers and purview of the Commission to adjudicate upon the same.

4.3. As per the GoM Notification dated 31 January 2014, MSEDCL is the nodal agency of GoM for issuance of certificate for availing exemption from sugar cane purchase tax in respect co-generation sugar factory. Accordingly, the dispute, if any, as alleged by STKWSSKL herein, is thus between STKWSSKL and GoM and not between STKWSSKL and Distribution Licensee. Therefore, the Regulations invoked by STKWSSKL is wrong and without any basis and thus, unsustainable.

- 4.4. GoM Notification dated 31 January 2014 clearly states that in order to avail the Purchase Tax benefits, the sugar factory has to mandatorily supply 100% power to MSEDCL during the seasonal period (i.e., October – September) for that particular year. In the present case STKWSSK has sought exemption of tax on purchase of sugarcane for the seasonal period between October 2012 to September 2013. However, it is an admitted position by STKWSSK that it had supplied its electricity to BEST for meeting BEST’s RE obligations for the period between January 2013 to March 2013 under Open Access. Therefore, in the present case, it has not sold 100% power to MSEDCL and thus, failed to fulfil the essential condition laid down in the said notification.
- 4.5. GoM Notification dated 31 January 2014 does not differentiate between infirm power and firm power as alleged by STKWSSK. Accordingly, MSEDCL, after verifying the above stated facts and documents submitted by STKWSSK, was justified in not issuing the required certificate for availing exemption under Sugarcane Purchase Tax.
- 4.6. Further, STKWSSKL has placed reliance upon the order dated 9 September 2019 in Case No. 159 of 2019 passed by the Commission wherein the Commission had stated that “*sale of infirm power cannot be equated with normal sale of electricity*”. STKWSSKL, while placing reliance on the said order, has conveniently ignored that the facts of the said order are clearly distinguishable. In the said case, there was a dispute between MSEDCL and STKWSSKL therein in reference to deduction made considering audit objection and also regarding the date of commissioning of the bagasse based cogeneration project in terms of the EPA. However, in the present case, there is no such dispute between the licensee and generator as detailed above. Accordingly, the said order has no relevance to the case at hand.
- 4.7. STKWSSKL should have approached the GoM seeking clarification of the Notification dated 31 January 2014 regarding the applicability of the said notification with respect to the sale of infirm and firm power.
- 4.8. In view of the above submission, the prayer sought by STKWSSKL herein may not be allowed and the Petition may be dismissed.
5. At the e-hearing through video conferencing held on 30 July 2021, the Advocates/representatives of the Parties reiterated their submission as made in the Petition/replies.
6. **MEDA made the following submissions dated 2 August 2021:**



6.1. Since the matter of this Petition is between MSEDCL and STKWSSKL, and no relief has been sought against it, MEDA has no say in this case.

7. **MSEDCL by its email dated 9 August 2021 placed its reliance on the following judgements:**

- a. Mafatlal Industries Ltd. and Ors. vs. Union of India (UOI) and Ors. (19.12.1996 - SC) : (1997) 5 SCC 536:
- b. Amin Merchant vs. Chairman, Central Board of Excise and Revenue and Ors. (22.07.2016 - SC) : AIR 2016 SC 3920
- c. K.B. Hides Versus State of U.P. and Others 2003 SCC OnLine All 2192 : (2005) 140 STC 205 : STI 2004 All 315

8. **STKWSSKL, by its rejoinder dated 26 August 2021 made the following submissions:**

8.1. The GR dated 31 January 2014 speaks of “कार्यान्वित” Generating Plant. Some relevant extracts of the GRs which reveal that the Project has to be commissioned “कार्यान्वित” for being eligible for concession in the Sugar Cane Purchase Tax are as under:

*“२. सहवीज/ वीज निर्मिती प्रकल्प कार्यान्वित असलेल्या सहकारी साखर कारखान्यांच्या बाबतीत सन २००६-०७ पासून आणि त्यानंतर (सन २००६-०७ नंतर) कार्यान्वित होणाऱ्या प्रकल्पांच्या बाबतीत प्रकल्प कार्यान्वित झाल्याच्या दिनांकापासून ऊस खरेदी कर सूट अनुज्ञेय राहिल.*

*खाजगी साखर कारखाने आणि बूट (BOOT) तत्वावर प्रकल्प कार्यान्वित करणाऱ्या सहकारी साखर कारखान्यांना, धोरणाची कार्यपद्धती विहित केल्यापासून (दि. १४.०७.२०१०) व त्यानंतर कार्यान्वित झालेल्या प्रकल्पांना प्रकल्प कार्यान्वित झाल्यापासून ऊस खरेदी कर सूट अनुज्ञेय राहिल.*

.....

*दि. १४.०७.२०१० नंतर कार्यान्वित झालेल्या प्रकल्पांच्या बाबतीत प्रकल्प कार्यान्वित झाल्याच्या दिनांकापासून ऊस खरेदी करत सूट देण्यात येईल.”*

8.2. It is an admitted position that the Exemption Certificate has been denied by MSEDCL on the purported ground of electricity being supplied to BEST Utility from the date of commissioning till March 2013. Therefore, the denial also proceeds on the rightful conditionality of commissioning of the Project. The denial ought to be set aside as this Commission has already concluded the date of Commissioning as 3 April 2013 (Order dated 9 September 2019 in Case No. 159 of 2019)

8.3. The GR dated 31 January 2014 clearly contemplates execution of an EPA with the MSEDCL and electricity to be supplied in accordance with the said EPA. In the present case, the EPA was executed on 21 June 2013 the EPA contemplated the commissioning date as 3 April 2013 and it is an admitted position that the entire surplus electricity (100%) has been supplied by Petitioner to only MSEDCL from 1 April 2013. Thus, the conditions stand fulfilled. The relevant Clause 7 of the GR dated 31 January 2014 reads as under:

“७) सहवीज निर्मिती प्रकल्प आस्थापित करणाऱ्या संबंधित साखर कारखान्यांना ऊस खरेदी कराची सूट उपभोगण्यासाठी प्रकल्पातील किमान ६ मे.वॅ. (७५ लाख युनिट) व त्यापेक्षा अधिक अतिरिक्त पारेषित वीज, केवळ महावितरण कंपनीशी वीज खरेदी करार करून, त्याप्रमाणे महावितरण कंपनीस प्रत्यक्षात वीज पुरवठा करणे आवश्यक आहे.”

8.4. Clause 8(d) of the GR dated 31 January 2014 reads as under:

“ड) संबंधित वर्षातील हंगामात वरीलप्रमाणे अतिरिक्त वीज पारेषित केल्याचे राज्य भार पुरवठा केंद्र (SLDC) यांचेकडील १०० टक्के वीज महावितरण कंपनीस पुरविली गेली असल्याबाबतचे प्रमाणपत्र.”

The Clause 8(d) above, contains the word “वरीलप्रमाणे” therefore the said Clause 8(d) is not a stand-alone clause. The rest of the contents of the GR cannot be ignored.

8.5. Contents of the GR dated 31 January 2014 have to be read in entirety and Clause 8(d) cannot be read in isolation ignoring the other clauses. Clause 8(d) exclusively relied upon by MSEDCL does not decide the eligibility for the tax concession but stipulates the requirement for issuance of eligibility certificate. This vital distinction has to be noted. It is a procedural requirement and not a substantive law.

8.6. When the GRs and the Policies read together it is clear that project commissioned are entitled to the tax concession and there are no conditions stipulated in respect of the power generated prior to commissioning which is in the nature of infirm power.

8.7. The sugar year from October 2012 to September 2013 is different and distinct from the financial year 2012-13. This vital aspect cannot be ignored. For the Sugar Year 2012-13 it is an admitted position that 100% electricity generated from the Petitioner's Project pursuant to its commissioning on 3 April 2013 has been supplied to MSEDCL.

8.8. MSEDCL in its first letter dated 31 May 2018 while denying the Eligibility Certificate reasoned that the Petitioner was “exporting power to BEST Utility from commissioning of the Project till March 2013 & started export to MSEDCL from April 2013 i.e. it has not

exported 100% surplus power to MSEDCL during the season 2012-13 (i.e. October 2012 to September 2013)

- 8.9. Thereafter, the Commission was pleased to clarify that 22 March 2013 as date of synchronisation and 3 April 2013 is the date of commissioning. This dictum of this Commission necessitates a fresh application dated 17 September 2019 for the Tax Exemption Certificate.
- 8.10. On 17 October 2019, MSEDCL however, without considering the order passed by the Commission simply reiterated the rejection in the letter dated 7 January 2019. Thus, even after passing of the Order dated 9 September 2019 by the Commission the MSEDCL continues to treat the date of commissioning as 22 March 2013. This is contrary to the order dated 9 September 2019 passed by the Commission and liable to action under Section 142 of the Act.
- 8.11. With regards to MSEDCL's contention, it is denied that the government GR dated 31 January 2014 does not concern itself with the power generated during testing etc., prior to commissioning namely, the infirm power. The doctrine of exclusion would apply in this case. The GR dated 31 January 2014 contemplates as an eligibility condition of power to be sold to MSEDCL of a minimum quantum of 6 MW and above, post commissioning. In other words, therefore, the GR does not have any stipulation qua infirm power. Therefore, the GR having stipulated the commissioning of a Project as eligibility criteria for tax exemption it impliedly deals with testing and other modalities including infirm power. In fact, most of the trial, testing and pre-commissioning activities are mandatory and stipulated under the regulatory framework of the CEA and other statutory provisions.
- 8.12. MERC (Distribution Open Access) Regulations, 2016 deals with infirm power by the generating station. The Provision speaks for itself that any generating station can be granted connectivity to the Distribution System subject to grid security considerations, to undertake testing and including full load testing by injecting infirm power into the grid before the date of commercial operation.
- 8.13. If the submissions of MSEDCL were to be accepted then it would mean that a Generator cannot inject infirm power into the grid. In fact, if the Generator has proper arrangements for offtake of the power that not only enhances the RPO compliance objective of Distribution Licensees and others but also ensures proper monitoring by SLDC of the security and safety of the Grid. Otherwise, it would amount to a Generator injecting power of its own volition, albeit prior to the date of commissioning, which scenario has been rejected and frowned upon, by the Hon'ble APTEL in some of its judgements.

- 8.14. Thus, in view of Regulation 5.10 of Distribution Open Access Regulations read with Paragraph 14 of the Order dated 9 September 2019 in Case No. 159 of 2019, the infirm power generated by STKWSSKL cannot be equated with power generated upon commissioning of the Project. Therefore, in the present case, the Sugarcane utilised prior to COD for testing and other purposes cannot be disregarded and STKWSSKL is entitled to Eligibility Certificate.
- 8.15. MSEDCL has relied on three (3) judgements forwarded as a Compilation of Judgements on 9 August 2021. These three (3) judgements are distinguishable on the ground of the same being irrelevant / inapplicable and otherwise distinguishable, on facts and law.

### **Commission's Analysis and Rulings**

9. STKWSSKL had entered into a Project Development Agreement with USTKWPCCL for developing 44 MW bagasse based Cogeneration plant in the premises of STKWSSKL. Further, on 21 June 2013, STKWSSKL and USTKWPCCL entered into EPA with MSEDCL.
10. USTKWPCCL had previously filed a Petition in Case No. 159 of 2019 primarily seeking directions to MSEDCL for considering COD as 3 April 2013 instead of 22 March 2013 (date of synchronization). The Commission in its Order dated 9 September 2019 accorded its approval to the prayers of USTKWPCCL as follows:

*“14. From the documents placed on records, the Commission notes that 22 March, 2013 was communicated to concerned parties / agencies as date of Synchronization of the plant. Synchronization enables newly constructed generating plant to connect with the Grid. Subsequent to such connection, generating plant can perform various performance test wherein electricity generated on account of such tests is injected into the Grid. Such electricity generated during the testing period is treated as infirm power and generator has to contract with buyer / Distribution Licensee for sale of such infirm power. In present case, USTKWPCCL has contracted with RETL for sale of infirm power. **Such sale of infirm power cannot be equated with normal sale of electricity.** Before declaring commissioning of the plant, the generator has to demonstrate 72 hours continuous running test. After successful completion of such test, CoD / date of commissioning is declared by the Generator subsequent to which Generator has to comply with all the obligations stipulated in the EPA with reference to contracted capacity. **Hence, Synchronization date and date of commissioning are two distinct dates. Accordingly, the Commission rules that in present Case, 22 March, 2013 is a date of synchronization and 3 April, 2013 is a date of Commissioning of the plant which has been declared after completion of 72 hours continuous run test.***

[Emphasis added]

11. In the Present Petition, STKWSSKL is seeking directions to MSEDCL to issue eligibility certificate for availing the exemption of tax on purchase of sugarcane for the period October 2012 to September 2013.
12. STKWSSKL has submitted that non-issuance of eligibility certificate for availing the exemption in tax on purchase of sugarcane for the period of October 2012 to September 2013 has resulted in demand notice from the Office of State Tax for an amount of Rs. 26.44 Crores.
13. The Commission notes that MSEDCL has denied issuance of such certificate stating that to avail the benefits of tax exemption, the sugar factory has to mandatorily supply 100% power to MSEDCL during the season (i.e., October – September) for that particular year. During the season of October 2012 to September 2013, STKWSSKL had supplied power to BEST (during the period of January 2013 to March 2013) under Open Access for meeting its RE obligations and thereafter sale power to MSEDCL from April 2013 onwards. Therefore, it has not sold 100% power to MSEDCL and has failed to fulfil the essential condition laid down in the GoM's Notification dated 31 January 2014.
14. While opposing these contentions, STKWSSKL has submitted that it has sold certain infirm power to BEST from January 2013 till March 2013, prior to the COD of the project. STKWSSKL has relied upon the Commission's Order dated 9 September 2019 in Case No. 159 of 2019 wherein the Commission has ruled that the sale of infirm power cannot be equated with normal sale of electricity. STKWSSKL has further submitted that the GR is silent on the treatment of infirm power and only imposes condition of surplus power to be sold to MSEDCL post commissioning of the project.
15. The Commission notes that STKWSSKL's bagasse-based co-generation plant was synchronised on 33 kV level in January 2013 and is seeking tax exemption eligibility certificate for the sugar season of October 2012 to September 2013 which includes the period of January to March 2013 during which STKWSSKL has supplied energy, though infirm, to BEST Undertaking through a Trader. This energy has been used by BEST for fulfilling its Renewable Purchase Obligations. Therefore, it is admitted fact that during the said sugar season of October 2012 to September 2013, STKWSSKL has supplied energy generated from bagasse-based co-generation plant to BEST Undertaking (infirm power during January 2013 to March 2013) and MSEDCL (from April 2013 onwards post CoD under long term EPA). GoM GR requires 100% sell of electricity to MSEDCL as eligibility criteria for seeking tax exemption. STKWSSKL has suggested to read such applicability of GR for power supply post commissioning of the plant and should exclude infirm power supply.

16. The Commission also notes the provisions of the GR on the exemption of Purchase Tax. Admittedly, the Government has issued this GR for promoting the Bagasse based Renewable Energy generation. The said GR is for facilitating the promotion of this source of Renewable Energy. This aspect and the intent of the Government needs to be considered in True Letter and Spirit.
17. The GR clearly specifies the conditions including Operationalising (कार्यन्वित) of the plant, Power Purchase Agreement with MSEDCL and then the 100% supply based on the said Power Purchase Agreement. Cogent reading of all the clauses of the GR and very necessary to arrive at the conclusion of deciding eligibility for availing such exemption.
18. In this regard, the Commission notes that in above quoted order dated 9 September 2019, it has clearly ruled that sale of infirm power cannot be equated with sale of normal power. The Commercial Operation Date is generally linked to the all the provisions of the Power Purchase Agreement including Commercial stipulations. However, such ruling is with reference to issues related to grid operations and its implications on PPA signed between parties. Present issue is related to eligibility conditions for seeking tax exemptions on purchase of sugar cane under GoM's GR.
19. The said GR is silent on the issue of infirm power. The GR covers the conditions of eligibility post Operationalising and post signing of PPA. Thus, an inference could be drawn obliquely about the conditions to be met post signing of EPA. It is a fact that infirm power can be sold to any person (Open Access Consumer, Distribution Licensee or Trader), but in present matter, such sale of infirm power is made to BEST Undertaking (through trader) which is also a Distribution Licensee as that of MSEDCL, and BEST Undertaking has used such energy for fulfilling its consumer demand and complying with RPO. Therefore, utilisation of infirm power in present case is same as that intended for firm power under the GoM's GR with only difference is change of Distribution Licensee i.e. BEST Undertaking instead of MSEDCL. Hence, dispensation which is applicable for firm power can be made applicable to infirm power in present matter.
20. Taxation and its exemption are the subject matter of the Government. Therefore, the Commission is of the opinion that it is up to the Government to clarify this issue of applicability of tax exemption in the present matter. Similarly, STKWSSKL's alternate suggestion that such GR should be read as applicable only for power supply post commissioning of the plant and should exclude infirm power supply, also needs to be clarified by the Government after considering the provisions of the GR (esp Signing of PPA) quoted in paras 8.1 and 8.2 above.

21. Section 86 (1)(f) of the Electricity Act, 2003 empowers the Commission to adjudicate dispute between generating company and licensee. In present case, dispute has been arisen between generator and MSEDCL, which is although a licensee but in present facts of matter is acting as nodal agency of the GoM for issuing certificate of exemptions to the co-generation plant based on eligibility conditions stipulated under GoM's GR. Any dispute with nodal or implementing agency on the issues of implementing tax exemptions / subsidy schemes of the Government, needs to be clarified/decided by the Government.
22. Therefore, STKWSSL may approach the GoM seeking clarification on the said issue. While clarifying, the Government may consider above observations of this Commission in para 16 to 21 above.
23. Hence, the following Order.

**ORDER**

1. Case No. 71 of 2021 is disposed off in terms of observations in para 16 and 22 above.

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

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

Sd/-  
**(Sanjay Kumar)**  
Chairperson

  
**(Abhijit Deshpande)**  
Secretary

  
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION  
॥ आदित्यं हृदयम् ॥