

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

Case No. 47 of 2022

Petition filed by M/s. Enel Wind Project (Amberi) Pvt Ltd. seeking Review of the Order dated 17 August 2021 passed by the Commission in Case No. 27 of 2021.

Enel Wind Project (Amberi) Pvt. Ltd. (EWPPPL)... Petitioner

Maharashtra State Electricity Distribution Company Limited (MSEDCL)... Respondent

Coram

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

Appearance:

For the Petitioner : Mr. Vishal Binod (Adv.)
For the Respondent : Ms. Mythili Gosavi (Adv.)

ORDER

Date: 15 September 2022

1. EWPPPL has filed the present Review Petition on 21 March 2022 under Section 94(1)(f) of the Electricity Act, 2003 read with Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 seeking Review and modification of the Commission's Order dated 17 August 2021 passed in Case No.27 of 2021.

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

1. Admit and allow the present Review Petition as prayed for hereinabove;

2. *Review and modify the Order in Review dated 17.08.2021 passed in Case No. 27 of 2021 to the extent prayed for in the present Review Petition and direct the Respondent to discharge its liability towards Late Payment Surcharge for the billing period ranging from April 2017 to February 2018 and for the month of January 2017 without any demur or delay; and*
3. *Pass any such other and further orders as this Hon'ble Commission deems just and proper in the nature and circumstances of the present case."*

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

- 31 EWPPPL has developed and commissioned wind power projects with a cumulative installed capacity of 22.2 MW in Satara and Sangli districts in the state of Maharashtra. These projects have been commissioned in FY 2011-12 and FY 2012-13. The project capacity is tied up with MSEDCL. EWPPPL has executed Power Purchase Agreements (PPAs) with MSEDCL for sale and supply of power from the aforesaid Projects.
- 32 EWPPPL has been raising monthly invoices to the MSEDCL since Commercial Operation Dates (COD) of its various units. However, MSEDCL has consistently defaulted in discharging its payment obligations under the PPA and has failed to make timely payments of the monthly invoices since the commencement of supply of power from the Projects on one pretext or the other, despite availing the power supplied by the EWPPPL.
- 33 Aggrieved by the persistent and brazen non-compliance by the MSEDCL of its contractual and legal obligations, the EWPPPL approached the Commission by filing Case No. 125 of 2018 seeking inter alia payment of outstanding dues and LPS by the MSEDCL for the billing period ranging from April 2017 to February 2018 and for the month of January 2017. The relevant prayer of Case No.125 of 2018 reads as below:

“

a) Direct the Respondent to make payments in respect of unpaid invoices for the billing period ranging from April 2017 to February 2018 and for the month of January 2017, cumulatively amounting to Rs. 17,60,19,452/- (Rupees seventeen crore sixty lakh nineteen thousand four hundred and fifty-two only), along with consequent late payment surcharge computed in terms of the PPAs till the date the unpaid invoices are actually paid upon by the Respondent;”

The Commission vide its Order dated 19 October 2018 allowed the aforesaid claim of the EWPPPL and directed the MSEDCL to release the outstanding payments/ dues owed to the EWPPPL, including LPS, as per the submitted payment plan dated 12 September 2018. Upon failure to make payment, MSEDCL was made liable to pay an additional interest at the rate of 1.25% per month on any unpaid LPS. The relevant part of the Commission's Order reads as below:

“

16.

The Commission directs MSEDCL to strictly adhere to the plan as submitted to the Commission in its true letter and spirit and release the amount to the Wind generators without any deviation in chronological order. At the time of reconciliation, MSEDCL shall inform the Petitioners the exact time limit in which the payment would be made to wind generators for their outstanding dues of principal and DPC amount. Further, MSEDCL should note that if it deviated from its commitment given in the plan, interest will be payable thereafter (beyond the date committed in the plan) at 1.25 % per month on any DPC.”

- 34 In compliance to the directives in Case No.125 of 2018, MSEDCL made payments towards the principal outstanding in relation to the invoices for the electricity supplied to them up to November 2018. However, MSEDCL failed to pay any amounts towards the accrued LPS and principal outstanding for monthly invoices since December 2018 billing period.
- 35 Aggrieved by such continued non-payment of monthly bills and consequent LPS; EWPPPL filed the Case No. 27 of 2021. By way of the 2021 Petition, EWPPPL had inter alia sought directions against MSEDCL qua payment of:
- a. LPS in respect of monthly invoices for the April 2012-March 2018 billing period, for which MSEDCL had paid the outstanding amount; and
 - b. Outstanding principal amount, as well as consequent LPS, in respect of monthly invoices for the December 2018-November 2020 billing period.
- 36 The Commission vide its Order dated 17 August 2021 (Impugned Order) partly allowed Case No.27 of 2021 and directed following:
- a. MSEDCL to reconcile the outstanding dues and make full payment towards such outstanding dues.
 - b. MSEDCL to make payment towards penal interest applicable on the Late Payment Surcharge amount paid on 26 April 2021 at the rate of 1.25% per month; and
 - c. Review Petitioner’s claim towards LPS for the April 2012 to March 2018 billing period was rejected.

- 37 Based on a bare perusal of the Impugned Order, it appears that the Commission rejected EWPPL claim towards LPS for the April 2012 to March 2018 billing period on the following basis:
- a. LPS claim for April 2012 to March 2018 billing period was not included by EWPPL in its 2018 Petition, and therefore such claim is belated;
 - b. Such purportedly belated claims cannot be allowed by the Commission as per various decisions of the Hon'ble Supreme Court and Order II Rule 2 of the Code of Civil Procedure, 1908 (CPC).
- 38 The aforesaid findings suffer from a error on the face of the record to the extent the Commission has included the billing period ranging from April 2017 to February 2018 and the month of January 2017, while rejecting the claim for LPS. On the contrary, the said period claims were a part and parcel of Case No. 125 of 2018 passed by the Commission. Hence, cannot be termed as belated or barred by law, including under Order II Rule 2 of the CPC.
- 39 EWPPL mentioned following grounds for sufficing the claim:
- a. Petition in Case No.125 of 2018 includes and pertains to the billing period ranging from April 2017 to February 2018 and for the month of January 2017.
 - b. The Commission in its Impugned Order noted and reproduced the Prayer Clause made in Case No.125 of 2018, which explicitly states that claim period is for April 2017 to February 2018 and for the month of January 2017. Therefore, the Commission's finding that the LPS claim for the entire April 2012 to March 2018 billing period is belated, suffers from a clear and apparent error and deserves to be reviewed immediately.
 - c. The above fact also becomes clear and indisputable from a bare perusal of the reconciliation statement dated 28 November 2018 signed between EWPPL and MSEDCL in pursuant Order dated 19 October 2018. Reconciliation statement specifically includes and specifies the billing period as the period ranging from April 2017 to February 2018 and the month of January 2017.
 - d. The aforesaid fact has been admitted by MSEDCL itself in its Reply filed before the Commission during proceedings in Case No.27 of 2021. In the said Reply, MSEDCL submitted that as per the Commission Order dated 19 October 2018, it has paid the outstanding principal for the to the billing period ranging from April 2017 to February 2018 and for the month of January 2017. The above fact clearly showcases that the said period was covered by the Commission in its Order in Case No.125 of 2018 dated 19 October 2018.

e. MSEDCL's dispute against EWPPPL LPS claim in Case No.27 of 2021 for being time-barred is limited to the April 2012 to July 2015 billing period, and not beyond that. Therefore, the Commission's direction to reject the LPS claim for the billing period ranging from April 2017 to February 2018 and for the month of January 2017, is squarely and manifestly contrary to the facts on the record, including the pleadings filed even by MSEDCL.

3.10 The LPS for period cumulatively amounts to Rs. 3,16,08,826/-(Rupees three crore sixteen lakh eight thousand eight hundred and twenty-six only) as of 25 January 2022; and the EWPPPL has been unjustly deprived of the payment of the said sum by the MSEDCL.

3.11 The Petition has been filed within the limitation period prescribed at Regulation 85 of the MERC (Conduct of Business) Regulations, 2004, read with order dated 10 January 2022 passed by the Hon'ble Supreme Court of India in Suo Motu Case (C.) 3/2021, titled In re: Cognizance for Extension of Limitation (Limitation Order).

4. MSEDCL in its Reply dated 08 June 2022 submitted as under:

4.1 The Petition as framed and filed is misconceived and not maintainable. The prayers sought in the Petition are ineligible for being granted as the Commission has already ruled on that matter. The Petition does not have any merit and substance. The same may be dismissed with exemplary costs in favor of MSEDCL.

4.2 EWPPPL has filed the present Petition with malafide intentions to harass MSEDCL by coercing them for payment of unnecessary interest over the principal amount which has already been cleared by it within the time frame accepted by both the parties in compliance with the Commission's Order dated 19 October 2018.

4.3 On a perusal of the Impugned Order passed, it is clear that the LPS claim for the period of 2012-2018 is belated and delayed under principles laid down by Supreme Court in various cases and in terms of Order II Rule 2 of the Code of Civil Procedure, 1908. Impugned Order noted that the principal amount for the period of 2012-2018 has already been paid by MSEDCL on 31 March 2019.

4.4 There is no clause or provision in the PPA pertaining to any interest being payable to EWPPPL on delay of payments by MSEDCL.

4.5 The Payments has been made within the given time frame (as per payment plan) for the outstanding payment. Hence, no claim for LPS on any delayed payment made between 2012-2018 is maintainable.

5. At the e-hearing held on 10 June 2022:

- 5.1. Advocate appearing on behalf of MSEDCL sought adjournment in the matter mentioning that its main arguing Advocate was busy with other commitment.
- 5.2. Advocate of EWPPPL insisted upon deciding the matter on merit and categorically pointed out error in the Impugned Order.
- 5.3. The Commission heard the EWPPPL's arguments along with MSEDCL. Further, MSEDCL was granted liberty to file its written arguments.

6. MSEDCL's Written Arguments dated 16 June 2022 state the following:

- 61 EWPPPL has filed the present Review Petition after delay of 216 days following the Commission's Order dated 17 August 2021 i.e beyond the 45 days prescribed for the actual filing of the Review Petition as per Clause 85 (a) of MERC (Conduct of Business) Regulations, 2004. Hence, this Review Petition is liable to be dismissed on this ground alone.
- 62 The scope of Review is limited and under the guise of Review, EWPPPL cannot be permitted to take up issues and questions that have already been adjudicated upon.
- 63 In compliance of the directives in the Daily Order dated 7 May 2021 in Case No.27 of 2021, MSEDCL has released principal outstanding amount of Rs. 21.25 Crores for the generation month period December 2018 to December 2019 on 27 May 2021 out of the claim of Rs. 36.87 Crores. The balance principal outstanding was paid on 28 December 2021. MSEDCL has reconciled the LPS of Rs.6.24 Crores for the period April- 2018 to December- 2019 and the same was paid on 28 December 2021 along with Penal interest on LPS to the tune of Rs. 1.36 Crores.
- 64 As per the payment plan dated 12 September 2018, MSEDCL had committed to pay the outstanding dues for the period up to March-2018 generation month by the end of March- 2019. Accordingly, MSEDCL had paid Rs. 33.14 Crores on 31 December 2018 and 31 March 2019 for the Generation month of January 2017 and April 2017 to August 2018. Further, MSEDCL has paid LPS of Rs 3.59 Crores for the period of Generation month August 2015 to March 2017 on 26 April 2021. MSEDCL has also paid Principal outstanding of Rs. 3.39 Crores from Generation month September 2018 to November 2018 (Satara & Sangli location) and December 2018 (Sangli Location).

- 65 EWPPL in its Petition in Case No.27 of 2021 has raised LPS claims for the period not initially claimed in its earlier Case No. 125 of 2018. Period contemplated under the first Case No. 125 of 2018 for LPS claim was January 2017 and April 2017 to February 2018, but in Case No. 27 of 2021, claims had been raised since FY 2012-13 till FY 2020-21.
- 66 With regard to the outstanding principal amount for the monthly invoices since August 2019, out of claim of Rs. 36.87 Crores; on 27 May 2021, MSEDCL has released principal outstanding amount of Rs. 21.25 Crores. The COVID-19 pandemic was responsible for disruptions in its revenue stream and delay in clearing payments and such delay is not deliberate. Further, the COVID-19 pandemic, clearly, unequivocally and incontrovertibly falls in the category of a force majeure circumstance.
- 67 EWPPL has approached the Commission multiple times seeking different reliefs in respect of the same cause of action. EWPPL ought to have placed all his claims in one suit viz. Case No. 125 of 2018, instead of emerging with retrospective claims barred by limitation as well as by terms of Order II Rule 2 of the Code of Civil Procedure, 1908, in the subsequent Petition (Case No. 27 of 2021).

Commission's Analysis and Rulings

7. The present Petition has been filed under Section 94 of the Electricity Act, 2003 read with the Regulation 85 of MERC (Conduct of Business) Regulations, 2004 seeking Review and modification of the Commission's Order dated 17 August 2021 passed in Case No.27 of 2021.
8. Regulation 85 of MERC (Conduct of Business) Regulations, 2004 dealing with the review of decisions, directions, and orders which reads as follows:

“
85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.”

MSEDCL objected that EWPPL has filed the present Review Petition after 216 days' delays and it is not tenable in view of Regulation 85 (a) of MERC (Conduct of Business) Regulations, 2004. EWPPL relied upon the Hon'ble Supreme Court Judgement dated 10 January 2022 which excluded the period from 15 March 2020 till 28 February 2022 for the purposes of limitation.

9. The Commission notes that Impugned Order is passed by the Commission on 17 August 2021 and the present Petition is filed on 21 March 2022. Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 stipulates that Review needs to be filed within forty-five (45) days of the date of Order. Now period between 15 March 2020 till 28 February 2022 is excluded by Hon'ble Supreme Court for the purpose of limitation. Hence, limitation period countdown starts from 28 February 2022. Accordingly present Review Petition filed on 21 March 2022 is not time barred.
10. EWPPPL has contended that the Impugned Order suffers from an error apparent on the face of the record to the extent the Commission has also included the billing period ranging from April 2017 to February 2018 and the month of January 2017, while rejecting the claim for LPS for being belated and not being included in the previous round of proceedings before the Commission.
11. MSEDCL has submitted that EWPPPL has approached the Commission multiple times seeking different reliefs in respect of the same cause of action. EWPPPL in its Petition in Case No.27 of 2021 has raised LPS claims for the period not initially claimed in its earlier Case No. 125 of 2018.
12. The Commission notes that the present Review Petition is seeking Review of Order in Case No.27 of 2021, which is having background of Case No.125 of 2018. EWPPPL mentioned that following Para of Impugned Order suffers from factual error:

“
11. With regards to LPS for the period of April-2012 to March-2018, the Commission notes that that EWPPPL in its earlier Petition in Case No.125 of 2018 has prayed following:

“
a) Direct the Respondent to make payments in respect of unpaid invoices for the billing period ranging from April 2017 to February 2018 and for the month of January 2017, cumulatively amounting to Rs. 17,60,19,452/- (Rupees seventeen crore sixty lakh nineteen thousand four hundred and fifty-two only), along with consequent late payment surcharge computed in terms of the PPAs till the date the unpaid invoices are actually paid upon by the Respondent;”

*It is apparent that LPS claim for April-2012 to March-2018 were not been sought in **Petition in Case No.125 of 2018**. The Commission has decided the Case No.125 of 2018 vide its Order dated 19 October 2018. EWPPPL in present Petition in Case No.27 of 2021 has raised belated claims for LPS. As per principles laid down by Supreme Court in various cases and Order II Rule 2 of the Code of Civil Procedure, 1908, such belated claims cannot be allowed as the EWPPPL did not include the same in original Petition.”*

13. From above, it is evident that the Commission in Impugned Order concluded that LPS claim for April-2012 to March-2018 were not sought in Petition in Case No.125 of 2018. However, on perusal of prayer clause (a) in Case No.125 of 2018 which has been reproduced in impugned Order and also reproduced in above para it is seen that claims for the period ranging from April 2017 to February 2018 and for the month of January 2017 were categorically sought in Case No. 125 of 2018. Therefore, the Commission's observation in impugned Order that claim for April 2012 to March 2018 were not sought in Case No. 125 of 2018 is not based on the facts to the extent that claim for part of that period i.e. April 2017 to February 2018 & January 2017 was sought and covered in Case No. 125 of 2018. The Commission notes that this is error apparent on face of record and hence review on this aspect needs to be allowed. Accordingly, LPS claim for this period need to be allowed.
14. Form the submission filed by MSEDCL it is noted that MSEDCL has paid LPS amount to EWPPPL for the period of April 2019 onwards as per payment plan. LPS amount for the period of April 2017 to February 2018 & January 2017 which is part of prayer in Case No. 125 of 2018 and allowed by the Commission vide Order dated 19 October 2018 is still to be paid. Further in the said Order dated 19 October 2018, the Commission had allowed interest at 1.25% per month on delayed payment of LPS amount. Hence, the Commission directs MSEDCL to pay LPS for the period of April 2017 to February 2018 & January 2017 along with interest at 1.25% per month on outstanding amount of LPS.
15. Hence, the following Order.

ORDER

- 1. Case No. 47 of 2022 is allowed.**
- 2. Enel Wind Project (Amberi) Pvt. Ltd is eligible for LPS for the period of April 2017 to February 2018 & January 2017 along with interest at 1.25% per month on outstanding amount of LPS.**
- 3. Maharashtra State Distribution Licensee to pay above amount within a month from date of this Order.**

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

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

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


**(Abhijit Deshpande)
Secretary**

