

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 13 of 2008

**In the matter of
Petition of Maharashtra State Electricity Distribution Co. Ltd. seeking
reconsideration of the clauses of penalty under the Renewable Purchase
Specification**

**Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member**

Maharashtra State Electricity Distribution Company Ltd
Prakashgad, Bandra (E),
Mumbai 400 051.

... Petitioner

Versus

1. Director General
Maharashtra Energy Development Agency
Pune
2. Chief Executive Officer
M/s. India Wind Energy Association
New Delhi
3. The Secretary
Renewable Energy Developers Association of Maharashtra
Mumbai
4. The President
Cogeneration Association of India
C/o M/s. Maharashtra State Federation of Co-operative
Sugar Factories Ltd.
Pune.

... Respondents

ORDER

Dated: September 15, 2008

Maharashtra State Electricity Distribution Company Ltd., (“MSEDCL”) filed a Petition on 3.4.2008 wherein it has been submitted that in order to comply with specified percentages of procurement of power from renewable sources as directed by the Commission under its Order dated 16.8.2006, MSEDCL is always making efforts to procure such power. It has already contracted out almost 100% purchase of power by



executing Energy Purchase Agreements with non-conventional energy developers/generators. MSEDCL has given a list of all those projects for which such Energy Purchase Agreements have been executed by MSEDCL as on May 2007. These projects generate power from bagasse, non-fossil fuel based co-generation projects, biomass projects, wind power projects. The list gives year wise breakup as well as identifies those projects where the plants have yet not been commissioned. It is averred in the Petition that fulfilment of RPS obligation of 4% for financial year 2007-08 seems to be difficult because the actual power received from existing co-generation, NCNQ, wind projects, small hydro projects is less than what had been contracted for. This is because such power is infirm in nature and is out of control of the generator. It is further averred in the petition that although the Commission's order dated 16.8.2006 particularly in terms of paragraph 2.10.8 thereof if it is established that Eligible Person had adequately contracted for procurement of RE power with generator and if the generator fails to add RE capacity or fails to supply RE power, then, Eligible Person shall be entitled to recover such costs of enforcement from such RE generator. It is the contention of MSEDCL that such costs of enforcement should be waived because there is merit in the generator's claim that they virtually have no control over generation of electricity from non-conventional energy sources. MSEDCL also feels that levy of such charges on the generator or on MSEDCL will not be fair since the said power is neither in the control of MSEDCL nor in the control of generators. Moreover, MSEDCL is always contracting all the power that is available from NCE sources and trying to meet RPS obligations. It is further averred in the petition that for the year 2007-08 the contracted RPS is 4.56% of the total power requirement, which is more than the specified 4%. However, the actual RPS achieved is only 3.49% (as on January, 2008) of the total power requirement which is less than the specified 4%. As such any such enforcement charges either on MSEDCL or on the generator needs to be withdrawn forthwith. It is MSEDCL's contention that enforcement charges can only be levied when RE power is available and the same is not contracted by MSEDCL, which is not the case.

2. The prayers contained in the Petition are as follows:

- “1) MSEDCL prays to kindly exclude the clause pertaining to penalty in case of short supply of power by the RE generators or shortfall in procurement by MSEDCL (Utility);
- 2) Modify the RPS Order dated 16.08.2006 accordingly;
- 3) Pass any other order as may be deemed fit in the interest of justice and in the interest of promoting non-conventional energy sources, at the same time, protecting the MSEDCL's commercial interest. ”

3. Subsequently MSEDCL impleaded the following parties to the Petition:

- “1) Director General, Maharashtra Energy Development Agency, Pune
- 2) Chief Executive Officer, M/s. India Wind Energy Developers Association, New Delhi
- 3) The Secretary, Renewable Energy Developers Association of Maharashtra, Mumbai



- 4) *The President, Cogeneration Association of India, C/o M/s. Maharashtra State Federation of Co-operative Sugar Factories Ltd., Pune.*

4. On 28.5.2008, MEDA filed a Technical Taskforce Report dated 19.4.2008 on MEDA's view regarding MSEDCL's Petition. MEDA has essentially submitted that no dilution or alteration in the Commission's Order dated 16.8.2006 in regard to specification of RPS, be permitted, as any such dilution may adversely affect the development of green energy sector. MEDA also submitted that percentage of RPS stipulation is well within the reach of 'Eligible Persons' if only they put in sincere efforts in this direction. Hence the RPS Order dated 16.8.2006 may be implemented as it is and should be enforced in letter and spirit.

5. In response to the direction given by the Secretariat of the Commission directing distribution licensees to submit their comments on MSEDCL's Petition, Brihan Mumbai Electric Supply and Transport Undertaking ("BEST") submitted a letter dated 28.7.2008 essentially supporting MSEDCL's Petition of considering the waiving of enforcement charges on distribution licensees. Tata Power Company Ltd., ("TPC") filed its letter dated 4.8.2008 submitting that they have no comments on the stand taken by MSEDCL that RE generation is infirm in nature and that there may be a case for waiver of penalty enforcement on the quantum of shortfall. TPC's submission is that the Commission should provide suitable incentive to utilities who have taken additional efforts and have met their RE obligation targets by putting up NCE generation on their own such as TPC has set up wind farms to fulfill its RPS obligations. TPC has submitted that the overall shortfall as a percentage of the Gross Energy Consumption for the utilities contributing to the shortfall (i.e. MSEDCL, REL, BEST and MPECS) is about 1.34%. The Commission may consider giving an incentive of about Rs.0.50/kWh for 1.34% of Tata Power's Gross Energy Consumption (1.34% of 2625 MUs). This would translate to Rs.0.50/kWh for about 35 MUs thus resulting in an incentive of Rs.1.76 Crore. This, would be a reasonable reward to Utilities who have taken independent pro-active measures for meeting their RPS obligation as also encourage other utilities to take necessary steps in similar direction.

6. A hearing was held in the matter on 5.8.2008. Smt. Deepa Chawan, Advocate appeared for MSEDCL. Shri. Sudhir Kumar, and Shri. G.D. Rane represented MEDA. Shri K.N. Rajgopal, Shri M.R. Dharaskar and Shri. S.D. Pawar represented BEST. Shri V.H. Wagle and Shri. P.V. Joshi represented TPC. Shri G.N. Kamath represented REDAM and Shri Sanjay Sen, Advocate represented InWEA. Smt. Deepa Chawan argued that the Electricity Act, 2003 ("EA 2003") does not authorize or empower the Commission to impose penalty under its Order dated 16.8.2006. There is no sanction for levying penalty under Section 86(1)(e) of the EA 2003. Penalty needs to have sanction of law. Smt. Chawan pointed out to one Supreme Court judgement reported in AIR 1975 SC 1549 in the case of M/s. Khemka & Co., vs. State of Maharashtra (Civil Appeal No. 2089 of 1969) and State of Mysore vs. Goldas Oil Mills (Civil Appeal No. 2118 of 1970). From the judgment, she read out as follows:-

"20.The reason why rebate is allowed and penalty is disallowed is that rebate is a concession whereas penalty is an imposition. The concession does not impose liability but penalty does. It, therefore, stands to reason that rebate



is included within the procedural part of collection and enforcement of payment. Penalty like imposition of tax cannot be included within the procedural part”.

“24. Penalty is not merely sanction. It is not merely adjunct to assessment. It is not merely consequential to assessment. It is not merely machinery. Penalty is in addition to tax and is a liability under the Act”.

“25. The mere fact that there is machinery for assessment, collection and enforcement of tax and penalty in the State Act does not mean that the provision for penalty in State Act is treated as penalty under the Central Act. The meaning of penalty under the Central Act cannot be enlarged by the provisions of machinery of the State Act incorporated for working out the Central Act”.

“27. For the foregoing reasons, we are of opinion that the provision in the State Act imposing penalty for non-payment of income-tax within the prescribed time is not attracted to impose penalty on dealers under the Central Act in respect of tax and penalty payable under the Central Act. There is no lack of sanction for payment of tax. Any dealer who would not comply with the provisions for payment of tax would be subjected to recovery proceedings under the Public Demands Recovery Act. A penalty is a statutory liability. ”

“37. On consideration of the provisions mentioned above, it seems to me to be clear that whatever may be the objects of levying a penalty, its imposition gives rise to a substantive liability which can be viewed either as an additional tax or as a fine for the infringement of the law. The machinery or procedure for its realization comes into operation after its imposition. In any case it is an imposition of a pecuniary liability which is comparable to a punishment for the commission of an offence. It is a well settled canon of construction of status that neither a pecuniary liability can be imposed nor an offence created by mere implication. It may be debatable whether a particular procedural provision creates a substantive right or liability. But, I do not think that the imposition of pecuniary liability, which takes the form of a penalty or fine for a breach of a legal obligation, can be relegated to the region of mere procedure and machinery for the realization of tax. ”

Smt. Chawan argued that as per the above decision, penalty in any Act has to be strictly interpreted and strictly construed. She further argued that penalty is a statutory liability which ought to have the sanction of law.

7. At the hearing, Shri. Sudhir Kumar representing MEDA, argued that any person would be required to meet the RPS percentage by three ways. First, is by its own RE generation and procurement, second would be by way of purchase from RE developers within the state and third by way of purchase from another licensee in case such another licensee has surplus RE generation. He argued that it is a misplaced contention regarding the non-availability of RE generation in the State. It could as well be from Distribution Licensee’s own RE generation and procurement.



8. Shri Sanjay Sen, Advocate representing InWEA argued that the enforcement charges/penalty under the Order dated 16.8.2006 is a disincentive which is permissible under the Electricity Act, 2003. Since this order has been implemented by MSEDCL, there is no question of raising a dispute after expiry of two years. It has also been argued that the Supreme Court in the case of Central Power Distribution Company vs. Central Electricity Regulatory Commission (2007) 8 SCC 197 has upheld the ABT mechanism and applicability of UI charges. In view thereof there is no illegality in the enforcement charges/penalty under order dated 16.8.2006. However, MSEDCL can claim dispensation in terms of paragraph 2.6.12 of the order dated 16.8.2006 for seeking the waiver of minimum targets subject to supply constraints or any uncontrollable factors which may be considered by the Commission in its opinion. It has been submitted however that InWEA does not propose any final comments on the issue of sufficiency or material to invoke the waiver clauses No.2.6.12 or 2.9.9 of the Order dated 16.8.2006. It has also been submitted that there is no provision for the Commission to 'modify' any order. The jurisdiction is to 'review' an order and which has not been sought for by MSEDCL.

9. Shri. G.N. Kamath appearing on behalf of REDAM argued that it would require to be investigated as to whether the shortfall in RE procurement is due to non-availability of RE power / unpredictable nature of RE generation or due to non-execution of energy purchase agreements by MSEDCL with RE generators. He also submitted that a law without any enforcement mechanism is no law.

10. Subsequently, MEDA submitted a letter dated 7.8.2008 stating that MSEDCL being a contributing licensee had purchased costlier renewable energy and compensated by drawee licensees, thus, MSEDCL gained by Rs.2.40 crores in 2004-05 and Rs.4.072 crores in 2005-06. MSEDCL has gained while purchasing additional renewable energy over and above RPS obligation and therefore they must pay penalty for not fulfilling RPS obligation. MEDA has also contended that MSEDCL has not taken any efforts for bringing in its own RE generation even though there is sufficient RE potential available in the State. MEDA also contended that the RPS Order dated 16.8.2006 needs to have teeth for effective implementation and therefore the argument that the Commission is not empowered to levy penalty, is not agreeable by MEDA. Further, in terms of Clause No.2.10.9 of the RPS Order dated 16.8.2006 MEDA has enforced the penalty and reported the matter to the Commission on 2.8.2008. MEDA has also submitted that RPS Order dated 16.8.2006 has resulted in several benefits among all stakeholders since the said order has promoted non-conventional energy sources.

11. Under letter dated 14.8.2008, InWEA has filed its written submissions reiterating the stand taken during the hearing.

12. MSEDCL has filed its written submissions on 9.9.2008, responding on the contentions raised by InWEA and the Task Force Report submitted by MEDA. It is averred in the said written submission that to meet the RPS target, MSEDCL has contracted with RE developers for purchase of RE. Contracted capacity and expected units thereof are as follows:



S. No.	Category	NOC / EPA's in operation in 2007 - 2008	Total capacity	Expected Units
	Bagasse	17	173.5	733.632
	NCNQ	4	7.5	24.192
	Biomass	2	18	65.192
	Small Hydro (Private)	2	30	78.84
	Small Hydro (MSPGCL)	19	182	637.728
	Wind Group - I	13	18.18	28.666224
	Wind Group - II	144	116.003	182.9135304
	Wind Group - III		1056.45	1850.9004
	TOTAL		1601.633	3602.064154

Although, based on the above, MSEDCL should have achieved the target of 4.56% which is above the stipulated target of 4%. However, the actual achieved target is 3.56% for FY 2007-08. Furthermore, MSEDCL has refuted the contention taken by MEDA that MSEDCL has not made any efforts towards its RPS obligation. With regard to bringing in its own RE generation, MSEDCL has submitted that MSPGCL is a separate legal entity in whom the generation functions vest. The SHP of MSPGCL has the total and commissioned capacity of 182 MW. MSEDCL is also developing a site at Deogad for a wind farm project. MEDA is yet to finalise the wind study report in this regard. MSEDCL has made an interim arrangement with solar power developer and given in principle approval for grid connectivity. In view of the above, it has been submitted that MEDA's argument that no efforts have been made by MSEDCL to comply with the RPS Order dated 16.8.2006 is incorrect and totally unacceptable as the same is without any substance and without any facts and figures. MSEDCL is not required to be levied with any penalty as claimed by MEDA in its letter dated 2.8.2008 because as per the contracted capacity of RE developer, MSEDCL should have achieved the target of 4.56% which is above the stipulated target of 4%. In any case such penalty is to be recovered from the generator / open access (OA) consumer / captive consumer. However, MEDA has not enforced any penalty on such OA consumers or captive consumers.

13. With regard to InWEA's contentions, MSEDCL has replied to the same in its written submissions, as under:

- (i) The UI mechanism revolves around the Grid Security and also the UI mechanism pertains more to power purchase by different utilities at specific frequency. UI charges are pass through and covered in the ARR of the utilities. As such, UI Charges (incentives and disincentives) under the CERC's ABT Order dated 4.1.2000 is totally irrelevant to the present case. Linking UI charges to the present case is nothing short of misleading the Commission.
- (ii) Neither InWEA nor its members have supplied (a) expected MUs which is beyond the control of MSEDCL; (b) list of developers who have not supplied the committed energy as per EPA and as per the Order dated 16.8.2006.



- (iii) Members of InWEA will be liable to pay penalty as per the Order dated 16.8.2006 in case of shortfall of contracted energy.

DECISION WITH REASONS:

14. Having heard the parties and after considering the material placed on record, the Commission is of the view that it has jurisdiction to decide on issues raised in the present petition as specifically presented and pleaded in the petition and the prayers made therein. It is settled procedure that any relief that a petitioner desires to be granted must be specifically pleaded in the Petition. It is also settled procedure that any ground that the Petitioner desires to rely upon or bring to the notice of the Commission must be specifically pleaded by way of written pleadings. In that view of the matter, the Commission is not inclined to go into the issue as to whether the enforcement charges are penalty or not or whether the Commission has jurisdiction or the power to impose such enforcement charges under its Order dated 16.8.2006. The Commission cannot decide a case based on oral arguments only. Therefore, the Commission does not wish to express on the issues as stated above. Consequently, all contentions on the above issues as raised by InWEA and by MEDA, are not dealt with, because the principal petition filed by MSEDCL does raise any such issue to be decided. In its written submissions filed on 9.9.2008, it is submitted that MSEDCL is not required to be levied with any penalty as claimed by MEDA in its letter dated 2.8.2008 because as per the contracted capacity of RE developer, MSEDCL should have achieved the target of 4.56% which is above the stipulated target of 4%. It is also submitted therein that in any case such penalty is to be recovered from the generator / open access (OA) consumer / captive consumer. However, MEDA has not enforced any penalty on such OA consumers or captive consumers. As for the Commission, it cannot travel beyond the petition filed by MSEDCL and will not go into the issue of levying or non-levying of penalty on OA/ captive consumer or generator.

15. The Commission can only examine the contentions raised in the petition filed by MSEDCL and the prayers made therein. The prayers that have been made therein are as under:

“1) MSEDCL prays to kindly exclude the clause pertaining to penalty in case of short supply of power by the RE generators or shortfall in procurement by MSEDCL (Utility);

2) Modify the RPS Order dated 16.08.2006 accordingly;

3) Pass any other order as may be deemed fit in the interest of justice and in the interest of promoting non-conventional energy sources, at the same time, protecting the MSEDCL's commercial interest.”

16. In its Order dated 26.9.2007 in Case No. 4 of 2007, the Commission had observed that in such cases owing to the insufficiency of renewable energy sources available in Maharashtra, REL could achieve the cumulative average of the RPS percentage (as otherwise specified for FY 2006-07, FY 2007-08, FY 2008-09 and FY 2009-10) and had



opined that REL should try to make good any shortfall in the RPS target pertaining to one fiscal year, in the following fiscal year. This would apply to MSEDCL as well.

The Commission had observed that REL would be able to adhere to RPS targets, should it adhere to the energy input requirement levels as specified by the Commission. REL has to re-assess their energy input requirement levels and endeavour achieving the RPS targets.

It is relevant to point out to certain paragraphs of the said order as under:

“13.Further, as regards FY 2007-08, the Commission would like to highlight that MSEDCL under its MYT Petition (Ref. Commission’s Order for Case 65 of 2006 – clause 5.3, page 125) had projected renewable energy procurement in excess of 4% of its projected energy input requirement indicating excess availability of renewable energy sources during FY 2007-08. During FY 2007-08, MSEDCL had projected power procurement from renewable energy sources of 4640 MU comprising 3720 MU from wind energy sources and 920 MU from co-generation projects. Thus, need for review of stipulated RPS percentage would arise only upon availability of findings of the study to be undertaken by the Task Force constituted by MEDA.”

“18. However, the Commission is yet to receive any submission from MEDA and MSEDCL in this matter. The Commission is of the opinion that need to review the RPS targets for FY 2007-08, FY 2008-09 and FY 2009-10 can be ascertained only after receipt and validation of RE data of previous years from MEDA/MSEDCL and upon availability of findings of the study initiated by Task Force constituted by MEDA.”

On 28.5.2008, MEDA filed a Technical Taskforce Report dated 19.4.2008, in terms whereof :

“

3.4 Expected status of RPS 2007-08:

Based on the data made available by distribution licensees upto January, 2008 i.e. MSEDCL, TPC and BEST, expected availability of RE in the state and anticipated percentage of RE vis a vis conventional energy is given in table 3.3.

TABLE 3.3

<i>Particulars</i>	<i>RE Addition (MUs)</i>	<i>Conventional Energy</i>
<i>Data between April to Jan. 08</i>	<i>2710.220</i>	<i>77119</i>
<i>Projected data Between Feb. to Mar. 08</i>	<i>501</i>	<i>19698</i>
<i>Total</i>	<i>3211</i>	<i>96817</i>



<i>RPS % fixed By Hon. Commission</i>	4%
<i>Expected RE % for 2007-08</i>	3.31% (4%**)

RPS % upto Jan 2008 is 3.51%

***In view of the discussion in para 3.3, it is expected that during 2007-08 also 4% stipulation of green energy is likely to be achievable.*

Note: Calculations as per the RE and consumption data submitted by the licensees. The MEDA is in process of getting data of RE from all other resources.

From the initial data collected from the concerned stakeholders, it appears that certain utilities have implemented the RPS order in true spirit and have made investment in this sector on their own as well as have made tie ups with the RE generators. Such utility has not just achieved the RPS target but has exceeded this target.

The TTF believes that other utilities could have achieved or exceeded the target, had they taken the RPS order seriously. The general impression given by some of the utilities suggests that they were employing more efforts in downsizing the RPS target rather than taking genuine interest in achievement of target. This tendency of the utilities not abiding by the RPS target needs to be curbed by effective implementation of the RPS order.

In any case, in view of premise made out in section 3.3, the TTF believes that the 4% RPS stipulation for 2007-078 would be achieved in the state. The TTF strongly believes that the penalty levied from the “eligible persons’ towards shortfall of the RPS target of 4%, if any, may further accelerate investment in the sector.”

“

3.6.2 Impact of Proactive Actions:

*.....
The addition in RE power in the state after pronouncement of RPS order is elaborated in Table 3.4.*

TABLE 3.4

Sr. No.	Source	Potential in the state (MW)	Achievement (MW) (31st March 2006)	Achievement (MW) (31st March 2008)	Addition after RPS order
01.	Wind	4584	1001.135	1753.785	752.650
02.	Small Hydro Power (SHP)	600	211.320	211.320	0



03.	<i>Biomass</i>	781	14.000	58.000	44.000
04.	<i>Bagasse</i>	1250	98.060	173.360	75.300
05.	<i>Urban waste</i>	287	0.000	0.000	0
06.	<i>Industrial waste</i>	350	6.125	6.125	0
	Total	7852	1330.64	2202,59	871.950

From the above table 3.4, it is seen that there was sudden spurt in the growth of RE sector after pronouncement of RPS order. In fact, the cumulative rate of growth during these two years was phenomenal 65.53%.”

17. It is apparent that in order to grant the prayers made by MSEDCL as above it would be necessary for the Commission to review its Order dated 16.8.2006. In this regard, the Commission is of the view that neither has MSEDCL filed a review petition justifying the allowable grounds of review nor has otherwise been able to make out a case of review of the Order dated 16.8.2006. There is nothing to point out in the Petition that there is any new or important matter or evidence which after the exercise of the due diligence was neither in the knowledge of MSEDCL nor could be produced by it when the said Order dated 16.8.2006 was passed. The contention that generators may not be able to fully generate as per the contracted capacity does not fall within the ambit of the allowable ground of review as stated above. This contention cannot be taken to mean that there is or has been a mistake or error apparent on the face of the Order dated 16.8.2006. The rule of *ejusdem generis* does not permit to allow the above contention to be taken as an allowable ground for review as ‘sufficient reasons’. The aforesaid allowable grounds are provided under Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004. These Regulations also entitle an applicant to apply for review where there are allowable grounds, within 45 days from the date of passage of the order for which review is proposed to be sought. The order with regard to which the present petition has been filed by MSEDCL is dated 16.8.2006 and therefore, there is a delay of nearly 550 days for coming up to seek a modification thereof. So therefore neither is there any allowable ground for review when tested with the requirements of Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004 nor can such an enormous delay be condoned in the facts and circumstances of the present case.

18. The basis of the present petition is that most of the non-conventional energy is infirm power which totally out of the control of the generator. It is the contention of MSEDCL that such costs of enforcement should be waived because there is merit in the generator’s claim that they virtually have no control over generation of electricity from non-conventional energy sources. MSEDCL also feels that levy of such charges on the generator or on MSEDCL will not be fair since the said power is neither in control of MSEDCL nor in the control of generators. However, the Commission finds that no generator has represented in the present proceeding that they have any difficulty and that they would like to seek a waiver or exemption from the enforcement charges under the order dated 16.8.2006. The correct locus-standi would be that of the generators who are being represented by InWEA and REDAM in the present proceeding, none of whom have sought for such waiver or exemption.



19. Needless to mention that the duty to promote cogeneration and generation of electricity from renewable sources of energy vests with both the distribution licensee as well as the generators. Therefore, the Order dated 16.8.2006 makes it mandatory not only for the distribution licensee to procure the specified percentage of power from such sources but makes it mandatory for the generators to supply as per the contracted capacity. Just like it will be inequitable to dispense with the enforcement mechanism qua one of these two parties, similarly, in the absence of an enforcement mechanism it will be difficult for the Commission to discharge its mandatory function under Section 86(1)(e) of the E.A. 2003 to promote cogeneration and generation of electricity from renewable sources of energy and also to specify for purchase of electricity from such sources, a percentage of the total consumption of electricity.

20. In these proceedings, TPC's submission has been that the Commission should provide suitable incentive to utilities who have taken additional efforts and have met their RE obligation targets by putting up NCE generation on their own such as TPC has set up wind farms to fulfill its RPS obligations. The Commission is of the view that these submissions cannot be considered in the present proceedings as the same are outside the scope of the Petition filed by MSEDCL.

With the above, the present Case No.13 of 2008 stands disposed of.

(S.B. Kulkarni)
Member

(A. Velayutham)
Member



(P.B. Patil)
Secretary, MERC