

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 89 of 2007

In the matter of
Petition filed by Maharashtra State Electricity Distribution Company Ltd. seeking directives in respect of purchase of wind power and/or wheeling of energy for long term commercial arrangement from Wind Farm Projects under Group II category, after expiry of validity period.

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

ORDER

Dated: October 7, 2008

The Maharashtra State Electricity Distribution Company Limited (MSEDCL) submitted a Petition under affidavit, before the Commission on January 21, 2008, under Section 86 (a), (b) and (e) of the Electricity Act, 2003 (EA 2003) inter alia seeking directives / Order for long term commercial arrangement in respect of tariff and other commercial terms and conditions for the purchase of wind energy and/or wheeling of energy from Wind Farm Projects (WFP) under Group II category, after the expiry of the validity period.

2. MSEDCL, under its Petition, prayed as under:

“The Petitioner (MSEDCL) hereby prays to approve the following proposal, for long term commercial arrangement, in the matter of Tariff & other commercial terms & conditions for the purchase of wind energy and / or wheeling of energy from Wind Farm Projects under Group II Category after expiry of validity period,

A) For sale of power to MSEDCL under group II project, for Long Term Commercial Arrangement for period of 2007.08 to 2011-12 (For 5 Years)

i) For Financial Year 2007-08

The MSEDCL shall purchase the wind power at the rate of 90% of Lowest HT Industrial Energy Tariff rate in the TOD slot i.e. Rs. 1.17 per KWH (for April 2007, HT-I- Industries Continuous) {(215-85) X 90%} fixed rate with no variation.

ii) For Financial Year 2008-09



The MSEDCL shall purchase the wind power at the rate of 90% of Lowest HT Industrial Energy Tariff rate in the TOD slot applicable for April 2008, HT-I-Industries continuous, fixed rate with no variation.

iii) For Financial Year 2009-10

The MSEDCL shall purchase the wind power at the rate of 90% of Lowest HT Industrial Energy Tariff rate in the TOD slot applicable for April 2009, HT-I-Industries Continuous fixed rate with no variation.

iv) For Financial Year 2010-11

The MSEDCL shall purchase the wind power at the rate of 90% of Lowest HT Industrial Energy Tariff rate in the TOD slot applicable for April 2010, HT-I-Industries Continuous fixed rate with no variation.

v) For Financial Year 2011-12

The MSEDCL shall purchase the wind power at the rate of 90% of Lowest HT Industrial Energy Tariff rate in the TOD slot applicable for April 2011, HT-I-Industries Continuous fixed rate with no variation.

vi) *The tenure of Energy Purchase Agreement shall be 5 years. This is the highest proposed rate for purchase of energy and the commission is requested to suitably fix a lower tariff based on the various submissions as above and considering the fact that the cost is now fully recovered by the wind Generators & now the only cost they (wind generators) will incur is the O&M & Incidental costs.*

B) For the Option of Sale of Power to Licensee, Tata, Reliance, BEST & MPECS after expiry of Validity period

*If any Wind energy developer (under Group II category) after expiry of Validity period, wishes to sell to energy to any **distribution Licensee**, Tata, Reliance, BEST & MPECS, after expiry of Validity period, then **such transaction shall be governed by MERC (Transmission Open access Regulations), 2005 or MERC (Distribution Open Access) Regulations, 2005**, as the case may be. The transmission charge, transmission loss, wheeling charge and wheeling loss shall be applicable for such open access wheeling transactions as determined by the Commission through its various Orders from time to time.*

C) Self Use cases after expiry of Validity period {Self use (51%) & Third Party Sale (49%)}

Electricity Supply Act 2003 came into force and accordingly self-use option will be continued ever after expiry of agreement period of 8 years.

As per sub-section (2) of Section 9 of EA 2003, every person who has constructed captive generating plant has right to open access for the purpose of carrying electricity from his captive generating plant to destination of its use subject to availability of transmission capacity.

In case of captive consumer consuming Wind Energy solely for Self Use can be permitted as per section 9 of 2003. Hence, MSEDCL will continue to provide credit adjustment as per Open Access (OA) Wheeling Transaction with applicable



wheeling charges, wheeling losses, transmission charge and transmission losses in respect of such captive wheeling transactions.

Further as per provision of EA 2007, subsection 3 no license is required under this act for supply of electricity for captive consumption (Self use, 51%) and partly third party sale (49%)

D) For the Option Sale of Power to Third Party in the MSEDCL Licensee Area of Operation, after expiry of Validity period

For Option of sale of power to third party cases (Bhushan Steel & Strip Ltd), License from Appropriate Commission / MERC is required as per section 12 to 15 of Electricity Act 2003 and as per Hon'ble High Court Mumbai order dated 4.04.2005, supported by Hon'ble Supreme Court order dated 17.05.2005.

For the **Option of Third Party sale** in the MSEDCL licensee Area Operation, after expiry of Validity period, **license from Appropriate Commission/ MERC is required as per section 12 to 15 of Electricity Act 2003.**

E) Hon'ble Commission is requested that interest should not levied for the period from 01.04.2007 till finalization of Tariff by MERC.

F) This Hon'ble Commission approve the aforesaid proposal put forward by the Petitioners and issue directions/order accordingly.

G) This Hon'ble Commission may be pleased to issue a direction that the order passed by the Commissioner in this petition shall be applicable for financial year 2007-08 to 2011-12 (i.e. for period from 1st April 2007 to March 2012), after expiry of validity of Wind Power project Group II category.”

3. MSEDCL, under its Petition, referred to various Orders issued by the Commission, viz.,:

- a) Order dated November 20, 2007 in the matter of Petition filed by MSEDCL seeking directives in respect of issues connected with procurement of wind energy from Group-II Category wind energy projects post the expiry of eight years from the date of commissioning of the said projects (Case No. 33 of 2007);
- b) Order dated November 24, 2003 in the matter of application filed by (i) The Maharashtra State Electricity Board [MSEB], (ii) Shri Pratap G. Hogade, (iii) Renewable Energy Developers Association of Maharashtra [REDAM], and (iv) Indian Wind Energy Association [InWEA] for procurement of Wind Energy and wheeling for Third Party sale and/ or Self-use (Case No. 17(3), 3, 4 & 5 of 2002);
- c) Clarificatory Order dated September 30, 2004 in the matter of clarification of various provisions of Order dated 28.11.2003, regarding procurement of Wind Energy sought by (i) Mahratta Chamber of Commerce, Industries & Agriculture,



- Pune; (ii) Indian Wind Energy Association (Case No.s 7, 15 and 16 of 2004 read with 17(3), 3, 4 & 5 of 2002);
- d) Order dated September 12, 2006 in the matter of Petition filed by M/s. Renewable Energy Developers Association of Maharashtra for implementation of Commission's Order dated 24th November 2003 and Clarificatory Order dated 30th September 2004 in Case Nos. 17(3), 3, 4 & 5 of 2002 read with Case Nos. 7, 15 and 16 of 2004 (Case No. 10 of 2006);
- e) Order dated September 10, 2004 in the matter of Review of Order dated 24.11.2003 for procurement of Wind Energy, etc., conditions for change from self-use / third party sale to sale to MSEB (Case No. 59 of 2003 read with Case No.s 17(3), 3, 4 & 5 of 2002);
- f) Order dated August 16, 2006 in the matter of Long term Development of Renewable Energy Sources and associated Regulatory (RPS) Framework (Case No. 6 of 2006).

4. Subsequently, MEDA vide its affidavit dated February 27, 2008, responded to the Petition filed by MSEDCL, and submitted as under:

- a) "The Commission in its Wind Tariff Order (WTO) dated November 24, 2003, had assumed an investment of Rs. 500 Lakh per MW while determining energy tariff for Group II wind energy projects. As against the assumed capital investment of Rs. 500 Lakh per MW, the wind projects have availed following benefits:
- i) 100% depreciation on invested amount. Project promoters have saved income tax of Rs. 183.75 Lakh per MW thereby project is equity free in first year itself.
- ii) 100% sales tax benefit (around 500 Lakh per MW) on eligible amount of project
- iii) Rs. 20 Lakh capital subsidy per promoter
- iv) Revenue from generation depending on the year of commissioning as follows:

Year of Commissioning	Total revenue generation for 8 years assuming 18% PLF (Rs. Lakh)
1999-2000	401.769
2000-2001	415.644
2001-2002	429.52
2002-2003	443.396

5. InWEA, vide its counter affidavit dated March 1, 2008, opposed the Petition filed by MSEDCL and submitted as under:

- a) MSEDCL has determined the energy tariff rate to be paid to the wind energy generators without any consultation with the wind farm developers, which is a violation of the provisions of EA 2003, and hence, regulatory process should be adjourned till MSEDCL and InWEA and REDAM agree on the tariff rate



- proposal to be submitted for approval of the Commission under Section 62(1) (a) of EA 2003.
- b) Denial of the interest to be paid to the wind energy developers whose EPAs / PPAs have expired and from whom MSEDCL would procure electricity, would violate the law and Judgment dated February 5, 2008 passed by the Appellate Tribunal of Electricity (ATE) in Appeal No. 15 of 2007 (MSEDCL Vs. MERC and Anr). Interest is payable to wind farm developers by way of compensation in the payment of bills raised by the wind farm developers and payable by MSEDCL.
 - c) MSEDCL's contention that the Commission's ruling specified in Order dated November 20, 2007 is contradictory to its earlier Orders dated September 30, 2004 and September 12, 2006, would be the subject matter of review Petition, which has not been filed by MSEDCL. Further, the Commission has already issued its Order dated February 13, 2008 in the matter of Complaint filed by Renewable Energy Developers Association of Maharashtra seeking implementation of Order dated November 20, 2007 passed in Case No. 33 of 2007 (Case No. 85 of 2007).
6. REDAM, vide its counter affidavit dated March 3, 2008, opposed the Petition filed by MSEDCL and submitted as under:
- a) The National Electricity Policy (NEP) clearly and expressly stipulates that purchase by distribution licensee from non-conventional sources of energy would be through competitive bidding process, however, MSEDCL has already specified the energy tariff rate to be paid by it to the wind farm developers without even making any efforts to discuss, consult and agree to the same with the participation of the wind farm developers, which is a violation of the provisions of EA 2003, and hence, regulatory process should be adjourned till MSEDCL and REDAM and InWEA agree on the tariff rate proposal to be submitted for approval of the Commission under Section 62(1)(a) of EA 2003.
 - b) Although MSEDCL has stated that it had filed the Petition under the provisions of Sections 86 (a), (b) and (e) of EA 2003, MSEDCL at paragraph 22 (A)(i) of its Petition and at various other places has stated that the Commission's ruling specified in its Order dated November 20, 2007 is contradictory to its earlier Orders dated September 30, 2004 and September 12, 2006.
 - c) MSEDCL has stopped issuing Credit Notes to certain wind farm developers from April 1, 2007, although the electricity is fed into the grid. No payment has been received so far despite repeated follow up for the same. Section 70 of the Indian Contract Act 1872 makes it obligatory on the person who enjoys the benefits of non-gratuitous act to pay compensation to the person who has provided the benefit.
 - d) MSEDCL's proposal that wind farm developers under Group II category should sell power only to MSEDCL thereby forcing them is contrary to EA 2003 and cannot be sustained under law. Wind farm developers are entitled to sell power from their wind farms to any of the following:



- i) Any distribution licensee at the tariff to be determined by the Commission under Section 62(1)(a);
- ii) Any distribution licensee at the tariff to be determined through a transparent process of bidding in accordance with the guidelines issued by the Central government, as provided under Section 63 of EA 2003;
- iii) Supply of electricity by a captive plant to any distribution licensee or electricity trader (who is also a licensee under Section 14(c) of EA 2003) or consumer in terms of proviso to sub-section (1) of Section 9 as amended by the Electricity (Amendment) Act, 2007 notified w.e.f. June 15, 2007;
- iv) Any Open access consumer as provided in Section 10(2) of EA 2003 read with Section 49.

7. At the admissibility hearing held in the matter on March 5, 2008, Smt. Deepa Chawan, Advocate for MSEDCL submitted that in the present matter, a Public hearing would be required keeping in view the provisions of Section 64 read with the provisions of Section 86(1)(a) and (b) of EA 2003. The Commission observed that once the tariff has been determined under WTO dated November 24, 2003, for eight years, thereafter it may be discovered through competitive bidding. Even the Tariff Policy stipulates that competition be brought in for procurement from renewable energy (RE) sources whenever it is feasible. Therefore, after expiry of eight years period, wind energy developers are free to sell power to any person and to any licensee, through competitive bidding.

8. Shri. Harinder Toor, Advocate for REDAM, submitted that tariff should not be determined for sale of power after the period of eight years, once the tariff has already been determined and the same having expired post the period of eight years. REDAM pointed out that MEDA has completed a study and the same could be made available by MEDA. The Commission observed that no such study report has been submitted to the Commission by MEDA. Further, MSEDCL has already sought the very same reliefs in an earlier Petition, wherein MSEDCL has prayed for the tariff to be determined. It is fallacious on the part of MSEDCL to contend that the Commission has passed an Order disposing of their aforesaid earlier Petition seeking determination of tariff, when the same Order stipulates that the present petition be filed by MSEDCL. The Commission opined that the proposal for interim determination of tariff is also misconceived because the time period of the earlier Agreements has not elapsed for certain cases. The time period of eight years lapses variously between March 31, 2008 to March 31, 2011. The Commission had held in its earlier Order that if any wind energy developer under Group II category wished to sell energy to MSEDCL or to any distribution licensee post the stipulated eight year period which is from March 31, 2008 onwards, a Petition should be filed either by the concerned distribution licensee or wind energy developer to initiate separate proceedings in the matter before Commission for seeking approval of proposed long term commercial arrangement.



9. Respondents further submitted that the Tariff Policy and National Electricity Policy stipulate that power from Non-Conventional Energy (NCE) sources needs to be procured through the process of competitive bidding. Regulations 7.1, 7.2, and Part D (Electricity Purchase and Procurement) of the MERC (Terms and Conditions of Tariff) Regulations, 2005 [Tariff Regulations] were referred to and it was stressed that with regard to the procurement of power from the wind farm developers post the period of eight years (long-term power procurement), MSEDCL would need to have in place a long-term power procurement plan for the period post March 31, 2008. It was submitted that Regulation 23.5 of the Tariff Regulations stipulates that *“Where the Commission has stipulated a percentage of the total consumption of electricity in the area of a Distribution Licensee to be purchased from cogeneration and renewable sources of energy, the long-term power procurement plan of such Distribution Licensee shall include the plan for procurement from such sources at least upto the stipulated level.”*

10. The Commission observed that the issues that have been pointed out are not germane to the present proceedings. However, in case there are any proposed power purchase or power sale agreements, then they should be filed for approval of the Commission in accordance with Regulation 7.1 of the Tariff Regulations. The Commission also observed that post the eight-year period, MSEDCL or any other distribution licensee in the State may procure power by competitive bidding process and in which case there will be no need to approach the Commission for its approval. However, the competitive bidding documents will need to be vetted by the Commission.

11. MSEDCL filed an additional affidavit in the matter to the Commission under Section 62, 64 and 86 (a), (b) and (e) of EA 2003 on June 13, 2008 inter alia seeking policy directives from the Commission for purchase of wind power and/or wheeling of energy from wind farm projects under Group II category pursuant to the directives issued by the Commission. MSEDCL in its Petition submitted as under:

- a) As regards the Commission’s Order dated November 20, 2007, wind developers can sell energy to MSEDCL or any distribution licensee, post termination of stipulated period of eight years (from date of commissioning of project). The Commission has not determined tariff rate for sale of energy to MSEDCL, post termination of stipulated eight-year period. Wind developers whose EPA / EWA have expired on December 27, 2007 are still feeding energy to MSEDCL grid and MSEDCL is unable to make the payment in absence of any tariff approved by the Commission.
- b) Year-wise project commissioning details for the option of sale of power to MSEDCL, Self-use and sale of power to Third Party are as under:

Sl.	Year of Commissioning	Sale to MSEDCL		Self-use		Third Party Sale		Total MW	
		No.	MW	No.	MW	No.	MW	No.	MW
	Group II								



1	1999-2000	8	10.35	5	9.25	8	44.72	21	64.32
2	2000-2001	40	38.94	15	34.37	18	29.675	73	102.99
3	2001-2002	93	63.12	56	81.89	29	50.623	178	195.63
4	2002-2003	3	3.6	0	0	0	0	3	3.6
	Grand Total	144	116.01	76	125.51	55	125.02	275	366.53

12. MSEDCL essentially reiterated its earlier proposal of 90% of lowest Energy Rate of TOD slot as applicable for HT-I Industrial consumers for a period of five years. MSEDCL further stated that pending notification of Guidelines for Competitive Bidding for renewable energy projects by the Central Government, it had explored the option of bilateral negotiation by inviting offers from wind energy developers, which has ranged from Rs. 3.50/kWh to Rs. 3.85/kWh. MSEDCL also referred to MEDA's submission that Group-II wind projects have availed income tax benefits on account of accelerated depreciation (upto Rs 183.75 Lakh/MW), sales tax benefit (upto Rs 500 Lakh/MW), capital subsidy (upto Rs 20 Lakh/promoter) and wind energy tariff for eight-year period (varying from Rs. 2.80/kWh in FY 1999-2000 to Rs. 3.68/kWh in FY 2007-08). Accordingly, Group-II wind energy projects have been relieved of all commercial liabilities/obligations and all fixed costs have been fully recovered over the eight-year period. Further, only O&M costs and incidental expenses needs to be incurred by Group-II wind energy projects over remaining project life. MSEDCL requested the Commission to take into consideration above aspects while determining tariff and other commercial conditions.

13. The Commission, vide its Notice dated July 16, 2008, scheduled the hearing in the matter on August 12, 2008, which was further postponed to August 13, 2008.

14. Meanwhile, M/s Bajaj Finserv Ltd. (BFS) filed its intervention application dated August 5, 2008 seeking specific clarifications regarding expiry of validity period of Group II wind energy projects for Self-use/Third Party sale and requirement of license (trading / wheeling) by MSEDCL to continue 100% sale of wind energy to Third Party as per the Commission's WTO dated November 24, 2003 during and after eight years of project life. BFS under its application submitted as under:

- a) MSEDCL has stopped wheeling of wind energy from existing Group II wheeling projects w.e.f. April 1, 2008 and has demanded exorbitant wheeling charges other than those specified under WTO dated November 24, 2003.
- b) As regards the High Court's order dated December 18, 2007, BFS is the owner of wind power project and BAL is the wind energy user.

15. BFS, under its application, prayed as under:

- a) The Commission should direct MSEDCL to re-establish wheeling of wind energy from existing Group II wheeling projects who have opted for Self-use/Third Party



sale since beginning and still desire to continue as per WTO dated November 24, 2003 and to adjust banked units in respective months in current year only.

- b) The Commission should direct MSEDCL that WTO dated November 24, 2003 is operative for existing Self-use/Third Party sale of Group II projects during and after eight years of project life with 2% wheeling charges and 5% transmission losses and wheeling charges specified in MSEDCL MYT Order dated October 20, 2007 (Case No. 65 of 2006) are not applicable to wind energy wheeling transactions.
- c) MSEDCL / licensee should not apply tariff or Regulations of conventional energy sources to non-conventional energy sources, where respective non-conventional energy sources Tariff Orders are existing and operative.
- d) The Commission should direct MSEDCL/licensee that, trading, wheeling/transmission licence is not required for part or 100% sale of grid connected wind energy to “Third Party” till wheeling transactions are as per WTO dated November 24, 2003.

16. REDAM, vide its rejoinder dated August 5, 2008, opposed the Petition filed by MSEDCL and sought interim and/or ad-interim Order by the Commission and submitted as under:

- a) MSEDCL has been enjoying the benefit of compliance with RPO/RPS stipulations due to off-take of energy supplied by the Group II wind projects.
- b) Tariff determined by the Commission for last financial year of eight year cycle, i.e., Rs. 3.79 per kWh should be payable by MSEDCL to Group II wind energy developers until the tariff for sale of energy to MSEDCL is determined by the Commission or until MSEDCL adopts competitive bidding process or until Group II wind energy developers find third parties to sell such energy.
- c) Besides payment of tariff, it would be MSEDCL’s liability to pay interest for the amounts that MSEDCL was bound to pay to Group II wind energy developers for off-taking the energy that has been fed into MSEDCL’s grid even after expiry of EPA tenure. MSEDCL is liable to pay interest at a rate of 2% above the SBI short term lending rate.
- d) Rates proposed by MSEDCL are not acceptable, as it is not based on rational methodology. REDAM has taken into consideration the impact and feasibility of the tariff as proposed by MSEDCL including the need to cover retrofitting cost of wind turbines post eight to ten years period. Instead of MSEDCL’s proposal of 90% of HT-I Continuous industry tariff corrected for lower tariff rate under the TOD zone, REDAM proposed rate equivalent to 90% of HT-I tariff for Continuous industry corrected for surcharge/discount based on actual generation under respective TOD zones. Tariff proposed by REDAM is as under:

Particulars	Upto 07 Apr	May 07 to May 08	W.e.f. June 08	W.e.f. June 08



As per MSEDCL				
HT-1 lowest tariff (i)	2.15	3.10	4.30	4.30
TOD discount (ii)	-0.85	-0.85	-0.85	-0.85
Tariff plus/(minus) TOD	1.30	2.25	3.45	3.45
90% of (iii)	1.17	2.03	3.11	3.11
Counter Proposal by REDAM				
HT-1 lowest tariff (i)			4.30	4.30
TOD discount/recovery (ii)			0.34*	0.18*
Tariff plus/(minus) TOD			4.64	4.48
90% of (iii)			4.17	4.03

* TOD discount + surcharge is based on actual generation from 2 different wind farms during respective time slots in April 2007 to March 2008 of a member of REDAM.

- e) The aspect whether capital cost of the wind developers have been fully recovered or partially recovered or not recovered is completely immaterial for the purpose of the mandate given to the Commission under Section 86(1)(e) of EA 2003 to specify a percentage of total consumption of electricity in the area of distribution licensee for purchase of electricity from renewable sources.

17. At the hearing held in the matter on August 13, 2008, Shri Vikas Singh, Senior Counsel for MSEDCL submitted that in terms of the liberty granted by the Commission to file fresh Petition in its Order dated November 20, 2007 in Case No. 33 of 2007, MSEDCL had filed the Petition for fixation of tariff of Group II wind energy projects post the expiry of EPA. Shri Vikas Singh submitted that the wind generators should not be entitled to any extra profits other than that stipulated under EA 2003. Group II wind energy generators have received several financial benefits in the initial phase in terms of the Tariff Order passed by the Commission on November 24, 2003. Shri Vikas Singh further submitted that the said Order having worked itself out, the present Petition seeks the determination of a new regime applicable to such generators.

18. The Commission observed that similar issues have been dealt with in its Order dated November 20, 2007 in Case No. 33 of 2007 and further in the earlier hearing conducted on March 5, 2008 in the present Case No.89 of 2007. Shri. Vikas Singh submitted that in the earlier proceedings as referred by the Commission, the Commission had stipulated that MSEDCL ought to initiate competitive bidding for procurement of power or execute power sale agreements. There exists an anomaly in this regard as Section 63 of EA 2003 makes it mandatory for MSEDCL to comply with competitive bidding guidelines notified by the Central Government. However, since no such



guidelines have yet been notified by the Central Government, the question of initiating competitive bidding by MSEDCL does not arise. Shri Vikas Singh further submitted that MSEDCL had written to various wind energy generators under Group-II category asking them as to what they propose for sale of power after the expiry of the eight-year period stipulated by the Commission under its Order passed in November, 2003. These generators have responded by proposing identical rate for sale of power with minor variations for each generator, thereby implying that there is a cartel amongst them, thereby preventing competition. Shri Vikas Singh submitted that in real terms, the competitive bidding regime would be applicable when there would be large-scale power generation thereby offering competitive rates to the procurer licensee. However, since the stage of large-scale generation has yet not happened in the State of Maharashtra, competitive bidding is not applicable. Shri Vikas Singh submitted that neither is there currently any competitive bidding undertaken by MSEDCL nor is there any EPA signed with these generators post the expiry of eight-year period. Shri Vikas Singh stated that for the power that is injected by these generators into the grid even after expiry of their EPAs, no amounts are payable by MSEDCL to these wind generators. Shri Vikas Singh submitted that in the cost plus regime, these Group II wind energy generators have already recovered their costs and MSEDCL is agreeable to pay a tariff, which would include the cost of generation, O&M and the reasonable return. Shri Vikas Singh further submitted that since the wind energy generators continue to inject power into the grid without having any agreement with MSEDCL and even then if these generators do not agree to the tariff as proposed by MSEDCL, then there would be a dispute between MSEDCL and these generators. MSEDCL needs to know the tariff that it will be required to pay to Group II wind energy generators for off-taking the power generated by them. The Commission should safeguard the interest of all stakeholders.

19. Counsel for MSEDCL submitted that in its Order dated November 20, 2007 in Case No. 33 of 2007, the Commission had stipulated that an application seeking determination of tariff could either be filed by the distribution licensee or the generator. He further referred to Section 63 of EA, 2003 and submitted that the competitive bidding guidelines contemplated thereunder must be notified by the Central Government, in the first instance. The Commission observed that it is open to MSEDCL to formulate competitive bidding documents and submit the same to the Commission for approval.

20. Counsel for MSEDCL submitted that due to the percentage of renewable purchase specification mandated on MSEDCL, Group II wind energy generators are arm-twisting MSEDCL. The Commission enquired of MSEDCL as to whether MSEDCL had explored the possibility of signing EPAs with such Group II generators. Counsel clarified that because of the cartelization, the execution of EPAs are not possible. Counsel submitted that such Group II wind energy generators may be asked to submit their O&M costs and also submit details of components that have not been recovered yet by the generators from their project costs keeping in view the balance twelve-year period from the entire twenty-year life of the projects. Reasonable return, depreciation, and the actual cost of generation is the frame work agreeable to MSEDCL, which could be offered while



determining tariff for procurement of power from these generators. Counsel for MSEDCL referred to Section 61 of EA 2003, particularly clauses (d), (e), (f), (g) and (h), and submitted that various financial incentives have already been given to these generators. Counsel further referred to Section 62 (1)(a) of EA 2003 to contend that it is the Commission's responsibility to determine tariff for supply of electricity by a generating company to a distribution licensee. He submitted that if the competitive bidding referred under Section 63 of EA 2003 cannot be undertaken then it is the duty of the Commission to determine the tariff under Section 62 (1)(a) of EA 2003 because this is a continuing obligation of the Commission. Counsel submitted that Group II wind energy generators should not be allowed to sell power at any rate beneficial to them. The Commission observed that power purchase agreements are to be approved by the Commission. Counsel further submitted that such Group II wind energy generators should not be permitted to sell power to any distribution licensee or any party other than MSEDCL because it is MSEDCL on whom the penalty for non-compliance of RPS obligations would be enforced. MSEDCL is a State utility, which is under social obligations and the same should be protected. Counsel referred to Section 86 (1)(a) of EA 2003 to contend that it is the responsibility of the Commission to determine the tariff for generation. Further, Shri Vikas Singh referred to Section 86 (1)(f) of EA 2003 and pointed out that the Commission should adjudicate upon the disputes between licensees and generating companies.

21. Shri. Harinder Toor, Advocate for REDAM put forward three issues before the Commission, viz., (a) the electricity that has already been supplied to MSEDCL and the payment that the generators are required to receive under law, (b) correct procedure in law for supply of electricity to be made by such Group II wind energy generators, like procedure of competitive bidding, execution of Power Purchase Agreements, etc., (c) MSEDCL's proposal and REDAM's counter proposal. As regards the first issue, Shri. Harinder Toor relied on Section 70 of the Indian Contract Act, 1872 and referred to a Judgment dated February 5, 2008 passed by ATE in Appeal No. 15 of 2007 reproduced below and contended that MSEDCL has been directed by the ATE to make payment to the wind energy generators for the supply that has been off taken by MSEDCL.

"10. The argument of the appellant that prior to 24-11-2003, there was a grey area also does not hold any water. It is true that after the Commission came into existence and was made responsible to fix tariff, tariff was payable only at the rate fixed by the Commission. It does not mean that nothing fell due for the energy supplied to the grid by the members of the respondent no.2 for the benefit of the appellant. The appellant could have continued payment at the rate at which it was making the payment. If the appellant intended to reduce the rate of purchase from the wind power developers, it could have paid at such reduced rates. The appellant can not say that it was not liable to make any payment since no rate at all was fixed. Section 70 of the Indian Contract Act 1872 makes its obligatory on the person who enjoys the benefits of non-gratuitous act pay compensation to the person who has provided the benefit. The plea that no payment could be made because the area was grey has therefore only to be rejected."



22. Shri. Vikas Singh objected that the points being made by REDAM had not been raised by MSEDCL and submitted that the Commission had asked REDAM to rejoin on the points that were made by MSEDCL. Shri. Vikas Singh submitted that REDAM should reply on the question as to whether the Commission could determine the rate or not. Shri. Harinder Toor referred to the following paragraph of the ATE's Judgment in Appeal No.15 of 2008:

"13. The Supreme Court in Central Bank of India Vs. Ravindra & Ors. [(2202) 1 Supreme Court Case 367] has quoted with approval the following part of the judgment of the Punjab High Court in the case of CIT Vs. Shyam Lal Narula (AIR 1963 Punjab 411). The same is given hereunder:

"8. The words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money...In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

Thus interest is basically intended to compensate the party who was entitled for payment of amount due to it.

14. The appellant was in fact in default in not making payment of the electricity which it had received from the members of the respondent No. 2. Therefore it will not be wrong to say that rate of interest on amount which was long due, should be payable at penal rate. Since the commission has already fixed the rate, and, as mentioned earlier, the rate itself is not in challenge, the appellant is liable to pay interest at the rate so fixed.

15. The appellant is liable to pay interest. There is no reason why the appellant should not pay interest from the date payment became due. The payment became due when the energy was received by the appellant from the members of Respondent No.2 Such date may be before or after 24.11.2003 as there was nothing to prevent such payment when the energy was received."

23. Shri Harinder Toor submitted that MSEDCL must pay for the electricity that has already been supplied to them by injection into the grid for which, MSEDCL has already enjoyed the benefits. Shri. Harinder Toor referred to the Commission's Tariff Regulations particularly to the definition of "existing generating station" and "new



generating station” and Regulation 3.1 thereof. Shri. Harinder Toor further stressed on the second proviso of Regulation 7.1.2 as below:

“7.1.2 Where, as at the date of notification of these Regulations, the power purchase agreement or arrangement between a Generating Company and a Distribution Licensee for supply of electricity from an existing generating station has not been approved by the Commission or the tariff contained therein has not been adopted by the Commission or where there is no power purchase agreement or arrangement, then the supply of electricity by such Generating Company to such Distribution Licensee after the date of notification of these Regulations shall be in accordance with a power purchase agreement approved by the Commission in accordance with Part D of these Regulations:

Provided that an application for approval of such power purchase agreement or arrangement shall be made by the Generating Company or the Distribution Licensee to the Commission within a period of three (3) months from the date of notification of these Regulations:

Provided further that the supply of electricity shall be allowed to continue under the present agreement or arrangement, as the case may be, until such time as the Commission approves of such power purchase agreement and shall be discontinued forthwith if the Commission rejects, for reasons recorded in writing, such power purchase agreement.”

24. Shri. Harinder Toor submitted that the supply of electricity should be allowed to continue until such time the PPAs/EPAs are approved by the Commission and that therefore, for the current supply by the wind energy generators, MSEDCL must pay for the same. Shri. Harinder Toor referred to Regulation 7.4 of the Tariff Regulations referred below and contended that no such competitive bidding has been undertaken by MSEDCL.

“7.4 Notwithstanding anything contained in this Regulation 7, the Commission shall adopt the tariff for supply of electricity by a Generating Company to a Distribution Licensee if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government:

Provided that the applicant shall provide such information as the Commission may require to satisfy itself that the guidelines issued by the Central Government have been duly followed.”

25. Shri. Harinder Toor contended that execution of EPA is mandatory but till such time the same is finalized, MSEDCL must pay for the electricity that it has off taken from the wind energy generators.

26. The Commission enquired as to the response from REDAM regarding the points made by MSEDCL, viz., (i) whether the Commission has jurisdiction to decide the tariff for supply of electricity in cases where the EPAs have expired; (ii) the contention that



wind energy generators who had contracted with MSEDCL earlier and whose EPAs have expired should not be permitted to supply to any entity other than MSEDCL. Shri. Harinder Toor submitted that there are only two ways by which energy can be supplied to MSEDCL i.e., by way of competitive bidding or execution of EPAs. Shri. Harinder Toor further submitted that MSEDCL is not coming forward with the EPA.

27. The Commission enquired as to the stand of REDAM as to the contention placed by MSEDCL that there is a dispute, which is required to be adjudicated because there is no tariff applicable post the eight years period. Shri. Harinder Toor submitted that in the interim, the tariff applicable for the eighth year should be applicable in accordance with the principle contained in the second proviso of Tariff Regulation 7.1.2. The Commission again enquired as to whether the Commission would have the power to adjudicate on the dispute that has been contended by MSEDCL to the extent that the Commission needs to determine the tariff. Shri. Harinder Toor again submitted that for the interim period, MSEDCL must compensate the wind energy generators for the supply that has been made by them post the expiry of the EPA. Shri. Harinder Toor submitted that not only has REDAM proposed a modification to the tariff that has been submitted by MSEDCL in its Petition but REDAM has also submitted its own proposed tariff. The Commission enquired as to whether it will have the power to determine such a tariff. Shri. Harinder Toor submitted that he has already referred to relevant provisions of the Tariff Regulations under which the same could be done for the interim period till the time the tariff is decided by the Commission. The Commission observed that there is no doubt that there is a general principle that for goods supplied compensation must be made but the issues raised by MSEDCL and reliefs sought do not cover the above point in the Petition being considered now.

28. The Commission then summarized the argument of MSEDCL that after the original tariff determination, the costs have been recovered by the generators and that therefore, the Commission would be required to determine the tariff afresh keeping in view (i) RPS penalty on MSEDCL for non procurement; (ii) safe guarding consumer interest and generators' interest. The Commission enquired of REDAM's stand on the same. Shri Harinder Toor submitted that Group II wind energy generators were not the only source of renewable energy generation and MSEDCL is free to source power at competitive rates from such other sources of generation. Shri Toor further submitted that Group II energy generators are under open access regime and are free. Shri. Harinder Toor clarified that as per the proviso to Regulation 26.1 of the Tariff Regulations, determination of tariff for supply of electricity to a distribution licensee from non-conventional sources of generation shall be in accordance with such terms and conditions as stipulated in relevant Orders of the Commission. Even in the RPS regime / framework, the two mechanisms of competitive bidding and execution of EPA, are applicable.

29. Shri. Harinder Toor submitted that for a period of eight years MSEDCL has also enjoyed supply of electricity at subsidized rate during which period subsidies were provided to the generators. Therefore, MSEDCL does not have any right under law to



force generators to sell power to MSEDCL. The Commission enquired whether generators had applied for open access, which had been rejected. REDAM clarified that open access applications have not been made. Shri. Harinder Toor further submitted that REDAM is willing to execute EPAs with MSEDCL incorporating the tariff as proposed by REDAM. The Commission observed it is not that the Commission has to accept the tariff proposed by the generator. The entire tariff determination process has to be gone into including Public Hearing.

30. The Commission observed that it can only restrict itself to the prayers made by MSEDCL in its Petition for determination of tariff. Shri Harinder Toor submitted that several prayers have been made by MSEDCL, which have no relation to determination of tariff and in fact constitute misjoinder of causes, which ought to be rejected. Shri. Vikas Singh clarified that MSEDCL is only pressing for the prayer relating to the Commission's jurisdiction to determine the tariff post the expiry of the EPAs and not the other prayers. Shri. Vikas Singh further submitted that the tariff should be determined on cost plus basis and in case REDAM does not agree to the same then they should be taken out of the RPS regime. However, if the RPS obligation is on MSEDCL, then wind generators ought to supply and it would be the bounden duty of the Commission to determine the tariff under Section 62 of EA 2003, which is not limited in any manner by Section 63. The power under Section 62 of EA 2003 is not taken away by Section 63. Shri Harinder Toor submitted as regards RPS obligation, the strong opposition of REDAM is contained in its reply submitted to the Commission. Shri Harinder Toor refuted the argument made by Shri. Vikas Singh regarding Section 63 by submitting that Section 63 is a non obstante provision which starts with the words "Notwithstanding anything contained in Section 62" thereby implying that even if the power of the Commission is there under Section 62 to determine tariff, the Commission ought to adopt the tariff if such tariff has been determined in accordance with Section 63. He submitted that Section 63 of EA 2003 is not an enabling clause as contended by MSEDCL.

31. Shri. Mahesh Vipradas, appearing on behalf of InWEA, submitted that the Commission had in its WTO dated November 24, 2003 specifically stipulated that post the expiry of the eight-year period, the tariff would be left to market forces and that therefore, MSEDCL's proposed rate would not be sustainable. Forcing the generators to supply to MSEDCL only would be against the open access framework. It is also not a sustainable argument of MSEDCL that Group II projects should be kept out of the RPS regime.

32. The Commission enquired as to whether REDAM has failed to negotiate the rate proposed by MSEDCL and whether the wind generators are taking advantage of the RPS regime and the shortage situation to avoid a consensus on the rate. Shri C. Kale appearing for Savita Chemicals Ltd., one of the members of REDAM submitted that MSEDCL had sent an enquiry on the rate where MSEDCL had explained that there is a difference of 1 Paisa or 2 Paise amongst various offers received by MSEDCL, but in



reality, it is not such a minor difference because the rate quoted by various wind energy generators belonging to Group-II ranged from a lowest of Rs.3.50/kWh and highest rate of Rs.3.80/kWh. That was the only discussion between MSEDCL and generators regarding the rate.

33. Shri Shantanu Dixit appearing for Prayas Energy Group, one of the authorized Consumer Representatives, submitted that energy rates must be approved by the Commission. The Commission needs to approve all EPAs, else MSEDCL would be liable to pay in accordance with Section 70 of the Indian Contract Act to all those generators from whom they purchase power without having the EPAs approved by the Commission. Shri Shantanu Dixit added that MSEDCL would also be liable to pay penalty if they fail to have EPAs approved by the Commission. Shri Shantanu Dixit further referred to a report of the Accountant General of Maharashtra – Commercial Audit (page 197 of MSEDCL's petition) and submitted that the methodology of tariff fixation has been incorrect for projects with twenty year life. The tariff so fixed was on the higher side as observed in the said report. Shri Shantanu Dixit submitted the same should be taken into consideration by the Commission. The Commission enquired of the jurisdiction of the Accountant General of Maharashtra – Commercial Audit in regard to fixation of tariffs. Shri Shantanu Dixit clarified that although no jurisdiction vests with Accountant General to decide tariff he looks into the audit of MSEDCL.

34. Shri Shantanu Dixit also referred to a report by the Centre for Environmental Sciences. He further referred to the Tariff Policy notified by the Central Government and submitted that in terms thereof, the benefit of various costs after depreciation should be passed on to consumers. The benefit of capital cost free generation where generators have already recovered their costs should be passed on to consumers. Shri Shantanu Dixit pointed out that none of the distribution licensees have been able to meet their RPS obligation (excepting TPC who have set up their own generating facility). In fact there may be a case of cartelization amongst developers, which anomaly needs to be removed by the Commission. As a first step, MSEDCL must disconnect the generators who are injecting power into the grid without having an EPA approved by the Commission. In the absence of such a step, no penalty under RPS Order should be imposed that would have a bearing on the consumers. Shri Shantanu Dixit opined that no penalty should be imposed on any distribution licensee as long as it is willing to purchase power at the tariff approved by the Commission.

35. The Commission enquired as to a position whether any licensee should offer a rate directly to developers other than that approved by the Commission after the expiry of eight year period. Shri Dixit submitted that these rates are required to be determined afresh by the Commission post the expiry of the EPA under the eight-year period regime. Shri R. B. Goenka appearing for Vidharbha Industries Association (VIA), one of the authorized Consumer Representatives submitted that proactive steps need to be taken by



the generators to agree on the rate and in this regard the procedure for determination of tariff should be adhered to. Initiation of adjudication of dispute would be unnecessary.

36. Shri. Dixit submitted that the RPS regime would need to be revisited if procurement is done under competitive bidding because the RPS regime was formulated under cost plus basis and any variation in the rate under competitive bidding would impact the RPS regime. Shri Vikas Singh submitted that Section 63 of EA 2003 neither stipulates any subsidy being given nor stipulates any RPS regime. Section 63 does not apply in a situation where subsidies are given by the Government and where RPS obligation is applicable. Shri Vikas Singh submitted that when neither subsidy applies nor RPS obligation applies then Section 63 would operate. Shri Vikas Singh added that Section 63 is a free market economy situation.

37. Shri. Harinder Toor submitted that even as subsidy was received by the developers, MSEDCL too has enjoyed power supply consistently. Shri. Toor submitted that post the expiry of eight-year period, the Commission cannot determine the tariff without there being competitive bidding or execution of EPA. Having utilized power injected into the grid, MSEDCL is legally bound to compensate and pay the generators for such electricity.

38. Having heard the parties and after considering the material placed on record, the Commission hereby rules as under:

39. Before going into the issues before the Commission, it is necessary to bring out the factual matrix to establish the context under which this Order is being given. The Commission, under its Wind Tariff Order dated November 24, 2003 had categorized wind energy projects into three categories for the purpose of tariff determination for wind energy projects. The wind energy projects commissioned after December 27, 1999 but before March 31, 2003 have been categorised as Group-II projects. The Commission had determined Tariff and approved principles of EPA for such Group-II projects for a period of eight years from the date of commissioning. Subsequently, the Commission under its Order dated November 20, 2007 (Case 33 of 2007) had further clarified that EPA tenure for Group-II WEG projects would vary from December 27, 2007 to March 31, 2011, depending on its date of commissioning.

40. Further, the Commission under its Order dated November 20, 2007, had observed that, *“while the Commission reiterates that wind energy generators have freedom to sell to any party other than MSEDCL pursuant to expiry of the existing EPA, in case wind energy developer wishes to sell to MSEDCL (or any other distribution licensee), the licensees and such wind energy developers need to explore alternate commercial arrangements pursuant to expiry of existing EPA sufficiently in advance so that need for seeking approval for interim arrangement does not arise at all.”*



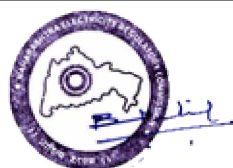
41. In this context, it is submitted that no wind energy developer has filed any Petition for approval of tariff or commercial arrangement in advance. Both, MSEDCL and wind energy developers are equally responsible for non-conclusion of commercial arrangement; particularly when need for such conclusion or advance action was very well known to all concerned. It is evident that the licensees and wind energy developers have failed to devise any commercial arrangement which is mutually acceptable; besides licensee/MSEDCL has not initiated any regulatory process for approval of Competitive Bidding Documents.

42. Further, though MSEDCL's Petition contained several prayers, during the hearing, MSEDCL Counsel, Shri. Vikas Singh, clarified that he was seeking relief only on the prayer regarding the Commission's jurisdiction to determine tariff post the expiry of the EPAs, and was not pressing for the other reliefs. Shri. Vikas Singh clarified that the Commission should determine the appropriate tariff for wind energy projects post the expiry of the EPAs. Accordingly, in this Order, the Commission has restricted itself to ruling on the issue of the Commission's jurisdiction post the expiry of the EPAs and the method to be adopted for determining the appropriate tariff in such cases.

43. As regards the Commission's jurisdiction for determination of tariff, the Commission has the requisite powers to determine Tariff in this case, in exercise of its power under Sections 61, 62, 86(1)(a), (b) of EA 2003, although, the Commission had determined tariff for a period of only eight years earlier.

44. However, regulatory process for determination of tariff for Group-II wind energy projects; upon expiry of validity of existing EPA, will have to be undertaken in a transparent manner including participation of all key stake-holders and upon conducting public hearing process similar to any other tariff determination process. The Commission shall initiate such regulatory process on suo-motu basis by way of circulation of Discussion Paper summarising key issues involved in tariff determination for Group-II wind energy projects; upon expiry of validity of existing EPAs. The Commission shall invite comments/objections/suggestions of all concerned and shall conduct Public Hearing in the matter before determining Tariff for such projects.

45. However, the Commission hereby directs MSEDCL and all concerned Wind energy developers that, until such regulatory process is completed, the status-quo vis-à-vis wind energy generation from Group II projects whose EPAs have expired shall be maintained. They shall be allowed to continue to inject power into the Grid; unless such Group II project developer chooses to supply to any consumer under open access regime subject to provisions under Section 42(2) of EA 2003 and payment of applicable transmission charges, transmission loss, wheeling charges and wheeling loss as determined by the Commission from time to time. Accordingly, MSEDCL's Petition in Case No. 89 of 2007 stands disposed of.



Sd/-
(S. B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(P.B. Patil)
Secretary, MERC