

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 58 of 2008

**In the matter of
Petition filed by M/s. Renewable Energy Developers Association of Maharashtra
regarding refusal of MSEDCL to make any payment to the wind farm
developers of Group- II category for the energy that is being fed to the
MSEDCL Grid after the date of expiry of the EPA's.**

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

ORDER

Dated: December 10, 2008

M/s. Renewable Energy Developers Association of Maharashtra (REDAM) under its Petition filed on August 4, 2008, submitted that the Maharashtra State Electricity Distribution Company Limited (MSEDCL) has been refusing to make any payment to wind farm developers of Group- II category for the energy that is being fed to the MSEDCL Grid after the date of expiry of the EPA's. Under the said Petition, REDAM made following specific prayers:

- a) *“The Hon'ble Commission may issue necessary order and direction to MSEDCL to pay for and make compensation for the energy that has been off-taken from the grid by the virtue of the fact that energy has been fed into MSEDCL's grid and accordingly to pay the tariff at the rate of last financial of the eight year cycle which has already been determined by the Commission under its order dated 24.11.2003, which is Rs. 3.79/- per kWh.*
- b) *The Hon'ble Commission may issue necessary order and direction to MSEDCL to pay for such energy from the date immediately after the expiry of the EPAs and from the date of energy fed into the grid.*
- c) *The Hon'ble Commission may issue necessary order and direction to MSEDCL to pay rate of interest viz 2% above the SBI short term lending rate on the energy that it has so off-taken from the grid by virtue of the fact that energy has been fed into MSEDCL's grid and payment to developers having not been made;*



- d) *Till such time the Hon'ble Commission dispose of the present petition, MSEDCL may be specifically directed by the Hon'ble Commission to continue with the status-quo practice of purchase of power, issue of credits, etc. As followed under Wind Power Tariff Order dated 24.11.2003 in respect of all such cases where the period of EPAs/ EWAs have expired or are expiring at the end of 8 year period from the date of commissioning.*
- e) *Pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

2. Subsequently, REDAM vide its additional affidavit dated September 15, 2008 made an alternate prayer as under:

"The Hon'ble Commission may issue necessary order and direction to MSEDCL to pay for and make compensation for the energy that has been off-taken from the grid by virtue of the fact that energy has been fed into MSEDCL's grid and accordingly to pay the tariff at the marginal cost of power purchased."

3. MSEDCL submitted its detailed comments in the matter vide its letter dated September 15, 2008 stating that the Commission's Order dated November 20, 2007 in Case No. 33 of 2007 states as under:

"If any wind energy developer (under Group II Category) wishes to sell energy to MSEDCL or any other distribution licensee, post the termination of stipulated eight-year period; a Petition should be filed either by concerned distribution licensee or the wind energy developers to initiate separate proceedings in the matter before the Commission for seeking approval of proposed long term commercial arrangement."

4. MSEDCL submitted that the Commission has not determined the tariff for sale of energy to MSEDCL post termination of the stipulated eight-year period, i.e., for the projects commissioned on or after 28.12.1999 and their validity expires from 27.12.2007 onwards. Though wind developers whose EPA expired on 27.12.2007 and thereafter, are feeding energy into the MSEDCL Grid, MSEDCL is unable to make the payment in the absence of any tariff approved by the Commission.

5. MSEDCL added that as per the Commission's Order dated November 20, 2007, MSEDCL had filed a Petition before the Commission for approval of long-term commercial arrangement in the matter of issuing directives or Order 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 under Group II Category after expiry of validity period of PPA.



6. MSEDCL also submitted that the Wind Energy Developers have already recovered the cost of project and have availed all benefits at the cost of MSEDCL's consumers. Now the expenditure involved is only O&M expenses and other contingency such as insurance, taxes, etc., and the Wind Energy Developer might avail a profit margin of 20-25% over this cost and submit their proposal to the Commission. MSEDCL submitted that in case Wind Energy Developers did not submit the proposal, then the Commission may determine the reasonable tariff for Group-II projects post-expiry of the validity period for long-term commercial arrangement as per the Commission's Tariff Regulations and Electricity Act, 2003.

7. MSEDCL also put up a supplementary request that the generators should not be allowed to take unjustified advantage of RPS mechanism and requested the Commission to intervene in the matter as the capital cost of the Wind Energy Developers was already paid for by MSEDCL, and hence, the additional charge may burden the consumers of the State further. In addition, MSEDCL submitted that post expiry of EPA, there is no contractual agreement between MSEDCL and Wind Developers, therefore, under law, under Section 70 of Indian Contract Act, 1872, the liability would not be with MSEDCL. Further, MSEDCL prayed that REDAM's Petition need not be heard separately and the same should be clubbed with MSEDCL's Petition on the same issue.

8. The Commission, vide its Notice dated August 21, 2008, scheduled a hearing in the matter on September 16, 2008, which was subsequently postponed at the request of the Petitioner. Accordingly, the Commission, vide its Notice dated September 15, 2008, re-scheduled the hearing in the matter on October 15, 2008 in the presence of Consumer Representatives authorized on a standing basis under the Electricity Act, 2003 (EA 2003). REDAM was directed to serve a copy of its Petition along with its accompaniments, to the Maharashtra State Electricity Distribution Company Limited (MSEDCL) and the four authorised Consumer Representatives.

9. Meanwhile, the Commission issued its Order dated October 7, 2008 on the Petition filed by MSEDCL in Case 89 of 2007, wherein various issues raised by the Petitioner in this Petition and objections filed by the Respondent (MSEDCL) have been dealt with. Under Paragraphs 43, 44 and 45 of the above-said Order, the Commission has ruled as under:

“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.”

10. During the hearing on October 15, 2008, Shri. Harinder Toor, Counsel, and Shri. Ratnakar Singh, represented REDAM, and Shri. Vikas Singh, Counsel, represented MSEDCL.

11. During the hearing, both Parties argued on the nature and extent of compensation for energy injected post expiry of EPA by Wind Energy Developers, as an interim relief, until the Commission passes a final ruling in the matter. During the hearing, Shri. Toor requested the Commission to direct both MSEDCL and the Wind Power Projects to maintain status quo, which would necessarily encompass within itself the direction to MSEDCL to continue making payment because the Petitioners have been continuously supplying energy to MSEDCL through the grid. Counsel further submitted that the direction of status quo necessarily meant that the existing condition before the lapse of the EPA should continue.

12. Shri. Toor submitted that the supply of electricity made to the Grid was not gratuitous under Section 70 of the Contract Act as reproduced below, and MSEDCL has lawfully made use of the electricity supplied:

“70. *Obligation of person enjoying benefit of non-gratuitous act –*
Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.”

13. Shri. Vikas Singh submitted that while passing the Order dated October 7, 2008, the Commission stated that a regulatory mechanism would be put into place for



fixation of tariff post expiry of the EPA. Shri. Singh added that the Petitioner had already recovered the cost of the project. Hence, the actual amount required for generation should not include the component of Project Cost and to that extent the consumers should be benefited, as the developers were benefited before. Moreover, MEDA, which is a statutory body, has filed an affidavit in Case No. 89 of 2007 confirming that the wind energy developers have already recovered their project cost. However, Shri. Singh agreed that there was no denying that some payment has to be made to the Wind Energy Developers, for the energy injected into the grid post expiry of their PPAs.

14. The Commission directed the Parties to submit their replies. The Commission further made it clear to the Parties that based on the tariff finally determined, necessary adjustments would have to be made by both the Parties vis-à-vis the interim arrangement to be put in place under this Order. The Commission directed REDAM to submit its say giving justification for the rate suggested by them for interim relief.

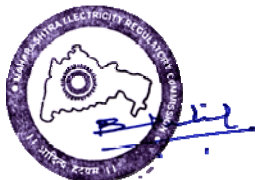
15. Subsequently, MSEDCL filed its supplementary affidavit on October 22, 2008, wherein it reiterated its submissions that as the Commission has not determined tariff for wind energy injection post expiry of the EPA of Group II wind projects, MSEDCL is unable to make any payment for such injection. MSEDCL also submitted that Wind Developers are connected to the grid and are feeding energy into the MSEDCL grid and the same cannot be isolated from the grid considering the acute shortage of power in the State and to mitigate the load shedding to some extent. MSEDCL further submitted that Regulation 81 of the MERC (Conduct of Business) Regulations, 2004, empowers the Commission to pass such ad-interim or interim Orders, as the Commission may consider appropriate at any stage of any proceedings, having regard to the facts and circumstances of the case. Therefore, MSEDCL has already requested the Commission, vide its Supplementary Affidavit dated September 25, 2008 in Case 89 of 2007, to determine the Interim Rate for purchase of energy from these projects till the final tariff is determined by the Commission.

16. As regards interim Purchase Rate, MSEDCL referred to the Commission's ruling vide its Order dated November 24, 2003 (Section 2.2.15 at Page No 54) wherein assumptions for various cost components, viz., capital cost, sales tax benefit, benefits of accelerated depreciation, Income tax/MAT liability, O&M expense, Debt:Equity ratio, rate of interest on long term debt, rate of interest on working capital, return on equity and tenure of loan, etc., was elaborated with respect of Group-II wind energy projects. In addition, MSEDCL also referred to MEDA's affidavit dated February 27, 2008, wherein MEDA requested the Commission to take into consideration various benefits, viz., income tax benefit on account of accelerated depreciation (Rs 183.75 Lakh per MW), 100% sales tax benefit (around Rs 500 Lakh per MW), capital subsidy (Rs 20 Lakh per MW) and revenue generated from date of commissioning availed by Wind Energy projects under Group-II category, while determining tariff for such projects pursuant to expiry of their existing EPA.



17. In view of above, MSEDCL proposed various options for determination of interim Purchase Rate as under:

Options	Parameter assumptions	Proposed Interim Rate (Rs/kWh)
Option-1	<ul style="list-style-type: none"> • O&M expense: 2% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 20% to Wind developers • CUF: 18%, i.e., 15.77 Lakh units 	Rs 1.29 / kWh
Option-2	<ul style="list-style-type: none"> • O&M expense: 2% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 30% to Wind developers • CUF : 18%, i.e., 15.77 Lakh units 	Rs 1.31 / kWh
Option-3	<ul style="list-style-type: none"> • O&M expense: 3% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 20% to Wind developers <p>CUF: 18%, i.e., 15.77 Lakh units</p>	Rs 1.62 / kWh
Option-4	<ul style="list-style-type: none"> • O&M expense: 3% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 30% to Wind developers • CUF: 18%, i.e., 15.77 Lakh units 	Rs 1.63 / kWh
Option-5	<ul style="list-style-type: none"> • O&M expense: 4% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 20% to Wind 	Rs 1.94 / kWh



Options	Parameter assumptions	Proposed Interim Rate (Rs/kWh)
	developers <ul style="list-style-type: none"> • CUF: 18%, i.e., 15.77 Lakh units 	
Option-6	<ul style="list-style-type: none"> • O&M expense: 4% of Project Cost • Other contingencies, insurance and taxes: 2% of Project Cost • Profit margin: 30% to Wind developers • CUF: 18%, i.e., 15.77 Lakh units 	Rs 1.96 / kWh

18. Accordingly, MSEDCL proposed interim Purchase Rate in the range of **Rs 1.29 per kWh to Rs 1.96 per kWh**, for the wind energy projects under Group-II category whose EPA validity has expired on or after 27.12.2007, till the finalisation of the tariff by the Commission. MSEDCL submitted that while promoting wind energy, the consumers of MSEDCL should not be overburdened with high tariffs, especially after the project cost is fully recovered. MSEDCL further argued that in case the final tariff determined by the Commission is lower than the Interim Rate, the difference in amount should be paid by the Wind Developers and they should submit an Undertaking to this effect. Also, to ensure payment security, the Wind Developers should give a Bank Guarantee to this effect, as decided by the Commission. However, if the final tariff determined by the Commission is higher than the Interim Rate, the difference in amount will be paid by MSEDCL. MSEDCL also prayed that no interest should be levied for the period from April 1, 2007 till finalisation of Tariff by the Commission.

19. REDAM filed a rejoinder dated November 6, 2008, and stated that MSEDCL's contention that they are unable to make any payment for power injected by Group-II developers post expiry of EPA in the absence of approved tariff for such power, is incorrect, as the Commission had vide its Order dated October 7, 2008, ruled that the status quo shall continue till such time the Commission *suo-motu* determines the tariff after due hearings from the stakeholders. The said Order being clear and status quo being interpreted as continuation of the existing conditions prevailing prior to the expiry of the EPA would tantamount to effecting payment at the last accepted rate for the power supplied, i.e., the tariff determined in the Order dated 24.11.2003 and applicable for the eighth year. In fact, only a clarification and a confirmation of the logical interpretation of the term 'status quo' is being sought from the Commission. To deny any payment on the plea of tariff not having been determined is unacceptable to REDAM, particularly in the context of the Order dated October 7, 2008.



20. REDAM also argued that despite the Commission's specific instructions to MSEDCL during the hearing on October 15, 2008, MSEDCL has once again brought in the issue of tariff fixation by quoting the Order dated November 24, 2003. According to REDAM, MSEDCL was directed to give specific unambiguous rate for interim tariff, particularly in the context of REDAM's view that the last tariff applicable for Group-II projects should be continued for the interim period. As regards MSEDCL's proposed interim tariff ranging from Rs 1.30 per kWh to Rs 1.96 per kWh, REDAM argued that MSEDCL have overtly and covertly tried to undertake a one-sided tariff fixation exercise to suit their own interest, in total disregard of the Commission's directive in the hearing held on October 15, 2008. The rate suggested by MSEDCL cannot be accepted and goes against the letter and spirit of the Order dated October 7, 2008 passed by the Commission. REDAM reiterated that the last year's tariff as per the relevant EPA applicable for the developer should continue to be in force as the interim tariff for the period after the expiry of the EPA and until such time the Commission finalises the tariff for Group II projects. The rate suggested by MSEDCL makes a mockery of the letter and spirit of the Order dated October 7, 2008 and it cannot be accepted as it is illogical and unlawful as MSEDCL are getting unduly enriched by deliberate misinterpretation of the Commission's Orders.

21. REDAM further submitted that MSEDCL has no right to claim any of the so-called incentives that have accrued to wind power projects based on the policies of the Government and the respective Regulatory Commissions, as the projects are IPPs, which have not been promoted or developed by MSEDCL. MSEDCL has a claim only in case they have directly participated in financial outlays in any manner in the development of the wind power projects. It is also a fact that the Commission has considered all these incentives while fixing the tariff for Group-II projects and the very fact that an 8 year period for the EPA was suggested by the Commission was only to introduce a free market economy and the beneficial effects of the same. MSEDCL themselves have admitted having received bids from wind farm developers with rates, which were generally near the tariff applicable in the last year of the EPA, thus, giving an indication of the market prices.

22. REDAM further submitted that MSEDCL's contention that they should not be over-burdened with high tariff once the project costs are fully recovered may at best be applicable for their own projects and cannot be imposed on projects developed by independent wind power project developers. The wind developers have not invested in wind power projects only for recovering the cost invested. Power projects are not social projects to work on 'no profit no loss' basis. Each power project is a profit centre and has to post reasonable returns to the investors, which is not possible if only the cost is recovered.

23. REDAM added that MSEDCL's request for submission of Bank Guarantee for difference in the tariff between the Interim Tariff proposed to be fixed by the Commission and the Final Tariff after conclusion of the exercise of tariff fixation, is ridiculous since, the final rate to be fixed by the Commission cannot be estimated by



anybody. Bank Guarantees have to be specific and unambiguous and cannot be given for unspecified value. The demand of MSEDCL to seek Bank Guarantee deserves to be prima facie discarded. An Undertaking from the developer shall well cover the small risk brought about by the uncertainty in the final rate. MSEDCL have taken recourse to innumerable Undertakings from the developers even in the case of earlier Interim Orders issued by the Commission.

24. REDAM further submitted that undue financial hardship would be caused to the Petitioner if the Commission were to accept the rates suggested by MSEDCL and therefore, MSEDCL's proposed range of Rs 1.30 per kWh to Rs 1.90 per kWh should be summarily rejected. The Interim Tariff should be applicable immediately after the expiry of the present EPA. REDAM added that Developers can only submit an Undertaking for defraying the difference in the amount once the rates are finally approved by the Hon'ble Commission and to make adjustments in the units generated subsequently to avoid any disputes later on. REDAM also submitted that MSEDCL has to pay interest for the delay in payment for the period after the expiry of the EPA as they have continued to consume the power and have been enriched unduly by the sale of power thereon despite withholding payments to the developers. Developers are suffering huge losses on account of non-receipt of the expected source of income. The tariff proposed by MSEDCL is not only legally unsustainable but also practically unworkable.

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

26. The following issues need to be addressed in the context of the tariff payable for energy injected into the grid post expiry of EPA and during the interim period till such time the Final Tariff is determined by the Commission:

- a. Interim Tariff for Group-II projects (post expiry of EPA)
- b. Applicability of interest charges for this period (post expiry of EPA till the date of issue of this Order)

A] Interim Tariff for Group-II Projects (post expiry of EPA)

27. The energy generated by Wind Energy projects under Group-II category post expiry of EPA and its injection into MSEDCL Grid should be continued, in view of acute shortage of power in the State. MSEDCL has also acknowledged that such injections will help mitigate load shedding to some extent. However, there are divergent views expressed by the Parties as regards the extent and basis for compensation to be paid for such injection post expiry of the EPA. The tariff proposed by the Parties has ranged from Rs 1.29 per kWh (as per MSEDCL) to Rs 3.68 per kWh for EPAs expired during FY 2007-08 and Rs 3.79 per kWh for EPAs expired during FY 2008-09 (as per REDAM) i.e. REDAM's claim for Interim Rate is around Rs 3.74 per kWh on average basis.



28. Without getting into the arguments for appropriate basis for determining compensation for wind energy injection post expiry of EPA, which in any case is the subject matter of the final tariff determination, the Commission recognises that there is an urgent need to determine tariff on ad-interim basis to address concerns of Wind Developers as well as MSEDCL's concerns, to facilitate continued injection from such wind projects into the grid at reasonable costs.

29. In view of the above, the Commission hereby determines the Tariff on ad-interim basis for wind energy injection into the Grid by Wind Energy developers under Group-II category post expiry of their respective EPAs, at **Rs 2.52 per unit**, which is the arithmetic average of rates proposed by both the Parties [i.e., Rs 2.52 per unit = (Rs 1.29 per unit + Rs 3.74 per unit)/2]. Above compensation on ad-interim basis shall be payable by MSEDCL towards electricity supplied immediately after the expiry of the EPAs, and would be subject to final adjustment depending on Final Tariff as may be determined based on further regulatory process to be initiated pursuant to para 44 of the Commission's Order dated October 7, 2008 in Case No. 89 of 2007.

30. Further, both REDAM and MSEDCL should furnish Undertakings to each other to carry out adjustments/set-off/additional compensation, as the case may be, vis-à-vis ad-Interim Tariff, pursuant to issuance of Final Tariff in the matter.

B] Applicability of interest charges for this period (post expiry of EPA till issue of this Order)

31. The Commission hereby rules that no interest payment shall be applicable, as wind developers were at liberty to supply to any other party other than MSEDCL post expiry of EPA.

Accordingly, REDAM's Petition in Case No. 58 of 2008 stands disposed of.

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(P.B. Patil)
Secretary, MERC