

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case Nos. 104, 122 and 125 of 2008

In the matter of
Petitions seeking waiver of RPS under the Commission's Order dated 16.8.2006 in
Case No. 6 of 2006 and / or review thereof.

Shri. V.P. Raja, Chairman
Shri A. Velayutham, Member
Shri. S.B. Kulkarni, Member

Case No. 104 of 2008

Maharashtra State Electricity
Distribution Company Ltd.

....Petitioner

Vs.

1. Director General
Maharashtra Energy Development Agency
2. Chief Executive Officer
Indian Wind Energy Association
3. Secretary
Renewable Energy Developers Association of Maharashtra
4. President
Co-generation Association of India
5. President
Maharashtra Biomass Energy Developers Association ... Respondents



Case No. 122 of 2008

Reliance Infrastructure Ltd

... Petitioner

Vs.

Maharashtra Energy Development Agency

... Respondent

Case No. 125 of 2008

BEST Undertaking

... Petitioner

Vs.

Maharashtra Energy Development Agency

... Respondent

ORDER

Dated: August 7, 2009

Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) filed a Petition on 18.11.2008 seeking a review of the Commission’s Order dated 16.8.2006 in Case No. 6 of 2006. This has been numbered as Case No. 104 of 2008. Condonation of delay has been sought on the ground that the review as sought is from the Order dated 16.8.2006 read with the Order dated 15.9.2008 (Case No. 13 of 2008) received by MSEDCL on 18.9.2008. A Supplementary Affidavit has been filed by MSEDCL seeking review of the Order dated 15.9.2008 (Case No. 13 of 2008) on the ground that there is an error apparent on the face of the record though the basis for such ground has not been mentioned in the affidavit. According to MSEDCL, the delay is for 17 days and such delay has been sought to be condoned. However, at paragraph G) of its Petition, MSEDCL has stated that it ought to have filed the present petition by 1.10.2006 as the review has been sought from the Order dated 16.8.2006. Condonation of delay of 798 days has been sought.

2. MSEDCL has submitted that although it had contracted for 1601.633 MW / 3602.06 MU of RE power from various sources and thus a target of 4.56% was contracted for in order to meet the RPS obligations under the Order dated 16.8.2006, the actual achieved target is 3.56% in FY 2007-08. The reasons for shortfall in procurement in RE power is beyond the control of MSEDCL as these are due to operational, technical and other factors such as long commissioning period of the RE projects, availability of RE fuel (eg: Bagasse and Biomass), availability of water sources, rainfall for hydro sources, etc. Besides seeking a review of the Order dated 16.8.2006 on the aforesaid grounds as the basis for not being able to meet the RPS obligations, MSEDCL has also disputed the contents of the Technical Task Force (“TTF”) Report prepared by Maharashtra Energy Development Agency (“MEDA”) on the basis that as per the contracted capacity MSEDCL has achieved the target of 5.14% that is above the target of 4% stipulated by the Commission for the year 2007-2008. MSEDCL submits that MEDA



has not complied with the Order dated 16.8.2006 in that no enforcement charges have been imposed on Open Access Consumers and Captive Consumers by MEDA but enforcement charges have been imposed only on the distribution licensees. It is MSEDCL's contention that in accordance with the Order dated 16.8.2006 if the RE Generator fails to supply then the enforcement charges would be levied on such RE Generator because MSEDCL would be entitled to recover the enforcement charges from such RE Generator. Hence, in view of the contracted capacity according to MSEDCL being that of 5.14%, no enforcement charges can be levied on MSEDCL. MSEDCL's stand is that they have complied with their RPS Obligation of procuring 4% of the total consumption in its area of supply in the year 2007-2008 from eligible renewable energy sources.

3. Besides the above grounds, MSEDCL has also contended that the enforcement charges specified in the Order dated 16.8.2006 does not have the sanction of law. It has been submitted that the nomenclature of enforcement charge is actually the imposition of penalty. There is no provision in the Electricity Act, 2003 ("EA 2003") which authorises the Commission to impose a penalty in the nature of enforcement charge under the Order dated 16.8.2006.

4. The prayers made by MSEDCL are as under:

"1) Hon'ble Commission is requested to kindly review the penalty clause for FY 2007-08 (para 2.10.7) of Renewable Purchase Specification (RPS) Order dated 16.8.2006;

2) As per Para 2.6.12, Hon'ble Commission is requested to kindly exclude the clause pertaining to penalty (waive the penalty) in case of short supply of power by the RE generators or shortfall in procurement by MSEDCL (Utility) as in any case the same will have to be recovered from the generators for shortfall on their part.

3) Modify the RPS Order dated 16-08-2006 accordingly;

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

5. The Brihan Mumbai Electric Supply and Transport Undertaking ("BEST") filed a Petition on 20.11.2008. This has been numbered as Case No. 125 of 2008. BEST has submitted *inter alia* in its Petition that whereas the Commission's Order dated 16.8.2006 in Case No. 6 of 2006 stipulates the obligation to procure renewable energy as specific percentages of the total consumption of electricity within the area of a distribution licensee for the years 2006 – 07 to 2009 -10, the fact of the matter is that all distribution licensees have failed to meet the same. The RPO / RPS account for utilities and the projection of energy requirement as presented by MEDA during the Task Force Meeting held on 5.11.2007 substantiates the abovesaid failure. This indicates that renewable energy ("RE") generation is not available to the utilities as projected by MEDA. Although, MEDA declared that the RE generation during FY 2006-07 was close to 3%, the same has not flown into the system. BEST has contended that the RE generation was not sufficient enough to enable each utility independently to achieve the target stipulated in the aforesaid Order dated 16.8.2006. For FY 2007-08, BEST is of the opinion that the



RPS target of 4% was over-projected by MEDA and accordingly the target stipulated in the said Order was not achievable. BEST has disputed various submissions made by MEDA in the Technical Task Force meetings and report regarding the sufficiency of RE power availability. BEST has also mentioned that in their entire area of supply there is no RE generation and consequently all RE sources prefer to sell to MSEDCL for convenience of grid connectivity, tariff rate, meter reading, accounting, etc. In short the submission is that the environment is not conducive for RE sources to sell to other distribution licensees mainly because RE generators connected at 33 kV level in the distribution network of MSEDCL are being considered for RPS Obligation. On the basis of these contentions, BEST has stated that there is a need to relook at the RPS Policy for ensuring a level playing field.

6. BEST has submitted that it had released an Expression of Interest (“EOI”) for purchasing 300 MU of RE power from generators for the period from September 2007 to March 2010. The response has been dismal as only 150 MU were on offer for 330 days in a year and the project would get commissioned in the year 2009. As part of another EOI exercise, BEST has been able to procure only 3.5 MU for FY 2007-08.

7. Another aspect raised by BEST is that since all procurers are competing against each other to procure RE power, the generators are offering rates which are higher than the rates approved by the Commission. Besides, these generators are expecting early payment, non sharing of CDM benefits, etc. Also, most of the generators have already signed PPAs with MSEDCL. BEST has also pointed out that the enforcement charges specified in the aforesaid Order has emboldened the RE generators and as a consequence they are seeking a high tariff knowing that the distribution licensee will have to succumb to the pressure because the enforcement charges for non-compliance will have to be paid by the distribution licensees which cannot be passed through in ARR. BEST has also mentioned that it has taken various measures to set up their own RE generation however there are obstacles for the same and it is somewhat thwarted due to such obstacles and in any case it would take time for them to set up such facilities.

8. Citing the above difficulties, BEST has asked for a waiver of the targets specified in the Order dated 16.8.2006 for the FY 2007-08 by referring to the following portion of the said Order:-

“2.6.12 The Commission may waive the above minimum targets for the year as per clause 2.6.8 of this Order subject to supply constraints or any other uncontrollable factors in the opinion of the Commission.”

9. BEST has made the following prayers:-

“14.1 The Commission be pleased to waive the target of RE power procurement of 4% for the FY 2007-08 as provided for in clause 2.6.12 of MERC Order dated 16.08.2006 and consequently condone the enforcement charges of Rs. 90.22 Crore imposed by MEDA vide letter dated 2.8.2008 for the FY 2007-08; In view of the difficulties faced by BEST in obtaining renewable energy and in establishing its own RE generation in its own area of supply as described in the Application.



14.2 *The Petitioner BEST Undertaking respectfully says and submits that pending hearing and disposal of this petition, the Hon'ble Commission be pleased to stay the operation of the impugned order dated 16-8-2006 in Case No. 6 of 2006 as well as the letter dated 2-8-2008 issued by the General Manager (R&D) of MEDA.*

14.3 *That the costs of this petition be provided for.*

14.4 *For such further and other reliefs as the nature and circumstances of the case may require."*

10. Subsequently, Reliance Infrastructure Limited ("RInfra") submitted a Petition on 22.12.2008. RInfra has pointed out to the difficulties faced by them in procuring RE power. Since, these are similar to the ones pointed by BEST in its Petition, the same is not referred to here for the sake of avoiding prolixity. Essentially, RInfra has mentioned about the supply side, regulatory and operational constraints faced by them while trying to procure RE power which are beyond their control. RInfra has disputed the contents of the Technical Task Force ("TTF") Report on the basis that various points regarding RE availability and projections as discussed in the TTF meetings were not reflected in the TTF Report and has contended that the TTF Report be not enforced without affording an opportunity to RInfra to respond to the same. It is alleged that MEDA did not share the actual data of RE generation during FY 2007 either with the TTF Members or with the Commission. MEDA has yet not developed an elaborate energy accounting system by collecting information from eligible persons as well as generators. In short, RInfra's submission is that the TTF Report has not been made with transparency and therefore the creditability of the TTF Report has been questioned. RInfra has consequently sought that the letters of MEDA demanding the enforcement charges of Rs. 183,63,55,360/- from RInfra, be directed to be withdrawn. RInfra has also contended that the Commission had left open ended in its Orders dated 26.9.2007 and 15.9.2008 the question of MEDA's power and jurisdiction to levy penalty/enforcement charges as is sought to be done in terms of the Order dated 16.8.2006. It has been submitted by RInfra that neither MEDA nor this Commission has any jurisdiction to levy penalty by any name whatsoever including the nomenclature of enforcement charge as sought to be done under the Order dated 16.8.2006. It has further been submitted that what is sought to be done under the nomenclature of enforcement charge is the imposition of penalty. A penalty needs to be backed by sanction of law. There is no power or provision in the EA 2003 which authorises the Commission to impose a penalty. In the circumstances, it has been submitted that the imposition of penalty itself is illegal and beyond the jurisdiction of this Commission.

11. RInfra has prayed as under:

- a. that the demands dated August, 02, 2008, October 13, 2008 and November 18, 2008 made by MEDA on the Petitioner be set aside;*
- b. that the purported Task Force report be set aside;*
- c. that this Hon'ble Commission may be pleased to waive the minimum targets of RPS for the years 2007-08, 2008-09 and 2009-10;*
- d. for such further and other reliefs as the nature and circumstances of the case may require."*



12. In response to MSEDCL's Review Petition, MEDA filed its submissions on 15.12.2008. MEDA has submitted that the Review Petition is not only time barred but is also outside the scope of review under Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004. MEDA has opposed the submission of MSEDCL that there is no sufficient RE availability, on the ground that MSEDCL could procure it through its own generation as there is sufficient RE potential in the State. Another submission made by MEDA is that MSEDCL was comfortably placed till the time of imposition of enforcement charges and had no problem in accepting the Order dated 16.8.2006. In fact, the precursor of RPS, i.e., RPO was not only willingly accepted by MSEDCL, but MSEDCL had also derived substantial associated benefits to the tune of Rs. 6.472 Crore. In view of this MSEDCL cannot now ask for waiver of enforcement charges and reduced target for the year. MEDA has summarized the amount of enforcement charges payable by all distribution licenses and has submitted that no waiver, etc., may be granted to any distribution licensee.

13. MSEDCL has submitted a letter on 5.1.2009 pointing out to several discrepancies in the Technical Task Force Report prepared by MEDA.

14. A preliminary hearing was held on 20.1.2009 whereunder MEDA was asked to submit the technical, statistical inputs and economic analysis for the TTF Report, underlying the recommendations of the task force. Respondent Nos. 2, 3 and 4 in Case No. 104 of 2008 were also asked to commission studies, if required, and provide quantitative data on the supply scenario of RE power.

15. MEDA has submitted a letter on 2.2.2009 defending its TTF Report and attempting to justify it on various counts. Under letter dated 9.3.2009, MEDA has provided a copy of the TTF Report to the Commission.

16. Another hearing was held on 9.2.2009. During the hearing, the Commission directed that written submissions on the following issues should be submitted: (a) proof of supply constraints and uncontrollable factors so as to be entitled to waiver of RPS targets; (b) stand of MEDA on the issue at foregoing item (a); (c) need to set aside the TTF Report; (d) legal validity of the enforcement charges; (e) estoppel on the Petitioners to seek review after having accepted the Order dated 16.8.2006 in the past. While keeping in mind that the National Action Plan for Climate Change announced on 30.6.2008 by the Government of India, and based on the National Electricity Policy and Tariff Policy, the Commission further directed that the methodology to be adopted for review of the Order dated 16.8.2006, may be submitted. MEDA filed its submissions on 6.3.2009 on the aforesaid issues. MEDA's submission is that out of the various RE sources the total potential in the State as per MNRE is 7852 MW and the plausible potential in the State is of 10031 MW. Thus, as per MEDA there are no supply constraints or uncontrollable factors so as to enable the Petitioners to be entitled to waiver of RPS targets. According to MEDA, the TTF Report, which has been prepared by MEDA subsequent to the Order dated 16.8.2006, cannot be the basis for seeking review of the said Order. MEDA's submission is that the said Order be implemented in full spirit. BEST filed its submissions on 2.4.2009 on the aforesaid issues. BEST has submitted that although it had issued EOI for establishing wind farms projects, it did not materialise due to lack of funds. The response to EOI for procurement of RE power



received dismal response. The point made is that as per the response to the EOIs the available RE power was much less in quantum to meet the specified RPS targets and at a rate much higher than the rates approved by the Commission. Much of the submissions made by BEST are a repetition of the submissions made in their Petition. BEST's submission is in the negative on the issue of the legal validity of the enforcement charges. On the issue of estoppel, BEST has submitted that there can be no estoppel against the law and question of law as to whether the Commission had the power to impose enforcement charges can be raised by BEST at any point in time for the consideration of the Commission. No estoppel can legitimize action which is *ultra vires* the statute. BEST has denied that it has accepted the Order dated 16.8.2006 in the past. On the TTF Report, BEST has objected that the same should have been made available to BEST before it was uploaded in its website and made official. There is therefore no consensus on the TTF Report. For various reasons, BEST has disputed the TTF Report and sought the setting aside of the said TTF Report. By another letter dated 2.4.2009, BEST submitted that the earlier methodology of financial settlement i.e., RPO Operational Framework be introduced to ensure level playing field and to continue to operate till net RE generation – 10% of total energy consumption becomes available for distribution licensees. It has been suggested by BEST that Open Access Consumers and Captive Consumers may be excluded from 'eligible persons' for meeting the RPS targets from the said Order dated 16.8.2006 as it is difficult to monitor their consumption. Furthermore, the said Order makes it mandatory for distribution licensees to establish RE generation projects. This provision may be excluded. The RPS Framework while deciding the RPS target has to take into account the availability within the State in terms of both installed capacity and actual availability of power. The RPS Framework should not be based on optimistic projections of RE potential in the State. It has also been suggested that a mechanism regarding periodic review of tariffs for procurement of RE power may be inbuilt in the respective orders. BEST has filed on 19.5.2009 a compilation of copies of the EOIs released by them and certain correspondences on the subject matter of their EOIs.

17. Pursuant to the directions given in the hearing held on 9.2.2009, RInfra filed its written submissions on 23.3.2009. As regards supply constraints and uncontrollable factors so as to be entitled to waiver of RPS targets, RInfra has mentioned about the supply side, regulatory and operational constraints faced by them while trying to procure RE power which are beyond their control, as stated in the Petition. As regards the stand of MEDA on the issue of supply constraints and uncontrollable factors, RInfra has stated that MEDA is clear that while no RE is available *in praesenti* to fulfil the RE Obligation, there is a possibility / potential of establishing such source of RE, which when established, will be used to supply RE. However, the fact is that there is no sufficient quantity of RE that is available, is expressly or impliedly admitted by MEDA in its response. MEDA has not conclusively stated the quantity of RE which is available to be obtained by RInfra and other 'eligible persons'. MEDA's statement on its website is that the total potential of RE in the country is 79724 MW; total potential of RE in the State is 7852 MW; Achievement upto 31.3.2007 is 1837.84 MW; Achievement upto 31.3.2008 is 2285.230 MW; Achievement upto 28.2.2009 is 2386.445 MW. According to RInfra, the statement of MEDA completely supports the stand of RInfra. RInfra's submission is in the negative on the issue of the legal validity of the enforcement charges. On the issue of estoppel, RInfra's stand is the same as that of BEST. RInfra has disputed the contents of the Technical Task Force Report on the same grounds as stated in their Petition. RInfra



has filed on 8.6.2009 a compilation of copies of the EOIs released by them and certain correspondences on the subject matter of their EOIs.

18. Pursuant to the directions given in the hearing held on 9.2.2009, Maharashtra Biomass Energy Developers Association (“MBEDA”) filed its written submissions on 11.6.2009. It has been contended therein that biomass developers never got a notice to represent in the proceedings that culminated into the Order dated 16.8.2006 and therefore the penalty clauses in the PPAs for any shortfall on generation or supply were a *fait accompli* for the biomass developers. The Commission has no powers to stipulate enforcement charges payable by Biomass based project developers. In any case, when the biomass generation is to be treated as an infirm supply with no lower limitation then the imposition of penalty against the shortfall would not be applicable. It has been stated that the amount of penalty per unit of power cannot be greater than the amount of earning per unit allowed to the investor. In the Commission’s Tariff Order dated 8.8.2005, the RoE allowed to a biomass generator is only about 30 paise per unit @ 16% equity, whereas RPS penalty is Rs. 7 per unit of shortfall for 2009-10. Any time there is a shortfall of more than 4.5% in average generation (80%PLF) the penalty amount would exceed the total earnings made on the balance power sold to the licensee. Therefore, it does not make any business sense to a biomass generator to invest so heavily and in the end lose all revenue to RPS penalty, even when the net export achieved is 76.4%PLF (4.5% of 80%PLF). For any generation lower than 76.4%PLF, the biomass generator will have to pay from his pocket to cover the penalty amounts. The penalty amounts were worked on hypothetical ratios of total estimated consumption versus total RE generation expected in the State for the respective penalty period. This however has not happened in that manner. Accordingly, a review has been prayed for by MBEDA.

19. An additional affidavit has been filed by MSEDCL on 14.5.2009 justifying the efforts it has taken for promoting procurement from RE sources. It has been stated therein that for the shortfall in procurement, MSEDCL has been levied with enforcement charges. However, there are various factors involved. Many generators have exited out of the PPAs which had an adverse bearing on the contracted capacity of MSEDCL. It is MSEDCL’s case that as per the TTF Report of MEDA, MSEDCL has already achieved the RPS target of 4.11% for FY 2007-08 as against stipulated 4%. It has also been submitted that as per the judgment in *Khemka & Co. Vs. SOM AIR 1975 SC 1549*, RPS penalty cannot be imposed or levied, for want of specific provision in the statute. Thus, the penalty does not have the sanction of law.

20. A combined hearing in Case Nos. 104, 122 and 125 of 2008, was held on 20.5.2009. All the respondents were directed to file written submissions. The Petitioners were directed to file rejoinders.

21. InWEA filed its combined written submissions in Case Nos. 104, 122 and 125 of 2008 on 1.6.2009. InWEA has submitted that it is apparent that distribution licensees are not taking genuine efforts to achieve RPS targets instead they are employing all efforts in downsizing the RPS target. In InWEA’s opinion, to grant the prayers as prayed for in the aforesaid Petitions, would mean to take a retrograde step. A solution has to be found within the parameters of the Order dated 16.8.2006 without having to review or re-open the same. Referring to the Supreme Court’s judgment in *Parsion Devi Vs. Sumitri Devi*



(1997) 8 SCC 715, it has been contended that it is not permissible for an erroneous decision to be reheard and corrected in review. A Review Petition, it must be remembered has a limited purpose and cannot be allowed to be “an appeal in disguise”. InWEA has also submitted that in case there is a shortfall in generation of contracted capacity due to unavoidable circumstances, the Commission may consider waiver of RPS target. This will not amount to re-opening of the Order dated 16.8.2006. With reference to the judgment in *Khemka & Co. Vs. SOM* AIR 1975 SC 1549, as cited by MSEDCL, it has been submitted by InWEA that it is not proper to compare the powers of the Commission, i.e., of “sectoral regulator” under the EA 2003 with the powers of “an assessing officer”, i.e., a tax collector under tax statutes. InWEA submits that the aforesaid judgment is irrelevant for deciding the present controversy. InWEA has also submitted that the enforcement charges under the Order dated 16.8.2006 cannot be placed on the same platform as a penalty prescribed under a tax statute. Giving the example of the UI Charges which has been upheld by the Honourable Supreme Court in the case of *Central Power Distribution Company and Ors vs. Central Electricity Regulatory Commission* AIR 2007 SC 2912, InWEA has submitted that the Commission has the powers to enforce a scheme which is otherwise permitted under the EA 2003.

22. RInfra filed on 9.6.2009 its rejoinder to the written submissions filed by InWEA stating therein that the submissions made by InWEA are not supported by any data, comprises of bald statements and allegations, does not address factual issues raised by RInfra, and the same remain uncontroverted. In short, RInfra is not in agreement with the written submissions filed by InWEA. BEST filed on 17.6.2009 its rejoinder to the written submissions filed by InWEA stating therein that the submissions made by InWEA have been belatedly filed and relates only to MSEDCL’s Petition in Case No. 104 of 2008 and RInfra’s Petition in Case No. 122 of 2008 and does not refer to BEST’s Petition in Case No. 125 of 2008. It has been stated that InWEA’s submissions contain arbitrary and vague assumptions and allegations and do not provide for any factual record or statistical material in support. It has also been stated that UI and RPS are both so different in nature that a similarity cannot be drawn as attempted by InWEA. BEST has sought that InWEA’s submissions should be discredited and dismissed.

23. MSEDCL filed an affidavit and a set of documents in pursuance of the direction given during the hearing held on 9.2.2009 substantially making the same submissions as in the additional affidavit filed by MSEDCL on 14.5.2009.

DECISION WITH REASONS

24. Having heard the parties and after having considered the materials placed on record, the Commission is of the view that the question as to whether the Commission had the power to specify “enforcement charges” in its Order dated 16.8.2006 needs to be taken up first. The Commission is of the view that the “enforcement charges” being regulatory in nature as a regulatory measure, it is not necessary to establish the factum of it being specifically mentioned in Section 86(1)(e) of the EA 2003. The said Section reads thus:-



“86. (1) The State Commission shall discharge the following functions, namely: -

...

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;”

In case the “enforcement charges” were a penalty then there could not have been a *quid pro quo*. Nonetheless, *quid pro quo* is built in the Order dated 16.8.2006 in that the collections from enforcement will have to be deposited in a separate account by MEDA, and will be used to support the research and development efforts, institutional capacity building, training, public awareness related to renewable energy. This will in turn benefit the Eligible Persons. These features can never be there in any penalty. This distinguishes the “enforcement charges” from penalty. Penalty is a punishment inflicted by law for its violation. A penalty is a temporary punishment or sum of money imposed by statute to be paid as a punishment for the commission of a certain offence. Penalty is a liability composed as a punishment on a party committing a breach or contravention or unlawful act. P. Ramanathan Aiyer’s ‘The Law Lexicon’ (Justice YV Chandrachud) states that the words “penal” and “penalty” strictly and primarily denote punishment, whether corporal or pecuniary imposed or enforced for a crime or offence against the laws. In view of the above, there is a fallacy in the contentions raised by the Petitioners questioning the “enforcement charges” on the ground that it is a penalty.

The National Electricity Policy mandates that “ 5.12.1 Non-conventional sources of energy being the most environment friendly there is an urgent need to promote generation of electricity based on such sources of energy. adequate promotional measures would also have to be taken for development of technologies and a sustained growth of these sources.” Section 86(4) of the EA 2003 provides as under:-

“(4) In discharge of its functions the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”

The “enforcement charges” specified in the Order dated 16.8.2006 is a promotional measure to give impetus to generation of electricity from renewable sources of energy.

The judgment in *Khemka & Co. Vs. SOM* AIR 1975 SC 1549 cited by MSEDCL with regard to imposition of pecuniary liability, in the form of a penalty or fine as a machinery for the realization of tax. This judgment and the facts and the law governing the same is completely distinguishable from the present case. The Order dated 16.8.2006 does not impose any tax so the question of imposition of penalty for realisation of tax does not arise.

25. Before passing the Order dated 16.8.2006, the Commission had made available for public comments an “Approach Paper” on ‘long term development of renewable energy sources within Maharashtra and associated regulatory framework (RPS) thereof’ dated 29.4.2006 exploring and evaluating various dimensions of harnessing renewable



energy sources within the extant 'Regulatory Framework' arising out of EA 2003, National Electricity Policy and National Tariff Policy prescribed by the Central Government.

26. The Commission issued a Public Notice on 11.5.2006 and invited comments from all stakeholders on the aforesaid 'Approach Paper'. In fact in the List of Participants at Annexure 2 of the Order dated 16.8.2006, the names of Reliance Energy Limited, BEST, Cogeneration Association of India, MEDA, InWEA, are recorded. Thus, the said "Approach Paper" preceded the Order dated 16.8.2006, leaving no doubts about its effect so that the persons who are to be subjected to such a liability for the infringement of the RPS Obligations are not left in a state of uncertainty as to what their duties or liabilities are. The Order dated 16.8.2006 provides *inter alia* as under:-

"2.10 Enforcement

2.10.1 REL submitted that penalty proposed in the Approach Paper for failure to comply with the RPS percentage is on higher side. REL opined that considering nature of power from RE projects and other options available to investors, the penalty should be reduced."

Having been given an opportunity to respond to the proposal of "enforcement charges" mentioned in the aforesaid "Approach Paper", it is not now open to the Petitioners to argue that the Commission did not have the jurisdiction to impose the same. This question cannot be raised after a period of more than two years after the passage of the Order dated 16.8.2006. Moreover, as recorded at paragraph 5 of the Commission's Order dated 26.9.2007 in Case No. 4 of 2007 "*Counsel further submitted that the disallowance of the penalty for failure to achieve RPS targets, as "pass through" expenses in the ARR, as per clause 2.10.7 of the RPS Order would cause sufficient hardship to REL*". It is apparent from this that REL did not raise any objection on enforcement charges on the ground of it being illegal. The argument raised by REL was that such enforcement charges ought not to be barred from being recovered from REL's consumers as "pass through" having been paid by REL. It is settled law of *Stare decisis, et non quieta movere* that it is best to adhere to decisions and not to disturb questions put at rest. It would be a pedantic approach to treat the enforcement mechanism as a 'penalty' as in the Order dated 16.8.2006 making Eligible Persons liable to pay at the rate of Rs. 5.00 per unit of shortfall in 2007-08, Rs 6.00 per unit of shortfall in 2008-09, and Rs 7.00 per unit of shortfall for 2009-10. It would be a pedantic approach to treat the enforcement mechanism as a 'penalty' not having the sanction of law. It is the view of the Commission that aforesaid enforcement mechanism is a regulatory measure which the Commission had the jurisdiction to impose to give teeth to the Order dated 16.8.2006 which otherwise would have remained simply a piece of paper without being effectively undertaking the promotional measure mandated to be so done under Section 86(1)(e).

27. It is also relevant to consider certain parallels in the electricity sector where regulatory charges have been imposed without there being a specific mention in the statute about such charges. The nature of the Unscheduled Interchange charge ("UI") has been held by the Supreme Court in its Judgment dated 17/08/2007 in Appeal (civil) 2104 of 2006 in the case of *Central Power Distribution Co. & Ors vs. Central Electricity Regulatory Commission & Anr*, as follows:-



“..UI charges are tariff or charges payable for deviations..”.

Therefore, UI is a penal charge to be charged when power is drawn beyond the schedules. UI charge is not a penalty. The Supreme Court in its aforesaid judgment held that *“The UI charges penalises whosoever caused grid indiscipline, whether generator (NTPC) or distributor, is subject to payment of UI charges who are not following the schedule.”*

It is reiterated that there is not even a whisper in the EA 2003 about UI Charges yet the Supreme Court has upheld it. In the aforesaid judgment the Supreme Court has held :

“(25) In the facts and circumstances as alluded, and as per the Scheme of the Electricity Act, 2003 mentioned above, the Central Commission has the plenary power to regulate the Grid, particularly in the context of the Grid being integrated and connected across the region comprising of more than one State. The State Grid cannot be isolated and can be seen as independent from the region.”

The Commission is of the view that the Commission has plenary power over the subject matter under Section 86(1)(e). If the Commission does not have plenary power then how else will the Commission promote co-generation and generation of electricity from renewable sources of energy and specify for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee?

28. In one Order dated 4th May, 2005 passed by this Commission, a 'Load Management Charge' was directed to be levied on all electricity consumers in Maharashtra (including Mumbai) whose consumption exceeds 500 units per month in the billing months of May and June, 2005 (billing months of June and July in the case of BEST). This charge was directed to be levied at the rate of Re. 1 per unit for the electricity consumed in excess of 80% of the consumption recorded in the corresponding billing months of 2004. The net amount recovered from the 'Load Management Charge' was directed by the Commission to be kept separately by the Licensees to be used for energy conservation and other programmes, for which separate instructions were to be issued. This was to be the DSM Fund. The Appellate Tribunal for Electricity vide its judgment dated 19th October, 2006 upheld the ordering by the Commission of collection of 'Load Management Charge'.

29. It is to be noted that neither 'Load Management Charge' nor Unscheduled Interchange charge are mentioned as such in the EA 2003. Despite that, these have been upheld by higher courts because these are in the nature of regulatory charge or regulatory measure and not penalty for contravention or offence.

30. The Commission's intervention is necessary in the case of procurement of RE power because the Commission has a legal obligation under Section 86(1)(e) in the form of the RPS targets which the Commission has specified in its Order dated 16.8.2006. The objective is to increase renewable electricity to the level required. The Commission has had to have some enforcement mechanism through some regulatory measure by which it could do so. These are in the form of “enforcement charges” and deployment of collected



charges for use to support the research and development efforts, institutional capacity building, training, and public awareness related to renewable energy. The objective is beneficial to the sector and not penal. Whereas, on the other hand, the mandate on the Commission to promote RE power has to have a binding character. Without an enforcement mechanism, there will not be delivery of the amount of renewable energy— or that electricity may not deliver its required share. Also, the response from the investment community and individuals will not be sufficient to meet the targets without the enforcement mechanism being in place. The main purpose of mandatory RPS target is to provide certainty for investors and to encourage and promote continuous development of technologies which generate energy from all types of renewable sources.

31. The Commission is empowered under the Electricity Act, 2003 to pass orders and directions, from time to time, on various matters. The Act has also empowered the Commission to adopt measures to oversee and enforce the implementation of the orders and directions passed by it. Whereas, for non-implementation of orders and directions of the Commission, the Act provides for penal consequences under several provisions including Section 142. However, it is not that always penal provisions are required to be initiated and the Commission is required to undertake regulatory measures which form part of the orders and directions passed by the Commission. “Enforcement Charges” is one such regulatory measure in the Order dated 16.8.2006. The “Enforcement Charges” in the Order dated 16.8.2006 is not a penalty.

32. In light of the above position under law, the Commission does not find any reason for undertaking review of the Order dated 16.8.2006 to the extent of “enforcement charges”.

33. By Order dated September 15, 2008 (Case No. 13 of 2008), the Commission had held as under-

“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 holds that this dispensation will be applicable for all the Petitioners herein on the ground of insufficiency of renewable energy sources as put forth by the Petitioners. Thus, the question of levy of enforcement charge shall arise only at the end of current regime of RPS Control Period (i.e. after March 31, 2010) upon ascertaining whether on cumulative basis if there exists any shortfall in RE procurement/RPS compliance. Thus, as far as levy of enforcement charge for FY 2007-08 and FY 2008-09 is concerned, it is pre-mature at this stage, particularly in view of earlier dispensation held by the Commission in the matter of Case No. 4 of 2007 and Case No. 13 of 2008.



34. Further, the enforcement charges can only be levied when RE power is available and the same is not contracted by the Petitioners. In the Order dated 16.8.2006, the Commission had held as under:-

“Commission’s Ruling

2.10.5 In order to ensure strict compliance with the RPS, it is essential to put in place an efficient enforcement mechanism. Hence, shortfall in RE procurement by Eligible Persons against the directives issued under this Order shall be treated as noncompliance with the directives of the Commission, and shall attract appropriate action as per appropriate provisions of EA 2003. The Commission directs MEDA to report such incidence of failure to comply by Eligible Persons to the Commission.”

“2.10.9 The Commission is of the opinion that the primary responsibility of enforcing and reporting such incidences of non-compliance rests with MEDA. The collections from enforcement will have to be deposited in a separate account by MEDA, and will be used to support the research and development efforts, institutional capacity building, training, public awareness related to renewable energy, etc.”

“3.1.9. Shortfall in RE procurement by Eligible Persons shall be treated as non-compliance with the Commission’s directives, and shall attract action as per appropriate provisions of EA 2003. The Commission directs MEDA to report such incidences of failure to comply by Eligible Persons, to the Commission. During first year of RPS operating framework, i.e., 2006-07, there shall not be any charge towards enforcement. However, the Eligible Persons shall be liable to pay at the rate of Rs 5.00 per unit of shortfall in 2007-08, Rs 6.00 per unit of shortfall in 2008-09, and Rs 7.00 per unit of shortfall for 2009-10.”(emphasis added)

In light of the above, MEDA’s role was to “report such incidences of failure to comply by Eligible Persons, to the Commission”. Thereafter, it is for the Commission to decide whether such failure would “attract action as per appropriate provisions of EA 2003” or result in the liability to pay “Rs 5.00 per unit of shortfall in 2007-08, Rs 6.00 per unit of shortfall in 2008-09, and Rs 7.00 per unit of shortfall for 2009-10”. However, MEDA has gone ahead and raised demand letters on the Petitioners. MEDA has overstepped the role delegated to it under the Order dated 16.8.2006. Thus, it is necessary to direct MEDA to withdraw the demand letters levying the enforcement charges. This will give relief to the Petitioners and they would not have any grievance. MEDA is accordingly directed to withdraw the demand letters levying the enforcement charges.

35. In the aforesaid Order dated 26.9.2007 in Case No. 4 of 2007, the Commission had observed that –

“.....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...”

Although, the Task Force Report has been submitted by MEDA, however, the Petitioners have disputed it. The Commission will need to verify the Task Force Report independently and only thereafter come to the conclusion as to whether the minimum targets for RPS require to be modified or waived. In this regard, the Order dated 16.8.2006 empowers the Commission as under:-



“2.6.12 The Commission may waive the above minimum targets for the year as per clause 2.6.8 of this Order subject to supply constraints or any other uncontrollable factors in the opinion of the Commission.”

36. In this context, the Commission has compared the actual addition of renewable energy capacity for various RE sources during FY 2007-08 and FY 2008-09 against that projected by MEDA under the TTF Report (Ref. Table 2.4 of TTF Report), which are summarised below:

RE Source	MEDA projections of RE Capacity Addition (MW) (as per TTF Report Table 2.4)			Actual RE Capacity Addition (MW) (Source: MEDA website)	
	FY 2007-08	FY 2008-09	FY 2009-10	FY 2007-08	FY 2008-09
Wind Energy	600	600	600	268.15	178.07
Biomass	50	100	100	4	43
Bagasse Cogeneration	200	250	250	45.36	-
SHP	20	20	20	4.26	-
Urban Waste	10	-	-	-	-
Industrial waste	10	15	25	-	-
Total	890	985	995	321.77	221.07

37. It is evident from the above Table that the actual RE capacity addition has fallen short of the projected RE capacity addition, the reasons for which may need to be investigated further, which, however does not form part of current process. Thus, there is no denying the fact that the supply constraints were prevalent during this period which is contrary to the licensees’ claim that they have taken adequate steps to contract for RE power in advance.

38. The Commission is of the view that while it has noted the efforts taken by licensees for RE procurement, the failure to generate RE power or install capacity sufficiently in advance, despite contracts being in place (in case of MSEDCL) will have to be addressed through suitable contracting arrangements. In this context, the Commission notes that one of the licensees, namely, TPC has been able to achieve the RPS target.

39. Further, considering year-to-year shortfall in RE capacity addition, the Commission is of the view that it would not be practical to expect that such shortfall can be made good on cumulative basis by the end of FY 2009-10. Hence, the Commission believes that in pursuance of Cl. 2.6.12 of RPS Order (Case 6 of 2006), it would be most appropriate to modify the RPS percentage requirement for FY 2007-08, FY 2008-09 and FY 2009-10 to be lower of (a) RPS target as specified under Cl. 2.6.7 or (b) actual achievement of RPS target in respect of each ‘Eligible Person’.



40. As regards clarification sought by BEST regarding whether RE Generators connected to grid shall be eligible to meet RPS obligation of licensees other than MSEDCL, the Commission would like to highlight that as per Cl. 2.6.11 of the RPS Order (Case No. 6 of 2006), the licensees can meet their RPS obligation by way of procuring renewable energy from RE generation projects within or outside their licence area but within the State, provided such generation is from grid connected renewable energy projects as per Cl. 2.1.5 of the said Order.

With the above, these cases listed as Case Nos. 104, 122 and 125 of 2008 are disposed of. No order as to costs.

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(V.P. Raja)
Chairman



(P.B. Patil)
Secretary, MERC