

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 75 of 2009

In the matter of
Clarification of Order dated November 24, 2003 in Case No. 17 (3), 3,4,5 of 2002

Shri. V.P. Raja, Chairman
Shri. S. B. Kulkarni, Member
Shri. V. L. Sonavane, Member

1. Dhariwal Industries
2. M/s Sharp Engineers
3. B F Utilities Ltd.
4. M/s. Prestress India Pvt. Ltd.
5. M/s Sahani Enterprises
6. Khanna Industrial Pipes Pvt. Ltd.
7. M/s Snowcem India Ltd.
8. Savita Chemicals Limited
9. Ghodawat Industrial (I) Pvt. Ltd.
10. Sheth & Sura Engineers Pvt. Ltd. ...Petitioners

V/s

Maharashtra State Electricity Distribution Company LimitedRespondent

ORDER

Dated: April 13, 2010

The Petitioners abovenamed submitted a joint Petition under affidavit before the Commission on November 19, 2009.



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

“

- i) *Hon'ble Commission to hold and declare that demand of MSEDCL of the share of 50% of the capital subsidy received by Petitioners (Group –I Developers) is illegal, arbitrary and without any sanction of law.*
- ii) *Hon'ble Commission be pleased to clarify to the extent that the Order dated 24th November, 2003 passed by this Hon'ble Commission in Case No. 17(3),3 ,4 & 5 of 2002 does not apply to the Petitioners.*
- iii) *Hon'ble Commission to direct MSEDCL to refund Capital Subsidy deducted from the Petitioners being the Group-I developers.*
- iv) *Any other directions that the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.”*

3. The Petitioners submit that they are seeking clarification from the Order dated November 24, 2003 in Case No. 17(3), 3, 4 & 5 of 2002 passed by the Commission.

4. The Petitioners have submitted in their petition that on March 12, 1998, the Government of Maharashtra had introduced a policy to promote generation of energy through non-conventional sources to supplement the ever increasing demand of electricity in the state. This policy provided that such wind power projects will be granted status of small scale industries, and that MEDA shall give a subsidy upto 30% of the fixed capital investment, limited to Rs. 20 lacs, to the promoters subject to a condition that wind power plant has successfully operated with a minimum 12% Plant Load Factor for at least one year. A survey was thereafter conducted by MEDA which revealed that there was an immense potential for generation of wind power in the state.

5. The Petitioners submit that applied to MEDA for the said Capital Subsidy pursuant to the abovementioned scheme promoted by the State of Maharashtra, and that they were granted the Capital Subsidy for their wind power generation project which were commissioned in the years 1998 and 1999. It is submitted that this was done much prior to the Conduct of Business Regulations framed by the Commission.

6. It is submitted that MSEDCL, by relying on the Order dated November 24, 2003 in Case No. 17(3), 3, 4 & 5 of 2002 passed by the Commission, had demanded 50% Capital Subsidy refund and in some cases, had directly deducted the said amount from the credit notes of the Petitioners.

7. The Petitioners have quoted certain portions of the Order dated November 24, 2003 in Case No. 17(3), 3, 4 & 5 of 2002 passed by the Commission. Clause 1.4 has been quoted, which reads as follows:

“
ii) *For the first group of projects: Since the Respondent as well as nodal agencies are not in a position to provide any data regarding these projects and since the number of projects under this category is small, it is not possible to determine the tariff. Further, these projects have been commissioned prior to the formulation of CBR of the Commission. Commission’s jurisdiction over tariffs for such projects is not clear. Therefore, the Commission decided that then prevailing Government policy should continue to apply to such projects.*”

Further, as quoted by the Petitioner, the Commission in clause 1.4.3.1 has held as follows:

“
Group I: The Commission notes that as per the information placed before the Commission, very few wind projects were commissioned before 27th December, 1999. Very little or practically no data could be made available to the Commission either by the developers of the projects or by the nodal agency in the State. Moreover, investment in these projects was based on GoM's existing policy. Therefore, the Commission felt that these projects should be dealt with as per the policies of Govt. of Maharashtra prevailing then.”

8. It is submitted that the observation of the Commission that “*such benefits (capital subsidy) if materializing in future, should be equitably shared between the developer and the purchasing agency*” does not apply in the case of the Petitioners, since they are under the “Group-I” category, to which the Commission has observed that they are to be governed as per the prevailing policy of the Government.

9. The Commission, vide its Notice dated December 16, 2009, scheduled a hearing in the matter on January 7, 2010, in the presence of four consumer representatives authorised on a standing basis under Section 94(3) of the EA 2003 to represent the interest of the consumers in the proceedings before the Commission. The Commission also directed the Petitioners to serve a copy of its Petition, along with annexures, to the Respondent (MSEDCL) and the four consumer representatives.

10. During the hearing, the Petitioners submitted that the Commission had passed an Order dated November 24, 2003 in Case No. 17 (3), 3, 4 & 5 of 2002 wherein the Commission had categorized those Wind power projects that were commissioned before 27th December, 1999 as Group-I category. These wind projects which includes the Petitioners herein had received capital subsidy of the amount of Rs. 20,00,000/- in each case from the State Government of Maharashtra (“GOM”) for putting up the Wind power projects/wind farms. . It was alleged that the Respondent demanded 50% of the capital subsidy amount received by the Petitioners and in fact, have directly deducted the said 50% capital subsidy

amounting to the tune of Rs. 10,00,000/- from the credit notes of each of the Petitioners. It has been furthermore alleged that the said claim of the Respondent is based on a gross misinterpretation of the aforesaid Order of the Commission. It was contended that the said Order does not hold that Group I category of developers would be requiring to share 50% of the capital subsidy received by them from the GOM.

11. The Petitioner contended that the Commission has recently dealt with a similar type of case in which an Order dated December 19, 2009 has been passed. This order relates to Case No. 30 of 2009 being a petition filed by M/s. Nav Maharashtra Chakan Oil Mills Ltd. seeking clarification of the Commission's abovementioned order dated November 24, 2003 with respect to applicability of the order to "Self-Use / Third Party Sale". This order quotes a portion of the earlier order dated November 24, 2003 which holds as under:-

*"The Commission has considered and included the benefits availed by the **Group II (old) projects** in the form of Sales Tax incentive, income tax benefit due to accelerated depreciation, and exemption of profit from sale of energy from income tax in the financial model. Cash subsidy to the extent of Rs.20 Lacs per project provided by the GoM through MEDA has, however, not been taken into account as most of the projects have not been able to avail of this benefit. The Director General, MEDA has confirmed in his oral submission that this subsidy could not be provided in time due to budgetary problems, and that a large backlog is still to be cleared. Therefore, the Commission recommends that such benefits, if materialising in future, should be equitably shared between the developer and the purchasing agency since the rate determination is based on the Cost Plus Methodology. {Emphasis added}"*

12. It is submitted that it therefore clear from a reading of the above paragraph in the aforesaid Order dated November 24, 2003 that, the observation quoted above is in the context of **Group II (old) projects** and thus not applicable to Group I projects.

13. In view of the above and placing reliance on the said Order dated December 19, 2009 the Petitioners submitted that Capital subsidy as received by Group-I Wind energy Generators is not supposed to be shared with MSEDCL as is sought to be illegally done.

14. The Petitioners have tried to explain the rationale on the basis that since the tariff for Group-I category of developers was not determined by the Commission in the Order dated November 24, 2003, the Commission could not have in any case held that amounts of capital subsidy was required to be shared with MSEDCL. . In this regard certain passages from the Order dated November 24, 2003 Order were quoted as reproduced below:

"For the first group of projects: - Since the Respondent as well as nodal agencies are not in a position to provide any data regarding these projects and since the number of projects under this category is small, it is not possible to determine the tariff. Further, these projects have been commissioned prior to the formulation of CBR of the Commission. Commission's jurisdiction over tariff for such projects is not clear.

Therefore the Commission decided that then prevailing Government policy should continue to apply to such projects.”

15. The Respondents, MSEDCL have submitted their reply in the matter on January 13, 2010. The main averments of MSEDCL in its reply are as follows:

(a) MSEDCL has quoted certain portions of the Order dated November 24, 2003 which is as follows:

“

*Government of Maharashtra declared **capital subsidy** up to a maximum of **Rs. 20 Lakhs per project**. Though it may not be a very significant amount for any major project consisting of large numbers of wind mills, yet from the data furnished by the MSEB it is observed that individuals or institutions in a wind farm own small number of windmills. For such owners holding an installed capacity e.g. 2x225 kW of less than one or two MW, this capital subsidy can be a significant (2-5% of Capital) amount. Further, MEDA has reported that this incentive has not been made available to the investors due to budget constraints and other procedural issues. In view of these uncertainties, this benefit has been ignored both for past and future installations.”*

(b). MSEDCL submitted that vide letter no. 19029 dated June 26, 2006 it had requested MEDA to send a list of wind developers who had availed the benefit of cash subsidy. MEDA vide letter no. 5660 dated July 24, 2007 and 5762 dated August 4, 2007 have submitted the list of investors to whom the capital subsidy of Rs. 20 Lakhs has been given. It was further submitted that, in order to comply with the Commission's Order, MSEDCL had requested wind developers i.e. M/s. Suzlon Energy Ltd., M/s. Enercon, M/s. REDAM, and M/s. InWEA to pay 50% of capital subsidy (i.e. Rs. 10 lakhs per project) to MSEDCL, saying that otherwise the same will be recovered from energy bill vide letter no. 23275 dated May 24, 2007 and letter no. 34335 dated September 3, 2007.

(c). With respect to prayer (ii) of the Petitioner, MSEDCL has quoted certain portions of the Commission's Order dated November 24, 2003 as follows:

Credit Adjustment:

For the period ending 31st March, 2003, credit shall be given as per the policy of GoM in force as on 27th December, 1999. From 1st April, 2003 onwards, net energy delivered to the grid for self use or for sale to third party shall be adjusted at the rate of prevailing base HT energy tariff.”

Also another portion of the same Order has been quoted as under:

“Old projects under Group- I, for which EPA/EWA have already been executed; the tenure of EPA/EWA shall be as per the agreements in force. For Group-II projects, tenure of EPA/EWA shall be 8 years Tenure of EPA/EWA for new projects under Group-III shall be 13 years.”

(d). MSEDCL has also referred to the Commission's Clarificatory Order dated September 30, 2004 which clarifies that Tariff determined for Group-I and Group-II projects is linked to the fiscal year. Also, MSEDCL has referred to the Commission's Clarificatory Order dated January 31, 2005 which contains information as follows:
Clarification of the Commission as regards to recovery of Wheeling Charges & Transmission Charges, for the two periods i.e. before April 1, 2003 and after April 1, 2003.

For the period ending March 31, 2003:

Wheeling Charges – 2%

Transmission Charges – 0% for three years and 1% from 4th year.

From April 1, 2003 onwards:

Wheeling Charges – 2%

Transmission Charges - 5% (as stipulated in the Commission's Order November 24, 2003).

(e). It is further submitted by MSEDCL that the Commission had issued Clarificatory Order dated June 3, 2002 in respect of Wind Energy and had given directives regarding credit adjustment for Captive and Third Party Sale to MSEDCL. Further, the Commission vide Orders dated November 20, 2007 and March 9, 2007 had applied Open Access Transaction to all Renewable Energy projects including Wind Group-I, Group-II and Group-III.

(f) With respect to prayer (i) of the Petitioner, MSEDCL has submitted that since the Commission's Order dated November 24, 2003 is applicable to Group-I projects also, the clause related to Capital subsidy share by purchasing agency (clause 2.3.1 of the order) is also applicable to the Petitioners. It has been submitted that the Petitioners i.e. Dhariwal and others have been permitted for Sale of Power to MSEDCL. This is evident that MSEDCL is a Purchasing Agency in these cases and capital subsidy is recovered from these developers. It has further been submitted that at the time of framing the Tariff Order dated November 24, 2003 for wind developer, the Commission was not aware of the details of the Group-I projects. Further, the past and future installations as mentioned in para 3.4.4 of the Order were not very clear as to which Wind projects are covered under this portion.

(g). It has been submitted that the GOM had determined the tariff for Group-I projects by considering them as IPPs (Independent Power Producers) and did not take into account the benefits received by them. MSEDCL had been purchasing power from them without having any obligation (such as RPS) from FY 1994-95. Thus, it is submitted that MSEDCL consumers are burdened by this higher tariff given to Group-I projects. MSEDCL further submits that whatever amount MSEDCL has received under the Share of Capital subsidy was treated as its income and is considered in APR for determination of tariff. Thus, the Commission should consider consumers interest in this matter also. Also, it is submitted that at the time of determination of policy by the Commission, actual data regarding Wind Projects was not available with the Commission and MEDA. But now since the data related to the commissioned projects

in Group-I, II and III is available to MEDA, the Commission can decide on the matter considering the facts of the matter.

16. The Petitioners vide their letter dated February 17, 2010, have submitted their rejoinder to the reply dated January 13, 2010 filed by MSEDCL. The averments in the rejoinder are as follows:

- a) It is submitted by the Petitioners that the Commission in its Order dated November 24, 2003 has clearly stated w.r.t. Group-I projects that these projects should be dealt with as per the policies of the GOM prevailing then.
- b) Further, it is submitted that a bare perusal of the above order makes it clear that the tariff for Group-I projects has not been finalized on cost plus basis and therefore, the Commission's recommendation as per the interpretation of clause 2.3.1 of the order is not applicable to Group-I projects.
- c) It is submitted that the Commission has very recently once again clarified the ambiguity of the Order dated November 24, 2003 in its Order dated December 19, 2009 in Case No. 30 of 2009 filed by M/s. Nav Maharashtra Chakan Oil Mills Ltd.

17. Having heard the parties and after considering the materials placed on record, the Commission is of the view that while claiming share of 50% of the capital subsidy from the Petitioners herein, MSEDCL has solely relied upon the order of the Commission dated 24.11.03 (Case No. 17 (3), 3,4, & 5 of 2002), whereunder the Commission gave an observation as under :-

".... such benefits (capital subsidy) if materializing in future, should be equitably shared between the developer and the purchasing agency".

However, the observation quoted above appears under the following paragraph in the aforesaid Order dated 24.11.2003 :-

*"2.3.1 Part-A: **Group II (Old) Projects** commissioned before 31.03.2003, which have availed Sales Tax Benefits".*

The observation quoted above when read in its entirety reads as follows:-

*"The Commission has considered and included the benefits availed by the **Group II (old) projects** in the form of Sales Tax incentive, income tax benefit due to accelerated depreciation, and exemption of profit from sale of energy from income tax in the financial model. Cash subsidy to the extent of Rs.20 Lacs per project provided by the GoM through MEDA has, however, not been taken into account as most of the projects have not been able to avail of this benefit. The Director General, MEDA has confirmed in his oral submission that this subsidy could not be provided in time due to budgetary problems, and that a large backlog is still to be cleared. Therefore, the Commission recommends that such benefits, if materialising in future, should be equitably shared between the developer and the purchasing agency since the rate determination is based on the Cost Plus Methodology. {Emphasis added}*

It is clear from a reading of the above paragraph in the aforesaid Order dated November 24, 2003 that the observation quoted above is in the context of **Group II (old) projects** and thus not applicable to Group I projects. The Respondent has not disputed as to whether the Petitioners are are Group I projects.

The aforesaid Order dated 24.11.2003 subsequently provides as under:-

“2.3.3 Part-B: New Projects commissioned after 01.04.2003 with no Sales Tax Incentive

..... As explained earlier, the Commission has taken into account the benefits in the form of accelerated depreciation of income tax and exemption of profit from sale of energy from income tax in the financial model for the typical project. Cash subsidy to the extent of Rs.20 Lacs per project to be provided by the GoM through MEDA has however not been taken into account as most of the projects have not availed of this benefit. However, such benefit, if availed of in future, would be equitably shared between the utility and the developer.”

Thus, it is clear from a reading of the above paragraph in the aforesaid Order dated November 24, 2003 that the observation quoted above is not applicable to Group I projects because Group I Projects have been classified in the said Order as those Wind power projects commissioned before 27th December 1999 and whereas the above paragraph is self explanatory as it is titled *“2.3.3 Part-B: New Projects commissioned after 01.04.2003 with no Sales Tax Incentive.”*

18. In view of the above, the following directions are passed :-

- (i) Demand of MSEDCL to share 50% from the capital subsidy received by Petitioners (Group –I Developers) is contrary to the Order dated November 24, 2003, and accordingly, such demand / claim is hereby set aside;
- (ii) MSEDCL is directed to refund the Capital Subsidy deducted by it from the Petitioners, within 30 days from the date of this order.

With the above, the present petition stands disposed of.

Sd/-
(V. L. Sonavane)
Member

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(K. N. Khawarey)
Secretary, MERC