

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 6 of 2006

In the matter of
***Suo motu* hearing in the matter of publication of “Maharashtra RPS Operational Framework, 2007” by the Maharashtra Energy Development Agency in the Government Gazette (Extra-ordinary), Part IV-C, dated March 8, 2007.**

Dr. Pramod Deo, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member

ORDER

Dated: July 2, 2007

The Maharashtra Energy Development Agency, (MEDA), the Nodal Agency in the State for development of renewable sources of energy, under Ministry of Non-conventional Sources of Energy, had applied to the Commission for approval of principles of Renewable Portfolio Standard (RPS) in April 2004. In this matter, the Commission had vide its Order dated 3rd September 2004 given certain directions to MEDA as under:

“28. Further, taking note of the need expressed by Prayas at the first hearing, MEDA are directed to prepare an Approach Paper on the long-term development of renewable sources and associated enabling regulatory framework for Maharashtra, and submit it to the Commission after eliciting public comment and debate.”

2. As MEDA did not submit any Approach Paper until April 2006, an ‘Approach Paper’ on ‘long term development of renewable energy sources within Maharashtra and associated regulatory framework (RPS) thereof’ covering issues related to harnessing of renewable energy sources within the State, was prepared at the instance of the Commission for initiating further regulatory process for consultation amongst various stakeholders. After following public process, and eliciting comments and views from licensees and other stakeholders, the Commission, in exercise of the power vested in it under clause (e) of sub-section (1) of Section 86, read with sub-section (h) of Section 61 of the Electricity Act, 2003 (“EA 2003”) and all other powers enabling it in this behalf, had vide an order dated August 16, 2006 in Case No. 6 of 2006 determined the regulatory framework for long term development of renewable energy sources namely, Renewable Purchase Specification (RPS) and associated RPS Framework, within the State of Maharashtra. It is pertinent to note that MEDA had made laudable efforts while submitting their views on the operational aspects of RPS during the public process, as aforesaid. The Commission had considered the role of MEDA as a

facilitator towards the RPS framework and operational issues therein. The Commission had also considered the following submissions made by MEDA during the hearing held:

“2.9.2 MEDA submitted that it is happy to take up the responsibility of RPS implementation...”

3. The Commission had also considered the submissions made by other participants. To the extent relevant, some observations read thus:

“2.9.3 Prayas noted that as per the Approach Paper, MEDA will operate RPO and evolve operating mechanism for implementation of RPS. Essentially, MEDA will be monitoring the development and compliance of RPS as well as facilitate financial settlement amongst different participants. Prayas observed that this is a very crucial and complex role and complete transparency needs to be ensured. Prayas requested the Commission to specify data compilation and disclosure formats for MEDA. Prayas further suggested that such formats should include details such as individual project and unit-wise RE generation on monthly basis, installed capacity, self and auxiliary consumption, exported power, beneficiaries of the generation (i.e., distribution licensee, OA user or captive consumer), fuel usage, applicable tariff for such project, etc. Further, MEDA should be required to periodically publish this data as well as RPO report on its website.”

“2.89.4 In view of above, InWEA requested the Commission to constitute a Working Group to work out the details for implementation RE certificate model under RPS regime and until the same is evolved and accepted by all stakeholders, the existing ‘contract path model’ could be continued.”

4. In the aforesaid Order dated August 16, 2006, the Commission had issued certain directions, as under:

“2.9.5Hence, a mechanism needs to be established to enable Eligible Persons to undertake such transactions by way of financial settlements rather than energy settlement.

2.9.6 MEDA has developed RPO Operating mechanism in consensus with the licensees. While noting the concerns raised by InWEA and Prayas, the Commission directs MEDA to assess suitability of extending the existing RPO Operating Mechanism to the RPS framework to undertake reconciliation and settlement of renewable energy transactions amongst eligible persons. MEDA will have to develop and implement suitable operating framework to accommodate all ‘Eligible Persons’ under this Order. Though the final settlement is to be carried out at the end of the year, MEDA will have to develop a system for monitoring of RPS on monthly basis.

2.9.7 MEDA had taken an unduly long time to settle RPO for 2004-05. Only after issue of stern warning by the Commission to ensure settlement of RPO for 2004-05, it was settled in April 2006, nearly one year after completion of financial year. It is obvious that necessary capacity does not exist within MEDA to ensure settlement of complex RPS framework. Therefore, the Commission directs MEDA to engage a

suitable consultant to develop mechanism for settlement of RPS as well as for capacity building within MEDA to undertake subsequent settlements.

2.9.8 The RPS settlement for 2006-07 will have to be carried out at the end of 2006-07. Thus, 6 months are available to MEDA for engagement of consultant, development of process and system and subsequent implementation of the system. The Commission directs MEDA to take appropriate steps to ensure implementation of RPS within stipulated timeframe.”

“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.”

5. Subsequent thereto, it was brought to the notice of the Commission that MEDA had published a notification titled “Maharashtra RPS Operational Framework, 2007” in the Maharashtra Government Gazette (Extra-ordinary), Part IV-C dated March 8, 2007.

6. The Commission issued a notice to MEDA under its letter dated April 19, 2007 informing *inter alia* that (i) MEDA was not, under the aforesaid Order dated August 16, 2006, directed to notify/publish RPS operational framework in the Government Gazette; (ii) the directions given to MEDA under the Order dated August 16, 2006, cannot be carried out by MEDA without consulting the Commission with respect to the framework to be developed and the modifications to be carried out to the RPO mechanism; (iii) MEDA has exceeded the mandate given under the said order dated August 16, 2006, while notifying the said notification; (iv) the said notification is in the format of regulations which the Commission and not MEDA is authorised under the EA 2003 to notify. Further, in order to provide MEDA an opportunity of being heard, for explaining the irregularity, a *suo motu* hearing was held on April 24, 2007 in the presence of the distribution licensees, Government of Maharashtra. No one represented the consumer representatives authorised on a standing basis under the EA 2003, though notified of the hearing.

7. Under their letter dated April 21, 2007 bearing reference no. BP-02/RPS/2007-08/2387, MEDA submitted their response to the aforesaid letter of the Commission dated April 19, 2007. Under the said letter, MEDA has conceded that the said notification may be cancelled or rescinded. A summary of the various averments made by MEDA, are as under:

- (i) MEDA had published the said notification in spite of any directive issued by the Commission to that effect under the Order dated August 16, 2006, for the following reasons:
 - (a) Unlike the Order dated September 3, 2004 passed in Case No. 1 of 2004, the Order dated August 16, 2006 has envisaged the enforceability of RPS on “eligible persons” apart from licensees. Consequent thereto, the RPO framework is required to be officially made known to any future “eligible persons” about the RPS obligation to aid their prudent business decisions.

- (b) The publication of any matter in the official gazette makes it an authentic document as it is to be taken as read by all citizens of the State, including existing and future licensees as well as eligible persons. The said publication was notified not only for dissemination of information on RPO and RPS but also to ensure abundant precaution with respect to enforcement of RPO. It was not implied to be strictly a 'notification' but a 'simple publication' in the official gazette.
 - (c) MEDA being a public authority under Section 2 (h)(ii) of the Right to Information Act, 2005 ("RTI") and simultaneously an agency within the meaning of Article 12 of the Constitution of India, it is legally entitled to publicise information under Section 4 (ii)(iii)(iv) of the RTI. The notification was required in line with the Order dated August 16, 2006, for ensuring the welfare of citizens with special reference to adequate supply of electricity, especially through renewable green sources, and environmental protection in terms of Section 86(1)(e) of the EA 2003.
 - (d) There is no bar on MEDA to publish a notification in the official gazette which in fact may be undertaken even by private individuals.
- (ii) MEDA has not consulted the Commission before carrying out the RPO framework as developed by MEDA, for the following reasons :
- (a) Under paragraph 2.9.6 of the order dated August 16, 2006, it is provided that "*MEDA will have to develop and implement suitable operating framework to accommodate all 'Eligible Persons'...*". There is no explicit direction under the said Order to consult the Commission on the RPO framework.
 - (b) During the proceedings in Case No. 1 of 2004, MEDA had approached the Commission for guidance on the draft RPO framework before issuance of the same. The Commission under its letter dated January 7, 2005 bearing reference no. MERC/Case No. 1 of 2004/ 0028 had informed MEDA *inter alia* that since the report (meaning to say the draft RPO framework) has been finalized in consultation with licensees, MEDA should share the RPO framework with all stakeholders and take further appropriate action.
- (iii) There is justification in MEDA not consulting the Commission before carrying out modifications in the RPO operating mechanism as the modifications as carried out are pursuant to the experience garnered by MEDA over a period of 2 to 3 years, on scrutiny of the difficulties encountered while implementing the RPO framework. The problems on the operational forefront vis-à-vis suitable solutions with respect to the modifications in the RPO operating mechanism has been taken into account while devising and drafting the Maharashtra RPS Operational Framework, 2007. MEDA has tried to improve the existing mechanism, offering practical and legal solutions, the problems associated for achieving the RPS, as was visualised keeping in view the public interest. Further, the objections raised by stakeholders were also considered by MEDA and the existing RPO operating mechanism was paraphrased to bring out more clarity, specificity and justifiability.

- (iv) Though, the said notification appears to have been in the format of a regulation, in effect, it is only an ‘office order’ and not a ‘regulation’ under the EA 2003. MEDA accepts that the legislative functions under the EA 2003, so far as RPO Operational Framework is concerned, has not been vested on MEDA. Further, the said notification is not a regulation. With reference to paragraph 3.1.8 and 3.1.9 of the Order dated August 16, 2006, the said notification even provides clarity and transparency in the responsibility of every stakeholder involved in the achievement of the stipulated RPS.

8. At the hearing held on April 24, 2007, MEDA was represented by Shri. Mahesh Zagade, Director General-MEDA. Shri. Gaurav Joshi, Counsel, appeared for Maharashtra State Electricity Distribution Company Limited (“MSEDCL”). Shri. Arun Shyamkul, O.S.D, represented the Government of Maharashtra. Authorised representatives were present on behalf of TPC and BEST. Shri. Mahesh Zagade submitted that the said notification has been notified with the benevolent intention of providing interpretations and constructions of various technical terms which have been employed in the Order of the Commission dated August 16, 2006. The intention of MEDA behind the said publication was not to usurp the legislative functions enshrined upon the Commission under the EA 2003.

9. Per contra, Shri. Gaurav Joshi, Counsel for MSEDCL, submitted that it is a well-settled principle in administrative law that a delegate cannot sub-delegate. While the power to frame regulations has been enshrined only upon the Commission under the EA 2003, the making of the RPO framework is primarily a legislative function. This power, under no circumstances, can be delegated by the Commission. MEDA should not be given the liberty to act upon any misunderstanding that such essential legislative functions of the Commission have been delegated in their favour.

10. Refuting the submissions of Shri. Joshi, Shri. Zagade submitted that a notification does not acquire the status of law or regulation, solely on its publication in a government gazette. The right to publish in the government gazette vests with individual persons; with government institutions to publish commercial advertisements, tenders; and also with private firms to advertise their dissolution. While regulations framed by quasi-judicial bodies and government institutions are always notified in government gazettes, all notifications appearing in government gazettes are not law *per se*. Further, owing to it being covered under the definition of “State” under Article 12 of the Constitution, MEDA was well within its entitlements to disseminate information over which the public at large may exercise their right to obtain information.

11. Shri. Gaurav Joshi argued that the submissions of Shri. Zagade were not sustainable considering the wording used in the said notification, especially under Clause 1.2 and 1.3 thereof, which are as follows:

- “1.2. *This order shall extend to whole of the State of Maharashtra;*
1.3. *This order shall come into force from the date of its issue;*”

Thus, the intention of MEDA was to enforce the said notification.

12. Shri. Arun Shyamkul, appearing for Government of Maharashtra, submitted that MEDA before notifying the said notification in the Maharashtra Government Gazette, should have given prior information of the same to all concerned.

13. Having heard MEDA and other parties, the Commission is of the view that the intention of the Commission while issuing the directions as aforesaid to MEDA in its Order dated August 16, 2006, is manifestly clear. Considering the constitution of MEDA and the role played by it in the electricity sector, the Commission has viewed MEDA as a facilitator towards implementation of the RPS framework, as is clearly borne out from the said order of the Commission. The power to issue commissions is well recognized under the procedures governing the working of civil courts. Courts are generally empowered to issue a commission to any person as it thinks fit where any question arises which cannot in the opinion of the court be conveniently handled by the court itself and therefore, whenever the court thinks it necessary or expedient in the interests of justice so to do, assistance of such third parties are taken. Such assistances are necessarily taken on operational issues which should not otherwise take the time of the courts. These powers are essentially discretionary in nature. However, judicial and legislative functions cannot be delegated to a commissioner. In the aforesaid order dated August 16, 2006 the Commission has issued instructions to MEDA which distinctly specify that MEDA is required to assess suitability of extending the existing RPO Operating Mechanism to the RPS framework to undertake reconciliation and settlement of renewable energy transactions amongst eligible persons; to develop and implement suitable operating framework to accommodate all 'Eligible Persons'; to engage a suitable consultant to develop mechanism for settlement of RPS; to develop a system for monitoring of RPS on monthly basis. As the power to make regulations under Section 86(1)(e) of the EA 2003 on any matter that concerns the purchase of electricity from renewable sources of energy, manifestly vests with the Commission only, the Commission is of the view that the notification titled "Maharashtra RPS Operational Framework, 2007" in the Maharashtra Government Gazette (Extra-ordinary), Part IV-C dated March 8, 2007 needs to be rescinded. In this regard the Commission directs MEDA to take immediate steps to cause the said notification to be rescinded as the said notification will purportedly have the force of law while at the same time being *ultra vires* the EA 2003 and the Order dated August 16, 2006. The mode of exercise of the directions and powers thereunder in terms of the said Order dated August 16, 2006 should have been followed by MEDA strictly in terms thereof. As the terms of the said Order are unambiguous, MEDA is hereby directed to act in terms thereof, prepare the framework as stipulated therein and take steps towards its implementation.

14. As regards the contentions of MEDA towards justifying the publication of the notification in the Official Gazette, for making it known to the public, it would be relevant to point out to the decision in the case of *Jayalakshmi Talkies vs. Asst. Commercial tax officer, Chirala*, AIR 1982 AP 194 which holds that the term 'publish' does not imply a publication in the Gazette and information to be made known to the public may not be necessarily in the Gazette. The Commission does not sustain the contentions of MEDA regarding the Right to Information Act, 2005. The Right to Information Act, 2005 provides as under:

"4. "disseminated" means making known or communicated the information to the public through notice boards, newspapers, public announcements, media broadcasts, the internet or any other means, including inspection of offices of any public authority."

The Commission is, therefore, of the view that MEDA should prepare the framework as stipulated in the Order dated August 16, 2006 and disseminate requisite information as aforesaid. In this regard the Commission notes MEDA had submitted under their letter dated February 9, 2007 a draft of the RPS framework prepared with the help of consultants. MEDA had submitted therein that the draft was put up on its website for public comments. The Commission is of the view that MEDA should not preempt the participation of the public towards review of the said framework, as prepared, and should put a definitive time-frame for eliciting comments and views from the public at large and inform the Commission of the same for facilitation of further regulatory process, if required.

There shall be directions to MEDA in terms of this Order. MEDA shall report compliance of the directions contained herein within 8 weeks from the date hereof.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

Sd/-
Secretary, MERC