Before the

MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 11 and 38 of 2008

In the matter of
Non-payment of actual dues arising out as per the Commission's Order dated November 24, 2003,
and
Non-payment / inappropriate payments by MSEDCL to the developers of Wind Power Energy

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

Case No. 11 of 2008

M/s Nishkalp Energy Ltd …. Petitioner

Vs.

Maharashtra State Electricity Distribution Company Limited …. Respondent

Case No. 38 of 2008

M/s Tata Motors Ltd. …. Petitioner

Vs.

Maharashtra State Electricity Distribution Company Limited …. Respondent

Dated: June 19, 2009

ORDER

The Commission had issued an Order dated November 24, 2003 in Case No. 17(3)(4)(5) of 2002 in the matter of application filed by the (I) Maharashtra State Electricity Board [MSEB], (II) Shri Pratap G. Hogade, (III) Renewable Energy Developers Association of Maharashtra [REDAM], and (IV) Indian Wind Energy Association [InWEA] for Procurement of Wind Energy & wheeling for third party-sale and/ or self-use. M/s Nishkalp Energy Ltd submitted a Petition (numbered as Case No. 11 of 2008) under affidavit, before the Commission, on February 28, 2008, inter alia seeking directives from the Commission under Sections 142 and 149 of the EA, 2003 against MSEDCL for non-payment of actual dues arising out of the Commission's Order dated November 24, 2003.

2. The following are the prayers of the Petitioner:

"

(a) this Hon'ble Commission be pleased to declare the action on the part of the Respondents of reducing the claim of the Petitioners to the extent of Rs. 27,01,932/- was arbitrary, unreasonable, unjust and contrary to the provision of Law.

(b) the Respondent be ordered and decreed to pay to Petitioner the sum of Rs. 65,28,617/- as the interest on delayed payment @ 2% over the rate of lending interest rate of State Bank of India as permissible under orders contained in the Hon'ble Commission's orders dated 24 November 2003 and 12 September 2006 till the payment and/or realisation.

(c) the Respondent be ordered and decreed to pay to the Petitioner the sum of 27,01,931/- (Twenty Seven Lakhs One Thousand Nine Hundred Thirty One Only) being the difference between the claim amount and the amount determined by the Defendant as set out in Exhibit F of the Petition.

OR

(c). in the alternative the Respondent be ordered and decreed to render a true and faithful reconciliation of account and the Respondent be further ordered and decreed to pay to the Petitioners such amount as may be found due and payable to the Petitioner on such account being taken.

(d). the Hon'ble Commission be pleased to order the Respondent to pay interest at 2 % over the rate of lending interest rate of State Bank of India as permissible under orders contained in the Commission's order dated 24 November 2003.

(e). for the cost of Petition

(f). such other and further reliefs as the nature and circumstances of the case may require."

2. The Commission, vide its Notice dated April 30, 2008, scheduled the hearing in the matter on May 14, 2008 in the presence of consumer representatives authorized on a standing basis under Section 94(3) of the Electricity Act, 2003 ("EA 2003") to represent the interest of consumers in the proceedings before the Commission. The Commission also directed the Petitioner 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. The hearing as scheduled in the matter was postponed to June 10, 2008 at the request of the Petitioner.

3. During the hearing, the Counsel for the Petitioner (i.e., M/s. Nishkalp Energy Ltd.) requested for three week's time to file a rejoinder to the submission filed by MSEDCL on June 5, 2008. The Commission granted three weeks time to the Petitioner to file the rejoinder. The Petitioner, vide its letter dated August 20, 2008, requested the Commission for a further extension of three weeks to file the rejoinder. The Commission granted the same and directed the Petitioner to file the rejoinder on or before September 10, 2008.

4. M/s Tata Motors Ltd. also submitted a Petition (Case No. 38 of 2008) under Section 86(1)(f) of the EA 2003, before the Commission on January 31, 2008, inter alia seeking adjudication of the dispute arising due to non-payment/inappropriate payments made by MSEDCL to the Petitioners. M/s Tata Motors are the developers of the Wind Power Energy, falling under the Group II category.

5. The prayers of M/s Tata Motors Ltd. are as follows:

"

(a). this Hon'ble Commission be pleased to declare the action on the part of the Respondents of reducing the claim of the Petitioners to the extent of Rs. 28,58,629/- as arbitrary, unreasonable, unjust and contrary to the provisions of law;

(b). the Respondent be ordered and decreed to pay to Petitioner the sum of Rs. 1,08,36,036/- as interest on delayed payment @ 2% over the rate of lending interest rate of State Bank of India as permissible under orders contained in the Hon'ble Commission's orders dated 24 November 2003 and 12 September 2006 till the payment and / or realization;

(c). The Respondent be ordered and decreed to pay to the Petitioner the sum of Rs. 28,52,629/-(Twenty Eight Lakhs Fifty Two Thousand Six Hundred Twenty Nine

Only) being the difference between the claim amount and the amount determined by the Defendant as set out in Exhibit F of the Petition;

OR

(c). *In the alternative the Respondent be ordered and decreed to render a true and faithful reconciliation of account and the Respondent be further ordered and decreed to pay to the Petitioners such amount as may be found due and payable to the Petitioner on such account being taken;*

(d). *the Hon'ble Commission be pleased to order the Respondent to pay the interest at 2% over the rate of lending interest rate of State Bank of India as permissible under orders contained in the Commission's order dated 24 November, 2003*

(e). *for costs of this Petition*

(f). *such other and further reliefs as the nature and circum stances of the case may require.*"

6. After scrutiny the Commission, vide its letter dated February 18, 2008 directed M/s Tata Motors Ltd. to remit the requisite application processing fee as per Regulation 21 of the MERC (Fees and Charges) Regulations, 2004. M/s Tata Motors Ltd., vide letter dated June 20, 2008 submitted the requisite application fee.

7. The Commission, vide its Notice dated July 8, 2008 scheduled the hearing in Case No. 38 of 2008 on July 22, 2008 in the presence of consumer representatives authorized on a standing basis under Section 94(3) of the EA 2003 to represent the interest of consumers in the proceedings before the Commission. The Commission also directed the Petitioner to serve a copy of its Petition, along with its accompaniments, to Maharashtra State Electricity Distribution Company Limited (MSEDCL) and to the four authorised consumer representatives.

8. The Counsel of M/s Tata Motors Ltd., also representing M/s Nishkalp Energy Ltd., vide letter dated July 21, 2008 requested the Commission to adjourn the hearing and requested to combine this present matter with Case No. 11 of 2008 as the issues involved in both the matters were same.

9. MSEDCL filed its written submissions in Case No. 38 of 2008 vide letter received by the Commission on July 21, 2008.

10. The Commission, vide its Notice dated September 18, 2008 scheduled the combined hearing in both the matters on October 15, 2008 in the presence of consumer representatives authorized on a standing basis under the EA 2003.

11. During the combined hearing on October 15, 2008, the Counsel for the Petitioners (M/s. Nishkalp Energy Ltd. and M/s Tata Motors Ltd.) requested the Commission for one week time to file the rejoinder in both the cases, which was granted by the Commission. The Commission vide reminder letter dated December 18, 2008 directed the Petitioners to file their rejoinder in the subject matter. Subsequently, both the Petitioners filed their submissions vide letters dated December 29, 2009.

12. The Commission vide Notice dated January 21, 2009 again scheduled a combined hearing in the matters on February 12, 2009.

13. During the combined hearing, the Petitioners submitted that they are withdrawing all their prayers expect two prayers, which are as follows:

Prayers of Nishkalp Energy Ltd (Case No. 11of 2008)

" *(a) this Hon'ble Commission be pleased to declare the action on the part of the Respondents of reducing the claim of the Petitioners to the extent of Rs.27,01,932/- as arbitrary, unreasonable, unjust and contrary to the provisions of law".*

(c) the Respondent be ordered and decreed to pay to the Petitioner the sum of Rs.27,01,931/- (Twenty Lakhs One Thousand Nine Hundred Thirty One only) being the difference between the claim amount and the amount determined by the Defendant as set out in Exhibit F of the Petition."

Prayers of Tata Motors Ltd (Case No. 38 of 2008)

"

(a) this Hon'ble Commission be pleased to declare the action on the part of the Respondents of reducing the claim of the Petitioners to the extent of Rs. 28,58,629/- as arbitrary, unreasonable, unjust and contrary to the provisions of law;

(c) The Respondent be ordered and decreed to pay to the Petitioner the sum of Rs. 28,52,629/-(Twenty Eight Lakhs Fifty Two Thousand Six Hundred Twenty Nine

Only) being the difference between the claim amount and the amount determined by the Defendant as set out in Exhibit F of the Petition;"

14. The Petitioners further submitted that MSEDCL has agreed to pay the amount referred in their prayer (b) as the Appellate Tribunal for Electricity has also issued an Order dated February 5, 2008 in Appeal No. 15 of 2007 which is in their favour, which confirms the Commission's Order in Case No. 10 of 2006 on the Petition filed by M/s Renewable Developers Association of Maharashtra (REDAM) seeking implementation of the Commission's Order dated November 24, 2003 read with the Clarificatory Order dated September 30, 2004 in Case No. 17(3)(4)(5) of 2002. The relevant part of the Order passed by the Appellate Tribunal is reproduced below:

"

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

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

16. We find no flaw in the impugned order directing payment of interest from the date of commissioning i.e. date on which energy was first fed into the grid by the members of Respondent No.2. The appeal has no force and the same is accordingly dismissed with costs."

15. The Petitioner further referred to the Commission's Order in Case No. 17(3)(4)(5) of 2002 dated November 24, 2003 and submitted that in the said Order it was settled that the wind energy developers have to pay 5% T&D loss and 2 % wheeling charges. So, overall 7% of the power has to be deducted from the total energy supplied by the wind energy developers. However, MSEDCL was deducting a total of 15 % of the power on provisional basis, thus, the wind energy developers were getting a credit of 85 % of power injected into the grid.

16. The Commission observed that both the Petitioners were in agreement that they would receive credit for 85% of the power fed into the grid on provisional basis, and 15% of the energy would be retained by MSEDCL (erstwhile MSEB) on provisional basis. Subsequently, the Commission issued the Order ruling that the wheeling charges and transmission losses would be considered as 2% and 5% respectively, as an interim arrangement. Accordingly, the Petitioner is entitled to receive credit/payment for the remaining 8%.

17. MSEDCL submitted that the Petitioners had opted for settlement of the above balance 8% of the energy under the 'Cash Option'. The Petitioners also admitted that they had opted for the Cash Option, in their written submissions.

18. The Commission enquired regarding whether MSEDCL had mentioned the rate for settlement under the cash option, as in MSEDCL's response, MSEDCL has mentioned that under the cash option, all retained 5% / 8% units were to be refunded to the wind farm developers as per the lowest slab of HT Tariff applicable on March 31 of the respective financial year.

19. The Counsel for the Petitioners referred to the letter dated March 23, 2005 related to settlement of retained 15% for self user / third party sale and settlement of surplus units at the end of financial year, which reads as under:

> "*In case of self use and sale to third party, credit were given upto 85% of the total units on adhoc basis for valid NOCs. The balance 15% units will be accounted for after approval of MERC for the Energy Wheeling Agreement. These directives were given vide T.O.L. No.21726 dated 4.6.2002. In view of the MERC orders dated 24.11.2003, dated 30.9.2004 and 31.1.2005, instructions were given to follow the MERC directives vide T.O.L. No.7455 dated `1.2.1004 and No.4228 dated 9.2.2005 respectively."*

20. The Commission enquired about the Cash Option given in writing to the Petitioner. In response, the Counsel for the Petitioners stated that the cash option as per meeting held on March 14, 2005 between Chairman, MSEB and Vice-Chairman, M/s Bajaj Auto Ltd reads as under:

"For Group II projects, in case of self use and third party sale (for the period ending upto 31st March 2003 & onwards) after deducting transmission losses (5%) and wheeling charges (2%) from the retained units of 15% the payment for these balance 8% unit will be made to wind farm developers as per the HT tariff (HTP-II) applicable during that financial year or otherwise, credit will be given through self user's/wind party purchaser's energy bills from April 2005 onwards to March 2006."

21. The Counsel for the Petitioners stated that though technically they were entitled to respective TOD rates, since the TOD meters were not installed at the generator end, they were entitled to the lowest TOD rates. The Petitioner's contention is that the rates approved by the Commission (Rs. 2.75 per kWh from April to December and Rs.2.05 per kWh from January to March), while MSEDCL was ready to pay at the rate of Rs. 2.05 per kWh. The Petitioners added that since MSEDCL has retained excess 8% units provisionally, subject to the Commission's decision, MSEDCL has to pay at the rate applicable during that period for the 8% units retained by MSEDCL.

22. The Counsel for MSEDCL referred to the letter dated June 17, 2005 and submitted that MSEB had retained 15% units from October 2001, and since April 2004 there were no retained units with the MSEB. Further, he referred to Regulation 39 of the MERC (Conduct of Business) Regulations, 2004, which reads as under:

"39. All Petitions shall contain a summary / synopsis of the brief facts, issues, case law referred to, and reliefs sought therein and shall mention the following particulars:

……

(c) whether the Petition is filed within the time limit prescribed in the Limitation Act, 1963, and if not, the period of delay and whether the Petitioner is seeking condonation of delay, and on what grounds."

23. The Counsel for MSEDCL raised the issue of maintainability of both the Petitions due to limitation of time period and added that both the Petitions cannot be pleaded as the Petition are not within the period prescribed by the Limitation Act, 1963. He pointed out that the claims of the Petitioners pertain to the period from October 2001 to April 2004 **whereas the Petitions have been filed in January 2008 and no averments as regards condonation of delay in filing have been made. Further, he submitted that the Petitions have

been filed in 2008, and as per Article 13 of the Limitation Act, 1963, for recovery of money, the time period is three years.

24. MSEDCL further stated that as per the Tariff Order, the money for remaining 8% is required to be paid within 45 days and the bills produced were for the period from October 2001 to April 2004, and hence, the Petition is clearly time barred, and even otherwise, the Petition is not in accordance with the mandatory provisions of the MERC (Conduct of Business) Regulations, particularly Regulation 39 (c).

25. MSEDCL referred to Clauses 3.4.9 and 3.4.10 of the Commission's Order dated November 24, 2003, which is reproduced below:

"***3.4.9 Banking and Credit of Energy on the basis of TOD tariff slots***

The Commission is of the strong view that credit for wind energy should be provided strictly on the basis of TOD tariff slots. For example, wind energy generation in time slot A should be offset against the consumption in time slot A. Any generation not used during the month should be carried forward to the next month in the same time slot. Any unutilized wind generation at the end of the year shall be purchased by the utility subject to banking provisions. The MSEB, in its role as a State Transmission Utility, should immediately take steps to develop necessary processes and software to track wind energy credits and for maintaining accounting database. The Commission also notes that inability to consume the entire energy delivered into the grid due to factors beyond control of the developers/ purchasers cannot be ruled out. Also, the need to change third party purchaser may arise during the project life, and energy fed into the grid during the period of changeover of third party may have to be absorbed by the MSEB. Therefore, the Commission has decided that surplus energy at the end of the financial year, limited to 10% of the net energy delivered into the grid during that year, may be purchased by the utility at the lowest slab of HT TOD tariff applicable on the 31st March of the financial year during which the energy was fed into the grid. The Commission is also of the opinion that, under force majeure conditions, if the surplus energy delivered to the grid exceeds 10%, such surplus energy in excess of the 10% limit specified earlier shall be purchased by the utility at a rate equivalent to the weighted average fuel cost for the year as determined by the Commission.

3.4.10 Billing and Payment

The Developer shall raise a monthly energy bill based on the joint meter reading taken by the developer and the MSEB/Utility at the end of each month. The due date for the payment by the utility shall be 45 days from the date of the bill. In case of delay in payment beyond the due date, the Developer shall be entitled to interest on delayed payment at 2% above the State Bank of India, short-term lending rates".

26. MSEDCL further referred to Clause 1.6.1 of the Commission's Order dated November 24, 2003, which reads as under:

> **1.6.1 Energy Purchase Agreement (EPA) & Energy Wheeling Agreement (EWA)**
> *It is not the intention of the Commission to approve the EPA/EWA for each wind project individually. The Commission however has formulated the principles of EPA/EWA, which have been elaborated in the Order. The Commission directs the MSEB and other utilities/ licensees to modify Draft EPA/EWA to reflect the tariff provisions and principles of EPA / EWA as approved in the Order before executing the EPA/EWA with developers. The Commission further directs the MSEB and other utilities/ licensees to make all EPAs/EWAs public"*

27. The Petitioners stated that the latest draft of EPA/EWA as per the guidelines of the Commission prescribed by the Commission is yet to be executed, since MSEDCL (MSEB) was expected to modify the draft agreement suitably. MSEDCL is further required to make the EPA/EWA public, instead, MSEDCL is asking the Petitioner to execute the EPA/EWA, but have not sent the modified copy of the EPA/EWA after duly making the same public, and hence, MSEDCL is responsible for non-execution of EWA.

28. MSEDCL further submitted that the Petitioners have not entered into the EWA purposely as otherwise all the disputes could have been resolved. Further, MSEDCL referred to Clause III of the Interim Order issued by the Commission in Case No. 3,4 and 5 of 2002 dated June 3, 2002, which reads as under:

> *"III. During the intervening period (till the completion of approving the MSEB's application on Energy Purchase Agreement (EPA) / Energy Wheeling Agreement (EWA) as mentioned in point No.I above, the Respondent agreed to give credit for:*
>
> *a. 85% of energy, meant for captive consumption or third party sale only, received for wheeling in all such cases where credit is yet to be given to the respective wind farm developers, and*
>
> *b. 70% credit shall be released against valid NOCs issued to such wind farm developers meant for sale to the MSEB only in absence of any third party identification."*

29. MSEDCL submitted that the Interim Order also clarified that till the EWA is approved by the Commission, credit was required to be given for only 85% of energy meant for captive consumption or third party sale only, received for wheeling in all such cases where credit is yet to be given to the respective wind farm developers, and added that after the Tariff Order was issued, the draft of EWA was prepared.

30. The Commission enquired regarding whether there was any correspondence for execution of EWA between the Parties. In response, MSEDCL submitted that that as per Commission's Order dated November 24, 2003 and the Clarificatory Order September 30, 2004, the draft Energy Wheeling Agreement (EWA) for 100% Self Use and 100% Sale to third party were sent to Wind Developers (M/s. Enercon, M/s. Suzlon, M/s. Vestas RRB, M/s. NEG Micon, M/s. REDAM and M/s. InWEA vide letter no. 36193 dated November 24, 2005 and 36452 dated November 25, 2005 respectively and the Wind Developers have executed EWA with MSEDCL as per the same. However, as per records submitted by MSEDCL, the Petitioners had not executed EWA even until August 2007.

31. Having heard the Parties and studying all the material placed on the records, the Commission hereby rules as under:

32. The Commission observes that during the Hearing held on February 12, 2009, the counsel for the Petitioner(s) has confirmed that the issue of retained units with MSEB pertains to period from October 2001 to March 2004 and from April 2004 onwards there are no retained units with MSEB. Further, the Petitioner in its written submission dated February 20, 2009 submitted that MSEDCL is liable to refund the balance 8% of the retained unit accumulated till March, 2004, which confirms that the Petitioner do not have any dispute related to settlement of units after March, 2004 (i.e. from April 2004 onwards).

33. The Commission also observes that there exists no Energy Wheeling Agreement (EWA) for the period (October 2001 to April 2004) relating to which the claims for the disputed amount have been filed by the Petitioner(s), viz., M/s Nishkalp Energy Ltd and M/s Tata Motors Ltd. The Commission also observes that despite MSEDCL's repeated reminders, the Petitioners have failed to execute Energy Wheeling Agreement in a timely manner. Thus, the issue of claims of Petitioners and Respondent will have to be dealt with in accordance with law in the absence of EWA.

34. The Commission observes that the arrangement for providing credit upto 85% on provisional basis was in accordance with the Commission's Interim Order dated June 3, 2002 which has not been disputed by the Parties. Subsequently, through the Tariff Order dated November 24, 2003, the Commission had ruled for applicable transmission loss of 5% and wheeling charge of 2% as an ad-interim arrangement for such wind energy wheeling transactions. Thus, credit or payment for excess retained units upto 8% (i.e. 15% - 7%) needs to be effected to the Petitioner, which as matter of fact has also not been denied or disputed by Respondent and has been confirmed by the Petitioners.

35. Further, under the said Tariff Order dated November 24, 2003, the Commission has also ruled that credit adjustment for such wheeled wind energy units shall be undertaken on Time of Day (TOD) slot-wise basis. In the absence of TOD meters for the period under consideration (i.e. October 2001 to April 2004) as admitted by the Petitioners, the Petitioners have also agreed to consider entire energy credit at the lowest tariff slab of the TOD slot. The dispute is arising as regards whether such credit adjustment is to be effected on month-wise basis at month-wise applicable rate as claimed by Petitioner or credit adjustment is to be effected on fiscal year basis as per the tariff rate prevalent on 31st March at the end of the fiscal year.

36. In this context, based on records submitted by Petitioners and the Respondent, it is evident that the Respondent has offered option to the Petitioners to choose from (a) Cash Option or (b) Credit Option, to receive credit for the excess retained units, as summarized below:

> ***Cash Option:*** In this option, all the retained units (5%/8%) were to be refunded to the Wind Power Developers as per the lowest Slab of High Tension (HT.T) Tariff applicable on the 31st March of the Financial year. .
>
> ***Credit Option***: In this option, all the retained units (5%/8%) were to be adjusted in the monthly energy bills of self user/third party from April 2005 onwards to March 2006.

37. Admittedly, the Petitioner(s) have selected Cash Option, even though they could have selected the Credit Option as their consumption was always in far excess of generation as submitted by the Petitioners. Further, the terms of Cash Option, i.e., tariff rate prevalent as on 31st March at the end of fiscal year, were also known to the Petitioners well in advance, although the Petitioner's consent letters of June 29, 2005 for final settlement also state that

"they want to sale balance 8% units to MSEB as per HT Tariff (HTP-II) applicable during respective year". If the condition for final settlement as proposed by MSEDCL was not acceptable to the Petitioner, they should have raised the issue at that time before granting the consent. The difference in interpretation, i.e., whether applicable tariff rate shall be as prevalent during respective months or as prevalent on 31st March of the fiscal year should have been taken up for resolution at that time itself.

38. In view of above, the Commission hereby rejects the Petitioners' claim for additional compensation and upholds MSEDCL's submission in respect of 'Cash Option' for effecting credit of remaining 8% units. The claims raised by both the Petitioners are also barred by the Limitation Act, 1963, whereunder the claims should have been filed within three years from the date when the claim of the Petitioners were reduced by MSEDCL. However, both the Petitions have been filed in the year 2008 whereas the claims of both the Petitioners pertain to the period from October 2001 to April 2004. On this ground, both the Petitions are liable to be dismissed and are hereby dismissed.

Sd/-	Sd/-	Sd/-
(S.B. Kulkarni)	(A. Velayutham)	(V. P. Raja)
Member	Member	Chairman

(P.B. Patil)
Secretary, MERC