

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 148 of 2008

In the matter of
Implementation of the Commission's Order dated 24.11.2003 in Case No.17 (3), 3, 4, 5 of 2002, Order dated 12.09.2003 in Case No.10 of 2006 and Judgment dated 05.02.2008 by the Appellate Tribunal of Electricity in Appeal No.15 of 2007 for the payment of interest by MSEDCL on delayed payments for energy off taken.

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

The Renewable Energy Developers Association
of Maharashtra
Empire House, 214, Dr. D.N. Road,
Ent. Nayak Marg, Fort,
Mumbai-400 001

.....Petitioner

Vs.

Maharashtra State Electricity Distribution Company Ltd.
Prakashgad, 5th floor,
Bandra (East),
Mumbai-700 051

..... Respondent

ORDER

Dated: August 17, 2009

The Renewable Energy Developers Association of Maharashtra ("REDAM") filed a Petition on 16.01.2009, seeking implementation of:

- i) the Commission's Order dated 24.11.2003 in Case No.17 (3), 3, 4, 5 of 2002, in the matter of application for procurement of wind energy and wheeling for third party sale and / or self use;



- ii) the Commission's interim Order dated 12.09.2006 in Case No.10 of 2006, in the matter of Petition filed by REDAM for implementation of the Order dated 24.11.2003, and
- iii) the Appellate Tribunal of Electricity's Judgment dated 05.02.2008 in Appeal No.15 of 2007 for the payment of interest by MSEDCL on delayed payments for energy off taken.

2. It has been averred by the Petitioner that the Government of Maharashtra vide GR dated 12.3.1998, circulated the policy on wind power generation. MSEB adopted this wind power generation policy vide Circular (Comm.) No. 640 dated 03.04.2000, and adopted the revised policy vide Circular (Comm.) No. 664 dated 05.10.2001, wherein it laid down the billing procedure to be:

"....the payment for the energy fed to MSEDCL system will be made within each Quarter i.e. June/ September/ December/ March within 45 days from the date of receipt of bills, delay will attract interest at saving bank rate,"

3. It has been further stated that MSEB issued NOC for installations of wind farm projects at various places in Satara, Sangli, Ahmednagar and Dhule, with the permission to use wind power for self use, sale of power to MSEB and to third parties. However, such NOCs required the wind developers to obtain Commission's approved tariff rate for the sale of power to MSEDCL from August 1999. Meanwhile, MSEB vide letter No. 8147 dated 06.03.2002, approached the Commission seeking advice on finalising Energy Purchase Agreement/ Energy Wheeling Agreement to be executed by the wind developers and to examine the provisions of Electricity Regulatory Commissions Act, 1998. Vide affidavit dated 14.05.2002, MSEB submitted two model draft agreements to the Commission for the provisions of (a) Sale of power to MSEB and (b) for self use and third party sale based on MSEB's policy vide Circular No. 664 dated 05.10.2001. It further submitted to the Commission, the Tariff Revision Proposal for the financial year 2001-2002, along with Policy regarding generation based on wind. Vide Order dated 10.01.2002, the Commission ruled among other things as under:

"...the Commission would not like to comment on the policy of renewable energy sources at this stage; but would like to state that the MSEB has appended the captive power policy, which includes the policy for renewable energy sources along with the Tariff Proposal for the information of the consumers, and the Commission's silence on this policy should not be taken as approval of the same..."

4. On 03.06.2002, the Commission passed an interim Order, directing MSEB to release 70% payment to wind developers meant for sale to MSEB. REDAM and InWEA accepted the proposal. Vide letter no. 24325 dated 17.06.2002, MSEB requested the Commission to approve the rates since NOCs were already issued to the wind developers requiring them to obtain the Commission's approval for the rate of sale to MSEB and



requested the Commission to clarify as to whether 70% payment is to be made in this case. Vide letter No. 708 dated 19.07.2002, the Commission directed MSEB that as far as this particular category of developers were concerned, the Commission's interim Order dated 03.06.2002, does not apply and that such developers, if they so desire, may approach the Commission for interim order. The Commission directed MSEB to release 70% payment on an *ad hoc* basis for 44 cases of InWEA and 39 cases of REDAM, in furtherance to MSEB's letter to the Commission dated 29.08.2002, to issue such directives in cases where NOCs were issued to wind farm developers who had commissioned wind farms and fed energy into the MSEB grid before identifying third party sale or self use. However, MSEDCL had also issued NOCs for the option of self use and third party sale as and when identified. Vide Order dated 24.11.2003, the Commission accorded final approval for the rate of purchase of wind power and in Clause 3.4.10 on Billing and Payment, it directed as under:

"..the Developer shall raise a monthly bill based on the Joint Meter Reading by the Developer and the Maharashtra State Electricity Board / 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 beyond the due date, the Developer shall be entitled to interest on the delayed payment at 2% above the State Bank of India, Short term lending rates."

5. MSEB filed a Review Petition on this Order on issues relating to (a) Share of other utilities, (b) need for a Transparent Competitive Bidding Process, (c) Cut off date for the funding of evacuation facilities, and (d) Change of option. Vide Order dated 12.03.2004, the Commission directed MSEB that it will consider the Petition for clarification and not for review, and that MSEB's field officers should go ahead with the implementation of its Order dated 24.11.2003. Vide interim Order dated 12.09.2006, at para 29, the Commission directed MSEDCL (post trifurcation of MSEB) to:

"..pay interests on delayed payments within one month of the date of this Order, to all wind developers having any type of valid NOC, for the period since the date of commissioning of the plant."

Vide Clarificatory Order dated 10.09.2004, the Commission permitted -

"..all wind energy project holders to exercise the option of switching (from sale of power to third party) to sale to MSEDCL on one time basis."

Further, MSEDCL went in appeal before the Appellate Tribunal for Electricity. The Tribunal vide its judgement dated 05.02.2008, dismissed the appeal with costs, stating that it had no force, and held MSEDCL liable to pay interest as it saw no reason why MSEDCL should not pay interest from the date the payment became due.



6. Thus, through this Petition, the Petitioner seeks the implementation of:
- i) The Order of the Commission dated 24.11.2003 by emphasising on Clause 3.4.10 of the said Order. The Commission in regard to procurement of wind energy and wheeling for the third party and / or self use; directed that the developer, at the end of each month, shall raise a monthly bill based on the Joint Meter Reading by the Developer and the Maharashtra State Electricity Board / Utility. The due date for the payment by the utility shall be 45 days from the date of the bill and in the event of delay beyond the due date, the Developer shall be entitled to interest on the delayed payment at 2% above the State Bank of India, Short term lending rates;
 - ii) Interim Order of the Commission dated 12.09.2006, wherein the Commission was of the view that the energy stands sold and appropriate revenue is realised by the MSEB/ MSEDCL as and when it is generated and fed to the grid. It observed that, it is inappropriate on MSEDCL's part to hold back the payment for purchase of power as mandated by the Commission and therefore directed MSEDCL to make payment of interest within one month from the date of its Order (i.e. 12.09.2006), to all the wind developers, having any type of valid No Objection Certificate, for the period since the date of commissioning of the plant.
 - iii) The Appellate Tribunal of Electricity's Judgment dated 05.02.2008 in Appeal No.15 of 2007 for the payment of interest by MSEDCL on delayed payments for energy off taken.

7. The Petitioner claims that MSEDCL made the payment of interest to some of the Wind Farm Developer members of the Petitioner. However, these payments were calculated from the day MSEDCL received and accepted the invoices from the Petitioner members. The Petitioner is aggrieved by the way the payments have been calculated. It relies on the Commission's and Appellate Tribunals' view that the payment becomes due to Wind Farm Developers from the time when the energy is fed into the grid i.e. when it is ready to be off-taken for use by MSEDCL. It thus claims that Wind Farm Developers have incurred financial loss due to such calculations.

8. The Petitioner alleges that MSEDCL insisted on quarterly submission of invoices. This made the Wind Farm Developers loose out on the interest that should be payable from the date the energy is fed into the grid. Such demand was contrary to the directions of the Commission and the Tribunal. Even when the Petitioner forwarded the invoices on quarterly basis for August, September and October 2001, MSEB issued credit notes for these invoices only in December 2001 and January 2002. Such delay in issuing credit notes continued till much later. Credit notes for August, September and October 2003 were released in February and March 2004. Moreover, based on their own calculations, MSEB computed the interest for these payments from 31.03.2005. It is alleged that



MSEDCL later stopped accepting invoices from the Wind Farm Developers. All this resulted in major losses to the member Petitioners. The Petitioner alleges that it communicated the issue to MSEDCL by its letter dated 2.12.2008 and a reminder dated 18.12.2008. However, MSEDCL reverted on 29.12.2008 without throwing any light on the issue of payment calculation. Instead, it directed the Petitioners to approach its respective Operation and Management circle. Nothing came out of approaching the Operation and Management circle as it had plainly released payments for the invoicing period upto March 2004, as per the calculations best understood to them.

9. In the circumstances, the Petitioner has prayed as follows:

- iv) The Commission may issue necessary order and direction to MSEDCL to review payments that have been made to the members of the Petitioner as also the payment being made currently and in future so as to make payment of interest in cases where the payment for energy received has been delayed beyond 45 days from the Joint Meter Reading;*
- v) The Commission may issue necessary order and direction to MSEDCL to pay interest on delayed payments, if any, for all periods and not restricted to period upto March 2004.*
- vi) Pass such other order or orders as this Commission may deem just and proper in the circumstances of the case.*

10. MSEDCL filed its reply on 9.04.2009. MSEDCL has challenged the maintainability of the Petition by claiming that MSEDCL has made the payments to the wind farm developers who have raised the invoices based on Joint Meter Reading as per the Commission's direction in Order dated 24.11.2003. It claims that MSEDCL's Nodal Officers S.E. Satara, S.E. Sangli and S.E. Ahmednagar have released the interest payment in the event of delay beyond the due date through its field officers, where the wind developers have raised invoices to MSEDCL field offices based on Joint Meter Reading. MSEDCL has submitted that as per the request of the wind developers the erstwhile MSEB permitted installation of wind farm project as per the policy prevailing from time to time before the issuance of the Commission's order dated 24.11.2003. The matter was under the regime of the Commission from 3.06.2002 to 24.11.2003. Therefore, MSEDCL made payments for valid NOC meant for the sale to erstwhile MSEB. MSEDCL claims to have complied with the Commission's directives to release 70% payment on *ad hoc* basis for 44 cases of InWEA and 39 cases of REDAM. Vide letter dated 10.06.2003, MSEDCL informed the Commission about such compliance and of the total payment of Rs. 1264.11 Lakhs being effected to InWEA and REDAM. It also brought to the Commission's notice that future payments were not effected for the want of Commission's approval. After the Commission's interim Order dated 30.06.2003, extended the operational validity of its interim Order dated 18.12.2002 until the approval of EPA / EWA and directed to release further 70% payment. MSEDCL vide letter dated



2.08.2003, directed its field officers to comply with this direction. MSEDCL submits that prior to the Commission's order dated 24.11.2003, in the absence of Commission approved tariff rate for the purchase of wind energy from wind farm developers, MSEDCL has released payments as per the MSEDCL policy Circular No. 664 dated 5.10.2001 and the same has been accepted by the wind developers. It submits that the project cost of Rs. 5 crores has been recovered considering various benefits availed by the wind farm developers and the revenue from generation for eight years. It claims that the projects under Group II have realised the total benefit of Rs. 1085.519 lakhs (sales tax benefit 500 lakhs per MW + 100% depreciation on invested amount, saved income tax of Rs. 183.75 lakhs per MW + revenue from generation of Rs. 401.769 lakhs, immediately after commissioning of the project).

11. MSEDCL claims that on request from the wind developers, it issued NOC for the sale of power to the third party, as and when identified. Since the wind developers had not identified the third party, no credit reports could have been generated in the third party name. There was no question of raising invoices as the NOC was not valid for the sale of power to MSEDCL. On the other hand, Wizemann Ltd. executed Energy Purchase Agreement with MSEDCL, and it was permitted sale of power to the identified third party named by it as M/s Telco Ltd. Later, at Wizemann's request; the NOC No. 36952 dated 1.12.2005, was amended for sale of power to MSEDCL on one time basis. In this case, as per the NOC, the credit notes were issued from time to time and there was no delay in payments.

12. A hearing was held on 13.04.2009. The Petitioner's counsel submitted the facts of the case as brought out in the Petition. The Petitioner disputed on the issue of payment due to certain entities whom the Petitioner represents, under Group II under the Tariff Order, i.e. entities whose projects have been commissioned, during specific period between 27.12.1999 to 31.03.2003. The Petitioner calculated the amount due from the Commission's Order dated of 24.11.2003 to October 2005 to be approximately seven (7) to eight (8) crores. The Petitioner emphasised on the Commission's and Tribunal's decisions holding that electricity is considered sold when put in the grid and that interest becomes payable from such date. In the light of above submissions, the Petitioner has prayed that the Respondent be directed to honour Clause 3.4.10 of Commission's Order dated 24.11.2003, interim Order of the Commission dated 12.09.2006 and Appellate Tribunal's judgement dated 5.03.2008. The Petitioner also submitted that the Appellate Tribunal while considering the Respondent's appeal in Appeal No. 15 of 2007; cited a Supreme Court's judgment in *Central Bank of India V. Ravindra & Ors; CIT V. Shyam Lal Narula (AIR 1963 Punjab 411)* which reads as follows:

“ the words ‘interest’ and ‘compensation’ are sometimes used interchangeably and on other occasions they have distinct connotation. ‘Interest’ in general terms is the return or compensation for use or retention by one person of a sum of money belonging to or owned to another. In its narrow sense, ‘interest’ is understood to mean the amount which one has contracted to pay for the use of borrowed



money...In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money after it has become payable”

Thus, the Tribunal held that “*it will not be wrong to say that rate of interest on amount which was long due by MSEDCL, should be payable at penal rate. It further observed that the payment became due from the date when the energy was received by MSEDCL. This date may be before or after 24.11.2003.*”

13. The Petitioner brought to the attention of the Commission four categories as under:

i) Before the tariff order was passed on 24.11.2003, MSEDCL was insisting on quarterly invoices. The Petitioner alleged that they were forced to follow the procedure of quarterly invoices and on the basis of this quarterly billing system; MSEDCL has derived profits from the date of commissioning of the wind farms. This is in contradiction to the Commission’s and Tribunal’s Orders.

ii) Later MSEDCL stopped issuing Credit Notes. The procedure that MSEDCL followed required the Joint Meter Reading to be taken, and only thereafter would MSEDCL issue credit notes. After which the quarterly invoice is submitted and the payment is cleared. However, MSEDCL delayed in issuing credit notes. This is violative of the Commission’s and Tribunal’s directions.

iii) MSEDCL gradually stopped accepting invoices. The Petitioner claims that the reason for this was that some of the wind farm developers had approached MSEDCL and applied for supplying electricity to the third party. This application was not allowed.

iv) From March 2004 to October 2005 no interest was paid by MSEDCL. Petitioner issued letter dated 02.12.2008 and a reminder dated 18.12.2008. However, MSEDCL reverted on 29.12.2008 without throwing any light on the issue of payment calculation. Instead, it directed the Petitioners to approach its respective Operation and Management circle.

14. Per contra, MSEDCL clarified that they had a specific procedure to follow in respect of payments as per MSEDCL’s policy / Dept. Circular No. 664, dated 05.10.2001 and that as per the EPA signed by both the parties; the due date for payment is 45 days from the day the bill is received by MSEDCL. The Respondent further submitted that even though from November 2003 to March 2004, they followed quarterly invoice system, after the Commission’s Order dated 24.11.2003 was issued, monthly billing system has been complied with and that they will pay the interest on which the invoice has been raised and delay has occurred. MSEDCL also submitted that Joint Meter Reading is the basis on which the bill is raised and not the basis on which the payment is to be made. MSEDCL referred to the Petitioner’s prayer which reads as follows:



“The Commission may issue necessary order and direction to MSEDCL to review payments that have been made to the members of the Petitioner as also the payment being made currently and in future so as to make payment of interest in cases where the payment for energy received has been delayed beyond 45 days from the Joint Meter Reading;”

According to MSEDCL, the above prayer would have the effect of a Review Petition. It further argued that MSEDCL’s liability arises only when the bill is received by it. As far as payment is concerned, MSEDCL claims to have made payments following the Order of the Commission. Submitting that March 2004 onwards, MSEDCL has began work in this regard and shall make payments.

15. Having heard the parties and after considering the materials placed on record the Commission is of the view that the present controversy can be seen in a narrow compass. For cases, where bills have been raised after Joint Meter Reading (“JMR”), there cannot be any ambiguity. For delayed payments beyond 45 days from the date of the bill, MSEDCL is liable to pay interest. For cases, where JMR has been taken but no bill has been raised for whatever reasons, the submissions made by the Petitioner are that the payment becomes due to Wind Farm Developers from the time when the energy is fed into the grid, which is however not tenable as a bill or a claim has to be preferred for payment. It is alleged that MSEDCL stopped accepting invoices from the Wind Farm Developers, and/or MSEDCL insisted on quarterly invoices.

Since both the parties have failed to resolve the issue, the Commission without getting into metering and billing details rules that as a practical and reasonable solution, wherever invoices have not been issued/ accepted, 30 days from JMR would be deemed to be the date of “bill” and last due date of payment by MSEDCL would be 45 days thereafter and for payments beyond 45 days, interest would become due.

With the above findings, Case No. 148 of 2008 stands disposed of.

Sd/-
(S. B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(V .P. Raja)
Chairman



(P.B.Patil)
Secretary, MERC