

**Before the
MAHARASHTRA ELECTRICITY REGULATORY
COMMISSION**
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Case No. 30 of 2009

**In the matter of
Petition seeking clarification of MERC's Order dated 24-Nov-2003, with respect to
applicability of the order to "Self-Use/ Third Party Sale"**

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

M/s. Nav Maharashtra Chakan Oil Mills Ltd.Petitioner

Vs.

Maharashtra State Electricity Distribution Company Ltd.Respondent

ORDER

December 19, 2009

M/s. Nav Maharashtra Chakan Oil Mills Ltd., submitted a Petition under affidavit before the Commission on May 4, 2009 (and rectified the deficiencies on July 18, 2009), inter alia seeking clarification of the Commission's Order dated November 24, 2003, with respect to the applicability of the Order to the "Self-use / Third party Sale Wind Mills.

2. The prayers of M/s. Nav Maharashtra Chakan Oil Mills Ltd are as follows:
- a) The Hon'ble Commission be pleased to clarify whether the order dated 24th Nov. 2003 is applicable to "Self- use/ third Party Sale" Wind Mills.



- b) That the Hon'ble Commission be pleased to direct the Respondents not to stop the credit notes or lapse credit notes if payment of subsidy is not paid before March 2009 to the Group-I wind Mill, Group-II Wind Mill who have not received the capital subsidy is against the order of the Commission.
- c) As also the said order is not applicable to the wind Mills whether in Group-I or Group-II who are self consumers of power or who are Third Party Sellers of the power.
- d) That such other order as justice and convenience may demand from time to time be passed in favour of the applicant”

3. The Commission, vide its Notice dated July 31, 2009, scheduled the hearing in the matter on August 7, 2009, which was rescheduled to August 26, 2009, in the presence of the 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 Petitioner to serve a copy of its Petition, along with its accompaniments, to the Respondent (MSEDCL) and the four consumer representatives.

4. During the hearing the Petitioner sought the clarification of the Order issued by the Commission on November 24, 2003, with respect to applicability of the Order to Self-Use/ Third Party Sale” Wind Mill. The Respondent (MSEDCL) submitted that this is an individual grievance and the appropriate remedy lies with the CGRF and the present Petition is not maintainable. After hearing both the parties the Commission directed the Petitioner and the Respondent to jointly submit the issues involved in the matter to the Commission. Both the parties submitted their issues to the Commission on August 26,2009, which are as follows:

- a) Whether this Commission has got jurisdiction to decide a dispute of the present nature?
- b) Whether the present clarificatory Petition/ Review Petition is maintainable and is not further barred by limitation?
- c) In the light of the letter dt: 11th Sept'08 by Respondent MSEDCL, whether the Applicant is entitle to share the subsidy received by it, or not?
- d) Whether, in terms of 24th Nov 2003 order, Grp-I project are liable for capital subsidy sharing?
- e) Whether the present Applicant belonged to Group II and has received any subsidy till date?
- f) Whether this Applicant is liable to share the subsidy inspite of being a “Self Consumer” which did not sell electricity to MSEDCL.



5. The Commission vide its Notice dated August 28, 2009, scheduled the hearing in the matter on September 14, 2009. During the hearing the Counsel for the Petitioner submitted that the entire issue is relating to the payment of Capital Subsidy paid by the Maharashtra Energy Development Agency (MEDA). The Petitioner submitted that they have received Capital subsidy of Rs.20 Lakhs from MEDA for Group-I Project and no such subsidy has been received for Group-II Project. Therefore, the question of sharing the same with the MSEDCL does not arise.

6. MSEDCL submitted that the Petitioner has not received any Capital Subsidy for Group-II, however, for Group-I the Petitioner have received the Capital Subsidy. Further, added that there are two issues (i) maintainability of the Petition and (ii) merit of the Petition. According to the Respondent, the current Petition per-say was not admissible at all.

7. The Commission enquired as to under which provision of law / Regulation / Order the Petitioner was liable to share its Capital Subsidy as received by the Petitioner for Group I project. The Respondent replied that MSEDCL raised its claim of equal sharing of Capital Subsidy received by the Petitioner from the GoM through MEDA in pursuance of the MERC Order dated November 24, 2003. The relevant extract of the Order is as follows:

“... Therefore, the Commission recommends that such benefits if materialized in future should be equitably shared between the Developers and purchasing agency (MSEDCL) since the rate determination is based on the cost plus methodology”.

8. The Respondent further submitted that the wind developers are eligible for one time Capital Subsidy only, and it is not differentiated between Group-I, Group-II or Group-III, etc. Hence, MSEDCL raised their claim for equitable sharing of the Capital Subsidy as per the MERC Order.

9. The Commission enquired about the letter from MSEDCL which directed the Petitioner to share the Capital Subsidy. The Petitioner submitted that it received a letter dated September 20, 2007 stated that 50% subsidy is required to be paid latest by October 15, 2007 failing which, the said subsidy would be recovered from the bills of wind project owners. Further two more letters dated October 22, 2007 and September 11, 2008 also directed the Wind mill manufacturers to make the payment of capital subsidy. The relevant extract of the letter dated September 11, 2008 is reproduced below:

“Sub: Payment of Capital Subsidy share Rs.10 lakh to MSEDCL.” “Please refer letters under reference, it was requested to arrange for payment of 50% share of Capital Subsidy to MSEDCL as per MERC order or otherwise the amount will be



recovered through pending bills with MSEDCL. However in spite of above mentioned communication & even after lapse of 10 to 11 months period, it is regretted to note that no any wind project owner has deposited the share of Capital Subsidy to this office. As such this office is compelled to deduct Amount of share of Capital Subsidy from payments due to wind farm owners. Please convey to all your members accordingly, Credit reports for all such windmill owners will be issued only after payment of amount of Capital subsidy please note.”

10. The Petitioner added that in January 2009, MSEDCL stopped their credit in the bills. On an enquiry, MSEDCL stated that 50% need to be repaid failing which the credits to be given due would be stopped and would lapse if the payment is not made before March 2009.

11. The Commission enquired as to whether the Petitioner responded to MSEDCL's letter directing to share the Capital Subsidy. The Petitioner submitted that the above referred letter was addressed to Wind mill suppliers. Further, the Wind mill supplier responded vide its letter dated September 17, 2009 addressed to MSEDCL and also referred to the Commission's Order dated November 24, 2003. The relevant extract of the Order is reproduced below:

“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.”

12. The Petitioner submitted that the wind project owners under the self use and third party sale category are not liable to share Capital Subsidy with MSEDCL. Petitioner also submitted that Group I projects are outside the purview of the said Order dated November 24, 2003. Further, the said Order is not applicable to the Petitioner and no reference could be found in the agreement signed by the Petitioner and MSEDCL in relation thereto.



13. The Commission further enquired whether the Petitioner is a third party seller. The Petitioner responded that they are self users.
14. The Commission directed MSEDCL to submit -
 - a. A list of Wind Energy Projects in Maharashtra under Group-I, Group-II and Group-III.
 - b. Amount of capital subsidy received from GoM through MEDA in each case.
 - c. Refund of capital subsidy received by MSEDCL.
15. MSEDCL vide its letter dated October 6, 2009 submitted its reply to the Commission as directed by the Commission related to the information of list of Wind Energy Projects in Maharashtra under Group-I, Group-II and Group-III, Amount of capital subsidy received from GoM through MEDA in each case, refund of capital subsidy received by MSEDCL from the wind energy generators.
16. Having heard the parties and after considering the materials placed on record, the Commission is of the view that the issues as formulated by the parties requires to be dealt with in the first instance. Accordingly, the Commission proceeds to deal with each of the issues as follows:
 - (a) Whether this Commission has got jurisdiction to decide a dispute of the present nature?
 - b) Whether the present clarificatory Petition/ Review Petition is maintainable and is not further barred by limitation?

As regards issues at items (a) and (b) above, being dealt with together, the Commission is of the view that the present petition having been filed for seeking clarifications from an order of the Commission dated 24.11.03 (Case No. 17 (3), 3,4, & 5 of 2002, is not for adjudication of any dispute. While issuing clarifications the Commission would be empowered under law to issue necessary directions as may be required. The present petition having been filed for seeking clarifications (and not a review) from an order of the Commission dated 24.11.03 (Case No. 17 (3), 3,4, & 5 of 2002, the question of limitation does not arise.



- c) In the light of the letter dt: 11th Sept'08 by Respondent MSEDCL, whether the Applicant is liable to share the subsidy received by it, or not?
- d) Whether, in terms of 24th Nov 2003 order, Grp-I project are liable for capital subsidy sharing?
- e) Whether the present Applicant belonged to Group II and has received any subsidy till date?
- f) Whether this Applicant is liable to share the subsidy inspite of being a “Self User” which did not sell electricity to MSEDCL?

As regards issues at items (c), (d), (e) and (f), which are being dealt with together, the Commission is of the view that while claiming share of 50% of the capital subsidy 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 aforesaid observation is not at all applicable to the Petitioner herein as MSEDCL is not the ‘purchasing agency’, it may be only the wheeling agency. Hence MSEDCL’s claim is not only unjustified but is also patently illegal which ought to be set aside.

Moreover, the observation quoted above appears under the following paragraph in the aforesaid Order dated 24.11.2003 “2.3.1 Part-A: **GroupII (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 24.11.2003 that the observation quoted above is in the context of **Group II (old) projects** and thus not applicable to 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 24.11.2003 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.”

The aforesaid Order dated 24.11.2003 also provides as follows:-

3.4.4 Capital Subsidy

*Govt. of Maharashtra declared capital subsidy upto a maximum of Rs.20 Lacs 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. (for details please refer to the Commission’s rulings under section 2.2.15)” {Emphasis added}*



Considering the submission made by MEDA as quoted above, in case the Petitioner's Group II project has not received Capital Subsidy question of sharing any amounts not received does not arise.

17. In the circumstances, letters issued by the Respondent demanding share in the Capital Subsidy from Group I projects and from those Group II projects which have yet not received Capital Subsidy, are hereby set aside. The Commission is also of the view that it would be in the interests of justice to direct MSEDCL, the Respondent herein, to immediately stop and desist from stopping issuance of credit notes to Group-I projects, Group-II Wind Mills who have not received the capital subsidy and where MSEDCL is not the purchasing agency that is it is hereby clarified that the observation in the aforesaid Order that “... *such benefits (capital subsidy) if materializing in future, should be equitably shared between the developer and the purchasing agency*” does not apply to the wind Mills who are under the category of “*Self-use and Sale to Third Party*”. In case the Respondent has deducted any amounts on account of sharing of Capital Subsidy from the categories clarified above, being unauthorized in law to do so, Respondent is directed to immediately refund such amounts to such Wind farm developers.

With the above clarifications and necessary directions, the present case stands disposed of.

Sd/-
(V.L. Sonavane)
Member

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(V. P. Raja)
Chairman



(Sanjay Sethi)
Secretary, MERC