

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal no. 59 of 2013 and
Appeal no. 116 of 2013**

Dated : 1st August, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of

Appeal no. 59 of 2013

Maharashtra State Electricity Distribution
Company Limited
Prakashgad Bandra (East)
Mumbai – 400 051

...Appellant(s)

Versus

1. Maharashtra Electricity Regulatory
Commission
Centre 1, 13th Floor, World Trade Centre
Cuffee Parade, Mumbai – 400 005
2. Maharashtra Energy Development Agency
MHADA Commercial Complex, II Floor
Opp. Tridal Nagar
Yerwada, Pune – 411 006
3. Indian Wind Power Association
Empire House, 214, Dr. D.N. Road
Ent. A.K. Nayak Marg

...Respondent(s)

Fort, Mumbai – 400 001

4. Tata Motors Limited
Bombay House
24, Homi Modi Street
Fort Mumbai – 400 001
5. Enercon (India) Limited
Enercon Tower
A-9, Veera Industrial Estate
Veera Desai Road
Andheri (East), Mumbai – 400 053
6. Ushdev International Ltd.
Appejay House, 6th Floor
130, Mumbai Samachar Marg
Fort, Mumbai – 400 001
7. Canpex Chemicals Limited
123, Nana Peth, Opp. – J.D.
Transport, Pune – 411 002
8. Sahyadri Industries Limited
Swastik House, 39/D, Gultekdi
J.N. Road, Pune – 411 037
9. Subhash B. Mutha
123, Nana Peth, Opp. J.D.
Transport, Pune – 411 002

Counsel for the Appellant(s):

Ms. Deepa Chawan
Mr. Kiran Gandhi
Mr. Ramni Taneja
Mr. Umang Jain
Mr. Nirav Shah

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. M.G. Ramachandran
Ms. Poorva Saigal
Mr. Vishal Gupta
Mr. Kumar Mihir
Ms. Dipali Sheth

Appeal no. 116 of 2013

Maharashtra State Electricity Distribution ...Appellant(s)
Company Limited
Prakashgad Bandra (East)
Mumbai – 400 051

Versus

1. Maharashtra Electricity Regulatory ...Respondent(s)
Commission
Centre 1, 13th Floor, World Trade Centre
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2. Maharashtra Energy Development Agency
MHADA Commercial Complex, II Floor
Opp. Tridal Nagar
Yerwada, Pune – 411 006
3. M/s. Serum Institute of India Limited
2112/2, Off Soli Poonawalla Road
Hadaspsar, Pune – 411 028

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Mr. M.G. Ramachandran
Ms. Poorva Saigal
Mr. Vishal Gupta
Mr. Kumar Mihir
Ms. Dipali Sheth

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

Appeal nos. 59 of 2013 and 116 of 2013 have been filed by Maharashtra State Electricity Distribution Company Limited, the Distribution Licensee, against two orders of the State Commission dated 03.01.2013 relating to the same issue of banking of energy from wind energy generator and reduction in contract demand of the consumers availing wind energy under open access.

2. In both the Appeals Maharashtra State Regulatory Commission (“State Commission”) is the Respondent no.1 Maharashtra Energy Development Agency, the nodal agency of the State for development of renewable energy is the Respondent no.2. The other Respondents are Indian Wind Power Association and the industries which have sourced power from wind energy generators.

3. The facts of the case in Appeal no. 59 of 2013 are as under:
 - a) The State Commission by order dated 24.11.2003 determined the preferential tariff for wind energy generators and also provided for banking of energy by the Distribution Licensee for those wind energy generator who wanted to supply power to consumers under open access.

 - b) On 20.01.2005, the State Commission notified the Maharashtra Electricity Regulatory Commission (Electricity

Supply Code and Other Conditions of Supply) Regulations, 2005, hereinafter referred to as "Supply Code". Thereafter on 21.06.2005, the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005, hereinafter referred to as "Open Access Regulations", came into force.

- c) The State Commission notified the Renewable Energy Tariff Regulations 2010 and subsequently passed the renewable energy tariff order dated 14.07.2010 for FY 2010-11.
- d) On 30.09.2011, the Appellant issued circular no. 147 relating to instructions to its field staff for grant of open access to consumers sourcing power from renewable energy sourced. On 25.11.2011, a Petition was filed by Indian Wind Power Association, the Respondent no. 3 herein in Appeal no. 59 of 2013 impugning the internal circular no. 147 dated 30.09.2011. However, on 23.01.2012, the Appellant issued a

new circular no. 155 in respect of grant of open access to consumers sourcing power from renewable energy generators and the earlier circular no. 147 dated 30.09.2011 was cancelled. The internal circular dated 23.01.2012 provided for reduction in contract demand of the consumer to the extent of open access availed from wind energy generator and disallowing banking facility to wind energy generators, which was available to them earlier. Thereafter, the Petition filed by Indian Wind Power Association before the State Commission was amended to bring on record the new circular no. 155 dated 23.01.2012. Some consumers which were availing power from wind energy generators under open access also filed similar petitions.

- e) On 03.01.2013, the State Commission passed a common order in case nos. 8 of 2012, 18 of 2012, 20 of 2012 and 33 of 2012 setting aside the internal circular dated 23.01.2012 of the Distribution Licensee. Aggrieved by this impugned

order dated 03.01.2013, the Appellant Distribution Licensee has filed this Appeal.

4. The facts of the case in Appeal no. 116 of 2013 are also similar. Since issues involved in both the Appeals are the same, a common judgment is being rendered by us. However, for brevity, the impugned order and the facts of the Appeal no. 59 of 2013 are being referred to by us.
5. The main issues raised by the Appellant in these Appeals are as under:
 - (A) Reduction in contract demand as contemplated in circular dated 23.01.2012
 - (B) Banking provision granted to wind energy generators.
6. On the above issues, the Appellant has submitted as under:-

(A) Reduction in contract demand as contemplated by the circular dated 23.01.2012.

- i) The termination/reduction of contract demand on open access consumer has been made in accordance with the Regulations no. 4.2.1 and 4.2.2 of the Open Access Regulations. Once the Regulations are framed, the same are binding on the State Commission. The impugned order amounts to ignoring and altering the statutory Regulations which is not permissible under the law:
- ii) The Electricity Act envisages liberty to the consumer to procure his own requirement of power and does not warrant dependence on the Distribution Licensees in whose area the consumer is situated. This provisions also *inter alia*, relieves the Distribution Licensees from its universal service obligation to supply electricity in respect of open access consumers and gives liberty to the Distribution Licensee to

contract and procure less quantum of power to the extent of requirement of power availed by the open access consumers. Thus, an open access consumer is required to contract and arrange for his own requirement on real time basis and is not expected to depend on Distribution Licensee for his requirement except in cases of the standby provisions.

- iii) The Electricity Act, 2003 also provides for compensation to the host licensee due to loss of cross subsidy as a result of migration of a high end open access consumer from the distribution network through imposition of Cross Subsidy Surcharge to be determined by the State Commission. The National Tariff Policy has devised a formula to determine the Cross Subsidy Surcharge. The Tariff Policy assumes that the consumer would move out of Distribution Licensee's net under open access which in turn would reduce the costly power purchase requirement of distribution licensee. This

clearly indicates that the Distribution Licensee is not expected to procure power for open access consumers as per the Act and the National Tariff Policy.

- iv) If the contract demand of open access consumer is not reduced even after availing open access power from a generator and sources other than the Distribution Licensee, it will not be in consonance with the Electricity Act and the Tariff Policy. If the Distribution Licensee is not required to reduce the contract demand of the open access consumer, there would be no reduction in the power purchase of the Distribution Licensee.

B. Banking provision granted to wind energy generators.

- i) Wind is an infirm source of power. Generally, wind intensity is high during June to September every year i.e. during monsoon season and it falls down thereafter. About 70% of electricity from wind energy generators is generated during 4

months of monsoon and balance 30% is generated during remaining 8 months. Most of the wind energy is generated at night time when wind is high and generation is normally low at day time.

- ii) The State Commission through order dated 24.11.2003 determined preferential tariff of wind energy generator and also provided for banking of wind energy by the Distribution Licensee for those wind energy generators who wanted to supply power to the consumers through open access. The wind energy generated at given TOD time slot was allowed to be adjusted against the consumption at that particular TOD time slot on any day over the financial year. It was also provided that the unadjusted units to the extent of 10% of the total generation during a particular year would be purchased at lowest TOD tariff by the Distribution Licensee. The banking facility was applicable to those wind generators who were either consuming the power for self use or selling power to a third party consumer. The State Commission

initially extended the validity of the said order vide order dated 16.08.2006 up to 31.3.2010. The State Commission again extended the validity of the said order vide its order dated 31.03.2010 till such time the new renewable energy tariff order is passed.

- iii) The State Commission then notified Renewable Energy Tariff Regulations 2010 and subsequently passed renewable energy tariff order dated 14.07.2010 for the financial year 2010-11 which do not provide for banking facility for wind energy generators. Thus, the validity of the order dated 24.11.2003 expired on 14.07.2010 i.e. date of passing of renewable energy tariff order. Further, the State Commission on 29.04.2011 passed next renewably energy tariff order for financial year 2011-12. Therefore, the provision of banking of energy as provided under the State Commission's order dated 24.11.2003 has now become null and void. The facility of banking of energy for open access generator/consumer

has not been provided in the Open Access Regulations. Therefore, said facility cannot be extended to renewable energy generators de hors the Regulations.

- iv) The Distribution Licensee has to suffer loss for providing banking facility to the wind generator due to a difference in price of power during the monsoon season and summer and winter season. The burden of this financial loss is falling on the other consumers of Distribution Licensee which is not desirable.

- v) As per the Electricity Act 2003, the Distribution Licensee is bound to provide non-discriminatory open access on its distribution system for wheeling of electricity. However question of banking of energy does not arise in the context of open access.

7. On the above aspects, we have heard Ms. Deepa Chawan, Learned Counsel for the Appellant, Mr. Buddy Ranganadhan, Learned Counsel for the State Commission and Mr. M G Ramachandran and Mr. Vishal Gupta, Learned Counsel for the Respondent nos. 3 to 5.

8. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:
 - i) **Whether the State Commission has erred by holding that the consumers availing power through open access from wind energy generators can continue to maintain the full contract demand with the Distribution Licensee in violation of its own Regulations and provisions of law?**

 - ii) **Whether the law automatically relieves the Distribution Licensee from its universal service obligation to supply**

electricity to an open access consumer to the extent of quantum of open access granted even though the consumer has chosen to maintain its full contract demand with the distribution licensee?

iii) Whether the State Commission has erred in allowing banking facility to the wind energy generators without there being any provision for the same in the Regulations and renewable energy tariff orders?

9. The first two issues regarding maintaining of full contracted demand of an open access consumer with the distribution licensee are interconnected and are being dealt with together.

10. According to Ms. Deepa Chawan, the Learned Counsel for the Appellant, the provision regarding termination/reduction of contract demand of open access consumer in the

commercial circular no. 155 dated 23.01.2012 has been made as per and in accordance with the Regulation 4.2.1. and 4.2.2 of the Open Access Regulations, 2005.

11. According to Mr. M G Ramachandran, a combined reading of the Open Access Regulations, 2005 and Supply Code Regulations, 2005 would show that it is the right of the consumer and not the Distribution Licensee, to require such reduction in contract demand and so long as the consumer is agreeing to pay the charges relating to the full contract demand, the Distribution Licensee has the universal service obligation to allow the contract demand to the extent desired by the consumer. Further, according to Mr. Ramachandran, these issues are covered by the earlier judgments of this Tribunal in their favour.

12. As rightly pointed out by Shri M G Ramachandran, Learned Counsel for Respondent no. 2 to 5, this issue has already

been settled by this Tribunal in judgment dated 11.05.2006 in Appeal no. 34 of 2006 and dated 11.07.2006 in Appeal no. 1 of 2006. These have also been relied upon by the State Commission in the impugned order.

13. In M/s. Bhushan Limited Vs. West Bengal Electricity Board and others in Appeal no. 34 of 2006 by order dated 11.5.2006 this Tribunal held that :

“13. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of area Discom so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that WBSEB has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant’s plant in Bhagihatti is connected to WBSEB system and the appellant is an existing consumer, as defined in Section 2(15) of The Electricity Act 2003.

14. *As already pointed out, Section 43 mandates that the area licensee shall supply power so long as the*

consumer remits the charges prescribed as per Tariff Notification and as provided in Section 45 of The Electricity Act 2003....”

15. *On a careful consideration of various provisions in The Act, we find that there is no provision in the Act which mandates that the consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because open access is applied and allowed. The appellant has unequivocally made it clear that the appellant is willing to pay the charges prescribed by the area distribution licensee including demand charges, energy charges and other charges for the connected load of 14.9 MVA in the same manner as in the case of identically placed industrial consumers in the area and the appellant is ready and willing to remit the charges payable to the area distribution licensee.”*

14. In Indian Aluminium Company Limited Vs. West Bengal Electricity Regulatory Commission and others in Appeal no. 1 of 2006 dated 11.07.2006 this Tribunal held as under:-

“18. In law and as per statutory provisions so long as the appellant desires to continue its relationship with the area distribution licensee and agree to abide by the stipulations, there can be no direction or compulsion to sever its contractual relationship as a consumer of the area DISCOM. In the present case, the appellant as

already pointed out, had agreed to comply with the existing terms and conditions of supply and is ready to remit all the charges prescribed as a consumer of electricity to CESC Limited. It is rightly pointed out that the appellant has not sought for any variation with respect to its being a consumer of CESC for the connected load of 8.5 MW at 33 KV nor it has sought for any reduction in demand charges or energy charges or other charges consequent to open access being allowed in its favour.

19.....Nothing in the Electricity Act 2003 which either directs or mandates that a consumer who applies for open access should cease to be a consumer of the area DISCOM.

20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmth is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.

21. As already pointed out, Section 43 mandates that the area licensee shall supply power so long as the consumer remits the charges prescribed as per Tariff Notification and as provided in Section 45 of The Electricity Act 2003. Section 48 enables the distribution licensee to impose certain additional conditions when open access is permitted.”

In the above cases the Tribunal has held that a consumer who has sought open access can also maintain its full contract demand with the area Distribution Licensee as long as it agrees to pay full charges of the Distribution Licensee, consequent to open access being allowed in his favour.

15. The findings of the Tribunal in above judgments will squarely apply in the present cases too.

16. Let us now examine the relevant clauses of open Access Regulations, 2005 referred to by the Appellant

“4.2 Application by a consumer

4.2.1 Where a consumer of the Distribution Licensee, who is eligible under Regulation 3.1, applies for open access to the distribution system so as to obtain supply from a Generating Company or a Licensee other than such Distribution Licensee, the consumer and the Distribution Licensee shall take necessary steps for termination of agreement for supply of electricity and discontinuance of supply to such consumer, in accordance with the procedure and within the time limits specified in the Electricity Supply Code.

4.2.2 Where a consumer of the Distribution Licensee, who is eligible under Regulation 3.1, applies for open access to the distribution system so as to obtain a part of his total requirement for supply from a Generating Company or Licensee other than such Distribution Licensee, the Distribution Licensee shall reduce the contract demand/ sanctioned load of such consumer, to the extent of capacity applied for under open access, in accordance with the procedure for reduction in contract demand/ sanctioned load specified in the Electricity Supply Code and within the time limits specified in the Standards of Performance Regulations.”

17. The relevant portion of the Supply Code Regulations, 2005 referred to by the Appellant.

“6.6 A consumer may terminate the agreement after giving a notice of thirty days to the Distribution Licensee.

6.7 Whenever an agreement is terminated by notice given by the consumer, the Distribution Licensee shall give a written intimation to the consumer within fourteen days after termination failing which it shall be construed that such intimation has been given to the consumer.

6.8 The Distribution Licensee shall increase or reduce the contract demand/sanctioned load of the consumer upon receipt of an application for the same from the consumer.”

18. The combined reading of the Open Access Regulations, 2005 and Supply Code Regulations, 2005 clearly shows that only the open access consumer has the option to reduce or terminate its contract demand with the Distribution Licensee. The Distribution Licensee on its own cannot terminate or reduce the contract demand to the extent of quantum of open access. There is also no deemed reduction of contract demand of a consumer which obtains open access.

19. Thus, the provision regarding deemed reduction of contract demand of a consumer who opts for open access in the

commercial circular 155 dated 23.01.2012 of the Appellant is in contravention of the Regulations and the dictum of this Tribunal.

20. Ms. Deepa Chawan, Learned Counsel for the Appellant, has argued that the Distribution Licensee is not required to procure power for the consumers who have opted for open access and if the Distribution Licensee is made to make arrangements for full quantum of power for such consumer without any liability to pay stand by/temporary charges it would result in loading of additional cost on other consumers.
21. The open access consumer who maintains full contracted demand with the Distribution Licensee is liable to pay for demand charges which should cover the fixed cost of the Distribution Licensee. In case the Distribution Licensee is not able to recover full fixed cost for the power arranged for such consumer then the Distribution Licensee has liberty to put up

a case with supporting documents for the recovery of same for consideration of the State Commission to appropriately compensate the Distribution Licensee so that the burden is not passed on to other consumers.

22. Section 42 (2) of the Electricity Act provides for open access in the distribution system on payment of wheeling charges and surcharge as specified by the State Commission and the surcharge to be utilized to meet the requirement of cross subsidy within the area of supply of the Distribution Licensee. However, the surcharge shall not be levied in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use. According to Section 42(2) of the Act, the open access consumer is also liable to pay additional surcharge as may be specified by the State Commission to meet the fixed cost (stranded cost) of the Distribution Licensee arising out of his obligation to supply. Therefore, if there is a stranded cost which the Distribution Licensee has to

bear out his obligation to supply to open access consumer, the Distribution Licensee can submit its claim for additional surcharge in its petition for ARR and tariff for consideration of the State Commission while deciding the wheeling charges, surcharge and additional surcharge for open access consumers. Thus, the law has provided a remedy for recovery of stranded cost of the Distribution Licensee out of its obligation to supply to an open access consumer. Therefore, if the Appellant Distribution Licensee finds that it has to bear some fixed cost (stranded cost) due to its obligation to supply to the open access consumer, it can always approach the State Commission with supporting data and claim additional surcharge in its ARR/tariff. Whenever such claim is raised by the Appellant, the State Commission shall consider the same and decide as per law.

23. Accordingly, we decide first two issues as against the Appellant.

24. The third issue is regarding continuation of banking facility for wind energy generators.

25. Ms. Deepa Chawan, Learned Counsel for the Appellant has submitted that the State Commission by its order dated 24.11.2003 had determined the preferential tariff for wind energy and had also provided for banking of wind energy. On 16.8.2006 the State Commission extended the validity of its order dated 24.11.2003 till such time a new tariff for financial year 2010-11 is determined pursuant to notification of Renewable Energy Tariff Regulations for new control period. The State Commission notified the Renewable Energy Tariff Regulations 2010. The Tariff Regulations did not provide for banking of wind energy by the Distribution Licensee. Thereafter on 14.07.2010, the State Commission passed its renewable energy tariff order which did not have a provision for banking of energy of wind energy generators.

Thus, the validity of wind tariff order dated 24.11.2003 has come to an end on 14.07.2010. Therefore, the banking of wind energy is not available to wind energy generators from 14.07.2010. Therefore, the Appellant has correctly discontinued the banking facility by its commercial circular dated 23.01.2012.

26. According to Shri M.G. Ramachandran, Learned Counsel for the Respondent no. 3, 4 and 5, the banking facility provided by the Distribution Licensee to wind energy generator as per the order dated 24.11.2003 is not restricted up to 14.07.2010 or otherwise affected by the absence of any Regulation in this regard by the State Commission or impliedly overridden by the provisions of Open Access Regulations. The Open Access Regulations do not in any manner provide for cessation of banking facility specially allowed in the order dated 24.11.2003. The banking facility as held in number of decisions of the Tribunal is inherent and essential for the

wind power developers. It is also not necessary to have a Regulation notified for giving effect to the order dated 24.11.2003 directing the Distribution Licensee to provide banking facilities on the terms and conditions contained in this order. Further, the State Commission had deliberated and clarified on the issue of banking facility and the related matter of issuance of credit notes and directed for continuation of banking facility in the various orders dated 16.08.2006, 07.11.2007, 20.11.2007, 10.07.2009, 04.08.2009, 09.03.2009, 09.09.2011 and 20.10.2011. It is also settled principle of law that absence of Regulations does not take away the powers of the State Commission to issue directions, orders, etc.

27. Let us examine the order dated 24.11.2003 of the State Commission.

28. The order dated 24.11.2003 allows banking of energy delivered to the grid for self use and or sale to third party at any time of the day and night subject to the condition that surplus energy at the end of the financial year shall not be carried over to the next year. Surplus energy at the end of the year limited to 10% of the net energy delivered by the wind energy developers to the grid during the year shall be purchased by the Distribution Licensee at the lowest TOD slab rate for HT energy tariff applicable on the 31st March of the financial year in which the power was generated. According to this order, the credit for wind energy is to 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 is to be carried forward to the next month in the same TOD slot. Any unutilized wind generation at the end of the Financial Year is to be purchased by the Distribution Licensee.

29. We find from the impugned order that the State Commission in various orders has been directing continuation of banking facility by the Distribution Licensee. The directions given in these orders are as under:-

(a) In order dated 07.11.2007 in petition filed by M/s. Bajaj Auto Ltd. seeking clarification of order dated 24.11.2003, the Commission has decided as under:-

As per sub-section(2) of Section 9 of EA2003, every person who has constructed captive generating plant has right to open access for the purpose of carrying electricity from his captive generating plant to destination of its use subject to availability of transmission capacity. Thus, not providing credit for energy wheeled by such captive generating plant would tantamount to denial of statutory right granted under EA 2003. MSEDCL is required to issue credit notes in favour of BAL, which is a captive user and its wheeling is duly metered. Under the existing laws, there is no time bar on BAL to wheel wind energy from MSEDCL for self-use. ...”

- (b) In another case the State Commission by order dated 20.11.2007 gave directions for continuation of banking facility is as under:-

“In view of the above, the Commission rules that MSEDCL should continue to provide energy credit in case of open access wheeling (whether captive or third party) transactions upon adjusting for applicable wheeling charge and wheeling loss. There is no scope for adjustment in money terms as claimed by MSEDCL and the Commission rejects the proposal of MSEDCL in this respect.”

- (c) The State Commission by its order dated 09.03.2009 in a petition filed by M/s. Bajaj Finserv Limited has held as under:-

“In view of the above, the Commission hereby directs MSEDCL to apply wheeling charges and losses strictly in accordance with the Tables outlined under the said Order. Further, the Commission has already directed MSEDCL at Para 31, 32 and 33 of the above - said Order in Case No. 33 of 2007 to provide appropriate credit for the wind energy wheeling transactions (whether captive or third party wheeling) upon adjustment of suitable wheeling charges, wheeling losses, transmission charge and transmission losses, as may be applicable”

- (d) The State Commission in its order dated 10.07.2009 in a petition filed by BF Utilities for release of credit notes for its wind energy projects recorded as under:-

“Subsequently, MSEDCL filed on 10.2.2009 a letter dated 28.1.2009 from its Chief Engineer (Comm) addressed to Chief Engineer, Pune Zone, stating therein that the Petitioner has paid applicable open access charges since January 2008 onwards and credit notes have been released by S.E. Satara. Chief Engineer, Pune Zone has been requested in terms of the aforesaid letter to give necessary credit adjustment in the energy bills of January 2008. It has been mentioned therein that wind generation units from April 2008 have been adjusted in the subsequent energy bills, as per credit report of S.E. Satara”

- (e) The State Commission again deliberated on the issue of continuation of banking facility to wind energy generators in order dated 04.08.2009 in a petition filed by BF Utilities Ltd. seeking clarification of Commission's order dated 20.11.2007 and held as under:-

“As regards the issue of banking, the Commission has already dealt with this issue under its Order dated November 24, 2003 (Case 17(3), 3,4&5 of 2002) under para 1.6.10, para 2.4.3, and para 3.4.9 of said Order.”

- (f) Again the State deliberated on the issue of continuation of banking facility to wind energy generators in a petition filed by M/s Navlakha Transline by its order dated 20.10.2011 directed continuation of banking facility as under:-

“The Petitioner also prayed for credit to be given to its consumer for the energy already supplied by the Petitioner in the respective months from the date of commissioning. It also prayed for the release of credit notes for energy to be supplied by it by feeding the same into grid and the same should not be held back by MSEDCL. The Commission is of the view that, cases of self use and third party sale (prior to expiry of validity period) have been dealt with by the Commission in its order (Tariff for procurement of wind energy & wheeling for third party - sale and/ or self - use) dated November 24, 2003. Accordingly credit notes should be immediately released by the Respondent MSEDCL and any other form of adjustment made to the same would be treated as contravention of the Order dated 5th September 2006.”

- (g) Again in a petition filed by the Appellant/Distribution Licensee regarding cross subsidy surcharge and stand by charges for open access consumers, the State Commission in its order dated 09.09.2011 has ruled on delay in issuance of credit notes as under:-

“...It has been observed that MSEDCL has been delaying grant of Open Access to many eligible generators and delaying in providing Credit Notes for the third party sale units though the energy is being injected to the MSEDCL network. Energy is generated and fed into the grid; it is sold and appropriate revenue is realized by MSEDCL. However, Credit Notes for the third party sale is inordinately withheld/delayed by MSEDCL. These actions need to be deprecated. MSEDCL is directed to provide hassle free non-discriminatory Open Access to the RE generators.”

30. Thus, it is seen that the State Commission has consistently been maintaining the same position and that the banking facility provided under order dated 24.11.2003 has continued to be in operation. The order dated 09.09.2011 has been passed after notification of the Tariff Regulations and the subsequent tariff orders. As regards contentions raised by the Distribution Licensee pertaining to commercial and financial implication of providing banking facility to wind energy generator, the State Commission has already given directions to the Appellant to carry out a detailed study and submit a report to the State Commission. Accordingly, the Appellant has been given liberty by the State Commission to

put up a case to remedy any commercial and financial implication of providing the banking facility.

31. Banking of wind energy is an essential feature to enable commercial viability of a wind energy generator supplying power to a consumer, captive or otherwise, through open access. The quantum of generation at the wind energy generator varies during the time of the day and season to season from nil to full capacity and does not match with the load profile of the consumer. The generation of wind energy generator in excess of the load of the open access consumer in a metering time block is fed into the grid and consumed by the Distribution Licensee. Various State Commissions have provided different type banking facilities to the wind energy generators to discharge their function of promotion of renewable sources of energy under the Electricity Act, 2003 under which the surplus energy injected by the wind energy generator and utilized by the Distribution Licensee is considered as banked energy which is supplied

back to the consumer during the period when the wind energy generation is less than the demand of the open access consumer in the same Financial Year. Different models for levy of banking charges and payment for the unutilized energy by the open access consumer at the end of the Financial Year by the Distribution Licensee exist in various States.

32. Similar banking facility have been provided by the wind energy generators by the State Commission by order dated 24.11.2003 which has been extended from time to time by the State Commission. We do not find any illegality in continuation of the banking facility to the wind energy generators in pursuance of Section 86(1)(e) of the Electricity Act as a promotion measure for wind energy generators. However, we agree with Ms. Deepa Chawan, Learned Counsel for the Appellant that such banking facility should not be at the cost of other consumers of the Distribution Licensee especially as the wind energy generators are

supplying energy to third parties or for captive use on commercial basis. The Distribution Licensee may incur same cost as a result of difference in price of electricity during high wind season when the energy is banked and rest of the year when the banked energy is supplied. If the Distribution Licensee is incurring same cost for providing the banking facility, the same should be recovered from the wind energy generators/open access consumers availing such facility. Accordingly, liberty is granted to the Appellant to submit a case with supporting data for charges for providing banking facilities and the State Commission shall consider the same.

33. We, therefore, do not find any reason to interfere with the impugned order of the State Commission with regard to banking of wind energy.

34. Summary of our findings

i) Maintaining of full contract demand with the distribution licensee by consumer availing power through open access from wind energy generators.

The combined reading of the Open Access Regulations, 2005 and Supply code Regulations, 2005 clearly shows that only the open access consumer has the option to reduce or terminate its contract demand with the Distribution Licensee. The Distribution Licensee on its own cannot terminate or reduce the contract demand to the extent of quantum of open access. There is also no deemed reduction of contract demand of a consumer which obtains open access. This issue is also covered by judgment of this Tribunal in Appeal no. 34 of 2006 and Appeal no. 1 of 2006. The open access consumer who maintains full contracted demand with the Distribution Licensee is liable to pay for demand charges which should cover the fixed cost of the Distribution Licensee. In case the Distribution Licensee is not able to recover full fixed cost for the power arranged for such consumer then the Distribution Licensee has liberty to put up a case with supporting

documents for the recovery of same for consideration of the State Commission to appropriately compensate the Distribution Licensee so that the burden is not passed on to other consumers.

Further, the law has provided a remedy for recovery of stranded cost of the distribution licensee out of its obligation to supply to an open access consumer. Therefore, if the Appellant Distribution Licensee finds that it has to bear same fixed cost (stranded cost) due to its obligation to supply to the open access consumer, it can approach the State Commission with supporting data and claim additional surcharge in its ARR/tariff. Whenever such claim is raised by the Appellant, the State Commission shall consider the same and decide as per law.

- ii) Continuation of banking facility for wind energy generators**

We do not find any infirmity in the State Commission continuing banking facility based on the various orders passed from November, 2003 to October, 2011. As regards financial implication of banking facility on the Distribution Licensee, the Appellant is at liberty to approach the State Commission with supporting documents before the State Commission for levy of charges for banking and the State Commission shall consider the same and decide as per law.

35. In view of above, both the Appeals are dismissed with some directions and consequently the State Commission's impugned orders are confirmed. No order as to costs.

36. Pronounced in the open court on this
1st day of August, 2014.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

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REPORTABLE/~~NON-REPORTABLE~~
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