

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case Nos. 108 of 2019

**Report submitted by Maharashtra Energy Development Agency (MEDA) relating to
Classification of Wind Zone in Maharashtra**

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

ORDER

Date: 10 July, 2019

1. MSEDCL had approached the Commission in Case No. 41 of 2017 seeking revision in Wind Zone classification assigned by Maharashtra Energy Development Agency (MEDA) to the Wind Energy Projects achieving consistently higher generation in the last three years. The Commission vide its Order dated 3 April, 2018 did not allow the relief sought by MSEDCL.
2. Thereafter, through review Petition in Case No 152 of 2018, MSEDCL approached the Commission for review of above said Order dated 3 April, 2018. The Commission by its Order dated 9 July, 2018 while allowing review had instituted study of wind zone classification through MEDA. The relevant excerpts of the Order is reproduced below:

“13. In view of the foregoing, the Commission allows the present Review Petition and hereby directs MEDA to review the Wind Zone classification of the instant 42 Wind Generators and review the Wind Zone classification for all the remaining such Wind Generators at the end of the current financial year based on the actual generation data submitted by MSEDCL /Generators.

If the generation is more than the allotted Wind Zones and CUF, then MEDA will make a recommendation about change in wind zone classification after taking into

consideration, the wind power density and the technology employed by the generator. Surely, the benefits of technology in terms of injecting more wind power into grid would need to be passed on to the wind generator. But, the generator can not simultaneously take advantage of the higher tariff fixed for low wind zone classification claiming just the technological superiority of the machine. The idea of giving higher tariff to low wind density zone was to encourage harnessing of wind power by offsetting the low returns due to less wind density. It would amount to perversion of promotional tariff regime in low wind density zones, if the wind generators start generating power exceeding the assigned capacity for such zone with alternate technology to the one considered while fixing feed-in tariff. It would in fitness of things that the CUF indicated in the respective wind zones is treated as the upper limit for claiming tariff of that wind zone. Any generation more than the assigned CUF would either change the classification or lapse the additional generation or adjust the additional generation in the subsequent year. MEDA will consider all these aspects before making an appropriate recommendations for such wind generators who are deviating significantly from the wind zone assigned to them.

Further annual verification needs to be carried out for the first three years from the date of commissioning (COD) of such Wind Generators and the correct Wind Zone classification based on average CUF as submitted by MSEDCL/Generators needs to be decided, which will be applicable for the remaining tenure of the EPA, if any, with MSEDCL/Distribution Licensees, so that the benefits of better efficiency can be availed by generators and proportionately shared with consumers of Maharashtra. MSEDCL may prefer separate petition to Commission in this regard with full justification for apportioning the extra benefit noticed in 42 wind generators between consumers and the wind generators.

14.The Commission further notes that MSEDCL's study of about 800 to 900 Wind Generators and compiled data about actual Generation details of all the Wind Generations by MEDA would be dealt with separately through public consultation process since it may require amending the present provisions of RE Tariff Regulations, 2015. The Commission directs MEDA/MSEDCL to complete this exercise within six months from the date of this Order and submit compliance report to the Office of the Commission accordingly."

3. Aggrieved by the Commission's above Order, various wind generators filed Writ Petitions No. 2682, 2686, 2688, 2793, 2868 and 2912 of 2018 before the Hon'ble Bombay High Court. During the proceedings of these Writ Petitions, the Advocate General representing the Commission clarified that the Commission's Order in Case No. 152 of 2018 has not achieved its finality and any amendments/changes will be made only after hearing all the respondents/generators. The relevant excerpts of the Order are reproduced below:

“24 The learned Advocate General appearing on behalf of the respondent No.1 and Mr. Bhatt appearing for the respondent No.2, both submit that the order passed by the Commission and impugned in these petitions should not be taken as a conclusive and binding decision. It is urged by them that we should read paras 12, 13 and 14 of the impugned order with the earlier paragraphs and harmoniously. If the order is read as a whole, at best an exercise is carried out by respondent No.3, but that is not final. If the recommendations of the respondent No.3 are forwarded to the Commission, the Commission will carry out the further exercise and there is no doubt in the mind of respondent Nos.1 to 3 that the Commission will follow the principles of natural justice, give an opportunity to all the affected parties, including the petitioners before this Court and then make appropriate final orders in the exercise of the powers of review. At that stage and when the Commission is considering the recommendations of the MERC [MEDA] and whether to accept them or otherwise, all contentions can be raised by the petitioners based on their objections.

4. Based on above undertaking, Bombay High Court in its Judgment dated 30 August, 2018 has finally ruled as follows:

*“28 Then in para 13 and 14, it may have issued certain directions to the third respondent, but we accept the statements made by learned Advocate General and Mr. Bhatt on instructions that there is no finality attached to them and though the order says that Case No.152 of 2018 stands disposed of, it would not mean that sweeping alterations or changes would be brought and as apprehended by the petitioners. They are not going to be brought about instantly. All that the Commission has done is to direct an exercise to be carried out and has issued some guidelines in that regard. After the third respondent abides by this, the recommendations of the third respondent would be placed before the first respondent-Commission. It has categorically stated in the order itself that it would hear or give an opportunity of hearing to all the respondents /generators and then decide relevant matters or the issues raised before it finally. For instance, it is observed that further annual verification should be carried out for the first three years from the date of commissioning of such Wind Generators and the correct Wind Zone classification based on average CUF as submitted by second respondent/generator needs to be decided, but the MERC may prefer separate petition to the Commission for apportioning the extra benefit noticed in the case of 42 wind generators, between consumers and the wind generators. **Thus, to our mind, the learned Advocate General is right in urging that after the exercise is completed within six months from the date of the impugned order, for claiming any relief in terms of that exercise carried out by the third respondent, the second respondent would have to approach the Commission again and when the Commission is approached again, it would then decide as to what final orders should***

be passed. Presently, there is no apprehension that either the terms and conditions of the existing contracts would be altered or some new terms and conditions will be imposed, much less any adverse consequences would be visited insofar as the charges levied and collected by the generators. Therefore, we do not think that we should enter into any wider question or a larger controversy, at this stage. Advisedly, once the Commission carries out the exercise at the instance of the second respondent, if at all it is approached again and that exercise results in an adverse order, the petitioners are free to challenge such final orders in accordance with law.”

5. Thus, High Court in its above Judgment did not stop exercise initiated by MEDA in accordance with Commission’s Order dated 9 July, 2018. Accordingly, MEDA has completed the study and submitted its report on ‘Study of Wind Power Density Zones of Wind Power Projects Commissioned under MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2010 (RE Tariff Regulations,2010) to the Commission on 28 February, 2019. The key observations made in the Report are summarized below:
 - 5.1. MSEDCL had selected 42 wind power projects comprising 205 MW out of the total installed capacity of 2373.25MW (or 1918 MW the capacity of projects selling power to MSEDCL under the said control period).
 - 5.2. Only 1 wind mast data, which is owned by NIWE, is available. Rest 13 wind masts are installed by private developers and hence their wind data is not available
 - 5.3. To undertake study for revision of CUF based on the actual generation data, complete wind farm’s sample needs to be accessed.
 - 5.4. From the date of commissioning till March 2018, selected 42 projects had the average CUF more than 20%. These 42 projects were spread across 14 wind masts and hence 14 wind farms were considered for evaluation of CUF. When the neighboring wind turbines were added to these 42 projects to have a sample of complete wind farm it was observed that about 869MW of wind turbines were spread across 14 projects. Out of these 14 wind farms only 6 wind farms had average generation more than 20%.
 - 5.5. Analysis of Wind Power Density at actual Wind Turbine Generator (WTG) Hub Height was done by extrapolating data to Hub Height of 42 wind power projects. Revised WPD was compared with respective zone WPD stipulated in 2010 Regulation. It is observed that, out of 205.7MW of shortlisted projects, 13.6 MW has WPD below Zone 1 and about 120.9 MW of wind projects had higher WPD coming under Zone II and III.

- 5.6. All the 42 projects have benefited in generation due to technology and location.
- 5.7. The average CUF of wind power projects is dependent on the annual wind pattern which is unknown and subject to year on year change. Thus, applying the CUF derived from generation data of first three years will not be appropriate.
- 5.8. Though Distribution Licensees in Maharashtra are paying higher tariff for first thirteen years, their tariffs for the period between 14th year to 25th year are low as compared to the other States and are benefited with lower costs of procurement of wind power. Hence, the overall cost to Distribution Licensee over the 25 years project life is comparable with other States and is win-win situation in for investors and Distribution Licensee/consumers of Maharashtra.
- 5.9. Out of 1918 MW of projects, only 602.7MW (31%) of projects are generating above 20% benchmark and rest 1315.3MW (69%) are generating below 20% CUF.
- 5.10. It is difficult to apportion the incremental cost of project due to increased hub height, increased rotor diameter, incremental cost in developing project on high elevation and complex terrains, incremental cost of effective O&M by IPPs etc. which is benefiting the wind projects in terms of higher generations.
- 5.11. In case of doubts in wind zoning, MEDA has referred such cases to NIWE for its WPD certification. Wind zoning was analyzed by the committee constituted by DG MEDA for this purpose and the MERC Regulation specifying WPD measurement at 50 mtr was strictly followed. If at all any new methodology is to be adopted for WPD and zone certification, the variable parameters like turbine hub height, WTG elevation, turbine technology etc. needs to be correlated to derive an acceptable formula for the new control period.
- 5.12. The weighted average CUF of all the projects commissioned under the control period of MERC RE Tariff Regulation 2010 is 18.86% which is less than that of 20% ceiling for Zone-I. Wind power projects are not generating more than 20% and there is no excess payment to developers for any generation more than 20% if it is seen at macro level.
6. MEDA being expert body and Nodal Agency under MERC RE Tariff Regulations, the Commission had directed it to conduct above study. Once Report of such study is received to the Commission, as required under Section 69 (d) of MERC (Conduct of Business) Regulations, 2004, same needs to be shared with parties for their comments. Relevant part of MERC (Conduct of Business) Regulations, 2004 is reproduced below:

“(d) The report or the opinion received from such person shall form a part of the record of the case and the parties shall be given the copies of the report or opinion given by the person designated by the Commission. The parties shall be entitled to make their submissions, written or oral, either in support or in opposition to the report or the opinion, as the case may be.”

Accordingly, Report of MEDA was shared with MSEDCL, being Petitioner in Case No. 152 of 2018, for comments. MSEDCL submitted its comments on 22 April, 2019 which are summarized below:

- 6.1. 42 wind generators have been shortlisted based on the actual generation which has been consistently higher for two/three years than the generation corresponding to the CUF (upper limit) for such wind zones.
 - 6.2. MEDA being the state nodal agency for development of renewable energy in Maharashtra ought to have complete details of all the wind masts (private or NIWE)
 - 6.3. If higher hub-height turbines were deployed, MEDA should have, at the time of commissioning, brought to the notice of the Commission for re-determination of tariff considering higher CUF instead of burdening the consumers of Maharashtra and enriching the Wind Energy Generators
 - 6.4. Objective of the Commission’s direction was not to verify wind zone based on WPD but based on actual generation.
 - 6.5. As accepted by MEDA in its report, the Commission should immediately revise the wind zone for 120.9 MW out of identified 205.7 MW for being in higher WPD zone.
 - 6.6. MEDA has not referred the data of all the wind masts in the state of Maharashtra that is available with NIWE regarding extrapolation of wind power density for 50 mtr hub height.
 - 6.7. Actual generation data are correct and accordingly the wind zones of the said WTGs shall be revised on the basis of actual CUF data available with MSEDCL
 - 6.8. As MEDA has agreed that 602.7 MW projects are generating more than 20% CUF, the Commission shall allow MSEDCL to amend the wind zone for these projects with immediate effect
7. As issues of Wind Zone Classification would have impact on various wind generators, their

comments on the Report submitted by MEDA become mandatory condition as per Regulation 62(d) of the MERC (Conduct of Business), Regulations, 2004. Therefore, through a Public Notice published in the daily newspapers, Times of India and Indian Express (English), and Maharashtra Times and Loksatta (Marathi) on 9 May, 2019 the Commission invited comments and suggestions by 31 May, 2019. While doing so, for allowing stakeholders to submit informed comments, MSEDCL's comments were also uploaded along with MEDA's Report on MERC website and stakeholders were requested to submit their comments considering these two documents. This process of public consultation on the MEDA's Report was registered as Case No. 108 of 2019.

8. MEDA, through its submission dated 31 May, 2019, gave point wise response to the issues highlighted by MSEDCL on the report. MEDA clarified that Zone classification was done as per the Regulations and Procedures. Further, MEDA stated that through its report, it has brought all facts and figures for the consideration of the Commission based on the generation data submitted by MSEDCL.
9. Total 32 Wind generators submitted their written comments which are summarised issue wise as follows:

9.1. The Present proceeding is in contravention to the undertaking given by the Commission to the Bombay High court.

The initiation of the present proceeding as a separate and independent proceeding, on its own motion / *suo moto* and on the premise that the Commission has already allowed the review Petition filed by MSEDCL against the Order dated 3 April, 2018 is clearly inconsistent with the undertaking given by the Commission to the High Court. The Commission cannot proceed with the present public hearing, without first taking a final and conclusive view with respect to the findings recorded in the Original Order. Review Petition filed by MSEDCL in Case No. 152 of 2018 has not yet been finally decided in view of the undertaking given by the Commission before the High Court. The Commission must withdraw the Public Notice issued by it as the proceeding initiated thereunder is in the teeth of the legal due process and is untenable in law

MSEDCL needs to approach the Commission with separate Petition if it wishes to seek any relief based on MEDA's report. Further, the Commission must issue directions for a fresh public hearing to invite all stakeholders to provide their comments / submissions / objections to the Petition filed by MSEDCL seeking review of the Original Order, or such other fresh Petition as may be filed by MSEDCL in light of the MEDA Report, and thereafter pass a final order on such review Petition.

9.2. Maintainability of Review Petition:

MSEDCL reiterated all the prayers originally made in Case No. 41 of 2017 and sought the review on the grounds which do not satisfy the criteria for seeking review of the Original Order. Hence, the present review proceeding is not maintainable and deserves to be dismissed *in limine*.

9.3. Present proceeding is not maintainable against projects that have been set up under the RE Tariff Regulations, 2010.

RE Tariff Regulations, 2010 specify that the tariff determined vide the applicable tariff Orders for each control year shall be valid for the term of their EPAs i.e. 13 years. Under the RE Tariff Regulations, 2010 the Commission does not have the necessary enabling powers to revise, amend or make any changes to the norms prescribed in it, including the CUF norms, at a later or subsequent date.

Generic Tariff Order which was passed in FY 2011-12 and its review period has long been elapsed, with no review being sought by MSEDCL or suo-moto reviewed by the Commission. Further, no appeal has been filed against the said Generic Tariff Order. As such the said Generic Tariff Order has attained finality and the Commission has been rendered functus officio. Hence, the Commission has no power to review the Generic Tariff Order (whether prospectively or retrospectively),

The fundamental basis of investments was on (i) the estimated long term mean annual energy production and (ii) the then existing FIT tariff scheme. The decision on investment is always done based on the financial modelling of the 20-year life of the project. Post facto altering the tariff based on three year (does not represent the lifetime mean performance) actual performance will be against the norms of business ethics. The Tariff determination parameters are normative and no provision of project specific tariff and any true-up based on actual parameters. It is unlawful to use actual CUF as against normative CUF.

9.4. Amendment of Regulations with retrospective effect not permissible in law.

The CUF norms for the projects covered by the proviso to Regulation 28.1 of RE Tariff Regulations, 2015 can be revised only from prospective effect and not retrospectively, as has been sought by MSEDCL. RE Tariff Regulations, 2010 or 2015 do not contain any provisions that allows a retrospective change in the Regulations or in the EPAs signed pursuant to such Regulations.

It is an established principle of law that unless the statute or Regulation specifies that the same shall have a retrospective effect, the said statute or Regulation shall have

prospective effect only. For projects commissioned in FY 2014-15, the Commission changed the Zone-1 CUF to 22%, and accordingly determined the wind tariff. Hence the Commission did not retrospectively interfere with the CUFs for those projects which were already commissioned in FY-2011, 2012 and 2013.

It is unclear whether MSEDCL is seeking amendment of RE Tariff Regulations, 2010 and 2015, various Generic Tariff Orders and EPAs etc prospectively or retrospectively.

9.5. Wind zone classification and criteria of deciding it.

Wind zoning was done with the knowledge of MSEDCL and only after due consultation with them, which agreed with the classification, and executed EPA . Now MSEDCL seeks to question the sanctity of analysis done by NIWE/MEDA. This cannot be allowed under the applicable RE Tariff Regulations, 2010 and also in view of the EPAs presently subsisting and continuing.

Wind zone was assigned by MEDA to the wind project and not to individual WTG. The Commission has to consider PLF of entire wind Project and not of individual WTG while taking decision of revising the Wind Zone. In the entire wind farm, one WTG/machine may generate higher PLF due to its location advantage and other may generate less energy. There was no restriction in the Regulation that project/s cannot improve generation by employing better/superior technology.

PLF of first 3 year cannot be the criteria for revising the wind zone. There is no guarantee that same PLF will continue for the entire duration of the Project. If in future during the lifetime of the project, generation is lesser, whether wind zone will be revised in future also based on the actual generation. State / MSEDCL / MEDA is not guaranteeing the PLF in particular wind zone. Had State / MSEDCL / MEDA guaranteed the PLF, then it could be appropriate to reclassify the wind zone based on actual generation.

Re-classification of Wind Zones to reduce generic tariff is contrary to the principles enunciated under EA 2003 and principles of legitimate expectation and Regulatory certainty. MSEDCL has not shown how the present wind zone classification, its rationale, principles, framework and process, is unscientific or ill- founded.

9.6. Using advanced technology to optimize technical parameters shall not be penalized.

CUF depends on hub height, rotor diameter, turbine performance and maintenance etc. MEDA in its wind zone classification provides that developer is required to optimize all technical parameters. The credit for better performing turbines should not be denied.

The use of advanced technologies is not leading to perversion of promotional tariff regime and is not inappropriate and against the spirit of the Renewable cause. Wind-

zoning should technically represent purely the windiness of a site. Technological advances come with associated higher costs and hence should not be construed to be against the spirit of the wind zone based tariff scheme.

MSEDCL has cherry picked by seeking increase in CUF based on actual generation, while remaining silent on those projects which are achieving lower than normative CUF. MSEDCL has only selected CUF which is only one of the many parameters for tariff determination (such as capex, O&M, etc). Some individual parameters may be worse off than normative ones, while some parameters may be better-off. Under a Normative Generic tariff environment, the risk / reward is transferred to the developer / generator. This is the very foundation of the Normative Generic tariff principle.

Capex incurred for the increased hub height above 50 meters is not considered for determining levelized tariff. RE is dependent on laws of nature and therefore infirm cannot be expected to perform as per the normative principles all the time. If the review of zoning is done then all other tariff component RoE, O&M, Interest on Loan, Depreciation, IoWC etc should also be reconsidered.

10. On 14 June, 2019, 12 wind generators (List attached as Appendix-3 to this Order) filed Interim Applications (IA) seeking following relief:

10.1. The High Court has left open all the contentions for the parties to argue. Hence, as a preliminary issue MSEDCL must demonstrate and the Commission has to decide whether a case for review of the Original Order has been made out or not.

10.2. The initiation of the Public Hearing by the Commission by issuing the Public Notices dated 09.05.2019 and 01.06.2019 as a separate and independent proceeding, on its own motion / *suo moto* and on the premise that the Commission has already allowed the review petition filed by MSEDCL against the Original Order dated 3 April, 2018 is clearly inconsistent with the undertaking given by the Commission to the High Court.

10.3. From the comments filed by MSEDCL, it is evident that MSEDCL is aggrieved by the finding in MEDA's Report and has briefly submitted as to why MEDA's Report must not be taken into consideration by the Commission. However, MSEDCL has not approached the Commission with any petition, seeking dismissal of MEDA's Report. In these circumstances, it is neither proper nor valid for the Commission to initiate a *suo moto* proceedings to consider MEDA's Report and decide on MSEDCL's Comments thereon because it gives an unwarranted impression of a premeditated approach on the part of the Commission.

10.4. The Public Hearing initiated by the Commission to the extent it seeks to revisit the

parameters and procedure of wind zone classification allowed by the Commission from time to time, is nothing but in the nature of review of the earlier Orders of the Commission, including the Original Order, which as per its own submissions before the High Court has not attained finality and conclusion. Accordingly, the law and propriety demand that the Commission must withdraw the Public Notices issued by it and issue directions for a fresh public hearing to invite all stakeholders to provide their comments / submissions / objections to the petition filed by MSEDCL seeking review of the Original Order, or such other fresh Petition as may be filed by MSEDCL in light of the MEDA Report.

- 10.5. The present IA is filed seeking urgent interim reliefs before the Commission proceeds to decide the issue raised by it under Case No. 108 of 2019 or passing any final orders thereunder. Being an affected and interested party, the Applicant has also filed its Statement of Objections elaborating upon its concerns regarding the issue of change in classification of wind zones, being the issue decided upon by the Commission in the *suo moto* proceedings initiated by it under Case No. 108 of 2019.
- 10.6. The Commission, while initiating the present proceedings has erred and failed to consider the following issues:
 - a. In its review petition filed in Case No. 152 of 2018, MSEDCL has failed to meet the criteria stipulated in Regulation 85 of the MERC (Conduct of business) Regulations, 2004 as well as the Code of Civil Procedure and has, hence, failed to establish that the Original Order passed by the Commission warrants re-consideration or needs to be reviewed. Reliefs prayed by MSEDCL in its review petition are identical to the reliefs sought in Case No.41 of 2017, which issues have already been decided by a well-reasoned Original Order, and MSEDCL is in effect trying to re-argue the matter on merits. Hence, the present proceeding is not maintainable.
 - b. The review jurisdiction would not be applicable to an ‘erroneous decision’ which needed rehearing and correction as a review Petition cannot be allowed to be an appeal in disguise.
 - c. The tariff determined vide the applicable tariff Orders for each control year shall be valid for the renewable energy projects for the entire duration of the Tariff Period i.e.13 years. Under the RE Tariff Regulation 2010 the Commission does not have the necessary enabling powers to revise, amend or make any changes to the norms prescribed thereunder, including the CUF norms, at a later or subsequent date.

- d. It is an established principle of law that unless the statute or Regulation specifies that the same shall have a retrospective effect, the said statute or regulation shall have prospective effect only. In view thereof, no changes to the terms incorporated in the EPAs can be considered as applicable since the RE Tariff Regulation 2010 does not contain any provision allowing retrospective change to the normative factors determined by the Commission. Further, even though the proviso to Regulation 28.1 of RE Tariff Regulations 2015 enables the Commission to revise the CUF norms, such revision cannot be with retrospective effect.
- 10.7. Considering the undertaking given before the Bombay High Court, the Commission is obliged to first hear all the affected parties on the review Petition filed by MSEDCL seeking review of the Original Order, including on the maintainability of the review Petition. Once the review Petition is finally decided and the Commission has taken a conclusive view on the issues raised thereunder, then only MEDA's Report, if the need so arise, can be considered or looked into. Without first deciding the review Petition filed by MSEDCL, the Commission cannot consider MEDA's Report as is sought to be done by way of the present proceeding.
11. The Public Hearing in the matter was held on 18 June, 2019 at the Office of the Commission at 13th Floor, World Trade Centre, Cuffe Parade, Mumbai. The list of persons who filed their written comments, suggestions and objections and/or made oral submissions during the Public Hearing is at Appendix-1, and the list of those present at the Public Hearing is at Appendix-2.
12. At the Public Hearing held on 18 June, 2019:
- 12.1. The Advocate Shri. S.S. Chaudhary and Shri Avijeet Lala representing wind generators who had submitted comments/suggestions and also filed IA contended that their IA need to be heard first to decide the preliminary issues of maintainability of this *suo moto* proceedings (i.e. Case No. 108 of 2019). The Advocates reiterated their submissions in IA and insisted that the suo-moto proceeding is clearly in contravention of the undertaking given by the Commission to the Bombay High Court as the review Order of the Commission in Case No 152 of 2018 has not yet been finally decided. All affected party need to be heard before the review is decided.
- 12.2. Advocate Shri S.R Ganbavale representing MEDA reiterated point wise clarification given in written submission to the allegation of MSEDCL against MEDA. The Advocate stated that the wind zoning procedure was finalized after consultation with

NIWE (then C-WET), MSEDCL and other Distribution Licensees, and Wind Project Developers, after that approval of the Commission has been taken. Allegations against MEDA are baseless and biased. MSEDCL was expected to provide the data and material for all the wind generators but they did not do so, and cherry picked only 42 wind generators. MEDA has no objection to the maintainability of the present proceedings

- 12.3. Shri Ravi Gupta representing M/s Bhilwara Energy Ltd. reiterated its objections/suggestion given in written submission and further stated that wind zone is assigned to wind project and not individual WTG. Out of its 7 (WTG) for 14 MW capacity only one WTG has CUF greater than 20% but the average of CUF is about 19 %. CUF of three year cannot be the criteria for deciding CUF because it is not guaranteed that CUF will continue to remain same for the remaining life of the project. Also, annual degradation factor and delay in making payment by MSEDCL must also be considered by the Commission while taking the decision.
- 12.4. Advocate Shri S.S. Chaudhary and Shri. Avijeet Lala representing 12 Wind generators such as M/s Bhilwara Green Energy, Bothe Wind farm, Clean Wind Power Pvt. Ltd, Green Infra and others reiterated its objections/suggestion given in written submission and further stated that prayer made by MSEDCL in Case No 41 of 2017 and in Case No 152 of 2018 are same and no error on the face of record is indicated by MSEDCL hence the review Case No 152 of 2018 is not maintainable. RE Tariff Regulations, 2010 do not have the enabling provision to revise or amend CUF norms which are applicable for the tariff period of 13 years. Due to enabling provision in RE tariff Regulation 2015, CUF norms can be revised that too from prospective effect and not retrospectively.
- 12.5. Advocate Shri Abhishekh Munot representing BLP Wind Project (Amberi) Pvt. Ltd., reiterated its objections/suggestion given in written submission and stated that unless a statute gives power to the executives to make sub-ordinate legislations with retrospective effect, the executives can make sub-ordinate legislations with prospective effect only. In support of its contentions the Advocate quoted following Judgments of Supreme Court of India:
- i) Mahavir Vegetable Oils (P) Ltd. & Anr. v. State of Haryana & Ors, [(2006) 3 SCC 620],*
 - ii) Income Tax Officer, Alleppy v. M.C. Ponnoose and Ors. Etc. [(196 9) 2 SCC 351]*
 - iii) State of Rajasthan v. Basant Agrotech (India) Ltd. [(2013) 15 SCC 1],*

He further stated that once a Generic Tariff Order is passed, and the same has been acted upon, then the parties cannot seek re-determination/ revision of the said Generic Tariff Order. Same has been held by *APTEL in its Judgment dated 02.03.2016 in Appeal No. 215 of 2018 titled as Vaayu (India) Power Corporation Pvt. Ltd. v. APERC.*

The Advocate stated that reclassification of Wind Zones and to reduce generic tariff is contrary to the principles enunciated under EA 2003 and principles of legitimate expectation and Regulatory certainty. In support of its contentions the Advocate quoted following Judgments Hon'ble Supreme Court of India:

- i) *Energy Watchdog v. Central Electricity Regulatory Commission reported as (2017) 14 SCC 80*
- ii) *Delhi Cloth and General Mills Limited v. Union of India [(1988) 1 SCC 86].*
- iii) *Monnet Ispat and Energy Limited v. Union of India [(2012) 11 SCC 1].*
- iv) *Vodafone International Holdings BV v. Union of India reported as (2012) 6 SCC 613,*

12.6. Advocate Shri. Sumant Nayak representing Orange Maha Wind Energy Pvt. Ltd. and Ratnagiri Wind Power Projects Pvt. Ltd. stated that it is an established principle of law that unless the statute or Regulation specifies that the same shall have a retrospective effect, the said statute or regulation shall have prospective effect only. In support of its contentions the Advocate quoted following Judgments of the Supreme Court of India:

- i) *Sangam Spinners vs. Regional Provident Fund Commissioner (2008) SCC 391*
- ii) *J.S.Yadav vs State of Uttar Pradesh and another (2011) SCC 570*

Therefore, the Commission cannot retrospectively change the CUF as per actual generation. The Tariff determination parameters are normative and there is no provision of project specific tariff for wind project and any true-up based on actual parameters. It is unlawful to use actual CUF as against normative CUF.

12.7. Wind Generators also objected that MSEDCL, on whose Petition, the process of Wind Zone review has been initiated by the Commission, have not appeared before the Commission in present hearing. They have supported the report submitted by MEDA on Wind Zoning issue.

COMMISSION'S ANALYSIS AND RULING

13. Background to present proceedings have been summarized in para 1 to para 7 of this Order. During the proceeding of present case, some of the Wind Generators through their Interim

Applications have mainly contended that initiation of the Public Hearing by the Commission by issuing the Public Notices as a separate and independent proceeding, on the premise that the Commission has already allowed the review Petition filed by MSEDCL is not as per undertaking given by the Commission before the Bombay High Court. Hence, they have argued that the Commission should first decide the MSEDCL's review Petition and then it can proceed, if required, on the Report submitted by the MEDA.

14. In this regard, the Commission notes that the Commission's review Order dated 9 July, 2018 in Case No. 152 of 2018 was challenged by some Wind Generators before the Bombay High Court and during that proceeding, on behalf of the Commission, Advocate General has given undertaking that Case No. 152 of 2018 has not achieved finality but it has just initiated study through MEDA and before taking any final decision opportunity of hearing will be given to all affected parties. Based on this undertaking from the Commission, Hon'ble High Court has finally disposed these Writ Petitions with following rulings:

*"28 Then in para 13 and 14, it may have issued certain directions to the third respondent, but we accept the statements made by learned Advocate General and Mr. Bhatt on instructions that **there is no finality attached to them and though the order says that Case No.152 of 2018 stands disposed of, it would not mean that sweeping alterations or changes would be brought and as apprehended by the petitioners.** They are not going to be brought about instantly. All that the Commission has done is to direct an exercise to be carried out and has issued some guidelines in that regard. After the third respondent abides by this, the recommendations of the third respondent would be placed before the first respondent-Commission. **It has categorically stated in the order itself that it would hear or give an opportunity of hearing to all the respondents /generators and then decide relevant matters or the issues raised before it finally.** For instance, it is observed that further annual verification should be carried out for the first three years from the date of commissioning of such Wind Generators and the correct Wind Zone classification based on average CUF as submitted by second respondent/generator needs to be decided, but the MERC may prefer separate petition to the Commission for apportioning the extra benefit noticed in the case of 42 wind generators, between consumers and the wind generators. **Thus, to our mind, the learned Advocate General is right in urging that after the exercise is completed within six months from the date of the impugned order, for claiming any relief in terms of that exercise carried out by the third respondent, the second respondent would have to approach the Commission again and when the Commission is approached again, it would then decide as to what final orders should be passed.** Presently, there is no apprehension that either the terms and conditions of the existing contracts would be altered or some new terms and conditions will be imposed, much less any adverse consequences would be visited insofar as the charges levied and collected by the*

*generators. Therefore, we do not think that we should enter into any wider question or a larger controversy, at this stage. **Advisedly, once the Commission carries out the exercise at the instance of the second respondent, if at all it is approached again and that exercise results in an adverse order, the petitioners are free to challenge such final orders in accordance with law.***

Thus, Hon'ble High Court in its above judgment has allowed the Commission to complete the exercise initiated by MEDA as per Commission's direction in Case No. 152 of 2018. Further, when such Report was submitted by MEDA and based on such Report, if MSEDCL files Petition before the Commission seeking any relief then during that proceeding, Writ Petitioners would have opportunity to raise their objections before the Commission. And as directed by the High Court, this Commission must then issue final Order in that matter after considering all the issues raised before it.

15. Thus, subsequent to High Court Judgment dated 30 August, 2018, relief granted in review Order dated 9 July, 2018 in Case No. 152 of 2018 has been restricted only to initiation of Study on Wind Zoning through MEDA. Accordingly, the Commission in its Public Notice dated 9 May, 2019 has mentioned as follows:

"2. The Commission vide its Order dated 9 July, 2018 in Case No 152 of 2018 allowed the Review and directed Maharashtra Energy Development Agency (MEDA) to review the Wind Zone classification of Wind Generators at the end of FY 2018-19 based on the actual generation data submitted by MSEDCL /Generators."

Some of the Wind Generators have objected on the word 'allowed the Review' in the above notice and stated that the said words are contrary to the undertaking given before the High Court that all parties will be heard before taking final decision in the matter. The Commission finds such contention inappropriate. As explained in para above and as can be read from the notice itself, relief allowed in review Order is just limited to conducting study relating to Wind Zone Classification. The Commission reiterates that the relief is limited only to conducting the study relating to wind zone classification. Accordingly, the final decision on the same can be taken only after hearing all the parties on the Petition only if the same is separately filed by MSEDCL.

16. Some of objectors have also raised objection to Commission initiating present proceeding through separate Case number as an independent proceeding rather than the review Order in Case No. 152 of 2018. The Commission notes that providing separate case number to any proceeding is an administrative matter of Registry, and till the contentions raised during the proceedings are addressed through Order of the Commission, issue of registering new case or continuing proceeding under old case number is immaterial. As explained in initial paragraph of this Order, present proceeding, although it has been initiated through separate case

number, it is continuation of earlier Order of the Commission read with judgment of the High Court.

17. Wind Generators have also objected that as stated in High Court Judgment, subsequent to receipt of Report from MEDA, MSEDCL should have first filed Petition seeking the relief from the Commission and then all affected parties could have filed their comments. Hearing the present petition without submission of the Petition by MSEDCL is in contravention of the High Court Judgment. In this regard, the Commission notes that it was conscious of the fact that MSEDCL needs to file Petition seeking relief but still chose to initiate this public hearing proceedings and to receive comments on the MEDA report by expanding the public process by giving an opportunity to other stakeholders also. This action of the Commission is in no way in contravention of the order of the Hon'ble High Court.
18. As directed by the Commission in Case No. 152 of 2018, MEDA has submitted its report on 'Study of Wind Power Density Zones of Wind Power Projects Commissioned under RE Tariff Regulations, 2010 to the Commission. When such report is submitted in any proceedings, the MERC (Conducts of Business) Regulations, 2004 requires sharing of such report with all concern parties for their comments. MSEDCL being Petitioner in the matter MEDA's Report was shared with them for their comments. Although Wind Generators were not party in that proceeding, as per the undertaking given before the Hon'ble High Court, the Commission has thought it fit to seek comments through Public Notice so that not only 7 Petitioners who filed the Writ Petition before Bombay High Court would be able to file their comments but also other affected Wind Generators would also get opportunity to give their comments on the Report. Further, to enable these Wind Generators to file informed comments, the Commission has also uploaded MSEDCL's comments along with MEDA's Report. Thus, present proceeding transparently followed for seeking comments on MEDA's Report needs to be seen as Commission's efforts towards giving opportunity of filing comments to other wind generators who are not the Petitioners but could be affected by the study recommendations.
19. Now, MEDA's Report and comments on the same from the affected Wind Generators have been received, as stated in the Judgment of the Bombay High Court, if MSEDCL desires to seek any relief, it is at liberty to approach the Commission through a fresh Petition with a copy served on all affected parties/stakeholders with full justification for the relief it sought considering the provisions of the RE Tariff Regulations, 2010 and 2015, PPA and various RE Tariff Orders as well as by taking into consideration various Objections raised by Wind Generators in the present proceedings. Although, the Commission has summarized the comments of Wind Generators in this Order, MSEDCL needs to refer to detailed submissions filed by these Generators in case it decides to Petition the Commission. The Commission deems it fit to direct its Secretariat to provide copy of submission filed by Wind Generators

including Interim Applications to MSEDCL. Once MSEDCL files such Petition, during that proceedings affected Wind Generators would be at liberty to press their objections including on the maintainability of review.

20. Hence, the following Order:

ORDER

- 1) **The Case No. 108 of 2019 stands concluded.**
- 2) **Based on the Report submitted by Maharashtra Energy Development Agency, if desired, Maharashtra State Electricity Distribution Co. Ltd. is at liberty to file a fresh Petition for seeking specific relief with a copy served on all affected parties with full justification for the relief sought, considering the provisions of the RE Tariff Regulations, 2010 and 2015, PPA and various RE Tariff Orders as well as by taking into consideration various Objections raised by Wind Generators.**
- 3) **The Secretariat is directed to provide copy of the submissions filed by Wind Generators including Interim Applications, to Maharashtra State Electricity Distribution Co. Ltd.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member



Appendix-1**List of Organisations/persons who submitted Suggestions and Objections**

Sr. No.	Name of the Organization/Company
1	Agrawal Group of Company.
2	Arvind Costyn (India) Ltd.
3	B.C & Sons, Davangere, Dist. Karnataka
4	Bhilwara Energy Ltd.,
5	Bhilwara Green Energy Ltd., Delhi
6	BLP Wind Project (Amberi) Pvt. Ltd.,
7	Bothe Windfarm Development Pvt. Ltd.,
8	Clean Wind Power (Satara) Pvt. Ltd.,
9	Devi Construction,Civil Engineers And Builders,
10	Shri Gajalaxmi Industries (H.U.F), Ichalkaranji
11	M/s. Green Infra BTV Ltd.
12	M/s. Green Infra Wind Energy Project Ltd.,
13	M/s. Green Infra Wind Energy Ltd.,
14	M/s. Green Infra Corporate Solar Ltd.
15	Indian Wind Power Association, (Northern Region Council)
16	Jathar Textile Pvt.Ltd.
17	M/s. Khandke Wind Energy Pvt. Ltd.,
18	M/s. KRBL Ltd.
19	M/s. Lalpur Wind Energy Pvt. Ltd.,
20	Orange Maha Wind Energy Pvt. Ltd.
21	M/s. Panama Wind Energy Godavari Pvt. Ltd.,
22	M/s. Panama Wind Energy Private Limited
23	Pradeep Metals Limited
24	Rama Handicrafts (Govt. Recognised Export House)
25	Ratnagiri Wind Power Projects Pvt. Ltd.
26	Raysons Marketing Pvt. Ltd. Kolhapur
27	M/s. ReNew Power Limited
28	Sun Irrigation Systems Pvt. Ltd.
29	Tata Power Renewable Energy
30	B.S. Channabasappa & Sons
31	Vaanya Resources
32	M/s. Vandana Textiles

List of Persons present for the Public Hearing

Sr. No.	Name
1	Shri. Karthy Nair, BLP Wind Project (Amberi) Pvt, Ltd.
2	Shri. Ashish Nandan, BLP Wind Project (Amberi) Pvt, Ltd.
3	Shri. Surendra Pimpalkhedekar, WISE, Pune
4	Shri. Anand Wage, WISE Pune
5	Shri. Manoj Pise, MEDA
6	Mrs. Shital Kumar Kulkarni, Bothe Wind Farm
7	Shri. S. K. Shivaraj,
8	Shri. Naveen Kumar, Ratanagri Wind Power
9	Shri. Promod Thakre, Suzlon
10	Shri. S. R. Parida, Continuum
11	Shri. Manish P Sharma, Suzlon Energy Ltd.
12	Shri. Manish Verma, CLP India

Appendix-3

List of Wind generators who have filed Interim Applications (IA) on 14 June, 2019

Sr.No.	Name of Wind Generators
1	Bhilwara Green Energy Ltd., Delhi
2	Bothe Windfarm Development Pvt. Ltd.,
3	Clean Wind Power (Satara) Pvt. Ltd.,
4	M/s. Green Infra BTV Ltd.
5	M/s. Green Infra Wind Energy Project Ltd.,
6	M/s. Green Infra Wind Energy Ltd.,
7	M/s. Green Infra Corporate Solar Ltd.
8	M/s. Khandke Wind Energy Pvt. Ltd.,
9	M/s. Lalpur Wind Energy Pvt. Ltd.,
10	M/s. Panama Wind Energy Godavari Pvt. Ltd.,
11	M/s. Panama Wind Energy Private Limited
12	M/s. ReNew Power Limited