

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 28 of 2020

Case of Bothe Windfarm Development Pvt. Ltd. seeking directions against Maharashtra State Electricity Distribution Limited for executing Energy Purchase Agreement for supply of power from the its's 6.3 MW Wind Turbine Generators located at Satara, Maharashtra.

M/s Bothe Windfarm Development Pvt. Ltd.Petitioner
V/s

- 1) Maharashtra State Electricity Distribution Co. Ltd..
2) Maharashtra Energy Development Agency
3) Maharashtra State Load dispatch Centre
4) Government of Maharashtra. (Energy Dept.)Respondents

Appearance

For the Petitioner	:Smt. Deepa Chavan (Adv.)
For the Respondent No-1	:Shri Harinder Toor (Adv.)
For the Respondent No-2	:Shri Manoj Pise (Rep.)
For the Respondent No-3	:Shri S.V. Jaltare (Rep.)
For the Respondent No-4	:None

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

ORDER

Date: 1 July 2020

1. M/s Bothe Windfarm Development Pvt. Ltd. (**BWDPL**) has filed this Case dated 27 January 2020 seeking directions against Maharashtra State Electricity Distribution Company Ltd. (**MSEDCL**) for executing Energy Purchase Agreement (**EPA**) for supply of power from its 6.3 MW Wind Turbine Generators (**WTGs**) located at Satara, Maharashtra.

2. Main Prayers of BWDPL are as follows:

- a) *Direct MSEDCL to comply with its Wind Policy, 2014 and the Government of Maharashtra's RE Policy, 2015 and accordingly execute EPAs with the Petitioner qua the three WTGs aggregating 6.3 MW (being SP 27 at Gat No. 5 of village Khandyachiwadi, SP 25 at Gat No. 61 of village Garudachiwadi, SP 21 at Gat No. 31 of village Uglyachiwadi), for a period of 13 years from the date of their commissioning i.e. 26.12.2014 and 30.12.2014, at the levellised generic tariff of Rs. 5.70/ kWh determined by this Hon'ble Commission (for Wind Zone 1) vide its Generic Tariff Order dated 07.07.2014 in Case No. 100 of 2014;*
- b) *Direct MSEDCL to pay an amount of Rs. 41,35,33,733(Rupees Forty One Crores Thirty Five Lacs Thirty Three Seven Hundred and Thirty Three only) [inclusive of interest/ late payment surcharge at the rate of 15% per annum envisaged in the EPAs executed between wind developers and MSEDCL]as compensation to the Petitioner towards power supplied from the Petitioner's three WTGs to MSEDCL from December, 2014 till 23.01.2020;*
- c) *Direct MSEDCL to pay tariff at the rate of Rs. 5.70/ kWh for the power supplied by the Petitioner to MSEDCL for the period beyond 23.01.2020 alongwith interest/ late payment surcharge at the rate of 15% per annum till realisation;*
- d) *Pending adjudication of the present Petition, pass an ex-parte ad interim order,:-*
 - (i) *Staying the operation of the Disconnection Notice issued by MSEDCL vide e-mail dated 23.01.2020 during the pendency of the present Petition; and*
 - (ii) *Directing MSEDCL and/ or other statutory authorities under the Electricity Act such as Maharashtra State Load Despatch Centre from taking any coercive action/ steps against the Petitioners three WTGs during the pendency of the present Petition;*
- e) *Hold and declare that the that letter dated 13.01.2020 issued by the Government of Maharashtra (i.e. Respondent No. 4) to the Petitioner cannot be made applicable to the three WTGs commissioned on 26.12.2014 and 30.12.2014 as per MSEDCL Wind Policy, 2014 and the RE Policy, 2015;*

3. BWDPL on 27 January 2020, requested for urgent listing and interim reliefs:

3.1 After hearing the Advocate of BWDPL on request of interim relief, the Commission by its daily Order Dated 27 January 2020 has directed as under:

The Advocate of the Petitioner mentioned about disconnection notice issued by MSEDCL on 23 January 2020 and requested for passing an ex- parte ad interim Order, staying such disconnection notice.

The Commission is of the opinion that Respondents need to be heard in the matter. However, considering disconnection notice, the Commission deems it fit to direct status-quo in the matter. MSEDCL shall not take any coercive action in the matter till final disposal of the main Petition. At the same time, the Commission clarifies that it has not gone into merits of the matter and this status quo will not have any impact on outcome of the main matter. The Commission also clarifies that such status quo does not automatically entitle the Petitioner to claim any relief under Forecasting and Scheduling Regulations, 2019.

4. BWDPL in its Petition has stated as under:

4.1 BWDPL has setup a 199.7 MW wind farm in Satara district which is the largest single site wind project undertaken by an Independent Power Producer (**IPP**) in Maharashtra. The entire Project has been commissioned in phases starting from May 2013 till 30 December 2014. Four WTGs (aggregating 8 MW) of BWDPL were commissioned in the year 2013 in terms of New Policy of Government of Maharashtra (**GoM**) for Generation of Power from Non-conventional sources of Energy, 2008 (**RE Policy 2008**). In FY 2013-14 itself, the entire capacity of 2000 MW envisaged under the RE Policy 2008 was exhausted.

4.2 On 3 June 2014, MSEDCL notified its Wind Policy, 2014 which made a promise to wind generators that MSEDCL would execute EPAs in chronological order based on the date of commissioning of WTGs. MSEDCL's Wind Policy, 2014 did not require the wind project developers to register their Projects with any Nodal Agency prior to execution of EPAs with MSEDCL. The Clause 3 of the Wind Policy states as under:

“

3)Execution of Energy Purchase Agreement (EPA)

- *MSEDCL shall execute the EPA with wind generators to the tune of capacity in MW to be declared by the GoM and as may be decided by MSEDCL Board considering the fulfilment of Renewable Purchase Obligation targets.*
- *The EPA shall be executed in chronological order on the basis of date of Commissioning of WTGs (date of delivery of energy into state grid) i.e. EPA of First Commissioned project will be signed first.”*

4.3 From March 2014 to August 2014, BWDPL and MSEDCL executed EPAs for 101 MW capacity.

4.4 During the year 2014, BWDPL commissioned the remaining capacity of its Project i.e. 191.7 MW including the three WTGs aggregating 6.3 MW (being part of the present dispute). These WTGs were set up and commissioned in view of the fact that MSEDCL's Wind Policy, 2014 promised that the power generated by BWDPL's Project would be tied up with MSEDCL, in chronological order on the basis of date of commissioning.

- 4.5 Subsequently, in June 2015 the GoM notified the RE Policy, 2015. The said Policy envisaged addition of 5000 MW wind capacity in the State of Maharashtra. Out of the said 5000 MW, 1500 MW was earmarked for MSEDCL to meet its Renewable Purchase Obligation (**RPO**) targets. The RE Policy, 2015 envisaged formulation of a suitable methodology for the installation, commissioning, and effective implementation of RE projects. Maharashtra Energy Development Agency (**MEDA**) was notified as the designated agency to give effect to the RE Policy, 2015 in terms of the methodology. The said Policy, required wind projects to mandatorily register with MEDA which was a prerequisite for executing EPAs with MSEDCL/ availing Open Access etc.
- 4.6 Despite repeated reminders, MSEDCL had failed to execute EPAs with BWDPL for the capacity of 98.7 MW, BWDPL was left with no option but to register their project under the RE Policy, 2015 in order to ensure that its Project does not become stranded.
- 4.7 Accordingly, BWDPL sought registration of its Project with MEDA and upon receipt of the MEDA registration approached MSEDCL for executing EPAs. After numerous correspondence, MSEDCL finally signed EPAs for 92.4 MW (in May 2017 executed EPAs for 52.5 MW and 39.9 MW in September 2017) out of the 98.7 MW. While MSEDCL has signed EPAs for 193.4 MW (101 MW in 2014 and 92.4 MW in 2017) capacity, MSEDCL has not executed EPAs for following three WTGs aggregating 6.3 MW:
- (a) SP 27 at Gat No. 5 of village Khandyachiwadi;
 - (b) SP 25 at Gat No. 61 of village Garudachiwadi; and
 - (c) SP 21 at Gat No. 31 of village Uglyachiwadi.
- 4.8 BWDPL approached MEDA on 7 December 2015 seeking registration of these three WTGs. The registrations for the said projects came through only on 20 April 2019. During the period 2016 to 2019, BWDPL had regularly reminded MEDA for the registration of the three WTGs. Immediately after the registration came through, BWDPL approached MSEDCL to execute EPAs for the three WTGs. MSEDCL vide its letters dated 10 May 2019, 7 June 2019, 13 July 2019 and 12 December 2019 denied BWDPL's requests for execution of EPAs for the three WTGs, citing a change in policy pursuant to which, MSEDCL is procuring RE power to meet its RPO targets only through competitive bids post 2017.
- 4.9 Aggrieved by MSEDCL's refusal to sign EPAs for the three WTGs, BWDPL has approached the Commission by filing the instant Case on the following, amongst other grounds:
- a. MSEDCL is required to execute EPAs with BWDPL in terms of its Wind Policy, 2014 and the RE Policy, 2015.
- 4.9.1 BWDPL has setup and commissioned its project capacity of 191.7 MW including the three WTGs aggregating 6.3 MW in terms of MSEDCL's Wind Policy, 2014 which was notified by MSEDCL on 3 June 2014. In terms of clause 3 of the said policy, MSEDCL

made a promise to the developers that it would sign PPAs in chronological order on the basis of their commissioning date. The said Wind Policy, 2014 did away with the requirement of an Infrastructure Clearance (which existed in the prior RE Policy 2008) thereby making it convenient and easier for generators to commission their WTGs and execute EPAs with MSEDCL. BWDPL duly accepted such promise made by MSEDCL and commissioned 98.7 MW (101 MW was commissioned by 31 March 2014) capacity of its project from April 2014 to December 2014. Out of said capacity, three WTGs aggregating 6.3 MW were commissioned on 26 December 2014 and 31 December 2014.

- 4.9.2 The Project capacity, including 6.3 MW has been setup by BWDPL on the promise made by MSEDCL in its Wind Policy, 2014 wherein MSEDCL promised project developers that it would execute EPAs with wind developers setting up projects in Maharashtra. However, MSEDCL has failed to give effect to the said Policy and meet the promises made by it thereunder.
- 4.9.3 During the course of various proceedings related to MSEDCL's compliance of its RPO targets (from FY 2014-15 to FY 2016-17), MSEDCL has submitted Affidavit dated 22 January 2015 in Case No. 190 of 2014 (Suo-moto proceeding for RPO verification) that it shall execute, and in fact is executing, EPAs with all wind developers who have commissioned their projects in FY 2014-15, the tariff for which would be the preferential tariff as determined by the Commission in its RE Tariff Order for FY 2014-15. Further, in the very same Affidavit, MSEDCL has stated that it has contracted sufficient RE power for meeting RPO targets for FY 2014-15 and FY 2015-16. Accordingly, MSEDCL has placed on record that 400 MW of capacity addition is expected in the State of Maharashtra in FY 2014-15. Since BWDPL's three WTGs aggregating 6.3 MW have been commissioned on 26 December 2014 and 30 December 2014 (i.e. in FY 2014-15), the said capacity is part of the 400 MW expected capacity addition in FY 2014-15. MSEDCL has failed to sign EPAs with BWDPL for the three WTGs which were commissioned in FY 2014-15. In fact, from details available in the public domain (MEDA website), it is seen that during the year FY 2014-15 only 364.15 MW capacity of wind power was commissioned in the State of Maharashtra i.e. significantly less than the 400 MW projected by MSEDCL in its Affidavit dated 22 January 2015.
- 4.9.4 Further, MSEDCL has considered the capacity of 6.3 MW pertaining to the three WTGs for its RPO compliance from the years 2015-2018 and has issued credit notes to BWDPL to that extent. In such circumstances, MSEDCL ought to execute EPAs with BWDPL for the three WTGs. Non-execution of the EPAs would amount to contempt of the statements made by MSEDCL before the Commission.
- 4.9.5 MSEDCL is already considering the power from BWDPL's three WTGs towards its RPO compliance. This is nothing but an implied contract between BWDPL and MSEDCL. Hence, execution of the EPAs is merely formalizing this implied arrangement between the parties in terms of the promises made by and implicitly acted upon by MSEDCL. Having availed the benefit of power generated by BWDPL's three WTGs in terms of its promise, MSEDCL is now estopped from holding that it no longer wishes to execute EPAs

with BWDPL. MSEDCL cannot deny BWDPL its right to levy and charge preferential tariff (as applicable from the date of commissioning) for the power generated by the said three WTGs .

- 4.9.6 MSEDCL is duty bound to execute the EPAs for the three WTGs and give effect to the RE Policy, 2015 which clearly provides that 1350 MW capacity of Wind Projects which had been commissioned after the expiry of the RE Policy, 2008 and prior to the notification of the RE Policy, 2015 will form part of the 1500 MW capacity identified under the RE Policy, 2015 for execution of EPAs. It is never denied that the three WTGs fall within the 1350 MW identified by the GoM in the RE Policy, 2015.
- 4.9.7 Since MSEDCL did not execute EPAs in terms of the promises made by it in its Wind Policy, 2014, BWDPL was compelled to seek the benefit of the RE Policy, 2015 in order to tie up its stranded capacity with MSEDCL. Accordingly, BWDPL was constrained to seek registration of its WTGs (which were already commissioned in the year 2014) with MEDA.
- 4.9.8 BWDPL has been injecting power into the grid which is being utilized by MSEDCL. It is settled principle of law that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof the latter is bound to compensate the former in respect of, or to restore, the things so done or delivered.
- 4.9.9 Due to non-execution of EPAs for the three WTGs, BWDPL is unable to raise invoices on MSEDCL for the power injected into the grid resulting in heavy financial losses to BWDPL.

b. Delay in grant of registration was not on account of BWDPL's inactions.

- 4.9.10 Clauses 2.5 and 2.9 of the RE Policy, 2015 read with Clause 7 of the MEDA Methodology, 2015 mandatorily required that projects commissioned and considered for the capacity addition of 1500 MW to meet MSEDCL's RPO targets have to be registered with MEDA before executing EPAs. Only those Projects that have been registered with MEDA are eligible to execute EPAs with MSEDCL. In line with the said mandate, BWDPL applied for registration of its Project with MEDA. BWDPL received MEDA registration of its Project as follows:-

- (a) 76.7 MW during March, 2016;
- (b) 10.5 MW during April, 2016;
- (c) 50.3 MW during May, 2016;
- (d) 8.00 MW during June 2016; and
- (e) 39.9 MW during May, 2017.
- (f) 6.3 MW on 20 April, 2019.

- 4.9.11 For reasons best known to MEDA, registration for three WTGs came through on 20 April

2019 despite BWDPL having applied for registration in January 2016. Once BWDPL received the MEDA registration for 6.3 MW on 20 April 2019, it immediately issued a letter to MSEDCL on 24 April 2019 requesting MSEDCL to execute EPAs for the three WTGs aggregating 6.3 MW. Hence, the delay in approaching MSEDCL for execution of the EPAs was not due to any inactions on the part of BWDPL.

- c. Non-execution of EPA by MSEDCL is contrary to its own averments in various Affidavits filed by MSEDCL before the Commission

4.9.12 In addition to above said Affidavit, following submissions made by MSEDCL before the Commission in various other proceedings demonstrate that MSEDCL's conduct has been contrary to what it has averred before/ promised to the Commission:

- (a) On 10 February 2016, MSEDCL filed an Affidavit in Case No. 16 of 2016 (RPO Verification process for FY 2014-15) stating that it has signed EPAs with all renewable (non-solar) generators approaching MSEDCL during FY 2014-15 at the preferential tariff in line with the terms and conditions specified by the Commission. Contrary to the said statement, MSEDCL has in fact not executed EPAs with BWDPL for the three WTGs at the preferential tariff determined by the Commission.
- (b) On 31 January 2017, MSEDCL filed an Affidavit in Case No. 169 of 2016 where it detailed the steps taken by it in meeting its RPO shortfall. In the said Affidavit, MSEDCL has stated that it is executing EPAs with wind generators commissioned in FY 2014-15 and FY 2015-16 from the date of commissioning of the project. Further, in the said Affidavit MSEDCL has provided details of audited energy injected into the grid in Annexure B to the said Affidavit. The quantum of energy injected into the grid from generators without signing EPAs includes BWDPL's three WTGs aggregating 6.3 MW.

- d. MSEDCL cannot take benefit of the power generated by BWDPL without paying consideration for the same

4.9.13 BWDPL has supplied electricity to MSEDCL from 30 December 2014 and continues to supply power to MSEDCL till date. Having taken benefit of the electricity supplied from the date of commissioning of the three WTGs i.e. 26 December 2014 and 30 December 2014 till date, MSEDCL is duty bound to pay/ compensate BWDPL for the same. Even, in terms of Section 70 of the Indian Contract Act, 1872, a person, who enjoys the benefit of a non-gratuitous act, is liable to compensate the person providing such non-gratuitous act. Hence, in the present case, MSEDCL is obligated to compensate/ restitute BWDPL for such supply of electricity. Hence BWDPL's claim with interest is as under:

Amounts to be paid by MSEDCL (December 2014 till 23 January 2020)	Amount in Rs.
Net Invoice Value	31,87,03,886

Interest as per EPA @ 15%	9,48,29,848
Total	41,35,33,733

e. MSEDCL's conduct is contrary to the Doctrine of Legitimate Expectation

4.9.14 The Hon'ble Supreme Court in a catena of Judgments has held that if based on a Government Representation, a party alters its position then the said party has the legitimate right to seek enforcement of the said representation. The Hon'ble Supreme Court has dealt with the Doctrine of Legitimate Expectation as under:

- (a) If a private party alters its position based on a representation then it is not necessary for the party to prove any damage or detriment as long as the party has simply altered its position.
- (b) In situations where even though a person has no enforceable right yet he is affected or likely to be affected by the order passed by a public authority the courts have evolved the principle of legitimate expectation.
- (c) 'Legitimate expectations' is capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis.
- (d) Fair procedure and just treatment is the core of jurisprudence. No one should suffer for omission in law or technicalities in rules.
- (e) Private parties in dealing with the Government have legitimate expectation to be dealt with regularity, predictability and certainty.
- (f) If a right had been enjoyed previously by private parties then the parties have a legitimate expectation to enjoy the same unless the right has been withdrawn with a rationale behind it.
- (g) Denial of legitimate expectation amounts to denial of rights guaranteed to a party by the Government.

In this regard, reference may be made to the following Judgments:-

- (a) *Delhi Cloth and General Mills Limited v. Union of India* [(1988) 1 SCC 86].
- (b) *Monnet Ispat and Energy Limited v. Union of India* [(2012) 11 SCC 1].
- (c) *Punjab Communications Limited v. Union of India* [(1999) 3SCC 499].
- (d) *Union of India v. Hindustan Development Corporation and Others* [(1993) 3CCC 499].
- (e) *Ashoka Smokeless Coal India (P) Limited v. Union of India* [(2007) 2 SCC 640].

4.9.15 BWDPL's decision to set up its project in the State of Maharashtra is premised on a guarantee by the GoM, MEDA and MSEDCL that MSEDCL shall execute EPAs with project developers, upto 1500 MW, as long as the Projects have been commissioned under

the aegis of the RE Policy, 2015. However, refusing to sign EPAs even after BWDPL has complied with the requirements under the RE Policy, 2015 and the MEDA Methodology, 2015 goes against the Doctrine of Legitimate Expectation. Hence, MSEDCL ought to be directed to forthwith executed EPAs with BWDPL for the three WTGs.

Interim Relief

4.9.16 On 23 January 2020, Chief Engineer RE, MSEDCL has issued an e-mail to its Superintending Engineer, Satara directing him to immediately disconnect the three WTGs from the grid in light of the fact that MSEDCL has not executed EPAs with BWDPL for the three WTGs. This act of MSEDCL is illegal and arbitrary, in as much as the fact that MSEDCL has over the period FY 2014-15 to FY 2019-20, utilised the power generated by the three WTGs towards its RPO compliance without paying a single penny. Now, since BWDPL has been requesting MSEDCL to execute EPAs and give effect to its Wind Policy, 2014 and the RE Policy 2015, MSEDCL is taking such coercive steps to deny BWDPL the benefits of the RE Policy, 2015. Hence, BWDPL is constrained to approach the Commission for seeking appropriate ex-parte ad interim and final reliefs against MSEDCL.

5. MSEDCL in its reply dated 6 March 2020 has stated that:

- 5.1 MSEDCL is under no obligation to execute EPA with any party. Further, it has not given any consent for signing EPA to BWDPL.
- 5.2 MSEDCL vide letters dated 20 November 2014 and 9 November 2014 has issued Permission to Commission (PTC) in which it has been categorically mentioned that, MSEDCL does not guarantee purchase of this power. MSEDCL has never made any promise or any agreement with BWDPL. The present Case being devoid of merits be dismissed and hence the claim made by BWDPL for an amount of Rs.41.35 Cr. is liable to be rejected.
- 5.3 The Commission has time and again upheld that a Generator cannot keep injecting power into the grid without valid EPA or open access permission. The Commission by its Order dated 11 April 2018 in Case No. 86 of 2016 has categorically held that:

3) *In pursuance of this notice, Gopani should have stopped injecting power from its CPP into the grid of MSEDCL after 4 March, 2016, but did not. Hence, Gopani is not entitled to any payment for the power injected thereafter, when the EPA no longer subsisted. This principle has been recently reiterated by the APTEL in its Judgment dated 8 May, 2017 in Appeal No. 120 of 2016 as follows:*

“10. I (iv) ...The crux of these two judgments is also that a generator cannot inject electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.”

The above principle has again been reiterated and upheld by the Commission in its Order dated 25 July 2018 in Case No. 120 of 2018. Relevant part of the Commission's Order is reproduced below:

21. *The Commission notes that merely on the basis of the MSEDCL's willingness to accept the proposal for execution of Long term EPA, GIE has injected power in the MSEDCL's grid without any valid EPA or formal contract. In fact, no valid EPA has eventually materialized between MSEDCL and GIE. The Commission while noting this fact rules that in line with the principle as set out in APTEL Judgment dated 8 May, 2017 in Appeal No. 120 of 2016 GIE is not entitled to any payment for the power injected, if any, other than that injected during FY 2014-15 for which MSEDCL has already made payment to GIE. In order to maintain the grid discipline the Commission rules that GIE and for that matter any other RE Generator should not inject its power into the grid of MSEDCL or any Distribution Licensee without any valid contract or EPA.*

In similar such matter in Case No. 121 of 2018 dated 23 July 2018 filed by M/s Ultra mega Power Private Limited the Commission has ruled as under:

“9.

“RPO provisions make it clear that a Distribution Licensee can decide how it wishes to fulfill its RPO – by its own generation, by procurement of RE power, by purchase of RECs or through a combination of these. To the extent that it chooses to procure power, there is no requirement to do so from one particular Generator or the other. In that Order the Commission has further held that just as the Distribution Licensee has several options for fulfillment of its RPO; RE Generators also have several alternatives besides sale of power to a Distribution Licensee, which they can be expected to explore such as the options of sale to OA consumers or through Power Exchanges.

10. *The Commission also notes that a Distribution Licensee should plan its power procurement considering various factors such as the power demand and supply position, grid/system conditions, availability of cheaper power thereby providing lowest tariff to its consumers (i.e. protecting the interest of the consumers) and at the same time protecting its commercial and financial interest as well. The Commission observes that the Ministry of Power, Government of India has also issued guidelines under Section 63 of EA, 2003 for conducting a Competitive Bidding process for procurement of power from RE sources (wind and Solar) and the tariffs discovered by Competitive Bidding are considerably lower than the RE generic tariffs as determined under Section 62 of the EA, 2003. Since the tariff rates discovered by Competitive bidding process are considerably lower than the generic tariffs, many of the Distribution Licensees have carried out the Competitive bidding process rather than exercising the option to purchase RE at a generic tariff. In those Cases the Commission has also adopted the discovered tariff rate as mandated under section 63 of EA, 2003, in its various recent Orders. UMPPL can explore such options as*

cited earlier in this Order for sale of its wind power including participation in the Competitive bidding process that may be conducted in future.

11. In view of foregoing the Commission rules that MSEDCL cannot be directed to sign an EPA with any particular RE Generator.

In view of the above ruling the present matter is of similar nature as the Case No. 121 of 2018. BWDPL does not have the permission to inject the power into the grid without valid EPA and Open Access. Hence the ruling is applicable in the present case.

5.4 As regards point raised by BWDPL regarding RPO, an obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. The above statement upheld by APTEL in its Judgment dated 16 April 2015 in Appeal No. 258 of 2013 as under:

71 (ii) An obligated entity has option to fulfill its RPO either by procuring renewable energy in physical form or by REC or partly by REC and partly by physical renewable energy. However, a distribution licensee has to exercise the option based on economic principles. An obligated entity other than the distribution licensee may also opt for purchase of REC for fulfilling its RPO obligation to avoid the issues involved in banking, open access, sale of surplus power, etc., or if the RPO requirement is too small.

MSEDCL is fulfilling its non-solar RPO targets by purchasing Renewable Energy from different sources like wind, bagasse, biomass and small hydro projects. Also, some time by purchasing RECs from open market. The way to purchase this RE power is the sole discretion of MSEDCL. Further MSEDCL has fulfilled its standalone as well as cumulative non-Solar RPO targets till FY 2017-18 with a surplus of 55.151 MU as approved by the Commission vide Order dated 27 March 2019 in Case No. 36 of 2019.

5.5 Since December 2017, MSEDCL has taken decision to procure RE power through competitive bidding procedure and no EPA has been signed at preferential tariff thereafter. MSEDCL has successfully implemented the procurement of 500 MW wind power through competitive bidding process with e-reverse auction on long term basis for 25 years. BWDPL had the options of participating in such tendering process, however BWDPL has not participated.

5.6 On 13 January 2020, the GoM issued a letter to BWDPL, stating that MSEDCL purchases all its energy except solid waste to energy through tender process from the year 2017.

5.7 BWDPL has submitted that, the MSEDCL's policy in 2014 does not require MEDA registration. MSEDCL's Wind Policy dated 3 June 2014 and the clarification dated 26 September 2014 issued thereof are kept in abeyance with immediate effect from 6 February 2015. This policy dated 3 June 2014 was not materialized and not a single EPA is executed by MSEDCL without MEDA registration certificate.

5.8 Rates of wind power project discovered through competitive bidding (at around Rs. 2.87 per unit) are much cheaper than the preferential tariff (at Rs. 5.70 per unit). Hence the impact for signing of EPA at preferential rate should not be passed on to the consumers.

5.9 MSEDCL requests the Commission to vacate the status quo granted to BWDPL and allow MSEDCL to disconnect the Generator in the interest of grid security.

6. MEDA in its reply dated 20 March 2020 has stated that:

6.1 WTGs of 6.3 MW capacity were commissioned on 26 December 2014 and 30 December 2014 in financial year 2014-15. These projects are registered under clause No.2.5 of GoM Policy dated 20 July 2015 in which 1500 MW capacity earmarked for meeting the procurement requirement of distribution licensees under the RPO regime. The details of these 3 WTGs of 6.3 MW are given below:

Sr. No.	Project Location	Infrastructure Clearance	Commissioning Date	Application for Registration	Project Registered on	Remark
1.	Gat No. 5 of village - Khandyachiwadi, Tal.- Maan, Dist.- Satara (Location:- SP-2, Site- Shripalvan)	10.7.2014	26.12.2014	07.12.2015 (received on 06.01.2016)	20.4. 2019	<ul style="list-style-type: none"> Due to micro siting issue registration of project was held up. After submission of documents in respect of micro siting, reinspection of WEG was carried out & after approval MEDA has issued registration letter This project registered under 1500 MW capacity under Renewable Energy policy G.R.No.Apau2015/ pra.kra.49 / urja-7, dated 20 July, 2015.
2.	Gat No. 31 of village - Uglyachiwadi, Tal.- Maan, Dist.- Satara (Location:- SP-21, Site- Shripalvan)	Not given	30.12.2014	07.12.2015 (received on 08.01.2016)	20.4. 2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No.Apau-2016/pra.kra.251/urja-7, dated 21 December, 2016 under 1500 MW capacity under Renewable Energy policy G.R. No. Apau2015/pra.kra.49/urja-7, dated 20 July, 2015.
3.	Gat No. 61 of village - Garadachiwadi, Tal.- Maan,	Not given	30.12.2014	07.12.2015 (received on 08.01.2016)	20.4. 2019	<ul style="list-style-type: none"> This project was commissioned earlier without infrastructure clearance (IC) & commissioning clearance (CC) of MEDA. This project registered as per GR No.Apau-2016/pra.kra.251/urja-7, dated 21 December, 2016

	Dist.- Satara (Location:- SP-25, Site- Shripalvan)					under 1500 MW capacity under Renewable Energy policy G.R. No. Apau2015/pra.kra.49/urja- 7, dated 20 July, 2015
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6.2 The Projects are registered on 20 April 2019. BWDPL was informed by MSEDCL that it has executed EPAs with the generators who have registrations and clearances up to year 2017, after that MEDCL has been procuring the wind power through competitive bidding process only.

7. MSEDCL in its MA No 36 dated 15 May 2020 has stated that:

7.1 Maharashtra State Load Dispatch Centre (MSLDC) (Respondent No. 3) vide its letter dated 2 May 2020 has intimated MSEDCL to disconnect such wind/solar generators who do not have valid EPA or any open access permissions and intimate their office before onset of high wind season. The said letter further stated that as per its records 1181 MW (Wind-1103 MW & Solar-78 MW) unaccounted power is available. The relevant portion of the said letter is reproduced as under:

Due to non - availability of contract details, 1181 MW capacity cannot be scheduled. Further if such facility is not disconnected it will keep injecting power in the grid. This in turn can harm grid severally.

Wind generation starts increasing from mid of May and reach peak generation during monsoon season. From the historical data, it has been observed that the maximum wind injection is around 3300 MW against the installed capacity of around 4800 M W which corresponds to around 68 % injection. Hence, if non - contracted capacity (1103MW) is still connected to the grid then there may be additional injection of around 750 MW to the scheduled power."

7.2 The monsoon season in Maharashtra starts from the mid of May and so does the intensity of air also increases which in turn will help in generating more of wind power. Accordingly, non-accounted/ non-scheduled power will substantially add to the power availability and in turn will put the stability of power grid at risk.

7.3 When the Daily Order was issued nobody contemplated that the COVID-19 pandemic would hit the world at large to such an extent, that would lead to total shut down. This has further lead to the shut-down of various industries and thus, the power already available or even agreed with other generators are more than sufficient to deal with the current scenario. Hence, any un-scheduled addition of power would lead to grave situation of grid instability and would seriously prejudice the grid discipline.

7.4 If the impugned Daily Order dated 27 January 2020 is not recalled or modified, RE generation without valid EPA, will draw MSEDCL in over injection status. Further, the same will be treated as unscheduled power in view of implementation of MERC Renewable

Energy Forecasting & Scheduling Regulations-2018 w.e.f. 1 January 2020 and CERC (Deviation Settlement Mechanism Regulation 2014 and its amendments) Regulation and hence MSEDCL will have to accordingly pay the penalties as specified in the said Regulations.

8. BWDPL in its Rejoinder dated 19 May 2020 has submitted para wise reply to MSEDCL's submission dated 6 March 2020. BWDPL has reiterated its earlier submission except some new additional facts/information which are summarised below:
 - 8.1 MSEDCL has stated that its wind power policy of 3 June 2014 was kept in abeyance on 12 February 2015 (w.e.f 6 February 2015). This does not impact the entitlement of BWDPL's 6.3 MW capacity which was commissioned in December, 2014, i.e, prior to this policy being kept in abeyance. MSEDCL itself issued clarification on 26 September 2014 that no registration/clearance will be required from MEDA for commissioning of wind turbines.
 - 8.2 BWDPL's three WTGs fall within 1500 MW capacity earmarked under the RE Policy 2015 for mandatory tie up with MSEDCL. This has been affirmed by MEDA in its response dated 9 January 2020 to a query made under the RTI Act.
 - 8.3 BWDPL's claim for EPA execution arises from the very fact that both MSEDCL's Wind Policy 2014 as well as the RE Policy 2015 guarantee EPA execution once all the prerequisites contained in the said Policies are met. Further, given the fact that MSEDCL has accounted for power generated from BWDPL's three WTGs towards meeting its RPO compliance, it is clear that an implied contract is already in existence between MSEDCL and BWDPL. The present Petition is merely seeking formalising of the said arrangement by execution of EPA. Hence, MSEDCL's contention that it cannot be compelled to execute EPAs with BWDPL for the three WTGs is incorrect in light of the fact that an implied agreement is already in place between MSEDCL and BWDPL.
 - 8.4 Regarding injection of power without valid EPA, it is settled law that the ratio of any judicial decision must be understood in the background of the facts of that case. A case is only an authority for what it actually decides and not what logically follows from it. The ratio decidendi has to be ascertained by an analysis of the facts of the case.
 - 8.5 The various Cases referred by MSEDCL (viz. Gopani, GIE and UMPPL). In the Gopani Case, it had sought execution of EPAs with MSEDCL on the basis of the Commission's CPP Order dated 8 September 2004, Gopani was not wind generator. The GIE Case largely pertains to denial of Open Access by MSEDCL and withdrawal of MSEDCL's offer to execute a long-term contract. Neither of two cases referred by MSEDCL dealt with the promises made by MSEDCL in its Wind Tariff Policy 2014 and RE Policy,2015. In UMPPL's Case, UMPPL's wind power projects are not entitled to preferential tariff as the said Projects were not commissioned. Further, the MEDA Registration granted to UMPPL was conditional as there were certain micro siting issues. However, BWDPL's three WTGs have been granted unconditional registration by MEDA, MSEDCL issued PTC and

commissioned in December 2014. Hence, BWDPL is entitled to preferential tariff determined by the Commission in its Generic Tariff Order dated 7 July 2014.

- 8.6 As regards, participating in competitive bidding, BWDPL's Project was conceived and implemented in FY 2013-14 and FY 2014-15, qualifies to receive the benefit of EPA execution as mandated under the RE Policy 2015. BWDPL is entitled to a generic preferential levelized tariff of Rs. 5.70 per unit.
- 8.7 Had MSEDCL executed EPAs with BWDPL in FY 2014-15 itself, BWDPL would not have to take benefit of the RE Policy, 2015. There is no delay on the part BWDPL in approaching MSEDCL for EPA execution. BWDPL had approached MSEDCL to execute EPAs on 31 December 2014 itself. BWDPL had to re-approach MSEDCL once again on 24 April 2019 under the aegis of the Wind Policy 2015 immediately after receiving the MEDA Registration on 20 April 2019 only because of MSEDCL's refusal to abide by its Wind Policy, 2014 and execute EPAs.
- 8.8 As regards, MSEDCL's letter dated 12 February 2015 for abeyance of wind policy 2014, MSEDCL cannot seek to benefit from its default by first promising wind developers that it would execute EPAs in chronological order of date of commissioning of WTGs and not following through on such promise, and thereafter relying on a subsequent letter whereby it has kept its Wind Policy 2014 in abeyance.

9. BWDPL in its reply dated 20 May 2020 to MSEDCL's MA has stated as under:

- 9.1 The fundamental premise on which MSEDCL has sought recall of the Commission's Interim Daily Order dated 27 January 2020 is based on an incorrect understanding of facts and law, which clearly demonstrates a contractual relationship between the parties. Once the contractual relationship is established between the parties, then the principle of 'Must Run' must be honoured even in the present situation (due to the pandemic). This position is further established by the Ministry of New and Renewable Energy's (MNRE) Office Memorandums dated 1 April 2020 and 4 April 2020. Further, BWDPL cannot be treated differently than those generators who have an express contract in place.
- 9.2 Given the fact that MSEDCL has accounted for power generated from three WTGs towards meeting its RPO compliance and has undertaken Joint Meter Readings/ issued Credit Notes to BWDPL (from FY 2014-15 to January 2019) for such power supply, it is evidently clear that an implied contract is already in existence between MSEDCL and BWDPL. The instant Case is merely seeking to formalize the said arrangement by execution of EPA.
- 9.3 The express and implied contracts are both contracts in the true sense of the term, they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct (i.e. the present case). As a sequitur it follows that there is no distinction between express and implied contracts. In this regard, reference may be made to the Hon'ble Supreme Court's Judgment in *Haji Mohd. Ishaq v. Mohd. Iqbal and Mohd. Ali & Co.* [(1978) 2 SCC 493, Para 10-12].

- 9.4 MSEDCL's contentions that there is no EPA in existence between MSEDCL and BWDPL is incorrect and contrary to law. Hence, the reliefs sought in the present IA ought to be rejected.
- 9.5 The wind generators have been granted 'Must Run' status by law. As a consequence, wind generation cannot be unilaterally/ arbitrarily curtailed and/ or the wind generators cannot be disconnected from the grid. In light of the fact that there exists an implied contract between BWDPL and MSEDCL, BWDPL is entitled to the benefit of 'Must Run' status.
- 9.6 On 1 April, 2020, MNRE issued an Office Memorandum clarifying that RE generators have been granted 'Must Run' status and this status shall remain unchanged during the COVID-19 related lockdown. On 4 April 2020, MNRE issued another Office Memorandum reiterating that RE generation remains 'Must Run' during the present lockdown. The said Office Memorandum further states that where RE curtailment is on account of any reason other than grid safety reasons, then the same will amount to deemed generation.
- 9.7 Hence, even under the present circumstances, MSLDC/ MSEDCL cannot seek to disconnect/ curtail generation from three WTGs in light of the 'Must Run' status granted to BWDPL by law.
- 9.8 Hence, in light of the above, MSLDC's letter dated 2 May 2020 is not applicable to three WTGs. Further, the MSEDCL's Application deserves to be dismissed for lack of merit.
10. **MSLDC in its reply dated 25 May 2020 has stated as under:**
- 10.1 MSLDC being a system operator for the State of Maharashtra, it has to ensure adherence to Regulations and Orders issued by the Commission. Recently the Commission has notified MERC (Forecasting, Scheduling and Deviation Settlement for Solar and Wind Generation) Regulations, 2018 on 20 July 2018 and same is commercially implemented from 6 January 2020. This Regulations is applicable to BWDPL and it should abide the Scheduling and Despatch Code and DSM Procedure approved by the Commission.
- 10.2 As per Regulation No 5.14 of MERC (F&S) Regulations, 2018, no Wind and Solar energy shall be considered by the SLDC if it is not scheduled by the Qualified Coordinating Agencies (QCA) on behalf of the generators. Accordingly, as per the Clause No 6.3 of the amended F&S Procedure dated 19 December 2019 prepared by MSLDC and approved by the Commission, MSLDC is collecting Pooling Sub-Station (PSS)-wise details of power contracted by Discoms and their embedded consumers from various Discoms in the State on monthly basis. Based on the information, PSS-wise power is scheduled to respective Discoms based on the quantum received. On analysing the information for the month of May 2020 it is observed that out of total capacity of 6305 MW considered under F&S Regulations, contract details for 1181 MW capacity are not available.

- 10.3 Hence, if non-contracted capacity (1103 MW) is still connected to the grid then there may be additional injection of around 750 MW to the scheduled power. This shall create heavy mismatch at the State periphery and also create issues in real time operation during peak injection scenario. This unscheduled and non-contracted RE penetration shall hamper grid stability and reliability. Hence, MSLDC vide its letter dated 2 May 2020 has intimated the list of PSS with quantum having mismatch in the contracted capacity and asked to confirm whether such capacity of 1181 MW is connected to the grid or disconnected and ensure disconnection prior to commencement of high wind season.
11. At the e-hearing through video conferencing held on 26 May 2020, the Advocate of BWDPL reiterated its submissions in the Petition, its Rejoinder to MSEDCL's reply and MA. The Advocate of MSEDCL reiterated its submissions in its reply and MA. In reply to clarification sought by the Commission on unduly long time taken by it to grant registration as per the methodology, the representative of MEDA sought one-week time to submit its reply. The Commission granted five days' time MEDA to submit its submission with copy to other parties. The Commission granted one week time thereafter to other parties to file their submission, if any.
12. **MEDA in its additional submission dated 8 June 2020 has stated that:**
- 12.1 MEDA has provided details of major events took place from the date of application made by BWDPL for registration till the date on which registration was granted as under:

For Project-1

SNo.	Major Event	Date	Remark
1.	<u>Project - 1</u> Application for Registration Wind power project at Gat No.5 of village-Khandyachiwadi, Tal.- Maan, Dist.- Satara of 2.1 MW (1x2100kW) capacity	6 January 2016	Vide letter No. BOTHE/MEDA REG/44
2.	Micrositing inspection of Project - 1	25 Feb 2016	Project found installed nearby road.
3.	Scrutiny committee meeting	14 March 2016	Scrutiny Committee recommended for Stay on Registration.
4.	Projects file were sent for approval of GoM	14 March 2016	-----
5.	M/s Bothe submitted explanation	23 May 2016	Land is not acquired by concerned Department and submitted supporting documents.

6.	M/s Bothe submitted undertaking	23 May 2017	Undertaking for their 3 projects that roads nearby wind turbine are constructed by their company and the roads are not public roads. BDWPL through their undertaking had taken full responsibility of any legal issues if arises in future.
7.	Scrutiny committee meeting	23 June 2017	Projects recommended for registration
8.	Projects files were sent for approval of GoM	10 August 2017	-----
9.	Registration file received on	11 May 2018	GoM had ordered for re-inspection of the projects for verifying Micrositing guidelines.
10.	Re-inspection Done on	13 July 2018	-----
11.	Scrutiny committee meeting	20 August 2018	Projects recommended for registration
12.	Projects file were sent for approval of GoM	7 Sept 2018	-----
13.	Approved file received from GoM	20 April 2019	GoM approved files
14.	Registration issue date	20 April 2019	Project Registration issued

For Project - 2 and 3

S No.	Event	Date	Remark
1.	<p>Application Date – Project – 2 & 3</p> <p><u>Project – 2</u> - Wind power project at Gat No.31 of village- Uglyachiwadi, Tal. - Maan, Dist.- Satara of 2.1 MW (1x2100 kW) Capacity- Directly commissioned project</p> <p><u>Project – 3</u> - Gat No.61 of village Garadachiwadi, Tal.- Maan, Dist.- Satara of 2.1 MW (1x2100 kW) Capacity - Directly commissioned project</p>	8 Jan. 2016	Vide letter no. BOTHE/MEDA REG/74 & 72
2.	GoM had issued G.R. No. Apau 2016/ Pra.Kra.251/Urja-7	21 Dec. 2016	GoM had issued G.R. for regularization and registration of directly commissioned wind projects by MSEDCL

3.	Submitted Inspection fee	2 January. 2017	As per GR dated 21/12/2016
4.	Micrositing inspection of Project – 2 & 3	2 February, 2017	Project found installed nearby road
5.	M/s Bothe submitted explanation	18 February. 2017	Land is not acquired by concerned Department and submitted supporting documents.
6.	M/s Bothe submitted undertaking	23 May 2017	Undertaking for their 3 projects that roads nearby wind turbine are constructed by their company and the roads are not public roads. BDWPL through their undertaking had taken full responsibility of any legal issues if arises in future.
7.	Scrutiny committee meeting	23 June 2017	Projects recommended for registration
8.	Projects files were sent for approval of GoM	10 August 2017	-----
9.	Files received date	11 May 2018	GoM had ordered for re-inspection of the projects for verifying as per Micrositing guidelines
10.	Re-inspection Done	13 July 2018	----
11.	Scrutiny committee meeting	20 August 2018	Projects recommended for registration
12.	Projects files were sent for approval of GoM	7 and 19 Sept 2018	----
13.	Approved files received from GoM	20 April 2019	-----
14.	Registration Letter issue date	20 April 2019	Project Registration issued

13. BWDPL in its additional submission dated 16 June 2020 (in reply to the issues argued by MSEDCL during the Hearing and on the additional submission made by MEDA on 8 June 2020) made following submission:

13.1 BWDPL has reiterated its submission in Petition and its reply except some new additional facts/information in reply to issues raised/argued by MSEDCL and on the additional submission made by MEDA, which is summarised below:

13.2 MSEDCL on 26 May 2020 has argued on following points:

- i. MSEDCL is under no obligation to enter into an EPA with any party. MSEDCL has not consented to executing EPA with BWDPL.
- ii. There is no implied agreement/ implied arrangement between MSEDCL and BWDPL. The implied agreement/ arrangement between BWDPL and MSEDCL is contrary to the Indian Contract Act, 1827, and is void.
- iii. Credit Notes issued by MSEDCL to BWDPL is misplaced. The said Credit Notes clearly state that they are subject to issuance of NOC/ EPA execution.
- iv. MSEDCL had requested the Commission to consider contracted generation of RE and not actual RE injected into the grid towards meeting its RPO targets
- v. BWDPL cannot rely upon both the Wind Policy 2014 and the RE Policy 2015. The Wind Policy 2014 does not bind MSEDCL to execute EPAs with BWDPL. Neither the Wind Policy 2015 nor the Methodology dated 9 September 2015 guarantees EPA execution with MSEDCL.
- vi. The MEDA registration granted to BWDPL is conditional upon BWDPL abiding by all the policies, orders and directions of the GoM and the Commission.
- vii. Since December 2017 MSEDCL is procuring power through competitive bidding and no further EPAs have been signed at preferential tariff.
- viii. Granting the reliefs sought for by BWDPL will result in cost of expensive power being passed on to consumers.

13.3 Regarding executing formal EPA, GoM and MSEDCL have issued various policy decisions aimed at increasing the non-Solar RE capacity addition in Maharashtra by inviting private investors to set up RE Projects. The primary reason for inviting developers to invest in non-solar RE generation in the State of Maharashtra was to enable MSEDCL to meet its non-Solar RPO targets which it was failing to meet. These policies incentivized development of RE capacity in Maharashtra, amongst others, by making a promise to developers that MSEDCL shall execute EPAs with RE developers who setup their projects in Maharashtra. The capacity of 2000 MW envisaged under the RE Policy 2008 was exhausted some time in FY 2013-14 the capacity addition in Maharashtra in lieu of the RE Policy 2008 was not sufficient to meet MSEDCL's RPO targets. Hence, in order to meet its RPO targets by taking benefit of the wind capacity commissioned in Maharashtra after the expiry of the RE Policy 2008, on 3 June 2014, MSEDCL issued the Wind Policy 2014 in which MSEDCL made a promise to wind developers that it would, execute EPAs with wind developers for projects commissioning in FY 2014-15 (and onwards) in chronological order on the basis of date of commissioning of WTGs, for capacity to be declared/ identified by the GoM.

13.4 Subsequently, on 26 September 2014 MSEDCL issued a Clarification to its Wind Policy 2014 which stated that it intends to proceed with the Wind Policy 2014 and that no MEDA

Infrastructure Clearance is required for issuance of PTC. The PTC issued by MSEDCL refers to its Wind Policy 2014 and its Clarification dated 26 September 2014. Immediately thereafter, on 31 December 2014 BWDPL wrote to MSEDCL seeking EPA execution in effect requesting MSEDCL to honour the promises made by it in its Wind Policy, 2014. However, MSEDCL did not execute EPAs with BWDPL at that point in time. BWDPL's three WTGs were commissioned by MSEDCL in December 2014 i.e. during the period that is saved by Clause 2.5 of the RE Policy 2015. Hence, BWDPL's three WTGs fall within the 1500 MW capacity earmarked under the RE Policy 2015 for mandatory tie up with MSEDCL because these three WTGs were commissioned by MSEDCL for the purpose of supplying power to MSEDCL and included in the procurement target of MSEDCL for RPO.

- 13.5 As MSEDCL had not executed EPAs with BWDPL three WTGs at the time of their commissioning, BWDPL was left with no choice but to seek registration of its three WTGs with MEDA in RE Policy. Accordingly, on 6 January 2016 and 8 January 2016 BWDPL submitted its application to MEDA seeking registration of its three WTGs. The MEDA Registration for BWDPL's three WTGs came through only on 20.04.2019 i.e. after an inordinate delay of more than three years. The delay in grant of registration by MEDA was not on account of any delays by BWDPL as is evident from MEDA's Submission dated 9 June 2020. On a conjoint reading of the Wind Policy 2014 and the RE Policy 2015 it is evident that MSEDCL is duty bound to execute formal EPAs with BWDPL for its three WTGs, the issue of MSEDCL's Wind Policy 2014 being kept in abeyance and its impact on BWDPL's entitlement to execute EPAs is immaterial. Having not executed EPAs with BWDPL at the time of commissioning of the three WTGs i.e. in December, 2014, MSEDCL cannot now contend that on account of the Wind Policy 2014 being kept in abeyance subsequently with effect from 6 February 2015, it is under no obligation to execute EPAs with BWDPL. MSEDCL cannot seek to benefit from its own inactions and defaults.
- 13.6 MSEDCL has retrospectively executed EPAs with various wind developers, including BWDPL for 92.4 MW WTGs, whose WTGs have been commissioned during FY 2014-15 around the same time as these three WTGs. These WTGs have been commissioned under the aegis of MSEDCL's Wind Policy 2014, on the basis of Commissioning Certificates issued by MSEDCL and are registered under the RE Policy 2015 in the year 2019. Hence, MSEDCL cannot now contend that its Wind Policy 2014 has been kept in abeyance, especially since MSEDCL and various wind generators have acted upon MSEDCL's Wind Policy 2014. MSEDCL's contention that the Wind Policy 2014 and the RE Policy 2015 have to be construed independently will cause violence to the express terms of the said policies thereby rendering them otiose/ unimplementable.
- 13.7 With regards to 'no implied contract', BWDPL has supplied power to MSEDCL from the date of commissioning of its WTGs which has been utilized by MSEDCL towards meeting its RPO targets for FY 2014-15 to FY 2019-20. MSEDCL has undertaken Joint Meter Readings/ issued Credit Notes to BWDPL for the period FY 2014-15 to January 2019. The Credit Notes record the energy supplied by BWDPL to MSEDCL over the years. This clearly establishes that an implied contract is already in existence between BWDPL and MSEDCL for the three WTGs. It is now a question of mere formality to reduce the said

implied agreement to writing. Hence, a legal right has accrued in favour of BWDPL to seek directions against MSEDCL to formalise the implied agreement between the parties by executing EPAs for the three WTGs.

13.8 It is an admitted fact that MSEDCL (as a matter of practice) delays EPA execution although it takes the benefit of power supply from a wind developer. MSEDCL generally executes EPAs belatedly with retrospective effect. In the case of BWDPL's other WTGs which were commissioned during the period August, 2014 to December, 2014 (i.e. 92.4 MW capacity WTGs), BWDPL had supplied power to MSEDCL from the date of commissioning of these WTGs. MSEDCL executed formal EPAs for these WTGs only in September, 2017 i.e. after a period of almost three years. The Credit Notes issued by MSEDCL enabled it to make payments retrospectively (for the power supplied by wind developers till the time formal written contracts are executed) once the EPAs are executed. Hence, MSEDCL's contention that the Credit Notes are merely a means of keeping record is incorrect. By arguing that the implied agreement between the parties is void, MSEDCL has in effect agreed that an implied agreement is in existence between the parties which has now become void.

13.9 Section 10 of the Contract Act provides that all agreements are contracts if they are made with by the free consent of the parties, for a lawful consideration and with a lawful object. The following elements required to constitute a valid contract are:

- i. The implied agreement between MSEDCL and BWDPL is borne out of their free will and consent. Since December 2014 until February, 2020, MSEDCL has never intimated to BWDPL, either expressly or by conduct, that it does not accept or does not wish to accept the power supplied by BWDPL. Contrary to the same, MSEDCL has in fact accepted the power supplied by BWDPL, considered it towards meeting its RPO targets and in lieu thereof has undertaken Joint Meter Readings/ issued Credit Notes to BWDPL.
- ii. The implied contract between the parties is for a lawful object i.e MSEDCL's RPO compliance, and for a lawful consideration – preferential tariff determined by the Commission vide its Generic Tariff Order dated 7 July 2014. This is also evident from Clause 2.1 and 2.5 of the RE Policy 2015 read with MEDA's response to the RTI query dated 9 January 2020.
- iii. The implied agreement is not expressly declared to be void by any law, especially since neither the Electricity Act nor the Rules/ Regulations prohibit implied contracts/ agreements between generating companies/ distribution licensees.

13.10 In terms of Section 10 of the Contract Act, all contracts that are statutorily required to be in writing cannot be implied. In order to establish that a contract is hit by the bar of Section 10 of the Contract Act, it needs to be demonstrated that the statute mandates written contracts and explicitly ousts implied contracts. Contrary to MSEDCL's submissions, the Electricity Act nowhere states that generation and sale of electricity has to take place on the basis of a "written/ express" power purchase agreement and that implied power purchase agreements are illegal. the Hon'ble Supreme Court in *All India Power Engineer Federation*

v. *Sasan Power Limited* reported as (2017) 1 SCC 487 has held that the Contract Act is applicable to statutory contracts as well.

13.11 The contention of MSEDCL is that prior approval of the Commission is required for generation and sale of power by a generator to a distribution licensee. MSEDCL has failed to point out that in the context of Feed-In-Tariff projects like BWDPLs no written approval of the Commission is required. EPAs executed between wind developers and MSEDCL that are based on Generic Tariff Orders passed by the Commission are not approved by the Commission. Hence, MSEDCL's contention that lack of a written power purchase agreement approved by the Commission invalidates the implied agreement between the parties is incorrect and contrary to law. The Hon'ble Supreme Court through a catena of cases has settled the law related to implied contracts:

- i) *Coffee Board, Karnataka v. Commissioned of Commercial Taxes, Karnataka & Ors.* reported as (1988) 3 SCC 263,
- ii) *Bhagwati Prasad Pawan Kumar v. Union of India* reported as (2006) 5 SCC 311,
- iii) *Bharat Petroleum Corporation Ltd. v. Great Eastern Shipping Co. Ltd.* reported as (2008) 1 SCC 503
- iv) *Haji Mohd. Ishaq v. Mohd. Iqbal and Mohd. Ali & Co.* reported as (1978) 2 SCC 483.

13.12 From above law laid down by the Hon'ble Supreme Court, it is clear that if a party has accepted supply of goods/ an offer without any reservations/ demur or has never objected to such supply and has in fact enjoyed the benefit resulting from such supply of goods, then such a party is said to have entered into a contract impliedly. MSEDCL has never objected once to supply of power by BWDPL from its three WTGs, has enjoyed such power supply by considering it towards meeting its RPO compliance and has undertaken Joint Meter Readings and issued Credit Notes to BWDPL in lieu of such power supply. Hence, by its conduct MSEDCL has accepted the power supplied by BWDPL and acted upon an implied agreement with BWDPL.

13.13 With regard to delay in grant of registration, MEDA in its submission dated 8 June 2020 has provided details of relevant events took place from the date of application for registration till the date on which registration was granted. The chronology of events is largely accurate but there are certain factual gaps in chronology. It is evident from the chronology of events, that i) There was a procedural delay of approximately 7 months in the case of SP 21 in processing of registration. ii) A delay of approximately 12 months in the case of SP 25 and 21 due to the fact that MEDA was awaiting the notification of the GR dated 21 December 2016 for processing BWDPL's request for registration of its WTGs (SP 25 and 21) which were directly commissioned by MSEDCL and had to be regularized and iii) A procedural delay of approximately 20 months for all three WTGs in getting final approval from Chairman, MEDA. Hence the registration of BWDPL's three WTGs was delayed by about three years on account of various procedural issues not attributable to BWDPL.

13.14 MSEDCL contended that it has sought relief in all RPO proceedings that its RPO compliance ought to be considered on the basis of contracted RE and not actual RE injected into the grid which was allowed by the Commission. This contention of MSEDCL is incorrect and based on a selective reading of the various RPO compliance Orders passed by the Commission. The Commission in RPO verification Orders has held that MSEDCL's RPO compliance will be determined on the basis of actual energy injected into the grid and not on the basis of contracted RE capacity. To that extent, the Commission has considered the revised data submitted by MEDA which is based on the IBSM/ FBSM report furnished by MSLDC which includes the quantum of power injected into the grid by WTGs with whom MSEDCL does not have written EPAs.

13.15 With regard to participating in a competitive bidding invited by MSEDCL for procurement of power, BWDPL's Project was conceived and implemented in FY 2013-14 and FY 2014-15. The costs incurred by BWDPL for constructing and operating the three WTGs is keeping in mind the prevailing technologies. Directing BWDPL to participate in a competitive bid is contrary to the RE Policy 2015 which clearly guarantees that wind developers will receive preferential tariff based on their date of commissioning. Since BWDPL's three WTGs have commissioned in FY 2014-15 and qualify to receive the benefit of EPA execution as mandated under the RE Policy 2015, BWDPL is entitled to a generic levelised preferential tariff of INR 5.70/ kWh in terms of the Commission's Generic Tariff Order dated 7 July 2014. During the period August 2014 to December, 2014, BWDPL commissioned WTGs aggregating 92.4 MW (under the aegis of MSEDCL's Wind Policy 2014 read with the RE Policy 2015). Out of this capacity, for WTGs aggregating 39 MW MSEDCL has executed EPAs in the month of September 2017 i.e. after the letter dated 17 July 2017 was issued by the GoM. MSEDCL itself also understood that WTGs which were commissioned in terms of the promise made under the RE Policy 2014 and thereafter registered under the RE Policy 2015 were to be given EPAs despite the decision of the GoM to go for bidding. GoM's letter dated 17 July 2017 did not, and does not, override the RE Policy 2015. Hence, once WTGs were registered under the RE Policy 2015, they were entitled to execution of EPAs so long as they fall within the capacity (1500 MW) identified by the GoM in the RE Policy 2015.

13.16 The Hon'ble Supreme Court in *A.P. Diary Development Corp. Federation v. B. Narasimha Reddy*: (2011) 9 SCC 286 has held that the Government Policy cannot change abruptly, especially retrospectively and to the prejudice of parties who have acted on the basis of an extant Government Policy. If a Government Policy has been implemented, and is not struck down as unconstitutional, then the said Policy has to be given effect to in entirety. Any decision taken by the Government that is contrary to its Policies has to be read down/ is liable to being quashed.

13.17 The Hon'ble Supreme Court in a catena of Judgments has held that if based on a Government Representation, a party takes a position then the said party has the legitimate right to seek enforcement of the said representation. Some of the Hon'ble Supreme Court's Judgments relied upon for this purpose are (a) *Delhi Cloth and General Mills Limited v. Union of India* [(1988) 1 SCC 86], (b) *Monnet Ispat and Energy Limited v. Union of India*

[(2012) 11 SCC 1], (c) *Punjab Communications Limited v. Union of India* [(1999) 3 SCC 499], (d) *Union of India v. Hindustan Development Corporation and Others* [(1993) 3 SCC 499] and (e) *Ashoka Smokeless Coal India (P) Limited v. Union of India* [(2007) 2 SCC 640].

Commission's Analysis and Ruling:

14. BWDPL has filed this case mainly requesting the Commission to direct MSEDCL for signing of EPA for its 3 WTGs having aggregate capacity of 6.3 MW (commissioned in December 2014) in terms of MSEDCL's Wind Policy 2014 and RE Policy 2015.
15. Out of 199.7 MW capacity Wind Project of BWDPL located in Satara District of Maharashtra, four WTGs of 8 MW capacity were commissioned in 2013 under RE Policy 2008. Out of balance 191.7 MW, 101 MW was commissioned by 31 March 2014 and remaining 98.7 MW capacity was commissioned in April to December 2014 which includes the disputed capacity of 6.3 MW in the instant Case.
16. Out of its total project capacity of 199.7 MW, EPA for 101 MW was signed between the period of March 2014 to August 2014. Whereas EPAs for 92.4 MW were signed in the year 2017. EPA for remaining capacity of 6.3 MW has not been signed. All signed EPAs were made effective retrospectively i.e. from date of commissioning of the project. BWDPL has contended that its project capacity of 191.7 MW (excluding 8 MW covered under RE Policy 2008) was based on MSEDCL's Wind Policy 2014 which stated that MSEDCL shall execute EPAs in chronological order on the basis of date of commissioning of WTGs without any requirement of registration of project with MEDA. However, upon insistence from MSEDCL for registration of project with MEDA under GoM's RE Policy 2015, BWDPL applied for registration of its 191.7 MW projects.
17. Registration for 6.3 MW capacity was received on 20 April 2019. MSEDCL has refused to sign the EPA on the ground that since 2017, it has decided to procure power through competitive bidding only. BWDPL is contending that since commissioning of these projects in 2014, MSEDCL is using power generated from these projects and hence now cannot refuse to sign EPA. Whereas, MSEDCL has contended that it has never assured BWDPL about signing of EPA and hence MSEDCL cannot be forced to procure power from these projects at generic tariff which is almost double the tariff being discovered through recent competitive bidding process.
18. Having heard the parties and after taking on record various submissions filed by all parties, the Commission frames following issues for its consideration in the present matter:
 - a) Whether the then applicable Policies mandate MSEDCL to sign EPA with BWDPL?
 - b) Whether there was an implied contract/agreement between the parties?

- c) Whether BWDPL is eligible for compensation for energy injected by it into the Grid and if yes, at which rate?
- d) Balance of Convenience/equity/Way forward.

The Commission has dealt with all the above issues in the following paragraphs.

19. **Issue: a) Whether the then applicable Policies mandate MSEDCL to sign EPA with BWDPL?**

- 19.1 BWDPL has contended that it has setup the project based on promise made by MSEDCL in its Wind Policy, 2014 to execute EPAs with wind developers setting up projects in Maharashtra. It has further contended that 6.3 MW disputed capacity is also included in 1350 MW capacity identified within 1500 MW capacity in GoM's RE Policy, 2015 for meeting RPO of MSEDCL. Based on these policies, BWDPL has contended that it is mandatory for MSEDCL to sign EPA for its 6.3 MW balance capacity of 199.7 MW project located in Maharashtra. While opposing this contention of BWDPL, MSEDCL has stated that it has not given any consent for signing EPA hence it is not under any obligation to execute EPA with BWDPL.
- 19.2 To address this issue, the Commission finds it appropriate to summarize the various policies related to Wind generation, applicable at the time of setting-up of these projects. BWDPL has contended that it has setup its project based on MSEDCL's Wind Policy 2014. However, the said Wind Policy was issued on 3 June 2014, whereas out of its total project capacity of 199.7 MW, capacity of 101 MW was commissioned before March 2014 i.e. before issuance of MSEDCL's Wind Policy 2014 on 3 June 2014. Therefore, the Commission finds it appropriate and necessary to also include the policy applicable before issuance of MSEDCL's Wind Policy in its analysis.
- 19.3 Further, the Commission also notes that framing of Policy is the function of the Government. As per requirement of the Law, the Government, through Policy document lays down the targets for setting up of RE projects in the State and while doing so it provides some fiscal benefits and removes procedural barriers for incentivizing the stakeholders to achieve the decided/planned targets. Policy also specifies the eligibility criteria for availing such benefits. The policy may also necessitate changes from time to time. The Stakeholders can claim benefits under such policies only if they meet the criteria stipulated in the Policy. Thus, the Policy is required to be followed in full and the provisions cannot be selectively chosen. In the present case, considering timeframe involved, applicable GoM's policies would be RE Policy 2008 and RE Policy 2015. BWDPL has also relied upon MSEDCL's Wind Policy 2014. Although, the Commission would be analysing all these three documents, in the opinion of the Commission, MSEDCL's Wind Policy 2014 needs to be referred to as circular/document of MSEDCL in its capacity as a Distribution Licensee, communicating its intent of procuring Wind Power and laying down procedural aspect related to the same rather than as a 'Policy' by the Government. As MSEDCL's Wind Policy has not been notified by the Government, in the opinion of the Commission, mere

existence of such document would not accrue any legal rights to any party, unless it is specifically granted and/or agreed by the parties involved, which otherwise would be available from the Policy notified by the Government.

19.4 Accordingly, the Commission is summarizing below, contents relevant for present matter from the Policies applicable at relevant point of time:

- a. New Policy for Generation of Power from Non-Convectional Sources of Energy 2008 (RE Policy 2008) notified by the GoM on 14 October 2008
 - i. Objective was to setup 2000 MW of Wind Projects
 - ii. If the Investor / Developers wishes to obtain benefits allowable under this policy then, it is obligatory on them to sell 50% electricity from the project to MSEDCL and remaining 50% to any other entity within the State.
 - iii. Letter of Infrastructure clearance will be issued to the project by MEDA mentioning all applicable benefits.
- b. Target of 2000 MW specified in RE Policy 2008 was achieved in FY 2013-14. Subsequent to the above mentioned 2008 Policy, the GoM notified its next policy in 2015.
- c. MSEDCL's New Policy for Wind Power Projects issued on 3 June 2014
 - i. MSEDCL shall execute the EPA with wind generators to the tune of capacity in MW to be declared by the GoM and as may be decided by MSEDCL Board considering the fulfilment of Renewable Purchase Obligation target.
 - ii. The EPA shall be executed in chronological order on the basis of date of commissioning of WTGs i.e. EPA of first commissioned project will be signed first.
- d. MSEDCL's clarification to its New Policy for Wind Power projects issued on 26 September 2014:
 - i. No MEDA infrastructure clearance is required for issuing PTC
 - ii. Statutory clearances shall be obtained by generators, only undertaking shall be submitted to MSEDCL
 - iii. MSEDCL will verify the commissioning of the WTG, fulfilment of the formalities for eligibility and issue commissioning certificate.
 - iv. For execution of EPA, generator shall submit commissioning certificate and other documents as per MSEDCL's policy, however, MSEDCL at its discretion will take

decision whether or not to enter into EPA with the generator.

- e. Shortly after issuing above clarification, MSEDCL on 12 February 2015, kept its Wind Policy 2014 and subsequent clarification dated 26 September 2014 in abeyance in view of RE Policy being notified at GoM level.
- f. Comprehensive Policy for Grid-connected Power Projects based on New and Renewable (Non-conventional) Energy Sources-2015 (RE Policy, 2015) notified by the GoM on 20 July 2015:
 - i. Target to setup 5000 MW wind projects out of which 1500 MW capacity would be developed for meeting procurement requirement of distribution licensees under RPO regime.
 - ii. Capacity of about 1350 MW commissioned after the expiry of previous policy [RE Policy 2008] would be included in procurement target of 1500 MW. MERC tariff prevailing at the time of commissioning of respective projects will be applicable for signing the PPAs. However, registration with MEDA will be mandatory for these projects.
 - iii. As per provisions of the Electricity Act 2003, matters relating to promotion of RE sources, measures for evacuation arrangement, sale of electricity, percentage of RPO and other related matters are in the domain of the MERC and all Orders in respect of these matters will be applicable to the projects set up under this policy.
- g. Methodology for the Installation of projects will be as covered under the comprehensive policy for grid-connected power projects based on New and Renewable (Non-conventional) Energy Sources, 2015, notified by the GoM on 9 September 2015:
 - i. The wind power projects will be eligible to execute EPA or to seek Open Access or to sell energy through Renewable Energy Certificates (REC) only upon obtaining project registration from MEDA.
 - ii. If all necessary documents are received and the proposal is complete in all respects, the project registration will be done by MEDA after approval from the Chairman MEDA.

19.5 In view of the above summary of the policy framework applicable at the relevant point of time the Commission notes that out of 199.7 MW of the total project capacity, BWDPL has commissioned 101 MW capacity before March 2014, which was prior to issuance of MSEDCL's Wind Policy in June 2014, and that the balance capacity of 98.7 MW has been commissioned before December 2014 (project preparation work for which would have started before June 2014). Thus in the opinion of the Commission, it cannot be accepted that BWDPL has setup its project of 191.7 MW (excluding 8 MW covered under RE Policy 2008) entirely based on MSEDCL's Wind Policy 2014.

- 19.6 Generation of electricity being delicensed activity under the Electricity Act 2003, any person can setup generating facility by complying with technical standards and the statutory provisions. Such generator is free to use electricity so generated for its self-use or for sale to Distribution Licensee or any other person through Open Access. In case of Renewable energy Generators, since 2010 (including the project in this petition), one more option of Renewable Energy Certificate (REC) mechanism was made available wherein RE generator can sell brown component of energy at Average Power Purchase Cost (APPC) to Distribution Licensee and earn revenue on the cost of green attribute by selling RECs on the power exchanges.
- 19.7 Further, in the State of Maharashtra, this Commission has been enforcing Renewable Purchase Obligations (RPO) on Distribution Licensees since 2006, thereby, the Distribution Licensees are mandated to procure certain percentage of its total power procurement from RE sources and/or RECs. BWDPL was aware of all these aspects and hence even though target stipulated in the GoM's RE Policy 2008 was exhausted in the FY 2013-14, it has commissioned 101 MW of project capacity by March 2014, out of which only 8 MW was covered by RE Policy 2008. MSEDCL's Wind Policy was issued only in June 2014. As balance project capacity of 98.7 MW has been commissioned by December 2014, it could be very well concluded that project related activities for these 98.7 MW would have started before MSEDCL notified its policy in June 2014. Therefore, while setting up the project, BWDPL must have envisaged all the scenarios of selling electricity and must have taken a business decision before making this investment. The Commission does not accept the contention/representation that BWDPL has setup the project based on promise made by MSEDCL in its RE Policy 2014 since the same is not corroborating with the facts and the sequence of activities of the case as detailed above. Further, BWDPL has been able to sign EPA of 101 MW till March 2014.
- 19.8 Further even if it is considered that BWDPL has setup the project based on MSEDCL Wind Policy, then also it is important to note that the said MSEDCL policy was a comprehensive document which had a clause clearly stating that capacity to be procured would be subject to the GoM's decision. As coverage of 2000 MW stated in GoM's RE Policy, 2008 was exhausted in FY 2013-14 itself, MSEDCL's Wind Policy, 2014 issued in June 2014 was in effect not operative till GoM increased coverage beyond 2000 MW. Further, if one goes on the presumption that in future dates, the GoM may increase the coverage beyond 2000 MW, for making any investment decisions, other conditions of RE Policy 2008 which were then applicable needs to be considered as it is, including obligation of MSEDCL to procure only 50% of project capacity. As against such mandate of procuring 50% project capacity, till August 2014, MSEDCL signed EPA for 101 MW (50.5% of project capacity of 199.7 MW). It is also important to note that even though MSEDCL's Wind Policy stated that EPA will be signed in chronological order in accordance with date of commissioning, its clarification issued in September 2014 (before commissioning of disputed capacity of 6.3 MW in December 2014), has clearly stated that discretion of signing of EPA would be with MSEDCL. Therefore, MSEDCL's Wind Policy read with its clarification does not give any assurance of signing of EPA to investors.

19.9 Subsequently, the RE Policy 2015 was notified by the Government of Maharashtra which has allowed projects of upto 1350 MW, Commissioned post completion of 2000 MW targets under RE Policy 2008, to include in 1500 MW capacity allocated for fulfillment of RPO by 'Distribution Licensees'.

19.10 It is important to note that RE Policy 2015 allocated 1500 MW for fulfillment of RPO by 'Distribution Licensees' which included other licensees in the State beside MSEDCL. Therefore, it is also not correct to presume that all 1500 MW capacity needs to be procured by MSEDCL only. BWDPL could also have approached other Distribution Licensees in the State. Further, the said policy mandates registration of projects with MEDA before signing of EPA with Distribution Licensee. Therefore, even if, MSEDCL would have not put its Wind procurement policy in abeyance, due to its interlinking with GoM's decision on capacity to be procured, all provisions of RE Policy 2015 including mandatory provision relating to Registration with MEDA would have become applicable to MSEDCL's 2014 policy. Therefore, it can be safely presumed that the said MSEDCL policy of 2014 was a conditional intent of MSEDCL to procure wind power. This was anyways kept in abeyance by MSEDCL and hence the only policy that would be applicable is RE Policy 2015 of GoM.

19.11 The RE Policy amongst other things mandates registration of project with MEDA before signing of EPA and the same needs to be complied with for being eligible for applicability of the provisions under that policy. The generator always had the option of selling its energy under Open Access or opt for REC mechanism. Further, BWDPL was aware of this aspect which can be confirmed from the comments it had raised during the proceeding of suo-moto verification of compliance of RPO targets for FY 2013-14. BWDPL vide letter dated 20 March 2015, had submitted following comments:

"31.MSEDCL's practice is to sign EPAs with Wind Generators after their commissioning and mostly towards the end of the financial year, it is impossible for it to exercise any choice in selection of the appropriate price mechanism, i.e preferential Tariff or REC mechanism, prior to commissioning of the RE Projects. Regarding discrepancies pointed out by MSEDCL in MEDA's report, MSEDCL can only claim fulfilment of its Non-Solar RPO on the RE procured by it at the preferential tariffs as per the RPO Regulations...."(Emphasis added)

19.12 Once the project developer has decided to take benefit under the Policy, it needs to abide by all the provisions of the policy and also comply with the same in totality. The Project holder does not have the right to question the conditions stipulated under the policy. Thus the condition of having registration with MEDA is mandatory for BWDPL and hence BWDPL applied to MEDA for registration of WTGs for the cumulative capacity of 191 MW. Further, out of this 191 MW it had applied for Registration, all the other WTGs barring 3 WTGs of 6.3 MW had received registrations during the period of March 2016 to May 2017. Also, as per the provisions of RE Policy 2015, after receiving the Registration, MSEDCL has signed EPAs for all the capacities at the generic tariff applicable till

December 2017. Thereafter all the Wind power procurement is on the basis of the discovered tariff through competitive bidding process.

19.13 Registration for balance 3 WTGs of 6.3 MW was received in April 2019. Meanwhile, Tariff Policy 2016 notified by the Government of India recommended procurement of Renewable Energy (except waste to energy plant) through competitive bidding/market discovered price so as to encourage competition and possibly reduce the tariffs. Considering the nationwide changing scenario for procurement of RE power through competitive process, MSEDCL approached the GoM for allowing procurement of RE power through competitive process. The GoM vide its letter dated 17 July 2017 had approved the purchase of Wind, Solar and Bagasse based cogeneration power through Competitive Bidding. Thereafter, on 8 December 2017, Ministry of Power, Government of India notified competitive bidding guidelines for procurement of wind power. Accordingly, MSEDCL started procurement of Wind energy through competitive bidding from December 2017 onwards. Therefore, when BWDPL approached MSEDCL for signing of EPA in the year 2019, MSEDCL refused to do so as it had already started procurement of Wind power based on competitive bidding. In this regard, the Commission notes that once MSEDCL has started procurement of Wind Energy through competitive bidding which was also approved by the GoM and further which is in line with the provisions of Tariff Policy 2016 notified by the Government of India, it would not be appropriate for Commission to direct MSEDCL to sign EPAs based on generic tariff of previous years.

19.14 It is also important to note that BWDPL had also approached the GoM, to direct MSEDCL to sign EPA for its balance 3 WTGs aggregating to 6.3MW as per terms of RE Policy, 2015. However, the GoM vide its letter dated 13 January 2020 has advised BWDPL as follows:

“The Maharashtra Electricity Distribution Company Limited since 2017 purchases all energy except Solid Waste to energy through tender process. Hence feed in tariff EPA cannot be signed by Maharashtra Electricity Distribution Company Limited. Hence you are advised to participate in MSEDCL tender whenever it is floated”

BWDPL has prayed in the present Petition to declared that above letter cannot be made applicable to 6.3 MW project commissioned in 2014. In the opinion of the Commission, it cannot allow such prayer of BWDPL which selectively ignores the correspondence of Government of Maharashtra more so since the GoM which had notified RE Policy, 2015 itself has subsequently allowed MSEDCL to procure Wind power through competitive bidding process. The option of procurement of power at the best available price cannot be taken away from MSEDCL/Government of Maharashtra since it is in the Public interest.

19.15 BWDPL has also contended that there was delay in issuance of registration from MEDA. In case registration for these 3 WTGs of 6.3 MW was issued along with registrations of other WTGs in the same project, MSEDCL could have signed EPAs for these projects also. In this regard, the Commission notes that MEDA has issued registrations to around 184 MW capacity of BWDPL's project in phases starting from March 2016 to May 2017 and last registration for 3 WTGs of 6.3 MW capacity in April 2019. As per RE Policy 2015,

MEDA has to ensure that all necessary documents have been received and project is complete in all aspect before issuance of registration to any project. MEDA has submitted details of activities undertaken before issuance of registration to these 3 WTGs of 6.3 MW capacity. The Commission is not inclined to go into details of the same as BWDPL was equally responsible to follow-up its registration process and if there was delay beyond reasonable limit it should have invoked its legal rights at that time only. Without taking actions at appropriate time, BWDPL now cannot shift the blame fully on MEDA for delay in registration and consequently non signing of EPA.

19.16 In view of the above detailed analysis of relevant applicable policies, the Commission notes that it cannot be concluded that BWDPL has set up its project solely on the assurance of MSEDCL's Wind Policy, 2014. Further, provision of RE Policy 2015 of including around 1350 MW capacity commissioned post completion of 2000 MW targets is just an enabling provision with mandatory condition of registration of project with MEDA. BWDPL has failed to comply with such mandatory condition of registration for a long period, and in the meanwhile based on subsequently notified Tariff Policy 2016 and competitive bidding guidelines, MSEDCL with the approval of the GoM which had notified RE Policy 2015 has started procurement of Wind Power through competitive bidding since December 2017. Therefore, in the opinion of the Commission, MSEDCL cannot be directed to sign EPA for balance capacity of 6.3 MW by relying on MSEDCL's Wind Policy 2014 and RE Policy 2015.

20. **Issue: b) Whether there was an implied contract/agreement between the parties?**

20.1 BWDPL has contended that its 3 WTGs of 6.3 MW capacity were commissioned on 26 December 2014 and 30 December 2014 in FY 2014-15. Since commissioning these WTGs, BWDPL has been injecting power into the Grid. Based on joint meter reading, MSEDCL has been issuing credit notes to BWDPL and also has used this power for fulfilling its non-Solar RPO targets since FY 2014-15 onwards. Therefore, BWDPL has contended that as MSEDCL has never objected to the injection of power and has enjoyed the benefits of that power in terms of fulfilling its non- Solar RPO targets, by its conduct MSEDCL has accepted the power supplied by BWDPL and acted upon an implied agreement with BWDPL. Signing of EPAs would be just a formality to convert that implied agreement into contract document. For this purpose, BWDPL has relied upon various judgments of the Hon'ble Supreme Court.

20.2 While opposing above contention of BWDPL, MSEDCL has stated that it has never consented for signing of EPA and purpose of issuance of monthly credit notes is limited to energy accounting only.

20.3 BWDPL's reliance on the concept of implied contract is on the alleged ground that since commissioning of these projects in December 2014 until February, 2020, MSEDCL has never intimated to BWDPL, either expressly or by conduct, that it does not accept or does not wish to accept the power supplied by BWDPL. In this regard, from the documents submitted during this proceeding, the Commission notes that while granting additional time

for commissioning of project, MSEDCL vide its letter dated 6 December 2014 and 29 December 2014 has expressly communicated as follows:

“In view of the above, the permission for commissioning of New WTGs, under reference is hereby extended upto 15 days from the date of issue of this letter. This permission is only for commissioning of new WTGs and MSEDCL does not guarantee purchase of this power”

Therefore, just few days before commissioning of the projects under consideration, MSEDCL has expressly communicated that commissioning of WTG does not guarantee purchase of power. Even after having such express communication way back in 2014, BWDPL has continued to inject energy into the grid.

- 20.4 BWDPL has also cited various affidavits filed by MSEDCL before this Commission during RPO verification process wherein MSEDCL has stated that for meeting its RPO, it is signing EPAs at generic tariff with the project developer who is approaching it. In this regard, the Commission notes that there is nothing wrong in these affidavits as BWDPL itself has accepted that barring 6.3 MW disputed capacity, MSEDCL has signed EPAs for balance capacity of around 193.4 MW as per generic tariff applicable at the time of commissioning of the individual WTGs. The Commission also notes that most of these EPAs have been signed post 2 to 3 years of commissioning of the project. This was because, these projects were yet to be registered with MEDA as per mandatory requirement of RE Policy 2015. Post such registration, MSEDCL based on the prevailing policy of procurement at generic tariff, has signed EPAs with retrospective date i.e. for date of commissioning of the project. Thus, the principle of actions as per the prevailing policy has been uniformly followed by MSEDCL.
- 20.5 Therefore, post commissioning of the project, MSEDCL was always hopeful that BWDPL will complete this mandatory process of registration with MEDA and thereafter it would be able to sign EPAs. Further as stated by the BWDPL itself in this Petition, MSEDCL has insisted for registration of the project before signing of EPAs and hence BWDPL has submitted application for registration with MEDA. Therefore, it is not correct to state that post commissioning of the project, MSEDCL has accepted the power without any conditions. In fact, MSEDCL put condition of registration with MEDA as per RE Policy 2015 before signing of EPA.
- 20.6 BWDPL has also contended that post commissioning of the project, MSEDCL is regularly issuing credit notes certifying energy injected into the grid and hence recognized and accepted energy generated from the project. In this regard, the Commission notes that monthly credit notes issued by MSEDCL are an energy accounting document to demonstrate how much energy is being injected into the Grid. This credit notes are used for financial settlements when there is valid EPA or Open Access permission. In the present case, as agreed by BWDPL, when MSEDCL has entered into EPAs with its project with retrospective effect from the date of commissioning of the project, such credit notes are used to settle financial bills for the sale of power in past years. Therefore, in the opinion of

the Commission, mere issuance of monthly credit notes does not bind MSEDCL to sign EPA with project.

20.7 Thus, in the opinion of the Commission, MSEDCL has communicated to BWDPL in clear terms before commissioning of the project that MSEDCL does not guarantee purchase of power and post commissioning that EPA can be signed only after registration of project with MEDA. MSEDCL has also acted in a fair and just manner by signing the EPAs for all project capacity of 191.7 MW, excluding 6.3 MW with BWDPL projects, where the Registration process was completed before December, 2017 and the policy was to procure power at generic tariff. Therefore, it cannot be considered that MSEDCL has provided free consent for procurement of power from BWDPL's project under dispute. Therefore, BWDPL's contention that MSEDCL is in implied contract with free consent cannot be accepted.

21. **Issue: c) Whether BWDPL is eligible for compensation for energy injected by it into the Grid and at which rate?**

21.1 BWDPL has contended that it has supplied electricity to MSEDCL from date of commissioning of these projects i.e. from 30 December 2014 and continues to supply till date. Therefore, MSEDCL is duty bound to pay/ compensate BWDPL for the same. Hence, at the time of filing the Petition, BWDPL has claimed Rs. 41.35 crore (which includes interest of Rs. 9.48 crore) as a compensation from December 2014 till 23 January 2020. MSEDCL has opposed such claim on the ground that energy injected into the grid without valid EPA need not be compensated.

21.2 In this regard, the Commission in earlier paragraphs has already held that MSEDCL cannot be mandated under the prevailing policy framework to sign EPA with disputed capacity of 6.3 MW. The Commission has also rejected BWDPL's contention that MSEDCL is in implied contract with free consent. Therefore, all these years, BWDPL was injecting energy into the Grid from this disputed capacity of 6.3 MW without any valid EPA and thus is not eligible for any compensation.

21.3 The APTEL, in its various judgments has ruled that entity injecting any energy into the grid without a valid contract need not be compensated. APTEL in its Judgment dated 16 May 2011 in *M/s Indo Rama Synthetics Vs MERC* has explained the importance of PPA for injecting power into the Grid and thereafter held that no compensation shall be payable for energy injected without agreement. Relevant part of the APTEL Judgment is reproduced below:

“11 In our opinion the Section 70 and 72 of the Indian Contracts Act, 1872 will not be applicable in the present case. The present case is governed by the Electricity Act, 2003 which is a complete code in itself. In the electricity grid, the SLDC, in accordance with Section 32 of the Act is responsible for scheduling and dispatch of electricity within the state, to monitor the grid operations, to exercise supervision and control over the intra-state transmission system and to carry out grid control and dispatch of electricity though

secure and economic operation of the State Grid. All the generators have to generate power as per the schedule given by the SLDC and the grid code in the interest of secure and economic operation of the grid. Unwanted generation can jeopardize the security of the grid. Moreover, in this case the injection of electricity was without the consent or knowledge of the distribution licensees and the energy generated by the appellant was booked to the distribution licensees for balancing the energy generated/injected with energy consumption in the energy accounting. Accordingly, the decision in Haji Mohammed Ishaq WD. S.K.Mohammed and others vs. Mohamad Iqbal and Mohamed Ali & Co. Reported in (1978) 2 SCC 493 relied upon by the appellant will also not be of any relevance.

.....

13 Thus, we do not find any substance in the claim of the appellant for compensation for the power injected into the grid without any schedule and agreement”.

Further, the APTEL in its Judgment dated 8 May 2017 in Appeal No 120 of 2016, has interpreted its earlier two judgments and concluded as follows:

iv. The Respondent No. 1 had also quoted two more judgements of this Tribunal in appeal nos. 267 of 2014 and appeal no. 68 of 2014. In the judgement dated 15.4.2015 in appeal no. 267 of 2014 this Tribunal has held that the Appellant (M/s Cauvery Power Generation Pvt. Ltd.) is not entitled to claim payment of infirm power injected into the grid without the approval from the Respondent (TANGEDCO) for specific duration as mentioned in the judgement till TANGEDCO conveyed its consent to purchase infirm power. In the judgement dated 30.5.2016 in appeal no. 68 of 2014 this Tribunal has disallowed the payment by Respondent (TANGEDCO) towards injection of power from COD of the Appellant (M/s OPG Power Generation Pvt. Ltd.) till approval of third party sales by TANTRANSCO as the energy was injected to the grid without the consent/knowledge of the distribution licensee and SLDC. The crux of these two judgments is also that a generator cannot pump electricity into the grid without having consent/ contractual agreement with the distribution licensee and without the approval/scheduling of the power by the SLDC. Injection of such energy by a generator is not entitled for any payments.

21.4 Although, BWDPL has objected that above cited judgments of the APTEL are not applicable in the matter, the Commission is of the opinion that spirit of these Judgments are important to understand, as it deals with injecting energy into the Grid without valid contract. The Commission would like to specifically mention that the Infirm nature of Wind creates more problem for the procurer when it is being injected without any identified buyer. As stated by the APTEL, such injected energy without valid contract would lead to deviation in drawal or injection into grid and levy of corresponding penalty under Deviation Settlement Mechanism (DSM) in force for ensuring grid discipline. Further in States like Maharashtra where multiple Distribution Licensees and Open Access users are connected to an interconnected Intra-State Transmission network, it would be difficult to identify or pinpoint a single Distribution Licensee / OA user who has consumed such energy injected

into the grid. Therefore, to maintain grid discipline and grid security, such injection of energy without any valid EPA or a contract needs to be discouraged. Hence, such injected energy should not get any compensation due to the reasons explained above including the fact that in the interconnected system, any single entity cannot be identified as a user of such uncontracted injected energy.

- 21.5 In the present matter, as held earlier in this Order, MSEDCL had been signing EPA with MEDA registered Wind generators till December 2017 with retrospective effect. Had BWDPL obtained registration from MEDA by that date, then EPA would have been possibly signed for present disputed capacity also. Hence, MSEDCL was fairly considering the possibility that once registration is received, EPA could be signed. The Commission also notes that in the past, during suo-moto proceedings for verification of compliance of RPO targets, MSEDCL had prayed for considering compliance of RPO target based on actual contracted RE capacity and not on the basis of the actual units injected. The Commission had denied the request of MSEDCL while considering reconciled data submitted by MEDA which was based on the IBSM/ FBSM report furnished by MSLDC which included the quantum of power injected into to the grid by WTGs. During the proceeding for verification of compliance of RPO targets for FY 2015-17, held on 2 February 2017 in Case No 169 of 2016, Wind Independent Power Producers Association had raised following comments:

“

MSEDCL is yet to execute EPAs with the Wind Generators commissioned in FY 2014-15-16, but has sought that 1202 MUs from these Generators be counted towards its cumulative RPO compliance. At the moment, there is no binding EPA in place and MSEDCL has not paid anything towards purchase of the power injected into the grid from 2014 onwards. MSEDCL cannot be allowed to use this energy for its Non-Solar RPO compliance on the basis of mere intent to execute EPAs till such time as such EPAs are actually executed. Thus, this statement of MSEDCL with regard to 1202 MUs is intended to mislead the Commission.

The commission had sought detailed information from MSEDCL regarding year wise RE power and RECs procured, execution of EPA with wind generators etc. and further subsequent clarifications to its reply submitted. MSEDCL had provided the requisite information in various submission till 7 March 2018. Finally, based on the submissions of MSEDCL, the Commission had issued the Order on 27 March 2018 considering the energy injected by the Wind generators.

- 21.6 However, to have more clarity, the Commission in the instant matter sought information from MSEDCL whether energy injected from BWDPL's 6.3 MW projects has been considered by it for fulfilment of its non-Solar RPO targets. MSEDCL in reply stated that it has considered the energy injected from BWDPL's 6.3 MW, towards fulfilment of Non-Solar RPO targets for FY 2014-15, 2015-16 and FY 2016-17 only. As MSEDCL has started procurement of RE power through Competitive bidding from December 2017, it has not considered the energy from these 6.3 MW projects from April 2017 till date.

- 21.7 As per the provisions and further as ruled by the APTEL, energy injected without valid contract is not eligible for any compensation.
- 21.8 The Commission however would like to also consider the conduct of MSEDCL and BWDPL. It has been accepted by MSEDCL that it has taken the benefits by considering this power for fulfilling its non- Solar RPO targets for three years i.e. from FY 2014-15 to 2016-17 i.e till such time the procurement methodology had not been changed to Competitive Bidding. The Commission thus feels that MSEDCL should compensate BWDPL for that limited period. As there was no valid EPA between the parties, generic tariff applicable at that point of time cannot be made applicable in the present matter. Only other method that can be considered is sale of power at Average Power Purchase Cost (APPC) to Distribution Licensee which is akin to REC mechanism. Therefore, the Commission directs MSEDCL to compensate BWDPL for the period of FY 2014-15 to 2016-17 at rate of approved APPC (excluding renewable sources) for respective year. Further, as MSEDCL has used this energy for meeting its RPO, green attribute of the same also needs to be paid. Hence, in addition to APPC rate, MSEDCL should also compensate BWDPL for such energy at Floor price of non-solar REC prevailing at that point of time. Accordingly, the Commission direct MSEDCL to pay compensation for energy injected by BWDPL from 3 WTGs aggregating 6.3 MW capacity in the year FY 2014-15 to FY 2016-17 at the rate of APPC (excluding RE) plus floor price of non-solar REC applicable for respective year. However, such compensation would be without any carrying cost as MSEDCL was not responsible for delay in raising bills for FY 2014-15 to FY 2016-17.
- 21.9 Energy injected by BWDPL form FY 2017-18 onwards, which has not been utilized by MSEDCL for its RPO, needs to be treated as energy injection without a valid EPA and hence need not be compensated.
22. **Issue: d) Balance of Convenience/equitability/Way forward**
- 22.1 Having ruled as above, the Commission notes that as of today, BWDPL does not have valid EPA and hence cannot continue to inject energy into the Grid. BWDPL in its submission has also referred to the Office Memorandum of the Ministry of New and Renewable Energy, Government of India, stating that renewable energy is having ‘must run’ status and during the period of Lock Down also said ‘must run’ status should be maintained. In the opinion of the Commission this Office memorandum is applicable to Renewable Generators having valid EPAs and cannot be made applicable to BWDPL’s 6.3 MW capacity which does not have any valid EPA. Therefore, through this Order, the Commission revokes status quo granted in the matter. MSEDCL is free to take appropriate actions as per instructions of MSLDC in case BWDPL is not able to produce valid contract for injecting energy into the Grid.
- 22.2 The Commission notes that although BWDPL has various options such as sale to Open Access consumer, sale to Other Distribution Licensee in the State or opt for REC mechanism, it can also exercise option provided under MERC RE Tariff Regulations, 2019. Regulation 7.3 of RE Tariff Regulations, 2019 has an enabling provision of signing of EPA

with distribution licensee at recently discovered tariff if such project capacity is below the threshold limit specified for competitive bidding process. If both parties agree, they may utilize this provision of these Regulations for signing of long-term agreement at a rate recently discovered and adopted by the Commission on the same terms and conditions which are applicable to such competitively bidden EPA. This will end uncertainty about EPA for the generator, at the same time MSEDCL will not be put to any disadvantage as the energy if procured will be as per the extant policy of procurement and also at competitively discovered rate.

23. In the opinion of the Commission, MSEDCL may provide such option to other similarly placed Wind generators also.


24. Hence, the following Order:

ORDER

1. **The Case No. 28 of 2020 is partly allowed.**
2. **Maharashtra State Electricity Distribution Company Limited cannot be compelled to sign Energy Purchase Agreement with Bothe Windfarm Development Pvt. Ltd. for its 3 WTGs aggregating 6.3 MW.**
3. **Maharashtra State Electricity Distribution Company Limited is directed to compensate Bothe Windfarm Development Pvt. Ltd. for the energy injected from 3 WTGs aggregating 6.3 MW during FY 2014-15 to FY 2016-17 which is considered for fulfilment of non-Solar RPO targets, at Average Power Purchase Cost (excluding Renewable Energy) plus floor price of non-solar REC applicable for respective year. Such compensation would be without any carrying cost.**
4. **Bothe Windfarm Development Pvt. Ltd is not entitled to claim any compensation for the energy injected by it since April, 2017 onwards from its 6.3 MW projects in the absence of valid Energy Purchase Agreement.**

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I. M. Bohari)
Member


(Abhijit Deshpande)
Secretary

