

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate jurisdiction)

Appeal No. 101 of 2009 & Appeal No. 112 of 2009

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

Dated: 3rd June, 2010

In the matter of :-

APPEAL NO. 101 OF 2009

1. M/s Sarjan Realities Pvt. Ltd.,
285/10 Koregaon Park, Behind Singh Motors,
Near Hotel Gulmohar Jupiter, Pune – 411 001
2. Indian Wind Energy Association,
PHD House, 3rd Floor, Opposite Asian Games Village,
Siri Fort Road, New Delhi – 110016Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
Through The Secretary, 13th floor, Centre No. 1, World
Trade Centre, Cuffe Parade, Mumbai – 400005.
2. Maharashtra State Electricity Distribution Company Ltd.,
Through Superintendent (ANRC), MSEDCL,
Station Road, Ahmednagar.
3. M/s Bajaj FinServ Limited,
Bajaj Auto Ltd Complex, Mumbai – Pune Road,
Pune – 411 035
.....Respondents

APPEAL No. 112/ 2009

M/s Enercon (India) Limited,

513 & 514, World Trade Centre,
Barakhamba Road, New Delhi – 110001 Appellant(s)

Versus

1. Maharashtra Electricity Regulatory Commission,
Through The Secretary,
13th floor, Centre No. 1, World Trade Centre,
Cuffe Parade, Mumbai – 400005.
2. Maharashtra State Electricity Distribution Company Ltd.,
Through Superintendent (ANRC), MSEDCL,
Station Road, Ahmednagar.
3. M/s Bajaj FinServ Limited,
Bajaj Auto Ltd Complex
Mumbai – Pune Road, Pune – 411 035 Respondents

Counsel for Appellant(s): Ms Sikha Ohri, Mr. M. G. Ramachandran
Ms. Sneha, Ms Mandakini Ghosh,
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Ms. Surbhi Sharma, Mr. Aashish Bernard
Ms Priyanka, Mr. Devdutt Kamat, Raunak Jain
Mr. Varun Agarwa, Mr. Ravi Prakash,
Mr. Vikrant Ghumare, Mr. B. A. Ranganadhan

Judgment

Per Hon'ble Shri Rakesh Nath, Technical Member

The above Appeals have been filed by M/s Sarjan Realities Pvt. Ltd., Indian Wind Energy Association and M/s Enercon (India) Limited, Wind Energy Developers in the state of Maharashtra. Maharashtra State Electricity Distribution Company (R-2) is

Distribution Licensee in Maharashtra. M/s Bajaj FinServ Ltd. (R-3) is also a Wind Energy Developer.

2. The Appeals are against the order dated 9.3.2009 in case No. 8 of 2008 by Maharashtra Electricity Regulatory Commission (R-1). In the impugned order the Commission gave clarifications sought for by M/s Bajaj FinServ Limited (Respondent 3), on Commission's order dated 20.11.2007 regarding charges for wheeling of energy from Wind Energy Projects classified as Group II Projects, through the transmission and distribution system of MSEDCL (R-2). Group II Wind Energy Projects are those projects which were commissioned after 27.12.1999 and before 1.4.2003. Appellant's Wind Energy Projects fall under Group II.

3. The clarification given by the Commission in the impugned order has resulted in substantial increase in charges payable by the Appellants and similarly placed Wind Energy Projects of Group II to MSEDCL (R-2) retrospectively from October 2006 for wheeling of energy for sale to third party or self use. Hence these Appeals.

Background of the case :

4. In the year 1998, the Government of Maharashtra issued a policy in respect of non-conventional energy sources under which Wind Energy Developers were given the choice of either selling energy to Maharashtra State Electricity Board or to a third party and/or for self use. They were permitted open access on the transmission & distribution system of Maharashtra State Electricity Board, since succeeded by MSEDCL (R-2), for wheeling of energy from the point of injection of energy from Wind Generator to the point of supply to a third party or for self use on payment of wheeling charges and adjustment of transmission and distribution losses. On 12.8.1999, Maharashtra Electricity Regulatory Commission (R-1) was set up.

5. In the year 2001 the Electricity Board issued No Objection Certificate to the Appellants specifying 1% transmission loss and 2% wheeling charges for conveyance of energy of the Wind Power Projects through its transmission and distribution system to third party and/or self use. The NOC also stated that the

wheeling charges and transmission & distribution losses as revised from time to time by the Commission would be binding on the Wind Energy Developer.

6. On 4.3.2002 the Electricity Board filed an application before the commission seeking approval of energy purchase from wind/solar projects and wheeling charges and transmission & distribution losses for wheeling of energy through the Board's transmission & distribution system for third party sale or self use. On 3.6.2002 the Commission passed an interim order to maintain status quo as on 27.12.1999, the date on which the Commission's Conduct of Business Regulations were notified.

7. A detailed Wind Power Tariff order for procurement of wind energy and wheeling for third party sale or self use was passed by the Commission on 24.11.2003. The Commission decided that a study will be conducted to determine the wheeling charges and adjustments for transmission and distribution losses in respect of Wind Power Project and pending such determination, uniform wheeling charges at the rate of 2% and transmission &

distribution loss of 5% shall be adjusted. In this order it was also decided that the tenure of the Energy Purchase Agreement or Energy Wheeling Agreement for Group II Projects shall be as 8 years. With this order the transmission loss adjustment for wheeling was enhanced from 1% to 5% for the Appellants. The Wind Energy Projects accepted the increase in transmission loss adjustment.

8. On 6.6.2005 MSEDCL (R-2) came into existence as a distribution licensee after unbundling of Maharashtra State Electricity Board into four companies.

9. On 21.6.2005, Distribution Open Access Regulations 2005 were notified by the Commission. The Regulations dealt with the eligibility for open access including matter relating to filing of application, signing of agreements, etc. The Regulations did not provide for charges for wheeling but provided the procedure for levy and collection of charges.

10. In April, 2006, MSEDCL (R-2) signed Energy Wheeling Agreement with Wind Energy Projects governed by the Commission's order dated 24.11.2003 and subsequent orders. The Agreement stipulated levy of uniform wheeling charges of 2% and transmission & distribution loss charges of 5% of energy wheeled subject to variance as per Commission's directives. It was indicated in the Agreement that the terms and conditions of the Agreement could be modified at any time in line with the order passed by the Commission or Government of Maharashtra or Government of India.

11. The Commission issued a Tariff Order on 20.10.2006 dealing with tariff for 2006-07. In the said order the Commission determined the wheeling charges and transmission & distribution losses for providing open access on the transmission & distribution system of MSEDCL (R- 2). In regard to the existing contracts, the Commission opined that all open access contracts in existence on the date of enactment of the Electricity Act, 2003 should be honoured to ensure sanctity of the contract. The Commission ruled that all open access transactions on the

date of effectiveness of the Electricity Act, 2003 shall be required to pay the wheeling charges as mentioned in their contracts till the current validity of such contract. On expiry of the current contract these consumers would also be subjected to the wheeling charges determined by the Commission from time to time.

12. Thereafter by tariff order dated 18.5.2007 dealing with the Multi Year Tariff for 2007-08 to 2009-2010, the Commission determined the wheeling charges and transmission & distribution losses for open access transactions. In this order also the Commission made an exception in case of the existing contracts as done in the tariff order for the year 2006-07.

13. Pursuant to the above orders, Appellants as well as similarly placed wind energy generators continued to avail open access by paying 2% for wheeling charges and 5% for transmission & distribution losses i.e. aggregating to 7%, adjusted in kind by the Electricity Board/MSEDCL and effected third party sales from the year 2003 onwards. Thus if 100 units

were injected by the Wind Generator into the transmission and distribution system of the Board/MSEDCL (R-2), 93 units were admissible for delivery to third party or for self use at the point of supply. This was against higher charges applicable to other open access transactions from other projects which were governed by the charges determined in the tariff orders.

14. On 23.7.2007 MSEDCL (R-2) filed a petition before the Commission seeking directives or order in respect of tariff, tenure and other commercial terms and conditions for the purchase of wind energy and/or wheeling of energy from Wind Energy Projects under Group II category after expiry of validity period. According to MSEDCL (R-2) the validity of contract of some of the Group II wind projects had expired on 31.3.2007. MSEDCL (R-2) also submitted proposal for rate of purchase of energy from Group II projects. For wheeling for third party sale/self use MSEDCL proposed scheme of credit adjustment in money terms to be adjusted in the electricity bills of the concerned third party/self use consumers.

15. On 20.11.2007 the State Commission passed an order on the above issue. The Commission did not approve the proposals of MSEDCL (R-2) for purchase of energy and credit adjustment in money terms and held that the contract of the Group II Projects were still valid. Regarding wheeling charges for Group II Projects, the Commission clarified that it had determined applicability of open access charges through various Multi Year Tariff orders. The Commission also summarized the applicable open access charges in the form of a table.

16. Even after the above order MSEDCL continued to levy open access charges aggregating to 7% (2% wheeling and 5% transmission loss) from Group II Projects for wheeling of energy for third party sale/self use.

17. On 3.1.2009 MSEDCL (R-2) communicated to M/s Sarjan Realities Pvt. Ltd.(Appellant-1) confirming the validity period of the existing wheeling arrangements till 29.12.2008. The letter stated that thereafter the wheeling would be as per the terms and conditions contained in the Commission's order dated

20.11.2007. The Appellant was also called upon to execute a new agreement after the expiry of the validity period of the existing agreement. Similar letters were also sent by MSEDCL to similarly placed Group II Projects.

18. On 09.09.2008 M/s Bajaj FinServ (R-3) one of the Wind Power Developers whose validity of contract was expiring filed a petition before the Commission seeking clarifications on its order dated 20.11.2007. Respondent-3 wanted clarifications whether the tenure ordered by the Commission for Group II wind generators was 8 years or 20 years (life of the project) or unlimited and whether the open access charges as per the Multi Year Tariff were applicable to existing Group II Projects without considering their low plant load factor. The Commission passed an order on this petition on 9.3.2009 (impugned order).

19. The Commission in the impugned order stated that M/s Bajaj FinServ had attempted to seek review of the Commission's order dated 20.11.2007 in the guise of seeking clarification which is not permissible. However, the Commission also gave detailed

clarification regarding the applicable wheeling charges for Group II wind generators. The Commission ruled that it had not distinguished in respect of wheeling charges and losses in respect of open access transaction whether belonging to Group II Wind Energy Projects or any other renewable or fossil fuel based wheeling. Wind Power Tariff Order dated 24.11.2003 had also clearly spelt out that the open access charges as and when determined by the Commission shall be applicable for wheeling transaction of wind energy irrespective of the tenure of Energy Wheeling Agreement.

20. Following the above order MSEDCL (R-2) started levying higher open access charges as per Tariff Order of the Commission as applicable to other projects even to the Group II wind energy projects whose validity of Agreement was still valid. Respondent-2 also claimed arrears for open access charges retrospectively from October, 2006 from Group II wind energy projects. According to the Appellants, the new rates are about three to five times the rates charged earlier.

21. Aggrieved by the same, the present appeals have been filed by the affected Wind Power Developers falling under Group II category and their Association.

Submissions made on behalf of the Appellants.

22. The Learned Counsel for the Appellants while challenging the impugned order dated 9.3.2009 urge the following contentions :-

(i) The Appellants and similarly placed Wind Power Developers in Group II category were having contracts either in the form of No Objection Certificate or in the form of an Energy Wheeling Agreement. The tenure of the agreement is 8 years from the date of commissioning of the Project.

(ii) Order dated 20.11.2007 was passed by the Commission on the petition filed by MSEDCL (R-2) seeking specific directions in respect of tariff, tenure

and other commercial terms and conditions for wind power projects under Group II category after the expiry of the validity period. The order did not deal with wheeling charges and transmission & distribution losses payable by these projects during the validity of the agreement.

(iii) The Commission in its Tariff order dated 20.10.2006 and 18.05.2007 categorically held that the sanctity of the contracts existing on the date of enactment of the Electricity Act, 2003 shall be honoured and decided that such open access transactions were required to pay the wheeling charges as per their contract till the current validity of the contract. Only on expiry of the current contract, these were also subjected to the wheeling charges as determined by the Commission from time to time.

(iv) Respondent No.2 also did not sign any fresh agreement with them as provided in the Distribution

Open Access Regulations 2005 notified by the Commission on 21.6.2005.

(v) In January 2009, MSEDCL (R-2) approached the Wind Power Developers whose contract had expired or going to expire and asked them to sign fresh Agreement since after the expiry of the current agreement transaction of wind power will be governed as per the Commission's orders dated 20.11.2007.

(vi) MSEDCL (R-2) continued to charge open access charges aggregating to 7% of wheeled energy from the Appellants and not at rates provided in the tariff orders for other projects which were 3 to 5 times the rates charged from them till the passage of the impugned order.

(vii) Thus the legal right of MSEDCL to charge at higher rates with effect from October 2006 is deemed to have been waived.

(viii) The Appellants can not collect the revised rates of Wheeling Charges and Transmission & Distribution loss from their beneficiaries from October, 2006. On the other hand the entire cost of MSEDCL (R-2) with the exclusion of wheeling charges at the revised rates has been fully provided for in the Annual Revenue Requirements approved by the Commission.

(ix) The impugned order which is only a clarificatory order has travelled beyond the order dated 20.11.2007. Moreover, the impugned order has been passed without affording any opportunity of being heard to the Appellants in contravention to the principles of natural justice.

Submission of the Respondent-2.

23. In reply to these contentions, the Learned Counsel for MSEDCL (R-2) has made the following submissions :-

- i) No Objection Certificate given by the Electricity Board to Wind Energy Projects clearly stated that the policy as revised by the Commission from time to time would be binding on the developers. Similarly the Energy Wheeling Agreement entered between MSEDCL and the developers also had a clause stating that any terms and conditions of the Agreement could be modified any time in line with the subsequent orders passed by the Commission.

- ii) Thus the open access charges were not frozen at the time of the Agreement. The charges determined by the Commission in its order dated 24.11.2003 were interim charges. As per the order, a study was to be conducted to determine the transmission and distribution losses and based on the study the Commission had to determine the transmission and distribution loss.

- iii) Commission's order dated 20.11.2007 dealt with two aspects viz. open access charges during the validity of Energy Wheeling Agreement and applicable charges after the expiry of the Agreement. Regarding the first issue the Commission had categorically held that the charges during the tenure of the Agreement had to be in accordance with the tariff orders passed from time to time. The charges had been explicitly spelt out in the order. If the order had not dealt with applicable charges during the validity of the Agreement, the Commission would not have given reference to Multi Year Tariff Order in respect of 2007-08 and the tables indicating the applicable charges.
- iv) Regarding the second aspect of period after expiry of the Agreement, the Commission had held that the transactions would be governed by the Open Access Regulations, 2005 and the charges would be as per the various orders which would be passed by the Commission from time to time.

- v) Order dater 20.11.2007 has not been challenged and the said findings have become final.
- vi) The impugned order only confirms the position of order dated 20.11.2007 and no arguments can be raised at this stage as to the correctness of the said order. The impugned order is only an order refusing to review the order dated 20.11.2007 and thus no appeal is maintainable against the impugned order.
- vii) Regarding their letter dated 3.1.2009 to the Wind Energy Projects of Group II asking for execution of fresh agreement after the expiry of the validity period, the said letter did not state that the Group II projects had to pay under the regime of 2003 during the validity of the contract.
- viii) The tariff orders of the Commission are in pursuance of the Electricity Act, 2003. Merely because the tariff order was not enforced before the year 2007-08, it does not create an estoppel from enforcement of such

order if the same is enforced or sought to be enforced within the period prescribed by the Limitation Act.

- ix) The tariff orders dated 20.11.2006 and 18.5.2007 making an exception to open excess charges for the existing Agreements are prior to the order dated 20.11.2007 and can not override the effect of the order dated 20.11.2007.

- x) Distribution Open Access Regulations, 2005 provided for the validity of all the existing contracts as on the date of the regulations and there was no need to sign a new Connection and Use of Distribution System Agreement contemplated in the Regulations.

24. The Commission was not represented in the hearing.

25. In the light of the rival contentions urged by the counsel for the parties, the following questions would arise for consideration by this Tribunal:

- (a) Whether the Commission's order dated 20.11.2007 dealt with open access charges applicable to Group II Wind Energy Projects only after the tenure of the Energy Wheeling Agreement or it also dealt with the charges applicable during the tenure of the Agreement?
- (b) Whether the impugned order which was a clarificatory order, has travelled beyond the order dated 20.11.2007?
- (c) What are the applicable charges in respect of Wheeling and Transmission and Distribution Loss Charges payable by Group II Wind Energy Projects during and after the tenure of the existing Energy Wheeling Agreements?
- (d) Whether MSEDCL's legal right to charge open access charges at a higher rates with effect from October, 2006 is deemed to have been waived, if it is established that the higher rates are payable to them?

26. Let us now deal with every one of the issues raised in this Appeal.

27. The Regulations and tariff orders of the Commission have an overriding effect over the existing Agreements in terms of Section 174 of Electricity Act, 2003. Moreover No Objection Certificate issued by Maharashtra State Electricity Board in the year 2001 and Energy Wheeling Agreement signed by MSEDCL(R-2) in the year 2006 have clauses regarding modifications subject to the orders passed by the Commission.

28. Rightly when the Commission in its Wind Power Energy Tariff order dated 24.11.2003 increased the prevailing Transmission losses to 5%, the same were implemented by the Electricity Board and accepted by the Wind Energy Developers. The Energy Wheeling Agreement signed between MSEDCL (R-2) and Group II Projects in April, 2006 under the provisions of 24.11.2003 order also stipulated uniform wheeling charges @ 2% and transmission & distribution loss charges @ 5% subject to variance as per the Commission's directives from time to time.

29. However, the Commission in its order dated 20.10.2006 regarding Annual Revenue Requirements of MSEDCL (R-2) for the years 2004-05, to 2006-07 and determination of tariff for 2006-07 decided to honour the sanctity of the contracts in existence on the date of enactment of the Electricity Act, 2003 and held as under in para 1 of Chapter 7(B) on “Determination of wheeling charges and surcharge”.

“ The Commission rules that open access transactions on the date of effectiveness of the Electricity Act, 2003 shall be required to pay the wheeling charges as mentioned in their contract till the current validity of such contract and on expiry of the current contract, their consumers would also be subjected to the wheeling charges determined by the Commission from time to time”

Thus the eligibility of Projects for applicability of this clause is that the open access transaction shall be effective on the date of effectiveness of Electricity Act, 2003. By these stipulations the

Commission decided not to subject these charges to variance during the current validity of the Agreement. Since Group II Wind Energy Projects were commissioned before 1.04.2003, their open access transactions stand covered under these stipulations.

30. Again the Commission in its order dated 18.5.2007 in the matter of determination of Annual Revenue Requirement of MSEDCL (R-2) for the years from 2007-08 to 2009-10 and tariff for 2007-08 also decided to make an exception in case of the existing contracts for open access charges as made in the earlier tariff order.

31. The Commission's order dated 20.11.2007, was passed on the petition of MSEDCL seeking directions for purchase of energy and wheeling of energy to third party/self use specifically after the validity of the existing Agreements with the Group II wind energy projects. This is very clear from the preamble and the submissions made by the various respondents and the petitioner as recorded in the order.

32. However, learned counsel for MSEDCL (R-2) pleaded that the first part of the order from para 26 to 30 dealt with open access charges during the tenure of the Energy Wheeling Agreement.

33. We fail to comprehend that the Commission on its own would have gone beyond the prayer of the petition to determine the wheeling arrangements during the validity of the existing Wheeling Agreements. Moreover, the reading of the entire order including the discussions and observations of the Commission recorded in the order do not give the impression that the Commission has gone into the subject of open access charges during the tenure of the existing Agreements.

34. The orders cannot be understood by picking up random lines from the order but require complete reading to understand the correct findings. Moreover, findings for applicable charges during the validity of the Agreement cannot be made under the guise of proceedings specifically meant for applicable charges after the expiry of the Agreement.

35. It is argued by the learned counsel for R-2 that the Commission need not have to tabulate the applicable charges for 2007-08 and to give lengthy explanations if its intention was not to cover the period during the validity of the Agreement. As evident from the order, the Agreements of the Group II projects were going to expire commencing from December, 2007 to March, 2011 depending on the date of commissioning of the project. Thus the new open access rates as per the tariff orders of the Commission for 2007-08 were to be made applicable to some of the projects whose tenure was expiring during the year 2007-08 from December 2007 to March, 2008.

36. It is clear that MSEDCL also understood the order dated 20.11.2007 correctly and did not raise any demand on the Group II projects for open access charges at higher rate as applicable to other open access transactions. Even as late as 3rd January 2009, MSEDCL approached M/s Sarjan Realities Pvt. Ltd. (Appellant I) for execution of fresh Agreement after expiry of the

existing Agreement. The relevant para of the letter is reproduced below:

“ As per MERC orders under reference, validity period of 8 years from the date of commissioning has expired on 29.12.2008. Since then the transaction of wind power from your above mentioned project will be governed as per MERC order dated 20.11.2007 i.e. open access transactions”.

Only after passing of the impugned order MSEDCL has changed their position.

37. The impugned order dated 9..3.2009 was passed on the petition of M/s Bajaj FinServ (R-3), whose energy wheeling agreement had expired.

38. The clarification sought by M/s Bajaj FinServ Ltd. were;

- a) Whether the tenure of Group II wing energy projects was 8 years, 20 years (life of the project) or unlimited;
- b) Whether the charges as illustrated in the table indicating open access charges were applicable to

existing Group II projects without considering the plant load factor of wind projects or whether wheeling charges as per Commission's order dated 24.11.2003 were applicable or whether both the charges were applicable. M/s Bajaj FinServ had prayed for continuation of open access charges as per Commission's order 24.11.2003 for Group II projects after the tenure of the existing Agreement giving justifications for the same.

39. The Commission has rightly held that under the guise of clarificatory petition, the petitioner (R-3) had attempted to seek review of the Commission's orders, which is not permissible. It is pointed out that having held like that, the Commission has gone ahead with explaining the earlier orders and the applicable wheeling charges.

40. Let us now examine while giving explanations in the impugned order whether the Commission has travelled beyond its earlier order dated 20.11.2007.

41. It would be pertinent to reproduce the relevant extracts from the impugned order:

“ 15. In this context, the Commission has already ruled under para 30 of its orders dated 20.11.2007 (case 33 of 2007) that it has not distinguished in respect of applicability of wheeling charges and wheeling losses in respect to open access transactions whether belonging to Group II wind energy projects or any other renewable energy source or any other fossil fuel based open access wheeling.

16.....

17.Thus it was clearly spelt out under the said WPTO (Wind Power Tariff Order) that as and when the Commission determines such wheeling charges, transmission charges and losses, the same shall be applicable for the wheeling transactions of wind energy irrespective of tenure of EWA(Energy Wheeling Agreement)”

42. MSEDCL (R-2) has interpreted para 17 to conclude that the open access charges of Group II wind energy projects during the

tenure of the Energy Wheeling Agreement will also be as per the various tariff orders as applicable to wheeling for any other project . Accordingly it raised demand for higher charges retrospectively from October 2006, date of applicability of tariff order dated 20.10.2006 for 2006-07. Thus the explanation given in the order has changed the colour of order dated 20.11.2007.

43. Thus the impugned order is not just rejection of review petition against which appeal is not maintainable as pointed out by the learned counsel for MSEDCL (R-2). In our opinion this Appeal against the impugned order is maintainable as it has modified the earlier order dated 20.11.2007.

44. Admittedly, no opportunity had been provided to the Appellants while passing the impugned order which is against the principles of natural justice.

45. Thus this Tribunal is of the view that the Commission in the impugned order has travelled beyond its order dated 20.11.2007 while giving the clarifications.

46. Learned counsel for MSEDCL (R-2) has argued that the Commission's tariff order dated 20.10.2006 and 18.5.2007 were prior to the order dated 20.11.2007 and the same cannot override the effect of later.

47. Section 64(6) of the Electricity Act, 2003 stipulates that a tariff order shall unless amended or revoked continues to be in force for such period as may be specified in the tariff order. Undoubtedly, the Commission has powers to review its own order under Section 94(f) of the Electricity Act, 2003. For one moment let us accept the argument of learned counsel of R-2 that the order dated 20.11.2007 also dealt with the charges during the tenure of the Agreement. However, it is clear that the order dated 20.11.2007 has not envisaged reviewing or revoking the earlier tariff orders dated 20.10.2006 and 18.5.2007. The proceedings of the order dated 20.11.2007 were clearly for

determination of applicable charges for period after the validity period of the Agreement of the Group II projects.

48. In our opinion, in view of the stipulation in tariff orders dated 20.10.2006 and 18.5.2007 regarding honouring of the contracts till the current validity of such contract, Group II wind energy projects would be required to pay the wheeling charges as mentioned in their Agreements till the current validity of the Agreement i.e. wheeling charge of 2% and transmission loss of 5%. On expiry of current Agreement they will also be subjected to the wheeling charges as determined by the Commission from time to time. Thus though the Commission had power to modify the open access charges, it chose to maintain status-quo in respect of wheeling transactions as existing on the date of enactment of Electricity Act, 2003 in the Tariff Order for 2006-07 and 2007-08.

49. In view of above observations, there is no question of determining the legal right of Respondent No. 2 for recovery of its

past dues on account of wheeling of energy of Group II wind energy projects.

50. **Findings:**

- i) The open access charges applicable to the Appellant and similarly placed Group II wind energy projects during the validity of Energy Wheeling Agreements for 8 years from the date of commissioning of the project will be as mentioned in their Agreements i.e. wheeling charges of 2% transmission loss of 5%.
- ii) The impugned order dated 9.3.2009 has travelled beyond the order dated 20.11.2007 on which clarification was sought by one of the Wind Energy Developer of Group II Projects.
- iii) The Commission's order dated 20.11.2007 only dealt with the open access charges as applicable after the expiry of validity of the Energy Wheeling Agreement of the Group II Wind Energy Projects.

Conclusions:

51. In view of the above findings, we allow the Appeals and set aside the impugned order of the Commission to the extent that it dealt with clarifications regarding applicability of open access charges for Group II wind energy projects during the validity of the Agreement.

52. We also direct MSEDCL (R-2) to charge the wheeling charges and transmission loss adjustment during the validity of Energy Wheeling Agreements of the Appellants and similarly placed Wind Energy Projects as per the Agreement i.e. wheeling of 2% and transmission & distribution loss adjustment of 5%. MSEDCL is also directed to refund the excess wheeling and transmission & distribution charges recovered from such Wind Energy Projects for the period of validity of the Energy Wheeling Agreements immediately.

53. With these observations, these Appeals are disposed of. No order as to costs.

54. Pronounced in the open court on 3rd June, 2010. No costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE/NON-REPORTABLE

Dated: 3rd June, 2010