

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69
Email: mercindia@merc.gov.in
Website: www.merc.gov.in

Case No. 114 of 2023

Petition of MSEDCL for reclassification of wind zones of wind energy projects in Maharashtra.

Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)...

Petitioner

- 1) Maharashtra Energy Development Agency (MEDA)
- 2) M/s. Khandke Wind Energy Pvt. Ltd. (KWEPL)
- 3) M/s. Lalpur Wind Energy Pvt. Ltd. (LWEPL)
- 4) M/s. Clean Wind Power Satara Pvt. Ltd. (CWPSPL)
- 5) M/s. Bhilwara Green Energy Ltd. (BGEL)
- 6) M/s ReNew Power Pvt. Ltd. (RPPL)
- 7) M/s. Bothe Windfarm Development Pvt. Ltd. (BWDPL)
- 8) M/s. Panama Wind Energy Pvt. Ltd. (PWEPL)
- 9) M/s. Panama Wind Energy Godavari Pvt. Ltd. (PWEGPL)
- 10) M/s. Sispara Renewable Private Ltd. (SRPL)
- 11) M/s. Green Infra Wind Energy Ltd. (GIWEL)
erstwhile M/s. Sembcorp Green Infra Ltd.
- 12) M/s. Apraava Renewable Energy Pvt. Ltd. (AREPL)
erstwhile M/s. CLP Wind Farm (India) Pvt. Ltd.
- 13) M/s. Tata Power Renewable Energy Ltd. (TPREL)
- 14) M/s. Vena Energy MH Wind Power Pvt. Ltd. (VEMHWPPPL)
- 15) M/s. NSL Wind Power Company- (Satara) Pvt. Ltd. (NSL-Satara)
- 16) M/s. NSL Wind Power Company- (Sayamlai) Pvt. Ltd. (NSL-S)
- 17) M/s. NSL Wind Power Company- (Kayathar) Pvt. Ltd. (NSL-K)
- 18) M/s. Nilgiri Powers Pvt. Ltd. (NPPL)
- 19) M/s. Kalsubai Powers Pvt. Ltd. (KPPL)
- 20) M/s. Jath Wind Energy Pvt. Ltd. (JWEPL)

: Respondents

I.A. No. 66 of 2023 in Case No.114 of 2023

Interlocutory Application of Bothe Windfarm Development Pvt. Ltd. for challenging the maintainability of the Petition in Case No. 114 of 2023 filed by MSEDCL and the jurisdiction of the Commission to entertain and grant relief sought by MSEDCL in the present Petition.

Bothe Windfarm Development Pvt. Ltd. (BWDPL)... Applicant
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)... Respondent

&

I.A. No. 67 of 2023 in Case No.114 of 2023

Interlocutory Application of Vena Energy MH Wind Power Pvt. Ltd. for challenging the maintainability of the Petition in Case No. 114 of 2023 filed by MSEDCL.

Vena Energy MH Wind Power Pvt. Ltd. (VEMHWPPPL)... Applicant
Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL)... Respondent

Coram

**Sanjay Kumar, Chairperson
Anand M. Limaye, Member
Surendra J. Biyani, Member**

Appearance in the Case:

For the Petitioner: : Ms. Deepa Chawan (Adv.)
For the Respondents & Applicants: : Mr. Manoj Pise (Rep.)
Mr. Sanjay Sen (Adv.)
Mr. Avijeet Lala (Adv.)
Mr. Tushar Nagar (Adv.)
Mr. Kunal Kaul (Adv.)
Mr. Sakya Singha Chaudhuri (Adv.)
Mr. Aniket Prasoon (Adv.)
Mr. Ravi Deshmukh (Adv.)
Ms. Astha Sharma (Adv.)

ORDER

Date: 31 December 2024

1. Maharashtra State Electricity Distribution Co. Ltd (MSEDCL) filed this Case on 31 March 2023 for reclassification of wind zones under Regulation 76 & 26 of MERC (Terms and Conditions for Determination of Renewable Energy Tariff) Regulations, 2010 (RE Tariff Regulations-2010) and Regulation 81 & 28 of RE Tariff Regulations, 2015. MSEDCL also referred to Section 86 (1) (b) & (e), Section 61 (b) to (d), Section 62 (5) to (6) and Section 181 of the Electricity Act, 2003.

2. **Major Prayers of MSEDCL are as follows:**

“

b) *Clarify that the preferential pricing of the WTG's must be determined on the basis wind zone corresponding to the actual CUF observed from the date of commissioning basis and not solely on wind density basis.*

c) *Further, clarify that the CUF based zoning and the applicable preferential pricing thereon would be applicable from MERC (Terms And Conditions For Determination Of Renewable Energy Tariff) Regulations, 2010 onwards in terms of order dated 07.07.2014 in Case No. 100 of 2014; and Pass such other orders as required in the interest of justice.”*

....”

3. Post filing of the present Petition, on 3 November 2023 BWDPL and VEMHWPPPL filed Interlocutory Applications (IAs) requesting to decide the maintainability and jurisdiction as a preliminary issue before adjudicating upon prayers sought by MSEDCL.

4. During proceedings, the Commission received IAs from Wind Independent Power Producers Association (IA No.61 of 2023) and Prayas (Energy Group) (IA No.24 of 2024) seeking impleadment in Case No.114 of 2024.

5. During the hearing held on 7 November 2023, based on submission made during the hearing the Commission clarified that it would decide the issue of maintainability first. Applications for impleadment will be decided thereafter. Hence, through this Order, the Commission is first deciding on the issue of maintainability. Based on the outcome, the merits of the case will be dealt with subsequently.

6. **MSEDCL in its Petition has stated as follows:**

6.1. Past Legal Proceeding:

Sr. No.	Date	Event
1	03.04.2018	<p><u>Case No. 41 of 2017</u></p> <p>MSEDCL had approached the Commission seeking revision in Wind Zone classification assigned by MEDA to the Wind Energy Projects achieving consistently higher generation in the last three years.</p> <p>The Commission vide its Order dated 03 April 2018 in Case No.41 of 2017 did not allow the relief sought by MSEDCL.</p>
2	09.07.2018	<p><u>Case No 152 of 2018</u></p> <p>MSEDCL filed the Review Petition in Case No 41 of 2017 which is numbered as Case No.152 of 2018. The Commission, while allowing Review, sought report on MSEDCL's plea regarding study of wind zone classification from MEDA.</p>
3	30.08.2018	<p><u>Writ Petitions No. 2682,2686, 2688, 2793,2868 and 2912 of 2018</u></p> <p>Wind Generators approached the Bombay High Court under Writ Jurisdiction.</p> <p>The Bombay High Court decided on the Writs based on Commission's undertaking. In the said proceedings the Commission assured that it will follow principles of natural justice and give opportunity to all affected parties.</p>
4	10.07.2019	<p><u>Case No.108 of 2019</u></p> <p>MEDA submitted its Report dated 28 February 2019 on Study of wind power density zones of wind power projects commissioned under RE Tariff Regulations, 2010 to the Commission. Report of MEDA was shared with MSEDCL for comments. MSEDCL submitted its comments on 22.04.2019.</p> <p>The Commission completed proceedings and issued Order on Report submitted by MEDA relating to classification of wind zones in Maharashtra. The Commission ruled that based on report, MSEDCL is at liberty to file a fresh Petition for seeking specific relief.</p>
5	13.12.2019	<p><u>338 of 2019</u></p> <p>MSEDCL filed Petition based on MEDA report and seeking reclassification of Wind Zones.</p>
6	19.06.2021	Public notice is issued for public hearing and inviting comments & suggestions from the stakeholders on Petition in Case No.338 of 2019.
7	16.07.2021	Wind Independent Power Producers Association filed Original Petition No.11 of 2021 before APTEL challenging the process of e-public hearing in Case No.338 of 2019.

Sr. No.	Date	Event
8	19.07.2021	APTEL vide its Order dated 19 July 2021 in Original Petition No.11 of 2021 opined that till maintainability of the present proceedings is decided, the Commission shall not proceed further in the matter pending before it.
9	21.11.2022	MSEDCL filed application for withdrawal of the Petition vide Case No. 338 of 2019 with liberty to file fresh Petition.
10	13.02.2023	The Commission passed Order in Case No. 338 of 2019 allowing withdrawal of Petition.

- 6.2. The Commission has been conferred with powers under the Electricity Act, 2003 and the Regulations framed thereunder to relax, alter or modify any provisions of the Regulations. This is more so, when the proposed modification/alteration/ amendment to the wind zone classification methodology has a reasonable nexus with the object and the purpose of the Electricity Act, 2003. Regulation 76 of the RE Tariff Regulations, 2010 grants power to the Commission to vary, alter, modify or amend any provisions of the Regulations.
- 6.3. MERC RE Tariff Regulations, 2010 allows amendment/change in the Capacity Utilization Factor (CUF) from time to time. Regulation 26.1 has linked CUF norms with annual mean wind power density, as follows:

Annual mean wind power density(W/m ²)	CUF
200-250	20%
250-300	23%
300-400	27%
>400	30%

- 6.4. In accordance with Regulation 26.2 of the RE Tariff Regulations, 2010 the annual mean wind power density is to be measured at 50 Meter hub-height. Further, as per Regulation 26.3 for the purpose of classification of wind energy project into particular wind zone class, the state-wise wind power density map prepared by Centre for Wind Energy Technology (C-WET) annexed as schedule to the RE Tariff Regulations, 2010 is to be considered, provided that the said schedule may be amended based on inputs provided by C-WET/MNRE.
- 6.5. Further, MEDA has notified the 'Procedure for classification of wind power projects into wind zone class' on 12 September 2011. As per the said procedure the annual mean Wind Power Density (WPD) measured by the wind mast forms the basis for determining/classifying the wind zone. It is understood that MEDA has classified all the Wind Zones accordingly.
- 6.6. MNRE vide its Circular dated 01 August 2011, among others, suggested that there should not be any restriction for minimum WPD of 200 W/m² for development of wind power projects. It may be seen that MNRE issued the said circular considering the Order passed by

the Commission in Case No. 153 of 2011 wherein the submissions made by MNRE that the provisions for consideration of WPD of 200 W/m² at 50 m hub height does not hold relevance any longer.

- 6.7. Pursuant to the same, the Commission modified the wind zone-1 as ' ≤ 250 W/m²' vide its generic RE tariff Order dated 22 March 2013 issued for FY 2013-14 in Case No. 06 of 2013. The said modification was done in pursuance of the powers of the Commission under 'Deviation from Norms' as specified in Regulation 74.1 of MERC RE Tariff Regulations, 2010. Subsequently, the Central Electricity Regulatory Commission (CERC) in RE Tariff Regulations, 2012 specified the revised eligibility criteria for the wind energy projects in line with the said guidelines issued by MNRE.
- 6.8. The CERC vide 'Explanatory Memorandum for Draft Terms and Conditions for Determination of Tariff For Renewable Energy Sources November, 2011 observed that with better technology the higher CUF can be achieved at lower wind power density. The wind power density bracket should have been lowered for the CUF quoted in MERC RE Tariff Regulations. On the contrary, it is submitted that the CUF for corresponding wind zone density was increased as shown in following table:

Annual mean wind power density(W/m²)	CUF as per 2010 Regulations	CUF as per 2015 Regulations
200-250 (≤ 250)	20%	22%
250-300 ($>250 - \leq 300$)	23%	25%
300-400 ($>300 - \leq 400$)	27%	30%
>400	30%	32%

- 6.9. Tariff is based on the CUF considered i.e., lower the CUF, higher the tariff and vice versa. By increasing the CUF range, the wind generators which otherwise ought to be in Zone II or higher category were retained in lower zone category as annual mean wind power density (W/m²) was the criterion considered for zoning instead of CUF.
- 6.10. As the relation between Wind Power Density, CUF and Preferential Tariff was not correctly effected, it resulted in undue enrichment of wind generators which is lies in teeth of the provisions of section 61 (d) of Electricity Act, 2003. The Commission in past has categorically observed that there is need for revised zone-wise classification established through study of actual CUF data.
- 6.11. The Commission in its RE Tariff Order dated 14 July 2010 in Case No. 20 of 2010 noted the operational concerns expressed by the Wind Energy Developers and MSEDCL and directed MEDA to devise suitable procedure for operationalizing the Wind Zone classification based on state-wise wind power density maps.

- 6.12. The Commission issued RE Tariff Order for FY 2011-12 on 29 April 2011 (in Case No.39 of 2011). In said Order, the Commission decided to allow an interim mechanism wherein a uniform tariff (the tariff determined for Wind Zone 2) irrespective of wind zone shall be applicable for wind energy purchase by Distribution Licensee under preferential tariff route.
- 6.13. The Commission in its Order dated 07 July 2014 in Case No. 100 of 2014 had specifically noted that the benefit of advancement in the technology and improvement in the performance thereof should also be passed on to the utilities/consumers. Appreciating the concerns of MSEDCL about the rapidly increasing Annual Wind Power capacity addition in Maharashtra over past decade, the Commission was pleased to recognize that CUF is to be specified against revised Zone-wise classification and higher hub height needs to be established through study of actual CUF data. For the said purpose, MEDA was directed to submit a report of project-wise CUF of Wind Projects in the State which would be taken into consideration to arrive at the CUF Norms to be specified against the revised Zone-wise classification at higher hub height and result of such analysis shall be considered by the Commission for arriving at appropriate CUF Norms in the future years for further determination of Zone wise tariff.
- 6.14. In past, the Commission had itself intended to specify CUF against revised zone-wise classification. Moreover, the Commission vide Order dated 09 July 2018 (in Case No 152 of 2018 filed by MSEDCL) directed MEDA to submit a report on Wind Zone classification based on actual data.
- 6.15. MEDA's Report highlighted following:
- 6.15.1 As per the report, details of only (1) wind mast is available with MEDA out of total (14) wind masts.
- 6.15.2 MEDA being the state nodal agency for development of renewable energy in Maharashtra did not have the complete details of all the wind masts in the State whether owned by private developers or NIWE. Moreover, if the data of wind masts were not available with MEDA, then, the classification of wind zone for 1519 no. of WTG (1572 MW) appears to be done without considering its own rules/procedure. In absence of authentic data, the wind zones classified by MEDA automatically become null and void.
- 6.15.3 The data available on the web portal of National Institute of Wing Energy (<http://niwe.res.in>) for private wind monitoring stations i.e. wind mast for period from 20 June 2008 to 31 March 2012, provides following information:

Sr. No.	Owned by	Name of the site	District	Mast Height	Measured interpolated / extrapolated at 50m AGL	
					WS	WPD
01	Enercon (I) Ltd. Mumbai	Vedganga	Kolhapur	75	6.64	310.16
02		Andralake	Pune	58	6.14	200.44
03		Ghotibudruk	Nasik	58	7.10	416.14
04		Andra Lake Western	Pune	58	6.25	230.91
05		Chandwad	Nasik	101	6.00	204.08
06		Igatpuri	Nasik	58	6.05	254.58
07		Kitawade	Kolhapur	58	6.49	321.49
08		Suleran	Kolhapur	76	7.08	336.51
09		Chavaneshwar	Satara	58	6.30	219.75
10		Chavaneshwar (k)	Satara	57	6.48	228.16
11		Khandke	Ahmednagar	76	6.46	229.68
12	M/s Kenersys Ind. Pvt. Ltd.	Rani Amberi	Satara	85	6.52	281.11
13	Sarvoday Properties Pvt Ltd	Avandi	Kolhapur	50	6.71	276.95
14	Suzlon Energy Ltd.	Sadawaghapur Forest	Satara	65	6.45	315.90
15		GudePanchagani-II	Sangli	65	6.57	287.99
16		Malavshi	Satara	65	6.10	330.20
17		Gotne	Satara	65	5.87	257.11
18		Karvat	Satara	65	6.64	265.96
19		Maloshi	Satara	65	5.9	262.75
20		Maharsavali	Aurangabad	80	7	279.26
21	TS Wind Developer.	Kolvan	Kolhapur	80	7.41	426.23

6.15.4 The wind sites in Maharashtra, especially in the Pune, Satara, Kolhapur, Nashik Districts has wind potential of Zone II and above even considering the wind mast height of 50 Mtr. If the same is extrapolated at 80 mtr hub height then the potential may fall in zone IV category also.

6.15.5 MEDA vide letter dated 18 January 2017 sought the opinion of NIWE for wind zone class in respect of wind power projects. In reply NIWE vide its letter dated 10 August 2017, opined that the factors for deciding the adoption of an appropriate procedure for fixation of Wind Zone are as follows:

- (i) Based on actual generation /CUF, or
- (ii) Based on numerical at a static height (50m or 80 m), or
- (iii) Based on a combination of the above.

Interestingly, the above suggestion (i) by NIWE is in lines with the prayer of MSEDCL as well.

6.15.6 MEDA has stated that for some projects the generation has been higher i.e. the average CUF has been higher than 20%. This could be due to following reasons:

- A. Wind farm's zone may be wrongly determined as Zone I instead of Zone II/III/IV.
- B. Higher generation may be due to deployment of high hub height wind turbines than that of 50 mtr. It is an established fact that, more the hub height – more the wind speed and higher the CUF. Hence the MEDA's methodology which identifies a geographical area based on the fixed hub height of MAST for wind zoning has a serious drawback.
- C. Wind project / some of the wind turbines got the advantage of best location, elevation, lower array loss etc.
- D. Improved wind profile/pattern in the year when CUF was assessed as compared to that of the wind mast's data was referred for measurement.

6.15.7 MEDA has agreed in its report that 602.7 MW projects are generating energy at CUF of more than 20%. Such wrong classification leads to financial burden on common consumers of the State of Maharashtra.

6.16. The amendments in the CUF norms (as compared to RE Tariff Regulations, 2010 owing to higher hub height) had been made through notification dated 10 November 2015. Regulation 28 of the MERC RE Tariff Regulations, 2015 provides for following

Wind Zone	Annual Mean Wind Power Density (W/m ²)	CUF
Zone 1	<= 250	22%
Zone 2	>250 <=300	25%
Zone 3	>300 <=400	30%
Zone 4	>400	32%

The Regulation specifically provides that annual mean wind power density shall be measured at 80 mtr hub height.

6.17. After the MERC RE Tariff Regulations, 2015 following stipulation has been provided in EPA, which reads as under:

“Clause No. 7.01

For the purpose of classification of wind energy project into particular wind zone class, the annual Mean Wind Power Density specified in Regulation 28.1 shall be measured at 80 meter hub height and the State Nodal Agency (MEDA) shall certify the relevant wind zone based on wind power density map prepared by the National Institute for Wind Energy (NIWE).

- 6.18. MEDA continued with the same old methodology for ‘wind zoning of wind mills’ devised in September 2011 even for the EPA signed after MERC RE Tariff Regulations, 2015 by considering WPD at 50 mtr hub height in spite of clear provision in EPA to consider WPD at 80 mtrs for zoning. The same is established from the ‘Minutes of Wind Zone Classification & Evaluation Committee’ published on MEDA website. It is also observed the zoning is being done with a delay of almost 2 years.
- 6.19. The Commission is empowered under Regulation 81 of the MERC RE Tariff Regulations, 2015 to amend the provisions of the Regulation.
- 6.20. The classification of wind projects, assumes great significance and importance in view of the competing interests required to be balanced under the provisions of the Electricity Act, 2003. On one hand, the promotion of RE-Energy like wind has to be ensured while on the other adherence to commercial principles and safeguarding of consumer interests has to be finely balanced.
- 6.21. The providing undue benefits to the wind generators will be contrary to public interest. MSEDCL referred to *Supreme Court in All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487*, wherein it is held that the conditions for determination of tariff it is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner. Further, it is trite law that individual inconvenience has to yield to national importance and that public interest is of paramount consideration which cannot to be ignored.
- 6.22. The tariff determined by the Commission for wind mills starting from 2010 is as follows:

FY	Zone 1 in INR	Zone 2 in INR	Zone 3 in INR	Zone 4 in INR
2010-11	5.07	4.41	3.75	3.38
2011-12	5.37	4.67	3.97	3.58
2012-13	5.67	4.93	4.20	3.78
2013-14	5.81	5.05	4.31	3.88
2014-15	5.70	5.01	4.18	3.92
2015-16	5.71	5.02	4.19	3.92
2016-17	5.56	4.89	4.08	3.82
2017-18	5.40	4.75	3.96	3.71

- 6.23. There is an increasing trend in the generic tariff for wind power as against the decreasing trend in generic tariff of solar generators due to advancement in technology (Drastic reduction of tariff from Rs. 17.91/kWh in FY 2010-11 to Rs. 5.13/kWh in FY 2017-18). Due to innovation in technology of wind mills and with better technological advancement, the efficiency of wind turbine has increased, which ought to have resulted in decreasing trend in wind power generic tariff. However, MSEDCL has strong reasons to state that due

to wrong zoning the generators are getting highest tariff for higher CUF. Hence, it is submitted that the generators are recovering more than what they are permitted to recover.

- 6.24. The preferential tariff determined by the Commission for different wind zones is based on cost plus method. More importantly, while determining the tariff of appropriate wind zone, CUF is the only deciding factor and not the wind power density.
- 6.25. The concept of wind zone is not generic and is case specific as the generation of an individual wind turbine is dependent on various factors including location, wind density and wind flow on the turbine. Consequently, wind turbine of same hub height may generate different wind energy. Unfortunately, it may be seen that the present classification of wind zone is based on measurement of wind density at particular hub height and accordingly, an estimated CUF is considered.
- 6.26. As such, it is observed from the report that wind farm's zone may be wrongly determined as Zone I instead of Zone II/III/IV, that it would be prudent to effect the tariff as per the actual CUF observed from the date of commissioning.
- 6.27. As such, considering the huge financial impact, the classification shall be based on CUF (calculated on actual generation from the date of commissioning as empowered under Regulation 26.3 of MERC RE Tariff Regulations 2010).
- 6.28. The Commission has determined tariff every year through transparent and public participation process by considering all costs of equipment, maintenance etc. for different wind zones and there was no objections from the generators regarding consideration of cost for efficient turbine and higher hub heights for determination of tariff. Therefore, it is submitted that the Commission has already taken care of better performing equipment costing which was also acceptable to investors/generators.
- 6.29. The exercise for reclassification of wind zone, ought to be considered to ensure that the delegated legislation which governs the field of the classification of wind projects is in tandem and conformity with the changing technology relating to the wind projects including the changed requirements relating to metering etc. The evolving and changing technical and technological scenario, it is further submitted cannot be ignored to the detriment of the interests of the common consumers of the State.

6.30. In this regard, MSEDCL refer to the following table:

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
FY	No. of Machines in Group 4	No. of M/c with high CUF (than zone I)	Wind Zone -II	Wind Zone -III	Wind Zone -IV	% Machines in higher zone
2010-11	79	1	1	0	0	1
2011-12	362	8	6	2	0	2

Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7
FY	No. of Machines in Group 4	No. of M/c with high CUF (than zone I)	Wind Zone -II	Wind Zone -III	Wind Zone -IV	% Machines in higher zone
2012-13	537	160	104	35	21	30
2013-14	1189	355	126	185	44	30
2014-15	1388	448	297	135	16	32
2015-16	1490	609	339	199	71	41
2016-17	1519	873	370	302	201	57
2017-18	1519	694	375	259	60	46
2018-19	1519	1025	336	462	227	67

6.31. The column 7 indicates the % number of machines which has generation CUF of higher wind zone. In view of above, it is submitted that, many of the machines classified under zone I, have actual CUF more than that of Zone I category and falls in higher wind zone category.

6.32. Further, as given in the Regulations, the CUF and corresponding wind zone are as under:

Wind Zone	CUF as per 2010 Regulations	CUF as per 2015 Regulations
Zone I	20%	22%
Zone II	23%	25%
Zone III	27%	30%
Zone IV	30%	32%

6.33. From the above tables, it is evident that based on the CUF calculated on actual generation, for any given FY under consideration, there are large number of windmills which are wrongly classified in low wind zone category (for instance, for FY 2016-17, the number of machines considered for analysis are 1646). As per the data available 97% of the machines has been classified under zone I. However, the CUF based data shows that 53% of the machines has actual CUF more than that of zone 1 category and falls in higher wind zone category. Due to such wrong wind zone classification the consumers have suffered significant financial burden.

7. BWDPL (Respondent No. 7) in its Interlocutory Application (IA No.66 of 2023) stated as follows:

7.1. This is the 4th attempt by MSEDCL for essentially seeking retrospective re-determination of tariff payable by it to the Wind Generators in the State of Maharashtra. The said action is sought to be justified under the garb of alleging irregularity/ illegality in classification of wind zones with effect from 2010.

- 7.2. The present filing is a gross abuse of law and ought to be dismissed with cost. MSEDCL has been agitating this issue since 2017. The Applicants provided tabulated statement of Prayers made by MSEDCL in past (3) proceedings and payers made in this Petition. The Commission has decided the issue for which no appeal has been preferred by MSEDCL. In other words, the present proceedings are barred by the principles of *Res-Judicata/constructive Re-Judicata*.
- 7.3. APTEL vide its Order dated 19 July 2021 in O.P. No. 11 of 2021 (being the O.P. filed by Wind Independent Power Producers Association inter alia seeking that Case No. 338 of 2019 be heard on maintainability before proceeding) categorically noted that since the tariff for existing project was already determined earlier, if the question of re-determination of the desired tariff is raised in the present proceedings, it may amount to Res Judicata. Therefore, maintainability of the matter needs to be heard as preliminary issue.
- 7.4. On 21 September 2021, MSEDCL had filed an application in Case No. 338 of 2019, seeking its withdrawal with the liberty to file a fresh Petition. However, the Commission vide its Order dated 13 February 2023, permitted MSEDCL to withdraw its Petition but did not grant any liberty to MSEDCL for filing a fresh Petition. No appeal has been filed by MSEDCL against the denial of liberty. Hence, in view of the principles laid down in Order XXIII Rule 1 of CPC, the present Petition cannot be entertained.
- 7.5. The present filing is not bona-fide and MSEDCL is guilty of *suppressio veri* and *suggestio falsi* as it has failed to provide the relevant factual matrix, in particular the Hon'ble APTEL's Order dated 19 January 2023 where it was held that MSEDCL is to first demonstrate the maintainability of issues raised by MSEDCL.
- 7.6. Despite clear and categorical findings in APTEL Orders, MSEDCL has sought to confuse the issue by stating that the present Petition is maintainable in light of: (i) The Commission's Order dated 09 July 2018 in Case No. 152 of 2018; and (ii) The Bombay High Court's Order dated 30 August 2018 in W.P. No. 2682 of 2018 and batch.
- 7.7. It is to be noted that the APTEL's Orders dated 19 July 2021 and 19 January 2023 in O.P. No. 11 of 2021, and the Commission's Order dated 13 February 2023 in Case No. 338 of 2019 were passed after considering the Order dated 09 July 2018 and Order dated 30 August 2018. Thus, MSEDCL was required to demonstrate the maintainability without considering these Orders. Accordingly, the present Petition ought to be dismissed. In any case, Order dated 09 July 2018 and Order dated 30 August 2018 neither give any liberty to MSEDCL to file a fresh Petition before the Commission nor makes the present filing maintainable.
- 7.8. Case No. 338 of 2019 has been withdrawn by MSEDCL without any liberty. Hence, no sperate proceedings can be initiated by MSEDCL for the same cause of action.

- 7.9. The present filing is vague, bereft of any factual details and/ or justification qua re-classification of wind zones and seeks omnibus reliefs. In any case, the enhanced reliefs sought by MSEDCL is barred by principles of Order 2 Rule 2 of CPC.
- 7.10. The Commission cannot in a subsequent/ new proceeding (on the judicial side) revisit regulations and / or reopen Tariff Orders that have otherwise attained finality. In any case, the Commission cannot retrospectively changes/ modify/ amend Regulations and/ or tariff, to take away vested rights.
- 7.11. The Regulations have been given effect to and Generic Tariff Orders have been issued pursuant thereto. Based on such RE Tariff Regulations and Generic Tariff Orders, parties have executed binding and concluded contracts. There is no jurisdiction to reopen such RE Tariff Regulations, Generic Tariff Orders and contracts. As such the powers available with the Commission has been exhausted in the facts of the Applicant.
- 7.12. If MSEDCL is aggrieved by the CUF norms laid down by the Commission in the RE Tariff Regulations 2010 and 2015, then MSEDCL ought to have challenged the said RE Tariff Regulations before the Hon'ble High Court. Having neither challenged the RE Tariff Regulations 2010 and 2015, nor the Generic Tariff Orders passed by the Commission pursuant to the principles laid down in the RE Tariff Regulations, MSEDCL cannot seek amendment to the RE Tariff Regulations 2010 and 2015 to the prejudice of the wind developers.
- 7.13. The Generic Tariff so determined is a number derived basis the interplay of a number of normative factors (and sub-factors), wind zone classification or normative CUFs are only one of several such factors that have gone into the determination of Generic Tariff. By determining a generic tariff, the regulations insulate the Distribution Licensees as power purchasers from the various risks associated with energy projects, such as delay in construction, increase in cost of project, unavailability of debt or availability at a higher interest rate, high O&M, varying direct and indirect taxes, lower generation than normative CUF et al.
- 7.14. It is important to note that there is no bar in the RE Regulations 2010 or in the RE Regulations 2015 for a wind energy project to set and operate in deviation from such norms i.e. set up taller or shorter than 50 m wind energy generators, incur lower or higher capital expenditure, incur higher or lower debt at higher or lower interest rates, incur higher or lower depreciation charge in accordance with the various other applicable laws, incur higher or lower operations and maintenance charges, etc.
- 7.15. The RE Tariff Regulations 2010 does not permit amendment of Generic Tariff Orders (during the term of the PPA) to be converted into project specific Tariff.

7.16. MSEDCL has already exhausted its right to seek review of the Original Order dated 03 April 2018 in Case No. 41 of 2017. Furthermore, the Electricity Act, 2003 read with the rules and regulations made thereunder does not permit filing of more than (1) Review Petition.

7.17. The Applicants have made investments in the State of Maharashtra, by setting up its Project, in terms of MSEDCL's assurance that the Generic Tariff determined by the Commission would be applicable for the entire term of the EPA/ PPA, being 13 years. Having acted upon the tariff represented in Generic Tariff Orders, by entering into the EPA/ PPAs, there is a legitimate expectation on the part of the Applicants that the EPA/ PPA terms, including the Tariff, will be honoured by MSEDCL. Hence, granting any reliefs as sought by MSEDCL would be contrary to the principles of Legitimate Expectation.

8. VEMHWPPL (Respondent No. 14) in its Interlocutory Application (IA No. 67 of 2023) stated as follows:

8.1. VEMHWPPL in its Application has raised the following issues:

- a. Present Petition is barred as no liberty was granted to MSEDCL by way of Order dated 13 February 2023;
- b. Alteration of wind zone the for existing projects would amount to retrospective amendment of Regulations which is impermissible in terms of and under the applicable law;
- c. Lack of Jurisdiction to issue clarifications sought by MSEDCL;
- d. Lack of Jurisdiction to amend the normative parameters basis actual values;
- e. Present Petition is barred by the principle of Res Judicata to the extent it seeks to reopen existing EPAs / Tariff;
- f. Concluded EPAs cannot be rewritten by the Commission;
- g. Reclassification of wind zone and / or alteration of Tariff not applicable to existing projects as per the RE Tariff Regulations, 2010 and 2015;
- h. The present Petition does not and cannot fall within the contours of 'Review Jurisdiction';
- i. Re-opening the tariff would be contrary to the principles of legitimate expectation and regulatory certainty.

8.2. The Commission notes that VEMHWPPL has made similar averments as contended by BWDPL. For sake of brevity only new arguments have been presented below:

- 8.3. It is a trite law that courts cannot alter the terms of a contract between the parties. However, the relief as sought by MSEDCL by virtue of the present Petition, if allowed, would effectively result in re-writing of the terms of the EPAs for the existing projects, which is not permissible in law.
- 8.4. Accordingly, since the Commission cannot re-write the terms of the EPAs executed between the parties therefore, the same purpose cannot be permitted to be secured by MSEDCL through a disguised Petition purportedly filed under the tariff determination powers of the Commission.

9. Reply from Respondents Wind Generators:

- 9.1. Following Respondents filed their preliminary objections on maintainability of the Petition:

Name of Respondent	Reply date
BGEL	20 October 2023
CWPSPL	
TPREL	01 November 2023
JWEPL	03 November 2023
KPPL	
NPPL	
NSL-K	
NSL-S	
NSL-Satara	
SRPL	
KWEPL	09 November 2023
PWEGPL	07 December 2023
PWEPL	
GIWEL	11 December 2023
CLP	19 February 2024

- 9.2. The Commission notes that above submission are highlighting the similar grounds/averments, as raised in Interlocutory Applications. For sake of brevity the submission has not been repeated and only new grounds have been elaborated below:
- 9.3. In the event the Commission alters/ modifies the wind zones for existing projects under the existing EPAs as sought by MSEDCL, it would amount to retrospective operation of such Order thereby reviewing/ revising the position already settled under existing regulation and tariff orders passed from time to time by the Commission. This cannot be allowed.

- 9.4. The present Petition even though filed under the nomenclature of fresh Petition is in fact, seeking review of earlier Orders of the Commission, which is not allowed in law. MSEDCL by way of clever drafting has approached the Commission thereby seeking clarification on the point that preferential pricing of the WTG's must be determined on the basis achieved CUF.
- 9.5. If relief is granted by the Commission, then it would result in retrospectively reworking of CUF parameters and the Wind Zone Classification under applicable regulations in a retrospective manner. This is contrary to law. It is a settled law that any change or alteration of any regulation can only be prospective in operation unless the parent statute expressly provides for retrospective amendment to the regulation.
- 9.6. It is an established principle of law that, unless the statute or regulation specifies that the same shall have a retrospective effect, the said statute or regulation shall have a prospective effect only. In view thereof, no changes to the terms incorporated in the EPAs can be considered as the applicable RE Tariff Regulation 2010 does not contain any provisions allowing retrospective change to the normative factors determined by the Commission vide the RE Tariff Regulations 2010.
- 9.7. It is pertinent to mention that the Hon'ble High Court of Bombay in its Order dated 30 August 2019 records the undertaking of the counsels for MSEDCL and the Commission as under:

“28. Then in para 13 and 14, it may have issued certain directions to the third respondent, but we accept the statements made by ... on instructions that there is no finality attached to them and though the order says that Case No. 152 of 2018 stand disposed of, it would not mean that sweeping alterations or changes would be brought as apprehended by the petitioners.

.....”

MSEDCL by way of the present Petition is seeking to re-open the concluded contracts and alter the vested rights of generators. The same is contrary to the solemn undertaking given by MSEDCL before the Hon'ble Bombay High Court. MSEDCL cannot be allowed to go-back on its undertaking. The same would amount to contemptuous conduct.

- 9.8. For filing the Petition and seeking any relief against the wind generators, MSEDCL must demonstrate an independent cause of action or legal injury against each and every wind generator, which has been arrayed as a respondent. Without such demonstration, the Petition cannot be entertained by the Commission.

9.9. MSEDCL has wrongly clubbed the Respondent wind generators into a single Petition without specifically demonstrating any cause of action against the individual Respondents.

9.10. MSEDCL has failed to place on record any data/ details *qua* any of the individual respondent-wind generators in the present Petition. To suffice the arguments, the reliance is placed on *Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission: 2014 SCC OnLine APTEL 168*.

10. Reply of MEDA dated 3 November 2023:

10.1. According to Wind Zone Classification procedure the developer/investor is required to optimize all technical parameters to maximize generation from the wind power project classified as per the procedure.

10.2. The feasibility of the project will be the responsibility of the developer/investor, NIWE and /or MEDA shall not be responsible in any way for the feasibility of the project, and/or for the non-achievement of PLF by any or all WTGs in the project area.

10.3. The classification of wind projects is based on the procedure approved by the Commission and as per the Orders of the Commission.

11. MSEDCL's Common Rejoinder dated 7 December 2023:

In Rejoinder, MSEDCL has restricted its submission to the point of maintainability/admissibility of the Petition. MSEDCL in its Rejoinder stated as below:

11.1. The Commission has been conferred with powers under the Electricity Act, 2003 and the Regulations framed thereunder to relax, alter or modify any provisions of the Regulations. This is more so, when the proposed modification/alteration/ amendment to the wind zone classification methodology has a reasonable nexus with the object and the purpose of the Electricity Act, 2003.

11.2. MERC RE Tariff Regulations, 2010 allows amendment/change in the CUF from time to time. As the relation between Wind Power Density, CUF and Preferential Tariff was not correctly effected, it resulted in undue enrichment of wind generators which is lies in teeth of the provisions of section 61 (d) of Electricity Act, 2003.

11.3. The classification of wind projects, assumes great significance and importance in view of the competing interests required to be balanced under the provisions of the Electricity Act, 2003. On one hand, the promotion of RE-Energy like wind has to be ensured while on the other adherence to commercial principles and safeguarding of consumer interests has to be finely balanced.

- 11.4. The exercise for reclassification of wind zone, ought to be considered to ensure that the delegated legislation which governs the field of the classification of wind projects is in tandem and conformity with the changing technology relating to the wind projects including the changed requirements relating to metering etc. The evolving and changing technical and technological scenario cannot be ignored to the detriment of the interests of the common consumers of the State.
- 11.5. The Commission has categorically observed that there is need for revised zone-wise classification established through study of actual CUF data. This submission may be seen in light of the various RE tariff Orders passed by the Commission pursuant to the Regulation 26 of the MERC RE Tariff Regulations, 2010.
- 11.6. The wind power plants installed under different zones are generating at higher CUFs than expected CUFs under respective zones. This is leading to giving undue benefits to the wind power plant developers at higher tariffs while the actual levelized cost of electricity would be lower considering the actual higher CUFs. The Commission had itself intended to specify CUF against revised zone-wise classification.
- 11.7. The Commission vide its Orders dated 03 April 2018 in Case No.152 of 2018 and 10 July 2019 in Case No.108 of 2019 has granted liberty to MSEDCL to approach the Commission with respect to the Wind Zone reclassification based on actual CUF.
- 11.8. The Hon'ble Bombay High Court vide its Order dated 30 August 2018 has granted liberty to MSEDCL to approach the Commission with respect to the issue at hand. Relevant Para of Order dated 30 August 2018 is reproduced below:
- “...Advisedly, once the Commission carries out the exercise at the instance of the second respondent, if at all it is approached again and that exercise results in an adverse order, the petitioners are free to challenge such final orders in accordance with law”*
- 11.9. ‘Res Judicata’ does not apply to the current Petition:
- j. The Respondent Wind Generators in their replies has averred multiple times that the issue in hand has attained finality in Case No. 338 of 2019 which was disposed off by the Commission vide order dated 13 February 2023. The current Petition is barred by Res Judicata.
 - k. The Respondents Wind Generators in their replies have misrepresented the Order dated 13 February 2023 by omitting the relevant observations and quoting the same without context.
 - l. The Order dated 13 February 2023 clearly leaves it open for the Petitioner to seek appropriate remedy including but not limited to filing of a Petition subject to it being tested on the anvil of maintainability.

- m. To suffice the arguments, MSEDCL referred to the Hon'ble Bombay High Court Judgement in the matter of *Mario Shaw v. Martin Fernandez*, 1995 SCC OnLine Bom 313 and *Chandrakant Pandurang Shingade v. Walchand Gulabchand Bora*, 2019 SCC OnLine Bom 1669. Further, reliance is placed on Hon'ble Supreme Court Judgement in the matter of *Sarguja Transport Service v. S.T.A.T.*, (1987) 1 SCC 5.
- 11.10. The agreements/EPAs entered into by MSEDCL and the Respondent-Wind Generators contained provisions allowing for changes prescribed by the Commission and other applicable policies of the Government:
- n. MSEDCL in its submission referred to Articles pertaining to 'GOVERNING LAW. DISPUTE RESOLUTION AND CONSENT TO JURISDICTION' in EPAs. As per said Articles the agreement are subject to the Commission's powers as well as MEDA's Reports.
- o. The Respondent-Wind Generators at a later stage may not be allowed to cry foul merely on the fact that the Commission has been approached to clarify the applicable tariff.
- p. EPA categorically stipulate that the Seller shall undertake to maintain CUF as determined by the Commission for each wind zone. Clearly, CUF achieved can't be more than 22% for Zone 1, 25% for Zone 2, 30% for Zone 3 and 32% for Zone 4. Moreover, it is an admitted position that the WTGs in question have been achieving much higher CUF than what is stipulated in the EPA. Hence, the tariff for the WTG should be lower in terms of the prescribed tariff for the CUF as the WTG has to adhere to the CUF in terms of the EPA.
- q. MSEDCL since beginning has raised the dispute regarding the faulty procedure adopted by MEDA and that as a consequence a much higher CUF is being achieved than prescribed. This has been accepted as a grievance to be adjudicated by the Commission as well as the Hon'ble High Court in their Orders. Therefore, retrospective revision of tariff from the date of raising the dispute for adjudication by the Commission is maintainable under the provisions of the EPA entered with the WTG.
12. At the hearing held on 20 February 2024, the Commission suggested MSEDCL to engage in dialogue with Wind Generators who are respondents in the matter for finding out solution, if any, acceptable to all and file submission to that effect.
13. In compliance to the Commission's directive, a meeting was held on 18 May 2024 between Director (Commercial), MSEDCL and the respondents- Wind Generators regarding discussion on reclassification of wind zone. On 30 May 2024, MSEDCL

submitted the Minutes of Meeting (MoM). After perusal of MoM, it is evident that parties have just elaborated their stand without any consensus.

14. During the e-hearing 31 May 2024, matter is heard extensively on maintainability aspect. The Commission allowed parties to file their written submission.
15. In Response, the following Respondent-Wind Generators filed their written submission:

Name of Respondent-Wind Generator	Date of filing
PWEPL (Respondent No. 8)	18 June 2024
PWEGPL (Respondent No. 9)	
GIWEL(Respondent No. 11)	19 June 2024
RPPL(Respondent No. 8)	
TPREL(Respondent No. 13)	21 June 2024
BWDPL(Respondent No. 7)	24 June 2024
SRPL(Respondent No. 10)	1 July 2024
NSL-Satara (Respondent No. 15)	
NSL-S (Respondent No. 16)	
NSL-K (Respondent No. 17)	
NPPL (Respondent No. 18)	
KPPL (Respondent No. 19)	
JWEPL (Respondent No. 20)	
AREPL (Respondent No. 12)	
BGEL (Respondent No. 5)	
AREPL (Respondent No. 12)	
	03 July 2024

MSEDCL also filed its written submission on 6 September 2024. The Commission notes that averments made in respective submission have been repeated. Hence, for simplicity and brevity, arguments have not been summarized again in this Order.

Commission's Analysis and Rulings:

16. The Commission notes that the present Petition has been filed under Regulation 76 & 26 of RE Tariff Regulations-2010 and Regulation 81 & 28 of RE Tariff Regulations, 2015. MSEDCL also referred to Section 86 (1) (b) & (e), Section 61 (b) to (d), Section 62 (5) to (6) and Section 181 of the Electricity Act, 2003. MSEDCL in its Petition sought clarification on following two counts:
 - a. The preferential pricing of the WTG's must be determined on the basis wind zone corresponding to the actual CUF observed from the date of commissioning basis and not solely on wind density basis.

- b. The CUF based zoning and the applicable preferential pricing there-on would be applicable from RE Tariff Regulations, 2010 onwards in terms of Order dated 07 July 2014 in Case No. 100 of 2014.
17. MSEDCL contended that the wind power plants installed under different wind zones are generating at higher CUF than what was anticipated for those zones. As per data available 97% of the machines has been classified under Zone I. However, CUF based data shows that 53% of the machines has actual CUF more than that of Zone I category and falls under higher wind zone category. As a result, wind power plant developers are receiving unfair advantage of higher tariff. Considering the financial impact, MSEDCL is emphasising on re-zoning of windmills based on actual CUF from date of commissioning of WTGs. The Wind Zone classification undertaken in 2010 or there about cannot be construed as perennial, and the impact of subsequent technological advancements needs to be factored in.
18. The Respondents-Wind Generators raised the issue of maintainability of the present Petition. The Respondent-Wind Generators pointed out that this is 4th attempt by MSEDCL whereby it is seeking retrospective re-determination of tariffs payable by it to the Wind Generators. The Commission has already decided the issues raised in present Petition and MSEDCL has not filed any appeal against the said Orders. It is argued that the present Petition is barred by *Res Judicata*.
19. Considering the same, the Commission finds it appropriate to note the background before delving into the facts presented in present matter:

Sr. No.	Date	Event
1	03.04.2018	<p><u>Case No. 41 of 2017</u></p> <p>MSEDCL had approached the Commission seeking revision in Wind Zone classification assigned by MEDA to the Wind Energy Projects achieving consistently higher generation in the last three years.</p> <p>The Commission passed Order in Case No.41 of 2017 and did not allow the relief sought by MSEDCL.</p>
2	09.07.2018	<p><u>Case No 152 of 2018</u></p> <p>MSEDCL filed the Review Petition in Case No 41 of 2017.</p> <p>The Commission, while allowing Review, sought report on MSEDCL's plea regarding study of wind zone classification from MEDA.</p>
3	30.08.2018	<p><u>Writ Petitions No. 2682, 2686, 2793, 2868 and 2912 of 2018</u></p> <p>Many Wind Generators approached the Bombay High Court under Writ Jurisdiction.</p>

Sr. No.	Date	Event
		The Bombay High Court decided on the Writs based on Commissions undertaking. In the said proceedings the Commission assured that it will follow principles of natural justice and give opportunity to all affected parties.
4	10.07.2019	<u>Case No.108 of 2019</u> The Commission initiated <i>suo-motu</i> proceedings on Report submitted by MEDA relating to Classification of Wind Zone in Maharashtra. The Commission completed proceedings and issued Order giving liberty to MSEDCL for filing Petition with specific relief.
5	13.12.2019	<u>338 of 2019</u> MSEDCL filed Petition based on MEDA report and seeking reclassification of Wind Zones.
6	24.03.2021	MSEDCL filed additional submission in Case No. 338 of 2019 wherein additional prayers with regards to preferential tariffs and recovery of excess amounts have been mentioned.
7	19.06.2021	Public notice for public hearing in Case No.338 of 2019 was issued, inviting comments & suggestions from the stakeholders.
8	19.07.2021	Hon'ble APTEL vide its Order dated 19 July 2021 in IA No.1066 of 2021 in DFR No. 240 of 2021 opined that till maintainability of the present proceedings is decided, the Commission shall not proceed further in the matter pending before it.
9	21.11.2022	MSEDCL filed application for withdrawal of the Petition vide Case No. 338 of 2019 with liberty to file fresh Petition.
10	13.02.2023	The Commission passed Order in Case No. 338 of 2019 allowing withdrawal of Petition.

20. The Commission opines that to ascertain maintainability of the Petition under ambit of doctrine of *Res Judicata*, it necessary to refer to past Orders mentioned in table above.
21. The Commission notes that the issue of reclassification of wind zones started with MSEDCL's Petition in Case No. 41 of 2017. In Case No. 41 of 2017, MSEDCL contended that actual CUF achieved by a Project should be the basis of Wind Zone classification and corresponding Tariff. The Commission rejected the MSEDCL's contentions vide its Order dated 03 April 2018, on the ground that it would amount to doing away entirely with zoning and Tariff determination on that basis, and its encouragement to efficiency improvements and, in effect, tantamount to determination of Tariff Project-wise. The *relevant* paras from the Order dated 03 April 2018 have been reproduced below:

“17. MSEDCL proposes that the actual CUF achieved by a Project should be the basis of its Wind Zone classification and corresponding Tariff. That would amount

to doing away entirely with such zoning and Tariff determination on that basis, and its encouragement to efficiency improvements; and, in effect, tantamount to determination of Tariff Project-wise. As the Commission has pointed out during these proceedings, MSEDCL has not shown how the present Wind Zone classification rationale, principles, framework and process, set out at paras. 12 and 13 above, are unscientific or ill-founded. By the very nature of Wind Zone classification and the differing profiles of Generators, it is not expected nor at all likely that the performance of all Projects at all locations in a particular Wind Class would be uniform. The fact that 42 (i.e. 13%) of the Projects at Wind Zone 1 locations have a higher CUF does not militate against or negate this framework or its rationale, as NIWE has also pointed out.

18. MSEDCL has also taken contradictory and inconsistent stands: while Projects which achieve a higher CUF would be given the lower Tariff of a higher Wind Zone class, Projects in higher Wind Zone locations who have achieved a lower CUF would not be entitled to the higher Tariff applicable to the lower Wind Zone class. While it has focused on the 13% of Projects in Wind Zone 1 with a higher actual CUF, the Commission notes that, in order to justify its shortfalls in RPO compliance, MSEDCL has been consistently claiming that Wind Generators in general have been achieving a lower CUF than contracted. MSEDCL has also cited approvingly the alternative of a single, uniform Generic Tariff for all Wind Projects. In other words, it would then have no objection to that Tariff being applied even to Projects which achieve a higher CUF than was considered for the determination of the uniform Tariff.

...

20. In view of the foregoing, the Commission finds no merit in MSEDCL's contentions."

There was no appeal filed against the above Order dated 03 April 2018.

22. Subsequently, MSEDCL filed Review Petition (Case No.152 of 2018) seeking Review of Order dated 03 April 2018. The Review Petition was allowed by the Commission vide its Order dated 09 July 2018.
23. In meantime Writ Petitions bearing No. 2682, 2686, 2688, 2793, 2868 and 2912 of 2018 were filed by Wind Generators before the Hon'ble Bombay High Court against the Order dated 09 July 2018 on the ground that the Commission passed the Review Order against the principles of natural justice. The Hon'ble Bombay High Court in its Order dated 30 August 2018 noted that the Commission has only directed MEDA to carry out an exercise for re-classification of wind zones.

24. After the decision of the Hon'ble High Court, the Commission initiated Case No. 108 of 2019 for considering the report of MEDA on wind-zone classification. By Order dated 10 July 2019 the Commission disposed of Case No. 108 of 2019. Relevant Para of Order dated 10 July 2019 reads as under:

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

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

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

Above dispensation make clear that the scope of review Order dated 09 July 2018 was limited with respect to whether there should be a study by MEDA or not.

25. Based on liberty granted by the Commission in its Order dated 09 July 2018, MSEDCL filed Petition in Case No. 338 of 2019 on 13 December 2019. The Commission directed MSEDCL to issue Public Notice for the same, which was challenged by the Wind Generators Association (WIPPA) on the ground of maintainability. The APTEL vide its Order dated 19 July 2021 observed following:

“On going through, we note from the orders of the Hon'ble High Court, at the time of disposal of the said Petition before the High Court, the present Petitioner was neither a party to the proceedings nor was a party to the Petition filed before the 1st Respondent. We are of the opinion that since the tariff for existing project was already determined earlier, if the question of re-determination of the desired tariff is raised in the present proceedings, it may amount to Res Judicata. Therefore, we are

of the opinion that maintainability of the present public hearing needs to be heard as preliminary issue.

Till maintainability of the present proceedings is decided, the Respondent Commission shall not proceed further in the matter pending before it.”

26. On 22 September 2019, MSEDCL filed an application for withdrawal of the Petition bearing Case No. 338 of 2019.
27. While the withdrawal application was pending before the Commission, the APTEL disposed of the Petition pending before it in view of the withdrawal application pending before the Commission. The relevant portion of the Order dated 19 January 2023 is as under:

*“We are informed that orders have been reserved by the MERC on the application filed by the 2nd Respondent seeking withdrawal; and that the Appellant’s application, questioning the maintainability of the petition filed by the 2nd Respondent, was also taken up by the MERC, though no orders have been passed therein as yet, possibly because the 2nd Respondent had sought withdrawal of their petition itself. The Appellant’s grievance in this Appeal does not therefore survive. Suffice it, instead of keeping the appeal pending on our board, to dispose of the Appeal **directing the MERC, after it decides the application filed by the 2nd Respondent for withdrawal, to decide, if need arises, the maintainability petition filed by the Appellant; and thereafter, if so required, to hear and decide the petition filed by the 2nd Respondent.**”*

28. The Commission vide its Order dated 13 February 2023 in Case No.338 of 2019 allowed withdrawal of Petition. The relevant para reads as under:

*“17. The Commission notes that MA Applicant/Respondent have no objection to allow withdrawal of Petition, however for allowing liberty to file afresh, they are requesting that the Commission should first decide on maintainability of this Petition. In the opinion of the Commission, to decide maintainability of Petition which is proposed to be withdrawn would not serve any purpose. **In any case, if MSEDCL’s approaches again with fresh Petition, it would have to demonstrate maintainability of Petition especially when Hon’ble ATE in its Judgement (referred above in Para 16) dated 19 January 2023 has categorically directed the Commission to decide maintainability of the Petition before considering MSEDCL’s Petition for reclassification of Wind Zone or corresponding redetermination of wind tariff. In view of such observation of ATE, even if the Commission grants liberty, MSEDCL has to meet maintainability test when they approach afresh.** Therefore, in the opinion of the Commission, granting liberty to file afresh or otherwise would not serve any purpose. **Hence, while allowing***

withdrawal of Petition the Commission is not granting liberty to file afresh. This does not restrict MSEDCL to initiate any suit/case as per applicable laws and the directions of Hon'ble ATE in its order dated 19 January, 2023.”

The Commission in above Order has not granted any liberty to re-approach with same Case. But kept opening for initiating any new suit/case as per applicable law and directions of APTEL in its Order dated 19 January 2023. Under such scenario, test of maintainability is a pre-requisite.

29. MSEDCL's major prayers in Case No.41 of 2017, Case No.152 of 2018, Case No.338 of 2019 and present matter are tabulated below:

<i>Case No. 41 of 2017</i>	<i>Case No. 152 of 2018</i>	<i>Case No. 338 of 2019</i>	<i>Case No. 114 of 2023</i>
<p><i>(b) Revise wind zone classification of 42 generators;</i></p> <p><i>(c) Devise a procedure to adopt 80 m hub height (or more) data for WPD measurement, to link up actual generation data with wind zone classification;</i></p> <p><i>(d) To issue directives to MEDA to review the wind zone classification of 42 wind generators and revise them as per the actual generation; and</i></p> <p><i>(e) To issue direction to MEDA to adopt the methodology suggested by MSEDCL till the procedure to adopt 80 m hub height creation is finalized by MEDA.</i></p>	<p><i>(a) Review the order dated 03.04.2018 in Case No. 41 of 2018 by allowing the present review petition;</i></p> <p><i>(b) Revise wind zone classification of 42 generators;</i></p> <p><i>(c) Devise a procedure to adopt 80 m. hub height (or more) data or WPD measurement, to link up actual generation data with wind zone classification;</i></p> <p><i>(d) To issue directives to MEDA to review the wind zone classification of 42 wind generators and revise them as per the actual generation; and</i></p> <p><i>(e) To issue direction to MEDA to adopt the methodology suggested by MSEDCL till procedure to adopt 80</i></p>	<p><i>MSEDCL sought the following additional reliefs vide its additional submissions dated 24 March 2021:</i></p> <p><i>(a) To allow MSEDCL to levy the preferential tariff based on actual CUF for particular financial year and to make the revenue adjustments, if any in the next financial year.</i></p> <p><i>(b) To allow recovery of excess amount paid to such generators with interest for past period based on their reclassification of wind zones as per actual generation.</i></p>	<p><i>(b) Clarify that the preferential pricing of WTG's must be determined on the basis wind zone corresponding to the actual CUF observed from the date of commissioning basis and not solely on the wind density basis;</i></p> <p><i>(c) Further, clarify that the CUF based zoning and the applicable preferential pricing there-on would be applicable from MERC (Terms and Conditions for determination of Renewable Energy Tariff) Regulations, 2010 onwards in terms of order dated 07.07.2014 in Case No. 100 of 2014; and Pass such other orders as required in the interest of justice.</i></p>

<i>Case No. 41 of 2017</i>	<i>Case No. 152 of 2018</i>	<i>Case No. 338 of 2019</i>	<i>Case No. 114 of 2023</i>
	<i>m hub height creation is finalized by MEDA.</i>		

30. From Prayers in present Petition, it is evident that MSEDCL has rephrased the prayer clauses in the nature of clarification. But in effect seeking amendment of the RE Tariff Regulations, 2010 and 2015 which have since been repealed. For this purpose, MSEDCL has relied upon clauses on power to amend as stipulated in Regulation 76 of RE Tariff Regulations, 2010 and Regulation 81 of RE Tariff Regulations, 2015. MSEDCL is also seeking tariff revision based on revised classification.
31. It is pertinent to note that RE Tariff Regulations, 2010 introduced the determination of Generic Tariffs for wind projects depending on the wind zone class of their location, with which different CUF levels were associated. Similar approach is continued by the Commission in RE Tariff regulations, 2015 with changes in CUF norms. Progressive increase have been stipulated by the Commission in normative CUF associated with each Wind Zone class- for instance from 20% in 2010 to 22% in 2015 for Wind Zone 1 (Annual WPD of 200-250 W/m²) considering technological advancement and other factors.
32. Generic Tariffs for Wind Energy projects refers to standardized pricing mechanism wherein tariffs are determined based on pre-set parameters like capital cost, RoE, Deprecation, Debt/Equity ratio etc. Before transition to competitive bidding era, Generic tariff regime have been used as one of the market development tool. Generic tariffs assumes a one-size-fits all approach and due to which there exists a technological risks and regional resource variability risk. MSEDCL in present Petition and in past also vehemently contending that certain wind projects are achieving higher CUF and getting undue advantage of higher tariffs. But at the same time, MSEDCL's submission is silent on wind projects in higher wind zone locations who have achieved a lower CUF. In past, during RPO verification exercises MSEDCL has been consistently claiming that wind generators in general have been achieving a lower CUF than contracted.
33. From submission on record, it is amply clear that MSEDCL intends to consider actual CUF as a norm for wind zone classification and corresponding tariffs. But this aspect will be tantamount to determination of tariff project-wise. This aspect has been categorically dealt by the Commission in its Order dated 03 April 2018 in Case No.41 of 2017. In para (21) above, relevant portion of the Order has been reproduced. In view of ruling in Order dated 03 April 2018 and the structure of the Petition, it can be concluded that MSEDCL is essentially attempting to seek the same reliefs which have already been adjudicated. In view of uncontroverted findings in Order dated 03 April 2028 in Case No.41 of 2017, the present Petition is not maintainable on ground of *Res Judicata*.

34. Moreover, for supporting the claim, MSEDCL has relied upon Regulation 26 and Regulation 28 of RE Tariff Regulations, 2010 and RE Tariff Regulations, 2015 respectively, which read as follows:

RE Tariff Regulations, 2010:

“26. Capacity Utilisation Factor

26.1 Capacity Utilization Factor (CUF) norms for the Control Period shall be as follows:

<i>Annual mean wind power density(W/m²)</i>	<i>CUF</i>
<i>200-250</i>	<i>20%</i>
<i>250-300</i>	<i>23%</i>
<i>300-400</i>	<i>27%</i>
<i>>400</i>	<i>30%</i>

26.2 The annual mean wind power density specified in Regulation 26.1 above shall be measured at 50 meter hub-height.

26.3 For the purpose of classification of wind energy project into particular wind zone class, the State-wise wind power density map prepared by the Centre for Wind Energy Technology (C-WET) and enclosed as Schedule to these Regulations, shall be considered.

Provided that the Commission may by notification in official gazette, amend the schedule from time to time, based on the input provided by C-WET/MNRE.”

RE Tariff Regulations, 2015:

“28. Capacity Utilisation Factor

28.1 The CUF norms for wind Energy Projects for the Review Period shall be as follows for the purpose of tariff determination:

<i>Wind Zone</i>	<i>Annual Mean wind Power Density (W/m²)</i>	<i>CUF</i>
<i>Zone 1</i>	<i><= 250</i>	<i>22%</i>
<i>Zone 2</i>	<i>>250 <=300</i>	<i>25%</i>
<i>Zone 3</i>	<i>>300 <=400</i>	<i>30%</i>
<i>Zone 4</i>	<i>>400</i>	<i>32%</i>

Provided that these CUF norms may be revised by the Commission through general or specific Order considering data that may become available subsequently.

28.2 The annual mean wind power density specified in Regulation 28.1 shall be measured at 80 meter hub height, and State Nodal Agency shall certify the Wind Zone relevant to the proposed Wind Energy Project.

28.3 For the purpose of classification of a Wind Energy Project in a particular Wind Zone class, the State Nodal Agency shall refer to the wind power density map prepared by the National Institute for Wind Energy.”

On plain reading of above regulatory provisions, it is evident that it does not provide re-working of CUF parameters without input from C-Wet/MNRE or in absence of data. Now the Regulations in questions have been repealed and ceased its operation.

35. With regards to the issue of whether the expired regulations can be considered for the purpose of re-determination of tariff, Judgement of Hon’ble Andhra Pradesh High Court dated 15 March 2022 in W.P. No. 383 of 2021 & batch is pivotal. In said Judgement the Hon’ble AP High Court held that post expiry of the Regulation, operational norms cannot be amended. Relevant part of the said Judgement is reproduced hereinbelow for reference:

“64. While that being so, in the case at hand, we are faced with not only prayer for revision/reduction of tariff, but also to amend Regulation No.1 of 2015 by amending the parameters. The issue, therefore, is not merely about Commission’s power to amend tariff, but we are also required to consider whether amendment of the Regulation which has now ceased to remain in force for the petitioner power producers, can be allowed and whether such power exists with the Commission in the given factual matrix and circumstances.

65. The first relief prayed for in O.P.No.17 of 2019 seeks to amend the parameters of Regulation No.1 of 2015. The Regulation has been enacted as a subordinate legislation, which has already expired after 31.03.2017 in view of the order passed in O.P.No.5 of 2019. The Control Period having already been curtailed, Regulation No.1 of 2015 has already expired. Therefore, its operational life and parameters cannot be amended post its expiry.

....”

In view of above, the Commission cannot proceed for retrospective amendment of Regulations and re-determine the tariff.


ORDER

Petition in the Case No.114 of 2023 is dismissed as not maintainable. All associated IAs stand disposed of accordingly.

Sd/-
(Surendra J. Biyani)
Member

Sd/-
(Anand M. Limaye)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary

