

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 58 of 2021

Case of NuPower Renewables Private Limited seeking Review of the Order dated 15 March 2021 passed by the Commission in Case No. 337 of 2019

NuPower Renewables Private Limited Petitioner
Maharashtra State Electricity Distribution Co. Ltd. Respondent No. 1
Maharashtra Electricity Transmission Co. Ltd. Respondent No. 2
Maharashtra Energy Development Agency Respondent No. 3

Coram

I.M. Bohari, Member
Mukesh Khullar, Member

Appearance for the:

Petitioner	: Sh. M G Ramchandran (Adv.)
Respondent No. 1	: Sh. Ravi Prakash (Adv.)
Respondent No. 2	: Sh. Sanjeevkumar Suradkar (Rep.)
Respondent No. 3	: Sh. Manoj Pise (Rep.)

ORDER

Date: 9 August, 2021

1. NuPower Renewables Private Limited (**NPRPL**) has filed the present Petition on 26 April 2021 under Section 94(1)(f) of the Electricity Act, 2003 (**EA**) read with Regulation 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004

read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 seeking Review of the Commission's Order dated 15 March 2021 in Case No. 337 of 2019.

2. NPRPL's main prayers are as follows:

- a) *Review the Impugned Order dated 15.03.2021 passed in Case No. 337 of 2019 on the aspects mentioned herein above;*
- b) *Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*

3. NPRPL in its Petition has stated as follows:

3.1. It had initially filed a Petition in Case No. 337 of 2019 with the following prayers:

- “(a) Direct MSEDCL to grant Permission To Commission (PTC) to Petitioner's Wind Turbine Generator located at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra;*
- (b) Direct MEDA to immediately grant extension of project registration to the Wind Turbine Generator located at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra for a period of six (6) months or till grant of PTC by MSEDCL, whichever is later;*
- (c) Direct MSEDCL to enter into an Energy Purchase Agreement for buying the power generated by the Petitioner's Wind Turbine Generator at its derated capacity at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra at a preferential rate prescribed by this Hon'ble Commission under the Wind Policy 2015 and Methodology Circular 2015 on same terms as if the WTG was commissioned in 2015;*
- (d) Direct MSEDCL to compensate for delay in granting Permission To Commission the Petitioner's Wind Turbine Generator located at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra and pay Rs.9,84,98,777 (Rupees Nine Crores Eighty Four Lakhs Ninety Eight Thousand Seven Hundred and Seventy Seven Only) as per detailed calculation sheet annexed hereto as Annex QQ;*
- (e) Pending the hearing and final disposal of this Petition the said Project registration extension granted by MEDA be directed to subsist and extend for 1.6MW WTG of the Petitioner at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra, till consideration and disposal of the present Petition by this Hon'ble Commission;*
- (f) Pending the hearing and final disposal of this Petition the Petitioner be permitted to complete with the cooperation of all authorities all the steps relating to sanctions*

and approvals preceding the commissioning of the subject WTG i.e. the Project at location No. VAS-556 at Gut No. 556 at Vaspeth, village- Jath, Sangli, Maharashtra;

- (g) In alternative to prayer (f) above, pending the hearing and final disposal of this Petition the extension granted by MEDA be directed to subsist and extend, till consideration and disposal of the request / application of the Petitioner by MSEDCL and a period of three (3) weeks thereafter;*
- (h) Pending the hearing and final disposal of this Petition the Petitioner be permitted to complete all the steps relating to sanctions and approvals preceding the commissioning of the subject WTG i.e. the Project at location No. VAS-556 at Gut No. 556 at Vaspeth village, Taluka-- Jath, Sangli, Maharashtra with the cooperation of all authorities;”*

- 3.2. The Commission, after hearing the Parties, passed the Order dated 15 March 2021 and framed following four issues for its consideration, namely:
- a) Whether PTC (Permission to Commission) needs to be granted for wind project under consideration?
 - b) Whether MSEDCL can be compelled to sign EPA at Preferential Tariff with NuPower Renewables Private Limited (Review Petitioner)?
 - c) Whether NuPower Renewables Private Limited is eligible for compensation as claimed by it?
 - d) Balance of Convenience/equity/Way forward.
- 3.3. The Commission ruled that NPRPL’s prayer for grant of Permission to Commission (PTC) cannot be allowed because the subject Wind Turbine Generator (WTG) does not have valid grid connectivity. In view of this, the Commission held that all other prayers of NPRPL become redundant. However, to avoid unnecessary duplication of efforts at subsequent occasion, the Commission considered other issues also. The Commission held that Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) cannot be directed to sign Energy Purchase Agreement (EPA) for 1.6 MW of de-rated capacity of NPRPL’s subject WTG at preferential tariff. The Commission has also held that NPRPL is not eligible for any compensation for a project/WTG as it had not entered into legal agreement.
- 3.4. The Commission while dismissing the petition also vacated the status quo granted in the matter vide Daily Order dated 17 December 2019.
- 3.5. Subsequent to the passing of the Impugned Order, on 5 April 2021, MSEDCL dismissed the application submitted by the NPRPL seeking PTC for the subject WTG.

- 3.6. NPRPL submits that there are errors apparent on the face of record in the Impugned order; certain important aspects / evidence have not been considered in the Impugned Order, which have material bearing on the outcome of the case and otherwise also there is sufficient cause for review and rectification of the Order.

Grounds for Review

- 3.7. One of the principal grievances raised by the NPRPL in Case No. 337 of 2019 was about non-grant of PTC by MSEDCL for the purported reason that the subject WTG of the Petitioner does not have valid grid connectivity.
- 3.8. The Commission acknowledged that grid connectivity is a pre-requisite for grant of PTC and accordingly observed that the main issue in granting PTC to the subject WTG is submission of a valid grid connectivity.
- 3.9. While holding that PTC to subject WTG of NPRPL cannot be granted in absence of valid grid connectivity, the Commission inter-alia noted the following in the Impugned Order, viz.:
- i. MSETCL has granted grid connectivity of 350 MW to Wind Project Developer i.e. Sri Maruti Wind Park Developers (SMWPD) from its 220 kV Jath Substation.
 - ii. Project of NPRPL, including the subject WTG, is connected to Shedyal Farm Substation / Pooling Substation and the said Shedyal PSS is to be connected to MSETCL's Jath substation for evacuation of wind power.
 - iii. All works related to Shedyal PSS is complete, and only work that remains to be completed is construction of line bays at MSETCL's Jath substation which will be used for connecting Shedyal substation to Jath Substation. Due to delay on MSETCL's part in constructing line bays at its Jath substation, MSETCL has allowed evacuation of 200 MW of wind power through LILO arrangement.
 - iv. SMWPD, who is responsible for executing works related to grid connectivity, had initially received grid connectivity approval of 250 MW which is subsequently increased upto 350 MW through an interim arrangement on LILO basis.
 - v. Subject WTG was erected in April 2014 and is still pending for PTC due to non-availability of valid grid connectivity, although some of WTGs which are erected post April 2014 (i.e. post erecting of subject WTG) have already been commissioned.

- vi. NPRPL's project of 15 WTG (each WTG of 2.05 MW) was part of 350 MW Grid Connectivity approval to SMWPD. Therefore, under temporary evacuation arrangement approved by MSETCL (restricted to 200 MW) which WTGs are to be covered would be depending upon agreement between SMWPD and NPRPL which is not part of present proceedings.
- 3.10. In making the above-said observations and returning a finding that subject WTG of NPRPL does not have valid grid connectivity, the Impugned Order has not considered the following aspects which could not be produced at the time of hearing in Case No. 337 of 2019 but have material bearing on the decision rendered by the Commission.
- 3.11. The Commission after having observed that the SMWPD already holds temporary grid connectivity for 350 MW of wind capacity to be connected to Shedyal PSS (subsequently restricted to 200 MW) and despite noting that under the temporary grid connectivity arrangement granted by MSETCL to the SMWPD which WTG is to be covered would depend upon the agreement between the SMWPD and the NPRPL, erred in proceeding to hold that NPRPL does not have grid connectivity for the subject WTG. This is erroneous because it is noted by the Commission in the Impugned Order itself that subject WTG of NPRPL is located in the wind power project developed by the SMWPD at Vaspeth, Sangli (Site). As part of the wind park, SMWPD has constructed Shedyal PSS for evacuating the WTGs set up at the Site and, accordingly, it is responsible for obtaining grid connectivity. There is no dispute to the fact that SMWPD in the instant case presently holds temporary grid connectivity arrangement for 200 MW capacity for evacuating power through Shedyal PSS.
- 3.12. The Commission has inadvertently over-looked the fact that the grid connectivity in the instant case is obtained for the Shedyal PSS and the individual WTGs that are installed by individual investors like the NPRPL herein which are connected to the said PSS are not required to have separate grid connectivity. For this reason, on 12 August 2011, SMWPD had applied for and obtained grid connectivity from MSETCL for its proposed 250 MW (later increased to 350 MW and subsequently restricted to 200 MW) wind farm project located at the Site. A copy of this grid connectivity approval letter dated 12 August 2011 was annexed to the petition filed in Case No. 337 of 2019, and this fact is also admitted by MSETCL in its reply dated 19 October 2020 filed in Case No. 337 of 2019.
- 3.13. Further, in this regard, it is also important to refer to the Memorandum of Understanding (MOU) dated 25 January 2013 entered into between NPRPL and the SMWPD wherein SMWPD has undertaken all responsibilities in relation to development of evacuation infrastructure and of obtaining grid connectivity for the WTGs to be set up at the Site. The contents of the grid connectivity approval dated 12 August 2011 and the MOU make it

abundantly clear that the grid connectivity for evacuating power generated by NPRPL's WTGs, including for the subject WTG, through Shedyal PSS has been obtained by the Developer. Copy of the said MOU is annexed to the present petition.

- 3.14. During proceedings in Case No. 337 of 2019 none of the Respondents had controverted the above position and, therefore, no occasion arose to produce the said MOU. However, specific reference to the agreement entered into between SMWPD and NPRPL has been made in the Impugned Order. Hence, it is imperative to produce the MOU before the Commission so as to set the records straight and to prevent miscarriage of justice that is caused due to factual error that has crept in the Impugned Order.
- 3.15. On the lines of MOU signed with NPRPL, SMWPD has entered into similar arrangements with other investors who have installed WTGs of varying capacity at the SMWPD's Site and are connected to the Shedyal PSS developed by the Developer for evacuation of power from the Site. This un-mistakenly posits that the right to allocate / de-allocate / assign / re-assign the capacity in the Shedyal PSS, and concomitantly the attended grid connectivity, has been kept by SMWPD with itself. SMWPD has not parted with this valuable right over grid connectivity obtained for Shedyal PSS hitherto in favour of any of the investors located at Site. Hence, subject to the terms and conditions of its contract with investors and the grid connectivity approval granted by MSETCL, it is the prerogative of SMWPD to allot the available capacity and the attended grid connectivity to an investor of its choice. Such allotment / de-allotment / assignment of connectivity by the Developer is in the realm of contract and outside the purview of the Commission's regulatory superintendence.
- 3.16. The Commission at para 22.3 of the Impugned Order has also observed that "under temporary evacuation arrangement approved by MSETCL (which is restricted to 200 MW) which WTG is to be covered would be depending upon agreement between SMWPD and NPRPL which is not part of present proceedings". However, since the MOU dated 25 January 2013 was not available before the Commission, therefore, the correct factual and contractual position has not been taken note by the Commission and the same has led to the error in the Impugned Order. The Commission has not considered the fact that vide its letter dated 8 August 2019, SMWPD has already requested MSEDCL to connect the subject WTG to the existing 220kV Shedyal PSS by disconnecting the already existing grid connection of a different WTG which was idle. The letter dated 8 August 2019 was annexed to the Petition in Case No. 337 of 2019.
- 3.17. It is submitted that if the above-referred facts and documents are taken into account the only view possible is that subject WTG of Petitioner has valid grid connectivity in its favour and, hence, the subject WTG of Petitioner is entitled to grant of PTC.

- 3.18. Therefore, the Impugned Order suffers from an error apparent on the face of it to the extent that it has failed to consider that SMWPD who has already obtained grid connectivity, has in clear terms conveyed to the MSEDCL its decision to allot the available capacity / connectivity to NPRPL.
- 3.19. The MOU dated 25 January 2013 clarifies the admitted position that MSETCL had duly granted Grid Connectivity of 350 MW (subsequently reduced to 200 MW) to SMWPD from its 220 kV Jath Substation, which duly and clearly constitutes a valid grid connectivity to the subject WTG being established in the Wind Power Park developed by SMWPD.
- 3.20. The absence of MOU dated 25 January 2013 also led the Commission to err in holding that NPRPL ought to have made developers with idle WTGs a party to NPRPL as it was seeking the said capacity. The Commission has failed to note that SMWPD has a valid grid connectivity of 200 MW over which capacity it has absolute control and claim at present. Out of the said capacity of 200 MW, only 197.2 MW is currently being utilized by the various WTGs connected to the Shedyal PSS. NPRPL is seeking to utilize the balance 2.8 MW capacity connectivity clearly available in the existing 200 MW connectivity for the subject WTG. SMWPD has already consented to the same and it has also communicated its decision to utilize this spare connectivity of 2.8 MW in favour of NPRPL's subject WTG vide its letter dated 8 August 2019 to MSEDCL.
- 3.21. The Commission has erred in proceedings on the basis as if there was no arrangement between NPRPL and SMWPD and NPRPL was seeking capacity that had been allocated to a third party. NPRPL has sought to utilize the balance 2.8 MW capacity available out of the 200 MW grid connectivity granted to Shedyal PSS for the subject WTG in view of the fact that the same is lying idle and / or other WTGs have been disconnected by MSEDCL itself.
- 3.22. The Commission failed to take into consideration that the subject WTG of NPRPL is connected to Shedyal substation and the substation is only connected to 197.2 MW WTG out of its permitted capacity of 200 MW and therefore the said substation has sufficient infrastructure to accommodate NPRPL's subject WTG which is derated to 1.6 MW.
- 3.23. SMWPD in its capacity as owner and grid connectivity holder of Shedyal PSS sought MSEDCL's concurrence to disconnect the idle WTG with ID- MV2T-21 (1 x 2.0 MW) of M/s Jath Wind Energy Private Limited from feeder no. 7 and in-lieu of it to connect the subject WTG of NPRPL bearing ID- VAS 556 to the grid. It is also important to highlight here that subsequently on 5 June 2020, MSEDCL has itself disconnected the WTG of Jath Wind Energy Pvt. Ltd. from grid. Therefore, even otherwise, there is no embargo at all in

connecting subject WTG of NPRPL to the grid by utilizing the spare connectivity available with Shedyal PSS.

- 3.24. The Commission in the Impugned Order has erred in noting at Para 23.3 that the erection work of subject WTG was completed on 20 April 2014. Following this, the Commission wrongly went on to hold that the subject WTG was hence completed well before the notification of RE Policy 2015 and, therefore, evidently NPRPL must have taken business decision of developing the wind project prior to the notification of GoM's RE Policy 2015.
- 3.25. In its rejoinder dated 23 February 2021 to MSEDCL's Reply, NPRPL had set out complete details in respect of WTGs erection date and their respective dates of joint inspection by MSEDCL, MSETCL and MEDA. NPRPL has given details w.r.t. the subject WTG. It has clearly mentioned therein that for the subject WTG at Location No. VAS 556, Gut No. 556, Village Vaspeth, Taluk Jath, District Sangli the turbine erection was completed on 20 April 2015 and joint inspection was carried out on 13 October 2015 and 21 November 2017.
- 3.26. Hence, in view of the evidence on record to the contrary, the erection date of 20 April 2014 recorded in the Impugned Order is erroneous. Accordingly, the consequent finding of the Commission that the subject WTG cannot be accepted to be developed under the RE Policy of 2015 is also erroneous.
- 3.27. MEDA vide letter dated 17 March 2018 bearing reference No. PGN-I/PRL/NuPower/1.6MW(2.05MW)/2017-18/1017 registered the WTG at a derated capacity of 1.60 MW at Gut No. 556 of Village Vaspeth, Tal - Jath, Dist - Sangli (Site - Vaspeth). The said letter of MEDA further provides that the subject WTG of NPRPL was registered under the RE Policy 2015 read with methodology dated 9 September 2015.
- 3.28. The findings in the Impugned Order with regard to grid connectivity, erection date and applicability of RE Policy 2015 to the subject WTG, in respect of which NPRPL is praying for the Commission to review the Impugned Order as the same are materially and gravely affecting the rights and interests of it.
- 3.29. NPRPL submits that the principles governing the review jurisdiction are now well settled by various decisions of the Hon'ble Supreme Court (SC). Such review jurisdiction is to be exercised not merely for apparent error but to avoid injustice and the resultant multifarious proceedings. NPRPL relies upon the following judgements:
- a. Board of Control for Cricket in India-v-Netaji Cricket Club (2005) 4 SCC 741
 - b. Dhanani Shoes Limited -v- State of Assam and Others [2008] 16 VST 228 (Gau)

- c. Moran Mar Basselios Catholicos and Anr. Vs. The Most Rev. Mar Poulouse Athanasius and Ors., (1955) 1 SCR 520
- d. Thungabhadra Industries Ltd. -v- The Government of Andhra Pradesh, (1964) 5 SCR 174
- e. Rajender Singh –v- Lt. Governor, Andaman and Nicobar Islands and Ors., (2005) 13 SCC 289
- f. Green View Tea and Industries Vs. Collector, Golaghat, Assam and Anr.(2004) 4 SCC 122

4. **MSEDCL made the following submissions in its reply dated 27 May 2021:**

- 4.1. The power of revision is not an inherent power of the Court. The Court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1 of CPC (Code of Civil Procedure, 1908) itself. The grounds for review submitted by NPRPL are outside the scope of Order 47 Rule 1 of CPC.
- 4.2. The Commission has passed a well-reasoned Impugned Order in Case No. 337 of 2019, after hearing the parties and taking on record various submissions filed by the parties.
- 4.3. NPRPL has failed to bring the said document on record in the proceedings before the Commission. The Commission has taken note of the same under Para 22.3 of the Impugned Order. Following is the relevant text from Impugned Order:

“22. 3 The Commission notes that NPRPL is an investor, and it must have signed agreement with its Project Developer i.e. SMWPD, who is responsible for executing works related to grid connectivity. Said agreement / understanding between NPRPL and SWMPD has not been made part of this proceedings.”
- 4.4. The MOU relied upon by NPRPL does not fall under the category of new and important matter as envisaged under Order 47 Rule 1 of CPC and that NPRPL had knowledge of the same but failed to bring it on record in the proceedings.
- 4.5. Regarding date of erection of the turbine, it is submitted that the date of completion mentioned in the noting was wrongly recorded as 20 April 2014 instead of 20 April 2015. It is submitted that the view taken by the Commission that the erection date of completion of WTG at location VAS 556 is well before the notification of RE Policy 2015 remains accurate. The said RE Policy 2015 was notified by the Government of Maharashtra on 20 July 2015 which is a subsequent date to the date of completion of subject WTG which was on 20 April 2015 as averred by NPRPL.

- 4.6. The Petition under reply does not lay down any “error apparent in the face of the record” nor does it bring on record any new substantial material which was not in possession whilst the main matter was being argued. If the Commission has decided a point and presuming, has decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order 47, would amount to an abuse of the liberty given to the Commission under the EA and the rules made thereunder to review its Order.
- 4.7. Under the garb of a review petition NPRPL herein is seeking to re-agitate the main petition, which factor becomes clear from the averments as contained and set out in the application styled as a review petition. An order or decision cannot be reviewed on the ground that a different view could have been taken the Commission on a point of law or fact.
5. **MSETCL in its Reply dated 17 June 2021 made the following submissions:**
- 5.1. In its earlier submission of dated 19 October 2020 in Case No.337 of 2019, MSETCL has stated that the interim final connectivity issued to SMWPD will be reviewed based on information submitted by it.
- 5.2. Now, SMWPD vide its letter dated 1 April 2021 has requested MSETCL to extend the Grid connectivity of their 200MW Wind Power project.
- 5.3. In the above said letter dated 1 April 2021, SMWPD has not submitted any documents showing any progress to ascertain development by it.
6. **In its rejoinder dated 16 June 2021, NPRPL reiterated the submissions made in the Petition:**
- 6.1. There are errors apparent on the face of record, with regard to grid connectivity, erection date and applicability of RE Policy 2015 with respect to the subject WTG, in the Impugned Order and NPRPL has sufficient cause to approach the Commission for review and rectification of the Impugned Order.
- 6.2. On no occasion any of the Respondents, in the course of proceedings in Case No. 337 of 2019, raised any objection on agreement between the SMWPD and NPRPL for evacuation of power from the subject WTG. Therefore, no occasion arose for NPRPL to produce the MOU dated 25 January 2013.

7. **MEDA, by its letter dated 21 June 2021 re-iterated the submissions made by it in the Original Petition in Case No. 337 of 2019.**
8. At the e-hearing through video conferencing held on 22 June 2021, the representative of the Parties reiterated their submissions as made in the Petition. The Commission granted 7 days for parties to file their written notes of arguments.
9. NPRPL made the following submission through its written notes of arguments dated 28 June 2021:
 - 9.1. Out of 200 MW sub-station capacity, only 197.2 MW has been utilized and NPRPL's project of not more than 2.8 MW, and hence can be fully accommodated in the existing 200 MW without any reservation or conflicting claim of any other person.
 - 9.2. NPRPL is not raising any issue on the basic aspect of the decision that the capacity in excess of 200 MW in aggregate cannot be accommodated within the existing capacity available and need to wait till the upgradation of the capacity to 350 MW which is currently being implemented and is at the stage of finalization of approvals
 - 9.3. The Commission at para 22.3 of the Impugned Order has observed that *"NPRPL is an investor, and it must have signed agreement with its Project Developer i.e. SMWPD, who is responsible for executing works related to grid connectivity. Said agreement / understanding between NPRPL and SWMPD has not been made part of this proceedings.*
 - 9.4. NPRPL and SMWPD entered into MoU dated 25 January 2013, whereunder SMWPD has undertaken all responsibilities in relation to development of evacuation infrastructure and of obtaining grid connectivity for the WTGs to be set up at the Site. Contents of the grid connectivity approval dated 12 August 2011 and the MoU make it abundantly clear that the grid connectivity for evacuating power generated by NPRPL's WTGs, including for the subject WTG, through Shedyal PSS has been obtained by SMWPD.
 - 9.5. On the issue of Scope of Review, NPRPL places its reliance on the following judgements:
 - a. Board of Control for Cricket in India–v-Netaji Cricket Club (2005) 4 SCC 741-

"...
89. Order 47 Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the

record but also if the same is necessitated on account of some mistake or for any other sufficient reason.

*90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. **An application for review would also be maintainable if there exists sufficient reason therefor.** What would constitute sufficient reason would depend on the facts and circumstances of the case. **The words “sufficient reason” in Order 47 Rule 1 of the Code are wide enough to include a misconception of fact or law by a court or even an advocate.** An application for review may be necessitated by way of invoking the doctrine “*actus curiae neminem gravabit*”.*

...

93. It is also not correct to contend that the Court while exercising its review jurisdiction in any situation whatsoever cannot take into consideration a subsequent event. In a case of this nature when the Court accepts its own mistake in understanding the nature and purport of the undertaking given by the learned Senior Counsel appearing on behalf of the Board and its correlation with as to what transpired in the AGM of the Board held on 29-9-2004, the subsequent event may be taken into consideration by the Court for the purpose of rectifying its own mistake." (Emphasis supplied)

*b. Dhanani Shoes Limited -v- State of Assam and Others [2008] 16 VST 228 (Gau)-
"...*

32. From the decisions in Municipal Board, Pratabgarh [1982] 3 SCC 331, Rajesh D. Darbar [2003] 7 SCC 219, Lily Thomas [2000] 6 SCC 224 and Board of Control for Cricket, India [2005] 4 SCC 741, what clearly transpires is that whenever a mistake is committed by a court, because of wrong interpretation of law or because of incorrect assumption of fact or because of misrepresentation of fact by the counsel or when a decision is based on a submission, which might have been made by a counsel on a wrong or incorrect instruction, or when a decision is based on a wrong understanding of a counsel's submissions or on assumption of existence of a fact, which was actually non-existent, the court shall, if the error is such, which would cause, or has caused, grave miscarriage of justice, review its own order."

Commission's Analysis and Rulings

10. NPRPL has filed the instant Petition seeking review of the Commission's Order dated 15 March 2021 in Case No. 337 of 2019. Said original Case No. 337 of 2019 was filed by NPRPL seeking the following key reliefs:

- a. Direct MSEDCL to grant Permission to Commission (PTC) to its WTG at derated capacity
- b. Direct MEDA to grant extension of project registration to its WTG
- c. Direct MSEDCL to enter into EPA with NPRPL at preferential Tariff

However, the Commission in impugned Order dated 15 March 2021 has observed that NPRPL's WTG has no valid Grid Connectivity and accordingly rejected relief related to PTC and subsequently also rejected other reliefs prayed for by NPRPL.

11. Present Petition has been filed under Regulation 85(a) of the Commission's Conduct of Business Regulations, 2004 governing review of its Orders, which specifies as follows:

“Review of decisions, directions, and orders:

85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission.”

Thus, the ambit of review is limited, and this Review Petition is required to be evaluated accordingly

12. The Commission notes that NPRPL has sought review on following two key grounds:
 - a. Error with respect to Grid Connectivity in the Impugned Order
 - b. Error with respect to erection date of subject WTG

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

13. **Issue a: Error with respect to Grid Connectivity in the Impugned Order**

- 13.1. NPRPL has contended that the Commission at para 22.3 of the Impugned Order has also observed that “under temporary evacuation arrangement approved by MSETCL (which is restricted to 200 MW) which WTG is to be covered would be depending upon agreement between SMWPD and NPRPPL which is not part of present proceedings”. Since the MOU dated 25 January 2013 signed between SMWPD and NPRPPL was not available before the

Commission, therefore, impugned Order leads to wrong conclusion that subject WTG of NPRPL does not have valid grid connectivity.

13.2. NPRPL has submitted that on 25 January 2013, it had entered into an MoU with the SMWPD wherein SMWPD has undertaken all responsibilities in relation to development of evacuation infrastructure and of obtaining grid connectivity for the WTGs to be set up at the Site. The STU had given the grid connectivity approval to SMWPD vide dated 12 August 2011. The MoU between SMWPD and NPRPL makes it clear that the grid connectivity for evacuating power generated by NPRPL's WTGs, including for the subject WTG, through Shedyal PSS has been obtained by SMWPD. SMWPD has a valid grid connectivity of 200 MW over which capacity it has absolute control and claim at present. Out of the said capacity of 200 MW, only 197.2 MW is currently being utilized by the various WTGs connected to the Shedyal PSS. NPRPL is seeking to utilize the balance 2.8 MW capacity connectivity clearly available in the existing 200 MW connectivity for the subject WTG. SMWPD has already consented to the same and it has also communicated its decision to utilize this spare connectivity of 2.8 MW in favour of NPRPL's subject WTG vide its letter dated 8 August 2019 to MSEDCL

13.3. During the proceedings in Case No. 337 of 2019 none of the Respondents had objected on such arrangement of NPRPL and SMWPD, therefore there was no occasion to produce the said MoU. However, as the Commission, in the impugned Order, had specifically referred to the agreement between SMWPD and NPRPL, therefore, now in the review Petition, it is placing the MoU between SMWPD and NPRPL on record.

13.4. MSEDCL has contended that NPRPL has failed to bring the MoU on record during the original proceedings in Case No. 337 of 2019 and the said MoU does not fall under the category of new and important matter as envisaged under Order 47 Rule 1 of CPC as NPRPL had knowledge of the same but did not bring it on record earlier.

13.5. The Commission notes that in its impugned Order dated 15 March 2021, the Commission has made following observations and ruling on these issues:

“22.3 The Commission notes that NPRPL is an investor, and it must have signed agreement with its Project Developer i.e. SMWPD, who is responsible for executing works related to grid connectivity. Said agreement / understanding between NPRPL and SMWPD has not been made part of this proceedings. The Commission further notes that the SMWPD had initially received grid connectivity approval of 250 MW which is subsequently increased upto 350 MW. Further, NPRPL's project of 15 WTG (each WTG of 2.05 MW) was part of 350 MW Grid Connectivity approval to SMWPD, therefore under temporary evacuation arrangement

approved by MSETCL (which is restricted to 200 MW) which WTG is to be covered would be depending upon agreement between SMWPD and NPRPPL which is not part of present proceedings.

22.4 Further, NPRPL has also requested to disconnect other idle turbines and allow commissioning of its WTG. In this regard, the Commission notes that details of so called idle WTGs are not part of this proceedings and also the developer of those idle turbines have not been made party to present proceeding. Seeking any relief against any party without making such person party to the proceedings is against the principles of natural justice and hence cannot be allowed.

22.5 In view of above, the Commission is of the opinion that PTC to WTG under consideration cannot be granted in absence of valid grid connectivity. NPRPL may take up this issue with its developer i.e. SMWPD for expediting the work of grid connectivity. They may also approach the Infrastructure development committee which is primarily responsible for periodic review of progress of already granted Grid Connectivity to RE projects.”

Thus, in the above impugned Order, the Commission has recorded that which WTG to be covered under temporary grid connectivity of 200 MW would be governed by agreement between the SMWPD and NPRPPL, however as said agreement was not on record, the Commission was not able to peruse the conditions of such agreement.

13.6. Now in present review Petition, NPRPL has stated that as none of the parties during the original proceeding has questioned about its contractual agreement with SMWPD, same was not submitted during the original proceeding. However, as the commission in the impugned Order has made observations due to non-availability of such agreement, through present proceeding, NPRPL is bringing on records MoU dated 25 January 2013 signed with SMWPD and requested the Commission to allow it as new document which could not be produced during original proceedings. MSEDCL has objected to it as this is not a new document which NPRPL was not aware during the original proceeding.

13.7. In this regard, the Commission notes that it is a fact that during the proceeding of original matter none of the parties had raised any issue about contractual agreement between NPRPL and SMWPD, and the Commission while analyzing issues in the impugned Order wanted to refer to it but could not do so as it was not part of the record. Issue involved in original Petition was about Grid Connectivity, which is to be availed through SMWPD, NPRPL should have annexed it in original petition itself as a very basic and essential document. However, considering importance of such agreement in present matter, the

Commission thinks it fit to allow taking on record MoU dated 25 January 2013 signed between SMWPD and NPRPL.

13.8. The Commission notes that said MoU dated 25 January 2013 has put complete responsibility of Grid Connectivity on SMWPD. Relevant clauses of MoU read as follows:

“1.....

- b. The entire development of the required evacuation system for the power generated from the 49.2 MW wind power project is to be undertaken by the PARTY before the erection/Commissioning of the Wind Turbine generators (WTGs). The Party shall also obtain and secure all the required approvals, consents, NOC, etc. as may be required in connection with development of the aforesaid power evacuation.*
- c. In case of delay in completion of the Substation works for any reason whatsoever, other than for any default by the Company in releasing the agreed milestone payment to the Party, the Party has to arrange for a temporary power evacuation tie-up with any existing MSETCL substation or any other nearby substation in line with the norms of MSETCL/MSEDCL/MEDA.*
- d. The party agrees and undertakes to construct / establish power evacuation and grid connectivity arrangement for the Company in 220/33 kV level at Shedyal for connecting 49.2 MW Project at Vaspeth wind domain site, Maharashtra..... ”*

In the above agreement, SMWPD is referred as ‘Party’ and NPRPL is referred as ‘Company. Thus, as per above agreement, responsibility of developing required evacuation system is of SMWPD and in case of delay in completion of substation works, SMWPD needs to arrange for temporary power evacuation.

13.9. NPRPL has submitted that as SMWPD is bound by above said MoU, SMWPD vide its letter dated 8 August 2019 has requested MSEDCL to connect the subject WTG to the existing 220kV Shedyal PSS by disconnecting the already existing grid connection of a different WTG which was lying idle. NPRPL has further stated that on 5 June 2020, MSEDCL has itself disconnected the WTG of Jath Wind Energy Pvt. Ltd. from grid. As per NPRPL, out of 200 MW Grid Connectivity, only 197.2 MW is currently being utilized by the various WTGs connected to the Shedyal PSS. NPRPL is seeking to utilize the balance 2.8 MW capacity connectivity clearly available in the existing 200 MW connectivity for the subject WTG.

13.10. In this regard, the Commission notes that 200 MW Grid connectivity is issued in the name of SMWPD and as per MoU signed with NPRPL, SMWPD has informed MSEDCL to

allow use of remaining capacity in 200 MW grid connectivity may for commissioning WTG of NPRPL. The Commission notes that SMWPD in its letter dated 8 August 2019 has requested MSEDCL as follows:

“This is with reference to the wind turbine generator with ID – MV2T-21 (1 x 2.0 MW), commissioned on 31.10.2015 in the name of M/s Jath Wind Energy Private limited at Feeder No. 7 at 220kV Shedyal Substation. However the above mentioned Inox make (1x2.0 MW) with turbine generator is not generating power since last 2 Years due to non PPA by MSEDCL Head office Mumbai, and the concentrated load (1x2.0 MW) at the feeder No. 07 is lying idle for long time. We are hereby enclosing the credit notes of the feeder no. 7 for your kind reference.

The total connected load of 200 MVA transformers at 220kV Shedyal substation in feeder 1 to 8 with the present condition in 199.2 MW. However, due to idle condition of wind turbine generator with ID-MV2T-21(1 x 2.0 MW), the effective load connected is only 197.2 MW

Hence, we propose to disconnect the idle wind turbine generator with ID-MV2T-21(1 x 2.0 MW) by the generator M/s Jath Wind Energy Private limited from Feeder No. 7 and in-lieu of the same wind turbine Generator with the ID – VAS 556 (1 X 2.05 MW) by the generator M/s NuPower Renewables Private Limited can be connected to the Grid.

As the Wind turbine Generator with ID – VAS 556 (1 X 2.05 MW) is already erected and the evacuation lines are available and ready for commissioning in all respect, the wind turbine generator can be connected to the Grid.

Now we hereby request your kind approval for disconnecting the turbine with ID – MV2T-21 (1 x 2.0 MW) from Grid and connecting turbine with ID – VAS 556 in lieu of the same in the feeder -7 at 220/33kV Shedyal Sub/stn” [emphasis added]

The Commission notes that WTG of M/s Jath Wind Energy Pvt. Ltd. is commissioned on 31 October 2015 and since then has reportedly remained idle on account of not having valid EPA. Therefore, in August 2019, SMWPD requested MSEDCL to disconnect such generator and in lieu of it to allow connection to WTG of NPRPL.

- 13.11. Admittedly, as on date NPRPL also does not have any valid EPA/PPA as is the case with M/s Jath Wind Energy Pvt. Ltd. who has been requested to be disconnected for this reason and was actually disconnected on 5 June 2020. M/s Jath Wind Energy Pvt. Ltd. is not party

to present case and hence in the impugned Order dated 15 March 2021, the Commission has ruled as follows:

*“22.4 Further, NPRPL has also requested to disconnect other idle turbines and allow commissioning of its WTG. In this regard, the Commission notes that details of so called idle WTGs are not part of this proceedings and **also the developer of those idle turbines have not been made party to present proceeding. Seeking any relief against any party without making such person party to the proceedings is against the principles of natural justice and hence cannot be allowed.**” [emphasis added]*

Above ruling is still applicable as although WTG of M/s Jath Wind Energy Pvt. Ltd. has actually been disconnected on 5 June 2020, it may have a say on allowing its Grid Connectivity to other generator especially in favour of someone who is equally placed in terms of not having a valid EPA. Therefore, the Commission cannot decide this issue without hearing M/s Jath Wind Energy Pvt. Ltd.

- 13.12. NPRPL has argued that SMWPD being Wind Developer in whose name Grid Connectivity has been granted by MSETCL, it has full rights to allocate / reallocate such Grid Connectivity to individual generators. The Commission does not agree with this proposition. Although practice of Wind Developer taking approval for Grid Connectivity at a given location and then subsequently allocating such grid connectivity to Wind Generators through MoU has been in vogue for past several years, it does not mean that such Wind Developers enjoy rights to allocate such grid connectivity to individual generators as per their whims and fancies. As such Grid Connectivity is used to access Transmission Grid, to which non-discriminatory access is allowed by the EA, 2003, Wind Developer through MoU cannot discriminate amongst Wind Generators while allowing connectivity. It is also important to note that such arrangement of using Grid Connectivity of Wind Developer to access transmission grid is similar to Franchisee Arrangement recognized under the EA, 2003 wherein Franchisee acts as agent of Distribution Licensee for consumers in franchisee area. Under such franchisee arrangement, Distribution Licensee is ultimately responsible for providing services to the consumers as per Rules and Regulations. Similarly, in present case, as Wind Generators are ultimate users of Grid Connectivity taken by Wind Developer, MSETCL shall be responsible for protecting legal rights of the Wind Generators who are connected / to be connected to Transmission Grid. The Commission in its Order dated 19 September 2019 in Case No. 235 of 2019 has directed MSETCL to frame procedure for Grid Connectivity as follows:

“12.8 In view of the above and considering the upcoming large Renewable Energy Generation, it is necessary to have separate and tangible with time bound grid connectivity procedure for connectivity of RE Generators/Sources to InSTS . Hence in line with the approach adopted by CTU/CERC, the Commission thinks it fit to

direct STU to formulate a detailed grid connectivity procedure for Renewable Energy sources/Generators in line with the relevant provisions of MERC TOA Regulations 2016 , CERC's approved detailed grid connectivity procedure , GoM's RE 2015 Policy and other relevant Commission's Regulations and the Commission's analysis and ruling in this Order. The same may be initiated by following a transparent process after considering the comments from the stakeholders. This revised procedure shall be submitted to the Commission within a period of three months from the date of this Order."

MSETCL is yet to inform compliance of above directives of the Commission. In case, MSETCL is yet to frame such procedure, it shall complete the process within 2 months from date of this Order. While doing so, MSETCL shall also cover procedure/guidelines for allocating Grid Connectivity by Wind Developer to individual generator. MSETCL shall insure that such Grid Connectivity is not being used for gaining undue advantage by Wind Developers and at the same time each of the Wind generator gets non-discriminatory access to the transmission grid.

- 13.13. In view of the above, even after taking on record new document submitted by NPRPL in present review proceeding, the Commission cannot review its decision as Grid Connectivity being sought in present case is in lieu of other generator (M/s Jath Wind Energy Pvt. Ltd), which is not party to the present proceeding. Accordingly, review sought on this issue needs to be rejected.

14. Issue b: Error with respect to erection date of subject WTG

- 14.1. NPRPL has submitted that in the Impugned Order, the Commission has wrongly noted the date of erection of the subject WTG as 20 April 2014 instead of 20 April 2015. Such error has caused inaccuracy in the finding of the Commission that NPRPL must have taken the business decision of developing the WTG without relying on RE Policy 2015 which was announced post construction of such WTG.
- 14.2. The Commission notes the submission of NPRPL and acknowledges the inadvertent mistake of noting the erection date as 20 April 2014 instead of 20 April 2015.
- 14.3. Further, the Commission highlights that the GoM's RE Policy 2015 was notified in July 2015. Therefore, such factual aspect does not impact the findings of the Commission in the Impugned Order. Hence, the Commission is not inclined to consider any changes in the Original Order based on the submission of NPRPL which is contesting based on the inaccuracy in the Commission's finding as to the date of erection of WTG.

15. In view of above, there is no merits in the review sought by NPRPL.

16. Hence, the following Order.

ORDER

1. Case No. 58 of 2021 is dismissed.

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I.M. Bohari)
Member**


**(Abhijit Deshpande)
Secretary**

