

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
13th Floor, Centre No.1, World Trade Centre, Cuffe Parade, Mumbai-400 005.
Tel. 22163964 / 22163965, Fax No. 22163976
E-mail: mercindia@mercindia.org.in
Website: www.mercindia.org.in

CASE NO.18 OF 2004

In the matter of
Rice Millers Association's Petition regarding non-compliance by MSEB
of Section 126 of the Electricity Act, 2003 and other issues.

Dr. Pramod Deo, Member
Shri. A. Velayutham, Member

ORDER

Dated: 15th December, 2005

1. The Rice Millers Association, Gondia filed the present Petition on 5th May 2004 against the Maharashtra State Electricity Board (MSEB) as Respondents. The Petitioner has prayed that MSEB should be directed as follows:

- “i) Assess as per Section 126 of the EA, 2003 in all theft cases;*
- ii) Refund the excess amount recovered by demanding 20% of the provisional assessment bill as per 31(e) of the Conditions of Supply;*
- iii) To recover PF penalties as per approval given vide letter No.MERC/Case No.1/0725 dated 23.7.2002;*
- iv) To settle all pending disputes of PF penalty and credit the excess amount charged;*
- v) Direct the Respondent to withdraw Circular No.562 circulated vide letter No.SE/BHR/Accts/No.01459 dated 16.3.2004;*
- vi) To settle all such remaining cases to avoid burden of interest and DPC (Case No.6 of 2002) and*
- vii) Bill Gondia consumers at Gondia.”*

2. The Petition states that when, upon inspection of electrical installations of industrial units by MSEB's Flying Squad, any irregularities are observed, MSEB has been filing FIRs with the police under Sections 135 and 138 of the Electricity Act (EA) 2003. The meter box and meter are seized, and the electricity supply is discontinued. Further, provisional assessment is done for a period of 3 years as per Condition 31(e) of MSEB's Conditions of Supply, and the consumer is forced to pay 20% of the provisional assessment bill for restoration of supply. The Petition contends that these actions are in violation of the provisions of Section 126 of the EA 2003. Under Section 128, the Commission is empowered to investigate the matter, and can issue directions under Section 129.

3. The Petition further states that, in respect of power factor (PF) penalty, MSEB's approved Tariff Booklet applicable from 1st January 2002 (following the Second Tariff Order of the Commission) states that - *'In case of consumers who have instruments (meters) to measure the power factor, the power factor penalty shall be as follows:*

"Whenever the average power factor is less than 90%, penal charges shall be levied at the rate of 1% of the amount of the monthly energy bill (excluding T&D loss charge, FOCA Charge, Demand Charge, Electricity Duty) for each 1% fall in the power factor below 90%."(Sub-clause (b))

According to the Petition, MSEB installed LTMD meter with facility to record PF for all LTPG consumers, and all the members of the Association have installed capacitors of adequate size. In spite of this, MSEB are applying PF penalty according to sub-clause (a), and not (b) which is applicable, thus violating the Commission's directives.

4. The Petition further challenges the validity of MSEB's Commercial Circular No. 562, intimating that the provision laid down in "Conditions and Miscellaneous Charges for Supply of Electrical Energy" under Condition No.28(2) has been modified. It is contended that the Commission, vide its Order dated 14th February 2001, had directed MSEB to submit a proposal in respect of Conditions and Miscellaneous Charges for Supply of Electrical Energy for its approval before the next tariff revision proposal, which MSEB has failed to do.

5. The Petition further urges MSEB to comply with the earlier directions given by the Commission in Case No. 6 of 2002, with regard to debiting of lump sum amounts in the regular bills for the period 1998-99 during March and April 2001. At the hearing in that case, held on 21st October, 2002, MSEB had submitted that some cases had already been scrutinized or settled and that scrutiny in remaining 52 cases would be completed within a month. However, the Petition states that all these remaining cases are still pending, and the consumers have been wrongly burdened with mounting interest and delayed payment charges (DPC) claims on the alleged old arrears.

6. The last issue raised in the Petition is that, since consumers find it difficult to approach the S.E. of the Circle Office at Bhandara to get their bills corrected, MSEB should start billing their consumers at Gondia in order to provide better service.

7. In their Reply dated 29th June 2004, MSEB have admitted that there could be some instances where the power factor (PF) penalty was levied wrongly as some members of the Petitioner Association with appropriate meters may have been levied penalty as applicable to consumers who have meters that are not capable of measuring PF. However, this may have occurred inadvertently and instructions would be issued to take immediate remedial action in such cases.

8. In their Reply, MSEB have further submitted that, as directed by the Commission, the draft Booklet of proposed revision in their Conditions of Supply has already been submitted by MSEB for consideration of the Commission. MSEB have proposed to continue the provisions of Condition No.28(a) of the existing Conditions of Supply (which prescribes inter alia that consumer availing power supply on LT should not exceed 50 kVA demand) and, therefore, the

request of the Petitioner to withdraw MSEB's Departmental Commercial Circular No.562 dated 11.01.1996 may not be considered by the Commission at this stage.

9. With respect to the issue of past cases of billing disputes relating to the members of the Association referred to by the Petitioner, MSEB have submitted that these cases being quite old, further time would be required before all the pending cases are settled, inspite of the earlier assurance. In the meanwhile, MSEB have ensured that the power supply of the Association's members is not disconnected for recovery of the arrears pertaining to these past disputed cases.

10. With respect to the request of the Association that its members should be billed at Gondia instead of the office at Bhandara, MSEB have submitted in their Reply that such a request would mean interference in the administrative decisions of the Board. Besides, such request is based on the apprehension that wrong bills are issued by MSEB, as the office at Bhandara is overburdened with work. MSEB has submitted that so long as the members of the Association are issued correct bills, there would be no scope for any grievance by the Association on this account.

11. MSEB's additional reply submitted on 16th October 2004 substantially deals with the allegations made by the Association that MSEB is not following the provisions of Section 126 of the EA, 2003. In their Reply, MSEB have submitted that the EA 2003 prescribes different treatment for consumers involved in "unauthorized use of electricity" and "theft of electricity". Further, MSEB has submitted that the provisions of Section 126 basically deal with consumers involved in unauthorized use of electricity, whereas in respect of consumers involved in theft of electricity, the assessment and other actions need to be carried out in accordance with the provisions of Section 135 of the EA 2003 alongwith the provisions of the prevailing Conditions of Supply. In addition, MSEB has argued that, the Petitioner has an alternate remedy to contest the action taken by MSEB before the Special Court.

12. At the admissibility hearing held on 27th October 2004, the Commission asked Shri. Agrawal, (representative of the Association) to address, how their Petition is maintainable for admission in view of specific objection filed by MSEB.

13. Shri. Agrawal pointed out that the primary issue has been non-compliance of provisions of Section 126 of the EA 2003 by MSEB.

14. Shri. Agrawal then referred to a case filed by the Petitioner Association on behalf of its member, Shanti Nagar Rice Mill, Gondia, in which case, there was evidence of tampering of the meter. He submitted that tampering cases have not been referred to under Section 126, which deals with "unauthorized use of electricity" and therefore, there is a distinction between "theft" and "unauthorized use of electricity".

15. The Commission observed that even if it is assumed that Section 126 of the EA 2003 is applicable in the instant case instead of Section 135, the Petitioner has still not addressed the issue whether the Commission is the appropriate forum to agitate the issue and how the Petition deserves admission for hearing at this stage.

16. In this context, Shri. Agrawal, referred to the powers of the Commission under Sections 128 and 129 of the EA 2003. He quoted Section 128 as under:

S.128 Investigation of certain matters:

“The Appropriate Commission may, on being satisfied that a licensee has failed to comply with any of the conditions of license or a generating company or a licensee has failed to comply with any of the provisions of this Act or the rules or regulations made thereunder, at any time, by order in writing, direct any person (hereafter in this section referred to as “Investigating Authority”) specified in the order to investigate the affairs of any generating company or licensee and to report to that Commission on any investigation made by such Investigating Authority.”

17. Shri. Agrawal submitted that Section 126 (Part XII) of the EA 2003 clearly provides for the procedure that has to be followed by MSEB, which according to the Petitioner, MSEB has failed to follow. He further submitted that, MSEB has failed to give an opportunity to their consumers to file objections as per sub-section (3) of Section 126 of the EA 2003. He argued that, MSEB has also failed to carry out provisional assessment and therefore, the consumers are deprived of their right of appeal under Section 127 of the EA, 2003.

18. The Commission pointed out to Shri. Agrawal that MSEB have already filed a case against the concerned consumer under Section 135 of the EA 2003. Therefore, before going into the details of the present case, the Petitioner will have to satisfy the Commission that this is the proper forum for hearing this case.

19. In this context, Ms. Deepa Chawan, Counsel for MSEB submitted that, Section 128 of the EA 2003 empowers the Commission to investigate the affairs of a generating company or a licensee by appointing an investigating officer. However, Section 128 does not contemplate any investigation of the kind that is contemplated by the Petitioner. Further, she argued that, even if it is assumed that MSEB has erroneously invoked the provisions of Section 135 of the EA 2003 by filing a case in the Criminal Court or a Special Court constituted to hear such cases, then these authorities that are adjudicating authorities by themselves, will naturally consider various provisions of the EA 2003 and accordingly decide whether MSEB or any other licensee as the case may be, has wrongly invoked the provisions of Section 135 of EA 2003. Therefore, Counsel for MSEB requested the Commission to consider whether a consumer can approach the Commission under such circumstances, while ruling on admissibility of the said Petition.

20. Further, Counsel for MSEB argued that in the instant case, Association of Rice Millers has approached the Commission as a representative case. She submitted that in cases of theft or even unauthorized use of electricity, it needs to be considered whether it is possible to file such cases in a representative manner, as the facts and circumstances of each case will differ from one to another. To support her argument further, she referred to the case of M/s. Jai Bamleshwari Rice Mills, which was heard by the Commission recently, where the CT unit itself was taken away and replaced, with the result that the multiplying factor and therefore, the ratio itself has changed. Therefore, she argued that, as the facts of each case would vary from case to case, under the circumstances the Commission should not admit, a Petition filed in a representative capacity since there cannot be generalization in the nature of reliefs, as sought through this Petition.

21. Further, as regards the issue of adopting the principles of natural justice, as raised by Shri. Agrawal, Counsel for MSEB submitted that MSEB has always made available copies of complaints filed against the consumers as well as copies of documents annexed to the proceedings filed against the consumers. Therefore, she argued that the injustice, if any, caused to anyone on this account, will have to be scrutinized on a case to case basis.

22. Shri. Agrawal, however, pointed out that the main issue raised before the Commission by the Petitioner Association is that the procedure under Section 126 of the EA, 2003 has not been followed by MSEB in any of the cases relating to their members, where there has been evidence of tampering of meter.

23. The Commission asked Shri. Agrawal as per provisions of Section 128 of the EA, 2003 whether an Association can represent a consumer or a number of consumers to seek appointment of 'Investigating Authority'? Further, whether the Petitioner is seeking to appoint an investigating officer in the instant case, as per provisions of Section 128 of EA 2003.

24. In response, Shri. Agrawal submitted that the Petitioner Association does not want appointment of an agent or investigating officer under Section 128 of the EA 2003. He reiterated that it is the Petitioner's case that the provisions of Section 126 of the EA 2003 are not followed by MSEB in the consumer cases where tampering of meter has been detected. He further submitted that, the Commission has to exercise its powers to ensure that the provisions of the EA 2003 are duly followed by the licensee.

25. Shri. Agrawal further submitted that as per the provisions of Section 126 of the EA 2003, the maximum permissible period of assessment for non-domestic use is only 6 months immediately preceding the date of inspection, whereas MSEB has carried out assessment for a period of 36 months preceding the date of inspection. He further argued that, had MSEB given the opportunity to the concerned consumers to file their objections and if the assessment was undertaken for period of only 6 months, then it would have been possible for a consumer to pay the entire amount as per assessment and discharge its liability.

26. Shri. Agrawal then drew the attention of the Commission to issue No.5 of the Petition about the validity of MSEB's Commercial Circular No.562 dated 11th January 1996. To the Commission's query referring to date of issue of this Circular, Shri. Agrawal replied that it was issued by MSEB prior to the Tariff Order that gave optional LTMD based tariff as approved by the Commission. However, he pointed out that based on MSEB's reply dated 15th September 2003 (Annexure 8), it is clear that as on 31st July 2003, 1169 LTPG consumers out of 5431 consumers (with sanctioned load between 67 HP and 100 HP) are provided with LTMD meters. Hence, while applying Commercial Circular No.562, MSEB is discriminating between consumers.

27. Shri. Agrawal then pointed to Para 3 of the letter dated 16th March 2004 (Annexure "A" of the Petition) addressed by the S.E., MSEB, Bhandara to M/s. Rani Sati Rice Mill and submitted that this major change in MSEB's Circular is not approved by the Commission. Upon this, the Commission asked whether the said Circular was at variance with the Commission's Tariff Order.

28. Shri. Agrawal submitted that there is no uniformity in the electricity supply by MSEB because MSEB is providing electricity supply to other Rice Mills within Maharashtra for 67 HP to 100 HP under LT supply, but they are not giving such supply to the members of the Petitioner Association. In fact, MSEB are restricting the use of power under LT connection to 50 KVA, while other consumers are given 100 HP supply on LT without LTMD meter.

29. He further argued that, MSEB have provided power supply upto 100 HP at LT without LTMD meter to a large number of consumers. This shows that MSEB have given no load restriction in such cases and they are charging only Rs.3000/- as fixed charge (towards service line charges). On the other hand, MSEB are restricting the power to be used by present members of the Association upto 50 KVA. He submitted that it is impossible for the members of the Association to compete with other consumers who are given a facility of availing LT connection upto 100 HP. He submitted that MSEB's Head Office should issue a Circular dealing with this variation of policy in different Circles. He contended that if there is no uniformity in the level of power supply, then it is not possible for the members of the Petitioner Association to carry on their business. He further contended that in a competitive industry, MSEB cannot restrict the use of power for the members of the Petitioner Association to 50 KVA, when other consumers with similar requirement and usage purpose, are provided power supply upto 100 HP at LT.

30. In this context, Counsel for MSEB referred to MSEB's Commercial Circular No. 562 and quoted the last sentence in the 3rd Para as under:

"... In stray cases where the demand exceeds 67 HP equivalent to 50 KVA, the demand charges given in LTMD tariff will be applicable as per tariff".

She submitted that if there is any case of discrimination by MSEB against the members of the Petitioner Association, it may be inadvertent and MSEB will be happy to look into and rectify the matter. She submitted that there was no discrimination as far as implementation of this Circular is concerned. She also submitted that this is one of the Circulars, which is sub-judice before this Commission for its consideration and will be considered when this Commission finalizes the Conditions of Supply.

31. The Commission observed that the Conditions of Supply is a much larger issue to be addressed separately, and that the Commission has finalized the MERC (Supply Code and Other Conditions of Supply) Regulations 2005. Accordingly, as per Regulation No. 19 of the said Regulations, the licensees have to propose their 'Conditions of Supply' for Commission's approval and the process for the same is underway. Pending finalisation of the same, the existing MSEB Conditions of Supply will continue as long as they are not inconsistent with the EA 2003 or Regulations or any Tariff Order or any direction as may have been issued by the Commission from time to time.

32. Counsel for MSEB submitted that as far as the contents of this particular Circular are concerned, the same pertains to the practice being followed by MSEB since 1970. Counsel submitted that, if there are any cases where there is evidence of discrimination by MSEB, the same may be pointed out by the Petitioner forthwith as MSEB's officer from Bhandara is present at the hearing. In case, due to inadvertence on the part of MSEB, there has been discrimination against any of the members of the Petitioner Association, the Counsel for MSEB assured that the same shall be looked into by MSEB.

33. It was observed by the Commission that if this Circular is at variance with the Commission's Tariff Order and its directives, then the question of its application will not arise. However, in case the Tariff Order is silent on a particular issue, then obviously, the old Supply Conditions continue to apply. Counsel for MSEB submitted that, specifically on this issue, the Tariff Order is silent.

34. Shri. Agrawal then referred to Issue No.4 of the Petition, i.e., settlement of dispute of old arrears. He pointed out that similar matter of dispute was discussed in detail during the hearing in the Commission held on 21st October 2002 in Case No.6 of 2002. He submitted that in this particular case, MSEB debited lump sum amount to the regular bills for the period of 1998-99 during the months of March and April 2001. He referred to the Record of the proceedings of the hearing held on 21st October 2002 and submitted that during the hearing, MSEB had assured the Commission that they will settle all the cases within a period of one month. He submitted that most cases are still lying pending with MSEB and the consumers are facing hardships and are being overburdened with the huge amount of interest and DPC on such old arrears. Therefore, he submitted that MSEB should be directed to settle all such remaining cases to avoid burden of interest and DPC to consumers.

35. Representative on behalf of Rice Millers Association further informed the Commission that though MSEB are charging interest on DPC, the members are paying the same under protest to MSEB until now, after 3 to 4 years, such amount has doubled or tripled. Therefore, some relief should be given to the consumers.

36. The Commission noted that there has to be expeditious settlement in this matter and directed MSEB Counsel to take instructions and file written submissions on the same. The Commission observed that it is necessary to fix some timeframe within which relief should be provided by MSEB to their consumers.

37. The Commission enquired whether it is possible for MSEB to give some time frame within which relief could be provided. Counsel for MSEB assured the Commission that MSEB would look into these matters and dispose them off within a period of 3 months.

38. The Commission has considered the written submissions and oral presentations made by the parties during the hearing. The Commission notes that the Petitioner has prayed to '*assess as per Section 126 of the EA 2003 in all theft cases*'. In this context, the Commission observes that EA 2003 has specifically mandated separate treatment for 'un-authorized use of electricity' under Section 126 and 'theft' under Section 135 respectively. Thus, there cannot be generalization of directive to treat all alleged 'theft' cases under Section 126 as prayed by the Petitioner and the 'theft' related cases will have to be dealt with as per provisions of Section 135.

39. Further, the provisions under Sections 126 and 135 of the EA, 2003 relating to unauthorized use and theft respectively, are specific in nature. The procedure for assessment, dispensation and assessing authority in case of 'un-authorized use of electricity' have been set out in Section 126. Further, Section 127 has provisions pertaining to appeal to 'Appellate Authority' against the 'final Order' of the assessing authority. Similarly, Section 135 sets out the provisions in cases of alleged theft, and Section 153 under Part XV refers to the constitution of 'Special Courts' as forum for speedy trial of offences referred under Sections 135 to 139. Thus, the

Commission cannot have jurisdiction to make assessment under Section 126, neither can it entertain appeals against such assessment under Section 127. Similarly, it cannot try cases pertaining to offences referred under Section 135. In view thereof, it is not within the Commission's jurisdiction to determine whether or not Section 126 or Sections 135 to 139 of the Electricity Act, 2003 relating to un-authorized use of electricity or theft, as the case may be, have been applied properly in a given case. As far as the criminal proceedings initiated by MSEB against the Petitioner under Section 135 are concerned, whether the same are maintainable and whether MSEB has followed due procedure and process of law, and whether there is at all a case made out under Section 135 rather than Section 126, are all matters which will be decided by the competent Court before which the Petitioner will have his say, and not before the Commission.

40. It has been submitted by Shri. Agrawal that though the members of the Association have installed the capacitors of the adequate size, MSEB is not charging power factor penalty as per the meters. The Commission has approved MSEB's booklet in respect of tariff applicable to the different categories of consumers with effect from 1st January 2002 vide its letter No. MERC/Case No. 1/0725 dated 23rd July 2002, wherein it has been decided that -

'In case of consumers, who have instruments (meters) to measure the power factor, the power factor penalty shall be as follows:

"Whenever the average power factor is less than 90%, penal charges shall be levied at the rate of 1% of the amount of the monthly energy bill (excluding T&D loss charge, FOCA Charge, Demand Charge, Electricity Duty) for each 1% fall in the power factor below 90%."

Further, the Commission has issued its third Tariff Order dated 1st December 2003 and detailed Tariff Order dated 10th March 2004, in the matter of Case No. 2 of 2003 corresponding to MSEB's ARR and Tariff Petition for FY 2003-04. In this context, the Commission has also approved the 'LT Tariff Booklet', which provides for provisions pertaining to Power Factor Penalty and Power Factor Incentive, as outlined below -

Power Factor Penalty

"PF penalty will be levied only if the PF recording instrument is available and in case of consumers, who have instruments (meters) to measure the power factor, the power factor penalty shall be as follows:

Whenever the average power factor is less than 90%, penal charges shall be levied at the rate of 2% (two percent) of the amount of the monthly energy bill (excluding Regulatory Liability charge, FOCA Charge, Demand Charge, Electricity Duty) for first 1% (one percent point) fall in the power factor below 90%, beyond which the penal charges will be levied at the rate of 1% (one percent point) for each percentage point fall in the power factor below 89%."

Power Factor Incentive

“The Power Factor incentive shall be applicable to those General Motive Power & Non-Domestic consumers only, who have opted for the MD based tariff & are provided with instruments (meters) to measure the power factor and the same shall be as follows:

- 1. Whenever the average power factor is more than 0.95, an incentive will be given to Low Tension General Motive Power consumers and Non-Domestic consumers, who have opted for LTMD based tariff.*
- 2. The said incentive will be at the rate of 1% (one percent) of the amount of the monthly energy bill (excluding Regulatory Liability Charges, Fixed / Demand Charges, FOCA, Electricity Duty) for every 1% (one percent) improvement in the average power factor above 0.95.*
- 3. For power factor of 0.99, the effective incentive will amount to 5% (five percent) reduction in the energy bill and for unity power factor; the effective incentive will amount to 7% (seven percent) reduction in the energy bill.*
- 4. Power factor will be computed, by the method of kWh / KVAh & rounded off to two decimal points as per the existing practice.”*

41. In view of above, it is clear that wherever the meters with facility of measurement of power factor have been installed by MSEB, the PF penalty should be charged as per those meter readings. In their Reply dated 29th June 2004, MSEB have themselves admitted that there have been instances where the PF penalty was levied wrongly and that immediate remedial action would be initiated in all such cases, wherever discrepancies were observed. MSEB is therefore, directed to settle all pending cases relating to dispute of Power Factor Penalty and also credit the excess amount so charged within a period of six months from the date of the hearing or in the immediate billing cycle, if not adjusted so far.

42. With respect to the issue of MSEB's Commercial Circular No. 562 dated 11th January 1996, Counsel for MSEB submitted that though there is no discrimination as far as implementation of this Circular is concerned, MSEB assures that if there is any case of discrimination by MSEB against the members of the Petitioner Association, it may be inadvertent and MSEB will be happy to look into and rectify the matter. Presently, this Circular forms a part of MSEB's Conditions of Supply, which is sub-judice before this Commission for its consideration and same will be addressed at the time of approval of the 'Draft Conditions of Supply' filed by licensees before the Commission. However, it is clarified that as per Regulation No. 19.1 of MERC (Supply Code and Other Conditions of Supply) Regulations 2005, the Circular would not be valid, if it is inconsistent with any of the provisions of said Regulations or contrary to any of the directives issued by the Commission from time to time through its Tariff Order or otherwise.

43. With respect to prayer (vi) of the Petition, the Commission notes that, Counsel for MSEB has already submitted that MSEB would look into the pending matters for settlement of dispute of old arrears (Case No.6 of 2002) and dispose them off within a period of 6 months. The

Commission hereby directs MSEB to expeditiously scrutinize the pending cases and settle the matter, in any case, not later than three months from date of this Order, if not done until now.

44. With respect to the request of the members to be billed at Gondia instead of the office at Bhandara, the Commission believes that this is within the realm of administrative decision making by MSEB and therefore, does not wish to comment on the same. However, MSEB is advised to address genuine consumer grievances, so as to improve its customer service.

45. Finally, the Commission advises MSEB that they need to take concerted action to dispose off the cases within the time frame agreed to by them before the Commission. Any failure on this count will be construed as violation of the Commission's directions and will attract action under Sections 142 and 146 of the EA, 2003.

In view of the above directions, the Petition is accordingly disposed off.

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC.