

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 72 of 2008

In the matter of
Complaint filed by Maharashtra Paper and Board Manufacturers Association
under Section 142 of the Electricity Act, 2003 against MSEDCL

Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member

Maharashtra Paper and Board Manufacturer's Association
Manisha, Behind UTI Bank, Adalat Road,
Aurangabad – 431 005

... **Complainant**

Versus

Maharashtra State Electricity Distribution Company Ltd
5th Floor, Prakashgad,
Bandra (East), Mumbai – 400 051

... **Opponent**

ORDER

Dated: December 19, 2008

The Maharashtra Paper and Board Manufacturer's Association filed a complaint on 4.9.2008 invoking the provisions of Section 142 of the Electricity Act, 2003 ("EA 2003") alleging breach by MSEDCL of Tariff Order dated 10.3.2004 in Case No. 2 of 2003. It is alleged that MSEDCL is in breach of the said order for collecting excessive amount of Regulatory Liability Charge (RLC) thereby causing grave injustice to the Complainant.

2. The Complainant has made the following submissions:
 - a) The concept of RLC was introduced vide Tariff Order dated 10.3.2004 in Case No. 2 of 2003 and under the same, RLC was to be charged for only one year and to the extent of Rs. 947 crore only. Therefore, MSEDCL was duty bound



to discontinue RLC after the targeted recovery of Rs. 947 crore. However, MSEDCL continued charging RLC till the Commission discontinued it. RLC was charged from the billing month of December 2003 and was being recovered till September 2006 and an amount of Rs. 3227 crore was recovered under the RLC instead of Rs.947 crore. Thus, an excess recovery to the extent of Rs. 2280 crore has been made by MSEDCL.

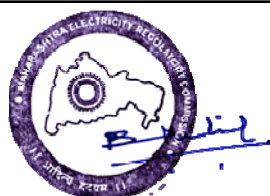
b) In spite of the Commission's directions under Order dated 20.10.2006 in Case No. 54 of 2005 to provide treatment for refund of RLC in MYT regime, MSEDCL did not make any provision for refund of RLC in its first MYT proposal. Therefore, the Commission in its Tariff Order dated 18.5.2007 directed MSEDCL to refund Rs. 500 crore of RLC to the specified consumer categories in FY 2007-08, out of the total amount of around Rs. 3,227 crore collected by MSEDCL through RLC, which was like a loan given by the subsidizing categories to help MSEDCL tide over the financial crisis due to its heavy distribution losses. In the same Tariff Order dated 18.5.2007, the Commission directed MSEDCL to refund the balance amount in the near short term.

c) In the Clarificatory Order of the Commission dated 24.8.2007, the Commission clarified the following:

"Since MSEDCL has not refunded the RLC for the bills issued till date during the period May 2007 to August 2007, the Commission has determined the monthly RLC refund in such a manner that the entire refund of Rs. 500 crores occurs over the balance seven months of the year, as computed above. This would enable MSEDCL to overcome any liquidity constraint, which could occur if MSEDCL were directed to combine the refund of past three months with that date in August 2007, and give the balance refund thereafter."

3. Aggrieved by the conduct of MSEDCL committing breach of the Commission's Order dated 10.3.2004, Complainant prayed for the following reliefs:

"a) The Respondent be directed to refund the excess amount of Rs. 2280 crores collected as RLC.



b) The Respondent be further directed to pay interest by way of damages @ 18% p.a. on the excess amount, from January 2005 till complete refund.”

4. A hearing was held on 16.10.2008. In the hearing, Shri. .S.C. Karandikar, Advocate, appearing for the Complainant made the following submissions:

- a) Section 61 (c), (d), (e) and (i) of the EA 2003 are the factors to be considered by the Commission while determining tariff.
- b) It was suggested by Mumbai Grahak Panchayat that if the MSEB needed Oxygen in the form of tariffs to recover the cost of excess losses, the consumers would be willing to contribute the same, provided the Commission treated this contribution as a Regulatory Liability owned by the MSEB to the consumers, as this was not part of the MSEB's rightful revenue requirement. The Commission gave serious thought to the suggestion and opined that this may solve the current predicament. This was only a relief suggested by the Commission.
- c) In the Order dated 10.3.2004 in Case No. 2 of 2003 Opponents were allowed to collect RLC only to the extent of Rs. 947 crore, but an amount of Rs. 3227 crore was recovered under the RLC. MSEDCL must not enjoy any benefits without paying interest.
- d) Allowing base T&D loss levels of 26.87% means abnormal increase of cost of supply to consumers and is against Section 61 (g) of EA 2003 and is rewarding MSEDCL for its continued proven inefficiency and burdening the huge amount on the innocent consumers for no fault on their part.

5. Replying to the Complainant's arguments, Shri. Abhishek Khare, Advocate for the Opponent made the following submissions:

- a) The complaint is not maintainable on technical reasons and on merits. Under Section 142 of the EA 2003, no substantive relief can be granted, only penalty can be levied. If there is a wilful default then the Commission may penalize MSEDCL.



- b) In the prayers, Complainant has sought adjudication on the issue of the amount over and above Rs. 947 crore collected by MSEDCL found in excess. There has been no order of the Commission which holds that the amount collected is excess of what was permitted. Such a prayer cannot be entertained under Section 142.
- c) Interest cannot be asked for under Section 142 as prayed.
- d) There is nothing to show that only Rs. 947 crore was permitted by the Commission to be collected as RLC.
- e) The Order dated 9.9.2005 in Case Nos. 7 and 8 of 2005 provides:

“3. According to both Applications, the RLC was applicable only for one year from the date of effect of the revised tariff, i.e. from 1st December, 2003. However, MSEB have continued to charge RLC from the concerned consumers even after 30th November, 2004, in breach of the Tariff Order. Hence, the amount so recovered should be refunded with interest. The RLC itself should also be reviewed, and returned to the consumer categories through tariff reduction as per the dispensation envisaged in the Order. Essentially, the Applicants have relied on certain statements in the detailed Order, particularly the following:

“The net cost of the excess energy input requirement is Rs 947 crore.... Thus, there is a need to contribute Rs 947 crore towards the Regulatory Liability over a period of one year. The average rate of contribution works out to 50 paise per unit for the subsidizing categories....”.”

“20. In both their written and oral submissions, the Applicants as well as MSEDCL have quoted extensively from the Tariff Order, as set out in the foregoing paras, with regard to the nature and background of RLC, and it is not necessary to repeat it except to draw attention once again to some of the provisions of the detailed Tariff Order dated 10th March, 2004 set out below. At para 18 of Part III of the Order, the Commission had ruled that:



"the revised tariffs would be applicable for 4 months of FY 2003-04, i.e. from 1st December,2003 to 31st March, 2004, and till such further time as the MSEB does not approach the Commission for tariff revision."

Thus, it was made unambiguously clear that the RLC, being a separate component of tariff as clarified in the Order, would continue to be charged beyond 30th November, 2004, and until the next tariff revision takes place. The Petitioners have cited the basis of the computations made by the Commission to determine the quantum of RLC to support their argument that it was applicable for only one year. However, although the computations for determining the RLC and other charges are based on an assessment for a specific and finite period, the Tariff Order envisages that they would continue until the next tariff revision process is completed, when the ARR would be reviewed."

"21. In this connection, the Commission notes that, since its last Tariff Order, significant changes have taken place in the ground realities, notably the unbundling of MSEB into three functional entities and a holding company, changes in the demand scenario, load shedding on an extensive scale, changes in the price scenario with regard to outside purchases, and other parameters. These require MSEDCL to approach the Commission at the earliest with their ARR, which is already overdue, along with a proposal for tariff revision where necessary. The Commission accordingly directs MSEDCL to submit their ARR and tariff proposal by the end of November, 2005. The RLC dispensation would also be re-examined during that process."

- f) The Commission has considered the nature of the amount in April 2008. The exact amount of RLC, which was collected by MSEDCL, has been determined by the Commission. The process of refund has been initiated by the Commission. There is no question of interest considering the amount of income. There cannot be any application of Section 62 (6). There is no excess



recovery. There must be adjudication to the effect that there is excess recovery. The Commission has decided the modalities and quantum as to refund, therefore the present complaint is not maintainable.

6. Subsequently, the Complainant filed its written submissions through its Advocate, on 18.11.2008. It has been contended therein that the Commission's Order dated 9.9.2005, as relied upon by the Opponent, does not come in the way of the present complaint. It has also been contended that it was never the intention of the Commission while passing the Order dated 10.3.2004 to make RLC as a permanent feature of tariff but it was purely a stop gap arrangement and thus was to remain in force only for the period for which it was assessed. The following portion of the Order dated 10.3.2004 have been referred:

“The Commission thus rules that the revised tariffs would be applicable for 4 months for FY 2003-04, i.e., from December 1 to March 31, 2004, and till such further time as the MSEB does not approach the Commission for tariff revision.”

The Complainant has submitted that these observations cannot be interpreted in isolation and without considering its background. The Complainant has also contended that the issue of refund of RLC cannot be equated with revision in tariffs of MSEDCL. The RLC could not have been continued to be recovered by the Opponent even when the losses were not being reduced. The Complainant has contended that although, the Commission has in its Order dated 20.6.2008 recognised the continuance of RLC for a period of around 2.75 years when it was intended to be levied only for one year that by itself does not give sanctity to the over-recovery.

7. Having heard the Parties and after considering the material placed on record, the Commission is of the view that it will decide the matter only in the light of the prayers made by the Complainant in the complaint. The Commission cannot go beyond the prayers made. The prayers read as under:



“a) The Respondent be directed to refund the excess amount of Rs. 2280 crores collected as RLC.

b) The Respondent be further directed to pay interest by way of damages @ 18% p.a. on the excess amount, from January 2005 till complete refund.”

The first issue that needs to be decided is whether the Opponent collected RLC in excess of what had been allowed to be levied. In the Tariff Order dated 10.3.2004, it was held that Rs. 947 crore was the amount required to be contributed towards the Regulatory Liability over a period of one year, as Rs. 947 crore was the net cost of the excess energy input requirement (6107 MU at an average rate of Rs. 1.55 per unit). However, it needs to be pointed out that the Commission has taken into account an overall RLC collection by the Opponent of Rs. 3227 crore over a period from December 2003 to September 2006. This is evident from the following portion of the Order dated 20.6.2008 in Case No. 72 of 2007 in the matter of MSEDCL’s Petition for approval of Annual Performance Review for FY 2007-08 and Tariff for FY 2008-09:

*“26. The Commission, in line with its directions in the Order dated April 2, 2008 in Case No.s 47 and 92 of 2007 on the Review Petition filed by MSEDCL on the issue of refund of Regulatory Liability Charges (RLC), has considered a refund of RLC of Rs. 500 crore in FY 2008-09 to be refunded to the specified consumer categories, out of the **total amount of around Rs. 3227 crore collected by MSEDCL** through RLC over the period from December 2003 to September 2006, which were like a loan given by these subsidizing categories to help MSEDCL tide over the financial crisis due to its heavy distribution losses. This is only a token amount, amounting to around 16% of the RLC collected from the selected consumer categories. It is expected that with progressive improvement of MSEDCL’s operations in future years, the balance amount will be refunded in the near short-term. This refund amount of Rs. 500 crore has been added to the ARR of MSEDCL for FY 2008-09, and will thus be recovered from all the consumers of MSEDCL.”*

[Emphasis added]



Thus, it is evident that the Commission has expressly acknowledged that the refund of RLC of Rs. 500 crore in FY 2008-09 amounts to around 16% of the total amount of around Rs. 3227 crore collected by MSEDCL. The liability to refund the balance amount which works out to Rs. 2280 crore has not been written off. The Opponent will have to refund the excess collected in the near short-term with its progressive improvement of operations. Thus, the contention raised by the Complainant regarding collection of RLC over and above Rs. 947 crore has been addressed by the Commission in its Order dated 20.6.2008. Further, it would be relevant to point out to certain portions of the said Order dated 20.6.2008, as under:

“6.4 Methodology for refund of RLC

.....

During the public process on the APR Petition filed by MSEDCL, there were requests that the refund of RLC should be undertaken on a one-to-one basis, rather than to the category as a whole.

The Commission has reconsidered its views in this regard. Though the Order dated March 10, 2004, states that RLC collected by MSEDCL will be refund to the category as a whole, and not to the individual consumer, the Commission is now of the view that it would best serve the interests of justice, if the refund of the RLC collected by MSEDCL is undertaken on a one-to-one basis. The reasons for the same are as given below:

- a) *The Commission understands that MSEDCL has maintained a record of individual consumer-wise RLC paid, though it was not required to do so.*
- b) *The RLC, when introduced, was intended to be levied only for a period of one year, but due to the fact that no ARR and Tariff Petition was filed for a long time by MSEB/MSEDCL, the levy of RLC continued for a period of around 2.75 years, from December 1, 2003 to September 30, 2006.*



c) *Even after this period, MSEDCL has not refunded the RLC collected from the consumers, citing lack of liquidity and inadequate performance improvement. Consequently, it is now around four and a half years, since the levy of RLC commenced.*

d) *During this period, several new consumers would have been added to MSEDCL's consumer base, who would either have contributed RLC for a period lower than 2.75 years or may not have contributed at all, since they would have been consumers for only part of this period.*

e) *If MSEDCL were to refund the RLC to the category as a whole, rather than on a one-to-one basis, it would result in a situation wherein consumers who have contributed to RLC would get lower than what they have actually contributed, because consumers who have not contributed at all or who have contributed lower amounts, would also be eligible to the same amount as refund. This would be against natural justice.*

f) *By ordering that the refund of RLC be done on a one-to-one basis, the Commission is of the view that on the one hand, consumers who have contributed to RLC would get refund in the same proportion as their contribution, while consumers who have not contributed to RLC, would not be eligible for any refund. This would be a very just solution and would not adversely affect any consumer.*

In view of the above observations, the Commission rules that the refund of RLC would be undertaken on a one-to-one basis, rather than to the contributing category as a whole, in the following manner.

a) *The refund of RLC will be in absolute terms, viz., Rs/month, and not in terms of paise/kWh of consumption, so that the consumers are eligible for a fixed amount every month, irrespective of their consumption, minimising the need for undertaking detailed truing up of this refund amount. It would also*



ensure that no injustice is done to consumers who have shifted/are planning to shift to captive consumption subsequently.

b) Since Rs. 500 crore is to be refunded out of the total RLC collection of Rs. 3227 crore, the refund in FY 2008-09 will be in the same proportion of the contribution by that consumer. The percentage of refund works out to 15.5%.

This will also ensure that consumers get the refund in the exact same proportion as their consumption, and consumers who have paid RLC for a lower duration, would get lower refund on a monthly basis, such that all the consumers get their complete refund over the same period of time.

c) Since the effective billing period remaining in FY 2008-09 is nine months – from July 2008 to March 2009 (considering that MSEDCL will have to incorporate this methodology into the billing software), MSEDCL should ensure that the entire refund of Rs. 500 crore is undertaken in the balance nine months, by ensuring proportionate refund.

d) MSEDCL should ensure that the RLC is refunded in the time-frame provided by the Commission, given that the amount is being recovered through the base ARR from all the consumers. In case MSEDCL delays the refund beyond the billing month of July 2008, then MSEDCL will be liable to pay interest at the rate of 6% per annum to the consumers on the amount of refund due to them, for the period of delay. This interest paid, if any, will not be recoverable from the ARR.”

Although the issue of levying penalty under Section 142 of the EA 2003 does not form a part of the prayers in the Petition in this case, it is pointed out that the same has already been decided upon by the Commission in the Order dated April 2, 2008 in Case Nos. 47 and 92 of 2007.



The Commission has in its Order dated 20.6.2008, acknowledged that RLC, when introduced, was intended to be levied for a period of one year or till the time the licensee filed its next ARR and tariff revision Petition before the Commission. The levy of RLC continued for a period of around 2.75 years, from December 1, 2003 to September 30, 2006, since the next tariff revision Petition was decided upon by the Commission only on September 29, 2006. Therefore, the contention that RLC was being recovered till September 2006, although RLC was to be charged only for one year, is not tenable. As regards the contention on excess recovery, since the total RLC collection has been acknowledged by the Commission as Rs.3227 crore, the issue of excess recovery to the extent of Rs. 2280 crore made by MSEDCL, is covered in the overall liability of MSEDCL after deduction of Rs. 500 crore that has been already directed to be refunded in the FY 2008-09. This issue of excess recovery is not tenable, therefore, in light of the Order dated 20.6.2008.

As regards the prayer to grant interest @ 18% p.a. on the excess amount from January 2005 till complete refund of RLC, the Commission has already held as under: in Paragraph (7) of its Order dated April 2, 2008 in Case No. 47 and 92 of 2007, in the matter of Review Petition filed by MSEDCL in the context of refund of Regulatory Liability Charges:

“ ...

*Also, it is not possible to consider the reduction in tariff in order to refund the RLC to be linked directly to the reduction in losses as compared to the target set by the Commission, because in order to refund any amount, the tariffs will have to be determined considering the losses at a higher level than the actual losses, to ensure that MSEDCL has surplus funds due to efficiency gains, which could then be used to refund the RLC. The straightforward method to balance the interests of MSEDCL as well as the contributing consumer categories would be to include this amount of RLC refund as an expense in the ARR, so that it is shared by all consumers. **In view of the above observations and directions, no interest would be payable by MSEDCL to the contributing subsidising categories, with regard to the amount of RLC not refunded till date.**” (emphasis added)*



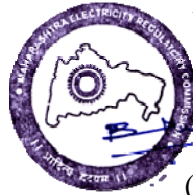
Thus, the issue of excess recovery as well as payment of interest on amounts not refunded earlier, as sought by the Petitioner, are not tenable.

The Complainant has contended that allowing base T&D loss levels of 26.87% means abnormal increase of cost of supply to consumers and is against Section 61 (g) of EA 2003 and is rewarding MSEDCL for its continued proven inefficiency and burdening the huge amount on the innocent consumers for no fault on their part. The Commission is of the view that the above contention is not within the ambit of the present complaint because it, in effect, challenges the Order dated 10.3.2004 of the Commission. This contention is therefore liable to be rejected and is therefore rejected.

In view of the above, the present Complaint stands dismissed.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member



(P. B. Patil)
Secretary, MERC