

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 82 of 2006

**In the matter of compliance by MSEDCL of directions issued under Order dated
May 17, 2007.**

Dr. Pramod Deo, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member

ORDER

Dated: 21st August, 2007

On a complaint filed by Maharashtra Rajya Veej Grahak Sangathana on February 28, 2007, the Commission had initiated proceedings under Section 142 of the Electricity Act, 2003 (“EA 2003”). The Complainants had complained that the Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) have collected Outright Contribution Charges (“ORC”) and cost of meter, while giving new connections, without the sanction of law. During the proceedings before the Commission which culminated into an Order dated May 17, 2007, and as recorded in the said Order, MSEDCL admitted that they had inadvertently levied certain charges and cost of meter on certain consumers in direct contravention of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 (“Supply Code”) and Commission’s Order dated September 8, 2006 issued in Case No. 70 of 2005. On such an admission, MSEDCL were liable to be directed to pay penalty under the provisions of Section 142 of the EA 2003. However, considering the submission of MSEDCL that their field officers were not able to comprehend the method of implementation of the said Order dated September 8, 2006, the Commission, without invoking penal provisions under Section 142, had by the said Order dated May 17, 2007, directed MSEDCL to refund to all consumers all amounts that have been collected towards ORC, SLC or such other head-based charges, including cost of meter, which are directly in deviation from the aforesaid Order dated September 8, 2006. In fact, on the Commission’s finding that collection of head-based charges in the nature of ‘CRA’/ SLC has been unlawful, Shri. K.B. Fakir, Electrical Engineer, MSEDCL-Beed Circle, undertook to refund amounts collected from Devang Vishesh Magaswargiya Ready Made Garments Sanstha, Wadwani, (“Devang Sanstha”) towards ORC, SLC, CRA, and cost of meter, together with interest. To this, the Commission had directed MSEDCL to refund to Devang Sanstha and to all such consumers, all amounts

unlawfully collected towards SLC, ORC, CRA and cost of meter, together with interest, and report compliance to the Commission.

2. The Commission had passed the following directions under its Order dated May 17, 2007:

- (a) *MSEDCL should submit a detailed compliance report under affidavit, with respect to the directives issued under Order dated September 8, 2006 in Case No. 70 of 2005;*
- (b) *MSEDCL should submit a copy of the clarificatory instructions issued by MSEDCL- HO to officers at circle level on April 13, 2007 in the English Language;*
- (c) *MSEDCL should re-issue the aforesaid clarificatory instructions in authenticated Marathi translation to officers at zonal level, wherein strict timeline for refund in terms of this Order shall be clearly provided for, and submit a copy of the same before the Commission;*
- (d) *MSEDCL should submit a detailed compliance report under affidavit, with respect to refund of amounts collected from all consumers towards ORC, cost of meter and 'CRA', together with interests, on and from September 8, 2006 (which is the date of enforcement of the Order dated September 8, 2006 in Case No. 70 of 2005) up to April 30, 2007;*
- (e) *MSEDCL should submit a detailed compliance report under affidavit, with respect to refund of the amount of Rs. 6500/- (collected under the head 'CRA') and the interest amount collected towards ORC, cost of meter and 'CRA' from Devang Sanstha.*

3. As against the directions contained in the Record of Proceedings of the hearings held on April 3, 2007 and April 17, 2007, circulated to the parties on April 23, 2007, the Commission had specifically observed in its aforesaid Order dated May 17, 2007 that MSEDCL's affidavit filed on April 23, 2007 does not declare the refund of (i) amounts collected towards 'CRA' (Rs. 6500/-), nor (ii) the interest amounts on ORC, cost of meter and CRA collected from Devang Sanstha, calculated from the date of collection upto the date of refund. Subsequent to the Order dated May 17, 2007, MSEDCL submitted a clarification-cum-compliance report accompanied by an affidavit of Shri. Anil Palamwar, MSEDCL-Director (Operations). As regards the directions as stated above, the following has been submitted under the said affidavit:

- (a) MSEDCL has already issued a detailed Circular No. 43 dated September 27, 2006 for implementation of the directives issued under order dated September 8, 2006. MSEDCL has also issued a revised Circular with regard to the directions relating to Meter Cost (Circular No. PR-3/COS/21560 dated May 9, 2007). Copies of the said Circular have been submitted.
- (b) MSEDCL has submitted that a letter has been issued by its Head Office to officers at circle level on April 13, 2007. It has been further submitted that the said letter dated April 13, 2007 was not in the nature of any clarificatory instructions as

interpreted by the Commission but it was a letter issued in response to irregularities noticed by the Commission vide its letter dated February 14, 2007. It has also been submitted that MSEDCL has sought information from its field officers regarding incidences of consumers being charged as per old set of charges. It has been stated in the affidavit that copies of such letters dated March 1, 2007 and April 13, 2007 have been enclosed for submission to the Commission. It has further been submitted that MSEDCL has drafted a clarificatory Circular in view of the Commission's Order dated May 17, 2007. A draft of the said Circular has been enclosed for the Commission's perusal. It is stated in the affidavit that as MSEDCL will have to bear the cost of approximately Rs. 200 crores for releasing new connections where new infrastructure is to be created, it will not be in a position to refund the ORC, CRA and other charges illegally collected towards cost of meter which also amounts to approximately Rs. 200 crores. MSEDCL has submitted a capital expenditure scheme for release of new connection and a statement of the total amounts liable to be refunded in terms of the Order dated May 17, 2007 with the stated intention that the capex may be accorded with the Commission's approval prior to recovery from its ARR as the amounts towards capex is similar to the total amounts liable to be refunded in terms of the Order dated May 17, 2007.

- (c) MSEDCL has submitted that it does not need to refund CRA amounts to Devang Sanstha as the same actually pertains to Service Connection Charges which is allowed to be recovered in terms of the Order dated September 8, 2006. It has been submitted that all other amounts collected illegally have been refunded to Devang Sanstha.
- (d) Additionally, it has been submitted by MSEDCL that amounts will be refunded to consumers in terms of the Order dated May 17, 2007 and a separate register shall be maintained for records at sub-division/division/circle levels.
- (e) One more additional submission has been made in the aforesaid affidavit filed by MSEDCL wherein it has been submitted that the draft Circular ref. no. CE/BIST/D-III/23302 dated May 24, 2007 shall only be released and issued to the various functionaries of MSEDCL only after MSEDCL receives the Commission's in-principle approval of "Capex for release of new connections".

4. As against the first direction, the Commission is of the finding that with the issuance of Circular No. 43 dated September 27, 2006 and Circular No. PR-3/COS/21560 dated May 9, 2007, MSEDCL has complied with the said direction.

5. As against the second direction, the Commission is of the finding that MSEDCL has misrepresented before the Commission by stating that the letter dated April 13, 2007 is enclosed, which, in effect has not been enclosed under the said affidavit and therefore has not been submitted.

6. As against the third direction, the Commission is of the finding that MSEDCL has contravened the direction to re-issue clarificatory instructions in Marathi to officers at zonal level by not complying with the same. MSEDCL has not submitted any such instructions/letter as specifically directed under paragraph 6(iii) of the Order dated May 17, 2007. MSEDCL has further submitted that the purported letter dated April 13, 2007 was not a clarificatory instruction but it was a letter issued in response to irregularities noticed by the Commission vide its letter dated February 14, 2007. The Commission specifically notes that as per the Record of Proceeding that was circulated on April 23, 2007, to a query raised by the Commission during the hearing held on April 17, 2007, as to whether appropriate instructions to implement the order dated September 8, 2006 have been issued to officers at zonal level, the Counsel on behalf of MSEDCL had submitted that certain clarificatory instructions were issued at circle level on April 13, 2007 from which the field staff and officers of MSEDCL are expected to get clarity with respect to the import, directions contained therein, procedure and implementation of the order dated September 8, 2006 in two weeks. During the hearing as recorded in the Record of Proceedings, the Commission had asked MSEDCL to submit the said letter dated April 13, 2007 to the Commission. The said submission of the Counsel of MSEDCL culminated into the directives under paragraph 6(ii) and (iii) of the Order dated May 17, 2007. The Commission notes with anguish the statements made by the Counsel of MSEDCL across the bar and now as contradicted under the aforesaid affidavit of Shri. Palamwar. MSEDCL should be aware of the consequences of contradictory statements being so made in proceedings before the Commission which are deemed to be judicial proceedings, as provided under Section 95 of the Electricity Act, 2003.

7. The fourth direction was “*MSEDCL should submit a detailed compliance report under affidavit, with respect to refund of amounts collected from all consumers towards ORC, cost of meter and ‘CRA’, together with interests, on and from September 8, 2006 (which is the date of enforcement of the Order dated September 8, 2006 in Case No. 70 of 2005) up to April 30, 2007.*” As against the fourth direction, the Commission notes with anguish the stand taken by MSEDCL under affidavit that the amounts illegally collected and as specifically admitted before the Commission during the hearing in the matter as aforesaid and as recorded in the Order dated May 17, 2007 shall be refunded only when the capital expenditure scheme for release of new connection is accorded with the Commission’s approval prior to recovery from its ARR. There is no doubt that there has been a blatant contravention of the direction so issued by the Commission, there is also no doubt that MSEDCL has completely disregarded the conceding statements made by itself before the Commission on one hand, during the hearing in the matter as specifically recorded in the Order dated May 17, 2007 while on the other hand, attempted to bargain with the Commission by subjecting the compliance of directions with the approval of capex schemes. Such a stand being taken on behalf of a public body such as MSEDCL is unheard of and is completely unreasonable. The proceedings in the present case has nothing to do with approval of capex schemes. Public utilities such as MSEDCL are those industries who are affected with public interest and as such are subjected to regulatory control and cannot be permitted to claim charges beyond what the legislature regards as legal. In view of the submissions of MSEDCL under its affidavit filed on May

28, 2007, the Commission holds that MSEDCL has contravened the directions of the Commission under the order dated May 17, 2007 and is therefore liable to be penalised under Section 142 of EA 2003.

8. MSEDCL has submitted under affidavit that the amounts collected under the head CRA actually pertains to SCC (service connection charges) and is therefore not liable to be refunded. The Commission is of the finding that completely contradictory statements have been made by MSEDCL, which one hand during the hearing, as recorded in the order dated May 17, 2007, submitted before the Commission that CRA is a head-based charge akin to SLC (service line charges). In fact, on the Commission's finding that collection of head-based charges in the nature of 'CRA' has been unlawful, Shri. K.B. Fakir, Electrical Engineer, MSEDCL-Beed Circle, undertook to refund amounts collected from Devang Sanstha, towards ORC, CRA, and cost of meter, together with interest. To this, the Commission had directed MSEDCL to refund to Devang Sanstha and to all such consumers, all amounts collected towards ORC, CRA and cost of meter, together with interest. The Commission is of the view that MSEDCL had all the time available if there was a need to seek a review of the Order dated May 17, 2007 on the contention that CRA is nothing but SCC. However, no such review application has been filed by MSEDCL. MSEDCL has not found it pertinent or necessary to seek a review but has gone ahead and concluded itself that compliance of the Commission's direction to refund CRA amounts, is not required, as CRA pertains to SCC. This is based on MSEDCL's interpretation which MSEDCL has not found necessary to check with the Commission by seeking a review. In view of the submissions of MSEDCL under its affidavit filed on May 28, 2007, the Commission holds that MSEDCL has contravened the directions of the Commission under the Order dated May 17, 2007 is therefore liable to be penalized under Section 142.

9. The penalty is attracted as soon as contravention of the statutory obligations as contemplated by the EA 2003 is established and, therefore, the intention of MSEDCL committing such violation becomes immaterial. In other words, the breach of the directions contained in the Order dated May 17, 2007 which attracts penalty under the provisions of Section 142 of EA 2003 would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by MSEDCL with any guilty intention or not. It is sufficient to prove that a default in complying with the directions has occurred. In fact, the bargain of MSEDCL to approve its capex for new connections in return for compliance of the Commission's directives, is sufficient to establish animus, i.e., intention to not comply. The directions of the Commission to MSEDCL were to refund amounts that never belonged to them as they were collected illegally. It is well settled that interest shall also be leviable on such amounts. MSEDCL cannot argue that the amounts spent towards creating infrastructure must be replenished at the cost of those consumers at whose cost MSEDCL has enriched unjustly. What is sought to be prevented is unjust enrichment or unjust benefit derived by MSEDCL from its consumers. The approval of the capex scheme for new connections has no nexus with the compliance of directions contained in the Commission's Order dated May 17, 2007. In view of the above, the Commission is satisfied that MSEDCL has contravened certain directions

issued by the Commission under its Order dated May 17, 2007. Opportunity of being heard has already been given to MSEDCL. As stated above, MSEDCL had conceded during the hearings that it has indeed contravened the provisions of the Supply Code and the Commission's Order dated September 8, 2006 issued in Case No. 70 of 2005. In fact, MSEDCL had undertaken to refund the amounts collected illegally by it and to comply with the directions of the Commission. In view thereof, the Commission directs that, without prejudice to any other penalty to which MSEDCL may be liable under the EA 2003, MSEDCL shall pay, by way of penalty, an amount of Rupees One Lakh for each contravention as aforesaid at paragraph 7 and paragraph 8, which shall be paid within 30 days from the date of this Order and in case of a continuing failure with an additional penalty of Rupees Six Thousand for every day during which the failure continues after contravention of the directions contained in the Order dated May 17, 2007.

10. MSEDCL shall not claim the amount of penalty paid as a deductible expense as part of the annual revenue requirement.

11. MSEDCL shall submit to the Commission their statutory auditor's certificate to the effect that the amounts collected illegally together with interest, as held at paragraph 9(d) and (e) of the Order dated May 17, 2007, have been refunded to the concerned consumers.

12. The Managing Director, Director (Operations) and Chief Engineer (Commercial) of MSEDCL, who are important functionaries of MSEDCL shall take a note of the provisions of Section 149(2) of the EA 2003, that, where an offence under EA 2003 has been committed by a company and it is proved that the offence has been committed with the consent or connivance of or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of having committed such offence and shall be liable to be proceeded against and punished accordingly. The purpose of the law is not to allow the offender to sneak out of the meshes of law.

Ordered accordingly.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC