

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 85 of 2006

In the matter of
Petition filed by M/s. Dodson-Lindblom Hydro Power Private Limited seeking
review of the Order dated November 9, 2005 in Case No. 25 of 2004.

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

ORDER

Dated: May 23, 2007

M/s. Dodson-Lindblom Hydro Power Private Limited (“**the Petitioners**”) filed a Petition on March 23, 2007 under Regulation 85(a) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 (“**CBR**”) read with Section 94(1)(f) of the Electricity Act, 2003 (“**EA 2003**”) seeking a review of paragraph 3.58 of the Order dated 9th November 2005 (Case No. 25 of 2004) passed by the Commission in the matter of Determination of Tariff for Small Hydel Power (SHP) Projects within Maharashtra, to the extent it applies to the Petitioners herein. The Petitioners are a Generating Company as defined in Section 2(28) of the Electricity Act, 2003 for the purpose of developing hydro-power projects and to construct, test, commission, and operate electricity generating stations.

2. The Petitioners have submitted that the Commission while determining the tariff, power procurement process and related dispensation for the purchase of power by the Distribution Licensees in the State of Maharashtra from the Small Hydro Project generating stations in Maharashtra, issued an Order dated 9th November 2005 (Case No. 25 of 2004). Paragraph 3.58 of the said Order provides as under:

“Sale of Power

3.58 Generated electricity can be sold to any consumer located in the state of Maharashtra or any willing distribution licensee or any power trading company. There shall be no limitation on the supply of energy units by the Developer to the Distribution Licensees. However, Maharashtra State



Electricity Distribution Company shall have the first right of refusal. Sale of power shall be in accordance with the Orders, Regulations and Directions of the Commission.”

It has been contended by the Petitioners that in the quoted portion of Paragraph 3.58 of the said Order dated 9th November 2005 the words”. *However, Maharashtra State Electricity Distribution Company shall have the first right of refusal..*” (emphasis added) conflicts with Section 10(2) of Electricity Act, 2003 (hereinafter referred to as “EA 2003”). The said Section 10(2) reads as under:

“(2) A generating company may supply electricity to any licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer.” (emphasis added)

Section 10(2) of EA, 2003 clearly contemplates that a generating company (which includes SHPs), may supply electricity to any licensee. The Petitioners have stressed that to subject the sale of electricity generated by SHPs to the right of first refusal in favour of a particular licensee (i.e., Maharashtra State Electricity Distribution Company Limited in this case) before electricity generated could be sold to consumers, other licensees and electricity traders, is not in accordance with Section 10(2) of EA, 2003 and would not only lead to absurdity and make the provisions of the EA 2003 nugatory but also create friction, contradiction and conflict with the provisions of Section 10(2), Section 42(2) and Section 49 of EA, 2003 which makes it mandatory for the Commission, introduce open access by the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Commission. Section 42(2) and Section 49, respectively, reads as under:

“42(2) The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints:.....”

“49. Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.”

3. Next, the Petitioners have submitted that the impugned Paragraph 3.58 of the said Order dated 9th November 2005 tends to defeat the basic scheme and purpose of the EA 2003 which seeks to encourage competition which in turn is expected to yield efficiency



gains and in turn result in availability of quality supply of electricity to consumers at competitive rates. The preamble to the EA, 2003 reads as under:

*“An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and **generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers** and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.” [Emphasis added]*

4. It has also been submitted that the said Paragraph 3.58 of the said Order dated 9th November 2005 tends to defeat the objectives sought by the National Electricity Policy dated the 12th February, 2005 which seeks to achieve *inter alia* the following:

- (i) Maximum emphasis would be laid on the full development of the feasible hydro potential in the country.
- (ii) Harnessing hydro potential speedily will also facilitate economic development of States.
- (iii) The States with hydro potential need to focus on the full development of these potentials at the earliest.
- (iv) The Electricity Act 2003 enables competing generating companies and trading licensees, besides the area distribution licensees, to sell electricity to consumers when open access in distribution is introduced by the State Electricity Regulatory Commissions. As required by the Act, the SERCs shall notify regulations by June 2005 that would enable open access to distribution networks in terms of sub-section 2 of section 42 which stipulates that such open access would be allowed, not later than five years from 27th January 2004 to consumers who require a supply of electricity where the maximum power to be made available at any time exceeds one mega watt. Section 49 of the Act provides that such consumers who have been allowed open access under section 42 may enter into agreement with any person for supply of electricity on such terms and conditions, including tariff, as may be agreed upon by them. While making regulations for open access in distribution, the SERCs will also determine wheeling charges and cross-subsidy surcharge as required under section 42 of the Act.
- (v) To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long-term power purchase agreement framework. In the



coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the power markets and provide alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff.

5. The Petitioners have submitted that the Commission is mandated under Section 86(1) (e) to promote generation of electricity from renewable sources of energy by providing suitable measures for sale of electricity to any person. The words “and also specify” is in addition to and is not intended to limit or restrict the operation of the words “sale of electricity to any person”, as appearing in the said Section 86 (1) (e). It has been submitted that the words “sale of electricity to any person” is primary in nature as it lays down the primary provision. Thereafter, the Legislature proceeds to use the words “and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of the distribution licensee”. However, the said paragraph 3.58 of the order dated 9th November 2005 tends to defeat the aforesaid primary provision that is “sale of electricity to any person” from generation of electricity from renewable sources of energy. The freedom to sell electricity to any person in view of paragraph 3.58 gets vitiated and is rendered nugatory and otiose when MSEDCL is given the first right of refusal. It has been submitted that therefore it would be clear that the said paragraph 3.58 of the order dated 9th November 2005 suffers from an error apparent on the face of the record. It is further submitted that review of an order, direction or decision is permissible under the MERC (Conduct of Business) Regulations, 2004, particularly Regulation 85 (a) thereof, for the existence of sufficient reasons. It is submitted that the said paragraph 3.58 impinges not only on the spirit of the EA 2003, particularly Section 10(2), 42(2), 49, 86(1)(e), but also impinges on the growth of the electricity sector in the State of Maharashtra. Therefore, sufficient reasons exist for the review of the said paragraph 3.58.

6. At the admissibility hearing held in the matter on April 17, 2007, Shri. Harinder Toor, Counsel, appeared on behalf of the Petitioners. Smt. Deepa Chawan, Counsel appeared on behalf of MSEDCL. Shri. Toor submitted that the creation of the right of first refusal in favour of MSEDCL impugnes the order dated November 9, 2005 not only as the same amounts to an “error apparent” on the face of the order but also for other “sufficient reasons”. Shri. Toor cited the following portions of the Judgment dated April 1, 2005 passed by the Hon’ble Supreme Court, in *State of Nagaland vs. Lipok Ao & Ors.* [(2005) 3 SCC 752] on the issue of condonation of delay:

“ 9. ...in *Shakuntala Devi Jain vs. Kuntal Kumari* [AIR 1969 SC 575] a Bench of three Judges had held that unless want of bona fides of such inaction or negligence as would deprive a party of the protection of Section 5 is proved, the application must not be thrown out or any delay cannot be refused to be condoned.....



12. In *O.P. Kathpalia vs. Lakhmir Singh* [(1984) 4 SCC 66] a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned.”

Shri. Toor submitted that in the present matter, the Petitioners could not proceed to initiate appropriate legal proceedings within the prescribed limitation period owing to inadvertent and erroneous legal advice. Counsel submitted that erroneous legal advice acts as a valid ground for condonation of delay. In this regard, Shri. Toor cited the following portion of the above-referred judgment:

“10. In *Concord of India Insurance Co. Ltd. vs. Nirmala Devi* [1979 SC (Cri) 996] which is a case of negligence of the counsel which misled a litigant into delayed pursuit of his remedy, the default in delay was condoned. In *Lata Mata Din vs. A. Narayanan* [(1969) 2 SCC 770] this court has held that there is no general proposition that mistake of counsel by itself is always sufficient cause for condonation of delay. It is always a question whether the mistake was bona fide or was merely a device to cover an ulterior purpose. In that case it was held that the mistake committed by the counsel was bona fide and it was not tainted by any mala fide motive.”

Shri. Toor submitted that courts should refrain from adopting a strict technical approach on the issue of limitation. Courts should always aim towards substantial justice. Shri. Toor cited the following portion of the Judgment dated January 10, 2005 passed by the Hon’ble Supreme Court, in *Board of Control for Cricket in India & Anr. vs. Netaji Cricket Club & Ors.* [(2005) 4 SCC 741] on the issue of grant of review by way of invoking the doctrine of *actus curie neminem gravabit*:

“106.In *Rajesh D. Darbar vs. Narasingrao Krishnaji Kulkarni* [(2003) 7 SCC 219] this court noticed: There is a well-recognised maxim of equity, namely, *actus curie neminem gravabit* which means an act of the court shall prejudice no man. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law.”

Counsel submitted that in the interests of the justice the Petitioners seek and pray for condonation of delay in filing the present Review Petition. Grave miscarriage of justice will be caused in case the delay is not condoned as the impugned order of the Commission suffers from an error apparent on the face of the record. The Commission is empowered in this regard by the following regulations of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, as under:



“92. Nothing in these Regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for meeting the ends of justice or to prevent the abuse of the process of the Commission.”

“96. If any difficulty arises in giving effect to any of the provisions of these Regulations, the Commission may, by general or special order, do anything not being inconsistent with the provisions of the Act, which appears to be necessary or expedient for the purpose of removing the difficulties.

“97. Subject to the provisions of the Act, the time prescribed by these Regulations or by order of the Commission for doing any act may be extended (whether it has already expired or not) or abridged for sufficient reason by an order of the Commission.”

“98. Failure to comply with any requirement of these Regulations shall not invalidate any proceeding merely by reason of such failure unless the Commission is of the view that such failure has resulted in miscarriage of justice.”

It has been submitted that the review as sought for does not entail any re-determination of tariff for SHPs but is to seek review solely on legal grounds relating to one particular provision of the impugned order, as aforesaid, and therefore neither there would be any need of conducting public hearing nor would there be any other hindrance of conduct of substantial procedural formalities. The balance of convenience lies in favour of the Petitioners as refusal to grant review on technical grounds including refusal to condone delay would substantially affect the rights of the Petitioners adversely and would cause irreparable loss to the Petitioners. It has therefore been prayed that this Hon'ble Commission condones the delay in filing this Review Petition.

7. Per contra, Smt. Deepa Chawan argued that the present review petition should be rejected owing to the same not being filed within the prescribed limitation period. Smt. Chawan submitted that the contention of the Petitioners to the extent that delay is attributable to inadvertent and erroneous advice, does not hold sufficient ground. Smt. Chawan submitted that representatives of the Petitioners were present at the time of hearing in Case No. 25 of 2004 on September 27, 2005. It may be reasonably presumed that the Petitioners were aware that the order in Case No. 25 of 2004 was passed on November 9, 2005. Smt. Chawan submitted that the Petitioners have not quantified the number of days that constitute delay. The oral submissions advanced by the Counsel of the Petitioners, so far as the same relate to the Petitioners being erroneously advised on the issue of limitation, are bereft of any details in writing. Smt. Chawan cited the following portion of the Judgment dated April 4, 2006 passed by the Hon'ble Supreme Court, in *Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania & Ors.* [(200)43 SCC 741] on the issue of tenability of oral submissions seeking condonation of delay:



“54. The observation made by the Bombay High Court while discussing the appeal of the appellants was that, *an oral application for condonation of delay will not be* entertained in the court of law according to the laws present in our judicial system.”

8. Shri. Harinder Toor submitted that the Commission is not bound to be guided by observations passed by a higher court. Observations are not final orders and cannot act as precedents. Smt. Chawan further submitted that the impugned order does not act as a fetter to sale of generated power by small hydel power projects. A proper interpretation of paragraph 3.58 of the impugned order would hold that MSEDCL only has a right of pre-emption on the sale of generated power. Further, the DOAR has been considered in the impugned order under paragraph 3.70 therein, which is as follows:

“Default Provisions

3.70 In case of any default by the Distribution Licensee, the project holder shall be entitled to the sale energy to any other Licensee or third party consumers, subject to compliance with the Open Access Regulations as may be applicable from time to time. The STU and Distribution Licensees shall facilitate such third party sale and enter into an Energy Transmission enable such third party sale.”

9. The Commission notes that the Petitioners have raised the following grounds for seeking review of the aforesaid Paragraph 3.58 of the said Order dated 9th November 2005:

- (i) That the said Paragraph 3.58 of the said Order dated 9th November 2005 suffers from an error apparent on the face of the record of the said Order as the same is contrary to Section 10(2), Section 42(2) and Section 49 of the EA 2003;
- (ii) That the said Paragraph 3.58 of the said Order dated 9th November 2005 suffers from an error apparent on the face of the record as due to the said Paragraph 3.58 of the said Order dated 9th November 2005 it becomes imperative on every Small Hydro Power Generator to sell electricity to Maharashtra State Electricity Distribution Company Limited thereby frustrating the legal right of purchase by any consumer without offering the first right of refusal to Maharashtra State Electricity Distribution Company Limited
- (iii) That the said Paragraph 3.58 of the said Order dated 9th November 2005 suffers from an error apparent on the face of the record as it renders the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations, 2005, inoperative, otiose, sterile and nugatory as the said Regulations entitle a consumer of a Distribution Licensee eligible for open access to the distribution system of such Distribution Licensee for



obtaining supply of electricity from a Generating Company in accordance with certain eligibility conditions.

- (iv) That the said Paragraph 3.58 of the said Order dated 9th November 2005 conflicts with Section 86(1)(e) as explained at paragraph 1(f) above, by restricting “sale of electricity to any person” as the freedom to sell electricity to any person in view of paragraph 3.58 gets vitiated and is rendered nugatory and otiose when MSEDCL is given the first right of refusal.
- (v) That sufficient reasons exist for review and modification of the said Paragraph 3.58 of the said Order dated 9th November 2005 as the said paragraph 3.58 impinges not only on the spirit of the EA 2003, particularly Section 10(2), 42(2), 49, 86(1)(e), but also impinges on the growth of the electricity sector in the State of Maharashtra.

10. Notices were issued to all the distribution licensees and consumer representatives (authorised on a standing basis under the EA 2003) apprising them of the review petition filed by the Petitioners, however, no one has filed reply. MSEDCL is the only licensee which appeared in the hearing but objected only on the ground of maintainability. MSEDCL did not specifically admit, deny or explain the facts stated in the Petition or show cause as to why the review sought be not granted other than raising objections on condonation of delay. MSEDCL did not state any additional facts (other than its contention on limitation) as it considered necessary for the decision of the case.

11. The judgment dated April 1, 2005 passed by the Hon’ble Supreme Court in *State of Nagaland vs. Lipok Ao & Ors.* [(2005) 3 SCC 752] on the issue of condonation of delay, deserves attention. Paragraph 12 of the said judgment is reproduced hereinbelow:

“12. In *O.P. Kathpalia vs. Lakhmir Singh* (1984 (4) SCC 66), a Bench of three-Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Delay was accordingly condoned. In *Collector, Land Acquisition vs. Katiji* (1987 (2) SCC 107), a Bench of two Judges considered the question of the limitation in an appeal filed by the State and held that Section 5 was enacted in order to enable the court to do substantial justice to the parties by disposing of matters on merits. The expression "sufficient cause" is adequately elastic to enable the court to apply the law in a meaningful manner which subserves the ends of justice - that being the life-purpose for the existence of the institution of courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other courts in the hierarchy. This Court reiterated that the expression "every day's delay must be explained" does not mean that a pedantic approach should be made. The doctrine must be applied in a rational common sense pragmatic



manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. Judiciary is not respected on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal. The fact that it was the State which was seeking condonation and not a private party was altogether irrelevant. The doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner. There is no warrant for according a step-motherly treatment when the State is the applicant. The delay was accordingly condoned.”

Having considered the material placed on record and considering the submissions advanced by the parties, the Commission sustains the arguments advanced by Counsel for the Petitioners placing reliance on the judgments passed by the Hon’ble Supreme Court and accordingly comes to a finding that when the factual background is considered in light of the legal principles as noted above, the inevitable conclusion is that the delay of about 455 days deserves condonation and is hereby condoned.

12. The powers of the Commission under Section 94(1)(f) of EA, 2003 read with Regulation 85(a) (Review of decisions, direction and orders), Regulation 92 (Inherent Powers), Regulation 96 (Removal of Difficulties), Regulation 97 (Extension or abridgement of time prescribed) and Regulation 98 (Effect of non-compliance) of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 cannot be whittled down, nullified, curtailed, abrogated, diluted or taken away either by the counter arguments raised by Counsel for MSEDCL on condonation of delay. The Judgment dated April 4, 2006 passed by the Hon’ble Supreme Court, in *Hari Shankar Singhania & Ors. vs. Gaur Hari Singhania & Ors.* [(200)43 SCC 741] as quoted by Counsel for MSEDCL does not reverse the position. In *O.P. Kathpalia vs. Lakhmir Singh* [(1984) 4 SCC 66] a Bench of three Judges had held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay. Moreover, the grounds for seeking exemption from limitation are not inconsistent with the grounds set out in the present petition. The power of review is an inherent part of the basic structure of proceedings before the Commission and it cannot be abrogated when grounds for condonation of delay are made out. The Commission is required to apply the law in a meaningful manner which subserves the ends of justice.



13. With the above observations, the Commission admits the Petition for further hearings. MSEDCL will file counter reply, if any, within fifteen days from the date of this Order. The Petitioners will file rejoinder, if any, within ten days from the date of filing of counter reply, if any, by MSEDCL. Parties shall complete the pleadings within a period of one month from the date of this Order. The Review Petition will be listed for further hearings thereafter.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr Pramod Deo)
Chairman



Secretary, MERC