

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai - 400 005
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.org.in
Website: www.mercindia.org.in

Case No. 98 of 2011

In the matter of

**Maharashtra State Electricity Distribution Company Limited's (MSEDCL) Petition
seeking review of Commission's Suo-Motu Order dated May 30, 2011 in
Case No. 23 of 2010**

Shri V.P. Raja, Chairman
Shri Vijay L. Sonavane, Member

Maharashtra State Electricity Distribution Company Limited.

Registered office:
Plot No. G-9, Prakashgarh,
Prof Anant Kanekar Marg
Bandra (East),
Mumbai – 400051,
Maharashtra, India

....Applicant

ORDER

Dated: September 2, 2011

Background

The Commission passed an order on May 30, 2011 in Case No. 23 of 2010. This case was initiated by the Commission *suo motu* in response to a letter, dated April 28, 2010, submitted by Maharashtra Rajya Veej Grahak Sanghatana (MRVGS) alleging violation of the Load Shedding Protocol approved by the Commission in Case Nos. 77 and 78 of 2008 vide Order dated November 28, 2008. Under the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004, “32. *The Commission may initiate any proceedings suo motu, or on a Petition filed by any affected or interested person*”.

2. Before initiating Case No. 23 of 2010 suo motu, the Commission also considered the responses it received from MSEDCL in relation to the objections raised by MRVGS. The said Order of November 28, 2008 was passed by the Commission considering the powers vested in it under Section 23 of Electricity Act 2003 (“2003 Act”) and the Orders and Record of Proceedings of the Hon’ble Supreme Court dated May 13, 2005 in Appeal (Civil) Nos. 11437-11438/2005 from the judgement and Order dated May 4, 2005 and May 6, 2005 in

WP No. 2097/ 2005 filed by Maharashtra Electricity Distribution Company Limited (MSEDCL).

3. In the Order in Case No. 23 of 2010, dated May 30, 2011 the Commission had inter alia directed MSEDCL to recover Rs. 92.38 crore from the consumers benefitting from Zero Load Shedding (ZLS) scheme implemented by MSEDCL in the Revenue Headquarters, and to pass on the same to non-ZLS consumers through FAC, as the Commission found that MSEDCL had violated the basic principles of ZLS by failing to procure adequate additional power for ZLS and still maintained ZLS at these Revenue Headquarters by diverting power from the common pool of the State of Maharashtra.

4. On July 6, 2011, MSEDCL filed a Petition under Section 94(2) of the 2003 Act and Regulation 85(a) of MERC (Conduct of Business) Regulations, 2004, seeking review of the suo motu Order dated May 30, 2011, in Case No. 23 of 2010.

The prayers in the Petition are as follows:

“

4.1. *The Hon'ble Commission may be pleased to admit the present Petition seeking Review of the Order dated 30th May passed by the Hon'ble Commission in the matter of Case No. 23 of 2010;*

4.2. *The Commission may further be pleased to approve the arrangement of power procurement executed by the Petitioner Company for implementation of Zero Load Shedding in the Head Quarters of the Revenue Divisions, including the power procured by the Petitioner Company from the vintage units of GENCO at regulated price;*

4.3. *The Hon'ble Commission may also be pleased to appropriately modify the impugned Order dated 30th May 2011 (Case No. 23 of 2010) to the extent directions given by the Hon'ble Commission for recovery of Rs. 92.38 Crs. from ZLS beneficiary consumers and refund of the same to non – ZLS consumers through FAC;*

4.4. *The Hon'ble Commission may also be pleased to permit the Petitioner Company to alter/modify/amend the present Petition and may also grant liberty to make additional submissions as may be required.”*

5. MSEDCL, in its Petition, submitted as under:

5.1. As approved by MERC in its Order dated November 30, 2009 (Case No. 31 of 2009), MSEDCL was implementing the Zero Load shedding scheme in the Head Quarters of the Revenue Divisions and was recovering “Reliability Charge” at the rate as has been determined by the Commission in the said Order, except in case of “Thane”, since the reliability charge to be levied & recovered from the beneficiary consumers

from the said area had subsequently been modified vide Order dated May 24, 2010 (Case No 89 of 2009), followed by a clarificatory Order dated November 15, 2010 (Case No. 26 of 2010).

- 5.2. For implementation of Zero Load Shedding scheme, MSEDCL made appropriate arrangement for procurement of additional power. Also, quarterly reconciliation reports (duly audited by the Third Party Auditor) on “Reliability Charges” recovered and additional cost incurred towards procurement of additional power had been submitted to the Commission.
- 5.3. As directed by the Commission, the information regarding the arrangement made by MSEDCL for procurement of additional power, the cost incurred for the same, etc. for implementation of Zero Load Shedding, had been submitted by MSEDCL vide its letter dated January 27, 2011. It craved leave to refer to and rely upon the said additional information as may be required during the proceeding of the present petition.
- 5.4. In the Order dated May 30, 2011 (Case No. 23 of 2010), on the basis of data available on record, the Commission had inter alia concluded that energy scheduled for ZLS for some days in April and May 2010 was less than the requirement. Further the Commission found certain discrepancies in MSEDCL’s submission regarding the availability of power for ZLS and data submitted for FAC approval, which also had significant variation with SLDC’s IBSM data. Based on such observations the Commission concluded that MSEDCL might have maintained ZLS by making available grid power from the general pool of power available for meeting supply requirements in the State.
- 5.5. In the Order dated May 30, 2011 (Case No. 23 of 2010), the Commission, after reconciliation of the entire data, had further concluded that 307.93 MUs of energy of the State’s common pool had been used by MSEDCL for implementation of ZLS, increasing load shedding in the remaining part of the State. The Commission observed that this energy (307.93MUs) was procured by MSEDCL at Rs.2.67 per unit as compared to the average rate of power procured for ZLS from other sources at Rs.5.67 per unit, which resulted in undue benefit to the ZLS beneficiary consumers. If the said energy (307.93MUs) would have been procured by MSEDCL from the other sources at an average rate of Rs. 5.67 per unit, the ZLS beneficiary consumers might have paid Rs.92.38 crore more. Therefore, the Commission in the impugned Order directed MSEDCL to recover Rs. 92.38 crore from ZLS beneficiary consumers and to pass on the same to non -ZLS consumers through FAC.
- 5.6. For the period December 2009 through June 2010 MSEDCL procured sufficient power from the vintage units of MSPGCL for implementation of the ZLS and had already clarified the discrepancies (discrepancies as recorded on page no. 35 of the

impugned Order dated May 30,2011 in Case No. 23 of 2010) vide its letter dated January 27, 2011. However, the Commission did not consider the contents of the said letter, while passing the impugned Order. Therefore, MSEDCL has filed the present Review Petition for review of the impugned Order.

- 5.7. Even though MSEDCL contracted sufficient power for implementation of ZLS, it faced certain problems of unavailability from the contracted sources and therefore, it procured power from MSPGCL's vintage units for the period December 2009 through July 2010, and that the same was considered by the Commission as energy available in the common pool of power for the State. Hence, the Commission concluded that the said power should have been used for distributing in the entire State.
- 5.8. In December 2009 MSPGCL had decided to close down all the vintage generation plants, since sale of power at regulated rate from these plants was not financially viable. After informal discussion of the top Managements of both the Companies, and only on request of MSEDCL, MSPGCL agreed to operate the said vintage units at regulated price to avoid uncertain power supply situation of the State. In July 2010 it was decided at the top Management level of these two companies to treat these vintage units as merchant plants and a PPA was executed in October 2010 to this effect. In such circumstances MSEDCL decided to divert the power procured from such vintage units of MSPGCL for implementation of ZLS as it had committed to the beneficiary consumers of ZLS that there would be no load shedding against payment of the Reliability Charges.
- 5.9. The information about such development was not available before the Commission during the proceeding in Case No. 23 of 2010 or even at the time of passing of the impugned Order. Therefore, these developments, which had already happened in the past, was a discovery of new and important matter for the Commission, for which MSEDCL had no occasion or reason to produce such information during the proceedings in Case No. 23 of 2010 or even at the time of passing of the impugned order dated 30th May, 2011. Therefore, there is merit for reviewing the impugned order.
- 5.10. In the arrangement of recovery of Rs. 92.38 crore and from the ZLS beneficiary consumers and passing on the same to non-ZLS consumers through FAC, MSEDCL would neither be at a gain or at a loss. However, prima facie, MSEDCL anticipated that the ZLS beneficiary consumers may "rightly" dispute recovery of such amount on the ground that the same cost had not been incurred by MSEDCL. In such a situation MSEDCL might be burdened with the same amount, which eventually will have to be permitted by the Commission at the time of truing up. As the Commission had not considered such a situation while passing the impugned order, this can be treated as sufficient ground for review of the impugned Order.

- 5.11. MSEDCL has to be revenue neutral and cannot charge over & above the actual cost of power procured for implementation of ZLS. In such circumstances, recovery of such amounts from the ZLS beneficiary consumers, which has not been incurred by the MSEDCL, would also be against the principles as laid down by the Commission in its Order dated November 30, 2009.
- 5.12. MSEDCL has filed the present petition under Regulation 85 (a) of MERC (Conduct of Business) Regulations, 2004.
6. Therefore, MSEDCL's Petition for review of the impugned Order dated May 30, 2011 is founded on the following three premises, and submitted under the provisions of Regulation 85 (a) of MERC (Conduct of Business) Regulations, 2004.
- 6.1. The Commission did not consider the contents of MSEDCL's letter dated January 27, 2011 while passing the impugned Order. This letter apparently explained the discrepancies observed by the Commission in Case No. 23 of 2010 in various submissions made by MSEDCL and data of SLDC.
- 6.2. The decision reached at the Management level of MSEDCL and MSPGCL for treating the vintage units of MSPGCL as merchant units, and consequent sale of power from such merchant units to MSEDCL through a PPA executed in October 2010 was not known to the Commission during the proceeding in Case No. 23 of 2010 or even at the time of passing of the impugned Order. Therefore, these developments, which had already happened in the past, was a discovery of new and important matter for the Commission, for which MSEDCL had no occasion or reason to produce such information during the proceedings in Case No. 23 of 2010 or even at the time of passing of the impugned order dated 30th May, 2011.
- 6.3. The Commission, while passing the impugned Order, had not considered a situation of ZLS beneficiary consumers disputing recovery of Rs. 92.38 crore as per the impugned Order, wherein the Commission will have to allow MSEDCL to true up unrecovered cost of power from such consumers. MSEDCL has to be revenue neutral and cannot charge over & above the actual cost of power procured for implementation of ZLS. In such circumstances, recovery of such amounts from the ZLS beneficiary consumers, which has not been incurred by the MSEDCL, would also be against the principles as laid down by the Commission in its Order dated November 30, 2009.

7. Regulation 85 (a) of MERC (Conduct of Business) Regulations, 2004, reads as below:

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

8. The Commission, vide Notice dated July 15, 2011 scheduled an admissibility hearing in the matter on August 4, 2011 at 15.00 hrs.

9. During the hearing, Shri S. V. Bapat, Suptd. Engineer (TRC), MSEDCL along with Shri. M. M. Digraskar, Executive Engineer (TRC), MSEDCL and Shri A.S. Chavan, Chief Engineer (Power Purchase), MSEDCL appeared on behalf of MSEDCL.

10. During the hearing Shri S.V. Bapat, Suptd. Engineer, MSEDCL submitted that the Hon'ble Commission in its Order dated May 30, 2011 in Case No. 23 of 2010 concluded that 307.93 MUs of energy of the State's common pool had been used by MSEDCL for implementation of ZLS and therefore directed MSEDCL to recover Rs. 92.38 crore from ZLS beneficiary consumers and to pass on the same to non -ZLS consumers through FAC. Therefore, MSEDCL approached the Hon'ble Commission for review of the Order dated May 30, 2011 in Case No. 23 of 2010.

11. Having heard the Petitioner, and after considering the material placed on record, the Commission is of the view as under:

11.1. In its Order dated May 30, 2011 in Case No. 23 of 2010, the Commission had clearly considered the contents of the letter submitted by MSEDCL. Also, MSEDCL's claim that the treatment of MSPGCL's vintage units as merchant units and purchase of power from these units for ZLS was not known to the Commission is incorrect because, these information were captured in the said letter of MSEDCL dated January 27, 2011. On page 38 of the impugned Order dated May 30, 2011 the Commission observed, *“In this reply (dated 27.01.2011 and 31.01.2011) MSEDCL submitted source wise information about power purchase for ZLS from Dec 2009 till Dec 2010. Here MSEDCL indicated that they utilized power from MSPGCL's vintage units right from Dec 2009.”*

Therefore, the contentions of MSEDCL do not hold ground. There is no “...discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed..”. Also there is no error apparent on the face of the record or any other sufficient reason for consideration of review of the impugned Order.

- 11.2. As regards the ground of review summarised in Para 6.3 above, the Commission is of the view that this is not a ground for seeking review. Non consideration of a situation where ZLS beneficiary consumers could dispute recovery of Rs. 92.38 crore is no ground to seek a review. It has not been established as to how this ground could be an error apparent on the face of the record or how this arises on account of “*discovery of new and important matter or evidence..*”. To speculate a situation is no ground for seeking review. Merely because two views are possible does not mean that review should be granted. A review can never be said to be an appeal in disguise. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it.

In view of the above, the application of Maharashtra State Electricity Distribution Company Limited in Case No. 98 of 2011 seeking review of Order dated May 30, 2011 (in Case No. 23 of 2010) stands dismissed as not maintainable.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V. P. Raja)
Chairman