

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

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Case No. 62 of 2011

In the matter of

Maharashtra State Electricity Transmission Company Ltd's (MSETCL) Petition seeking exemption under the first proviso to Regulation 4.1 of MERC (Multi Year Tariff) Regulations, 2011 and certain amendments thereto.

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

ORDER

Date: November 03, 2011

Maharashtra State Electricity Transmission Co. Ltd. ("MSETCL") submitted a Petition seeking exemption from determination of tariff and applicability of the MERC (Multi Year Tariff) Regulations, 2011 ("MYT Regulations, 2011") for a period of five years. The Petition has been filed to invoke the first proviso to Regulation 4.1, Regulation 99 and Regulation 100 of the MYT Regulations, 2011 read with Section 94 (2) of the Electricity Act, 2003 ("EA 2003") and Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004.

2. The prayers of MSETCL in the Petition are as follows:-

“

- a) *Admit Petition in accordance with Section 94 (2) of Electricity Act 2003, Regulation 85 (A) of the MERC (Conduct of Business) Regulation, 2004, Regulation 4.1, 99 and 100 of the MERC (MYT Regulation) 2011.*
- b) *Accept the deferment request for application of MERC (MYT Regulation) by postponing the second control period by five year.*

- c) *Provide the detailed working of O & M expenses norms specified for MSETCL and approve the proposed O & M norms for HVDC as submitted by MSETCL. Further consider higher R & M requirement because of vintage transmission asset base and also due to increasing transmission asset base on account of projected capital expenditure.*
- d) *To provide a positive consideration to the representation made by MESTCL and Amend Regulations 31 by including Advance against depreciation along with depreciation.*
- e) *To provide a positive consideration and Amendment the Regulation 32 – Return of Equity Capital in a manner equivalent to the Regulation 15 of Hon’ble CERC (Terms and Conditions of Tariff) Regulation, 2009 in case of Transmission licensee.*
- f) *Give liberty to MSETCL to add/change/modify/alter this Petition and make further submissions as may be required at a future date.”*

3. The Petitioner has averred as under:

a) Timeline for Implementation of MERC MYT Regulations 2011 for MSETCL

- The Government of Maharashtra is in the process of finalizing the final Transfer Scheme. With the notification of the said scheme, the components of ARR are envisaged to change significantly.
- The Commission has the inherent powers under the proviso to Regulation 4.1 of the MYT Regulations 2011, to exempt the determination of tariff under the MYT framework for a Transmission company for a specific period of time.

b) Business Plan is subject to revision and may not remain valid for the MYT control period

- Regulation 4.2 (ii) and 4.2 (iii) of the MERC MYT Regulations, 2011 provides that the utilities are supposed to file a Multiyear Business Plan which shall be adopted in the MYT Petition for the purpose of approval of tariffs.
- Regulation 4.2 (iv) of the MERC MYT Regulation, 2011 suggests that the scope of APR Petition would only be limited to a revision in the indexed items.
- Business Plan prepared for the purpose of determination of tariff is a dynamic document and requires periodic revision depending upon several external factors, which may be beyond the control of MSETCL.
- Projection of system augmentation requirement are subject to the load forecast and load flow analysis undertaken periodically, the results of which would require additional Capex to be undertaken. Considering the changing technological advancement and to ensure safety and security of the system, there may be some unforeseen system augmentation or overhaul requirement in its requirement.

c) Norms for Operation and Maintenance for existing stations

- The methodology adopted by the Commission for proposing the O&M expense norms were justified enough to capture the actual O&M costs of MSETCL. However, the norms specified by the Commission do not capture the same. In addition to this, neither MSETCL has been requested to submit

any information nor has there been any consultation with MSETCL on the matter before finalization of the norms.

- The current norms are insufficient to capture the escalation desired to compensate for the rising WPI & CPI indices. Apart from this, during the erstwhile MSEB era, the R&M expenses were on a lower side. The R&M expenses allowed by the Commission are not reflecting the actual R&M expense requirement of the Petitioner for past many years.
- MSETCL requires more Operation and Maintenance expense due to following reasons
 - Vintage of Asset Base
 - Rise in Transmission Assets

d) Non Consideration of Advance Against Depreciation (AAD):

- The projected capital expenditure plan calls for huge funding requirement, which is not possible from the internal accruals of MSETCL. In this regard, MSETCL has taken in to consideration the debt funding to the extent of 80% as per the Commission's directives in the previous MYT and APR orders.
- Considering the higher funding requirement it is likely that the repayment of loans for particular year may be more than the depreciation allowed and in such it will lead to cash flow issues for MSETCL. Provision like advance against depreciation is a regulatory provision which has been considered earlier to avoid utilities loose credentials for not meeting the repayment obligation to various funding agencies.
- The Commission has introduced higher depreciation rates for the assets considering that the assets funding is done by taking 70% loan and loan repayment taking place in 10 years and accordingly the Commission has done away with the AAD. However as pointed out earlier, MSETCL meets its capex funding requirement by taking 80% of the amount and loan repayment is normally done in 10 years. Therefore MSETCL's amount of loan repayment in a year would always be higher than allowable depreciation computed using the new rates. Since MSETCL is not having any other resources of income except the Transmission tariff, it would not be able to meet its loan obligation.

e) Pre Tax Return on equity

- The National Tariff policy notified by the GOI on 6th Jan 2006 also stipulates that the rate of return on equity as notified by the Central Commission should also be followed by the SERC's. MSETCL requests the Commission to change the norms on ROE and make it in line with the current CERC regulations, which provides that ROE should be computed at the base rate of 15.5% to be grossed up with the applicable tax rate for that year.

4. Subsequent to the filing of the Petition, the Commission issued a Notice on April 27, 2011 to MSETCL with copies marked to Consumer Representatives, i.e., Prayas (Energy Group), Mumbai Grahak Panchayat, Vidarbha Industries Association and Thane Belapur

Industries Association, conveying the hearing to be held for the Petition on May 05, 2011 at 12.00 hours in the office of the Commission.

5. Accordingly, a hearing was held on May 05, 2011, where the Petitioner elaborated on the issues raised in the Petition.

6. Having heard the matter, the Commission is of the view as under :

- (a) MSETCL has sought review of the MYT Regulations, 2011 under Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004. The said provision applies for seeking review of direction, decision or order of the Commission and not Regulations notified under Section 181 of the 2003 Act. There is no provision for review of Regulations. Regulation 85 (a) provides as under:-

“Review of decisions, directions, and orders:

85. (a) 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.”

Even Section 94(1)(f) of the 2003 Act, which is extracted below, applies to review of decisions, directions and orders and not regulations:-

“94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

...

(f) reviewing its decisions, directions and orders;”

Hence, the prayer seeking review of MYT Regulations, 2011 is not maintainable under Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004 or under Section 94(1)(f) of the EA 2003, and is therefore rejected.

- (b) As regards the prayer made in the Petition seeking exemption under the first proviso to Regulation 4.1 MYT Regulations 2011, the Commission is of the view

that the MYT Regulations 2011 were to take effect from April 1, 2011. Certain provisions are extracted:-

“1.3 (a) These Regulations shall be applicable for determination of tariff in all cases covered under these Regulations from April 1, 2011 and onwards up to FY 2015-16 [i.e., till March 31, 2016].

(b) These Regulations shall be applicable to all existing and future Generating Companies, Transmission Licensees and Distribution Licensees and their successors, if any.

1.4 These Regulations shall come into force from April 1, 2011.”

However, till date no Tariff filing has been made by the Petitioner under the MYT Regulations, 2011. On the other hand, the Commission is duty bound to notify Tariff Regulations under Section 61 of the 2003 Act and in doing so is to be guided by “multi year tariff principles”. Section 61 provides inter alia as follows:-

“61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

..

(f) multi year tariff principles;”

Paragraph 5.3 of the Tariff Policy notified by the Central Government provides *inter alia* as follows:-

“(h) Multi Year Tariff

1) Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for the determination of tariff, shall be guided inter-alia, by multi-year tariff principles. The MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The framework should feature a five-year control period. The initial control period may however be of 3 year duration for transmission and distribution if deemed necessary by the Regulatory Commission on account of data uncertainties and other practical considerations. In cases of lack of reliable data, the Appropriate Commission may state assumptions in MYT for first control period and a fresh control period may be started as and when more reliable data becomes available.”

In the present situation where till date no Tariff application has been filed by the Petitioner under the MYT Regulations, 2011, and if no filings are continued to be made by the Petitioner for its aggregate revenue requirement and tariff then the Petitioner and the beneficiaries of its transmission system will suffer as the determination of tariff would get delayed. The Tariff Policy also provides that:-

“8.1 Implementation of Multi-Year Tariff (MYT) framework

....
7) *Appropriate Commissions should initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee.”*

Currently, the Hon'ble Appellate Tribunal is seized of the larger issue facing several Electricity Regulatory Commissions of “delays in the tariff determination exercise” in Tariff Revision (Suo motu action on the letter received from the Ministry of Power) in O.P. No. 1 of 2011. In these circumstances, the Commission is of the view that the Petitioner must file its application under Section 64 of the 2003 Act seeking approval for its annual revenue requirement and determination of tariff.

Having said that, it may not be possible to ask the Petitioner to file application under Section 64 of the 2003 Act seeking approval for its Annual Revenue Requirement and determination of Tariff under the MYT Regulations, 2011 in view of the fact that by the time the Petitioner gets the approval of the Business Plan under the MYT Regulations, 2011 and consequently based on the forecasts and trajectories approved in the Order approving the Business Plan by the time the Petitioner files its Petition under the MYT Regulations, 2011 in all probability the entire one whole financial year of 2011 – 2012 would get over. There is no other choice but to enable the Petitioner to file its ARR and Tariff application under the "Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005".

- (c) The Commission has issued amendments to the MYT Regulations 2011 viz., Maharashtra Electricity Regulatory Commission (Multi Year Tariff) (First Amendment) Regulations, 2011, on October 21, 2011, to enable the continuance of ARR and Tariff filings under the "Maharashtra Electricity Regulatory Commission

(Terms and Conditions of Tariff) Regulations, 2005" for the period of exemption under the first proviso to Regulation 4.1 MYT Regulations 2011.

- (d) The Commission is empowered under the first proviso to Regulation 4.1 of the MYT Regulations, 2011 to exempt the determination of tariff of a Generating Company or Transmission Licensee or Distribution Licensee or category of Transmission Licensee or Distribution Licensee under the Multi-Year Tariff framework. The proviso to Regulation 4.1 provides as follows:-

“4 Multi-Year Tariff Framework

4.1 The Commission shall determine the tariff for matters covered under clauses (i), (ii), (iii), (iv) and (v) of Regulation 3.1 above under a Multi-Year Tariff framework with effect from April 1, 2011:

Provided that the Commission may, either on suo-motu basis or upon application made to it by the applicant, exempt the determination of tariff of a Generating Company or Transmission Licensee or Distribution Licensee or category of Transmission Licensee or Distribution Licensee under the Multi-Year Tariff framework for such period as may be contained in the Order granting such an exemption.”

(e) The Commission is not inclined to grant the prayer of the Petitioner seeking postponement of the second control period by five year. Such a long gap would defeat the statutory provisions quoted above that mandate tariff determination be undertaken on multi year principles. However, it is on the other hand necessary to allow the applicant to gear up to the framework enshrined under the MYT Regulations, 2011 as also mandate the applicant to continue to file its ARR and Tariff Petition annually in time without delay. This is in the interest of the applicant and the beneficiaries of its transmission system.

(f) In light of the above, the Commission is of the view that it has become necessary to invoke the first proviso to Regulation 4.1 of MYT Regulations, 2011 in order to exempt the determination of tariff of the Petitioner under the Multi-Year Tariff framework till March 31, 2013 (i.e., for a period of 2 years). The said exemption is hereby granted.

With the above, Case No. 62 of 2011 stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V.P. Raja)
Chairman