

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.com
Website: www.Mercindia.com

CASE No. 29 of 2003

In the matter of SLC charges and ORC scheme.

Shri P. Subrahmanyam, Chairman
Shri Jayant Deo, Member
Dr Pramod Deo, Member

ORDER

Dated: 10th August, 2004

Under their Petition dated 6th August, 2003, M/s Shree Om Estate Developers (SOED) & two Others have submitted the following prayers:

- "a) The Hon'ble Commission may kindly invoke its powers under Sec.29 and 22(1) (c) & (d) of the Electricity Regulatory Commissions (ERC)Act and to declare the impugned ORC scheme as null and void and to restrain the Respondent from implementing the same or to formulate a new ORC scheme.*
- b) Pending final decision of this petition on merits the Respondent be directed to compensate the petitioners either by directing the respondent to repay the amounts of SLC that will be recovered from the prospective consumers to whom electricity connections will be given from the infrastructure erected by the petitioners and handed-over to the Board; or by restraining the respondent from giving electricity connections from the said infrastructure, without obtaining NOC from the Petitioners."*

Subsequently, since the Electricity Act (EA), 2003 had already come into force, the Petitioner modified the original Petition and referred to Section 43 and 86 of the EA, 2003 read with the proviso to Section 61 and Regulation 72 of the Conduct of Business Regulations, 1999, with the following prayers:

- a) The Hon'ble Commission may kindly invoke its powers under Sec.43 of the Electricity Act 2003 and to declare the impugned ORC scheme as null and void and to restrain the Respondent from implementing the same or to formulate a new ORC scheme.*

b) *Pending final decision of this petition on merits the Respondent be directed to compensate the petitioners either by directing the respondent to repay the amounts of SLC that will be recovered from the prospective consumers to whom electricity connections will be given from the infrastructure erected by the Petitioners and handed-over to the Board; or by restraining the respondent from giving electricity connections from the said infrastructure, without obtaining NOC from the Petitioners.*

2. At the hearing on 1st December 2003, the Petitioners' Counsel, Shri S.C. Karandikar, submitted that the Petition in essence challenges the collection of SLC (Service Line Charge) by the Maharashtra State Electricity Board (MSEB), which is already collected through the ORC (Out Right Contribution) scheme. While explaining the scheme, which is essentially for expeditious creation of infrastructure facility at the cost and option of the consumer so as to avail of new connection for electricity supply instead of waiting for a long period for the utility to do so and effect supply, he submitted that, in this case, besides paying the cost of 100 kVA transformer, the Petitioner has also paid 15% supervision charges on the quote given by MSEB for creation of the complete facility.

3. Counsel submitted further that MSEB have released 9 connections from the same transformer. MSEB put a condition in the scheme that the contributors will have no exclusive rights over that particular portion of infrastructure, though fully paid for by them, and that MSEB will be free to give connections to anyone. The Petitioners' basic objection is that the connection should be given to only such consumers who have contributed for the infrastructure proportionate to the capacity of the transformer sub-station. Alternatively, a proportionate amount should be reimbursed to the original ORC scheme contributor(s) from the prospective consumers from whom the Board will collect SLC charges.

4. Counsel drew Commission's attention to Section 43 of the EA 2003:

“Every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply”.

Thus, a statutory duty has been cast upon MSEB to erect the infrastructure, if necessary, and to give supply within one month.

“Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission.”

If there is no infrastructure, or if strengthening or other arrangement for necessary infrastructure is required, then the time allowed beyond one month is to be stipulated by the Commission. There is no legal provision that empowers MSEB to recover the cost.

Sub-section 43(2) reads as:

“It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1);

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.”

Thus, the exception is only that, if he is having a separate supply, then the consumer must pay the price determined by the Commission. Further, according to Section 46,

"The State Commission may, by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply".

SOED Counsel also drew attention to Regulation 72(2), which reads as follows:

"No utility shall fix any tariff for intra-state transmission, distribution or supply of electricity and terms and conditions for the supply of electricity, without the general or specific approval of the Commission."

5. Therefore, in view of Sections 43, 46 and Regulation 72(2), SOED Counsel submitted that it is the duty of the licensee to erect his infrastructure, the period will be fixed by the Commission and, if any expenses are to be incurred, then those expenses are also to be fixed by the Commission. Hence, without such approval from the Commission, MSEB cannot collect the SLC or O.R.C. to erect new infrastructure. In effect, therefore, the existing ORC scheme is against the provisions of EA, 2003 and should be declared null and void. The Commission may direct MSEB to frame a new ORC scheme under the provisions of Section 46, if at all it is required.

6. Shri Gaurav Joshi, Counsel for MSEB submitted that the Petition is not maintainable in the first place. Similar Petitions had been taken up earlier by the Commission, who had already ruled on them. Referring to Case No 26 of 2002 where a similar challenge was made to the levy of SLC under the ERC Act., the Commission in its Order dated 27.6.2002 [Para 12, 13, 14, 22(iii); 26(viii)] has made clear its position regarding collection of SLC charges. In compliance with those directions, MSEB issued a Commercial Circular withdrawing the enhancement of SLC charges and have continued charging as per the dispensation in existence prior to the constitution of the Commission.

7. Counsel for MSEB submitted that the 1985 scheme and Conditions 5 and 6 of MSEB's Conditions of Supply are self-explanatory. These had already been submitted in earlier cases. Being statutory and binding at that time, they are not open to challenge. The jurisdiction of the Commission to determine SLC charges under the new Act cannot be disputed. However, under Section 49 of the Electricity (Supply) Act, MSEB had vast powers as the deciding authority and could supply electricity on such terms and conditions as it thought fit, which position has been repeatedly upheld by various Courts.

8. MSEB Counsel submitted further that, as upheld by the High Court in the light of the ERC Act, any further amendment to a Commercial Circular relating to terms and conditions of supply requires the approval of the Commission. However, that did not mean that the Circulars issued or the Conditions of Supply fixed prior to 1998 become void. Section 24 of the General Clauses Act provides that whatever has been done under the previous Act shall continue unless it is sought to be changed. Even the EA, 2003 does not impose any specific prohibition on such changes. It says that whatever the charges are to be have to be approved by the competent authority, otherwise the existing status quo continues.

9. The Commission inquired as to whether, since the authority to fix terms and conditions of supply was challenged right in 1999 and regarding which the High Court has upheld the Commission's jurisdiction, the Commission is not required to approve and/or amend such Circulars with recovery of charges as may be applicable, with effect from 1999 when it was challenged first, or prospectively. Counsel for MSEB responded that such charges are not to be amended retrospectively since the High Court has held that fresh charges cannot be levied without approval. It had also been the view of the Commission earlier that the existing Circulars as on the date of the Commission coming into existence are valid. Counsel submitted that, accordingly, while the Commission can determine the charges, yet till such time as it does so, the pre-existing charges continue. The entitlement and right of MSEB to charge is not inconsistent with the Act, except that the charges have to be approved by the Commission through framing of Regulations, which are not yet in place. Counsel pointed out that MSEB have already placed before the Commission the proposed modified Conditions of Supply for approval because of its ruling to that effect, but under Section 50 of the new Act that has become irrelevant now. In any case, the entire Conditions of Supply and Circulars have been placed for approval of the Commission.

10. The Commission observed that this scheme existed earlier for HT consumers. They were given refund in their tariffs. For 10 years, this was the scheme and the money was refunded through their bills. The capital cost of the infrastructure was advanced by prospective consumers in whatever form MSEB wanted it. After sometime, consumers got a refund through their tariff. The issue is whether the Commission is going to look into all this in the light of the 1999 case (2000 tariff Order) observations, and whether it applies only to a particular case or all other cases? The Commission also observed that, at this stage, the limited question is that of maintainability of the Petition, and whether MSEB have increased the charges under the ORC scheme after the Commission came into existence. Counsel for MSEB submitted that what is recovered is the capital expenditure. There was no formal scheme as such. Unless SLC are to be charged, the cost is estimated and compared with the estimate of SLC from the consumer. If the estimate is more than the SLC that is recovered from the consumers, the party concerned is given an option to either carry out the work himself and pay 15%, or MSEB carries out the work and the consumer pays the actual cost plus 15% supervision charges. If the estimate of aggregate SLC charges received from the new consumers is equal to the total capital expenditure, then there is no problem. If it is higher, then the consumers have two options, i.e. to either pay the entire amount themselves and have the work carried out with 15% supervision charges, or MSEB are also willing to pay the difference subject to fulfilment of budgetary procedures that are likely to take time. Hence, consumers generally opt to carry out the work themselves.

11. MSEB Counsel also pointed out that another builder had filed a similar Petition, and it was rejected on the ground that it was essentially a dispute between the builder and his customers [Case No. 40 of 2002- Para 11].

12. The Commission observed that since MSEB are mandated to effect supply but are not able to arrange finances quickly, they are asking the consumer to do so. Therefore, MSEB would have to refund the amount as and when funds become available. Counsel for MSEB submitted that, besides the cost of the earmarked facility, MSEB are also providing other infrastructure like upstream equipments, and maintaining them. There is no question of refunding the amount because the consumers have opted to carry out the work on their own instead of waiting for MSEB's budgetary arrangements. Schedule VI of the Electricity (Supply) Act, 1948 also empowers the SEB to collect such charges. Under Schedule VI (Proviso B to Clause VI):

"If required by the licensee so to do, pay to the licensee the cost of so much of service line as may be laid down or placed for purposes of supply upon the property in respect of which the requisition is made and of so much of any service line has been necessary for the said purposes to lay down a place beyond 100 feet from the distributing licenses main..."

Counsel for MSEB submitted that the issue of charging the SLC was also challenged in 1985, and has been well settled by two High Court judgements that have held that the terms of the Electricity (Supply) Act are overriding and that the SEB can charge such amounts.

13. Counsel for SOED responded that the challenge is not against the SLC but the ORC scheme alone. For the ORC scheme, he pointed out that there is not even a formal, specific Circular. It is the sweet will of the concerned field official as to what estimate is to be given against the particular requirement of each application. If at all the consumer has to pay the charges to MSEB, there must be formal guidelines as to what the amount of the ORC should be. Apart from that, if a group of people who are ready to contribute approach MSEB and obtain connections on investing certain amounts for the purpose, those amounts should be refunded, and that is what prayed for by way of interim relief. If MSEB are giving connections to anyone besides such consumers, as and when they recover the SLC charges from the prospective consumers the related SLC portion should be given back. Unfortunately, there is no Circular governing ORC. If a person is contributing or personally incurring expenditure to set up a transformer, that becomes a part and parcel of MSEB's machinery. Its use is extended to many others besides him, and that particular cost should be refunded.

14. Counsel for MSEB submitted that a clarificatory Circular was issued subsequently in 2000 because different officers were computing the amounts differently, following different methodologies. Now MSEB have a uniform system for the purpose.

15. The Commission noted at the hearing that it is surprising that MSEB, a product of statute as well a public service organisation, did not have a formal Circular in this regard. Thus, there was no system which binds the field officials regarding the estimates for the particular requirement of each application. If at all the consumer is to pay the charges to MSEB, there should have been formal guidelines as to the amount of the ORC. The issue at hand is whether levying of such charges is legal or not while keeping in mind the arguments and observations at Paras 9 and 10 above. The point at issue is the manner in which MSEB are determining this amount. Counsel for MSEB submitted that it is within their discretionary power, which is exercised on the basis of an estimate of the actual costs that have to be incurred. Moreover, in the present case, the builder has a problem with his customers and that is why he has come forward with a plea that if you give to any customer from my infrastructure, please take my NOC or else don't do so, so that he retains a handle over his customers.

16. The Commission notes that the dispensation regarding SLC is set out in various Circulars of MSEB, on a basis that is pre-existing. Admittedly, the ORC charges have not been codified in this manner, although MSEB Counsel has stated that clarifications had been given subsequently with regard to how the estimates are to be drawn up. Although there is some basis for the computation of ORC charges, viz. the estimates prepared in each case regarding the cost required to be incurred, the entire scheme of things lacks transparency and may suffer from arbitrariness in the absence of a clear and duly approved dispensation. The existing practices also do not adequately address the matter of refund to the original contributor when other prospective consumers are subsequently brought in. As acknowledged by their Counsel, MSEB's challenge to the Commission's jurisdiction over the dispensation and charges in respect of matters, such as

these (arising from an earlier Order) failed in the High Court. MSEB were given time by the High Court to appeal to the Supreme Court, but they did not do so. Consequently, after a communication from the Commission, MSEB submitted a proposal on 26th September, 2003 for approval of their Conditions and Miscellaneous Charges of supply and various Circulars issued after the constitution of the Commission. By that time, the EA, 2003 had come into force. Under the new Act, the Commission is required to specify the Supply Code and related matters by Regulations, and this exercise was initiated. In fact, the draft Supply Code and related Regulations, which seek to comprehensively address the matters raised by the Petitioner and the anomalies and open endedness of the present practices followed by MSEB, have recently been put to the public for comments by the Commission. There would, therefore, be a clear and transparent dispensation after these Regulations are notified, i.e. prospectively. Therefore, while appreciating the issues raised by the Petitioner, and also keeping in view MSEB's arguments that some of these charges are pre-existing and continue to operate until they are duly revised by the Commission, the Commission is not inclined to interfere in the matter of ORC and SLC retrospectively. However, with regard to the prayer that the amounts in excess of SLC collected/ to be collected from others to whom connections are given from the infrastructure erected by the Petitioners and handed over to MSEB, the MSEB should reimburse these amounts to the Petitioners as and when recovered, without interest.

The Commission disposes of this Petition with the above observations.

Sd/-
(Jayant Deo)
Member

Sd/-
(Dr Pramod Deo)
Member

Sd/-
(P. Subrahmanyam)
Chairman, MERC

Sd/-
(A.M. Khan)
Secretary, MERC