

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 28, 29 and 30 of 2002

**In the matter of
Waiver of demand charges, compensation for losses incurred, etc., on account of
failure to power supply by Maharashtra State Electricity Board (MSEB) and
related matters.**

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

ORDER

Dated: August 1, 2003

In their Petitions, applications and / or interventions, the Shirolu Manufacturers Association, (SMA), Kolhapur (on 19.7.2002), the Gokul Shirgaon Manufacturers' Association (GSMA), Kolhapur (on 23.10.2003), the Maharashtra Rajya Veej Grahak Sanghatana, (MRVGS), Ichalkaranji (on 3.10.2002), and the Krishna Valley Chamber of Industries and Commerce, (KVCIC), Kupwad (on 15.11.2002) have referred to the disruptions in power supply that took place in certain areas of the State in May-June 2002 and have sought directions to the Maharashtra State Electricity Board (MSEB) with regard to the following:

- (i) Waiver of Demand Charges for the relevant period, and general guidelines for future cases,
- (ii) Compensation for losses / damages suffered by the parties, and general guidelines.
- (iii) Simplification of procedures and timely permission to continuous process industries for installing DG sets.

Citing these, M/s Primlaks Waffles Pvt Ltd. (PW), with their unit at village Ambervet, Taluka Mulshi, District Pune have referred to the power supply at low voltage (below 360 volts) to them and other units in the Pirangut area virtually throughout November, 2002, as a result of which heavy costs had to be incurred by them on account of operating DG sets, and which were likely to continue. They have also sought waiver of demand charges for that period, and guidelines for the future.

2. Given the nature and issues involved in these Petitions and applications, they were clubbed together for hearing before admission on 13th January 2003. Thereafter, the Central Electricity Authority (CEA) Report regarding collapse of towers on the Parli-Chandrapur line, which was ostensibly one of the causes of disruption in power supply in May, 2002, was circulated to the parties, particularly with regard to the facts and role of MSEB in this regard, and some have submitted their comments.

3. The parties present elaborated on the short submissions and reliefs prayed for in their Petitions/applications in oral submissions at the time of hearing. On behalf of M/s Shirolī Manufacturers Association (SMA), Shri Pratap Hogade submitted that the industrial consumers around Shirolī in Kolhapur District comprise mainly steel and foundry units which are power intensive and require continuous power. For a period of 13 days from 18th to 30th May 2002 there was a sustained disruption of power, which continued even upto 10th June 2003 through load shedding. This resulted in heavy losses in terms of outright production, inferior quality of finished goods, delay in supply of finished products, etc. The power cut for a part of this period was notified and, therefore, MSEB were approached to give relief in the demand charges claimed for the May, 2002. However, instead of reducing these charges, MSEB only allowed the payment of the May bill in two instalments. Since that decision was conveyed only on 20.6.2002, i.e. after the due date for payment, MSEB levied delayed payment charges and interest on those who did not pay within due date. Thus, in addition to production and related losses, the affected consumers were further burdened with demand, delayed payment and interest charges. Therefore, the Association seeks a reduction of the demand charges proportionate to failure to supply power and partly offset the increase in the cost of production.

4. On behalf of the Association, reference was made to SC judgement [AIR 1976 SC 1100] in the case of M/s Northern India Iron and Steel Co. VS. the State of Haryana in which the Court has ruled that upon the “*inability of the Board to supply energy due to power cut, proportionate reduction will have to be made*” in the monthly demand charge. The Court took account of the following definitions:

“Demand Charge - shall mean the amount chargeable per month in respect of Board’s readiness to serve the consumer irrespective of whether he consumes any energy or not, and is based upon the connected load, the maximum demand or the contract demand, as the case may be and as prescribed in the relevant schedule of tariff”.

“Energy Charge - shall mean the charge for energy actually taken by the consumer and is applicable to the units consumed by him in any month.”

In this background, it had been pleaded that “*since the Board was not ready to serve the consumer and the consumer was ready to consume maximum electric energy the former was not entitled to ask for any demand charge.*” To this the Supreme Court took the view that “*... the inability of the Board to supply electric energy due to power cut or any other circumstance beyond its control as per the demand of the consumer according to the contract will be reflected in and considered as a circumstance beyond the control of the consumer which prevented it from consuming electricity as per the contract and to the extent it wanted to consume. The monthly demand charge for a particular month will have to be assessed in accordance with sub-clause (b) of clause 4 of the tariff and therefrom a proportionate reduction will have to be made as per sub-clause (f).*” Shri Hogade submitted that, accordingly, the Commission should not only consider reduced demand charges for the month of May, 2002 as notified, but also for the subsequent periods

5. Shri Hogade also referred to Sections 14 and 20 of the Consumer Protection Act, in which the term “deficiency” is defined, and which provide for compensation for such deficiency in “service”. Moreover, a token penalty should also be imposed on the officials of MSEB on the analogy of MSEB being entitled to charge penalties (such as for low power factor, penalty, Contract Demand penalty, interest on delayed payment, etc.) from the consumer. The Commission must consider a complementary penal provision on the utility for deficiency in providing its service. This would improve the overall efficiency of the system and minimize untimely and unwarranted power cuts.

6. It was further pointed out on behalf of the Association that, given the nature of the industry around Shiroli to whom power was a critical element, the installation of DG sets was essential to deal with such contingencies. However, the procedure and unjustifiably long time taken by MSEB for granting such permission was highly unreasonable and sought directions to simplify the procedure and allow such applications within a reasonable time.

7. The Maharashtra Rajya Veej Grahak Sanghatana, again through Shri Hogade, its President, reiterating the contentions in their Petition which are substantially in support of the Petition filed by SMA, urged that MSEB be directed to reduce the demand charges on a pro-rata basis during the period of the power cut. It was submitted on their behalf that the load shedding that was resorted to far exceeded the notified duration. Since sub-station-wise data of actual load shedding is available with MSEB, they should have no difficulty in determining the extent of proportionate reduction which was required in the demand charges. The analogy of the existing provision in MSEB’s terms and conditions of supply relating to a new consumer in whose case levy of demand charges was permitted for 15 days was also available.

8. Shri M.M. Damle of Primlaks Waffles Pvt Ltd. submitted that, on account of the persistent low voltage and power failures in the Pirangut area, particularly between 2nd November and 31st December 2002, their unit along with hundreds of others has suffered heavy production and other losses. They have also incurred heavy costs on account of being forced to run the units on generators. The HT consumers have to spend double their monthly electricity bills for running generators because the connected load and generator capacity often do not match, resulting in higher fuel consumption. When the matter was taken up with MSEB officials, a reply was given after a long time and they took two months to repair the burnt booster. When MSEB were asked to replace the booster, the CE (Pune Rural) stated that the company that had fitted the booster has asked for advance payment before sending their representatives for repairs and, since MSEB do not make such advance payments, action was delayed. Thus, owing to internal policies and procedures of MSEB, there was a long delay in rectifying the problem. Consequently the consumers had to suffer financially while paying the Board ostensibly for delivering reliable supply. He drew attention to the newspaper report dated 20.11.2002 entitled “Low voltage cripples Pirangut firms” annexed to their Petition. He submitted that since there is no effort on part of MSEB to correct things within a reasonable time frame, they should not levy demand charges for November and December 2002.

9. Shri Damle submitted that, in its Order dated 5th May 2000, the Commission had dwelt on the quality of power supplied by MSEB, but even after two years there has been no significant improvement in the quality and quantity of power supply. While agreeing with the submissions of Shri Hogade, he urged the Commission to direct MSEB to waive and refund the demand charges, and also to set out guidelines for the future.

10. On behalf of the Vidarbha Industries Association, consumer representative under Section 26 of the ERC Act, Shri R.B. Goenka pointed out that in the review Petition on the tariff Order dated 10.1.2002 regarding which MSEB have filed an Appeal in the High Court, one of the points concerned load shedding and demand charges. While supporting the present Petitions, he drew attention to Section 29(2) (e) of the ERC Act, which enjoins that “*interest of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply*”. While emphasizing the expression “use of electricity”, he pointed out that the average cost of supply consists of the fixed cost (related to demand charges) and variable costs (related to energy charges), and submitted that, thus, when electricity is not supplied, MSEB cannot be allowed to charge for it. He submitted further that the demand charges levied, which are based on meeting unrestricted demand, are higher than would have been payable according to the principles set out under Section 46(5) of the Electricity (Supply) Act read with Section 29(2) of the ERC Act. In this connection he referred to SC judgment in Civil Appeal No.156-164 of 1989 dated 17.1.1989 (AIR 1989 – SC 1030). Although MSEB are expected to function on commercial principles, they are being compensated for fixed expenses even if they do not supply any electricity to a consumer in violation of these principles. That is also inconsistent with the provisions of Section 22(2)(e) and 29(2)(f) of the ERC Act. Therefore, the Board should not be entitled to recover demand charges if there is load shedding.

11. Referring to the Commission’s observations on reliability charges in its tariff Order dated 10.1.2002, Shri Goenka submitted that reliable supply goes beyond mere availability of power, and encompasses the quality of supply stipulated under the Indian Electricity Rules. Thus, it is the duty of MSEB to supply quality, uninterrupted power to consumers. Shri Goenka submitted that compensation and damages are provided for under Section 19 of the Indian Electricity Act. He supported reduction in demand charges in proportion to actual supply. He also urged the Commission to impose a token penalty on MSEB to send a signal to them that they cannot be absolved of the failure to provide uninterrupted and quality power.

12. In their written replies with regard to the disruptions in May-June, 2002, MSEB have submitted that, due to the failure of transformer at HVDC sub-station, Chandrapur on 13/05/2002, followed by failure of 400 kV Chandrapur – Parli Line due to cyclone on 17.5.2002, MSEB had resorted to additional load shedding to the extent of 1000 MW, and consumers in the districts of Pune, Satara, Sangli, Solapur, Kolhapur, Nanded, Parbhani, and Hingoli were affected. Due to the cyclone, which was beyond the control of the Board, 10 towers of 400 kV Chandrapur – Parli lines had collapsed and it was, therefore, not possible for MSEB to make immediate alternate arrangements for power supply. In view of this situation, the State Government, under Notification dated 30.5.2002 under Section 6-A(1)(a) and (b) of the Bombay Electricity (Special Powers) Act, 1946, had directed that “no industrial consumer within the areas of the limits of above mentioned districts should be permitted to use power (a) for purpose of iron and steel manufacturing 24 hours every day and (b) for any other industrial purposes between 08.00 a.m. and 12.00 midnight, every day”. These were with immediate effect i.e. w.e.f. 30.5.2002 and were valid upto 3.06.2002. On their own, MSEB permitted industrial consumers in the affected Districts to pay the energy bills for May 2002 in two equal instalments. These consumers had also requested for waiver of Demand Charges on a pro-rata basis, but MSEB did not agree since the demand charges payable by a consumer represent the fixed cost incurred by MSEB in making power supply available. MSEB have pointed out that the Commission, in its Tariff Order dated 05.05.2000, has mandated recovery of fixed costs through fixed charges, and that all consumers should be subject to a two-part tariff regime. The Commission followed the same principle in its subsequent tariff Order. MSEB have submitted that, in the instant cases, even though the consumers in these Districts were not permitted to use electricity for a specified period, MSEB

had incurred fixed expenditure on the infrastructure created for them. These consumers cannot, therefore, be permitted any relief in the demand charges on pro-rata basis.

13. Reiterating that the interruption in power supply in certain Districts in May-June 2002 was mainly due to natural calamity which resulted in the collapse of the towers on the 400 kV Chandrapur-Parli line, MSEB have stated that it was unintentional and beyond their control. On this ground alone, they have submitted that the industries affected cannot demand any compensation for the alleged losses. MSEB have drawn attention to the provision in the Agreement of Power Supply [Clause 15 (a)] executed by the High Tension consumers, namely “the supplier shall take all reasonable precautions to ensure continuity of supply of power to the consumer but shall not be responsible for or liable to the consumer for any loss to him or damage to his plant and equipment due to interruptions in supply due to damage to the Supplier’s plant and equipment for reasons including but not limited to war, mutiny, riot, earth-quake, cyclone, tempest, strike, civil commotion, lock out, lightening, fire, flood, accident or breakdown of plant and machinery or causes beyond control of the Supplier.” In view of this provision, MSEB are not liable for the payment of any compensation or penalty.

14. With reference to the SC judgment cited by the SMA, Counsel for MSEB submitted that the matter was further considered by the Mumbai High Court in the case of MSEB itself (Mukund Iron & Steel Works v/s MSEB AIR 1982) which pointed out that the SC judgment relates to certain specific provisions of the tariff in the absence of which the consumer is bound to pay demand charges. He also referred to SC judgment in the case of BSEB VS. Dhanawat Rice and Oil Mills (AIR 89 1030) and Orissa State EB (AIR SC 95 1553) and submitted that, in the absence of any provision made in this regard in the tariff, no pro-rata reduction in demand charges is possible. However, although the demand charges cannot be reduced in this manner as a matter of law, MSEB could and did offer concession in the payment terms by allowing instalments. With regard to the circumstances in which delayed payment charges were levied, Counsel for MSEB drew attention to their instructions dated 4.1.2003 to the effect that “*the consumers who were affected by the power failure and who were permitted to pay the May 2002 energy bill in instalments, have further been exempted from payment of Delayed Payment Charges and Interest incidental to delay in payment of May 2002 energy bill*”, and the same still holds good.

15. With regard to the prayer for compensation and imposition of a penalty, Counsel for MSEB submitted that such claims relating to alleged deficiency in services are within the ambit of the Consumer Protection Act, and should be argued in the fora under that Act. He submitted that Section 19 of the IE Act has no relation to the present matter since it deals with damages relating to the licencees power to lay lines, etc. That provision cannot, therefore, be read with Section 22 or 29 of the ERC Act for any claim of compensation due to load shedding or failure of supply, which was, in any case, beyond MSEB’s control in the instances of May-June 2002 that have been cited. The matter of penalty can also be determined only if it is specifically provided for in the tariff Order.

16. With regard to streamlining procedures and the time taken for allowing the use of DG sets, Counsel for MSEB submitted that certain procedural and statutory formalities have to be complied with, which may be one of the causes of delay, if any. He submitted, however, that such applications would be disposed of as quickly as possible, and MSEB would be willing to simplify the formalities. He pointed out, however, that MSEB’s powers under Section 44 of the Electricity (Supply) Act cannot be taken away.

17. With regard to the nature and circumstances of the breakdown which occurred in May 2002, Counsel for MSEB submitted that the CEA had investigated the power failure and there has been no indictment of the Board. Hence, in any event, the question of imposition of penalty for failure in providing services did not arise.

18. These Petitions and applications essentially concern the issues of whether, in the instances and circumstances cited, the affected consumers are entitled to directions from the Commission to MSEB to reduce demand charges, and to compensate them for losses suffered, and to impose penalty on account of failure to supply power as expected or contracted for; the general guidelines to be followed by MSEB in such cases; and the procedure and time frame for disposing of applications for installation of DG sets, particularly for industries which are heavily dependent on quality power. Another set of issues is subsequent to these, viz. the principles that should govern the nature and extent of relief and compensation, whether such relief and/or compensation can be mandated even in circumstances outside the utility's control and/or mandated by notifications under a statute such as the Bombay Electricity (Special Powers) Act.

19. As far as the specific instances cited and the reliefs and compensation claimed on this account by the parties are concerned, it is necessary to consider Section 49 read with Section 52 of the ERC Act, which provides that nothing contained in the Act or Regulations shall have effect in so far as it is inconsistent with the provisions of the Consumer Protection (CP) Act. Section 3 of the CP Act states that its provisions are in addition to and not in derogation of any other law. In other words, the two Acts operate concurrently. However, it is an established principle that where a statute specifically provides for certain matters, its provisions have primacy over other laws with more general application to that particular matter. Section 2 (o) of the C.P. Act defines the provision of supply of electrical energy as a service which is within its ambit. The CP Act also provides for compensation, refund and other specified reliefs where deficiency in service can be shown, for the determination for which competent fora have been set up. Some of the matters in the Petitions are also related to contractual obligations, for which also the fora of the Civil Courts is available. Thus, the Commission is not the appropriate forum under the ERC Act for such specific reliefs and compensation in particular instances. Indeed, SMA's Petition itself refers to the provisions of the CP Act.

20. As far as the prayer for general guidelines for the future with regard to relief in payment of demand charges in such instances of failure to supply is concerned, this is a tariff-related matter. Such guidelines can be considered in the course of consideration of MSEB's tariff proposal. As it happens, subsequent to the present Petitions, MSEB have approached the Commission for approval of their annual revenue requirements and tariff for the year 2003-04. Moreover, to the extent to which changes in the Conditions of Supply are involved, certain directions have been given by the Commission in Case Nos 10 and 11 of 2000. MSEB's challenge to these directions in the High Court having failed, and no Appeal having been filed within the period granted by that Court, the Commission has directed MSEB on 30.5.2003 to comply with its earlier Order and submit the Conditions of Supply for approval within a period of three months.

21. These proceedings have been initiated and conducted under the provisions of the ERC Act. Apart from the observations made above, the new Electricity Act, 2003, which has now come into force, has several provisions which would help resolve the kind of grievances raised by the Petitioners. As far as the installation of DG sets is concerned, no permission is now required under the new Electricity Act 2003, as was the case earlier when MSEB consent was necessary under Section 44 of the Electricity (Supply) Act.

22. The Commission had circulated, in connection with these proceedings, a copy of the report of the CEA Committee of experts appointed to investigate the failure of towers on the 400 KV transmission line, which is relevant to the nature and circumstances of one element of the disruption in May-June 2002. However, another report of a CEA Committee on the wider grid disturbances that occurred on 18, 23, and 29 May 2002, partly arising from a representation from Shri Prakash Jawdekar, was also received by the Commission and had been forwarded to the State Government for informing the Commission as to the action taken and/or proposed. The Commission would pursue separately the remedial measures taken wherever required in the context of these reports, as well as the situation pertaining in the Pirangut area, with MSEB and the State Government as the case may be.

The Commission disposes of the matter of admission in these cases with the above observations.

Sd/-
(Jayant Deo)
Member

Sd/-
Dr Pramod Deo)
Member

Sd/-
(P. Subrahmanyam)
Chairman, MERC

Sd/-
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Secretary, MERC