



Consumer Grievance Redressal Forum, Kalyan Zone
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No. **K/E/1136/1358 of 2016-17**

Date of Grievance : 01/03/2017

Date of order : 23/08/2017

Total days : 177

IN THE MATTER CASE OF GRIEVANCE NO. K/E/1136/1358/2016-17 IN RESPECT OF NAKKI HOSPITALITY P. LTD. SURVEY NO. 12, HISSA NO.1, VILLAGE KOLHI, POST KAMAN, TAL. VASAI (E), DIST. PALGHAR, PIN CODE-401201, REGISTERED WITH CONSUMER GRIEVANCE REDRESSAL FORUM KALYAN ZONE, KALYAN REGARDING ADDL. FAC.

Nakki Hospitality P. Ltd.,
Survey No.12, Hissa No.1,
Village Kolhi,
Tal. Vasai (E),
Dist. Palghar Pin code 401 201.
(Consumer No.001849035930)

..... (Hereinafter referred as Consumer)

Versus

Maharashtra State Electricity Distribution
Company Limited
through its Nodal Officer,
MSEDCL, Vasai Circle,

..... (Hereinafter referred as Licensee)

Appearance : - For Licensee- Shri Waman, ALO, Mrs. Desai, Dy. Manager,
Mrs. Dambe-UDC, Vasai Circle
For Consumer-Shri Harshad Sheth- CR

[Coram- Shri A.M.Garde-Chirperson, Shri A.P. Deshmukh-Member Secretary
and Mrs.S.A.Jamdar- Member (CPO)].

Maharashtra Electricity Regulatory Commission, is, constituted u/s. 82 of Electricity Act 2003 (36/2003). Hereinafter for the sake of brevity referred as 'MERC'. This Consumer Grievance Redressal Forum has been established as per the notification issued by MERC i.e.

“Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Ombudsman) Regulation 2006” to redress the grievances of consumers vide powers conferred on it by Section 181 read with sub-section 5 to 7 of section 42 of the Electricity Act, (36/2003). Hereinafter it is referred as ‘Regulation’. Further the regulation has been made by MERC i.e. ‘Maharashtra Electricity Regulatory Commission. Hereinafter referred as ‘Supply Code’ for the sake of brevity. Even, regulation has been made by MERC i.e. ‘Maharashtra Electricity Regulatory Commission (Standards of Performance of Distribution Licensees, Period for Giving Supply & Determination of Compensation) Regulations, 2014.’ Hereinafter referred ‘SOP’ for the sake of convenience (Electricity Supply Code and other conditions of supply) Regulations 2014’.

2] The grievance of the consumers in all the cases pertaining to AEC 1 to 4 and Addl. FAC recoveries are taken up for decision. The grievances pure and simple are of premature billing. In particular the aggregate contentions are as follows:-

- i] AEC 1 + AEC 2 are wrongly collected for billing month of August 2013.
- ii] AEC 3 + AEC 4 are wrongly collected for billing months August and September 2013.
- iii] Addl. FAC is wrongly collected for billing months of August and December 2013.

The grounds stated therefor are that the said recoveries are in contravention of MERC orders. The said MERC orders are as below:

- A] MERC Case No. 95/2013 dated 5th September 2013.
- B] MERC case No. 28 of 2013 3rd September 2013.
- C] MERC Case No. 44 of 2013 4th September 2013.

The relevant paragraphs from the above said three orders for our purpose are reproduced below for advantage.

“Commission’s Ruling.

Case No.95/2013

22. In view of the above, the Commission directs MSEDCL to recover two additional charges from its consumers, in the form of additional energy charge:

a. To recover the accumulated under-recovery of Rs. 2037.78 Crore accrued till the month of August 2013, which shall be levied by MSEDCL for a period of six (6) months with effect from the month of September 2013 till the month of February 2014. Category wise Additional Energy Charge (AEC-1) to be levied to all consumer categories in the proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Commission.

b. To recover monthly fixed expense of Rs. 235.39 Crore. This shall be levied by MSEDCL from the month of September 2013 to its consumers on a monthly basis till further determination of MSEDCL tariff by this Commission. Category wise Additional Energy Charge (AEC-2) to be levied to all consumer categories in the proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Commission.

c. Further, the Commission hereby rules that from this Order onwards MSEDCL will recover the variation in energy charge component of the amount billed by MSPGCL to MSEDCL as approved by the Commission from the consumers Suo Moto Order in Case No 95 of 2013 Page No. 6 of 6 through the FAC mechanism.

Similarly, the Commission allows MSEDCL to recover the variation in fixed charge component of the amount billed by MSPGCL and amount billed by MSETCL to MSEDCL as approved by the Commission from the consumers in proportion to the approved Average Billing Rate of respective consumer categories, under intimation to the Commission.

Case No. 28/2013

v. The Commission has allowed MSPGCL to recover the total amount of Rs. 106.44 crore (including carrying cost) on account of impact of Hon'ble ATE Judgment in Appeal No. 34 of 2012 from MSEDCL in 6 equal monthly installments starting from October, 2013.

x. The Commission has allowed MSPGCL to recover the total amount of Rs. 628.90 crore (including carrying cost) on account of impact of Hon'ble ATE Judgment in Appeal No. 47 of 2012 from MSEDCL in 6 equal monthly installments starting from October, 2013.

xi. As the variation in cost of generation is ultimately to be passed on to consumers, the Commission hereby rules that from this Order onwards MSEDCL will recover the variation in energy charge component of the amount billed by MSPGCL to MSEDCL as approved by the Commission from the consumers through the FAC mechanism. Similarly, the Commission allows MSEDCL to recover the variation in fixed charge component of the amount billed by MSPGCL to MSEDCL as approved by the Commission from the consumers in proportion to Average Billing Rate of respective consumer categories, under intimation to the Commission”.

Case No. 44 of 2013:-

“ 5.3.45--- The Commission has accordingly approved the Capital Cost and Tariff of Khaperkheda Unit # 5 for FY 2012-13. As FY 2012-13 is already completed, the Commission allows MSPGCL to recover the difference in

revenue recoverable in accordance with the Tariff approved in this Order vis-a-vis the Tariff charged by MSPGCL in 6 equal monthly installments from October 2013 onwards. The Commission shall carry out the truing up for FY 2012-13 in accordance with MERC Tariff Regulations, 2005.

5.3.46--- The Commission allows MSPGCL to recover fixed cost and energy charges as per the tariff approved in this Order from MSEDCL till tariff for FY 2013-14 is approved as a part of MSPGCL's Multi Year Tariff Petition for the second Control Period for FY 2013-14 to FY 2015-16.

5.3.47---- As the variation in cost of generation is ultimately to be passed on to consumers, the Commission hereby allows the MSEDCL to recover the variation in energy charge component of the amount billed by MSPGCL to MSEDCL as approved by the Commission from the consumers through the FAC mechanism. Similarly, the Commission allows MSEDCL to recover the variation in fixed charge component of the amount billed by MSPGCL to MSEDCL as approved by the Commission from the consumers in proportion to Average Billing Rate of respective consumer categories, under intimation to the Commission.”

Summary of our findings:

iv) The Commission observes that MSPGCL has capitalised the amount of fuel costs less revenue, on account of infirm generation of power. However, as fuel cost is a revenue expense, whether incurred during infirm generation or firm generation, the Commission is of the view that the same needs to be recovered directly for the power supplied during the period instead of capitalising it as a part of Capital Cost. Accordingly, the Commission hereby allows MSPGCL to recover the under-recovered fuel cost, i.e., Rs. 28.05 Crore for infirm power supplied to MSEDCL in three monthly installments

after the issue of this Order and MSEDCL can recover this cost through Fuel Adjustment Cost Adjustment (FAC) mechanism.

3] Consumers, therefore, seek refund of the amount recovered by MSEDCL by premature billing and excess respectively contravening the commands of the above referred orders.

4] In the reply the aggregate of contention of Licensee MSEDCL in all the cases is that to avoid complication in billing mechanism, instead of levying AEC 1 to 4 and separately they merged them all in AEC and also FAC -1 & FAC-II in --- FAC and started levying the same. Further as MSEDCL was allowed to recover the dues from October 2013, they charged the consumers from the billed month of September 2013, as such they consider August as the billing month. It is further the contention that the Hon'ble MERC was appreciate of the same. A letter in that regard was addressed to the Hon'ble MERC on 23/9/13. Further, the Circular no.209 issued by MSEDCL for above said scheme of implementation for recovery of AEC and FAC was brought to the notice of the Hon'ble MERC in a Contempt petition no. 144 of 2013 filed by one of such consumer. Same stand was taken by MSEDCL before the Hon'ble Ombudsman in case No.122 of 2013 filed by on such consumer. It is the contention that MERC has by its order passed on 27/3/2014, dropped the contempt proceeding. Also the Hon'ble Ombudsman Nagpur has upheld the scheme of recovery made by MSEDCL and denied to refund to the consumer in case No. 122/2013. It is also the contention of the MSEDCL that wherever the Hon'ble MERC has said about refund of premature billing amount it refers to billing months of July, and not August 2013.

5] Licensee has further contended that some claims are barred by limitation under 6.6 of MERC (CGRF & Ombudsman) Regulation,

2006, having been filed after two years. Reliance was placed on the order of the Hon'ble Ombudsman in Representation No.157/2016, in the matter of premature of AEC 1 & 2--- wherein it is held that:-

“The appellant has pointed out the Limitation Act is not applicable before the proceedings before the Tribunal of the Forum and therefore, the grievance cannot be rejected on the ground of limitation. The CGRF Regulations, 2006 are statutory and made in exercise of power under Section 181 and 42 of the Electricity Act, 2003. Regulation 6.6 of the CGRF Regulations clearly proves bar for admitting the grievance unless it is filed within a period of two years from the date on which cause of action has arisen. The grievance was admittedly not filed within a period of two years and hence the Forum has rejected the grievance on the ground of delay. There is no reason to interfere with the order of the Forum. Since the grievance is rejected on the ground of delay, it is not necessary to examine the merits of the case. The Bombay High Court has held in the case of Madhav Sarode V/s. Jyotiba Dayan Upasak Shikshan Mandal (2004(3) Mh. L.J. 1078) that the Ld. Tribunal erred in entering in to the merits of the matter while rejecting the appeal of the petitioner on the ground that it was beyond the period of limitation.”

6] We have heard both the parties. At the outset on plain interpretation of all these orders, it is amply clear that AEC 1 & 2 are to be recovered from September 2013. As per MERC Regulations any tariff order has to be prospectively applied. As such when MERC say in the order that recovery has to be made from September 2013, there is no reason for importing the month of August. As per the order, September 2013 is to be taken on billing month for recovery of AEC 1 & 2.

So far as AEC 3 & 4 is concerned, it has been mentioned in the order though the MSEDCL can recover the amount from Consumer in six monthly installments starting from October 2013 there is no mention that

MSEDCL can recover the amount from the consumer from billing month of August 2013. The order says that MSEDCL can recover the said charges (AEC 3 & 4) from the said order onwards. They can recover AEC 3 & 4 from September 2013 after the order was passed in case No.28/2013. This being so in both the cases of AEC 1 & 2 and AEC 3 & 4 the recovery was to be made from September 2013. Recovery made for the billing month of August 2013 is premature.

So as Additional FAC is concerned, it has been mentioned in the order though the MSEDCL can recover the amount from consumer in three months installments starting from the said order onwards. That is licensee can recover the Addl. FAC charges from billing month of September 2013 to November 2013. Recovery made for billing month of August 2013 and December 2013 is excess.

7] Now coming to the first contention raised by consumer that MSEDCL had prepared and implemented the recovery scheme and approached the Hon'ble MERC of that. A copy of the letter addressed to the Secretary MERC bearing No.026517 dated 23/9/13 is produced for perusal. Firstly, nowhere in the letter, it is mentioned that MSEDCL seeks to levy the charge for the month of August 2013. It is mentioned on the contrary that they have levied the charges from September 2013. The portion of the letter is reproduced as below:

“ -----”

“It is submitted that, to avoid the complications in billing mechanism, instead of levying all individual AEC's separately, MSEDCL has merged all the Additional Energy Charges under one head as well as also merged the Additional FAC 1 & FAC 2 under one head and started the levy of

above said charges from the month of September 2013 for further period of 6 months or till further Tariff Order by MERC.”

8] Even otherwise admittedly, there is no approval for the said scheme from the Hon’ble MERC. Much ado was tried to be made of the order passed by the Hon’ble MERC in case No. 44 of 2013 in which MERC dropped contempt action filed by one consumer.

9] It is true that among others there was a prayer in the petition as follows:

- i]
- ii] Direct MSEDCL to issue corrected energy bill for August 2013 by removing the illegal AEC charges, charged in energy bills of the consumer,
- iii]
- iv]

10] The Hon’ble MERC has recorded that vide daily order dated 8th Jan. 2014, MSEDCL was directed to take recovery action and rectify the bills. Thereupon the MSEDCL had vide its letter dated 3/3/2014 submitted that MSEDCL has refunded on months AEC and additional FAC of all such 1198 consumers amounting to Rs.2461.22 lac in billing month of February 2014. It is contended before us by MSEDCL that the said compliance as in respect of wrongful recovery for the month of July 2013 and not for August 2013. However, the Judgment is not clear on the said question. Further nothing has been produced before us to show that the refund in those 1198 cases was in respect of recovery for the month of July 2013. Even nothing has been produced to show that in 1198 cases any refunds were at all made. Further- more, the disposal of the contempt petitions as can be read from the order is on withdrawal by the petitioners. There is also a mention in the order about approaching appropriate Forum. The order in case No. 144 of

2013 does not help MSEDCL in any way to support their claim that their scheme to make premature recovery for the month of August 2013 was accepted by the Hon'ble MERC.

11] Then, there is the case of Hon'ble Ombudsman in case No.122 of 2013. With due respect this Forum has to follow and interpret the orders of MERC which we have done. The order of the Hon'ble Ombudsman does not come in the way.

12] The only question remains now is that of limitation under 6.6 of MERC (CGRF & Ombudsman) Regulation, 2006.

13] There are some cases in which point of limitation is raised by MSEDCL. In particular, it is contended that grievances have been filed after a period of two years hence there is bar of 6.6 of MERC (CGRF & Ombudsman) Regulations 2006. The cause of action arose in September 2013 but the grievance is filed before IGRC in January 2017 and before CGRF in March 2017. Licensee relies on an order of Hon'ble Ombudsman Mumbai in case Nos. 130, 130 (A) & (B) of 2016. It has been held therein that cause of action arose in September 2013 and the grievance is filed two years thereafter was barred by limitation under section 6.6 of MERC (CGRF & Ombudsman) Regulation 2006. As against this, the consumer has produced judgment of CGRF Pune in Case No.29/2016 wherein it has been held that cause of action arose on 25/6/15 when the order in case No. 95/2013 MA No.187/14, came to be passed in which MERC has directed MSEDCL to review the premature recoveries made.

14] We have given careful consideration to the submission made. The recoveries are made by the MSEDCL in September 2013, though the MERC orders thereunder were challenged by TATA Motors in Appeal No.295/2014. The APTEL set aside the order and remanded the matter with

a direction to MERC to follow the necessary procedure under section 62,64& 86(3) of the I.E.Act. This being so, the MERC orders on the basis of which the recoveries were made no more existed till 25/6/15, when the MERC passed the order in case No. 95/2013,MA No. 187/2014 passed on 26/6/15. That being so the amount recovered under the orders of MERC merely remained as deposits and in trust with MSEDCL on behalf of the consumer. The period of limitation which would start in September 2013 also remained in abeyance and stopped running/got extended till the order in case No.95/2013, MA No. 187/2014 passed on 25/6/15. This being so, cause of action arose on 25/6/15 as such the petitions filed in January 2017 are also within limitation even as per Section 6.6 of MERC (CGRF & Ombudsman) Regulation 2006.

15] Thus to conclude MSEDCL has to refund AEC 1 & 2 recovered for the month of August 2013 and AEC 3 & 4 recovered for the month of August 2013 and Addl. FAC recovered for the months of August and December 2013.

The Hon'ble MERC has also in its order in case No.78/2016 decided on 13/7/17 wherein it is held that,

“Considering the above discussion and the conjoint reading of the provisions of the Orders quoted at paras. 7 and 8 above, it will be clear that the AEC was applicable for the electricity consumption from 1 September, 2013 to 28 February, 2014. The levy of AEC on the electricity consumed prior to (in the present Case, on the consumption in August billed in September, 2013) or after that period is not mandated by the Commission's Orders. The Commission directs MSEDCL to take a review of the AEC levied on its consumers and to take corrective steps accordingly. Thus, for instance, if MSEDCL has recovered AEC in 6 installments on the electricity consumption of August,

2013 to January, 2014, it needs to refund the AEC collected on the August, 2013 consumption and recover the AEC for the consumption of February, 2014. In the circumstances of this matter, no carrying or holding cost shall be applicable.”

It is clear from the above cited order that the Hon’ble MERC has not granted the interest.

So far as this case is concerned it pertains to Addl. FAC.

16] Delay is due to a complicated question involved and the arguments heard from time to time. We were also waiting for some orders of MERC in some pending matters but ultimately due to long passage of time the matters were to be disposed off.

Hence the order.

ORDER

- 1] The grievance application of consumer is hereby allowed.
- 2] The Distribution company MSEDCL should refund Addl. FAC collected for the billing months of August 2013 & December 2013.
- 3] As per Regulation 8.7 of the MERC (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2006, order passed or direction issued by the Forum in this order shall be implemented by the Distribution Licensee within the time frame stipulated and the concerned Nodal Officer shall furnish intimation of such compliance to the Forum within one month from the date of this order.
- 4] As per Regulation 22 of the above mentioned Regulations, non compliance of the orders/directions in this order by the Distribution Licensee in any manner whatsoever shall be deemed to be a contravention of the provisions of these Regulations and the Maharashtra Electricity Regulatory Commission can initiate proceedings *suo moto* or on a

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complaint filed by any person to impose penalty or prosecution proceeding under Section 142 & 149 Of the Electricity Act.

Date: 23/8/2017.

(Mrs.S.A.Jamdar)
Member
CGRF, Kalyan

(A.P.Deshmukh)
Member Secretary
CGRF, Kalyan.

(A.M.Garde)
Chairperson
CGRF, Kalyan.

NOTE

- a) The consumer if not satisfied, may file representation against this order before the Hon. Ombudsman within 60 days from the date of this order at the following address.

“Office of the Electricity Ombudsman, Maharashtra Electricity Regulatory Commission, 606/608, Keshav Bldg, Bandra Kurla Complex, Mumbai 51”.

- b) Consumer, as per section 142 of the Electricity Act, 2003, can approach Hon. Maharashtra Electricity Regulatory Commission for non-compliance, part compliance or
c) delay in compliance of this decision issued under “Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Ombudsman) Regulation 2003” at the following address:-

“Maharashtra Electricity Regulatory Commission, 13th floor, World Trade Center, Cuffe Parade, Colaba, Mumbai 05”

- d) It is hereby informed that if you have filed any original documents or important papers you have to take it back after 90 days. Those will not be available after three years as per MERC Regulations and those will be destroyed.