



Consumer Grievance Redressal Forum, Kalyan Zone
Behind "Tejashree", Jahangir Meherwanji Road, Kalyan (West) 421301
Ph- 2210707, Fax - 2210707, E-mail : cgrfkalyan@mahadiscom.in

No. K/E/1292/1524 of 2017-18

Date of registration : 12/02/2018

Date of order : 14/03/2018

Total days : 30

IN THE MATTER OF GRIEVANCE NO. K/E/1292/1524 of 2017-18 OF M/S JAY JAGDAMBA PROFILE ENGINEERING PRODUCTS LTD., GUT NO.92/3, 422, 423, 424 WADA-SHAHAPUR ROAD, VILLAGE-ABITGAR, TAL-WADA, DIST.THANE, 421 303 REGISTERED WITH CONSUMER GRIEVANCE REDRESSAL FORUM KALYAN ZONE, KALYAN REGARDING BILLING DISPUTE AEC-1 & 2, 3 & 4 ADDL. FAC.

M/s Jay Jagdamba Profile Eng. Products Ltd.,
Gut No.92/3, 422, 423, 424,
Wada-Shahapur Road,
Village-Abitgar, Tal-Wada,
Dist.Thane, 421 303.

(Consumer no : 010519025870) ... (Hereinafter referred as Consumer)
V/s.

Maharashtra State Electricity Distribution
Company Limited,
Through it's Nodal Officer,
Vasai Circle, Vasai

... (Hereinafter referred as Licensee)

Appearance : For Licensee - Smt.R.S.Desai, Dy.Manager, Vasai Circle

For Consumer - Shri. B.R.Mantri (C.R.)

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

1) 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 Redressed 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. [Electricity Supply Code and other conditions of supply 2005] 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.

2) The grievance of the consumer is regarding excess recovery of AEC 1 to 4 and Addl. FAC. The grievance is 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 therefore 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 capitalized 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 capitalizing 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) Consumer, therefore, seek refund of the amount recovered by MSEDCL by premature billing and excess respectively contravening the commands of the above referred orders.

4) 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 they 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.

5) Point of limitation is raised by MSEDCL. In particular, it is contended that grievance has 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 on 09/10/2017 and before CGRF on 14/02/2018. 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.

6) We have given careful consideration to the submission made. The recoveries are made by the MSEDCL in September 2013, though the MERC orders there under 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.

7) 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.”

Thus even as on 13/7/2017 the Hon’ble MERC has directed MSEDCL to review the AEC levied on all consumers. Considering all these aspects bar of limitation does not operate.

8) MSEDCL in its reply on date 28/02/2018 contended that

1)

2)

3)

4) *The MSEDCL states that, in accordance with the order dtd.13/07/2017 of MERC in Case No.78 of 2016, MSEDCL has already taken decision on refund AEC-1 to 4 levied in billing month of Aug-2013 and issued Circular No.PR-3/Tariff/AEC/No.25310 dtd.13/10/2017 MSEDCL has levied and recovered AEC-1 to 4 in billing month AUG-13, after adjustment of recovery of AEC-1 to 4 of billing month of Feb-2014, MSEDCL has refunded in billing month of Oct-2017. The intimation of same of has been given to petitioner. As such the order of CGRF in respect of refund of AEC-1 to 4 has been complied and refund /recovery is adjusted through system in energy bill Oct-2017. (The copy of statement and Energy bill of Oct-2017 is enclosed herewith and marked as Annexure No.1 & 2).*

•

•

From the above circular and reply it is clear that MSEDCL has already refunded the AEC -1 to 4 amount collected from consumer for the month of Aug-2013 by giving adjustment in the month of Oct-2017.

9) Thus to conclude MSEDCL has already adjusted the refund of AEC -1 to 4 recovered for the month of Aug-2013 hence the issue is already settled. As far as Additional FAC is concerned MSEDCL to refund the Additional FAC recovered for the month of Aug and Dec-2013.

10) So-far-as interest is concerned the Hon’ble MERC has not granted the same in case No.78 of 2016 referred above.

11) Consumer Representative has submitted following submission :

1. ***Hon'ble Supreme Court in Civil Appeal No.2451 of 2007 in the matter of M/S. NTPC Ltd vs M.P. State Electricity Board & ... decided on 29 September 2011 in para 13,14 & 15 held that:***

13. *For deciding the issue of applicability of Section 62(6), we may refer to the relevant Section 62 of the Electricity Act, 2003, which reads as follows:*

"Section 62 - Determination of tariff

- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for-*
 - (a) Supply of electricity by a generating company to a distribution licensee: PROVIDED that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*
 - (b) Transmission of electricity;*
 - (c) Wheeling of electricity;*
 - (d) Retail sale of electricity: Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.*
- (2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.*
- (3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*
- (4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.*
- (5) The Commission may require a licensee or a generating company to comply with such procedure as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.*

(6) *If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.*

14. *If we look to this Section 62, sub-section (1) thereof lays down the authority of the Appropriate Commission to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee. It also permits the appropriate commission to fix the minimum and maximum ceiling of tariff in certain situations. Sub-section (2) lays down that the Appropriate Commission in its process of determining the tariff may call upon the licensee or a generating company to furnish particulars with respect to generation, transmission and distribution of power. Sub-section (5) permits the commission to require the licensee or the generating company to comply with the procedure to be specified by the commission for calculating the expected revenue from the tariff which it is permitted to recover. Sub-section (3) lays down that while determining the tariff the commission will take into consideration consumer's load factor, power factor, voltage, total consumption of electricity during any specified period, the geographical position of any area, the nature of supply and the purpose for which it is sought. It may differentiate in the matter of determining the tariff on such basis, though of course it is not expected to show any undue preference to any consumer of electricity. Sub-section (4) lays down that the tariff once fixed will normally operate for a financial year, and will not be amended more frequently than once in a financial year.*

15. *On this background sub-section (6) lays down that if a licensee or a generating company recovers a price or charge exceeding the tariff which is determined under this section, the excess amount shall be recoverable by the person who has paid such excess price or charge alongwith interest at bank rate. **We have noted that the earlier five sub-sections lay down the manner in which the tariff is to be determined, and thereafter sub-section (6) lays down that the licensee or a generating company shall not recover a price or charge exceeding the tariff that is determined. The words 'tariff determined under this section' indicate that the prohibition from charging excess price is dependent on the determination of the price under the preceding five sub-sections.***

This sub-section further states that this right to claim interest is without prejudice to any other liability incurred by the licensee. Besides what is prohibited is recovery of price or charge exceeding the tariff determined under this section and then only, the generating company will have to pay the interest on the difference. That is why the Appellate Tribunal has observed that it is only when a licensee or generating company deliberately recovers or extracts from a person a price or charge in excess of the price determined under section 62 (6), that such person can claim the excess price or charge paid by him alongwith interest computed on monthly basis, on the excess amount so charged, from the date of payment of such excess amount and up to the date of adjustment.

2. **Recently, High Court Bombay Nagpur bench in WP No.3997 of 2016 in the matter of MSEDCL v/s Shilpa Steel decided on 18/07/2017 in para 9 & 10 held that:**

9. Learned Counsel for petitioner then submitted that direction in the impugned order to pay interest is not in accordance with the Regulations. The petitioners have been directed to pay interest on the amount to be refunded at bank rate under Section 62(6) of the Electricity Act from 01/09/2010 till realization. Section 62(6) of the Electricity Act reads thus:

“Section 62. (Determination of tariff): (6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.”

10] From the careful reading of sub-section 6 of Section 62 of the Electricity Act, it is apparent that if the generating company recovers an excess amount from the consumer, the said amount shall be recoverable by consumer along with interest equivalent to the bank rate. From the communication dated 26/05/2015 by the Nodal Officer of petitioner addressed to the Member Secretary, Executive Engineer, MSEDCL, Nagpur, copy of which was sent to respondent no.1, it can be seen that in view of MERC order dated 12/09/2010 and circular issued by the Director Operations, MSEDCL, new tariff came to be implemented with effect from 01/09/2010 and the commercial consumption in the factory premises was to be charged as per industrial tariff. The communication further indicates that excess amount collected would be refunded through next upcoming energy bills. In view of this, no fault can be found with the order allowing interest on the amount to be refunded to respondent no.1.

3. **In Rep. No. 66 of 2014, Electricity Ombudsman Mumbai has also pointed out that the Electricity Act 2003 have status of subordinate legislation. It is well settled principle of law that the subordinate legislation validly made becomes a part of the Act as held by the Supreme Court in the case of UPPCL V/s. NTPC Ltd reported in (2009) 6 SCC 235.**
4. The Hon'ble Commission order in Case No.94 of 2015 date 19/08/2016 in the matter of application of Continuous to non-continuous tariff, Commission's held that in para 26.5 with help of Supreme Court and ATE order reference, "it is clear that the SoP Regulations being in the nature of subordinate legislation, an Order issued in contravention of these Regulations is not tenable. And own order has set aside with observation that "Hence, the Commission is of the view that the restriction stipulated by it earlier is inconsistent with the SoP Regulations."

As per Hon'ble Commission's order, in this case also, any order issued in contravention of Electricity Act 2003 Section 62 (6) is not tenable. So MSEDCL must refund the excess collected amount with interest.

12) We have gone through the submissions made as above. There are excerpts from some judgments quoted in the submissions. Full texts are not made available. Even otherwise we have concluded our judgments on the basis of MERC order on same issue given in Case No.78 of 2016. No interest is awarded by MERC in the said case. In fact there is some reciprocal orders of refund and recovery simultaneously made. For that reason perhaps there is no interest granted. We are told that, an application is also filed to Hon'ble MERC for review. In such a situation it would be advisable to go with the order of Hon'ble MERC, so long as the review remains not decided by Hon'ble MERC.

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

Dated :. 14/03/2018

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

(A.P.Deshmukh)
MemberSecretary
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.*