

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 47 of 2007

In the matter of
Petition of MSEDCL seeking review of Order dated August 24, 2007 read with Orders dated March 10, 2004, October 20, 2006 and May 18, 2007 inasmuch as the said orders concern Regulatory Liability Charges.

Dr. Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member

ORDER

Dated: November 1, 2007

Maharashtra State Electricity Distribution Company Limited (“MSEDCL”) filed a Petition before the Commission on September 24, 2007 seeking a review of the Order dated August 24, 2007 passed in Case No. 26 of 2007 and Case No. 65 of 2006 read with Orders dated March 10, 2004, October 20, 2006 and May 18, 2007 inasmuch as the said orders concern Regulatory Liability Charges (“RLC”). The prayers made in the Review Petition are as under:

- “a) Review and Quash/set aside/modify the Orders dated 24.08.2007 read with the earlier Orders dated 10.03.2004, 20.10.2006 and 18.05.2007 insofar as and to the extent the same, relate to and concern RLC.
- b) In the alternative to prayer (a) above, direct the Commission to devise a mechanism for refunding the RLC amount collected till 01.10.2006 in the ensuing tariff dispensation so that the Petitioner is kept revenue neutral. The refund of the said amount to be linked with this recovery mechanism through tariff.
- c) Any other directions which the Hon’ble Tribunal may deem fit in the present facts and circumstances”.

The Petitioner has also filed an application seeking ad-interim stay of the implementation, operation and execution of the directions of the Commission to refund Rs. 500 crore of RLC vide its Order dated August 24, 2007 read with Orders dated March 10, 2004, October 20, 2006, and May 18, 2007, until the final hearing and disposal of the present Review Petition. Condonation of delay in filing the Review Petition has been sought under a separate application wherein it has been submitted that

the Order dated May 18, 2007 directed refund of the RLC completely disregarding the Order dated March 10, 2004 which provided for refund through ARR mechanism and also that the Order dated May 18, 2007 does not consider the expected distribution loss reduction contemplated under the Order dated March 10, 2004 while directing the refund of RLC.

Subsequently, during the second hearing on September 28, 2007, on the admissibility of the Review Petition, Counsel for MSEDCL submitted that certain typographical errors had crept into the Prayers, and the word 'direct' should be deleted from prayer (b) and the words 'Hon'ble Tribunal' in prayer (c) should be replaced with the words 'Hon'ble Commission'.

2. On a request made by Petitioners to list the aforesaid Review Petition for hearing on September 26, 2007, in view of urgency, the Review Petition was fixed for hearing on the said date.

3. In the Petition, it has been averred that -

- (i) The Commission has erred in deviating from sample based metering, which was being undertaken on terms and directions issued by the Commission vide its Order dated May 5, 2000, January 10, 2002 and March 10, 2004 on a wrongful assumption that the class of consumers who are metered and who are using electricity on horse-power basis will form only one class in their pattern of electricity consumption and behaviour. It has been submitted that by ignoring sample based metering in respect of unmetered consumers, the Commission has contradicted its own orders passed on previous occasions wherein it had treated metered consumers and unmetered consumers differently by implicitly holding that they form separate class for the purposes of electricity consumption. It has been submitted that the agriculture consumption norms have a direct bearing on the figures of distribution loss. Abruptly changing its own methodology is likely to give improper results in the agriculture consumption norm and also in the figures of distribution loss;
- (ii) The Petitioner is aggrieved by the error apparent on the face of the record in the impugned orders of the Commission, which directs the Petitioner to refund Rs. 500 crore of RLC to the specified consumer categories in FY 2007-08 out of the total amount of around Rs. 3225 crore collected by the Petitioner through RLC over the period from December 2003 to September 2006. It has been submitted that while permitting RLC as part of energy charge in the FY 2003-04 Tariff Order in view of the dire financial condition of the Petitioner, it was provided that the RLC would be repayable after transmission and distribution ("T&D") losses are brought to 26.87%. By implication, reduction of loss would result in extra revenue for the same energy input as reduction of 1% implies revenue of near about Rs. 200 crore. It has been further submitted that the Petitioner has still not achieved financial turn around and is facing extreme financial difficulties for its day-to-day activities, as T&D losses have not come to the level set by the

Commission. The Petitioner has submitted that the Order dated August 24, 2007 is not implementable as the Petitioner is not in the financial position to comply with the said Order.

- (iii) RLC was designed as a contribution from the subsidising category of consumer of the erstwhile MSEB for refunding the cost of excess Transmission and Distribution Losses, to be returned to these consumer categories in future through tariffs. MSEB had collected RLC for Transmission and Distribution losses upto June 5, 2005 and the same is shown as revenue all along. Thereafter, MSEB was unbundled into four companies and this collected RLC would have to be distributed amongst all the four companies. Earlier MSEB (jointly) was concerned with the Transmission and Distribution losses whereas now the Petitioner is concerned only for Distribution Losses. It is pertinent to note that the original concept of RLC was concerned with 'Transmission and Distribution Losses'. The Petitioner states only for the argument sake (without accepting) that all four companies which have been formed from the erstwhile MSEB may be held liable to refund the amount in the proportions in which they had respectively been apportioned the said amounts.
- (iv) The Petitioner further states that in total in the ARR of the Petitioner, the Commission had considered the amount towards T&D loss as an income. Therefore, the Petitioner was short of revenue due to flawed assumptions and calculations of the Commission.
- (v) The Commission had categorically mentioned that the Commission would like to clarify that the T&D loss charge is a part of the tariff, and has been considered for the estimation of the MSEB' revenue. There will not be any additional revenue to the MSEB due to the levy of the T&D loss charge, over and above the tariff hike allowed by the Commission. Thus, the Commission was well aware about the fact that the T&D losses have to be recovered through the mechanism of tariff.
- (vi) Vide Tariff Order dated October 20, 2006 the levy of RLC have been discontinued w.e.f. October 1, 2006. The Commission has balanced the ARR for 2006-07 through tariff after considering the effect of non-levy of RLC w.e.f. October 1, 2006. Commission also deferred the issue of refund reiterating that the repayment of RLC should be linked to the loss reduction trajectory over the years and the treatment ought to be provided in the MYT regime. Thus, even if the mechanism of RLC was withdrawn, w.e.f. October 1, 2006, the ARR is met through the tariff.
- (vii) The Petitioner further states that the Commission in its Order dated March 10, 2004 had required the Petitioner to reduce its losses from 36.62% to 26.87%. However, in this target, the figure of 26.87% has been arrived by the Commission on certain undisclosed presumptions, which presumptions are fallacious and incorrect. In fact, the entire concept of RLC itself is flawed. The Petitioner states that it is not possible to reduce losses by 9.75%

in one year and it is practically not possible to reduce the losses by such a huge percentage. The Petitioner states that though it is trying its level best to reduce losses, it has not been able to achieve the same due to practical difficulties. It is thus submitted that the loss targets fixed by the Commission are incorrect, fallacious and impractical and arrived at by disregarding the ground realities.

- (viii) The Order of March 10, 2004 required the RLC to be refunded through reduction in tariffs. However, by its Order dated August 24, 2007, the Commission has completely disregarded its earlier order, by directing the Petitioner to refund the amount to the consumers. Thus, there is a clear contradiction in the Order passed by the Commission. The direction to refund RLC is contrary to the stipulations contained in the Order dated March 10, 2004. Further, refund through reduction in tariff to the tune of Rs. 500 crore to the end users in a so-called structured manner as suggested by the Commission would further aggravate the financial hardships of the Petitioner. The Order dated March 10, 2004 required the RLC to be returned through reduction in tariffs. Thus, for return of the RLC amount, the same has to be covered under the tariff dispensation process since the revenue (ARR) has to be matched and balanced so that the Petitioner is revenue neutral. It is pertinent to note that the assumed/target loss reduction levels cannot serve any purpose since it will never generate additional revenues till such time the losses go below the target set and since the target set is unachievable by any stroke of imagination such revenues will never be available as surplus with the Petitioner.
- (ix) It is submitted that RLC collected during the period of December 2003 to September 2006 was considered as revenue. However, while ordering the Petitioner to refund RLC, it has not been considered as an expense. Due to this, the ARR for FY 2007-08 stands reduced by an amount of Rs. 500 crore. Therefore, the Petitioner has no way to bridge the revenue gap, which has been caused due to the fact that the Commission has considered the losses at 26.87% instead of the actual 36.62% except by recovering the same through tariffs.
- (x) It will definitely not be in order for the Commission to order punishment not provided in the Electricity Act, 2003, i.e., refund of the RLC (without tariff compensation) because it amounts to depriving the Petitioner of Rs. 500 crore.
- (xi) Apart from the possibility of implementing the order of the Commission on refund of RLC, the Petitioner has also realised now (pursuant to the Clarificatory Order dated August 24, 2007) that the concept of RLC is flawed and needs to be reviewed and set aside/altered/modified. It is not possible to refund the amount of Rs. 500 crore as the Petitioner does not have the financial resources to do so. Secondly, it is not possible to reduce losses to 26.87% in one year. Should the Petitioner be forced to pay Rs. 500 crore, it will be driven to bankruptcy; which would be draconian to the

general public at large. Without prejudice to the other contentions raised in this Review, the Commission has contradicted its earlier Order dated March 10, 2004 in granting such a refund when the refund as contemplated in the said order was to be made by reduction in tariff.

4. The Petition also discloses that the Petitioner has on or about July 3, 2007 preferred an appeal before the Hon'ble Appellate Tribunal for Electricity from the Order dated May 18, 2007, which is *sub judice*.

5. Admissibility hearings were held on 26th and 28th September, 2007. Shri. Vikas Singh, Ld. Additional Solicitor General, assisted by Smt. Deepa Chawan and Shri. Ravi Prakash, advocates, appeared for the Petitioners. For and on behalf of consumer representative organisations authorised on a standing basis under EA 2003, Shri. R.B. Goenka appeared for Vidarbha Industries Association, Dr. Ashok Pendse appeared for Mumbai Grahak Panchayat and Dr. S.L. Patil appeared for Thane Belapur Industries Association.

6. It has been contended on behalf of the Petitioners that under the Order dated March 10, 2004 in Case No. 2 of 2003, the Commission had stipulated as under:

“In future, when the T&D losses are reduced, then the RLC will be returned to these consumer categories through reduction in tariffs.”

The Petitioners have argued that as the abovesaid quoted portion makes the said Order dated March 10, 2004 a conditional order, and as no refund of RLC was stipulated therein, Petitioners have not challenged the said order. However, as the Order dated May 18, 2007 directs the Petitioners to refund the RLC to specified consumer categories, the said Order has been appealed against before the Hon'ble Appellate Tribunal. According to Ld. Additional Solicitor General, the Order dated August 24, 2007 has for the first time stipulated the actual refund in a specified manner contrary to the Order dated March 10, 2004 and Order dated May 18, 2007. He submitted that it is the Petitioner's case that losses have indeed been reduced and that therefore, benefits have automatically been passed on to consumers through reduction in tariffs. Thus, there is no question of refunding RLC to consumers. He further argued that if the Commission comes to a finding that the Order dated August 24, 2007 is contrary to the Order dated March 10, 2004, then, in that event, the Order dated August 24, 2007 will be liable to be reviewed. However, if the Commission comes to the finding that the Order dated August 24, 2007 is not contrary to the Order dated March 10, 2004, then the Order dated March 10, 2004 also needs to be reviewed. In the appeal before the ATE, the issue that has to be decided is whether the stipulation that RLC should be refunded in the Order dated May 18, 2007 was in terms of the Order dated March 10, 2004. Contrasting the submissions with the appeal, Ld. Additional Solicitor General submitted that in review the aspect which is required to be decided is whether the Order dated August 24, 2007 was in terms of the Order dated May 18, 2007. He has also argued that the entire Order dated March 10, 2004 is liable to be reviewed, as it is full of errors apparent on the face of the record.

7. On behalf of the consumer representative organisations, it has been contended that in the present Petition, the Petitioners have tried to confuse two distinct issues, namely, T&D loss charge and RLC. Further, as it has been admitted by MSEDCL that losses have indeed been reduced, then in that event, the stipulation under Order dated March 10, 2004 comes into effect and therefore tariff is required to be reduced for refunding the RLC to specified consumer categories, in terms of the following:

“In future, when the T&D losses are reduced, then the RLC will be returned to these consumer categories through reduction in tariffs.”

It has further been submitted that the contention of the Petitioners that RLC is a notional amount is completely misplaced as specified consumers have actually paid these amounts. It has also been argued that the Petitioners' contention is misplaced to the extent that it has been argued that the RLC amounts have already been refunded through reduction in tariff. This cannot be the case as in that case all consumers across the board would have received the benefit of reduced tariff as against the express stipulation of the Commission in the Order dated March 10, 2004 that RLC would be returned to the subsidising consumer categories in future.

Shri. R.B. Goenka, Vidarbha Industries Association, submitted that on the operation of the Order dated March 10, 2004, MSEDCL should have separately accounted the recovery of amounts towards RLC, so that refund in terms of the Order dated May 18, 2007 can be provided. Shri. Goenka opposed admission of the present matter contending that the Order dated May 18, 2007 had provided that the refund of the total RLC shall be made within one year. Since MSEDCL has not sought review of the said observation of the Commission in the Order dated May 18, 2007, they should not be allowed to seek review of the mechanism in which refund is to be made, on the premise that the direction for refund violates the concept of RLC as introduced in the Order dated March 10, 2004.

Dr. Ashok Pendse, Mumbai Grahak Panchayat, submitted that issues concerning RLC are totally distinct and separate from issues concerning T&D Loss. Beneficial impact in tariff on account of reduction in T&D loss is not related to refund of RLC. Referring to paragraphs 31 and 32 of the Order dated March 10, 2004, it was submitted that the RLC component in energy bills reflects the amount of the loan that was provided to MSEDCL by consumers. Refund of RLC has absolutely no relation with reduction in applicable tariff. It was vehemently submitted that under no circumstances can MSEDCL escape from the duty of refunding RLC, which has been provided by consumers as a loan, in full faith and trust. It was submitted that had the said RLC loan been obtained from any bank or financial institution, the stand of financial constraints would have been no valid ground of defense and recovery proceedings would have been initiated by the lender. Under the present proceedings, MSEDCL has attempted to twist facts and escape from the said duty by contending that reduction in tariff on account of reduction in T&D loss, amounts to refund of RLC. Dr. Pendse further submitted that MSEDCL has always been aware that they would be required to refund the RLC loan and has initiated the present proceedings on account of financial crunch. Dr. Pendse opposed the admission of present Petition by submitting that the Order

dated August 24, 2007 does not suffer from any error apparent, nor any new fact or evidence has been produced by MSEDCL.

8. Per contra, Ld. Additional Solicitor General argued that the concept of RLC as it originated was to break up the ARR of MSEB in such a manner that a portion of the tariff was to be recovered by the notion of RLC. RLC was never intended to be a loan. According to him, RLC was nothing but a component of revenue requirement by including the loss in the ARR. He submitted that since the tariff has now been fixed taking into account the reduced lossess, the benefits have already been passed on to the consumers.

9. Having heard the parties, and after considering the material placed on record, the Commission is of the view that in the first instance the issue as to whether review is maintainable or not is required to be tested against the requirements laid down under Regulation 85 of the Maharashtra Electricity Regulatory Commission (Conduct of Business) Regulations, 2004. The said regulation reads thus:

“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.

(b) An application for such review shall be filed in the same manner as a Petition under these Regulations.

(c) The Commission, shall for the purposes of any proceedings for review of its decisions, directions and orders be vested with the same powers as are vested in a civil court under the Code of Civil Procedure, 1908.

(d) When it appears to the Commission that there is no sufficient ground for review, the Commission shall reject such review application.

(e) When the Commission is of the opinion that the review application should be granted, it shall grant the same provided that no such application will be granted without previous notice to the opposite side or party to enable him to appear and to be heard in support of the decision or order, the review of which is applied for.”

10. As stated above, the Petition discloses that the Petitioner has on or about July 3, 2007 preferred an appeal before the Hon’ble Appellate Tribunal from the Order dated May 18, 2007, which is *sub judice*. Since, the Commission has been made a party to the said appeal, notice has been served by the ATE to the Commission for causing

appearance on the next date of hearing. The Appeal Memo and annexures have also been served on the Commission. It is seen that the main submissions made by the Petitioner herein in the said Appeal before the Hon'ble Appellate Tribunal are:

(i) RLC was designed as a contribution from the subsidising category of consumer of the erstwhile MSEB for refunding the cost of excess Transmission and Distribution Losses, to be returned to these consumer categories in future through Tariffs.

(ii) The erstwhile MSEB had collected RLC for Transmission and Distribution losses upto 05.06.2005 and the same is shown as the revenue all along. Thereafter, MSEB was unbundled into 4 companies and this collected RLC would have to be distributed amongst all the 4 companies. Earlier MSEB (jointly) was concerned with the Transmission and Distribution losses whereas now the Petitioner is concerned only for Distribution Losses. It is pertinent to note that the original concept of RLC was concerned with 'Transmission and Distribution Losses'.

(iii) In total in the ARR of the Petitioner, the Commission had considered the amount towards catering to T&D loss as an income. Therefore, the Petitioner was short of revenue due to flawed assumptions and calculations of the Commission.

(iv) The Commission had categorically mentioned that the Commission would like to clarify that the T&D loss charge is a part of the tariff, and has been considered for the estimation of the MSEB's revenue. There will not be any additional revenue to the MSEB due to the levy of the T&D loss charge, over and above the tariff hike allowed by the Commission.

(v) Thus the Hon'ble Commission was well aware about the fact that the T&D losses have to be recovered through the mechanism of tariff.

(vi) The MERC vide this Tariff Order dated 20.10.2006 discontinued the levy of RLC w.e.f. 01.10.2006. It is submitted here that the Commission has balanced the ARR for 2006-07 through tariff after considering the effect of non levy of RLC with effect from 01.10.2006. The MERC also deferred the issue of refund reiterating that the repayment of RLC should be linked to the loss reduction trajectory over the years and the treatment ought to be provided in the MYT regime. Thus, even if the mechanism of RLC was withdrawn, w.e.f. 01.10.2006, the ARR is met through the tariff.

(vii) The Petitioner states only for the argument sake (without accepting) that all 4 companies which have been formed from the erstwhile MSEB may be held liable to refund the amount in the proportions in which they had respectively been apportioned the said amounts.

(viii) The Petitioner further states that the Commission in its Order dated March 10, 2004 had required the Petitioner to reduce its losses from 36.62% to 26.87%. However, in this target, the figure of 26.87% has been arrived by the Commission on certain undisclosed presumptions, which presumptions are fallacious and incorrect. In the fact, the entire concept of RLC itself is flawed. The Petitioner states that it is not possible to reduce losses by 9.75% in one year and it is practically not possible to reduce the losses by such a huge percentage. The Petitioner states that though it is trying its level best to reduce losses, it has not been able to achieve the same due to practical difficulties.

(ix) It is thus submitted that the loss targets fixed by the Commission are incorrect, fallacious and impractical and arrived at the disregarding the ground realities.

(x) The Order of March 10, 2004 required the RLC to be refunded through reduction in tariffs. However, by its Order dated 24.08. 2007, the Commission has completely disregarded its earlier Order directing the Petitioner to refund the amount to the consumers. Thus, there is a clear contradiction in the Order passed by the Commission.

(xi) The direction of refund of RLC contrary to the stipulations contained in the Order dated March 10, 2004 of refund through reduction in tariff to the tune of Rs. 500 crore to the end users in a so-called structured manner as suggested by the Commission would further aggravate the financial hardships of the Petitioner.

(xii) The Order dated 10.03.2004 required the RLC to be returned through reduction in tariffs. Thus, for return of the RLC amount the same has to be covered under the tariff dispensation process since the revenue (ARR) has to be matched and balanced so that the Petitioner is revenue neutral. It is pertinent to note that the assumed/target loss reduction levels cannot serve any purpose since it will never generate additional revenues till such time the losses go below the target set and since the target set is unachievable by any stroke of imagination such revenues will never be available as surplus with the Petitioner.

(xiii) It is submitted that RLC collected during the period of December 2003 to September 2006 was considered as revenue. However, while ordering the Petitioner to refund said RLC, it has not been considered as an expense. Due to this, the ARR for FY 2007-08 stands reduced by an amount of Rs. 500 crore. Therefore, Petitioner has no way to bridge the revenue gap which has been caused due to the fact that the Commission has considered the losses at 26.87% instead of the actual 36.62% except of covering the same through tariffs.

(xiv) It will definitely not be in order for the Commission to order punishment not provided in the Act i.e. refund of the RLC (without tariff compensation) because it amounts to depriving the Petitioner of Rs. 500 crore.

(xv) The Petitioner states that without these actions, it was completely unrealistic and impractical for the Commission to expect in 10.03.2004 Order that the Petitioner will have reduced losses as per the trajectory specified in its orders in the previous years without any action plan support by SERC and the State Government as mandated in NEP and then punish MSEDCL in 2007 by ordering RLC refund without tariff compensation.

(xvi) It has escaped the kind consideration of the Hon'ble Commission that even if the losses are brought down to zero% (assuming hypothetically), even then it will have no effect so far as the profit (additional revenue) is concerned, since the profit that the company will be making will remain constant at 16% ROE. Accordingly, there is no way that the company can pay back the RLC unless there being a provision of the said payment in the ARR approval (compensation of this payment in the ARR). This mechanism is the only alternative since except for the "costs" and the 16% ROE, there is no provision of any additional revenue to make these kind of payments (refunds) provided under the EA 2003 or the regulations made thereunder.

(xvii) Apart from the possibility of implementing the order of the Commission on refund of RLC, the Petitioner has also realised now (pursuant to the Clarificatory Order dated 24.08.2007) that it is a flawed concept of RLC and needs to be reviewed and set aside/altered/ modified. It is not possible to refund the amount of Rs. 500 crore as the Petitioner does not have the financial resources to do so. Secondly, it is not possible to reduce losses to 26.87% in one year. Should the Petitioner be forced to pay Rs. 500 crore, it will be driven to bankruptcy; which would be draconian to the general public at large. Without prejudice to the other contentions raised in this Review the MERC has contradicted its earlier Order dated March 10, 2004 in granting such a refund when the refund as contemplated in the said Order was to be made via reduction in tariff.

The questions of law framed by the Petitioner herein for consideration in the said appeal are:

- a) *"Whether or not the Orders dated 10.03.2004, 20.10.2006, 18.05.2007 and 24.08.2007 are sustainable in law and should be set aside insofar as the RLC is concerned.*
- b) *Whether or not the judgment and Order dated 24.08.2007 read with the earlier Orders dated 10.03.2004, 20.10.2006 and 18.05.2007 passed by the Commission requiring the Petitioner to refund Rs. 500 crore is tenable/ sustainable in law.*
- c) *Whether or not the direction of the Commission to return the Regulatory Liability Charge (RLC) upto the tune of Rs. 500 crore runs contrary and contradictory to its previous orders on the subject matter."*

11. It was necessary to extract the above portions of the appeal to come to the finding that the issues raised by the Petitioner in the present Review Petition are the same as raised by them before the Hon'ble Appellate Tribunal in appeal. In terms of

Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004, a review is allowed when no appeal has been preferred. As aforesaid, since the Petition discloses that the Petitioner has on or about July 3, 2007 preferred the aforesaid appeal before the Hon'ble Appellate Tribunal, the present Review Petition deserves to be rejected as it is not maintainable and is, therefore, hereby rejected.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC