

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 12 of 2007

In the matter of
**Petition filed by M/s. Associated Capsules Pvt. Ltd. seeking review of the Order dated
April 24, 2007 in Case No. 75 of 2006.**

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

ORDER

Dated: August 28, 2007

M/s. Associated Capsules Pvt. Ltd. (ACPL) filed a Petition on June 8, 2007 under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004 (“**CBR**”) seeking review of the Order dated April 24, 2007 passed in Case No. 75 of 2006 (in the matter of approval of the annual revenue requirement of the distribution business of M/s. Reliance Energy Limited for the Control Period FY 2007-08 to FY 2009-10, and retail tariff for FY 2007-08) (“**the impugned order**”). The Petitioners have further sought separate directions on M/s. Reliance Energy Limited (“**REL**”) which has been impleaded as respondents. Briefly, the case of the Petitioners, is summarised as under:

- (i) Petitioners are a manufacturer of empty hard gelatin capsules, high quality PVC packaging film, PVC coated films, moisture-barrier metallic flexible films and substracts, which are used randomly in blister packaging processes in food and pharmaceutical industries. Petitioners conduct part of their manufacturing activity at their factory premises located at Kandivli, and are a continuous process HT industrial consumer of REL.
- (ii) The tariff hike in the impugned order in the vicinity of 55.47% has increased the energy cost of the said factory premises of the Petitioners and has caused additional burden and financial hardship and weakened its competitiveness and revenue earning potential.
- (iii) The said steep tariff hike may negate the national schemes introduced by the Government of India aimed at reduction in the cost of medicines and establishment of “Free Medicine Banks” in rural India.

- (iv) The National Tariff Policy dated January 6, 2006 provides that in tariff fixation processes, consistency in approach becomes all the more necessary considering the large number of States in India and the diversities involved. The impugned order fails to honour the said approach.
- (v) The impugned order has failed to consider a realistic view of the transmission and distribution losses borne by REL while providing supply to HT industries. The transmission and distribution losses of REL while supplying energy to HT consumers are in the vicinity of 6% and the said losses of REL while supplying energy to LT consumers are in the vicinity of 17%.
- (vi) Tariff for HT industrial consumers has been disproportionately revised under the impugned order. The existing tariff for HT -2 Industrial consumers, in terms of the ratio of average billing rate to average cost of supply, is 97%. However, the revised tariff is 122%, in terms of the ratio of average billing rate to average cost of supply. On the other hand, the tariff for the residential consumer category and the BPL category has been revised at 69% and 17% of the average cost of supply, respectively.
- (vii) The impugned order is at variance from the approach of the Commission to efface cross-subsidization, as is reflected under the Orders dated January 10, 2002 in Case No. 1 of 2001 (in the matter determination of tariff for FY 2001-02 applicable to the various categories of consumers of MSEB) and Order dated March 10, 2004 in Case No. 2 of 2003 (in the matter determination of tariff for MSEB for FY 2003-04). The HT consumers of REL have been saddled with additional cost and the LT consumers have been cross-subsidised. Procurement of expensive power is to minimize load shedding for all consumers, irrespective of category. The cost for procurement of expensive power should thus be equitably distributed amongst all consumers. The imbalance in this regard, as effectuated under the impugned order, has been in contravention of the principles of natural justice.
- (viii) The impugned order does not reflect a consistent approach of the Commission inasmuch as providing the HT consumers of REL with proportionate rebates for consumption during non-peak hours, similar in line with the benefits that are provided to HT consumers of MSEDCL.
- (ix) Under the Order dated October 3, 2006 in Case No.s 25 & 53 of 2005 (in the matter of ARR Petition of REL for FY 2005-06 and ARR & Tariff Petition for FY 2006-07) it was observed that the energy requirement of REL was 8597 MU. Under the impugned order, it has been observed that 8905 MU of non-costly power is available for the energy requirement of REL for FY 2007-08. It has been further observed under the impugned order that HT industrial category consumption has not increased during FY 2007-08. Energy consumption during FY 2007-08 has increased in the case of the other consumer categories which should bear tariff hike. Charging HT

industrial consumers, and the Petitioners in particular, for costly supply of power during FY 2007-08 amounts to depriving Petitioners of their full legitimate share of non-costly power available for FY 2007-08.

- (x) Separate tariff for HT consumer category and LT consumer category could not be determined under the impugned order due to non-availability of appropriate data from REL, with respect to bifurcation of LT energy consumption and HT energy consumption. This aspect of non-availability of the said data has further rendered the impugned order inconsistent.
- (xi) The applicable tariff for the BPL consumers within the area of REL (urban slum dwellers), under the impugned order, is much similar to the applicable tariff for BPL consumers within the area of MSEDCL (poor tribes, farm dwellers, hutment dwellers). The impugned order has failed to recognise the vast financial difference between the BPL consumers within the area of REL and the BPL consumers within the area of MSEDCL. This is in defiance of the National Tariff Policy dated January 6, 2006 which stipulates that tariff for BPL consumers shall be at least 50% of the average cost of supply. The tariff for the BPL consumers of REL should, thus, have been fixed at Rs. 2.49/- (i.e., 50% of Rs. 4.98/-) per kWh and not Rs. 0.40/- per kWh, as has been provided under the impugned order.
- (xii) The impugned order should not have revised HT industrial tariff on account of rise in employee expenses, depreciation and R&M of REL as the said expenses have not increased due to HT industrial consumption. Revising the HT industrial tariff on the pretext of rise in the aforesaid expenditures has been a patent error in the impugned order.
- (xiii) The impugned order is silent on the methodology adopted in revision in tariff, which leads to improper application of such methodology.
- (xiv) The acts/efforts of REL towards tariff fixation under the impugned order has been rather to recover all losses, inefficiencies, subsidies to domestic consumers, pilferage, return on equity, wages and general expenses and other increases, through revision in HT industrial tariff. Approval of the said efforts under the impugned order does not incentivise REL to improve its performance levels and prevent such losses and enhance its distribution system. Despite the steep hike in tariff, power supply from REL has severe interruptions and fluctuations. REL has failed to take adequate measures towards renovation and modernisation of sub-stations, regular maintenance of equipments, up-gradation of supply network, improvement in supply, voltage stability, spikes, surges, dips, etc.

The Petitioners have further contented that payments toward the energy bill dated May 15, 2007 issued to them has been made 'under protest' and have prayed for the following:

- “(a) The impugned order be reviewed in view of the facts and figures as explained in the present Petition.*
- (b) The Respondent be ordered to reduce the hike in tariff.*
- (c) The Respondent be directed to refund the balance excess amount of the energy Bill and/or the same may be adjusted in the next month’s energy bill.*
- (d) The Respondent be directed to pay cost of the present Petition to the Petitioner.*
- (e) Other just and equitable orders be passed in favour of the Petitioner, which Hon’ble Commission deems fit and proper, in the context.”*

2. On July 25, 2007, REL filed its reply on affidavit. Under the said reply it has been contended that the Review Petition filed by the Petitioners, is not maintainable under Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004.

3. M/s. New Haven Steel Ball Corporation Pvt. Ltd. (“**New Haven**”), M/s. Mahindra & Mahindra Ltd., (Farm Equipment Sector, Kandivli) (“**Mahindra**”), M/s. Rashtriya Metal Industries Limited (“**Rashtriya Metal**”), and M/s. M.S. Patel & Co. (“**Patel**”) submitted separate applications seeking intervention in the present proceedings. The contentions raised under the applications seeking intervention are that the impugned order should be reviewed on account of the severe tariff hike that it has effectuated.

4. An admissibility hearing was held in the matter on August 1, 2007. At the said admissibility hearing, Smt. Deepa Chawan, Counsel for REL, submitted that the Petitioners and the interveners have not been diligent enough to participate in the tariff determination processes initiated by REL under the proceedings in Case No. 75 of 2006 which, inter alia, included technical validation sessions and public hearings. The efforts that were taken by REL in notifying its consumers and stakeholders, initiating their participation in public hearings, have not been disputed. Having not attended/appeared in the public hearings, the Petitioners and the interveners, cannot be permitted to seek review of a tariff order, determination of which is a lengthy process. Counsel further submitted that the proceedings initiated by Petitioners under the present case are in the nature of an appeal and should not be entertained under Regulation 85(a) of the CBR.

5. Shri. Sanjay Deo, Senior Manager – Associated Capsules Pvt Ltd., submitted that the implication of the impugned order was understood post its implementation and issuance of energy bills by REL, and the averments made under their present petition should be considered for review of the impugned order. Shri. A.B. Kothari, representative of New Haven, submitted that the impugned order has effectuated a severe tariff hike which diminishes the competitive edge of New Haven, which sells its products to defence forces and automobile manufactures. Further, New Haven has been an HT consumer of REL for a considerable period of time and should be allowed relaxation in tariff as compared to numerous new consumers. Shri. Yogesh Kadam, Deputy General Manager, Mahindra, submitted that the impugned order is a threat to the competitiveness of Mahindra in automobile manufacturing industry. Shri. Praveen Chowdhry, General Manager (Finance)-Rashtriya Metal, submitted that Rashtriya Metal are manufacturers of non-ferrous strips and coils made of copper alloys for supply to ordinance factories of the

Ministry of Defence and for export. He submitted that the impugned order has caused a steep rise in energy cost and an adverse effect on the competitiveness of Rashtriya Metal. Shri. G.S. Karnani, General Manager-Patel, submitted that Patel manufactures press metal components which are supplied to defence forces, amongst others. He submitted that the Tariff under the impugned order should be revisited and moderated, considering that the present tariff hike is a threat to the existence of Patel in the business of manufacturing of press metal components.

6. Refuting the contentions of Shri. A.B. Kothari, Smt. Deepa Chawan submitted that relaxation of tariff cannot be allowed in favour of New Haven, owing to their being an old consumer. Counsel submitted that under Section 62(3) of the Electricity Act, 2003 “*undue preference*” cannot be shown to any consumer of electricity unless the tariff is differentiated according to the “*load factor, power factor, voltage, total consumption of electricity during any specified period for 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*”. Shri. Sanjay Deo, further submitted that the present Review Petition is maintainable under Regulation 85(a) of the CBR considering that the grounds averred establish a ‘*sufficient reason*’ in terms of the said Regulation. Smt. Deepa Chawan submitted that the scope of the words “*for any sufficient reasons*” under the said Regulation should be construed *ejusdem generis* with the immediately preceding requirements of mistake or error apparent and/or new fact or evidence.

7. As regards the submissions of Counsel for REL that Petitioners and the interveners have not been diligent enough to participate in the tariff determination process (technical validation sessions and public hearings) in Case No. 75 of 2006 culminating into the impugned order, the Commission is of the view that the Petitioners and interveners need to know that the impugned order is a reasoned order whereunder the Commission has tried to built in economic signals in the tariffs to the categories to conserve energy especially in the context of severe energy deficits so that consumer categories can easily implement EE or DSM initiatives. The Commission has no intention of increasing the cross-subsidy levels but has tried to provide an economic signal to the categories having higher consumption. As regards the contention that separate tariff for HT consumer category and LT consumer category could not be determined under the impugned order due to non-availability of appropriate data from REL, with respect to bifurcation in LT energy consumption and HT energy consumption, the impugned order provides as under:

Chapter 2. (2) “.....This being the first control period, and keeping in view the reservations in this regard by the (authorised) Consumer Representatives, the Commission has taken a cautious approach that would reflect the ground realities in terms of data quality, availability etc..”

There has been a concern on the realistic view of the transmission and distribution losses borne by REL while providing supply to HT industries and the need to improve the performance levels and prevention of such losses and enhancement of the distribution system. In this regard, the impugned order has directed REL to reduce distribution losses by 0.5% during each year of the control period. The impugned order also provides that “The Commission shall review the baseline performance of REL-D with respect to quality parameters and shall provide quality

targets and corresponding incentive / penalty framework to regulate the performance of the licensee”.

8. Having considered the contentions of the Petitioners, the interveners and REL and the material placed on record, the Commission is of the view that the Petitioners and the interveners are essentially aggrieved by the increase in the tariff which is being perceived as steep so to have the effect of rendering their business and commercial ventures, unviable. On this basis, a review of the impugned order has been sought. However, the grounds available for seeking a review are limited. Therefore, the maintainability of present petition requires to be tested against the requirements laid down under Regulation 85 (a) of the CBR which provides as under:

“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.”

On first principles, a review of any order, direction or decision is permitted, under the regulations governing the conduct of business of the Commission, only upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by the applicant at the time when the direction, decision or order was passed. Review may also be sought on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons.

9. However, from the material submitted and contentions raised, it is found that the Petitioners and the interveners have not been able to point out to any new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the impugned order was passed. No mistake or error which is apparent on the face of the record of the impugned order, has been pointed out, which is within the scope of Regulation 85(a). Moreover, it is settled law that the error must strike on a mere looking at the face of the order. There is no such case as the Petitioners and the interveners are essentially aggrieved by the increase in the tariff which is being perceived as steep so to have the effect of rendering their business and commercial ventures, unviable. This cannot be a sufficient reason, for seeking review, although may be subject matter of appeal. It has neither been shown that the impugned order ignores a positive rule of law or the error is so manifestly patent that it admits of no doubt or dispute. No such error or sufficient reason has been shown which ought to be corrected in review. An appeal cannot be disguised as a review.

10. Therefore, the Commission is of the view that the present petition and the intervention applications, do not merit admissibility under Regulation 85(a) of the CBR. The Commission therefore rejects the Petition and intervention applications since the grounds sought for by the

Petitioners and interveners are not within the purview of review under Regulation 85(a) of the CBR and consequently the Review Petition is not maintainable since no grounds for review are made out.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

(P.B. Patil)
Secretary, MERC