

**Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**

World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai – 400 005

Tel. 022-22163964/ 65/ 69 Fax 022-22163976

Email: mercindia@mercindia.org.in

Website: www.mercindia.org.in

Case No. 24 of 2011

In the matter of

**Maharashtra State Electricity Distribution Company Ltd's (MSEDCL) Petition for
deferment of implementation of MYT Regulations, 2011**

Shri V. P. Raja, Chairman

Shri Vijay L. Sonavane, Member

ORDER

Date: August 23, 2011

Maharashtra State Electricity Distribution Co. Ltd. ("MSEDCL") submitted a Petition under affidavit on February 22, 2011 under Section 94 (2) of the Electricity Act, 2003 (EA 2003) and Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004, Regulation 4.1 of the MERC (Multi Year Tariff) Regulations, 2011 (hereinafter referred to as the "MYT Regulations, 2011") and Regulations 99 and 100 of the MYT Regulations, 2011 for deferment of the implementation of MYT Regulations, 2011.

2. The following are the prayers of the Petitioner:-

“

- I. *Admit Petition in accordance with Section 94 (2) of the Electricity Act 2003, Regulation 85 (A) of the MERC (Conduct of Business) Regulations, 2004 and Regulations 4.1, 99 and 100 of the MERC (MYT Regulations) 2011.*
- II. *Defer the implementation of MYT Regulations for MSEDCL for minimum 2 years.*
- III. *Give liberty to MSEDCL to add/change/modify/alter this Petition and make further submissions as may be required at a future date.*

IV. Pass such further and other orders, as the Hon'ble Commission may deem fit and proper keeping in view the facts and circumstances of the case. ”

3. Subsequent to the filing of the Petition, the Commission issued a Notice on March 4, 2011 to MSEDCL with copies marked to Consumer Representatives, i.e., Prayas (Energy Group), Mumbai Grahak Panchayat, Vidharbha Industries Association and Thane Belapur Industries Association, conveying the admissibility hearing to be held for the Petition on March 31, 2011 at 11.00 hours in the office of the Commission.

4. Meanwhile MSEDCL filed an addendum to the main Petition on March 21, 2011, wherein MSEDCL requested the Commission to review certain provisions of the MYT Regulations, 2011. The following are the main prayers made in the addendum Petition:-

“

I. To consider this Addendum Petition as a part of Petition dated 22.02.2011 (Case No. 24 of 2011);

II. To allow review of various provisions of MYT Regulations 2011; as commented upon by MSEDCL;

III. To allow MSEDCL to make further submissions and allow MSEDCL to alter/amend/modify the present petition;

IV. To pass any such order as may be deemed appropriate.”

5. The main submissions made in the addendum to the main Petition are as under:

(a) Review of the provisions of MYT Regulations, 2011 in exercise of the power conferred upon the Commission under Regulation 85 of the MERC (Conduct of Business) Regulations, 2004, read along with Regulations 4.1, 99 and 100 of the MYT Regulations, 2011.

(b) MYT Regulations, 2011 being a subordinate Legislation, the same needs to be supported by an appropriate “Statement of Objects & Reasons” wherein the reasons for introduction of such Legislation along with the objects to be achieved by such Legislation are defined.

(c) Revaluation process of assets, as envisaged in the Transfer Scheme, is not yet completed and after the final transfer value of the fixed assets is determined, keeping in view the revenue potential of such assets, the present book value

considered for all purposes would change. However, the Commission in the impugned MYT Regulations, 2011 have prescribed that, such change in cost of fixed assets, if adversely affects the tariff, would not be considered.

- (d) As per the Electricity Act, 2003, the Commission has the jurisdiction only to determine the Multi Year Tariff principles; however the Hon'ble Commission on the contrary has extended its jurisdiction and in the impugned MYT Regulations, 2011 has regulated certain values like Capital Expenses, Interest on Working Capital and O&M expenses.
- (e) MSEDCL further submitted that there are various pending issues such as indiscriminate deductions by the Commission in legitimate expenditure incurred by MSEDCL; Impact of Appellate Tribunal for Electricity (ATE) Judgment, Double Accounting Error which needs to be given appropriate treatment prior to commencement of MYT regime so as to reflect correct picture of MYT determination process.

6. The admissibility hearing scheduled on March 31, 2011 was adjourned at the request of the MSEDCL. Thereafter, the Commission issued a Notice to conduct the hearing on April 13, 2011, at 12:30 hours in the office of the Commission. However, the hearing was also adjourned at the request of MSEDCL. Subsequent to the adjournment of the hearing the Commission issued another Notice to MSEDCL and the Consumer Representatives in this matter to conduct the hearing on May 09, 2011, at 12:00 hours at the office of the Commission.

7. Accordingly, the hearing was held on May 09, 2011. During the hearing, MSEDCL informed that a Writ Petition has been filed by MSEDCL before the Hon'ble Bombay High Court challenging the MYT Regulations, 2011 and the hearing in the matter was scheduled on June 09, 2011. Citing the above reason, MSEDCL requested the Commission to schedule the next hearing in the present matter after the hearing in Writ Petition in Bombay High Court on June 09, 2011 is held. Considering the reasons cited by the Petitioner the Commission scheduled the next hearing on June 13, 2011.

8. Accordingly, the next hearing was held on June 13, 2011. During the hearing, the Petitioner reiterated its contentions as taken in the Petition as well in the addendum to the Petition. The Commission directed the Petitioner to submit written submissions within a week. The Commission further directed that the Petitioner should expedite filing of its Petition before the Commission for Final True up for the FY 2009-10, Provisional True up for FY 2010-11 and Annual Performance Review for FY 2010-11 forthwith, as the said exercise is getting delayed for the delay on the part of MSEDCL.

9. Thereafter, owing to the personal difficulties of the Counsel of the Petitioner, a request was made vide letter dated June 22, 2011 for of grant time to file the written submissions in the said case by the end of the month. The Commission accepted the request of the Petitioner and allowed the Petitioner to file the written submissions by the end of the month i.e, by June 30, 2011.

10. In this matter, Thane Belapur Industries Association, Authorised Consumer Representative vide their letter dated March 27, 2011 has made following written submissions to the Commission.

“...it is our submission that the issues raised are more of a clarificatory in nature which Office of the Commission can do so to the satisfaction of MSEDCL as almost all the issues have an answer in MERC (MYT) Regulation 2011 and EA 2003 & Other

We strongly submit that following the Regulation is mandatory and same should not be delayed AND not to grant the Prayers of MSEDCL...”

11. Further to the direction given during hearing held on June 13, 2011, the Commission communicated to MSEDCL, vide Letter No. MERC/ Tariff/ 20112012/ 00950 dated July 07, 2011, to submit a Petition for final Truing up for the FY 2009-10 and Provisional Truing up for FY 2010-11 as per MERC (Terms and Conditions of Tariff) Regulations, 2005 latest by July 25, 2011.

12. Having heard the matter, the Commission is of the view as under :

(a) MSEDCL has sought review of the MYT Regulations, 2011 under Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004. The said provision applies to seeking review of direction, decision or order of the Commission and not Regulations notified under Section 181 of the 2003 Act. There is no provision for review of Regulations. Regulation 85 (a) provides as under:-

“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.”

Even Section 94(1)(f) of the 2003 Act applies to review of decisions, directions and orders and not regulations:-

“94. (1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 in respect of the following matters, namely: -

...

(f) reviewing its decisions, directions and orders;”

Hence, the prayer seeking review of MYT Regulations, 2011 is not maintainable under Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004 or under Section 94(1)(f) of the 2003 Act, and is therefore rejected.

(b) As regards the prayer made in the Petition seeking deferment of the implementation of MYT Regulations 2011 for a minimum period of 2 years, the Commission is of the view that the MYT Regulations 2011 were to take effect from April 1, 2011. Certain provisions are extracted:-

“1.3 (a) These Regulations shall be applicable for determination of tariff in all cases covered under these Regulations from April 1, 2011 and onwards up to FY 2015-16 [i.e., till March 31, 2016].

(b) These Regulations shall be applicable to all existing and future Generating Companies, Transmission Licensees and Distribution Licensees and their successors, if any.

1.4 These Regulations shall come into force from April 1, 2011.”

However, till date no filings have been made by MSEDCL under the MYT Regulations, 2011. On the other hand, the Commission is duty bound to notify tariff regulations under Section 61 of the 2003 Act and in doing so is to be guided by “multi year tariff principles”. Section 61 provides inter alia as follows :-

“61. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

..

(f) multi year tariff principles;”

Paragraph 5.3 of the Tariff Policy notified by the Central Government provides inter alia as follows:-

“(h) Multi Year Tariff

1) Section 61 of the Act states that the Appropriate Commission, for determining the terms and conditions for the determination of tariff, shall be guided inter-alia, by multi-year tariff principles. The MYT framework is to be adopted for any tariffs to be determined from April 1, 2006. The framework should feature a five-year control period. The initial control period may however be of 3 year duration for transmission and distribution if deemed necessary by the Regulatory Commission on account of data uncertainties and other practical considerations. In cases of lack of reliable data, the Appropriate Commission may state assumptions in MYT for first control period and a fresh control period may be started as and when more reliable data becomes available.”

In the present situation where till date no filings have been made by MSEDCL under the MYT Regulations, 2011, and if no filings are continued to be made by MSEDCL for its aggregate revenue requirement and tariff then not only will MSEDCL suffer but the consumer will also suffer as the determination of tariff would get delayed. The Tariff Policy also provides that:-

“8.1 Implementation of Multi-Year Tariff (MYT) framework

....

7) Appropriate Commissions should initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee.”

Currently, the Hon’ble Appellate Tribunal is seized of the larger issue facing several electricity regulatory commissions of “delays in the tariff determination exercise” in Tariff Revision (Suo motu action on the letter received from the Ministry of Power) in O.P. No. 1 of 2011. In these circumstances, the Commission is of the view that MSEDCL must file its application under Section 64 of the 2003 Act seeking approval for its annual revenue requirement and determination of tariffs. It may not be possible to ask MSEDCL to do so under the MYT Regulations, 2011 in view of the circumstances explained above and also in view of the fact that by the time MSEDCL files its Business Plan under the MYT Regulations, 2011; an order is passed thereon;

and consequently based on the forecasts and trajectories approved in the order approving the Business Plan by the time MSEDCL files its Petition under the MYT Regulations, 2011 in all probability the entire one whole financial year of 2011 – 2012 would get over. There is no other choice but to enable MSEDCL to file its ARR and Tariff filings under the "Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005". However, the said 2005 Regulations stood repealed in terms of Regulation 101.1 of the MYT Regulations. Therefore, the said 2005 Regulations will need to be revived atleast for the period for which MSEDCL would file its ARR and Tariff filings.

- (c) The Commission has therefore published draft of amendments to the MYT Regulations viz., Maharashtra Electricity Regulatory Commission (Multi Year Tariff) (First Amendment) Regulations, 2011, on August 13, 2011. This is to enable the continuance of ARR and Tariff filings. Currently, the amendments are undergoing previous publication.
- (d) The Commission is empowered under the proviso to Regulation 4.1 of the MYT Regulations, 2011 to exempt the determination of tariff of a Generating Company or Transmission Licensee or Distribution Licensee or category of Transmission Licensee or Distribution Licensee under the Multi-Year Tariff framework. The proviso to Regulation 4.1 provides as follows:-

“4 Multi-Year Tariff Framework

4.1 The Commission shall determine the tariff for matters covered under clauses (i), (ii), (iii), (iv) and (v) of Regulation 3.1 above under a Multi-Year Tariff framework with effect from April 1, 2011:

Provided that the Commission may, either on *suo-motu* basis or upon application made to it by the applicant, exempt the determination of tariff of a Generating Company or Transmission Licensee or Distribution Licensee or category of Transmission Licensee or Distribution Licensee under the Multi-Year Tariff framework for such period as may be contained in the Order granting such an exemption.”

In light of the above, the Commission is of the view that it has become necessary to invoke the proviso to Regulation 4.1 of MYT Regulations, 2011 in order to exempt the determination of tariff of MSEDCL under the Multi-Year Tariff framework till March 31, 2013 (i.e., for a period of 2 years). The said exemption is hereby granted. The Commission is also empowered under Regulation 100 of the MYT Regulations, 2011 to remove any difficulty arising in giving effect to the provisions of MYT Regulations 2011.

With the above, Case No. 24 of 2011 stands disposed of.

Sd/-
(Vijay L. Sonavane)
Member

Sd/-
(V.P. Raja)
Chairman