

**Before the  
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**

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**Case No. 44 of 2011**

**In the matter of**

**Maharashtra State Power Generation Company Ltd's (MSPGCL) 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 Power Generation Company Ltd (MSPGCL) submitted a Petition under affidavit on March 31, 2011, under the proviso to Regulation 4.1 of Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2011 seeking exemption from determination of tariff under the MYT framework.

2. The prayers by MSPGCL in the Petition are as follows;

“

- a) *Exempt MSPGCL from determination of tariff under the MYT framework envisaged under the MERC MYT Regulations 2011 till such time when the issues and circumstances set-out in the present application are not finally resolved;*
- b) *Take on record and admit the petition of MSPGCL for approval of ARR and tariff for 2011-12, filed on basis of normative parameters and principles submitted earlier for determination of tariff applicable for 2010-2011;*
- c) *Pass such other order or orders as it may deem appropriate.”*

3. The main submissions in the Petition are as under:
- (a) Norms Specified in the MERC (Multi Year Tariff) Regulations, 2011 are significantly different from the norms specified in the draft MERC (MYT) Regulation 2010 and the norms suggested by the Petitioner during the presentation on October 15, 2010.
  - (b) The Commission has not provided, by an Order or otherwise, the reasons for rejecting the submissions/comments of the Petitioner.
  - (c) As per the directive of the Hon'ble Supreme Court ( S.N.Mukherjee Vs. Union Of India (1990) 4 SCC 594) it is necessary for the Commission to provide adequate reasons for accepting or rejecting submissions made by the stakeholders.
  - (d) Commission has the power under the proviso to Regulation 4.1 of the MYT Regulation, 2011, to exempt determination of tariff under the MYT frame work considering the circumstances given below.
    - (i) In view of the legislative scheme of Electricity Act 2003 and the interpretation given thereto, the Hon'ble Commission has to necessarily ensure that a distinction is made between a "Licensed" entity and a "Delicensed" entity.
    - (ii) From the review of the Regulations and the several orders passed by this Commission it is clear that the Commission has not entirely appreciated its Regulatory jurisdiction and has left no distinction between the jurisdiction it exercises *qua* a licensee and that it is proposing to exercise in the present case *qua* a generating company through the MERC (MYT) Regulations, 2011.
    - (iii) MSPGCL has further submitted that several issues arising under the previous tariff orders for existing as well as for the newly commissioned units are pending before the ATE. Final decision on these issues by the appropriate forum is likely to have severe consequences on the base year expense and also the trajectory of technical performance of the stations for the MYT period.

4. Subsequent to the filing of the Petition, the Commission issued a Notice on April 19, 2011 to MSPGCL with copies marked to Consumer Representatives, i.e., Prayas (Energy Group), Mumbai Grahak Panchayat, Vidharbha Industries Association and Thane Belapur

Industries Association, conveying the hearing to be held for the Petition on May 10, 2011 at 11.00 hours in the office of the Commission.

5. Accordingly, the hearing was held on May 10, 2011. During the hearing the Petitioner gave a presentation on the reason for which they are unable to implement the MERC MYT Regulation 2011. Further, the Petitioner proposed an optimistic scenario under which MYT Regime for the Second Control period can be implemented.

6. The matter stood adjourned and was heard on June 28, 2011. During the hearing, the Petitioner submitted that it wanted to place on record before the Commission the opinion of the Learned Advocate General, Government of Maharashtra . The Petitioner requested the Commission to allow them one week time for the purpose. The matter stood adjourned accordingly.

7. Subsequently, on July 18, 2011 the Petitioner, vide their letter No. RCD11/61/L658 highlighted the following from the opinion of the Ld. Advocate General, GoM :-

“ ...

a) *Whether the MERC can exempt the MSPGCL, a generating Company owned and Controlled by the State Government from seeking determination of tariff under the MERC (Multi Year Tariff) Regulation 2011?*

*...Yes, the MERC has power under the Regulation 4.1.to exempt the applicability of the MYT Regulations, 2011 to a party which is entitled to such exemption.*

b) *Having allowed such an exemption, can the MERC then proceed to determine generating tariff of MSPGCL for the year 2011-12?*

*After the exemption, the MERC may proceed to determine tariff in accordance with the provisions of the ACT even in the absence of said MYT Regulations. The legislative mandate contained in Section 64 to determine tariff must be carried out and cannot be ignored or diluted because of the absence of regulations.*

c) *If the MERC proceeds to determine tariff without following the MYT Regulation 2011, what will be the source for exercising jurisdiction and the relevant benchmark for*

*fixing tariff since the previous regulation i.e MERC (Terms Conditions of Tariff) Regulations, 2005 has been expressly repealed ?*

*The source of power of exercising jurisdiction in the absence of MYT Regulations 2011 will be the Electricity Act 2003. The previous tariff orders and procedure under Section 64 read with the principles enumerated in Section 61 would provide sufficient guidance to enable determination of Tariff....”*

8. During the hearing on July 21, 2011, the Petitioner read out the aforesaid opinion of the Ld. Advocate General and requested the Commission to allow them one week time to submit an affidavit regarding the period for which the exemption is sought along with the explanation therefor. The Petitioner further stated that while granting an exemption as above, the Commission may impose appropriate conditions for the same. The matter stood adjourned accordingly.

9. On July 27, 2011, the Petitioner vide its letter number RCD11/61/LO710 made additional submissions to the Petition filed in Case No. 44 of 2011. In the said additional submission the Petitioner submitted the reasons for seeking an exemption under the proviso to Regulation 4.1 of MERC MYT Regulations, 2011. The submissions are as under:

- a) Issues related to Advance Against Depreciation (AAD) has to be resolved by MERC as per the direction of the Hon’ble Appellate Tribunal for Electricity (ATE) in the Appeal No. 191 of 2009.
- b) Issues related to Disallowance in Project Cost, Cost of Common Facilities and Advance Against Depreciation has to be resolved by MERC as per the direction of the Hon’ble Appellate Tribunal for Electricity in the Appeal No. 72 and 99 of 2010.
- c) Issues related to Operation & Maintenance cost is pending before the Hon’ble ATE in Appeal No. 199 of 2010.
- d) The Petitioner further submitted that in case an exemption is granted and the Hon’ble Commission proceeds with determination of tariff for FY 2011-12, it would take at least another 5-6 months (Jan-Feb 2012) by the Hon’ble Commission to issue an order on the same. In the meanwhile the Petitioner would have to submit the ARR Petition for FY 2012-13 by November 2011 which can also be accommodated in the two years exemption period.

10. Further, on the same day i.e on July 27, 2011 the Petitioner vide it's letter number RCD11/61/LO706 filed certain further additional submissions as under:

- a) The Commission, either suo-motu, or on the basis of an application made by an applicant can exempt determination of tariff of a generating company under the proviso to Regulation 4.1 of MYT Regulations 2011.
- b) Under the Electricity Act 2003, a generating company certainly has the right to obtain determination tariff in accordance with the provisions of the said Act. The right cannot be taken away by the Commission through the exemption order under Regulation 4.1.
- c) Therefore it is possible to hold that the Commission while granting permission under the proviso to Regulation 4.1 could proceed to determine tariff on the basis of regulatory principles enumerated in the Act.
- d) The Commission could be guided by its previous tariff orders and make such changes as may be necessary to ensure that the interest of the generating company is protected.

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

- (a) As regards the prayer made in the Petition seeking deferment of the implementation of MYT Regulations 2011, 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 the Petitioner 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 the Petitioner under the MYT Regulations, 2011, and if no filings are continued to be made by the Petitioner for its aggregate revenue requirement and tariff then the Petitioner will 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 the Petitioner must file its application under Section 64 of the 2003 Act seeking approval for its annual revenue requirement and determination of tariffs.

The pendency of issues arising under the previous tariff orders for existing as well as for the newly commissioned units before the Hon'ble ATE, cannot be a ground for not filing application under Section 64 of the 2003 Act seeking approval for its annual revenue requirement and determination of tariffs.

Also, the contentions of the Petitioner that the Commission has to necessarily ensure that a distinction is made between a "Licensed" entity and a "Delicensed" entity, is misconceived. In fact, the MYT Regulations, 2011 have different criteria for Licensees and Generating Companies.

Having said that, it may not be possible to ask the Petitioner to file application under Section 64 of the 2003 Act seeking approval for its annual revenue requirement and determination of tariffs under the MYT Regulations, 2011 in view of the fact that by the time the Petitioner 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 the Petitioner 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 the Petitioner 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 the Petitioner would file its ARR and Tariff filings.

- (b) 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.
- (c) 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 the Petitioner 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.

In view of the above, the Commission is not inclined to accept the contention made by the Petitioner that the present tariff exercise could go on based on the previous tariff orders.

With the above, Case No. 44 of 2011 stands disposed of.

Sd/-  
(Vijay L. Sonavane)  
Member

Sd/-  
(V.P. Raja)  
Chairman