

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 1 of 2009

In the matter of
Non-compliance of the Commission's Order dated May 31, 2008 and March 3, 2007.

Shri. V. P. Raja, Chairman
Shri. A. Velayutham, Member
Shri. S. B. Kulkarni, Member

ORDER

Dated: August 17, 2009

The Commission has issued an Order in Case No. 50, 55 & 56 of 2006 dated March 3, 2007 in the matter of Review Petitions filed by Chamber of Small Industry Association, Laghu Udyog Bharati, and Kolhapur Engineering Association related to MD based tariff for the LT-V category (erstwhile LTP-G category) and Levy of ASC charges. The relevant extract of the said Order related to the Commission's ruling on the issue of MD based tariff is reproduced below:

32. As regards the matter of levy of demand charges of Rs. 220/kVA/month for LT-V category consumers, given the status of metering, and the unintended tariff shock caused to this consumer category due to abject failure of MSEDCL to install MD meters and educate the consumers regarding the implications of proper assessment of Contract Demand and the need for registering the same with MSEDCL, the Commission holds that sufficient reasons exist for review of the Order dated October 20, 2006 in Case No. 54 of 2005. The Commission has accordingly reviewed its aforesaid Order dated October 20, 2006 in Case No. 54 of 2005 and in supercession of the direction contained therein to levy demand charges at the rate of Rs. 220/kVA/month, directs MSEDCL to revert back to the earlier prevailing tariff of Rs. 60 per HP per month applicable for 50% of the sanctioned load, till such time as 100% MD metering is completed by MSEDCL.

33. This modification is to be done with retrospective effect from October 1, 2006, and all such consumer's bills should be adjusted accordingly (credited) in future bills issued in the next two months. This modification will be applicable even for consumers who already have MD meters installed (either optional or after issue of Tariff Order dated September 29, 2006), as it would be unfair to discriminate between these consumers, solely on account of MSEDCL's incapability to install the desired MD meters. MSEDCL is directed to submit the



compliance of above directions at the end of next two billing cycles for LT-V consumers, on affidavit to the Commission. MSEDCL is also directed to complete the MD metering latest by March 31, 2007, as submitted by them in their latest submission, to enable the Commission to specify MD based metered tariff in future.

2. Further, the Commission issued the Operative Order in Case No. 72 of 2007 dated May 31, 2008. In the Tariff Order the Commission also issued directives to MSEDCL related to the MD based tariff which is reproduced below:

47. In line with the Commission's ruling in the MYT Order, since MSEDCL is yet to achieve 100% MD metering for LT V industrial consumers above 20 kW (around 97% completion has been indicated by MSEDCL till date), the MD tariffs for LT V industrial consumers will not be made effective. Till the MD meters are installed, MSEDCL will be allowed to charge only the earlier HP based tariffs, though the revenue has been assessed based on MD based tariffs.

3. In this regard M/s V-Sector Udyojak Multipurpose Foundation, Jalgaon, has submitted a Petition (Case 1 of 2009) under affidavit, before the Commission, on March 16, 2009, under Section 142 and 149 of the Electricity Act, 2003 (EA 2003) for Non-Compliance Compliance of the Commission's Order Dated May 31, 2008 and March 3, 2007.

4. The following are the Prayers of the Petitioner:

- a) *Hold that the Respondent is guilty of non-compliance of the directions issued by this Hon'ble Commission as per the Operative Order dated 31st May, 2008 as well as detailed Order dated 20th June, 2008 and the Respondent may be imposed penalty for intentional breach and non-compliance of the directions of the Commission, as per the provisions of Section 142 read with Section 149 of the Electricity Act, 2003.*
- b) *The Hon'ble Commission may call for the names of the concerned Officers of the Respondent responsible for non compliance of the Commission's directions and punish them with imprisonment under Section 146 of the Electricity Act, 2003.*
- c) *The Hon'ble Commission may kindly issue direction for investigation to be carried out in the aforesaid subject matter.*
- d) *Hold that the Respondent is also guilty of changing the meters without complying the requisite obligations as per Section 163 of the Electricity Act, 2003*
- e) *By way of interim mandatory directions the Respondent be directed to purge the disobedience by immediately issuing bills as per the directions of the Hon'ble Commission till the final disposal of this Petition/ Application*
- f) *Further the Respondent be directed to give credit in future bills issued by the Respondent in the next months in compliance as per the above prayer clause b*
- g) *In view of extreme urgency in the matter the petition be heard and decided on priority by granting expeditious hearing.*



- h) *Further the Hon'ble Commission be please to direct the Respondent to pay Rs. 1,00,00,000/- to the Petitioner / Applicant as and by way of damages caused due to their fraudulent act and such amount for legal charges and ancillary expenses incurred for the file of the present petition.*
- i) *Grant any other reliefs which this Hon'ble Commission deems fit in the facts and circumstances of the case.*

5. After scrutiny the Commission vide its letter, directed the Petitioner to remit the requisite application processing fee as per the Regulation 26 (b) of the MERC (Fees and Charges) Regulations, 2004 and to rectify the deficiency related to Memo of Authorisation. The Petitioner vide its letter dated March 23, 2009 submitted the requisite application fee and rectified the deficiency related to Memo of Authorisation.

6. The Commission, vide its Notice dated April 9, 2009, scheduled the hearing in the matter on April 17, 2009 in the presence of consumer representatives authorized on a standing basis under Section 94(3) of the Electricity Act, 2003 ("EA 2003") to represent the interest of consumers in the proceedings before the Commission. The Commission also directed the Petitioner to serve a copy of its Petition, along with its accompaniments, to the Maharashtra State Electricity Distribution Company Limited (MSEDCL) and the four authorised consumer representatives.

7. During the hearing, the Petitioner submitted that as per the Commission's directions MD Tariffs would be made applicable for LT-V industrial consumers by MSEDCL, only after the 100% installations of MD Meters. However, MD Tariff was made applicable for LT-V industrial consumers from the month of August, 2008 without completing 100% MD metering by MSEDCL.

8. MSEDCL referred to Clause 44 of the Operative Order issued by the Commission in Case No. 72 of 2007 dated May 31, 2008. The referred clause is reproduced below:

47. The Time of Day (ToD) tariffs will be applicable compulsorily to most HT consumer categories, including the newly created HT II commercial category, but excluding HT III Railways, Mula Pravara Electric Co-operative Society, which is a licensee, HT Agriculture and HT VI Group Housing Societies. ToD tariffs will also be compulsorily applicable to LT V industrial category above 20 kW sanctioned load, as well as optionally available to LT V category consumers having sanctioned load below 20 kW, who have TOD meters. The TOD tariffs have been retained at existing levels.



9. MSEDCL submitted that MSEDCL vide its letter dated October 14, 2008 informed the Commission that 100 % TOD meters were installed for all consumers having load equal to 20 KW and above. MSEDCL also added that TOD Meters are having extra feature of Time-Zone in addition to the features of MD Meters. Hence, MD Meters were replaced by ToD Meters. MSEDCL further submitted that there was no wilful disobedience of the Commission's Orders/directives.

10. The Commission directed both the parties to file their written submissions in the matter.

11. The Petitioner vide its letter dated May 6, 2009 submitted its written submissions to the Commission. In the written submissions they have submitted that as per Commission's Order dated May 31, 2008 and March 3, 2007, the Commission directed MSEDCL to install 100% MD Meters with TOD facility to LT-V consumers before implementing MD based tariff which could record maximum demand in a month during 0600 hrs to 2200 hrs etc. From which billing demand of 65% of MD recorded could be charged. Further, it submitted that MSEDCL was aware about the Commission's order and directions and started to install TOD Meters to LT-V consumers and also informed the Commission regarding the status of compliance by installing MD meters with TOD facility. Hence MSEDCL is misleading the Commission regarding the compliance.

12. The Petitioner further referred to Clause 40 of the operative Order in Case No. 54 of 2005 dated September 29, 2006 which is reproduced below:

“40. Through this Order, the Commission has abolished HP based tariffs applicable to Low Tension Industrial Consumers (LTP – G i.e. General Motive Power). This category of consumers shall be governed by metered tariff only and depending on the metering features, TOD tariffs shall be made applicable.”

13. Having heard the parties and after considering the materials placed on record, the Commission does not sustain the contention of MSEDCL that there has been no wilful disobedience of the Commission's Orders/directives. In the case of *Chairman SEBI Vs. Shriram Mutual Funds* 2006 Vol.5 SCC 361 , the observation made by the Supreme Court with reference to *mens rea* in regard to violation or contravention while dealing with the SEBI Act, is reproduced as under:

“In our opinion *mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. In our view, the penalty is attracted as soon as contravention of the statutory obligation as contemplated by the Act is established and therefore the intention of the parties committing such a violation becomes immaterial. In other words,



the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract levy of the penalty irrespective of the fact that whether the contravention is made by a defaulter with any guilty intention or not.

This apart, unless the language of statute indicates the need to establish the element of *mens rea*, it is generally sufficient to prove that a default in complying with the statute has occurred. Hence, we are of the view that once a contravention is established then the penalty has to follow and only the quantum of penalty is discretionary.”

In the case of *UOI & Ors. Vs. Dharmendra Textile Processors 2008 Vol.13 SCALE 233*, the Supreme Court gave the proposition in regard to *mens rea* while dealing with the FERA. The following is the observation.

“The penalty under that provision is a civil liability. Wilful concealment is not an essential ingredient for attracting civil liability as in the case in the matter of prosecution under Section 276C of the I.T. Act.

The breach of a civil obligation which attracts penalty under Section 23(a) of FERA 1947 and the finding that the delinquent has contravened the provisions of Section 10, FERA, 1947 would immediately attract the levy of penalty under Section 23, irrespective of the fact whether the contravention was made by the defaulter with any 'guilty intention' or not. Therefore, unlike in a criminal case, where it is essential for the 'prosecution' to establish that the accused had the necessary guilty intention or *mens rea* to commit the alleged offence with which he is charged before recording his conviction in cases of contravention of the provisions of Section 10 of FERA, the obligation on the part of the Director of Enforcement would be discharged when it is shown that the blame on the conduct of the delinquent had been established.”

The above two judgments rendered by the Supreme Court, have been relied upon by the Appellate Tribunal for Electricity recently in its judgment dated 31 July, 2009 in Appeal No. 53 of 2009. Hon'ble Tribunal has held that penalty is attracted as soon as the contravention of the statutory obligation or the violation of the direction issued is established. In these cases, the intention of the parties committing such a violation becomes wholly irrelevant. A breach of civil obligation attracts penalty in the nature of fine under the provisions of the EA 2003. The contravention would immediately attract levy of penalty irrespective of the fact whether contravention is made by the defaulter with guilty intention or not. Unless the language in the statute indicates the need to establish the presence of *mens rea*, it is wholly unnecessary to ascertain whether such a violation was intentional or not. In regard to the violation of the direction or the contravention, it is generally sufficient to prove that the default in complying with the said directions has occurred. Once the violation or contravention is established then the penalty has to follow and only the quantum of penalty is discretionary. Hon'ble Tribunal held as under:



“19. The perusal of Section 142 of the Act as well as the ratio decided by the Supreme Court with reference to the violation of the directions or contravention of the rules would make it clear that once it is shown that the contravention or the violation of the directions of the Commission has taken place, the imposition of penalty by the Commission on such person is a natural consequence. In other words, the power to impose penalty gets invoked as soon as the contravention of rules and directions as contemplated under Section 142 of the Act is established.”

14. In light of the above, in the facts of this case unless 100% MD meters are installed by MSEDCL, the MD tariff for LT-V industrial customers will not be made effective. In all such cases where MSEDCL has contravened the direction of the Commission in this regard, MSEDCL would be liable to pay penalty under Section 142 of the EA 2003.

15. MSEDCL is therefore directed to explain within twenty one days from the date hereof as to why penalty under Section 142 be not imposed on it. The Commission is of the view that once proceedings under Section 142 has been invoked hereunder there is no need to separately invoke the provisions of Section 149, which in any case would not be applicable to the present case in view of the Appellate Tribunal’s judgment dated 31 July, 2009 in Appeal No. 53 of 2009 as under:-

“In brief, it shall be stated that Section 142 which deals with the violation of direction is not an offence and it cannot be linked with Section 149 which relates to the offences mentioned in the above sections in Part XIV.”

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(V. P. Raja)
Chairman



(P.B. Patil)
Secretary, MERC