

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 93 of 2016 and MA No.25 of 2016

Dated: 2 March, 2017

**CORAM: Shri Azeez M. Khan, Member
Shri Deepak Lad, Member**

In the matter of
Petition of MSEDCL for review of the Commission's Order dated 10 May, 2016 in Case
No. 43 of 2015

Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) ...Petitioner

V/s.

The Tata Power Company Ltd.-Distribution Business (TPC-D)	...Respondent No. 1
Ordnance Factory, Ambarnath	...Respondent No. 2
Central Railway (Chola)	...Respondent No. 3
Experimental Watershed Study Unit	...Respondent No. 4
Khopoli Resort	...Respondent No. 5
Bhandup Complex of MCGM	...Respondent No. 6
Central Railway - 100 kV (Thane)	...Respondent No. 7

Appearance

For the Petitioner	:	Shri Harinder Toor (Adv.)
For the Respondent No. 1	:	Smt. Deepa Chawan (Adv.)
For the Respondent No. 6	:	Smt. Raksha Jain (Adv.)
For the Respondent Nos. 3 and 7	:	Ms. Hema Patil Shri S.D. Nagpurkar
Authorized Consumer Representative	:	Shri Ashok Pendse, TBIA

Daily Order

Heard the Advocates/Representatives for the Petitioner and Respondents present, and the Authorized Consumer Representative.

Advocate for MSEDCL stated that the Petition has been filed under Regulation 85 of MERC (Conduct of Business) Regulations, 2004, for review of the Commission's Order dated 10 May, 2016 in Case No. 43 of 2015 in which the claim of MSEDCL for Cross Subsidy Surcharge (CSS) was rejected. The Order contains an error apparent on the face of the record for the following reasons:

1. The findings of fact and law in the Order are in favour of MSEDCL, but the final decision is contrary to those findings. This is a patent error which requires to be reviewed.
2. Except for Open Access, there is no provision in the Electricity Act, 2003 (EA, 2003) under which a Distribution Licensee can supply to consumers outside its Licence area, or which provides powers to the Commission to grant such permission.
3. The Commission has not considered the relevant Open Access Regulations and the Supreme Court Judgment dated 25 April, 2014 in Civil Appeal No. 5479 of 2013.
4. Under Regulation 17 of MERC (Distribution Open Access) Regulations, 2005, anything done or any action taken, including any existing contract or document or instrument issued or executed prior to the notification of the Regulations and which relates to the use of the distribution system, shall be deemed to be valid and binding only in so far as it is not inconsistent with the Act and these Regulations.
5. Supreme Court in its Sesa Sterlite vs OERC (Civil Appeal No. 5479 of 2013) Judgment has discussed the legal aspects of CSS before applying these principles to the facts of the Civil Appeal. The Commission erred in holding that the Supreme Court Judgment is in a different context, though the principles in that Judgment are equally applicable to this matter.
6. The Commission may condone the delay of 10 days in filing the review Petition.

In response, Advocate for TPC-D stated that:

1. MSEDCL is not in a position to fulfill its Universal Service Obligation (USO) under Section 43 of EA, 2003 and has not indicated its readiness to supply to these consumers. In spite of this, MSEDCL is claiming that it is entitled to CSS.
2. CSS is applicable only when a consumer of a Distribution Licensee stops taking supply from that Licensee and takes supply from another source.
3. Revenue/ expenses on account of supply to these consumers have always been reflected in TPC-D's ARR as TPC-D has been historically supplying to them. These consumers were never part of MSEDCL's ARR. MSEDCL's current level of cross subsidy is not affected due to these consumers continuing to get supply from TPC-D.
4. As mentioned at Para. 25 of the Supreme Court Judgment in the Sesa Sterlite Case, the mechanism of surcharges is meant for compensating the Distribution Licensee due to exit of high end consumers on mainly two aspects, one being the cross-subsidy to other low end consumers and the other for recovery of fixed cost the Licensee might have incurred as a part of its USO to the consumer.
5. The Commission has duly considered the Supreme Court Judgment while passing the Order, and the said Judgment needs to be read in its totality (including the excerpt quoted in the impugned Order) and not any one clause in isolation.

6. Situation in the present case is unique, and it is a historical arrangement in existence much before the commencement of EA, 2003. Although there is no specific provision in EA, 2003 for supply by a Distribution Licensee beyond its Licence area, the Commission has wide powers to ensure that consumers are not denied the supply of electricity.
7. Regulation 17 referred to by MSEDCL is an enabling Regulation, and MSEDCL has failed to indicate any infringement of the Regulations by the Commission.
8. In case these consumers shift from TPC-D to MSEDCL, TPC-D would require to be compensated for the loss of CSS.
9. The Supreme Court in various Judgments has held that the scope of review is not that of an Appeal, and can be entertained only if there is an error apparent on the face of the record. The term 'any other sufficient reason' has also been narrowly interpreted.
10. On bare perusal of the present Review Petition, it is evident that MSEDCL has only reiterated its submissions in Case No. 43 of 2015. MSEDCL has failed to demonstrate that there is an error apparent on the face of the record or otherwise fulfilled the requirements for review. MSEDCL has sought reconsideration of the Case under the garb of review, which is not permissible in law, as settled by the Supreme Court in various related Judgments.

As suggested by the Commission, TPC-D stated that MA 25 of 2016 filed by it on the issue of maintainability may be treated a part of its Reply on the Petition instead.

Advocate for MCGM Bhandup Complex stated that the Supreme Court Judgment, while discussing the CSS applicability, has mentioned about choice to the consumer for alternate supply. In the present case, there is no choice to the consumers other than continuing with TPC-D's supply. MCGM had communicated to MSEDCL its willingness to switch over to MSEDCL, but no response was received. However, it had not approached CGRF seeking relief.

The Central Railway Representative stated that it had nothing to say on the Review Petition.

Responding to TPC-D's submissions, MSEDCL stated that TPC-D has failed to show any provision in EA, 2003 under which the Commission can permit a Distribution Licensee to supply beyond its Licence area. The Commission's Order is transgressing Section 42 of EA, 2003 which states that, while allowing Open Access, CSS has to be considered. Extract of the relevant Supreme Court Judgment was submitted by MSEDCL.

Responding to MCGM's submission, MSEDCL stated that it has not received any Application for supply from MCGM Bhandup Complex.

Dr. Ashok Pendse, on behalf of Thane-Belapur Industries Association (TBIA), an Authorised Consumer Representative, pointed out that MSEDCL is also supplying to a few consumers in Karnataka State and no CSS is required to be paid by these consumers. This has also been mentioned in the impugned Order. The present Case is similar and the six consumers being supplied by TPC-D, therefore, should not be required to pay CSS to MSEDCL.

Case is reserved for Order.

Sd/-
(Deepak Lad)
Member

Sd/-
(Azeez M. Khan)
Member