

(2003) 02 BOM CK 0010

In the Bombay High Court

Case No : M.E.R.C. Appeal No. 1 of 2001 in Case No. 1 of 1999 and 2 of 2001 in Case No's. 10 and 11 of 2001

Maharashtra State Electricity Board

APPELLANT

Vs

Maharashtra Electricity Regulatory Commission

RESPONDENT

Date of Decision : 24-02-2003

Acts Referred:

Electricity Regulatory Commission Act, 1998 — Section 22, 22(1), 29

Citation : AIR 2003 Bom 398 : (2003) 5 BomCR 206 : (2003) 3 MhLj 84

Hon'ble Judges : Ranjana Desai, J;A.P. Shah, J

Bench : Division Bench

Advocate : S.R. Diwan and Alpana Dhake, instructed by Little and Co. in Appeal No. 1 and 2 of 2001, for the Appellant; S. Venkiteshwarn, instructed by K.R. Shriram, in in M.E.R.C. Appeal Nos. 1 and 2 of 2001 and C.N. Chavan, in M.E.R.C. Appeal No. 2 of 2001, for the Respondent

Judgement

A.P. Shah, J.—These appeals u/s 27 of the Electricity Regulatory Commissions Act, 1998, hereinafter called the "ERC Act", raise common issues of law and are being disposed of by this common judgment. The common issues relate to the jurisdiction of the Maharashtra Electricity Regulatory Commission (MERC) to issue directions relating to the terms and conditions for supply of electricity energy fixed by the Maharashtra State Electricity Board (MSEB) and to the MSEB's right to claim transit loss of coal.

Appeal No. 1 of 2001 :

2. This appeal is directed against the principal tariff order dated 5th May, 2000 passed by MERC determining the tariff applicable to various categories of consumers of MSEB for the period 2000-2001, the brief facts leading to this appeal are that on 4th May, 1999, MSEB submitted a proposal to the Government of Maharashtra for revision of its retail distribution tariff with effect from 1st June, 1999 u/s 49 read with Section 59 of the Electricity (Supply) Act, 1948, hereinafter called the "Supply Act". No decision was taken by the State

Government on the said proposal. On 5th August, 1999, MERC was constituted by a notification of the State Government issued u/s 17 of the ERC Act. With the constitution of the MERC, MSEB was advised by the State Government to submit its tariff proposal to MERC. On 15th October, 1999, MSEB submitted its tariff Revision Proposal to MERC. This tariff proposal came to be numbered as Case No. 1 of 1999. MERC issued public notice inviting objections and suggestions from interested parties and held public hearings at various locations in the state. In the course of hearing MERC felt that since the financial year 1999-2000 (in respect of which tariff hike was proposed) was almost over, MSEB should submit revised proposal for the period 2000-2001. Accordingly on 6th March, 2000 MSEB submitted a revised proposal to MERC for the period 2000-2001. MERC issued a public notice inviting objections to the revised proposals and held public hearings in the matter. MERC considered the objections submitted by 468 parties. On 5th May, 2000, MERC issued principal tariff order in Case No. 1 of 1999. On 16th June, 2000, MERC issued further clarifications in exercise of power under Regulation 68(3) of the M.E.R.C. (Conduct of business) Regulations, 1999, hereinafter called the "Regulations". On 9th August, 2000, MSEB filed an application under Regulation 87 of the said Regulations for review of the order dated 5th May, 2000, MERC was pleased to admit the Board's review application and also issued directions with regard to the procedure to be followed in the review. Public hearing was conducted on the points raised in the review application before MERC. By order dated 13th December, 2000, MERC decide the review application in Case No. 1 of 1999. By this order, MERC amended and modified in part the principal tariff order dated 5th May, 2000.

Appeal No. 2 of 2001 :

3. This appeal is directed against the common order dated 5th May, 2000 in MERC Case Nos. 10 and 11 of 2001. This order was passed by MERC on applications made by respondent No. 2 Maharashtra Chambers of Commerce and Industries and respondent No. 3 Akhil Bharatiya Grahak Panchayat seeking review and revision of conditions of supply framed by MSEB vide its commercial Circular dated 6th August, 1994. MSEB opposed the applications mainly on the ground that terms and conditions of supply are fixed by the Board u/s 49 of the 1948 Act and MERC has no jurisdiction in respect of terms and conditions of supply. By an order dated 14th February, 2001 MERC directed MSEB to secure approval of all commercial Circulars as prescribed in the tariff order dated 5th May, 2000 and to submit a proposal for conditions and miscellaneous charges for supply of electrical energy to the Commission before/along with the next tariff proposal. MSEB was restrained from collecting or taking undertakings from consumers in respect of certain differential amounts and was asked to refund an amount of Rs. 100/- to all consumers who had submitted undertakings after 6th September, 2000. A direction was also issued to MSEB not to force Maximum Demand Based Tariff on LTPG consumers but to treat it as optional, as provided in the Tariff Order dated 5th May, 2000.

4. On 5th December, 2002, this Court directed MSEB to issue the gist of the main grounds of appeal on its website and to publish public notice in various newspapers as mentioned in the order notifying the date of hearing of the appeals and accordingly MSEB had published the notice in the newspapers; published main grounds of appeal on its website and made available the copies of the memo of appeal at the request of the parties. In pursuance of the notice affidavits/written submissions were filed on behalf of some of the objectors.

5. Mr. Diwan appearing for MSEB, Mr. Venkiteshwaran appearing for MERC, Mr. Patwardhan appearing for respondent Nos. 2 and 3 made elaborate submissions on the two issues involved in these appeals.

Re Jurisdiction of MERC to issue directions relating to terms and conditions of supply.

6. Prior to the enactment of the ERC Act State Electricity Board had jurisdiction u/s 49 of the Supply Act to supply electricity "upon such terms and conditions as the Board thinks fit and may for the purpose of such supply frame uniform tariff. Section 49(4) provides that in fixing the tariffs and terms and conditions for the supply of electricity, the Board shall "not show undue preference to any person". Indian Electricity Rules, 1956, framed u/s 37 of the Indian Electricity Act, 1910, hereinafter called the Electricity Act, provide for model conditions of supply. Rule 27 of the said Rules reads as follows :

"27. Model conditions of supply.--(1) without prejudice to the powers conferred by Section 21 on the State Government in this behalf, the model conditions of supply contained in Annexure VI may, with such variations as the circumstances of each case require, be adopted by the licensee for the purpose of Sub-section (2) of that section with the previous sanction of the State Government.

(2) The licensee shall always keep in his office an adequate number of printed copies of the sanctioned conditions of supply and shall, on demand, sell such copies to any applicant at a price not exceeding 50 paise per copy."

Annexure VI to the said Rules provides a model form of draft conditions of supply which covers various matters such as service lines, security deposits, payment of bills, discontinuance of supply, schedule of service and miscellaneous charges etc.

7. The ERC Act was brought into force on 25th April, 1998. The object of ERC Act can be seen from the preamble of the Act which reads as under :

"An Act to provide for the establishment of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions, rationalisation of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and for matters connected herewith or incidental thereof."

The Act entrusts the whole range of issues relating to the energy supply to the Central Regulatory Commission in respect of matters governed by Chapter III of

the Act and to the State Electricity Regulatory Commission in respect of the matters governed by Chapter IV of the Act. Section 22 of the Act lays down various functions required to be discharged by the State Commission. Section 22 reads as follows :

"22. Functions of State Commission.--(1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely, :--

(a) to determine the tariff for electricity, wholesale, bulk, grid or retail as the case may be, in the manner provided in Section 29.

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in Section 29;

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;

(d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act.

(2) Subject to provisions of Chapter III and without prejudice to the provisions of Sub-section (1), the State Government may, by notification in the Official Gazette, confer any of the following functions upon the State Commission, namely, :--

(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity generation, transmission, distribution and supply in the State;

(b) to aid and advise the State Government, in matters concerning electricity generation, transmission, distribution and supply in the State;

(c) to regulate the operation of the power system within the State;

(d) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;

(e) to regulate the working of the licensees and other persons authorised or permitted to engage in the electricity industry in the State and to promote their working in an efficient, economical and equitable manner;

(f) to require licensees to formulate perspective plans and schemes in co-ordination with others for the promotion of generation, transmission, distribution, supply and utilisation of electricity, quality of service and to devise proper power purchase and procurement process;

(g) to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service;

(h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the customers.

(i) to lay down and enforce safety standards;

(j) to aid and advise the State Government in the formulation of the State power policy;

(k) to collect and record information concerning the generation, transmission, distribution and utilization of electricity.

(l) to collect and publish data and forecasts on the demand for, and use of, electricity in the State and to require the licensees to collect and publish such data;

(m) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State including the conditions governing entry into, and exit from, the electricity industry in such manner as to safeguard the public interest;

(n) to adjudicate upon the disputes and differences between the licensee and utilities and to refer the matter for arbitration;

(o) to co-ordinate with environmental regulatory agencies and to evolve policies and procedures for appropriate environmental regulation of the electricity sector and utilities in the State; and

(p) to aid and advise the State Government on any other matter referred to the State Commission by such Government;

(3) The State Commission shall exercise its functions in conformity with the national power plan."

8. One of the basic functions of the State Regulatory Commission u/s 22(1) is to determine the tariff for the electricity. Such tariff may be for wholesale, bulk, grid or retail, as the case may be. This is subject to Section 29. Section 29 reads as under ;

"29. Determination of tariff by State Commission.--(1) Notwithstanding anything contained in any other law, the tariff for intra State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the "tariff"), shall be subject to the provisions of this Act and tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

(2) The State Commission shall determine by regulations the terms and conditions for the fixation of tariff and in doing so, shall be guided by the following, namely;

(a) the principles and their applications provided in Sections 46, 57 and 57-A of

the Electricity (Supply) Act, 1948 (54 of 1948) and the sixth Schedule thereto;

(b) in the case of the Board or its successor entitles, the principles u/s 59 of the Electricity (Supply) Act, 1948 (54 of 1948);

(c) that the tariff progressively reflects the costs of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purposes of this Act;

(e) the interests of consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government.

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the 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;

(4) The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

(5) If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in Sections 57-A and 57B of the Electricity (Supply) Act, 1948 (54 of 1948) no rating committee shall be constituted after the date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in accordance with the provisions of this Act,"

Section 52 of the ERC Act gives overriding effect to the provisions of Act and says that save and except Section 49 the provisions of ERC Act shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act.

9. On behalf of MSEB Mr. Diwan submitted that there is a well recognised distinction between the notions of "tariff and "terms and conditions of supply". Mr. Diwan submitted that this distinction has been recognised by the Legislature as well as the Supreme Court of India. He referred to the decision in Hyderabad Vanaspati Ltd. v. Andhra Pradesh State Electricity Board, AIR 1978 SC 1715, where the Supreme Court has held, inter alia, that terms and conditions of supply are akin to subordinate legislation and are statutory in character. He submitted that these two notions are distinct and separate. While MERC had jurisdiction to do into all the issues relating to tariff it has no jurisdiction in respect of the terms and conditions of supply/commercial circulars issued by the MSEB. Mr. Diwan urged that MERC being a statutory body derives jurisdiction to deal with the issues pertaining to tariff u/s 22 read with Section "29 of the ERC Act. Neither of these sections makes any reference to "terms and conditions of supply". He submitted that Section 49 of the Supply Act continues to remain in statute book and has not been repealed by the ERC Act and, therefore, MERC does not have jurisdiction to decide the questions relating to the terms and conditions of supply.

10. We are unable to accept the submissions of Mr. Diwan. ERC Act confers exclusive jurisdiction on the State Regulatory Commission to determine the tariff for electricity. Section 22(1) requires the Commission to determine the tariff for electricity subject to Section 29. Section 29 incorporates a non-obstante clause which provides that notwithstanding anything contained in any other law, the tariff for supply of electricity grid, wholesale, bulk or retail, as the case may be, shall be subject to provisions of the ERC Act. Section 29 is in two parts. First is the non-obstante clause which provides that the tariff shall be determined by the State Commission in accordance with the provisions of the ERC Act. The State Commission is obliged to take into consideration various factors while determining the tariff as set out in Sub-clauses (2), (3) and (4) of Section 29. By Section 26 of the ERC Act consumer has been given a right of participation in fixation of tariff. The provision relating to the State Advisory Committee also emphasized the legislative intent to protect consumers interest. The terms and conditions for supply of electricity also go with the cost of electricity. Therefore, while fixing the tariff for electricity, the State Commission has to necessarily take into consideration terms and conditions for supply of electricity in so far as they add to the costs of the electricity. In determination of the tariff of electricity ,the terms and conditions of supply which form integral part of the electricity tariff cannot be bifurcated in the manner suggested by Mr. Diwan. Fixing of such terms and conditions by MSEB also impinges on payment of charges by the consumers and are, therefore, subject to review by the Commission in view of Section 29(1) and (4) of ERC Act. Section 29(4) of ERC Act provides that the Board shall

observe methodology and procedure specified by the Commission from time to time in calculating the expected revenue from tariff which it is permitted to recover and in determining tariffs to collect those revenue. Therefore, the charges as such service line charges, transmission charges etc. which were charged by MSEB will have to be approved by the Commission.

11. At this stage it would be appropriate to refer to the regulations framed by MERC. Regulation 72(2) provides that no utility shall fix any tariff for intra state transmission, distribution or supply of electricity and terms and conditions for the supply of electricity, without the general or specific approval of the Commission. Regulation 79 provides that all petitions, for approval of tariff (generation, transmission, distribution and supply) and terms and conditions of supply shall be made strictly in accordance with the regulations and procedure as may be prescribed by the Commission and shall also be in conformity with the requirement relating to petitions as prescribed in chapter 11 of the Regulations. Having regard to the specific provision contained in Section 22 and Section 29 of ERC Act and the provisions of above Regulations, we have no hesitation to hold that MERC has jurisdiction in respect of the terms and conditions of supply of electricity insofar as tariff involved therein. Section 52 of the Act gives overriding power to ERC Act and, therefore, the provisions of ERC Act would prevail over the Electricity Supply Act as well as the Electricity Act Re MSEB right to claim transit loss of coal.

12. Before the Commission the MSEB had made a claim for loss of coal in transit. This was objected to by various associations and corporations contending inter alia that regular instances of heavy losses of coal in transit have pushed up expenses and made the tariff revision necessary. It was contended that if MSEB should reduce its expenses in a phased manner, it can offer electricity at reduced rates. MSEB had responded by saying that it makes advance payments to coal companies i.e. WCL, SECL and MCL. The coal bills received by MSEB from CIL subsidiaries are based on declared grade of coal and quantity dispatched. After receipt of the coal at the MSEB TPS the same are sampled and analysed for its quality. Also, the coal received is weighed at destination for verification of under loading/over loading in the railway wagons. There is a normal 5 to 6% transit loss due to water evaporation etc. in the coal received at power stations and this fact is not under the MSEB's control. The Commission rejected M.S.E.B.'s claim with the following observations :

"The Commission is of the opinion that the moisture in the coal is not giving out any heat. The total heat content of the coal remains same irrespective of the loss of this moisture. Further, considering the provisions in the purchase contracts with coal mines and also the railway rules, the Commission rejects the demand for allowing this transit loss."

13. Mr. Diwan assailed the view taken by MERC as totally erroneous. He submitted that the accounting practice adopted by MSEB with regard to the transit loss of coal has been consistent with the Electricity (Supply) Annual

Accounts Rules, 1985 framed u/s 69 of the Supply Act. He submitted that the Rules show that transit loss of coal is a permissible head of accounting and legitimate loss. He submitted that Tariff Proposal put up by MSEB before MERC was consistent with M.S.E.B.'s own accounts which follow the Accounting Rules. Mr. Diwan pointed out that as a result of MERC not allowing this loss to the tune of approximately Rs. 96 crores was not included for the purpose of claiming tariff and consequently this loss will have to be borne by MSEB. Mr. Diwan submitted that loss beyond the control of the Board is legitimate loss and the same should be considered while framing the tariff. He relied upon the decision of the Supreme Court in West Bengal Electricity Regulatory Commission Vs. C.E.S.C. Ltd. etc. etc., . Mr. Venkiteshwaran and Mr. Patwardhan fairly conceded they have not disputed that the unavoidable transit loss of coal can be a permissible head of accounting. However, it is argued that loss claimed by MSEB is highly excessive. It is argued that the Board has failed to take concrete steps to minimise the transit loss and loss, if any, is caused due to negligence and incompetence of the Board's officials.

14. While we agree with the learned Counsel appearing for the respondents that MSEB should strive to bring down the loss under this head, at the same time we cannot ignore that transit loss of coal claimed by MSEB is consistent with the accounting rules. Even the Central Electricity Authority has in its report of October 2001 opined that coal loss in transit at 3% will have to be considered while calculating the tariff. According to MSEB the transit loss is caused mainly due to loss of moisture in the coal during transit. This loss, according to Board, is beyond their control. We find merit in the submission of Mr. Diwan. In our view, MERC was in error in denying the claim to MSEB for transit loss in coal. However, the percentage of loss has to be necessarily determined by MERC on the basis of evidence before it and after hearing the parties. It is not disputed that the exercise to determine coal transit loss for the year 2000-2001 is academic as period is already over. Needless to say that MSEB will have the right to claim coal transit loss for subsequent years.

In the light of the above discussion, both the appeals are disposed of.

On the request of Mr. Diwan interim order dated 28th September, 2001 is continued for 12 weeks.

Parties to act on an ordinary copy of this order duly authenticated as true copy by the Associate of this Court.