

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 26 of 2019

Implementation of the Hon'ble Appellate Tribunal for Electricity (ATE)'s Judgment dated 20 September 2021 in Appeal Nos. 386 of 2019 and IA Nos. 1888 of 2019, 279 of 2020 & 1256 of 2021.

M/s. Rajlakshmi Minerals

..... Petitioner

Maharashtra State Electricity Distribution Co. Ltd.

..... Respondent

Coram
Sanjay Kumar, Chairperson
I.M. Bohari, Member
Mukesh Khullar, Member

Appearance:

For the Petitioner

: Smt. Alefiyah Shipchandler (Adv)

For the Respondent

: Shri G. Saikumar, (Adv)
Shri. Rahul Sinha (Adv)

ORDER

Date: 05 January 2022

1. This proceeding is consequent to Judgment dated 20 September, 2021 of the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 386 of 2019 and IA Nos. 1888 of 2019, 279 of 2020 & 1256 of 2021 wherein the APTEL has dismissed the Appeal filed by Maharashtra State Electricity Distribution Co. Ltd. (MSEDCL) and remanded the matter back to the Commission. For sake of completeness, background to this APTEL judgment is summarized below:

- 1.1. M/s Rajlaksmi Minerals (RM) owns a 3.40 MW wind power facility at Pusrali and Altur village, Shahuwadi Taluka, in Kolhapur District, Maharashtra. The said Wind Power Plant was successfully commissioned on 29 March 2014. Wind Energy Purchase

Agreement (WEPA) was executed with MSEDCL on 20 August 2014. Tariff for wind energy was fixed as Rs. 5.81 per kWh.

- 1.2. As per the terms of WEPA, MSEDCL is under a contractual obligation to make the necessary payments to RM in respect of the electricity purchased by it within 60 days from the receipt of the monthly energy bills. When MSEDCL delayed the payment of the contractual dues to RM, an interest rate of 1.25% per month would be levied on it.
- 1.3. There were defaults made by MSEDCL by not making timely payments of dues for electricity supplied under the WEPA. Hence, on 09 January 2019 RM filed a Petition (Case No. 26 of 2019) before the Commission.
- 1.4. The Commission vide its Order dated 26 March 2019 granted relief to RM by directing MSEDCL to pay the outstanding dues. Further, in the event of default in payment within committed timeline, MSEDCL was directed to pay interest at 1.25% per month on outstanding DPC.
- 1.5. MSEDCL challenged the direction about levy of interest at 1.25% on outstanding DPC by way of Appeal (Appeal No. 141 of 2019) on 05 April 2019 but withdrew it on 16 April 2019 with liberty to file Review before the Commission.
- 1.6. Thereafter, MSEDCL filed a Review Petition (Case No. 105 of 2019) before this Commission. Same was rejected by the Commission vide its Order dated 02 August 2019.
- 1.7. Being aggrieved by the above said Order dated 02 August 2019, MSEDCL filed Appeal No. 386 of 2019 before the APTEL. In the said Appeal, MSEDCL contended that the levy of penal interest on DPC amounts to levy of interest on interest which is impermissible in Law.
2. The Hon'ble APTEL vide its judgment dated 20 September 2021 dismissed the above said Appeal filed by the MSEDCL with following observations and directions:

“30. The regulatory commission under the Electricity Act, while adjudicating upon a dispute, exercises powers and jurisdiction which are essentially that of a civil court but transferred to the regulator under the special regime governing this sector. In legal proceedings for recovery of money due - the case in which the impugned order was passed being proceedings of such nature, the adjudicating authority is competent not only to award (or decree) the principal sum but also interest – past, pendente lite, and future. It is trite that if future interest (over and above the sum determined to be paid till the date of the decision) were to be denied, and if the sum determined were not paid for substantial period after the decision, the party held entitled to recover will not receive the money due in full, the compensation suffering erosion of real value due to time elapse. That would

not be complete justice. Thus, the practice of adding the condition of future interest to the sum awarded in such cases is the norm, denial an exception. If the claim arises out of a contract, the addition of such condition does not amount to re-writing of contract. On the contrary, as is clear from Section 13.02 of WEPA on the subject of "Limitations on Damages", the very fact that the "obligor's liability (is to) be limited to direct actual damages" means the real value has to reach the hands of the creditor, the loss of real value due to delay in discharge of liability determined by the decision representing "actual damages".

.....

40. The impugned direction that in the event the procurer (appellant) "deviates from its commitment given in the payment plan, penal interest will accrue thereafter (beyond the date committed in the plan) at 1.25% per month on any LPS/DPC" does not fall foul of Section 3 of the Interest Act, 1978 for the simple reason that it is not "interest upon interest", the levy also being not over the amount of debt (arrears) after it has been repaid. Instead, it is in accord with what was accepted in Central Bank of India v. Ravindra (supra) as long-established practice of awarding future interest on the "principal sum adjudged". We fully agree with the submission of the Seller resisting the appeal that the contention of the procurer would lead to a patently unfair and absurd situation wherein defaulting parties could simply avoid meeting their payment commitments to generating companies by providing committed dates for payment for calculation of LPS / DPC, and thereafter not paying interest if the said amounts are not paid in a timely manner. The present case is a perfect illustration of the importance of awarding interest on LPS / DPC, as the appellant has, year after year, caused massive delay in payments and compelled the respondent to initiate legal proceedings before the State Commission for recovery of its legitimate dues.

41. For the foregoing reasons, in the given facts and circumstances, we find no merit in this appeal which, consequently, is dismissed. The pending applications are rendered infructuous and stand disposed of accordingly. 42. The above result of the appeal, however, cannot be the end of the matter. The case calls for further directives.

43. We direct the State Commission to determine the amount payable by the appellant to the second respondent in terms of directions in the impugned para 3 of the operative part of the order dated 26.03.2019 and take measures in accordance with law to ensure that the appellant discharges the liability on that score within three months of the date of this judgment.

44. We are deeply disturbed over the manner in which the appellant has been warding off its creditors depriving them of timely payments of their legitimate dues. This is reflective of financial mis-management on the part of the appellant but, more gravely, a conduct not expected of a distribution licensee. The MERC seems to have been playing along

believing the promises held out through payment-plans without insisting on scrupulous adherence thereto. This has been leading to unnecessary litigation adding to the cost for all stake-holders. The Commission, as the sector regulator, equipped as it is with the requisite powers, can do better. If the reasons for the mess indicated in the additional affidavit dated 29.07.2021 (mentioned earlier) are any pointer, it is the duty of the regulator to effectively deal with some of the issues that statedly plague the food chain and are attributable to actions (or inaction) of the regulatory authority including certain disallowances, delayed implementation of the tariff orders, approvals of gains and losses in MYT Order instead of True up; belated approval of the final true up etc. It is the obligation of the State Commission to ensure, by issuing appropriate directions and enforcement thereof to the logical end, that the Distribution licensee conducts itself in such a manner that it lives up to the objectives of the Electricity Act by maintaining financial discipline, adopting efficient systems, aiding in recovery of the cost of electricity in a reasonable manner and conduct of its business of distribution and supply on commercial principles which only would safeguard the consumers' interest.

45. We direct the State Commission to examine the financial affairs of the appellant and take appropriate measures in such regard in accordance with law so as to bring about financial discipline in a time-bound manner, bearing in mind the observations recorded above."

3. As Hon'ble APTEL directed the Commission to determine amount payable to the RM in terms of APTEL judgment and to ensure that such amount is paid within three months from the date of APTEL judgment i.e. by 19 December 2021, the Commission allowed parties to record appearance on 4 October 2021.
4. On 4 October 2021, Advocates of Petitioner and Respondent in Case No. 26 of 2019 appeared before the Commission. Advocate appearing for MSEDCL informed that it had preferred an Appeal before Hon'ble Supreme Court against the APTEL Judgment dated 20 September 2021. Advocate of RM submitted that no stay order had been issued on the preferred Appeal. The Commission noted that in Para 43 of the Judgment dated 20 September 2021, APTEL had directed to ensure that MSEDCL shall discharge its liability within three months. Hence, the Commission directed, RM and MSEDCL to file their submission on quantification of claim in terms of APTEL's directives.
5. **RM in its submission dated 19 October 2021 stated as below:**
 - 5.1. The Commission vide its Order dated 26 March 2019, directed MSEDCL to make outstanding payments to RM along with DPC. The Commission also granted interest @ 1.25% per month on the DPC payable, in the event of the MSEDCL failing to make timely payment of DPC.

5.2. With respect to the interest on DPC payable by MSEDCL in terms of the said Order, the said interest was to be payable if MSEDCL did not clear the DPC payable to RM within the dates committed by it. However, MSEDCL failed to provide dates by which DPC would be paid, because of which, no interest on DPC could be calculated in terms of the said Order.

5.3. On 26 April 2021, MSEDCL paid a sum of Rs. 69,03,671/- towards DPC payable for the period of May 2017 to September 2018, seemingly pursuant to a contempt Petition (Case No. 40 of 2021) under Sections 142 and 146 of the EA, 2003 before the Commission.

5.4. In the absence of any committed dates by MSEDCL for payment of the DPC, RM computed the interest on the said DPC amount for the period between seven days from the reconciliation report dated 18 April 2019, i.e., 25 April 2019, and the actual date of payment, i.e., 26 April 2021, which amounts to Rs. 21,05,620/-. MSEDCL made a payment of Rs. 10,00,000/- to the Petitioner on 17 June 2021. Hence, the outstanding amount towards the interest on DPC is 11,05,620/-.

5.5. RM clarified that, the principal amounts and DPC payable under Case No.26 of 2019 stand paid as on date. However, these payments have been made with significant delay.

6. MSEDCL in its submission dated 8 November 2021 stated as below:

6.1. RM had filed the Petition in Case No.26 of 2019 for claiming following amounts:

Sr. No.	Particulars	Amount
1	Principal amounts (from October 2017 to October 2018)	Rs. 3,59,90,095/-
2	DPC May 2017 to October 2018	Rs. 57,71,312/-
3	Interest on DPC	Rs. 17,77,160/-

6.2. MSEDCL in its submission narrated the chronology of events subsequent to Order dated 26 March 2019 issued in Case No. 26 of 2019.

6.3. In compliance of the directions of the Commission, MSEDCL has made the following payments:

Sr. No.	Particulars	Petitioner Claim		MSEDCL Payment	Date of Payment	Remark
		Principal Period	Amount (INR)	Amount (INR)	Amount (INR)	
1	Principal amount	October - 2017 to October - 2018	35,990,095.00	35,990,096.00	30-03-2019 /03-04-2019/22-08-2019	

Sr. No.	Particulars	Petitioner Claim		MSEDCL Payment	Date of Payment	Remark
		Principal Period	Amount (INR)	Amount (INR)	Amount (INR)	
2	Delayed Payment Charges	May-2017 to October - 2018	5,771,312.00	6,903,671.00	26-04-2021	MSEDCL has reconciled the DPC with Petitioner on 18-04-2019 for the Generation Month May-2017 to Sept-2018 and same is paid.
3	Interest on DPC	May -2017 to October- 2018	1,777,160.00	1,000,000.00	17-06-2021	Paid as per MSEDCL calculation and further Appeal filed in Hon'ble Supreme court of India (6440/21)
TOTAL			43,538,567.00	43,893,767.00		

6.4. RM in its submission dated 19 October 2021 has sought the Penal Interest @ 1.25% pm on DPC for Period from May 2017 to September 2018 amounting to Rs 21,05,620/-. MSEDCL is in the process of confirming the said claim of RM. MSEDCL pointed out that it had already made a payment of 10 lakhs against the said claim of Rs 21,05,620/- which is without prejudice to the rights and contention raised by MSEDCL in the Civil Appeal filed before the Supreme Court of India.

7. During the e-hearing held on 9 November 2021, the Commission allowed 7 days' time to MSEDCL for verifying the claims with a condition that agreed amount shall be paid within 7 days.

8. **MSEDCL in its additional submission dated 11 November 2021 stated as below:**

8.1. In compliance of the directives in Daily Order dated 9 November 2021, MSEDCL reconciled the amount and highlighted following discrepancies:

Details of Discrepancies (Amt. in Rs.)			
Particulars	As per MSEDCL	As per RM	Difference
Total amount of 1.25 % Penal Interest on delay payment on DPC (MERC Case 26/19)	20,76,775.53	21,05,619.64	28,844.10
Less: Paid on 17.06.2021	10,00,000.00	10,00,000.00	-
Balance	10,76,775.53	11,05,619.64	28,844.10

- 8.2. The difference of Rs.28,844.10/- is due to consideration of different days for calculation of interest on DPC by RM and MSEDCL. RM has considered 360 days in year and MSEDCL has taken 365 days. Considering the above calculation, MSEDCL has made the payment of Rs. 10,76,775.53/- on 11 November 2021. The above payments is without prejudice to MSEDCL's rights and contention raised in the Civil Appeal filed before the Supreme Court of India.
9. During the e-hearing held on 16 November 2021, Advocate of RM stated that they have received the amount paid by MSEDCL and such amount should be considered as reconciled between parties. With such payment, RM stated that Order stands complied with.

Commission's Analysis and Rulings:

10. The Commission notes that Hon'ble APTEL vide its judgment dated 20 September 2021 has remanded the matter to the Commission with following directions:
- a. Determine the amount payable by MSEDCL to M/s Rajlakshmi Minerals (RM) and take measures in accordance with law to ensure that MSEDCL discharges such liability within three months of the date of Judgment i.e. by 19 December 2021.
 - b. Examine the financial affairs of MSEDCL and take appropriate measures in accordance with law to bring about financial discipline in a time-bound manner.
11. As far as direction at 'a' above is concerned, the Commission observes that in compliance of APTEL judgment (without prejudice to its rights in Civil Appeal filed before the Supreme Court), MSEDCL has paid Rs. 10,76,755.53 to RM towards balance outstanding interest at the rate of 1.25% for delayed payment of DPC on 11 November 2021. RM has also accepted receipt of such payment and has stated that Order has been complied with. Hence, the Commission notes that APTEL's directive at 'a' above has been complied with.
12. As far as direction at 'b' above is concerned, the Commission notes that Hon'ble APTEL has issued such direction considering generic nature of the issue raised and is not specific to the generator in the present case. In present remand proceedings, none of the parties have filed any submission on this direction of the APTEL. In absence of such submission in present matter, in order to comply with APTEL directions and to take steps for identifying causes of alleged financial difficulties of MSEDCL, the Commission has relied upon its recent tariff orders, provisions of Regulations, MSEDCL's recent submissions in other matters etc. In the following paragraph, after analysing probable causes of financial distress of MSEDCL, the Commission has suggested way forward to address this critical issue.

13. The financial health of Distribution Licensee depends upon allowing its prudent expenses through ARR/Tariff and recovering such tariff from consumers. It also depends on the operational efficiency of the Distribution Licensees. Maharashtra has multiple Distribution Licensees including parallel licensees. In Maharashtra, the Commission has been adopting Multi Year Tariff (MYT) principles for last several years. Present applicable regulations i.e. MYT Regulations, 2019 have been notified after following due process of public consultation. These Regulations are uniformly followed for the stake holders. None of the Distribution Licensee including MSEDCL has been able to pinpoint a specific regulation or disallowance inspite of a provision in the Regulation allowing the expense, which has resulted in financial difficulties to them. In fact the approved ARR covers all the legitimate expenses as per the provisions of the MYT Regulations and is Revenue neutral. This initial neutrality is further subjected to true up mechanism to cover the actual expense and income. The present approved ARR is on the basis of the norms notified under the MYT Regulations, 2019 which covers the Control Period of FY 2000-21 to FY 2024-25. Based on such provisions of MYT Regulations, Multi Year Tariff Order in respect of MSEDCL has been issued in time on 30 March 2020 which is effective from 1st April 2020. The order covers the approved ARR and Tariff for the Control Period of FY 2020-21 to FY 2024-25. The Commission has allowed all prudent expenses of MSEDCL without creating any Regulatory Asset, thus ensuring recovery of all the legitimate expenses. Approved Tariff for each Financial Year automatically gets effective from 1st April of that Financial Year. MSEDCL has challenged some aspect of this MYT Order such as restatement of Distribution Loss and consequent disallowance in ARR, non-consideration of earlier disallowed GFA etc. before the Hon'ble APTEL. However, as the Commission has decided these issues after due public consultation process and recorded its detailed reasons in the Order, the Commission would not like to comments on merits of such appeal which is now *sub judice* before the APTEL. Hence, first aspect i.e. allowing prudent expenses to MSEDCL has been duly followed and does not require any further action on the same. The financial difficulty is more due to cash flow management which is a management action/inaction largely due to non recovery of the amounts billed from all the consumers.
14. Once, the prudent expenses are allowed through tariff, the Distribution Licensee needs to necessarily recover such tariff from its consumers, so as to avoid financial difficulties (cash flow continuity). Also, Distribution Licensee needs to continuously improve its operational efficiencies and achieve the targets stipulated in the Regulations/ Orders so as to reduce its operational expenses. For any Distribution Licensee, Billing and Collection efficiency are critical operational parameters. In case of MSEDCL, taking cognisance of chronic issues in billing to agriculture consumers, the Commission had constituted a working group to study the consumption of agriculture category of consumers particularly of the unmetered agriculture consumers. It had undertaken third party field survey and reassessed agriculture sales reported by MSEDCL as per the report of the working group. Accordingly, Billing Efficiency/ Distribution Loss of MSEDCL for FY 2018-19 had to be restated. Based on such

restated Distribution Loss, the Commission has given following loss reduction trajectory to MSEDCL for MYT Control Period:

Particulars	FY 20-21	FY 21-22	FY 22-23	FY 23-24	FY 24-25
Distribution Losses (Excluding EHV)	18.00%	16.00%	14.00%	13.00%	12.00%

Above loss reduction targets can only be achieved if MSEDCL improves its Billing Efficiency. In the MYT Order, the Commission had also directed MSEDCL to submit an action plan for improving agricultural billing within three months of the order. But, by citing difficulties being faced due to lockdown imposed on account of Covid-19 pandemic, MSEDCL has deferred submission of such action plan. Such approach towards important issues like billing efficiency continues to contribute to increasing financial stress/losses of MSEDCL. Billing efficiency (reduction in electricity losses) is extremely critical as MSEDCL is required to incur the additional cost of power without any corresponding sales/recovery. Similarly, in the MYT Order, the Commission has also recognised lower collection efficiency as major issue of concern and hence has stipulated following trajectory for improvement in collection efficiency:

“8.1.17 The Commission notes that MSEDCL in its submission has reported LT collection efficiency for FY 2018-19 as 92.74% and for FY 2019-20, MSEDCL has estimated same at lower level of 89.58%. Such deteriorating performance is not acceptable. Hence, the Commission is laying down following trajectory for improvement in LT collection efficiency:

Year	FY 2020-21	FY 2021-22	FY 2022-23	FY 2023-24	FY 2024-25
LT Collection Efficiency	93.50%	94.00%	94.50%	95.00%	95.50%

8.1.18 In case, MSEDCL fails to achieve above targets, the Commission may reduce 1% RoE of Supply Business and at the same time if it is able to improve collection efficiency 1% more than the target specified above, MSEDCL would get 1% more RoE on Supply Business.

Through above Order, the Commission has tried to lay down scheme of incentive / disincentive for improving collection efficiency. However, from the submissions made by MSEDCL in various other matters, it is observed that expected improvement in Collection Efficiency is also not achieved.

15. MSEDCL in its recent submissions in various matters before this Commission and also before the APTEL has highlighted that it is not able to recover billed amount from certain categories of consumers such as Agriculture, Govt. Departments (Public Water Works, Govt

Offices, street lights etc) etc. which is causing financial distress (cash flow problems). In this regard, the Commission is of the view that Electricity Act 2003 has provided necessary powers for enabling Distribution Licensee to recover billed amount from all the Consumers. Any laxity in recovery of dues reflects badly on the management of the utility. The inefficiencies in recovery of legitimate billed amounts forces MSEDCL to borrow more and more short-term loans for running its day to day operations. The interest on borrowed funds beyond allowable limits (subject to the ceiling of normative levels as specified in the Regulations) is not allowed in ARR. Hence, over the years, borrowing beyond the normative level is also causing financial stress/loss to MSEDCL.

16. Inefficiencies in Consumer Billing, Collection of revenue and borrowing of excessive short term loans are examples of managerial inefficiencies contributing to the current financial status of MSEDCL. Even after the Commission has put in place performance based financial incentives and disincentives, a visible improvement is not forthcoming, except for the recent period of past six months or so, wherein the recoveries have significantly improved. Such continued inefficiencies are detrimental to MSEDCL's financial health and may impact its ability to serve consumers in Maharashtra in a sustainable manner. It is not expected from the Commission to micro-manage internal affairs of the Licensee, but at the same time, the Commission cannot remain mute spectator especially when other stakeholders like electricity generators don't get their timely payment for electricity supplied.
17. In the opinion of the Commission this is high time that the Principal Secretary Energy on behalf of Government of Maharashtra who is 100% shareholder of MSEDCL through MSED Holding Company needs to intervene and set-up a study group to look into the current financial difficulties of MSEDCL for suggesting remedial steps on a short term and long term basis. Based on the recommendations of the study group, a revival plan could be drawn up which might entail action at all levels – MSEDCL to improve its billing and collection efficiency and thereby to get out of the debt trap due to mounting short term borrowing; State Government for ensuring timely payment of dues from different departments and local bodies as also to discharge its obligations under UDAY scheme for improving the liquidity of the MSEDCL; MERC for any mid course correction required in tariff design or any other regulatory matter for ensuring timely payment of dues especially to the generators.
18. The Commission would review action taken on the recommended measures during Mid Term Review process. The provisions of Section 86 (2) of the Electricity Act 2003 reproduced below enables the Commission to advise the State Government on the electricity matter:

"Section 86. (Functions of State Commission):

.....

(2) The State Commission shall advise the State Government on all or any of the following matters, namely :-

(i) promotion of competition, efficiency and economy in activities of the electricity industry;

(ii) promotion of investment in electricity industry;

(iii) reorganization and restructuring of electricity industry in the State;

(iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.”

Accordingly, the Commission will separately issue a detailed advisory to the Government of Maharashtra on this aspect.

19. Further, in order to avoid repeated instances of Wind Generator approaching the Commission seeking direction to MSEDCL for payment of outstanding amount, in the same Order dated 27 October 2021, the Commission has directed MSEDCL as follows:

18. Further, considering the facts that Wind Generators are required to approach the Commission repeatedly for payment of their legitimate dues from MSEDCL, the Commission in its recent Order dated 7 September 2021 has ruled as follows:

“60.3. The Commission also notes contentions of Petitioners that they are required to repeatedly approach before the Commission of payment of their dues and then only MSEDCL is releasing partial amount. Such situation of generator approaching the Commission for directing Distribution Licensee to pay their legitimate dues under contractual agreement is not at all desirable. MSEDCL is citing financial difficulties for such situation. The Commission in its recent Order dated 5 August 2021 on similar issues has made following observations:

“ 21. The Commission is aware of the financial difficulties of MSEDCL especially during the Pandemic period but it also notes that the payable amounts was much prior to the onset of Pandemic. The Commission would also like to advise MSEDCL about its contractual obligations and they being a state utility it is expected to lead by example, by working on options to sort out their Financial Difficulties. The least that is expected from them is timely reconciliation (if required) of amounts and payment plan which needs to be worked out transparently.”

In view of above observations, MSEDCL has to come out with timebound mechanism for reconciliation and payment of amount. If such mechanism and payment plan is made transparently available to all generators, then all future litigation will be avoided. Accordingly, MSEDCL is directed to act upon developing such transparent mechanism and upload the same on its website.”

MSEDCL is yet to submit compliance status of development of above transparent mechanism. MSEDCL is directed to complete the above exercise within one (1) months from date of this Order and report the compliance, failing which the Commission will be compelled to initiate action against concerned officers of MSEDCL under Section 142 of the Electricity Act, 2003. ”

20. In view of above, APTEL judgment dated 20 September 2021 stands complied with.

21. Hence, the following Order:

ORDER

In terms of observation in para 11 and 20, the Case Nos. 26 of 2019 stands disposed of.

Sd/-
(Mukesh Khullar)
Member

Sd/-
(I.M. Bohari)
Member

Sd/-
(Sanjay Kumar)
Chairperson


(Dr. Rajendra G. Ambekar)
Secretary (I/c)

