

Maharashtra Electricity Regulatory ... vs Reliance Energy Ltd. & Ors on 14 August, 2007

Equivalent citations: AIR 2008 SUPREME COURT 976, 2008 AIR SCW 513, 2008 (2) AIR BOM R 119, 2007 (8) SCC 381, (2007) 10 SCALE 279, (2007) 2 WLC(SC)CVL 777, (2007) 4 ALL WC 3662, 2008 (4) ALLMR (NOC) 1, (2008) 1 BOM CR 738

Bench: A.K.Mathur, Markandey Katju

CASE NO.:

Appeal (civil) 2846 of 2006

PETITIONER:

Maharashtra Electricity Regulatory Commission

RESPONDENT:

Reliance Energy Ltd. & Ors.

DATE OF JUDGMENT: 14/08/2007

BENCH:

A.K.MATHUR & MARKANDEY KATJU

JUDGMENT:

J U D G M E N T

1. This appeal under Section 125 of the of the Electricity Act, 2003 (hereinafter for short "the Act") is directed against the judgment and order dated 29th March, 2006 passed by the Appellate Tribunal for Electricity whereby the Appellate Tribunal has allowed the appeals filed by the distribution companies and set aside the orders passed by the Maharashtra Electricity Regulatory Commission (hereinafter for short "The Commission") dated 23.2.2005. The Commission on 3.8.2004 addressed a notice to all its licensees/distribution companies in Maharashtra and made an inquiry from them with regard to raising of the bills by the said licensees/distribution companies on the basis other than the actual meter reading for the relevant period, when large variations in consumption were noticed, or for other reasons. The notice dated 3.8.2004 sent by the Commission to all its licensees/distribution companies reads as under :-

"Several instances have come to the Commission's notice of so- called "amendment", "supplementary" or other such bills being raised by some licensees to consumers, often several years later, on a basis other than the actual meter reading for the relevant period, when large variations in consumption are noticed, or for other reasons. Computerised systems have sometimes been put in place which generate such bills automatically. Wide variations observed in recorded consumption and

other such apparent anomalies may be useful for monitoring, checking/testing of meters and for taking corrective action. However, billing on a basis other than recorded consumption, and raising amended bills accordingly (often after several years later, and without giving reasons), is not mandated by law.

The electricity statutes (in the past, and at present) provide inter alia that, in case of metered consumers, energy consumption charges have to be billed on the basis of meter readings. Moreover, the licensee, and not the consumer, is responsible for maintaining, rectifying, or having such meters replaced where necessary. Thus, no "amendment" bills of the kind referred to above can be raised, and any additional billing has to follow due process and the provision of law. In the context of such "amendment" bills, I am directed to ask that the billing practices followed be immediately reviewed and brought into conformity with the statutory provisions. An affidavit stating the corrective action taken (including withdrawal of all such pending bills, and refund, though adjustment in energy bills or otherwise, of amounts received from consumers on or after 10.6.2003) may be furnished by 3rd September, 2004."

2. In response to the said notice all the licensees/distribution companies in Maharashtra made their respective submissions before the Commission explaining under what circumstances the supplementary/amended bills were sent to the consumers. They tried to justify raising of such bills and stated that the these bills were rightly sent as they found that some time the meters were not registering proper consumption and on that basis they tried to justify their action.

3. The Commission examined the matter in detail and vide its order dated 23.2.2005 in para 46 directed as under:-

"46. After considering all these factors and the submissions made, the Commission directs that the supplementary/amendment bills issued in the circumstances set out at para 42 and 43 above from 10th June, 2003 (the date of coming into force of EA, 2003) and upto notification of the Supply Code.

a. should be withdrawn, if due meter testing has not been done with the results intimated to the consumer. b. any amounts collected should be refunded to the concerned consumers (without interest considering the earlier lack of clarity on this meter on the part of the licensees);

c. where meters have been found to be defective upon subsequent due testing (and the results intimated to the consumer), the bills may be adjusted for upto 3 months prior to the date of testing or meter replacement, whichever is earlier, and any amounts recovered in excess refunded without interest (in the case of 'stopped' meters, the analogy of the Supply Code provisions should be applied for assessment);

d. the above action should be completed by 30th May, 2005, so as to give the licensees more than 3 months' time in view of the work likely to be involved;

e. compliance should be submitted on affidavit by 15th June, 2005, with a list of consumers involved, and certifying that no further action remains to be done in terms of this Order."

By another order dated 23.8.2005 in the case of M/s. Prayas (Energy Group) Pune, the Commission in para 45 directed as under :-

"45. Considering the foregoing, the Commission disposes of Prayas' petition with the following directions, which would apply for the period from 1st June, 2004 (i.e. around 3 months after the detailed Tariff Order dated 10th March, 2004, upto 19th January, 2005 (following which the Supply code Regulations were notified):

(a) no billing using past consumption or some related 'average' basis should be resorted to for more than a period of 3 months. (where average billing has been continuing for more than that period just prior to 1st June, 2004, then it cannot be continued from that date.

In case average billing has been resorted to for, say, 2 months prior to that, it can be continued only for upto one month more). During that period 3 months, the meter should have been tested/replaced, with the results intimated to the consumer, and appropriate bill adjustments carried out thereafter (where such average billing is being done on the basis of presumed faulty meter, and where defectiveness of the meter has accordingly been established). If due and timely diligence has not been exercised by the licensee, he cannot claim the right to continue billing on a presumptive, average basis. The same principle will apply to all other situations in which such 'average' billing has been resorted to, except in cases where the meter is not accessible. (However, the Commission notes that, in the case of locked/inaccessible meters, the licensees have recourse to the remedies provided under Section 163 of EA, 2003, and it would be expected that MSEB would exercise it sooner rather than later).

(b) In all cases where bills have been raised and/or recoveries made which are not in accordance with (a) above, the bills should be withdrawn and/or amounts refunded to the consumers, through energy bills or other means, as may be relevant, by 30th November, 2005, with interest at the same rate as payable by consumers to MSEB for delayed payments."

4. Aggrieved against both these orders, the matter was taken up in appeal before the Appellate Authority. The Appellate Authority by the impugned order dated 29th March, 2006 set aside the orders passed by the Commission and directed that each consumer should approach the forum created under Section 42(5) of the Act for the individual grievances. 5. Aggrieved against the order dated 29.3.2006 passed by the Appellate Authority, the present appeal has been filed under Section 125 of the Act.

6. We have heard learned counsel for the parties and perused the record.

7. Learned counsel for the appellant-Commission has submitted before us that the Commission has the power to give a general direction to its licensees/distribution companies and he also submitted that in exercise of the power under the Act, the Commission was competent to issue the aforesaid direction. As against this, the learned counsel appearing for the respondent-licensees/distribution companies submitted that the Commission has no power to issue a direction like the one issued in the present case and entertain individual complaints and direct refund of the whole amount by a blanket order.

8. The question before us is : what is the power of the Commission and to what extent the Commission can issue directions. Suffice it to say that the Regulatory Commission was constituted under the Electricity Act, 2003. The Act was a new enactment which was promulgated by superseding the Indian Electricity Act, 1910 and the Electricity Supply Act, 1948. The Statement of Objects and Reasons of the Act which have been summarized in the Preamble, reads as under:-

"An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto."

"Appropriate Commission" as defined in Section 2(4) of the Act means the "Central Regulatory Commission referred to in sub-section (1) of Section 76 or the State Regulatory Commission referred to in Section 82 or the Joint Commission referred to in Section 83, as the case may be". In exercise of its power under Section 82 of the Act, the State of Maharashtra constituted the Maharashtra Electricity Regulatory Commission. The Commission exercises all the powers which are enumerated in the Act. Though various provisions were pointed out to us by learned counsel for the parties, but Section 82 which is relevant for our purposes reads as under :-

"82. Constitution of State Commission-(1) Every State Government shall, within six months from the appointed date, by notification, constitute for the purposes of this Act, a Commission for the State to be known as the (name of the State) Electricity Regulatory Commission :

Provided that the State Electricity Regulatory Commission, established by a State Government under Section 17 of the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule, and functioning as such immediately before the appointed date shall be the State Commission for the purposes of this Act and the Chairperson, Members, Secretary, and officers and other employees thereof shall continue to hold office on the same terms and conditions on which they were appointed under those Acts :

Provided further that the Chairperson and other Members of the State Commission, appointed, before the commencement of this Act, under the Electricity Regulatory Commissions Act, 1998 (14 of 1998) or under the enactments specified in the Schedule, may, on the recommendations of the Selection Committee constituted under sub-section (1) of Section 85, be allowed to opt for the terms and conditions under this Act by the concerned State Government. (2) The State Commission shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract and shall, by the said name, sue or be sued.

(3) The head office of the State Commission shall be at such place as the State Government may, by notification, specify.

(4) The State Commission shall consist of not more than three Members, including the Chairperson. (5) The Chairperson and Members of the State Commission shall be appointed by the State Government on the recommendation of a Selection Committee referred to in Section 85."

9. We are not concerned with the provisions of appointment of Members of the Commission as they are dealt with by Sections 84 and 85 of the Act. Section 86 deals with the functions of the Commission and is relevant for our purposes. For ready reference, the same is reproduced hereunder.

"86. Functions of State Commission:- (1) The State Commission shall discharge the following functions, namely :-

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution of licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of the Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of Section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary;

(k) discharge such other functions as may be assigned to it under this Act.

(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) reorganisation 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;

(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions. (4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section

3.

10. Thus, from the above provision it is clear that the primary purpose of the Commission is to determine tariff for generation, supply, transmission of electricity etc. and to regulate the electricity

purchase and procurement process of distribution licensees, to facilitate intra-State transmission, to promote congeneration and generation of electricity from renewable sources of energy, to adjudicate upon the disputes between the licensees and generation companies and to refer any dispute for arbitration, to levy fee for the purposes of this Act, specify State Grade Code consistent with the Grid Code specified under clause (h) of sub-section (1) of Section

79. Sub-Section (2) of Section 86 also empowers the State Commission to advise the State Government on any of the matters including promotion of competition, efficiency, matters concerning generation, transmission, distribution and trading of electricity etc. Sub-Section (3) provides that the Commission shall ensure transparency while exercising its powers and discharging its functions. Sub-section (4) provides that in discharge of its functions the Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3.

11. We are not going into other questions as to how licenses were granted to all these utilities, i.e., various distribution companies. It is not necessary for us to go into these questions as in the present case, we are primarily concerned to decide the powers of the Commission and to what extent it can issue directions and whether the direction given by the Commission in the present case is sustainable or not.

12. It may be noted from a perusal of Section 86(1)(f) of the Act that the State Government has only power to adjudicate upon disputes between licensees and generating companies. It follows that the Commission cannot adjudicate disputes relating to grievances of individual consumers. The adjudicatory function of the Commission is thus limited to the matter prescribed in Section 86(1)(f).

13. Section 14 of the Act provides for grant of licence; Section 16 provides for conditions of licence; Section 61 lays down the tariff regulations and Section 62 provides for determination of tariff. The Commission under Section 94 has civil powers also and under Section 96 it has power of entry and seizure. Under Section 126 the Commission has the power to investigate and make assessment. Section 127 provides for an appeal to the appellate authority. Under Section 128 the Commission can make investigation of certain matters where it is satisfied that the licensee has failed to comply with any of the conditions of licence or failed to comply with any of the provisions of the Act or the rules and regulations made thereunder. Sub-Section (6) of Section 128 empowers the Commission to take any action against the licensee/generating company. Sub-section (6) reads as under :-

(6) On receipt of any report under sub-section (1) or sub-section (5), the Appropriate Commission may, after giving such opportunity to the licensee or generating company, as the case may be, to make a representation in connection with the report as in the opinion of the Appropriate Commission seems reasonable, by order in writing :-

(a) require the licensee or the generating company to take such action in respect of any matter arising out of the report as the Appropriate Commission may think fit; or

(b) cancel the licence; or

(c) direct the generating company to cease to carry on the business of generation of electricity.

Section 142 of the Act provides for punishment for non-compliance of directions issued by the Commission and Section 143 empowers the Commission to adjudicate after holding an inquiry in such manner as may be prescribed by the Government. Section 181 empowers the Commission to make regulations.

14. A comprehensive reading of all these provisions leaves no manner of doubt that the Commission is empowered with all powers right from granting licence and laying down the conditions of licence and to frame regulations and to see that the same are properly enforced and also power to enforce the conditions of licence under sub- section (6) of Section 128.

15. Thus, insofar as the first contention of the learned counsel for the respondents that the Commission has no power is concerned, we are of the view that the same is wrong. In this behalf the provisions of The Electricity Act, 2003 are quite clear and categoric and Section 128(6) empowers the Commission to get the conditions of licence enforced. But the question is whether the said power under Section 128(6) has been rightly exercised by the Commission or not. After clearing the first hurdle, that the Commission has power to issue directions, we shall now examine whether the direction given by the Commission in the present case is correct or not.

16. When the Commission received a spate of complaints from consumers against its licensees/distribution companies that they are arbitrarily issuing supplementary/amended bills and charging excess amounts for supply of electricity, it felt persuaded to invoke its general power to supervise the licensees/distribution companies and in that connection issued notice dated 3.8.2004. There can be no manner of doubt that the Commission has full power to pull up any of its licensee or distribution company to see that the rules and regulations laid down by the Commission are properly complied with. After all, it is the duty of the Commission under Sections 45(5), 55(2), 57, 62, 86, 128, 129, 181 and other provisions of the Act to ensure that the public is not harassed.

17. In exercise of this general power notice dated 3.8.2004 was issued when mass scale supplementary/amended bills were issued to the consumers. When these consumers approached the Commission, the Commission directed its licensees to immediately review their billing policies and bring the same in conformity with the statutory provisions of the Act. The Commission did not get an investigation made under Section 128(1) which it could have done, and without that, and without getting a report under Section 128(5) it passed an order directing refund of the amounts collected by the licensees/distribution companies, which in our opinion was not permissible, since such a direction could, if at all, be given after getting a report of the investigation agency. The Commission could have made an investigation and got a report from the investigation agency and on that basis directions could have been given. However, that was not done. In these circumstances, in our opinion, the view taken by the Appellate Authority in the impugned order to that extent is correct that the individual consumers should have approached the appropriate forum under Section

42(5) of the Act.

18. Thus while we hold that the Commission has power to issue a general direction to licencees that they should abide by conditions of the licence issued by them and charge only as per the tariff fixed under the Act so that the public at large should not be harassed, we are of the opinion that so far as the blanket direction given by the Commission for refunding the entire amount without making a proper investigation whether the issue of supplementary/amended bills was really warranted in every case or not is unsustainable. Here the Commission has gone beyond its jurisdiction. After all the distribution/ generating companies have to incur expenses for generation/distribution of power, and we cannot at the same time give license to the consumers to commit theft of electricity or to be benefited by improper functioning of the meter to the disadvantage of the distribution/generating company. Thus, keeping in view the equity of both the parties, we think it will be proper for us to direct that all the licensees/distribution companies in the State of Maharashtra issue a general public notice in two daily newspapers having wide circulation in the State, one English newspaper and one in vernacular language. The notice shall state that whoever feels aggrieved by the supplementary/amended bill, he/she can approach the licensee/distribution company for redressal of their grievance within a period of three months from the date of publication of the notice. In our view, that would meet the ends of justice instead of passing a blanket order as given by the Commission for refunding the money charged by the licensees/distribution companies by issuing supplementary/amended bills. The individual consumers may make a grievance before the licensee/distribution company that they have not consumed the electricity for which they are charged or that the meter reading was not proper or that they have been excessively charged for the power which they have not actually consumed. Therefore, we direct that all the licensees/distribution companies shall issue a public notice in two daily newspapers having wide circulation in the State of Maharashtra, one in English language and the other in vernacular language requiring their respective consumers to make their representations for redressal of their grievances in respect of the supplementary/amended bills. The licensees/distribution companies shall decide the individual cases received by them after giving a fair opportunity of hearing to the consumers. The consumers who still feel not satisfied with the order passed by the licensees/distribution companies can approach the appropriate forum constituted under Section 42(5) of the Act and, if still not satisfied, with the order passed by the appropriate forum to approach the Ombudsman under Section 42(6) of the Act. Accordingly, we hold that while the Commission had a power to issue general directions to prevent harassment to the public at large by its licensees/distribution companies, but a blanket direction to refund the amounts collected by the licensees/distribution companies which has been given by the Commission was not warranted.

19. Although, the Appellate Authority has set aside the order passed by the Commission and issued a direction that the individual consumers may approach the appropriate orders under Sections 42(5) and (6) we are not interfering with that direction, but we direct that before that the licensees/distribution companies shall hear the parties as directed hereinabove and decide whether the supplementary/amended bills issued by them are proper or not.

20. In view of the above discussion, this appeal stands disposed of with no order as to costs.