BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

(Appointed by the Maharashtra Electricity Regulatory Commission
under Section 42(6) of the Electricity Act, 2003)

REPRESENTATION NO.167, 177, 178, 179, 180, 181 OF 2022

In the matter of retrospective recovery of tariff difference

I)	Spark Civil Infra Projects	(Rep. No.167 of 2022)	……..Appellants
II)	Creative Enterprises RMC	(Rep. No.177 of 2022)	
III)	Konark Structural Engrs. Pvt. Ltd.	(Rep. No.178 of 2022)	
IV)	7 Associates	(Rep. No.179 of 2022)	
V)	Dev Engineers	(Rep. No.180 of 2022)	
VI)	Aetreum Concrete RMC	(Rep. No.181 of 2022)	

V/s.

Maharashtra State Electricity Distribution Co. Ltd., Vasai (MSEDCL) ……. …. …… Respondent

Appearances:

Appellant: Prakash Sardar, Representative

Respondent: 1. Anis Mirza, Addl. Executive Engineer, Vasai Sub. Dn.
2. V.M. Gokhale, UDC, Vasai Sub. Dn.

Coram: Vandana Krishna IAS (Retd.)

Date of hearing: 18th January 2023

Date of Order : 25th January 2023

ORDER

These Representations were filed on 20th October 2022 individually under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the individual Orders dated 14th September 2022 passed by the Consumer Grievance Redressal Forum, MSEDCL, Vasai (the Forum). The Appellants did not pay the statutory amount of Deposit of Rs. 25000/- in terms of

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Regulation 19.22(h) of CGRF & EO Regulations 2020. The Appellants paid Rs. 25000/- in the second fortnight of Nov. 2021 only after individual deposit notices were served. Hence the Representations were registered on 25th Nov. 2022.

2. The Forum, by its individual Orders dated 14th September 2022 has partly allowed the grievance applications in Case Nos. 54, 49, 52, 53, 51 & 50 of 2022 in Rep. Nos. 167, 177, 178, 179, 180 & 181 of 2022 respectively which are common in language, hence taken as below:-

> *"2. Respondents shall grant 10 monthly installments for payment of supplementary bill without levying interest and DPC. If complainant defaults in the payment of any installment along with current bill then facility of installment along with concession of waiver of interest and DPC will stand cancel forthwith."*

3. Aggrieved by the orders of the Forum, the Appellants have filed these representations separately; however, the facts and circumstances in all these representations are similar in nature. In addition, common grounds are raised. Therefore, these representations are clubbed together for the purpose of this order. The e-hearing was held on 18th January 2023 through Video Conference. Parties were heard at length. The detailed submission and arguments of the Appellants are as below: -

(i) The Appellants are LT industrial consumers. The activity of the Appellants is processing of Ready-Mix Concrete (RMC). The Respondent has sanctioned load under Industrial tariff category for the activity of RMC plants, and was billed rightly under Industrial tariff category from the date of release of connections. Since the date of connection, Appellants are engaged in supplying RMC to other parties at the rate agreed between the seller and purchaser. RMC is 'ready to use cement concrete,' which is a predetermined mixture of cement, sand, water, and aggregates. The operational activity of RMC is organized with the help of labour and power supply, and the product of 'RMC' is supplied at different sites as per demand and requirement of the purchaser. The Appellants are not directly in construction activities, but only are the supplier of a mixture of ready to use cement concrete. Various details of the Appellants, Sanctioned Load (SL), Contract Demand (CD), date of inspection, supplementary bill etc., are tabulated below:

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Table1

Rep. No.	Appellant	Consumer No.	Address	Sanctioned load (HP)	Contract Demand (KVA)	Date of Supply	Date of Inspection	Supplementary bill (Rs.)	Date of Supplimentary Bill	Date of filing grievance in Forum
167	Spark Civil Infra Projects	002123341859	S.No.144, H.No.3/B, Nr. Lodha Dham, Maljipada Kolhi, Vasai(east)	107	100	05.02.2018	19.05.2022	22,44,770	26.05.2022	10.06.2022
177	Creative Enterprises RMC	002128343264	S.No.52/4, Nr. Ramdev Studio, Maljipada Kaman, Vasai(east)	107	99	21.04.2015	19.05.2022	9,71,260	26.05.2022	07.06.2022
178	Konark Structural Engineers Pvt. Ltd.	002123341841	S.No. 142/5, Nr.Lodha Dham, Maljipada Kolhi, Vasai (east)	107	100	10.03.2018	19.05.2022	30,28,830	26.05.2022	10.06.2022
179	7 Associates	002110010152	S.No.75,Nr.Ambaji Petrol Pump, Maljipada, Vasai(east)	107	80	04.02.2013	19.05.2022	51,13,240	26.05.2022	10.06.2022
180	Dev Engineers	002123344009	S.No.142/1, H.No.139/3 & 140/5 Nr. Ambaji Petrol Pump, Maljipada, Kolhi, Vasai (East)	107	100	20.04.2018	19.05.2022	45,57,600	26.05.2022	10.06.2022
181	Aetreum Concrete	002123336634	S.No.144/3A, Nr.Gulmohar Dhaba, Opp. Sunshine, Juchandra, Vasai (east)	107	100	13.10.2017	19.05.2022	44,46,230	26.05.2022	10.06.2022

(ii) The Addl. Executive Engineer, Flying Squad of the Respondent inspected the premises and checked the electrical installation of the Appellants in the month of May 2022. After inspection, the Appellants were abruptly re-classified from Industrial to Commercial tariff category from the date of connections.

Accordingly, the Respondent issued supplementary bills of retrospective recovery of tariff difference from Industrial to Commercial tariff category from the date of connection to Jan.2022 as tabulated above.

(iii) Aggrieved by the supplementary bills, the Appellants filed their grievances before the Forum in June 2022. The Forum, by its individual orders dated 14.09.2022 has rejected the grievance and granted 10 monthly instalments for payment of supplementary bills. The Forum failed to understand the basic issue that RMC activity falls under Industrial tariff category.

(iv) Not satisfied with the orders of the Forum, the Appellants have filed these representations before the Electricity Ombudsman.

(v) The Appellants further submit that the recovery of tariff difference on the erroneous inference that "RMC" activity falls under Commercial activity, is most arbitrary and

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baseless, because for getting the power connection for Industrial purpose, the Appellants were asked to submit the following:

- NOC of Local Gram panchayat
- Consent of Maharashtra Pollution Control Board
- Udyam Registration Certificate

(vi) These are the certifications required to be submitted for getting Industrial power connection as per G.R. No. 1094/PK-1083/NRG3, dated 06.08.1994. Based on the furnishing of the above certifications, power connections were sanctioned under Industrial Tariff Category.

(vii) The Hon'ble Supreme Court has laid down some principles to determine whether an enterprise establishment is an industry or not? Any activity will come under the definition of 'Industry' if it fulfils the "Triple Test" which is: -

a. It should be a systematic activity.

b. There should be a co-operation between employer and employees.

c. There should be a production / distribution of goods or rendering of services which satisfy human wants and wishes.

The RMC establishment fulfils the above triple test and therefore falls under "Industrial Activity". Profit motive is immaterial, philanthropy or charitable nature is also immaterial. Based on the above ruling in 1982, the Parliament of India amended the definition of "Industry" under Section 2 of the Industrial Dispute Act, 1947.

(viii) The Appellants relied upon the following orders for quashing the retrospective recovery.

a) Order of Hon'ble Appellate Tribunal for Electricity (ATE) dated 07.08.2014, in Appeal No. 131 of 2013.

b) Order of the Maharashtra Electricity Regulatory Commission (the Commission) dated 11.02.2003 in Case No. 24 of 2001

c) Orders of the Electricity Ombudsman (Mumbai) in Rep. No. 126 of 2014, dated 23.12.201), 91 of 2015, dated 11.01.2016 and 94 of 2015, dated 25.01.2016.

(ix) A recovery on account of alleged reclassification of tariff category can be only prospective from the date of error, but cannot be retrospective. The cost of material sold is based on the prevailing tariff. Now the difference between abrupt increase in tariff and old tariff cannot be recovered as it is beyond the control of the consumers. Billing the consumer on wrong

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tariff and sanctioning the load on wrong tariff amounts to an act of omission of the Distribution Licensee, resulting into loss for the consumer.

(x) In view of the above, the Appellant prays that the Respondent be directed

a) to quash the supplementary bills and to declare the activity of RMC under Industrial tariff category.

b) to waive off Delayed Payment Charges (DPC) and interest.

4. The Respondent, by its letter dated 13.01.2023 submitted its written reply separately for individual representations. The e-hearing was held on 18.01.2023. The written submission along with its arguments are stated in brief as below: -

(i) The Appellants, initially, were Industrial Consumers of the Respondent. The Appellants are in the business of production of RMC material for building concrete roads, buildings etc.

(ii) The details of consumer numbers, SL, CD, date of supply etc. is captured in Para 3(ii) of Table 1.

(iii) The Flying Squad of the Respondent inspected the premises of the Appellants on 19.05.2022. During inspection, it was observed that they were being wrongly billed under "Industrial" category instead of "Commercial" category.

(iv) Accordingly, supplementary bills towards tariff difference of LT-V (B) to LT-II from the date of connections to May 2022 were issued on 26.05.2022 which are captured in Para3(ii).

(v) The mere process of crushing, pumping, mixing, and lifting do not make the process industrial. If the process does not produce an end product which is different from its raw material, it cannot be termed as an industrial process. RMC plant is a part and parcel of their own construction sites, or construction sites of their vendor/partners. Hence the activities of the Appellants are commercial activities. The Commission in tariff order in case No.116 of 2008 and case No.111/2009 has clearly stated that the categorization of industry is applicable to such activities which entail "manufacture". Moreover, **the Commission ordered that all construction activities on infrastructure projects, buildings, etc. will be classified under 'Commercial' category.** The Appellants are engaged in the business of infrastructure projects and hence HT Commercial tariff is the proper tariff applicable to Appellants.

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(vi) The Commission in its order dated 12.09.2010 in Case No.111 of 2009 has stated that

"In this regard, it is clarified that classification under Industry for tax purposes and other purposes by the Central or State Government shall apply to matters within their jurisdiction and have no bearing on the tariffs determined by the Commission under the EA 2003, and the import of the categorisation under Industry under other specific laws cannot be applied to seek relief under other statutes. Broadly, the categorisation of "Industry" is applicable to such activities, which entail "manufacture"."

(vii) The Commission, in its order dated 17.08.2009 in Case No.116 of 2008 stated that all Construction activity on infrastructure projects, buildings, hill stations etc., will be classified under "Commercial Category" and be charged at HT Commercial or LT Commercial, as applicable.

(viii) Tariff categorization is done by the Commission on the basis of nature and purpose of usage of electricity. It is observed that RMC plant was meant for supply of concrete as per requirement of construction activities. RMC is one of the components or inputs in construction projects, therefore, it cannot be considered as a standalone industry. The electricity used for construction purposes is to be billed as commercial; accordingly, the correct category is 'Commercial'.

(ix) The Appellants have referred to the Judgment dated 07.08.2014 of Hon'ble Appellate Tribunal for Electricity (ATE) in Appeal No.131 of 2013 stating that retrospective recovery of arrears is contrary to the provisions of the Regulation 4 (2) of Tariff Regulations 2003. The Respondent argued that the ratio of this judgment is applicable only in cases where there is classification or reclassification of tariff by the Commission, and not applicable in cases of escaped billing due to wrong application of tariff since inception, due to a bona fide mistake. Therefore, the ratio of the said cases is not applicable to the present case.

(x) The Hon'ble Supreme Court of India in Judgment dated 5th October 2021 in Civil Appeal No. 7235 of 2009 in the matter of Prem Cottex V/s. Uttar Haryana Bijli Vitran Nigam Ltd. and Others has clearly differentiated between applications of Section 56 of the Act for "escaped assessment" versus "deficiency in service". The Hon'ble Supreme Court of India has allowed past recovery which was escaped assessment due to a bona-fide mistake

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of the licensee. The Court further held that limitation provided under Section 56(2) will not be applicable for "escaped billing" due to a bona-fide mistake.

"Coming to the second aspect, namely, the impact of Sub-Section (1) on Subsection (2) of Section 56, it is seen that the bottom line of Subsection (1) is the negligence of any person to pay any charge for electricity. Sub-section (1) starts with the words where any person neglects to pay any charge for electricity or any some other than a charge for electricity due from him."

24. Sub-section (2) uses the words "no sum due from any consumer under this Section". Therefore, the bar under Sub-section (2) is relatable to the sum due under Section 56. This naturally takes us to Sub-section (1) which deals specifically with the negligence on the part of a person to pay any charge for electricity or any sum other than a charge for electricity. What is covered by section 56, under subsection (1), is the negligence on the part of a person to pay for electricity and not anything else nor any negligence on the part of the licensee.

25. In other words, the negligence on the part of the licensee which led to short billing in the first instance and the rectification of the same after the mistake is detected, is not covered by Sub-section (1) of Section 56. Consequently, any claim so made by a licensee after the detection of their mistake, may not fall within the mischief, namely, "no sum due from any consumer under this Section", appearing in Sub-section (2).

26. The matter can be examined from another angle as well. Subsection (1) of Section 56 as discussed above, deals with the disconnection of electric supply if any person "neglects to pay any charge for electricity". The question of neglect to pay would arise only after a demand is raised by the licensee. If the demand is not raised, there is no occasion for a consumer to neglect to pay any charge for electricity. Subsection (2) of Section 56 has a non-obstante clause with respect to what is contained in any other law, regarding the right to recover including the right to disconnect. Therefore, if the licensee has not raised any bill, there can be no negligence on the part of the consumer to pay the bill and consequently the period of limitation prescribed under Sub-section (2) will not start running. So long as limitation has not started running, the bar for recovery and disconnection will not come into effect. Hence, the decision in Rahamatullah Khan and Section 56 (2) will not go to the rescue of the appellant."

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(xi) 'Commercial' tariff should have been applicable to the Appellants right from the date of supply, and hence the recovery towards tariff difference from LT-V to LT-II is justifiable and recoverable.

(xii) The Forum in its individual orders dated 14.09.2022 has rightly addressed all these issues and rejected the grievances of the Appellants

(xiii) In view of the above, the Respondent requested to reject the Representations of the Appellants.

Analysis and Ruling

5. Heard the parties and perused the documents on record. The Appellants are LT industrial consumers from the date of supply. The Appellants contended that their activities are processing of Ready-Mix Concrete from the date of connection. The Respondent has sanctioned load under 'Industrial' tariff category for the activity of RMC plants and was billed rightly under Industrial tariff category from the date of release of connection. RMC plant means, ready-mix concrete plant in which concrete is manufactured in a batch plant according to a set engineered mix design. RMC is 'ready to use the cement concrete,' material of predetermined mixture of cement, sand, water, and aggregates. This is a process industry. The product of 'RMC' is being supplied at different sites as per demand and requirement of the purchaser. The Appellants are not directly in construction activities but only the supplier of RMC product. Hence, the activity of the Appellants is industrial and not commercial.

6. The Respondent contended that the mere process of crushing, pumping, mixing, and lifting do not make the process industrial. If the process does not produce an end product different from its raw material, it cannot be termed as an industrial process. RMC plant is a part and parcel of its own construction sites, or construction sites of its vendor/partners, and hence the activity of the Appellants is commercial activity.

7. The main point of disagreement between the parties relates to whether the activity of production of RMC material is covered under "Industrial" activity or "Commercial" activity. The parties have partly based their argument on the issue as to whether the said activity is an internal activity (whereby the product is used by the producers themselves) or an external activity which supplies the product to other

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parties. The Appellants have argued that it is producing the product of RMC for other parties with whom it has entered into an agreement, and therefore the process is external and should be categorized under "Industrial". On the other hand, the Respondent has argued that this activity is an internal activity, as the product is used for their own business, whether it is for supplying to other parties or not.

8. As per the Order dated 17.08.2009 in Case No. 116 of 2008, the Commission states as follows:

Commission's Ruling

"…… ……..

The Commission appreciates the concern expressed by the consumers engaged in construction activity that the nature of their connection is by no means 'temporary' and hence, it is inappropriate to classify construction activity under temporary. The Commission agrees with this rationale and rules that from hereon, temporary supply – HT or LT as applicable – will not include any construction activity, and will be limited to electricity used on temporary basis for any decorative lighting for exhibitions, circus, film shooting, marriages, etc., and the time period for consideration under temporary category will be one year. Further, all Construction activity, on infrastructure projects, buildings, hill station, etc., will be classified under 'Commercial Category' and be charged at HT Commercial or LT Commercial, as applicable."

In the present case, the applicable Tariff Orders of the Commission in Case No. 48 of 2016 (dt.03.11.2016), Case No. 195 of 2017 (dt. 12.09.2018) and Case No. 322 of 2019 (dt.30.03.2020) states as under:

"HT II: HT- Commercial Applicability:

…… …… …… …… …… ……..

k) Construction of all types of structures/ infrastructures such as buildings, bridges, flyovers, dams, Power Stations, roads, Aerodromes, tunnels for laying of pipelines for all purposes, and which is not covered under the HT - Temporary category;"

RMC material is used for construction activity. Construction activity is defined broadly under Commercial tariff category.

The Commission is empowered as per Sections 61, 62 and 86 of the Electricity Act, 2003, to determine the tariff category. The Commission has not made any distinction based on the location of construction activities or infrastructure, or whether it is meant for own business or supply to other parties. In all cases, construction activity or infrastructure projects is to be classified as "Commercial". In other words, the tariff categorisation is based on the purpose or type of activity, and not on the location of the

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activity, or whether it is meant for the concerned party's own business or for sale of the product to other parties.

On careful reading of the tariff order of the Commission in Case No. 48 of 2016 and subsequent Tariff Orders, it shows that the classification under Industry / Commercial is silent on the specific activity of RMC. RMC is neither classified under Industrial nor Commercial. If any activity falls in the grey area between Industrial and Commercial, it is desirable that the Commission give a specific order on the classification of that activity or product. So far as RMC is concerned, it is used only in construction activities, and so we hold that **by default it is classified under Commercial, unless specified otherwise by any specific order of the Commission.**

It is, therefore, held that the correct categorisation for the Appellants' businesses would be "Commercial" and not "Industrial".

9. However, at the same time, retrospective recovery on this count cannot be allowed for more than two years even if the Respondent made a bona fide mistake due to human error or due to wrong interpretation of the tariff category. Various judgments mentioned below have clearly established that retrospective recovery must be limited to two years.

10. The Section 56 (2) of the Electricity Act, 2003 is reproduced below:

> *"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such sum became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."*

This Section 56 (2) of the Act has been interpreted by the Larger Bench Judgment dated 12.03.2019 of Hon'ble Bombay High Court in W.P. No. 10764 of 2011 with Other Writ Petitions. In accordance with this Judgment, the Distribution Licensee cannot demand charges for consumption of electricity for a period of more than two years preceding the date of the first demand of such charges.

11. The Hon'ble Supreme Court of India in its Judgment dated 18.02.2020 in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla has held that:

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"9. Applying the aforesaid ratio to the facts of the present case, the licensee company raised an additional demand on 18.03.2014 for the period July, 2009 to September, 2011. The licensee company discovered the mistake of billing under the wrong Tariff Code on 18.03.2014. The limitation period of two years under Section 56(2) had by then already expired. Section 56(2) did not preclude the licensee company from raising an additional or supplementary demand after the expiry of the limitation period under Section 56(2) in the case of a mistake or bona fide error. It did not however, empower the licensee company to take recourse to the coercive measure of disconnection of electricity supply, for recovery of the additional demand. (Emphasis added) …… ……"

12. In these cases, the connections were granted in the years 2018, 2015, 2018, 2013, 2018 and 2017 in Rep. **167, 177, 178, 179, 180, 181 of 2022** respectively and the supplementary bills were issued to the Appellants in the month of May 2022. Considering the provision of Section 56 (2) of the Act, and its interpretation given by the Larger Bench Judgment dated 12.03.2019 of Hon'ble Bombay High Court in W.P. No. 10764 of 2011 and other W.Ps. as well as the Judgment dated 18.02.2020 by the Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 in case of Assistant Engineer, Ajmer Vidyut Vitran Nigam Limited & Anr. V/s. Rahamatullah Khan alias Rahamjulla, only 24 months' retrospective recovery is allowed prior to the date of issue of supplementary bill.

13. The ratio of the Judgment dated 5th October 2021 in Civil Appeal No. 7235 of 2009 in the matter of Prem Cottex V/s. Uttar Haryana Bijli Vitran Nigam Ltd. passed by Hon'ble Supreme Court of India is not applicable in the instant case.

14. In view of the above Judgments of the Hon'ble Supreme Court of India in Civil Appeal No.1672 of 2020 and Hon'ble Bombay High Court in W.P. No. 10764 of 2011, we hold that the Respondent can recover only for 24 months retrospectively for tariff difference i.e., from June 2020 to May 2022, as the supplementary bill was issued in May 2022.

15. In view of the above, the Respondent is directed as under: -

(a) To revise the supplementary bills of the Appellants for the period from June 2020 to May 2022 without any interest and DPC, levied if any.

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(b) To allow the Appellants to pay the revised bill in 10 equal instalments. If the Appellants fail to pay any instalment, proportionate interest will accrue, and the Respondent has liberty to take action as per law.

(c) Compliance to be submitted within two months from the date of issue of this order.

(d) Other prayers of the Appellants are rejected.

16. The Representation is disposed of accordingly.

17. The Secretariat of this office is directed to refund the amount of Rs.25000/- each (taken as deposit) to the Respondent for adjustment in their ensuing bills.

Sd/-
(Vandana Krishna)
Electricity Ombudsman (Mumbai)

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