

BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 41 OF 2023

In the matter of retrospective recovery and change of tariff category

V & H Construction Appellant

V/s.

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

Appearances:

- Appellant:
1. Vinay Jain, Partner
 2. Ramchandra Pandey, Representative
- Respondent:
1. Swapnil Gharat, Ex. Eng. Admn, Palghar Circle.
 2. Ravindra Dehare Dy. Ex. Eng, Palghar Circle
 3. Sanjay Raut, Asstt. Engineer

Coram: Vandana Krishna [IAS (Retd.)]

Date of hearing: 13th June 2023

Date of Order : 11th July 2023

ORDER

This Representation was filed on 6th April 2023 under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the order dated



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7th November 2022 in Case No.79 of 2022 and Review order dated 31st January 2023 in Case No. 94 of 2022 passed by the Consumer Grievance Redressal Forum, Vasai (the Forum). The dispute relates to whether the Appellant runs an RMC plant or a stone crusher unit, and whether Commercial or Industrial tariff will be applicable to it. The Forum partly allowed the grievance in Case No.79 of 2022 of which its operative order is as below:


- “1. Respondent shall set aside supplementary bill and issue revised supplementary bill with commercial tariff instead of temporary Commercial tariff for the period.
2. Respondent shall grant 10 monthly instalments for payment of supplementary bill without levying interest and DPC. If complainant defaulted the payment of any instalments along with the current bill then facility of installation along with concession of waiver of interest and DPC will stand cancel forthwith.”

The Appellant filed a review application against the above order of the Forum which was dismissed by its order dated 31.01.2023.

2. The Appellant has filed this Representation against the above orders passed by the Forum. The e-hearing was held through video conference on 13^h June 2023. Parties were heard at length. The submissions and arguments of the Appellant are as below: -

- i) The Appellant applied online for a new HT industrial connection (application no. 32820469) on 26.07.2021 for 500 KW industrial load at Gat No. 58/2, at Ghatim Village, Saphale, Tal: & Dist: Palghar (rental property). The Appellant appointed a Licensee Electrical Contractor for coordination with the Respondent. The Contractor mistakenly wrote “Manufacturing of Ready-Made Concrete (RMC) Plant” on the A -1 application form for the new electric connection by oversight but it intended to set up a stone crushing unit. The Respondent sanctioned 11 KV HT power supply on 17.08.2021 with the condition that

"no part of sanctioned as above shall be used for non - industrial air conditioning purpose."


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- ii) The supply of the Appellant (Consumer No. 213699013590) was released on 01.02.2022. The Appellant started stone crushing activity from Feb. 2022 to Aug 2022 under industrial tariff category and energy bills were paid time to time without disputes.
- iii) The installation of the stone crushing unit took four to five months. The activity of the Appellant is that of stone crushing alone .
- iv) The Respondent-Saphale Sub-division alleged that the premises was inspected on 22.08.2022 and claimed that *“RMC work and cement- concrete block manufacturing was being done for Mumbai -Baroda highway.* No physical inspection was carried out on the site. When the RMC plant was not commissioned at all, how did this manufacturing of RMC and cement block manufacturing come in the picture? This is a wrong report which created this serious dispute.
- v) The Respondent issued a supplementary bill of Rs.44,92,608.61 towards tariff difference between HT-I Industrial and HT-II Commercial (Temporary) category for the period of Feb.2022 to August 2022, which was added in the monthly bill of August 2022. The tariff of the Appellant was changed from HTI to HT-II Commercial (Temporary).
- vi) The Appellant protested and raised a grievance with the Superintending Engineer vide its letter dated 22.09.2022 requesting to withdraw the supplementary bill.
- vii) The Appellant filed a grievance application with the Forum on 30.09.2022. The Forum, by its order dated 07.11.2022 partly allowed the grievance for tariff relief from commercial-temporary to commercial. The operative part of the order is captured at para 1. The Forum failed to understand that the activity of the Appellant was never RMC and/or block manufacturing, but was/is only stone crushing which comes under industrial tariff category. The Appellant filed a review application on 18.11.2022. The Forum by its order dated 31.01.2023 rejected the review application.
- viii) The Respondent has itself recommended to change the tariff from HT– II Commercial (Temporary) to HT – I A Industrial category in January 2023 after its site inspection pursuant to the Appellant’s application dated 23.01.2023 for change of tariff to industrial. So recovery of tariff difference of Rs. 44,92,608.61 and other bills issued other than industrial tariff need to be quashed.

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- ix) The B phase CT / PT metering unit was burnt on 16.06.2022. The Respondent inspected/tested the CT/PT unit and declared that B phase CT was burnt. The Appellant by its letter dated 21.06.2022 requested to bypass the CT/PT unit and restore the supply. The Appellant assured that he would pay the assessment bill as per MSEDCL's rules and regulations. The Superintending Engineer (SE) (competent authority) permitted direct supply by his letter dated 21.06.2022. The supply of the Appellant was direct for 7 days from 22.06.2022 to 28.06.2022, but was **arbitrarily billed for Rs. 540430/-** in month of July 2022 for 32 days (consumption units 1205 + adjustment units 31457) from 30.06.2022 to 31.07.2022. Actually, the stone crushing work, being seasonal, was closed in July due to rains, starting from the end of June 2022. The Appellant raised a grievance on 16.08.2022 stating the actual facts, but the SE denied to revise the bill stating that "this office has given you assessment bill for the bypass period as per rules & regulation of MSEDCL, so the bill for the month of July 2022 is correct." The disputed bill was paid under compulsion to protect the supply, and it was added as a supplementary grievance with a rejoinder dated 21.10.2022.
- x) The supply of the Appellant was disconnected on 04.11.2022 when the case was pending before the Forum. The Appellant had no option but to make various oral requests to restore the supply. The Appellant paid Rs. 10,00,000/- against pending bills on 08.11.2022. The supply of the Appellant was restored on 08.11.2022. Thus, the Appellant's stone crushing unit was closed from 04.11.2022 to 08.11.2022. The Appellant incurred irreparable expenses of Rs. 80,000/ per day x 4 days = Rs. 3,20,000/- against employee's salary & other expenses without any work.
- xi) The Appellant runs only a stone crusher, where he is selling the aggregates, with no self-use in any construction work.
- xii) In view of the above, the Appellant prays that the Respondent be directed
- to revise the bill as per previous Industrial tariff along with waiver of interest and delayed payment charges for the entire period till date.
 - to change from Commercial to Industrial tariff.
 - to Compensate for Rs. 25000/- towards abusing power, and applying activity, different than Appellant's activities.



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- d. to quash adjustment units of 31457.100 after proper accounting of CTPT by pass period from 22.06.2022 to 28.06.2022.
- e. to compensate Rs. 3,20,000/ towards loss of production, employees' salary and other expenses for four days from 04.11.2022 to 08.11.2022.

3. The Respondent filed its reply on 28.04.2023. Its submissions and arguments are stated in brief as below:-

- (i) The Appellant is HT Consumer (No.213699013590) from 01.02.2022 , having sanctioned load of 500 KW and Contract Demand of 500 KVA at plot Gat No. 58/2, at Ghatim Village, Saphale, Tal: & Dist: Palghar. The above supply was applied for the purpose of RMC manufacturing plant.
- (ii) The Assistant Director (S & E) of the Respondent vide his letter dated 22.08.2022 informed under the heading of "Discrepancies observed in Tariff Applied for HT Consumers" that
 - a) various HT consumers have taken HT connections under industrial tariff category, however, these HT consumers are doing exclusive activities of construction work of "Mumbai –Vadodara Expressway".
 - b) These consumers (including the Appellant) were billed wrongly under industrial tariff category from the date of supply instead of HT-II Temporary Commercial tariff category.
 - c) The Consumer is supplying RMC material to M/s. G.R. Infra Projects Ltd. for construction of expressway, to whom the tender of construction of Mumbai – Baroda Expressway was awarded. The copy of Purchase order and Tax Invoices between V & H Constructions and G.R. Infra Projects Ltd are kept on record.
- (iii) The Dy. Executive Engineer, Saphale of the Respondent inspected the premises of the Appellant on 22.08.2022, when it was found that the Appellant is using electric supply for RMC work and Cement Concrete block for Mumbai –Vadodara Expressway construction



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work, for which the applicable tariff is Commercial (Temporary) Tariff. The Appellant was mistakenly billed as per Industrial Tariff since the date of supply i.e., from 01.02.2022.

- (iv) The connection was sanctioned for Industrial activity however it was observed that the activity of the Appellant is Ready Mix Cement (RMC) plant which does not entail any manufacturing activities; therefore the consumer should have been charged under HT-II (Commercial) temporary tariff since the date of supply, but was wrongly charged as Industrial HT-I tariff. The Copy of spot inspection Report dated 22.08.2022 is kept on record.
- (v) Accordingly, the Respondent issued a supplementary bill of Rs.44,92,608.61 towards tariff difference between HT-I Industrial and HT-II Commercial (Temporary) category for the period of Feb.2022 to August 2022, which was added in the monthly bill of August 2022. The tariff of the Appellant was also changed from HTI to HT-II Commercial(Temporary).
- (vi) The mere process of crushing, pumping, mixing, and lifting do not make a 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. The RMC plant is a part and parcel of their own construction sites, or construction sites of their vendor/partners. Hence the activity of the Appellant is commercial (temporary) activity.
- (vii) The Maharashtra Electricity Regulatory Commission (the Commission) 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”. The Commission ordered that all construction activities on infrastructure projects, buildings, etc. will be classified under ‘Commercial’ category. The Appellant is engaged in the business of infrastructure projects and hence HT Commercial tariff is the proper tariff applicable to him.
- (viii) 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


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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.”

- (ix) Tariff categorization is done by the Commission on the basis of the nature and purpose of usage of electricity. This RMC plant was meant for supply of concrete as per requirement of construction activities. RMC is a component of construction project, therefore it cannot be considered as a standalone. Electricity used for construction purposes is to be billed as commercial.
- (x) 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 Temporary Category” and be charged at HT Commercial or LT Commercial rates, as applicable.
- (xi) The Respondent referred to Regulation 4.4.1 of Maharashtra Electricity Regulatory Commission (Electricity Supply Code and Standards of Performance of Distribution Licensees including Power Quality) Regulations, 2021 (Supply Code and SOP Regulation 2021) which is reproduced below:-

“The Distribution Licensee is authorized to recover charges for electricity supplied in accordance with such tariff as may be fixed from time to time by the Commission.”

- (xii) The Forum in its order dated 07.11.2022 rightly addressed all these issues and directed for classification of tariff category as “Commercial”, and allowed to pay the supplementary bill in 10 instalments.


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- (xiii) The Respondent cited the Judgement of Hon'ble Supreme Court 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. It has clearly differentiated between application of Section 56 of the Act for "escaped assessment" versus "deficiency in service". **The Hon'ble Supreme Court has allowed past recovery which was escaped assessment due to a bona-fide mistake 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. The relevant paras of the said Judgement are reproduced as below:

"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 sum 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,*

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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.”

- (xiv) Commercial tariff should have been made applicable to the Appellant from the date of supply, and hence the recovery towards tariff difference from HT-I to HT-II is justifiable and recoverable. In view of the above, the Respondent requested to reject the Representation of the Appellant.

Analysis and Ruling: -

4. Heard the parties and perused the documents on record. Various details of the Appellant’s Sanctioned Load, Contract Demand, date of inspection, supplementary bill etc., are tabulated below:


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Appellant	Consumer No.	Address	Sanctioned load (KW)	Contract Demand (KVA)	Date of Supply	Date of Inspection	Supplementary bill (Rs.)	Period of Recovery	Supplementary Bill credited in the bill	Purpose in A1 form	Actual Activity
V & H Constructions	213699013590	Gut no. 58/2, at Ghatim Village, Saphale	500	500	01.02.2022	22.08.2022	44,92,608.61	Feb.2022 to August 2022	Aug. 2022	manufacturing RMC	Stone Crushing

It is observed from the documents of the new connection that the Appellant made an application for supply of electricity on 23.07.2021 for “*Manufacturing of RMC Plant*”. The Respondent sanctioned this application vide its letter dated 17.08.2021 indicating the purpose as “*Manufacturing of RMC Plant*”. In fact, this phrase should have been “*Manufacturing of RMC*”. The Appellant contends that the application wrongly or mistakenly mentioned the activity or purpose as RMC, but actually it is stone crusher, as the machinery of stone crushing plant was installed from the date of release of connection. The Appellant never installed the machinery of RMC Plant. The Appellant by oversight had written “RMC” while applying for the connection i.e., “RMC Plant, Auto Sand, Sand Washing Plant, Gantry Chilling Plant, Building and cutting machine, Fuel Station, etc.”

From the above contention of the Appellant, it is clear that he is also partly responsible for the genesis of the dispute. He did not check the basic application which mentioned the purpose as “RMC plant”, whether intentionally or unintentionally.

The Assistant Director (S & E) of the Respondent vide his letter dated 22.08.2022 reported under the heading “Discrepancies observed in Tariff Applied for HT Consumers” that various HT consumers have taken HT connections under industrial tariff category. Among these HT consumers, the name of the Appellant was also in the list of those doing exclusive activities of construction work of “Mumbai –Vadodara Expressway”. The Dy. Executive Engineer, Saphale of the Respondent alleged that he inspected the premises of the Appellant on 22.08.2022, and made a Spot Inspection report dated 22.08.2022 with the following remarks:


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“Site inspected and found that RMC work and Cement - Concrete block manufacturing for Mumbai – Baroda highway. It is requested to check and apply proper tariff. Site visited as per telephonic conversation with the Vigilance officer Kalyan Zone.”


However, this report was not signed by the Appellant or his representative and is therefore suspect. Meanwhile the Respondent changed the tariff category from Industrial to Commercial Temporary in the bill of August 2022. The Respondent issued a supplementary bill of Rs.44,92,608.61 towards tariff difference between HT-I Industrial and HT-II Commercial (Temporary) for the period of Feb.2022 to August 2022, and added it in the monthly bill of August 2022. Subsequently, the tariff of the Appellant was changed from HT I Industrial to HT-II Commercial(Temp).

The Appellant objected and informed the SE by its letter dated 21.09.2022 that

- *“the change has been made WITHOUT taking any consideration of the factual site / work conditions of our work.*
- *Our work constitutes of Mining of Quarry and crushing in a Stone Crusher and it is a standalone unit crusher unit and we are only supplying the aggregates.*
- *We are enclosing the purchase order, invoices, current EB and earlier EB.”*

The purchase order dated 16.02.2022 of GR Infrastructure Project mentions the vendor details as “V.H. Construction”, and the items description is “coarse aggregate, stone dust and GSB crushed”. Thus, it is seen that the Appellant was supplying crushed stone, and not RMC, to GR Infrastructure Project, no doubt for the Mumbai – Vadodara Expressway. Considering this, it was the duty of the Respondent to recheck the site and to confirm whether the activity of stone crusher or RMC was going on, but it was not done.

Meanwhile, the Appellant applied online on 23.01.2023 for change of tariff from HT Commercial to HT Industrial. **The Respondent verified the site and recommended to change the tariff to HT Industrial as the activity was found as stone crusher.** Thus the latest site inspection report of the Respondent itself shows that activity as a stone crusher unit. The


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Respondent has also sent photographs of the site which clearly shows that a stone crusher plant is installed.

5. Considering the above facts, we are convinced that the activity of the Appellant is that of a stone crusher. The relevant tariff order dated 30.03.2020 in Case No. 322 of 2019 of the Commission is reproduced below:

“HT I: HT – Industry

HT I (A): Industry – General

Applicability:


This tariff category is applicable for electricity for Industrial use at High Voltage for purposes

of manufacturing and processing, including electricity used within such premises for general lighting, heating/cooling, etc.

.....
It shall also be applicable for use of electricity / power supply for (but not limited to) the following purposes:

- a. Flour Mills, Dal Mills, Rice Mills, Poha Mills, Masala Mills, Saw Mills;*
- b. Ice Factories, Ice-cream manufacturing units, Milk Processing / Chilling Plants (Dairy);*
- c.*
- d. Mining, Quarrying and Stone Crushing units;***
- e. Garment Manufacturing units*
- f. LPG/CNG bottling plants, etc.;*
- g. ”*

6. We had earlier observed in our previous orders that the Commission was silent in its latest tariff orders on the classification of the specific activity of RMC under Industry / Commercial. RMC was neither classified under Industrial nor Commercial, and hence this activity fell in the


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grey area between Industrial and Commercial until the Commission gives a specific order on the classification of that activity or product. This observation in the respective orders prompted Ultratech Cement and Others to approach the Hon'ble Bombay High Court in WP No. 1009 of 2023. The Hon'ble Bombay High Court disposed of this petition by its order dated 24th January 2023 with the following directions:

- "a) MSEDCL shall approach the MERC with an application/petition to reclassify petitioner's activity from 'Industrial' to 'Commercial'.*
- b) MERC shall endeavour to dispose of application/petition of MSEDCL within four weeks from receiving the application/petition subject to hearing petitioner, who shall be at liberty to file a reply to the application/petition filed by MSEDCL.*
- c) MERC shall also consider whether MSEDCL is entitled to reclassify petitioner with retrospective effect.*
- d) The order disposing application/petition of MSEDCL shall be a reasoned order by dealing with all submissions to be made by MSEDCL as well as petitioner.*
- e) **Until MERC disposes of the application/petition of MSEDCL, petitioner shall continue to pay in the 'Industrial' category and no coercive steps will be taken against petitioner.***
- f) The undertaking of petitioner that if ultimately the petitioner is classified as 'Commercial user' and not 'Industrial user' to pay all amounts of electricity dues be taken is accepted."*

7. Subsequently, the Commission, by its latest order dated 31.03.2023 in Case No. 226 of 2022 has classified RMC activity under LT V A Industrial tariff category. Therefore, even if we accept the Respondent's contention that the Appellant runs an RMC plant and not a stone crusher unit, industrial tariff would still be applicable to it.

8. In view of the above, the representation of the Appellant is partly allowed and the Respondent is directed as under: -


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- a) to withdraw the supplementary bill of the Appellant for the period from Feb. 2022 to Aug. 2022, by waiving of interest and DPC levied, if any.
- b) to bill the Appellant in industrial tariff category till date.
- c) Compliance to be submitted within two months from the date of issue of this order.
- d) Other prayers of the Appellant are rejected.

9. The Appellant had also prayed to quash the adjustment units 31457.100 after proper accounting of CTPT bypass period from 22.06.2022 to 28.06.2022. This grievance is not maintainable since it was not taken up at the Forum level. During the course of the hearing, the Appellant was therefore advised to approach the Respondent for clarity in this assessment.

10. The Secretariat of this office is directed to refund the amount of Rs.25000/- deposit to the Respondent for adjustment in the ensuing bill of the Appellant.

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


(Dilip Dumbre)
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