

BEFORE THE ELECTRICITY OMBUDSMAN (MUMBAI)

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

REPRESENTATION NO. 183 OF 2022

In the matter of retrospective recovery of tariff difference

Mahesh Hari Patil. Appellant
(Cons. No. 001880155306)

V/s.

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

Appearances:

Appellant : Kailash Patil

Respondent : 1. Prashant Dani, Executive Engineer, Virar
2. Mukund Deshmukh, Addl. Executive Engineer, Virar (East) S/Dn.
3. Vinay Singh, Addl. Executive Engineer, Flying Squad, Vasai

Coram: Vandana Krishna [I.A.S. (Retd.)]

Date of hearing : 10th January 2023

Date of Order : 27th January 2023

ORDER

This Representation was filed on 30th November 2022 under Regulation 19.1 of the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum & Electricity Ombudsman) Regulations, 2020 (CGRF & EO Regulations 2020) against the Order



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dated 10th August 2022 passed by the Consumer Grievance Redressal Forum, MSEDCL Vasai (the Forum).

2. The Forum, by its Order dated 10.08.2022 has partly allowed the grievance application in Case No. 44 of 2022 with the following direction:

“2. Respondent shall grant 10 monthly installments for payment of supplementary bill without levying interest and DPC. If complainant defaulted in the payment of any installment along with current bill, then the facility of Installment along with concession of waiver of interest and DPC will stand cancelled forthwith.”

3. The Appellant has filed this representation against the order of the Forum. The e-hearing was held on 10.01.2023 by Video/Audio conferencing. Both the parties heard. The Appellant’s written submission and arguments during the hearing in brief are as below:

- (i) The Appellant is an Industrial consumer (No. 001880155306) of the Respondent from 08.12.2011 having sanctioned load (SL) of 89 HP and contract demand (CD) of 89 KVA at S.No.29, H.No. 5&6 Virar (East).
- (ii) The activity of the Appellant is manufacturing of asphalt/bitumen. This is a process industry. The operation of an asphalt mixing plant includes heating of the aggregates and mixing them with bitumen and binder material. It blends together aggregates and bitumen to produce hot mix paving material.
- (iii) The Respondent has sanctioned load under Industrial tariff category for the activity of manufacturing of **asphalt/bitumen** and was billed rightly under Industrial tariff category from the date of release of connection.
- (iv) Since the date of connection, Appellant is engaged in supplying Asphalt/Bitumen to other parties at the rate agreed between the seller and purchaser. The operational activity of Asphalt is organized with the help of labour, power supply, and the process of materials. This is a process industry.




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- (v) The Addl. Executive Engineer, Flying Squad of the Respondent inspected the premises and checked the electrical installation of the Appellant on 18.01.2022. The following points were noted in the inspection report,
- a. *Consumer using electricity for bitumen mixing plant.*
 - b. *Consumer billed as per industrial i.e., LT VBII.*
 - c. *Case kept under observation.*
- (vi) The Respondent issued a supplementary bill of Rs. 10,30,646/- on 25.01.2022 of retrospective recovery of tariff difference from Industrial to Commercial tariff category from the date of connection i.e., 08.12.2011 to Jan.2022.
- (vii) The Appellant received disconnection notice of 24 hours for payment of the said supplementary bill dated 18.05.2022. The disconnection notice is not as per Section 56(1) of the Electricity Act, 2003(the Act).
- (viii) The Appellant referred the tariff order of Maharashtra Electricity Regulatory Commission (the Commission) in Case No. 48 of 2016 wherein it has included “stone crushing plant” under Industrial category. This is a processing unit where the finished product is ‘crushed stone’ which gets used in construction/repair works. Asphalt is also used for construction and repair work of roads. Asphalt activity is considerably different from RMC activity.
- (ix) The process industry is registered under Part II of Industrial Entrepreneur Memorandum (IEM) District Centre Thane, Govt. Of Maharashtra from 25.03.2011.
- (x) The process industry is following the general conditions and norms prescribed by Maharashtra Pollution Control Board and the said certificate is being renewed from time to time.
- (xi) The Appellant prays to condone the delay for filing this representation, as the Appellant received the physical order of the Forum, and the Appellant was suffering from a medical issue.
- (xii) In view of the above, the Appellant prays that the Respondent be directed


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- a) to quash the supplementary bill of Rs.10,30,646/- and to declare the activity of Asphalt under Industrial tariff category.
- b) not to disconnect electric supply of the Appellant till the case is pending with this authority.

4. The Respondent by its letter dated 21.12.2022 has submitted its written reply. The e-hearing was held on 22.12.2022. The written submission along with its arguments are stated in brief as below: -

- (i) The Appellant is a consumer (No. 001880155306) of the Respondent from 08.12.2011 having SL of 89 HP and CD of 89 KVA at S.No.29, H.No. 5&6 Virar (East). The supply of the Appellant was sanctioned under Industrial tariff category by mistake.
- (ii) The Flying Squad of the Respondent inspected the premises of the Appellant on 18.01.2022. During inspection it was revealed that the Appellant is using electricity supply for Bitumen/Asphalt mixing plant (mixing of aggregates and Bitumen), for which the applicable tariff is Commercial Tariff (71 LT - II C). However, the Appellant was mistakenly billed as per Industrial Tariff (36 LT V B II), since the date of supply i.e.,08.12.2011. The Appellant was engaged in the commercial activity of Bitumen/Asphalt mixing (mixing of aggregates and Bitumen) for which Commercial Tariff is applicable.
- (iii) The Respondent issued a supplementary bill of Rs.10,30,646/- on 25/01/2022 for recovery of tariff difference from Industrial to Commercial as per inspection report from Dec. 2011 to Jan. 2022. The details of SL, CD, date of inspection and supplementary bill etc. is tabulated as below:-

Rep. No.	Appellant	Consumer No.	Address	Sanctioned load (HP)	Contract Demand (KVA)	Date of Supply	Date of Inspection	Supplementary bill (Rs.)	Date of Supplementary Bill
183	Mahesh Hari Patil	001880155306	S.No.29, H.No. 5&6 Virar (east)	89	89	08.12.2011	18.01.2022	10,30,646/-	25.01.2022


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- (iv) Tariff categorization is done based on the purpose of usage of electricity. This Bitumen/Asphalt mixing plant was meant for supply of hot mix paving material (mixing of aggregates and Bitumen) as per requirement of construction activities. Bitumen/Asphalt mixing plant is a component of construction projects. Electricity used for construction purposes is to be billed as commercial; so the correct category is commercial.
- (v) The Respondent referred Regulation 4.4.1 of the 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.”

The Respondent is authorised to recover the charges of consumed electricity as per tariff category classified by the Commission.

- (vi) The Forum in its order dated 10.08.2022 has rightly addressed all these issues and rejected the grievance of the Appellant for classification of tariff category and allowed to pay the supplementary bill in 10 installments.
- (vii) The Respondent cited the Judgement of Hon'ble Supreme Court dated 5th October 2021 in Civil Appeal No. 7235 of 2009 in Case of Prem Cottex V/s. Uttar Haryana Bijli Vitran Nigam Ltd. and Others. It has clearly differentiated between applications 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:


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“23. Coming to the second aspect, namely, the impact of Subsection (1) on Subsection (2) of Section 56, it is seen that the bottom line of Sub section (1) is the negligence of any person to pay any charge for electricity. Subsection (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. Subsection (2) uses the words “no sum due from any consumer under this Section”. Therefore, the bar under Subsection (2) is relatable to the sum due under Section 56. This naturally takes us to Subsection (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 Subsection (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 Subsection (2).

26. The matter can be examined from another angle as well. Sub section (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 nonobstante 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 Subsection (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.” (Emphasis added)

The recovery of escaped billing of correct categorisation of Commercial tariff would have been applicable to the Appellant right from the date of supply, and hence the recovery towards tariff difference from LT-V to LT-II is justifiable and hence recoverable.



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- (viii) The Appellant filed this representation on 30th November 2022 before the Electricity Ombudsman (Mumbai) after expiry of 60 days from the date of the Order of the Forum which was 10.08.2022. The representation is time barred as per Regulation 19.1 of the CGRF & EO Regulations 2020.
- (ix) The disconnection notice for 15 days was issued as per section 56(1) of the Act on 04.02.2022 towards outstanding dues. The appellant did not pay the same and hence, 24 hours disconnection notice was issued on 18.05.2022. However, the supply was not disconnected.
- (x) Further, the Respondent has not been penalised under Section 126/135 of the Act for unauthorized use of electricity; this is plain recovery of tariff difference.
- (xi) 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.
- (xii) In view of the above, the Respondent requested to reject the Representation of the Appellant.

Analysis and Ruling

5. Heard the parties and perused the documents on record. The Appellant is initially, an LT industrial consumer from the date of supply, and his activity is manufacturing of Asphalt. The Respondent has sanctioned load under ‘Industrial’ tariff category for the activity of Asphalt plant, and was billed rightly under Industrial tariff category from the date of release of connection. This is a process industry. Asphalt is being supplied at different sites as per demand and requirement of the purchaser. The Appellant is not directly in road construction activity but only the supplier of Asphalt product. Hence, the activity of the Appellant is industrial and not commercial.


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6. The Respondent contended that Tariff categorization is done on purpose of usage of electricity. It is observed that this Bitumen/Asphalt mixing plant was meant for supply of hot mix paving material (mixing of aggregates and Bitumen) as per requirement of construction activities. Bitumen/Asphalt mixing plant is one of the components of a construction project, therefore it cannot be considered as separate from construction. The electricity used for construction purposes is to be billed as commercial; accordingly, the correct category is commercial.

7. 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;”*

8. One of the relevant Tariff orders of the Commission is reproduced below:

Tariff order of the Commission in Case of 121 of 2014 dated 26.06.2015

“LT V: LT- Industry

LT-V (B): LT - Industry - General

Applicability:

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

- a) Flour Mill, Dal Mill, Rice Mill, Poha Mill, Masala Mills, Saw Mills;*
- b) Ice Factory, Ice-cream manufacturing units, Milk Processing / Chilling Plants (Dairy);*
- c) Engineering workshops, Engineering Goods Manufacturing units, Printing Press, Transformer repairing workshops;*
- d) Mining, Quarrying and Stone Crushing units;*

*.....
i) Brick Kiln (Bhatti);”.....(Emphasis added)*



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Secretary

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The contents of this Tariff Order remain the same in other tariff orders of the Commission which are in force till date.

9. The main point of contention here is whether manufacturing of asphalt amounts to an industrial activity or a commercial activity, from the perspective of consumption of electricity. In order to determine this, it is important to understand some basic technical aspects of the production or manufacturing of asphalt.

Asphalt is still found in its natural state, and is also typically processed from petroleum. It is the heaviest part of petroleum when petroleum undergoes segregation into various factions in oil refineries. Asphalt is manufactured in a process industry, which comprises of binding / mixing of the aggregate of asphalt with stone, sand, and gravel. This is used for construction of highways, parking lots, airport expressways, and road construction. It is also used in waterproofing, sealing, and insulation products. Normally, asphalt is used in the following sectors:

- Transportation (roads, railway beds or airport runways, taxiways, etc.)
- Recreation (playgrounds, bicycle paths, running tracks, tennis courts...)
- Agriculture (barn floors, greenhouse floors...)
- Industrial (ports, landfill caps, work sites...)
- Building construction (floorings...)

Thus, the product asphalt is a widely used material in various sectors.

10. Manufacture of asphalt has not been specifically mentioned or categorized in any of the Commission's tariff orders directly. Whether it can be categorized with the activities mentioned in Para 8(d) above, being similar in nature, could fall under the grey area of interpretation, and best left to the Commission for specific orders. Meanwhile, we hold that by default, production of asphalt would fall under the 'industrial' category.



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11. 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.

12. We thus hold that the activity of the Appellant falls under "industrial category". The supplementary bill of the Appellant raised by the Respondent is therefore rejected, and the instant representation is allowed. The order of the Forum is set aside.


13. In view of the above the Respondent is directed:

- (a) to cancel the supplementary bill of Rs.10,30,646/- towards retrospective recovery for tariff difference from industrial to commercial for the period December 2011 to January 2022 along with interest and DPC, levied if any.
- (b) to bill the Appellant under "Industrial" tariff category from February 2022 onwards.
- (c) Compliance to be submitted within two months from the date of issue of this order.
- (d) Other prayers of the Appellant are rejected.

14. The Representation is disposed of accordingly.

15. The Secretariat of this office is directed to refund the amount of Rs.25000/- to the Appellant.

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


(Dilip Dumbre)
Secretary
Electricity Ombudsman Mumbai

