

BEFORE THE MAHARASHTRA ELECTRICITY REGULATORY COMMISSION

In the matter of Draft (Transaction of Business and Fees and Charges) Regulations, 2022

Submission by Prayas (Energy Group), Pune

11th July 2022

MERC vide its public notice dated 18th June 2022, invited comments and suggestions on the Draft (Transaction of Business and Fees and Charges) Regulations, 2022. The present submission is in response to the said notice, the draft regulation as well as the explanatory memorandum published by the Commission. The draft regulation incorporates many provisions to enable online filings, online hearings which could increase efficiency of proceedings before the Commission. However, many of the crucial provisions to encourage participation by consumers, transparency in proceedings and clarity in processes have been removed or modified. Our comments and suggestions on the draft regulations focus on these crucial changes.

1 Quorum of Commission

As per draft Regulation 11, quorum for the proceeding before the Commission shall be two members. In addition, the quorum can also be 1 in case of vacancies or unavailability of members or if a member has recused themselves from a proceeding.

The intent of having a multi-member Commission to decide critical matters before the sector was to ensure multiple perspectives are considered in the decision making process and that the decisions are informed by the varied and multi-faceted experiences of the three members of the Commission.

Thus, the quorum for any proceedings should be full strength of the Commission or three, whichever is less. Post amendment of the Electricity Act, 2003, if the Commission strength is increased from 3 to 4, then the quorum can be retained at 3. To avoid delay in proceedings, it is even more critical to ensure vacancies are filled on time.

It is also suggested that in case there is unavailability of member or in case member/s have recused themselves from particular proceedings, it is crucial that the reason for non-participation in proceedings is given in writing and the same is made public on the website of the commission.

As per Regulation 28 c, review applicable shall be decided by the same constitution of the Commission that passed the original order. This would also imply that the full strength of the Commission would be not reviewing the matter.

Further, the full strength of the Commission should also hear review petitions as the original constitution of the Commission (to the extent possible) would be part of the full strength of the Commission.

The following changes are suggested to the draft regulations:

- b. *The bench of the Commission shall be the full strength of the Commission or as per the quorum, unless otherwise required under the Act:*

*Provided that quorum for the Proceedings before the Commission shall be ~~Two (2)~~ **Three (3)***

*Provided further that quorum could be ~~One (1)~~ **less than three**, in the event only one Member is functional due to vacancies in the Commission or unavailability of Member for any reason or in case any Member(s) or in case any Member(s) has recused himself from a proceeding due to reasons stated by such Member. **In case a member has recused himself from a proceeding, the reasons have to be recorded in writing and be part of public record.***

2 Retain regulations related to Commission meetings

Regulation 22 to 27 of the existing Conduct of Business Regulations dealt with the manner of conducting meetings of the Commission and associated need for transparency. The regulations spelt out quorum for meetings, procedure for voting on decisions, process for recording minutes of the meetings and record of decisions of the Commission. These meetings refer to matters other than adjudicatory proceedings of the Commission. In that sense, these are not merely administrative (as stated in the Explanatory Memorandum) but are proceedings where critical decisions of the Commission are taken.

Thus, it is suggested that Regulations 22 to 27 of the existing CBR be retained.

3 Specification of fees by state government

As per draft Regulation 18 (b), the fees for filing petitions maybe specified by the Commission or prescribed by the State Government. It is unclear as to why the State Government would prescribe the fees of the Commission. It is suggested that the reference be removed to reiterate the independent nature of functioning of the Commission.

- (b) The fees as may be specified by the Commission ~~or prescribed by the State Government, as the case may be~~, from time to time, shall be payable along with the Petition:*

4 Revision of fees to encourage access and informed participation

The draft regulations propose to combine the conduct of business regulations with the Fees and Charges Regulations. In this context, the draft also proposes revision of fees for crucial matters before the Commission. These are summarised in Table 1.

Table 1: Proposed changes in fees

Application type	Application by	2017 Regulations	Proposed in draft
Review of Tariff Order/ PPA or power procurement rate	Consumer Representative	Rs. 25,000	Not Applicable
	Other persons	Rs. One Lakh	Rs. Ten Lakhs

Review of Order on adjudication of disputes		10% of Fee for Original Application	50% of Fee for Original Application
Review of Orders of the Commission not covered elsewhere in these Regulations		Rs. 10,000	Rs. 50,000
Miscellaneous Applications,	Applications by entities other than individuals	Rs. 1000	Rs. 1,00,000

For one, applications by Consumer representatives, especially for review of tariff order does not have a separate fees and the fees themselves have been increased to a prohibitive Rs. 10 lakhs. For review of other orders of the Commission the fees have been increased by five times to Rs. 50,000. In addition, for consumer groups and associations, the applicable fees for filing Miscellaneous Applications, which could even be consumer centric issues (such as supply and service quality, performance of licensees, seeking compliance with Commissions regulations etc) the fees is Rs. 1 lakh, as prohibitive as an application before APTEL. In fact, applications by the Government of Maharashtra are charged lower fees than applications by consumer groups.

MERC has been long lauded for its efforts to encourage consumer participation and has active, informed participation by varied groups of consumers on several critical matters. Increasing the fees would severely limit participation before the Commission. In its stead, the number of writ petitions before the High Court will increase where action from the Commission would be anticipated. This would unnecessarily increase litigious decision making process before the Commission. Thus, increasing the fees would only limit access and participation before the Commission and not reduce the number of matters which the Commission has to act on. Curtailing such access would also erode the credibility of the process and would be against the spirit of the Act and also sections 86.3 and 94.3 of the Act, .

To ensure that consumers and consumer groups participate in crucial proceedings, it is critical that:

- **Any application by association of consumers should be charged Rs. 10,000**
- **Any application of current or past consumer representatives are charged Rs.5,000.**

5 Commissions orders to be reasoned orders

Regulation 74 of the Conduct of Business Regulations, 2004, stated that:

Every order made by the Commission shall be a reasoned order.

As such, this regulation is critical such that the prayers, objections and suggestions provided by parties are addressed and to ensure that the rationale for Commission's decisions are clearly stated. Without this basic requirement, the orders of the Commission would not adequately address concerns of the parties and could be challenged as well. To ensure transparency, deliberate decision making it is crucial that cryptic orders are not issued by the Commission. We urge the commission not to delete this crucial provision aimed at ensuring accountability of the commission and instilling confidence in all stakeholders. In our humble opinion deleting this crucial requirement would also be against the spirit of

the Act (specifically section 86.3) and various observations and comments of the APTEL and SC regarding the functioning of Tribunals and Commissions. In fact, orders which are not reasoned enough would be fertile ground for appeals and litigation. Hence we urge MERC not to dilute the high standards of transparency established in the current Conduct of Business Regulations. Additionally, it needs to be noted that this crucial change has not been documented/mentioned in the explanatory memorandum and hence the proposed change is of legally doubtful validity.

To this effect, it is suggested that Regulation 74 of the existing CBR be retained in these regulations.

6 Retain existing declaration requirement for affidavit in support

Draft Regulation 17 (b) states that petitioners shall declare that there are no proceedings pending in any court of law or tribunal or arbitrator or authority where identical or similar issues as in the petition are present. The rationale for petitioners declaring that there are no pending proceedings is unclear and will severely limit participation especially as several issues could be similar if not identical. The Commission can consider declaration of existing/pending matters while deliberating admissibility of the petition but seeking such a declaration before the fact would limit access to the forum for several parties. Regulation 41 (b) of the existing Conduct of Business Regulations, 2004, has such a requirement and should be retained in lieu of Draft Regulation 17 (b).

The following edits are therefore suggested:

*(b) Every affidavit shall be drawn up in the first person and shall state the full name, age, contact number, e-mail address, occupation and address of the deponent and the capacity in which he is signing. The Petitioner shall ~~declare that there are no proceeding pending in~~ **furnish information with regard to any proceeding pending in** any court of law/ tribunal or arbitrator or any other authority, wherein the deponent is a party and where issues arising and/or reliefs sought are identical or similar to the issues arising in the matter pending before the Commission.*

7 At least two modes of communication for serving notice

According to draft Regulation 20.(a) of the draft regulations, new modes of communication have been introduced for the purpose of serving notice. Draft Regulation 20.(e) states that communication made via any of the specified modes shall be deemed to have been received on the day it is delivered provided that it records the attempt to deliver. To ensure certain and fail-proof communication protocols, such communication should be deemed as delivered only when the attempt to deliver is recorded via at least two of the modes of communication specified. Following modifications could be made to section 20.(e) in this regard:

*“Where a party is not found at the address furnished by him to the Commission and after making a reasonable enquiry, a notice shall be deemed to have been received if it is sent to the addressee **via at least two of the specified modes** (Specified modes include: registered letter to **addressee’s** last known place of business or work, habitual residence or mailing address or by any other means including digital mode such as Whatsapp message, e-mail, SMS etc, which provides a record of the attempt to deliver the notice by the Commission), the communication is deemed to have been received on the day it is so delivered.”*

8 Access to digitized records and preservation of physical records

According to the draft regulation 30.(c),

Provided that as and when the Commission completes digitization of records, any person can apply online for certified copy of Orders/ documents available from the record of the Commission online and the copies will be provided on payment to the parties through online mode, as per the procedure notified by the Commission separately.

If the intent of the regulation is to extend access to commission's orders and documents for any person who pays fees, it is important that there is not ambiguity. While "any person" can apply for a copy, copies will be provided to "parties". To ensure there is no ambiguity, and there is consistency, the regulation should state that the copies will be provided to 'persons' instead of 'parties' in regards to the application made by them. To this effect, the regulation could be modified as:

*"Provided that as and when the Commission completes digitization of records, any person can apply online for certified copy of Orders/ documents available from the record of the Commission online and the copies will be provided on payment to the **persons applying** through online mode, as per the procedure notified by the Commission separately."*

Further, section 30.(f) states that the hard copies of the document will be destroyed after it is converted to electronic form. As the destruction is final, to maintain authenticity and safety from probable data loss, the documents should be preserved in its original / physical format for at least 5 years from digitization. Section 30.f could be modified as:

*"The office record of the Commission may be destroyed **60 months** after it is converted to electronic form in accordance with Section 7 of the Information Technology Act, 2000 as per operational procedure and protocol approved by the Commission from time to time."*

9 Public record of amendments/ alterations to pleadings by parties

As per draft regulation 22.(k), the commission may allow parties to alter / amend the pleadings. These amendments / pleadings should also be made available in public domain to ensure transparency, consistency. To ensure this, the following addition could be made to the said regulation:

*"The Commission may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, within the time limit fixed by the order for that purpose, and all such amendments shall be made as may be necessary for the purpose of deciding the matter. **Such amendments / pleadings made shall be available publicly on the website**"*

10 Public availability of all petitions by licencees and generating companies

As petitions by licencees and generating companies could have proposals that affect tariff, supply and service quality of consumers, it is suggested that all petitions by licencees and generating companies which have signed PPAs with licencees should be available on the Commission's website.

11 Measures to encourage participation in crucial proceedings

Draft Regulation 21.(d) provides a framework for participation by persons in crucial proceedings before the Commission. However, it implies that objections and comments could be filed only in accordance with the notice issued for the purpose. This could imply that unless comments are explicitly sought in the notice, comments and suggestions cannot be provided by persons. To ensure greater participation, the draft should allow all persons to submit comments and suggestions for all matters before the Commission, especially matters filed by licensees and generators with PPAs with licensees.

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