Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 3 of 2005

Indian Tea Association & others **Appellants**
Versus
Assam State Electricity Regulatory Commission & Others **Respondents**

Under Section 111 (2) of Electricity Act, 2003

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member

Dated 14th March, 2006

Counsel for the appellant (s) : Mr. K. P. Ray,
Mr. Amit Sharma & Mr. Arijit Raha.

Counsel for the respondent(s) : Mr. A. K. Thakur, Mr. M.K. Adhikari for Resp. No. 1
: Mr. N. Zaman, Mr. B.M. Saikia & Mr. H.M. Samnah for Res. No. 2,3,4 & 5

Judgment

Per Hon'ble Mr. A.A. Khan, Technical Member

This appeal is directed against the Tariff order dated 2.5.2005 applicable for the year 2005-06.

2. The Appellant (s) have primarily raised the following questions relating to matters which have direct impact on electricity tariff for tea industries.

a) Whether demand charges can be worked-out on the basis of the contract demand linked to connected load.

b) Availability based fixed charges.

c) Cross subsidy.

d) Tariff design procedure.

3. It is observed that earlier in the past when the power was supplied to Tea gardens by Assam State Electricity Board (ASEB) the tariff payable was at flat rate based on average charges only. Therefore, most of the Electricity Supply Agreements were based on quantum of connected load. This was seen in the schedule for tariff applicable w.e.f. 1.7.1986. The Board subsequently in 1994 adopted a two-part tariff for groups of HT consumers including Tea, Coffee and Rubber with fixed charges as one part and the energy charges for the units consumed as second part. The levy of fixed charges was based on recorded reading or 80% of the connected load, whichever was higher. Levy of such alleged high fixed charges by ASEB was protested by Tea Gardens. The consumers were advised by ASEB to install electronic meters for ascertaining actual delivery of power to the Tea Gardens. Most of the Tea Gardens, thereafter, had installed such meters in their premises, which besides recording consumption of electricity were also capable of recording maximum demand and ASEB too honoured their commitment by revising the tariff w.e.f. 1.9.1998 based on maximum demand recording in accordance with the following clause incorporated in the tariff schedule.

"Maximum demand recording: Demand charges shall be levied on the basis of maximum demand recorded in the demand meter installed on the premises of the consumer. Where demand meter is not installed or the demand meter is defective the demand charges shall be levied on the basis of 80% of the connected load in KW converted into KVA at 80% of the power factor."

4. It appears that the Tea Gardens were satisfied with the above approach of the ASEB. The ASEB, however, after **'finding that the recovery from these consumers became less & less**', appointed a Committee to look into the matter. The Committee found that the consumers under these categories did not create demand up to the level envisaged due to non-imposition of minimum demand limit leading to recovery being affected adversely. Therefore, the ASEB issued a notice in May 2001 modifying the procedure of computing the demand charges w.e.f. 01 July 2001. The modified terms & conditions were as under:-

(a) **"Fixed Charge"** means charge payable by a consumer monthly on KW/KVA basis as per provisions of the tariff in force so as to recover charges in part or full by the Board of costs incurred towards O & M expenses, depreciation, interest on financing charge etc.

(b) **"Billable Demand Charge":** The demand charge for the month shall be made on actual maximum demand recorded in the demand meter or 80% of the contracted demand whichever may be higher. Where demand meter is not installed or the demand meter is found to be defective, demand charge shall be levied on the basis of 80% of connected load converted into KVA at 85% power factor.

On representations made by the Appellant(s) against the modified order, the ASEB did not concede to their request and the Appellant(s) and some other consumers filed petitions WP(C) Nos. 6015/2001, 6059/2001,

7294/2001, 7295/2001 and 495/2002 against the ASEB's decision before Guwahati High Court in 2002 and prayed for stay of the amended tariff order. The High Court did not allow any interim Order as prayed by the Appellant(s) and the petition was withdrawn by the Appellant(s) in the year 2003 and the matter was brought before Assam Electricity Regulatory Commission (AERC) which was established in August 2001. However, the order of the Commission failed to satisfy the appellant(s). AERC's Tariff order for retail sale of electricity to different consumers for the financial year 2004-05 was issued on 21st July 2004. The said Tariff Order was challenged in the Guwahati High Court by WPC 367/2005. The High Court, by its order dated 25.08.2005 has remanded the matter to this Tribunal for adjudication and the same has been registered as an Appeal No.3/2005. The instant appeal before the Tribunal is, however, against the tariff order of the AERC for the year 2005-06.

5. Government of Assam issued a notification dated 10th December 2004 to restructure the ASEB into five Corporate entities comprising of Assam State Electricity Board (ASEB); Assam Power Generation Corporation (APGCL) with redefined role as a trading licensee; {to carry out the functions of generation of electricity in the State of Assam} and three Distribution Companies {to carry out the functions of electricity distribution and retail supply to distinctly defined areas of distribution}.

It needs to be pointed out that the ASEB had continued to supply power under Supply Agreement signed with the Appellant(s). The appellants, however, allege that they had signed the agreements under commercial duress and because of unequal bargaining powers. The said Supply Agreement, inter-alia, stipulates the terms and conditions relating to 'Contract Demand' and to 'Connected Load' of the consumers. AERC in Regulations 2.1 of the Assam Electricity Regulatory Commission (Terms & Conditions for Determination of Tariff) Regulations 2005 –defines Tariff **stating that it shall mean the schedule of charges for generation and bulk supply, wheeling and supply of electricity together with terms & conditions for application thereof.** The aforesaid terms & conditions of the supply agreement, therefore, have to be read along with Regulation 2.1 for the purpose of determination of tariff.

6. AERC notified Electricity Supply Code and related matters Regulations 2004 vide notification No. AERC/2004/13 dated 30 August 2004 which was published in Assam Gazette on 17th February 2005. According to the Regulation 1.3 the **'Contract demand'** is defined as the demand contracted in the Electricity Supply Agreement with the licensee. It also provides that the 'Contract Demand' shall be determined within the limit specified in the Commissions tariff order. AERC, vide its order dated 27th May 2005, while specifying the limit relating to contract demand provided as following:-

"**Contract Demand** : The Contract Demand shall be between 70% to 105% as declared by the consumer of the connected load corrected to KVA at 0.85 power

factor. In case declaration/option is not made by the consumer within the stipulated time, 100% of the Connected Load converted to KVA shall be the Contracted Demand. Contract Demand for off-season shall be minimum 30% of the Seasonal Contract Demand".

7. The Supply Agreement signed with the licensee also defining the 'Contract Demand' in the following manner.

"Contract Demand:- the contract demand shall be determined by the consumer which shall be between 70% and 105% of the connected load (which shall not exceed the sanctioned load) converted to KVA at .85 power factor. Billing demand shall be the 100% of the contract demand or recorded demand whichever is higher. This is applicable for the category of consumers as per provisions of tariff in force. In absence of declaration of contract demand, the connected load shall be taken as the contract demand".

8. We may also refer to the definition of 'Connected Load' as contained in the AERC (Electricity Supply Code and Related Matters) Regulations 2004.

"Connected Load means aggregate of the manufacturers' rated capacities of all energy consuming devices connected with distributiobn Licencee's mains, in the consumer's installation which can be simultaneously used. This shall be expressed in KW, KVA or HP".

9. In the Tariff Order for 2005-06, **'Contract Demand'** in respect of HT category of Tea, Coffee and Rubber has been defined thus:

> **"Contract Demand: -** the contract demand shall be between 70% to 105% as declared by the consumer of the connected load converted to KVA at 0.85 power factor. In case declaration/ option is not made by the consumer within the stipulated time, 100% of the connected load converted to KVA shall be the contracted demand. Contract demand for off season shall be minimum 30% of the seasonal contract demand."

10. From the above, it inter-alia emerges that the "Contract Demand and Connected Load" – both of these form part of AERC (Electricity Supply Code and related matters) Regulations 2004 notified by the Commission under Section 181 of the Electricity Act 2003. Tariff order for 2005-06 was based on the above definition of the contract demand and the Appellant(s) felt aggrieved that they had to pay higher "fixed charges" than the maximum demand recorded by the demand Meters installed at the consumers' premises. In order to decide the issue, aforesaid examination reveals the following:-

a) In a rational tariff structure of two-part tariff, 'Fixed Charges' are levied to consumers to recover fixed liabilities incurred by the utilities. Ideally this should be done in proportion to the demand placed by a consumer on the System, as reflected by "connected load" which provides information about the load-profile of the consumer and maximum demand to arrive at the estimates of its consumption. This helps utility design

supply system to match the needs of a consumer and is, therefore, just and fair mechanism for recovering fixed liabilities of the utility. Linking Demands with the 'Connected Load' therefore is not unreasonable.

b) Demand Charges linked to 'Connected Load' for recovery of 'fixed charges' and minimum guaranteed Demand are normally one of the adopted approaches followed by a number of state utilities in the country with slight variation based on their local conditions and circumstances.

c) Comparative Tariff of Tea, Coffee & Rubber consumers for the years 2003-04, 2004-05 and 2005-06 indicate that while % increase in tariff (Fixed+ Energy) of 2004-05 over 2003-04 was 6.67%, it declined to an increase of 2.6% in 2005-06 over 2003-04. Also TOD tariff has been introduced in three tier from 2005-06.

Based on the above, we are of the view that no case is made out against the principle of linkage of 'Contract demand' to 'Connected Load' and leverage of minimum demand charges to recover 'Fixed Charges', therefore, we order accordingly.

11. We are also of the view that it was necessary to first determine the fixed charges for supply of electricity which need to be fully recovered from the consumers at a specified **Targeted Availability**. However, Tariff order does not indicate any specific process followed for quantifying explicitly any Targeted Availability at which the fixed charges shall be fully recovered. AERC, however, in their reply to the memo of Appeal has pointed out that **"the Tariff Order 2005-**

06 has fixed 70% target availability to recover 100% fixed charge, which is more favourable to the consumers than the stipulation in the supply code regulations". This issue ought to have been decided in a transparent manner by AERC Monthly contracted / demand charges in KVA as defined in para 6 above is billed at the rate corresponding to the Monthly Availability of the supply to the consumers as cited below:

Total Monthly Availability in %	**Fixed Charges in Rs./KVA**
More than 70%	230
More than 60% and up to 69%	225
More than 50% and upto 59%	220
Up to 49%	210

12. Senior Counsel of the Appellant(s) has submitted that the determination of the fixed charges by the AERC were against Regulation 7.5 of the AERC's Electricity Supply Code and Related Matters which resulted in overcharging to the consumers of Tea Garden. In order to appreciate the submission it will be useful to refer to Regulation 7.5, which reads as under:

"In case the Distribution Licensee is unable to supply power to a consumer who is not otherwise a defaulter, disconnected or unconnected for a period of 240 hours or more in a calendar month, the Distribution Licensee shall charge the consumer applicable fixed charges if any, pro-rata basis for the hours power was available. This facility will be provided to consumers with metered connections only".

Both, the Appellant(s) and AERC, have agreed that 240 days non-availability corresponds to 66.6% of availability in a calendar month. Thus if the availability is 66.6% or less during a billing month, the Supply Code provides that Fixed Charges will be levied at pro-rata basis without limit to availability-percentage.

13. Fixed Charges for monthly availability in percentage as brought out in table at para 11 based on the schedule of tariff for year 2005-06 if compared to the corresponding rate of fixed charges computed on pro-rata basis from 66% availability downward according to electricity supply code the following are observed:-

a) There is a wide disparity in the fixed charges and in all percentages of availability the fixed charges computed as per supply code are less than those provided as per tariff order 2005-06.

b) In case of consumers having availability less than 49%, the demand charges are not limited to that of at the level of 49% as provided in the tariff but it could be pro-rata reduced to a much lower level as there is no lower limit of availability to which it is restricted under the supply code. AERC's statement that "It (tariff provisions) is more favourable to the consumers than the stipulation in the supply code regulations" is not sustainable.

c) The Regulation Clause 7.5 of the Supply Code Regulation provides no qualification other than the one mentioned therein, viz

"this facility will be provided to consumers with metered connection only" and all the consumers of the Tea Gardens are stated to have metered connections. It is our considered view that the tariff order for 2005-06 should be consistent to 'Fixed Charges' derived from supply code regulation. AERC's assertion that availability based fixed charges as per Tariff order for 2005-06 is more advantageous to the HT consumers of Tea Gardens compared to the one based on Supply Code is not sustainable. We conclude that the Tariff order on availability based demand charges is not consistent with the clause 7.5 of the Supply Code Regulation and decide to remand the issue to AERC.

14. On 07 November 2005 Appellant(s) had filed a supplementary affidavit regarding inconsistency between Approved Charges and expected revenue from the Schedule of Tariff for the year 2005-06. A **'serious alarming error'** was stated to have been committed by AERC in respect of expected revenue (Approved at page 863 of the Paper Book Volume-II) vis-à-vis the schedule of Tariff, '(Page 890-892 of Paper Book Volume-II) for HT category consumers of Tea, Coffee and Rubber'.

From the aforesaid affidavit and other material on record of Appellant(s), the following are noted:-

(a) Expected Revenue from the sale of 300 MU of energy at approved rates for total connected load of 561, 602 KW is:

i) Sale of Energy = 300 MU

ii) Fixed Charge = Rs. 59.68 crores

iii) Energy Charge = Rs. 115.50 crores

iv) Total charge = Fixed charge + Energy Charge

= Rs. 175.18 crores.

As the Energy Charge is based on the total consumption recorded by the meters installed in the premises of the consumers, the numbers as in (i) & (iii) could be accepted as mentioned. However, the computation of revenue accrual on account of fixed charge with worst case scenario of 70% of the 'Connected Load' as Contracted Demand during Season (8 months); 30% of Seasonal Demand during off-season (4 months) and minimum leviable fixed charge at the rate of Rs. 210/KVA/month for availability below 49% reveals that the Total Fixed Charge comes to Rs. 89.35 crores as against the expected revenue of Rs. 59.68 crores (Page 863 of Paper Book Volume-II). Thus it is claimed by the Appellant(s) that in the worst case scenario, the application of Schedule of Tariff results in excess accrual of revenue of Rs. 30 crores on account of Fixed Charge i.e. almost 100% increase in revenue

b) Respondents 2, 3 & 4 and Respondent No. 1 in their written submissions of 14 November 2005 and 18 November 2005 respectively, have accepted the error that the figure of total connected load of Tea, Coffee & Rubber category was mistakenly

doubled as the total connected load of 280.801 KW remains constant irrespective of season/off-season and, therefore, total connected load will be 280801 KW and not 561602 KW as indicated.

(c) If in the computation at (a) above, the total connected load is halved i.e. 561602 ÷ 2 = 280801 KW, the total fixed charge as computed shall also be halved i.e. Rs. 89.35 crores ÷2 = Rs. 44.68 crores, the figure that is confirmed by Respondents 1, 2, 3 & 4 in their submissions as at (b) above,

In view of the above, the aforesaid error is taken as a typographical in nature as it does not impact the tariff. Therefore, we do not consider any merit in the prayer made by the Appellant (s) at (a) above and the same stands rejected.

15. As regards the issues relating to cross subsidy raised by the appellant(s) we find that the term **"Cross Subsidy"** in the tariff regulations framed by AERC has not been defined. While the appellant(s) has submitted that the cross subsidy be defined as the difference between the tariff for the consumers and the actual cost of supply to the consumers, it implies that for the determination of cross subsidy firstly cost of supply to the consumer is to be determined. In other words if the contribution towards the cross subsidy by a category of consumer is to be ascertained, the cost of supply to the consumer is required to be determined. AERC in its submission in response has submitted that it has

considered the average cost of supply to all categories of consumers and has also put forward the view that cross subsidy in common parlance is charging higher charges from some categories of consumers to compensate some other categories/groups on account of socio-economic considerations. We feel that considering the average cost of supply rather than cost of supply for subsidizing category of consumers is likely to hide the extent of cross subsidy contribution by different categories of subsidizing consumers. Section 61 clearly provides that the appropriate Commission shall, while specifying the terms and conditions for determination of tariff will be guided by the consideration that the tariff progressively, reflects the cost of supply of electricity and also reduces cross-subsidies. It appears that the principle behind this provision is that the tariff determination should reflect the extent of cross subsidy contributed by different categories of consumers. It adds to transparency and cross-subsidies which are contributed by consumers are not camouflaged. However, the Commission has explained in the tariff order that cross subsidy has been gradually reduced in conformity with Section 61(g) of the Electricity Act 2003 .AERC have also stated that the consumers were grouped, depending upon the consumption and connected load to avoid tariff shock to lower income group. The observations of the Commission that cross-subsidy has been reduced in conformity with Section 61 (g) is not enough. The cost of supply of electricity must be determined in accordance with the principle laid down in the Act. Since the relevant data was not available with the Commission, it was not possible for it to determine the cost of supply of electricity. We cannot ask the Commission to do the impossible.

Since in the past, the Commission was not in a position to give appropriate directions for want of data, we will now direct the utilities to meter the installations at strategic locations to help energy audit for determining losses and supply to various classes of consumers immediately, so that it is possible for the AERC to determine the cost of supply to different categories of consumers. We presently decide not to interfere with the order of the Commission on this aspect of the matter.

16. The learned counsel for the appellants also invited us to examine the validity of some of the regulations. The question of validity of regulations can not be determined by us. In Neyveli Lignite Corporation Ltd., V/s Tamil Nadu Electricity Board & Others, Appeal No. 114 & 115 of 2005, decided by the Tribunal on November 9, 2005, relying upon the decision of the Supreme Court in West Bengal Electricity Regulatory Commission V/s CESC Ltd. (2002) & SCC 715, have already held that it has no jurisdiction to go into the question of the validity of the Regulations. In this regard, it was observed as follows:

"In view of the aforesaid decision of the Supreme Court, which is directly on the point, we have no hesitation in holding that the Regulations framed under Sections 61 & 178 of the Electricity Act 2003, are in the nature of subordinate legislation and we have no jurisdiction to examine the validity of the Regulations in exercise of our appellate jurisdiction under Section 111 of the Act of 2003. Even, under section 121, which confers on the Tribunal supervisory jurisdiction

over the Commission, we cannot examine the validity of the Regulations framed by the Commission, as we can only issue orders, instructions or directions to the Commission for the performance of its statutory functions under the Act. It is not a case, where the Commission has failed to perform its statutory functions."

In this view of the matter the validity of the Regulations cannot be determined by us in an appeal filed under Section 111 of the Act. The power to declare a regulation ultra vires of the provisions of the Act has not been vested by the Statute in the Tribunal.

17. As regards the issue pertaining to the alleged improper tariff-design-procedure raised by the appellant(s), and request for the removal of penalty for over drawl during the off-peak hours in-season and also in off-season periods, we do not consider the request to be justified and reasonable and therefore we decline the same.

18. In view of the aforesaid discussion, the matter needs to be remitted to the AERC to undertake the exercise mentioned in the following paras (a) to (c) and for deciding the issue afresh as detailed in para (d) below:

a) AERC to lay down principle and procedure for the future in stipulating the Fixed Cost and to determine fixed charges of the supplier which is to be recovered from the various class of consumers.

b) Target Availability seems to have been chosen arbitrarily as, neither is it defined in the Regulations nor it has been discussed/deliberated in the tariff proceedings. For the year 2005-06, a methodology be evolved.

c) AERC should itself clearly define availability considering the quality of the supply.

d) Disparities in Availability-based 'Fixed Charges' as provided in Tariff Order for the year 2005-06 and those computed based on Electricity Supply Code and Related Matters – Regulations are to be reconciled (Refer Para 11) and benefits be extended to the cases which qualify as per the provisions of the Regulations.

19. Accordingly, the matter is remitted to the AERC for a fresh decision in accordance with law in regard to the issue contained in para 18 (d) and for undertaking the exercise as stipulated above.

(A. A. Khan)
Technical Member

(Justice Anil Dev Singh)
Chairperson