BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 70 of 2007

Dated this *19th* day of *September*, 2007

Coram: Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Maharashtra State Electricity Distribution Co. Ltd.
Plot No. G-9, Prakashgad, Bandra (E),
Prof. Anant Kanekar Marg,
Mumbai – 400 051. … Appellant

Versus

Maharashtra Electricity Regulatory Commission
Through its Secretary
13th Floor, Center No.1,
World Trade Centre, Cuffe Parade;
Colaba, Mumbai – 400 005. … Respondent

For the Appellant : Mr. Ravi Prakash, Advocate
Mr. Amit Kapur, Advocate
Mr. Mansoor Ali Shoket, Advocate
Mr. Varun Aggarwal, Advocate

For Respondents : Mr. Buddy A. Ranganathan, Advocate
Mr. Arijit Maitra, Advocate

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

This appeal is directed against the order dated 23.04.2007 passed by Maharashtra Electricity Regulatory Commission (MERC for short) purportedly passed in exercise of power vested in the Commission under The Electricity Act 2003. The appellant is a successor of the erstwhile the Maharashtra State Electricity Board (MSEB) which was unbundled on 04th June, 2005 by a notification of the same date issued under the powers conferred by sub-section (2) of Section 131 of The Electricity Act 2003. The properties, rights and liabilities of the MSEB were vested in three different companies so as to separate the powers of generation, transmission and distribution. The appellant namely Maharashtra State Electricity Distribution Co. Ltd. was vested with the function of distribution of electricity. As per the Maharashtra Electricity Regulatory Commission (MERC) (Terms and Conditions of Tariff) Regulations 2005, the application for determination of tariff was required to be made to the Commission not less than 120 days before the date from when the tariff is intended to be made effective. The MERC introduced multi year tariff (MYT) regime from the FY 2006-07. However, the implementation of the MYT was deferred by one year. For determination of tariff for the control period beginning 01st April, 2007 the appellant was required to submit its tariff petition by 30th November, 2006. The appellant requested for extension of the time up to 31st January, 2007 vide a petition dated 30th

November, 2006. The principle ground on which the extension was sought was that the first tariff order after the formation of the appellant was passed on 20th October, 2006 which was to remain effective till 31st March, 2007 and the tariff order raised many complex issues which required a very detailed study and analysis before the next tariff petition could be filed. The petitioner also submitted, inter alia, that the implementation of tariff order dated 20th October, 2006 involved major issues including re-classification of consumers and had also introduced many new concepts and that some important issues were also required to be addressed before filing the MYT petition. The petitioner submitted that various figures were required to be reworked and the format of MYT was complex and data was voluminous and so the period in hand, being only one month. was not sufficient for presenting the MYT petition. The impugned order rejected the request of the appellant for extension of time and communicated the rejection of the petition for extension of time vide a letter dated 14th December, 2006. The tariff petition was filed on 29th December, 2006. The new MYT order was not promulgated till 31st March, 2007 although the MERC held technical validation session on 25.01.2007 and admitted the MYT petition of the appellant on 08th February, 2007. On 02.04.2007, the appellant submitted an application to the MERC requesting continuation of billing in the month of April, 2007 in terms of the orders passed by the respondent in Case No. 54 of 2005. The impugned order was passed on 23.04.2007 permitting the appellant to charge and issue bills to the consumers as per tariff order dated

10th October, 2006 but it also provided that in case the recovery was more than what could be warranted by MYT order, the over charged amount would be returned to the consumers but in case the amount was under-recovered no further recovery could be made from consumers to bridge the gap caused by under-recovery. It is this order which is under challenge in this appeal. The appellant contends that this order has led to a loss of Rs.88 Crores to the appellant. The MYT order was passed on 24.04.2007. The tariff for the three year period was higher than the period fixed by the earlier order dated 20th October, 2006. The appellant contends that billing based on the tariff order dated 20th October, 2006 for the period till the MYT was decided led to the under-recovery of Rs.88 Crores and the impugned order has thus caused a loss of Rs.88 Crores to the appellant. The respondent MERC defends its impugned order by filing a counter affidavit of its Secretary. It is contended in the reply that the Commission is bound by the tariff policy which included the guidelines for the MYT framework in paragraph 8.1 under which the gap in question has to be on account of the licensee. The relevant portion of the policy relied by the MERC is as under :

> "8.1.(7). Appropriate Commissions should initiate tariff determination and regulatory scrutiny *on a suo moto basis in case the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year*

and ***any gap on account of delay in filing should be on account of licensee****."*
[Emphasis added]

2. The MERC reiterates the impugned order by reproducing the same in the counter affidavit. The impugned order decides several petitions of like nature filed by several distribution licensees in the State. The MERC considered the grounds given by the licensees as "*far from convincing and satisfactory besides being frivolous*". The grounds which were rejected are listed as (a) hard disc crash, (b)un-prepared and (c) data unavailability. The ground of hard disc crash is discarded because the business runs on integrated sap platform. The ground of being un-prepared is discarded as the last date of filing was known in November-December, 2005. The ground of data un-availability was found to be frivolous as half yearly corporate result was being published as part of stock listing requirements. The Commission said "*in the circumstances the Commission is of the view that the brunt of under-recovery, if any, or financial implications, caused solely due to late submission of the MYT applications by the licensees should not be passed on to the hapless consumers and it is the licensee who should internalise and bear the same*". It further said "*while submitting data for truing up, the licensees should submit revenue data separately for the period from 01st April, 2007 to the date till existing tariff are being levied and for the balance period for the FY 2007-08.*"

3. We have heard counsel for the parties and have considered their submissions carefully. The impugned order makes no reference to paragraph 8.1.7 of the tariff policy. However, it is understandable that since the MYT itself was being fixed under the tariff policy, the provision of 8.1.7 was before the Commission while the petition of the appellant as well as all other distribution licensees to continue to charge the existing tariff was being considered. The question before us therefore is whether the MERC could have imposed the condition it did so as to deny the revenue gap for the month of April 2007 to the appellant forcing it to suffer the huge loss of Rs.88 Crores on account of delay of approximately one month in filing its ARR.

4. It is contended on behalf of MERC, during arguments, that the sum of Rs.88 Crores should not be considered to be a loss to the appellant because the appellant earns profit out of its business and the return to equity is calculated at 16%. This understanding, however, cannot be taken as correct. The return on equity at 16% has been considered to be a reasonable return of equity and such a return forms a part of cost for supply of electricity to the consumer and cannot be deployed to off set against the expenditure of Rs.88 Crores which the consumers would have anyway borne if the ARR was submitted in time.

5. We now proceed to examine the tariff policy, paragraph 8.1.7 as extracted above. In our opinion the entire paragraph has to be

read to interpret the expression given therein. The intention of the government in this part of the tariff policy is to maintain discipline in the matter of date of commencement of every new tariff. The policy says that it is desirable that MYT tariff should come to effect in the beginning of the financial year. The policy does not say that the tariff changes will come into effect at the commencement of the financial year irrespective of any prohibitive situation that may arise for various reasons. There can be no quarrel that if the tariff changes take place at the beginning of the financial year it becomes convenient for all the players in the electricity market as well as for the end consumers. In order to make this possible an advice is given to Appropriate Commissions to initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. However, suo moto initiation of tariff determination may not be an easy process. A large amount of data is required for determination of tariff. Without a tariff petition being filed by a licensee the Appropriate Commission may find it quite difficult to collect and collate the necessary data and to fix a tariff. If the appropriate Commission is able to so determine the tariff on suo moto scrutiny, the same may be different from the tariff which could have been framed on an ARR and tariff petition with relevant data filed by a licensee. It is in this context that the tariff policy says that if there is a gap of this nature the licensee should be made to bear the same. This provision has been made to discourage the licensee from delaying its tariff petition and for

compelling the Appropriate Commission to go into suo moto determination of tariff in the next financial year.

6. Undoubtedly, the suo moto tariff determination will commence only if the ARR filing is inordinately delayed. It is not expected that whenever ARR filing is delayed the Appropriate Commission would suo moto start initiating the exercise of tariff determination. In our considered view the last clause of para 8.1.7 of the tariff policy comes into play only when the ARR filing is so enormously delayed that the appropriate Commission is made to issue a tariff on its own suo moto regulatory scrutiny.

7. Further "any gap" on account of delay in filing has to be properly understood. The tariff policy is silent about the meaning and calculation of "gap". The sole aim of tariff fixation by an independent body like the Appropriate Commission is to ensure viability of the licensees while maintaining a reasonable price for the consumer. Therefore, the cost of supply has to be met out of revenue earned by sale of electricity. In case the MYT tariff comes into effect a month later than the day on which it was expected, the required annual revenue minus the revenue realized in that month will have to be recovered in the remaining months of that period. In such a situation the increased cost of the new period will have to be distributed over the remaining period of the MYT. The other way of fixing the tariff, in case of a delay, would be to distribute the ARR over the entire tariff period so that some amount of revenue for the

delayed period remains under-recovered. Here again the under-recovered amount has to be recovered in order to maintain the viability of the licensee. However, if the under-recovery caused by increase in tariff is recovered in the rest of the MYT period a carrying cost will be involved. This carrying cost will be an additional burden which, in all fairness, should not be imposed on the consumer and has to be on account of the licensee.

8. In the present case the gap between the beginning of the FY and the date when the new MYT becomes effective is nearly a month. The loss of revenue in this given situation is Rs.88 Crores. This loss could be much higher if the delay in tariff fixation had been longer. In a given situation, if the licensee is unable to file the ARR petition due to some reasons will it be proper to say that tariff policy requires such difference to be denied to the licensee forever? The answer clearly is 'NO'. All that can be denied to a licensee in this situation is the carrying cost and not the legitimate claim towards revenue.

9. It has to be understood that the consumer has to pay for the electricity supplied to him. As per Section 61 of The Electricity Act 2003 the Appropriate Commission fixes the tariff safeguarding, inter alia, interest of consumers and at the same time, recovery of cost of electricity in a reasonable manner. Therefore, there is nothing unjust in recovering the sheer cost of supply of electricity from the consumers. It is not an additional burden on the

consumer. The consumer in the present example would have paid the same tariff had the ARR and tariff petition been filed in time. Only, the tariff order comes into effect a month later. The expression used by the Commission namely "financial implications caused solely due to late submission of MYT applications by the licensees should not be passed on to the hapless consumers" indicates misplaced sympathy. In case consumer is made to pay more than the cost of supply he can be described as hapless. Secondly the financial implication caused solely due to late submission is only the delay in recovery and not the increase in tariff. It is not the case of the MERC that the tariff has gone up because of late filing. Only the determination of tariff is delayed because of late filing. The financial implication of the delay is nothing but the carrying cost. The consumer cannot be burdened with this resulting carrying cost because the delay has not been caused on account of their default.

10. In view of the above, we allow the appeal and set aside the impugned order of 22nd April, 2007. The MERC will now pass appropriate orders, making it possible for the appellant to recover the amount denied to it by the impugned order, either through the process of truing up or by the process of revision in tariff.

Pronounced in open court on this 19th day of Sept., 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End