BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 71 of 2007

Dated: 04.05.2009

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

IN THE MATTER OF:

Maharashtra State Electricity Distribution Co. Ltd.
Prakashghad,
Plot No. G-9, Bandra (East)
Mumbai – 400 051. … Appellant

Versus

1. **Maharashtra Electricity Regulatory Commission**
Mumbai, 13th Floor,
World Trade Centre,
Cuff Parade,
Mumbai – 400 005.

2. **Prayas Energy Group, 4**
Om Krishna Kunj Society,
Opp. Kamla Nehru Park,
Ganagote Path,
Erandavane,
Pune – 411 004.

3. **Mumbai Grahak Panchayat**
Grahak Bhavan,
Sant Dyaneshwar Marg,
Behind Cooper Hospital,

Vile Parle (W),
Mumbai – 400 056.

4. **Thane Belapur Industrial Association**
Plot No. P-14, MIDC,
Rabale Village,
P. O. Ghasoli,
Navi Mumbai – 400 701.

5. **Vidarbha Industries Association**
1st Floor, Udyog Bhavan,
Civil Lines,
Nagpur – 440 001. … Respondents

Counsel for the appellant : Mr. Vikas Singh, Mr. Amit Kapur, Mr. Ravi Prakash, Ms. Amrita Narayan, Mr. Varun Aggarwal, Mr. Avijit Lala, Mr. Abhijeet, Mr. Apoorva Misra, Mr. Vikrant Ghumare, Mr. Rahul Sinha

Counsel for respondents : Mr. Jayant Bhushan, Sr. Adv. Mr. Buddy A. Ranganadhan, Mr. Mragank Sharma, Mr. Arijit Maitra, Mr. A. Mathur

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

The present appeal is directed against the order of the Maharashtra State Electricity Regulatory Commission, the Commission for short, dated 20th October, 2006, in case No. 54 of

2005 determining distribution tariff for the appellant which is a distribution licensee in the State of Maharashtra for the year 2006-07 as well as against the order dated 07.02.07 passed in the review petition filed by the appellant.

Facts in brief:

2) The only issue which has been pressed in this appeal is the disapproval of Rs.96 Crores, which the appellant had incurred on short term power purchase cost on the plea that the appellant had incurred that expenditure in violation of the principles of protocols of load shedding. The appellant, MSEDCL, was constrained to undertake load shedding on account of acute shortage of power in the State of Maharashtra at the relevant time. The indiscriminate load shedding led to certain litigations. The Supreme Court vide an order dated 13.05.05 directed that the load shedding should be undertaken by the appellant in consultation with the Commission. The Commission passed certain orders in this regard. The order relevant for us is the one dated 10.01.06 in which the Commission recognized that the load shedding for industrial consumers was very disruptive to the industries in the State which would affect the economy of the State and ultimately the common man. The Commission ordered that industries would not suffer any daily load shedding though in certain areas industries were subjected to a single staggering day of no power every week. In this order the Commission also introduced the concept of load regulation for HT

industrial consumers. It, *inter alia*, directed that HT non-continuous industries have to restrict monthly consumption to less than or equal to 80% of their average consumption over the past three months in MU terms, while the HT continuous industries have to restrict monthly consumption to less than or equal to 90% of their average consumption over the same period. It then said "*in case the stipulated target is not achieved by the end of February 2006, the entire MIDC area or the dedicated feeder will be subjected to an additional day of no-supply during the week, from the beginning of March, 2006.*" On the proposal of the appellant, to increase the load shedding from 8 hours to 12 hours, the Commission directed "*hence the Commission, very reluctantly permits the increasing of sealing to 12 hours considering that the permission is being granted primarily to avoid EHV opening, MSIDCL should ensure that EHV openings are not undertaken, except in emergency situation such as failure of a generating station etc.*" The Commission further advised the Government of Maharashtra to support the appellant by additional financial support for purchase of power as surplus power was available with the captive generating stations as well as from other sources outside the State namely Kawas generating station owned by NTPC. In the tariff petition the appellant had projected a total power purchase of 78453 MUs at a cost of Rs.17,359/- Crores. The Commission, however, calculated that a total power required to be purchased was only 75206 MUs and approved a power purchase expense after deducting from the

total estimated cost of 5418 Units of costly power which was proposed to be purchased at the cost of Rs.4/- per unit. In making these calculations the Commission adjusted the impact of non-implementation of second off day in the period of March, 2006 for continuous and non-continuous industries. Total power purchase expenses disallowed on account of impact of non-implementation of second staggering load shedding day amounted to Rs.96/- Crores. The Commission made the following observations about the cost of procurement of additional power in violation of the load shedding protocol and load Regulation:

> "*The Commission has noted that, despite the load regulation, MSEDCL so far, has not strictly implemented the protocol of second off day for consumers violating the load regulation. Considering that this has contributed to procuring additional power from costly sources, the Commission has disallowed power purchase expenses to the extent of violation of load regulation for the period March to September 2006.*"

> *"The total consumption owing to violation of Load Regulation as determined would amount to 215 MU. For estimating the expenses corresponding to this power purchase, the Commission has considered the power purchase rates of marginal stations for each month.*

Accordingly, power purchase rate of Kawas-Liquid was considered for March 2006 as per the FAC Order and for the period starting April 2006 to September 2006, average power purchase rate of RGPPL has been considered"

3) Based on the above mentioned approach, the Commission has determined the related power purchase expenses as given below:

Table 49 Impact of Second Off Day

Month	**Total MU disallowed**	**Power Purchase rate (Rs./Unit)**	**Power purchase Cost (in Rs. Crore)**
March 2006	28.97	6.60	19
April 2006	32.03	4.63	15
May 2006	31.64	4.63	15
June 2006	32.74	4.63	6
July 2006	30.76	4.63	14
August 2006	29.61	4.63	14
September 2006	28.99	4.63	13
Total	**215**		**96**

The Commission has therefore, decided that the power purchase of 215 MU and the related power purchase expense of Rs.96 Crore that was incurred by MSEDCL on account of violation of Load Regulation by Continuous and Non continuous industries till the month of September 2006, should be disallowed and has hence, reduced the power purchase cost to this extent."

4) The appellant filed a petition for review which was disposed of vide the second impugned order dated 02.02.07. The appellant contended therein that the second staggering day of load shedding for the industries could not be implemented due to difficulty in cutting off supply to industrial consumers having continuous production as: (a) such consumers are connected to composite feeders in MIDC areas and / or mixed feeders; (b) cutting-off supply may have created labour problems; and (c) cutting-off supply impacts the State's economy.

5) The petitioner further contended that the petitioner had already contracted in advance with electricity traders and suppliers for power supply for its consumers and power purchase had already been made and therefore disallowance of short term power purchase cost results in adverse financial implications on the petitioner. The appellant further contended that the revenue earned from consumers other than HT consumers were comparatively too low to off set the cost incurred on power purchase that has been made. The appellant therefore, contended that the disallowance of short term power purchase cost of Rs.96 Crores be reconsidered. The appellant also contended that it had no intention of not complying with the Commission's directives. The Commission, however, rejected the review petition on the ground that no ground for review has been made out. The Commission further lamented that when the orders in respect of load shedding

measures were being passed the appellant did not cite any difficulty in implementation of measures so proposed and that the appellant was violating the Commission's order on flimsy grounds.

6) The appellant filed an additional affidavit and contended, inter alia, that the demand-supply imbalance had been regulated during the period of March, 2006 to September, 2006 and there was no need for load shedding for more than 12 hours in any category of consumers. According to the appellant in this view the need to put into motion the dispensation of second staggering day off was not attracted at all. During June to September 2006 qua the Commission's protocol the position that emerged was that on certain dates there was no load shedding and on other days the load shedding protocol were partly implemented and on no occasion EHV opening was necessary for the period of June to September, 2006. The appellant therefore, prayed that the Commission should appreciate the efforts made for battling such grave imbalance and condone the violations of protocol, if any, rather than taking the punitive measure of disallowance of Rs.96 Crores.

<u>The challenge to the impugned order:</u>

7) The appellant has crystalised its challenge to the two impugned orders in its written submissions. The challenge to the two impugned orders, as made out in these written submissions are as under:

8) The Commission ordered for the second staggering off day very reluctantly and only as a measure of meeting acute shortage faced by the State. The period relevant for the purpose of the present appeal is 01st April, 2006 to September, 2006. The second staggering off day was not implemented by the appellant but it did not thereby adversely affect the power supply to any other category of consumers. The appellant with its effort could make available more power for the State and accordingly it was no more necessary to implement the second staggering day of load shedding. Therefore it was not necessary for the Commission to disallow the power purchase cost to the extent of Rs.96 Crores.

9) The appellant further contends that in the load shedding protocol the Commission did not provide for the eventuality of there being surplus power available. Therefore, whenever more power was available the appellant could not be made to obey the load shedding protocol. Since the Commission had not provided apportionment of additional availability of power the Commission should not take any exception if the additional available power was supplied to a section of consumers on nondiscriminatory basis i.e. to the entire industrial sector.

10) The appellant further contends that the Commission had approved the purchase of additional power from NTPC, kawas based

plant with Naphtha as fuel and Commission found justification for purchase of such power but it disallowed the very same expense as being the costliest power which has been attributed towards supply to industry in order not to implement the second staggering day of load shedding. It is further contended that power has been purchased from the approved sources and at an approved price. Therefore, the appellant says that it was justified in purchasing the power to be supplied without the load shedding for the second staggering day without adverse consequences on any other category of consumers. The appellant further contends that the linking of power from costliest sources to supply being made to industry for not implementing the second staggering day is not permissible in any law since entire power purchase comes to the basket of State and no particular supply could be linked to any particular purchase. Finally it is submitted that even if the load shedding protocol is found to have been violated, no penal action could be taken while determining the ARR and tariff.

Commission's reply:

11) The Commission has filed a counter affidavit and additional counter affidavit to meet certain allegations made in the affidavit of the appellant. The Commission has refuted the challenges made to the impugned order and has reiterated that the order is just and fair. In response to the additional affidavit the Commission contends that the facts alleged therein were never submitted to the

Commission. However, the Commission also examined the data submitted by the appellant and came out with the finding that the demand-supply gap during the morning peak exceeded 4500 MW only on two occasions in the relevant period namely on 01st March, 2006 and 11th February, 2006 and there was no occasion of exceeding the gap by 4500 MW for the evening peak. The Commission further conceded that in accordance to the extant principles and protocol for load shedding the ceiling hours of load shedding was specified as 12 hours for any category/region for demand-supply gap of around 4500 MW. The Commission said further: *"since the demand-supply gap has been below 4500 MW for almost the entire period under consideration, namely viz., March to September 2006 there would have been no requirement to undertake load shedding for more than 12 hours for any category / region."* Nonetheless, the Commission contends that there was an infringement of the Commission's order and power procurement expenses in violation of Commission's order dated 10.01.06 cannot be recovered by the appellant through tariff.

12) The Commission has also crystalised its submissions by filing written submissions justifying the disallowance of Rs.96 Crores. It is contended that the Commission had expressly prohibited the incurring of cost for supplying without adhering to the load shedding protocol and therefore the consequences of violation should follow. The Commission also quotes the provision of section

142 of the Electricity Act 2003 which prescribes for penalty for violating the Commission's order. It contends that the penalty prescribed under section 142 was too low to meet with the gravity of the conduct and would not have been sufficient deterrent for disobedience of Commission's order. The Commission further contends that the licensee cannot be allowed to openly flout the orders of the Regulatory Commission and cannot be allowed to benefit itself from violation of such order.

Decision with reasons:

13) We have carefully considered the views expressed by the two sides and examined the facts placed before us. The alleged difficulties in implementing the load shedding protocol, as reproduced in paragraph 4 above, can certainly not be valid excuses for violating the protocol. Yet we are unable to approve of the action taken by the Commission to deal with the violation. The striking feature of this case is that the disallowance of Rs.96 Crores is in the nature of penalty, not on account of inefficiency but on account of an act perceived as disobedience. The purpose of determining the ARR and designing the tariff is to regulate power purchase, supply and distribution in an equitable manner so that the consumer is able to get the power at the price reflecting the cost while the distributor is able to recover the cost of supply along with the normal profit. The sole attention of the Commission while doing this exercise is to balance the cost of procurement and the revenue.

The Commission has to be alert all the time that no distribution licensee is able to pass on to the consumers any cost unwisely or inefficiently incurred. At the same time the Commission has to see that the distribution licensee can survive in the business by getting the due returns and the cost. The Commission has to be entirely objective, dispassionate and professional in its approach in doing this tedious exercise. The Electricity Act has sufficient provision for handling the situation of disobedience. As already mentioned above, section 142, gives the Commission, power for punishment in such a situation. The Commission is a creation of the statute. Even if such power given is considered by the Commission to be insufficient the Commission cannot convert its power of tariff fixation given by section 61 and 62 of the Electricity Act 2003 into a proceeding for imposing penalty. Accordingly we will proceed to examine this case from the view of ARR and tariff fixation, not with a view to analyse what punishment should be inflicted on the appellant on account of disobedience, if at all, to comply with the Commission's order for implementing the second staggering day of load shedding. In the first place, as already mentioned above, the demand-supply gap which had necessitated passing of the load shedding protocol had been largely bridged. In the load shedding protocol order of 10.01.06 the Commission, inter alia, said the following:

"(iv) The Commission has debated the effectiveness of introducing a second staggering no-supply day for HT industrial category, in view of the huge shortfall. There is no denying that when the situation has reached such critical proportions, all the consumer categories have to share the load shedding impact to some extent. At the same time, load shedding to industrial category is disruptive and will adversely affect the contribution of the industrial sector to the State's economy, and eventually the common man, in terms of employment. Moreover, the Commission has always propagated voluntary load regulation rather than load shedding. Hence, rather than introducing another staggering day or introducing 3 to 4 hours daily load shedding for HT industrial consumers located in MIDC areas and/or served by dedicated feeders, the Commission has introduced the concept of load regulation.

(v) HT non-continuous industries have to restrict their monthly consumption to less than or equal to 80% of their average monthly consumption over the past three months, in MU terms. Similarly, HT continuous industries have to restrict their monthly consumption to less than or equal to 90% of their average monthly

consumption over the past three months, in MU terms. In case the stipulated target is not achieved by the end of February 2006, the entire MIDC area or the dedicated feeder will be subjected to an additional day of no-supply during the week, from the beginning of March 2006. The basis and the justification for this load regulation has been elaborated in another Order being issued by the Commission on MSEDCL's proposal under S.23 of the EA 2003.

(vi) The Commission is extremely unhappy with the situation, wherein it does not have any choice but to permit the increase in ceiling hours of load shedding to 12 hours. In fact, it is a fait accompli, with the MSEDCL having already implemented the revised protocol proposed in the Petition, before obtaining the Commission's approval of the same. Such action would normally invite sanction, however, in this case, it has been condoned in view of the fact that the alternative would have been EHV openings.

(vii) The Commission is of the opinion that 8 hours of load shedding itself is very high, and permitting load shedding for a maximum of 12 hours goes against

the Commission's philosophy. At the same time, the Commission also has to bear in mind that if the Commission does not permit the higher ceiling of 12 hours, MSEDCL will resort to EHV openings, as it has been doing in the past, in order to maintain grid security. EHV openings, by their very nature, are done under emergency conditions, are not scheduled and are very disruptive, as the consumers will not be able to plan their activities. Hence, the Commission, very reluctantly permits the increasing the ceiling to 12 hours. Considering that the permission is being granted primarily to avoid EHV openings, MSEDCL should ensure that EHV openings are not undertaken, except in emergency situations such as failure of a generating station, etc. Further, MSEDCL should submit a Report on all such incidences of EHV openings, on a weekly basis, to the Commission, giving reasons for the EHV opening. If there are no EHV openings, a 'NIL' Report should be submitted."

14) The order reflects how reluctantly the Commission directed the second staggering day of load shedding and how happy the Commission would have been if the demand-supply gap could be bridged so as to obviate such load shedding. The demand-supply gap could be bridged if the industrial

consumers could reduce their average consumption to 80% or 90%. The gap could equally be bridged if power procurement within reasonable cost was permissible. Has the purchase of power been made at the price which is too expensive? The Commission does not say that the appellant purchased the power, equivalent to the power which could be saved if the second staggering day of load shedding had been observed, at the price which was exorbitant. The Commission merely says had the second staggering day of load shedding been implemented the total purchase of power would have been reduced by 215 MUs. The Commission calculated the price of 215 MUs at the purchase rates of marginal stations and thus held that the appellant should be denied Rs.96 Crores incurred for supplying power in violation of the load shedding protocol.

15) While calculating this cost of Rs.96 Crores for the additional power of 215 MUs purchased, the Commission has taken the marginal rates that is the highest rate of the day. However, we have taken the view in our earlier judgment in Appeal No. 124 of 2006, *Kashivishwanath Steels Ltd. Versus Uttaranchal Electricity Regulatory Commission and Others, dated 02nd June, 2006* that the tariff for the power intensive units will be based on the pooled average cost of power rather than at the marginal rate on the excuse that the purchases at

marginal rates had been occasioned on account of the increased demand of the PIUs. The idea behind the order was that no particular category of consumer can be burdened with the marginal cost of power purchase. If that view is introduced in the present case, even if the Commission was to deny the price of 215 MUs it could only calculate the cost at an average pooled cost and not at marginal cost.

16) Be that as it may the revenue earned by supplying the 215 units has been duly included in the ARR calculation. Therefore, there is no reason why the price of the 215 MUs units should not also go into the calculation of ARR. One could perhaps say that the appellant would not be granted the price of 215 MUs units had it led to a loss to the appellant. There is however, no such case.

17) It is not the case of the Commission that any supply to other category of consumer was reduced in any way for supplying electricity to the HT consumers. Had such been the case it would certainly have been a grave concern. The appellant has provided the power to all other consumers as was due to them, subject however to the load shedding protocol, although it could make possible the supply to the HT consumers by procurement of additional power. We do not

think that in this situation the Commission was justified in denying the cost of power supplied to the industries.

18) Finally one has to see that the Commission's order for load shedding was an extreme step to meet with the shortage scenario and was not an absolute order which was required to be complied with even if the shortage scenario was wiped out for any reason. The load shedding protocol made no provision for dealing with a situation of reduced demand-supply gap. It will be too technical to say that whenever there was improvement in the supply situation the appellant was required to seek the approval of the Commission for distributing the available power or else deprive the consumers the benefit of the available power. It could not have been the intention of the Commission, when it passed the order dated 10.01.06, that even if there was no gap in the demand and supply situation the consumers be deprived of electricity merely for the sake of adhering to the load shedding protocol

19) In view of the above premises we are constrained to say that it was a mistake on the part of the Commission to disallow Rs.96 Crores to the appellant as pass through in tariff. We therefore, set aside the impugned order and allow the appeal and direct that the sum of Rs.96 Crores denied to the appellant be allowed in its ARR to be recovered through

tariff. The effect of this order be given during the truing up exercise and in the tariff fixation for the ensuing tariff period.

20) Pronounced in open court on this ***04th day of May, 2009.***

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member