

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 229 of 2006

Dated this 04th day of May, 2007

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

IN THE MATTER OF:

Vidarbha Industries Association ... Appellant
1st Floor, Udhyog Bhavan,
Civil Lines, Nagpur

Versus

1. Maharashtra State Electricity Distribution Co. Ltd.
Hongcong Buildig,
Fort, Mumbai
2. Maharashtra Electricity Regulatory Commission,
13th Floor, World Trade Centre,
Cuff Parade, Mumbai ... Respondents

Counsel for the Appellant : Mr. G. B. Lohia, Advocate
Mr. Vikram Saluja, Advocate
Mr. Satyajit A. Desai, Advocate
Mrs. Anagha S. Desai, Advocate
Mr. Amol Suryavanshi, Advocate

Counsel for Respondents: Mr. Jayant Bhushan, Sr. Adv.,
Mr. Buddy A. Ranganadhan,
Advocate
Mr. Arijit Maitra, Advocate
Ms. Valanka Alemao, Advocate for
MERC, Respondent No.2

Mrs. Deepa Chawan, Advocate
Ms. Alpana Dhake, Advocate
Mr. Shaiwal Shrivastav, Advocate
for MSEDCL, Respondent No.1

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1. The present appeal is directed against the order of the Maharashtra Electricity Regulatory Commission (MERC or Commission for short) in respect of Fuel Adjustment Charges (FAC) for the month of May, 2006 as communicated to the Maharashtra State Electricity Distribution Co. Ltd. the respondent No.1 vide letter dated 09th August, 2006. The Maharashtra Electricity Regulatory Commission (MERC) is the respondent No.2 in the present appeal. Both the respondents challenge the appeal, inter alia on the ground of maintainability. Arguments were heard limited to the question of maintainability. The judgment on this point was reserved after the conclusion of hearing on 26th April, 2007.
2. Facts necessary to deal with the preliminary question of maintainability are arrayed below :

The respondent No.2 framed the MERC (Terms and Conditions of Tariff) Regulations 2005 on 24th August, 2005 (hereinafter referred to as the Regulations). Regulation 82

of the Regulations dealt with fuel surcharge adjustment. Regulation 82.5 gave the formula for calculation of Fuel Adjustment Charge (Fuel Adjustment Cost). Regulation 2.6 provided that monthly FAC charge provide will be as under :

“82.6 *The monthly FAC charge shall not exceed 10% of the variable component of tariff, or such other ceiling as may be stipulated by the Commission from time to time.*

Provided that any excess in the FAC charge over the above ceiling shall be carried forward by the Distribution Licensee and shall be recovered over such future period as may be directed by the Commission.”

3. The respondent No. 1 filed a petition for review of Regulation 82.6 praying for the removal of the cap of 10%. This petition was decided vide an order dated 21.03.2006. The prayer in the petition for review of Regulations were as under :

“2. *The prayers in the Petition are, inter alia :*

- a) *“Examine the concerns expressed by the Petitioner for a favourable dispensation as detailed in the Petition.*

- b) *In view of the various reasons explained in the Petition, it is respectfully submitted that the Commission may approve the removal of cap on FAC Charges recovery taking into consideration the fuel cost variations and power purchases for full eligible amounts.*

- c) *The Commission may kindly consider this Petition expeditiously due to the severe liquidity problems being faced by MSEDCL and approve the removal of cap on FAC Charges recovery to ensure that MSEDCL mitigates the load shedding problem in that State to the extent possible.*

- d) *Condone any*

- e) *Pass such..... ”*

4. In order to support the prayer for removal of the cap of 10% the respondent No.1 pleaded, inter alia, that due to shortage of power it was compelled to tap every available source irrespective of price, that it has entered into an agreement to purchase 545 MW of power from NTPC's Kawas and Gandhar Power Station which are expected to cost around Rs.7.45 per unit based on naphtha, that it had spent Rs.1,060 Crore from April to December 2005 for additional purchase of high cost power, that the FAC mechanism provided by Regulation with a cap of 10% of energy charges

was grossly inadequate to compensate for extra financial burden and that it was not possible to recover the power purchase cost through the given FAC mechanism. The respondent No.1 further pointed out that the Regulation 82.6 itself contemplated that ceiling other than 10% of the variable component of tariff could be fixed by respondent No.2, Commission. On demand of the respondent No.2, Commission, the respondent No.1 submitted various details of power purchase for the relevant period. The Commission heard the matter in the presence of authorized consumer representatives and other distribution licensees on 08th March 2006. The petitioner namely Vidarbha Industries Association was also one of the parties to whom notice of hearing had been duly served. The Commission disposed of the review petition by detailed speaking order dated 21st March, 2006. The part of the order which is relevant for the purpose of the present judgment is extracted below :

“35. Based on actual FAC per unit for the month of September 2005 as approved by the Commission and the FAC per unit to be charged to the consumers based on generation and power purchase cost data submitted by MSEDCL, the Commission is of the opinion that there is a need to modify the FAC ceiling to improve the liquidity position of MSEDCL and to enable MSEDCL to continue the short term power purchase to mitigate the load shedding to the extent possible. Considering the

quantum of FAC to be recovered based on data submitted by MSEDCL the enhancement of ceiling from 10% of variable charge to say 20% of variable charge will not suffice. However, it may not be appropriate to completely remove the FAC ceiling and permit MSEDCL to levy a substantial high charge as FAC to consumers, without prior approval of the Commission.

36. The Commission will approve the FAC to be recovered by MSEDCL in excess of existing ceiling on recovery through FAC charge, i.e. 10% of variable charge, after detailed vetting of the actual FAC data on case-to-case basis. However, this mechanism will only be applicable in case of MSEDCL till the Commission issues the Order on ARR and Tariff of MSEDCL for FY 2006-07. MSEDCL has already filed the ARR Petition for FY 2006-07 and the Commission will consider the same while determining the power purchase costs of MSEDCL.

37. The Commission directs the MSEDCL to submit the details of FAC Computations in the formats prescribed by the Commission for vetting for the period October 2005 to January 2006 by 25th March 2006. For subsequent months, i.e. from February 2006, the MSEDCL should submit the details of FAC computations for vetting in a timely manner, if it is serious to mitigate its projected liquidity problems. The Commission, after vetting the FAC computations submitted by MSEDCL,

will approve the FAC charge to be recovered in excess of the existing FAC cap.

38. *The Commission also directs MSEDCL to submit a Petition for post facto approval of short-term power purchase for the period October 2005 to March 2006 and submit a separate Petition for prior approval of short term power purchase for the next quarter i.e. April 2006 to June 2006 by 25th March, 2006.*

With this Order, the Commission disposes the Application of Maharashtra State Electricity Distribution Company Limited.”

5. In compliance with the direction contained in order dated 31.03.2006, extracted above, the respondent No.1, on 25.07.2006 sought approval of the Commission for levy of the FAC for the month of May, 2006 to be recovered in August 2006. The MERC then communicated this approval in respect of levy of MSE by respondent No.1 for the month of May, 2006 to be recovered in August, 2006 vide its communication dated 09.08.2006 which is impugned in the present appeal. The impugned order/communication conveys the approval of the Commission for the levy of FAC for the month of May, 2006 to be recovered in August, 2006 after considering the increase in the power purchase cost for the month of May, 2006 only in case of approved power sources as per tariff order dated 10th March, 2004 and in

line with the Commission's vetting report dated 06th July, 2006. The communication also shows that the Commission had earlier conveyed vide its letter dated 05th May, 2006 the details of arrear and recovery during October 2005 to February 2006, interest allowed on the same and the recovery of the same in the billing month of July, August and September, 2006. The communication further discloses that respondent No.1 had incurred a bill amount for the month of May 2006 as Rs. 313.08 Crore as against estimated amount of Rs. 384.34 Crore. The Commission also directed respondent No.1 to submit audited billed amount details pertaining to the FAC for the month of August 2003. The Commission revised the arrear under recovery for the period of September, 2005 to February 2006 to Rs. 555.74 Crore out of which an amount of 338.58 Crore had already been recovered in the month of June 2006 and July 2006. The Commission then said as under :

“The balance amount of Rs. 217.16 Crore and Rs. 1.56 interest thereon is allowed to be recovered in billing month of August, 06. The details are given in Table A of the annexure. The month wise recovery of arrear under-recovery along with the interest thereof is detailed in Table B of the annexure.

The total amount allowed to be recovered in the billing month of August 2006, is Rs. 440.77 Crore and is as detailed below:-

No.	Sr. Particulars	As per MSEDCL	Allowed by Commission
1	FAC of May 2006 net of T&D loss	355.87	222.95
2	Arrear under recovery for the period September 2005 to February 2006	217.16	217.16
3	Balance Interest on arrear under recovery for the period September 2005 to January 2006	1.16	1.56
	Total	574.19	440.77

The Commission hereby allows FAC rate @ 103 paise/unit for May 2006 to be billed in the month of August, 2006 consisting of 52 paise/unit towards increase in fuel cost in the month of May 2006 and 51 paise/unit on account of arrear under-recovery and interest thereof. Also the matter of recovery of arrear under-recovery for the period September 2005 to February 2006 stands disposed.”

6. The order was communicated to the consumer bodies including the President of the petitioner.
7. On behalf of the respondents it is submitted that the impugned communication is only implementation of the order dated 21st March, 2006 whereby the petition of the respondent No.1 in respect of reviewing the cap of 10% was disposed of. This order, the respondents submit, has not been challenged in any bill and therefore has become final.

The impugned communication does nothing other than putting the order dated 21st March, 2006 into effect. It is contended by respondents further that so long as the order dated 21st March, 2006 remains in force the challenge against the impugned communication is incompetent and not maintainable. On behalf of petitioner it is contended that the respondent No.1 in fact has been purchasing power from sources at a much higher costs than what could be purchased from other cheaper sources and is accordingly putting the consumer to loss by charging higher fuel surcharge. It is also contended on behalf of the appellants that the impugned communication dated 09th August, 2006 can be challenged independent of the order of 21st March, 2006 and therefore the present appeal is maintainable.

8. On considering the submissions of the two sides we find force in the submission of respondents. The petitioner is unable to challenge the impugned communication dated 09th August, 2006 without challenging the order dated 21st March, 2006. This is clear from the memorandum of appeal itself. The memorandum of appeal says that the order of review dated 21st March, 2006 was harsh and not justified as there was no cause for reviewing the original cap of 10%. The appellant then proceeds to say that in May, 2006 the application of the respondent No.1 was allowed by the respondent No.2 and the amount was directed to be recovered by the impugned communication and so the

appeal. The appellant then says the order dated 09th August was bad because :

- (1) The order was passed without hearing the representatives of the consumers as was required before passing the tariff order,
- (2) Tariff order should not ordinarily be revised more than once in a tariff year,
- (3) The impugned order amounts to revision of part of tariff under the garb of increase in terms of fuel surcharge formula,
- (4) Removal of cap of 10% is illegal,
- (5) The respondent No.1 has added power purchase cost under the garb of increase in fuel cost.

9. There are certain other grounds which are not necessary to be detailed here. The first two grounds relate to the procedure adopted for the impugned communication while the last three grounds relate to the merit of the order of 21.03.2006. The impugned communication is not a tariff order and so there is no force in the plea that the procedure for passing a tariff order should have been followed before issuing the impugned communication. Coming to the objections regarding the validity of the removal of cap of 10% and power purchase cost being treated as fuel surcharge or increase in tariff on that account, one can easily see that both the aspects were carefully examined by the Commission in its order of 31.03.2006 and the ruling of

the Commission on these aspects are actually the meat of that order. As can be seen from Para 35 of the order of 21st March, 2006, extracted in paragraph 4 above, the respondent No.2 observed that there was need to modify the FAC ceiling to improve the liquidity position of respondent No.1 so as to enable respondent No.1 to continue the short term power purchase to mitigate the load shedding to the extent possible. The order dated 21st March, 2006 has mostly referred to the cost of power purchase and not the hike in the cost of fuel. The appellant could have challenged the order dated 21st March, 2006 in case the appellant felt that approach of the Commission in this regard was bad. The appellant having omitted to do so cannot raise the same challenge when the order of 21st March, 2006 is implemented vide the impugned communication. So long as the order dated 21st March, 2006 stands, no challenge can be made to the impugned communication. We are in agreement with counsel of the respondents that the present appeal is incompetent for this reason.

10. Accordingly the appeal is dismissed.

Pronounced in open court on this 04th day of May, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member