Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 223 of 2006

Dated the October 4, 2007.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

M.P. Electricity Consumers' Society
C/o AIMO (MPSEB), Industrial Estate
Pologround, Indore-452015

-Appellant

Versus

1 to 3. Madhya Pradesh Poorva/Madhya/
Paschim Kshetra Vidyut Vitaran Companies
Ltd. Jabalpur
Bhopal, Indore

4. Madhya Pradesh Electricity Regulatory
Commission, Urja Bhawan
Shivaji Nagar, Bhopal

5. Govt. of Madhya Pradesh
through Principal Secretary
Energy Department, Vallabh Bhawan
Bhopal -Respondents

Counsel for Appellant :Ms Sampada Narang,Advocate
Mr. Ajay Porwal (Elec.Consultant)

Counsel for Respondents :Mr. Rohit Singh, Advocate for
Resp.Nos. 1,3,4&5

GB
No. of corrections

Mr. Sakesh Kumar,Advocate for MPERC
Mr. Ahok Sharma, Secretary (MPERC)
Ms Manisha for MPMKVVCL
Mr. Rajesh Chaurasia

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member

This appeal has been preferred by Madhya Pradesh Electricity Consumer Society against the Tariff Order dated March 31, 2006 issued by Madhya Pradesh Electricity Regulatory Commission (MPERC or Commission in short) whereby retail supply tariff for the Financial Year 2006-07 has been determined.

2. Aggrieved by the impugned order, the appellant has sought the following relief:

(i) The amount earned by the distribution companies on account of delayed payment surcharge be considered as part of revenue and tariffs reviewed.

(ii) The Agriculture tariff be re-determined taking into account the cost of supply and taking into consideration the subsidy from state Government. The additional revenue available be redistributed amongst other consumers as tariff relief.

GB
No. of corrections

(iii) The billing demand definition be reintroduced in the tariff order.

(iv) The power factor rebate be restored to the extent of 7.5% and be made applicable both on fixed cost and energy cost.

(v) The minimum charge based on load factor be abolished.

3. As the appellant has raised several issues in its appeal , we proceed to deal with each issue one by one.

Revenue from surcharge levied on delayed payment:

4. Learned counsel for the appellant stated that whereas MPERC vide its orders dated September , 2001, November 30, 2002 and December 10,2005 had considered revenue receipt from surcharge on delayed payments as miscellaneous revenue, in the tariff petition filed by MPSEB on March 21, 2005 revenue accrued from delayed payment surcharge was not considered as available by giving reference to tariff Regulations framed by the Commission. She submitted that several consumers had raised objections to this revenue not being considered in the Annual Revenue Requirement (ARR) but, the revenue and expenditure were not elaborated in the tariff order of MPERC issued on June 29, 2005 and, therefore, the issue remained unclarified. She

stated that once again this point was raised during the hearing on retail supply tariff for the FY 2006-07 to which MPERC has recorded as issue No. 4 under heading A3- Public Objections and Comments on the licensees petition as under:

"Issue No. 4 Delayed Payment Surcharge

Issue raised by stakeholders

3.15 Some of the respondents made strong objections against not including huge amount of revenue collected through delayed payment surcharge from the consumers. They have contended that during last few tariffs, the revenue income from this surcharge has increased considerably. They made request to devise a way through which the revenue is accounted for.

Response from Discoms.

3.16 The Commission has opined that delayed payment surcharge received by the company is not source of income. Hence it is not included in the income of the company.

Commission's views

3.17 The Commission has considered that the entire revenue billed shall be collected by the Company. Delayed payment surcharges are on account of delayed payment // non payment of dues by the consumers. Since the Commission has considered that the company shall collect its dues in a timely manner, the Commission has not taken delayed payment charges for the purpose of tariff determination. The Commission will not be allowing interest / penal interest on overdue

principal repayment while calculating ARR as the licensees are expected to collect 100% of billed amount. This is also in line with Multi Year tariff principle as it will be very difficult to determine the interest / penal interest on overdue payments and also estimate the surcharge income when the licensees are expected to file petitions for the control period".

5. Learned counsel for the appellant contended that the view of the Commission cannot be accepted as the Commission has erred in respect of the following:-

a) *The view of the Commission that the entire revenue billed shall be collected, has always been the principle in estimating ARR. If revenue was not collected, it was carried forward as receivables. There is also a provision for bad and doubtful debts through which the uncollected revenue is waived of and shown as expenditure.*

b) *The Commission in working out the ARR have allowed the licensees as working capital. In the working capital estimates two months receivables are allowed as working capital. Thus the Commission has already accepted the view that the dues can get delayed by a period of two months. The Commission's views "the company shall collect its dues in a timely manner" are contradictory to the provision which allowed working capital.*

c) *The Commission has expressed the view that the Commission will not be allowing interest/penal interest on overdue principal repayment while calculating ARR" is incorrect as any expenditure*

GB
No. of corrections

legitimately incurred has to be allowed. However, such default because of non collection of revenue is a remote possibility as unlike in earlier years, working capital is available with the licensee to make such payments. If at all any such payments arising out of default are likely to be meager and do not get offset against delayed payment surcharge. The Commission, therefore, have hesitated to workout the estimated amounts.

d) *The Commission has also expressed the view that "This is also in line with multi year tariff principle as it will be very difficult to determine the interest/penal interest on overdue payments and also estimate the surcharge income when the licensee are expected to file petition for control period". The multi year tariff principle has been specified in "Tariff Policy" dated January 06, 2006 by Ministry of Power. In 5.3(b) sub para 4 the following is stated*:

"4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs will include (but not limited to) fuel cost, costs on account of inflation, taxes and cess, variations in power purchase unit costs including on account of hydro thermal mix in case of adverse natural events"

It will thus be seen that mid term corrections in tariff is available and thus there will hardly be occasions when interest/penal interest will arise.

Against this the estimating of delayed payment surcharge is not difficult and is a regular income and has a ratio to total revenue bills. Such estimates have earlier been made when the Electricity

Boards projected their revenue for Five Year Plans and for Finance Commission.

e) Thus the view of the Commission that the revenue cannot be estimated or the revenue gets offset against other elements is not supported by facts.

6. She contended that the Commission has erred in not directing the respondent Discoms to account for the amount of Rs. 300 crores per year collected on account of levy of delayed payment surcharge and that the Commission ought to have considered this amount while conducting the exercise of truing up while determining the tariff for the respondent Discoms. She stated that though the tariff policy advocates the multi-year tariff principle, it does not restrain the Commission from giving appropriate directions to the Discoms to account for such huge sum of monies collected. Moreover, she said, the multi-year tariff principle is made applicable from the date of the impugned order, however, the Commission has done precious little in this behalf to utilize such amounts in the hands of the Discoms for the benefit of the industry.

7. Per contra, learned counsel appearing for the Commission contended that it is not true that the 10th December, 2004 order considered revenue received from surcharge on delayed payment

as miscellaneous revenue. In fact, in para 6.197 of the order, the Commission had stated as under:

> *"Delayed payment surcharges are on account of delayed payment/non-payment of dues by consumers. Since, the Commission had considered that the licensee shall collect its dues in a timely manner, the Commission has not taken the delayed payment charges for the purpose of tariff determination"*

8. He further stated that again in paragraph 6.199 of the order, in the approved figures of the non-tariff income given in the Table No. 136, the delayed payment charges have been shown as Rs. 0 against Rs. 274.16 crores as proposed by the MPSEB and that it is also not true that in the tariff petition, reference was given to tariff regulations framed by the Commission. In paragraph 5.13 the petitioner had stated as under:-

> *" In the tariff order dated December 10, 2004, the Commission has not considered providing for any bad debts (receivable) on normative basis. At the same time, non-tariff income by way of surcharge was also not considered. Accordingly, the Board has also followed the same approach and have not considered any normative provisions towards bad debts and have excluded delayed payment surcharge for computation of non-tariff income as elaborated below".*

9. Learned counsel for the Commission stated that it is not true that several consumers raised objection to this revenue not being considered and that In its tariff order dated June 26, 2005 under paragraph 16, the Commission had given the gist of the comments/objections/suggestions received during the hearing and there was only a mention of delayed payment charge of Rs.10 be reduced. He contended that the issue regarding: non-elaboration of revenue and expenditure in tariff order dated June 29, 2005 and therefore the point remained un-clarified, is not relevant in this appeal as this appeal pertains to the tariff order dated March 31, 2006. However, the reason for not elaborating the revenue and expenditure had been provided by the Commission in paragraphs 21 to 42 of the order dated June 29, 2005 and in paragraph 43 the Commission had stated as under:-

> *" The licensees and generating company are directed to file their separate tariff petitions before 31st July and if they are not in a position to file the tariff petitions for FY 2006 by the above date on account of the opening balance sheets not becoming final, the Commission would consider treating the difference between the revenue and expenditure (which will be subject to prudence check)as regulatory asset. The regulatory asset will be adjusted during the tariff period when the Commission introduces multi year tariff for the generating company and the licensees from the Financial Year, 2007".*

10. Learned counsel for the Commission stated that as per the clause 2.27 of the Regulations notified on December 23, 2005

(G-27 of 2005), the provision for bad and doubtful debts shall be allowed to the extent the distribution licensee has identified/actually written off bad debts subject to a maximum of 1% of sales revenue and according to a transparent policy approved by the Commission. He stated that hence it is not true that licensee can write off whatever they consider as bad or doubtful and the Commission had not allowed the provision for bad and doubtful debts projected by the MPSEB in the previous petitions. He further stated that it is not true that the expression, "company shall collect its dues in a timely manner" is contradictory to allowance of two months receivables in the working capital. He contended that supply by a licensee is made for a whole month and then bills are issued after the meter readings are taken. 15 days time is given to the consumers for making payment of the bills and thus it is almost two months before the payment can be received by the licensee after supplies have started and that the collections of the last two months of the previous year will be collected during first two months of the current year and thus the collections are for a period of 12 months in a year and hence it is not contradictory to the expression that the company shall collect its dues in a timely manner. He stated that the Regulations also provide that the consumer security deposit of 45 days consumption is to be deducted from the two months receivables for arriving at the amount of working capital. He further stated that one month power purchase cost will also be deducted from the two months

receivables. Clause 3.31 (a) of the Regulations notified on December 23, 2005(G-27 of 2005) pertinent to this issue is reproduced below:-

> *" 3.31 (a) Working capital for supply of electricity shall consists of:*
>
> *(1) Receivables of two months of billing less any consumer security and less power purchase cost of one month".*

11. Learned counsel for the Commission contended that it is not incorrect to say that overdue interest and penal interest are not legitimate expenditure even though these have been incurred legitimately as per loan agreements. He asserted that the appellant is also wrong in assuming that such default because of non collection of revenue is a remote possibility as unlike in earlier years, working capital is available with the licensee to make such payments. He contended that as per the Regulations notified on December 23, 2005, the licensee will be having only a much lesser amount of working capital after deduction of the consumer security deposit and one month energy procurement cost from the two months' receivables. He stated that the licensee will be getting only the interest cost on such reduced amount in their annual revenue requirement and in case the licensee is not in a position to collect the billed amount, as is happening in the last few years (the collection is only around 80 to 82% of the billing), there is bound to be default by the Discoms in payment of interest and principal installments due. He stated that MPSEB,

in the past, had been claiming huge amounts as penal interest and overdue interest and the Commission had not allowed the same.

12. Learned counsel for the Commission contended that the appellant is wrongly quoting the provisions contained in the National Tariff Policy issued by the Government of India on January 6, 2006. Sub para 4 of Clause 5.3 (b) of the policy talks only about uncontrollable costs. He emphasized that the Commission does not consider poor collection by the licensee is uncontrollable but it expects the licensee to collect 100% of the billing in view of various provisions available in The Electricity Act, 2003. He said that while calculating tariff under multi-year principles, the loans are expected to be paid back as per the loan agreements along with the interest and the interest liability is calculated for the period on the remaining amounts only every year and that this is the principle being followed by the Central Electricity Regulatory Commission also. He contended that in view of the fact that the licensee is collecting only 80 to 82% of the billed amount, there is bound to be increase in receivables (Arrears on account of current demand) and defaults can occur in payment of interest and principal installments due and that the default will result in payment of overdue/penal interest by Discoms and will also increase the interest cost in the following year and that this situation requires to be avoided while calculating tariff in a multi year frame work and that in view of

this it is justified that surcharge on delayed payments is not considered in the ARR.

Analysis and Decision:

13. On a consideration of contentions of all parties, we are inclined to agree with the decision of the Commission to not include delayed surcharge revenue in the ARR in view of the fact that the working capital amount has been reduced to the bare minimum, 100% collection is not happening as of now, and therefore, to meet its cash requirements, the Discoms will have to borrow from Banks to compensate for the outstanding payments from consumers.

Revenue from Agriculture and subsidy from State Government.

14. Learned counsel for the appellant contended that in fixing the tariff for Agriculture, the Commission has not followed the provisions of law and has helped the State Government in reducing the burden of subsidy. She stated that in effect the reduction in subsidy has been passed on to other consumers of electricity which is not equitable. She submitted that the State Government is in a position to pay higher subsidy as the revenue of electricity duty and cess are increasing every year and that additional revenue to the extent of Rs. 250 crores per year will be

available to the State Government on equity from the five distribution companies formed out of the erstwhile MPSEB.

15. Learned counsel for the appellant also contended that the Commission has failed to take into account Clause 8.3 (2) of the Tariff Policy and sub-section 61(g) of The Electricity Act, 2003 which are extracted below:-

"Clause 8.3(2) of the Tariff Policy"

" 2 For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify a road map within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20% of the average cost of supply. The road map would also have intermediate mile stones, based on the approach of a gradual reduction of cross-subsidy".

" Section 61(g) of Electricity Act, 2004."

"(g) that the tariff progressively, reflects the cost of supply of electricity, and also reduces and eliminates cross subsidies within the period to be specified by the Appropriate Commission".

16. Learned counsel for the appellant submitted that the Tariff Petition filed by three Discoms against which the tariff order dated March 31, 2006 is issued, did not assume any subsidy as available. She contended that there was full justification for increasing the agriculture rate over the rate of November, 2002 and such a rate would have worked out to Rs. 3/- per unit and

that with subsidy, this rate would be much less than the rates proposed by the Commission for the year March 31, 2006 and that this was not done as is evident from Schedule LV- 5.1 of the order.

17. Per contra, learned counsel for the fourth respondent Commission stated that it is not correct to determine tariff upfront with subsidy in anticipation of State Government order for grant of subsidy. He stated that the Commission cannot pre-empt the amount of subsidy to be provided by the State Government and that the tariff for various categories of consumers were determined in their order dated March 31, 2006 in terms of various provisions of The Electricity Act, 2003 and National Electricity Policy. As per the National Tariff Policy the cross subsidy is to be reduced to plus minus 20% of the average cost of supply by 2010-11 and that the Commission is in the process of providing a road map for reduction in cross subsidy. Learned counsel asserted that it is not correct to say that the effect of reduction in subsidy has been passed on to other consumers. He contended that the Commission has determined tariff after considering various factors in terms of the Act and the National Tariff Policy on full cost basis, which is equitable.

Analysis and Decision:

18. We have examined various contentions of the rival parties. In Udyog Nagar Factory Owners Association V/s BSES Rajdhani Power Ltd. & Delhi Electricity Regulatory Commission appeal No. 131 of 2005, this Tribunal has held as under:

> *" On consideration of the submissions of the learned Counsel for the appellant and respondents, the provisions of The Electricity Act, 2003, the National Electricity and Tariff Policies, we are of the view that the cross- subsides can only be gradually reduced and brought to the levels envisaged by the Act and the Tariff Policy. At present it may not be pragmatic to drastically reduce the subsidies in one go."*

The above mentioned judgment squarely applies to the facts of the present appeal and, therefore, in this view of the matter we decide this issue against the appellant.

We also do not agree with the contention of the appellant that the earnings of the five distribution companies will be available to the State Government to increase the subsidy element. As the five distribution companies are separate business entities in themselves, the Government does not enjoy any freedom to allocate these earnings towards providing additional subsidy.

Changing of billing demand.

19. Learned counsel for the appellant contended that the Commission in its order dated March 13, 2006 has changed the modality of fixed charge recovery from the billing demand to the contract demand and that this change has been made by the Commission without any discussion in the public hearing and that even when there was no proposal to make such change by any of the Discom in their petition. She contended that this change will increase the demand charges of a consumer by an average of 10-15% as the actual demand is kept 10-15% less than contract demand to avoid penalty for exceeding contract demand and have small addition of machinery to improve production. She said that as this increase in revenue due to higher tariff is not accounted for in ARR there is a case for restoring status quo.

20. She further submitted that in case the Commission insists on the aforesaid change of fixed cost recovered, the impact can be reduced by allowing all HT consumers to re-adjust contract demand up to 25% without any approval and penalty for exceeding the contract demand may be levied only when contract demand exceeds over 10%.

21. Per contra the learned counsel for the respondent Commission contended that for HT and LT consumers with

demand based tariff, the fixed charges shall be linked to their full contract demand. In this regard he drew our attention to the clause 1.6 (i) of the Regulations, 2006 extracted below:

> *(i) " Fixed charges: A fixed network charge in addition to the charge for the actual electricity supplied to recover the expenditure on fixed network, which the licensee incurs to maintain the network for sub transmission shall be recoverable by the licensee. For HT consumers and LT consumers with demand based tariff, the fixed charges shall be linked to their full contract demand. For LT consumers, the fixed charges shall be linked to their authorized load for domestic and non domestic connections or sanctioned load in other cases.*
>
> *Revenue earned by the licensee from fixed charges shall be counted towards the total expected revenue of the licensee and shall be disclosed for public information at the time of determination of tariff".*

22. Learned counsel submitted that as there is no provision of "billing demand" in the notified regulations, the tariff for fixed charges is based on contract demand only and not on billing demand. He said that as per regulations, LT/HT consumers have to pay fixed charges according to their sanctioned load/contract demand, as the case may be and that the revenue from LT/HT consumers against fixed charges has been estimated on the above basis. He stated that the consumers have executed agreement for a fixed quantum of load to be supplied by the licensee and that any relaxation in the use of such load just on the ground

that the consumers have to pay the penalty if they use the load beyond the contractual demand and that they have to pay for the contractual load even if they could not use, is not justified. He contended that the Commission has made provision equitable for LT/HT consumers and that there is no justification for allowing such relief to HT consumers just for avoiding penalty on account of exceeding the contract demand.

23. Learned counsel for the respondent Commission contended that the principles adopted in Tariff Order dated March 31, 2006 were as detailed in the Regulations, 2006 which was notified after giving full opportunity to all stakeholders and all the implications of the Regulation were in the knowledge of all the stakeholders. He contended that as the Regulation was notified, published and enforced before the date of issue of tariff order, it can be applied for determination of retail tariff and, therefore, tariff order dated March 31, 2006 is not a violation of the principles of natural justice and bad in law as wrongly alleged by the appellant.

Analysis and Decision:

24. On a consideration of the submissions made on behalf of the appellant as well as respondents and the contentions advanced by either side we decide not to interfere with the decision with regard to the basis of the Fixed Charge Recovery of the Commission as the same is as per its Regulations, extracted in

para 21 above which were issued before date of the impugned tariff order.

With regard to appellant's request for allowing HT consumers to readjust contract demand up to 25% without any approval is concerned, it is for the appellant to agitate this issue before the Commission and we do not wish to intervene in this view of the matter.

Change of Power Factor Incentive.

25. Learned counsel for the appellant contended that the power factor incentive has been reduced unilaterally by the Commission and has prayed that the same be restored to 7.5%, on both fixed costs charges and energy charges. She contended that this reduction has been made despite the fact that Discoms in their petition did not even ask for a change and, therefore, this issue was never discussed in the public hearing which is against Section 61(d) of The Electricity Act, 2003 which provides for safeguarding of consumers interest and also against Section 61(e), the principles of Rewarding Efficiency for Performance.

26. Per contra, the respondent Commission submitted that it is the responsibility of the consumer to maintain unity power factor so that no reactive power shall flow in the power system network and that the consumer has inbuilt advantage on improvement in power factor as the active energy drawn by the consumer gets

reduced for the same load. The counsel stated that the Commission has still provided incentives to the consumer even though it puts loss to the licensee by drawing reactive energy from power system network at power factor of above 95% but less than 100% and that there is no technical feasibility for providing power factor on fixed charges as the power factor does not depend on contract demand of the consumer.

27. Learned counsel for the Commission stated that the tariff is determined after considering various aspects of revenue income and expenditure as a whole and is not determined merely on the basis of what the licensee has asked for and that the Commission while determining the tariff has kept in mind the interest of the stakeholders. He submitted that it is not correct to say that the Commission has made unilateral changes and that safeguarding of consumer interest and rewarding efficiency in performance does not mean undue and irrelevant advantages to be given to HT consumers at the cost of other consumers. He stated that the Commission while determining the tariff, did not find any justification for providing incentive on power factor between 90% to 95%.

Analysis and Decision:

28. On consideration of submissions and contentions advanced by the rival parties, we find no justification in interfering with the decision of the Commission as improving power factor entails

inbuilt advantage: On improvement in power factor the active energy drawn by the consumer gets reduced for the same load. Therefore, the appeal fails on this issue also.

Minimum charges for HT and LT consumers based on Load Factor.

29. The appellant submitted that the minimum charges levied as per the Impugned Order in respect of LT consumers, 15% load factor, HT consumers 135 kV- average 25% load factor and 33 kV average load factor 15% is a burden on consumers, specially for those who have single shift working and the work is based on changing demand of their consumers. She requested that load factor based on minimum charges be withdrawn and the Commission may be asked to work out extra income arising out of these charges and revenue be considered for ARR before the charges are levied.

30. Per contra, the learned counsel for the Commission contended that the minimum charges are levied so that the licensee may get assured and sufficient revenue in making its infrastructure for consumers and committed payments of recurring nature are made for efficient running of the distribution company. He stated that the fixed costs are incurred even if the consumers do not consume any energy and that presently fixed charges do not recover the fixed costs of the

licensee. He further contended that it is not correct to say that the fixed cost of network is not met as fixed charges are not levied on agricultural consumers and these costs are met by high energy costs charges to consumers who cross subsidize. He stated that fixed charges are not being charged from domestic consumers consuming 30 units per month who are to be subsidized in term of National Tariff Policy and non-domestic category of consumers who are subsidizing through cross subsidy. Learned counsel submitted that the total revenue earned either through actual consumption or through minimum charges is taken into account in the ARR and also for tariff determination.

Analysis and Decision:

31. In appeal No. 131 of 2005, Udyognagar Factory Owners Association V/s BSES Rajdhani and DERC, this Tribunal has already held as under:

> " .....*The rationale and relevance of fixed charges is well established in the Electricity Industry. Fixed charges are to be recovered as a part of the fixed cost of the utility through fixed charges, so that at least a part of the fixed cost is recovered even if there is no consumption by the consumer. It is to be recognized that when a consumer is connected to the system, the utility has to provide or keep in readiness certain capacity of the distribution system to serve the consumer.*

Skilled workforce and supervisory staff is kept on the job for monitoring the system, attending to emergencies, restoring the supply in the event of an outage and *periodic maintenance, meter reading, billing, bill delivery, defraying administrative expenses not directly related to the consumption of energy."*

In view of the above mentioned decision of this Tribunal, we uphold the decision of the Commission with regard to the minimum charges.

32. In the result, the appeal fails on all the issues and is, therefore, dismissed.

(H.L.Bajaj)
Technical Member

(Anil Dev Singh)
Chairperson

GB
No. of corrections