

**MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION, BHOPAL**

**Sub:**In the matter of petition filed under clause 11.1, 11.2 (Force Majeure condition) and 11.10, 11.11. (Unforeseen Circumstances) 11.14, (Power to remove difficulties), 11.17, 11.8 and 11.19(Repeal and Savings) of the M.P. Electricity Supply Code, 2013 (PNo. 49/2020)

**Order**

(Hearing through Video Conferencing)

Date of order: **10.02.2021**

**Association of Industries, Dewas , MP :**

**Petitioner**

V/s

Energy Dept. Govt. of M.P, Bhopal; :  
MP Power Management Co. Ltd., Jabalpur (MPPMCL)  
MP Paschim KVVCL, Indore ( West Discom)  
MP Madhya K VVCL, Bhopal (Central Discom)  
MP Poorv KVVCL, Jabalpur ( East Discom)

**Respondents**

Shri R.C Somani, appeared on behalf of the petitioner. Shri V.D. Joglekar, GM (RM) appeared on behalf of MPPMCL. Shri A.R. Verma, Dy. CGM and Shri G.R. Patele, GM appeared on behalf of Central Discom. Shri Nirmal Sharma, SE and Shri Shailendra Jain, Dy. Director appeared on behalf of West Discom. Shri Deepak Chandela, DGM appeared on behalf of East Discom

1. The petitioner has filed the subject petition under clause 11.1, 11.2 (Force Majeure condition) and 11.10, 11.11. (Unforeseen Circumstances) 11.14, (Power to remove difficulties), 11.17, 11.18 and 11.19(Repeal and Savings) of the M.P. Electricity Supply Code 2013. It is stated in petition that pursuant to the nationwide lock down declared by Central Govt. and respective State Govt. with effect from 22.03.2020 due to spread of Covid-19 pandemic, all the industries were closed down and stopped their production along with carrying out other associated activities and hence could not consume the power during said period. The petitioner has requested that in view of aforesaid force majeure conditions that prevailed during lockdown period, following relief be granted:

- (i) *Issue directions/order to Discoms not to charge the fixed charges and Tariff minimum charges during the lockdown period and only actual consumption be billed of all HT & LT industrial and non-industrial consumers*
- (ii) *Provide convenient instalments to make payment of electricity bills raised during lockdown period from April 2020 to June 2020 or permit all the consumers to apply under force majeure conditions from the date from which they required reduced supply and for which licensees should give wide publicity and inform to consumers and permit reduced supply.*

2. During the course of motion hearing held on 18.08.2020, representative for the petitioner stated that Energy Dept., GoMP vide order dated 02.06.2020 has differed levy of fixed charges for the months of April, May and June 2020 for LT non- domestic and LT/HT industrial consumers. He further stated that such deferred amount shall be recovered through six equal monthly instalments commencing from October 2020 to March 2021 without interest and therefore the same dispensation cannot be construed as relief to consumers. The petitioner has made reference to various States where either fixed charges are waived off or reduced in view of lockdown due to Covid-19 pandemic such as Punjab, Haryana, Andhra Pradesh, Uttar Pradesh, Gujarat, Maharashtra and Tamil Nadu. The petitioner has made Energy Deptt., GoMP, MPPMCL & West Discom as respondents in the petition.
3. The Commission vide daily order dated 26.08.2020 admitted the petition and directed to enlist East and Central Discoms also as respondents in the matter due to the fact that outcome of this petition would also be applicable in jurisdictions of the other two Discoms. Further, the Commission clubbed this petition with another Petition no. 41 of 2020 filed by Association of All Industries, Mandideep vide its order dated 22.09.2020 being similar nature of relief sought in the matter.
4. During the hearing held on the 29.09.2020, the petitioner was heard who reiterated the contents of the petition and requested the Commission to allow filing additional written submission, which was allowed by the Commission. The Commission directed all the respondents to submit their replies so that a comprehensive view may be taken in the matter.

During the next hearing held on 02.11.2020, the Commission heard the petitioner, respondents and perused the additional submission made by the petitioner. The Commission granted ten days to the petitioner to file a written submission, if any .

5. Subsequently, the petitioner filed the additional submission which is reproduced below:

1. *Requirement of 7 days notice:*

a. *With regard to unforeseen circumstances supply code gives following provisions:*

***Unforeseen Circumstances***

*11.10 If any circumstances not envisaged by the provisions of this Code arise, the licensee shall, to the extent reasonably practicable in the circumstances, consult promptly and in good faith with all affected parties in an effort to reach an agreement as to what should be done. If agreement between the licensee and those parties cannot be reached to a conclusion, the licensee shall determine it in the manner best to its ability.*

*11.11 Wherever the licensee makes such a determination, it shall do so having regard, wherever possible, to the views expressed by the affected parties and, in any event, to what is reasonable in the circumstances. Each party shall comply with all instructions given to it by the licensee following such a determination, provided that the instructions are consistent with the prevailing Codes, Regulations and Act. The licensee shall promptly refer all such unforeseen circumstances, and any such determination to the Commission for consideration.*

b. *Force Majeure relating provision of supply code are following:*

***Force Majeure:***

*11.2 If at any time during the continuance of the agreement between the licensee and the consumer, if the use of electricity is not possible fully or partially by the consumer due to Force Majeure conditions such as war, mutiny, civil commotion, riot, terrorist attack, flood, fire, strike (subject to certification by Labour Commissioner), lockout (subject to certification by Labour Commissioner), cyclone, tempest, lightning, earthquake, act of God, act of Central/State Government, etc. which are beyond the control of the consumer, he may, on giving 7 clear days notice in writing to the licensee, about such a situation, take a reduced supply of power as may be necessary and feasible within permissible limits of contract demand at relevant voltage levels. In all cases where the consumer claims Force Majeure conditions, the licensee's authorised representative shall verify the same. Such a facility shall be available to the consumer only if the period of reduced supply is for a minimum continuous period of 10 days and up to a maximum of six months. The aforesaid period of reduced supply shall not be counted towards the initial period specified in the agreement and the initial period of agreement shall be extended for a further period equal to the period of reduced supply. There is no*

*restriction on number of times of such facility availed by the consumer subject to maximum period of total six months of all such occasions.*

*c. It is clear from provision of 11.2 and 11.10/11.11 that although there is a provision if use of electricity not possible due to act of god by giving 7 days notices in writing. But there is no provision of situation where said service of notice itself becomes impossible due to act of god. Such situation (which is exist due to lock down on account of Covid 19) of impossibility of notice covered under clause 11.10/11.11 and not 11.2. Therefore, determination by licensee and approval of this Commission required for this requirement of service of notice.*

*d. In this regard it is necessary to mention judgment of the Hon'ble Supreme Court in the civil appeal No. 2082 of 2011:*

*“DOCTRINE OF IMPOSSIBILITY:*

*38. The Court has to consider and understand the scope of application of the doctrines of "lex non cogitadimpossibilia" (the law does not compel a man to do what he cannot possibly perform);*

*"impossibiliumnullaobligatioest" (the law does not expect a party to do the impossible); and impotentiaexcusatlegem in the qualified sense that there is a necessary or invincible disability to perform the mandatory part of the law or to forbear the prohibitory. These maxims are akin to the maxim of Roman Law Nemo TeneturadImpossibilia (no one is bound to do an impossibility) which is derived from common sense and natural equity and has been adopted and applied in law from time immemorial. Therefore, when it appears that the performance of the formalities prescribed by a statute has been rendered impossible by circumstances over which the persons interested had no control, like an act of God, the circumstances will be taken as a valid excuse. (Vide: Chandra Kishore Jha v. Mahavir Prasad &Ors., AIR 1999 SC 3558; Hira Tikkoo v. Union Territory, Chandigarh &Ors., AIR 2004 SC 3648; and Haryana Urban Development Authority &Anr. v. Dr. Babeswar Kanhar & Anr., AIR 2005 SC 1491).*

*39. Thus, where the law creates a duty or charge, and the party is disabled to perform it, without any fault on his part, and has no control over it, the law will in general excuse him. Even in such a circumstance, the statutory provision is not denuded of its mandatory character because of the supervening impossibility caused therein.”*

- e. As per above judgment of the supreme court it is clear that since service of notice in writing was impossible due to restrictions of lock down such formality prescribed in the statute shall be excused/waived.*
- f. Therefore facility of 11.2 must be allowed to all consumers without notice.*

**2. Notice by Email:**

- a. Respondent submitted in hearing on 02.11.2020 that facility of email available hence notice is mandatory. This argument of respondent wrong on two grounds:
  - i. As per clause 11.2 notice in writing required so consumer was not aware about email notice.*
  - ii. Licensee not issued any guideline/intimation regarding email notice. Only in May 20 through a circular that too issued only to its offices and not to consumers that email notice shall be considered.*
  - iii. Licensee not intimated to which email id email is to be sent.**
- b. In view of above contention of email id is bad in law and fact both.*

**3. Effective date of notice:**

- a. From above 11.2 it is clear that only requirement is to given notice within 7 days of incidence, but it is no where written that facility shall be applicable from end of 7 days. If we assume there is no meaning of facility because after 7 days it is possible that effect of act of god comes to end. In such situation there is no utility of such provision.*
- b. Notice is required for verification of claim of consumer. In the Covid-19 situation no such verification required as respondents were very well aware about whole situation. Despite knowing all things demand of notice is beyond the common sense.*

**4. Rebate provided by Government of India:**

- a. As per instructions of ministry of power government of India, central public section generation and transmission companies provided rebate to licensees of the country with a condition that such rebate shall be pass on to consumers. In other state like Utarkhand licensee himself filed petitions for pass on benefits of rebate to consumers. However in our state licensees after getting rebates not giving benefits to consumers.*
- b. This against the fair play and natural justice.*  
*In view of above Commission required to provide relief of waiver of fixed charges, waiver of 7 days notice, effective date of facility of 11.2 from date of imposition of lock down”.*

6. Subsequently, the Respondents East , West & Central Discoms, MPPMCL& the Energy Dept, GoMP filed their reply . The State Govt. in its reply made following submission -

*1. Regarding waiver of fixed and tariff minimum charges and to recover as per actual consumption –*

*(a) The fixed charges in the tariff structure have been incorporated as a component of two part tariff as per the provisions under clause 45(3) of the Electricity Act,2003 and clause 8.4 of the Tariff policy 2016 notified by GoI which is meant for recovery of fixed cost of Discoms for payment of capacity charges to Generators as obligations against the power purchase agreements based on two part tariff, irrespective of power purchase by them, which depends on the demand of Consumers. In addition to above, Discoms have their own fixed cost relating to retail supply and wheeling cost.*

*(b) At present, the fixed charges as determined under tariff are not sufficient to recover the above mentioned fixed cost of the Discom. As such, provision of tariff minimum charges is designed in the Tariff Order to compensate the gap. Further Regulation 42.1(d) of the MPERC Tariff Regulations,2015, clearly states that tariff minimum charges shall be recoverable from the consumers till the time fixed charges are aligned with recovery of full fixed costs.*

*(c) There is no provision of waiver of fixed charges and tariff minimum charges or to recover only as per the actual consumption in clause 11.2 of force majeure in the MP Electricity Supply code, 2013. The clause only allows the facility to the Consumers to reduce its Contract demand with certain conditions of limit in reduction of contract demand at relevant voltage levels, notice period, minimum and maximum reduction period.*

*(d) A bare perusal of the conditions shows that hon'ble Commission has not intended and therefore not mentioned any provision of waiver of fixed charges and/or tariff minimum charges. Further, the Hon'ble Commission has stipulated the minimum reduction which is allowed up to the relevant voltage levels. Hence, the Hon'ble Commission has made appropriate provisions for both the Consumers and Discoms to maintain the minimum demand relevant of voltage level.*

*(e) It is also pertinent to note that the reduction in contract demand in turn reduces the fixed charges and tariff minimum charges of the Consumers during the concerned period.*

2. Regarding providing instalment for making payments to bills during lockdown period –  
(a) The Discoms have stood with its Consumers during the time of crisis even when its own revenue has been badly suffered due to Covid-19 pandemic. So far as the instalment facilities are concerned, Discoms have generously considered the requests of all the Consumers, who have applied for the instalments and such facilities have been extended to such Consumers.

3. Regarding grant of permission to apply under Force Majeure from the date from which reduced supply is required-

(a) The alternate remedy for grant of permission to apply under force majeure condition from the date from which the Consumers required reduced supply is not acceptable as any notice with retrospective effect will be against the spirit of Force Majeure clause 11.2 of MP Electricity supply code, 2013.

4. Relief provided by State Government to Consumers during lockdown period due to spread of covid-19 pandemic –

It is further to submit that the State Government has already provided following relief measures to its consumers, in view of the lockdown due to Covid-19 pandemic:-

(a) The recovery of fixed charges, in respect of LT Non Domestic, Industrial and HT(HV-3 category) Consumers, for the month of April, May and June, 2020 have been deferred and the deferred amount shall be recovered along with the regular payment of monthly electricity bills in six equal instalments without any levy of interest w.e.f oct 2020 to March 2021.

(b) An incentive of 1% (up to the maximum of Rs Ten Thousand only for LT Consumers and Rs one lakh only for HT consumers) has been provided for timely payment of electricity bills within the due date for the month of April and May 2020. A Order dated 02.06.2020 issued in this regard.

5. A representation dated 07.04.2020 from the Petitioner, addressed to Hon'ble Chief Minister, was received in the Department from the office of Hon'ble Chief Minister, whereby the Petitioner had sought similar reliefs as sought in the instant petition. The issues raised by the Petitioner were examined in view of the provisions of the existing Regulations/Tariff Orders and the factual position regarding various relief measures already taken by the State Government were conveyed to the petitioner vide Department's letter dated 09.06.2020.

6. *All three Discoms have extended the facility of reduction in contract demand to their consumers as per the provision contained in the Force Majeure clause 11.2 of MP Electricity Supply Code, 2013, notified by the Hon'ble Commission.*

7. *It is therefore submitted that the State Government and Discoms are committed to extend full support to the Industries in the State and have already provided various relief measures to the Consumers of the State within the available framework of existing acts and applicable Regulations.*

8. *In light of above, the instant petition deserves to be dismissed by the Commission.*

7. The Commission observed that the petitioner has mainly prayed to issue direction/ order to Discoms not to charge the fixed and tariff minimum charges during the lockdown period and that billing be allowed on actual consumption only for all the HT and LT industrial and non-industrial consumers. It has also been prayed to provide convenient instalments to make payment of electricity bill raised during the lockdown period from April-June' 2020. They have also prayed that alternatively all the consumers be permitted to reduce their supply as per their requirement under force majeure conditions.

8. The Commission observed that the petitioner's prayers for waiving off the fixed charges is against the principles laid down under Section 45(3) (4) (5) of the Electricity Act 2003, Tariff Policy and Tariff Regulations notified by the Commission. Section 62(5) of the Electricity Act 2003 provides that the Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover. Further, clause 8.4 (1) of the Tariff Policy specifies that two-part tariffs featuring separate fixed and variable charges and time differentiated tariff shall be introduced on priority for large consumers (say, consumers with demand exceeding 1 MW) within one year and subsequently for all consumers within a period of five years or such period as may be specified. In accordance with the above principles, the Commission has been specifying fixed charges and energy charges in its MYT Regulations for Distribution and Retail supply so that the cost incurred by the Distribution Licenses for power purchase and other expenditure which are fixed and variable nature are duly recovered. Further, while fixing retail supply tariff, it is imperative that fixed and variable charges be recovered from their corresponding components of Annual Revenue requirement approved by the Commission. ARR is summation of fixed & variable components of power purchase cost and other major

expenditures such as Operation & maintenance , Interest & finance charges, Depreciation and Return on Equity.

9. For ensuring 24x7 quality power supply to the consumers, Discoms are required to have long term power purchase agreements with the generators. The Commission in accordance to provisions of the Tariff Policy determines two part tariff for conventional power plants to enable them to compete under Merit Order Dispatch. The Fixed Charges of the Generators, which are linked to availability of generation, enable recovery of the plant capital investment, whereas the energy charges allow recovery of the fuel expenses incurred on actual generation. Accordingly, if the generator declares normative availability, the Distribution Licensee shall be required to pay full fixed charges of the generators, even if no power has been scheduled by it. Similarly, transmission charges payable by Discoms are solely having fixed component for allowing recovery of the capital cost incurred for the project. It is mandatory for distribution licensees to pay fixed charges based on normative availability on those accounts whether electricity for the period has been availed or not. Discoms also recover Financial Charges on capital cost incurred through a fixed cost component on distribution infrastructure developed for providing electricity to the consumers. Accordingly, in order to safeguard the distribution licensee, the Commission approves two part tariff for majority of consumer categories to enable recovery of Fixed portion of its expenses from the Fixed charges and Variable portion of the expenses through Energy Charges. However, for purpose of avoiding tariff shocks to the consumers and with an intent to promote levy of tariff on consumption basis, the Commission has been consciously allowing only part recovery of the Fixed Cost through Fixed Charges, whereas the balance recovery is being done through energy charges and Monthly Minimum Charges. Accordingly, any waiver of Fixed Charges or allowing payment of fixed charges based on actual consumption as prayed by the Petitioner shall have grave financial implication on the Distribution Licensees due to under recovery of its Aggregate Revenue Requirement, which again shall be required to be recovered from the consumers through truing up petition in future.

10. The Commission has notified the Madhya Pradesh Supply Code, 2013 which is applicable for the Distribution licensees of the State and for the consumers of these Licensees. Clause 11.10 and 11.11 of the Supply Code specifies following under the unforeseen circumstances:-

*11.10 If any circumstances not envisaged by the provisions of this Code arise, the licensee shall, to the extent reasonably practicable in the circumstances, consult promptly and in good faith with all affected parties*

*in an effort to reach an agreement as to what should be done. If agreement between the licensee and those parties cannot be reached to a conclusion, the licensee shall determine it in the manner best to its ability.*

*11.11 Wherever the licensee makes such a determination, it shall do so having regard, wherever possible, to the views expressed by the affected parties and, in any event, to what is reasonable in the circumstances. Each party shall comply with all instructions given to it by the licensee following such a determination, provided that the instructions are consistent with the prevailing Codes, Regulations and Act. The licensee shall promptly refer all such unforeseen circumstances, and any such determination to the Commission for consideration.”*

11. The above-mentioned sub-clause 11.10 provides that if any circumstances not envisaged by the provision of this Code arise, the licensee shall, to the extent reasonably practicable in the circumstances, consult promptly and in good faith with all affected parties in an effort to reach an agreement as to what should be done. It has further been provided that if agreement between the licensee and those parties cannot be reached to a conclusion, the licensee shall determine it in a manner best to its ability.
12. The Commission observed that in these unforeseen circumstances due to lockdown during the Covid-19 pandemic period, the State Government/ Discoms have provided various reliefs to the consumers of the Discoms.
  - a. As a first step, the State Government/ Discoms have deferred payment of the fixed charges in respect of LT Non -domestic , Industrial and HT (HV-3) categories of consumers for the months of April to June’ 2020.
  - b. The consumers were allowed to make payment of the deferred amount, without any interest, in six equal installments from October’ 2020 to March’ 2021.
  - c. Incentive of 1% was also provided, in case consumer made payment of bills for April and May months in a timely manner.
13. The Commission further observed that vide submission dated 27.10.2020 Respondent MPPMCL has conveyed that NTPC and other CPSUs generators have provided a rebate of Rs. 144.61 Crore on the capacity charges payable by the State Distribution Companies. PGCIL also provided rebate of Rs. 67.97 Crore to State Discoms payable as transmission

charges. The Commission has already passed through these rebates of Rs. 212.58 Crore to electricity consumers of the State in the retail supply tariff order issued on 17<sup>th</sup> December 2020 for the year FY 2020-21.

14. The Commission further observed that Clause 11.1 and 11.2 of the Electricity Supply Code, 2013 provides relief to the consumers on certain specific force majeure conditions. The clauses are reproduced as under:

***“Force Majeure:***

*11.1 The licensee shall not be liable for any claim by the consumer for loss, damage or compensation whatsoever arising out of failure of supply when such failure of supply is due, either directly or indirectly, to war, mutiny, civil commotion, riot, terrorist attack, flood, fire, strike, lockout, cyclone, tempest, lightning, earthquake or act of God or act of Central/State Government.*

*11.2 If at any time during the continuance of the agreement between the licensee and the consumer, if the use of electricity is not possible fully or partially by the consumer due to Force Majeure conditions such as war, mutiny, civil commotion, riot, terrorist attack, flood, fire, strike (subject to certification by Labour Commissioner), lockout (subject to certification by Labour Commissioner), cyclone, tempest, lightning, earthquake, act of God, act of Central/State Government, etc. which are beyond the control of the consumer, he may, on giving 7 clear days notice in writing to the licensee, about such a situation, take a reduced supply of power as may be necessary and feasible within permissible limits of contract demand at relevant voltage levels. In all cases where the consumer claims Force Majeure conditions, the licensee's authorised representative shall verify the same. Such a facility shall be available to the consumer only if the period of reduced supply is for a minimum continuous period of 10 days and up to a maximum of six months. The aforesaid period of reduced supply shall not be counted towards the initial period specified in the agreement and the initial period of agreement shall be extended for a further period equal to the period of reduced supply. There is no*

*restriction on number of times of such facility availed by the consumer  
subject to maximum period of total six months of all such occasions.”*

15. In the above mentioned sub-clauses , there is no provisions for waiver of fixed charges and tariff minimum charges. The sub-clause 11.2 only facilitates the consumers to reduce their contract demand to a certain limit at relevant voltage level . This Sub-clause 11.2 provides that for a certain force majeure conditions, consumers can reduce their contract demand up to a defined period by giving seven clear days notice to the distribution licensee. The respondents Distribution Licensees intimated that they have provided relief to those consumers who had made such request under provisions of the aforesaid clause. Therefore, Discoms had acted upon in this regard as per provisions of the Supply Code 2013.
16. Further, under the above-mentioned Sub-Clause 11.2,the consumers were having an option to reduce their contract demand at relevant voltage level limit. The consumers who wanted to reduce their contract demand during the lockdown period, had the option to submit such a request through electronic mode to the Distribution Licensee. Distribution Licensees have appraised the Commission that they had already acted upon on such requests as per provisions of the Supply Code 2013.
17. In view of the measures already taken by the State Government, and the distribution licensees under provisions of the Supply Code 2013 and rebates provided by CPSU electricity generators & PGCIL having been passed on in the Retail Supply Tariff order for FY 2020-21, the Commission finds no merit in the prayers made by the Petitioner.

The petition is disposed of.

**(Shashi Bhushan Pathak)**  
**Member (Law)**

**(Mukul Dhariwal)**  
**Member**

**(S.P.S. Parihar)**  
**Chairman**