

MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION,
BHOPAL

Sub: - In the matter of review of the order No. MPERC/D(RE)/2751 dated 07.10.2010 passed by the Commission in Petition No. 51 of 2010.

ORDER

(Date of hearing 12.01.2011)

Date of order :11.02.2011

M.P. Madhya Kshetra V.V. Co. Ltd., Bhopal Petitioner No.1

M.P. Poorv Kshetra V.V. Co. Ltd., Jabalpur Petitioner No.2

Shri A.R. Verma, S.E. appeared on behalf of Petitioner No.1 and Shri Praveen Kumar Jain, E.E. and Shri Avinash Gadhre, Legal Executive appeared on behalf of Petitioner No.2.

2. The petitioners namely, the M.P. Madhya Kshetra V.V. Co. Ltd. and the M.P. Poorv Kshetra V.V. Co. Ltd. have filed review petitions (No.85/2010 and 86/2010 respectively), for review of the Commission's Order passed on 07.10.2010 in the matter of Petition No.51 of 2010. Petition No.51 of 2010 was filed by M/s. All India Induction Furnace Association, Mandsaur as they were aggrieved by some of the provisions of the Retail Supply Tariff Order for FY 2010-11 issued on 18.5.2010..

3. The Commission observed that both the petitions (Nos. 85/2010 and 86/2010) were similar in content and therefore it was decided to club these petitions together for further deliberations. The motion hearing in the matter was scheduled on January 12, 2011.

4. The petitioners have stated in the review petitions that they are aggrieved with the Commission's Order of 07.10.2010 in the petition No.51/2010, as the Commission overlooked the principle of natural justice while passing the order. The order has resulted in affecting the tariff of all the HT consumers whereas the relief was sought only by M/s. All India Induction Furnace Association, Mandsaur, who are a small sub-category of tariff category 3.1. It has resulted in further loss of revenue to the

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petitioners. The petitioners have filed the subject petitions for review of the Order of the Commission by referring to MPERC (Conduct of Business) Regulations, 2004 Clause 40 (1) & (2) and the Commission's Order passed on 16.11.2010 in the matter of Petition No.48 and 52 of 2010. The Commission on 16.11.2010 in petition no 48 & 52 of 2010, observed that a review can be taken up on the following grounds:

- a) "There is an error apparent on the fact of order.
 - b) Any facts surfaced after the release of the Order which have the effect on the contents of the order
 - c) And other sufficient reason
- Therefore in view of this fact a review can always be taken up on any order by the Commission, if the conditions so warrant."

Accordingly, the review of the order of the Commission of 7.10.2010, can always be taken up by the Commission if the conditions so warrant.

5. The petitioners have further submitted under the facts of the case that –

- (i) The Petition No.51/2010 filed by M/s. All India Induction Furnace Association, Mandasaur for grievances of Mini Steel Plants in the State of Madhya Pradesh only and no other sub-category of HT consumers have filed any petitions to amend the formula of load factor.
- (ii) The matter of Petition No.51/2010 was a review of the provisions of Tariff Order dated 18.5.2010. For determination of tariff, the Section 64 of Electricity Act, 2003 says " The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public –
 - (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order."

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- (iii) As described above, the Act clearly says “after considering all suggestions and objections received from the public.” But in this case, no public hearing was conducted and the Tariff was reviewed and amended and made applicable for all the HT consumers without involving the public/other consumers.
- (iv) In its petition, M/s. All India Induction Furnace Association, Mandasaur, prayed for following relief:-
- a. Mini Steel Plant sub-category shall be given reduction of Rs.0.30 per unit.
 - b. Old load factor formula as previous tariff order of 09-10 shall be restored.
 - c. PF incentive shall be given from 0.9 onwards to those MSP units who achieve unity P.F.
- (v) In the order dated 07.10.2010 of the Commission, it has been stated in para 10 that “The Commission was of the view that there is merit in the submission made by the petitioner in stating that due to change in load factor incentive formula, they have been adversely affected since they are maintaining near unity power factor. It was not intended to discourage higher power factor as such higher power factor supports the system and reduces reactive load on the system. It was with this consideration that a higher power factor incentive was prescribed for power factors higher than 98% in the tariff order. It has been, therefore, considered that there is a need to review the load factor incentive formula, so as to make it more equitable both to the consumer and to the Discoms and also consistent with the general philosophy to encourage higher power factor.”
- (vi) In para 13 of the Order dated 7.10.2010, it has been stated that “The Commission also examined the following requests made by the petitioner and observed that there is no merit in the arguments put forth by the petitioner in this regard. The request has not been considered as feasible to accept:

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- a. Mini Steel Plant (MSP) sub-category be given relief by reducing tariff by Rs.0.30 per unit ;
- b. Power Factor (PF) incentive be given from 0.9 onwards to those MSP units who achieve unity PF.”

(vii) In the forgoing paras, contentions from the petition of M/s. All India Induction Furnace Association, Mandasaur, as well as from the Order of the MPERC have been quoted to establish the fact that the petitioner has applied for restoration of load factor formula as was in vogue in the year 2009-10 and the MPERC also intended to give relief to them by giving higher load factor incentive only and on the other hand found their request to give them relief in tariff NOT feasible. However, from the amended formula of load factor, the load factor incentive as well as energy charges payable by them have also gone on lower side for the same consumption.

(viii) As described above, the Order dated 07.10.10 issued by the MPERC is erroneous in the sense that the consumers, in addition to taking the benefit of higher load factor incentive are also benefited by paying lower energy charges in comparison to what they were paying for energy charges as per the load factor formula of Order dated 18.05.2010, whereas, the Commission in the order itself has stated that the request of the consumer for reducing the tariff has not been considered as feasible to accept. This petition is filed for rectification of this error. The Commission has not given any treatment for recovery of revenue loss due to reduction in energy charges.

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6. The petitioners had prayed as below:-

- (i) The order dated 07.10.2010 issued in petition No.51/2010 may be reviewed and the amended formula of calculating the load factor of HT consumers may be restored as was in the tariff order dated 18.5.2010.
- (ii) The matter of review of tariff as filed in the petition No.51/2010 can be heard during the stage of objections/public hearing in determination of tariff for the year 2011-12.
- (iii) Any other relief as the Commission may think appropriate.

7. During the course of hearing, the petitioners filed the additional submissions as given below:-

a) The M.P. **Poorv Kshetra** V.V. Co. Ltd., Jabalpur in their additional submission has stated that :-

- (i) The Commission while passing the Order dated 07.10.2010 has not considered the provisions of the Section 62(4) of the Electricity Act, 2003, which is reproduced as under :-

“No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.”

- (ii) The Commission has not considered the provisions of Section 64(2) of the Electricity Act, 2003, which is reproduced as under:-

“Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.”

The petition No.51/2010 is related with the amendment in Tariff Order and therefore, the decision of amendment in Tariff Order is a part of Tariff Order.

Provision of Section 64(2) is applicable for all the decisions related with Tariff Order if any amendment is to be made.

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(iii) The Regulations namely Manner of service and publication of notice 2004 at Clause 1.13 provides the manner of publication as under:-

“Where any petition is required to be advertised it shall be advertised within such time and in such manner as the Commission considers appropriate for the purpose of bringing it to the knowledge of persons likely to be affected by it in one issue each of a daily news paper in English Language and in Hindi Language having circulation in the area specified by the Commission.”

In this case, the petitioner of Petition No.51/2010 was M/s. All India Induction Furnace Association, Mandsaur and applicant has not published the application in such abridged form as specified by the Commission. Therefore, the Order passed by Commission is without following due procedure.

(iv) Section 64(3) (a) of the Electricity Act, 2003 provides that “ The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public –

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order.”

The Commission has not considered the above provision before passing the Order dated 07.10.2010.

(v) The petitioner quoting precedent in the matter has stated that while passing the Order in SMP No.43/2006 for amending the Tariff Order dated 31.03.2006 for the year 2006-07, a public notice dated 30.05.2006 was issued and suggestions and comments were invited from the public before the amendment of the mentioned Tariff Order. Similar, practice had been adopted by the Commission in the petition No.52/2009 for the amendment in Tariff Order 2009-10, whereby the Commission had issued

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an Interim Order dated 13.10.2009 for issuance of the public notice to invite suggestions/comments or objections. The Commission had ordered that the case shall be decided after considering the response from the stakeholders.

- (vi) The aforesaid practice has not been adopted before passing the order dated 07.10.2010 in Petition No.51/2010 which is a mandate under the Electricity Act, 2003.
- (vii) The Commission in the Tariff Order dated 18.05.2010 has approved the revenue income at revised tariff as 3099.4 cr. On account of implementation of the said Order dated 07.10.2010, the tariff income of the licensee will be reduced by more than 4 cr. The Commission has not decided the treatment for this un-recovered gap. In absence of any treatment on un-recovered amount at present will lead to the burden on prospective consumers, which is against the law of natural justice and National Tariff Policy.
- (viii) Clause 5.3 (h) (4) of Tariff National Policy provides that “Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, 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.” In this manner, the Commission has overlooked the above mentioned provision of National Tariff Policy while passing the Order dated 07.10.2010.
- b)** In addition to the above, M.P. **Madhya Kshetra** V.V. Co. Ltd., Bhopal submitted as given below:-
 - (i) In the present tariff structure, the energy charges for HT consumers have been categorized on the basis of load factor, therefore, any change in methodology of calculation of load factor due to which percentage of load factor is liable to change, affects the energy charges also. In the order issued on Petition No.51/2010, this fact was not taken in view which resulted in huge decrease in energy charges as with the new formula, load

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factor percentage increases and the bifurcation of consumed units below and above 50% load factor changes.

The billing before and after for three consumers of O&M Circle, Bhopal namely M/s. Abhishek Industries, M/s. Moenus Textiles, M/s. Kakda Steels has been enclosed, from which it may be observed that the Discom lost Rs.19.32 Lakh, Rs.2.53 Lakh, Rs.2.77 Lakh respectively in energy charges. There are more than 1200 consumers in Central Discom, the loss therefore would reach to the tune of Crores of Rupees.

(ii) The Commission found the expenditure of Rs.3390 Crore as legitimate in the ARR of the Discom and accordingly, decided the tariff so that equivalent revenue may be earned. Now with this order of amendment in LF formula, there would be a huge deficit in revenue.

(iii) The MPERC clarified/amended some of the provisions of the Tariff Order dated 31.03.2006 while deciding the SMP No.43/06. The order was issued on 13.06.2006. In para (vi) of this order the Commission has stated that

“As per tariff order dated 31.03.06, the minimum consumption based on load factor is levied to following categories of consumers:-

- a) LT industries
- b) Coal Mines
- c) Industrial & Non-Industrial

It has come to the notice of the Commission that supply to some areas is not continuous or some other restrictions are placed on consumption due to which aforesaid consumer may not be in a position to ensure minimum consumption based on prescribed load factor. There is thus a need to clarify the provision of minimum charges/minimum consumption.”

The purpose of quoting the old order of the Commission here is that previously the Commission has found that the “Load Factor” should not be linked with the consumption and ordered accordingly.

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(iv) In petition No.51/2010, the Commission has decided the new formula of Load Factor for giving more incentive on LF to the consumer. It is pertinent to mention here that in most of the states of India either there is no provision of incentive on load factor or available on higher percentage as compared to MP. Recently, the Jharkhand SERC in its order issued in Jan. 2010 has abolished the load factor rebates on load factor below 60%. In Chhattisgarh, the SERC has approved the load factor incentive over 70% only. The APERC in its tariff order for the year 2010-11, discontinued the load factor incentives w.e.f. 01.08.10.

In view of the previously mentioned facts and figures, the Discom prays the Commission to review its order dated 07.10.10 and restore the LF formula as it was provided in Tariff Order dated 18.05.2010.

8. During the course of hearing on 12.01.2011, in the oral submissions made by the petitioners, they reiterated the submissions/additional submissions filed by them. In addition, the representative on behalf of Central Discom stated that the change in the formula of load factor has resulted loss to the tune of Rs 19 Lakh in case of one consumer in the small period for which the tariff for FY 10-11 has been applicable and there has been loss in case of other consumers also. The representative on behalf of the East Discom stated that as per Tariff Policy uncontrollable cost should be recovered speedily and that such change is not an uncontrollable cost and the burden on this account would fall on other consumers in future.

9. On enquiry made by the Commission as to how the error in the Order is established, the petitioners stated that the intent of the Order dated 07.10.2010 was to make a change in load factor incentive and not the energy charges. However, due to change in load factor formula, not only the quantum of load factor incentive has undergone a change but the total energy charges, which are based on load factor, have also substantially undergone a change, having adverse impact on the revenue. The Commission did not intend to reduce the energy charges, as is clear from the Order

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dated 07.10.2010, wherein the Commission has refused to accept the request of M/s. All India Induction Furnace Association for reduction in energy charges by Rs.0.30 per unit.

10. The issue of admitting the petitions for further consideration has been deliberated at length by the Commission. In the process the order passed by Hon'ble Appellate Tribunal of Electricity, New Delhi (APTEL) in the matter of the Appeal No. 51/2008 has also been referred to. There was no consensus. The Chairman holds divergent views from the views of Member (Economics) and Member (Engineering). Both are given in this order.

11. **Per Member (Engineering), Shri. K.K.Garg and Member (Economics), Shri. C.S.Sharma:**

On going through the submission made by petitioners, it emerges that the main grounds on which the review of the impugned order has been sought are as under:-

- (i) **Issue No.1:-** Due process of review by conducting a public hearing was not followed.
- (ii) **Issue No.2:-** Relief was sought only by a small segment of the consumers whereas the changes have been applied across all HT consumers.
- (iii) **Issue No.3:-** While the Commission in its review order had mentioned that the Commission did not find any merit in requested reduction of tariff by Rs.0.30 per unit, however, the changes agreed by the Commission have resulted in tariff reduction.

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We now examine the above issues in detail:-

Issue No. 1:-

(a) Section 64 of the Electricity Act, 2003 provides the following procedure for tariff order:

(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,–

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

PROVIDED that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

From the above provisions, it is clearly seen that the prescribed procedure is in respect of application made either by a generating company or a licensee. It does not cover the nature of petition filed by M/s All India Induction Furnace Association, Mandasaur for review of the tariff order. Hence plea of the petitioners in this petition does not hold good.

(b) The petitioner no.2 has cited a specific case of SMP No. 43/06 where in the Commission had conducted a public hearing in the matter of review of certain

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aspects of the tariff order. While it is true that a public hearing was conducted in the specific case, it is also a fact that the proceedings were initiated suo- moto by the Commission covering a variety of issues. There is no practice of holding public hearing in all the cases of issuing clarification on the tariff order or making amendments in tariff order related issues.

(c) The petitioners have also referred to the clauses 40(1) and (2) of MPERC (Conduct of Business) Regulations, 2004. These clauses are reproduced below:

40 Review of the decisions, directions and orders:

(1) The Commission may on its own motion, or on the application of any of the person or parties concerned, within 60 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate order as the Commission thinks fit.

(2) An application for such review shall be filed in the same manner as a petition under Chapter II of these Regulations.

It is seen that provisions of above mentioned regulations had been complied with. Clause 9(3) of the said regulation mentions that the Commission may, if it considers appropriate, issue orders for advertisement of the petition inviting comments from interested persons on the issue involved in the proceedings in such form as the Commission may direct. The Commission did not consider it necessary to go for publication of any advertisement in the impugned petition. Moreover, the respondents in the impugned petition namely M.P.Madhya Kshetra Vidyut Vitaran Company, M.P.Paschim Kshetra Vidyut Vitaran Company and M.P.Poorva Kshetra Vidyut Vitaran Company did not raise this issue at that time.

It is therefore viewed that no case for review on this aspect has been made out.

Issue No. 2 :-

It is a fact that the impugned review petition was filed only by a segment of the consumers. However, during the proceedings the petitioner had brought certain anomalies to the Commission's notice in the changes introduced in the load factor

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incentive formula in the tariff order for FY 2010-11 as against the formula prescribed in the tariff order for FY 2009-10. Load factor calculation formula given in the above two tariff orders are as under:

ARR AND RETAIL TARIFF DETERMINATION FOR FY 2009-10

1.9 Load factor calculation and load factor incentive

- (i) The **load factor** shall be calculated as per following formula:
Units consumed (excluding units received from sources other than the Licensee) in a billing month X 100

Load factor(%) =-----

No. of hours in the billing month X max. demand or contract demand in KVA, whichever is higher X 0.9

ARR AND RETAIL TARIFF DETERMINATION FOR FY 2010-11

1.9 Load factor calculation and load factor incentive

- (i) The **load factor** shall be calculated as per following formula:
Monthly consumption X 100

Load factor(%)=-----

No. of hours in the billing month X Demand X PF

- i. Monthly consumption shall be units consumed in the month excluding those received from sources other than Licensee.
- ii. No of Hours in billing month shall exclude period of scheduled outages in hours.
- iii. Demand shall be maximum demand recorded or contract demand whichever is higher.
- iv. Power factor shall be 0.9 or actual average monthly power factor whichever is higher.

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The Commission saw merit in the petitioner's arguments. However, the Commission, rather than restoring the old load factor formula as requested by the petitioner, only made some suitable changes thereby while retaining the spirit of the formula in the tariff order FY 2010-11 on one hand but at the same time addressing the issue of unintended hardship resulting due to the changes in FY 2010-11 vis-à-vis FY 2009-10. Since the formula is common to all relevant consumers, it was only appropriate to apply the changes across the board. It is neither necessary nor prescribed anywhere that the Commission can review only if all consumers approach. In fact, the Commission has powers for even suo-moto review and had been doing the same.

In view of above, the plea for review on this ground also does not survive.

Issue No. 3 :-

The petitioner's plea that while the Commission did not accept the request for reduction of Rs. 0.30 per unit for mini steel plant sub. category, the changes made in the load factor incentive formula has resulted in tariff reduction. They also stated that the same would have revenue loss and the Commission did not provide for making good such revenue loss. In support of the argument petitioner no.1 submitted details of revenue loss in respect of three consumers.

We do not find any merit in the above argument. The Commission has not revised the fixed charges and energy charges and they continue to remain unchanged. Thus, the contention of the petitioner that the Commission had revised the energy charges is not supported by facts. Moreover, from the documents submitted in respect of the three consumers it is seen that a part of the claimed reduction in billing is on account of power factor incentive which perhaps was due to improper application of power factor incentive formula. The claimed reduction of Rs.4 Crs in revenue by petitioner no.2, although not supported by any documents but assuming, for the arguments sake, to be correct, hardly constitutes approximate 0.13% of the approved ARR and thus does not warrant any dispensation other than appropriately dealing the same at the time of true-up along with all the elements of revenue and expenses. It may also be mentioned that there are myriad provisions in the tariff order for penalty and incentives such as exceeding contract demand,

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recover minimum charges for consumption below specified levels, load factor incentive, power factor incentive and penalty, prompt payment, etc. As incidence of penalty or incentive depends on number of factors, its quantitative assessment is neither filed by the licensee in their ARR and tariff proposals nor taken into account in assessment of revenue.

In view of the above discussions, we are of the view that no case for review of the impugned order has been made out.

12. Views of Shri Rakesh Sahni, Chairman are as given below:

On going through the submissions made in the matter by the petitioners and on perusal of the records related to the case, I am of the opinion that the petitions are maintainable and should be admitted as there is an error apparent on the face of the Order dated 07-10-2010 issued in the petition no. 51 of 2010. My views on the related issues are as follows:

I. Procedure for review of tariff order:

The petitioners have raised the issue that the Commission has not followed due process of issuing notice to the public and inviting comments. The issue here, therefore, is as to whether any amendment in the Tariff Order requires following the same procedure which is adopted for determination of tariff. Here, I would like to quote relevant sections of MPERC (Conduct of Business) Regulations, 2004.

“8. *Proceedings before the Commission*

(4) *Except where the Commission may provide otherwise all matters affecting the rights or interests of the licensee or any other person shall be undertaken and discharged by the Commission through proceedings in the manner specified in these Regulations.*

9. *Initiation of Proceedings:*

(1) *The Commission may initiate any proceeding suo moto or on a petition or any other filing by any affected or interested person.*

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- (2) *When the Commission initiates the proceedings it shall be by a notice issued by the Office of the Commission and the Commission may give such orders and directions as may be deemed necessary **for service of notices to the affected or interested persons, for the filing of replies and rejoinders in opposition or in support of the petition in such form as the Commission may direct.***
- (3) *The Commission may, if it considers appropriate, **issue orders for advertisement of the petition inviting comments** from interested persons on the issue involved in the proceedings in such form as the Commission may direct.*
11. *If the Commission admits the petition, it may give such orders and directions as may be deemed necessary, for service of notices to the respondents if any in the petition and **also to other affected or interested parties** as the Commission may consider appropriate for filing of replies and rejoinder in opposition or in support of the petition in such form as the Commission may direct.”*

For true and correct construction of the legislation, the principle of harmonious construction is required to be resorted to. The purpose and object of the legislation must prevail over a narrow and/or literal interpretation which otherwise would defeat its purpose and object. A critical comparison of the said provisions would show that the intent is to provide opportunity to all affected persons to make their suggestions and objections, as it clearly lays down that the proceedings of the Commission shall include issue of notice by the Commission to the affected or interested persons. The petition once admitted (petition no. 51 of 2010), the procedure under clause 11 of the regulations, as mentioned above, should have been followed.

In the instant case, the affected persons were not only limited to the original petitioners who filed the petition for review of FY 10-11 Tariff Order under petition No.51/2010 nor the Distribution Licensees only but all other consumers also. This is so because the amendment to the Tariff Order issued vide Order dated 07.10.2010 under petition No.51/2010 has given increased incentive which is not limited to the original petitioners of petition No.51/2010 but it has also been extended to other consumers.

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Consequently, to bridge the deficit in the revenue income on account of increased incentive, this deficit so caused may have to be passed on to other consumers , who thus become affected by the order dated 07-10-2010. Therefore, in my opinion, affected persons in this case would cover all the consumers. This implies that before any amendment to tariff is made, the procedure of giving due public notice and seeking suggestions and objections from the public is essential so as to implement the intent and spirit of the Regulations specified by the Commission and the Electricity Act, 2003 and also to ensure that the principles of natural justice are not violated.

The Electricity Act, 2003, clearly lays down that while determining tariff, procedure under Section 64 is required to be followed. Sub-Section (2) and (3) under Section 64 of the Act provides for publication of the application for determination and consideration of all suggestions and objections received from the public. While an application for determination of tariff is filed by the Generating Company or Licensee on which the tariff is determined, such tariff becomes the basis for revenue projected to be earned by the Generating Company or Licensee vis-à-vis Aggregate Revenue Requirement. Any such further application for review of tariff order which may result in any amendment in the tariff order may also need similar treatment as it will have consequent adverse, or otherwise financial, impact either on the licensee or the consumers. Again, I would like to reiterate that the purpose and object of the legislation must prevail over a narrow and/or literal interpretation which otherwise would defeat its purpose and object. Therefore, in my view, any application which seeks to review the tariff order, must be brought to the notice of the public before any decision is taken to ensure a fair and transparent process.

The Commission in the past has followed the procedure of issuing public notice and inviting comments from the stakeholders and conducting public hearings when any changes or amendments in the Tariff Order were decided. Such proceedings of the Commission may be initiated Suo-Moto or on application from the licensee or consumer(s). Whether any objection is raised or not either by the Licensee or by the consumers, I feel that it is the responsibility of the Commission to follow due procedure inviting public comments when the tariff order is sought to be amended. The Commission is a quasi judicial body and it will not be appropriate to apply different yardsticks in cases of similar nature.

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I would also like to refer to the Order of Hon'ble APTEL in Appeal No.51/2008. This Order of the APTEL was also brought to the notice of the Members on record before finalization of this Order. The APTEL in the above mentioned Order held that –

“Part of para 2 “It is also noticed that the order dated 20th March, 06 modified a tariff order dated 15th March, 03 and such modification could not be done on certain representations without following the same procedure which is required to be followed for determination of tariff. It is noticed that the revenue loss caused to the appellant on account of order dated 20th March, 06 will have to be recovered from the other consumers which will raise the tariff for others. Thus, there is full justification for a public notice followed by a public hearing before the tariff order was reopened and a new dispensation was added for the industrial parks seeking single point HT connection. It may be added here that the condition for single point HT connection given in order dated 20th March, 06 do not make any provision for any charge, cross subsidy or compensation for the appellant.

Para 4: The learned counsel appearing for the respondent Nos. 2 to 4 do not dispute that a tariff order cannot be amended on representation of certain consumers without notice to all the stakeholders. The Electricity Act, 2003 and Regulations framed under by various Commissions categorically provide for notice to public and opportunity to consumers of all sections to represent their views before the tariff is determined by appropriate commissions. Therefore, once the tariff is actually determined it would amount to violation of the procedures laid down if the tariff so determined is subsequently altered to the disadvantage of the distribution company and / or the other consumers on the representation of a few specific consumers.

Para 9: Further, the Commission was amending the tariff order and therefore, the tariff implication of the new dispensation was a *sine qua non* of such an order. What the appellant was pointing out in the review petition was the losses to it which were required to be taken care of by the Commission. No

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doubt the review petition suffers from drafting defects but the same does draw attention to certain apparent errors.

Para 11 : In our opinion, **the failure to adhere to the procedure for passing a tariff order is an error apparent** and can be set aside in review.....”

Part of para 13: The Commission lost sight of the fact that it was revisiting the tariff order and while doing so the tariff implication of the amendment had necessarily to be taken care of. The Commission also lost sight of the fact that while amending the tariff order long time after the tariff order was passed, the procedure provided for passing such an order given by the law was required to be followed.....”

I would further like to quote the remarks of Member (Engg.) on the case file with which the Member (Economics) has also agreed:

“I have gone through the judgment of Hon’ble APTEL quoted above and find that the facts and circumstances were different than the facts in this case.”

I am surprised that the Members have decided to hold that the Hon’ble APTEL judgment would not or does not apply in this case. What Hon’ble APTEL has laid down is the principle that modifications in the Tariff Order are not possible at the hands of the Commission without it following due process. I also find that the facts could not have been more similar in two separate cases than they are in this APTEL case and the case at hand.

II. Reasoned Order :

The Order dated 07.10.2010 in the Petition No.51/2010, vide which the tariff order has been amended, nowhere speaks about the reasons for not following the procedure of issuing the public notice or inviting comments from the public. Here, I would like to refer to the judgment of Hon’ble Supreme Court in civil appeal No.2225 of 2010, relevant extracts of which are reproduced below:-

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“31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration justice – delivery system, to make known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind.

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum.

33. Thus, it is evident that the recording of reasons is principle of natural justice and every judicial order must be supported by reasons in writing. It ensures transparency and fairness in decision making. The person who is adversely affected may know, as why his application has been rejected.”

The object underlying the rules of natural justice “is to prevent miscarriage of justice” and secure “fair play in action”. The requirement about recording of reasons for its decision by an authority exercising quasi judicial functions achieves this object by excluding chances of arbitrariness and ensuring a degree of fairness in the process of decision-making. The order of the Commission dated 07-10-2010 is devoid in this regard as no explicit and clear reasons for not issuing the public notice and inviting comments have been provided so as to indicate that the authority has given due

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consideration to the points in controversy. I therefore do not find any justifiable reasons to refuse the admissibility of the petitions in the instant case.

III. Impact on revenue of the licensees due to change in LF incentive formula- change in tariff applicability:

The principle issue involved from the point of view of petitioners has been entirely ignored as their request to compensate the loss in revenue due to amendment in the tariff order has not been given any attention. Although it is true that the rates have not been amended but its applicability has under gone a significant change, as also contended by the petitioners. This is further explained in the following paragraph.

As per the tariff Order for FY 2010-11, differential energy charges are applicable based on the levels of load factor attained for specified categories of consumers. The amendment in the load factor formula has resulted in increase of load factor for the same amount of consumption. This has resulted in not only an increase in the amount of load factor incentive but it has also resulted in change in applicability of the energy charges for the same amount of energy consumption, thereby reducing the quantum of total energy charges. The first higher rate is applicable up to the consumption which is commensurate up to 50% load factor and the second rate which is substantially lower than the first rate, is applicable for consumption commensurate to the load factor in excess of 50%. Since the change in formula of load factor calculations has resulted in increase of load factor, the consumption commensurate up to 50% load factor has gone down and the consumption commensurate with the load factor in excess of 50% has gone up for the same amount of total consumption. Thus, while the rates although have not been amended, its applicability for the same amount of consumption has substantially changed resulting in billing of less energy charges for the same amount of consumption. Obviously it has the impact of reduction in the tariff for same amount of consumption. This issue has been clearly brought out by the petitioners in their petitions.

Furthermore, Order dated 07.10.2010 clearly rejected the request of the petitioner to extend tariff relief finding it devoid of merit but the change in the formula has achieved precisely that in favour of, not merely the original review petitioner, but a whole class of consumers. The adverse financial impact on the revenues of the

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distribution licensees has not been compensated in the Order thus, leaving an unfilled gap. The Commission has also not considered the overall adverse financial impact on the revenues of all the distribution licensees taken altogether nor has it provided any treatment to meet the deficit on this account. This, in my view is a grievous infirmity which ought to be considered for correction. I consider that in rejecting the present review petition, we would be closing our eyes to the law as uniformly understood. I feel that there has to be harmonious interpretation of the law and all the issues raised by the petitioners or the respondents need to be given a due and fair consideration ensuring that the Commission makes an equitable and fair order in consonance with law.

IV.Provisioning of incentives in tariff Order- legal considerations:

Tariff determination process is required to be guided by the relevant provisions of the Electricity Act, 2003 and the Tariff Policy. The Tariff policy nowhere enumerates the principle whereby incentives to a selected group of consumers are allowed. I am of the opinion that the framework provided in the law allows the Commission to determine the tariff for various categories considering various factors with allowance for built-in cross-subsidy. Thus, the rates including cross-subsidy are required to be fixed upfront in a manner that the specified rates are effectively commensurate with the prescribed cross-subsidy percentage for that particular category of consumers. This would mean that any incentive over and above such tariff may not be valid unless the reduction in revenue on this account is suitably taken care of. I also find it unjustified that by availing incentives, average cost of supply of some of the so called cross-subsidizing consumers goes below the average cost of supply determined in the tariff order. This means that factually such cross-subsidizing consumers do not pay any cross subsidy but they get cross-subsidized. The order dated 07-10-2010 by increasing the amount of incentive may have further aggravated this situation.

I would like to quote the relevant provisions of the Tariff policy:

“ 8.1 (4) Licensees may have the flexibility of charging lower tariffs than approved by the State Commission if competitive conditions require so without having a claim on additional revenue requirement on this account in accordance with section 62 of the Act.”

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Thus while the licensee may not be allowed to charge any consumer in excess of the prescribed tariff, he may on his own looking to the competitive conditions, allow incentives/rebates ensuring that there is no discrimination and that the quantum of such incentive/rebate shall not be a pass-through in the ARR.

V. I, therefore, hold the view that the Commission has not followed due procedure in the instant case. I am of the considered opinion that the review petitions should be admitted so that the petitioners have the opportunity to express their views in detail.

13. In terms of Section 92(3) of Electricity Act, 2003 (36 of 2003), the majority view of Shri K.K. Garg, Member (Engineering) and Shri C.S. Sharma, Member (Economics) will be the Order of the Commission and accordingly the petitions in the matter are not found admissible.

Ordered accordingly.

(C.S. Sharma)
Member (Economics)

(K.K. Garg)
Member (Engineering)

(Rakesh Sahni)
Chairman

Date: : 11.02.2011

Place: Bhopal