

BEFORE
THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION
LUCKNOW

In the matter of:

Revised Tariff Rates for Power Loom Consumers

And

In the matter of:

Uttar Pradesh Power Corporation Limited, Lucknow.
Poorvanchal Vidyut Vitran Nigam Limited, Varanasi.
Paschimanchal Vidyut Vitran Niagam Limited, Meerut.
Madhyanchal Vidyut Vitran Nigam Limited, Lucknow.
Dakshinanchal Vidyut Vitran Niagam Limited, Agra.
Kanpur Electricity Supply Company, Kanpur
Noida Power Company Limited, Greater Noida

ORDER

The Commission has received a letter of Principal Secretary (Energy) Government of Uttar Pradesh dated 14th June, 2006 addressed to Managing Director, UP Power Corporation Limited on 28th June, 2006 directing the Corporation that the power loom consumers in the State will be billed on a concessional flat rate per HP with provision of specific rate of charge for urban and rural power loom consumers depending on their reed space. It has also been provided in the direction that the tariff of existing connections would also be converted into this flat rate tariff. The direction also prescribes security amount and system loading charges for new connections. Under point No. 11 of the direction, it is provided that meters will continue to exist in the premises of power loom consumers, which will be read twice in a year in order to estimate the quantum of subsidy to be informed to the State Government arising out of the difference of prevalent tariff rates and the subsidized flat rates.

Since the fixation of tariff by Electricity Regulatory Commission under section 62 of the Electricity Act, 2003 is a quasi judicial function reflecting an exercise of delegated legislative power and also because of the fact that the Commission is the only body entrusted with the responsibility of tariff determination as has also been construed by the Hon'ble Supreme Court in the matter of West Bengal Regulatory Commission Vs. CESC Ltd. , the Commission takes suo moto cognizance of the aforesaid direction issued by the State Government with respect to prescribing flat rate tariff to power loom consumers. Before touching upon the justifiability of the aforesaid direction, it would be in fitness to refer various provisions of Electricity Act, 2003, which deal with the jurisdiction of tariff determination, directions by the State Government and implication of such direction in the process of tariff determination.

“Section 62(1)(a): The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

- (a) *Supply of electricity by a generating company to a distribution licensee:
Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into*

between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

- (b) Transmission electricity;*
- (c) wheeling of electricity;*
- (d) retail sale of electricity;*

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

Section 65: *If the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State Commission under Section 62, the State Government shall, notwithstanding any direction which may be given under section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the license or any other person concerned to implement the subsidy provided for by the State Government:*

Provided that no such direction of the State Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard.

Section 86(1)(a): *The State Commission shall discharge the following functions, namely:- Determine the tariff for generation, supply transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:*

Section 108 (1): *In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.*

(2) *If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.*

It is abundantly clear from section 62 and 86(1)(a) that the Commission and the Commission alone is authorized to determine the tariff. However, while determining the tariff, the Commission has not been given an unguided and arbitrary power to fix tariffs as it likes rather the same has to be done in conformity with the provisions of the Electricity Act, 2003 and the relevant regulations made by the Commission in requirement of the provisions of the Act. On policy matters in public interest the Commission has to be guided by the directions of the State Government under section 108 so long as the directions issued by the State Government are consistent with the provisions of the Act and specifically section 65 of the Electricity Act, 2003, which requires payment of subsidy in advance in case of any direction issued by the State Government in tariff matters.

Having discussed the applicable legal framework we examine the contents of the direction of the State Government. No doubt, even if the order issued by the State Government in public interest does not mention section 108 as the source of such direction such non mentioning of section should not be held against the direction but then the direction in matter of tariff determination and other wise also with reference to section 108 can only be issued to the State Electricity Regulatory Commission and not to the Power Corporation Limited or licensees. Accordingly, any direction issued to the licensees to charge a rate of tariff at variance from the specified rates by the Commission becomes a nullity and lacks legal force.

In this context it also needs to be examined as to what kind of policy direction can be issued to the State Commission in such a situation. There is absolutely no doubt that the State has manifold functions including extending an encouragement to a class of entrepreneurs but while doing so it has to be ensured that the direction does not run counter to the statutory mandate contained in the sections related to tariff determination under the Electricity Act, 2003. It is also observed that since section 108 does not begin with a non-obstante clause and therefore, the direction issued under it do not override the obligations laid down under the provisions of the Act specifically the requirement provided under section 65 of the Act. In the instant case, the direction of the State Government provides that quantum of subsidy will be estimated by meter reading to be carried twice in a year to determine the difference between the amount payable on

prevalent tariff rates and the subsidized flat rate. This procedure of estimating the subsidy, without even talking about its payment, runs directly counter to section 65 of the Act, which unambiguously provides that the subsidy to any consumer is required to be paid in advance by the State Government in a manner specified by the Commission, otherwise the tariff prepared by the State Electricity Regulatory Commission would prevail. Since the direction does not provide for advance subsidy and the Commission has not been approached in this matter to specify the manner of advance payment, the rates provided in the direction of the State Government cannot be implemented in accordance with the proviso of section 65.

Having established that the Commission has the exclusive jurisdiction to determine the tariff and also that the Government may issue a policy direction to encourage or subsidize a group of consumers under section 108, while abiding by the requirement of section 65, the Commission would also like to discuss the nature of policy direction as may be issued under this section for the purposes of tariff determination. The State Government is empowered to give direction on the questions of policy in general hence we don't find anything wrong with this direction as it targets a class of consumers in general however, it needs to be underlined that the direction of the State Government, as in the instant case to provide a concessional tariff for power looms, while being within the ambit of the policy, in indicating the specific rate is certainly in excess of the power of giving direction on the question of policy. It may be recalled that the Commission had allowed an annual relief/rebate of Rs. 5000.00 per power loom consumer in the last two months bills of the financial year on the proposal of the licensee. If the Government intends to subsidize these consumers further, the Government may specify a higher relief for these consumers, along with commitment of advance subsidy, without tinkering with the existing rate structure.

Therefore, in view of above the said direction of the State Government does not stand the scrutiny of law. The direction is ultra vires to the extent that it provides specific flat rates for power loom consumers that too on the basis of an assumed contracted load (with no relationship whatsoever with actual connected load) and it does not provide for the subsidy estimation along with the commitment of the State Government to make an advance payment against it in accordance with section 65 of the Electricity Act, 2003. The licensees are, accordingly, directed not to implement any revised rate on the power

loom consumers and to bill them strictly in accordance with the rate schedule provided in the tariff order 2004-05 with the existing rebate provision.

(R.D. Gupta)
Member

(P.N.Pathak)
Member

(Vijoy Kumar)
Chairman

Place : Lucknow
Dated : 3rd July, 2006