

Before the  
**MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**  
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Case No. 49 of 2007

In the matter of  
Petition filed by M/s. New Bombay Ispat Udyog Private Limited seeking review of Tariff  
Order dated October 20, 2006 read with Clarificatory Order dated February 26, 2007.

Shri A. Velayutham, Member  
Shri S. B. Kulkarni, Member

**ORDER**

**Dated: September 4, 2008**

M/s. New Bombay Ispat Udyog Pvt. Ltd. (NBIUPL) submitted a Petition under affidavit, before the Commission on October 5, 2007 seeking review of the Tariff Order issued by the Commission for Maharashtra State Distribution Company Limited (MSEDCL) dated October 20, 2006 in Case No. 54 of 2005 in the matter of approval of Annual Revenue Requirement (ARR) for FY 2004-05, FY 2005-06 and FY 2006-07 and determination of Tariff for FY 2006-07, read with Clarificatory Order dated February 26, 2007 in Case No. 54 of 2005. Review has been sought with regard to the calculation of Additional Supply Charge (ASC) units and the inclusion of ASC units while computing the Load Factor Incentive.

2. NBIUPL in its Petition prayed as under;
- a. *“the Hon’ble Commission be pleased to alter / modify Clause 4 (a) of the aforesaid order dated 26<sup>th</sup> February 2007 read with order dated 20<sup>th</sup> October 2006 in the following manner “..... or the billing period of the month in **which the third occasion of the consumer utilizing at least 75%.....***
  - b. (i) *In the alternative the Hon’ble Commission be pleased to declare that the ASC be calculated on the basis of consumption of first complete Billing Cycle of 30 days (inserted based on additional submission by Petitioner).*  
(ii) *in the alternative the Hon’ble Commission be pleased to clarify that the application of the said clause 4(a) of the aforesaid order dated 26<sup>th</sup> February 2007 read with order dated 20<sup>th</sup> October 2006 would become applicable only after 3 months from the increase in the sanctioned load / Contract Demand.*

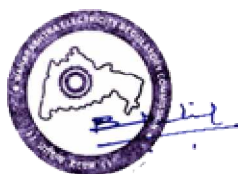


- c. *That the Hon'ble Commission be pleased to direct the Respondent to refund or adjust against future billings, the amount of energy charges and other incidental charges paid by the Petitioner along with interest accrued thereon, on the basis of the benchmark units fixed in the first month (April 2006) and ASC units calculated accordingly.*
  - d. *The Hon'ble Commission be pleased to alter / modify Clause "e" at page 145 of the order dated 20<sup>th</sup> October 2006 by inserting the phrase "including ASC charges" after the words "Consumers having load factor over 75% up to 85% will be entitled to a rebate of 0.75% on the energy".*
  - e. *in the alternative the Hon'ble Commission be pleased to clarify that the Additional Supply Charge should include in the first slab of load factor over 75% up to 85%.*
  - f. *That the Hon'ble Commission be pleased to direct the Respondent to refund or adjust against future billings, the amount of Load Factor Incentives and other incidental charges paid by the Petitioner along with interest accrued thereon, on the basis of the existing clause "e" at page 145 of the aforesaid order dated 20<sup>th</sup> October 2006.*
  - g. (i) *In the circumstances the Hon'ble Commission comes to a conclusion that the present Petition is not filed within the period of limitation, the Petitioner prays that in the peculiar facts and circumstances of the case and in the interest of justice the delay if any may be condoned. (inserted based on additional submission by Petitioner).*  
(ii) *for cost of the present Petition.*
  - h. *such other further reliefs as the circumstances of the case may require."*
3. NBIUPL in its Petition submitted as under:
- a) NBIUPL had a contract demand of 4900 kVA with MSEDCL till the month of April 2006, which was increased to 9700 kVA with effect from April 29, 2006.
  - b) The two issues in the context of the Commission's Tariff Order dated October 20, 2006 read with Clarificatory Order dated February 26, 2007, are as under:

(i) The basis of calculation of ASC units:

For the billing cycle from April 14, 2006 to May 13, 2006, the billing period was of 29 days because of no power supply on April 29, 2006 from 10:00 hrs to 17:00 hrs due to replacement of CT/PT, meter, cubicles as well as line testing, etc., and load release was done by MSEDCL only in the late hours.

NBIUPL could use the additional load (increased Contract Demand) for only about 12 to 13 days during the billing period. Further, NBIUPL achieved 75% of the increased Contract Demand immediately, due to specific nature of the business (being a Foundry). Thus, the maximum demand was recorded for nearly full level, i.e., 90% to 91 % of the enhanced Contract Demand within the first billing month, whereas the



energy consumed was not continuous at the enhanced level and that too for 29 days, of which the increased Contract Demand was utilised for only 12 to 13 days.

Clause 4 (a) of the Commission's Clarificatory Order dated February 26, 2007 read with Commission's Tariff Order dated October 20, 2006 stipulates that in cases of increase in Contract Demand, either the billing period after 6 months of the increase in Contract Demand/Sanctioned Load, or the billing period of the month in which the consumer has utilised at least 75% of the increased Contract Demand/ Sanctioned Load, whichever is earlier, would be considered for determining the reference period for calculation of benchmark units.

NBIUPL submitted that High Tension continuous process consumers typically take a period of 3 to 6 months for utilisation of various machinery and equipment, and then the production is normalised so as to optimise the energy consumption. Due to above referred Clause 4 (a) adopted for the purpose of calculating the number of ASC units, the whole purpose of increase in the Contract Demand would be defeated as the cost of energy from MSEDCL would become exorbitant and unviable, as the Petitioner has reached 75% of the revised Contract Demand in the first month itself, even though the consumption has not increased commensurately.

NBIUPL submitted that the Commission has introduced the concept of incentive/disincentive to enable the consumer to respond to levy of ASC charges by reduction in their consumption with respect to the consumption in previous period whereas, the above referred clause 4(a) has resulted in the benchmark units being fixed at abnormally low level, and is not possible for NBIUPL to respond to the Commission's intention of incentivising the consumers to reduce energy consumption.

NBIUPL sought review of the Tariff Order of the Commission dated October 20, 2006 in Case 54 of 2005, and substitution of Clause 4 (a) of the Clarificatory Order dated February 24, 2007, with Clause 12 of the Clarificatory Order dated August 24, 2007, in Case 26 of 2007 and Case 65 of 2006, as under:

*“In case of consumers whose sanctioned load/contract demand had been duly increased after the billing month of December 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which the third occasion of the consumer utilising at least 75% of the increased sanctioned load/Contract Demand after increasing the Contract demand is recorded, whichever is earlier.”*



(ii) Load Factor Incentive on ASC units:

The Commission, under Para 28 on page 128 of the Tariff Order dated October 20, 2006 in Case No. 54 of 2005 has specified that all the discounts and incentives would remain same as earlier, as reproduced below:

***“28. Incentives/ Discounts***

*MSEDCL in its Petition has proposed to withdraw all the rebates and incentives to HT industrial category viz. bulk discount, load factor incentive, prompt payment incentive, and power factor incentive.*

*The Commission does not agree with MSEDCL’s proposal and rules that all the rebates and incentives **will continue** till further Order from the Commission. The Commission is of the view that incentives and penalties are the factors that promote efficiency, commercial principles, better performance, etc., and therefore should be applicable...” (emphasis added)*

However, in Para 2 on Page No. 145 of the Order, the Commission has specified the Load Factor Incentive as follows:

***“e) Load Factor Incentive***

*The Commission **has retained** the Load Factor incentive for consumers having Load Factor above 75% based on contract demand. Consumers having load factor over 75% up to 85 % will be entitled to a rebate of 0.75 % on the energy charges for every percentage point increase in load factor from 75% to 85%. Consumers having a load factor over 85 % will be entitled to rebate of 1% on the energy **including ASC charges** for every percentage point increase in load factor from 85 %. ...” (emphasis added)*

In the above referred Order, while specifying the load factor incentive for the first slab of load factor over 75% up to 85%, the words “including ASC charges” have been omitted inadvertently, while for the second slab of load factor above 85%, it has been expressly mentioned that consumers having load factor above 85% will be entitled to rebate of 1 % on the energy charges including ASC charges. As a result, MSEDCL has split units consumed into energy units and ASC units, and has given load factor rebate for load factor up to 85%, only on energy units rather than computing the same on energy units as well as ASC units.

NBIUPL submitted that the exclusion of the phrase ‘including ASC charges’ was inadvertent and the Commission has discovered this omission and error at a later stage. The Commission had expressly inserted the same phrase in its subsequent Orders dated May 18, 2007 and Clarificatory Order dated August 24, 2007. NBIUPL



requested the Commission to issue necessary clarification in the matter to cover the period from October 1, 2006 to April 30, 2007.

4. The Commission, vide its Notice dated October 23, 2007, scheduled a hearing in the matter on November 7, 2007, and directed NBIUPL to serve a copy of its Petition along with its accompaniments and amendment to MSEDCL and the four authorised Consumer Representatives.

5. At the hearing held in the matter on November 7, 2007, Shri. Haresh Jagtiani, Counsel, appeared on behalf of NBIUPL. Shri. Abhishek Khare, Counsel, appeared on behalf of MSEDCL. Shri Abhishek Khare sought two weeks time to file MSEDCL's reply, which was granted by the Commission.

6. Subsequently, MSEDCL vide its letter dated November 19, 2007 responded to the Petition filed by NBIUPL and submitted as under:

- a) The Review Petition filed by NBIUPL is time barred and not maintainable as the Petition is filed by an individual consumer to reconsider the Commission's Orders, which have been in force for some time.
- b) The Proceedings concerning the Tariff Order dated May 18, 2007 read with the Clarificatory Order dated August 24, 2007 are sub-judice before the Appellate Tribunal for Electricity (ATE), and as such the NBIUPL ought not to be permitted to invoke so belatedly the review jurisdiction of the Commission.
- c) The concept of ASC is intended to protect the interests of all segments of consumers, wherein the consumers who are benefited from reduced load shedding pay for the additional power procured through ASC. As per the provisions of the National Energy Policy (NEP), National Tariff Policy (NTP) and Electricity Act, 2003 (EA 2003), it would not be prudent to alter the reference period for ASC. If the Commission changes the reference period for a single consumer, the ASC matrix will be required to be revisited, since the mechanism will have to be balanced resulting in unnecessary modification of the Commission's Tariff Order, since Annual Revenue Requirement (ARR) has to be balanced. MSEDCL submitted that any further discussion on ASC is unwarranted and need not be considered since the same has been formulated after detailed deliberation by the Commission.

7. Subsequently, the Commission, vide its Notice dated December 3, 2007, scheduled a further hearing in the matter on December 12, 2007.

8. At the hearing in the matter on December 12, 2007, Shri. Haresh Jagtiani, Counsel, appeared on behalf of the NBIUPL and Shri. Abhishek Khare, Counsel, appeared on behalf of MSEDCL. Shri. Haresh Jagtiani referred to the reply submitted by MSEDCL and submitted



that there has been no delay in the initiation of the proceedings, and if any delay is decided against the NBIUPL, there is sufficient ground for the Commission to exercise its discretion to condone the same. Shri. Jagtiani submitted that the period of limitation for the matter should be considered from the date of the passing of the Clarificatory Order dated August 24, 2007 (which is a Clarificatory Order of the Order dated May 18, 2007). Shri. Jagtiani further referred to the provisions contained under Regulation 85(a) (c), 92 94 of the MERC (Conduct of Business) Regulations, 2004 read with Section 114 of the Code of Civil Procedure, and Sections 3, 5 and 29(2) of the Limitation Act, 1963 and submitted that a conjunctive reading of the said provisions would hold that while condoning delay in the initiation of review proceedings, on the '*discovery of new and important matter or evidence*' and/or '*any sufficient reason*', which is the case of NBIUPL, the Commission may exercise the powers of a High Court. Under Section 5 of the Limitation Act, 1963, delay may be condoned for '*sufficient cause*' in the filing of an *application* or an *appeal* (as compared to a *suit*). Counsel made the following submissions while seeking condonation of delay:

- (i) The impugned Order has been modified by the Clarificatory Order dated August 24, 2007 in Case Nos. 26 of 2007 and 65 of 2006 (which is a Clarificatory Order of the Tariff Order dated May 18, 2007 in Case 65 of 2006). The relief sought under the Petition is the inclusion of ASC charges while calculating load factor incentive for load factor between 75% to 85% of Contract Demand. In paragraph 15 of the Clarificatory Order dated August 24, 2007 (pages 27 and 28), such a relief has been allowed. This amounts to modification of the impugned Order read with the Order dated October 20, 2006. Since the said Clarificatory Order is operative from May 1, 2007, NBIUPL sought a retrospective operation of the said relief in case of bills issued during FY 2006-07 (under the impugned Order dated October 20, 2006). Thus, NBIUPL has not sought any relief inconsistent with law under the Petition.
- (ii) The nexus of attainment of 75% to 85% of Contract Demand for being eligible for load factor incentive, as provided under the Order dated October 20, 2006 read with the impugned Order, is a new policy. Sufficient time needs to be provided to industrial consumers to understand the implication of this new policy, and adopt appropriate technical measures to control/conduct their energy consumption inasmuch as to avail load factor incentive. If NBIUPL had known of the operation of such benchmark, it would have taken appropriate steps to attain 75% of the increased Contract Demand, so as to avail load factor incentive.
- (iii) Considering the ground realities involved in the testing of new machines, vis-à-vis the increase in Contract Demand being made effective late in the month, NBIUPL had only 12 days during the reference period for its eligibility of load factor incentive.
- (iv) No rights have crystallised in favour of any party, which disturbs or renders infructuous the condonation of delay in favour of NBIUPL. The delay in the filing of review proceedings does not impinge on any third party rights and does not jeopardize the interests of MSEDCL.



- (v) The load factor eligibility as claimed by NBIUPL has already been allowed to other HT industrial consumers, with the operation of the Clarificatory Order dated August 24, 2007.
- (vi) Any industrial consumer is not expected to employ prompt legal due diligence to analyze the implication of each Order passed by a court.

9. Shri. Jagtiani further submitted that since the impugned Order has 'retained' the policy of including ASC charges in the quantum of energy charges in the determination of load factor incentive, MSEDCL should be directed to give retrospective operation to the same. It was submitted that the term 'retained' should imply as from inception.

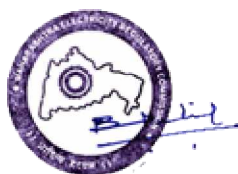
10. On an enquiry made by the Commission, Shri. Jagtiani submitted that the appellate proceedings pending before the Appellate Tribunal for Electricity (ATE) on the impugned Order does not bar the admission of the present matter, as the said appellate proceedings have not been initiated at the instance of NBIUPL.

11. Shri. Abhishek Khare opposed the grant of condonation of delay and submitted that NBIUPL being an industrial consumer is not expected to take considerable time to understand the technical implication of an Order. An industrial consumer has recourse to sound advice. Shri. Abhishek Khare requested the Commission to reject the Petition filed by NBIUPL for gross delay and negligence. It was further submitted that retrospective operation of the grant of load factor incentive would not be feasible considering that closure of annual accounts have already taken place. Further, the adverse impact on the annual revenue requirement and annual performance review of MSEDCL, due to the grant of load factor incentive with retrospective operation, should be considered by the Commission. Shri. Khare further sought one week's time to apprise the Commission as to whether the issues raised in the present matter are pending adjudication before the ATE.

12. Per contra, Shri. Jagtiani argued that the submissions of Shri. Khare defeats the ends of justice and the sufficiency of reasons for condonation of delay. Counsel filed a copy of the judgment passed by the Hon'ble Supreme Court [*AIR 1998 SC 3222*] on the issue of condonation of delay. On the issue of closure of annual accounts, Shri. Jagtiani submitted that accounts should always be subject to modification and necessary rectification.

13. Dr. S.L. Patil, Thane Belapur Industries Association, supported the case of the NBIUPL and submitted that the delay should be condoned.

14. The Commission kept the issue of jurisdiction and admission of the matter open and directed MSEDCL to file appropriate submissions on affidavit apprising whether the appellate



proceedings initiated by MSEDCL before the ATE cover the issues raised under the present Petition.

15. The Commission, vide its Notice dated February 21, 2007, scheduled the further hearing in the matter on April 22, 2008.

16. MSEDCL, its letter dated April 21, 2008, submitted a counter reply in respect of the Petition filed by NBIUPL, as under:

- (a) NBIUPL is trying to prefer an appeal under the garb of review, which ought not to be entertained by the Commission. The Petition is barred by limitation and the NBIUPL cannot take advantage of its own wrong doings, and the Petition as filed is outside the scope of Regulation 85 of the MERC (Conduct of Business) Regulations, 2005.
- (b) NBIUPL has recorded 90 to 91% of the increased Contract Demand in the very first month after the increase in Contract Demand.
- (c) If the Commission has inadvertently excluded ASC for computation of load factor incentive in its Tariff Order dated October 20, 2006, then the Commission should issue another Clarificatory Order in the matter. Further, NBIUPL, under MERC (Conduct of Business) Regulations, 2004, should have applied for the review within forty-five days of issuance of the Order.
- (d) NBIUPL's suggestion for providing 3 months from the increase in the increased/sanctioned load as the reference period for billing is not logical.
- (e) NBIUPL has been charged in accordance with the Commission's Order dated October 20, 2006 and therefore, there has been no non-compliance or discrepancy on the part of MSEDCL and thus, the question of compensating for interest accrued does not arise.

17. MSEDCL, vide another letter dated April 21, 2008 submitted that it has raised the same issues under two matters, viz., Appeal No. 108 and 144 of 2007, which are sub judice before the ATE. Further, MSEDCL requested the Commission to postpone the hearing till the ATE gives its decision on Appeals No. 108 and 144 of 2007.

18. At the third hearing in the matter held on April 22, 2008, Shri. Abhishek Khare, Counsel for MSEDCL, referred to the Record of Proceedings held on December 12, 2007, wherein, the Commission had directed MSEDCL to apprise the Commission as to whether any proceedings were pending before the ATE that concern the same issues as that under the Petition filed by NBIUPL, and submitted that, inadvertently, this aspect was missed out in the counter affidavit filed by MSEDCL. He further submitted that MSEDCL had filed a separate letter on April 21, 2008, thereby apprising the Commission that there are two appeals pending in the case of MIDC Industries Association, Chandrapur before the ATE being Appeal No. 108 of 2007 and Appeal No. 144 of 2007, where the issues raised in the present matter and



raised under the appeals before the ATE are identically the same. It was submitted that the said appeals have been preferred against the Commission's Order dated May 18, 2007 passed in Case No.65 of 2006.

19. Shri. Haresh Jagtiani, Senior Counsel for the NBIUPL, refuted the stand taken by MSEDCL that identical issues were pending before the ATE. It was submitted that the case of the NBIUPL is a unique case, where the NBIUPL has sought for alteration Clause 4 (a) of the Commission's Clarificatory Order dated February 26, 2007 read with the Commission's Tariff Order dated October 20, 2006 applicable with effect from October 1, 2006 in view of the clarifications issued under the Order dated August 24, 2007. NBIUPL had raised two issues from the aforesaid Order for determination by the Commission, as under:

- (i) Issue I: The basis of calculation of ASC units;
- (ii) Issue II: Load Factor incentive on ASC units.

20. Shri. Jagtiani further submitted that Appeal Nos. 108 and 144 of 2007 has not raised the issues raised by NBIUPL, as, Appeal No. 108 of 2007 challenges the Commission's Order dated May 18, 2007 so far it relates to the concept of Regulatory Liability Charge (RLC), and on the other hand, Appeal No. 144 of 2007 challenges the Commission's Orders dated October 20, 2006, March 2, 2007, and March 3, 2007 on issues relating to and arising out of Transmission and Distribution (T&D) losses. In both the said appeals, MSEDCL has defended the impugned Orders and is not challenging the same. Shri. Haresh Jagtiani pointed out that the stand taken by MSEDCL before the ATE was different than that being taken before the Commission and pressed that any stand that is taken by MSEDCL should be on affidavit. Shri. Jagtiani brought to the notice of the Commission that almost six months' time has elapsed but MSEDCL has yet not filed the requisite information on affidavit.

21. NBIUPL submitted that if the Commission issues a further clarification to its Order dated August 24, 2007, it will not be as if a special retrospective right would be granted to the NBIUPL, which did not previously exist. Thus, any notion that NBIUPL has sought retrospective relief and rights in its favour must stand dispelled forthwith. NBIUPL further submitted that MSEDCL at paragraph 5 of its reply filed on April 19, 2008 has admitted vis-à-vis issue No. II, that the exclusion of the phrase "*including ASC charges*" was inadvertent. This admission on the part of MSEDCL must automatically result in the grant of relief to NBIUPL as regards issue no. II.

22. NBIUPL submitted that the Commission, while issuing the Clarificatory Order dated August 24, 2007 has clarified that the test for setting the benchmark would be the third occasion on which the consumer utilises at least 75% of the increased Sanctioned Load/Contract Demand or trial run during 6 months billing period, whichever is earlier. The

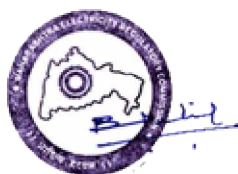


Clarificatory Order stipulates that in certain cases, the Billing Demand could exceed 75% of the Contract Demand in the first month itself and has thus, modified the previous criterion. NBIUPL's revised Contract Demand is higher by 25% over the existing Contract Demand. The reference period was the period from April 14, 2006 to May 13, 2006. The Contract Demand was increased on April 29, 2006, hence, NBIUPL was able to utilise the enhanced Contract Demand for a period of 13 days only. As a result, 42% of NBIUPL's consumption has been billed at the higher ASC rate. It is the third occasion on which Billing Demand exceeds 75% of Contract Demand that should be taken to be the reference period. The other issue is load factor incentive. In both these matters, viz., whether it should be the third occasion or six months, whichever is earlier, is a clarification issued by the Commission at subsequent point of time. Similarly, the Commission has clarified subsequently that ASC must be considered while computing load factor incentive for both 75% to 85% bracket as well as 85% upwards. NBIUPL further submitted that its case is to let these changes apply to NBIUPL although its reference is prior in point of time but these are changes and clarifications issued by the Commission. NBIUPL submitted that there is enough power vested in the Commission to grant a review in this matter.

23. Shri. Abhishek Khare submitted that although a lot of time has been taken by MSEDCL, the direction of the Commission to apprise as to whether any parallel proceedings are pending before the ATE, have been complied with. Shri. Abhishek Khare further submitted that the tariffs being charged are as per the Orders of the Commission.

24. Shri. Jagtiani submitted that MSEDCL has not addressed the specific query raised by the Commission during the hearing held on December 12, 2007. Shri. Jagtiani further pointed out that though MSEDCL, during the last hearing held in the matter on December 12, 2007, submitted that MSEDCL had preferred certain appeal before the ATE where identical issues as that under the present Petition are pending, it is actually not MSEDCL, but MIDC Industries Association, Chandrapur, which has preferred the Appeal. No Appeal seeks to challenge the Commission's Clarificatory Order dated August 24, 2007. A plain reading of the memo of Appeals clearly shows that Appeal Nos. 108 and 144 of 2007 are not even remotely related to the issues raised under the present Petition filed by NBIUPL. As against the misleading contention of the MSEDCL, the fact remains that the issues raised under the Petition are in no way sub-judice or pending in any appellate forum. Shri. Haresh Jagtiani also pointed out that the Commission had given time of one week to MSEDCL to file additional reply/rejoinder.

25. NBIUPL, under its rejoinder submitted to the Commission on April 28, 2008 submitted that the reply submitted by MSEDCL in the captioned matter is wholly misconceived and filed with the sole objective of misleading the Commission and is thereby liable to be disregarded by the Commission. NBIUPL further submitted that at the hearing



held on December 12, 2007, MSEDCL had contended that it has filed a Petition before the ATE challenging the Clarificatory Order dated August 24, 2007 and the same could not be made a basis for present Review Petition. NBIUPL pointed out that the Commission had already directed MSEDCL to file its submission that has been filed in ATE and covered under the present Petition, but the same has not been addressed by MSEDCL under its reply submitted to the Commission on April 21, 2008.

26. NBIUPL filed an additional submission in the matter to the Commission on June 16, 2008 and submitted that the ATE, in its Judgment passed in the matter of Eurotex Industries and Exports Limited in Appeal No.135 of 2007 on May 12, 2008, has modified the original Clause 7.4 (g) of the Commission's Tariff Order dated May 18, 2007. NBIUPL requested the Commission to take note of the Judgment passed by the ATE. NBIUPL further submitted that the term 'month' appearing in the Original Clause 7.4 (g) of the Commission's Tariff Order dated May 18, 2007 must be interpreted as defined under Regulation 2(1)(r) of the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, as reproduced below:

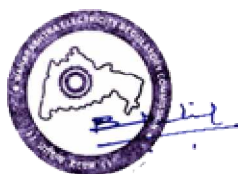
*"2.1 (r) "Month", in relation to billing of charges, means the English Calendar month or any period of thirty (30) days"*

NBIUPL further submitted that in the circumstances defined in the Petition, the billing period for the purpose of Clause 7.4 (g) of the Tariff Order dated May 18, 2007 must be strictly interpreted in terms of the aforesaid definition and any period less than thirty days should not be considered while deciding the benchmark for ASC.

27. Having heard the parties and after considering the material placed on record, the Commission is of the view as under:

28. The admissibility of any Review Petition has to tested against the provisions of Regulation 85 of the MERC (Conduct of Business) Regulations, 2004, which stipulates as follows:

*"85. (a) Any person aggrieved by a direction, decision or order of the Commission, from which (i) no appeal has been preferred or (ii) from which no appeal is allowed, may, upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons, may apply for a review of such order, within forty-five (45) days of the date of the direction, decision or order, as the case may be, to the Commission."*



29. MSEDCL has submitted that the issues raised by the Petitioner are subject matters of Appeals pending before the Honourable Appellate Tribunal for Electricity (ATE), viz., Appeal No. 108 of 2007 and Appeal No. 144 of 2007, both filed by MIDC Industries Association, Chanrdapur, and that the issues raised are identical. This clearly is a misrepresentation of facts by MSEDCL. Appeal No. 108 of 2007 primarily challenges the Commission's ruling on refund of Regulatory Liability Charges under its MYT Order, while Appeal No. 144 of 2007 challenges the impugned Orders as well as the MYT Order issued by the Commission for MSEDCL, in the context of Transmission and Distribution losses approved by the Commission. MSEDCL should refrain from making such misleading representations before the Commission.

30. The Petitioner, NBIUPL, has also made varying contentions at different places, in the context of which of the Orders issued by the Commission have been impugned by the Petitioner filed by NBIUPL. Reference has been made to the following four Orders at different points of time, viz.

- a) Tariff Order for MSEDCL for FY 2006-07, dated October 20, 2006, in Case 54 of 2005;
- b) Clarificatory Order dated February 26, 2007, on the Tariff Order for MSEDCL in Case 54 of 2005;
- c) Multi-Year Tariff Order for MSEDCL determining tariff for FY 2007-08, dated May 18, 2007 in Case 65 of 2006;
- d) Clarificatory Order in Case 26 of 2007 and Case 65 of 2006 on the MYT Order for MSEDCL in Case 65 of 2006 dated August 24, 2007.

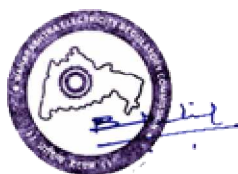
31. The Commission clarifies that only the following Orders have been impugned by NBIUPL in this Petition:

- a) Tariff Order for MSEDCL for FY 2006-07, dated October 20, 2006, in Case 54 of 2005;
- b) Clarificatory Order dated February 26, 2007, on the Tariff Order for MSEDCL in Case 54 of 2005;

32. Thus, the remaining two Orders, viz., MYT Order and related Clarificatory Order for FY 2007-08, have not been impugned by NBIUPL, and no issues have been agitated by NBIUPL on these two Orders. Moreover, the impugned Orders refer to FY 2006-07, whereas the MYT Order and related Clarificatory Order are applicable for FY 2007-08.

33. Given the above background, the Commission is of the view that the Review Petition filed by NBIUPL is not admissible, on account of the following reasons:

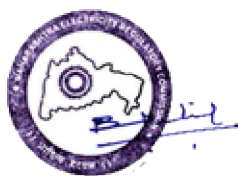
- (i) The Petition has not been filed within the stipulated timeframe of 45 days from the date of issue of the impugned Tariff Order or even the impugned Clarificatory



Order. The Petition was filed on October 5, 2007, which is well into the next financial year and Tariff period, when the impugned Orders were no longer in force. Although NBIUPL has requested the Commission to condone the delay, and has stated that the Commission has wide powers to condone the delay, the Commission does not find this a fit case to condone the delay and admit the Review Petition, since the Review Petition has been filed after around 9 months of issue of even the Clarificatory Order, and the impugned Orders were no longer in force when the Review Petition was filed.

- (ii) Even if the Commission were to condone the inordinate delay, for admitting the Review Petition, the Commission has to assess whether the Petition qualifies under the purview of Review as stipulated under the Regulation 85 (a) of the MERC (Conduct of Business) Regulations, 2004. The Commission is of the view that no such case has been made out by the Petitioner on both the issues raised by the Petitioner, viz., benchmark period for cases of increased Contract Demand and the inclusion of ASC units while computing the Load Factor incentive for load factor between 75% to 85%, as explained below:

- a) No error has been proved by the Petitioner, either apparent on the face of the record or inadvertent or otherwise, in the context of the Commission's dispensation under the impugned Orders. Any dispensation or clarifications given by the Commission in Orders issued for the subsequent tariff period cannot be extended back in time, and be sought to be applied for prior periods. The argument that the Commission has clarified its intention in the Orders issued for the subsequent tariff period and that is what the Commission intended all along, and the dispensation in the impugned Orders amounts to an inadvertent error, has no merit. By extending this rationale, it can be interpreted that since the Commission has removed the concept of ASC in the latest Tariff Order issued for MSEDCL for FY 2008-09, and also reduced the Demand Charges for industrial consumers; the same dispensation should also be made applicable for the previous tariff periods. This clearly is neither logical nor tenable. As regards the contention that since the Commission has stated in the Order that all the rebates and incentives will continue till further order by the Commission, the Load factor incentive should include ASC units even for load factor between 75% to 85%, even though the formula does not stipulate the same, is not sustainable. If this rationale is to be accepted, it could also be interpreted to mean that the Load Factor incentive computation should not consider ASC units at all for all levels of load factor, since the ASC concept has been introduced through the impugned Order and was not included in the formula



specified in the previous Order. The Commission's ruling that all the rebates and incentives will continue till further order by the Commission, has to be interpreted in the general sense, and the computation of the incentives and rebates has to be done in the manner specified in the Order, else there was no need to specify the same in the Order.

- b) The issues raised by the Petitioner in the Review Petition clearly do not qualify under the clause of “...*discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the direction, decision or order was passed...*”. The Commission's dispensation on benchmark period for computation of ASC units in the subsequent Tariff Order cannot be cited as new and important evidence to seek review under this clause. The Petitioner has also claimed that the nexus of attainment of 75% to 85% of Contract Demand for being eligible for load factor incentive, as provided under the Order dated October 20, 2006 read with the impugned Order, is a new policy. This is clearly incorrect. The Commission's Tariff Order for erstwhile MSEB for FY 2003-04 (the Tariff Order previous to the impugned Tariff Order for FY 2006-07) had a very similar dispensation, with the only difference being that the load factor incentive under the impugned Orders was required to be computed by adding the ASC charges for load factor above 85%. The relevant portion of the Commission's Tariff Order for erstwhile MSEB for FY 2003-04 is reproduced below:

***“32.1.3 Load Factor Incentive***

*The Commission has introduced a Load factor incentive for consumers having Load Factor above 75% based on contract demand. Consumers having load factor over 75% upto 85% will be entitled to a rebate of 0.75% on the energy charges for every percentage point increase in load factor from 75% to 85%. Consumers having a load factor over 85 % will be entitled to rebate of 1% on the energy charges for every percentage point increase in load factor from 85%. The total rebate under this head will be subject to a ceiling of 15% of the energy charges for that consumer. This incentive is limited to HTP-I and HTP-II categories...”*

- c) The references made by the Petitioner to the Judgment issued by the Honourable Appellate Tribunal for Electricity (ATE) in Appeal No.



135 of 2007 in the matter of Appeal filed by M/s Eurotex Industries Limited against MSEDCL, have no relevance in the context of the Review Petition filed by NBIUPL. The ATE Judgment is in the context of the MYT Order and related Clarificatory Orders issued by the Commission for FY 2007-08, and hence, have no linkage to the impugned Orders, which were applicable for FY 2006-07.

- d) The Petitioner's contentions in the context of the definition of 'month' as per the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005, vis-à-vis the period of 13 days available to the Petitioner for achieving the benchmark consumption after the increase in the Contract Demand, also do not appear to have any merit, since MSEDCL appears to have raised the bill correctly for a period of 30 days. The Regulations do not specify that the first billing period has to be a minimum period of 30 days after such increase in Contract Demand.
- e) Consequently, the Petitioner's request for alternative dispensation for benchmark period, minimum period of billing of 30 days, interest on excess amounts allegedly recovered from the Petitioner, also stand rejected.

Accordingly, NBIUPL's Petition in Case No. 49 of 2007 stands disposed of.

Sd/-  
(S. B. Kulkarni)  
Member

Sd/-  
(A. Velayutham)  
Member



(P.B. Patil)  
Secretary, MERC