

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th floor, Cuffe Parade, Mumbai 400 005.

CASE No.10 of 2003

In the matter of
Determination of tariff for the ferro alloy industry and related issues.

Shri P. Subrahmanyam, Chairman
Shri Jayant Deo, Member
Dr Pramod Deo, Member

O R D E R

Dated: August 1, 2003

Under their Petition dated 19.5.2003, M/s Universal Ferro & Allied Chemicals Ltd. (UFAC) have impleaded the Maharashtra State Electricity Board (MSEB) as Respondent, with the following prayers:

- (a) *to direct MSEB to withdraw and recall all bills purportedly for the period July 1, 2001 till date;*
- (b) *to provide a detailed working of the rates at which NTPC power ex-Korba was available to the Respondent and the actual T&D Losses and the actual wheeling charges and on that basis to recompute its bills and make rectification;*
- (c) *to provide power to the Petitioner and the ferro alloy industry in the State of Maharashtra at NTPC rates as applicable from the nearest NTPC STPS to the Petitioner's plant.*

At Para 6 of their Petition, UFAC have reiterated that the relief sought is that the Commission modify its general tariff Order and direct MSEB to supply power to ferro alloy Export Oriented Units (EOUs) at international prices and/or at NTPC rates, whichever is lower. This is claimed to be consistent with Section 29 of the Electricity Regulatory Commissions (ERC) Act, 1998 inasmuch as it is not discriminatory.

2. In their Petition, further written submissions and oral arguments through Counsel, UFAC have stated that their plant in Taluka Tumsar, Dist. Bhandara, was established in 1958 and has contributed large amounts in taxes and other levies to the Central and State Governments, and earned Rs 427 crores through exports. Apart from M/s Balaji Electro Smelters Ltd., Yavatmal, UFAC are the only unit in Maharashtra who have a dedicated furnace for export purposes, and are the only ferro / silico manganese EOU. The ferro

alloy industry is power intensive, power constituting about 58% of the variable cost. It is a continuous process industry in which any shut down entails a huge cost. Its products are of national importance, being essential in the production of iron and steel.

3. UFAC have stated that, recognizing the importance of the industry, its power intensity, the high cost of electricity in India, and in order to make the industry competitive in the export markets, and considering the industry representations and in consultation with the concerned Ministries and authorities, the Ministry of Power (MoP), Govt. of India, introduced a scheme in 1994 whereby ferro alloy EOUs would be provided power through the SEBs from out of the 15% NTPC unallocated quota at the NTPC rate, with reasonable wheeling charges. Under the scheme, UFAC were allocated 28 MW of NTPC power ex-Korba via the Korba-Koradi line. UFAC availed of it from October 1994. However, in breach of the scheme and their obligations, MSEB levied exorbitant charges for the NTPC power, compelling UFAC to close down their unit from September 1996 to February 1999. On the intervention of the State Govt., the supply of NTPC power was resumed through MSEB on terms decided at a meeting held in December, 1998. In terms of this settlement:

- i) NTPC power would be available to the Petitioner on 24 hour basis;
- ii) The charges for the supply of NTPC power would be at the pool rate of NTPC power to the Respondent via the Koradi bus as applicable in the month. In addition, line losses and wheeling charges would be levied;
- iii) No demand charges would be levied;
- iv) Interest on arrears, if any payable, would be at 10% per annum;
- v) Service line / service charges would be waived;
- vi) The arrears, if any, would be as per the revival package sanctioned by the Board of Industrial & Financial Reconstruction ("BIFR").

4. After the Commission passed its first tariff Order on 5.5.2000, and even though that tariff was not applicable to UFAC in view of the MoPs 1994 scheme, MSEB claimed that NTPC power would not be available to them from that date. In its Order dated 29.11.2000, the Commission rejected this stand after being approached by UFAC. In April 2001, MSEB threatened disconnection of NTPC power supply, wrongly alleging that Rs 40 crores arrears were outstanding. UFAC approached the Commission which, by its Order of 22.1.2001 directed that MSEB recompute the alleged arrears, but they failed to do so. Instead, in December 2002, citing MoP's letter dated 22.11.2002 regarding discontinuance of NPTC power on account of UFAC not meeting its export obligations, MSEB again withdrew NTPC power with retrospective effect, alleged arrears in excess of Rs 100 crores and threatened disconnection. UFAC have submitted that these arrears do not arise as NTPC power had only been wheeled by MSEB, and MSEB cannot profit by its supply to the detriment of UFAC. Thereafter, UFAC filed Writ Petition Lodging No. 1052 of 2003 in the High Court, which is pending.

5. Under their letter dated 31.3.2003, MSEB conveyed that MoP had discontinued the allocation of NTPC power to all exporting units w.e.f. 1.4.2003, and also pointed out that, in the case of UFAC, the allocation of 28 MW NTPC power had already been

withdrawn by MoP earlier, as communicated by them under their letter of December 2002. UFAC have submitted that, with regard to the withdrawal specific to them, Ministry of Commerce had clarified to MoP in January 2003 that it was incorrect since the unit retained its EOU status. As far as the withdrawal of the 1994 scheme generally by MoP is concerned, the terms are set out in MoP's letter dated 17.3.2003 addressed to Central Electricity Authority. UFAC have submitted that the import of the letter is that, although the 1994 scheme had been discontinued in that form, NTPC power would continue to be made available to the SEBs and that the latter should distribute the power to the ferro alloy EOUs. According to UFAC, export commitments amounting to Rs 50 crores are on hand with them, which are premised on power supplied at NTPC rates. Unless power is supplied at those rates in terms of the settlement arrived at in December 1998, huge direct losses and claims for breach of export commitments would hit the Petitioner. As per the regular MSEB tariff, UFAC would incur a cash loss of atleast Rs 3 crores per month.

6. In the above circumstances, the primary relief sought in the Petition is that the Commission modify its general tariff Order and direct MSEB to supply power to ferro alloy EOUs at international prices and/or NTPC rates, whichever is lower. It has been argued that this is justified in view of the strategic importance of the industry (which has been recognized by the Govt. of India and various States); similar facilities granted in States such as Chattisgarh, Orissa & Andhra Pradesh, the fact that, unless power is made available at competitive rates, the industry would close down; that export commitments have to be met, failing which UFAC will be faced with large default claims; and the fact that no burden would be placed on MSEB as a result, as the only cost to them would be that of wheeling. The Petition also contends, with respect to the last point, that MSEB had abused the scheme by not adhering to the charges that were to be levied while it was in operation.

7. In their reply dated 10.6.2003 opposing admission, MSEB have pointed out that the issues raised in the present Petition and those put before the High Court in Writ Petition Lodging No. 1052 of 2003 are the same. Moreover, no case has been made out for review under the Commission's Regulations, and Govt. of India have not been made a party to the present proceedings. On all these grounds, MSEB contend that the Petition is not maintainable. MSEB have also referred to the interim Orders of the High Court, the facts of which have been suppressed by the Petitioner.

8. In oral submissions, Shri Bharucha, Counsel for UFAC, submitted that their Petition clearly states that the High Court had been approached. The Writ Petition was filed in the High Court because of MoP's letter of November 2002 withdrawing NTPC power to UFAC retrospectively on the ground that export obligations were not met, and to MSEB's letter dated 5.12.2002 ostensibly in pursuance of MoP's communication. It did not concern the recent withdrawal by MoP from 1.4.2003 of the scheme as a whole. With regard to the interim Orders of the High Court, Counsel submitted that the first Order only directed UFAC to make a deposit with MSEB, and the latter not to cut off power. Under the last interim Order dated 25.4.2003, the High Court had granted UFAC, inter alia, "leave to amend in terms of the draft handed in". The leave was granted

because MSEB pointed out that the scheme had now been withdrawn entirely by MoP. However, he clarified that the amendments referred to were never carried out by them. Therefore, the issue of the withdrawal of the scheme and consequent matters are not before the High Court. He drew attention to UFAC's rejoinder dated 12.6.2003 which seeks to clarify the circumstances and the process in the High Court to show that the issues before the Court and the Commission are distinct and separate. The rejoinder also commits UFAC not to press before the High Court any claim in respect of power supply to the ferro alloy industry from 1.4.2003.

9. Responding to a query from the Commission, Counsel for UFAC submitted that, with the withdrawal of the MoP scheme, MSEB would be providing them power from their own pooled resources. It is for that power that UFAC are seeking that the Commission determine the tariff, on the same terms as was applicable to them earlier. He argued that MoP's letter of 17.3.2003 is basically a continuation of the scheme, albeit on terms to be decided by the Commission. Thus, it is in the nature of an entrustment to the Commission. So long as MSEB supplies power, the Commission is asked to determine the terms on which it should be given.

10. Ms. Deepa Chawan, Counsel for MSEB stated that, from 1.4.2003, MoP have discontinued the scheme itself for all ferro alloy units. This is in the nature of a general direction not restricted to UFAC. In its Order dated 23.3.2003 in Case No. 9 of 2003 filed by M/s Balaji Electro Smelters Ltd., the Commission had directed MSEB to maintain the status quo and not unilaterally discontinue the scheme which had been framed as a matter of policy by MoP, but that situation did not obtain any longer because MoP itself had now discontinued the scheme.

11. With regard to UFAC's Writ in the High Court, Counsel for MSEB pointed out that their draft amendments had been shown to the High Court in connection with its interim Order granting them leave to amend. These draft amendments challenge the same letter of discontinuance of the MoP scheme in connection with which UFAC have now approached the Commission. They had also taken further time from the High Court to move the amendments. She argued further that, assuming the High Court grants absolute relief, the MoP scheme would continue. Counsel submitted that the argument cannot be made that, in the interim, the Commission can also be approached because of the suggestion in MoP's letter dated 17.3.2003 that the ferro alloy units may approach the concerned State Commissions. She submitted that there is no provision under the ERC Act under which MoP can issue directions to the Commission, nor is it in fact a direction. She submitted that it is legitimate for UFAC to hope that the scheme would be continued, but since this is already before the High Court, its decision should be awaited.

12. With regard to UFAC's plea for a separate tariff determination, Counsel for MSEB submitted that the Petitioner does not constitute "the electricity industry" referred to in the relevant provisions of the ERC Act. With regard to the argument that MoP have divested themselves of their discretion and entrusted it to the Commission, she submitted that, in fact, under the earlier scheme, NTPC power was wheeled through MSEB, and now the discretion has been exercised by MoP not to do so. MoP have explained the

changed circumstances under which this decision was taken, after a review which was provided for in the scheme.

13. MSEB Counsel submitted that, although the Commission has the absolute power to decide the tariff and categories, it would have to be in the form of a proper tariff proposal for ferro alloy industries, and not through an individual case. To that, UFAC Counsel submitted that review or tariff fixation is a matter of procedure, but rules of procedure cannot take away substantive jurisdiction. If the application for determination of tariff does not constitute a review, then it can be taken up as a plea from an aggrieved consumer. Moreover, the relief sought with regard to tariff is not restricted to UFAC, but would apply to all exporting ferro alloy units.

14. Subsequent to the hearings, UFAC have submitted a copy of their rejoinder dated 3.7.2003 filed in the High Court to the effect that the issue of supply of power from 1.4.2003 would not be pressed before it in view of the prayer in their Petition before the Commission. Thus, the High Court being seized of the other matters relating substantially to the prior period, UFAC are primarily seeking from the Commission a certain tariff for themselves and other exporting ferro alloy industries, subsequent to the discontinuance of the 1994 MoP scheme. The Commission notes that the Petitioner has paid fees of Rs 25,000/- which are prescribed for Petitions seeking review of a tariff Order, and has been registered accordingly. At para 6, the Petition clearly states that the relief sought from the Commission is "to modify its terms of general tariff Order and direct the Respondent to supply power to ferro alloys EOUs in the State of Maharashtra at international prices and / or at NTPC rates, whichever is lower". In the heading of the Petition also it is stated, inter alia, that it is in the matter of determination of tariff applicable to various categories of consumers vide Order dated January 10, 2002, as clarified by various subsequent Orders. Regulation 87 of the MERC (Conduct of Business), Regulations governs review of its Orders, and reads as follows:

"Any person aggrieved by a decision or order of the Commission, from which no appeal is preferred or allowed, and who, from 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 decision / order was passed by the Commission 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 60 days of the date of decision/order, to the Commission".

Neither in the Petition and other written submission, nor in oral arguments, has the issue of how the Petition meets the test of Regulation 87 and thereby entitles it to admission been substantially addressed. This is quite apart from the matter of limitation. However, it has been implied that a review, leading to consideration on merits for a separate tariff for ferro alloy industries, is justified inasmuch as a new circumstance has emerged subsequent to the last tariff Order dated 10.1.2002, viz. the discontinuance of the MoP scheme as a result of which the Petitioner and other such industries would have to pay for power at the approved MSEB tariff, which does not distinguish in favour of such units. However, this is not a tenable argument. It cannot be said that, merely because a certain

policy dispensation (which is not very different in actual effect from, say, a subsidy) within the executive discretion of the Central or State Government has been withdrawn, the consumers affected by that withdrawal can claim that such withdrawal would have been material to their case as far as determination of tariff is concerned. Although the example is not strictly analogous, it would be similar to saying that the tariff for a particular category of consumers, for example agriculturists, would have been fixed at a lower level by the Commission had it been known that the Government would do away with subsidy to them. Tariff determination principles are a quite different matter, and this would clearly have not been the case. For the same reason, the Commission is unable to grant the interim reliefs prayed for, even while appreciating the likely impact on the Petitioner. The situation has arisen on account of the withdrawal, apparently at short notice, of an executive dispensation of MoP, and the remedy for that, therefore, lies elsewhere.

15. Apart from its maintainability as a review Petition is concerned, Counsel for UFAC has argued that both review and tariff fixation are a matter of procedure, but rules of procedure cannot take away substantive jurisdiction. The Petition can, therefore, be taken up as a plea from an aggrieved consumer, in which the reliefs would apply to all others similarly placed. Leaving aside the matter of whether the Petition meets the test of Regulation 87 and although, generally, the determination of the MSEB tariff needs to be examined in totality, under the provisions of the ERC Act the Commission can entertain separately claims by certain categories for a different tariff. However, as it happens, proceedings have already been initiated independently on a Petition filed by MSEB for approval of its annual revenue requirement and tariff for 2003-04, in which suggestions and objections are being invited and public hearings would take place. UFAC can take the opportunity of these separate proceedings to argue their claim.

16. The Commission disposes of the Petition accordingly.

Sd/-
(Jayant Deo)
Member

Sd/-
(Dr Pramod Deo)
Member

Sd/-
(P. Subrahmanyam)
Chairman, MERC

Sd/-
(A.M. Khan)
Secretary, MERC