

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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CASE No. 9 of 2003

In the matter of
Petition filed by M/s Balaji Electro Smelters Ltd., Yavatmal
In respect of Commission's Order dated 24.3.2003 in the matter of withdrawal /
termination of wheeling of NTPC Power from 15% unallocated quota to export
oriented Ferro Alloy Industries

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

O R D E R

Dated: July 21, 2003

M/s Balaji Electro Smelters Ltd. (BESL), Yavatmal have filed a Petition on 30.4.2003 seeking review of the Commission's Order dated 24.3.2003 in Case No. 39 of 2002 in the matter of their original Petition regarding withdrawal/ termination by the Maharashtra State Electricity Board (MSEB) of wheeling NTPC Power from the 15% unallocated quota to export oriented ferro alloy industries. The Review Petition has the following prayers:

- a) i. *Provide power to the Petitioner at a special tariff @ 194 paise for KWH on the basis of actual 2% T&D losses and without the burden of cross subsidy and allow Power Factor and Bulk Discount incentives with effect from April 1, 2003;*
- ii. *To direct the Respondent Board to furnish a break up of the NTPC tariff and revise its charge as per the applicable tariff without penalties etc. and actual NTPC pooled tariff in the break up from 1999 and credit the excess paid by the Petitioner to its account;*
- b) *Pending the hearing and final disposal of this petition, this Hon'ble Commission be pleased to direct the Respondent its servants, agents, subordinates and successors-in-office be directed to permit the Petitioner to effect payment of its electricity bills at NTPC Tariff, till the disposal of this petition by issuance of final orders in the matter of providing special tariffs, to facilitate the Petitioner executing committed export orders in hand;*

In their supplementary affidavit dated 13.5.2003, BESL have set out additional grounds, and also modified the prayer at (a) (ii) and (b) above to read as follows:

- a) ii) *To direct the Respondent Board to furnish a break up of the NTPC tariff and revise its charge as per the applicable tariff without penalties etc. in the break up from 1999 and to charge actual NTPC pooled tariff with 6% transmission losses and credit the excess paid by the Petitioner to its account;*

- b) *Pending the hearing and final disposal of this petition, this Hon'ble Commission be pleased to direct the Respondent its servants, agents, subordinates and successors-in-office to continue supply of power at NTPC Tariff and consequently raise bills and/or permit the Petitioner to effect payment of its electricity bills at NTPC Tariff, till the disposal of this petition by issuance of final orders in the matter of providing special tariffs, to facilitate the Petitioner executing committed export orders in hand;"*

The Review Petition was heard for admission on 16.6.2003.

2. In their Petition and other written submissions, BESL have stated that, considering the high cost of power on account of cross subsidization etc, which made it difficult for ferro alloy industries, which are power intensive, to compete in export markets, and considering the representations received from them and consultations with other authorities concerned, the Ministry of Power (MoP), Govt. of India, decided in 1994 to allocate NTPC power from the unallocated quota to the export oriented ferro alloy industries through the SEBs at the NTPC rate with wheeling charges, etc. BESL, with the concurrence of the State Govt., was provided NTPC power under the scheme from 1996 onwards for certain hours. Various issues had arisen with MSEB which were decided upon by MERC, lastly under the Order dated 24.3.2003 which is sought to be reviewed.

3. BESL have stated, that subsequent to MERC's Order, they came to know on 1.4.2003 of a letter dated 11.3.2003 (the copy of this letter submitted as an Exhibit in Case No. 10 of 2003 bears the date 17.3.2003) of MoP addressed to the Central Electricity Authority (CEA) to the effect that, in view of changed circumstances, viz. the establishment of State Regulatory Commissions, implementation of ABT, extra burden on the unallocated quota in view of power shortages, and the special tariff provided to Ferro alloy units in various States, etc., the 1994 scheme of allocation of NTPC Power to such units would be discontinued from 1.4.2003. The power so withdrawn would be reallocated to the concerned States, and the ferro alloy units need to approach the concerned SERC for providing special tariff for them. BESL have submitted that the directives dated 11.3.2003 of the MoP were communicated to them only on 1.4.2003, i.e. after the Commission passed its Order. Therefore, this fact could not be brought to the notice of the Commission during the original proceedings. They contend that this communication constitutes disclosure of a new and important matter of fact which was not within BESL's knowledge before the original Order was passed and would, therefore, justify the admission of the Petition for hearing on merits and for grant of the interim reliefs prayed for. In effect, the communication of the discontinuance of NTPC power communicated by MSEB on that basis would result in negating the Order passed by the Commission. BESL pointed out that, in their letter dated 11.3.2003, MoP themselves have clearly stated that the ferro alloy units need to approach the concerned SERC for provision of power at a special tariff.

4. Referring to the Commission's direction in its Order dated 24.3.2003 to MSEB to rectify the bills issued to the applicant and give necessary credits to correctly reflect the outstanding and avoid billing disputes, BESL had pursued the matter with MSEB, but they have neither refunded the amount nor replied to them.

5. BESL have given details of the special tariff provided in States such as Andhra Pradesh, Orissa, Chattisgarh & Meghalaya to ferro alloy units, not restricted to exporting units. Their Petition also sets out various computations in support of their claim for the particular tariff that should be made applicable to ferro alloy units subsequent to the discontinuance of the MoP scheme. Amplifying on these contentions, in oral arguments, Shri Bharucha, Counsel for BESL, submitted that MoP had withdrawn the scheme considering the changed circumstances set out in their letter, but that letter also shows that they are satisfied that the industry requires a special dispensation with

regard to tariff for which they should approach the concerned ERCs. Accordingly, the matter has now been entrusted to MSEB on terms to be decided by the Commission, MoP having divested themselves of such discretion. Counsel for BESL submitted that it is MSEB's contention that the Review Petition is not maintainable since the principal Order no longer subsists in view of the withdrawal of the scheme itself by MoP. He submitted, however, that the MoP scheme was in force upto 31.3.2003, i.e. for some period after the Order was passed. He submitted that the Review Petition had been filed under the ERC Act, but similar relevant provisions were contained in the new Electricity Act, 2003. The Petition invokes the powers of the Commission to determine tariff under Section 22 and Section 29(2)(e) which enjoins that the tariff should take into account consumer interest. Moreover, under Section 29(3), although no undue preference can be shown, the tariff can differentiate on the basis of purpose. These matters are within the exclusive domain of the Commission.

6. Counsel for BESL also drew attention to Regulation 24 which establishes the Commission's threshold jurisdiction and procedure, and enables "any affected or interested party" to approach it. When the Regulation states that "the Commission may initiate any proceedings", the word 'may' must be equated with 'shall' in view of the exclusive jurisdiction conferred under Sec.22 and 29, and Counsel subsequently submitted Supreme Court judgments in support. He contended that the Commission would necessarily have to entertain the Petition under Regulation 24. The only ground on which admission could be declined would be if BESL are not an interested or affected party. That is clearly not the case since BESL continue to be a ferro alloy exporter to whom the 1994 scheme had been applicable.

7. Counsel for BESL submitted that Sec.22 of the ERC Act states that, subject to Chapter 3, the Commission "shall discharge" certain functions. These are duties, and, therefore, responsibilities. Sec 22(1)(a) makes clear the Commission's exclusive jurisdiction with regard to tariff. Sec 22(1)(b) is not relevant except to the extent of wheeling charges. The other sub-clauses are also relevant in view of cross subsidies and unjustified costs of MSEB. Under Sec.29, the tariff "shall be determined by the Commission" having regard to various factors. While conceding that policy matters are to be dealt with elsewhere, he submitted that the statute also recognizes the Commission's role in this regard by providing for a State Advisory Committee and for advice to the State Government. He submitted that BESL are not asking the Commission to issue directions to NTPC, MoP or the State Government, who are therefore not necessary parties. Thus, admission can be denied only if MSEB shows that BESL are not an affected or interested party.

8. BESL Counsel submitted further that MSEB's contention that the Petition is bad for misjoinder is not correct because no directions have been sought against the Central Government and, therefore, they are not concerned. Moreover, if, after admission, the Commission feels it necessary, it has statutory powers under Regulation 40 to issue notice to anyone. Regulation 55 is also relevant in this regard.

9. In their written reply, and in oral arguments MSEB, through their Counsel, Ms. Deepa Chawan, pointed out that the reliefs sought in the Review Petition are altogether different from those sought by BESL in their original Petition in Case No. 39 of 2002 leading to the Order dated 24.3.2003. Thus, MSEB contend that BESL have, in effect, filed a totally new Petition in the guise of seeking review, and that it deserves to be dismissed on this ground alone.

10. MSEB submitted that, in accordance with the decision of MoP, they have stopped wheeling of NTPC Power to BESL w.e.f. 1.4.2003 and have, accordingly, billed them from 1.4.2003 onwards as per the MSEB tariff applicable to them.

11. MSEB have pointed out that the Commission's Order dated 24.3.2003 directed MSEB to maintain the status quo until such time as clear directives were received from MoP on the policy of wheeling of NTPC Power. Such directives have been given by MoP through their letter dated 11.3.2003 and, therefore, the Commission's Order is no longer in force. Therefore, the question of reviewing it does not arise. Moreover, any claim for review has to meet the test of Regulation 87, and no ground has been given by BESL to justify admission under that Regulation.

12. As far as the mention by MoP in their letter that the Commission be approached for a special tariff, MSEB submitted that MoP cannot issue directions to the Commission, nor is it, in fact, a direction. Although the Commission admittedly has absolute powers to decide the tariff and the categories, this would have to be in the form of a proper tariff proposal for ferro alloy industries and not in isolation. Finally, MSEB pointed out that MoP were a necessary party, but have not been joined by the Petitioner.

13. The Commission notes that, essentially, BESL are seeking review of the Commission's Order dated 24.3.2003 on the ground that the discontinuation of MoP's 1994 scheme by their letter dated 11.3.2003 came to be known to them only on 1.4.2003, after the Order in their original Petition was passed and the proceedings closed. BESL contend that, thus, a new and important matter of fact had become available which would materially affect it and justify review of the Order. Counsel for BESL has also argued, with regard to the prayers relating to the determination of a special tariff, that review or tariff fixation is a matter of procedure, and rules of procedure cannot take away substantive jurisdiction. If the prayer for determination of a special tariff is not covered within the ambit of a review, then it can be taken up as a plea from an aggrieved consumer. The Commission notes that, as pointed out by MSEB, the prayers in the Review Petition are altogether different from the prayers in the original Petition on which Orders were passed on 24.3.2003. In that Order, the Commission had disposed of the Petition while directing:

- i) MSEB to maintain the status quo ante in the matter till the emergence of clear directions in the matter of the MoP policy review, since the Petitioner has met his obligations for availing of such power.
- ii) MSEB to rectify the bills already issued to the applicant in line with direction (i) above and give necessary credit to correctly reflect the outstanding and avoid billing disputes arising out of the same.
- iii) That the right of MSEB to argue its case for review of the present scheme / policy before the Commission covering all the legal points is upheld without prejudice.

14. Essentially, in the original case, the issue was whether MSEB were entitled to unilaterally discontinue a dispensation which had been mandated by MoP, ostensibly on the ground that the scheme provides for review at regular intervals and on account of various other factors. It is clear from the original prayers as well as the directions given in the Order that the status quo was to be maintained inter alia, until such time as clear directions to the contrary were received from MoP. Under their letter dated 11.3.2003 discontinuing the scheme from 1.4.2003, such directions have now been given. Therefore, the case does not subsist.

15. The prayers and reliefs sought in the original Petition in Case No. 39 of 2002 were as follows:-

- i) To direct the MSEB to withdraw the notice dated 23/07/2002 for discontinuation of NTPC power,

- ii) To restrain the MSEB from reviewing the policy of the Ministry of Power in respect of wheeling of NTPC power to export oriented Ferro Alloy Industries, and to restrain them from charging tariff different from the NTPC tariff for the power consumed by the Petitioner,
- iii) To restrain the MSEB from giving effect to their decision till the decision is decided by the Commission,
- iv) To direct the MSEB to release wheeling of additional allocated 0.95 MW NTPC power to the Petitioner.

Thus, it will be evident that, had the MoP communication been available at the time of original proceedings, these prayers would, in effect, have become irrelevant from 1.4.2003 in view of the discontinuation of the scheme by MoP themselves rather than unilaterally by MSEB. In these circumstances, the Review Petition clearly does not meet the test of Regulation 87, and the dispensation sought has no nexus with the Order sought to be reviewed. It may be mentioned that, as far as the prayer for a special tariff is concerned, as it happens a separate proceeding for determination of MSEB's Tariff for the year 2003-04 has been separately initiated in which BESL would have an opportunity to be heard with regard to its claims.

15. In these circumstances, the Commission rejects admission of the Review Petition.

Sd/-
(Jayant Deo)
Member

Sd/-
(Dr Pramod Deo)
Member

Sd/-
(P. Subrahmanyam)
Chairman, MERC

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