

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

**Appeal 24 of 2007 with IA 80 of 2007, Appeal No.33 of
2007 with IA 55 of 2007 and appeal No. 101 of 2007**

Dated: January 28, 2008.

Present: - Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member

Appeal No. 24 of 2007 with IA 80 of 2007

Mula Pravara Electric Co-operative
Society Ltd.

Distt. Ahmednagar, Maharashtra-413709

....Appellant

Versus

1. Maharashtra Electricity Regulatory
Commission ,13th floor, Centre No. 1,
World Trade Centre,Cuffe Parade
Mumbai-4000005
 2. Maharashtra State Electricity Distribution
Company Ltd. MSEDCL, Station road
Ahmednagar
 3. Government of Maharashtra
through the Principal Secretary Deptt. of Energy
Labour & Industries, Mantralaya
Mumbai
-Respondents

Appeal No. 33 of 2007 with IA No. 55 of 2007

Mula Pravara Electric Co-operative
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Distt. Ahmednagar, Maharashtra-413709Appellant

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3. Maharashtra State Electricity Distribution
Company Limited
MSEDCL, Station Road
AhmednagarRespondents

Appeal No. 101 of 2007

Mula Pravara Electric Co-operative
Society Ltd.
Distt. Ahmednagar, Maharashtra-413709Appellant

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Commission ,13th rloor, Centre No. 1,
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through the Principal Secretary Deptt. of Energy
Labour & Industries, Mantralaya
MumbaiRespondents

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With Mr. Arijit Maitra and Mr. Buddy
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Mrs Deepa Chawan, Mr. Kiran Gandhi
and Mr. H.S. Juaggi for Respn.No.2 in
appeal Nos. 24 and 101 of 2007 and
Resp. No. 3 in Appeal No. 33/07
Mr. Jayant Bhushan,
Mrs. S. Tuli for State of Maharashtra
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Resp.3
Ms Shubhangi Tuli for Resp.2 GoM
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For State of Maharashtra.

Judgment

Per Hon'ble Mr. H.L. Bajaj, Technical Member

Appeal No. 24 of 2007 with IA 80 of 2007

This appeal is preferred by the Mula Pravara Electric Co-operative Society Ltd. (MPECS in short) against the Tariff Order dated October 20, 2006 passed by the Maharashtra Electricity Regulatory Commission (MERC or the Commission in short), in case No. 54 of 2005, to the extent it applies to MPECS.

2. In this appeal the appellant has sought the following relief:

(a) Allow the present appeal and set aside the impugned order dated October 20, 2006 passed by the Maharashtra Electricity Regulatory Commission in case No. 54/2005, to the extent of determination of bulk supply tariff applicable to the appellant.

(b) Direct that the Maharashtra Electricity Regulatory Commission should dispose of the petition for determination of ARR and tariff filed by the appellant

(being case No. 51 of 2005), which is presently pending, on the principles enumerated by this Tribunal for determination of tariff for a licensee operating in the rural area, on cooperative principles in line with National Policy for Rural Electrification and Bulk Power Purchase and Management in Rural areas.

(c) Direct Maharashtra Electricity Regulatory Commission/Government of Maharashtra to expeditiously settle the issue of past power purchase dues of the appellant, including take such measures as may be necessary for creating a regulatory assets for the past arrears of the appellant as advised by the state Government, in order to ensure long term sustainability of operations of the appellant.

As the MERC has since disposed of case No. 51 of 2005, the prayer (b) above is rendered infructuous.

Appeal No. 33 of 2007 with IA No. 55 of 2007

3. This appeal is preferred by the Mula Pravara Electric Co-operative Society Ltd. (MPECS in short) against the Tariff Order

dated February 23, 2007 passed by the Maharashtra Electricity Regulatory Commission (MERC or the Commission in short), in case No. 51 of 2006 wherein Retail Supply Tariff has been determined.

4. In this appeal the appellant has sought the following relief:
 - (a) Allow the present appeal and set aside the order dated February 23, 2007 passed by the Maharashtra Electricity Regulatory Commission in case No. 51 of 2006 and remand the matter to the Maharashtra Electricity Regulatory Commission for re-determination of tariff for the consumers of the appellant.
 - (b) To frame and/or provide guidelines for framing of appropriate policies and principles relating to regulatory principles applicable for licensees and societies engaged in distribution of electricity in a rural area under cooperative principles, in the manner envisaged in The Electricity Act, 2003 and the Rural Electrification Policy dated August 23, 2006 issued by the Central Government and thereafter direct that the Maharashtra Electricity Regulatory

Commission to re-determine tariff to the consumers of the appellant in terms of such principle, policies and/or guidelines.

- (c) Direct Maharashtra Electricity Regulatory Commission/Government of Maharashtra to expeditiously settle the issue of past power purchase dues of the appellant by creating a regulatory assets as advised by the state Government, and to ensure assistance in the form of capital and revenue subsidy as may be necessary, for the long term sustainability of operations of the appellant.

Appeal No. 101 of 2007

5. This appeal is preferred by the Mula Pravara Electric Co-operative Society Ltd. (MPECS in short) against the Tariff Order dated May 18, 2007 passed by the Maharashtra Electricity Regulatory Commission (MERC or the Commission in short), in case No. 65 of 2006, to the extent it applies to MPECS.

6. In this appeal the appellant has sought for the following relief:

- (a) Allow the present appeal and set aside the impugned order dated May 18, 2007 passed by the Maharashtra Electricity Regulatory Commission in case No. 65/2006, to the extent of determination of bulk supply tariff applicable to the appellant.
- (b) Direct Maharashtra Electricity Regulatory Commission/Government of Maharashtra to expeditiously settle the issue of past power purchase dues of the appellant, including take such measures as may be necessary for creating a regulatory assets for the past arrears of the appellant as advised by the state Government, in order to ensure long term sustainability of operations of the appellant.

7. The aforementioned three appeals are filed by the same appellant namely: Mula Pravara Electric Co-operative Society Ltd. against various orders of the MERC. As the issues involved are similar, we have taken up the three appeals together in this judgment.

8. The appellant, a distribution licensee is engaged in the supply/distribution of electricity in rural areas in the District of

Ahmednagar, Maharashtra, which predominantly consist of agricultural consumers.

9. Learned counsel for the appellant stated that in the Impugned Tariff Orders the tariff has increased monthly electricity bills in some cases between two to three time and has therefore given a tariff shock to the consumers of MPECS and has resulted in a large scale discrimination between consumers within the state of Maharashtra. It was further pleaded that the Commission has completely failed to discharge its statutory duties and obligations towards the consumers of MPECS who are predominantly agricultural and domestic consumers with limited paying capacity. It was further urged that the impugned orders are contrary to the provisions of The Electricity Act, 2003(the Act in short) , National Electricity Policy, the National Tariff Policy and the Rural Electrification Policy. In this context the learned counsel cited the judgment of this Tribunal dated June 2, 2006, in the case of M/s Kashi Vishwanath Steel Ltd. vs Uttaranchal Electricity Regulatory Commission, and drew our attention to the following para:

“ We therefore, direct the Commission to review and revise its tariff orders dated October 04, 2005 and April 25, 2005 adopting the approach of using pooled average cost of power purchased from all sources for all categories of consumers. Simultaneously, it should also ensure that no tariff shock is caused to any consumer in line with the spirit of The Electricity Act, 2003. Subsidy element needs to be succinctly brought out in a transparent manner. This exercise may be carried out along with truing up during the next tariff revision”.

10. Learned counsel for the appellant asserted that discrimination between the consumers in the state is entirely unacceptable and that although the Commission has argued that it is not permissible for one set of consumers belonging to a particular licensee to subsidize the consumers of another licensee, in the tariff order dated October 20, 2006, the MPECS consumers, who are predominantly agricultural consumers, are being made to subsidize the MSEDCL consumers. Learned counsel for the appellant alleged that the Commission has failed to determine the Bulk Supply Tariff for supply to the appellant in accordance with the principles set by itself under its orders dated October 20, 2006 for BST determination for FY 2006-07 and order dated May 18, 2007 for BST determination for FY 2007-08 under MYT regime. It was stated that the Commission has contradicted itself when it comes to BST determination for the

appellant because of allocation of non-costly power to all consumer categories uniformly. MPECS area of operation falls under agriculture dominated region, hence it is subjected to load shedding protocol approved by the Commission up to 12-14 hours each day. Therefore, while MPECS is subjected to load shedding applicable to agricultural area for the rest of Maharashtra, the cost of power purchase determined by Commission has no relation to the cost of non-costly power being procured by MSEDCL and/or the cost of power supplied to other agricultural consumers in Maharashtra.

11. Learned counsel for the appellant stated that the Commission has also allocated Annual Revenue Requirement pertaining to wires business of MSEDCL and determined wheeling charges for supply at 33 kV. Learned counsel submitted that tariff for supply to MPECS (Bulk Supply) should have been determined by the Commission upon establishing cost of supply for BST to be truly cost reflective. In this regard a comparison of PU landed cost of supply at 33 kV based on Commission order for FY 2006-07 and FY 2007-08 was presented by the learned counsel as per following table:

Sl.No.	Particulars	Units		Commission Order (case 54 of 2005) FY 2006-07	Commission Order (Case 65 of 2006) FY 2007-08
	Non-Costly Sources				
1	Power purchase Quantum (non-costly sources)	MU	(i)	69789	80573
2	Power purchase cost (non-costly sources)	Rs.Cr	(ii)	11363	14633
3	Rate of power purchase (non-costly sources)	Rs/kWh	(iii)=(ii)/(i)X10	1.63	1.82
	Transmission Charges				
4	Transmission Charges for InSTS	Rs/kW/mth	(iv)	110.20	126.86
5	PU Transmission charges (equivalent)	Rs/kWh	(v)=(iv)/(24X30)	0.15	0.18
6	PU cost of supply (Procurement + transmission)	Rs./kWh	(vi)=(iii+v)	1.78	1.99
7	Transmission loss for InSTS	%	(vii)	4.85%	4.85%
8	PU landed cost of supply at (InSTS periphery)	Rs/Kwh	(viii)=(vi)/(1-vii)	1.87	2.09
	Wheeling charges				
9	Wheeling charges for supply at 33 kV	Rs/kW/mth	(ix)	3	38
10	PU Wheeling charge (equivalent)	Rs/kWh	(x)=(ix)/(24X30)	0.005	0.05
11	PU cost of supply (Procurement+Transmission+wheeling)	Rs/kWh	(xi)=(vii +x)	1.88	2.15
12	Wheeling losses for supply at 33 kV	%	(xii)	11%	6%
13	PU landed cost of supply at 33 kV		(xiii)=(xi)/(1-xii)	2.11	2.28

As against above landed cost, MERC had determined Tariff for supply to MPECS as under

10	Demand charge	Rs/kWh		200	200
11	Energy charge	Rs/kWh		2.80	3.00
12	Equivalent BST Rate	Rs/kWh		3.43	3.63

12. Learned counsel stated that it is evident from the above table that against cost of supply of Rs. 2.11/kWh (FY 2006-07) the Commission has determined Bulk Supply Tariff as Rs. 3.43

per unit and cost of supply of Rs. 2.28/kWh (FY 2007-08), the Commission has determined Bulk Supply Tariff as Rs. 3.63/kWh. It was submitted that the above cost of Rs. 2.11/kWh are fully allocated cost of supply for MSEDCL to arrange supply to MPECS at 33 kV, even in terms of the principles adopted by the Commission. Learned counsel further stated that the cost of supply to the industrial consumers, who are entitled to a lesser amount of load-shedding cannot be applied to predominantly agriculture area.

13. Learned counsel for the appellant stated that appellant receives bulk power supply from MSEDCL at 33 kV and 11 kV interface points emanating from Grid Sub-Stations. In turn the feeders emanating from these Grid substations supply power to MSEDCL as well. Whereas MPECS receives supply at 33 kV or 11 kV receiving stations, as the case may be, either from Grid Sub Stations directly or supplied by MSEDCL at its receiving station, MSEDCL records energy sold based on meters installed at the Grid Sub Stations thereby forcing MPECS to bear the sub station losses and line losses up to its receiving stations. MPECS has installed meters at its receiving sub-stations incomers.

Based on analysis of the units reading, there is a difference of 2 to 3 per cent in energy units, as a result thereof these amounts of losses are required to be borne by MPECS. Learned counsel submitted that though the Commission was requested by the appellant to direct MSEDCL to install meters at the receiving stations of MPECS and bill accordingly, no direction has been issued by the Commission.

14. Learned counsel for the appellant alleged that MSEDCL continues to charge billing demand of aggregate of maximum demand recorded by various demand meters located at 23 metering points when its Simultaneous Maximum Demand would actually be lower than that billed by MSEDCL.

15. Learned counsel pleaded that the Commission has failed to appreciate its jurisdictional mandate under Section 5 and 6 of The Electricity Act, 2003 and the regulatory impetus envisaged under the Rural Electrification Policy as envisaged in the following paras:

“9.13 Where such persons purchase power from the licensee of the area, they would be treated as a separate category by the appropriate Commission for

the determination of the Bulk Purchase Price (BPP) to be paid by them to the licensee.

9.14. In such cases the tariff for retail sale to the consumers in the area of such persons would be as determined for the licensee by the appropriate Commission.

9.15. If not determined competitively, the BPP should be set on a normative basis based on representative consumer mix and should not vary on a case-to-case basis. The BPP set along with margins prescribed for the local distribution enterprise should be such that consumers tariff is maintained at the same level. This BPP would be fully factored into the submissions of the State Utilities to the State Electricity Regulatory Commissions for their revenue requirements.

9.16. Where the said persons purchase power from a source other than the distribution licensee of the area, the procurement price would be mutually agreed between such person and the suppliers. In such cases the retail tariff shall be determined in accordance with the guidelines laid down by the SERCs with oversight of the District Committee”

16. Learned counsel stated that the Commission has failed to give effect to the policy directives required under the provisions of

The Electricity Act, 2003 and that the impugned order is contrary to the principles that are enumerated in the Rural Electrification Policy (REP). Learned counsel argued that as the provisions of the Rural Electrification Policy applied to persons exempted under Section 13, these should necessarily also apply to a licensee under Section 12 and it cannot be the mandate of law that the provision of REP will apply to a deemed licensee and not to an actual licensee other things remaining equal. Citing the judgment of Hon'ble Supreme Court of India in Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405, the counsel said that the Commission order has to stand on the reasons as given in the order and cannot be justified by now giving further reasoning and sustenance of the orders. Learned counsel asserted that MERC, in exercise of powers under Section 65 of The Electricity Act, 2003, has not acted upon the GR dated May 27, 2005 issued by the Government of Maharashtra committing payment of subsidy to agricultural consumers. The GR had inter-alia required that the revenue loss to MSEB and MPECS due to concessional tariff for agricultural consumers would be compensated by the Maharashtra Government and that

free electricity to agricultural consumers will not be provided w.e.f. June 1, 2005. The decision relating to compensation to be paid by the Government was to be implemented subject to the approval of MERC. Learned counsel complained that the GR has not been approved by the MERC and also not taken into account for purposes of determination of tariff. The MERC has also relied on August 24, 2004 GR for purposes of calculating the revenue deficit of the appellant by taking into consideration the amount of Rs. 72 crores to be paid by the Government and the balance deficit of revenue to be recovered through hike in tariff.

17. Learned counsel stated that if the bulk supply tariff (BST) order dated October 20, 2006, the RST consumer tariff order February 23, 2007 and MYT order dated May 18, 2007 were to be upheld in its present form, the Government has to then pay an additional amount of approximately Rs. 105 crores in addition to the commitment to pay Rs. 72 crores payable as subsidy under GR dated August 24, 2004. MPECS has not received any subsidy out of Rs. 72 crore neither any capital subsidy out of Rs. 4 crore as committed by GOM. The subsidy amount claimed and received by MPECS is for giving concessional tariffs to

agricultural consumers only as per GOM's GR of May 27, 2005. He sought to clarify that under Section 65, there is no distinction on the ground of revenue subsidy and tariff subsidy. Further, the said GR has no application for domestic and other consumers who have been deeply affected by the impugned tariff order.

18. Learned counsel submitted that unless the GR dated May 27, 2005 is made a part of the order of the Commission and administered in the manner provided under Section 65, the same cannot be taken as a ground to non-suit the appellant and/or to hold that the appellant is not "aggrieved" by the impugned tariff orders. If the Commission has chosen to ignore the said GR, the same cannot be now introduced at the appellate stage to hold that the appellant are not prejudiced by the tariff order in view of the said GR. Learned counsel prayed that in order to come to such a finding, the tribunal may remand the matter to the Commission and provide guideline as to how the GR is to enforced within the existing regulatory regime. The mandate of the reform legislation prevents a parallel tariff regime, at the instance of the Government. The Government subsidy

commitment has to be computed and paid in advance, in the manner directed by the State Government. Any other process of administering subsidy will violate the mandate of the Act. The counsel cited the judgment dated May 26, 2006 of this Tribunal in case of the SIEL vs. PSERC and has drawn our attention to the following paras:

*“ 115. Under Section 65, State Government can grant subsidy to any consumer or class of consumers in the tariff determined by the State Electricity Regulatory Commission under Section 62. The State Government is required to pay subsidy in advance and in such manner as may be specified by the Regulatory Commission. If the payment is not made in advance and in such manner as may be directed by the State Commission, the tariff fixed by the State Commission shall be applicable. As per para 8.3 of the National Tariff Policy, payment of direct subsidy is a better way to support the economically weaker sections of consumers than the mechanism of cross subsidizing the tariff across the Board. As a substitute of cross subsidy, the state Government has the option of raising resources through mechanism of electricity duty and giving direct subsidies to only needy consumers. It is the option of the State Government to ** subsidize or not to subsidize. It is also the option of the State Government, in case they decide to give subsidy, to*

*determine** the extent to which the subsidy shall be given. In case the State Government decides to give subsidy as a substitute for cross subsidy, it will be a better way to support the poorer sections of the society, but as already pointed out, the option lies entirely in the hands of the State Government.*

116. Keeping in view the provisions of the Act, the Commission was bound to require the Government to pay the outstanding subsidy including Rural Electrification Subsidy. The manner of payment was also to be specified under Section 65 of the Act by the Commission and the State Government would be bound by such specification. Section 29(2) (d) and (e) and Sub-Section (5) of Section 29 of the 1998 Act is also to the same effect. It can not be left to the discretion of the state how the subsidy is to be paid to the Board. The state appears to be adjusting subsidy against the interest allegedly due from the Board on account of Government loans which is not permissible, as the Act provides for actual payment as a statutory obligation. Factually, subsidy has not been paid in cash and has merely been adjusted not against the principal but against interest. In any case, if loans would have been substantially reduced and consequently, the interest payable by the Board would have come down drastically.

117. *In view of the aforesaid discussions, we direct the Commission shall determine the following:*

i) What is the total amount of subsidy payable by the State to the Board including cash and RE subsidy without any adjustment of earlier loans or interest?

ii) What should be the mode of payment of subsidy?

iii) To what extent the subsidy could be applied or adjusted towards the principal (loan)?

iv) What is the amount of interest payable by the Board to the State?

v) What is the quantum of amount which the state has failed to disburse towards RE subsidy?"

The aforesaid judgment is also based on the principle laid down by the Supreme Court in West Bengal Electricity Regulatory Commission v CESC Ltd. (2002) 8 SCC 715.

19. Learned counsel asserted that the law therefore, as laid down by this Tribunal is clear and unambiguous. The payment of subsidy cannot be independent of the order or directions of the State Commission. The law does not recognize a parallel tariff

regime, at the instance of the State Government. Since the Independent Regulator has been created and empowered on all matters of tariff, the decision of the State Government on matter of subsidy necessarily has to be routed through the Commission. The Commission has a statutory obligation to ensure that the licensee or utility receives the subsidy component “in advance” and that the licensee is not left to another forum for recovery of subsidy from the State Government.

20. Learned counsel submitted that in the aforesaid legal regime, the GR dated May 27, 2005 had to be necessarily incorporated in the tariff order but instead of incorporating the same, the Commission has relied upon and taken notice of GR dated August 24, 2004.

21. Learned counsel submitted that, therefore, the Commission should be directed to take notice of GR dated May 27, 2005 and thereafter determine actual tariff burden on the consumer. While doing so the Commission should also be directed to moderate the impact on the domestic consumers (who are

otherwise excluded from GR dated May 27, 2005), from the total subsidy component payable by the Government. A different tariff package has to be determined on the basis of the commitment made in GR dated May 27, 2005. The fact that the appellant has received subsidy under the GR dated May 27, 2005 from time to time does not in any manner change the legal position. The subsidy under the May 27, 2005 GR was available to both the agricultural consumers of the appellant as well as the consumers of MSEDCL, when there was parity in tariff regime. Now with huge difference in tariff between the consumers of the appellant and the MSEDCL, the Government has failed to confirm whether they will continue to pay such differential tariff amounts to the appellant only as the difference in case of MSEDCL is marginal.

22. Per contra learned counsel for the respondent Commission stated that on a reference made by the State of Maharashtra, it had prepared a report dated January 1, 2004 as per which the MERC had crystallized the following three options for the continuance of the appellant Society:

“ (i) In this option, keeping in view the provisions of the Electricity Act(EA), 2003, the Commission would fix the Fully Allocated Cost (FAC) based Bulk Supply Tariff (BST) at which MSEB or its successor entities would supply electricity to MPECS. The Commission would also determine the “viable” BST on the surplus cash revenue available towards power purchase. The difference between the FAC-based BST determined by the Commission and the “viable tariff” would have to be paid by GoM as subsidy to MPECS, subject to the performance parameters laid down in the time-bound programme for efficiency improvement. If MPECS purchases energy over and above the permissible limit of power purchase in any specified time period, then such purchases would be charged at FAC based BST by MSEB. Such additional costs would have to be borne and recovered by MPECS through future efficiency improvements. It is estimated that the requirement of subsidy from GoM under this

arrangement would be of the order of Rs. 72 crores per annum, expected to decline progressively.

(ii) In this option, MSEB would be directed to supply power at the “viable tariff” to MPECS to the extent of power purchase limit as may be stipulated. The gap between FAC based BST and the viable tariff would be treated as a ‘Regulatory Asset’ in the books of MSEB (or its successor entities), to be recovered over a period of time, from MPECS.

(iii) After considering all factors, including the financial requirements from GoM and the efficiency advantages of MPECS, the Commission finds the option of continuing MPECS as only a management contractor rather than a licensee in its present area of supply as the most tenable alternative. All MPECS assets would be transferred to MSEB in lieu of its current dues, and MPECS would be allowed to operate as a long term management contractor to MSEB or its successor entities for electricity distribution. The period of contract would be that of the current MPECS license period and

the entire arrangement would be secured through a formal contractual agreement. Thus, MPECS would be compensated as a management contractor, and no BST fixation would be required. Prima facie, this option could be implemented without resorting to the complex revocation process under Section 19 and subsequent provisions of the EA, 2003. The 8th proviso to Section 14 of the Act enables the State Government to notify a rural area for distribution of electricity, consequent upon which the entities intending to operate in such area are exempted from requiring a license. GoM would have to further examine the feasibility of this recommended alternative considering, in particular, the legal provisions. It is also to be noted that if this option could be adopted, it would have universal applicability while implementing GoM's study group report on management of rural electrification.

23. Learned counsel for the Commission stated that though the MERC had recommended the third option whereby the appellant

could continue as a Management Contractor of the respondent No. 2 (MSEDCL) for the distribution of power rather than a licensee, the state of Maharashtra decided vide order dated August 24, 2004 that the first option as recommended by the MERC be implemented. The first option postulated two things: firstly the appellant would have to pay the FAC-BST(Fully Allocated Cost based Bulk Supply Tariff) and secondly the gap between the FAC-BST and the “viable tariff” which, at that time was estimated at Rs. 72 crore would be paid by the Government of Maharashtra. Hence in accordance with the said recommendation as accepted by the State of Maharashtra and by the appellant Society, the Commission has, in the Impugned Tariff Order dated October,20, 2006 (impugned in appeal No. 24/07) determined the Fully Allocated Cost based Bulk Supply Tariff for the appellant.

24. Learned counsel asserted that the appellant is in reality seeking a situation where the consumers of MSEDCL are to cross subsidize the consumers of the appellant and submitted that under the EA, 2003 consumers of one licensee cannot be

expected to subsidize the consumers of another licensee and that the appellant seeks to rely on the landed cost of supply of power for MSEDCL to show an imaginary difference between the cost of MSEDCL and the price payable by the appellant. Such contention of the appellant ignores the fundamental premise on the basis of which the appellant is continuing that the appellant would be bulk consumer of MSEDCL and would pay a Fully Allocated Cost based Bulk Supply Tariff. Hence the question of comparing the landed cost of power for MSEDCL with the rate payable by the appellant is fundamentally flawed and in so doing the appellant is seeking to conveniently ignore all the costs of MSEDCL in supplying power to the appellant and is seeking to rely on the landed cost of power which is nothing but the baseline on top of which all other costs of MSEDCL would be built.

25. Learned counsel submitted that subsidy of Rs. 72 crores from the Government of Maharashtra in terms of their earlier decision dated August 24, 2004 has already been factored in by the MERC in their tariff order dated February 23, 2007 (which is

the subject matter of appeal No. 33 of 2007). It was submitted that the appellant has been guilty of not disclosing full and material facts pertaining to the further subsidy decided by the Maharashtra Government vide GR dated May 27, 2005 whereunder the Maharashtra Government had committed payment of subsidy with respect to agricultural consumers of the appellant. Admittedly, more than 80% of the consumers of the appellant are agricultural consumers. The appellant has also not disclosed that vide the aforesaid GR, the Maharashtra Government has decided to subsidize the entire difference between the tariff as decided by the MERC and the tariff fixed by the Government as chargeable by the appellant from their consumers. Hence the appellant has failed to disclose that in reality their consumers would not be hit by any tariff shock at all. While the entire case of the appellant is being built around the alleged "Tariff Shock" to their consumers, the appellant has failed to disclose that there is in fact, no tariff shock at all. The appellant failed to disclose that as late as in the year 2007 the appellant had written to the Government requesting payment of the subsidy under the GR of May 27, 2005. Such request of the

appellant from the Government presumes that the appellant was and is charging the subsidized tariff from their consumers and this fact was conveniently not disclosed by the appellant. The said GR of May 27, 2005 was brought to the forefront by MSEDCL during the proceedings and it was only at that stage that the appellant chose to even acknowledge the same or address the issue.

26. Learned counsel stated that in the circumstances the entire case of the appellant being built around an alleged “tariff shock” is belied by the fact that it is not actually charging the so-called “shocking” tariffs from their consumers and that this fact alone is sufficient to dismiss the appeal with costs.

27. Learned counsel further submitted that the subsidy committed by the Government of Maharashtra is not one contemplated under Section 65 of the Electricity Act, 2003 since it is a post tariff fixation subsidy. The text of the notification presumes that the tariff is fixed de-hors the subsidy since the Government has mentioned that it would subsidize the difference

between the tariff fixed by the MERC and the rate specified by the Government. In these circumstances the MERC was and is not called upon to consider the said subsidy in its tariff fixation. Where the subsidy was required to be considered by the MERC in its tariff fixation (of Rs. 72 crores) it was taken into account by the MERC in fixation of the tariff in Tariff Order dated February 23, 2007.

28. Learned counsel further submitted that the Rural Electrification Policy, even on a prima facie basis, is not at all applicable to the appellant since it is a licensee under the Act. Hence the reliance on the same by the appellant is flawed and misplaced.

29. Learned counsel for the respondent Commission further submitted that the appellant has repeatedly contended that, while passing order dated October 20,2006 for MSEDCL it should have treated the appellant in a special and separate manner and that the Commission has proceeded to treat the appellant as the bulk consumer of MSEDCL. Learned Counsel stated that in fact, the appellant has been treated as a separate category and a

separate tariff has been fixed for them in the impugned order and that it is denied that the Commission's order dated October 20,2006 is arbitrary or irrational only because it has been stated therein that "the Commission has treated MPECS as a bulk consumer of MSEDCL....." He submitted that irrespective of the words used, the appellant has to pay for the power purchased from MSEDCL. Learned counsel submitted that it is a fact that the appellant avails supply from MSEDCL at high voltage (33/11 kV) level in bulk and in turn supplies it to its own consumers and that there is no impediment under the Act for the Commission to determine tariff for such supply as under Section 86 it is required to determine tariff, wholesale, bulk, retail, as the case may be. Furthermore, there are other distribution licensees in the state who also take bulk supply from other distribution licensees, for which they have to pay the tariff for such bulk supply as determined by the Commission.

30. Learned counsel for the Commission stated that the contention of MPECS that the increase in energy charges from 150 paise/kWh to 280 paise/kWh is contrary to the tariff

philosophy applicable to it who distributes power among rural agricultural consumers under cooperative principles is not tenable. As the consumer base of the appellant consists predominantly of agricultural consumers (approximately 80%), there are hardly any consumer left in the distribution area of the appellant who could have cross-subsidized the agricultural consumers of the appellant and that in view of this, any comparison of tariff rates for MSEDCL and the appellant, would be misplaced. He submitted that demand of reduction on the differential bulk supply tariff rate, is not sustainable, as it is already comparatively lower than the other bulk supply tariff rates specified in the order dated October 20, 2006 in case No. 54 of 2005 payable by consumers of MSEDCL. Learned counsel stated that it has already given concession regarding the BST rate and to further reduce the same on account of cross subsidy being borne by the consumers of MSEDCL so as to reduce the BST of the appellant eventually translating into reduction of RST of consumers of the appellant, would have been unreasonable. Cross subsidization can be between consumers of a particular licensee and to arrive at a differential BST for appellant would

translate into the consumers of one licensee (MSEDCL) to cross subsidize consumers of another licensee (MPECS). Moreover, there is no provision in the Act allowing special tariff to be fixed for a licensee who distributes power amongst rural agricultural consumers under cooperative principles. The Rural Electrification Policy (REP) dated August 23, 2006 notified by the Central Government stipulates the passing on to the consumers of the benefit of financial assistance/subsidies by the Government, which the impugned order has factored into considering the subsidy provided by the Government of Maharashtra. Reliance by the appellant on clauses 9.13 to 9.16 of the REP is misleading as no such notification as expressly stipulated under Section 13 of The Electricity Act has been issued by the Commission exempting the appellant from the provisions of Section 12. The appellant is a deemed licensee in accordance with the first proviso to Section 14 of the Act. Clauses 9.13 to 9.16 of the REP would have been applicable to the appellant had a notification under Section 13 been issued with respect to the appellant. Furthermore, the REP is not binding on the Commission as evidenced in Section 61(i) of the

Act which mandates that the Commission is required to be guided by the National Electricity Policy and the National Tariff Policy notified under Section 3 and not the REP notified under Section 4 and 5.

31. Responding to appellant's contention that the Commission without determining the ARR of the appellant has erroneously fixed the Bulk Supply Tariff (BST) payable by them to MSEDCL, learned counsel stated that on the contrary, unless the power purchase costs of a licensee is determined the Annual Revenue Requirement cannot be arrived at and, therefore, it was necessary for the Commission to determine the BST to factor in the expense into the ARR and to determine the Retail Supply Tariff (RST). He submitted that the contention; that the Commission without appreciating the concerns of the appellant proceeded to determine the ARR of MSEDCL and fixed the BST payable by the appellant is fallacious, as the issues regarding the concern of past arrears payable to MSEDCL by the appellant as sought to be bridged with the subsidy given by the

Government of Maharashtra has been factored into the ARR of the appellant in case No. 51 of 2005.

32. Learned counsel for the Commission submitted that under Section 22 of the repealed Electricity Regulatory Commission Act, 1998, as well as under Section 61 read with Section 86 of The Electricity Act, 2003, the sole authority to decide the issue as to whether regulatory asset should be created or not to take care of the past power purchase dues/arrears of the appellant in the books of MSEDCL vests only with the Commission and therefore, it is incorrect to paint a picture of any binding nature, on the Commission, of Government of Maharashtra's decision under GR dated August 24,2004 pertaining to treatment of MSEDCL.

33. Learned counsel submitted that the Commission directed Government of Maharashtra, vide its order dated December 16, 2005, to rectify and remedy the said GR and thus it is wholly incorrect and unlawful on the part of the appellant to demand that the past power purchase dues to MSEDCL had to be treated in the impugned order as regulatory asset in terms of the

aforesaid GR, as the GR to this extent is without jurisdiction under the law.

34. The counsel submitted that the said GR dated August 24, 2004 was not a direction to the respondent and even if it is assumed to be so, without admitting the same, Section 108 provides that “the State Commission shall be guided by such directions....”. He asserted that any such direction is not binding on the Commission especially when the same conflicts with and contradicts a decision contained in an order passed by the Division Bench of the High Court of Judicature at Bombay in MERC appeal No. 4 to 6 of 2002 in case of MSEC vs. MERC, which stipulates that regulatory assets should be created only as an “exception”.

35. Learned counsel contended that appellant has himself referred to the National Tariff Policy (NTP) notified by the Central Government on January 6, 2006 whereunder it is clearly stipulated that the facility of regulatory asset should be adopted by regulatory commission only as an exception and that the circumstances in which the regulatory asset can be created

should be clearly defined through regulations but there are no regulations notified by the Commission which either stipulate the creation of a regulatory asset or stipulate the circumstances in which they should be created. He said the NTP further stipulates that regulatory assets may be created subject to the requirement of existence of regulations as aforesaid, due to natural causes or force majeure conditions and that none of these two conditions exist creating any fetter on the appellant to pay his past power purchase dues to MSEDCL.

36. Learned counsel pleaded that the Commission being obligated to regulate the working of the licensees and further to promote their working in an efficient, economical and equitable manner could not have allowed MSEDCL to suffer irreversible damage considering its financial health, which was suffering from mounting arrears on account of the unpaid dues by the appellant. Learned counsel stated that it is common regulatory practice that any revenue gap can only be met through: (i) revision in tariff, (ii) subsidy by Government or (iii) creation of regulatory assets and that under Section 65 of The Electricity

Act, subsidy could have been given by Government of Maharashtra and that the Commission has no jurisdiction under the Electricity Act to issue directions to Government of Maharashtra to provide subsidy to the appellant for bridging any revenue gap. Learned counsel asserted that whether the unrecovered revenue gap had to be covered through transition financial arrangement or capital restructuring was for the appellant to come up with a justifiable and permissible solution as it is for the appellant to submit its petition under Section 64 of the Electricity Act and it is not for the Commission to devise creative solutions on behalf of license's application for tariff and that the functions of Commission are distinct under the Act and in the circumstances, Commission had to revise the tariff of the appellant in order to bridge the revenue gap in order dated February 23, 2007 in case No. 51 of 2005.

37. Responding to the allegation that the impugned order is arbitrary and contrary to the philosophy of the Commission that the retail tariff in the state shall be uniform, learned counsel stated that in fact, due to diverse reasons including inter alia

absence of metering, inability of licensees to determine the exact cost to serve/cost of supply and various other reasons, as also due to different dynamics across different licensees, it is not possible, at this juncture, to arrive at uniform retail tariffs in the state of Maharashtra across all licensees. He said that Section 62(3) permits the Commission to fix differential tariffs for consumers. He controverted the contention that the Commission in its order dated July 18, 2002 accepted that retail tariff for agricultural consumers in the state should be uniform and alleged that the same is misleading as; the said order was an interim order to support the appellant for a limited transition phase where the appellant was directed to adopt the MSEB tariff order dated January 10, 2002 for its retail consumers with effect from January 1, 2002, as the tariff revision proposal filed by the appellant for the year 2002-03 was liable to be rejected outright for reasons recorded in the said order. He submitted that in the circumstances, the Commission could not have rejected the appellant submissions that its (appellant's) financial health would suffer irreversible damage and, therefore, appellant was directed to adopt the MSEB tariff order dated January 10, 2002

for its retail consumers with effect from January 1, 2002. He said that this direction of the Commission has been read out of context by the appellant while contending that the Commission in its order dated July 18, 2002 accepted that retail tariff for agricultural consumers in the state should be uniform. He drew our attention to the following para of the said order where Commission had observed as under:

“ 17...The Commission further feels it is necessary to advise the Government of Maharashtra under Section 22(2) (j) of the ERC Act, 1998 that it shall require to take urgent action in line with the acceptance of the Rajadhyaksha Committee recommendation so as to facilitate the working of the Society in an objective manner and compensate the MSEB to tide over its financial crisis arising out of this case alone.”

38. He further submitted that point No. 25 of the summary of recommendations from the Rajadhyaksha Committee report submitted in December, 1996 provided that *“the state Government should take an urgent decision regarding the tariff to be charged to the Mula Pravara Cooperative Society. This rate*

must be viable for the Board and should not constitute an awkward precedent in the other future cases”.

39. Learned counsel stated that the appellant has made completely misleading statements in the appeals while trying to divert the attention of this Tribunal from the real issue at hand and while making unnecessary demands which are otherwise not permissible. He refuted that the revenue gap stands substantially increased as a result of arbitrary principles and submitted that the increase in the revenue gap is due to the inefficiencies of the appellant and that it is for the appellant to approach Government of Maharashtra for subsidy/financial support required for building the uncovered revenue gap of Rs. 2/- per unit as stipulated by the appellant.

40. Learned counsel stated that whereas the appellant has contended that the Commission has failed to locate low cost generator so that the BST could be reduced but the Commission under the Act does not have the jurisdictional mandate to locate and allocate low cost generation/cheap power.

41. Learned counsel stated that the appellant avails supply from MSEDCL at high voltage (33/11kV) level in bulk and in turn supplies it to its own consumers. He emphasized that the contention that the cost of MSEDCL cannot be loaded on the BST payable by the appellant, is not sustainable. There is no impediment under the Act for the Commission to determine tariff for such supply as under Section 86 the Commission is required to determine tariff, wholesale, bulk, retail, as the case may be. He said that there are other distribution licensees in the state who also take bulk supply from other distribution licensees, for which they have to pay the tariff for such bulk supply and, therefore, the contention that the impugned order to the extent it applies to the appellant is without jurisdiction, ought to be rejected.

42. Learned counsel stated that the appellant has contended that the Commission has failed to appreciate the mandate of the National Tariff Policy as enumerated in paragraphs 8.2(3), 8.3(2) and 8.3(3) as appearing therein and submitted that it is an incorrect contention as the subsidy given by the Government of

Rs. 72 crores has indeed been factored for arriving at the ARR for retail tariff and the ARR net of revenue subsidy given by the GoM has been arrived at in the order dated February 23, 2007 in case No. 51 of 2005.

43. Learned counsel stated that the contention of the appellant that it is a failure of the Commission to explore viable options for the turn around of operations of the appellant is unjustified, illegal, highly misplaced and is an unreasonable demand as it is for the appellant to effectively explore viable options and not to be a silent spectator of its own inefficiencies and at the same time expect the Commission to create options for its viable turn around. He contended that it is the appellant who is abdicating its own duty and obligation to operate on commercial principles as required under the Act.

44. On consideration of the submissions made on behalf of appellant as well as the respondents and the contentions advanced on either side and the written arguments submitted by the parties and keeping in view that though number of contentions have been raised in the appeal grounds, the learned

counsel appearing for the appellant, while advancing common contentions restricted himself to some main issues, the following issues and points emerge for our consideration in these appeals:

- A. Is MERC justified in not allocating non-costly power to MPECS when load shedding applicable to agriculture areas prevails?**
- B. Is it correct for MERC to include MSEDCL's costs over and above the cost of supply for determination of BST payable by MPECS to MSEDCL?**
- C. Is the appellant justified in alleging that its consumers are subsidizing MSEDCL consumers?**
- D. Is it correct for MSEDCL to meter supply to MPECS at its substations rather than at the receiving stations of MPECS?**
- E. Is MSEDCL justified to bill maximum demand charges on the basis of aggregate of maximum demand recorded by various meters rather than bill on the basis of Simultaneous Maximum Demand?**
- F. Is MERC required to determine state-wise uniform Retail Supply Tariff though there are several licensees within the state?**

- G. Is MERC justified in not following the principles of the Rural Electrification Policy for MPECS?**
- H. Is MERC responsible for ensuring that MPECS gets promised subsidies from the Government of Maharashtra?**
- I. Is it proper for the Commission to determine Bulk Supply Tariff payable to MSEDCL without determining the ARR of MPECS?**
- J. Is the Commission responsible for locating low cost power for the appellant?**
- K. Is the Commission responsible for exploring viable options for the turn around of operations of the appellant?**
- L. Regarding Tariff shock to the appellant's consumers.**
- M. Regarding Creation of Regulatory Assets:**

Now we proceed to discuss and decide each issue and point.

- A. Is MERC justified in not allocating non-costly power to MPECS when load shedding applicable to agriculture areas prevails?**

45. It has been contended by the appellant that in determination of BST for the appellant, as a bulk consumer, the cost of power purchase taken by the Commission has no relation to the cost of non costly power being procured by MSEDCL. Admittedly, MPECS consumers are predominantly agricultural consumers and therefore, the power required by the MPECS should have been sourced from non costly power suppliers.

46. The Commission itself in its orders dated October 20, 2006 and May 18, 2007 for BST determination under MYT has envisaged allocation of non costly power to all consumer categories uniformly. Accordingly, the Commission has determined the base tariffs using non costly power procured by MSEDCL for all categories of consumers including MPECS. Costly power costs are being recovered by imposing Additional Supply Charges from such consumers as are exposed to reduced load shedding hours.

47. We, therefore, find no force in the plea of the appellant as same is based on wrong premise. This issue is decided against the appellant.

B. Is it correct for MERC to include MSEDCL's costs over and above the cost of supply for determination of BST payable by MPECS to MSEDCL?

48. The issue for our consideration is that whether the Commission is right or not in allowing costs over and above the Fully Allocated Cost of supply in determination of Bulk Supply Tariff. The fundamental premise on which the Commission is required to determine BST is that the appellant is a bulk consumer of MSEDCL and would pay Fully Allocated Cost based Bulk Supply Tariff. We, therefore, agree with the contention of the Commission that the landed cost of power for MSEDCL is the base line on top of which all costs of MSEDCL would be built. There is no force in the contention of the appellant that it should be charged the landed cost of supply of power for MSEDCL. The Commission is justified in allowing all costs such as: demand charges, operation, financial and

administration costs, etc. of MSEDCL for supplying power to the appellant. We, therefore, decide this issue against the appellant.

C. Is the appellant justified in alleging that its consumers are subsidizing MSEDCL consumers?

49. The appellant avails supply from MSEDCL at 33/11 kV level in bulk and in turn supplies to its own consumers. Under Section 86 of The Electricity Act, 2003 the Commission is empowered to determine inter-alia Bulk Supply Tariff. Appellant is required to pay BST to MSEDCL as determined by the Commission. BST Tariff for the appellant is comparatively lower than other Bulk Supply Tariff rates specified in the order dated October 20, 2006 payable by other bulk consumers of MSEDCL as contended by the Commission. In view of this we do not agree with the appellant's contention that its consumers are subsidizing the consumers of MSEDCL.

D. Is it correct for MSEDCL to meter supply to MPECS at its substations rather than at the receiving station of MPECS?

50. Admittedly MPECS receives supply at 33 kV or 11 kV receiving stations, as the case may be, either from Grid Sub Stations directly or supplied by MSEDCL at its (appellant's) receiving stations. MSEDCL records energy sold based on meters installed at its Grid sub stations thereby making MPECS to bear the sub stations and line losses up to its receiving stations. When the intrastate system losses have already been taken into account while determination of Bulk Supply Tariff there is no justification in having the metering point at the sending end of the MSEDCL. We, therefore, direct that MSEDCL should meter supply to the appellant on the high voltage side of the receiving stations of MPECS. This direction may be complied within six months. We order accordingly.

E. Is MSEDCL justified to bill maximum demand charges on the basis of aggregate of maximum demand recorded by various meters rather than bill on the basis of Simultaneous Maximum Demand?

51. Admittedly, MPECS is a bulk consumer of MSEDCL. That being so it is the Simultaneous Maximum Demand which should be reckoned for Billing Demand Charges. There is no justification in aggregating the maximum demands, which may not occur simultaneously, recorded by all the 23 meters installed at the interface points of MPECS and MSEDCL. Due to diversity of demand Simultaneous Maximum Demand will actually be lower than the aggregate of maximum demand recorded by various demand meters located at 23 metering points. In view of this we direct that Simultaneous Maximum Demand which may be determined by installing special energy meters, should be the criteria for determining the billing demand and not the aggregate of maximum demands. We order accordingly.

F. Is MERC required to determine state-wise uniform Retail Supply Tariff though there are several licensees within the state?

52. Before we proceed to examine this issue, it is necessary to set out Sections 61(1), 62(1), 62(3) and Section 86 of The Electricity Act, 2003 for reference:

Section 61: Tariff Regulations.

1. The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- a. the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- b. the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- c. the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- d. safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- e. the principles rewarding efficiency in performance;*
- f. multi year tariff principles;*
- g. that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;*

h. the promotion of co-generation and generation of electricity from renewable sources of energy;

i. the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

62. Determination of Tariff.

1. 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 of 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.*

3. *The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.*

86. Functions of State Commission

1. *The State Commission shall discharge the following functions, namely:*

(a) *determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to*

a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

c. facilitate intra-state transmission and wheeling of electricity;

d. issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

e. promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licence;

f. adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

g .levy fee for the purposes of this Act;

h. specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

i. specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

j. fix the trading margin in the intra-State trading of electricity, if considered, necessary;

k. discharge such other functions as may be assigned to it under this Act.

53. Licensees are required to file their Annual Revenue Requirement(ARR) and tariff proposal to the Commission who determines the ARR and the Retail Supply Tariff for various categories of consumers falling in the licensee's area. We agree with the contentions advanced on behalf of the respondent Commission that due to various reasons of varying cost of supply, consumer mix etc. it is

not possible to arrive at uniform Retail Supply Tariff in the state across all licensees. The cost to serve depends upon various factors such as cost of power procured, transmission and distribution losses, operational and administrative expenses etc. which is bound to be different for different licensee's areas and, therefore, there is no way in which the Retail Supply Tariff can be kept at uniform level in the state. We are not able to agree with the contention of the applicant in IA No. 80 of 2007 in appeal number 24 of 2007 wherein it is alleged that the impugned order is violative of Article 14 of the Constitution of India as tariffs for MSEB and MPECS consumers set by MERC are different. The Commission has to set tariffs for various licensees areas individually and common tariff for consumers falling in different licensees area is envisaged in the Act. Section 62(3) of the Act permits the Commission to fix even differential tariff within a licensee's area for consumers. In view of this no interference with the orders of the Commission is called for in this view of the matter.

G. Is MERC justified in not following the principles of the Rural Electrification Policy for MPECS?

54. Our attention has been drawn to the following clauses of the Rural Electrification Policy:

“9.13 Where such persons purchase power from the licensee of the area, they would be treated as a separate category by the appropriate Commission for the determination of the Bulk Purchase Price (BPP) to be paid by them to the licensee.

9.17. In such cases the tariff for retail sale to the consumers in the area of such persons would be as determined for the licensee by the appropriate Commission

9.18. If not determined competitively, the BPP should be set on a normative basis based on representative consumer mix and should not vary on a case-to-case basis. The BPP set along with margins prescribed for the local distribution enterprise

should be such that consumers tariff is maintained at the same level. This BPP would be fully factored into the submissions of the State Utilities to the State Electricity Regulatory Commissions for their revenue requirements.

9.19. Where the said persons purchase power from a source other than the distribution licensee of the area, the procurement price would be mutually agreed between such person and the suppliers. In such cases the retail tariff shall be determined in accordance with the guidelines laid down by the SERCs with oversight of the District Committee”

55. The basic issue before us is to determine whether or not the provisions of the Rural Electrification Policy will apply to the appellant. As per Section 12 of the Act a license is required under Section 14 unless one is exempted under Section 13 to transmit, distribute or undertake trading in electricity.

At this point it is pertinent to refer to Section 13 which states as under:

“13. Power to exempt:

The appropriate Commission may, on the recommendations of the appropriate Government, in accordance with the national policy formulated under Section 5 and in the public interest, direct, by notification that subject to such conditions and restrictions, if any, and for such period or periods, as may be specified in the notification, the provisions of Section 12 shall not apply to any local authority, Panchayat Institution, users' association, cooperative societies, non-governmental organizations, or franchisees.”

Eighth proviso to Section 14 states:

“ Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the state Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under Section 53.”

56. Admittedly no notification exempting the appellant from the provisions of Section 12 as explicitly stated under Section 13 has been issued by the Commission. Therefore, the appellant has the status of a deemed licensee in accordance with the first proviso to Section 14 of the Act which states as under:

“Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business”.

57. Had a notification been issued by the Commission under Section 13 exempting the appellant from requirement of a licence for distribution required under Section 12, the provisions of the

Rural Electrification Policy would have applied. In the absence of such a notification, the appellant is a deemed licensee and, therefore, provisions of Rural Electrification Policy will not apply. We decide accordingly.

H. Is MERC responsible for ensuring that MPECS gets promised subsidies from the Government of Maharashtra?

58. In order to discuss the matter regarding subsidies by the state Government, it is pertinent to refer to Section 65 of the Act which states as under:

“ Provision of subsidy by state Government:

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 licence 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.

59. The Act is very clear with regard to subsidies; that if the state Government requires the grant of any subsidy to any consumer in the tariff determined by the Commission under Section 62, then it is the responsibility of the state Government to pay in advance to compensate the licensee affected by the grant of subsidy. In this case if the Commission determines the tariff de hors the subsidy, in no way the Commission can be made responsible to ensure that the appellant gets subsidy from the Government. However, if the Government provides a subsidy, as has been the case, in case No. 51 of 2005 where the Commission vide its order dated February 23, 2007 has factored Rs. 72 crores for arriving at the Annual Revenue Requirement as suggested by MPECS in their petition before the Commission where they have stated as under for determination of retail tariff:

“ The Annual Revenue Requirement of MPECS is the summation of all the expenses and the return on equity as computed above, less the non-tariff income. The GOM GR dated August 24, 2004 states that MPECS shall receive a revenue subsidy of Rs. 72 crores every year till MPECS makes a turn around, the same has been considered by MPECS for estimating of the ARR for all the three years.

60. In view of the aforesaid discussion we decide that if the Commission determines tariff de hors promise of any subsidy, it cannot be held responsible for ensuring that MPECS gets the promised subsidy from the Government of Maharashtra as it is a post tariff fixation subsidy. But as the Commission has factored Rs. 72 crores subsidy element in determination of tariff, it is duty bound as per this Tribunal's judgment dated May 26, 2006 in SIEL vs PSERC case, to require the Government to pay outstanding subsidy. We order accordingly.

I. Is it proper for the Commission to determine Bulk Supply Tariff payable to MSEDCL without determining the ARR of MPECS?

61. Annual Revenue Requirement of the appellant comprises of power purchase cost, operating and financial expenses etc. Therefore, it is essential that the Commission determines the power purchase cost of the licensee to determine its ARR. As the appellant is a bulk consumer of the MSEDCL, it is necessary for the Commission to determine the Bulk Supply Tariff payable by the appellant to MSEDCL in order to determine the power purchase expenses of the appellant.

In view of this, we decide that it is necessary for the Commission to determine the BST of MSEDCL before determining the ARR of MPECS and we do not agree with the contention of MPECS in this view of the issue.

J. Is the Commission responsible for locating low cost power for the appellant?

62. We do not find any justification in the appellant abdicating its responsibility and thrusting the same on the Commission as a

licensee is required to manage its affairs including arranging low cost power.

K. Is the Commission responsible for exploring viable options for the turn around of operations of the appellant?

63. In appeal No. 80 of 2006, Karnataka Power Transmission Corporation Ltd. vs Karnataka Electricity Regulatory Commission this Tribunal had decided as under:

“ 23 The Karnataka Electricity Regulatory Commission has not acted reasonably or fairly in interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum. We have made ourselves clear and in future years to come the Commission will take this into consideration and will act accordingly. The point (A) is answered in the above terms.”

64. It is for the appellant to manage its business and the Commission, in no way, can be expected or held responsible for exploring viable options for turn around of the appellant.

L. Regarding Tariff shock to the appellant's consumers.

65. Following decision in respect of MPECS has been taken by the Government of Maharashtra as per their GR dated August 24, 2004:

(A) has been allowed to continue its operation as distribution licensee: In order to improve its operation further, the MPECS will have to adhere to the time bound action plan as per key recommendations given by MERC till such time turn around in operation of MPECS is achieved. The quantum of revenue subsidy to be around Rs. 72 crores per annum which GoM shall provide to MSEB directly.

(B) In order to enable MPECS undertake time bound action plan as recommended by MERC and to undertake rural electrification works and other capital expenditure schemes, the GoM shall extend capital subsidy support to MPECS of around Rs. 4.00 crore per annum.

(C) MSEB shall treat the past arrears from MPECS on 'Regulatory Asset', in its books and not to charge any further interest on the past arrears henceforth. MSEB shall recover the said regulatory asset from MPECS upon turnover of operations of MPECS.

66. MPECS is a deemed licensee and the tariff for supply to it has to be calculated on the basis of Fully Allocated Cost (FAC) based BST. The Commission having determined this tariff and after taking into account operation, financial and other costs of MPECS was required to determine the Retail Supply Tariff. After determination of ARR in order to match the revenue requirement and revenue realization, the tariff had to be determined. The MPECS area is predominantly agricultural area, there is not much scope of cross subsidization amongst various categories and therefore the resulting tariff is a ***fait accompli***.

67. It has also been brought to our notice that de-hors determination of tariff by the Commission, the Maharashtra state Government has agreed to provide subsidy '***post tariff fixation***'.

68. In view of the prevailing, compulsions and the fact that subsidy by the Government is a post tariff fixation, no interference with the order of the Commission is required even if it may have caused tariff shock which eventually is being ameliorated by the post tariff fixation subsidy by the GoM.

M. Regarding Creation of Regulatory Assets:

69. Although the Government of Maharashtra vide GR dated August 24, 2004 had decided that MERC shall treat the past arrears from MPECS as Regulatory Assets, it is not binding on the Commission as the GoM GR was not a direction under Section 108 of The Electricity Act, 2003. It has also been brought to our notice that as per the orders passed by Division Bench of the High Court of judicature at Mumbai in MERC appeal No. 4 to 6 of 2002 (MSECS vs MERC) stipulated that the Regulatory Asset should be created only as an exception. Even as per the National Tariff Policy the facility of Regulatory Asset should be adopted by the Commission only as an exception and the circumstances in which the Regulatory Asset could be created should be clearly defined through regulations. National Tariff Policy further cites reasons for creation of Regulatory Assets such as: due to natural causes or force majeure. We agree with the contentions of the Commission that MSEDCL was suffering from mounting arrears on account of unpaid dues by the appellant and had the Commission allowed creation of

Regulatory Assets, the miserable financial condition of MSEDCL would have further deteriorated.

70. In view of the aforesaid discussions, the decision of the Commission- not to create Regulatory Asset for the past arrears- needs no interference.

71. In the result the appeals are allowed in part to the extent indicated herein in above. Accordingly, the appeals and the IAs are disposed of but with no order as to costs.

(Mr. H.L. Bajaj)
Technical Member

(Mr. Justice Anil Dev Singh)
Chairperson