

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
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Case No. 23 of 2007

In the matter of
**Petition filed by M/s. Empire Industries Limited seeking review of Order dated
April 30, 2007 passed in Case No. 70 of 2006.**

**Dr. Pramod Deo, Chairman
Shri A. Velayutham, Member
Shri S. B. Kulkarni, Member**

ORDER

Dated: October 15, 2007

M/s. Empire Industries Limited (Vitrum Glass Division) (“**Empire Industries**”) filed a Petition on June 29, 2007 seeking review of Order dated April 30, 2007 passed in Case No. 70 of 2006 (in the matter of the Multi-Year Tariff Petition of TPC-D for the Control Period from FY 2007-08 to FY 2009-10) (“**the impugned Order**”). The case of Empire Industries is as follows:

- (i) Empire Industries manufactures amber glass bottles from their factory premises located at Vikhroli, for use in the pharmaceutical industry, and is a HT-II industrial consumer of TPC. Owing to it being a continuous process industry, energy cost amounts to 10% of the cost of production. At present, increased labour costs, octroi duty and non-availability of incentives have made it very difficult for Empire Industries to continue its manufacturing activity.
- (ii) Paragraph 5.20 of the impugned Order enumerates the revenue gap of TPC between the revenue requirement and the revenue from existing tariff in FY 2007-08, which has been projected as Rs. 256 crores requiring an increase of 21% over existing levels of revenue. However, as reflected in the Table under Appendix 3 – “*Illustrative Impact on Monthly Bills due to revised Tariff*” – the impugned Order has registered a tariff hike on HT-II consumers of TPC by 40%. Thus,

tariff has not been determined reducing the incidence of cross-subsidy or without subjecting any consumer category to a tariff shock, as declared by the impugned Order. The tariff philosophy under the impugned Order of consolidating the movement of uniform tariff throughout Mumbai has actually not been followed. The impugned Order has provided for subsidies to residential consumers at the cost of HT industrial consumers.

- (iii) Under the impugned Order, LT-I residential consumers, LT-II and LT-III industrial consumers, HT-I public and CPP owners, and HT-IV railways enjoy a tariff hike below 21%. However, HT-II industrial consumers have been subjected to over 40% hike in tariff. The Commission should consider the potential of HT-II industries in generating national wealth, earn valuable forex and provide large-scale employment.
- (iv) The applicable tariff rate of HT-II Industrial consumers located in Bhandup (Rs. 4.60/- per unit) is less than the applicable tariff rate of Empire Industries (Rs. 6.10/- per unit), which is situated in Vikhroli, the immediate railway station before Bhandup. Further, the applicable energy rate on glass items manufacturers in the State of Gujarat is Rs. 4.50/- per unit. On this aspect, the impugned Order has not been consistent, and has further adversely affected the competitiveness of industrial units situated in Mumbai.
- (v) The severe tariff hike determined under the impugned Order adversely affects the feasibility of Empire Industries in providing large-scale employment and in the long run, many current employees of Empire Industries may be rendered jobless. The peril of these employees who are not well versed with English Language and are thereby deprived of obtaining alternate employment, should be considered by the Commission.

With the aforesaid submissions, Empire Industries have prayed for the following:

- “(i) To refix the tariff so that HT-II Industrial consumer’s power bills do not go up by more than 21% (revenue gap of TPC-D)*
- (ii) To condone the delay in filing this review-petition.”*

2. At the admissibility hearing held in the matter on August 1, 2007, Shri. A.B. Ketkar, Advocate for Empire Industries, submitted that vide order dated May 18, 2007 in Case No. 70 of 2006, an errata was issued in continuation to the impugned Order. The period of limitation for maintainability of the present Review Petition should therefore be computed from the date of issuance of the said errata, which is May 18, 2007.

3. Shri. Ketkar further submitted that the energy cost of Empire Industries has risen by about 50% on account of implementation of the impugned Order. The energy cost of Empire Industries for the month of April, 2007 was in the vicinity of Rs. 41 lakhs which has increased to about Rs. 63 lakhs in the month of May, 2007. It was submitted that the impugned Order fails to safeguard consumer interest as contemplated under the Electricity Act, 2003 (“EA 2003”).

4. Shri. Ketkar further submitted that the impugned Order does not ensure uniformity in tariff. This discriminative approach under the impugned Order violates the spirit of the EA 2003 and in particular, is not contemplated under Section 61 of the said Act. He argued that it is well settled that neglect of statutory provision qualifies for review. He further submitted that Empire Industries are putting their best efforts to minimise their demand though the scope of minimising demand is very less for a continuous processing industry. He referred to the two main components of Reliability Charge as mentioned under the impugned Order, being (i) Stand-by Charges and (ii) Approved Cost of Expensive power. It was submitted that the levy of a charge in the nature of Approved Cost of Expensive power is outside the scope, spirit and legislative contemplation of the EA 2003.

5. Shri. Ketkar referred to the following provisions of the impugned Order

“6.2 TARIFF PHILOSOPHY

.....Commission has determined the tariffs such that there is an in-built incentive to consumers to reduce their consumption, as the impact on the bills is designed to increase as the consumption increases.....

.....Further, considering the severe energy deficit situation of Mumbai and rest of Maharashtra, Commission would like to put a high cost on unwarranted commercial consumption like flood lights, shopping malls, multiplexes, advertising and hoarding, etc. by charging a higher tariff. The Commission feels that these are non-critical services and have higher capacity to pay. These categories also have a huge potential to conserve energy and a high price of power would send the economic signal for minimizing consumption.”

It was contended that arguably, the approach of the Commission that the consumer which has a capacity to pay more shall be required to pay more, is not judicious. However, accepting the said approach considering the demand-supply situation in Maharashtra, it would not be judicious to conclude that unlike HT-II industrial consumers, HT-IV Railways have no potential to conserve energy and should therefore not be subjected to any tariff hike. This reflects an error apparent on the face of the impugned Order, in terms of Regulation 85(a) of the MERC (Conduct of Business) Regulations, 2004 (“**CBR**”). Shri. Ketkar further submitted that the impugned Order is not in consonance with the

provisions of Clause 4.0 of the National Tariff Policy dated January 6, 2006 which reads as under:

“4.0 OBJECTIVES OF THE POLICY

The objectives of this tariff policy are to:

(a) Ensure availability of electricity to consumers at reasonable and competitive rates;....”

It was submitted that the impugned Order should be reviewed considering adverse social impact and social repercussions. Further, as per the said National Tariff Policy, so far as multi-year tariff fixation is concerned, in cases where “*operations have been much below the norms for many previous years the initial starting point in determining the revenue requirement and the improvement trajectories should be recognized at “relaxed” levels and not the “desired” levels. Suitable benchmarking studies may be conducted to establish the “desired” performance standards.....”*. The impugned Order underlines a contrary approach of fixation of tariff as per the desired levels. Suitable desired levels of improvement trajectories may not be achieved during the first financial year of the three-year control period.

6. It was further submitted by Shri. A.B. Ketkar that while the Commission has considered the effect and impact of controllable and uncontrollable factors under paragraph 4.4 in the impugned Order, in terms of Regulations 17.6.1 and 17.6.2 of the MERC (Terms and Conditions of Tariff) Regulations, 2005, (“**Tariff Regulations**”) the impugned Order may further be modified/ reviewed in terms of Regulation 17.8 of the said Regulations, which reads as hereunder:

“17.8 The Commission may, as a result of additional information not previously known or available to the Commission at the time the forecast under Regulation 15 was developed, if it so deems appropriate, either suo motu or on an application made by any interested or affected party, modify the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges for the remainder of the control period, as part of the annual performance review.....”

Regulation 15.2.1(b) prescribes that the forecast for aggregate revenue requirement may be developed by the licensee based on the “*assumptions relating to percentage annual change in a suitable macro-economic or market index, or combination thereof, to which the aggregate revenue requirement*” of the licensee “*is correlated.*” Thus, on a harmonious consideration of the said provisions and the National Tariff Policy dated January 6, 2006, review or modification of a multi-year tariff order may be considered under the cited provisions even if the requirements of Regulation 85(a) of the CBR are not met. Regulation 17.8 of the Tariff Regulations vests express power upon the Commission to review any tariff Order. In this context, reference was made to the Order that was passed by the Commission on December 21, 2006 in Case No. 49 of 2006 (in the

matter of Review of Load Management Charges imposed by the Commission through the Tariff Order for TPC for FY 2006-07 in Case Nos. 22 of 2005 and 56 of 2005), on a Petition filed by Empire Industries. In the said Order, directions to TPC for imposition of load management charges were modified considering adverse tariff hike and social impact.

7. Shri. T.P. Mohan, Asst. GM, TPC, submitted that the contract demand of Empire Industries is 3 MW and their extent of power consumption per annum is about 14 MUs. On an enquiry made by the Commission as to the maintainability of the present Petition, Shri. Mohan submitted that it appears prima facie that the present Review Petition is not maintainable under Regulation 85, though the admissibility under Regulation 17.8 cited by the Petitioner would have to be verified. The Commission observed that TPC needs to submit legal submissions in response to the contentions of Shri. A.B. Ketkar and granted a period of one week to TPC for filing reply.

8. On August 10, 2007, TPC filed their affidavit-in-reply and made the following submissions therein:

- (i) The present Petition filed by Empire Industries seeking review of the impugned Order is not maintainable under Regulation 85 of the CBR.
- (ii) Review of the impugned Order cannot be considered under Regulation 17.8 of the Tariff Regulations which provides for the review of the forecast that a generating company or a licensee may submit under Regulation 15 of the said regulations.
- (iii) Considering the average tariff hike effected pursuant to the Order dated October 3, 2006 in Case No.s 12 and 56 of 2005 (in the matter of ARR Petition of TPC for FY 2005-06 and ARR & Tariff Petition for FY 2006-07), the Multi-Year Tariff petition of TPC under Case No. 70 of 2006 sought an average tariff hike in the vicinity of 17% for HT industries. However, the impugned Order has caused a tariff hike of about 47% on HT industries. On implementation of the impugned Order, the bill amount of Empire Industries has increased by about 42% even though they have reduced energy consumption by 10%.
- (iv) It is evident that all consumers in the category of Empire Industries have been subjected to a steep tariff hike. Thus, though the present review petition is not maintainable in terms of Regulation 85 of the CBR, the issues that have been raised need to be considered by the Commission. Revision in the tariff of TPC may be considered so far as the annual revenue requirement of TPC for the Control Period is not adversely affected.

9. On August 21, 2007, Empire Industries submitted their affidavit-in-rejoinder and made the following submissions:

- (i) Under Regulation 17.8 of the Tariff Regulations, interested or affected parties may institute review proceedings as part of the annual review of performance of a licensee. The said regulation further vests inherent powers upon the Commission to suo motu initiate review / modification of the approved forecast or the aggregate revenue requirement and expected tariff and charges of TPC for the remainder of the Control Period for which the impugned Order has been issued, based on additional information made known or made available subsequent to the issuance of Order.
- (ii) So far as a multi-year tariff Order is concerned, review proceedings are not encompassed within the parameters of Regulation 85 of the CBR. The wide scope of Regulations 17.7 and 17.8 of the Tariff Regulations should not be ignored thereby restricting and curtailing the powers of the Commission to review a tariff Order.

10. Having considered the material placed on record and the oral submissions advanced by the parties, the Commission is of the view that the present Petition seeking review of the Order dated April 30, 2007 passed in Case No. 70 of 2006 requires to be tested against the requirements laid down in Regulation 85 of the CBR. On first principles, a review of any order, direction or decision is permitted, under the regulations governing the Conduct of Business of the Commission, only upon the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by the applicant at the time when the direction, decision or order was passed or on account of some mistake or error apparent from the face of the record, or for any other sufficient reasons. Regulation 85(a) of the CBR provides as under:

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

The grounds made out by Empire Industries under their petition cannot be considered for the grant of review of the impugned Order. The detriment of Empire Industries due to tariff hike, their loss of potential in generating national wealth, earn valuable forex and provide large-scale employment, existing competitive edge and the peril of their present employees in obtaining alternate employment, are not adequate grounds that qualify for grant of review of an Order under the said Regulation 85 (a) of the CBR. These grounds do not amount to discovery of new and important matter or evidence which, after the

exercise of due diligence, was not within the knowledge of Empire Industries or could not be produced by them at the time of issuance of the impugned Order or reveal any mistake or error apparent from the face of the record. These grounds further, do not amount to sufficient reasons for review of the impugned Order, but may be sufficient reasons for appeal. An appeal cannot be disguised as a review.

11. The Commission further observes that the projections made by a licensee under a multi year tariff petition is considered by the Commission vis-à-vis various factors in terms of Regulation 12.2 of the Tariff Regulations. The process of approval of the said projections require sufficient consideration of the demand-supply situation anticipated in the remainder of the Control Period and the need of issuing relevant tariff signals. Under paragraph 6.2 of the impugned Order, it has been provided as under:

“As compared to consumers in other parts of the State, consumers in Mumbai have had the privilege of uninterrupted power supply for many years, on account of the existence of a standby power agreement with MSEDCL. This ensures that the city does not face any load shedding in case of an emergency situation in the licensee area. The annual cost implication of the standby arrangement for TPC-D is around Rs 62 Crore.....Due to increasing energy consumption in its license area and no additional generation capacity, TPC-D has been purchasing expensive short-term power to meet this demand. The approved cost of expensive power of around Rs 511 Crore in FY 2006-07, has been levied to selected specified consumer categories.....The demand-supply situation in the city of Mumbai is in a fine state of balance, with the licensees barely managing to meet the demand, through a combination of own generation and costly power purchases from outside the State. However, if the demand continues to grow at the current rate, then it is likely that the city of Mumbai, including TPC-D’s consumers, will have to face load shedding during system peak hours, even after paying the Reliability Charges. Thus, Commission has determined the tariffs such that there is an in-built incentive to consumers to reduce their consumption, as the impact on the bills is designed to increase as the consumption increases.....The existing cross-subsidy and the reduction in cross-subsidy considered by the Commission, excluding the reliability charges, are given in the Table below:

Consumer Category	Avg Cost of Supply (Rs/unit)	Average Billing Rate (Rs./unit)		Ratio of Average Billing Rate to Average Cost of Supply (%)		Percentage point Increase/ decrease in Tariff w.r.t Avg. CoS
		Existing Tariff	Revised Tariff	Existing Tariff	Revised Tariff	
HT IV - Railways	3.49	2.32	2.34	67%	67%	0%
HT II - Industrial		2.86	4.29	82%	123%	41%
HT I - Public		2.28	2.59	65%	74%	9%
HT II - Textiles		2.67	4.14	77%	119%	42%
HT I - CPP		2.55	2.78	73%	80%	7%
HT III - Commercial		2.25	4.41	65%	126%	62%
LT III (>20 kW)						
Industrial		4.89	4.74	140%	136%	-4%
Commercial		3.07	5.23	88%	150%	62%
LT II (<20 kW)						
Industrial		3.19	3.65	91%	105%	13%
Commercial		3.20	4.43	92%	127%	35%
LT I - Residential		2.62	2.92	75%	84%	8%

The above Table shows increase in the cross-subsidy levels for certain consumer categories, despite excluding the reliability charges, because the Commission in this Tariff Order has tried to build in economic signals in the tariffs to encourage conservation of energy especially in the context of severe energy deficits and these categories can easily implement EE or DSM initiatives.”

The contentions of Empire Industries inasmuch as their being aggrieved by revision in tariff over and above the projections submitted by TPC under their ARR and Tariff Petition for the Control Period are subject matters that has been thus considered by the Commission, while issuance of the impugned Order. The prime concern of the Commission is to safeguard consumers' interest and at the same time, ensure recovery of the cost of electricity in a reasonable manner, as stipulated under Section 61 of EA 2003. The Commission also requires to ensure that the licensee is able to recover its annual revenue requirement from tariffs or else the licensee will not be able to function. While, balancing these objectives, the impugned Order has not adopted any discriminative approach contrary to the spirit of the EA 2003.

12. The Commission further observes that Empire Industries have contended that contrary to the policy directives issued by the Central Government under the National Tariff Policy dated January 6, 2006, the impugned Order underlines the approach of fixing tariff as per the desired levels and not as per “desired” levels. It has been contended that suitable desired levels of improvement trajectories may not be achieved during the first financial year of the three-year control period, and, therefore, the tariff for FY 2007-08 should be revised. The Commission observes that appraisal of the said contention cannot be entertained under a review petition as it does not amount to discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of Empire Industries or could not be produced by them at the time of issuance of the impugned Order or reveal any mistake or error apparent from the face of the record. This ground further, does not amount to a sufficient

reason for review of the impugned Order. Review essentially needs to be considered only when the requirements of Regulation 85(a) of the CBR are met.

13. The Commission further observes that Empire Industries have raised the contention that so far as a multi-year tariff Order is concerned, review of the said Order may be permitted under the specific Regulation 17.8 of the Tariff Regulations, whereunder the forecast submitted by TPC under Regulation 15 of the Tariff Regulations may be modified. It has been contended that the scope of review of the impugned Order should be considered beyond the parameters laid down under Regulation 85 of the CBR. In this regard, TPC has contended that Regulation 17.8 of the Tariff Regulations provides for the review of the forecast that a generating company or a licensee may submit under Regulation 15 of the said regulations, and, therefore, do not necessitate review. The Commission is of the view that Regulation 17.8 of the Tariff Regulations should be interpreted harmoniously with Regulations 17.1, 17.6.1, 17.6.2, 17.7 and 17.9 of the Tariff Regulations, which are hereunder reproduced:

“17 Annual review of performance

17.1 Where the aggregate revenue requirement and expected revenue from tariff and charges of a Generating Company or Licensee is covered under a multi-year tariff framework, then such Generating Company or Licensee, as the case may be, shall be subject to an annual performance review during the control period in accordance with this Regulation.

17.6.1 Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to uncontrollable factors include, but are not limited to, the following:

- (a) Variation in the cost of power generation and/ or power purchase due to the circumstances specified in Regulation 25;*
- (b) Variation in the number or mix of consumers or quantities of electricity supplied to consumers:*

Provided that where there is more than one Distribution Licensee within the area of supply of the applicant, then any variation in the number or mix of consumers or in the quantities of electricity supplied to consumers within the area served by two or more such Distribution Licensees shall be attributable to controllable factors:

Provided further that where any consumer or category of consumers within the area of supply of the applicant is eligible for open access under sub-section (3) of Section 42 of the Act, then any variation in the number

or mix of such consumers or quantities of electricity supplied to such eligible consumers shall be attributable to controllable factors;

17.6.2 Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to controllable factors include, but are not limited to, the following:

- (a) Variations in capital expenditure on account of time and/ or cost overruns / efficiencies in the implementation of a capital expenditure project not attributable to an approved change in scope of such project, change in statutory levies or force majeure events;*
- (b) Variations in technical and commercial losses, including bad debts;*
- (c) Variations in the number or mix of consumers or quantities of electricity supplied to consumers as specified in the first and second proviso to clause (b) of Regulation 17.6.1;*
- (d) Variations in working capital requirements;*
- (e) Failure to meet the standards specified in the Standards of Performance Regulations, except where exempted in accordance with those Regulations;*
- (f) Variations in labour productivity;*
- (g) Variations in any variable other than those stipulated by the Commission under Regulation 15.6 above, except where reviewed by the Commission under the second proviso to this Regulation 17.6.*

17.7 A Generating Company or Licensee may, as a result of additional information not previously known or available to him at the time the forecast under Regulation 15 was developed, apply for a modification in the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges for the remainder of the control period, as part of the annual performance review:

Provided that the Generating Company or Licensee may be allowed a modification of the approved forecast under this Regulation not more than once in each control period.

17.8 The Commission may, as a result of additional information not previously known or available to the Commission at the time the forecast under Regulation 15 was developed, if it so deems appropriate, either suo motu or on an application made by any interested or affected party, modify the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges for the remainder of the control period, as part of the annual performance review:

Provided that the Commission may modify the approved forecast under this Regulation once in each control period.

17.9 *The Commission shall review an application made to it under Regulation 17.7 and Regulation 17.8 above in the same manner as the original application for determination of tariff and upon completion of such review, either approve the proposed modification with such changes as it deems appropriate or reject the application made for reasons to be recorded in writing.”*

The Commission observes that the cited Regulations vests jurisdiction upon the Commission to modify the earlier approved forecast of aggregate revenue requirement and expected revenue from tariff and charges for the remainder of the Control Period, which modification shall form part of the annual performance review of a licensee. It is specifically provided under Regulation 17.8 of the Tariff Regulations that either suo motu or on an application, such review of annual performance may be considered “, *as a result of additional information not previously known or available to the Commission at the time the forecast under Regulation 15 was developed*”. Under the present proceedings, Empire Industries have not submitted any such additional information which merits the annual performance review of the TPC for the Control Period. In this regard, the Commission further observes that an incidence of steep hike in tariff is not any information based on which the annual performance of TPC may be reviewed. This “*additional information*” should be in terms of the forecast submitted under Regulation 15 of the Tariff Regulations, as meticulously contended by TPC. Moreover, sub-clause (ii) of the second proviso to Regulation 9.1 of the Tariff Regulations provides that “the application for annual performance review during any financial year of the control period shall be made not less than one hundred and twenty (120) days before the close of such financial year”. As this exercise is contemplated in the Tariff Regulations, M/s. Empire Industries Limited or any interested or affected party may invoke the provisions of Regulation 17.8 of the Tariff Regulations at the appropriate time.

With the aforesaid observations, the Commission rejects the Petition filed by M/s. Empire Industries Limited (Vitrum Glass Division) as not maintainable.

Sd/-
(S.B. Kulkarni)
Member

Sd/-
(A. Velayutham)
Member

Sd/-
(Dr. Pramod Deo)
Chairman

Sd/-
(P.B. Patil)
Secretary, MERC