

Bihar Electricity Regulatory Commission
Ground Floor, Vidyut Bhawan – II
Jawahar Lal Nehru Marg, Patna – 800 021

Review Petition No. 1 of 2006 and Others clubbed with it

- (i) ARC Welding 440 Vidyut Upbhokta Sangh, Patna
- (ii) Secretary, Bihar Industries Association, Patna
- (iii) President, Patna City Vyapar Mandal, Patna
- (iv) Bihar 440 Volt Vidyut Upbhokta Sangh, Patna.

..... Petitioners

Versus

- (i) The Energy Secretary, Deptt. of Energy, Govt. of Bihar,
Sinchai Bhawan, Patna
- (ii) The Secretary, Bihar State Electricity Board, Vidyut Bhawan,
Baily Road, Patna
- (iii) The Secretary, Deptt. of Industry, Govt. of Bihar, Patna.

..... Respondents

Present :

Justice B.N.P. Singh, Chairman

B.K. Halder, Member

S.K. Jayaswal, Member

ORDER

Some of the significant events that led to commencement of this proceeding before the Bihar Electricity Regulatory Commission (In short Commission) can be highlighted simply to appreciate the contentions raised before us. On 20th May 2005, with the Chairman Bihar Electricity Regulatory Commission taking oath of office before His Excellency the Governor of Bihar, Bihar Electricity Regulatory Commission was constituted in terms of Section 82 of the Electricity Act, 2003. Subsequently on 12th July 2005 and 26th July 2005 the other two Members took oath

of Office before His Excellency the Governor of Bihar and that the Commission became functional from 15th August, 2005. In due course it was on 10th April 2006 that the Bihar State Electricity Board (in short BSEB or Board) the deemed licensee filed its Aggregate Revenue Requirement (in short ARR) and proposed tariff for the Financial Year 2006-07 before the Commission. Since the ARR and Tariff proposal submitted by the Bihar State Electricity Board was found to be incomplete, the deficiencies noticed in the proposal were communicated to the Board on 6th May, 2006. Further statistic with regard to the said proposal were made available to the Commission by the Board on 22nd May 2006 which followed a meeting of the officers of this Commission with the officers of the BSEB. The ARR and the proposed tariff submitted by the Board earlier on 10th April, 2006 followed submission of revised tariff proposal on 4th August 2006. It was only on 11th August 2006 that after deficiencies in the tariff proposal were removed by the Board, that the application was taken on record by this Commission. This Commission after due public notice inviting objections and suggestions on ARR and Tariff proposal from stakeholders and general public and taking into consideration the objections and suggestions filed in response thereto, after making necessary modifications therein pursuant to a public hearing, determined the ARR and tariff for retail sale of electricity for the year 2006-07 by its order on 29th November, 2006.

The other significant events which need to be highlighted are that the Government of Bihar issued Industrial Incentive Policy 2006 on 15th July 2006 exempting industrial units from AMG/ MMG/Fixed Charges for a period of 5 years with effect from 1st April 2006 and this resolution of the Government was adopted by the Bihar State Electricity Board in its letter bearing No. COM/Misc./917/2003/ 678 dt. 7th October, 2006 by way of follow up measures of the new Industrial Policy of the Government of Bihar.

The Bihar Industries Association is an association formed under the Companies Act 1956 and has been established for the purpose of promoting and

protecting the trades, commerce, industry and manufacturers of Bihar and to take all appropriate steps relating thereto where as other petitioners are either a Company or Partnership Firm/Establishment dealing with production of various items or running their mills.

Bihar State Electricity Board is a public authority and an autonomous body of the State created under a statute envisaged in generation and supply of electrical energy at concessional rates to different class of consumes.. It is subject to the exercise of some statutory powers by the State Government under the Act. State has a pervasive control over the Board and State Government is behind façade of the statutory body, it being instrument of the State.

Four set of review petitions purported to be under Section 94 (1[f]) of the Electricity Act, 2003 came to be filed at different points of time by ARC Welding 440 Vidyut Upbhokta Sangh, Secretary, Bihar Industries Association, President, Patna City Vyapar Mandal and Bihar 440 Vidyut Upbhokta Sangh. As the points in issue were more or less identical in nature, all these review petitions were clubbed together and were taken up jointly for hearing on admission matter.

The upshot of the grievance of the petitioners is imposition of the AMG/MMG/Fixed charges in the tariff order which is a constraint on the consumers particularly LT and HT consumers, without taking into consideration the inadequate and erratic supply of electricity by the Board. It is pleaded that in many of the states such AMG/MMG/Fixed charges have been abolished and the pleadings made in the review petitions also suggest an attempt sought to be made emphasizing the tariff rate allegedly being much higher than those prevalent in the neighbouring states. Yet it is pleaded in the review petitions that imposition of AMG/MMG/Fixed charges on the consumers in the tariff order runs counter to the directive of the State Government contained in the Industrial Incentive Policy 2006 which has been formulated with an object to promote industrial growth in the State exempting industrial units from payment of those charges for a period of 5 years. Direction of

the Commission in the Tariff Order about its operation with retrospective effect was also challenged in the review petition. The failure on part of the Commission to get the Tariff Order notified in official gazette was pleaded to be a serious omission on part of the Commission making the Tariff Order invalid. Yet it is pleaded that direction contained in the Tariff Order to the consumers running 5HP motor or exceeding 5HP to install shunt capacitor was also pleaded to be unreasonable without taking into consideration the necessity of a particular class of consumers for installation of such capacitor.

Though notices were issued to the Department of Energy, Government of Bihar, Department of Industries, Government of Bihar and Bihar State Electricity Board, we are deeply distressed to find that the Energy Department, Government of Bihar which was the most concerned authority to respond in the circumstances, had chosen not to appear in the proceeding much less filing any rejoinder to controvert the pleadings made in the review petitions, at least about the Industrial Incentive Policy of the State Government. However the Industry Department, Government of Bihar and the Bihar State Electricity Board contested claims of the petitioners and filed rejoinders.

Then per contra it is pleaded on behalf of the respondent no. -2 that the review petitions of Vyapar Mandal and Bihar 440 Volt Vidyut Upbhokta Sangh were not maintainable for the simple reason that they had never sought to raise objection to the tariff proposal submitted by the Bihar State Electricity Board in response to public notices. About AMG/MMG/Fixed charges it is pleaded by respondent No.-2 that it is not a new concept which has also been approved by the Apex Court holding that MMC charges were meant to defray the capital cost, consumption charges to meet running expenses of Electricity Board, maintenance of the machinery, plants and equipments, sub-stations, transmission lines and so on for which Board has to raise funds by obtaining loans which are to be paid with interest. Provision has to be made for installation of machinery equipment and buildings,

plants, stations and transmission lines all of which would require a huge cost and hence to meet these expenses which are not running charges Board has to levy such charges.

Apart from these pleadings which have been raised by petitioner no.-1 also, it is sought to be pleaded other by other petitioners also that the tariff schedule for HT and LT consumers which are on much higher side than that of the neighbouring states is most irrational and unreasonable. We have heard the parties with rapt attention and have given anxious consideration, which we shall advert to later on.

Against provision made in the tariff order for all consumers having connected load of 5HP and above to install shunt capacitor, it is sought to be urged on behalf of Bihar Industries Association that the said provision is unsustainable as there is no arrangement to measure power factor and LTIS installations have no TRI-Vector meters and hence it is not possible to measure either kW or KVA. Rightly it is urged by the learned counsel appearing for the Board that this provision is made by the Commission in the Tariff Order with a sanguine purpose as it intends to ensure that by installing shunt capacitor of appropriate rating, the individual consumers power factor would improve and reach the level of 0.9. It is equally true that the low power factor of the system leads to go for paying more for the fixed capacity charges on account of under utilization of energy due to system low power factor. The validity of industrial consumer requiring installation of shunt capacitor has been upheld even by the Apex Court in the case of Raymond and another Vs. MP Electricity Board and others reported in (2001) 1 SSC 534 wherein it was held that direction to the industrial consumer or those using 5HP motors for installation of shunt capacitor was not invalid and the Board had no obligation to install it and hence it was for the consumer to install the said equipment. The installation of shunt capacitor would not only improve power factor of the equipment, it will also have impact on the power supply system, and hence contention raised at this score by the petitioners is rejected. Extensive arguments were canvassed by almost all the petitioners about

imposition of AMG/MMG/Fixed charges particularly on HT and LT consumers and it is sought to be urged that it is compulsive in nature which the consumer has to pay extra without any additional facility in the matter of availability of electricity.

In its review petition Vyapar Mandal seeks review of the Tariff Order on the premises that the tariff order issued by the Commission was bad for want of issuance of draft tariff order by the Commission. Contentions were raised that a deliberation should have been arranged with the industrialists before final touch was given by the Commission. Rightly the submission is countered by the learned counsel appearing for the Board that the Electricity Act, 2003 do not envisage issuance of draft tariff order and the procedure adopted by the Commission in issuing the tariff order 2006-07 was unassailable as the Commission had resorted to adhere to the provisions of Electricity Act, 2003. The tariff was fixed by the Commission after adopting all the procedure enjoined under section 64 of the Electricity Act, 2003. Before the Tariff Order was finalized, public notice was issued inviting objections/suggestions from all the interested persons, and those who took part in the proceeding were given due audience. Hence it follows that there has been a fair compliance of even principle of natural justice and submissions, in our view, cannot sustain factually. Yet the tariff order issued by the Commission is questioned by the Vyapar Mandal on the basis of classification of consumer of LTIS category into two heads, namely 1HP to 25HP and 26HP to 99HP. In this context the Commission has followed the long precedent about industries having load upto 25HP having been classified separately than the higher category of LTIS consumer having load of more than 25HP. Hence we find that there has been flaw in classification of two category of LTIS consumers. Common arguments were advanced on behalf of the petitioners that the tariff determined by this Commission speaks of a volume about this to be unreasonable and a shock to the consumers. Citing illustration of the neighbouring states it is sought to be urged that the tariff of this State has become higher than the neighbouring state and this Regulatory

Commission should have followed the tariff schedule of those states. Though other identical issues were advanced by the petitioners, it is not necessary for us to traverse the same once again, as we shall deal with some of the significant issues later on.

Other contention raised was that the tariff order 2006-07 issued by the Commission was also invalid for the reason that it was not published in the official gazette. The submission is untenable for the simple reason that the statute in vogue did not require the Commission to get the tariff order published in the official gazette to make it effective. This Commission while processing the tariff proposal submitted by the Board discharged its statutory functions assigned under the Act and it was issued well within the period stipulated under Section 64 of the Electricity Act, 2003 and hence the Commission cannot be faulted for issuance of the tariff order without getting it published in the official gazette.

Petitioners have also questioned the validity of the tariff order as it was made effective retrospectively from 1st November, 2006 though issued on 29th November, 2006. It is urged that the Commission has no jurisdiction to require the consumer to pay enhanced tariff from a retrospective date. The learned counsel argues that Board was not entitled to make the tariff retrospective unless statute especially empowers it. The contentions raised are devoid of merit for the simple reason that there is no requirement of law that tariff should be effective from the date of issuance of order and therefore in absence of any such provision in the statute, there is no infirmity in making new tariff effective from a date prior to date of order or its publication. As recording of electricity consumption goes on, but billings are done later, hence there cannot be any question of retrospectivity as has been sought to be urged by the petitioners. In our findings, the reasons which led to the passing of tariff order on 29th November 2006 and not on 1st November 2006, it is necessary to refer to few dates. It was on 10th April 2006 that the Bihar State Electricity Board filed its ARR and proposed tariff for the Financial Year 2006-07 to be effected from

1st April 2006. Since the ARR and tariff proposal submitted by the Board was found to be incomplete, the deficiencies noticed in the proposal were communicated to the Board on 6th May, 2006. Further statistics with regard to said proposal were made available to the Commission on 22nd May 2006 which followed a meeting of the officers of the Commission with that of the Board. The ARR and the proposed tariff submitted by the Board earlier on 10th April, 2006 followed submission of revised tariff proposal on 4th August, 2006. It was only on 11th August, 2006 that after deficiencies in the tariff proposal were removed by the Board that the application was taken on record by the Commission. The Commission after due public notice and taking into consideration the objections and suggestions filed in response thereto, after making necessary modifications therein, pursuant to a public hearing, determined the tariff and ARR for the year 2006-07 by its order on 29th November, 2006. Though the tariff order was issued by the Commission well within the time as stipulated under Section 64 of the Act, it could have been issued much earlier but for the delay i.e. attributable to the Bihar State Electricity Board for not submitting tariff proposal free from defects and that apart, retrospective operation covers a period of 28 days only and regard being had to short time involved, Commission was of the view that the interest of the consumer will not be adversely affected by the retrospective operation of the tariff order.

Shri B.R. Mohan, General Secretary, appearing for ARC welding 440 vidyut Upbhokta Sangh drew our attention to a decision of Hon'ble High Court, Patna rendered in Bihar Chamber of Commerce Vs. Bihar State Electricity Board reported in 1993(1) PLJR-36 and relying on the decision it is submitted that the Hon'ble Court taking into consideration all aspects of the matter held that retrospective operation of the tariff order was not permissible as it is to be effective from the date of publication in official gazette. Reliance was placed also on a decision of Hon'ble High Court, Patna in case of Council for Protection of Public Rights and Welfare Vs. State of Bihar reported in 1994 (1) PLJR-853. In this case too the Hon'ble Court held

that the Board had no jurisdiction for making the tariff order effective from retrospective date, as it was a subordinate legislation which cannot be construed to have retrospective operation. Shri A. Lal appearing for the Bihar Industries Association seeks to urge that only sovereign legislature has power to enact laws with retrospective operation and since Board is like making subordinate legislation, in absence of such power it cannot make tariff effective retrospectively. This fact, however, cannot be lost sight of that in both these decisions, powers of the Bihar State Electricity Board for issuance of a tariff order making it effective from retrospective operation was examined by the Hon'ble Court. After Electricity Act, 2003 was enacted by the Parliament through a legislation, the whole scenario was changed on creation of Regulatory Commission which has been empowered by the statute to provide for regulating supply, distribution, consumption or use thereof for maintaining the efficient supply and securing equitable distribution of electricity and promoting competition. The determination of the tariff order has been one of the significant task assigned to the Regulatory Commissions under the statute. However, we find that decision rendered by the Apex Court of the land in Kanoria Chemicals and Industries Limited and another Vs. State of U.P. and others (1992) 2 SCC 124 cannot be lost sight of. In that case a question was raised with regard to competence of Electricity Board to determine tariff with retrospective effect. The Hon'ble Apex Court was however of the view that retrospective effect to the revision of tariff was clearly envisaged in law. Section 62 of the Electricity Act, 2003 which provides for determination of tariff by the Commission does not suggest that tariff cannot be determined with retrospective effect. That apart, sub section 6 of Section 64 of the Act of 2003, enjoins that a tariff order unless amended or revoked, construes to be in force for such period as may be specified in the tariff order. The Apex Court held that the Regulatory Commission is vested with power to specify the period for which the tariff order will remain in force. We may profitably quote the observations made by the Apex Court of the land.

“ A retrospective effect to the revision as seems to be clearly envisaged by the Section. One can easily conceive a weighty reason for saying so. If the Sections were interpreted as conferring a power of revision only prospectively, a consumer affected can easily frustrate the effect of the provision by initiating proceeding seeking an injunction restraining the Board and State from revising the rates, on one ground or other and thus getting the revision deferred indefinitely. Or, again the revision of rates, even if effected promptly by the Board and State, may prove infructuous for one reason or another. Indeed even in the present case the Board and State were fairly prompt in taking steps. Even in January, 1984 they warned the appellant that they were proposing to revise the rates and they did this too as early as in 1985. For reasons for which they cannot be blamed this proved ineffective. They revised the rate again in March 1988 and again in August 1991 and till today the validity of their action is under challenge In this state of affairs. It would be a very impractical interpretation of the Section to say that the revision of rates can only be prospective.

Hence submissions advanced on this score being devoid of merit is rejected and we are of the view that the validity of the tariff order on the ground of its operation with retrospective effect is unassailable.

Extensive arguments were canvassed by Shri A. Lal, learned counsel appearing for the Bihar Industries Association and also Shri B.R. Mohan appearing for ARC welding 440 Vidyut Upbhokta Sangh and also other petitioners that the formula adopted by the Regulatory Commission in the tariff order for levy of fuel surcharge was not rational as the consumers would be left in lurch in making payment of surcharge even for unconsumed units. Reliance on this score was placed by Shri B.R. Mohan on a decision of Hon'ble High Court, Jharkhand in case of N.C. Agrawal Vs. Jharkhand State Electricity Board reported in Writ Petition (C) No. 2626 of 2001 and CWJC No. 644 of 2000 (R) (M/s Chotanagpur Small Scale Industries and others Vs. the Bihar State Electricity Board and others). Though

much reliance was placed on the decision quoted above, this does not come for rescue of Shri Mohan, as the issue that was raised before the Hon'ble Court was as to whether there can be levy on fuel surcharge on unconsumed units. The Hon'ble Court noticed that the Jharkhand Electricity Board had decided to withdraw such levy of unconsumed units and hence the petitioners were given liberty to file representation before the Board to decide the matter afresh. What happened there after is not known as Shri Mohan has not taken pains to place on the record the subsequent events that took place. Reliance was also placed by Shri Mohan on a decision rendered in case of Bihar State Electricity Board Vs. Bihar 440 Vidyut Upbhokta Sangh and others reported in (1997) 11 SC case 380. However, we notice that the reliance placed by Shri Mohan was seriously misconceived, as in fact in the case cited before us what the Apex Court held was that though levy of operation surcharge was invalid, earlier it has been held by the Court that levy on fuel surcharge was valid because there was direct relation with generation of electricity.

Though plethora of decisions were cited by Shri Mohan even without explaining the relevancy thereof and he did not even take pains to place Xerox copy of the decisions on the record and only those which were placed on the record were taken notice by us.

Lot of arguments were canvassed by almost all the petitioners about imposition of MMC charges on all class of consumers particularly that of LT consumers and HT consumers. The contentions were raised on behalf of Bihar 440 Volt, that LTIS-II consumers should be treated at par with LTIS-I consumer in the matter of MMC. However this fact cannot be lost sight of that LTIS-II category is a class by it having a minimum load of 26HP and extending upto 99HP, whereas the LTIS-I category of consumer represents a class for load from 1HP to 25HP. Since the higher load category of consumers of LTIS-II are availing and utilizing much more power in comparison to the lower load category of consumers of LTIS-I, they cannot claim the same benefit of lesser tariff as extended to LTIS-I category of

consumer. The basic concept of formulation of this tariff order by Regulatory Commission has been that there be lesser charges for lesser consumption and higher charges for higher consumption irrespective of the category, whether it be domestic/commercial/LTIS/HTS. Different tariff for different class of consumers regard being had to the socio economic state of is quite logical. The imposition of MMC charges in the tariff order on the consumer is sought to be questioned on the premises that had there been uninterrupted supply of electricity by Bihar State Electricity Board, no eyebrows could have been raised about its imposition but since supply of electricity is erratic and uncertain in the State and consumers are to pay extra charges without any additional facility in the matter of availability of electricity, imposition of MMC is a compulsion on the consumers which ought to be withdrawn. The contention is countered by the learned counsel appearing for the Board on the premises that MMC in case of LTIS consumers would become achievable by consuming electricity even for a period of 3-4 hours a day on an average. When the Board is not assured of a minimum return of revenue it cannot chose to keep on buying electricity from CPSU on the whims of consumers. The Board cannot procure fluctuating power spply from CPSU when it is allotted a definite share and hence it has to avail the whole of it and accordingly pay for the same and therefore the consumers cannot have the privilege of choosing to pay only on their recorded units which in many cases may be less than the MMC units.

For a moment we may pause to consider the legality of imposition of fixed charges by the BSEB. The meaning of word "Tariff" as given in Law Lexicon is "method of charging for services, e.g. supply of gas and electricity". Tariff, as Hon'ble Supreme Court, says in BSEB Vs. Tata Power reported in 2004-1-SCC 195 is the Charges for Consumption of Electricity and we may take notice of provision of Section 45 and also 46 of the Electricity Act, 2003 also.

Section 45- Power to Recover Charges

45(1) “ Subject to provisions of this Section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of Section 43 shall be in accordance with such tariffs fixed from time to time and conditions of licences.

(3)(a) fixed charges in addition to the charge for actually electricity supplied.”

Section 45 of the Act empowers the State Commission by regulations to authorize a distribution licensee to charge from a person requiring supply of electricity in pursuance of Section 43, any expenses reasonably incurred in providing electricity line or electricity plant for the purpose of giving that supply.

These provisions in our view in most unambiguous terms highlight power of the utility for imposition of fixed charges for supply of electricity to the consumers. If the Board has powers to regulate, Hon'ble Supreme Court in U.P. Cooperative Cane Union Federation Vs. West U.P. Sugar Mill & Association and others, reported in 2004 Volume-V SCC 430, after analyzing pronouncement in Giyajee Rao Cotton Mills Ltd. and the entire case by a majority decision held that the power to regulate shall include full power over the thing and the power must be regarded as plenary over the entire subject. Yet we may take notice of salutary provision of Clause (d) of Section 61 of the Electricity Act, 2003 which requires Regulatory Commission in the matter of formulation of tariff, not only to safeguard the consumers' interest but also to keep into consideration the recovery of cost of electricity in reasonable manner.

While assailing imposition of MMC/Minimum guarantee charges, it is sought to be urged that the tariff has been loaded with MMC and this has been levied by way of camouflage for short supply of electricity. Decisions were cited before us by Shri B.R. Mohan and reliance was placed on a decision of Hon'ble High Court Patna rendered in Bihar Chamber of Commerce Vs. Bihar State Electricity Board reported in 1993 (1) PLJR-36 and other decision rendered in the case of Council for Protection of Public Rights and Welfare Vs. Government of Bihar and BSEB and other reported in 1994 (1) PLJR 853. However reliance placed on these two cases

appeared to be misconceived, as while in case of Bihar Chamber of Commerce, the Hon'ble Court held minimum guarantee charges to be not invalid, there being remission clause for adjustment of power bills in case of short supply of power, in case of Council for Protection of Public Right also the Hon'ble Court held framing of two part tariff permissible and what was held by the Hon'ble Court was that levy of minimum guarantee charges in case of domestic consumers only was arbitrarily as supply of electric energy to them was exceeding by erratic and uncertain. The Hon'ble Court also held that total amount of electric energy consumed by domestic consumer was comparatively meager as compared to bulk consumers. The petitioners are advocating the cause of LTIS consumers and HT consumers and can it be said that the findings of the Hon'ble Court would help them in any way. Such fixed charges are levied by the utility with a view to compensate it for loss sustained by it so as to keep itself in readiness for supply of electrical energy, and that apart, fixed charges and minimum charges are not new concept, validity of which has been recognized by Courts in a catena of decisions which we may now advert to. Now we may profitably take notice of the decision of the Hon'ble Supreme Court of India rendered in case of Raymond and another Vs. M.P. Electricity Board and others reported in (2001) 1 SCC 534. The observations made by the Hon'ble Apex Court are as follows- "The contract for supply of electrical energy cannot be treated at par with any other contracts of mutual rights and obligation having regard to the peculiar problems involved in the generation, transmission and supply of power invariably depending upon the vagaries of the monsoon as well as short supply of them of required coal and oil in time and similar other problems over which the Board cannot have absolute control. In fact tariff inclusive of such a provision for payment of minimum guarantee irrespective of the supply/consumption factor appears to be the consideration for the commitments undertaken by the Board as a package. It is not possible or permissible to allow the consumer to wriggle out of such commitment merely on the ground that the Board is not able to supply at any point of time or

period, the required or agreed quantum of supply or even supply to the level of minimum guaranteed rate of charges. While that be the position, it is futile for the consumers to contend that they will not be liable to abide by the minimum guaranteed charges undertaken, unless on every day of the month/year and during the 24 hours or round the clock the load factor and power supply agreed to be made at one and is the same level without any shortfall, tripping or low voltage.”

We may also take notice of a decision of Hon'ble Supreme Court of India rendered in Bihar State Electricity Board Vs. Green Rubber Industries & others reported in (1990)-1 SCC 371 in which observations were made by the Hon'ble Apex Court that a Clause in the agreement which provided for payment of minimum guarantee charges irrespective of whether energy was consumed or not, the same was reasonable and valid for reason that the supply of electricity to the consumer involves incurring of equipment installation expenses by the Board which do not vary with quantum of electricity consumed and also for the reason that those installations need to be continued and it must be maintained until the agreement itself comes to an end. In case of Andhra Steel Corporation Ltd. Vs. A.P. SEB reported in (1991) 3 SCC 263 the Hon'ble Apex Court held that the purpose of prescribing minimum charges is to ensure that no undue loss is caused to the electricity board due to the tendency of the consumer to have connected inflated requirement and the Board's agreement to meet such requirement and the readiness to maintain the supply up to that requirement even if very little energy is consumed.

In fact our view is that the Hon'ble Courts have held on a number of occasions that two tier tariff was permissible and concept of minimum guarantee charges was necessarily inbuilt in the tariff system. In our view the controversy raised about justification for imposition of monthly minimum charges has been set at rest by findings of the Hon'ble Courts and this matter is no longer resintegra and the eyebrows raised by the petitioners about imposition of these charges was unassailable. The power to determine tariff by the Regulatory Commission on the

request of utility emanates from the Electricity Act, 2003 and at the cost of repetition we may hold that the Regulatory Commission has power to determine the tariff and ARR of utility and it has all incidental and ancillary powers to effectuate the purpose for which power is vested in it. Consequently directives or orders of the Regulatory Commission made for the purpose of determination of tariff and ARR in consonance with provisions of the Act are binding on all the concerned parties including the State and the Board. Yet there is other aspect of the matter which cannot be lost sight of. Even if the arguments of the petitioners about withdrawal of monthly minimum guarantee charges are accepted for a moment, rightly it is urged by the Board that the Commission will again be required to revise upward the energy charges and rates for achieving the said revenue level and such a recourse would hit hard on large number of consumers. If the petitioners treat the imposition of monthly minimum charges as a compulsion with which the tariff, it is alleged, has been unnecessarily loaded, there is no option but to accept it painfully in view of authoritative decision of the Hon'ble Apex Court.

Two-fold submissions were made by the petitioners on the score of the imposition of monthly minimum charges. We have noticed their submission about imposition of monthly minimum charges and other aspect of their submission is about modification of the tariff order with respect to monthly minimum charges in view of Industrial Incentive Policy 2006 of the Government of Bihar. In the review petitions the petitioners have moved this Commission to make the Energy Department, Government of Bihar, the Industry Department, Government of Bihar and the Bihar State Electricity Board, all respondents, to make them answerable as to why MMC charges, pursuant to declaration of the Industrial Incentive Policy of the State Government which was duly adopted by the Board was not reflected or incorporated in the tariff proposal submitted to the Commission. The submission is that since this was a policy of the State Government, both the Electricity Regulatory Commission as well as the Bihar State Electricity Board was bound to honour the

decision of the Government, violation of which does not have good excuse. We would like to narrate certain events for appreciation of the contentions raised before us. The Bihar State Electricity Board, the Utility, filed its ARR and proposed tariff for the Financial Year 2006-07 before the Commission on 10th April 2006. The Industrial Incentive Policy 2006 was issued by the Department of Industry, Government of Bihar on 15th July 2006 granting exemption from payment of AMG/MMG for a period of 5 years to the industrial units in Bihar from 1st April 2006, for which corresponding orders were issued by Department of Energy, Government of Bihar on 27th July 2006. The Bihar State Electricity Board too adopted resolution of the Government of Bihar and issued an order in consonance thereof on 07.10.2006 with regard to use of energy in such industrial units. Though the State Regulatory Commissions in discharge of its functions are to be guided by such directions in matters of policy involving public interest, the said provision operates with a rider also and we may profitably quote provisions of Section 108 of the Electricity Act 2003 which is reproduced below

“108 – Directives by State Government –(1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

Though revised tariff was submitted by the Board before the Commission on 4th August, 2006 notwithstanding the fact that the Industrial Incentive Policy was issued by the Government as early as on 1st July 2006, no communication was ever made either by the Government of Bihar or by Bihar State Electricity Board to the Commission about such policy of the State Government, if such direction contained in Industrial Incentive Policy relates to a matter of policy involving public interest, decision for which is to be taken by the State Government. It was obligatory on part

of the Government that such direction which involves public interest should have been communicated to the Commission in writing and we regret to say that no such communication was ever made with the Commission by the Government. Now for a moment we may pause to think as to whether the Regulatory Commission should take cognizance of such policy decision of the Government regardless of the fact that its communication has not been made to the Commission as required under the statute, and the answer in our view would be in negative and in this view of the matter the Commission cannot be faulted for not incorporating the exemption factor in respect of MMG/AMG, in the tariff order. Now the significant question would be as to whether the consumer would be left in lurch for no fault on their part. Yet there is remedy and there is light at the end of tunnel and here we may quote the provisions of Section 65 of the Electricity Act, 2003

“65 – 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 Government may direct, as a condition for the license 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 the Section and tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard.”

As discussed above 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 of the Act. 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, the tariff fixed by the State Commission shall be applicable. As per part 8.3 of the National Tariff Policy, payment of direct subsidy is a better way to support the economically weaker section of the consumers than the mechanism of cross subsidizing the tariff across the board. As a substitute of cross subsidy, the State Government has option for raising resources through mechanism of electricity duty and giving direct subsidy to needy consumers. It is the option of the State Government to subsidise or not to subsidise. It is the option of the State Government in case they decide to give subsidy to determine the extent to which the subsidy shall be given.

Other aspect of the matter which needs consideration is as to whether the utilities should suffer loss of revenue by way of exemption to the Industrial units from payment of AMG/MMG without State Government coming to its rescue in the shape of grant of subsidy to such consumers? This aspect of the matter too has been clarified by the Central Government in its tariff policy issued by the Ministry of Power wherein in paragraph No. 8.2 (3) it has been laid down that “Section 65 of the Act provides that no direction of the State Government regarding grant of subsidy to consumers in the tariff determined by the State Commission shall be operative if the payment on account of subsidy as decided by the State Commission is not made to the utilities and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in this regard. The State Commission should ensure compliance of this provision of law to ensure financial viability of the utilities. To ensure implementation of the provisions of law, the State Commission should determine the tariff initially, without considering the subsidy commitment by the State Government and subsidised tariff shall be arrived at thereafter considering the subsidy by the State Government for the respective category of consumers”.

If expectations of the industrial consumers has become high following pronouncement of Industrial Incentive Policy granting exemption to such consumers

from payment of MMG/AMG for a period of 5 years, such consumers feel aggrieved availing not such benefits and instead the Commission imposing MMC on them, then who will treat the injury inflated on them. It seems to us that the State Government would not be indifferent and impervious to the grievance of the petitioners if gain of the Industrial Incentive Policy is to reach the prospective beneficiaries. Healing touch must be applied by the Government which is the sole authority in the matter of grant of subsidy. In facts and circumstances of the case while disposing of the review petitions at admission shall itself in light of the observations made above we would like to direct these consumers, who are hopeful of getting remission in the light of Industrial Incentive Policy of the Government, should move the State Government instead of knocking the door of the Commission.

We would also like to record our observations about the issues raised before the Commission in these review petitions. Rightly it was urged by the learned counsel appearing for the Board that while petitioners 3 and 4 had not agitated the matter during public hearing, they have come before the Commission to seek relief in the review petition. Be that as it may, even some of the petitioners who participated in the public hearing and had not raised some issues are agitating before us, and that apart there is other aspect of the matter. The review of any order/judgement rightly it is urged can be questioned only on limited grounds as clearly set out under Section 114 of the Code of Civil Procedure read with order 47 Rule 1. Ordinarily the recourse to review would not be available to a person who is not a party to the original proceeding and one can take recourse to the review primarily on the following premises

- i) Discovery of new and important matter or evidence which after exercise of due diligence, was not within knowledge of the applicant or could not be produced by him at the time when the decree was passed or order was made or
- ii) Some mistake or error apparent on the face of record or
- iii) for any other sufficient reason.

The petitioners though seeks to challenge the tariff order on number of accounts in the review petitions, obviously they have not chosen to challenge the order before the proper forum for appeal. The ambit of review is not unduly wide like appeal that the authority determining an issue can travel without rider. Where remedy of appeal is available, Courts say that the power of review should be exercised with greatest circumspection.

Having given our anxious consideration to the pleadings made on behalf of the parties and also the submissions made before us logical conclusion is there is no merit in them and dispose of this review petitions in terms of above. However in facts and circumstances of the case, there would be no order as to cost. Let a copy of this order be sent to the Secretary, Department of Energy, Government of Bihar, Patna; the Secretary, Department of Industry, Government of Bihar, Patna and also the Secretary, Bihar State Electricity Board, Patna.

Sd/-
(S.K. Jayaswal)
Member

Sd/-
(B.K. Halder)
Member

Sd/-
(Justice B.N.P. Singh)
Chairman