

(Published in Part – III Section 4 of the Gazette of India, Extraordinary)

Tariff Authority for Major Ports

G. No. 95

New Delhi, 24 May, 2004

NOTIFICATION

In exercise of the powers conferred by Sections 49 and 50 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of the proposal received from the Tuticorin Port Trust (TPT) for fixing a levy to recover overhead charges in respect of electricity charges as in the Order appended hereto.

(**A.L. Bongirwar**)
Chairman

Tariff Authority for Major Ports
Case No. TAMP/79/2003-TPT

The Tuticorin Port Trust (TPT)

...

Applicant

ORDER

(Passed on this 4th day of May 2004)

This case relates to a proposal received from the Tuticorin Port Trust (TPT) for fixing a levy to recover overhead charges in respect of electricity charges.

2.1. The TPT has made the following main points in its proposal:

- (i). The charges in respect of electricity consumed by the consumers/ users is collected as per the tariff prescribed by the Tamil Nadu Electricity Board (TNEB).

In case of PSA SICAL, a separate transformer exists, hence in addition to consumption charges, Maximum Demand charges and meter rent are also collected from PSA SICAL.

- (ii). While distributing the electricity to the consumers, the port incurs heavy expenditure on Maximum Demand Charges, infrastructure provided for distribution, distribution loss and operation and maintenance cost. Hence, it is proposed to recover overhead charges from the users. Since the rate worked out by the port in June 2003 to recover the overhead charge was not acceptable to the members of its Board of Trustees, a three member Committee was constituted to recommend the levy to be recovered as overhead charge in respect of the electricity consumed by users.

- (iii). As per the cost calculation submitted by the Committee, 142.77 % is to be recovered from the PSA SICAL and 158.09% is to be levied on the electricity charges from other users to recover the total overhead charge. In this context, it has quoted that the electricity overhead charge levied by the COPT is at 291% and at the Jawaharlal Nehru Port Trust it is at 20%.

- (iv). In view of the huge indirect cost involved, the Committee subsequently proposed to recover only the direct fixed cost @ 52.55% from port users and 33.62% from the PSA SICAL.

- (v). Two members of the Committee objected to this reduced rate also and suggested to recover a levy at a nominal rate of 5%. The members of the Committee pointed out that the users would like to avail power supply directly from the Tamil Nadu Electricity Board after obtaining No objection Certificate from the port.

2.2. The Board of Trustees of TPT has finally approved recovery of overhead charge @ 20% of the electricity bill from the port users, contractors, etc., on an adhoc basis. The port has stated that the proposed levy would be reviewed later.

3.1. In accordance with the consultative procedure adopted, a copy of the proposal was forwarded to the concerned user organisations for their comments.

3.2. The comments received from the above users were forwarded to the TPT as feedback information. In response, the TPT has furnished its comments as summarised below:

- (i). As per the lease agreement executed with the TPT, the Tuticorin Steamer Agents' Association (TSAA) have to bear the tariff fixed by the port from time to time. Copy of the Agreement has been attached in support of its claim.

- (ii). As regards the observation of the TSAA that port has not furnished proper justification, it has clarified the port also incurs repairs and maintenance (which includes the establishment charges of the staff deployed) and depreciation cost on the electrical installation, in addition to the tariff paid to the TNEB. This has to be recovered from the users availing the facility.
- (iii). It has referred to various clauses of the Electricity Act, 2003 as reproduced below to clarify the legal provisions of the proposed levy:

Part - IV - Licensing

Section No.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 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, co-operative societies, non-governmental organisations or franchisees.”

Section No.41

“ “Local authority” means any Nagar Panchayat, Municipal Council, Municipal corporation, panchayat constituted at the village, intermediate and district levels, body or port commissioners or other authority legally entitled to or entrusted by the Union or any State Government with, the control or management of any area or local fund”

Section No.184

“ The provisions of this Act shall not apply to the Ministry or Department of the Central Government dealing with Defence, Atomic Energy or such other similar Ministries or Departments or undertakings or Boards or institutions under the control of such Ministries or Departments as may be notified by the Central Government”

As per the above provisions in the Electricity Act 2003, it is clear that the provision of obtaining license to be an authorized person to transmit, distribute the electricity, etc., shall not apply to any “Local authority” and the definition of the term “Local Authority” includes port commissioners apart from the other bodies.

- (iv). Further, it has also referred to the Terms and Conditions of Electricity Supply entered with the TNEB in support of its claim. Clause 31.03 (1)& (2) in this document reads as follows:

“The builder or promoter of the complex in whose name the supply continues, may be permitted to extend power supply to the individual owners of the flats etc. or to the lessees by installing sub-meters and to collect the cost of consumption of power from them on no profit or no loss basis (i.e. sharing of expenses of consumption of Electricity) and this shall not be treated as unauthorised extension of supply or sale of energy. “

The port is extending supply of power to users. As per this clause, the port can collect charges towards recovery of the expenditure incurred over and above the amount payable for consumption of electricity on no loss and no gain basis.

- (v). Maximum demand charge is continuously increasing and there has been substantial increase in maintenance and establishment charges also. The gap

between tariff of HT and LT has also narrowed down. Apart from these factors, the port also incurs huge capital expenditure for strengthening the electrical installations. While the nature of expenditure may be the same, the different types of expenditure and quantum of expenditure do not remain the same. Hence it is proposed to introduce this overhead charges.

- (vi). The users have option to avail power directly from the TNEB.
- (vii). The Electricity Act provides for fixed charges in addition to charges for actual electricity supplied, therefore, the proposal submitted by the port and being considered by the Authority is in order.
- (viii). The issue about monitoring port's own private consumption are outside the purview of the current proposal.
- (ix). While the port is paying the charges for electricity to TNEB at the rates applicable to HT (III) (commercial) consumers, the collections from the consumers by the port are on the basis of LT (V) commercial rates. In addition, the port has to meet the maximum demand charges and other incidental charges of maintenance, etc. Hence, comparison of the tariff levied by the port and the TNEB tariff for electricity charges is not relevant.
- (x). The PSA SICAL have to pay the electricity charges as per the TNEB tariff and the TNEB tariff provides for collection of cost on no profit no loss basis. Hence, the PSA SICAL should also pay the proposed overhead charge.

4. Based on a preliminary scrutiny of the proposal, the TPT was requested to furnish additional information on various points. The TPT has furnished clarification with reference to the legal provisions of the proposed levy as mentioned earlier. In addition to that, the TPT has stated the following main points:

- (i). The electricity cost has been charged to various sub-activities as per the units consumed; and, the related overhead expenses are treated as part of management and general administration expenditure and apportioned to the various sub-activities in the cost statements furnished at the time of the last general revision proposal.
- (ii). The current proposal is subsequent to the submission of the general revision proposal, therefore, the issue of exclusion of this cost element from the general revision proposal does not arise. The total collection from users from the instant proposal comes to Rs.47.57 lakhs and the impact of this on the general revision proposal will be almost nil and hence the same is not a relevant factor for the current proposal.
- (iii). The unit rate of electricity levied by the TNEB is Rs.5/- as per HT tariff and the effective rate works out to Rs.6.20 per unit after including the maximum demand charges of Rs.300/- per KVA per month and the meter rent. However, the port collects LT tariff fixed by the TNEB (i.e. Rs.5.30 for first 200 unit, Rs.5.80 above 200 unit plus 5% E. Tax and fixed charges of Rs.60/-) without recovery of any overhead charge.
- (iv). It has confirmed that the cost attributable to consumption by the port, port employees, and the PSA SICAL have already been excluded in this computation.

5. A joint hearing in this case was held on 19 February 2004 at the TPT premises. At the joint hearing, the TPT and the concerned users have made their submissions.

6.1. As decided in the joint hearing, the TPT was requested to forward copy of the legal opinion obtained by it on the competence of the port to levy the proposed overhead

charge vis-à-vis the provisions in the Electricity Act, 2003 and to furnish relevant cost statements for the years 2003-04 (RE) and 2004-05 (BE).

6.2. The TPT has furnished the requisite cost statements and a copy of the legal opinion obtained by it on the competence of the port to levy the proposed overhead charge. Some of the main observations made by the legal advisor of the TPT are reproduced below:

"I would also suggest that you 'd better collect an opinion from T.N.E.B. authorities on the issue of collection of service charges. I guess under the Electricity Act, the licencees are allowed to collect an extra sum. But the licencee in the Act would mean only those who are given licence by the Authorities for transmitting and distributing. It would be helpful, in my opinion, to have an endorsement from the concerned authorities."

"If permissible, we can get an approval from the Authorities, which would be conducive in case of any predicament lateron. In all possibilities there would be representation from the electricity board during the meeting convened by TAMP. This issue could discussed thereitself."

"As far as the agreement entered in to with other port users, which are predominantly uniform, I find that clause (ii) would come into your rescue. This clause specifies that the licensee shall, during the period of lease pay all rates, taxes and charges of every description now payable or hereafter becomes payable by the lesser or lessee in respect of the demised plot of plot or the buildings to be erected thereupon. This provision would mean that any rates, taxes or charges revised, being revised or to be revised shall also be paid by the lessee."

"In this particular column in the agreement, it is specifically mentioned that the 'charges' levied on the licenses shall be as per the schedule rates of T.N.E.B. Therefore in my opinion M/S PSA SICAL Ltd. can definitely vindicate their rights in case of any attempt for additional collection and not to pay anything extra other than what is granted in the agreement in the clause 6.1.8."

"I would suggest that the proposal could be implemented with a proportionate hike, to all the users, except M/S PSA SICAL Ltd, who is protected by their agreement with you. Speaking about the percentage of hike, I guess, it has to be in the reasonable ratio."

7. The proceedings relating to consultation in this case are available on records at the office of this Authority. An excerpt of the comments received and arguments made by the concerned parties will be sent separately to the relevant parties. These details are also available at our website www.tariffauthority.org.

8. With reference to the totality of information collected during the processing of this case, the following position emerges:

- (i). The proposal of TPT is for introduction of a new tariff item to cover the overhead expenses involved in distribution of electricity for various purposes within its geographical area of jurisdiction. Although the objective of the port is to recover at least the direct cost incurred in distribution of electricity, it has proposed to restrict the levy at 20% since actual cost based rate is reportedly very high.
- (ii). Presently, the port recovers from its users the tariff being paid to the Tamilnadu Electricity Board (TNEB) at the applicable rates. As correctly pointed out by the port, in addition to payment of electricity charges to the TNEB, it also incurs expenditure on creation and maintenance of the required infrastructure for distribution of electricity within its area. In the existing arrangement the related overhead expenses are treated as part of the general administrative overheads

and apportioned to the various activities. This means the expenditure relating to the electrical installations maintained by the TPT is spread over the tariff for all the activities of the TPT. This Authority has always held that recovery of charges should commensurate with the services / facilities provided and such charges are to be recovered from the concerned users instead of resorting to indirect recovery. Viewed from this perspective, the approach proposed by the TPT is found to be in line with the general thinking of this Authority and deserves to be endorsed in principle. In response to the comments made by some of the user organizations, the TPT has clarified that the users have an option to avail power directly from Tamil Nadu Electricity Board. This will, however, be subject to technical feasibility. It has to be recognized that the concerned users opting for such an arrangement would have to necessarily invest in the required installations or pay the Electricity Board for creation of such facility.

- (iii). As mentioned above and conceded by the TPT, the overhead expenses related to electric supply were treated as part of general administration expenditure at the time of the last general revision of Scale of Rates of TPT. If a separate levy to recover the overhead expenses is introduced at this juncture without reworking other tariff, it will definitely be a double counting. The impact of such a review on other tariff item could only be marginal or negligible cannot be a valid reason for allowing double counting of overheads. It is noteworthy that such overhead expenses are excluded by this Authority while fixing new tariff items elsewhere in order to remove the possibility of double counting. That being so, it will be appropriate in this case to introduce the proposed levy, if otherwise admissible, at the time of the next general revision of Scale of Rates of TPT which is due in September 2004. While preparing such a proposal, TPT may consider the suggestion made by the Tuticorin Chamber of Commerce and Industry about not requiring the users to pay the levy on the expenditure incurred for the electricity consumed by the port for its own use and for residential colony. Such expenditure can continue to be treated as general administrative overheads and apportioned to all the activities of the Port.
- (iv). The Tuticorin Chamber of Commerce and Industry has raised an important issue about the competence of the TPT to levy such a charge with reference to the provisions in the Electricity Act, 2003. While this Authority endorses in principle the proposal of TPT, the legal position of the port in relation to distribution of electricity needs to be clarified unambiguously so that the competence of this Authority to approve such rate can be established. The TPT has relied on the provisions of Section 13 of the Electricity Act 2003 which exempts a local authority like TPT from the requirement of having a license for distribution of electricity. A careful reading of Section 13 of the Electricity Act reveals that such an exemption is not automatic but, requires a notification to that effect from the Appropriate Commission on the recommendations of the Appropriate Government. No such notification issued by the Appropriate Commission exempting TPT is available on record.

The TPT has further referred to Section 184 of the Electricity Act 2003 which stipulates that the provisions of the Act shall not apply to the Ministry or Department of Central Government dealing with defence, atomic energy or such other similar Ministries or departments or undertakings or Boards or institutions under the control of such Ministries or departments as may be notified by the Central Government. While applicability of this provisions to TPT is not in doubt, it is not clear whether any formal notification to this effect would be required from the Central Government. The legal advice furnished by the TPT in support of its contention is not conclusive.

- (v). The legal advice submitted by the TPT suggests that the licensees are allowed to collect an extra sum which, in fact, is the proposal of the TPT. The legal

opinion, however, qualifies this position by mentioning that the licensee as per the Electricity Act will mean only those who are given license by the Authorities for transmitting and distribution. In support of its proposal, the TPT has forwarded a copy of the relevant portion of the terms and conditions of electric supply issued by the TNEB. Clause 31.03 (i) of this document clearly permits collection of cost of consumption on no profit or not loss basis. This provisions is, however, stated to be applicable in case of commercial or office or residential complexes where high tension or low tension power supply is availed originally in the name of builder or promoter of the complex who subsequently transfers ownership of the complex either entirely to different individuals or partly to different individuals retaining the balance for lease. It is not very clear whether the Port Trust will fit into this definition. The proposal of TPT was forwarded to the TNEB for their comments, but we have not received any response from them.

- (vi). The TPT has proposed to cover the PSA SICAL also within the ambit of the proposed levy. The transactions between PSA SICAL and TPT are governed by a specific BOT license agreement. The PSA SICAL has challenged the proposed levy claiming that it has to reimburse charges based on the scheduled rates of TNEB as per the BOT agreement. Clause 6.1.8 of the BOT agreement regulates power and water supply arrangement. The relevant clause clearly specifies that that charges levied on the licensee shall be as per the scheduled rate of the TNEB. The legal opinion obtained by TPT also endorses this position. Presuming that the terms and conditions of supply of electricity issued by the TNEB is valid and clause 31.03 of such terms and conditions will be relevant to TPT, it is not clear whether the term 'scheduled rate of TNEB' will include the proposed overhead levy. Again, this issue is not clarified by the TPT and the TNEB.
- (vii). In view of what has been explained in the preceding paragraphs, it becomes clear that the proposal of TPT cannot be approved at this juncture for two reasons. Firstly, the overheads are counted twice. Secondly, the legal issues arising in this case need to be frontally addressed before approving the tariff arrangement proposed. The legal advisor of the port has suggested to obtain an opinion from TNEB. While the port may take necessary action in that direction, we are not sure whether this alone would be sufficient. The Port may also refer the issue to the Tamil Nadu Electricity Regulatory Commission and obtain their guidance on the correct legal position in this matter. As mentioned earlier, this Authority is inclined to endorse the approach of TPT in principle but defer consideration of introduction of levy till the next general revision of Scale of Rates of the TPT subject to the legal issues getting clarified in the manner mentioned above by TPT before they resubmit the proposal.

9. In the result, and for the reasons given above, and based on a collective application of mind, this Authority rejects the proposal of the TPT for introduction of a new levy to cover overhead expenses relevant to electric supply at this juncture. Subject to clarifications on the various legal issues, the TPT is, however, advised to include the proposed levy as a part of its proposal for the next general revision of its Scale of Rates which is due in September 2004.

(**A.L. Bongirwar**)
Chairman

**SUMMARY OF THE COMMENTS RECEIVED FROM THE PORT USERS /
DIFFERENT USER ORGANISATIONS AND ARGUMENTS MADE IN THIS CASE
DURING THE JOINT HEARING BEFORE THE AUTHORITY**

F. No. TAMP/79/2003-TPT - Proposal from the Tuticorin Port Trust for fixing a levy to recover overhead charges in respect of electricity charges.

1. The comments received from the port users / representative bodies of port users are summarised below:

Tuticorin Chamber Of Commerce & Industry (TCCI)

- (i). The TPT has to get the permission of the Electricity Regulatory Authority as the proposal will violate Sections 146 to 151 of the Electricity Act 2003.
- (ii). The TAMP has to place this matter before the Electricity Regulatory Authority for approval as it is beyond their statutory limits to approve the instant proposal.
- (iii). The port may privatise supply of electricity to the consumers.
- (iv). Supply of electricity free of cost or at concessional rate to the staff quarters may be discontinued.
- (v). If the PSA SICAL does anything illegal the same need not be followed by port. The port has to monitor its own private consumption to its employees and place it before the Board of Trustees.

The Tuticorin Steamer Agent's Association (TSAA)

- (i). Imposition of new levy and increase in the present rate will reduce the attraction to call the Tuticorin port and consequently will have an adverse impact on the trade. The proposal is, therefore, not acceptable.
- (ii). The port has not furnished proper justification for introducing this new levy.
- (iii). The Indian Electricity Act does not provide for collection of any additional charges over and above the tariff fixed. Similarly, the Electricity Regulatory Authority does not permit such a levy.
- (iv). This kind of recovery was not imposed by the TPT earlier though it did incur this capital expenditure. Obviously, there exists no reason for this new levy now.

- (v). The shipping community, having housed in the TPT premises, do not have any other alternate channel for getting power and this fact does not authorise the port to venture to introduce a new levy for collection of overhead charges.
- (vi). The TPT has conveniently made a comparison with the ports like Cochin and JNPT for levy of these charges. In this context, it may be relevant to state that when a rate is introduced or a rate is contemplated for an increase, comparison should be made with all the major ports in respect of levy which are common in nature.
- (vii). In view of the facts explained above, it is clear that there is no need for collecting overhead charges for electricity from port users.

Tuticorin Custom House Agents' Association (TCHAA)

- (i). The present tariff for electricity charges collected by Tuticorin Port Trust is very much higher than the charges collected by Tamil Nadu Electricity Board (TNEB).**
- (ii). The users are not provided with alternative option to choose power from the TNEB directly for their requirements.
- (iii). It strongly objects the instant proposal and recommends the present tariff to continue without any further increase.

Tuticorin Port-Land Users Welfare Association (Zone-B)

The instant proposal is not applicable to them, since the TPT does not provide any infrastructure facilities such as drinking water, drainage, approach road and electricity on these lands.

PSA SICAL Terminals Limited (PSASICAL)

- (i). The electricity is directly supplied from the (High Tension) HT line and therefore the distribution losses will be negligible. The distribution losses will be of significance only in the case of (Low Tension) LT distribution system.
- (ii). No additional investment was made by the port for supply of electricity to it. The development charges of the TNEB for procuring higher maximum demand has also been reimbursed to the TPT.
- (iii). The repairs and maintenance charges and the depreciation would have been a part of the TPT proposal during the last tariff revision exercise. Hence, there is no justification in showing it separately

now. Even if it was not the case, the revenue from the present proposal will form extremely small fraction of the total revenue.

- (iv). The reliability and quality of power supplied to it is unsatisfactory leading to delays in vessel operation. Hence, there is no justification in the imposing additional service charge.
- (v). **As per our licence agreement with TPT, it has to reimburse only the charges levied for a supply of power as per the scheduled rates of TNEB. It is not liable to pay any additional service charge for the supply of electricity.**

Tuticorin Port Handling Agents Association (TPLAA)

It has reiterated the comments made by the Tuticorin Custom House Agents' Association.

Indian Chamber of Commerce & Industry (ICCI)

A levy on electricity charge may be fixed at a reasonable level.

2. A joint hearing in this case was held on 19 February 2004 at the TPT premises. At the joint hearing, the following submission were made:

Tuticorin Port Trust (TPT)

- (i). We have obtained the legal opinion on our competence to levy this charge. The proposal has been made accordingly. We will send the legal advice in this regard to TAMP.
- (ii). Such charges are already levied in some other ports.
- (iii). The benefit of our investment on improvement in electricity system goes to the PSA SICAL also. They cannot routinely interpret BOT agreement provision.
- (iv). The words 'TNEB tariff' in BOT should be seen broadly as electricity cost. Let it be analysed in detail.

Tuticorin Stevedores Association (TSA)

- (i). Port users should be allowed to draw electricity directly from TNEB. They do not have any objection if such an arrangement is technically possible.

Tuticorin Steamer Agents' Association (TSAA)

- (i). Port draws HT from the TNEB whereas we get LT. That is why rates are high.
- (ii). Electricity Act does not permit the TPT to levy any surcharge.

PSA SICAL Terminals Limited

We have given written comments. Please consider them.

3. At the joint hearing, the All India Chamber of Commerce and Industries has filed written submission. It has reiterated the comments of the TSAA and in addition to that it has made the following points:

- (i). There should be a segregation of HT users and LT users and the users outside the Green Gate should be brought under LT tariff structure.
- (ii). As per the terms and conditions of supply of electricity clause 4(c) “customers have to avail HT service only if the connected load exceeds 112 KW. However, if the connected load is less than 112 KW, the customers shall avail LT service under Tariff 1 (a). When the rules are amply clear, levy by the TPT for HT under maximum demand of 3800 KVA consumed by the entire port and passing on the burden to users even to outside Green Gate shipping community is unjustified and not correct. So suitable steps should be taken immediately to bring it under LT service by installing a separate Transformer outside Green Gate.
- (iii). The port may also study the economics of installing a captive power plant.
