

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

Appeal No. 34 & 96 of 2007

Dated: October 4, 2007

**Present: Hon'ble Mr Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A.A. Khan, Technical Member**

Appeal No. 34 of 2007

Jindal Steel & Power Limited,
Jindal Centre,
12, Bhikaji Cama Place,
New Delhi- 110 066.

... Appellant

Versus

1. Chhattisgarh State Electricity Regulatory Commission,
Civil Lines, G.E. Road
Raipur-492 001,
Chhattisgarh

... Respondent No. 1

2. Chhattisgarh State Electricity Board,
Through its Secretary,
Dangania, Raipur-492 001,
Chhattisgarh

... Respondent No. 2

Counsel for the appellant(s) : Mr. Jayant Bhushan, Sr. Advocate and
Mr. Atul Shankar Mathur

Counsel for the respondent(s) : Ms. Suparna Srivastava for CSEB
Mr. M.G. Ramachandran for CSERC

Appeal No. 96 of 2007

Chhattisgarh State Electricity Board,
Through its Secretary,
Dangania, Raipur-492 001,
Chhattisgarh

... Appellant

Versus

1. Chhattisgarh State Electricity Regulatory Commission,
Old Chhattisgarh College Building,
Civil Lines, G.E. Road
Raipur-492 001,
Chhattisgarh

... Respondent No. 1

2. Jindal Steel & Power Limited,
Jindal Centre, 12, Bhikaji Cama Place,
New Delhi- 110 066.

... Appellant

Also at:

M/s. Jindal Steel & Power Ltd.,
Post Box No. 16, Kharsia Road,
Raigarh, Chhattisgarh.

Counsel for the appellant(s) : Ms. Suparna Srivastava

Counsel for the respondent(s) : Mr. Jayant Bhushan, Sr. Advocate and
Mr. Atul Shankar Mathur

JUDGMENT

Per Hon'ble Mr. Justice Anil Dev Singh, Chairperson

By this order, we propose to dispose of the two appeals filed against the order of the Chhattisgarh State Electricity Regulatory Commission (for short 'CSERC') dated January 29, 2007. While one appeal, being Appeal no. 34/2007 has been filed by M/s. Jindal Steel & Power Limited (for short 'JSPL'), the other Appeal No. 96/07 has

been preferred by Chhattisgarh State Electricity Board (for short 'CSEB'). By the impugned order, the CSERC has observed and held to the following effect:-

- i) There are two distribution licensees namely, J.S.P.L. and C.S.E.B. in the same area comprising of Jindal Industrial Park and two villages of Tumidih and Punjipathra;
- ii) Since proviso to Section 62(1) of the Electricity Act, 2003 (for short the 'Act') is applicable, the Commission can fix maximum ceiling of tariff for retail sale of electricity in the area, to promote competition between the two licensees;
- iii) In the absence of any indication in the Act or the Tariff Policy, the maximum ceiling of tariff under proviso to Section 62(1) can be determined by comparison of the actual tariffs of the competitors, namely JSPL and CSEB;
- iv) The tariff for retail sale of electricity by CSEB has already been determined by the Commission, in accordance with the provisions of the Act, the

National Tariff Policy and the relevant regulations framed by the Commission and the Commission in the interests of consumers cannot fix, as the maximum ceiling, a tariff higher than the tariff fixed for the CSEB;

- v) JSPL shall submit an application for determination of tariff under Section 62 of the Act by the end of November, 2007. Before filing the application, JSPL shall segregate its accounts for distribution business and steel business.
 - vi) Until the retail tariff of JSPL is determined, the balance of convenience lies in adopting the tariff of CSEB as the maximum ceiling of tariff upto a period of one year;
2. Both the appellants are partially aggrieved of the order of the CSERC but for different reasons. JSPL in Appeal No. 34/2007 has impugned the order on the ground that CSERC has rejected its contention that in order to promote competition among the distribution licensees of the area in question the CSERC should treat the tariff

already determined by the CSERC as the common maximum ceiling of tariff for retail sale of electricity. The JSPL is also aggrieved of the view of the CSERC that the maximum ceiling of tariff under proviso to Section 62(1) is to be fixed after the determination of distribution tariff of the JSPL by comparison of actual tariffs of the two distribution licensees. On the other hand, the CSEB is aggrieved of the view of the CSERC that until the retail tariff of the JSPL is determined, the tariff of CSEB is adopted as maximum ceiling upto a period of one year for retail sale of electricity in the area in question.

3. The facts giving rise to the appeals briefly stated are as follows:-
4. The appellant in Appeal No. 34/2007, JSPL is a company registered under the Companies Act. It has a Steel Plant at Raigarh in the State of Chhattisgarh. It has also set up a captive power plant at the same location.
5. On October 23, 2002, the Chhattisgarh State Industrial Development Corporation and JSPL reached an understanding whereby the Corporation agreed to

- provide necessary assistance in acquiring about 500 acres of land for JSPL for development of Private Industrial Estate in accordance with the declared Industrial Policy and Energy Policy of the State. JSPL was also given permission to supply power to new high tension consumers within the Industrial Estate.
6. CSEB by its letter dated May 31, 2003 granted permission to JSPL for laying transmission and distribution lines for supply of power to prospective units in the proposed Industrial Estate at Raigarh from its captive power plant.
 7. The State Government on February 28, 2004 granted 'NOC' to JSPL for supplying about 299 MW power to 43 new units in the Private Industrial Estate with the rider that the JSPL was required to submit application for permission from the CSERC in accordance with the provisions of the Act and in case the CSERC refused permission, the 'NOC' of the State Government was to be treated as cancelled.

8. On January 25, 2005, the JSPL made an application to the CSERC for grant of license for distribution of electricity to the units set up in its Industrial Estate. The CSEB filed objections to the application. The CSERC however, by its order dated September 29, 2005 granted distribution licence to the JSPL for supplying electricity to the units set up in its Industrial Estate and the above mentioned two villages. It needs to be pointed out that while granting the permission, the CSERC however, found that JSPL had been unauthorizedly supplying electricity to its Industrial Estate even before grant of a distribution license. The CSERC, therefore, imposed a penalty of Rs. one lakh on the JSPL.
9. Aggrieved by the imposition of penalty for unauthorized supply of electricity to its Industrial Estate, JSPL challenged the order of the CSERC in appeal before this Tribunal. The CSEB did not lag behind in filing a cross appeal. Besides, another appeal was filed by the Abhiyanta Sangh of the CSEB. The appeals were disposed of by a common order of this Tribunal dated

- September 7, 2006. While not interfering with the grant of distribution license to JSPL, this Tribunal did not find any fault with the finding of the CSERC that JSPL had unauthorizably supplied electricity to the units established in its Industrial Estate. The JSPL not being satisfied with the view of the CSERC and this Tribunal filed an appeal, being Civil Appeal No. 4529 of 2006 before the Hon'ble Supreme Court which is pending.
10. On June 28, 2006, JSPL filed an application before the CSERC, registered as Petition No. 28/2006(M), whereby it requested the CSERC to fix maximum ceiling of tariff for retail sale of electricity to industrial units established in its private Industrial Estate and the aforesaid two villages in accordance with the proviso to Section 62(1) of the Act. It contended that the tariff ceiling be set at the applicable category tariff of the CSEB.
 11. On July 17, 2006, the CSERC rejected the application of the JSPL on the ground that proviso to Section 62(1) was not applicable except for the two villages in the same area of supply of JSPL, the CSEB had no presence in or

- around the industrial area. While disposing of the application, the CSERC permitted the existing tariff of Rs. 2.50/KWh of JSPL to continue until the determination of retail tariff in an application to be filed by it for the year 2007-2008. The application was required to be filed by the JSPL by the end of November, 2006 in consonance with the Regulations.
12. The JSPL dis-satisfied with the order of the CSERC, filed a review petition, being Review Petition no. 33/2006, before the CSERC for review of the order dated July 17, 2006.
 13. On January 29, 2007 the CSERC, as pointed out, partially allowed the review petition.
 14. The appellant, JSPL is mainly aggrieved of the finding of the CSERC that the maximum ceiling of tariff under proviso to Section 62(1) of the Act is to be determined by comparison of the actual tariffs of the JSPL and CSEB. The argument of the learned senior counsel for the JSPL is that the tariff of the CSEB, as determined by the CSERC, ought to have been fixed as the common

maximum ceiling of tariff for retail sale of electricity to promote competition between the licensees. It was canvassed that the view of the CSERC that maximum ceiling could be lower than the specifically fixed tariff of either of the licensees is not in consonance with the provisions of the Act. According to the learned senior counsel for JSPL, the common maximum ceiling of tariff cannot be lower than the specifically determined tariff for the CSEB by the CSERC. The argument is sought to be built on the basis that the Regulations provide that the tariff fixed by the CSERC should provide minimum return of 14 to 16% on investment and in case maximum ceiling of tariff is fixed lower than the specifically fixed tariff, the Regulations will stand violated as the requirement of fair return on investment will not be satisfied.

15. We have considered the submissions of the learned senior counsel for the JSPL.
16. At the outset, we would like to point out that so far JSPL has not filed any application for determination of its tariff

as directed by the CSERC. The appellant, JSPL had set up the plea that it is not possible to segregate its accounts for distribution business and steel business. The contention was rightly rejected by the CSERC. It is not denied that it was one of the terms of the grant of distribution license to JSPL that it shall file an application for determination of tariff. Having obtained the license on the specific condition that it shall apply for determination of tariff, the appellant cannot be allowed to violate the conditions of license. Section 42 of the Act casts a duty on a distribution licensee to supply electricity in accordance with the provisions of the Act. Section 45 of the Act ordains that the price to be charged by a distribution licensee for supply of electricity by it in pursuance of Section 43 of the Act shall be in accordance with such tariff as is fixed from time to time by the Commission and conditions of his license. Therefore, distribution licensee is under a statutory obligation to supply electricity in consonance with the following two conditions:-

- i) supply of energy shall be as per the tariff fixed;
 - ii) supply of energy shall be in accordance with the conditions of distribution license.
17. The appropriate Commission has been empowered under Section 62(1) of the Act to fix tariff in accordance with the provisions of the Act. In case however, the CERC finds that the distribution of electricity in the same area is being carried out by two or more distribution licensees, it can by invoking the proviso to sub-section (1) of Section 62 fix only maximum ceiling of tariff for retail sale of electricity to promote competition among distribution licensees. In order to fully appreciate the impact of the proviso, it will be appropriate to set out the relevant provisions along with the proviso, reads as under:

62. Determination of Tariff- (1) The Appropriate Commission shall determine the tariff in accordance with provisions of this Act for –

- (a) supply of electricity by a generating company to a distribution licensee:

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement,

entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity ;

(c) wheeling of electricity;

(d) retail sale of electricity.

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

18. The proviso to sub section (1) of Section 62 of the Act, empowers the Commission to fix maximum ceiling of tariff for retail sale of electricity for promoting competition among two or more distribution licensees in the same area. But the power vested in the Commission is a discretionary power as indicated by the word 'may' occurring in the proviso. In other words, even if there are two or more distribution licensees in the same area, the Commission is not bound to fix the maximum ceiling of tariff depending upon the circumstances of the case. In the event the Commission exercises its power under the proviso, it must have basis for fixing maximum ceiling of

tariff for retail sale of electricity. While fixing maximum ceiling of tariff, it can require each one of the distribution licensees to file an application for determination of its tariff under sub-section (1) of Section 62 of the Act so that the Commission arrives at the maximum ceiling of tariff for retail sale of electricity by comparison of the tariffs. After the Commission determines the tariff of the distribution licensees for the purposes of finding out the maximum ceiling of tariff for retail sale of electricity, it will know the actual expenses of the licensees and after that is known, it can work out the maximum ceiling of tariff. The maximum ceiling cannot be fixed arbitrarily. It must have discernable basis and should be reasonable and fair. The contention of the learned senior counsel for the JSPL is that since the tariff of the CSEB is known and the common maximum ceiling of tariff cannot be lower than its specifically fixed tariff, there is no need for determination of tariff of JSPL, is not well founded. This argument stems from the apprehension of the JSPL that the whole attempt of the CSEB is to fix maximum ceiling

of tariff lower than the tariff that may be specifically determined in the case of JSPL. In opposing this methodology for fixation of maximum ceiling of tariff for retail sale of electricity, the learned senior counsel for the JSPL has advanced an argument which ostensibly espouses the cause of the CSEB. The argument is that in case the maximum ceiling of tariff is fixed which is lower than the specifically fixed tariff of the CSEB, it will not be possible for the CSEB to receive a fair return. In case this argument prevails, the process of determination of tariff of the appellant will be stalled and the question of fixation of lower tariff than 2.50 per unit will not arise. We cannot countenance such an argument. The whole object of competition between the competitors in the commercial field is to obtain the same business from third parties. It is well known that in competition the competing parties slash their prices to acquire business; the competitors strive against each other in acquiring the business, from same set of customers. Therefore, the concept of 14 or 16% return on equity does not apply

- while fixing maximum ceiling of tariff for retail sale of electricity under proviso to sub-section (1) of Section 62.
19. The learned senior counsel for the JSPL stated that in case the CSERC determines the tariff of JSPL lower than Rs. 2.50/- per unit and accordingly fixes the maximum ceiling of tariff for supply of electricity, JSPL will not supply electricity to its customers. The question how the maximum ceiling of tariff is to be fixed surely cannot be dependent upon how the appellant, JSPL will react in a given situation. The statute cannot be construed by keeping in mind a particular individual or his fact situation.
 20. In the circumstances, we do not find any fault with the view of the CSERC that the maximum ceiling of tariff under proviso to Sub Section 1 of Section 62 can be determined by comparison of the actual tariffs of the distribution licensees.
 21. The learned senior counsel for the JSPL submitted that in case the CSERC fixes the maximum ceiling of tariff

lower than the tariff of CSEB, it will virtually amount to fixing two separate tariffs for the CSEB, one for the area in question and the other for the remaining area of the State and this will amount to violation of the provisions of Section 62(3) of the Act. According to the learned senior counsel for the JSPL, Section 62(3) does not permit fixation of separate tariffs for different consumers of the same licensee located in one geographical area except for the factors mentioned in sub-section (3) of Section 62 of the Act. In order to appreciate the submission, it may be necessary to set out sub-section (3) of Section 62 of the Act. This provision reads as under:-

“62(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required”.

22. Sub-section (3) of Section 62 interdicts the Commission from showing undue preference to any consumer of

electricity while determining the tariff under the Act but it may differentiate according to the following factors:-

- i) consumer's load factor;
 - ii) power factor;
 - iii) voltage;
 - iv) total consumption of electricity during any specified period;
 - v) the time at which the supply is required or the geographical position of any area;
 - vi) the nature of supply and the purpose for which the supply is required.
23. As per the mandate of sub section (3) of Section 62, the CSERC is not to show any undue preference to any consumer while fixing tariff but it is permitted to differentiate according to factors mentioned therein. It is not the allegation of the learned senior counsel for the JSPL that the CSERC while determining the distribution tariff of the CSEB has shown any undue preference to any consumer of electricity. While fixing the maximum ceiling of tariff for retail sale of electricity in the area in question, the CSERC is not fixing the tariff. It is only fixing the maximum ceiling of tariff. Within the ceiling,

the competitors can adjust their rate. This promotes competition amongst the distribution licensees, which is good for the growth of the electricity sector. The proviso is not in any way subject to the provisions of sub-section (3) of Section 62 nor controlled by it. Assuming that fixing the maximum ceiling of tariff is considered as fixation of separate tariff in the area in question even then there would be no occasion to say that any undue preference to any consumer of electricity is being shown by the CSEB. The CSEB is a distribution licensee alongwith JSPL in the two villages. This area has been specifically carved out of the rest of the area. It is within this geographical area that the maximum ceiling of tariff is to be fixed. In doing that, no undue preference to any customer of electricity is being shown.

24. In view of the aforesaid discussion, we find no force in the appeal of the JSPL. Accordingly, appeal no.34 of 2007 is dismissed.

25. In so far as the appeal of the CSEB is concerned, the maximum tariff fixed by CSERC for retail sale of electricity is a tentative one and is only for a period of one year w.e.f. January 29, 2007. Since the tariff of JSPL has yet to be determined, we do not find any necessity to interfere with order of the CSERC.
26. In case the CSERC is not able to determine the tariff of the JSPL within one year from the date of the impugned order, it will re-determine the maximum tariff fixed for the area in question after hearing the parties. In the circumstances, appeal no.96 of 2007 is accordingly disposed of.

(Anil Dev Singh)
Chairperson

(A.A. Khan)
Technical Member

Dated: October 4, 2007