

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 277 of 2006

Dated this the 24th day of April, 2007

Coram : Hon'ble Mr. A. A. Khan, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Jayaswals NECO Ltd. ... Appellant
Siltara Growth Centre
Siltara, Raipur, Chhattisgarh
(Regd. Office at F-8, MIDC
Industrial Area Hingna Road,
Nagpur.

Versus

1. Chhattisgarh State Electricity Regulatory -
- Commission
Civil Lines, G. E. Road,
Raipur - 492 001.
2. Chhattisgarh State Electricity Board
Dagniya, Raipur - 492 013. ... Respondents

Counsel for the Appellant : Mr. Dipak Bhattacharyya, Senior
Advocate along with Mr. Niraj -
Kumar, Advocate

Counsel for the Respondents: Mr. M.G.Ramachandran,
Advocate along with Mr. Anand
K. Ganesan, Advocate for CSERC

Ms. Suparna Srivastava, Advocate
Ms. Nidhi Minocha, Advocate for
CSEB

J U D G M E N T

Ms. Justice Manju Goel

1. This appeal is directed against the order dated 10th October, 2006 passed by the Chhattisgarh State Electricity Regulatory Commission respondent No.1, hereinafter referred to as the CSERC in Petition No. 25 of 2006(M) by which the application for review filed by the appellant was disposed of. The facts leading to the present appeal may be briefly enumerated as under :

2. The CSERC passed its first tariff order for the financial year 2005-06 applicable with effect from 01st July, 2005 on 15th June, 2005. The tariff order was passed on Petition No. 5 of 2005 made by CSEB. This tariff order was to remain in force till 31st March, 2006. The appellant, Jayaswals NECO Ltd., moved a review petition on 15.06.2005. The CSERC framed three issues for consideration in this review petition, namely, (1) should minimum charges be based on actual load factor and has there been any error in fixing of tariff ? (2) should there be a reduction in demand charges ? (3) should the present formula of incentive / disincentive based on power factor be modified ? The CSERC passed an order on 05.10.05 to dispose of the review petition being No. 19 of 2005. While the CSERC took definite decision on the first

two points, it made the following observations on the question of power factor incentive and disincentive:

It is seen that power factor penalty as well as incentive have been introduced on both maximum demand and consumption. In the earlier tariff there was provision of levy of penalty/incentive on either of the two. Hence, the issue needs to be studied in detail by the Commission to consider if as per the request of the petitioner levy of penalty should be either on consumption or on maximum demand and not on both. Since, incentive is also being given on both maximum demand and consumption, any decision on disincentive will affect incentive, which will also have to be restricted to either of the two. This will have effect on a much wider spectrum of tariff and hence the Commission would like to consider this issue separately. Till then the petitioner will make payment of power factor penalty as per the tariff order dated 15.06.2005.

3. The Petitioner preferred the appeal against the order dated 05.10.05 being appeal No. 186 of 2005 which was disposed of by this Tribunal vide Judgment dated 05.04.2006. While deciding Appeal No. 186/05 on incentive/disincentive on power factor this Tribunal made the following observations:

“20. As regards the levy of power factor surcharge, the Commission had observed that in the earlier tariff effective from 1.3.1999, the power factor penalty was payable on maximum demand in case of coal mine,

cement industries and other industries and it was payable on consumption in case of mini steel plants, Rolling Mills / Sponge Iron Plants. The said levy of surcharge was at a uniform rate in terms of rupees per KVA or rupees per unit. In the next tariff order dated 15.6.2005, it has been charged on percentage basis. Power factor penalty as well as incentive has been introduced on both maximum demand and consumption. In the earlier tariff order effective from 1.3.1999, there was provision of levy of penalty / incentive on either of the two. In the review order appealed against the Commission has opined that this issue needs to be studied in detail by it to consider it, as per request of appellant. Levy of penalty should be either on consumption or on maximum demand and not on both. Since the incentive is also being given on both maximum demand and consumption, any decision on disincentive will affect incentive, which will also have to be restricted to either of the two. Since this decision will effect on much wider spectrum of tariff, the Commission has decided to consider this issue separately and till then Jayaswals Neco should make payment of power factor penalty as per tariff order dated 15.6.2005.

21. As the issue of power factor penalty is yet to be considered by the respondent Commission, it is premature for the appellant to approach this Appellate Tribunal on this issue. Appellant is at liberty to approach this Appellate Tribunal if it is

not satisfied with the decision of the Commission that may be rendered on the point.”

4. The CSERC eventually passed the Impugned order dated 10.10.06 on Petition No. 25/2006(M) declining to concede to the demand of the appellant that the power factor incentive/disincentive be imposed only on the basis of unit consumption. It may be mentioned here that by the time the Impugned Order was passed CSERC had already made its tariff order for the year 2006-07 on 13.09.2006. The CSERC for the year 2006-07 directed power factor incentive and penalty only on energy charge and to that extent agreed to the proposition of the appellant that the power factor incentive and penalty should be imposed either on demand or on energy but not on both. Nonetheless, the review petition of the appellant so far as it relates to the tariff order for the financial year 2005-06 was rejected. The reason why the CSERC decided to impose incentive and penalty only on energy charges for the year 2006-07 as well as the reason why the review petition of the appellant was dismissed can be obtained from Paras 8, 9, 10 & 11 of the Impugned Order which can be extracted for understanding the Commission's contention on the issues involved in this Appeal.

”8. The Commission has surveyed the practice obtaining in other States and has in this connection seen the tariff orders issued by various State Regulatory Commissions. It is observed that in the States of MP, Orissa, Maharashtra,

Assam, UP, etc. both incentives and disincentives are given for improved/poor power factor. In AP, Karnataka, Gujarat, HP, Uttaranchal etc. no incentive is given for better power factor. While MP, Maharashtra, Assam, HP, Uttaranchal, UP have provided for incentives/disincentives only on energy charge, States like Orissa, AP and Gujarat levy this charge both on demand and energy. Thus, there is no uniformity in the practice being followed across the States and the position obtaining in various States may not be a guide in the matter.

9. The CSEB while submitting the tariff petition for the year 2006-07 had proposed that power factor incentive should be discontinued on the ground that increase in the power factor beyond a value say 0.95 does in any way create additional capacity in generation as its MW capacity is fixed by the prime mover. Subsequently, they suggested that incentive should be given only when the power factor is improved beyond 0.98 which should be limited to demand charge only. In their submission, the CSEB pleaded for levy of penalty at KVA demand only. In course of public hearing of the tariff petition this issue came up for discussion and there was strong plea by consumers to continue the power factor incentive. This Commission after giving considerable thought to the various issues raised by the CSEB and the suggestions received in the public hearing, decided in its tariff order for the year 2006-07 passed on 13/09/2006 to continue both incentive and penalty but limiting it to energy charge only.

10. In view of the discussion above, the Commission comes to the conclusion that power factor incentive and penalty is in the best interest of health of the power system and network and hence should be continued. In view of the considered advice of the CEA, we do not agree with the CSEB that the incentive should be discontinued while the penalty may stay. The only other issue for consideration is whether the incentive /penalty should be levied on both demand charge and energy charge or only on one of them. We have already addressed this issue in the tariff order for 2006-07. The CSEB had proposed to levy PF incentive/penalty on demand charge only. This was not considered by the Commission in view of the fact that KVA demand has in-built composition of power factor and demand charge is levied on KVA basis and also since for a particular active power, KVA demand varies according to the PF. We have, therefore, decided on provision of PF incentive/penalty on energy charge only. We confirm that position in this order.

11. M/s. JNL has pleaded that since it is they who had petitioned to the Commission that PF penalty should be levied only on demand charge and not on both, in a petition for review of the tariff order for 2005-06 and the Commission vide its order dated 05/10/05 passed in Petition No. 19 of 2005 (M) had decided to defer consideration of the issue, in so far as they are concerned the Commission's present decision to limit PF penalty to energy charge only should be made applicable w.e.f. 01/07/05, the date of application of tariff of the year 2005-06. The Commission has given careful

consideration to this and is of the view that giving retrospective effect to this order for M/s JNL alone would not be justified. Our intension in para 13 of the order dated 05/10/05 aforementioned was not acceptance of the plea of M/s JNL. We had only held that the matter could not be considered in isolation for a single industry and that it had wider implications which had to be examined. Secondly, it would not be practicable to make the present provision for PF penalty effective from the date of last tariff order for one industry as a large number of consumers have either been penalized for poor load factor or given incentive for improved load factor, on the basis of the earlier order. Moreover, in our order of 05/10/05, we had not indicated that any decision on this issue would be given retrospective effect. Since, it was a part of the tariff order for the year 2005-06, it applied uniformly to all consumers. We, therefore, do not propose to give retrospective effect to the present provision only for M/s. JNL. Such a dispensation in favour of one consumer shall be contrary to the provision of Section 62(3) of the Act. This provision has already been made applicable as part of the tariff order for the year 2006-07, w.e.f. 01/10/06.”

5. It is contended before us in the present appeal that the respondent No.1, CSERC having accepted on principle that the power factor penalty / incentive should be imposed only on energy consumption should not have rejected review petition which asked for the same relief for the year 2005-06. It is further contended that the view of the CSERC that accepting the review petition would have amounted to giving

retrospective effect was erroneous in as much as order on the review petition would modify the original order to the extent it is reviewed and this does not mean giving retrospective affect to any order.

6. Before this Tribunal CSERC reiterates its stand and contends that it would have been discriminatory to accept the review petition and make the desired alterations only for the appellant. It is contended that any change in the tariff for the year 2005-06 can be made only if it is applied uniformly to all consumers and that if that is done several changes to correspond to the loss of revenue caused by exclusion of penalty on demand charge will have to be made in the tariff order for the year 2005-06 which may not be practicable.
7. There is no controversy about the scope of the review petition. It cannot be denied that the appellant was not seeking any retrospective action. The appellant was seeking a review of the tariff order for the financial year 2005-06. Since the order on the application for review is passed subsequent to the tariff order, any order passed on the review petition will naturally merge with the main order and accordingly operate from the same date on which the tariff order became operative. This, however, cannot be a ground to deny a review.
8. However, while challenging the Impugned Order before this Tribunal the appellant must establish some rationale for

doing so. Generally speaking an order can be reviewed when there is an error apparent on the face of the order, as provided for under Order 47 Rule I of Civil Procedure Code. The CSERC, for the financial year 2005-06, decided to impose the power factor penalty both on demand charge and energy charge. Subsequently, for the year 2006-07 CSERC imposed power factor penalty only on energy charge. Does it mean that CSERC admitted a mistake in the tariff order for the financial year 2005-06 ? The answer necessarily is 'No'. This is clear when the Impugned Order as reproduced in Para 8, 9, 10 & 11 is read carefully. The tariff orders for the year 2005-06 as well as for the year 2006-07 were based on ARR petition filed by CSEB, respondent No.2. The CSERC has to design the tariff keeping in view the revenue requirement of respondent No.2. There can be no fixed formula for raising the revenue required by respondent No.2. In case the revenue realized from one source is reduced, the shortfall caused thereby has to be recovered by raising the revenue from other sources. It is not always a question of value judgment. The tariff has to be fixed keeping in view the need of the electricity generator and distributor and the requirement and capacity of various types of consumers of electricity. The Regulatory Commission has to carefully balance various factors and make an informed choice. The CSERC after hearing several parties decided to opt for a different tariff design for the year 2006-07. This does not necessarily mean that the tariff design opted for in the previous year was erroneous in any way.

9. The appellant also has not offered any plea for holding the tariff order for the year 2005-06, so far as it relates to power factor, to be erroneous. The CSERC actually went into a detailed study of the practice followed by different Regulatory Commissions and found that there were no uniformity in the matter. While certain States namely Madhya Pradesh, Orissa, Maharashtra, Assam, UP had imposed incentive and disincentive for improved / poor power factor, Andhra Pradesh, Karnataka, Gujarat, Himachal Pradesh and Uttaranchal gave no incentive for better power factor. Madhya Pradesh, Maharashtra, Assam, Himachal Pradesh, Uttaranchal and UP had provided incentive and disincentive only on energy charges. States of Orissa, Andhra Pradesh, Gujarat levied this charge both on demand and energy. It is basically a question of choice rather than one of accuracy or correctness.
10. It has also to be remembered that Section 62(3) of The Electricity Act 2003 prohibits any discrimination between different groups of consumers except on certain grounds :

“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.”

11. The appellant wants an exclusive order only for its benefit on the ground that the appellant alone had asked for the review of the tariff order so far as it is related to the power factor. While it is true that other high tension consumers like the appellant had not sought any review of the tariff order, once the Regulatory Commission decides to make any alteration in the tariff order the same will have to be uniformly applied to all the similarly placed consumers. Once the Regulatory Commission decides to relieve the demand of any power factor penalty for any high tension consumer, the same will have to apply to all high tension consumers in the State of Chhattisgarh. If penalty on demand is wiped out the revenue loss on that account will have to be recovered from other sources. The amount given as incentive and the amount received as penalty on power factor are substantial as can be seen from the statement, Annexure-R-1 to the Written Submission of the Respondent No.2. Between August 2005 to September 2006 the total amount incurred on giving incentive was Rs.390,770,308.6. During the same period the amount received as penalty was Rs. 129,982,361.6. Therefore, the demand of the appellant in respect of change in the power factor incentive / penalty cannot be considered in isolation. This will imply that any change in the power factor incentive/penalty will entail a large scale modification in the tariff design for the year 2005-2006. This in turn will require recovering certain

dues from certain consumers and refunding amounts received from others. This type of readjustment would not have been practicable as it would have called for a massive exercise. The CSERC cannot be flawed for declining to accept the prayer for review in the power factor penalty / incentive as ordered in the financial year 2005-06.

12. In view of the above, we are constrained to dismiss the appeal. It is ordered accordingly.

Pronounced in open court on this the 24th day of April, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. A. A. Khan)
Technical Member