

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

**Dated: 07<sup>th</sup> March, 2014**

**Present:**

**HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**  
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**Appeal No. 89 of 2012**

**Raigarh Ispat Udyog Sangh**  
**C/O Zeon Steel Private Limited.,**  
**121 O P Jindal Industrial Park**  
**Gharghora Road, Punjipatara**  
**Raigarh-496 001**  
**Chhattisgarh**

**... Appellant**

**Versus**

- 1. Chhattisgarh State Electricity Regulatory Commission**  
**Irrigation Colony, Shanti Nagar,**  
**Raipur-492 001**  
**Chattisgarh**
- 2. Jindal Steel & Power Limited-Distribution**  
**Patrapali,**  
**Raigarh-496 001**  
**Chattisgarh**

**Respondent(s)**

**Counsel for the Appellant (s): Mr. Amit Kapur**  
**Mr. Apoorva Mishra**  
**Ms. Sugandha Somani**  
**Mr. Vishal Anand**  
**Mr. Gaurav Dudeja**

**Counsel for the Respondent (s): Mr. C K Rai**

**Mr. Ravin Dubey**

**Mr. Mahipal for R-1**

**Mr. M G Ramachandran**

**Ms. Ranjitha Ramachandran**

**Mr. Snehal Kakrania for R-2**

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. M/s. Raigarh Ispat Udyog Sangh is the Appellant herein.
2. Aggrieved by the Impugned Order dated 8.2.2012, the Appellant has filed this Appeal.
3. The short facts are as follows:
  - (a) The Appellant, Raigarh Ispat Udyog Sangh is an Association comprising of members who are engaged in the business relating to steel industry having their industrial units in Jindal Industrial Park.
  - (b) The Chhattisgarh State Commission is the First Respondent. M/s. Jindal Steel and Power Limited-Distribution (Jindal Steel) is the Distribution Licensee, the 2<sup>nd</sup> Respondent.
  - (c) The Appellant's Association members installed their industrial units at the Jindal Industrial Park set-up by the Jindal Steel. The members of the Appellant's

Association are the consumers for the electricity supplied by the Jindal Steel(R2).

(d) Jindal Steel is also engaged in the manufacture of sponge iron, ferro-alloys and various other steel products in their manufacturing unit at Raigarh.

(e) It has also set-up a captive power plant unit.

(f) A Memorandum of Understanding (MoU) was entered into between the Jindal Steel (R-2) and the Chhattisgarh State Industrial Development Corporation, Government of Chhattisgarh.

(g) Through this MoU, the Chhattisgarh State Industrial Development Corporation agreed to provide all help, prevailing incentives and facilitate clearance etc necessary for setting up Jindal Industrial Park in the Raigarh District in the State of Chhattisgarh.

(h) It was also agreed that the land for the proposed industrial estate would be acquired by the Government of Chhattisgarh in the name of Jindal Steel while the latter shall have absolute power and authority to allot such land to industries.

(i) The Government of Chhattisgarh on 29.1.2003 issued No Objection Certificate to Jindal Steel for supply of power by it from its captive power plant to

industries which may be set up in the Jindal Industrial Park subject to the condition that the Jindal Steel will comply with all legal and other essential conditions under prevalent Rules and Regulations in providing supply of power directly to industries.

(j) Chhattisgarh State Electricity Board also on 31.5.2003 granted permission to Jindal Steel for laying Transmission and Distribution lines for supply of 299 MW of power to units in the Jindal Industrial Park.

(k) Jindal Steel entered into a Power Purchase Agreement with the various industrial units of the park for a period of 5 years. On 1.6.2004, Jindal Steel connected supply of electricity to the Industrial Units which were already set-up. Then, Jindal Steel applied for licence to distribute the electricity to the industries in Jindal Industrial Park on 25.1.2005.

(l) Accordingly, the State Commission issued distribution licence to Jindal Steel on 29.11.2005 for distribution of electricity to 70 industrial consumers in Jindal Industrial Park with a maximum demand not exceeding 299 MW on various conditions.

(m) The Jindal Steel did not file the Tariff Petition for the Financial Year 2005-06 and 2006-07. However, the Jindal Steel filed an Application on 28.6.2006

seeking for a permission to file tariff Petition only for the Financial Year 2007-08.

(n) The State Commission on 17.7.2006 partly allowed the application dated 28.6.2006. The Jindal Steel filed a Petition for review which was subsequently disposed of by the Order dated 29.1.2007.

(o) Aggrieved by the said findings in the said order that the maximum ceiling of tariff under proviso to Section 62(1) of the Act has to be determined by comparison of the actual tariffs of the Jindal Steel, the Electricity Board filed the Appeals before this Tribunal in Appeal No.34 and 96 of 2007. This Tribunal disposed of the said Appeal on 4.10.2007 indicating the statutory obligation of the Distribution Licensee to supply the electricity in consonance with the conditions of the licence.

(p) On 27.2.2009, the Jindal Steel filed its first tariff petition in Petition No.17 of 2009 for approval of ARR and determination of the Retail Tariff for Distribution Business for the Financial Year 2009-10.

(q) The State Commission disposed of the said Petition by the Order dated 27.6.2009 giving various directions to Jindal Steel.

(r) Thereupon, the renewed PPA was signed between the Jindal Steel and various Industrial Consumers of the Jindal Industrial Park on 6.7.2009.

(s) On 27.10.2010, the State Commission passed an order in Petition No.22 of 2010 in the matter of power procurement plan (Short Term Plan) of Jindal Steel for the period 2010-11. In this order, Jindal Steel was directed to proceed for Long Term power procurement of electricity.

(t) On 14.1.2011, the State Commission initiated the proceedings in the matter of determination of ARR and Retail Supply Tariff for FY 2010-11. Thereafter on 30.7.2011, Jindal Steel submitted additional submissions for provisional true-up for FY 2009-10 and determination of ARR for FY 2010-11 and 2011-12 and Retail Supply Tariff for FY 2011-12. In the said proceedings, various information was sought and public notice was issued. Accordingly, the members of the Association filed their objections.

(u) Public hearing was conducted on 20.12.2011.

(v) On 10.01.2012, the Jindal Steel submitted its reply to the objections raised by the Appellant. Thereupon, the Chhattisgarh State Commission passed the Impugned Order on 8.2.2012 in the matter

of (i) Provisional truing-up of Financial Year 2009-10  
(ii) Determination of Annual Revenue Requirement from FY 2010-11 to FY 2011-12 and (iii) Retail Tariff for the Financial Year 2011-12.

(w) Aggrieved by the Impugned Order dated 8.2.2012 passed by the State Commission which has ignored the various violations of the Act and conditions of the license committed by the Jindal Steel(R2), the Appellant has filed the present Appeal.

4. The learned Counsel for the Appellant has raised the following issues and made following submissions in the present Appeal:

(a) **Availability of Surplus Power:** The State Commission has failed to reject the representation made by the Jindal Steel regarding the alleged non availability of surplus power from its captive power plant for supply to its consumers namely the Appellants which vitiates the very foundation of the distribution licence granted to Jindal Steel.

(b) **Delay in filing of Tariff Petition:** The State Commission has ignored the fact that the Jindal Steel, the Distribution Licensee has continuously violated Section 64 of the Electricity Act, 2003 read with Chhattisgarh State Commission's Tariff Procedure

Regulations either by not filing or in delaying the filing of the Petition for determination of its Annual Revenue Requirements and Retail Supply Tariff.

(c) **Non Segregation of Accounts:** The State Commission has ignored the fact that the Jindal Steel has failed to segregate the accounts of its Distribution Business from its other businesses by violating the Act and the Tariff Procedure Regulations as well as the License Regulations, 2004 despite repeated directions issued by the State Commission resulting in determination of Annual Revenue Requirements and Tariff without effective prudence check.

5. In regard to these issues, the reply made by the learned Counsel for the Respondents are as follows:

(a) **Availability of Surplus Power:** The Appellant is misconstruing the representation made during the proceedings relating to the grant of licence. There was no such commitment by the Jindal Steel to supply power from the captive power plant and the 1000 MW Independent Power Project set-up by Jindal Power Ltd., a subsidiary of Jindal Steel, exclusively to the industries in the entire licence period. The State Commission has considered the objection placed by the Appellants as well as the response of the Jindal

Steel while passing the Impugned Order. The issue of surplus power had been earlier considered by the State Commission and the same had been disposed of by the Order dated 27.10.2010. Since, the Jindal Steel had repeatedly submitted through the Affidavits that due to expansion of its steel plant, it had no surplus power available from its captive power plant, the State Commission had allowed the Jindal Steel to purchase power on Short Term basis at Rs.3 per kWh. In the above background, the State Commission has considered the issue of surplus power in the Impugned Order.

(b) **Delay in filing of Tariff Petition:** The Appellant had never raised any objection before the State Commission with regard to the delay in filing the Petition by the Jindal Steel in the previous years. It is only in the present year; the Appellant has raised the objection for the first time. The Petition for the FY 2010-11 had been filed on 9.2.2010. By the time, this Petition was processed; the Financial Year 2010-11 was over. Hence, the State Commission directed the Jindal Steel to file for a provisional true-up for the FY 2009-10, determination of ARR for the two years for the FY 2010-11 and 2011-12 and determination of tariff for the Financial Year 2011-12. Accordingly, the

Jindal Steel filed the Petition in pursuance of the said directions. Therefore, the delay in filing the Petition for determination of tariff for the FY 2011-12 was on account of the pending Petitions for the FY 2010-11. The delay in filing the Petition was unintentional and circumstantial. Further, the delay in filing the Petition for the FY 2009-10 has not adversely affected the consumer, the Appellant as the tariff determined by the State Commission vide order 27.6.2009 was charged prospectively from 15.7.2009. Similarly, in the present case, the revised tariff order under the Impugned Order dated 8.2.2012 is applicable only from 23.2.2012.

(c) **Non-Segregation of Accounts:** The State Commission has elaborately dealt with this issue in the Impugned Order. The Jindal Steel is engaged in several business activities. The size of the Distribution Business of the Jindal Steel is small compared to the overall operation of the Jindal Steel. There are a number of common expanses and fixed assets in the business of Jindal Steel. Therefore, the segregation process was not so simple especially this was a continuous process. As correctly observed by the State Commission, the Jindal Steel has been progressively segregating the accounts. It has now

fully segregated and ring-fenced the accounting of the distribution business. All the financials and accounting information not previously segregated and recorded separately has now been segregated. In the Impugned Order, the State Commission in fact, has disallowed various claims of Jindal Steel because of non-filing of the segregated audited accounts. Even, the State Commission declined the final true-up of previous year tariff in the larger interest of the consumers.

6. In the light of the above rival contentions, the following questions would arise for consideration:

**(a) Whether the State Commission ought to have rejected the representation made by the Jindal Steel, Distribution Licensee for the reason that on the one hand, the Jindal Steel represented about the non-availability of surplus power from its captive power plant for supplying powers to the Appellant and on the other hand selling surplus power from its captive power plant to Chhattisgarh State Power Distribution Company Limited resulting in higher cost of the supply and higher tariff for the Appellant?**

(b) **Whether the State Commission has failed in its duty by continuing to overlook delays and defaults of Jindal Steel in timely and proper filing of the Petitions for Annual Revenue Requirement, Truing-Up and Tariff Determination by neglecting its power to take effective action against the Distribution Licensee for their continued defaults?**

(c) **Whether the State Commission was right in determining the Jindal Steel's Annual Revenue Requirements and its Retail Supply Tariff on provisional basis in the absence of segregated accounts of Jindal Steel Distribution Business without undertaking effective prudence check perpetuating provisionality without taking any action against the Distribution Licensee?**

7. Let us now discuss each of the questions one by one.
8. The **First Question** relates to the conduct of the Jindal Steel, the Distribution Licensee for not supplying surplus power from its captive power plant to the consumers and instead selling surplus power for profit while procuring costlier power for consumers.
9. According to the Appellant, the licence for the distribution of electricity was granted to the Jindal Steel on the basis of its commitment that it would supply 300 MW of electricity out of

which 90 MW would be supplied from its existing captive power plant and 210 MW from the proposed 1000 MW power plant being put-up by Jindal Power Ltd and having so obtained the license on 29.11.2005 on the said commitment, the Jindal Steel cannot now be permitted to go back from its said commitment and contend that it was not obliged to supply power to the consumers in its distribution licence area from its Captive Power Plant.

10. As pointed out by the Appellant, the State Commission issued distribution license on the basis of the commitment of Jindal Steel that out of 300 MW of power to be supplied to Jindal Industrial Park, 90 MW of power was proposed to be supplied from Jindal Steel's Captive Power Plant. The Appellant relies upon the following documents to show that the Distribution License was granted to Jindal Steel only on the basis of its commitments. The documents are as follows:

(a) NOC dated 29.1.2003 issued by the Government of Chhattisgarh to Jindal Steel for supply of power from its Captive Power Plant to the industries which may be set-up in Jindal Industrial Park.

(b) The Jindal Steel in its application dated 15.9.2004 seeking licence for distribution of

electricity in Jindal Industrial Park submitted that out of 300 MW required on full implementation of Jindal Industrial Park, 90 MW would be sourced from captive power plant and 210 MW from the proposed 1000 MW capacity power plant of Jindal Power Ltd., Jindal Steel also clearly indicated that the supply in the licenced area would be met from own generation.

(c) In response to the letter dated 4.10.2004, issued by the State Commission, the Jindal Steel in its reply dated 25.1.2005 specifically identified the source for supply of power to Jindal Industrial Park.

(d) Even during the hearing on 23.4.2005, the State Commission posed the question to the Jindal Steel pertaining to source of supply of power to the units in the Industrial area of the Park. In response to the said question, the Jindal Steel specifically stated before the State Commission that it is supplying power from its Captive Power Plant. This submission has been made by the Jindal Steel during the course of hearing both on 7.5.2005 and 23.7.2005.

(e) On 29.9.2005, the State Commission issued an order in the Application filed for the distribution licence by Jindal Steel wherein it clearly identified that out of 300 MW of power to be supplied to the Jindal Industrial Park, 90 MW of power was proposed to be supplied from Jindal Steel's Captive Power Plant.

(f) The State Commission granted distribution licence to the Jindal Steel on 29.11.2005 recording the objections of the State Electricity Board that it would be deprived of the Cross Subsidy element of tariff for Industrial consumer due to grant of licence to Jindal Steel wherein Jindal Steel was supplying power from its Captive Power Plant.

(g) In the order dated 27.10.2010, the State Commission took cognizance of the inconsistent stand of Jindal Steel recording that the Jindal Industrial Area was set-up on the basis of the understanding with the State Government that industries set-up, would be supplied surplus power available from the Captive Power Plant but subsequently after issuing of the licence, the Jindal Steel took different position. The State Commission in this order also recorded as to how

Jindal Steel had entered into a Power Supply Agreement for FY 2009-10 and 2010-11 with CSPDCL for supply of 50 MW Power while claiming that there was no surplus power available in its Captive Power Plant for supply to consumers in its licensed area.

11. These documents would reveal that the Distribution license was granted to the Jindal steel only on the basis of the commitment that it would supply 300 MW of electricity out of which 90 MW was to be supplied from its existing captive power plant to the Appellant consumers and balance from the Power Project of Jindal Power Ltd, a subsidiary of Jindal Steel.
12. In the light of the above submissions made by the Appellant and also having regard to the documents referred to earlier, we have to analyze the submissions made by the Jindal Steel, the Distribution Licensee.
13. The submissions made by the Distribution Licensee are as under:
  - “ (a) The Captive Power Plant of the Jindal Steel was set-up for catering to the needs of its steel plant and surplus power from the same was proposed to be supplied to its consumers in its distribution area.

(a) No commitment was made by the Jindal Steel to the Industrial estate from its captive power plant.

(b) The Steel business of Jindal Steel has expanded significantly in the intervening years. Since the Chhattisgarh State Electricity Board refused to supply power to the Steel Plant, it was constrained to utilize the power from its captive power plant thereby reducing supply of power to its consumers in its licensed area.

(c) There is a huge fluctuation in power consumption by the Jindal's Steel Plant. Due to this, the availability of power from Captive Power Plant varied".

14. In response to these submissions of the Jindal Steel, it was pointed out by the Appellant that the submissions made by the Jindal Steel regarding non availability of surplus power since September, 2007 and the need to purchase power from other source is factually wrong and contrary to its audited accounts.

15. The Appellant has produced the information to establish that in all the years there was enough surplus power available from the Captive Power Plant of the Distribution Licensee as seen from the table which is hereunder:

Particulars	Unit	FY-05	FY-06	FY-07	FY-08	FY-09	FY-10	FY-11
Capacity								
Raigarh	MW	265	290	333	333	358	353	623
Satara(Wind)	MW					15	24	24
Angul	MW							135
Production	MU	1898.24	2225.23	2668.00	2665.00	2831.00	2942.00	3420.00
Captive Consumption	MU	769.53	1110.77	1430.00	1773.00	1818.00	1954.00	2489.00
Sales	MU	1123.36	1105.83	1231.00	892.51	1012.00	945.00	931.00
Sales	Rs. Crore	243.78	268.21	285.69	246.73	246.18	216.56	213.33
Inter Divisional Transfer	MU	5.35	5.06	5.00			42.00	
Inter Divisional transfer	Rs. Crore	1.76	268.21	1.56			5.81	

16. On the basis of this table, it is contended by the Appellant that the above chart would show that not only distribution licensee had enough surplus power for its distribution business but also in utter disregard of all its commitments and its duty to supply, the Jindal Steel, the Discom entered into a Power Purchase Agreement on 30.3.2009 with Chhattisgarh State Power Distribution Company Limited (CSPDCL) for supply of 50 MW of power over and above already contracted 70 MW of power from Jindal Steel's existing captive power plant for the FY 2009-10 and FY 2010-11.

17. According to Jindal Steel, the surplus of annual aggregate generation of energy does not correctly reflect the surplus

power on continuous and sustainable basis each day. The surplus power at different times of the day was dependent on the actual consumption of Steel Plant which varied frequently. Jindal Steel also submitted sample graphs of export from its Captive Power Plant for the months of July, 2010 and July, 2011 to substantiate its point. It is further submitted that their supply to CSPDCL formed a small part of total capacity handled by the network of CSPDCL, hence their network was able to absorb the fluctuations in power supply. CSPDCL also refused to grant increase in contract demand from 1 MW to 80 MW for its Steel Plant on 22.12.2008 against the request made by Jindal Steel on 6.9.2008 to enhance the contract demand to meet the increased demand of their Steel Plant.

18. Thus, Jindal Steel has given the following reasons for non-supply of power from its captive power plant to its licensed area:

- (a) Increase in demand of electricity in its Steel Plant due to expansion of its steel plant.
- (b) Refusal of CSPDCL to increase contract demand for supply of power to its steel plant consequent to its increase in the power demand of its Steel Plant.
- (c) Fluctuation in quantum of surplus power available from its Captive Power Plant due to fluctuating load of

its Steel Plant whereas Jindal Industrial Park required supply on continuous and sustainable basis. Therefore, the surplus power from its captive Power Plant could not be utilised in Jindal Industrial Park.

19. We are not convinced by the above reasons projected by the Jindal Steel due to the following:

(a) The proposal given by Jindal Steel for distribution licence keeping in view the future demand of 300 MW clearly indicated source of supply of 90 MW from its Captive Power Plant and 210 MW from the 1000 MW Power Plant of Jindal Power, knowing fully well the functioning demand of its Steel Plant.

(b) The demand of Jindal Industrial Park has so far, not reached the expected level of 300 MW and is presently of the order of 100 MW.

(c) The surplus availability from the sample half hourly data submitted by Jindal Steel indicated power availability varying from 20 to 80 MW. On the other hand, the average surplus power from the annual surplus energy indicated in the chart above is more than 100 MW (931 MU for FY 11 translates into average surplus of 106 MW and 945 MU for FY 10 translates into average surplus of 108 MW).

(d) The load pattern in the Jindal Industrial park will not be constant and will also have variations during different hours of the day.

(e) The surplus availability for Captive Power Plant can be made continuous and sustainable by Jindal Steel by contracting additional power from the CSPDCL, the State distribution licensee for its Steel Plant. According to Jindal Steel, they applied for increase in their contract demand to Chhattisgarh State Electricity Board on 6.9.2008. However, Board refused to sanction additional load vide their letter dated 22.12.2008. We feel that Jindal Steel should have approached the State Commission if the Board had refused to grant additional contract demand. Instead of arranging additional load from the State distribution licensee, Jindal Steel simply proceeded to enter into contract for supply of additional surplus power of 50 MW from its captive Power Plant to CSPDCL.

20. It is now noticed that these facts had been brought to the notice of the State Commission and despite that, without verifying the claims, the State Commission continued to approve Short Term Power Purchase by Jindal Steel at the rate of Rs.2.95 per unit in the FY 2009-10 and at Rs.3/- per unit in FYs 2010-11 and 2011-12.

21. When these facts are not disputed, then the conduct of the Distribution Licensees on the one hand, stating that it had no surplus power to supply to the Appellant from its captive power plant and on the other hand entered into Power Purchase Agreement with CSPDCL for the supply, cannot be said to be bona fide.
22. However, the State Commission has over looked this aspect and failed to take corrective steps to protect the interest of the consumers of Appellant's Association and allowed the Distribution Licensee to have Short Term Power procurement, instead of directing the Distribution Licensee to supply from its own Captive Power Plant in accordance with the Memorandum of Understanding on the basis of which the licence was sought by Jindal Steel.
23. In view of the above, we are constrained to conclude that the State Commission's finding on this issue is wrong and the same is liable to be set aside. The State Commission should have examined the pattern of surplus power available from the captive power plant after meeting the requirement of captive load of the Steel Plant and load pattern in the licensed area of Jindal Steel and should have considered part of energy supplied in the licensed area from the Captive Power Plant of Jindal Steel. Unfortunately, this has not been done. Therefore, we remand the matter with directions to the State Commission to carry out the exercise

and evaluate the energy from the Captive Power Plant that should have been booked to distribution business of Jindal Steel at the cost of the generation tariff of Jindal Steel's Captive Power Plant. The consequential relief may be passed on to the Appellant and other consumers. The State Commission should also facilitate increasing the contract demand of Jindal Steel from 1 MW to 80 MW from CSPDCL as sought by Jindal Steel for meeting the increased load of Jindal Steel. This will help in availability of continuous and sustainable supply from the Captive Power Plant to Jindal Industrial Park in future.

24. Thus, we decide this issue in favour of the Appellant's Association.
25. The **Second Issue** is relating to non filing or delay in filing of Tariff Petition by the Distribution Licensee.
26. According to the Appellant, the State Commission has failed to correct the Distribution licensee's persistent failure to file tariff petition in a timely manner and thus, the State Commission has acted contrary to the directions issued by this Tribunal in OP No.1 of 2011.
27. It is obligatory on the part of the Distribution Licensee to file the Petition for determination of tariff before the State Commission in a timely manner and in the prescribed format

by 30<sup>th</sup> November of every year in the ensuing Financial Year.

28. It is submitted by the Appellant that the Distribution Licensee (R-2) has been continuously violating the aforesaid statutory requirements and the directions of the State Commission in this regard issued from the time it was granted Distribution License on 29.11.2005.
29. A tabular chart summarizing the sequence of date of filing of the Petition seeking tariff determination by the Distribution Licensee and the orders passed by the State Commission is given as below:

FYs	Petition filed by Discom	Orders passed by Ld. Chhattisgarh Commission
2006-07	<b>No Petition was filed.</b> Application was filed on 28.06.2006 [7 months late] seeking liberty to file tariff petition for FY 2007-08 only and maximum ceiling of tariff may be fixed for retail sale of electricity.	17.07.2006 – continued the tariff approved in Discom's License Order dated 29.09.2005, directed Discom that tariff petition for the FY 2007-08 be filed by end of November 2006
2007-08	<b>No filing available</b>	No Tariff Order on Ld. Chhattisgarh Commission's website
2008-09	30.07.2008 – [8 months late for FY 2009 and 20 months' lapse since deadline set by Ld. Chhattisgarh Commission's Order dated 17.07.2006] <b>Application was filed</b> for determination of tariff which was <b>incomplete and full of deficiencies.</b>	05.11.2008 – In view of entire information not being filed by Discom and FY 2008-09 being almost over, tariff determination process not undertaken. Tariff as determined in Order dated 29.09.2005 continued.
2009-10	27.02.2009- First Tariff petition was filed by Discom <b>without segregated</b>	27.06.2009– In absence of segregated accounts of Discom's distribution

FYs	Petition filed by Discom	Orders passed by Ld. Chhattisgarh Commission
	accounts – 41 months after Distribution licence was granted.	business, Ld. Chhattisgarh Commission fixed maximum ceiling tariff which could not be more than the tariff applicable to the same category of consumers of CSPDCL
2010-11 2011-12	<p><b>14.01.2011 – Tariff Petition was filed with deficiencies.</b> Information was filed continuously on many occasions.</p> <p>On 18.08.2011 additional information was filed along with data for truing up of FY 2009-10, ARR for 2010-11 and 2011-12</p>	<p>08.02.2012- Impugned Order was passed with:</p> <p>(a) Provisional Truing-up of FY 2009-10</p> <p>(b) Determination of Annual Revenue Requirement for Discom from FY 2010-11 to FY 2011-12.</p> <p>(c) Determination of Retail Tariff for FY 2011-12.</p>

30. The above tabular chart would clearly indicate that the Distribution Licensee has not filed the tariff Petition both for the FY 2006-07 and 2007-08 and the State Commission admittedly, did not pass any tariff order for the Financial Year 2007-08. Even for the FY 2008-09, the Distribution Licensee did not file the Tariff Petition in time but it filed the Tariff Petition only on 30.7.2008 with eight months delay for the Financial Year 2008-09. Even the Petition which was filed for determination of tariff was said to be incomplete and full of deficiencies. The State Commission also passed the order on 5.11.2008 continuing the tariff as determined in the order dated 29.9.2005 in view of the fact that the entire information was not furnished by the Distribution Licensee and also on the fact that the period of FY 2008-09 was

almost over. Thus, the Tariff Determination process by the State Commission was not duly undertaken for the FY 2008-09.

31. In respect of the FY 2009-10, the Distribution Licensee for the first time filed the Tariff Petition on 27.2.2009 without segregating the accounts that too after delay of 40 months after the distribution licence was granted.
32. In the absence of the segregated accounts of Distribution Licensee's distribution business, the State Commission was able to fix only maximum ceiling tariff which cannot be more than the tariff applicable to same category of consumers of the CSPDCL.
33. Finally in respect of the FY 2010-11 and 2011-12, the Distribution Licensee filed tariff petition on 14.1.2011 with deficiencies. During the proceedings, the State Commission called for several information and that information were furnished on various occasions till 18.8.2011. Thereafter, the Impugned Order was passed on 8.2.2012. This would show that the State Commission, despite the persistent failure of the Distribution Licensee to file tariff petition in a timely manner, has not taken any action against the Distribution licensee for flouting the specific direction given in its tariff order dated 27.6.2009. This is the failure on the part of the State Commission to discharge its statutory

duties as such it is contrary to the directions issued by this Tribunal in OP No.1 of 2011. This Tribunal after hearing all the Commissions, passed the detailed order giving various directions to all the State Commissions by the order dated 11.11.2011.

34. The relevant directions issued by this Tribunal by the order dated 11.11.2011 are as follows:

*“65. In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:*

*(i) Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted year to year basis as per the time schedule specified in the Regulations.*

*(ii) It should be the endeavour of every State Commission to ensure that the tariff for the financial year is decided before 1st April of the tariff year. For example, the ARR & tariff for the financial year 2011-12 should be decided before 1st April, 2011. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff.*

*(iii) In the event of delay in filing of the ARR, true-up and Annual Performance Review, one month beyond the scheduled date of submission of the petition, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.”*

35. So, despite the directions, both the Distribution Licensees as well as the State Commissions have not taken steps to ensure the compliance of the specific directions issued by this Tribunal.

36. The Distribution Licensee has contended the following in respect of the above allegations. The same are as follows:

(a) The tariff charged by JSPL in the past years is lower than the actual cost incurred by it in supplying power and that losses have been absorbed by JSPL's non-licensed business. On this basis, it has been claimed that there has been no adverse impact of delays in filing Petition by JSPL.

(b) Prior to the Impugned Order, tariff charged by JSPL was much lower than tariff charged by Chhattisgarh State Power Distribution Company Ltd. ("**CSPDCL**") for the same consumer category. Consumers have raised this objection only in the present year since the JSPL tariff has been increased.

37. This reply is not satisfactory in view of the following reasons:

(a) Discom is under an obligation to file its ARR and petition for determination of retail supply tariff on time as prescribed under the Act, regulations framed there

under and directions of this Hon'ble Tribunal as well as its licence conditions. JSPL cannot continue to violate its licence conditions on any ground whatsoever.

(b) The claim that there is no adverse impact of the same on the tariff or that JSPL's tariff is lower than the actual cost was never made before Ld. Chhattisgarh Commission.

(c) Further, JSPL has accepted the Impugned Order and not challenged it. As such, they cannot now make such averments by making bald statements at this stage.

(d) The argument keeping tariff of the consumers in the licensed area of CSPDCL same as the tariff applicable to CSPDCL also does not impress us as the industrial tariff of CSPDCL is a subsidizing tariff and the cross subsidy on the industrial tariff neutralises the impact of subsidized tariff of low end consumers of the State. On the other hand, the licensed area of Jindal Steel is an Industrial Park where the consumption is mainly in industrial category and there is negligible cross subsidization for low end consumers of the licensed area of Jindal Steel.

38. The State Commission has submitted that they did not take any action since the Distribution Licensee Jindal Steel had

given undertaking by the letter dated 18.8.2011. This letter dated 18.8.2011 has not been placed on record before this Tribunal. However, such an undertaking given in the letter dated 18.8.2011 does not absolve the Jindal Steel of repeated and continued defaults since 2006 from its legal obligation regarding the non filing and timely filing of the tariff application. Thus, it is clear that the Jindal Steel Distribution Licensee has not shown due respect or co-operative attitude to the State Commission from the beginning. Flouting the directions issued by the Commission is punishable. Similarly, the failure of the Authority to take action against the said violation is reprehensible.

39. So, this issue is also decided in favour of the Appellant. Accordingly, we direct the State Commission not to pass on any burden on account of delay in filing of the Tariff Petition by Jindal Steel to the consumers in the form of tariff in the form of carrying cost.
40. The **Third Issue** would relate to the Non Segregation of Accounts of the Distribution Licensee's Distribution Business.
41. According to the Appellant, the State Commission has failed to undertake detailed prudence check and verification of the division wise segregation of accounts of its Distribution Business of the DISCOMs from its other businesses from

the year 2005 in violation of the Act and the Regulations and directions of this Tribunal. It is a statutory obligation of the Jindal Steel to maintain a separate account of its distribution business as per the Act and Regulations.

42. Section 51 of the Electricity Act, 2003 deals with other business of the Distribution Licensees. This section provides as under:

***“Section 51 (Other Businesses of Distribution Licensees):***

*A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilisation of its assets:*

*Provided further that the **distribution licensee shall maintain separate accounts for each such business undertaking** to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business”.*

43. So, the above proviso would reveal that the Distribution Licensee shall maintain separate accounts for each such business undertaken to ensure the Distribution Business does not get subsidized.

44. Let us refer to the license regulation. The same is as follows:

**“License Regulations:**

**“28. Accounts**

(1) *Unless otherwise permitted by the Commission, the financial year of the licensee shall be from the first of April to the following thirty first of March.*

(2) *The licensee shall, in respect of the licensed business and any other business:*

*(a) Keep such accounting records as would be required to be kept in respect of each such business as if it were carried on by separate companies so that the revenues, costs, assets, liabilities, reserves and provisions of, or reasonably attributable to, the licensed business are separately identifiable in the books of the licensee, from those of other business in which the licensee may be engaged;”*

45. As per this Regulation, the licensee shall keep separate records in respect of each business as if it were carried on by separate companies.

46. Let us refer to the Tariff Procedure Regulations. The same are as under:

**Tariff Procedure Regulations**

*“17. The statement referred to in Clause 7 above shall be given separately for each of the separate business of the licensee and for each of the separate businesses of the generating company. In case the licensee carries on any business or services other than those licensed under the Act, licensee shall give separate revenue statements, expenditure statements, balance sheet and cash flow statement together with such details as the Commission may require in respect of such businesses or services.*

47. This Regulation also would mandate that the Distribution Licensee shall maintain separate accounts of the Distribution Business and shall give separate revenue statements etc with such details of the distribution business as the Commission may require.
48. So, the perusal of the above Sections and Regulations would indicate that the requirement of maintaining separate accounts of the Distribution Business was made mandatory so that the distribution business does not subsidizes other business undertaking, in any way to support some other business.
49. In other words, in the absence of separate accounts of distribution business, it would not be possible for the State Commission to undertake prudence check while determining the Annual Revenue Requirement and the tariff of the Distribution Business. In the instant case, admittedly, the Jindal Steel has not segregated the accounts of its Distribution Business from its other businesses.
50. The facts as noticed in the instant case will show that ever since 2006, the Jindal Steel has not segregated the accounts of its distribution business from its other business. As admitted by the State Commission in the various orders dated 29.1.2007, 5.11.2008 and 27.6.2009, the State Commission has repeatedly directed the Jindal Steel to

maintain separate accounts of its licensed business with regard to which the Jindal Steel has consistently defaulted.

51. Let us refer to those orders. The relevant portion of the Order dated 29.1.2007 is as follows:"

*"The licensee shall segregate his account for distribution business as early as possible and submit application for determination of tariff under Section 62 of the Act by end November, 2007. We are not inclined to accept the Petitioner's plea that the accounts cannot be segregated. Segregation is possible, in most elements of cost on actual basis and some elements perhaps on notional basis, based on some rational presumption.*

52. When this order was challenged in this Tribunal in Appeal No.34 and 96 of 2007, this Tribunal also emphasised the importance of the Distribution Licensee to maintain a separate accounts for its distribution business.

53. The relevant observations rendered by this Tribunal dated 4.10.2007 is as follows:

***"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".***

54. Now we will see the order dated 5.11.2008 passed by the State Commission:

**“2. JSPL, the distribution licensee submitted an application on 30<sup>th</sup> July, 2008 for determination of tariff for the year 2008-09. On scrutiny, several discrepancies were observed and the applicant was advised for compliance/rectification. Some of the shortcomings still remain and these relate to separation of accounts for electricity distribution activity from the other main business of the licensee company; non submission of power procurement plan, both short-term and long-term;... The Commission hence directed the licensee to submit complete information within 15 days”.**

55. We will now refer to another order dated 27.6.2009:

**“6.1... In the absence of segregated accounts for distribution business, the Commission at present accepts the methodology adopted by JSPL for allocation of fixed assets for its distribution business..**

**10.1... In the absence of authenticated segregation of data for distribution segment of M/s. JSPL, the commission is left with no other option but to approve the gross employee expenses of Rs.303.61 lakhs at present for estimating the expenses.**

**12...While analysing the ARR, many discrepancies were not noticed mainly because the accounts for the distribution and supply business have not been separated from the main business of the company.. the Commission finds it difficult to arrive at realistic ARR due to unavailability of separate accounts for the business for which license was granted.**

**14. Directions**

***(i) In accordance with the terms and conditions of the license, a separate accounting of distribution and supply business is required to be kept. This has repeatedly been brought to the notice of the licensee. The separation of accounts may be confirmed within 3 months. Failure to comply with direction will result in reduction in tariff to Rs.2.50 per unit as is the licensee's agreement with most consumers".***

56. The above orders would show that there was a continuous failure on the part of the Jindal Steel to segregate the accounts of its distribution business from its inception. The State Commission has been simply issuing directions year after year without taking any further action or substantial measure to ensure compliance of its orders and statutory mandate.
57. This soft approach adopted by the State Commission has only tempted and encouraged the Jindal Steel to continue to flout the State Commission's directions and the Distribution licensee's statutory obligations.
58. In the absence of the segregated accounts of the Distribution business, the State Commission could not undertake prudence check in determining the ARR and retail tariff of the Jindal Steel. The prudence check is an essential part of the process of tariff determination.
59. It is settled position of law that any expenditure incurred by the Utility cannot be accepted by a Regulator on the face of

it and passed on to the consumers. The State Commission is required to assess the claims made by the Jindal Steel only after satisfying itself by the prudence check claims should have been allowed.

60. It is settled law as laid down by this Tribunal as well as by the Hon'ble Supreme Court that the Regulatory Commission is required to take into consideration the efficient working of a utility as also the interest of the consumers while determining the tariff. While complying with the same, the State Commission being a Regulator plays a role of internal auditor and it is not bound by the expenditure reflected in the accounts of the said Distribution Company.

61. The Appellant has cited the following decisions in which above principles have been laid down:

(a) West Bengal Electricity Regulatory Commission v. CESC Ltd (2002) 8 SCC 7152

(b) Cellular Operators Association of India v Union of India (2003) 3 SCC 186

(c) PTC India Limited V CERC (2009) 5 SCC 466

(d) SIEL Limited v Punjab State Electricity Regulatory commission (2007) ELR (APTEL) 931

(e) Karnataka Power Transmission Corporation Limited v Karnataka Electricity Regulatory Commission and Ors (2007) ELR (APTEL) 223

(f) North Delhi Regulatory Commission v Delhi Electricity Regulatory Commission (2007) ELR (APTEL) 193;

62. In view of the above settled position, the State Commission ought not to have entertained the claims of the Jindal Steel in the absence of segregated accounts maintained for its distribution license exclusively since in those cases, the State Commission could not have carried out prudence check on the expanses claimed by it thereby causing prejudice to the consumers such as the Appellant. The State Commission is directed not to entertain the Petition of Jindal Steel for enhancement of tariff in the event of failure to submit the segregated accounts as per the directions of the State Commission in future.

63. In view of the above, this point is also decided in favour of the Appellant.

64. **Summary of Our Findings**

(a) **The first issue relating to surplus power from the Captive Power Plant of Jindal Steel is decided in favour of the Appellant. The State Commission is directed to re-determine the power purchase cost as per the directions given in Paragraph-23 of this Judgment.**

(b) **The Second Issue regarding delay in filing the tariff petition is allowed in favour of the Appellant**

**with the directions to the State Commission not to pass on the burden on account of delay in filing of the tariff Petition by Jindal Steel to the consumers in the form of increase in tariff due to carrying cost.**

**(c) The third issue regarding segregated accounts is also decided in favour of the Appellant with the directions to the State Commission not to entertain any Petition of Jindal Steel for enhancement of tariff in the event of failure to submit the segregated accounts as per the directions of the State Commission in future.**

65. In view of the above findings, the Impugned Order which suffers from the various infirmities as referred to above, is set-aside. Accordingly, the State Commission is directed to pass consequential orders in terms of the findings in this Judgment at the earliest.

66. The Appeal is allowed.

67. No order as to costs.

68. Pronounced in the open Court on **07<sup>th</sup> day of March, 2014.**

**(Rakesh Nath)**

**Technical Member**

Dated: 07<sup>th</sup> March, 2014

~~√REPORTABLE/NON-REPORTABLE~~

**(Justice M. Karpaga Vinayagam)**

**Chairperson**