

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

Appeal no.272 of 2013

Dated: 28th November, 2014

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of

**Jayshree Chemicals Ltd.
P.O. Jayshree – 761 025
Distt. Ganjam
Odisha – 760 001**

...Appellant(s)

Versus

**1. Orissa Electricity Regulatory Commission
Bidyut Niyamak Bhavan
Unit-VII, Bhubaneswar – 751 012**

...Respondent(s)

**2. Southern Electricity Supply Company
Of Orissa Limited
P.O. Courtpetta, Berhampur – 760 004
Distt. Ganjam (Odisha)**

**Counsel for the Appellant(s): Mr. Sanjay Sen, Sr. Adv.
Ms. Shikha Ohri
Mr. Ruth Elwin
Mr. Matrugupta Misra**

**Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Prashanto Chandra Sen
Mr. Sayuj Kumar Banerjee
Mr. Hasan Murtaza**

Mr. Aditya Panda
Mr. Rutwik Panda
Ms. Rajkumari Banju
Ms. Anshu Malik
Ms. Anushruti

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Jayshree Chemicals Ltd. challenging the impugned order dated 23.03.2013 passed by Orissa Electricity Regulatory Commission (“State Commission”) determining the Annual Revenue Requirement and Tariff for FY 2013-14 for the Distribution Licensees.

2. The Appellant is a power intensive industrial consumer obtaining power supply at 132 kV from the Distribution Licensee. The State Commission is the Respondent no.1. The second Respondent is Southern Electric Company of Orissa Ltd., the Distribution Licensee.
3. The following issues have been raised by the Appellant:

- a. Imposition of reliability surcharge on HT and EHT consumers @ 20 paise per unit.
 - b. Change of Tariff slabs (Replacement of 50% load factor with 60% load factor in the graded slab tariff)
 - c. Withdrawal of Power Factor Incentive of 11 paise per unit.
 - d. Withdrawal of Take or Pay scheme of 30 paise per unit.
 - e. Determination of cross subsidy on the basis of average cost of supply instead of cost to supply basis.
4. On the above issues, we have heard the Learned Counsel for the Appellant, the State Commission and the Distribution Licensee. Let us take these issues one by one.

5. The first issue is regarding imposition of reliability surcharge on HT and EHT consumers @ 20 paise per unit.

5.1 According to the Appellant, the State Commission imposed a reliability surcharge @ 20 paise per unit on HT and EHT consumers for availing uninterrupted supply of power. Such imposition of reliability surcharge is illegal as it is not authorized under the Electricity Act, 2003 or in the Electricity Rules or in the Tariff Regulations. The Tribunal in Appeal no. 135 of 2013 in the matter of M/s. Ispat Industries Ltd. Vs. Maharashtra State Electricity Distribution Company Ltd. and Anr. has held that levy of such charge is not authorized even under Section 62(3) of the Electricity Act, 2003. HT and EHT consumers are already paying demand charges to the Distribution Licensee for the purpose of maintaining the contract demand and any additional liability in the form of reliability surcharge for ensuring supply of such contract

demand is illegal and arbitrary. Under Section 43 of the Act, a duty has been cast upon the Distribution Licensees to supply power on request. In furtherance of this duty, the Distribution Licensee has been authorized to charge demand charges and energy charges from the consumers and imposition of any additional charge runs contrary to the scheme of the Electricity Act, 2003. Further the reliability surcharge is being levied on all the units consumed by a HT and EHT consumers and not only on the units consumed during peak hours or load restriction hours. This levy is also speculative without any supporting cost analysis.

5.2 Shri Buddy A. Ranganadhan, Learned Counsel for the Respondent no.2 submitted that in law if the Appellant wants to enjoy a certain benefit, which a large part of the consumer base does not enjoy i.e. uninterrupted supply, the Appellant ought to be prepared to pay for such benefit. This

Tribunal in Appeals no. 108 of 2007 and 144 of 2007, both titled MIDC Vs. MERC in separate judgment both dated 21.07.2009, has upheld such imposition of reliability charge for uninterrupted power supply. The findings of the Tribunal in Appeal no. 135 of 2009 in Ispat Industries matter is not applicable to the facts of the present case.

5.3 This issue is already covered in the Tribunal's judgment dated 21.07.2009 in Appeal no. 108 of 2007 in which this Tribunal upheld imposition of additional supply charges for consumers benefitted from the reduced load shedding hours under power shortage condition. The relevant extracts of the para 39 is reproduced below:

“39. From the above, we observe that the Commission has linked the levy of ASC with the reduction in number of hours of load shedding, which we feel indicates a reasonable nexus between the cost of such additional power and the class of consumers who would be benefitted by purchase of such costly

power. The benefit is available in the form of reduction in the load shedding hours when there is shortage of power. Therefore, we do not find that the ASC or IASC based on the criteria adopted by the Commission is arbitrary in nature.”

5.4 In another judgment dated 21.07.2009 in Appeal no. 144 of 2007 this Tribunal held that the consumers benefiting from the reduced load shedding hours based on availability of costly power should pay for the costly power through Additional Supply Charge in addition to the base retail tariffs.

5.5 The findings of this Tribunal in Appeal no. 135 of 2009 in Ispat Industries matter is not applicable to the present case. In that case, the Appellant was a continuous process industry and was liable to pay tariff which has already covered the premium for zero load shedding thereby compensating the Distribution Licensee for providing continuous supply. The Tribunal set aside the State Commission order for levy of reliability charge which was

meant only for other consumers were paying normal tariff, as it would result in doubling of charge on the consumers like Ispat Industries.

5.6 Findings of this Tribunal in Appeal nos. 108 of 2007 and 144 of 2007 will apply squarely to the present case.

5.7 In view of above, this issue is decided against the Appellant.

6. The second issue is relating change of tariff slab i.e replacement of 50% load factor with 60% load factor in the graded slab tariff.

6.1 According to the Appellant, the tariff slabs applicable to HT and EHT consumer have been revised which has resulted in tariff impact of about 5 paisa per unit on the Appellant. The Regulations provide rebate to the consumers for maintaining

high power factor and load factor. Therefore, change in the slab for FY 2013-14 from 50% to 60% load factor is not tenable.

6.2 According to Mr. Buddy A. Ranganadhan, Learned Counsel for the Respondent no.2, the Appellant is seeking a mandatory direction from this Tribunal to grant them a concession and/or a rebate. In law, a person does not have a right to a rebate of a concession as held by the Hon'ble Supreme Court in (2010) 12 SCC 563. He has also referred to the ruling in (1991) 3 SCC 263 to press the point that a concession can also be withdrawn or modified and no question of natural justice is required for withdrawal of such concession and that beneficiary of concession has no legally enforceable right or vested right.

6.3 We find that in the impugned order the State Commission has revised the slab on tariff of HT and EHT consumer of 50% load factor consumption to 60% load factor consumption. We find no illegality in revision of the slab as we feel that this is a matter of tariff design which can be altered by the State Commission. This issue is, therefore, decided against the Appellant.

7. The third issue is regarding withdrawal of power factor incentive of 11 paisa per unit.

7.1 Shri Sanjay Sen, Senior Learned Counsel for the Appellant has submitted that the State Commission has withdrawn the power factor incentive while at the same time continued with power factor penalty in violation of Section 61(c) and (e) of the Electricity Act. The achievement of power factor of near unity could be possible only by incurring additional

investment of capacitor installation by the Appellant. In the absence of any incentive for higher power factor, continuation of power factor is arbitrary, unreasonable and discriminatory. He referred to the judgment of the Tribunal in Appeal no. 192 and 206 of 2010 in the matter of Tamil Nadu Electricity Consumers Association Vs. Tamil Nadu Electricity Board.

7.2 Shri Buddy A. Ranganadhan, Learned Counsel for the Respondent no.2 argued that findings of the Tribunal in Tamil Nadu case in Appeal no. 192 and 206 of 2010 will not be applicable to the present case because in case of Tamil Nadu the Regulations provided for incentive/disincentive for maintaining power factor above/below the prescribed level. In the present case the Regulation of Orissa Commission do not provide that rebate and incentive must go hand in hand. The Orissa Commission has also assigned reasons for

withdrawal of incentive. He further submitted that a grant or rebate is not a right of the Appellant.

7.3 Let us examine the Regulations of the Orissa Commission.

The Regulations are reproduced below:-

“(b) Power Factor and Load Factor Related Tariff

The Commission may provide rebates to the consumers for maintaining high power factor and load factor to promote efficiency of operation and optimum capacity utilisation. To achieve this, the Commission may at a future date consider switching over to kVAh tariff from kWh tariff for consumers having appropriate meters. However, even after switching to kVAh tariff demand charges shall continue to apply. This will take care of incentive for better power factor as well as curb the tendency of not improving the power factor beyond a point determined for penalty, to avail of the rebate for high load factor.”

7.4 The Regulations stipulates that the Commission may provide rebate to the consumers for maintaining high load factor to promote efficiency of operation and optimum capacity utilisation. Regulation also state that the Commission may in

future consider switching over to kVAh tariff from kWh tariff with view to achieve the objective of improving power factor. Thus, the Regulations have a provision for rebate for high power factor.

7.5 We find that this issue has been dealt by us in our judgment in Appeal no. 192 and 206 of 2010 in the matter of Tamil Nadu Electricity Consumers Association Vs. TNEB. The relevant paras of the said judgment are as below:

“....11.4. Let us first examine the provisions of Tariff Regulations regarding power factor incentive. The relevant Regulation 12 is reproduced below:

“12. Power Factor

The Commission may direct certain categories of consumers to maintain power factor at a prescribed level and allow incentive/disincentive for maintaining above/below the prescribed level”.

11.6 The State Commission in the impugned order has specified the power factor required to be maintained for certain categories of consumers and disincentive for not maintaining the same but

has not specified any incentive for maintaining a higher power factor than the benchmark. The impugned order is also silent about the reason for withdrawing the incentive which was earlier available. The learned counsel for the State Commission has now tried to provide a reasoning for the same.

11.7. The State Commission's Regulation provides for the State Commission prescribing the power factor benchmark and allowance of incentive for power factor above the benchmark and disincentive below the benchmark power factor. While the State Commission has prescribed the disincentive for power factor below the benchmark, it did not provide for incentive for power factor above the benchmark. In our opinion, the incentive and disincentive for maintaining power factor above and below the benchmark have to go together as per the Regulation-12....."

7.6 In the above judgment this Tribunal considered Regulations of the State Commission which provided for incentive/disincentive for power factor above/below with prescribed level. Tamil Nadu Commission had decided the disincentive for power factor lower than the benchmark but withdrew incentive for power factor higher than the

benchmark without assigning any reason. The Tribunal held that the incentive/disincentive for maintaining power factor above/below the benchmark have to go together as per the Regulations.

7.7 Keeping in view the Orissa Regulations and judgment of the Tribunal in Tamil Nadu case, let us examine the findings of the State Commission in the impugned order. The relevant extracts of the impugned order are as under:

“193. The Commission analyses the drawal pattern of EHT and HT industries of the State as submitted by the DISCOMs. Many industries have been able to run with a power factor of 95% or more. This has helped them to reduce their electricity bills. The system power factor of the DISCOMs have also reached a level of more than 90%. A time has reached when the consumers have become conscious of keeping their power factor high for their own benefit without any external stimulus. Therefore, the Commission abolishes power factor incentive and continues with existing provision of power factor penalty. There should be no power factor penalty for leading power factor. The power factor penalty shall be charged below the power factor level of 92% as usual as follows:

<i>Below 92% upto and including 70%</i>	<i>0.5% penalty for every 1% fall from 92% upto and including 70% plus</i>
<i>From 70% to 30%</i>	<i>1% penalty for every 1% fall below 70% upto and including 30% plus</i>
<i>From 30% or below</i>	<i>2% for every 1% fall below</i>

(Pro-rata penalty shall be calculated and the power factor shall be calculated upto four decimal points). The penalty shall be on monthly demand charge and energy charge of the HT and EHT industries as prescribed later on in this Order. The licensee may give a 3 months' notice to install capacitor for reduction of reactive drawl failing which licensee may disconnect the power supply if the power factor falls below30%."

7.8 Thus, the State Commission withdrew the incentive for high power factor but continued with the penalty for low power factor. The reason given by the Sate Commission for withdrawing the incentive for high power factor is that most industries have been able to run the power factor of 0.95% or more and the consumers have become conscious of

keeping their power factor high for their own benefit without any external stimulus.

7.9 We are not in agreement with the findings of the State Commission. The incentive for power factor is given to the industries to improve the power factor above the benchmark in order to reduce the reactive power drag on the system as high reactive power drag on the system results in lower voltage and higher transmission and distribution losses in the power system of the licensee. Power factor can be improved by installing capacitors. Techno-economically it is ideal to install the capacitors as close to the load as possible. It is ideal if adequate capacitors are installed by the consumers at their premises. Therefore, the consumer has to be encouraged to maintain a higher power factor by providing for incentive/rebate for maintaining power factor above the benchmark and disincentive/penalty if the power

is maintained below the benchmark. In the present case the State Commission retained the penalty for low power factor but withdraw the incentive for high power factor. It is correct that the consumer will try to maintain power factor above the benchmark which is 0.92 to avoid the penalty but if higher power factor is maintained above the benchmark, it will help the system for which consumer needs to be incentivised. The consumer has to install capacitor and incur expenditure in operating and maintaining the capacitor. The improvement of power factor of the consumer above the benchmark 0.92 benefits the system of the licensees by helping to improve the voltage and reducing losses. The consumer has incur the expenditure in maintaining power factor above 0.92, therefore, it is to be encouraged and compensated for helping the power system by providing for incentive of high load factor.

7.8 The Tariff Regulations of Orissa also provide for incentive for high power factor. Therefore, the findings of this Tribunal in Appeal no. 192 and 206 of 2012 in Tamil Nadu case will apply squarely in the present case. In view of above we set aside order of the State Commission for not allowing the incentive for power factor and at the same time imposing the penalty. Therefore, the incentive for high power factor is restored. The Respondent no. 2 has to grant the incentive for power factor above 0.92 in the tariff year to be adjusted in the future bills of the Appellant by suitable credits. The Respondent no.2 will be entitled to claim the same expenditure on this account in its ARR for future.

8. The fourth issue is regarding withdrawal of Take or Pay scheme:

- 8.1 According to Shri Sanjay Sen, Senior Learned Counsel, the State Commission has erroneously withdrawn the Take or Pay scheme.
- 8.2 On this issue Learned Counsel for the Respondent no.2 has given the same arguments as rendered on the second issue that the Appellant does not have right to a rebate or concession in law.
- 8.3 Let us examine the findings of the State Commission in this regard. The relevant paragraph is reproduced below:

“Take or Pay’ Tariff

180. The Commission on analysis of submission of DISCOMs during hearing found that the ‘Take or Pay’ tariff scheme introduced by the Commission in FY 2012-13 has not borne the desired result. The intended expectation of more and more industries would go for higher load factor opting for ‘Take or Pay’ scheme has not been achieved, in practice. Instead the process industries who are already consuming power at higher LF have multiple benefits seriously affecting the revenue inflow of the DISCOMs. It has upset the existing cross-subsidy mechanism. Therefore, the Commission is pleased to withdraw the scheme w.e.f FY 2013-14.”

8.4 Thus, the State Commission has withdrawn the Take or Pay tariff scheme introduced by the State Commission earlier as it had not borne desired result. We find that Take or Pay scheme was a concession available to certain HT/EHT consumers giving a guarantee in writing to pay for minimum load factor of 70% and in the process they were given concession of 30 paisa per unit. By the impugned order, the State Commission has withdrawn the Take or Pay scheme which means the consumer will not have to give guarantee for drawal at minimum load factor and will also not be entitled to any rebate.

8.5 We feel that there is no illegality in the State Commission discontinuing the Take or Pay scheme. We agree with the arguments given by Mr. Buddy A. Ranganadhan supported by rulings of Hon'ble Supreme Court that concession cannot be demanded as a matter of right. This is also a tariff design

issue, and therefore we are not inclined to interfere in the same.

8.6 In view of above, we uphold the findings of the State Commission on this issue and decide this issue against the Appellant.

9. The fifth issue regarding calculation of cross subsidy.

9.1 Shri Sanjay Sen, Learned Senior Counsel referred to this Tribunal's judgment reported in 2007 ELR(APTEL) 931 and judgment dated 30.05.2011 passed in the case of M/s. Tata Steel Limited Vs. Orissa Electricity Regulatory Commission in Appeal no. 102 of 2010 holding that the findings of the Commission that cost to supply a consumer category is the same as average cost of supply for the distribution system as whole and average cost of supply can be used in calculation of cross subsidy instead of actual cost of supply

is incorrect. Further, the State Commission with a view to present implementation of judgment passed by this Tribunal in Tata Steel case has amended the Regulation 7(c)(iii) of the Tariff Regulations, 2004 with effect from 10.08.2011. According to this amendment, cross subsidy is to be worked out on the basis of average cost of supply. Mr. Sanjay Sen, Senior Learned Counsel has argued that amendment is contrary to the provisions of the Electricity Act 2003, National Electricity Policy and Tariff Policy and is illegal and ought to be ignored by this Tribunal while determining the legality and validity of the impugned order.

9.2 According to Mr. Buddy A. Ranganadhan for Respondent no.2, the State Commission has determined the cross subsidy on the basis of average cost of supply in terms of Regulations 7(c) of the Tariff Regulation, 2004 as amendment on 10.08.2011. According to him this issue is

also pending before the Hon'ble Supreme Court in CA 9398 and 9401 of 2013 wherein a stay order has been granted by the Hon'ble Supreme Court.

9.3 The matter relating to Tata Steel is pending before the Hon'ble Supreme Court, therefore, we do not want to pass any order in this matter. We also notice that the tariff of the Appellants category has been fixed within $\pm 20\%$ of the average cost of supply as per the Tariff Policy. Therefore, we are not inclined to interfere in this matter.

10. Summary of our findings

- i). The issue regarding imposition of Reliability Surcharge on HT and EHT consumers is decided against the Appellant as per our findings in paragraph 5 above.**
- ii. In the second issue relating to Change of Tariff Slab, we find no illegality in revision of the slab as this is a matter of tariff design, which can be altered by the State**

Commission. This issue is also decided against the Appellant in view of our findings in paragraph 6 above.

- iii. Regarding withdrawal of Power Factor Incentive of 11 paisa per unit, the findings of this Tribunal in Appeal no. 192 and 206 of 2010 will apply squarely in the present case. We set aside order of the State Commission for not allowing the incentive for high power factor and at the same time imposing the penalty for low factor as per the reason given in paragraph 7 above. Therefore, the incentive of high power factor is resorted. We have given directions to the Respondent no.2 for allowing the incentive for high power factor in paragraph 7.8 of the judgment.**
- v. As regards withdrawal of Take or Pay scheme we uphold the findings of the State Commission and decide this issue against the Appellant.**

- v. Regarding calculation of cross subsidy, the matter is pending before the Hon'ble Supreme Court and, therefore, we do not incline to pass any order in the matter. We also notice that the tariff of the Appellants category has been fixed within $\pm 20\%$ of the average cost of supply as per the Tariff Policy. Therefore, we are not inclined to interfere in this matter.
11. The Appeal is allowed in part to the extent as indicated above i.e. only on issue of high power factor incentive with suitable directions to the Respondent no.2. No order as to costs.
12. Pronounced in the open court on this 28th day of November, 2014.

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

(Justice M. Karpaga Vinayagam)
Chairperson