

In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)

IA No. 192 of 2018
(Stay of Impugned Order)
in Appeal No. 36 of 2018

Dated: 23rd April, 2018

Present: Hon'ble Mr. I.J. Kapoor, Technical Member
Hon'ble Mr. N K Patil, Judicial Member

In the matter of :-

M/s Tata Power Co. Ltd. (Distribution) {Tata Power (D)}
Backbay Receiving Station,
148 Lt. Gen. J Bhonsale Marg,
Nariman Point,
Mumbai – 400 021

... Appellant

Versus

1. Maharashtra Electricity Regulatory
Commission

World Trade Centre, Centre No.1,
13th Floor, Cuffee Parade,
Mumbai – 400 005

...Respondent No. 1

2. Mumbai International Airport Pvt. Ltd. (MIAL)

Terminal 1B, 1st Floor,
Chhatrapati Shivaji International Airport,
Santa Cruz (East), Mumbai – 400 099

...Respondent No. 2

3. Hindustan Petroleum Corporation Ltd.

Mumbai Refinery, B.D. Patil Marg
Mahul, Mumbai – 400 074

...Impleader

Counsel for the Appellant(s): Mr. Amit Kapur
Mr. Abhishek Munot
Mr. Malcolm Desai

Counsel for the Respondent(s): Mr. Ramji Shrinivasan, Sr. Adv.
Ms. Ritika Singhal

Mr. Parinay Deep Shah
Ms. Aradhna Tandon
Mr. Naveen Hegde for R-2

Mr. G. Saikumar
Mr. Raheel Kohli for Impleader

ORDER

PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The IA No. 192 of 2018 has been filed by the Appellant in Appeal No. 36 of 2018 seeking stay of the operation of the Order dated 28.11.2017 (“**Impugned Order**”) passed by the Maharashtra Electricity Regulatory Commission (“**State Commission**”) in Case No. 110 of 2017 whereby the State Commission on application from the Respondent No. 2 has held that Power Factor Incentive/ Penalty is applicable to the Open Access (OA) consumers even on the power drawn by them from other sources with retrospective effect.
2. The Appellant is one of the distribution licensees operating in Mumbai area. The Respondent 1 is the State Regulatory Commission for the State of Maharashtra. The Respondent No. 2 i.e. MIAL is engaged in operation/maintenance etc. and management of the Chhatrapati Shivaji International Airport, Mumbai and is an Open Access consumer.
3. The Impleader is Hindustan Petroleum Corporation Ltd. (“HPCL”), a Government Undertaking and is the consumer of the Appellant and is also sourcing power from Open Access to cater to its load requirement in relation to its refineries.

4. The Appellant has been supplying power to MIAL since 1.11.2009 and from 1.11.2015 to meet its demand, MIAL is also procuring power partially as an OA consumer. As per the Appellant, no power factor incentive/penalty was applicable on energy procured by MIAL or any other consumer through Open Access. The Appellant discovered in May, 2017 that due to an error in the Appellant's computerised billing system, adjustment from power factor sector incentive was wrongly applied in the monthly bills of Open Access users like MIAL during July, 2013 to April, 2017 with respect to the Regulatory Asset Charge ("RAC") component of the Open Access quantum. Upon discovering the mistake the Appellant stopped applying the power factor incentive.
5. On 04.07.2017, MIAL filed a Petition (Case No.110 of 2017) before the State Commission seeking clarification regarding applicability of Power Factor Incentive to OA consumption by HT consumers. In the said petition apart from other contentions MIAL relied on the Judgment dated 14.11.2013 of this Tribunal in Appeal No. 231 of 2012 in case of Jindal Stainless Ltd. Vs. Dakshin Haryana Bijli Vitran Nigam & Anr. ("Jindal Case").
6. The State Commission on 28.11.2017, vide the Impugned Order directed the Appellant to provide Power Factor Incentive/Penalty, as the case may be to MIAL and other similarly placed OA consumers on the charges levied on the power sourced by them through OA. The State Commission has further held that for past periods, the said charges were to be adjusted in the subsequent bills of MIAL and other such OA consumers, along with applicable interest.

7. Aggrieved by the Impugned Order the Appellant has filed the Appeal No. 36 of 2018 and is seeking the stay of the Impugned Order vide this Interlocutory Application (IA) pending the hearing of the Appeal.

8. The learned counsel appearing for the Appellant Mr. Amit Kapur, vehemently submitted, gist of his submissions is as follows:-
 - a) The Appellant has contended that the decision of the State Commission is contrary to the applicable statutory framework relating to OA consumers. The MERC (Distribution Open Access) Regulations, 2016 (“**DOA Regulations, 2016**”) and the Tariff Orders passed by the State Commission do not provide applicability of Power Factor Incentive/ Penalty to the OA consumers of a Distribution Licensee. Billing for OA consumers as provided for under the DOA Regulations, 2016 does not include Power Factor Incentive/ Penalty for OA consumers of a Distribution Licensee.

 - b) The Appellant has distinguished that except few direct consumers of the Distribution Licensee others are not levied voltage linked incentive/ penalty. OA consumers who procure power through OA bring external impact in transmission/ distribution network voltage or stability. They are responsible for maintaining grid parameters by way of installing power factor correction equipment. They are entitled to receive or pay Reactive Energy Charges depending on system voltage and impact of OA use on the grid.

- c) The Appellant has also tried to distinguish the applicability of tariff determined under the Act on direct consumers and OA consumers and has also contended that as per Section 42 (2) of the Act the State Commission can only determine wheeling charges and surcharges for OA consumers. Tariff, penalty, incentives determined under Section 62 of the Act are not applicable to the OA consumers.
- d) The Schedule under which Power Factor Incentive/ Penalty has been computed (Schedule of Electricity Tariffs) is related only to direct consumers of the Appellant and cannot be applied to OA consumers. Regulation 21 of the DOA Regulations, 2016 provides for applicability of 'Reactive Energy Charges' to OA consumers and not Power Factor Incentive/ Penalty. The Appellant has also emphasized that similar provisions also existed in DOA Regulations, 2014 and related the same with the State Grid Code Regulations & MERC Multi Year Tariff (MYT) Regulations, 2011/2015. The State Commission failed to consider that the Reactive Energy Charges and Power Factor Incentive/ Penalty are exclusive and independent of each other. They cannot be interchangeably or simultaneously made applicable to same consumer.
- e) The State Commission in its order dated 3.1.2013 in Case No. 8 of 2012 & Batch has held that Power Factor Incentive / Penalty is applicable to OA consumer only on the net energy supplied by the distribution licensee.

- f) The State Commission has erred in allowing Power Factor Incentive with interest retrospectively to the OA consumers. The State Commission failed to appreciate that before issuance of the Impugned Order there was no occasion for the Appellant to believe that the Power Factor Incentive/Penalty is to be made applicable to the OA consumers. MIAL has approached the State Commission only to seek clarification on applicability of Power Factor Incentive/ Penalty to OA consumers and hence it was not just on part of the State Commission to apply Power Factor Incentive/ Penalty that too retrospectively with applicable interest.
- g) The State Commission has primarily relied on the judgement dated 14.11.2013 of this Tribunal in Appeal No. 231 of 2012 in Jindal Case and for the first time has held that the Power Factor Incentive/ Penalty is applicable on power sourced through OA. Accordingly, it is not lawful to apply the provision retrospectively along with applicable interest. The Appellant has distinguished the Jindal Case with the present case on account of applicability of Reactive Energy Charges to OA consumers in place of Power Factor Incentive/ Penalty, installation of ABT compliant meters by MIAL which are capable of recording voltage and Reactive Energy on 15 minutes time block and its analysis of the ABT meter data revealing that MIAL would not have been entitled to any Reactive Energy Charges as the system voltage of the sample data was always higher than 75% at MIAL's end.
- h) The Appellant argued that grave harm, loss and injury would be caused to it and the direct consumers of the distribution licensees of the State if the Impugned Order is not stayed.

9. The learned senior counsel Mr. Ramji Shrinivasan appearing for the Respondent No.2 and the learned counsel Mr. G. Saikumar appearing for the Impleader made the following submissions;
- a) The Appeal is not maintainable as the only issue involved regarding applicability of Power Factor Incentive/ Penalty has been covered vide judgement of this Tribunal in Jindal Case. Accordingly, there is no need for stay of the Impugned Order. In the Jindal Case this Tribunal has categorically held that Power Factor Incentive is based on technical and engineering principles and it has nothing to do with the source of power. Accordingly, Power Factor Incentive is to be given to all the consumers including OA consumers. The relief sought is in direct conflict of the judgement of this Tribunal in Jindal Case and deserved to be dismissed. Even on prima facie no case has been made out by the Appellant for the stay of the Impugned Order.
- b) The Appellant has wrongly stated that the MYT Order dated 21.10.2016 is applicable to direct customers only. Categorisation of consumers in MYT order is for the purpose of usage at different voltage levels and not for the sourcing of power. Perusal of the same brings out that it is applicable to all the consumers including the OA consumers. Clause 16 (Annexure II) of DOA Regulations, 2016 provide that the supply distribution licensee may provide penalty/incentive for low/high power factor as per the relevant orders of the State Commission.

- c) The contention of the Appellant regarding applicability of the Power Factor Incentive/ Penalty retrospectively is misconceived as the Respondents were eligible for Power Factor Incentive and as such there is no such retrospectivity in the Impugned Order.
- d) The Appellant has been applying incentive on Regulatory Access Charges for Open Access from November 2015 until May 2017 but stopped the same when the Respondent No. 2 requested the Appellant in April 2017 to pass on the incentive on Wheeling Charges and Cross Subsidy Surcharge also. Accordingly, the Respondent No. 2 was forced to file a petition before the State Commission based on which the Impugned Order has been issued in favour of the Respondent No. 2.
- e) The Respondents have contended that the intent of the Act is not to deny the incentives to the OA consumers otherwise the whole purpose of the Act would be defeated. The Respondent No. 2 has invested substantial amount on procurement, installation and operation & maintenance of the power factor improvement equipment and is also bearing losses in the said equipment. The Appellant failed to demonstrate that Reactive Energy Charges should be applicable to the Respondents. The State Commission has also dealt the issue of Reactive Energy Charges raised by the Appellant by stating that these charges have not been determined so far by the State Commission and has provided liberty to it to raise the same before the State Commission appropriately.
10. At this stage, this Tribunal is considering the interim order to be passed in this IA pending the hearing and decision in the Appeal.

The main Appeal has to be heard and decided on merits. Without going into the merits of various contentions of the Appellant and the Respondents, this Tribunal will consider some of the important aspects to decide on the disposal of this IA.

11. The main contention of the Appellant is that the Power Factor Incentive/ Penalty is not applicable to the OA consumers in view of DOA Regulations, 2016 and MYT Orders of the Appellant. On this issue the Appellant has also relied on the order dated 3.1.2013 of the State Commission wherein clarification was issued by the State Commission that Power Factor Incentive/Penalty is applicable only on the power sourced from the distribution licensee and not on the OA power. The Appellant has also relied on the State Supply Code and MYT Regulations to emphasise that Reactive Energy Charge is applicable to the OA consumers and not the Power Factor Incentive/ penalty.
12. The Respondents have defended the Impugned Order by quoting that the Impugned Order is a well-reasoned order after dealing with all the aspects raised by the Appellant during the proceedings before the State Commission and has been mainly based on the decision of this Tribunal in Jindal Case wherein it has been categorically held that Power Factor Incentive/ Penalty is applicable to OA consumers also and this is the settled position in the law.
13. We have heard the learned counsel appearing for the Appellant, learned counsel appearing for 2nd Respondent and learned counsel appearing for the Impleader at considerable length of time

and we have also gone through their respective written submissions and as well the Impugned Order. The relevant extracts of the Impugned Order are reproduced below.

“Commission’s Analysis and Ruling

7. The last MYT Order for TPC-D stipulates as follows with regard to Power Factor Incentive:

“Power Factor Incentive

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Whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the following percentages of the amount of the monthly electricity bill, excluding Taxes and Duties:

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8. Power Factor Incentive / Penalty has been provided in the electricity tariffs of TPC-D and other Distribution Licensees since long to encourage consumers to improve their Power Factor by providing shunt compensation and bring it as close as possible to unity so that system losses are reduced. Lower Power Factor causes higher system losses and consequent loss to the Distribution Licensee.

9. Although Open Access consumers source part or all of their power requirement from sources other than their Distribution Licensees, they use the distribution system of

the Licensees for wheeling of this power and, hence, also contribute to system losses (unless they are independently connected to a Generator and physically isolated from the rest of the Licensee's network). If they have no incentive to maintain a high Power Factor, the onus on the Distribution Licensees to take corrective measures to compensate for the variation in Power Factor of such consumers will be correspondingly greater. Moreover, Power Factor improvement can best be achieved if such measures are implemented at the consumer level. On this principle, the Power Factor Incentive / Penalty provided in the MYT Order for consumers sourcing power from TPC-D is equally applicable to the Open Access power sourced by such consumer, who also contribute by way of Wheeling / Transmission Charges and Losses, CSS, and Additional Surcharge, if any.

10. This is also consistent with the Judgment dated 14.11.2013 in Appeal No. 231 of 2012 in which APTEL held as follows:

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11. The list of charges specified in Regulation 14 of the DOA Regulations, 2016 has been cited by TPC-D. However, that is not an exhaustive list of the charges leviable while billing Open Access consumers, as will be seen from Regulation 14.1(v) (quoted earlier in this Order).

12. With reference to Regulation 21 of the DOA Regulations, 2016, TPC-D has raised the issue of levying a Reactive Energy Charge on Open Access consumers. As present, in the MYT Orders in respect of TPC-D and other Distribution Licensees, the Commission has not determined any Reactive Energy Charge. In its forthcoming Mid-Term Review Petition, TPC-D is at liberty to propose such determination.

13. In view of the foregoing, the Commission directs TPC-D to provide Power Factor Incentive (or levy Power Factor Penalty, as the case may be,) to MIAL and other similarly placed consumers on the charges it levies on the power sourced by them through Open Access. For past periods, these may be adjusted in the ensuing bills of MIAL and other such Open Access consumers, along with applicable interest.”

The State Commission while dealing with the contentions raised by the Appellant, on technical & commercial grounds and taking strength from the judgement of this Tribunal in Jindal Case has held that the Appellant is liable to pay Power Factor Incentive to the Respondent No. 2 and other such OA consumers retrospectively with applicable interest.

14. Now let us have a look into the findings of this Tribunal in Jindal Case. The relevant extract from this Tribunal's judgement in the said case is reproduced below:

“7. Having regard to the rival contentions urged by the learned Counsel for the parties, the following questions of law may arise for our consideration:

(a) Whether a person who is an embedded customer receiving power from the Distribution Company, seeks to draw power through Open Access, is obligated to pay the Reactive Energy Charges for the quantum of power taken on Open Access?

(b) Whether the Power Factor Rebate provided for in the Tariff Order is applicable to the Appellant for the quantum of the power taken by the Appellant on Open Access?

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It is to be noted that current drawn an lower power factor also cause excessive voltage drop which would further increase the system losses. Thus, it is proved that lower power factor causes higher system losses and loss to the distribution licensee. The very purpose of providing higher power factor incentive is to encourage the consumers to improve their power factor by providing shunt compensation and bring it as close as possible to unity so that the system losses are reduced to the minimum. This is a pure technical and engineering principle and it does not distinguish as to whether the power has been drawn from the licensee or on availing the ‘open access’.

34. The above analysis would show that very purpose to provide higher power factor rebate is to encourage the

consumer to maintain high power factor and to minimize the system losses. Any loss before the meter installed at consumer's premises is on account of the distribution licensee. In order to reduce these losses, the State Commission has incentivized high power factor based on pure technical and engineering principle. It has nothing to do with the source of power. Accordingly, power factor rebate is payable to the consumer who also avails open access.

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56. Summary of the findings:-

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II. The very purpose to provide higher power factor rebate is to encourage the consumer to maintain high power factor and to minimize the system losses. Any loss before the meter installed at consumer's premises is on account of the distribution licensee. In order to reduce these losses, the State Commission has incentivized high power factor based on pure technical and engineering principle. It has nothing to do with the source of power. Accordingly, power factor rebate is payable to the consumer who also avails open access."

This Tribunal has held that the issue of power factor is purely technical and based on engineering principles. Further, if higher power factor is not maintained then the distribution licensee would be burdened with more losses and accordingly the Haryana Commission has provided power factor incentive/ penalty. It has nothing to do from where the power is sourced.

15. From the above it can be seen that the State Commission while dealing with the issue in the Impugned Order has observed that this Tribunal in the Jindal Case has expressed similar views as that it has been done by the State Commission in the Impugned Order. On perusal of the Jindal Case judgement, it is appears that there were similar situations in present case as well as in Jindal Case with respect to the regulations & MYT orders. This Tribunal in the Jindal Case based on technical and engineering principles has held that Power Factor Incentive is to be made available to the OA consumer sourcing partly/fully power from other sources apart from the distribution licensee. We observe prima facie that this was an independent conclusion arrived at by this Tribunal irrespective of the other issues including that related to Reactive Energy Charges raised in that appeal.

16. We have also gone through the provisions of the Act, DOA Regulations, 2014/2016, MYT Orders of the Appellant issued by the State Commission, MYT Regulations, State Grid Code etc. as contended/relied by the Appellant and the Respondents. The same are not being discussed/ reproduced for the sake of brevity. Prima facie, we do not find any provision that inhibits the State Commission in applying the Power Factor Incentive/ Penalty on the Respondents and other OA consumers. Further, the order dated 3.1.2013 of the State Commission in Case No. 8 of 2012 relied by the Appellant regarding applicability of Power Factor Incentive/ Penalty only on power sourced from the Appellant was in time prior to the judgement dated 14.11.2013 of this Tribunal in Jindal Case.

17. On the issue of Reactive Energy Charges, which have been relied on heavily by the Appellant, we observe that the State Commission has already granted liberty to the Appellant to put up its case during Mid Term Review (MTR) proceedings before the State Commission. Further, the Reactive Energy Charges are yet to be determined by the State Commission. So presently, it is an issue, which is yet to be dealt and decided in totality by the State Commission.
18. After careful evaluation of the entire material on record and after considering the submissions of the learned counsel appearing for the parties and in view of our discussions and prima facie observations as stated above, we are not inclined to grant stay on the implementation of the Impugned Order as prayed in the instant IA by the Appellant.

We make it clear that the observations made by us, which touch on the merits of the case of the parties, are prima facie observations and shall not be treated as final expression on the merits of the case.

Pronounced in the Open Court on this **23rd day of April, 2018.**
List the main Appeal on 23.07.2018.

(N K Patil)
Judicial Member

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REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member