

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

Appeal No. 186 of 2020

Dated: 30th November, 2021

**Present: Hon'ble Mr. Justice R.K. Gauba, Judicial Member
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

In the matter of:

**1. NESCO Utility
Through Executive Engineer (Electrical),
Jajpur Road Electrical Division,
Odisha - 75501** **Appellant (s)**

Versus

**1. M/s. Jindal Stainless Limited
Through Senior Manager (Legal),
Kalinga Nagar Industrial Complex,
PO: Danagadi, District - Jajpur
Odisha - 755026** **Respondent No.1**

**2. Odisha Electricity Regulatory Commission
Through Registrar
Plot No. 4, Chunukoli,
SaileshreeVihar,
Chandrasekharapur, Bhubaneswar-751021
Odisha** **Respondent No.2**

**Counsel on record for the Appellant(s): Mr. SajanPoovayya, Sr. Adv.
Mr. Anand Kumar Shrivastava
Ms. Raksha Agarwa
Ms. Anuja Jain
Mr. Utkarsh Khandelwal**

**Counsel on record for the Respondent(s): Mr. K. Gopal Choudhary
Mr. Hitendra Nath Rath for R-1

Mr. Rutwik Panda
Ms. Nikhar Berry**

JUDGMENT (ORAL)

Per Hon'ble Mr. Justice R.K. Gauba, Judicial Member:

1. The matter has been taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.
2. The Appeal at hand was presented by the Distribution Licensee, earlier known as NESCO Utility, since vested in TP Northern Odisha Distribution Limited (*TPNODL*) – the change in the description of appellant allowed by separate short order of even date (on IA no. 1836 of 2021), the appellant carrying on the function of distribution of electricity in Northern and North-Eastern Odisha. The first Respondent – Jindal Stainless Limited (for short, “*JSL*”), operates and maintains an integrated steel manufacturing plant at Kalinga Nagar Industrial Complex, Jajpur Road, Odisha, operating and maintaining a 2x125 MW Captive Generating Plant (*CGP*) and also drawing electricity from the appellant.
3. The Appeal is directed against order dated 26.02.2018 passed by Odisha Electricity Regulatory Commission (*OERC or the State Commission*) directing the transaction of supply of electricity by the Appellant herein to the first Respondent/*JSL* for the period 01.07.2012 to 31.07.2015 to fall in the category of “*Emergency Supply of CGP*” under Regulation 80 (15) of *OERC Distribution (Conditions of Supply) Code, 2014* (hereinafter referred to as “*the Supply Code*”). The Appellant had earlier approached the jurisdictional High Court invoking its writ jurisdiction, but withdrew

from there having taken liberty to approach this Tribunal by Appeal which was filed subsequently.

4. The controversy which continues to rage between the parties pertains to certain provisions of the Supply Code, the relevant parts whereof, to the extent referred during the submissions before us, may be noted as under:

“80. Licensee may classify or reclassify the consumer into various categories from time to time as may be approved by the Commission and fix different tariffs and conditions of supply for different class of consumers. The present classification is as follows: -

“ ...

(10) Large Industries This category relates to supply of power to industries with a contract demand of 110 KVA and above but below 25000 KVA, where power is substantially utilised as motive force for industrial production.

(11) Heavy Industries This category relates to supply of power to industries with a contract demand of 25000 KVA and above where power is substantially utilised as a motive force.

...

(15) Industries owning Generating Stations and Captive Power Plants availing Emergency Supply only

This category relates to supply of power to industries with generating stations including Captive Power Plants only for start-up of the unit or to meet their essential auxiliary and survival requirements in the event of the failure of their generation capacity. Such emergency assistance shall be limited to 100 % of the rated capacity of the largest unit in the Captive Power Plant of Generating Stations

...

Reclassification of Consumer

82. If it is found that a consumer has been classified in a particular category erroneously or the purpose of supply as mentioned in the agreement has changed or the consumption of power has exceeded the limit of that category or any order of reduction or enhancement of contract demand has been obtained, the engineer may reclassify him under appropriate category after issuing notice to him to execute a fresh agreement on the basis of the altered classification or modified contract demand. If the consumer does not take steps within the time indicated in the notice to execute the fresh agreement, the engineer may, after issuing a clear seven days show cause notice and after considering his explanation, if any, may disconnect the supply of power.

... ”

5. The first Respondent JSL had entered into an Agreement with the Appellant on 24.08.2005 for supply of electricity under the Large Industrial category (“LI”) which was valid for five years. As noted above, it operates and maintains a 2x125 MW Captive Generating Plant (CGP). By letter dated 13.05.2018, the Odisha Power Transmission Corporation Limited (OPTCL) had allowed JSL to avail 50 MW power at 220 kV under “*Emergency Supply to CGP*” category while keeping volume of 125 MW power as per the regulations. Pursuant thereto, the parties (i.e. the Appellant and first Respondent) had entered into an agreement dated 01.07.2008 under Regulation 80 (15) of the Supply Code in terms of which JSL was entitled to “*Emergency Supply*” up to a demand of 50 MW but not exceeding 30 MU per annum with cap of 4 MU per month. The said agreement dated 01.07.2008 (“*Emergency Supply Agreement*”) was valid for two years and came to be renewed for further period till 30.06.2012.

6. The controversy leading to the impugned order being passed reached the State Commission by Case Nos. 12-14 of 2015, both registered on the applications of JSL, the first invoking its jurisdiction under Section 142 of the Electricity Act, 2003 alleging non-compliance with the OERC Order dated 20.02.2015 in Case No. 92/2013 and 3/2014 and the latter being a Petition under Section 86 (f) and (k) of the Electricity Act, 2003 challenging the action taken by the Appellant requiring JSL to execute an Agreement under LI category, the latter claiming the benefit of the Emergency Supply Category under Regulation 80 (15) of the Supply Code. Prior to the said proceedings, the parties had engaged in several communications with each other, the controversy over drawal pattern having changed having been agitated before the Ombudsman and the State Commission in some proceedings or the other. There is a long narration of the events that occurred in the course of such proceedings. In view of the direction in which we are taking this *lis*, we do not intend capturing the entire history in this Judgment. Suffice it to note that in taking a decision to the above effect, the State Commission took a communication dated 30.04.2015, describing it as “*Final Notice*” as the turning point. We may quote only a few paragraphs of the impugned decision dated 26.02.2018, the same reading as under:

“7. Based on the request of the Parties, the Commission has decided to send a fact finding committee to enquire into the proper classification of the industry for the past period. The fact finding team has submitted their report to the commission and the observation of the team as follows:

a. *The team discussed the matter in detail with the DGM (O&M) in charge of the Grid Sub-station at Duburi and their officials on duty, It is observed that M/s. JSL is drawing power from 400/220 KV Grid sub-station of OPTCL atDuburi through twonumbers of 220 KV feeders, The energy drawal is being recorded in a summation meter installed on 08.12.2015 and billing is being made at present based on the readings of this meter. Further individual meters, based on the reading of which billing was being made earlier i.e. prior to December, 2015 still exist in each feeder. Data/information regarding SMD of the drawal by M/s. JSL through these two feeders was not available at Duburi grid sub-station records. At M/s. JSL switchyard control, drawal is being recorded through individual meters in both the feeders without any summation meter. Thereafter, we had a detailed discussion with the concerned officials of M/s. JSL and NESCO Utility in the office chamber of SE, JajpurRoad Electrical Circle. The views of both the parties during the discussion are taken into record.*

b. *The representative M/s. JSL stated that the emergency power supply agreement was neither terminated nor renewed by NESCO Utility and bills were raised considering M/s. JSL as large industry having CD of 55.55 MVA without any regulatory provision. Hence, the emergency power supply agreement has continued till July, 2015 and from August, 2015, only the new agreement under LI category came into existence. The consumer meter was installed on 08.12.2015 which was the effective date of actual and correct billing under LI category. M/s. JSL has never violated the terms and conditions of emergency power supply agreement.*

c. *Representatives of NESCO Utility have stated that the bills of the consumer have been revised up to June, 2012 based on the order of the Ombudsman-II. In compliance to the directions of the Commission, the utility has submitted all relevant documents to establish that the drawal pattern of the consumer is contradicting Regulation 80 (15) of OERC Distribution (Conditions of Supply) Code, 2004, where the category industry owning generating station/Captive Power Plant (CPP) availability for emergency supply is provided. As per drawal pattern of the consumers it comes under large*

industry. The utility stated that the Commission shall issue directions for regularization of the billing period from July, 2012 to July, 2015 inviting reference to the point 8 of order dated 4.07.2015 of OERC.

d. From the submissions of both the parties we observe that the agreement for “Emergency supply to CGP” was valid till 30.06.2012. After the expiry of the said agreement, power supply to M/s. JSL has been continued without any valid agreement. Both the parties have not initiated any action for renewal of agreement or termination of the agreement. However, a fresh agreement was executed on 21.08.2015 between the parties under large industry category, effective from 01.08.2015 with a CD of 12 MVA.

e. As per the order of the Ombudsman/Commission, NESCO Utility has revised the energy bill up to 30.06.2012 as per the previous agreement for emergency power supply. Both the parties are not having any dispute as far as energy charge is concerned. Since there is no valid agreement from July, 2012 to July, 2015, the dispute on billing was raised regarding the classification of consumer category. A fresh agreement was executed under LI Category which is effective from August, 2015.

f. In this connection, GRIDCO Limited was asked to submit the data/information of month wise SMD for the drawal by M/s. JSL through both the feeders for the period from April, 2012 to 8th December, 2015 with time synchronisation. We analyse the said data received from GRIDCO Energy Billing Centre along with the submission/views of NESCO Utility and M/s. JSL. As per the OERC Distribution (Condition of Supply) Code, 2004 the category of supply depends upon the nature & purpose of supply. As per Regulation 80 (15), the emergency power supply to a CGP is limited to survival requirement/start-up of the unit in the event of failure of their generating capacity. But as far as the drawal pattern of the M/s. JSL is concerned, it is on regular basis not limited to its survival requirement. We are also of the same opinion in line with the findings/ observations of the Ombudsman that the nature and purpose of power supply is contradicting to the recorded/calculated data of the meter and the terms of the agreement so made between the parties. Further, both the parties have not followed the law correctly in taking

appropriate steps for execution of fresh agreement after the period of agreement is over.

g. In the instant case, since the power has been drawn by M/s. JSL on continuous basis and inferred to be used as motive force for its industrial production, the category of the supply may not be classified under the category of “industries owning generating stations and captive power plants availing emergency supply only”. However, it could be classified under the category of “large industry”, but there was no valid agreement exists between the parties during the disputed period for consideration of the contract demand for billing purpose and also no summation meter was available for ascertaining SMD and power factor of the power supply. In view of the above, any one of the following options may be considered by the Commission for resolution of the dispute between the parties.

i. Deemed continuance of the old agreement of emergency supply till July, 2015.

or

ii. The new agreement which was effective from August, 2015 may have retrospective effect from July, 2012.

or

iii. The disputed period may be treated as drawal under LI category considering the SMD as submitted by GRIDCO.

or

iv. Any other option as deemed fit and decided by the Commission.

...

14. Thus the consumer is at liberty to choose the classification of category initially, consistent with the Regulation depending upon his own requirement and purpose. If the engineer of the licensee subsequently finds from observations/ records that the initially agreed category requires alteration / modification, he has to proceed in the manner provided in the Regulation 82 of the Supply Code initiating the action by appropriate notice to the consumer.

15. We observe that the licensee has unilaterally proceeded on to bill the consumer from April, 2012 onwards in another category during currency of the prevailing agreement without following the procedure mentioned in the Regulations. The existing agreement at that point of time was not renewed due to disagreements over the category till 01.08.2015. We are of the view that, once a procedure is prescribed for some actions in the statute, it has to be in that way only; not in the other way.

16. However, in accordance with the regulations, the final notice to change the category appears to have been issued to the petitioner-consumer by the licensee much later on 30.04.2015 and the agreement has been signed in the new agreed category w.e.f. 01.08.2015.

17. Therefore, considering all the factors mentioned above, we are of the opinion, that the transaction for the period from 01.07.2012 to 31.07.2015 should fall in the category of "Emergency Supply to CGP" under Regulation 80(15) of the Supply Code which existed on 30.06.2012."

7. The communication dated 30.04.2015 referred to in the afore-quoted Paragraph 16 of the impugned decision was sent on behalf of the appellant to JSL and, to the extent relevant, reads thus:

"Sub: Revision of energy bill for the period April'12 to June'12 and notice for execution of Agreement,

Ref:- Order dated 20.02.2015 of OERC in case no 92 of 2013 and 03 of 2014.

Sir,

In obedience to the above referred order of the Commission your energy bill during validity period of Agreement, i.e. from April'12 to June'12 are revised in accordance with Order of OMBUDSMAN-II, i.e.

under normal emergency supply category (without referring to the additional clause under special agreement which require billing under LI category under violated condition) and considering accumulated DPS thereon up to March'15 an amount of Rs.6,50,72,048.80 withdrawn from the outstanding energy dues against your company. You are hereby noticed to pay the remaining outstanding amount of Rs. 43,89,76,236.20 up to March'15 less already paid during the month of April'15 within 15 days of this letter, i.e. on or before 15th May 2015.

Further, the validity period of the earlier agreement has already been expired on 30th June 2012 and the Commission has already disposed of the case filed before him for hearing. You have drawn power irrespective of failure of your power plant which is coming under ambit of "Large Industrial Category". Hence notice is hereby served upon you for execution of an agreement within 15 days of issue of this letter under large Industrial category with retrospective effect from 1st July'2012.

As per order dated 22.11.2013 of OMBUDSMAN-II a separate letter for installation of summation meter is being served upon you for your information and necessary action...."

8. The Appellant took the matter back to the State Commission invoking its review jurisdiction, *inter alia*, pointing out that the notice in terms of Regulation 82 (as quoted above) had been issued earlier on 20.12.2012. Upon perusal of the said document dated 20.12.2012 emanating from the office of the Appellant, it being addressed to the first Respondent, it is seen that it was in continuation of a previous notice (for show cause) issued on 21.11.2012. Both the said documents have been placed before us, it is necessary to extract the same. They read as under:

***"OFFICE OF THE EXECUTIVE ENGINEER
JAJPUR ROAD ELECTRICAL DIVISON
JAJPUR ROAD***

No. 7239

Dated: 21.11.12

To

M/s. Jindal Stainless Limited

*Kalinga Nagar Industrial Complex
Danagadi, Jajpur*

Sub – Notice to show cause

Take notice of the fact that, from the drawl pattern of M/s Jindal Stainless Limited, it is observed that the power imported is not utilized as an emergency assistance in the event of the failure of the generation capacity, rather utilized on a regular basis. In the months of July'12, Aug'12 and Sep'12, the Maximum Demand has been 47 MVA to 53 MVA. Thus, thereby the terms of availing such energy supply agreement and regulation of OERC have been violated. Hence, it is felt that you are no more entitled to continue with the same.

Hence, you are called upon to explain within 15 days, on which grounds further agreement under Emergency Supply to CGP will be executed with you i.e. M/s JSL and why steps will not be taken under regulation 106 of OERC Distribution (Condition of Supply Code'2004 for breach of the clause of agreement, failing which such action as deemed proper in law and regulation will be taken exparte.

Yours faithfully,

Sd/-

*Executive Engineer,
JRED, Jajpur Road”*

9. Subsequent communication dated 20.12.2012 is in continuation of the above-mentioned communication, reading thus:

“No: 7736

Dt:20-12-12

To

*M/s. Jindal Stainless Limited,
At-Kalinganagar Industrial Complex,
Po. Danagadi, jajpur*

Sub- Notice to Execute fresh Agreement under Large Industry Category

Take notice of the fact that, show cause notice was served to you vide Notice No. 7239 dated 21.11.12. Honouring the direction of the Ld. Ombudsman, no coercive action was taken against you on non-payment of the claimed dues. However, even after the expiry of the notice period, you have not turned up to explain the drawl pattern of M/s. Jindal Stainless limited which shows you do not have any ground to put against the observation.

Therefore, you are hereby called upon to execute agreement under Large Industry category with effect from 1.7.2012 within 15 days failing which such action as deemed proper in law and regulation will be taken exparte. Decision of the prior period will be taken after finalisation of the case No. OM-II(N)-72 of 2012

Yours faithfully,

*Sd/-
Executive Engineer,
JRED, Jajpur Road”*

*C.C. to The Asst. General manager (Elect.), Electrical Circle,
Jajpur Road
C.C. to The Ombudsman-II (OERC, Qrs. No. 3R-2(S): gridco
Colony, Bhoinagar, Bhubaneswar
C.C. to The Managing Director, NESCO for kind necessary
action for execution of agreement under Large Industry
category.*

10. The State Commission while rejecting the request for review observed that it had taken into consideration all the relevant materials including the various communications. We must point out here that we do not find any discussion whatsoever based on the

import and effect of the afore-quoted communications of November and December 2012 in the impugned order.

11. It must be noted here that, as observed in Para 7(g) of the impugned order, the State Commission had considered it appropriate to have an independent view, more for advice, taken from a fact finding Committee that had been constituted, the report of the said Committee having virtually confirmed the case of the Appellant herein that there had indeed been drawal of power by JSL “*on continuous basis*” used for “*its industrial production*”, it being not in a case that could be classified as one concerning “*industries owning generating stations and captive power plants availing emergency supply only*”.

12. For completion, we also note, as also captured in Para 16 of the impugned order quoted above, that the parties have since signed a new agreement which came into effect on 01.08.2015 where-under the JSL appears to be drawing power from Appellant in the Large Industry Category with contract demand of 12 MVA only.

13. Against the above backdrop, it is the classification of JSL for the period 01.07.2012 to 31.07.2015 which is the issue of controversy that needs to be resolved. If the contentions of the Appellant in such regard were to be upheld, as a natural consequence the question of determining the differential in the applicable tariff would also arise in as much as the Appellant had raised invoices under the re-

classification of JSL as LI category which was resisted by JSL on various grounds including on the plea of the extent of the contract demand.

14. The communications dated 21.11.2012 and 20.12.2012 which have been relied upon by the Appellant seem to have been glossed over. Having heard the learned counsel on both the sides, we do find merit in the contention that the State Commission may have fallen into error taking a certain view treating the letter dated 30.04.2015 as the only relevant material for purpose of examining as to whether the procedure envisaged under Regulation 82 of the Supply Code had been complied with or not.

15. The learned counsel on all sides agreed that there is no standardised format prescribed for a notice in terms of Regulation 82 of Supply Code to be issued. The communications of November and December 2012, in our reading, substantially complied with all the pre-requisites of notice envisaged under Regulation 82. We must add here that it is the contention of the JSL, and we agree with the same, that its response to the said notices of November and December 2012 must also be kept in view. In our view, the Commission could and should not have overlooked this relevant part of the material before reaching a conclusion adverse to the claim of the Appellant about it having legitimately invoked the prerogative conferred upon it by Regulation 82 to re-classify JSL as a consumer under LI category instead of the Emergency Supply category for which the parties had executed the agreement.

16. We may also note here that it is the submission of JSL that there was no summation metering system available and the effect of this during the relevant period was also required to be examined by the State Commission to determine if JSL would fall under the category of large industry or not. We do not wish to express any opinion on this contention of JSL leaving it to be examined for its worth and effect on the main issue of reclassification by the Commission.

17. In the foregoing facts and circumstances, with the consent of the Appellant and the first Respondent, we set aside the impugned order, since it suffers from the vice of perversity, material documents having been overlooked. We remit the matter involving the issue of reclassification to the State Commission for a fresh decision. Needless to add, if the contentions of the Appellant about a case for reclassification under Regulation 82 of the Supply Code are upheld by the State Commission, it shall also proceed to examine as to how the differential in the applicable tariff for the period in question is to be determined and recovered, and issue all necessary directions in such regard as well.

18. The State Commission will hear all parties afresh, not feeling bound by the view taken earlier and pass the requisite order, in accordance with law expeditiously, preferably within three months of this Judgment. While the State Commission is awaited to render its fresh decision in terms of the above direction, neither side will take any

precipitative action *vis-a-vis* the pending invoices issued by the Appellant and the proceedings taken out in that regard by JSL. The parties are directed to appear before the State Commission on 13.12.2021.

19. The Appeal is disposed of in the above terms.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERRING ON THIS 30thDAY OF NOVEMBER, 2021.**

**(Sandesh Kumar Sharma)
Technical Member**

**(Justice R.K. Gauba)
Judicial Member**

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REPORTABLE/NON-REPORTABLE
mk/tpd