



Review Petition No. 19 of 2005(M)

In the matter of:

Review of tariff order dated 15.06.2005 in P. No. 05 of 2005.

M/s. Jayaswal Neco Ltd. ... Petitioner
Vs.
Chhattisgarh State Power Distribution Company Ltd. ... Respondent

**Present: Narayan Singh, Chairman
Arun Kumar Sharma, Member**

**Order
(Dated 26.09.2017)**

Factual Matrix

Retail tariff order for the year 2005-06 of erstwhile Chhattisgarh State Electricity Board was passed on 15.06.2005 in petition No. 05 of 2005. The petitioner, M/s Jayaswals Neco Ltd. sought review of this tariff order [petition No. 19 of 2005(M)]. Order in this review petition was passed on 5/10/2005. One of issue raised in this review petition was on the principle of levying minimum charges.

2. According to review petitioner, levy of minimum charges was grossly unfair in the case of captive power plants as such the consumers were already liable to pay the demand charges in respect of the demand contracted by them with the Board. While in its order dated 05.10.2005, the Commission observed that levy of such minimum charges on load factor was in fact a tariff shock for the consumer which had not been intention of the Commission and further added that the same had not been done on realistic basis. The review petition filed was partly allowed. According to the main tariff order, consumers availing supply at 220/132 kv were required to pay minimum monthly payment of charges of the unit equivalent to 30% load factor on the contract demand plus demand charges on the billing demand for the month irrespective of whether any energy is consumed during month or not. In the review tariff order for the petitioner, petition No .19 of 2005(M), load factor limit for monthly minimum charges was reduced from 30% to 10%.

3. Aggrieved by the order, the petitioner filed an appeal No. 186 of 2005 before the Hon'ble APTEL challenging the Commission's order dated 05.10.2005 passed in petition No. 19 of 2005.

4. During the pendency of this appeal, petition No. 17 of 2005 (M) "In the matter of power purchase and related dispensation in respect of Captive Generating Plant" was filed before the Commission, in which petitioner was also party. In this petition No. 17/2005, one of the relief sought was regarding set off on contract demand (CD) of the captive generating plant holder, captive user and non-captive user availing power from the captive generating plant through open access. In this petition No. 17 of 2005, the Commission vide order dated 06.02.2006, held that:

*"6.6 In view of the above the Commission decides that for the present no set off on CD may be permitted. The Commission will review the position when the intra-State ABT regime is fully operational and the Balancing and Settlement Code is fully implemented. **The Commission, however, decides that both the captive as also the non-captive consumers of the CPPs, while paying demand charges including tariff minimum charge, will not be required to pay monthly minimum charges on consumption considering the fact that their requirement of power is to be met from the CPP only and they may take very little power from the licensee/CSEB. Thus such consumers, whether EHV or HT, shall be required to pay tariff minimum charges on the contract demand or the recorded maximum demand, whichever is higher only. This dispensation will, however, be available to these captive/non-captive consumers who avail power both from a CPP and the licensee, on the condition that the supply from the CPP is more than 50% of their requirement in terms of unit consumption. Every captive and non-captive consumer will have to declare that they will be drawing more than 50% of their monthly consumption from the CPP failing which it will be presumed that their power requirement from the CSEB/licensee is more than 50% and they will not get the benefit of waiver of monthly minimum charge on consumption.**"*

5. A review petition, petition No. 16 of 2006 (M) was filed by CSEB seeking review of Order dated 06/02/2006 passed in Petition No. 17 of 2005 (M). This review petition, petition No. 16 of 2006 was disposed off on 29/09/2006. The matter pertaining to monthly minimum charges was dealt in this review petition also and it was concluded that there shall be abolishment of minimum charges for captive users and subsequently the petitioner herein who was also a petitioner in Petition No. 17 of 2005 (M) did not have to pay minimum charges.

6. The CSEB approached to Hon'ble APTEL in Appeal No. 270 of 2006 against order passed by Commission in review order 29/09/2006. Hon'ble APTEL vide its decision dated 21/02/2011 settled the issue and stated that-

"38. SUMMARY OF FINDING

I. The 1st issue is the waiver of minimum energy charge. The Captive Consumers are different from other consumers as time Captive Consumers will normally take electricity only from Captive Power Plant. The Captive consumer will be taking electricity from grid only in exceptional circumstances, that too, when the Captive Power Plant is under an outage. The Captive consumers have been already paying demand charges for the contract demand as is applicable to all the other consumers. That apart, the transmission and the wheeling charges are being paid by the Captive Consumer to compensate the fixed cost incurred by the Appellant. The Electricity Act, National Electricity Policy and the National Tariff Policy place Captive Consumer in a separate category.

Therefore, the Captive Consumers of the Captive Power Plant have to be treated as different categories of consumers of a Licensee. Therefore, the finding given by the State Commission to waive the minimum energy charge to be paid by Captive Consumers of the Captive Power Plant is perfectly justified."

7. Petitioner submitted that the decisions of Commission and Hon'ble APTEL is crystal clear that in case of captive consumers minimum charge should be waived and it became settled for once and all that there will be abolishment of minimum charges in itself and question of load factor, thus, was struck down.

8. Meanwhile an appeal No. 186/2005 which was filed by petitioner before the Hon'ble APTEL challenging the Commission's order dated 05.10.2005 in petition No. 19/2005, was dismissed by the Hon'ble Appellate Tribunal vide judgment and order dated 05.04.2006. Petitioner filed review petition No. AFR No. 1208 before the learned Appellate Tribunal for review of said judgment and order dated 05.04.2006. Hon'ble Appellate Tribunal vide its order dated 17.10.2006 dismissed the review petition AFR No. 1208.

9. M/s JNIL filed civil Appeal No. 1368/2007 before the Hon'ble Supreme Court against the order dated 05.04.2006 and order dated 17.10.2006 passed by the Hon'ble Appellate Tribunal for electricity after being aggrieved by the judgements of the Hon'ble Appellate Tribunal. The Hon'ble Apex Court allowed the appeal and held that the matter of minimum charges for the financial year 2005-2006 has to be determined by the Commission on the basis of factual score keeping its own analysis that had been made while dealing with the same issue in Petition No. 17 of 2005 (M).

Petitioner Submissions

10. The petitioner stated that the issue pertaining to minimum charges is succinctly clear and both the Commission and Hon'ble APTEL has expressed their clear views in abolishment of the same in Petition No. 17 of 2005 (M) and in review and appeal thereafter. Thus, there is no confusion as to the fact and position of minimum charges that they are to be abolished in case of a captive consumer.

11. It is submitted that the Hon'ble Supreme Court remanded back the matter for fresh determination specifically directing the Commission to keep the analysis of Petition No. 17 of 2005 (M) in mind while determining the present petition. It sufficiently proves that the levy of minimum charges on the basis of load factor was untenable and later on the Commission itself disregarded the same in Petition No. 17 of 2005 and also Hon'ble APTEL thereof. Thus is also clear that the petitioner has to determine the tariff in relation to minimum charges in light of Petition No. 17 of 2005 and hence in such a scenario aid from tariff order dated 05/06/2005 cannot be taken as put forth by Respondent in its preliminary submission as the same has to be reviewed in petitioner's case.

12. It is also stated that there is no iota of doubt that the Electricity Act, 2003, National Electricity Policy and the National Tariff Policy place Captive Consumers in a separate category. Also Captive consumer has been already paying demand charges for the contract demand as is applicable to all other consumers. As a matter of fact, the transmission and wheeling charges are being paid by the Captive Consumers to compensate the fixed cost incurred by the Respondents. Therefore, the Respondent is restrained from putting forth that levy of minimum charges is for recovery of some part of fixed cost.

13. That the Hon'ble Supreme Court of India has diligently taken the view that the only issue of minimum charges in Petition No. 19 of 2005 has to be revisited and also observes that at Para 12 of its order that -

"12. It is the admitted position that the Commission while dealing with Petition No. 17 of 2005 has returned a categorical finding that the likes of the appellant are not liable to pay the minimum charges. However, as we find, it is not a determination in absoluteness. It depends upon the scrutiny and analysis of the factual score. To elucidate, abolition of minimum charges is not stated as a principle of law but has been so adjudicated on the basis of certain conditions precedent being satisfied. Therefore, the factual score, aelination thereof and the ultimate analysis thereon constitute the structural pillar of the discussion."

That this factual score that the Hon'ble Apex Court talks about is in relation to the supply of power from CPP as has been put forth in Petition No. 17 of 2005,

which states that, abolition of minimum charges shall be available on a condition that supply from the CPP should be more than 50% of their requirement in terms of unit consumption.

14. It is submitted that in financial year 2005-06, the petitioner was a captive consumer and was taking power from CPP and therefore subsequently the minimum charges were abolished for the petitioner as well. Also, the same may be corroborated by the fact that the Petitioner was one of the petitioners in Petition No. 17 of 2005, which matter was related to power purchase and related dispensation in respect of Captive Generating Plant. The units of consumption in F.Y. 2005-06, if required, may be duly verified by the Chief Electrical Inspector.

15. The petitioner requested that the minimum charges be abolished in case of Petitioner in light of Hon'ble Supreme Court's Order dated 22/02/2017 and that of Commission's order in Petition No. 17 of 2005 (M) for which the petitioner shall always be dutiful to the Commission.

Respondent Submissions

16. Respondent submits that the instant matter relates to review of tariff order passed by Commission on 15.06.2005 in petition No. 5 of 2005 wherein tariff minimum for respondent category HV-5 carried monthly minimum comprising of demand charges on billing demand plus energy charges on units equivalent to 30% load factor on contract demand, irrespective of whether any energy is consumed during the month or not.

17. It is submitted that petitioner filed review petition No. 19 of 2005 being aggrieved of aforesaid tariff minimum charges, wherein an order dated 05.10.2005 has been issued by the Commission providing a relief on energy charges equivalent to 10% load factor on contract demand, with other billing conditions of tariff minimum unchanged.

18. It is submitted that Hon'ble Appellate Tribunal upheld the Commission's order dated 05.10.2005 vide its order 05.04.2006 in Appeal No. 86/2005. Thereafter Hon'ble Apex Court has allowed the appeal against the order passed by Tribunal and has set aside the orders of Tribunal as well as Commission vide its order dated 22.02.2017 in Civil Appeal No. 1368/2007 and has further remitted the matter to Commission for determination on the basis of the factual score keeping its own analysis that has been made while dealing with the grievance put forth in petition No. 17/2005. It has been further directed that for this determination every aspect relatable to analysis of Order dated 06.02.2006 passed in petition No. 17/2005 has to be considered.

19. It is further submitted that order dated. 06.02.2006 in petition No. 17/2005 carves a special dispensation to captive/non captive consumers of CPPs to pay tariff minimum charges on contract demand and shall not be obliged to pay monthly minimum charges on consumption. Analysis behind such conclusion would have to be necessarily considered to deal with the petitioner's grievance as such tariff minimum billing to electricity consumers during same period stipulates demand charges plus energy charge on 10% load factor on contract demand.

20. It is submitted that in light of the above levy or non levy of tariff minimum on load factor basis to petitioner during 2005-06 i.e. currency period of tariff order dated 15.06.2005 would have to be considered on the scrutiny of following submission:-

- i) That tariff minimum charges is levy of demand charges plus an element of energy charge depending upon percent of load factor on contract demand to almost all industrial/non industrial consumer drawing supplying at 132/220 KW i.e. EHV consumers.
- ii) A conscious decision to continue with philosophy of prevailing tariff minimum to petitioner's consumer category in tariff order dtd. 15.06.2005 for recovery of some part of fixed cost (Clause 6.9 of order dtd. 15.06.2005).
- iii) That terms & conditions of HT agreement under repealed laws stipulate to pay annual minimum charges even though consumer may not have consumed electricity during that period. Clause No. 21 (b) read together with clause 19 entitled Electricity Board to realize minimum guarantee as prescribed in tariff time to time.
- iv) That legal background prevailing at the time of issuance of tariff order dtd. 15.06.2005 would also be taken for consideration wherein sub delegated legislation under Electricity Act 2003 were yet to be enforced and hence in light of proviso under section 61 of Electricity Act 2003 the tariff determined by the Commission would rightly to observe the terms & conditions of the repealed law. Relevant proviso is submitted for ready reference:-

"Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

- v) Technically electricity cannot be stored in quantity but must have to be generated as it is required, hence total cost of electricity supply depends not only upon total output of source a units or KWH but also upon capacity of plant required to meet the combined maximum demand of all consumers. Resultantly it has two components first as running cost and second as standing cost. Recovery of standing cost was based on tariff minimum guarantee for HT consumers.
- vi) Principally suitable compensation to distribution licensee for non use of the service is to be effectively considered. Accordingly Commission has reasonably differentiated between consumer of licensee and captive/non captive consumer of CPP for purpose of tariff minimum billing on energy in its order dtd. 29.09.2006 in petition No. 16/2006. The reasons have been demonstrated in details at para No. 7, 9 & 12 of this Order. This petition is a review matter filed by CSEB against order of Commission in petition No. 17/2005. It seems that the contents of this order were not placed for consideration before Hon'ble Apex Court.

Commission's View:

21. Looking to facts of the case and the Hon'ble Supreme Court observations and decision, the principle of levying minimum charges as specified in petition no 17 of 2005 shall be made applicable for petitioner for the period tariff order dated 15/06/2005 passed in petition No. 5 of 2005 was effective. Tariff order dated 15/06/2005 for the year 2005-06 was effective from 01/07/2005 to 30/09/2006. Accordingly, if the petitioner fulfils the requirement of captive generating plant and captive user for the financial year 2005-06 and 2006-07 as per Electricity Rules,2005 and if it has retail supply agreement with CSPDCL (erstwhile CSEB), the petitioner while paying demand charges including tariff minimum charge, will not be required to pay monthly minimum charges. The petitioner shall be required to pay tariff minimum charges on the contract demand or the recorded maximum demand, whichever is higher only. So the retail tariff bill of petitioner for the period 01/07/2005 to 30/09/2006 be revised in the light of above decision and excess recovery, if any, during this period be returned back to petitioner by 15/11/2017. It is clarified that this order is specifically for this case only.

**Sd/-
(ARUN KUMAR SHARMA)
MEMBER**

**Sd/-
(NARAYAN SINGH)
CHAIRMAN**