APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NO. 70 OF 2019 &
IA NO. 1640 OF 2019 & IA NO. 828 OF 2020

Dated : 12th August, 2021

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

IN THE MATTER OF :

M/s Jindal Poly Films Limited
28 KM Stone,
Nasik-Igatpuri Road
NH-3, Village Mundhegaon
Tal-Igatpuri, District Nashik
Maharashtra – 422403 .... **APPELLANT**

Versus

1. **Maharashtra Electricity Regulatory Commission**
Through its Secretary,
World Trade Centre No. 1,
13th Floor, Cuffe Parade
Mumbai – 400005.

2. **Maharashtra State Electricity Distribution Company Limited**
Through its Chief Engineer (Commercial),
Prakashgad, 4th Floor, Andheri (East),
Mumbai – 400052. .... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Pardeep Dahiya
Ms. Rhea Luthra

Counsel for the Respondent(s) : Mr. Udit Gupta
Mr. Ashish Singh
Mr. Anup Jain
Ms. S. Rama **for R-2**

J U D G M E N T

PER MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The present Appeal is being filed under Section 111 (1) of the Electricity Act, 2003 against Order dated 28.11.2018 (hereinafter referred to as **"impugned order"**) passed by the Maharashtra Electricity Regulatory Commission (for short "**MERC/State Commission**").

2. The facts that led to filing of this Appeal, in brief, are as under:

3. The Appellant - Jindal Poly Films Limited is a consumer of Respondent No. 2-Maharashtra State Electricity Distribution Company Limited (for short "**MSEDCL"**). One of the units of the Appellant, namely, Mundhegaon Unit in the State of Maharashtra had been availing bilateral open access power from August 2015 to January 2017.

4. The Appellant procures open access from the following four plants:

S. No.	Plant Location/ Consumer No.	Open Access Duration
1.	JSW Energy Limited, Ratnagiri	August 2015 to December 2015
2.	JSW Energy Limited, Ratnagiri	January 2016 to February 2016
3.	Adani Power Limited, Mundra	March 2016 to May 2016
4.	Jindal India Thermal Power Limited	June 2016
		July 2016
		August to November 2016
		December 2017
		January 2017

5. According to Appellant, as per the directions of the State Commission, it has been paying open access charges, such as transmission charges, wheeling charges, cross subsidy and additional charges. Despite paying all the open access charges and maintaining the power factor of Respondent No. 2 to unity, Respondent No. 2 has denied PFI to the Appellant. The total claim amount for the plant as claimed by the Appellant by letter dated 24.04.2018, which was denied by Respondent No. 2 is as under:

Plant Location/CN	Period of Partial OA	Claim Amount

HT Consumer No. 052789010129	August 2015 to January 2017	Rs. 3,36,68,624/-

6. Since the PFI has not been allowed by Respondent No. 2 on the open access charges paid by the Appellant as seen from the energy bills for the power availed through open access from different sources, the Appellant filed Petition No. 173 of 2018 before the State Commission. However, the State Commission by the impugned order rejected the Appellant's claim for PFI. Hence, the present appeal.

7. According to the Appellant, as far as the incentives are concerned, no PFI has been provided to the Appellant despite maintaining the power factor to unity by investing in the capacitor banks. In terms of the DOA Regulations 2016, framed by the State Commission on open access, which govern the open access framework within the State of Maharashtra, mandates Respondent No. 2 to provide the power factor incentive/penalty to open access consumer. Clause 16 of Connection Agreement under Regulation 16 of the MERC (Distribution Open Access) Regulations, 2016 is relevant, in this regard. Regulation 16.3, which is a part of the "connection agreement" not only governs the generating station/licensee but also the consumers. In this regard, the definition of "connectivity agreement" as envisaged under section 2.1(13) of the DOA Regulations, 2016 is relevant.

8. Appellant further contends that it is clear that the 'connection agreement' is also applicable to a distribution licensee and a consumer. Definition of 'consumer' under Section 2(15) of the Electricity Act, 2003 (hereinafter referred to as **"the Act"**) includes both normal consumer and the open access consumer under the distribution licensee.

9. Appellant further contends that Regulation 16.3 of the Connection Agreement under the relevant regulation of the DOA Regulations, 2016 provides that the average power factor of the distribution licensee should be in accordance with the relevant orders of the State Commission. The State Commission in all its previous Multi-Year Tariff orders had approved the PFI.

10. According to the Appellant, the Commission by the impugned Order, rejected the Appellant's claim for PFI, despite the fact that the State Commission in its earlier decisions has clearly held that even the open access consumers are entitled to PFI or shall be levied with Power Factor Penalty, as the case may be. Moreover, for the past periods, there may be adjustments on the same along with applicable interests. The said order of the State Commission, dated 28.11.2017, in Case No. 110 of 2017 was challenged before this Tribunal by the distribution licensees. However, the Tribunal denied to grant any stay on such directions of the State Commission.

11. The PFI shows nothing but how efficiently is the power/electricity system is being used. The objective behind providing the consumers with a PFI is to ensure reduction in system losses, for which necessary infrastructure has been developed with huge investment. Although the open access consumers do not source power from the distribution licensee, yet they use the distribution system of the licensee for wheeling of open access power, which ultimately helps the distribution licensee in improving their power factor to unity.

12. The power drawn on lower power factor causes higher system losses and thus causing loss to the distribution licensee. The idea behind providing higher PFI is to encourage the consumer to maintain high power factor and to minimize the system losses.

13. According to Appellant, they used the distribution system of Respondent No. 2 for wheeling of the open access power. The Appellant also contributed for reduction in system losses by maintaining power factor to unity, for which necessary infrastructure has been developed. In the event the consumers are not given any incentive to maintain the power factor, and the distribution losses would have gone up considerably, then distribution licenses would have to take corrective measures to reduce network losses.

14. They further contend that in another decision of the State Commission dated 23.07.2018 in Case No. 136, 137, 150, 151 and 158 of 2017, the PFI was denied to open access consumers on the same reasoning as mentioned above. However, the said order was challenged by one such open access consumers before this Tribunal, under DFR No. 3440 of 2018.

15. Being aggrieved by the impugned Order dated 28.11.2018 passed by the MERC in Case No. 173/2018, the Appellant has filed this appeal seeking the following reliefs:

"(a) Set aside the impugned order 28.11.2018 passed by the State Commission in Case No. 173 of 2018;

(b) Hold and direct Respondent No. 2 to pay the Appellant the amount of PFI as claimed under Para 7 (J) of the present appeal along with the applicable interest; and

(c) Pass such other Order/s as may be deemed just and proper in the facts and circumstances of the case."

16. Based on the above pleadings, the following questions of law arise according to Appellant:

"A. Whether the impugned order passed by the State Commission is justified in law by holding that no PFI can be provided to open access consumers since they no longer are consumers of Respondent No. 2 i.e., the State Distribution Licensee, MSEDCL?

B. Whether the impugned order passed by the State Commission is justified in law by holding that once the consumer becomes an open access consumer, he can no longer be treated as a direct consumer of the State Distribution Licensee and avail any benefits thereof?

C. Whether the State Commission while passing the impugned order has ignored the intent of legislature behind providing the PFI to its consumers and has therefore violated Section 45 of the Electricity Act, 2003?

D. Whether the impugned order passed by the State Commission is justified in law by holding that since MSEDCL has neither provided PFI nor levied power factor penalty on its open access consumers ever, therefore they should continue with the same?

E. Whether the State Commission while passing the impugned order has ignored its previous tariff orders?

F. Whether the State Commission while passing the impugned order has ignored the Judgments passed by this Tribunal on the same issue?"

17. We have heard learned counsel appearing for the Appellant and learned counsel for the Respondent at considerable length of time and we have carefully gone through their written submissions/arguments and also taken note of the relevant material available on record during the proceedings. On the basis of the pleadings and submissions available, the following issue emerges in the instant Appeal for our consideration:-

> ***"Whether in the facts and circumstances of the case, the State Commission was justified in holding that PF Incentives/Penalty will not apply to power sourced through open access."***

OUR ANALYSIS AND OPINION

18. The learned counsel for the Appellant submitted that the State Commission has erred in ignoring the Judgment dated 14.11.2013 passed by this Tribunal in Appeal No. 231 of 2012. This Tribunal vide its judgment dated 14.11.2013 in Appeal No. 231 of 2012 has in unequivocal terms in para 33, held as under:

> *"33. … 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 that very purpose to provide higher power factor 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 on pure technical 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."

19. Learned counsel for the Appellant further submits that in view of the law laid down by this Tribunal in the above-said case, the State Commission is duty bound to follow the law and ought to have allowed the PFI to the Appellant, but the same had been wrongly and arbitrarily denied by Respondent No.2-MSEDCL. The above Judgment dated 14.11.2013 passed by this Tribunal in Appeal No. 231 of 2012 is squarely applicable to the Appellant's case.

20. Learned counsel for the Appellant further submitted that the State Commission has erred in accepting the incorrect submission of MSEDCL that it has not been extending any such incentive to the Open Access consumers using its distribution network nor levying any penalty**.** It is

submitted that the State Commission has completely ignored the reply filed by Respondent No.2-MSEDCL in another case filed by the Appellant being Case No. 173 of 2018, whereby the contention of Respondent No. 2 was as under:

> *"In case the Open Access Consumer does not maintain the high Power Factor then it would be liable to the Reactive Energy penalty as will be determined by the Commission. Hence the Open Access Consumer will be liable to any penalty as envisaged under law".*

21. This is despite the fact that the said contention of MSEDCL was reproduced by the State Commission in para 4.10 of the impugned order dated 28.11.2018.

22. Thus, from the very assertion of MSEDCL, the Appellant is liable to pay the penalty, if it fails to maintain the high power factor. Such an occasion did not arise in the Appellant's case as it has been maintaining the high power factor and therefore, rightly claimed the power factor incentive for that, which was denied by Respondent No.2-MSEDCL, and therefore, the Appellant approached the State Commission. However, the impugned order, which was passed by State Commission is based upon erroneous understanding of incorrect and contradictory facts submitted by Respondent No.2-MSEDCL.

23. Learned counsel for the Appellant vehemently submitted that the State Commission failed to appreciate that there cannot be any differentiation amongst consumers availing power from Respondent No.2-MSEDCL and through Open Access as per the provisions of the Act and MERC (Distribution Open Access) Regulations, 2016.

24. It is further submitted that the State Commission has erred in appreciating that the denial of PFI to the Appellant is in violation of Article 14 of the Constitution of India as there cannot be any differentiation amongst consumers availing power from Respondent No.2-MSEDCL and through Open Access as per the provisions of Electricity Act, 2003 (hereinafter referred to as **"Act"**) and MERC (Distribution Open Access) Regulations, 2016. The action of MSEDCL in denying the PFI to Open Access consumers goes against the very spirit of providing Open Access under the Act. The very object of the Act was for taking measures conducive to development and supply of electricity **promoting competition therein, protecting interest of consumers** etc.

25. Learned counsel further submitted that the definition of "Open Access" under Section 2(47) of the Act means "the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer

or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission".

26. It is pertinent to mention that Clause 16.3 of the Connection Agreement under the relevant regulation of the Distribution and Open Access (DOA) Regulations, 2016 provides that the Distribution Licensee, may require the 'Applicant', within reasonable time period, which shall not be less than 3 months, to take such effective measures so as to raise the average power factor or control harmonics of his installation to a value not less than the prescribed norm, provided that the Supply Distribution Licensee may charge penalty or provide incentive for low/high power factor and for harmonics, in accordance with relevant orders of the Commission.

27. It is submitted that 'Applicant' under the Connection Agreement means such person, who has made an application for Grant of Connectivity and/or Open Access to the Distribution System of a Distribution Licensee in accordance with these Regulations. Even the MYT orders issued by State Commission do not make any differentiation in the matter of grant of PFI and these only provide that whenever the average Power Factor is more than 0.95, an incentive shall be given at the rate of the percentages of the amount of the monthly bill prescribed in those orders. Similarly, the Power Factor Penalty may be imposed whenever the

average PF is less than 0.9. Thus, the Appellant, being the Applicant for Open Access, was liable for penalty or to be provided the incentive based upon low/high power factor and cannot be discriminated with in the matter of PFI with those consumers availing power from MSEDCL. The definition of 'Applicant' does not make any differentiation or even remotely suggest that connection agreement detailing grant of PFI only governs the generating stations/Licensee and not a consumer. Therefore, any discrimination or classification as sought to be made by Respondent No.2-MSEDCL and as approved by the State Commission in the Impugned Order is arbitrary, discriminatory and bad in law as the same being contrary to the spirit of the Act of 2003 and MERC (Distribution Open Access) Regulations, 2016 and would also be hit by Article 14 of the Constitution of India.

28. Summing up his arguments, learned counsel for the Appellant emphasized that in view of the above, it is prayed that this Tribunal may be pleased to set aside the impugned order dated 28.11.2018 passed by the State Commission in Case No.173 of 2018 and further hold and direct Respondent No. 2 to pay the Appellant the amount of PFI along with interest as claimed by the Appellant.

29. *Per contra,* learned counsel for Respondent No. 2 submitted that assuming without admitting that "Power Factor Incentive on Open Access"

is applicable, the same cannot be made applicable with retrospective effect. MERC vide its Order dated 03.01.2013 passed in Case No. 8 of 2012, Case No. 18 of 2012, Case No. 20 of 2012 and Case No. 33 of 2012 in unequivocal terms has clearly held that "Power Factor Incentive" is only applicable to consumers of MSEDCL on the net energy supplied by MSEDCL and nothing beyond that.

30. The said Order was passed in the matter of "directing Maharashtra Electricity Distribution Company Ltd. to issue Open Access approval in accordance with MERC (Distribution Open Access) Regulations, 2005". The said Order has attained finality since the said order has never been challenged. After the said Order dated 03.01.2013 passed in Case No. 8 of 2012, Case No. 18 of 2012, Case No. 20 of 2012 and Case No. 33 of 2012, the MERC has passed several Tariff Orders wherein the said issue has never been raised nor has the issue been decided to the contrary. Said Tariff Orders have attained finality on the said issue. MSEDCL has followed a consistent stand of neither charging any penalty nor providing any incentive on power sourced through open access. The Appellant had to file a Petition before MERC seeking a clarification, in which the MERC has clarified against the Appellant.

31. The Appellant filed a Petition only after the MERC passed an Order dated 28.11.2017 in Case No. 110/2017 "***Mumbai International Airport***

Pvt. Ltd Versus The Tata Power Company Limited (Distribution)", which was decided by the MERC against "Tata Power Company Limited (Distribution)" in the specific facts and circumstances of that case.

32. In Appellant's case, MERC has clearly distinguished its Order dated 28.11.2017 in Case No. 110/2017 (Mumbai International Airport Pvt. Ltd Versus Tata Power Company Limited (Distribution*).* The operative part of the Order passed in Appellant's Case by the MERC is as under:

> *"9. The Commission notes the submission of MSEDCL that it has followed a consistent approach of not levying any Power Factor Penalty on Open Access consumption. The Commission also notes the submission of MSEDCL that the Commission in its Order dated 3 January, 2013 in Case No. 8, 18, 20 and Case No. 33 of 2012 has viewed that levy of penalty or provide incentives for various parameters as specified by the Commission in Tariff Schedule of the Tariff Order of MSEDCL from time to time (e.g., Power Factor incentive, Power Factor Penalty, Prompt Payment discount, etc.) shall be charged on the net energy supplied by MSEDCL to the Open Access consumer and captive user after adjusting the banked energy and actual generation during the month.*
>
> *11. The Commission notes that the contentions raised by the MSEDCL have some merit as the cases cited by Petitioner, the Order of Commission in Case No. 110 of 2017 and APTEL Judgment in Appeal No. 231 of 2012 are on different footing. In both these*

cases, Distribution Licensees were either extending PFI to the Open Access consumers or were charging Penalty for low Power Factor. In the instant case, MSEDCL has not been extending any such incentive to the Open Access consumers using its distribution network nor levying any Penalty. It is true that Power Factor Incentive should be extended purely on engineering principles and should not be differentiated on source of supply of power. However, the issue of Power Factor Incentive to Open Access consumers in the Case No. 110 of 2017 and APTEL Judgment cannot be directly applied to this Case as MSEDCL has neither provided any Power Factor Incentive to Open Access consumers nor levied any penalty on Open Access consumption in accordance with its earlier Order dated 3 January, 2013 in Case No. 8, 18, 20 and Case No. 33 of 2012."

(emphasis supplied)

33. Therefore, it is clearly established that Respondent No.2-MSEDCL has acted in accordance with the mandate of a binding Order, which has attained finality. Moreover, the Appellant has chosen to sit idle on the issue during tariff determination. Moreover, the issue of "Limitation" on such claims by the Appellant is also applicable, as the Appellant is not entitled to a time barred claim in view of the Supreme Court judgment dated 16.10.2015 in the matter of ***"Andhra Pradesh Power Coordination Committee and Others Versus Lanco Kondapalli Power Limited and Others"*** reported as ***(2016) 3 SCC 468***, wherein the Apex Court has categorically held that "principles underlying the Limitation Act, 1963 are

applicable to State Commissions when it functions as Statutory adjudicatory quasi-judicial /judicial authority in determining all "claims or disputes, including those arising out of contract between licensees and generating companies". Hence, wherever any claim/dispute is raised before the Commission under Section 86 (1) (f) then Limitation Act strictly applies and any claim barred by limitation i.e., a period of three (3) years cannot be adjudicated unless the principles underlying Section 5 and Section 14 of the Limitation Act, 1963 are satisfied. In the present case the Petitioner has not made out any case under the said provisions of Limitation Act.

34. Learned Counsel for Respondent No. 2 further contended that the Order dated 28th November, 2017 in Case No. 110 of 2017 *in the matter of* Mumbai International Airport Private Limited Versus Tata Power Company Limited was passed in the specific facts and circumstances of that Case and cannot be treated as a Judgment in *rem* rather it is a Judgment in *personam*. MSEDCL has neither provided any Power Factor Incentive to Open Access consumers nor has MSEDCL levied any penalty on Open Access consumption, therefore Case No. 110 of 2017 cannot be applied to Respondent No.2-MSEDCL.

35. Learned counsel for Respondent No. 2 also pointed out that the Tribunal's Judgment dated 14th November, 2013 in Appeal No. 231 of 2012

cannot be made applicable to the present Case as the said Judgment was passed in the specific facts and circumstances of the said case and after analyzing various provisions of the Haryana Electricity Regulatory Commission's Regulations.

36. The facts and circumstances leading to passing of the above Judgment were completely different. In the present case, all the metering arrangements are in place and hence the "Reactive Energy Charges" can be determined and levied without any hurdles. Moreover, there is no case of probating and approbating at the same time by MSEDCL as MSEDCL has followed a consistent stand of not charging any Power Factor penalty on Open Access consumption. Moreover, the observation of this Tribunal at Para (II) of the operative part in Appeal No. 231 of 2012 is based on the specific facts of the said case and is not a Judgment in *rem*.

37. On one hand, there is no specific provision to make the PFI applicable to Open Access, on the other hand, there is separate head created under the DOA Regulation, 2016 as "Reactive Energy Charges", which is applicable to Open Access consumers. Hence, when the DOA Regulations, 2016 specifically provide for such charges then the same has to be specifically fixed by the Commission.

38. Any charge, which is not determined in accordance with the applicable principles and without a detailed study on the implication of such charge would certainly have a negative impact on MSEDCL. Hence, the nuances of Power Factor and Reactive Energy although may seem to be similar but both of them are completely different as the charges applicable in money terms may be completely different. In such a case, allowing PFI to be applicable to Open Access consumers without studying the impact of the same would certainly cause a negative impact on MSEDCL and would in a way offset the other charges payable by the Open Access consumers. Once a consumer surrenders its load with MSEDCL to the tune of Open Access then it can no longer be treated as a consumer of MSEDCL to the tune of Open Access availed by it. A partial Open Access consumer cannot be equated to a retail consumer. While a retail consumer tariff is fixed through a Tariff Order, a partial Open Access consumer's tariff is only fixed to the tune as to what he is liable to pay under the Electricity Act, 2003 and the DOA Regulations, 2016 as various charges on account of availing Open Access. Hence, all these separate charges payable by an Open Access consumer are framed by a Regulatory process after analyzing all aspects. However, at present what is contended to be done is that the PFI, which is fixed for retail consumers shall be passed to Open Access consumers without determining the impact of the same. This cannot be done without initiating a Regulatory process.

39. Learned counsel for Respondent No. 2 submitted that the whole argument made by the Appellant of incurring high cost in installing equipment for maintaining high Power Factor is completely incorrect. It is to be noted that all these consumers have become Open Access consumers later in time, and they all were normal retail consumers of MSEDCL in the beginning. Hence, whatever equipment they have installed, are under the mandate of law at the relevant point in time, when they were not Open Access consumers. In case the Open Access consumer does not maintain the high Power Factor then he would be liable to the Reactive Energy Penalty that would be determined by the Commission. Hence, the Open Access consumer will be liable to any penalty as envisaged under law. Maintaining of high Power Factor also helps the Open Access consumer in appropriating the maximum Open Access quantum wheeled. Hence, arguments on the issue of high Power Factor leading to benefit to Grid and leading to low losses to MSEDCL is completely baseless and is rather opportunistic.

40. Learned counsel for Respondent No. 2 further contended that the Judgment dated 14.11.2013 passed in Appeal No. 231/2012 by this Tribunal was passed in the specific facts of the said case and is not a Judgment in *Rem*. Moreover, the said Judgment was passed by framing and analyzing three issues and these three issues cannot be made

applicable to the present case. In 2009/2010, Petition came to be filed by JSL before HERC for allowing “Power Factor Rebate” after relying on the definition of consumption charges. In **MSEDCL’s case**, no such Petition was ever filed instead a mere clarification was sought.

41. Learned counsel for Respondent No. 2 advancing his arguments further submitted that there is no charge for electricity supply recovered from an open access consumer as he does not procure electricity from DISCOM. Hence, only such surcharges are collected in accordance with Section 42 (2) and 42 (4) to safeguard the interest of common consumers. What happens in case of a full open access consumer is not answered. In case of full open access consumer, he surrenders his entire load with MSEDCL and consumes his entire requirement from third party. In such a case, without supplying electricity, MSEDCL would still collect surcharges in accordance with Section 42 (2) and 42 (4). Would such collection mean charge for electricity supplied? What happens to Captive Consumers is also not answered? In case of captive consumers, CSS is not collected. In, such a case, what would be the charge for electricity supplied? Hence, MSEDCL reiterates that both the above observations have to be seen together and cannot be read in isolation as both issues are based on the conduct of DISCOM and HERC. Hence, the above issue as decided in Appeal No. 231/2012 is not applicable to MSEDCL.

42. The learned counsel for Respondent No. 2 through its additional written submissions further submitted that it is pertinent to note that the MERC after the Order dated 03.01.2013 passed in Case No. 8, 18, 20 & 33 of 2012, passed several Tariff Orders in which a consistent approach was adopted by MERC which was never challenged by the Appellant. Suddenly a clarification was sought with regard to applicability of PFI by Appellant before the MERC on 14.06.2018 vide its Petition bearing Case No. 173 of 2018 after the MERC passed an Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power) seeking clarification on the "**Applicability of PFI to open access power consumption"**. A prayer was made therein to make the PFI applicable from retrospective effect from August, 2015 to January, 2017. The Petition was dismissed by the MERC vide Order dated 28.11.2018 by observing as under:

> *"12. The Commission observes that detailed reasoning has been given in the Order dated 23 July, 2018 in Case No. 135 of 2018 and also in common clubbed Cases viz. Case Nos. 136, 137, 150, 151 and 155 of 2018 while disallowing PFI to open access consumption. The Commission has similarly held that PFI is allowed only on the Net Energy supplied by MSEDCL to the OA consumers and not on the Open Access consumption by the Orders dated 3rd January 2013 in Case Nos. 8, 18, 20 and 33 of 2012.*
>
> *13. The Commission rules that the clarification on non-applicability of PFI on Open Access Consumption for the*

reasons given in the respective Orders mentioned above is squarely applicable to the present case as well. There is no new argument preferred by the Petitioner that calls for any further elaboration."

43. Further, the MERC vide its Common Order dated 23.07.2018 in Case No. 136, 137, 150, 151, and 155 of 2018 while clearly distinguishing its Order dated 28.11.2017 in Case No. 110/2017 (***MIAL Versus Tata Power***) held as under:

"28. All these Petitioners have filed these Petitions seeking clarification as to whether they are entitled for PFI excluding taxes and duties on its Open Access consumption. All these Petitioners are consumers of MSEDCL and also have been availing power under Open Access. MSEDCL has been providing PFI to these consumers for the electricity consumption from MSEDCL. However, MSEDCL has not provided PFI on Open Access Consumption.

30. The Commission notes the submission of MSEDCL that it has followed a consistent approach of not levying any Power Factor Penalty on Open Access consumption. The Commission also notes the submission of MSEDCL that it has been following the Commission's Order dated 3 January, 2013 in Case No. 8, 18, 20 and Case No. 33 of 2012 wherein the Commission has viewed that levy of penalty or provide incentives for various parameters as specified by the Commission in Tariff Schedule of the Tariff Order of MSEDCL

from time to time (e.g., Power Factor incentive, Power Factor Penalty, Prompt Payment discount, etc.) shall be charged on the net energy supplied by MSEDCL to the Open Access consumer and captive user after adjusting the banked energy and actual generation during the month.

32. *The Commission notes that the contentions raised by MSEDCL have some merit as the cases cited by Petitioners, the Order of Commission in Case No. 110 of 2017 and APTEL Judgment in Appeal No. 231 of 2012 are on different footing. In both these cases, Distribution Licensees were either extending Power Factor Incentive to the Open Access consumers or were charging Penalty for low Power Factor. In the instant case, MSEDCL has not been extending any such incentive to the Open Access consumers using its distribution network nor levying any Penalty. It is true that Power Factor Incentive should be extended purely on engineering principles and should not be differentiated on source of supply of power. However, the issue of PFI to Open Access consumers in the Case No. 110 of 2017 and APTEL Judgment cannot be directly applied to this Case as MSEDCL has neither provided any Power Factor Incentive to Open Access consumers nor levied any Penalty on Open Access consumption in accordance with the Commission's earlier Order dated 3 January, 2013 in Case No. 8, 18, 20 and Case No. 33 of 2012. Admittedly the equipment installed by Petitioners is on account of statutory mandate as well as a continuation of past practice when they were full consumer*

of MSEDCL. Therefore, the Commission is inclined to accept submission of MSEDCL in this regard that the two cases referred by the Petitioners are not applicable to MSEDCL.

33. In view of the foregoing, the Commission clarifies that even if the Power Factor Incentive (or levy Power Factor Penalty, as the case may be) is applicable on the power sourced through Open Access in view of the APTEL Judgment only on engineering principles, it cannot be granted to the Petitioners and that too with retrospective effect for the reasons cited in above para No. 32. Further, the impact of providing such Incentives/ Penalties has not been considered in the MYT Order of MSEDCL and hence there is no ground for Petitioners to seek Power Factor Incentive in isolation of other provisions relating to reactive energy charges and other associated measures which have not yet been determined by the Commission. Therefore, the Commission is not inclined to accept the prayers of the Petitioners for Power Factor Incentives without simultaneously making the Petitioner accountable for the incidences of low power factor including the correction of lead part of power factor whenever required."

44. Learned counsel for Respondent No. 2 brought out that without prejudice to MSEDCL's submissions on non-grant of retrospective applicability of PFI and assuming without admitting that PFI should be made applicable, MSEDCL submits that the date of such retrospective

applicability should be the date on which the Petition for “Clarification” on the issue of PFI was filed by the Appellant before the MERC. It is submitted that no Petition for adjudication of dispute in respect of PFI was ever filed by the Appellant before the MERC and it was only a “Clarification” Petition which was filed by Appellant on 14.06.2018. The Appellant was well aware of various Tariff orders passed by MERC on the issue of PFI and still chose to sit on its rights till MERC passed an Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power). Till the date of passing of the Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power), the Appellant had no problem with being denied the benefit of PFI on open access consumption. Hence, in case PFI is made applicable retrospectively, then the date of reckoning shall be the date of filing of petition by the Appellant before MERC i.e. 14.06.2018.

45. It is pertinent to mention that the Appellant in its Petition before MERC never claimed any “Interest” and only claimed retrospective PFI from August, 2015 to January, 2017. MSEDCL followed a consistent approach in not providing PFI on open access consumption. This approach was in accordance with the directions of the MERC issued vide Order dated 03.01.2013 passed in Case No. 8, 18, 20 & 33 of 2012. The said order has attained finality on the issue of PFI which till date has not been challenged. Several Tariff Orders thereafter have been issued by the

MERC adopting identical approach which has never been challenged by the Appellant.

46. It was only after the Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power) that Appellant filed its case before MERC seeking **Applicability of PFI to open access power consumption**.

47. The MERC clearly distinguished the Appellant's case to that of Case No. 110/2017 (MIAL Versus Tata Power) and denied reliefs to Appellant. It is of utmost importance to note that the question of awarding of "Interest" only arises in view of satisfaction of Section 62 (6) of the Electricity Act, 2003.

48. From a bare perusal of the above Section, it is crystal clear that the said provision cannot be made applicable to the case of the Appellant. Moreover it cannot be said that MSEDCL has denied PFI to the Appellant illegally or in contravention to the specific provisions of Tariff Order, as it is a matter of fact that MSEDCL has followed a consistent approach based on directions of the MERC which has been clearly recorded by the MERC while denying reliefs to Appellant. Hence, it is an admitted position that MSEDCL has not recovered a price or a charge in excess of the "Tariff" so fixed by the MERC.

49. The Bombay High Court, Nagpur Bench in a similar matter vide its Judgment dated 10.09.2014 passed in WP No. 5437 of 2013 has categorically held as under:

> *"(7) In so far as grant of interest at the rate of 9% p.a is concerned, the same has been granted by relying upon the provisions of Section 62(6) of the said Act. Under sub Section (6) of Section 62 it is only if any licensee or a generating company recovers a price or charge exceeding the tariff determined under said section, then the excess amount can be recovered by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee. It is not in dispute that in present case no such price or charge exceeding the tariff determined under Section 62 was sought to be recovered. Hence, award of interest at the rate of 9% is therefore not in accordance with law. Said part of the order will therefore have to be set aside."*

50. Through its second additional written submissions learned counsel for Respondent 2 further submitted that it is a matter of fact that the Appellant herein filed a Petition bearing Case No. 173 of 2018 on 14.06.2018 before the MERC under Section 86 (1) (k) of the Electricity Act, 2003 read with Regulation 37 of the DOA Regulations, 2016 seeking Clarification with regard to eligibility of Appellant to seek PFI on open

access consumption. Hence, the Petition was nothing but a "Clarificatory Petition". This fact is also amply clear from the provisions under which the Appellant filed its Petition before the MERC. It is pertinent to note that the Appellant filed its Petition bearing Case No. 173 of 2018 on 14.06.2018 before the MERC immediately after the MERC passed an Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power) seeking clarification on the "**Applicability of PFI to open access power consumption"**. Hence it will be worth noting the reasoned distinctive observations of the MERC in Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power) and Order dated 28.11.2018 in Petition bearing Case No. 173 of 2018 (Appellant's Petition) based on specific, distinctive and particular facts of each case.

51. Learned counsel for Respondent No. 2 further submitted that MERC vide its Common Order dated 23.07.2018 in Case No. 136, 137, 150, 151, and 158 of 2018 clearly distinguished its Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power). It is also pertinent to mention herein that there was no question of giving any retrospective effect of PFI in Case No. 110/2017 (MIAL Versus Tata Power) as it is an admitted position that TPC was providing PFI incentive till April 2017 and suddenly decided to withdraw the same. In MSEDCL's distribution license area i.e., (Appellant's case) it is an admitted fact that no PFI incentive/penalty was

ever charged or provided by MSEDCL on open access consumption which is also established from the above findings of the MERC.

52. Further, in the backdrop of the above crucial and vital facts and for deciding/adjudicating the issues raised by MSEDCL vide its Additional Written Arguments, which have been already filed on record, the following legal issue needs serious consideration and adjudication by this Tribunal as issues raised by MSEDCL vide its Additional Written Arguments are based on the said legal principle. MSEDCL most respectfully submits that the scope of a Petition seeking clarification has been very well explained by this Tribunal in Appeal No. 280/2013 vide its Judgment dated 24.07.2014.

53. Additionally, it is a matter of record that no Petition for adjudication of dispute in respect of PFI was ever filed by the Appellant before the MERC and it was only a "Clarification" Petition which was filed by Appellant on 14.06.2018 seeking clarification of MYT Tariff Order and DOA Regulations. The Appellant was well aware of various Tariff orders passed by the MERC on the issue of PFI and still chose to sit on its rights till the MERC passed an Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power). Till the date of passing of the Order dated 28.11.2017 in Case No. 110/2017 (MIAL Versus Tata Power), the Appellant had no problem with being denied the benefit of PFI on open access consumption.

The Appellant never challenged the Tariff Orders and the Tariff Orders have attained finality on such issue.

54. MSEDCL further submits that it is a settled principle of law that an order/judgment passed by a court of law is binding and a good law until and unless set aside by a higher court. In the present case, the Tariff orders have not be challenged or set aside on the issue of PFI being denied on the open access consumption. Hence, assuming without admitting that PFI is applicable on open access consumption, if in case it is made applicable, then the date of reckoning shall be the date of filing of petition by the Appellant before the MERC i.e. 14.06.2018. Under the garb of the present Appeal which arises from an order passed in a Clarificatory Petition, the Appellant is trying to re-open tariff orders which have attained finality and hence a clarification cannot be made with retrospective effect more so when such Tariff orders have not be challenged or set aside on the issue of PFI being denied on the open access consumption. The Hon'ble Supreme Court vide its judgment dated 17.11.1961 in the matter of "***The Kirloskar Oil Engines Limited., Kirkee, Poona Versus The Workmen and Ors"*** has categorically held as under:

> *"The case debated on the scope of clarification of award by the Tribunal with in the frame work of Industrial Disputes Act, 1947 - It was held that 36 A of the Act was intended to empower a Tribunal to clarify the provisions of the award passed by it where a difficulty*

or doubt arose about their interpretation, and not to review or modify its own order."

55. Learned counsel for Respondent No. 2 further submitted that this Tribunal's Judgment dated 20.10.2020 in Appeal No. 36/2018 Tata Power Versus MIAL is a judgment is *personam* and cannot be made applicable to the facts in the present appeal. The factual matrix in the present appeal and Appeal No. 36/2018 are completely different. MSEDCL has already in its Written Arguments distinguished the Judgment dated 14.11.2013 passed by this Tribunal in Appeal No. 231 of 2012 titled as Jindal Stainless Ltd. Vs. Dakshin Haryana Bijli Vitran Nigam Ltd to be a judgment in *personam* too. This Tribunal has squarely applied the said judgment and thereafter passed the Judgment dated 20.10.2020 in Appeal No. 36/2018. According to MSEDCL, the facts of Appeal No. 231 of 2012 and Appeal No. 36/2018 were quite similar or rather identical. Such is not the case with MSEDCL as has been explained in the Written arguments. Further, according to MSEDCL, as the Judgment dated 14.11.2013 passed by this Tribunal in Appeal No. 231 of 2012 titled as Jindal Stainless Ltd. Vs. Dakshin Haryana Bijli Vitran Nigam is inapplicable to the facts of MSEDCL's case, hence the Judgment dated 20.10.2020 in Appeal No. 36/2018 (Tata Power Versus MIAL) also will not apply to the present Appeal.

OUR FINDINGS:

56. We have critically analysed the rival submissions of learned counsel for the Appellant and learned counsel for Respondent No.2 and also perused the relevant provisions under the open access regulations. Vide Impugned Order dated 28.11.2018, the State Commission held that PF Incentive/Penalty for consumers sourcing power directly shall not apply to Open Access power sourced by such consumers like the Appellant. In fact, the issue at hand relates to the liability of a Distribution Licensee to provide PF Incentive on power sourced through Open Access during the period August 2015 to January 2017.

57. Learned counsel for Respondent No. 2 vehemently submitted that the power interchange as part of Open Access agreements is only Active Power, hence, consumers like Appellant only consume Active Power from their Open Access source and draw their quantum of Reactive Power from the Grid, for which they are not paying any charges. It is in this context the arguments were addressed that open access consumers like the Appellant are not bearing the costs towards drawl of Reactive Energy from the Grid for the Active Power drawn by them through Open Access, and they are seeking an incentive in the form of PF Incentive on this quantum, thereby seeking a double benefit at the costs of the Direct Consumers of the Respondent.

58. Learned counsel for Respondent No. 2 pointed out that although appropriate ABT/ SEM meters capable of recording active/ reactive power amongst other parameters on 15 minute time block basis have been installed at the Open Access consumers premises being a pre-condition for grant of Open Access in Mumbai city, but the State Commission had never determined the reactive energy charges. It is a peculiar situation that the open access consumers do not pay for the Reactive Power, but they are being rewarded with PF Incentive at the cost of the other consumers. The PF Incentive specified under the Mid Term Review ("**MTR**") Order dated 26.06.2015 and Multi-Year Tariff ("**MYT**") Order dated 21.10.2016 was only applicable on the power sourced directly from the Distribution Licensee. It is only on 28.11.2017, that State Commission has retrospectively provided PF Incentive on Open Access consumption and that too for TPC-D alone. Further, the PF Incentive on Open Access quantum was never factored in the Tariff Orders and that PF Incentive was applicable only on the Net Energy supplied by the Distribution Licensee in terms of the Order dated 03.01.2013. The State Commission has reiterated the findings of the aforesaid order dated 03.01.2013 in its Orders dated 23.07.2018 and 28.11.2018 passed subsequently in the case of MSEDCL – another Distribution Licensee in the State of

Maharashtra, which is placed on the same footing as other licensees as far as the law and Regulations are applicable in the State.

59. According to Respondent No.2, the contentions of the Appellant have been based on this Tribunal's Judgement dated 14.11.2013 in Appeal No. 231 of 2013 in the case of "***Jindal Stainless Ltd. vs. Dakshin Haryana Bijli Vitran Ltd. & Anr."*** It is reiterated that the said judgement of this Tribunal is not applicable in the case at hand because there were no appropriate ABT complaint meters in the State of Haryana, and hence there was no methodology to segregate reactive energy drawn from open access and which is drawn from the distribution licensee. Among others, this Tribunal has held that such an open access consumer is liable to pay the reactive energy charges. However, since appropriate metering system had not been provided, same could not be implemented. In the present case, necessary ABT complaint meters have already been installed by all other open access consumers. Accordingly, the reactive power charges could have been computed and ought to have been determined and applied to Respondents as envisaged in the distribution open access regulations. The Respondent emphasised that in the light of these facts this Tribunal's Judgement in the Jindal Stainless Limited's case is not applicable in the facts of the present case.

60. It is settled position of law that, a decision is only an authority for what it actually decides. What is of the essence in a decision is its 'ratio-decidendi' and not every observation found therein nor what logically follows from the various observations made in the judgment. In this regard, reliance is placed on the several judgments of the Apex Court as brought out in the submissions. The Respondent reiterated that in view of the above facts, the Impugned Order passed by the State Commission is correct. Accordingly, it is prayed that the Impugned Order may be upheld.

61. Learned counsel for the Appellant pointed out that the contentions of the Respondent that the State Commission has historically never provided PFI for Open Access consumers is totally wrong and they cited a reference from MTR Order dated 26.06.2015 and the subsequent MYT Order dated 21.10.2016, wherein it was clearly provided that PFI is payable on power sourced through Open Access. The Appellant is seeking PFI only with respect to open access charges that are collected by the Appellant as a distribution licensee. The Appellant is not claiming any PFI on energy charges of open access, which are paid to generator/trader. The Appellant is also using the Respondent's system for wheeling of power and thus, contributes to minimization of system losses by maintaining high Power Factor near to Unity. High Power factor is increasing the existing line capacity to carry maximum rated power with

almost negligible losses and this is not only beneficial to Distribution licensee as it reduces additional capex for new lines and also other miscellaneous costs like maintenance of ROW Space requirement etc.

62. In the Jindal Judgement, this Tribunal had categorically held that CSS, payable by Open Access charges, has to be treated as part of electricity charges and has to be factored in while determining the rebate admissible for PFI. Further, this Tribunal has held that PFI would be applicable irrespective of the source of power. In fact, the findings of the APTEL in its Judgment, with respect to PFI, are completely independent and separate from findings on REC, and is thus, a settled position of law. In the aforesaid judgment, it has been categorically held that PFI is purely a technical and engineering principle and has universal application, irrespective of source of power, and as such, it will also be applicable in the case of Open Access consumers. Further, DOA Regulations for applicability of open access and PFI/Penalty are for open access consumers, and accordingly PFI is legitimate charge payable to open access consumers.

63. After consideration and evaluation of the rival contentions made by the learned counsel for the Appellant and learned counsel for the Respondent, what transpires is that the main issue in the Appeal to be

decided is whether the PFI/Penalty is also applicable to open access consumers or not.

64. The Appellant is aggrieved by the directions of the State Commission vide the Impugned Order not to apply PFI/ Penalty for open access consumers as applicable to direct consumers from distribution licensee in terms of MYT Order dated 21.10.2016. It is the case of the Respondent that in terms of the various tariff orders passed by the MERC, the PFI/Penalty was not applicable to energy procured through open access. The Respondent has also alleged that the said order of 03.01.2013, which has attained finality, has been relied upon by the State Commission in its subsequent Orders dated 23.07.2018 and 28.11.2018 passed in the case of a competing Distribution Licensee, namely, Maharashtra State Electricity Distribution Company Limited ("**MSEDCL**"), where State Commission has held that PF Incentive/Penalty is not applicable on power sourced through Open Access.

65. The Respondent has drawn our attention towards various provisions of the Open Access Regulations, Grid Code, MYT Regulations 2011, MYT Regulations 2015, etc. to contend that never before the Order dated 28.11.2017 did MERC for PFI to be provided to open access consumers. However, on 28.11.2018, MERC by the Impugned Order has denied the Appellant the PFI on open access consumption.

66. It is an admitted position that maintaining of Power Factor is a mandatory obligation cast upon a consumer, as per the provisions of Section 22 of the Indian Electricity Rules 1956 as well as Regulations of CEA dated 21.02.2007. Under these provisions, it is mandatory for Distribution Licensees and Bulk Consumers such as Appellant to maintain Power Factor above 0.95, so as to provide sufficient reactive compensation to their inductive loads. It is also relevant to note from Regulation 16.4 of the Grid Code that Open Access Consumers are statutorily mandated/responsible for maintaining the Grid parameters, specifically the system voltage within 97% to 103% range. It is not in dispute that the Electrical power in normal conditions consists of two components (i) Active Power or Real Power and (ii) Reactive Power. In the case of open access consumer, the active power is drawn from the Generator/Trader whereas Reactive Power is drawn from the Grid. In Ideal conditions, along with measurement of HT Power the reactive power should also be measured as provided under the schedule.

67. The Appellant has heavily relied upon the judgement of this Tribunal dated 14.11.2013 in Appeal No. 231 of 2013 (***Jindal Stainless Ltd. vs. Dakshin Haryana Bijli Vitran Ltd. & Anr.***). While the Appellant contends that the finding of this Tribunal in the aforesaid judgement squarely applies to the case on hand, per contra, the Respondent reiterated that the

findings of the Tribunal are not applicable to the case on hand. The other contentions of the Respondent are that, in the case of Jindal Stainless Ltd., the requisite metering system complied through ABT were not installed in Haryana whereas all such ABT/SEM meters are well placed at the premises of the open access consumers.

68. It is to be mentioned that a similar case came up before this Tribunal vide Appeal No 36/2018. Based on the submissions of all the parties, relevant Regulations & Grid Code, various previous judgements, etc. the said appeal was adjudicated and decided by a judgement of this Tribunal dated 20.10.2020 holding that PFI/Penalty has to be made applicable to all class of consumers whether sourcing power from Discom or through open access. We, accordingly, hold that this Tribunal's Judgement in Jindal Stainless Ltd's Case and also judgment dated 20.10.2020 (***MIAL/HPCL vs TPC & others***) are squarely applicable to the present case on hand.

69. Without going into further details regarding measurement of reactive energy charges vis-à-vis quantum of PF Incentive/Penalty applicable to open access consumers including the Appellant, we hold that the State Commission has not passed the Impugned Order in accordance with settled law, and hence, the impugned order is liable to be set aside.

ORDER

70. In the light of the above discussion, we are of the considered view that the issues raised in the instant Appeal No. 70 of 2019 have merits, and hence the Appeal is allowed.

71. The Impugned Order dated 28.11.2018 passed by MERC in Case No.173 of 2018 is hereby set aside.

72. All the pending IAs, if any, shall stand disposed of. There shall be no order as to costs.

Pronounced in the Virtual Court through video conferencing on this the 12th day of August, 2021.

(Ravindra Kumar Verma)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓

REPORTABLE / ~~NON-REPORTABLE~~

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