BEFORE THE VIDYUT OMBUDSMAN
Andhra Pradesh :: Hyderabad

:: Present ::

N. Basavaiah, B.Sc, B.L.

Date: 04-01-2017

Appeal No. 28 of 2016

Between

Sri. Ch. Appa Rao, Director, C/o, NSL Textiles Limited, Inkollu, Inkollu, Prakasam District.

...Appellant/ Complainant

And

1. The DE/Operation/APSPDCL/Chirala/Prakasam
2. The SE/Operation/APSPDCL/Ongole/Prakasam

... Respondents

The above appeal filed on 06-09-2016 has come up for final hearing before the Vidyut Ombudsman on 26-11-2016 at Ongole. The complainant, as well as the respondents 1 to 2 above was present. Having considered the appeal, the written and oral submissions made by the complainant and the respondents, the Vidyut Ombudsman passed the following:

ORDER

1. This appeal has been preferred by the appellant-complainant against the **order dated.29-08-2016 in C.G.NO:04/2016-17/ Ongole Circle**, passed by the ***Forum for Redressal of Consumer Grievances in Southern Power Distribution Company of A.P Limited, Tirupati,*** whereby and where-under the above Forum passed the order as follows:

"Since the respondents have implemented the orders of APERC Lr.No:APERC/E-205/DD-DIST/2009 Dated 22.12.2009 the demand notice issued by the respondents are in order and hence no revision is required. Further the orders issued by Hon'ble commission are retrospective one and

directions to the DISCOM is very clear to back bill in case of any excess load factor incentive is allowed. Accordingly, the case is disposed off."

2. One Sri. Ch. Appa Rao, Director of NSL Textiles Ltd of Inakollu village, Prakasam District as a complainant filed the complaint before the above Forum on 29-04-2016 alleging that the above Limited company is a consumer of APSPDCL, Tirupathi with High Tension Service connection No.Ong.147, CMD.2000 KVA.Category.1A, Voltage: 132 KV of Inakollu village, that an amount of Rs. 60,48,147/- is included as other charges in the bill for September 2015 against their HT. SC. No. ONG 147, Inkollu, Prakasam (Dt) without any details of said charges, that subsequently, they came to know from the circle office, Ongole that the said amount was included towards recovery of alleged excess load factor incentive allowed during the period from Sep 2007 to August 2008 and that the load factor incentive is disallowed as the recorded maximum demand (RMD) exceeded the contracted maximum demand(CMD) during the said period. According to the complainant, the above demand of recovery of Rs.60,48,147/- is illegal and is not in accordance with the provisions of relevant tariff orders. Therefore, he prayed to redress his grievance on the above aspect. It is observed that the Limited Company being the consumer is not the complainant in this case.

3. The case of the respondents is that in the audit by the AG during March,2011,it was pointed as to the incentives being allowed even to the indiscipline HT category-1 consumers in those months where Recorded Maximum Demand(RMD) exceeded Contract Maximum Demand(CMD) against the directions of the APERC ,that the AG audit party raised shortfall amount of Rs.81.65 lakh against five consumers including Rs.60,48,147/ for the period from September 2007 to August,2008 against the above named limited company, that the corporate office, APSPDCL, Tirupathi also issued directions to follow the instructions of the Hon'ble APERC in its letters dated.29.4.2009 and 22.12.2009 as to recovery of incentives allowed to the irregular consumers for the tariff years 2001-2002 to 2008-09 and accordingly, a notice was issued to the above consumer explaining the tariff

order and demanding it to pay the above amount and that as the consumer in this case did not pay the amount as demanded in the notice, the said amount was included in the CC bill of the consumer during the month of October,2015.It is their further case that the consumer is wrongly contending that the demand of recovery is illegal and is not in accordance with the provisions of the relevant tariff orders.

4. No oral or documentary evidence was adduced before the Forum. After considering the material available on record, the Forum dismissed the complaint as stated supra. Not satisfied with the above order, the complainant preferred this representation. The parties didn't choose to lead any oral evidence, but, Exs. A1 to A4, copies of Annexure -D of H.T.Tariffs for the financial years2007-08 and 2008-09, on behalf of the complainant, and Ex. B1, copy of the letter dated.22.12.2009 addressed by the APERC, on behalf of the respondents, are marked by consent. The above documents are helpful to some extent to decide this representation.

5. The following submissions have been made on behalf of the appellant-complainant:

I) The claim is barred by the limitation as per section 56(2) of the Electricity Act, 2003;

II) Tariff Order does not contain any provision prohibiting the incentive being granted on the ground of exceeding the contract maximum demand and the distribution company can only claim 2 times of normal charges in case of consuming the load exceeding the contract maximum load;

III) Load Factor incentive cannot be recovered retrospectively as per the observations of Hon'ble APERC in para 3 of its orders dt:23-07-2015;

IV) Executive instructions of the APER commission cannot supersede the Tariff orders of the commission as per sections 62 and 64 of the Electricity Act, 2003;

V) APER Commission cannot issue instructions affecting the rights of consumers without following the transparent procedure;

VI) The Forum didn't decide the matter in accordance with law;

VII) The Forum which heard the matter did not sign the order. According

to the appellant, the chairperson of the Forum who heard the case ,did not sign the order passed by the Forum and the successor of the previous chairperson of the Forum who did not hear the case, signed the order as the chair person and therefore, the order passed by the Forum is not legally valid; and

VIII). On the basis of the above submissions, the representation may be upheld. The complainant also relied upon the following four decisions in the written submissions submitted:

1.Copy of Judgment dated.15.3.2010 in PTC India Limited Vs Central Electricity Regulatory Commission, through Secretary (Civil Appeal No. 3902/2006) with other appeals rendered by the Supreme court of India;

2.Copy of Judgment dated 22.8.2014 in TATA MOTORS LIMITED Vs Maharashtra Electricity Regulatory commission and another in Appeal No. 295/2013rendered by the Appellate Tribunal for Electricity;

3.Copy of Judgment dated.3.3.2015 in Appeal No.147/2014 in Chhattisgarh State power distribution Vs Chhattisgarh state Electricity Regulatory commission and others, rendered by Appellate Tribunal for Electricity ; and

4. Copy of Judgment of the Supreme Court dated.10.3.2006 in Civil Appeal case No.1635/2006 between Mahabir Vegetable Oils Pvt.Ltd. and another vs State of Haryana and others.

6. The respondents submitted written submissions supporting the order of the Forum and stating that the submissions that have been made on behalf of the appellant have no merit.

7. The grievance of the complainant in this case is against the recovery of incentive, on the basis of load factor, alleged to have been wrongly given from September, 2007 to August, 2008 to the company of the complainant.

8. Now I *am inclined to consider the submissions made by the complainant. I find no substance in any one of the submissions made on behalf of the complainant and they are being dealt hereunder.*

(a)As regards to the first submission:-The interpretation of the words 'first due' occur in section 56(2) of the Electricity Act, 2003, is involved in this representation. To answer this submission, it is necessary to look into Section 56(2) of the Electricity Act, 2003 and it runs as follows:

"(2) Notwithstanding anything contained in any other law for the time being in force, no sum due from any consumer, under this section shall be recoverable after the period of two years from the date when such became first due unless such sum has been shown continuously as recoverable as arrear of charges for electricity supplied and the licensee shall not cut off the supply of the electricity."

No decision is cited on behalf of the complainant on this submission. The plea of limitation is taken for the first time before this authority. According to the appellant, the amount sought to be recovered from the consumer for each month from September, 2007, fell first due on the corresponding due date in the next consumption month from September, 2007 to August, 2008 and the notice would have been issued at least before 28.4.2011 even as per the letters of the APERC dated.29.04.2009 and 22.12.2009, and issuance of the notice on 26.9.2015 for the alleged amount due in 2007-2008 after a period of 6 or 7 years is barred by time as per the above provision of law. But, I did not find much substance in the above submission. I already observed that the above aspect depends upon the interpretation of the clause "sum became first due" incorporated in sec 56(2) of the Act. In H.D.shourie vs. Municipal Corporation of Delhi, AIR 1987 Delhi 219, the Delhi High Court ruled that the electricity charges become first due after the bill is sent to the consumer and not earlier thereto. Though the above decision is not rendered under the present Electricity Act, 2003, yet, the ratio in the above decision can be made applicable to the present case. In my opinion, the liability to pay the electricity charges is created on the date of electricity is consumed or the meter reading is recorded but the charges would become first due for payment only after a bill or demand notice is sent by the licensee to the consumer. The date of the first bill/demand notice for payment, therefore, shall be the date when the amount shall become due and it is from that date the period of limitation of two years as

provided in section 56(2) of the Act shall start running. Even in the above third decision cited by the complainant, at Para No. 3 (XII),-- "8 (iii) of page.11, it is observed "that in this regard the judgment of High Court of Delhi in Case No. WP (C) no. 8647 of 2007 passed on 19.04.2011, in which the amount of revised bill issued after wrong multiplier, appeal had been filed for setting side under Section 56 (2) of the Electricity Act, 2003, regarding which order has been passed that "it was held that the revised bill amount would become due when the revised bill is raised and section 56 (2) of the Act would not come in way of recovery of the amount under the revised bill". According the above said order, after the erroneous multiplier, issued correct multiplier, the amount of bill issued cannot be accepted under Section 56 (2) of the Electricity Act, 2003 by the mentioned section 56 (2) of electricity Act, 2003 by the applicant, the payment of amount cannot be stayed. As the applicant has consumed excess electricity from way 2005 to September 2008, has paid less amount. Therefore, the amount of difference be paid by the applicant."

Since the notice was issued in September, 2015, and since I opined that the charges become first due only after the bill is sent, it cannot be held that the claim in this case, is barred by section 56(2) of the Electricity Act,2003.The first submission is thus answered against the complainant.

(b)As regards to the second to fifth submissions:-As these four submissions are inter-connected, they are being discussed together. There is no dispute that though the consumer in this case required the total maximum demand of 3500 KVA, yet, it entered into an agreement with the APSPDCL for only 2000 KVA for the period from October,2007 to August,2008 with a view that it could meet the remaining demand of 1500 KVA from its own captive 'Gas Power Plant available in East Godavari District and that the consumer used entire power (maximum demand) from APSPDCL GRID exceeding the contract maximum demand for the above entire period except in three months, namely, November and December,2007 and May, 2008.

"ANNEXURE-D: SCHEDULE OF RETAIL TARIFF RATES AND TERMS AND CONDITIONS IN RESPECT OF THE FOUR DISTRIBUTION COMPANIES FOR FY.2007-2008 , PART 'A'-H.T.TARIFFS"(EXs.A1 to A4) is relevant. Beneath the above, the words 'Notes' is written and the above word "Notes", the following is written:

1) "Incentive

(a) The following incentives are applicable for HT-Category-IA Consumers:

Load Factor (LF)	Discount applicable on the energy rates
More than 50% up to 70%	25% on the energy above 50% LF
More than 70%	25% on the energy above 40% LF

(b) *The incentive scheme is applicable for the consumption with the above mentioned load factors.* This scheme will be effective till 31 March 2008.

The above words in the Sentence" The incentive scheme is applicable for the consumption with the above mentioned load factors" gives an indication that incentive is allowed only within the limits of the load factors stated supra. Tariff Order for the FY: 2008-2009 on the above aspect is same as seen from Ex.A1 to A4. In electrical engineering the *load factor is defined as the average load divided by the peak load in a specified time period.* Its value is equal or less than one because the maximum demand is equal or higher than average demand. *The load factor depends upon energy and additional energy consumed.* The formula touching the load factor and maximum demand etcetera is:

$$Load\ Factor = \frac{BKWH(Billed\ Kilowatt\ Hour)}{CMD\ x\ No.HOURS\ INMONTH\ x\ POWERFACTOR}$$.There is no dispute that the Tariff order does not contain any provision prohibiting the incentive being granted on the ground that the recorded maximum demand exceeds the contract maximum demand and that the relevant tariff order

provides for charging at 2 times normal charges for the excess demand over the CMD. It is also not in dispute, that the load factor incentive cannot be recovered retrospectively, that the executive instructions of APERC cannot supersede the tariff orders passed by the commission after following the prescribed procedure as per the provisions of the Act and that the commission cannot issue instructions with respect to the tariff affecting the rights of the consumers without following the procedure prescribed in the Act. But I am unable to understand how the submissions suit to this case and can be upheld in this case as Ex.B1, the copy of the letter addressed by the APERC, does not contain any words to accept any one of the above four submissions. As it is observed by the APERC that the distribution companies were giving load factor incentives with a load factor of more than 100% which is practically impossible, the APERC under the original of Ex.B1 directed to recover the amount from the concerned consumers wherever incentives in excess of entitlement were wrongly given. It is not stated in Ex.B1 that incentive cannot be given if RMD exceeds CMD. As the load factor incentive existing in tariff order was being wrongly given, that fact under the original of Ex.B1 was brought to the notice of the DISCOMS by the APERC with a direction to recover that amount from the concerned consumers. From the contents of the letter, Ex.B1, We can say that there is no merit in the above submissions. *It is not the case of the complainant that the consumer in this case is entitled to load factor incentive as per the above formula as per tariff in force during the relevant financial years or that the formula to calculate load factor stated supra is incorrect .* In the absence of such plea and proof, It is not possible to uphold the above submissions. When two times of normal charges are being charged from the consumer on the ground of excess demand over the contract maximum demand, can we think that incentive will be given to the consumers of such type. So, I find no force in the above submissions. These four submissions are thus answered against the complainant.

(C)As regards to the sixth and seventh Submissions:

Clause 13 .1 of Regulation No. 3/2016, which is relevant, runs as follows:

"On conclusion of the inquiry, the forum shall pass reasoned orders on the

compliant and the decision of the Forum shall be by a majority of the Members who heard both parties and in the event of equality of votes, the chairperson or in his absence the person presiding, shall exercise a second or casting vote."

It is clear that the Forum has to pass a reasoned order. Perused the order of the Forum. The operative portion of the order of the Forum is referred to in the beginning of my order. As seen from the order of the Forum, it cannot be held that the order of the Forum is not a reasoned order." The respondents implemented the orders of the APERC letter dated.22.12.2009" is the reason assigned by the Forum. Can we say that the above is not a reason. The aspect whether the above reason is sound and tenable, or, not is different. If the above submission is accepted, I have to pass an order remanding the matter to the Forum for fresh disposal and passing such an order, in my view, will not serve any purpose. Since I expressed my opinion that the Forum assigned a reason, I am unable to accept the submission of the complainant on that aspect.

Three members including the chairperson of the Forum heard both parties. Two members who heard the parties and the successor of the previous chair- person signed the order. As per the above clause 13.1, the decision of the Forum shall be by a majority of the members of the Forum. This is not a case of chairperson exercising a casting vote. Since the decision is signed by two members of the Forum who heard both parties, it can be held that the decision of the Forum in this case is by a majority of the members of the Forum and is in accordance with the above provision of law and is legally valid and that the condition in the above clause is complied with. It does not matter even if the order of the Forum was not signed by the earlier chair person who heard the matter or is signed by the present chairperson who did not hear both parties. So, I find no merit even in these two submissions. These two submissions are thus answered against the complainant.

(D) As regards to the eighth submission: in the first decision, the Honorable Supreme court held that the Appellate Tribunal for Electricity has no

jurisdiction to decide the validity of the Regulations framed by the CERC under Section 178 of the Electricity Act 2003.

In the Second Decision, it is held that the state commission has to follow the mandatory procedure contemplated in the Electricity Act, 2003 regarding tariff.

The Third decision deals with Section 168 of the Act, 2003 as to the Protection of action taken in good faith. *In the fourth decision, It is held that a subordinate legislation can be given a retrospective effect and retroactive operation, if any power in this behalf is contained in the main Act.* I am unable to understand how the above decisions are relevant and can be made applicable to the present case though there is no dispute with regard to the proposition of law made in the above decisions.

As I expressed my opinion that there is no merit in any one of the submissions, I am of the opinion that this representation cannot be upheld. This submission is thus answered against the complainant.

09. In the result, I dismiss the representation of the complainant confirming the order of the Forum. Considering the facts and circumstances of the case, I direct both parties to bear their respective costs.

10. This order is corrected and signed on this 4th day of January, 2017.

11. A digitally signed copy of this order is made available at www.vidyutombudsman.ap.gov.in.

VIDYUT OMBUDSMAN

To

1. Sri. Ch. Appa Rao, Director, C/o NSL Textiles Limited, Inkollu, Inkollu, Prakasam District - 523 167.

2. The Divisional Engineer, Operation, APSPDCL, Chirala, Odarevu Road, Chirala, Prakasam District - Pincode - 523155.

3. The Superintending Engineer, Operation, APSPDCL, Vidyut Bhavan, Opposite IDBI bank Ramnagar, Ongole -523 001.

Copy to:

4. The Chairman, C.G.R.F., APSPDCL,19/13/65/A, Srinivasapuram, Near 132 kV Substation, Tiruchanoor Road, Tirupati - 517 503

5. The Secretary, APERC, 11-4-660, 4th Floor, Singareni Bhavan, Red Hills, Hyderabad - 500 004

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