BEFORE THE APPELLATE TRIBUNAL FOR ELECTRCITY
(APPELLATE JURISDICTION)

APPEAL
NOs. 28 of 2010, 29 of 2010 and 33 OF 2010

Dated : 4th May, 2011

Coram; Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial member

APPEAL NO. 28 OF 2010

In the matter:

Western Electricity Supply Company of Orrisa Ltd.,
Plot No. N 1/22, IRC Village, Nayapalli,
Bhubaneswar-757 015.   …Appellant (s)

Versus

1.   Orissa Electricity Regulatory Commission,
        Niyamak Bhawan, Unit –VIII, Bhubaneswar-757 012,
        Dist. Khurda, Orissa.

2.   Larsen & Toubro Limited,
        P.O. Kansbahal-770 034,
        Dist. Sundargarh, Orissa.

3.   Orissa Cconsumers' Association & FOCO,
        Biswanath Lane, Dist. Cuttack-753 002.

4.   State Public Interest Protection Council,
        Tala Talengabazar, Cuttack- 753009.

5.   OCL India Limited,
        AT/PO/PS-Rajgangpur-770017.

6.   Sambalpur District Consumers Federation,
        Balaji Mandir Bhawan, Khetrajpur,
        Sambalpur -768003.

7.   Orissa Electrical Consumers Association,
Sibasakti Medicine Complex, B.K. Road,
        Cuttack- 753 001.

8.   Chief Electrical Engineer, S.E. Railway,
        Garden Reach, Kolkatta-700 043.

9.   Shreeram Sponge &Steel Pvt.Ltd.,
        Rajgangpur- 770017

10.   Bajrang Steel & Alloys Ltd.,
        Plot No. 31, Goibhanga, Kalunga,
        Dist. Sundergarh- 770- 033.

11.   Shree Salsar Castings (P) Ltd.,
        Balanda, P.O. Kalunga,
        Dist. Sundergarh- 700 033.

12.   Rexon Strips Ltd.,
        Kamala Complex, Power House Road,
        Rourkela- 769 001.

13.   Sreechem Resins Ltd., Rourkela- 769 001.

14.   Scan Steels Limited,
        Main Road, Rajgangpur- 770 017.

15.   Shree Lingaaraj Feeds Ltd,
        Kachery Road, Rourkela 769012.

16.   Shri Radha Krishna Pvt.Ltd.,
        Goibhonga, Kalunga 770 033.

17.   M/s. Grihasti Udyog,
        .Chhend Basti, Rourkela 769015

18.   Refulgent Ispat Pvt.Ltd.,
        Chikatmati, P.O. Beldiha,
        P.O. Beldiha, P.S – Brahmanitarang,
        Dist. Sundergarh

19.   Shri Ramesh Chandra Satpathy,
        302 (B), Behera Sahi, Nayapalli,
        Bhubaneswar- 751012.

20.   Dalmia Institute of Science & Industrial Research,
         Post Box No. 2, Rajgangpur- 770 017.
        Dist. Sundargarh, Orissa

21.   Western Orissa Cold Storage Association,
         Baraipali, Sambalpur- 768 008.

22.   Shri R.P. Mahapatra,
         Plot No. 775(pt) Lane-3,
         Jayadev Vihar, Bhubaneswar, Orissa – 751013.

23.   Utkal Chamber of Commece & Industry,
         N/6, IRC Village, Nayapalli,
        Bhubaneswar- 751015.

24.   Mr. Pravakar Dora,
        Advocate, 3rd Floor, Vidya Nagar
        Cooperative Colony,
        Rayagada- 765001   Respondent(s)

APPEAL NO. 29 OF 2010

In the matter of:

1.   North Eastern Electricity Supply Company of Orissa Ltd.,
        Plot No. N 1/22, IRC Village, Nayapalli,
        Bhubaneswar-757 015.   …Appellant (s)

Versus

1.   Orissa Electricity Regulatory Commission,
         Niyamak Bhawan, Unit –VIII, Bhubaneswar-757 012,
         Dist. Khurda, Orissa.

2.   Orissa Electrical Consumers Association,
        Sibasakti Medicine Complex, B.K. Road,
        Cuttack- 753 001.

3.   State Public Interest Protection Council,
        Tala Talengabazar, Cuttack- 753009.

4.   East Coast Railway,
         B-2, Rail Vihar, Chandrashekharpur,
         Bhubaneswar- 751017.

5.   Utkal Chamber of Commece & Industry,
         N/6, IRC Village, Nayapalli,
         Bhubaneswar- 751015

6.   M/s. Ferro Alloys Corporation Ltd.,
        GD-2/10, Chandrashekharpur,
        Bhubaneswar 751023.

7.   Chief Electrical Engineer, S.E. Railway,
        Garden Reach, Kolkatta-700 043.

8.   IDCOL Ferro Chrome & Alloys Limited,
        Jajpur Road, Dist. Jajpur 755 020.

9.   Balasore Alloys Limited,
        Balgopalpur, Balasore 751009, Orissa.

10.   Shri Ramesh Chandra Satpathy,
        302 (B), Behera Sahi, Nayapalli,
        Bhubaneswar- 751012

11.   M/s. Rohit Ferro Tech Limited,
        Kalinga Nagar, Industrial Growth Complex,
        P.O. Jakhpura-755027, Dist. Jajpur.

12.   M/s. Jagdamba Polymers Pvt.Ltd.,
        25, Ganeswarpur Industrial Estate,
        Balasore- 756019.

13.   North Orissa Chambers of Commerce & Industry,
        Ganeswarpur Industrial Estate,
        P.O. Januganj, PS- Industrial Area, Dist. Balasore,
        Pin 756019

14.   Tata Steels Limited,
        273, Bhoumanagar, Unit-IV,
        Bhubaneswar-751 001.

15.   Shri R.P. Mahapatra,
         Plot No. 775(Pt) Lane-3,
         Jayadev Vihar, Bhubaneswar, Orissa – 751013.

16.   Mr. Pravakar Dora,
        Advocate, 3rd Floor, Vidya Nagar
        Cooperative Colony,
         Rayagada- 765001   Respondent(s)

Appeal No. 33 of 2010

1.   Southern Electricity Supply Company of Orissa Ltd.,
     Plot No. N 1/22, IRC Village, Nayapalli,
     Bhubaneswar-757 015.   …Appellant (s)

Versus

1.   Orissa Electricity Regulatory Commission,
      Niyamak Bhawan, Unit –VIII, Bhubaneswar-757 012,
      Dist. Khurda, Orissa.

2.   Orissa Cconsumers' Association & FOCO,
     Biswanath Lane, Dist. Cuttack-753 002.

3.   State Public Interest Protection Council,
     Tala Talengabazar, Cuttack- 753009.

4.   East Coast Railway,
     B-2, Rail Vihar, Chandrashekharpur,
     Bhubaneswar- 751017.

5.   Orissa Electrical Consumers Association,
     Sibasakti Medicine Complex, B.K. Road,
     Cuttack- 753 001

6.   M/s. Jayshree Chemicals Limited,
     P.O. Jayshree, Ganjam, -761025.

7.   Shri Ramesh Chandra Satpathy,
     302 (B), Behera Sahi, Nayapalli,
     Bhubaneswar- 751012

8.   Southco Finance Cadre Employees Welfare Association,
        At- Keshav Nagar, Langipalli,
         P.O.Berhampur, Orissa 760 008.

9.   Shri R.P. Mahapatra,
         Plot No. 775(Pt) Lane-3,
         Jayadev Vihar, Bhubaneswar, Orissa – 751013.

10.   Utkal Chamber of Commece & Industry,
         N/6, IRC Village, Nayapalli,
        Bhubaneswar- 751015

11.   Mr. Pravakar Dora,
        Advocate, 3rd Floor, Vidya Nagar
        Cooperative Colony,
         Rayagada- 765001   Respondent(s)

Counsel for the Appellant :   Mr. Buddy A Ranganathan
                               Mr.Hasan Murtaza
                               Mr. Saswat Patnaik
                               Mr. Shiv K Suri & Junaira Rehman
                                Ms. Anjali Chandurkar
                               Ms. Smitha Inna& Shilpy Chaturvedi

Counsel for the Respondent: Mr. Rutwik Panda
                             Mr. D.P. Mohanty
                             Mr. R.M. Patnaik
                             Mr. P.P. Mohanty
                              Me. Ashok Parija

JUDGMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

Appeal Nos. 28 of 2010, 29 of 2010 and 33 of 2010 preferred by the Western Electricity Supply Co. of Orissa Ltd. (WESCO), North Eastern Supply Co. of Orissa Ltd. (NESCO) and the Southern Electricity Supply Co. of Orissa Ltd. (SESCO) respectively are being disposed of by this common judgment and order in view of the fact that these three separate appeals yet identical in character are directed against the common order being dated 20th March, 2009 passed in case No. 66 of 2008, 67 of 2008, 68 of 2008 and 69 of 2008 filed separately by four distribution companies, and also against the common order dated 15th September, 2009 passed in RP No. 94 of 2009, 95 of 2009 and RP No. 100 of 2009 filed by the distribution companies   by the

Orissa Electricity Regulatory Commission, the Respondent No. 1 herein, determining the Annual Revenue Requirement (ARR) and Retail Supply Tariff (RTS) for each of the three appellants for the FY 2009-2010

2.   The grounds of appeals preferred by the three distribution companies are common. According to the appellants, the method of computing load factor during off peak hours as prescribed in the impugned order is contrary to the OERC Distribution (Conditions of Supply) Code, 2004.   The Commission has carried out truing up based on audited accounts in successive tariff orders of FY 2007-08, FY 2008-09 and FY 2009-10. The figures so calculated in these tariff orders are said to be different, since distinct and separate principles have been adopted for each element of cost and revenue for truing up purposes. The Commission is alleged to have not considered receivable audit figures in the truing up exercise. According to the appellants, the overdrawal

penalty for a consumer is to be computed as an aggregate of overdrawal for both peak and off peak hours in the light of the objective so as to flatten the load curve and possible future shortages. The classification of peak and off peak hours is essential. The appellants contend that while approving the ARR of the distribution companies for the FY 2009-10 the Commission adopted a different stand and deviated from the principles set out in its own order dated 23rd March, 2007 with regard to the determination of retail supply tariff for FY 2007-08 concerning the HT and EHT consumers whereby the Commission is said to have followed the consumption ratio in the matter of providing a concessional incentive tariff to the EHT and HT consumers.

3. The OERC notified on 21st May, 2004 OERC Distribution (Conditions of Supply) Code, 2004(Supply Code, for short). It is contended that all the EHT and the HT consumers have an agreement with the appellants stipulating thereby supply in terms of KVA or in terms of KW. The Commission in its

various orders determined slab rate of energy charged for all

the HT and EHT consumers. An incentive is provided to HT

and EHT consumers by encouraging higher consumption

through prescription of lower rates for a higher load factor

without any precondition. In the year FY 2007-08 the slab

rate of energy charged was given, and by the order dated

23rd March, 2007 applicable for the aforesaid year the

Commission for the purpose of incentive calculation held as

follows:

"5.32.3. The incentive calculation for the purpose of

entitlement of incentive is not to be based on "load factor"

but on the basis of ratio defined as follows:-

Actual consumption during a given period (p)

Consumption Ratio (CR)= (Actual Consumption during a

given period (P)/(Maximum Demand or Contract

Demand whichever is higher in KVA) x (No. of hours

during P) x 0.9) where KW = KVA x 0.9

The reason for adoption of this formula was that consumers

are found to be defaulters achieving higher level of

consumption; and yet become eligible for concessional tariff

by keeping the maximum demand sufficiently low (in the

denominator) of the ratio defined for "load factor" in para (2)

(y) of the OERC Distribution (Condition Supply Code), 2004.

This would defeat the purpose of providing for Concessional

tariff, viz, achieving higher level of consumption.

"5.32.4. The tariff structure now prescribed for allowing

concessional incentive tariff may have to be redesigned

when we move away from the present practice of

determination of consumption ratio to load factor system as

provided in the regulation. This needs no repetition that the

expected revenue of the distribution licensees as well as the

charges payable by the consumers were suitably worked out in the confessional incentive tariff keeping consumption ratio in view. At a future date, the Commission may dispense with the minimum stipulation period of 3 years as stipulated for availing benefit of incentive tariff and do away with the consumption ratio and accordingly redesign a tariff on slab rate basis so that consumers who are not getting the benefit of concessional incentive tariff may get that benefit."

4.   According to the appellants, the Commission was adopting the consumption ratio formula in order that the consumers though found to be defaulters in achieving higher level of consumption   yet become eligible for concessional tariff by keeping the maximum demand   sufficiently low in the denominator of the ratio as defined in Regulation 2 (y) of the Supply Code.   According to the appellants, on a rational basis OERC directed that the load factor was required to be considered on the basis of contract demand or maximum

demand whichever is higher. OERC was conscious of the

fact that all EHT and HT consumers had an agreement

which specified contract demand and in case of actual

demand being lower than the contract demand as specified

the agreement, the higher demand would be used for the

purpose of the consumption ratio. Paragraph 5.32.4 also

makes it clear that the expected revenue of the distribution

licensee as well as charges payable by the consumers were

suitably worked out in the confessional incentive tariff

keeping the consumption ratio determined on the basis of

the   principle 'contract demand or maximum demand

whichever is higher'.

5   While determining the tariff for the FY 2009-10, the

Commission deviated from the consumption ratio formula to

the disadvantage of the distribution companies and resorted

to maximum demand denominator instead of 'contract

demand or maximum demand whichever is higher' as per

Regulation 2 (aa) of the Supply Code; but the appellants

filed their ARR proposals with the Commission for FY 2009-

10 on the basis of the principles followed by the Commission

for FY 2007-08 and accordingly considered the revenue

requirement and the expected revenue from HT and EHT

consumers on the basis of the consumption ratio.   The

Commission's observation in this respect shall be dealt with

when we proceed to our reasoning.   According to the

appellants, the Commission clearly erred in specifying the

maximum demand to be taken as per Regulation 2(aa) of the

Supply Code when the revenue requirement and the

computation of average revenue from HT and EHT

consumers was approved by OERC on the basis of

computation of consumption ratio given by the OERC and

charged by the appellants by taking the higher of the

contract demand   or of the   maximum demand in the

previous year.

6.   It is further contended that the appellant has approximately

621   HT and EHT consumers.   Almost 25% of the said

consumers have an actual demand which is less than the contract demand. The incentive so given on the basis of computation or maximum demand as per Regulation 2(aa) of the Supply Code has resulted in a shortfall of about Rs.13 crore to one of the appellants, namely WESCO and Rs.6.88 crore to NESCO, the other appellant.

7.   The Commission has allowed drawal by industries during off peak hours that is, 10 pm to 6 am next day, upto 120% of their contract demand without levy of penalty. It is contended that when the maximum demand is within 120% of the contract demand in off peak hours the actual demand and not the contract demand should have been made the basis of computation of load factor.   It is contended that the consumer is already getting the benefit of waiver of penalty as OERC has allowed drawal up to 120% of their contract demand without levy of penalty.   There is no rational or justification for considering the contract demand as the basis

of computation of penalty and not actual demand when the

actual demand is within 120% of the contract demand.

8. Of the 24 respondents including the Commission

(respondent No.1), it is the respondent No.5, namely OCL

India Ltd. who has filed a counter affidavit to contend that

the appeal is not maintainable as being is devoid of merit.

The respondent No.5 who is engaged in the business of

manufacturing and sale of cement and refractories and is

an EHT consumer of the WESCO having contract demand of

43MVA filed an objection to the tariff proposal of the

appellant before the respondent No.1 which passed the

impugned order. The Commission has rightly held in the

impugned retail supply tariff order that it is the maximum

demand recorded that should be considered alone for

computing the load factor for HT and EHT category of

consumers. The WESCO issued energy bills to the

respondent No.5 computing load factor on the basis of "Contract demand/maximum demand whichever is higher" in violation of the RST order dated 20th March, 2009. Against the issuance of bills, the respondent No.5 filed an application before the Grievance Redressal Forum (GRF), Rourkela, Orissa under section 42(5) of the Electricity Act, 2003 read with Regulation 4 (1) of the Orissa Electricity Regulatory Commission(Grievance Redressal Forum and Ombudsman) Regulations, 2004. There the appellant WESCO told the GRF that it had already filed a review petition being case No. 95 of 2009 before the Commission being aggrieved against the order dated 20th March, 2009 but the review application was also dismissed by the Commission by the order dated 15th September, 2009. Then the GRF disposed of the application filed by the respondent No. 5 directing the appellant to revise the bills in terms of the impugned order. The Grievance Redressal Forum further directed the appellant to adjust the excess amount collected from the

respondent No. 5 in the future bills and that the said excess

amount would carry interest in terms of regulations 92 (1) of

OERC Distribution (Condition of Supply) Code, 2004. Even

then the appellant came to be deviant, which compelled the

respondent No. 5 to pay the amount under protest by its

letter dated 5.10.2009. Then, the appellant moved the

Ombudsman II, WESCO Area, Bhubaneswar which passed

an interim order dated 19th November, 2009 directing the

appellant to raise energy bills based on maximum demand in

computing load factor for availing graded tariff as per

Regulation 2 (aa) of Supply Code, 2004. During the

pendency of the case before the Ombudsman-II the

appellant preferred the present appeal.

9. According to the respondent No. 5, maximum demand

recorded should be considered for computing the load factor

for EHT an HT consumers. The Commission's order does

not suffer from any mistake directing the calculation of load

factor on the basis of maximum demand as per Regulation 2

(aa) of the Supply Code, 2004.

10. The appellants put in a rejoinder to the counter affidavit of

the respondent no. 5 reiterating the contentions made in the

memorandum of appeal and maintaining that the respondent

No.5 to avoid payment of the amount due and disconnection

of supply obtained a stay order from the High Court of Orissa

by filing a writ petition which is said to be pending.

11. The points for consideration raised in the memorandum of

appeal are as follows:

a) Whether the OERC was right in directing the

calculation of load factor on the basis of maximum

demand as per Regulation 2 (aa) of the OERC

Distribution (Condition of Supply) Code, 2004 and

not as per consumption ratio without any

justification or reasons when according to the

appellants the tariff has so long been determined

on the basis of consumption ratio specified in earlier tariff orders wherein the tariff was also charged to HT and EHT consumers on the aforesaid basis for the past period?

b)   Whether the dispensation through the impugned order has the ability to maximize consumption or will end up in incentivizing lesser consumption?

12.   Both the issues are interlinked. However there has been no appearance on behalf of the Commission and that of any other respondents than respondent no. 5.   Mr. Buddy A Ranganathan, learned Counsel for the appellant submitted as follows:

i)   From FY 2001-02 onwards, the State Commission has been incentivising consumption by consumers on the basis of a Consumption Ratio. The consumption ratio which was being followed by the Commission was as under:

Consumption **= Actual consumption during a given period (P)**
Ratio (CR)   **(Maximum Demand or Contract Demand**
Whichever is higher in KVA) x (No. of hours During P)

Where KW = KVA x 0.9

ii)   The detailed justification for the said consumption ratio is to be found in Retail Supply Tariff Order of the Commission   for FY 2007-08. In the said order, the Commission took a concerned and reasoned decision to delink the incentive tariff from the definition of 'Load Factor' as given in the Regulations. The principle of differentiation between the 'Consumption Ratio' and 'Load Factor' formulae is that while the consumption ratio is based on maximum demand or contract demand whichever is higher, Load Factor formulae centres round the basis of maximum demand only.

iii) The Commission had earlier realized and implemented the principle that if proper incentive was to be given to the consumers to maximize their consumption, the incentive had to be based on maximum demand or contract demand <u>whichever is higher</u>.

iv) While so,in FY 2008-09, the Commission, ignoring its own justification for de-linking the Consumption Ratio with the Load Factor and without giving any reason for the same, simply stipulated different slab wise rates for different Load Factors. The said order is also pending before this Tribunal in Appeal Nos. 26 to 29 of2009.

v) In the impugned Order, the Commission has in paragraph 283, stated that the intention of the Commission was to encourage higher consumption by prescribing lower rates for higher load factor without any pre-condition.   With this stated objective, the Commission, in paragraph 296 of the impugned order, held as under:

*"Therefore, the Commission allows drawal by the
industries during off peak hours (10 PM to 6 AM next
day) upto 120% of their contract demand without levy of
any penalty.   In view of that, for the purpose of
determination of load factor when maximum demand is
within 120% of contract demand in both off-peak and
other than off-peak hours (6 AM to 10PM), then
demands recorded in hours other than off peak hours
shall be the basis for computation of Load Factor. But
when maximum demand exceeds 120% of the contract
demand either in off-peak hour or other than off-peak
hour then actual maximum demand will be taken into
consideration for determination of load factor
irrespective of the hour when it occurs".*

Vi) The aforesaid direction contemplates two situations,
firstly, when the maximum demand exceeds 120% of
the contract demand and secondly when the maximum

demand is within 120% of the contract demand. In the 1st situation, when the maximum demand exceeds120% of the contract demand , then the actual maximum demand will be taken into consideration irrespective of whether the maximum demand is recorded in peak or off-peak hours. The appellants are not aggrieved with this situation.

vii) In the second situation if the maximum demand is more than the contract demand but within 120% of the contract demand, then the maximum demand recorded in the peak hours shall be the basis of computation of load factor.   In this event also, appellants are not aggrieved by the dispensation.

viii)   But, if the maximum peak demand is less than the contract demand and the maximum demand is taken to be the basis of the load factor, then the appellants are severely prejudiced.

13. According to Mr. Buddy A Ranganathan, if the objective of the Commission is to incentivize higher consumption using maximum demand as the basis for computation of the load factor then the dispensation would in effect incentivize lower consumption in a situation when maximum demand is less than the contract demand . Secondly, if the consumers are given a lower tariff for consuming less than the contract demand, it would tantamount to a situation where the distribution licensee has to invest, spend and plan for power procurement on the basis of a contractual load which its consumers are incentivized not to achieve, Such a situation would amount to put a premium to the inefficiency of the consumers in consuming less than their contract demand. Again, such a tariff would be contrary to section 61 (c) of the Electricity Act, 2003 which mandates that a tariff should reflect the factor which would encourage competition, efficiency, good performance and optimum investments.

14.   The dispensation, argument records,   provided in the impugned order is the very   antithesis of the stated and avowed objective of the Commission and the Commission did not cite any reason as to why it changed its well tested earlier methodology   of incentivising higher consumption through consumption ratio formula.

15.   Thirdly,   in the impugned order the commission has directed that the average revenue per KW/hr voltage wise on actual basis for the first nine months for FY 2008-09 was considered. This actual   revenue was on the basis of the consumption ratio stipulated in the Tariff Order for FY 2007-08.   However, the revenue calculated on the above basis is, as per the impugned order, to be multiplied by voltage wise sales projected for the ensuing year to arrive at an expected revenue for the licensees. This would mean that the per unit recovery for the past would be a higher figure whereas the projected per unit recovery for the future would be a lower figure resulting in increase in the revenue gap to that extent.

However, the revenue gap for FY 2008-09 to 2009-10, has remained the same with no increase in tariff. Therefore, the net resultant loss is borne by the distribution licensee.

16. The respondent No. 5 was represented by Mr. Ashok Parija who has supported the impugned order submitting that the Commission having not deviated from the relevant Regulations the order under appeal is really unassailable.

17. Having heard the submissions of the learned Counsel for the parties it calls for examination as to whether the Commission's impugned order dated 20th March, 2009 and the order passed in review dated 15th September, 2009 are or are not justifiable . What should be the methodology for incentivizing the consumers so as to reach higher consumption is the bone of contention of the parties. The OERC notified on 21st May, 2004 the OERC Distribution (Conditions of Supply) Code, 2004(Supply Code, for short), Regulation 2(y) defined load factor as follows:

*"Load factor" in case of contract demand of 100 KW
and above is the ratio of the total number of units
consumed during a given period to the total number of
units that would have been consumed had the
maximum demand been maintained throughout the
same period and is usually expressed as a percentage
that is,*

*Load Factor in percentage = (Actual units consumed
during a given period/maximum demand in KW X
Number of Hrs during the period) x 100*

*' load factor' in case of loads up to and excluding
connected load of 100 KW is the ratio of the total number
of units consumed during a given period to the total
number of units that would have been consumed had the
contract demand been maintained throughout the same
period and is usually expressed as a , that is,*

Load Factor in Percentage = (Actual units consumed

during a given period/contract demand in KW X Number

of Hrs during the period) x 100

18. "Maximum demand" has been defined in regulation 2(aa)as

follows:

Maximum Demand expressed in KW or KVA in relation to

any period shall mean four times the largest number of

kilowatt hours or kilovolt-ampere hours delivered at the point

of supply of the consumer and recorded during any

consecutive fifteen minutes in that period. Where agreement

stipulates supply in KVA, the quantum in terms of Kilowatts

may be determined by multiplying the KVA with 0.9

'Maximum demand' for a category of consumer shall be

calculated as per the procedure provided in the Tariff order,

approved by the Commission.

19. "Extra High Tension Consumer" is a consumer as per

regulation 2(t) who is receiving EHT supply at extra High

voltage while "High Tension Consumer" as per regulation

2(u) is a consumer *receiving HT supply at High Voltage"*

20. **C***ontract demand in terms of regulation 2(e)*means

"maximum KW or KVA or HP as the case may be, agreed to

be supplied by the licensee and reflected in the agreement

executed between the parties.   Where the agreement

stipulates in KVA, the quantum in terms of KW may be

determined by multiplying the KVA with 0.9"

21. Thus, we see that it is the maximum demand as defined in

regulation 2 (aa) of the Supply Code, 2004 that has been

used in the order as the denominator in determining the load

factor in the case of contract demand of 100 KW and above.

In terms of regulation 2(y) of the Code the actual units

consumed during a given period is divided by maximum

demand in KW and multiplied by number of hours and 100

then that determines the load factor in percentage.

Maximum demand or contract demand whichever is higher

formula has not been adopted in determining the load factor in the impugned order. Contract demand is distinguishable from maximum demand as the former is maximum KW or KVA or HP agreed to be supplied,   while in the latter it means four times the largest number of kW hours or KVA in relation to any period recorded during any consecutive fifteen minutes in that period. The Commission determined the slab rate of energy charged for all the HT and EHT consumers by encouraging higher consumption through low tariff for higher load factor.   The Commission in its earlier tariff order   for the FY 2007-08 dated 23rd March, 2007 calculated incentive not on the load factor but on the basis of a ratio which is called consumption ratio and which we have seen earlier. According to the consumption ratio, the actual consumption during a given period is divided by maximum demand or contract demand whichever is higher but this methodology was departed from while determining the tariff order for the FY 2009-10.

22. With regard to computation of revenue in respect of HT and EHT it is pertinent to record what the Commission says :

> *"242. The Commission observes that due to economic slow down the sales projected in different categories of consumer under HT & EHT may change but overall sales are likely to be achieved. Hence average revenue(P/Kwh) voltage wise on actual basis at HT & EHT for the first nine months of FY 2008-09 in respect of all the four DISCOMs were considered. This revenue was multiplied by voltage wise sales projected for FY 2009-10 to arrive at expected revenue of the licensees at respective voltage level for ensuing year."*

23. However, while determining tariff for FY 2009-10 by the impugned tariff order dated 20th March, 2009 the OERC held as follows:

"Graded Slab Tariff for HT/EHT Consumers

283. Staring from FY 2008-09 the Commission has been encouraging higher consumption by prescribing low rates for higher load factor without any pre-condition. Now the incentive scheme has been more broad based and simpler. Another reason for making the incentive scheme more broad based and simpler is to attempt to secure that the DISCOMs of Orissa should offer a competitive rate even after availability of full open access and harnessing of captive power generation in the State, resulting in opening up of the doors for competition. The incentives hereby granted would promote better competition in the interest of consumers, as per the mandate in Section 61 (c) of the Electricity Act, 2003.

284. Keeping the above factors in view the Commission determines the slab rate of energy charge for all HT & EHT consumers as follows:-

Load Factor (%)	HT	EHT
Upto 50%	300 p/u	290 p/u
>50% =<60%	225 p/u	202 p/u
>60%	220 p/u	202 p/u

285.   This graded slab tariff would have the effect of reducing the tariff for all HT & EHT consumers for higher consumption and thereby reduce cross subsidy. Demand charges and other charges as applicable would be chargeable in addition to the energy charges in the Table above.

286.   In calculation of load factor, Maximum Demand shall be taken as per Reg.2(aa) of OERC Distribution (Condition of Supply) Code, 2004"

24. Thus, no doubt there has been a departure of the Commission from its earlier stand but we are unable to hold that this was contrary to the Supply Code, 2004. According to the appellant, the appellant has 621 numbers HT & EHT consumers, 25% of which have an actual demand which is less than the contract demand and if the incentive is computed on the maximum demand as per Regulation 2 (aa) of the Supply Code this results in a shortfall of Rs.13 crore to WESCO and Rs.6.88 crore to NESCO, the appellants. No doubt, there is logic in it, if the consumers are given a lower tariff for consuming less than the contract demand it would amount to a situation where the Distribution Licensee has to invest on the basis of contractual load which its consumers may not be incentivized to achieve. Now, the Commission in the impugned order observes as follows:-

"Over Drawl Penalty Due to Excess Drawl during Off Peak Hours

295. The Commission has allowed consumers with two part –tariff to draw up to 120% of their contract demand during off peak hours without any penalty.   Some consumers may be reaching up to 120% of their contract demand during off peak hours but their recorded maximum demand during the other hours may be lower than that.   Such consumes will be put to difficulty if the higher recorded maximum demand during off peak   is taken into consideration for determination of load factor. The Commission is of the opinion that, drawal during off peak   hours helps the system for maintenance of better frequency profile and also utilization of surplus generation if any during this period. But any drawal above 120% of the contract demand during off peak hours will attract penalty in terms of demand charges.

296. Therefore, the Commission allows drawal by the industries during off peak hours (10PM to 6 AM next day) up to 120% of their contract demand without levy of any penalty. In view of that, for the purpose of determination of load factor when maximum demand is within 120% of contract demand in both off-peak and other than the off-peak hours (6 AM to 10PM) then demand recorded in hours other than off peak hours shall be the basis for computation of Load Factor. But when maximum demand exceeds 120% of the contract demand either in off-peak hour or other than off-peak hour then actual maximum demand will be taken into consideration for determination of load factor irrespective of the hour when it occurs"

25. Having read the order impugned it is difficult to say that it is de hors the Supply Code. The Commission has its own reason when it observes that the consumers who are reaching   upto 120% of their contract demand during off

peak hours with recorded maximum demand at other hours

lower than that may be inconvenienced   if the higher

recorded maximum demand during off peak hour is taken as

denominator for determination of load factor.   Now, the

appellants are not inconvenienced when the maximum

demand exceeds 120% of the contract demand in which

case   the   actual   maximum   demand   is   taken   into

consideration.   When the maximum demand is more than

the contract demand but within 120% of the contract demand

then the maximum recorded in the peak hours form the basis

of   computation   of   load   factor.   In   this   mechanism   the

appellants are not put to difficulty. But Mr. Ranganathan has

a point when he says that if the maximum peak demand is

less than the contract demand then the appellants may be

subjected to loss if the maximum demand is taken to be

basis of the load factor. In the last scenario the involvement

of   the   contract   load   would   have   been   beneficial   to   the

licenses.   Mr. Ranaganathan's apprehension that when the

maximum demand is less than the contract demand the
distribution companies may not be encouraged to give
optimum investments may not be unreal. But we feel that
since no provision of the Supply Code can come to the aid of
the appellants and further that the Commission cannot be
faulted with having breached any provision thereof the
impugned order cannot be interfered with; but at the same
time we are not able to appreciate how the replacement of
consumption factor by load factor will encourage higher
utilization of capacity, and we observe that the Commission
may deliberate on the situation and examine if any change
would be appropriate and feasible in future. It is for the
Commission to deliberate if it would adhere to the maximum
demand formula in case the maximum demand is less than
the contract demand so as to ensure maximize consumption.
With regard to the other point of projection of revenue for the
purpose of fixing the tariff on the basis of the actuals there is
likelihood of the increase of the revenue gap in as much as

the recovery for the future might be lower than that of the
preceding years per unit. This is the issue which we feel the
Commission should engage themselves for consideration, so
that the appellants are not put to loss due to change in tariff
computation based on load factor instead of consumption
ratio.   Accordingly, we direct the State Commission to
determine the revenue gap caused due to above and give
effect to the same in the ARR of the appellant at the earliest.

26. Since no breach of any provision of the Supply Code 2004,
is at issues, we dismiss the appeals without cost subject to
the observation made in the preceding paragraph.

(Justice P.S.Datta)   (Mr. Rakesh Nath)
Judicial Member   Technical member

Dated : 4th May, 2011

Index: Reportable/Non-Reportable

PK