Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 135 of 2007

Dated 12th May, 2008

Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson
Hon'ble Mr. A. A. Khan, Technical Member

Under Section 111 (2) of Electricity Act, 2003

In the matter of :

M/s Eurotex Industries And Exports Limited
Plot E-1 and E-23, MIDC, Gokul Shirgaon
Kolhapur - 416234

….Appellant

Versus

1. Maharashtra State Electricity Distribution Company Limited
Prakash Garh, Bandra (E)
Mumbai – 400051

2. Maharashtra Electricity Regulatory Commission
World Trade Centre, Centre No. 1, 13th Floor,
Cuffe Parade, Mumbai – 400005

… Respondents

Counsel for the Appellant : Mr. Haresh M. Jagtiani, Sr. Advocate and
Ms. Divya Bahi, Advs.
Mr. R.K. Aggarwal (Rep.)

Counsel for the Respondent : Mr. Buddy A. Ranganadhan
Mr. Arjit MAitra for MERC and

Mr. Ravi Prakash, Mr. Vikas Singh,
Ms. Neelam Singh, Mr. Vikrant Ghumare and
Mr. Jitendra Singh, Advs. for MSEDCL

Judgment

Per Hon'ble Mr. A.A. Khan, Technical Member

This Appeal challenges the order of the Maharashtra State Electricity Regulator Commission (hereinafter referred to as 'the Commission/MERC') passed on 19 Sep 07 (impugned order) under Regulation 85 of MERC (Conduct of Business) Regulations 2004 (to be called as "CBR") read with Section 61 and 62 of the Electricity Act 2003.

Facts of the Case and Discussion

2. The Appellant M/s Eurotex Industries and Exports Limited (to be referred to as "M/s Eurotex") is a HT-continuous process industry in the private sector, engaged primarily in the manufacturing and export of cotton yarn and knitted fabrics. It is a government recognized export house having 100% export oriented units. M/s Eurotex is a HT consumer of Maharashtra State Electricity Distribution Company Ltd. (for brevity to be referred to as "MSEDCL"), which is Respondent No. 1 in the instant appeal.

3. The Appellant filed a Review Petition before the Commission on 22 June 07 under Regulation 85 of CBR seeking review of Commission's order dated 18 May 07 passed in case No. 65 of 2006 in the Multi Year Tariff Petition filed by MSEDCL for the control period from FY 2007-08 to 2009-2010 and tariff for

Financial Year 2007-08. The aforesaid review petition of the Appellant sought to alter/modify the original clause 7.4(g) of the MERC High Tension tariff order dated 18 May 07 which came into effect from 01 May 07. The Review petition was disposed of by the Commission through its impugned order dated 19 Sep. 07

4. The contract demand of the Appellant till March, 2006 was 3000 KVA which was enhanced to the 4900 KVA with effect from 01 Apr. 06 after the approval by MSEDCL vide its letter dated 04 Feb 06. The Appellant during April 06 to June 06 conducted trial runs of the various production machines for quality stabilizations and for establishing the standards of its processing activity associated with the utilization of the increased contract demand. Even though the maximum record demand during the aforesaid period was nearly 88% to 95% of 4900 KVA, the actual consumption of the energy was in the vicinity of 61% to 71% of the maximum demand energy. Since July 06, however, the actual energy consumption has proportionately increased in step with the increasing build-up of contract demand up to 4900 KVA.

5. Clause 7.4(g) of the original order dated 18 May 07 specifying the fixing of benchmark units to calculate the Additional Supply Charge (ASC) of consumers is reproduced below

"In case of consumers whose sanctioned load/contract demand had been duly increased after the billing month of December, 2005, the reference period may be taken as billing period after six months of the increase in the sanctioned load/contract demand or the billing period of the month in which the consumer has utilized at least 75% of the sanctioned load/contract demand, whichever is earlier."

The application filed by MSEDCL seeking the approval of the Annual Revenue Requirement (ARR) from the Commission did not include the proposal as contained in Clause 7.4(g). The Appellant has stated that it realized the impact of Clause 7.4(g) only after the order was issued. The scenario that emerged was that while Clause 7.4(g) lays down the criterion for calculation of ASC units based on energy consumption, the reference period is based on reaching 75% of the contract demand.

6. In order to decide the reference benchmark for the consumption level the above stated clause specify the following criteria:

(a) billing period after six months of the increase in the sanctioned load/contract demand.

(b) billing period of the month in which the consumer has utilized at least 75% of the increased sanctioned load/contract demand

(C) whichever of the above criteria is achieved earlier shall be the reference period for calculation of bench mark units for determining ASC.

7. The Appellant states that after installation of the machinery against increased contract demand the trial runs on them had commenced with effect from 01 Apr. 06 and the additional demand of 75% of the increased contract demand may have been achieved within a few hours of the start up. The Appellant states that the entire process of establishing the production process involves several trial runs and re-runs of short durations, inspections of the new system machineries for adherence to quality standards, technical adjustment for quality products etc. and will involve a period of up to 6 months for normalizing the production process so as to reach optimum level of energy consumption. The Appellant avers that while the monthly maximum demand may have exceeded the specific threshold of 75% or more of the contract demand in short duration of the initial period of trial runs, the energy consumption, because of re-runs and intermittent nature of operation, gets restricted to a level below the consumption as a percentage of maximum energy that will be recorded during the post stabilization period. In this context, the Appellant has indicated that whereas the maximum demand as a percentage of contract demand was reached to the level of 88 to 95% in the first month itself, the actual energy units consumption as a percentage of the maximum energy was very low at 61% to 74%. The less energy consumption is stated to be because of the intermittent operation of the just installed production machinery and equipment

during stabilization period. The following table as furnished by the Appellant, depicts the maximum demand and energy consumption for the billing period of April 2006 to October, 2006.

S. No.	Billing Month and year	Energy consumed (Units)	Maximum Demand (kVA)	Percent Consumption of maximum energy
1	April 2006	2161200	4584	61%
2	May 2006	2526900	4332	72%
3	June 2006	2705760	4752	74%
4	July 2006	3190140	4752	91%
5	August 2006	3298800	4752	94%
6	September 2006	2142760	4860	87%
7	October 2006	3173760	4842	90%

8. The Appellant states that it was only in July 2006 that it was in a position to utilize its full production capacity and the maximum demand as a percentage of the contract demand was reached to 96.97% and energy consumption as a percentage of maximum energy went up to 91%. The Appellant confirms that since Jul 2006, it has been maintaining the level of utilization of its increased capacity and maximum demand and energy consumption have attained optimum level in a steady state manner.

9. The Commission in its clarificatory order dated 24 Aug. 07 against the MSEDCL's clarificatory Petition in Case No. 26 of 2007 has clarified as under:

"***Commission's Clarification and Ruling***

In case of consumers whose sanctioned load/Contract Demand had been duly increased after the billing month of December, 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which ***the third occasion of the consumer utilizing at least 75% of the increased sanctioned load / Contract Demand after increasing the Contract demand is recorded,*** *whichever is earlier.* (Emphasis supplied*)*

10. The Commission thereafter in a second clarificatory order in Case Nos. 26 of 2007 and 65 of 2006 passed on 11 Sep. 07 in respect of reference billing period for HT foundries in cases of increased contract demand has stated as under:

"In case of consumers whose sanctioned load/Contract Demand had been duly increased after the billing month of December, 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which ***the third occasion of the consumer utilizing at least 75% of the increased sanctioned load/contract demand after increasing the Contract Demand is recorded,*** *which ever is earlier.*

11. The Commission had also clarified on pages 14 and 15 of the Clarificatory Order that,

> *"….clause(g) of the Order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December, 2005……..."*

12. While disposing of the Review Petition of the Appellant the Commission observed that reconsideration of the issue raised by the Appellant was not necessary and insofar as the benchmarking the units for calculation of ASC was concerned the clarification provided by the above clarificatory orders dated 24 Aug. 07 and 11 Sep. 07 would have general effect. The Appellant is aggrieved by the review order of the Commission dated 19 Sep. 07 and has sought for following reliefs in its Appeal:

(a) To alter, modify Clause 7.4(g) of the Commission's order dated 18 May 07 by deleting the following part:

> *"or the billing period of the month in which the third occasion of the consumer utilizing at least 75% of the increased sanctioned load/Contract Demand after increasing Contract Demand is recorded, whichever is earlier."*

(b) alternatively to clarify that the application of the said Clause 7.4(g) would become applicable only after 6 months from the increase in the sanctioned load/Contract Demand.

(c) To direct the First Respondent to refund and adjust against future billings, the amount of energy charges and other incidental charges paid by the Petitioner on the basis of the benchmark units fixed in the third month (June 2006) and ASC units calculated accordingly.

13. We observe from the Tariff order dated 19 May 07 that the levy of ASC for allocating the costly power is applicable only to industries connected at EHV levels or express feeders, Railways and industries facing one day load shedding. The quantum of costly power for levying of ASC for continuous industries and Railways belonging to the same category of load shedding is set to be 24% of the consumption. The purpose is to provide economic signal to the consumers for efficient use of energy and to incentivise in reduction of consumption or to disincentivise for increase in consumption in comparison to reference month in the preceding year from January to December. In other words the current level consumption of the consumer in a particular month is benchmarked against the corresponding monthly average consumption during the preceding year (January 2005 to December 2005) while determining ASC for the consumer.

14 The relevant extract from the tariff order is as under:

"***Reference consumption to be considered for levy of ASC***

In the context of levy of Additional Supply Charges, the Commission's tariff order states:

The Commission has simplified the method of levy of ASC, by allocating the costly power only to industries connected at EHV levels or express feeders, Railways, and industries facing one day load shedding, in accordance with the quantum of costly power considered for the purpose of ASC determination. ASC will now be levied on 24% of the consumption for continuous industries and Railways, as compared to 42% earlier, and on 11% of the consumption for industries facing one day staggering, as compared to 28% earlier, irrespective of the location in the State, since the load shedding for these categories is the same, irrespective of their location. The revised ASC matrix giving the share of costly power consumption is giving below:

S. No.	***Consumer Category***	***Percentage of costly power consumed***
1.	*HT- Industry*	
1.1	*Continuous Industry (on express feeder)*	*24%*
1.2	*Non-continuous Industry (not on express feeder)*	*11%*
2	*HT-III Railways*	*24%*
3	*Express Water Works*	
3.1	*Express feeder*	*24%*
3.2	*Non-express feeder*	*11%*
4	*LT-V Industry (MIDC area)*	*11%*

15. In our opinion there are two broad classes of HT-consumers, one not being granted any additional contract demand but who continue to operate with the pre-existing contract demand and the other who is sanctioned an additional contract demand after December 2005 to support installation of new machinery and equipment to enhance the production of the existing products and/or to introduce new product lines. In the former class there is no difficulty in finding the reference period and the reduction / increase in consumption is discernable from the current energy consumption data. In the latter class of consumers, to which the Appellant belongs, the increased contract demand in post-stabilization period will proportionately consume additional energy and has no reference period in the preceding year (January 2005 to December 2005) except the ratio of energy consumption as a percentage of the pre-existing contract demand.

16. The issue, therefore, arises as to how the reference period in case of the consumer whose sanctioned load/contract demand has been increased after the billing month of December, 2005 is to be determined? The Commission at clause 7.4(g) of the tariff order as extracted in para-5 above has specified that the reference period may be taken as the billing period after six months of the increase in the sanctioned load/contract demand or the billing period of the month in which the consumer has utilized at least 75% of the increased sanctioned load/contract demand, whichever is earlier. Further, the Commission in the same tariff order

has explained with the help of the illustration the mechanism for determination of ASC for the consumers as indicated below.

> "*The ASC will be levied on the share of costly power consumption specified in this order subject to the comparison of monthly consumption with the consumption in the reference period. For instance, consider a HT industrial consumer (continuous industry) [with ASC share of 24%] with average monthly consumption of 1,00,000/- units during the reference period. If the consumption in June 2007 is 1,00,000 units, then the ASC rate will be applicable for 24,000 units, while the balance 76,000 units will be charged at base energy rate. However, if his consumption in June 2007 is 90000 units, then the ASC will be applicable on 14,000 units, (24,000-10,000), and the balance 76,000 units will be charged at base energy rate. Thus, the reduction in consumption with respect to the benchmark consumption will be entirely deducted from the consumption to be charged at ASC rate. The incentive is limited to the maximum percentage indicated against the particular category, i.e. 24% in above example. Similarly, if his consumption in June 2007 is 1,10,000 units, then the ASC will be applicable on 34,000 units, (24,000+10,000) and the balance 76,000 units will be charged at base energy rate. Thus, the increase in consumption with respect*

to the benchmark consumption will be entirely added to the consumption to be charged at ASC rates."

17. It is noticed that while the entire mechanism of determining the ASC to be levied is based on the energy consumption the reference period in case of consumer having increased sanctioned/contract demand has been provided two options as indicated in paragraph 6(a) and 6(b) above. Para 6(a) provides that the billing period after six months of the increased sanctioned load/contract demand takes care of the stabilization period of the newly installed machinery / equipment to reach energy consumption to its full level of utilization. We assume that the allocation of six months time period for stabilization to utilize the increased contract demand arrived by the Commission after due diligence of such cases of HT continuous industries. Para 6(b) however, provides that the reference monthly period is the one in which the consumer has utilized at least 75% of the increased sanctioned load/contract demand. There is an obvious mismatch between the reference periods formulated in options at 6(a) and 6(b). The expanded system to utilize the increased contracted demand having been accepted to be established after six months of the increased sanctioned load/contract demand the increase consumption would have reached its optimum level of utilization. Further, in case of option at 6(b) the reference period of utilizing 75% of the increased sanctioned load/contract demand is reached in the first month itself as described earlier. The monthly maximum demand of 75% of the contract demand may be recorded in 30

minutes time-slot itself when the expanded system is undergoing trial run or re-run and not fully operational. This will not facilitate consumption of energy up to the level consumed at post-stabilization period. In fact it appears that the probability of such consumer utilizing the reference period of 6(a) providing stabilization period of six months for reaching the energy consumption to the maximum level will become remote as it will be pre-empted by 6(b). Further, the same clause also imposes a condition as mentioned at 6(c) above that *whichever of the above criteria is achieved earlier [i.e. options at 6(a) and 6(b)]* shall become the reference period for calculation of benchmark units for determining ASC. The reference period as determined by option at 6(b) will become the dominant option as it will be achieved earlier and will render the option at 6(a) infructuous.

18. The Commission in its clarificatory orders dated 24 Aug 07 has modified the Clause 7.4(g) as indicated below

> "***Commission's Clarification and Ruling***
>
> *In case of consumers whose sanctioned load/Contract Demand had been duly increased after the billing month of December, 2005, the reference period may be taken as the billing period after six months of the increase in the sanctioned load/Contract Demand or the billing period of the month in which* ***the third occasion of the consumer utilizing at least 75% of the increased sanctioned load /***

Contract Demand after increasing the Contract demand is recorded, *whichever is earlier.* (Emphasis supplied*)*

19. The Commission further in its second clarificatory order dated 11 Sep. 07 has additionally clarified that:

"….clause(g) of the Order reproduced above, will be applicable only in cases, where the increase in Contract Demand is equivalent to 25% or more of the Contract Demand during the reference period from January 2005 to December, 2005……..."

20. So far as the applicability of the condition of increase in contract demand by 25% is concerned, the Appellant quantifies the condition as increase in the contract demand in its case is to the extent of 63.33 percent (increase from 3000 KVA to 4900 KVA). Further, the modification of the clause by introducing "*third occasion of the consumer utilizing at least 75% of the increased sanctioned load/contract demand*" will invariably be achieved in the third month after increasing the contract demand because the monthly maximum demand in each of the three months could be achieved without reaching the system stabilization. This leads to denial of the opportunity to Appellant for achieving optimum level of energy consumption and thereby making it difficult to claim ASC incentives for

reduction in energy consumption as per the scheme. The expanded system to reach the maximum demand of 75% of the contract demand has still not reached the plateau of steady operation as it is within the given period of stabilization of six months. The two conditions are unequal insofar as the time period allowed for stabilization is concerned. Also, if the same time period is allowed in both the options for fixing the reference period "*after six months"* there is no relevance of the condition of "*whichever is earlier*" mentioned in the original clause 7.4(g) of the tariff order dated 18 May 07. Further, since the billing is based on both maximum demand and as well as energy consumption it appears reasonable and fair that second option of the clause 7.4(g), needs to be appropriately modified.

21. In view of the above we modify Clause 7.4(g) of the Tariff Order dated 18 Mar 07 to read as under.

> *"In the case of consumers whose sanctioned load/contract demand had been duly increased after the billing month of December, 2005 the reference period may be taken as billing period after six months of the increase and the sanctioned load / contract demand* ***OR*** *the billing period after six months in which the consumer has utilized at least the same ratio of energy consumption as percentage of increase contract demand that has been recorded prior to the increase in sanctioned load/contract demand."*

22. We also direct the first respondent to refund and adjust against future billings, the amount of energy charges and other incidental charges paid by the Appellant on the basis of the benchmark units fixed in the third month (i.e. June 2006) and additional supply charges be calculated accordingly.

23. The Appeal is disposed of accordingly with no orders as to cost.

Pronounced in the open court on 12th day of May, 2008.

(A. A. Khan)
Technical Member

(Anil Dev Singh)
Chairperson

INDEX: "Reportable/Non-Reportable."