

Judgment in Appeal No. 203 of 2013

In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)

Appeal No. 203 of 2013

Dated: 29th April, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

IN THE MATTER OF:

Shree Cement Limited
Bangur Nagar, Post Box No. 33,
Beawar 305901, Rajasthan. Appellant

Versus

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhavan,
Sahakar Marg Jaipur-302005.
2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur-302005.
3. Ajmer Vidyut Vitaran Nigam Limited
Old Power House, Hathi Bhata,
Jaipur Road, Ajmer-305001
4. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House Industrial Area,
Jodhpur-342003. Respondents/Petitioners

Counsel for the Appellant(s) : Mr. M.G. Ramachandran
Ms. Swagatika Sahoo

Counsel for the Respondent : Mr. C.K. Rai for R-1
Mr. Bipin Gupta for Respondent Nos.
2 to 4.

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JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an appeal under Section 111 of the Electricity Act, 2003, filed by the appellant against the Order dated 06.06.2013, passed by the Rajasthan Electricity Regulatory Commission (hereinafter called the 'State Commission') in Petition No.356-358 of 2012, filed by the distribution licensees (respondents herein) wherein the State Commission had allowed petitions filed by the respondents and determined the Annual Revenue Requirements (ARR) and Revision of Retail Tariff for FY 2013-14 including the changes made for the determination of time block for maximum demand in a special manner for open access customers.

2. Thus the State Commission by the impugned order has permitted the respondents/petitioners to change the time block for recording maximum demand for open access consumers to 15 minutes instead of 30 minutes in their tariff booklet. The appellant is aggrieved by the impugned order dated 06.06.2013 due to the following aspects:

- (i) that the State Commission did not consider the basic intent and purpose of the Regulations and the object sought to be achieved by the maximum demand determination.
- (ii) that the State Commission, by allowing the maximum demand determination for those consumers who avail open access at a 15 minutes time block instead of 30 minutes time block on their drawal from Discoms made it discriminatory and violative of Section 62(4) of the Electricity Act, 2003 as similarly placed consumers getting the entire quantum from the distribution licensee are subjected to only 30 minute time block for maximum demand determination.

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- (iii) that the State Commission did not take cognizance of the fact that such an order adversely affects the consumers as it takes away the flexibility available to the consumers in managing their demand.
 - (iv) that the State Commission did not consider the consequential effects of its order, namely, that it would lead to two separate demand periods for the same types of consumers which is not allowed under the law.
3. The relevant facts giving rise to the instant appeal are as follows:-
- (i) that the appellant Shree Cement Limited is a public company limited by shares, incorporated and registered under the provisions of Companies Act, 1956.
 - (ii) That the appellant is engaged in the business of manufacture of cement and has its manufacturing units at Bangur Nagar, Beawar, District Ajmer and at Bangur City, Village Ras, District Pali and Clinker Grindings at RIICO Industrial Area, Khushkhera, District Alwar, Udasar Udaipur at Suratgarh, District Sriganganagar and Jobner, Jaipur. The appellant's manufacturing units are receiving power supply from the respondents/ Distribution licensees and also from captive power plants established by the Appellant. The Captive Power Plants of the Appellant are at Beawar and Ras.
 - (iii) That on 30.11.2012, the respondents filed the Petitions 356-358 of 2012 before the State Commission for the determination of the Annual Revenue Requirements (ARR) and Revision of Retail Tariff for FY 2013-14.
 - (iv) that in the proceedings, the appellant herein filed its comments on the above petition on certain specific aspects including the aspect of maximum demand determination.

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- (v) that the aforesaid petitions no. 356-358 of 2012, have been, as stated above, allowed by the State Commission vide impugned order dated 06.06.2013.

4. As per the learned counsel for the appellant there are no disputed facts. The issue relates to discriminatory treatment of HT or EHT consumers, availing open access, being subjected to determination of maximum demand at 15 minutes time block for their HT or EHT drawl from Discoms, as compared to similarly placed consumers of the respondents being subjected to the determination of maximum demand at 30 minutes time block.

5. The following question of law arises in the present appeal:-

Whether the State Commission is justified in subjecting the consumers availing open access to determination of maximum demand at 15 minutes time block on their drawl from discoms and whether the same is discriminatory?

6. We have heard Shri M.G. Ramachandran, learned counsel for the appellant, Shri C.K. Rai, learned counsel for the respondent no.1 and Shri Vipin Gupta, learned counsel for the respondent nos. 2 to 4 and have gone through the respective written submissions filed on behalf of the rival parties.

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

A that the differentiation of the two, based on the HT consumers having contract demand and getting open access power also is discriminatory and contrary to Section 62(3) of the Electricity Act, 2003. In so far as the power supply qua the contract demand with the distribution licensee is concerned both categories are similarly placed. There is no rationale to deny the benefit of 30 minutes integration to such consumers

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having open access in so far as the supply of power qua the contract demand with the distribution licensee as in the case of other HT consumers.

B. that there is no nexus for relating taking open access to the maximum demand issue to differentiate from other HT consumers. Regulation 12 of the RERC (Terms and Conditions for Open Access) Regulations, 2004 (amended upto 30.03.2007-4th Amendment) dealing with the Open Access Agreement provides as under:-

“12. Open Access Agreement

- (1) An open access consumer will enter into a commercial agreement with the open access supplier. The agreement shall provide, among other things, the eventuality of premature termination of agreement and its consequences on the contracting parties.
- (2) An open access consumer will enter into a commercial agreement with the Rajasthan Vidyut Prasaran Nigam (RVPN) for use of the transmission system.
- (3) (a) An open access consumer shall enter into a commercial agreement with the distribution licensee for use of the distribution system. This agreement may provide for:-
 - a) High Tension (HT) power supply from distribution licensee;
 - b) Stand by supply to meet the outage contingency of generating unit supplying electricity will be admissible only for annual maintenance outage, other planned outage and forced outage for a period not exceeding 42 days per annum in the aggregate.
- (b) The contract demand for HT supply agreement and stand by supply agreement will be in KW and also in KVA. Further an existing open access consumer may opt for HT power supply at the pre-open access contract demand or a reduced contract demand from any date during the first year of open access. However, subsequent option for reduced contract demand will be exercised only after one year.
- (4) An open access consumer will enter into a supplementary agreement for any change in the aforesaid agreements for open access supply for :-
 - (i) use of RVPN transmission system or of transmission licensee in the format and/or

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- (ii) use of distribution system of distribution licensee for HT supply or stand by supply
- (5) The standard formats for open access agreements referred at sub- regulations (2), (3) & (4) shall be issued by the Commission separately & shall be deemed to be part of these regulations. The agreement executed may have terms and conditions, different from such standard agreement formats subject to RERC approval.
- (6) HT power supply tariff shall be as applicable to that consumer category, billed on monthly or weekly basis as envisaged in these regulations.
- (7) Tariff for stand by supply will be as applicable for temporary supply to the respective consumer category applicable on daily basis.
- (8) For the billing purpose a year is to be counted as of 52 weeks or 365.25 days.
- (9) Copies of the agreements executed will be supplied to the State Load Dispatch Center (SLDC). SLDC will intimate the open access consumer the date from which open access will be available which will not be later than 3 days from the date of furnishing of agreements.
- (10) The execution of agreements under sub regulation (3) or (4), will supersede the prevalent HT power supply agreement with the distribution licensee. For a reduced contract demand of HT supply, distribution licensee may make an application under regulation 14, towards fixed cost, if any, arising out of his obligation to provide open access.
- (11) Supply voltage for an open access consumer will be determined on the basis of a sum of HT supply contract demand and open access contract demand or HT supply contract demand and stand by supply contract demand, whichever is higher. Provided, the supply voltage of an open access consumer prior to availing open access may be continued on the request of the open access consumer. "

C. Thus, the Regulation 12 of the Open Access Regulation, reproduced above itself provides for the application of HT tariff for supply from the distribution licensee and therefore HT tariff is determined for HT consumers in all respects including the 30 minute time integration should be applied to the Open Access Consumer to

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the extent they receive supply against the contract demand from the distribution licensee.

D. that the Electricity Act, 2003 provides for a right in any consumer to get open access power also in addition to maintain the contract demand with the distribution licensee. The quantum of power supply by distribution licensee is measured in terms of the average KVA delivered at the point of supply, after the adjustment of the supply received through open access. Accordingly, in regard to maximum demand, both - an open access consumer having a contract demand with the distribution licensee and a non-open access consumer having only a contracted demand with the distribution licensee are similarly placed.

E. that the State Commission has failed to appreciate the provisions of Section 62 (3) of the Electricity Act, 2003, which provides as under:-

" the Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required."

Accordingly there is no rationale for the differential treatment of open access consumers on the supply received by them from Discoms.

F. that the State Commission has failed to appreciate that as per the definitions in RERC (Supply Code and Connected Matters) Regulations, 2004, the duty has been cast on the Distribution Licensee to specify the consecutive period of maximum demand which may be either 15 minutes or 30 minutes with the approval of the Rajasthan Electricity Regulatory Commission. The above needs to be applied normally/generally and it cannot be applied selectively at

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15 minutes time block for some and 30 minutes time block for others. It may be noted that different demand periods of 15 or 30 minutes tantamount to two separate demand periods for the same types of consumers which is not allowed under the law.

G. that the metering equipment installed at the appellant's facilities is an ABT meter capable of measuring the electricity, both in terms of units as well as a maximum demand over a time block of 15 minutes. Since the meter is capable of measuring in terms of a 15 minutes time block, it logically follows that the maximum demand prevailing for a time block that is the multiple of 15 minutes time blocks (30, 45, 60 etc.) can be easily calculated by a simple consideration of aggregating the recording in the meter. It is, therefore, possible to determine the quantum of maximum demand in any time block of 30 minutes with ABT metering 15 minutes time integration.

H. that the State Commission has failed to appreciate that enforcing maximum demand in 15 minutes time block only for consumers having open access action adversely affects the consumers as it takes away the flexibility available to the consumers in managing their demand. The justification sought to be provided for revising the period of recording maximum demand, that is, the installation of meters having capacity to record demand on a 15 minutes time block does not have any merit to discontinue the existing flexibility available to the consumers.

8. **Per contra**, the learned counsels for the respondents have made the following pleas:-

A. that while passing the impugned order the State Commission has duly considered provisions of the Electricity Act, 2003, RERC (Supply Code and Connected Matters) Regulations, 2004, RERC (Term and Conditions for Open Access) 3rd Amendment Regulation, 2004.

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The relevant portion of the impugned order dated 06.06.13 is reproduced here under:

“20.4.10 As per regulation 2 (7) of RERC (Supply Code and Connected Matters) Regulations, 2004, the definition of Maximum demand is as follows:

‘Maximum Demand’ shall mean the average kVA delivered at the point of supply of a consumer during any consecutive period of 30 or 15 minutes of maximum use during the month, as may be specified by the licensee, with the approval of Commission.”

20.4.11 Whereas, the existing definition given in the tariff booklet reads as under:

Maximum Demand or Demand means the average KVA delivered to the point of supply of the consumer during any consecutive period of 30 minutes of maximum use during the month.

20.4.12 As per RERC (Terms & Conditions for Open Access)(3rd Amendment) Regulations, 2004, the Commission specified the Open Access agreement for case of distribution system & for HT supply of which clause 9 of scheduling and clause 29 (2) of billing are as follows:

9. Scheduling:

(ii)The day ahead schedule injection/ drawal shall be furnished each day, not later then 10.00 AM, to State Load Despatch Center, Heerapura, for each 15 minute block starting from 00.00 hrs. for the ensuing day;

(iii)Further, if it involves open access to inter state transmission system, open access customer shall cause his supplier to furnish day ahead schedule on 15 minute block basis at prescribed time to the Northern Regional Load Dispatch Center in accordance with the prescribed procedure with a copy to SLDC.

29. Billing

(2)The Billing shall be made as per finalized energy accounts issued by SLDC, based on various para-meters at 15 minutes interval, starting from 0.00 hours of the day, stored in ABT complaint meters and as specified by the Commission.

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20.4.13 It may be mentioned that energy accounting & scheduling for Open Access consumers is for each 15 minutes time block as distinct from other consumers. In view of this, reckoning of maximum demand based on 15 minutes time block for open access consumers as clarified by the petitioners in their reply to data gap seems a reasonable proposition and is worth consideration. Considering that Commission as per regulation 2 (7) of RERC (Supply Code and Connected Matters) Regulations, 2004 is empowered to specify the time period for the purpose of maximum demand, the Commission accepts the proposal of the Discoms. Accordingly, Commission directs the Discoms to make required changes in booklet "Tariff for Supply of Electricity".

B. that as per Supply Code Regulations, 2004 the determination of maximum demand could be done at the time block of 30 or 15 minutes as may be specified by the State Commission.

C. that Section 2 (15) of the Electricity Act, 2003 provides the definition of 'Consumer' as follows:-

2(15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;

D. that Section 2 (47) of the Electricity Act, 2003 defines the term 'Open Access' as "*open access" 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;*

E. that Regulation 2 (d) of the Rajasthan Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2004 defines the term 'Open Access' as follows:-

"Open Access Consumer" means a consumer permitted by the Commission to receive completely or partly for its consumption the

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supply of electricity from a person other than distribution licensee of his area of supply.

F. that Section 49 of the Electricity Act, 2003 which provides for Separate Agreement for Open Access Consumers provides as under:-

"Agreements with respect to supply or purchase of electricity.

49. Where the Appropriate Commission has allowed open access to certain consumers under section 42, such consumers notwithstanding the provisions contained in clause (d) of sub-section (1) of section 62, may enter into an agreement with any person for supply or purchase of electricity on such terms and conditions (including tariff) as may be agreed upon by them.

G. Thus, as per Section 49 of the Electricity Act, 2003 such open access consumers are required to execute a separate agreement with the supplier of electricity.

H. that according to Section 62 (3) of the Electricity Act, 2003, the Appropriate Commission may differentiate according to the consumer's load factor, power factor, voltage, nature of supply and the purpose for which the supply is required.

I. that according to Regulation 12 of the RERC (Terms and Conditions for Open Access) Regulations, 2004 (Amended upto 30.03.2007 vide 4th Amendment, every open access consumer in the State of Rajasthan is required to enter into a commercial contract with the open access supplier as well as distribution licensee for use of distribution system.

J. that the State Commission has specified the Open Access Agreement and HT Supply Agreement in accordance with clause 9 dealing with Scheduling and Clause 29 (2) dealing with Billing and prescribed the standard formats after due consideration while passing the impugned order.

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K. that according to Regulation 20 (5) of the RERC (Terms for Open Access) Regulations, 2004 as amended upto 30.03.2007 vide 4th Amendment, the energy accounting for billing of open access consumer shall be carried out as per the provisions for injection schedule, actual injection, drawal schedule and actual drawal as per meter readings for each time block of 15 minutes.

L. that as per Regulation 11 of RERC (Metering Regulation, 2007), the metering of open access consumers is to be done by way of interface meters of which minimum acceptable specification provided in the Annexure -1 of the regulations for maximum demand recording period is 15 minutes time block. Regulation 11 of RERC (Metering Regulation, 2007) provides as under:-

“11. Metering System Requirement

(i) Interface Meters:-

(a) Meter Location

(i) For Open access consumers, main & check meters shall be installed at delivery point or relevant to termination point of service line at outgoing isolator of licensee's sub station. The stand by meter shall be installed at other end of line. This is applicable to open access interface meters having inter connection with transmission system/distribution system.....”

M. that the learned State Commission, vide impugned order dated 06.06.2013, has rightly accepted the proposal of Discoms for subjecting the consumers availing open access to determination of maximum demand at 15 minutes time block. These Regulations are valid piece of subordinate legislation and are binding upon the State Commission.

N. that in the circumstances of the matter in hand, the learned State Commission has rightly and legally permitted the respondents/Discoms to change the time block for recording maximum demand for open access consumers to 15 minutes instead

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of 30 minutes in their tariff booklet. No discrimination, as alleged by the appellant, has been made in the impugned order.

O. that the consumers of HT or EHT category availing Open Access facility becomes a different class of consumers. The person availing open access facility becomes a different class of consumers and there cannot be any question of discrimination between different classes.

P. that the necessity has arisen for the amendment since under tariff it was only 30 minutes but that was to be applied on a consumer who is exclusively availing electricity from the Discom but a person who is availing electricity from Open Access as well as Discom, then such consumer of a different class and under the Open Access regulations and metering regulations, their maximum demand was required to be in block of 15 minutes instead of 30 minutes. In the proposal made by the Discoms it was specifically provided that since meter regulations ABT meters are required to be installed mandatorily for a consumer availing Open Access facility, therefore the Commission may amend it as 30/15 minutes. The State Commission after considering the reasons stated by the Discoms and the comments of the stake holders and considering relevant regulations and supply code regulations etc. passed the impugned order and directed that only for an Open Access consumer maximum demand (MD) has to be recorded on 15 minutes time block. All the Open Access consumers are being billed in block of 15 minutes and the appellant is the sole consumer asking for 30 minutes, though it is also being billed at 15 minutes, which point was challenged by it before the Ombudsman and the Ombudsman had given the order to calculate in 30 minutes by averaging two blocks of 15 minutes which has been stayed by the Hon'ble Rajasthan High Court and because of this the necessity arose for change in 30 minutes integration to 15 minutes for open access consumers with a contract demand and the same has rightly been permitted by the State Commission in the impugned order.

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Q. that an open access consumer consumes electricity from the Discoms and from other sources by scheduling it and thus he purchases and consumes energy during specified periods and therefore he becomes a consumer of a different class which difference is permissible under Section 62(3) of the Electricity Act, 2003. Since the appellant has neither challenged the Open Access Regulation nor the Metering Regulation, he cannot claim the recoding of time in block of 30 minutes and the impugned order is totally justifiable.

9. Shri M.G. Ramachandran, learned counsel for the appellant has vehemently tried to distinguish the law laid down by this Tribunal in its judgment dated 21.02.2011 in Appeal No. 270 of 2006 titled as Chattisgarh State Power Distribution Co. Ltd. Vs. J.P. Sahoo and Others saying that the reliance on the same by the respondent's counsel is totally misplaced because the issue decided in that appeal is related to minimum charges payable by the captive consumers for supply from the distribution licensee. Shri Ramachandran has drawn our attention to the following paragraphs of that judgment dated 21.02.2011 in Appeal No. 270 of 2006 passed by this Tribunal:

"14. The above observation made by the State Commission would indicate that the State Commission has held that the Captive Consumers are different from the other Consumers as the Captive Consumers would normally take electricity only from Captive Power Plant. In other words, the Captive Power Plant instead of drawing power from the grid will use its electricity generated by it thereby supporting the grid with its own generation. The Captive Power Plant and Captive Consumers will be taking electricity from grid only as stand-by supply, that too, only in circumstances when Captive Power Plant is under an outage.

15. This Captive consumer has been already paying demand charges for the contract demand as is applicable to all other consumers. Only a very small amount of minimum energy charges has been waived off. As a matter of fact, the transmission and wheeling charges are being paid by the

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Captive Consumers to compensate the fixed cost incurred by the Appellant.

16. That apart, there is no prejudice caused to the Appellant by way of non-recovery of minimum energy charges from the Captive Consumers. In fact, the Tariff order passed by the State Commission for the year 2005-06 was applicable only up to September, 2006, that is, till next Tariff Order for the year 2006-07 was issued. The main impugned order was passed by the State Commission on 6.2.2006. Therefore, the order dated 06.02.2006 was applicable only for the period of 8 months.

17. The Appellant has contended that the State Commission has wrongly given a favourable treatment to Captive Consumers as against the other consumers by exempting them from paying the minimum energy charge. The State Commission in the impugned order has observed that in the State of Chhattisgarh, the Captive Power Plant capacity is more than the installed capacity of the Appellant.

18. Many of the Captive Power Plants are based on co-generation and use industrial waste for fuel generation. Some of the Captive Power Plants are based on biomass and other renewable sources of energy. As a matter of fact, the Appellant is unable to supply the power to the extent of demand and the State has a constant peak deficiency of 200 MW which is likely to go up. The State Government also showed a positive approach towards the Captive Power Plants and granted various concession to them. In fact, the State Government has given a dispensation to promote Captive generation and use of electricity."

10. This Appellate Tribunal in the judgment dated 21.02.2011 has observed that since the consumers of captive power plant consumes power whether fully or partly from a CPP and partly from licensee and a stand by power has to be treated by its very nature in a different category and further the CPP has a right to open access for the purpose of supply of electricity to its captive consumers in view of Section 9 (2) of the Electricity Act, 2003 and the captive consumer is not liable to pay cross subsidy surcharge in view of proviso 4 to Section 42 (2) of the Electricity Act, 2003 they (the captive consumers of the CPP) have to be treated as a different category of consumer of licensee and this view of the State Commission has been upheld.

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11. After hearing the rival submissions of the parties and going through the material available on record, the following issues arise for our consideration:-

- (i) Whether the State Commission did not consider the basic intent and purpose of the Regulations and the object sought to be achieved by the maximum demand determination?
- (ii) Whether the State Commission, by allowing the maximum demand determination for those consumers who avail open access at a 15 minutes time block instead of 30 minutes time block on their drawal from Discoms made it discriminatory and violative of Section 62(4) of the Electricity Act, 2003 as similarly placed consumers getting the entire quantum from the distribution licensee are subjected to only 30 minute time block for maximum demand determination?
- (iii) Whether the State Commission did not take cognizance of the fact that such an order adversely affects the consumers as it takes away the flexibility available to the consumers in managing their demand?
- (iv) Whether the State Commission did not consider the consequential effects of its order, namely, that it would lead to two separate demand periods for the same types of consumers which is not allowed under the law?

12. Issue Nos. (i) & (ii)

12.1 Since issue nos. (i) & (ii) are inter-related, we are taking them up together and decide them simultaneously.

12.2 The distribution licensees/discoms while filing the impugned petitions no. 356-358 of 2012 proposed to revise or modify the definition of the 'maximum demand' or 'demand' as maximum demand or demand means the average KVA delivered to the point of supply of the consumer during any consecutive period of 30/15 minutes of maximum use during the month'.

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The justification provided by the discoms before the State Commission was that the ABT (Availability Base Tariff) meters are being installed with the recording period of 15 minutes along with the previously existing 30 minutes.

12.3 The main plea of the appellant is that in view of the maximum demand defined in Regulation 2 (7) of the RERC (Electricity Supply Code and connected matters) Regulations, 2004, the duty has been put on the distribution licensee to specify the consecutive period of maximum demand which may be either 15 minutes or 30 minutes with the approval of the State Commission. It cannot be both 15 minutes and 30 minutes for the same type of consumers. Section 62 of the Electricity Act, 2003 clearly prohibits the State Commission, while determining the tariff under the Act, to show undue preference to any consumer of electricity but may differentiate according to consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required. The factors detailed in Section 62 of the Electricity Act, 2003 for differential tariff do not allow differential tariff for same types of consumers. The different demand period of 15 or 30 minutes is tantamount to two separate demand periods for the same types of consumers which is not permissible under the law because such an action apart from adversely affecting the consumers would take away the flexibility available to the consumers in managing their demand. The justification set out by the discoms/petitioners before the State Commission for revising the period of recording of maximum demand by installing meters having capacity to record demand on 15 minutes time block basis does not have sound and cogent reasons or merit to dis-continue the existing flexibility available to the consumers.

12.4 The above mentioned were the submissions which were made through comments on the aforesaid petitions and also argued before us in the instant appeal and now we are to see whether the learned State Commission has, in a reasonable, competent and proper manner, discussed the merits of the submissions in a judicial and judicious way after having a

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look at the relevant provisions of the Electricity Act, 2003 and concerned Regulations.

12.5 The relevant portion of the impugned order dated 06.06.2013 which we have reproduced above in para 8 of this judgment while dealing with the counter submissions, depicts that the learned State Commission in para nos. 20.4.10, 20.04.11, 20.4.12 and 20.4.13 after going through the different definitions and provisions observed that the energy accounting and scheduling for open access consumers is for 15 minutes time block as distinct from other consumers, reckoning of maximum demand based on 15 minutes time block for open access consumers being based on data gap is worth consideration and the State Commission in view of Regulation 2(7) of the RERC (Supply Code and Connected Matters) Regulations, 2004 is empowered to specify the time period for the purpose of maximum demand, the Commission *accepts the proposal of the Discoms. The impugned order contains the complete discussion on the points in issue before us.*

12.6 It appears that the category of open access consumers having a contract demand has been treated separately from the other category of non-open access consumers having only contract demand. Thus, there are following categories of consumers:-

- (a) Open access consumers having contract demand with the distribution licensee.
- (b) Non-open access consumers having only a contracted demand with the distribution licensee.

12.7 The differentiation made by the impugned order appears to be rationale, proper and reasonable. Prior to the impugned order all HT or EHT consumers were being billed on the basis of maximum demand of 30 minutes time integration. The differentiation appears to be intelligible differentia.

12.8 The Electricity Act, 2003 provides for a right in any consumer to get open access power also in addition to maintain the contract demand with the distribution licensee. The quantum of power supply by distribution

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licensee is measured in terms of the average KVA delivered at the point of supply, after the adjustment of the supply received through open access. Thus, we observe that in regard to maximum demand, both - open access consumer having a contract demand with the distribution licensee and a non-open access consumer having only a contracted demand with the distribution licensee cannot, by any stretch of imagination, be said to be similarly placed but they have rightly, reasonably and justifiably been separately categorized by the impugned order of the learned State Commission. Therefore, different demand periods of 15 or 30 minutes are not tantamount to two separate demand periods for the aforesaid different categories of consumers.

12.9 The metering equipment installed at the appellant's facilities is an ABT metering which is capable of measuring the electricity, both in terms of units as well as maximum demand over a time block of 15 minutes. Hence the appellant's contention that the maximum demand prevailing for a time block i.e. multiple of 15 minutes time block 30, 45, 60 etc can be easily calculated by aggregating the recording in the meter is not a meritorious one and we are unable to accept this contention. When a meter is capable of correctly measuring maximum demand over a time block of 15 minutes, the State Commission cannot be compelled to adopt the practice as contended by the appellant like segregating or aggregating the recording in the meter. The discoms felt the necessity of the aforesaid amendment since under the tariff it was only 30 minutes which was to be applied to a consumer who is exclusively availing electricity from the discoms, a person who is availing electricity from the open access as well as discoms, hence the discoms proposed for the aforesaid amendment and the State Commission, by the impugned order, has permitted the discoms/respondents to change the time block for recording maximum demand for open access consumers to 15 minutes instead of 30 minutes in their tariff book and clearly directed that only for an open access consumer maximum demand has to be recorded on 15 minutes time block.

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12.10 We further note that all the open access consumers are being billed in block of 15 minutes and the appellant is the sole consumer who is asking for 30 minutes time block though the appellant being billed at 15 minutes time block which point was challenged by the appellant before the Ombudsman. According to the learned counsel for the respondents, the Ombudsman had given the order to calculate in 30 minutes by averaging two blocks of 15 minutes so far as appellant was concerned, and that order of the Ombudsman has been stayed by the Hon'ble Rajasthan High Court. This necessitated for a change from 30 minutes integration to 15 minutes for open access consumers having contract demand.

12.11 We further note that an open access consumer consumes electricity from the discoms and also from other sources by scheduling it and thus the open access consumer purchases and consumes energy during specified periods and therefore he becomes a consumer of different class which difference is permissible under the factors enumerated in Section 62 (3) of the Electricity Act, 2003.

12.12 The appellant has neither changed the open access regulations nor the meter regulations, thus it cannot claim recording of time in block of 30 minutes only.

12.13 It is pertinent to note here that the change of 30 minutes integration to 15 minutes integration was challenged by the appellate before the Ombudsman and the Ombudsman had given the order to calculate in 30 minutes by averaging two blocks of 15 minutes which order has been stayed by the Hon'ble Rajasthan High Court. All these important facts have nowhere been disclosed or revealed by the learned counsel for the appellant with the result that no details about the orders of the Ombudsman and that of the Hon'ble Rajasthan High Court are available on record. We find no perversity or illegality in the findings recorded by the State Commission in the impugned order on issue nos. I & II and we have no reason to deviate from the said findings. Thus, we also agree to the findings recorded by the State Commission on the issues No. I & II. Both these issues are decided against the appellant.

13. Issue Nos. III & IV

Since both these issues are inter-connected, we are deciding them together. It appears from the material on record that the learned State Commission has made complete discussion giving reasons while passing the impugned order and the impugned order does not adversely affect or take away the consumers flexibility in managing their demand. The learned State Commission after considering pros and cons of the matter, passed the impugned order and has rightly and justifiably categorized the consumers by keeping open access consumers with contract demand in one category and non-open access consumers with contract demand in separate category and there remains no uncertainty or ambiguity after the passing of the impugned order. Thus, issues no. III & IV are also decided against the appellant.

14. Summary of Findings

A. The learned State Commission has not committed any illegality by allowing maximum demand determined for those consumers who avail open access in a 15 minutes time block instead of 30 minutes time block on their drawal from discoms and the same is not discriminatory and violative of Section 62 (4) of the Electricity Act, 2003.

B. The State Commission has rightly and justifiably classified the following two categories of consumers:-

- (i) Open access consumers having contract demand with the distribution licensee.
- (ii) Non-open access consumers having only a contracted demand with the distribution licensee.

The said categorization made by the impugned order does not suffer from any perversity, infirmity or illegality.

C. that the State Commission has, by the impugned order, legally and correctly permitted the respondents/discoms to change the time block for

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recording maximum demand for open access consumers to 15 minutes instead of 30 minutes in their tariff booklet.

D. that the State Commission is fully justified in passing the impugned order in subjecting the consumers availing open access to determination of maximum demand at 15 minutes time block on their drawal from discoms and the same is not discriminatory.

E. In view of the above discussions, since all the aforesaid issues have been decided against the appellant, this appeal merits dismissal. The instant appeal is hereby dismissed and the impugned order dated 06.06.2013 is affirmed. No order as to costs.

Pronounced in open Court on this 29th day of April, 2014.

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

√ REPORTABLE/NON-REPORTABLE

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