

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 218 of 2012 & I.A. no. 360 of 2012**  
**&**  
**Appeal No. 219 of 2012**

**Dated: 8<sup>th</sup> October, 2014**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member**

**Appeal No. 218 of 2012 & I.A. no. 360 of 2012**

**In the matter of:**

**M/s. Balasore Alloys Ltd.,**

Balgopalpur, Balasore, Odisha-756 020  
Represented by Shri Bichitra Nanda Panda,  
Chief Director (Operation)

... **Appellant**

Versus

**1. The Odisha Electricity Regulatory Commission,**

Bidyut Niyamak Bhawan, Nayapalli,  
Unit-VIII, Bhubaneswar- 751012,  
Represented by its Secretary

**2. Director (Tariff),**

**Odisha Electricity Regulatory Commission,**  
Bidyut Niyamak Bhawan, Nayapalli,  
Unit-VIII, Bhubaneswar- 751012

**3. Northern Electric Supply Co. of  
Odisha Limited ( NESCO),**

At/ P.O. Januganj,  
Distt. Balasore-756 019,  
Represented by its Managing Director

...**Respondent(s)**

Counsel for the Appellant(s) : Mr. Ramji Srinivasan, Sr. Adv.  
Mr. Samareshwar Mahanty, Sr. Adv.  
Ms. Reha Mitra, Ms. Kabita Das  
Mr. Udit Seth, Mr. Anup Kumar

Counsel for the Respondent(s) : Mr. Rutwik Panda,  
Ms. Anshu Malik for R-1  
Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza  
Mr. Aditya Panda for R-2 & 3

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Mr. Udit Seth

Counsel for the Respondent(s) : Mr. Rutwik Panda,  
Ms. Anshu Malik  
Mr. Subrfat Sahu for R-1 & 2  
Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza  
Mr. Aditya Panda

**JUDGMENT**

**RAKESH NATH, TECHNICAL MEMBER**

Appeal nos. 218 of 2012 and 219 of 2012 have  
been filed by Balasore Alloys Ltd. against the orders  
dated 23.8.2012 and 31.8.2012 respectively passed by

Odisha Electricity Regulatory Commission (“State Commission”) in respect of tariff applicable to the Appellant.

2. The Appellant is a Ferro Alloys Industry and a consumer of Northern Electric Supply Company of Odisha Ltd. (NESCO), the Distribution Licensee. Electrical power contributes more than 40% of the Appellant’s cost of production. The State Commission is the Respondent no. 1. The other Respondent is NESCO, the Distribution Licensee.

3. The facts of the case in Appeal No. 218 of 2012 are as under:

3.1 The State Commission on 23.3.2012 passed Retail Supply Tariff Order w.e.f. 1.4.2012 in which it was decided to introduce ‘Take or Pay’ Scheme for HT and EHT industries having contract demand of 110 KVA or

more for FY 2012-13 after due consideration of suggestions of the Distribution Licensees and the HT/EHT consumers. Under 'Take or Pay' Scheme the HT/EHT consumers had to guarantee to pay for minimum load factor of 70% which would mean that whether they draw power or not they will have to pay charges based on consumption at 70% load factor or actual drawal whichever is higher. However, a rebate of 50 paise/kWh was available to the consumers opting for 'Take or Pay' Scheme. The 'Take or Pay' Scheme was optional for the HT/EHT consumers.

3.2 The Appellant came under EHT category and 'Take or Pay' scheme was optionally available to it. The Appellant also opted for 'Take or Pay' Scheme vide letter dated 6.4.2012 addressed to the Distribution Licensee (R-3).

3.3 Barely a month after coming into force of the Tariff order dated 23.3.2012, CESU, one of the Distribution Licensees in Orissa, by letter dated 26.4.2012 to the State Commission submitted that by implementing 'Take or Pay' tariff with 70% load factor of maximum demand, it would lose revenue, as normally the maximum demand was less than the contract demand. It requested for consideration of energy charges at 70% load factor calculated at the contract demand for the consumers willing to avail 'Take or Pay' tariff. Subsequently other Distribution Licensees including the Respondent No. 3 requested for computation of energy charges at 70% load factor corresponding to the contract demand or maximum demand other than off peak hours, whichever is higher. The Distribution Licensees, however, did not file formal petitions.

3.4 The State Commission thereafter initiated *suo motu* proceedings for review under Regulation 70(1) of Business Regulations on 23.6.2012 through an application of an officer of the State Commission to remove difficulties in implementation of 'Take or Pay' tariff introduced by the State Commission for FY 2012-13.

3.5 The *suo motu* review, registered as case No. 48 of 2012 was taken up for hearing on 30.7.2012.

3.6 The State Commission passed the impugned order dated 23.8.2012 abolishing the existing load factor based 'Take or Pay' Scheme of concessional tariff for HT and EHT consumers and replacing it by Assured Energy based Scheme retrospectively, i.e w.e.f. 1.7.2012. The State Commission also determined a formula for Assured Energy based on contract demand

of the consumer. The terms and conditions of the Scheme were also modified and the special rebate available under the Scheme was reduced.

3.7 Aggrieved by the impugned order dated 23.8.2012, the Appellant has filed the Appeal No. 218 of 2012.

4. The facts of the case in Appeal No. 219 of 2012 are as under:

4.1 The State Commission passed the Retail Supply Tariff order dated 23.3.2011 in respect of the Distribution Licensee. In this order the State Commission decided to implement 'Take or Pay' Scheme for FY 2012-13 for HT/EHT consumers having contract demand of 110 KVA or more. The Appellant also opted for Take or Pay Scheme vide its letter dated 6.4.2012 addressed to the Distribution Licensee. As

there was no action on the part of the Distribution Licensee (Respondent No. 2), the Appellant again sent a letter dated 23.4.2012 with request to prepare the bill on the basis of "Take or Pay" Scheme with effect from 1.4.2012.

4.2 Ignoring the aforesaid letters, the Distribution Licensee (Respondent no. 2) sent a bill dated 1.5.2012 without allowing special rebate under 'Take or Pay' Scheme in contravention of the Retail Supply Tariff order for FY 2012-13.

4.3 The Appellant *suo motu* re-computed the bill taking into account the rebate admissible under 'Take or Pay' Scheme and accordingly released the payment for the month of April 2012.

4.4 Thereafter, the Appellant filed a Petition being No. 34 of 2012, before the State Commission under



Section 142 of the Electricity Act, 2003 for levy of penalty against the Respondent No. 2 for non-compliance of the Retail Supply Tariff Order dated 23.3.2012 passed by the State Commission.

4.5 In the meantime, the State Commission by a *suo motu* review proceeding in case No. 48 of 2012 by order dated 23.8.2012 amended the aforesaid 'Take or Pay' Scheme retrospectively w.e.f. 1.7.2012.

4.6 By order dated 31.8.2012, the State Commission held that case No. 34 of 2012 is analogous/similar to case No. 48 of 2012 and disposed of case No. 34 of 2012 without considering the merits of the case.

4.7 Aggrieved by the impugned order dated 31.8.2012, the Appellant has filed Appeal No. 219 of 2012.

5. As the impugned order in Appeal No. 219 of 2012 is based on the impugned order in Appeal No. 218 of 2012, a common judgment is being rendered.

6. The Appellant has made the following submissions:

6.1 “Take or Pay” Scheme has been in force with proven efficacy for over a decade, with minor variations and has been considered as a win-win situation for the HT/EHT consumers and the Distribution Licensee.

6.2 The State Commission in the Tariff order dated 23.3.2012 had observed that the scheme was to remain in force till the expiry of the validity of the Tariff Order. Any sudden change or abandonment in the Scheme within the Financial Year will be hit by the doctrine of legitimate expectation and doctrine of promissory estoppel. The Appellant had acted upon

the tariff order dated 23.3.2012 in fixing the prices of its own products and entered into sale contracts with the customers at such reduced price level.

6.3 By the impugned order dated 23.8.2012, the State Commission has completely replaced the aforesaid 'Take or Pay' Scheme by a new 'Assured Energy' Scheme and without assigning any reason the rebate has been arbitrarily reduced from 50 paise per unit to 30 paise per unit. The payment of assured energy must be made even when there is load regulation or power interruption which is totally wrong. Further, the impugned order dated 23.8.2012 has been incorrectly made effective retrospectively from 1.7.2012.

6.4 As a result of the impugned order the Appellant has suffered extra energy charges and additional security deposit.

6.5 The Appellant had to opt for the revised 'Take or Pay' Scheme w.e.f. 1.7.2012 as without the undertaking, no concessional tariff would be available to it. Thus, the option given by the Appellant for the revised scheme should not be considered voluntary and this would also not amount to waiver of the original 'Take or Pay' Scheme.

6.6 The *suo motu* proceedings were initiated by the State Commission only by the letters by the Distribution Companies, behind the back of the consumers, even though the Retail Supply Tariff order was passed after considering the suggestions of the Distribution Companies.

6.7 There was no data before the State Commission for revising the “Take or Pay” Tariff Scheme. Even at the time of initiation of *suo motu* review, there was no such data. In the absence of the data, it is illegal on the part of the State Commission to initiate a proceeding for revision of ‘Take or Pay’ Scheme.

6.8 The impugned order dated 23.8.2012 amounts to an amendment of tariff order dated 23.3.2012 under the guise of *suo motu* review without there being an application for amendment or even review. Nothing in a tariff proceedings u/s 62 and 64 of the Electricity Act, 2003 is *suo motu*. It can only be initiated on an application by a licensee or a generating company.

6.9 The State Commission has power to amend the tariff order u/s 62(4) of the Electricity Act, 2003, but for exercise of such power there must be an

application giving the required data and showing that the amendment is necessary.

6.10 There was also violation of natural justice as the Assured Energy formula has not been part of notice.

6.11 Several directions have been issued in the impugned order regarding reduction of rebate from 50 paise/kWh to 30 paise/kWh, security deposit calculation without taking into account the rebate, calculation of Assured Energy without taking into account load regulations/power cuts, for which no notice was issued and objections of the public were not invited.

6.12 The impugned order dated 23.8.2012 has been made effective from 1.7.2012 thereby wiping the

accrued benefit of 50 paise/kWh rebate for the period from 1.7.2012 to 23.8.2012. This is illegal.

6.13 In Appeal No. 219 of 2012 the main argument is that the Case No. 34 of 2012 filed by the Appellant related to non-compliance of the unrevised 'Take or Pay' tariff scheme which was in force upto 1.7.2012. After hearing in case No. 34 of 2012 was closed on 11.6.2012, the State Commission waited till 'Take or Pay' Scheme was revised by order dated 23.8.2012 and thereafter passed the impugned order dated 31.8.2012 wrongly holding that the grievance of the Appellant does not survive any further.

7. NESCO, the Respondent Distribution Licensee, in reply to the Appellant's submission and in support of the impugned orders has submitted as under:

7.1 Regulation 70 of Conduct of Business Regulations specifically permits the State Commission to review its own order even *suo motu*.

7.2 Even if the Commission has not exercised its power of review, the Commission is empowered to amend or modify a tariff order at any time under Section 62(4) of the Electricity Act, 2003. As held by the Tribunal in O.P. no. 1 of 2011, the State Commission has power to *suo motu* initiate tariff proceedings.

7.3 Procedure u/s 64 was followed before passing the impugned order.

7.4 There is no right to a concession or rebate as held in (2010) 12 SCC 563 titled Union of India vs. Shankar Lal Soni & Another and (2008) 15 SCC 560. It is a



settled law that a concession can always be withdrawn or modified for which no public notice is necessary and no question of natural justice can be raised for withdrawal of such concession.

7.5 In imposing conditions or stipulations in a tariff order, even if such conditions are not part of the tariff petition or advertised before the order, there is no violation of natural justice as long as the imposition of such conditions are within the jurisdiction of the State Commission.

7.6 The Appellant has always achieved a load factor of more than 90%. Therefore, the dispensation in the impugned order increasing the qualifying load factor is immaterial as far as the Appellant is concerned.

8. The State Commission has also filed reply and written submission in support of the impugned orders.

9. We have heard Mr. Ramji Srinivasan, Senior Advocate for the Appellant, Mr. Buddy Ranganadhan, learned counsel for the Respondent Distribution Company and Mr. Rutwik Panda, learned counsel for the State Commission on the above issues. On the basis of the rival contentions of the parties, the following questions would arise for our consideration:

**(i) Whether the State Commission has jurisdiction to initiate *suo motu* proceeding to review its tariff order?**

**(ii) Whether the impugned order dated 23.8.2012 amounts to an amendment of the tariff order and such amendment could not have been carried out without filing of a Petition by the**

**licensee duly supported by the necessary data to justify the amendment?**

**(iii) Whether the State Commission was justified in modifying the 'Take or Pay' Scheme without going into the supporting details warranting such modification?**

**(iv) Whether the State Commission has erred in replacing the 'Take or Pay' Tariff Scheme by 'Assured Energy' Scheme on its own without giving notice to public on the proposed formula for 'Assured Energy'?**

**(v) Whether the State Commission has erred in reducing the special rebate from 50 paise to 30 paise without any justification or data therefor?**

**(vi) Whether the State Commission has erred in making impugned order dated 23.8.2012 effective retrospectively from 1.7.2012?**

**(vii) Whether the State Commission has erred in not taking into consideration the time of load regulation or interruption in supply in computing the Assured Energy?**

**(viii) Whether the State Commission has erred in directing that the calculation of security deposit/additional security deposit should exclude rebate available to the Appellant?**

**(ix) Whether the State Commission was correct in disposing of the Case No. 34 of 2012 in light of its order in Case No. 48 of 2012 without considering the merits of the case and the fact**

**that the Distribution licensee had not complied with the tariff order of the State Commission dated 23.3.2012 in not allowing the ‘Take or Pay’ rebate to the Appellant as per the tariff order?**

10. Issue No. (i) to (vi) above are interconnected and are being dealt with together.

11. Let us examine the Retail Supply Tariff Order for FY 2012-13 passed by the State Commission on 23.3.2012. The relevant extracts of the Tariff Order is reproduced below:

*“262. The Commission after due consideration of suggestions of DISCOMs and views of the HT/EHT industries decides to implement the Take or Pay scheme for FY 2012-13 with following stipulation:*

*(i) The scheme will be applicable to all HT and EHT industries having contract demand of 110 KVA or more.*

*(ii) The industries should guarantee in writing to pay for minimum load factor of 70% which will mean that whether they draw power or not they will have to pay charges based on the load factor billing for consumption of 70% load factor or actual drawl whichever is higher. For purpose of determination of load factor the following parameters shall be taken into consideration.*

*(a) Maximum demand shall be based on the highest demand recorded in hours in respect of hours other than off peak hours.*

*(b) The power interruption hours in HT and EHT feeder over and above 60 hours in a month shall be deducted from total hours in a month for load factor calculation. When actual power interruption hour in a month is less than 60 hours then no deduction from the hours in a month shall be made. (Methodology*

*of determination of interruption hours is given in the example below). Non-availability of power supply due to any reason whatsoever should not be considered. The interruption in feeder as per the dump report should be considered for this purpose.*

*(c) Actual power factor as ascertained from the meter shall be considered for calculation of load factor.*

*(iii) Demand charges on the basis of maximum demand recorded or 80% of the contract demand whichever is higher would continue to apply to industries entering into this special agreement with DISCOMs for payment of demand charge.*

*(iv) A special rebate of 50 paise per unit on the energy consumption shall be allowed. This is in addition to any other rebate the consumer is otherwise eligible.*

(v) For determination of actual hours of power supply the licensee may provide the 'dump data' to consumers on payment of Rs.500 on demand by consumer.

(vi) This agreement shall remain in force till the expiry of the validity of this tariff order. During that period consumer will not be allowed for downward revision of the contract demand”.

**“Graded Slab Tariff for HT/EHT Consumers**

263. Graded slab tariff have been adopted by the Commission for HT and EHT consumers as follows:

**Table – 35**

**Slab rate of energy charges for HT & EHT  
(Paise per unit)**

<b>Load Factor (%)</b>	<b>HT</b>	<b>EHT</b>
Upto 50%	495	490
> 50% = < 60%	450	445
> 60%	395	390

Load factor has to be calculated as per Regulation 2 (y) of OERC Distribution Code, 2004. **However,**



***in calculation of load factor, the actual power factor of the consumer and power-on-hours during billing period shall be taken into consideration.***

*264. Power on hours is defined as total hours in the billing period minus allowable power interruption hour. The allowable power interruption hours should be calculated by deducting 60 hours in a month from the total interruption hour. In case power interruption is 60 hours or less in a month then no deduction shall be made.”*

12. Thus, the State Commission after due consideration of the suggestions of stakeholders decided to implement the “Take or Pay” Scheme for FY 2012-13. The Scheme provided that the HT/EHT industries eligible for the scheme should guarantee in writing to pay for minimum load factor of 70%. Whether they draw power or not they will pay charges

based on energy consumption at 70% load factor or actual drawl whichever is higher. For determination of load factor, maximum demand will be based on the highest demand recorded in other than off peak hours. Power interruption of more than 60 hours per month shall be deducted from total hours in a month, as specified and actual power factor shall be considered. The HT/EHT consumers opting for “Take or Pay” Scheme were allowed a special rebate of 50 paise per unit on the energy consumption in addition to any other rebate the consumer is otherwise eligible. It was also decided that the agreement shall remain in force till the expiry of the validity of the tariff order. During this period, the consumer will not be allowed for downward revision of the contract demand.

13. It was also decided in the tariff order dated 23.3.2012 that the load factor has to be calculated as per Regulation 2 (y) of the OERC Distribution Code. Let us examine the definition of load factor under Regulation 2 (y) of the OERC Distribution Code.

*“(y) **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 percentage, 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”.

14. Thus, as per the Regulations, load factor in respect of consumers with contract demand of 100 KW and above is to be calculated on the basis of recorded maximum demand during a given period whereas the load factor in respect of consumers less than 100 KW is to be calculated on the basis of the contract demand.

15. Let us examine the impugned order dated 23.08.2012 in Appeal No. 218 of 2012.

16. In the impugned order, the State Commission has referred to the letter dated 26.04.2012 by CESU, one of the Distribution Licensees submitting that by implementing 'Take or Pay' tariff with 70% load factor based on maximum demand, CESU would lose revenue, as normally the maximum demand is less than the contract demand. The other Distribution Companies also prayed before the State Commission vide letter dated 2.5.2012 for computation of energy charges for 70% load factor units corresponding to the contract demand or maximum demand other than off peak hours, whichever is higher, as they were incurring financial loss. However, the State Commission vide letter dated 8.5.2012 directed the Distribution

Companies to implement the scheme of the Commission first and desired to review the scheme after three months with due consideration of feed back of all the stakeholders.

17. Thereafter, on completion of three months of the FY 2012-13, a *suo motu* petition was filed by Director (Tariff) of the State Commission to review the 'Take or Pay' tariff for HT and EHT industries with guaranteed load factor. The State Commission conducted hearing after publishing notice and inviting objections/suggestions on the 'Take or Pay' Scheme.

18. We find from the impugned order dated 23.8.2012 that the Distribution Licensee made the following submissions before the State Commission:

(i) The benefit extended to the HT/EHT consumers under 'Take or Pay' tariff is quite high as

load factor has been reduced to 70% compared to 75% in the previous year's (2011-12) tariff order, consideration of graded slab tariff and enhancement of special rebate to 50 paise/kWh i.e. 10% of energy charges compared to 5% allowed in the previous year's tariff order.

(ii) The distribution licensee's revenue from HT/EHT consumers will reduce even though the consumers would maintain the same load factor irrespective of rebate due to nature of operation. The Distribution Licensees prayed for consideration of contract demand or actual demand whichever is higher for computation of load factor.

19. Let us examine the findings of the State Commission in the impugned order dated 23.8.2012.

*“17. ‘Take or Pay’ Tariff had been allowed to HT and EHT consumers of the State to provide a hassle free Tariff structure which provide minimum assured revenue to DISCOMs while at the same time provide incentives to consumers to consume at higher load factor. Additional power consumption at HT and EHT level also provides cash comfort to DISCOMs. Due to lower tariff for higher consumption, the industries do not get tempted to avail Open Access. They continue to remain as consumers of embedded DISCOMs. The level of Cross-subsidy as mandated in Tariff policy also decreases in Case of HT and EHT industries. Therefore, this is a Win-win proposition both for DISCOMs and the consumers who opt for ‘Take or Pay’ Tariff.*

*18. The Commission has taken into consideration the submission made by the DISCOMs and the Objectors. It is understood from the submission of DISCOMs that they want a factor as provided in ‘Take or Pay’ Tariff in our RST order dated*



*23.3.2012 for FY 2012-13. They apprehend cash loss as the consumers who had been already operating in the load factor band as prescribed in our 'Take or Pay' Tariff scheme only opted for the scheme. The scheme could not encourage the industries operating at lower load factor to increase their power consumption level to reach the desired load factor to avail 'Take or Pay' Tariff. The analysis of consumption data of industries who have opted for 'Take or Pay' Tariff as submitted by the DISCOMs also confirm the above observation.*

*19. It is observed that guaranteed load factor as prescribed in our Tariff Order could not achieve its end for which it had been provided. But on the other hand higher consumption at an incentivized rate with assured revenue is beneficial both to consumers and DISCOMs. Therefore, we are inclined to revisit the scheme in its totality and to reorient the scheme in such a way that it captures the maximum numbers of consumers for its*

*simplicity and benefic results and at the same time it ensures cash comforts to DISCOMs.*

*20. The State Commission, therefore, has redesigned the 'Take or Pay' Tariff for HT & EHT consumers and has simplified the procedure. The Commission in place of guaranteed load factor of 70% has introduced the concept of Assured Energy Off take. The new scheme shall be as follows:*

***Assured Energy (AE) per month shall be calculated as under:***

***Assured Energy (AE) per month in KWh = K x Contract Demand (CD) in KVA***

***Where K is a constant equal to 560. (K=560)***

*For example for an industry having a contract demand of 1000 KVA, the Assured Energy off take per month would be  $1000 \times 560 = 560,000$  KWh.*

*21. The industries should undertake in writing to opt for the revised 'Take or Pay' Tariff scheme. There is no requirement of a Special Agreement or modification of original Agreement in this regard. Their undertaking must include the guarantee for*

*paying for Assured Energy (AE) per month in KWh which will mean that whether they consume power or not they will have to pay energy charges based on Assured Energy (AE) per month in KWh or actual consumption in KWh whichever is higher. The above guarantee of paying for Assured Energy is also applicable in case of Load Regulation or Power Interruption. For calculation of energy charges for Assured Energy or Actual Consumption the graded slab tariff as notified by the commission vide RST order dated 23.3.2012 for FY 2012-13 will be applicable. In addition to energy charges other charges such as demand charges, customer service charges etc. are also payable by the HT and EHT consumers as per the RST order dated 23.3.2012 for FY 2012-13.*

*22. Further, those consumers who opt for the revised 'Take or Pay' Tariff as ordered by us now shall avail a special rebate of 30 P/U for the entire actual consumption of energy”.*

*“24. ‘Take or Pay’ Tariff should not be taken into consideration for calculation of security/additional security deposit since the introduction of the Scheme by the Commission for FY 2012-13. No contract demand reduction is admissible during the operation of the scheme i.e. upto the end of FY 2012-13. All other conditions of RST Order for FY 2012-13 shall continue to apply.*

*25. This revised ‘Take or Pay’ Tariff Scheme will be applicable from 1<sup>st</sup> July 2012 and shall remain in force till expiry of the validity of RST Order dated 23.3.2012 for FY 2012-13”.*

20. The findings of the State Commission are summarized as under:

(i) ‘Take or Pay’ Tariff is a Win-win proposition both for Distribution Companies and the consumers opting for the scheme as it provides assured revenue to the Distribution Companies and at the same time provides incentive to the consumers and they are not

tempted to avail open access and continue to remain the consumers of the Distribution Companies. The level of cross subsidy is also reduced as mandated in Tariff Policy.

(ii) The scheme could not encourage the industries operating at lower load factor to increase their power consumption and at the same time revenue of Distribution Companies have reduced as seen from the analysis of consumption data of industries who have opted for 'Take or Pay' Tariff.

(iii) The guaranteed load factor as prescribed in the Tariff Order could not achieve its purpose. Therefore, the State Commission is inclined to revisit the scheme in totality.

(iv) The State Commission has introduced the concept of Assured Energy off take. Assured Energy per month is equal to  $K \times \text{Contract Demand in KVA}$ , where K is a constant equal to 560. The energy charges payable by the consumers opting for 'Take or Pay' Scheme will be the Assured Energy or actual energy whichever is higher.

(v) The above guarantee for payment for Assured Energy is also applicable in case of Load Regulation or Power Interruption. However, graded slab tariff as notified by the order dated 23.3.2012 for calculation of energy charges will be applicable.

(vi) The rebate under the revised scheme shall be 30 paise/kWh as against 50 paise/kWh decided in the tariff order dated 23.3.2012.

(vii) 'Take or Pay' tariff should not be taken into consideration for calculation of security/additional security. No contract demand reduction is permissible upto the end of FY 2012-13.

(viii) The revised 'Take or Pay' Scheme will be applicable w.e.from 1.07.2012.

21. Thus, the State Commission has introduced a new concept of Assured Energy based on contract demand in place of guaranteed load factor based on maximum demand. We find from the formula devised for Assured Energy that the K factor has been selected in a manner that the Assured Energy is about 77% of the energy that would be consumed if the contract demand is maintained throughout the month. Therefore, the Assured Energy as determined by the State Commission is nothing but energy at about 75%

to 78% load factor depending on 31 or 30 days in a month on the basis of contract demand instead of actual maximum demand. The State Commission has also reduced the special rebate available to the consumers opting for the revised 'Take or Pay' Scheme from 50 paise/kWh to 30 paise/kWh.

22. Now let us examine whether the State Commission had the jurisdiction to initiate *suo motu* proceedings to review or amend the tariff order passed on 23.3.2012.

23. Learned counsel for the Respondents have referred to Regulation 70 specifying power of the State Commission to review its own order even *suo motu*, Section 62 (4) of the Electricity Act, 2003 which permit amendment or modification of a tariff order and Section 94(1)(f) of the Electricity Act, 2003 which



allows the State Commission to review its own decision in regard to jurisdiction of the State Commission.

24. Let us first examine the Conduct of Business Regulations of 2004.

25. Regulation 9(1) provides that the State Commission may initiate any proceeding *suo motu* or on a petition filed by any affected or interested person. Regulation 70 (4) provides that while issuing the notice the Commission may, in *suo motu* proceedings designate an officer of the Commission to present the matter in the capacity of a petitioner in the case.

26. In the present case, the *suo motu* proceeding was initiated on a Petition filed by an officer of the State Commission as per Regulation 70.

27. Section 62(4) of the Electricity Act, 2003 provides that no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. In the present case, the State Commission has amended the tariff once during the FY 2012-13 by the impugned order dated 23.8.2012. The State Commission has also given reasons for the amendment.

28. This Tribunal in O.P. no. 1 of 2011 dated 11.11.2011 has also held that the State Commission has power to initiate tariff proceeding *suo motu*.

29. We feel that the impugned order is not a review order but an order to amend the tariff during the course of the FY 2012-13. The State Commission has

not amended the tariff from the effective date of the original order dated 23.3.2012 i.e. 1.4.2012 but has made the amended tariff applicable subsequently w.e. from 1.7.2012. Thus, as per the impugned order, the 'Take or Pay' Tariff as decided by the original order dated 23.3.2012 would remain in vogue from 1.4.2012 to 30.6.2012.

30. In view of above, we hold that the State Commission exercising its power to amend a part of tariff in a *suo motu* proceeding in the present case is perfectly legal.

31. Now let us examine if the State Commission has followed the principle of natural justice while passing the impugned order dated 23.8.2012.

32. We find that Director (Tariff) of the State Commission had filed a Petition for *suo motu* proceeding which was put to notice. The State Commission had given a public notice inviting objections/suggestions specifically on 'Take or Pay' Tariff scheme. The Petition of Director (Tariff) clearly indicated contention of the Distribution Licensees to consider computation of load factor corresponding to the contract demand or maximum demand other than off-peak hours whichever is higher. The Petition also clearly indicated that the State Commission wanted to review the 'Take or Pay' Tariff after completion of three months of implementation of the Scheme as approved in the tariff order dated 23.3.2012. The Appellant participated in the hearing and filed their objections. During the proceedings, the Distribution Licensees prayed for providing for higher load factor

and computation of the guaranteed energy on the basis of contract demand or maximum demand whichever is higher. The representatives of consumers gave their objections on calculation of the guaranteed energy on the basis of contract demand. Finally, after considering the suggestions and objections of the stakeholders, the State Commission decided that the 'Take or Pay' tariff scheme should be based on Assured Energy. Assured Energy is further calculated on the basis of the contract demand. Thus, the State Commission has neither accepted the suggestion of the Distribution Companies fully nor accepted the suggestions of the EHT/HT consumers not to amend the scheme.

33. In Mumbai International Airport Pvt. Ltd. vs. Maharashtra Electricity Regulatory Commission –

2009 ELR (APTEL) 0417, this Tribunal had considered the issue whether the impugned order could be issued in violation of principles of natural justice as there was no proposal for creation of HT-III Commercial Category in the tariff petition and as the Appellant had no notice regarding creation of the HT-III category and as such the Appellant was deprived of an opportunity to make its submissions on the issue. This Tribunal in that case held that:

*“14) It is not the case of the appellant that the Commission had no power to create a tariff design different from the one proposed by the licensee. The Commission has the power to design the tariff as per its own wisdom. The Commission need not, before issuing the actual order, publicly announce the tariff it proposed and call for public comments. In fact this is not even the appellant’s contention.*”

*15) The rule of natural justice requires the Commission to issue a public notice about the ARR and Tariff petition of the licensee and to allow the public to make its submissions on the ARR and Tariff proposals. The Commission has, thereafter, to design the scheme for recovery of the ARR keeping in view various relevant factors. If the classification of the consumers can be supported on any of the grounds mentioned in section 62(3) it would not be proper to say that the tariff fixing was violative of principles of natural justice because the Commission did not issue a public notice of the tariff categories which the Commission had intended to create”.*

34. We find that the State Commission has followed the procedure under Section 64 of the Electricity Act, 2003 before passing the impugned order and there has been no violation of principle of natural justice. The Petition filed by the Director (Tariff) clearly indicated

that the Distribution licensee's proposal to calculate load factor on contract demand and actual demand during the period other than peak hours whichever is higher and the intention of the State Commission to revise the 'Take or Pay' Tariff after 3 months of implementation of the Scheme. As such, we reject the contention of the Appellant with regard to violation of principle of natural justice.

35. According to Shri Buddy Ranganadhan, learned counsel for the Respondent No. 2, the 'Take or Pay' Tariff Scheme was a concession given to the EHT/HT consumers. There is no right to a concession or a rebate. He has referred to (2010) 12 SCC 563 in the matter of Union of India vs. Shankar Lal Soni and Another to press his point.



36. In Union of India vs. Shankar Lal Soni and another (2010) 12 SCC 563, the Hon'ble Supreme Court has held as under:

*“It cannot be for a moment be doubted that a concession granted by a carrier be it the Railway or the airlines or the road transport corporation is a concession only and no person is entitled to insist that the concession should be with conditions determined by that person. It has not been disputed before us that it would be open to the authorities to withdraw the concessions altogether and in some cases, we are told such, as in the case of Jet Airways, the concessions given to the senior citizens have been modified. Once it is held that no beneficiary of a concession has a right to insist on a particular condition or conditions, the very basis for the judgment of the High Court disappears.”*

37. In Steel Authority of India Ltd. vs. Madhusudan Das and others (2008) 15 SCC 560, the

Hon'ble Supreme Court held that the appointment under compassionate ground offered to a dependent of a deceased employee is an exception to the rule, it is a concession and cannot be demanded as a matter of right.

38. In Andhra Pradesh Corporation Ltd. & Others vs. Andhra Pradesh State Electricity Board and Others (1991) 3 SCC 263 the Appellants had challenged the levy of minimum charges by the Electricity Board in view of the directions issued by the State Government fixing concessional tariff under the Electricity (Supply) Act, 1948 and also withdrawal of the concessional tariff subsequently by the State Government without giving any notice to the Appellants. The Appellants had contended violation of principle of natural justice

as also the doctrine of promissory estoppel.

Hon'ble Supreme Court in this case held as under:

*“.....This is manifest from the aforesaid Government Orders themselves which expressly used the expression "concessional power tariff" or "concessional tariff. At no stage, does it appear to have been disputed by the appellants that what was extended to them by the said Government Orders was by way of concession. In the context of granting exemption from sales tax certain observations were made by this Court in Shri Bakul Oil Industries v. State of Gujarat, which would, keeping in view the principle laid down therein with regard to the grant of concession, be, in our opinion, useful in considering the above stated submission made by the learned counsel for the appellants. It was held:*

*"Viewed from another perspective, it may be noticed that the State Government was under no obligation to grant exemption from sales*

*tax. The appellants could not, therefore, have insisted on the State Government granting exemption to them from payment of sales tax, What consequently follows is that the exemption granted by the government was only by way of concession. Once this position emerges it goes without saying that a concession can be withdrawn at any time and no time limit can be insisted upon before the concession is withdrawn. The notifications of the government clearly manifest that the State Government had earlier granted the exemption only by way of concession and subsequently by means of the revised notification issued on July 17, 1971, the concession had been withdrawn. As the State Government was under no obligation, in any manner known to law, to grant exemption it was fully within its powers to revoke the exemption by means of a subsequent notification. This is an additional factor militating against the contentions of the appellants."*

*“15. This being the law with regard to grant of concession we are of the opinion that neither of the two orders mentioned above can be said to be illegal on the ground that they were passed in violation of principles of natural justice. The only question in this connection which survives is that of promissory estoppel. With regard to this plea it would be seen that it is not the case of the appellants that they established their mini plants after the grant of concessional tariff by the two Government orders referred to above and but for the grant of such concessional tariff they would not have established their mini plants. The necessary facts so as to sustain the plea of promissory estoppel are not, in our opinion, to be found to have been either pleaded or established by the appellants. To take it by way of an illustration reference may be made to the special leave petition giving rise to Civil Appeal Nos. 1454-1463 of 1981 filed by M/s. Andhra Steel Corporation Ltd. The plea with regard to promissory estoppel is to be found in ground no.(i) which reads :*

*"Whether in view of the fact that the Petitioner had acted upon the Government orders dated Nov., 2,1977 and Nov., 26,1977 and thus altered its position (as without the concessions being granted to the Petitioner they would not have possibly run the industry, since it was bound to suffer huge losses) is the State Government estopped from revoking, or modifying the same before the full period of concession had run out of efflux of time that is, by October 31, 1980?" (emphasis supplied).*

*16. Almost identical is ground no.(i) in the special leave petition giving rise to Civil Appeal Nos. 1642-1645 of 1981. The use of the word "possibly" is obviously indicative of lack of specific averment with regard to principle of estoppel. Even such an averment has not been made qua the Electricity Board. With regard to the plea based on the doctrine of legitimate expectation suffice it to say that except invoking the said doctrine nothing substantial was brought to our notice on the basis*

*of which the appellants could be held entitled to any relief.”*

39. In *State of Haryana & Others vs. Mahabir Vegetable Oils Private Limited* (2011) 3 SCC 778, the Hon'ble Supreme Court held that beneficiary of a concession has no legally enforceable right against the Government to grant a concession except to enjoy the benefits of the concession during the period of its grant. The right to exemption or concession is a right that can be taken away under the very power in exercise of which the exemption was granted.

40. In *Kusumam Hotels Private Limited vs. Kerala State Electricity Board and Others* (2008) 13 SCC 213, the Hon'ble Supreme Court considered the issue whether the Government was estopped from withdrawing the concession already granted in

electricity tariff to the Hotels and that too retrospectively. Hon'ble Supreme Court held that the concessions granted can be withdrawn in public interest and doctrine of promissory estoppel would not be applicable as no foundational facts, therefor have been laid down in a case of this nature. However, it held that by reason of withdrawal of concession with retrospective effect, the accrued right of the Appellants had been affected.

41. In the tariff order dated 23.3.2012, the State Commission had introduced a 'Take or Pay' Scheme for HT/EHT consumers with connected load of above 100 KVA which was optional and not mandatory. This scheme was in the form of a rebate or concession allowed to the HT/EHT consumers. The HT/EHT consumers not wanting to avail the 'Take or Pay'



Scheme were subjected to tariff as applicable to the relevant category. It was, therefore, open to the Appellant not to opt for the amended 'Take or Pay' Tariff and demand billing as per the normal tariff if the amended Scheme was not favourable to them. As discussed, the State Commission has powers to amend the tariff during the ensuing financial year. Section 62 (4) of the Electricity Act, 2003 allows amendment of a tariff once in a financial year. As per the ratio decided in the judgments referred to above, there is no illegality in the State Commission to amend the rebate/concession and the scheme for rebate/concession, during the ensuing financial year.

42. We find that in the tariff order dated 23.3.2012 the special rebate of 50 paise/kWh decided without any computation or determination based on same

economic principles of sharing the benefit of the scheme between the distribution licensee and the consumer. The reduction from 50 paise/kWh to 30 paise/kWh was also not based on any computation but to reduce the loss being incurred by the distribution licensees in allowing a rebate of 50 paise/kWh. A concession whether more or less is a concession. The 'Take or Pay' Scheme is also not mandatory and the consumers have the option to not to avail the scheme and get billing at the normal tariff applicable to their category. No evidence has been furnished by the Appellant to show that allowance of the revised special rebate will result in a loss to them with respect to the normal tariff applicable to their category. In view of the above, we do not want to interfere with the findings in the impugned order

regarding reduction of special rebate to 30 paise/  
kWh.

43. As regards retrospective application of the impugned order, we find that the State Commission on representation of the Distribution Licensees had decided to review the 'Take or Pay' tariff only after completion of three months in a separate communication between the Distribution Licensee and the State Commission, at the back of the Appellant and other consumers. Director (Tariff) of the State Commission filed the Petition for *suo motu* proceeding in the matter only after completion of three months of FY 2012-13. The hearing was conducted on 30.7.2012. However, in the tariff order dated 23.3.2012, it was clearly decided that 'Take or Pay' Tariff would continue till the end of FY 2012-13. There

was no indication to the consumers that the 'Take or Pay' Scheme would be amended after 3 months. Only after the issuance of public notice for suo motu petition and public hearing on 30.7.2012, the consumers became aware about the possible amendment of the tariff. By applying the amended tariff, the accrued benefit of 'Take or Pay' tariff @ 50 paise per kWh from 1.7.2012 to 23.8.2012 available to the Appellant as per the original tariff order for FY 2012-13 has been wiped off. Thus, if the Appellant had been informed before 1.7.2012 that the State Commission was considering to amend the 'Take or Pay' Tariff, they would have made necessary provisions and adjustments in their business. Therefore, the State Commission should not have made the revised tariff applicable w.e.f. 1.7.2012. In view of above, we hold that the amended scheme should be

made applicable w.e.f. 1.8.2012. Accordingly, the HT/EHT consumers will be entitled to special rebate of 50 paise per kWh from 1.4.2012 to 31.7.2012 as per the original tariff order dated 23.3.2012.

44. In view of above, issues (i) to (v) are decided against the Appellant. Issue (vi) is decided in favour of the Appellant.

45. Let us examine the seventh issue regarding consideration of time of load regulation or interruption in supply in computing the Assured Energy.

46. In the tariff order dated 23.3.2012, the State Commission held that power interruption hours in HT/EHT figures over and above 60 hours in a month shall be deducted from total hours in a month for load factor calculation. However, in the impugned order

the State Commission has decided that guarantee of paying Assured Energy will also be applicable in case of load regulation or interruption in supply of the consumer. The Distribution Licensees in their communication to the State Commission or in the public hearing had not pleaded for any relaxation relating to the condition imposed in the original order for excluding the power interruption hours in calculation of load factor. This issue was also not raised in the *suo-motu* Petition filed by Director (Tariff) of State Commission. However, strangely the State Commission on its own has decided that Assured Energy will also be applicable in case of load regulation or power interruption without giving any reason.

47. We feel that it is unfair on the consumers to consider the guaranteed off-take even when there is

interruption on the HT and EHT feeder or when power cuts have been imposed by the distribution licensee on the consumer which is beyond the control of the consumers. Therefore, we set aside the condition imposed by the State Commission in the impugned order that guarantee of payment for Assured Energy will also be applicable in case of load regulation or power interruption. We hold that guaranteed energy of the consumer calculated as per the formula given in the impugned order for Assured Energy shall be reduced to the extent of deemed energy which would have been consumed, had the maximum demand as recorded during the month is maintained for the hours of interruption on the feeder supplying power to the consumer, provided the number of hours of interruption is more than 60 hrs. in a month. This condition is on the same lines as

decided in the tariff order dated 23.3.2012.

Accordingly, decided.

48. The eighth issue is regarding calculation of security/additional security deposit.

49. The State Commission in the impugned order has held that the rebate available to the consumers opting for 'Take or Pay' tariff will not be considered for calculation of security/additional security deposit. However, this issue was neither pleaded by the Distribution Licensees in the *suo motu* proceeding nor proposed in the Petition filed by Director (Tariff) in the *suo motu* proceedings. The State Commission has given a finding on this issue without any justification or reason. The special rebate is a part of the Tariff. The EHT/HT consumers have been given the choice by the State Commission either to opt for



normal tariff applicable to their category or to avail 'Take or Pay' Tariff. Special rebate is part of the tariff package. Therefore, the special rebate cannot be ignored while calculating the security/additional security. Hence, the finding of the State Commission on calculation of security/additional security without consideration of special rebate is set aside. Accordingly, this issue is decided in favour of the Appellant.

50. Another issue raised by the Respondent no. 2 is that the original 'Take or Pay' scheme specifically provided that the rebate is "in addition to" any other rebate which the consumer was eligible for. Such requirement continued even in the amended 'Take or Pay' Scheme. The only other rebate that the Appellant was eligible for under the original tariff order was the

rebate for prompt payment. According to the Distribution Licensee, since the rebate under 'Take or Pay' scheme was "in addition to" any other rebates the Appellant could have, in law, been eligible to avail of the 'Take or Pay' rebate only if the Appellant availed the prompt payment rebate. Unless the Appellant availed the primary rebate i.e. prompt payment, it could not avail the secondary rebate i.e. 'Take or Pay' rebate.

51. We find that the State Commission in the impugned tariff order or in the impugned order has not given such finding as contended by the Respondent no. 2. The original order only stated that the special rebate of 50 paise per unit will be in addition to any other rebate the consumer is otherwise eligible i.e. availing of the special rebate will not disentitle the consumer to other rebates that he is

otherwise entitled to. Also availing of other rebates is not a pre-condition for availing rebate under “Take or Pay” Tariff. However, in the impugned order the State Commission has not qualified the special rebate with any other rebate. We feel that the Respondent No. 2 has taken up this issue out of context. If the payment of bill is not made by the Appellant in time then other remedies are available to the Respondent no. 2 i.e. delayed payment surcharge. Therefore, we reject the contention of the Respondent no. 2 regarding non-availability of the special rebate under “Take or Pay” Tariff in case the Appellant does not avail the other rebate to which it was entitled.

52. The ninth issue is regarding disposal of Case No. 34 of 2012 in light of the order dated 23.8.2012.

53. We find that the Appellant in Case No. 34 of 2012 had sought imposition of penalty on the Respondent No. 2 (NESCO) in accordance with Section 142 of the Act for contravention of the Retail Supply Tariff order dated 23.3.2012. It was pleaded that NESCO, the Respondent no. 2 in Appeal No. 219 of 2012 was issuing bills to the Appellant without the special rebate of 50 paise per kWh even though they had opted for 'Take or Pay' Tariff, in contravention of the tariff order dated 23.3.2012.

54. As evident from the impugned order dated 28.8.2012, the State Commission had given clear directions to the Respondent Distribution Licensee by order dated 8.5.2012 to first implement the 'Take or Pay' Scheme as per the original tariff order and the State Commission would review the scheme only after 3 months. Despite this the Respondent No. 2 did not

implement the order dated 23.3.2012 of the State Commission. We find that the State Commission has not dealt with the matter regarding non-compliance of the order of the State Commission's order dated 23.3.2012 in the impugned order in Case No. 34 of 2012. We feel that the State Commission should have at least given the directions to the NESCO to revise the bills from 1.4.2012 after allowing the special rebate to the Appellant as per the Tariff order of the State Commission.

55. In case the special rebate has still not been given to the Appellant by NESCO as per the Tariff Order dated 23.3.2012 of the State Commission, NESCO shall immediately pass on the same by giving credit in the current bills of the Appellant. With these directions, Appeal No. 219 of 2012 is disposed of.

56. **Summary of our findings:**

**Appeal No. 218 of 2012**

**(i) The State Commission has exercised its power to amend a part of tariff during the ensuing FY 2012-13 in a suo motu proceeding as per law.**

**(ii) The State Commission has followed the principle of natural justice in passing the impugned order dated 23.8.2012.**

**(iii) The special rebate allowed in the order dated 23.3.2012 under 'Take or Pay' Scheme was in the form of concession and it was an optional scheme. There is no illegality in the State Commission amending the rebate under 'Take or Pay' Scheme during the ensuing Financial Year.**

**(iv) We do not find any reason to interfere with the reduction in special rebate under 'Take or Pay' tariff effected by the impugned order.**

**(v) The amended Scheme should be made applicable from 1.8.2012 instead of 1.7.2012. Accordingly, the Appellant will be entitled to special rebate @ 50 paise per kWh from 1.4.2012 to 31.7.2012.**

**(vi) The guaranteed energy of the consumer calculated as per the formula given in the impugned order for Assured Energy shall be reduced to the extent of deemed energy which would have been consumed had the maximum demand as recorded during the month is maintained for the hours of interruption on the feeder supplying power to the consumer, provided**

**the number of hours of interruption in a month is more than 60 hrs.**

**(vii) Special rebate cannot be ignored while calculating the security/additional security. Hence, the finding of the State Commission on this issue is set aside.**

**(viii) There is no merit in the issue raised by NESCO that the Appellant can avail the special rebate only if it has availed the other rebate to which it was entitled.**

**(ix) The Distribution Licensee will grant the necessary relief to the Appellant and other similarly placed consumers as per the directions given in this order. The Distribution Licensee will be entitled to claim the expenditure on this account in the True Up of the FY 2012-13.**



**Appeal No. 219 of 2012**

**(x) NESCO is directed to immediately pass on the special rebate of 50 paise per kWh to the Appellant as per the order of the State Commission dated 23.3.2012 for the period 1.4.2012 to 31.7.2012 by giving credit in the current bill of the Appellant.**

57. In view of above, the Appeal No. 218 of 2012 is allowed in part as indicated above. Appeal No. 219 of 2012 is allowed and disposed of as per our directions.

No order as to costs.

58. Pronounced in the open court on this **8th day of October, 2014.**

**( Rakesh Nath)  
Technical Member**

**(Justice M. Karpaga Vinayagam)  
Chairperson**

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**REPORTABLE/NON-REPORTABLE**