

**ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAVAN
UNIT – VIII, BHUBANESWAR – 751 012
Fax No. 0674-2395781/2393306
E-mail : orierc@rediffmail.com
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Case No. 01 /2008

In the matter of:- The application filed by NESCO for review of Retail Supply
Tariff Order of the Commission dtd. 22.03.2005

And

The Order of the Hon'ble High Court dtd. 08.11.2006 passed in
WP (C) No. 5847/2006

PUBLIC NOTICE

Pursuant to the Order dtd. 08.11.2006 of the Hon'ble High Court of Orissa, passed in
WP (C) No. 5847/2006 (M/s Jindal Stainless Steel Ltd. Vrs State of Orissa & others), the
Commission is going to rehear the application of NESCO for review of the Commission
Retail Supply Tariff Order dtd. 22.03.2005 passed in Case Nos. 139,141, 143 & 145 of 2004.
The copies of NESCO's review application, and the Order of Hon'ble High Court in WP (C)
No. 5847/2006 are available in the Commission website which can be down-loaded or they
can be obtained from O/o the Commission by depositing Rs. 50/- in cash or by way of Bank
Draft in favour of the Commission, OERC. The review relates to appropriate formula to be
adopted for entitlement to incentive tariff applicable to HT & EHT consumers of the State in
respect of FY 2005-06.

Interested persons/ Organizations/ Institutions are requested to file their
suggestions/objections/views if any, before the Commission on or before 25.01.2008.

The date of hearing is fixed to 29.01.2008

By Order of the Commission

Dated 14.01.2008

SECRETARY I/c

**BEFORE THE ORISSA ELECTRICITY REGULATORY
COMMISSION,
BIDYUT NIYAMAK BHAVAN,
UNIT-VIII, BHUBANESWAR**

FILING NO _____

CASE NO 139,141,143 & 145 of 2004

IN THE MATTER OF: An Application under Regulation 70 of the OERC(Conduct of Business) Regulation, 2004 for review of the Retail Supply Order of the Hon'ble Commission Dated 22.03.2005

AND

IN THE MATTER OF: Annual Revenue Requirement and Retail Tariff Application of North Eastern Electricity Supply Company of Orissa for the year 2005-06 on dated 25.11.2004 and the rejoinder filed on 31.12.2004

AND

IN THE MATTER OF: North Eastern Electricity Supply Company of Orissa Limited, Represented through its Chief Executive Officer

.....APPLICANT

The humble petition by the above named applicant

MOST RESPECTFULLY SHEWETH:

1. That North Eastern Electricity Company of Orissa Limited (hereinafter referred to as 'NESCO') a company incorporated under the Companies Act, 1956, is engaged in the business of Distribution and Retail Supply of Energy in the North-Eastern part of the Orissa and holding the Distribution License No.3/99.
2. That NESCO has filed its Annual Revenue Requirement and Retail Supply Tariff Application for the FY 2005-06 before the Hon'ble

OERC on 25.11.2004 and subsequent rejoinder filed on 31.12.2004 categorically submitted inter-alia to consider the actual power factor without considering the conversion power factor at 0.9, in case the meters are having arrangement of recording the KW/MW.

3. That the Hon'ble Commission, vide its Tariff order dated 19.01.2001 in case No.32/2000 has clearly mentioned that for the purpose of determination of eligibility for incentive Tariff, the percentage of consumption shall be with reference to Contract Demand or Maximum Demand whichever is higher (e.g. CD or MD whichever is higher X PF X No of hours in a month). This means that the ratio of total no of units consumed during a given period to the total no of units that would have been consumed had the CD or MD whichever is higher was maintained throughout the same period.
4. That in the Tariff order dated 22.03.05 effective from 1st April,05 under para 7.14, it is mentioned that for determination of incentive Tariff the Load Factor shall be with reference to Maximum Demand (e.g. MD X PF X No of hours in a month)
5. That in para 8.26.4 of the above said Tariff orders it is mentioned that for the purpose of special Agreement, the Load Factor shall be calculated in the manner prescribed under clause-2(y) of OERC Distribution (Condition of Supply) 2004. The clause 2(y) of OERC Distribution(Condition of Supply)2004 says “ 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 Hours during the period)X100.

6. That the Clause 6aa of the Supplementary Agreement, since cancelled, signed between NESCO and EOUs mentioned that the Load Factor will be calculated for 24 hrs and total number of days of the month with reference to the maximum demand drawn or contract demand whichever is higher multiplied by 0.9(Power Factor).
7. That the agreement between NESCO and EOUs envisaged the method of computation of Load Factor based on the Contract Demand or Maximum Demand, whichever is higher, considering the power factor at 0.9 and the licensee while filing its Annual Revenue Requirement and Tariff application for the FY 2005-06 categorically submitted to consider the actual power factor without considering the conversion power factor at 0.9, in case the meters are having arrangement of recording the KW/MW.
8. That the Hon'ble Commission in its tariff order dated 22.3.2005 under clause 7.14.4 have accepted the submission since as per the character of the electrical system, MVA and PF are adversely related, i.e. as MVA increases, the Power Factor decreases.
9. That the Hon'ble Commission in its order dated 22.3.2005 under clause 7.14 and sub-clause 7.14.3 have mentioned while computing the method for determination of Incentive indicated that the Load Factor shall be computed with reference to Maximum Demand only instead of Contract Demand or Maximum Demand, which is higher.
10. That Hon'ble Commission in its order dated 22.3.2005 under clause 8.26.4 and 8.27.3 have referred the clause 2(y) of OERC

Distribution (Condition of Supply) Code, 2004 for computation of Load Factor towards determination of Incentive for higher consumption to HT and EHT group of consumers which will create confusion and reduction of revenue in case the maximum demand falls below the contract Demand. Secondly the agreement already made (on the basis of Contract Demand or Maximum demand whichever is higher for payment Demand Charges as well as determination of Incentive for Higher consumption) with the above categories of consumers will create confusion resulting to a substantial revenue loss to the Licensee.

11. That the license would loss substantially in case the Load factor Computation is made based on the Maximum Demand instead of Contract Demand or Maximum Demand whichever is higher.

12. That in view of the above the Licensee submitted that the Load factor for determination of Incentive Tariff should be calculated on the basis of

A. Where Meters are available with KW Reading:

Contract Demand or Maximum Demand which is higher X Actual PF recorded in the meter X No of hours in a month

B. Where Meters available without KW Reading

Contract Demand or Maximum Demand which is higher X 0.9 (Power Factor) X No of hours in a month.

13. That the petition reserves its right to file petitions before the Hon'ble Commission through further Affidavit for review of other issues of the tariff order dated 22.03.2005.

PRAYER

It is therefore prayed that Hon'ble commission may graciously be pleased to review its order dated 22.03.2005 based on the above facts and submission, as it seems to be an apparent error and issue an amendment to the said order clarify the following:

A. Where Meter are available with KW Reading:

Contract Demand or Maximum Demand which is higher X Actual PF recorded in the meter X No of hours in a month.

B. Where Meters available without KW Reading:

Contract Demand or Maximum Demand which is higher X 0.9 (Power Factor) X No of hours in a month.

For the kindness of which the licensee as in duty bound shall ever pray.

By the Applicant through

Sd/-

Chief Executive Officer

HIGH COURT OF ORISSA: CUTTACK

WRIT PETITION (CIVIL) NO.5847 OF 2006

In the matter of an application under Articles 226 and 227 of the Constitution of India

M/S. JINDAL STAINLESS LTD AND ANOTHER ---PETITIONERS

-VERSUS-

STATE OF ORISSA AND OTHERS ---OPP.PARTIES

For petitioners : M/s. S.Pal, Senior Advocate,
A.N.Das, A.N.Pattnaik,
N.Sarkar, B.D.Sahu
& G.S.Achari

For Opp. Party No.1 : Mr. D.K.Nanda,
Addl. Government Advocate

For Opp. Party No.2 : Mr. Sanjit Mohanty, Sr. Advocate,
And Mr. B.K.Naik

For Opp. Party No.3 : M/s.Samareswar Mohanty,
H.Parida

For Opp. Party No.4 : Mr. N.C. Panigrahi, Sr. Advocate
And M/s. G.S.Dash, N.K.Tripathy
& S.R.Panigrahi,

P R E S E N T:

THE HONOURABLE MR. JUSTICE A.K.GANGULY

&

THE HON'BLE MR. JUSTICE I.MAHANATY

Date of hearing 23.8.2006

Date of Judgment: 8.11.2006

I.Mohanty, J. M/s. Jindal Stainless Ltd (JSL) has filed the present writ application against the North Eastern Electricity Supply Company of Orissa

Ltd. (NESCO) opposite party No.2, alleging arbitrary and discriminatory Tariff being levied on the petitioner and further alleging violation of Orissa Electricity Regulatory Commission Distribution(condition of supply) Code, 2004(in short'2004 Code;) and the Tariff Review order dated 20.4.2005(Annexure-6) passed by the Orissa Electricity Regulation Commission-opposite party No.3. The petitioners have also sought to challenge the notice dated 18.4.2006 issued by the NESCO threatening to disconnect power supply to the petitioners' plant(Annexure-1) as well as the demand notice dated 19.4.2006 issued by the NESCO calling upon he petitioners to make additional security deposit of Rs.27,00,00,000/-(twenty seven crores)vide Annexure-1A.

2. In the light of afore said submissions though the petitioners have made various prayers in the writ petition, in course of argument the petitioners have restricted their prayer to the following reliefs:

- (i) The review order dated 20th April,2005 of OERC is null and void and consequently the reckoning of Contract Demand(CD) in the determination of LF is ultravires, without jurisdiction and void;
- (ii) A declaration that Load Factory(LF) can only mean what is provided in Regulation 2(y) of the 2004 OERC distribution(Conditions of Supply)code(Code);
- (iii) As a further consequence, JSL is entitled to have the bills for the month of September, 2005 till March, 2006 revised on the basis of LF defined in Regulation 2(y) and refund of the amount over charged and return and cancel all the bank guarantees furnished to North Eastern Electricity Supply Company(NESCO) in terms of the interim order passed by this Hon'ble Court and the contract to the extent it is inconsistent with Regulation 2(y) is unenforceable;

- (iv) NESCO be directed to permit the reduction of Contract demand on the basis of the letter of OPTCL dated 13th March, 2006 with effect from 11th December 2005;
- (v) Consequently to (iv) above, NESCO be directed to refund the excess amount realized as demand and energy charges;

3. In course of hearing, the issues that arose for consideration, are noted herein below:

1. Is the tariff review order dated 20.04.2005 vitiated by infraction of statute and rules of natural justice?
2. Did OERC have any jurisdiction to change or deviate from the statutory definition of 'load factor' as given in Regulation 2(y) of the Orissa Regulatory Commission Distribution(Conditions of Supply)Code 2004 Code)?
3. Is the agreement between NESCO and JSL, to the extent it is inconsistent with the 2004 Code and Tariff Order dated 22.3.2005, enforceable or valid?
4. Can demand charges as defined in 2004 Code be realized when admittedly NESCO is not in a position to supply the capacity which is to be reserved for JSL?
5. Is the non-reduction of contract demand of JSL by NESCO legally justified?
6. Is the demand for additional security of Rs.13.27 crores justified?
7. Does the principle of alternative remedy apply?
8. Is the writ petition maintainable against NESCO?

4. The Petitioners contention in respect of the issue No.1 is as follows:

A. The petitioner had filed all the objections in respect of Tariff proposal for the year 2005-06 before OERC and had also participated at the hearing held by OERC for determination of Tariff for the year 2005-06.

B. The Tariff Order dated 22.3.2005 was passed having regard to all objections and suggestions made before OERC. The Tariff order dated 22.3.2005 in Clauses-8.26.4 and 8.27.3 had held as follows:

8.26.4 For the purpose of special agreement, the load factor shall be calculated in the manner prescribed in clause 2(y) of OERC Distribution (Conditions of Supply) Code, 2004.

8.27.3 The load factor shall be calculated in the manner prescribed in clause 2(y) in OERC Distribution (Condition of Supply Code, 04.

Learned counsel for the petitioners submitted that the petitioners have no grievance with regard to the Tariff Order dated 22.3.2005 and in particular, accepted the application of Regulation 2(y) of the Distribution Code, 2004.

C. The petitioners seek to challenge the order of review dated 22.4.2005 which in effect caused an ex-parte change in the original Tariff Order dated 22.3.2005 thereby causing serious prejudicial consequences against the petitioners. It is further submitted that the order in review was passed without notice to the petitioners and without any public notice, whatsoever and by infracting the rules prescribed for such consideration of the review.

D. After Tariff Order dated 22.3.2005 was passed by the OERC, opposite party No.2 filed an application on 7.4.2005 under Regulation-70 of the OERC (Conduct of Business) Regulations, 2004 for review of retail supply order dated 22.3.2005, interalia, on the ground of apparent error on record. In the paragraph-10 of the said application, NESCO-opposite party NO.2 submitted that the OERC in its order dated 22.3.2005 under clause-8.26.4 and 8.27.3 has referred to Clause-2(1) of the 2004 Code for computation of load factor towards determination of incentives for higher consumption to HT and EHT group of consumers which, they averred, would create confusion and reduction of revenue in case of maximum demand fails below the contract demand. It was next averred that the agreement already made (on the basis of contract demand or maximum demand whichever is higher for payment of demand charges as well as determination of incentive for higher consumption) with the above category of consumers will create confusion resulting in substantial loss to the Licensee(NESCO). In the light of the aforesaid submissions, the NESCO sought for review of the original order dated 22.3.2005 passed in the Tariff proceeding and suggested that “incentive Tariff should be calculated on the following basis”:

“A. Where Meters are available with KW Reading:

Contract Demand or Maximum Demand whichever is higher X
Actual PF recorded in the meter X No. of hours in a month.

B. Where Meters available without KW Reading:

Contract Demand or Maximum Demand whichever is higher X
0.9(Power Factor) X No. of hours in a month.”

E. The OERC on hearing argument of NESCO on its review application on 11.4.2005 passed its order thereon 20.4.2005, interalia, accepting that

the NESCO has established its case and accepted their suggestion that the method of determination of load factor as stipulated in the Commission Order dated 22.3.2005(Original Tariff Order) is at the variance with the terms and conditions specified in the special agreement which was in accordance with the Commission's earlier tariff Order dated 19.1.2001 in case No. 32 of 2000. Therefore, the Commission on being satisfied that an apparent error had crept into the order dated 22.3.2005 allowed the review application and directed that the method of determination of incentive shall be in line with its earlier order dated 19.1.2001 which is as under:

“8.6.8.1 Incentive shall be available to those consumers who will not reduce their contract demand during the next three financial years.

8.6.8.3 For the purpose of determination of eligibility for incentive tariff percentage of consumption shall be with reference to contract demand or the maximum demand, whichever is higher (i.e. CD or MD X PF X number of hours in a month)

8.6.8.4 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 or the maximum demand, whichever is higher was maintained through out the same period as indicated above, exceeds 50% of the total consumption, the consumer will be entitled to get the benefit of incentive.

8.6.8.6 xxxx “charges as applicable would be chargeable in addition to the above.”

5.

- a) The NESCO in response to the contentions of the petitioners as noted hereinabove submitted that the OERC in fixing Tariffs exercises quasi Legislative Authority and, therefore, the said Tariff Orders and any order passed in review thereon remains legislative in character and therefore, not amenable to judicial review. NESCO further submitted that Regulation 70 of the Business Regulation 2004 read with Section 94(1)(f) of the Electricity Act,2003 provides for filing of application for review of any decision or order of the commission by person or party concern. It intends to provide of opportunity of hearing to the 'affected person' or party, whereupon, the Commission may make appropriate decision or direction upon hearing concerned affected person or party. The NESCO submits that they were the 'affected party', inasmuch as, they would stand to loss substantial revenue if Clause-8.26.4 and 8.27.3 which refers to Clause-2(y) of the OERC Distribution Code, 2004 was allowed to remain in force. It is, therefore, submitted by NESCO that they being the affected party, they alone had a right to made an application under Regulation 70 of the Business Regulation, 2004 to seek review of the order and the OERC is within its competency to pass the impugned order dated 20.4.2005 on the review application.

- b) The NESCO further submitted that neither on the date of passing of the Tariff Order dated 22.3.2005 nor on the date of passing of review order dated 20.4.2005 the present petitioner (JSL) was a 'Consumer' as contemplated under Section 2(15) of the Electricity Act,2003 and, therefore, the petitioner was not an affected party or

person concerned at that relevant time and, therefore, the petitioner could not claim as a right, any notice of the review proceeding.

- c) NESCO further submitted that the petitioner cannot derive any right as an objector for having participated in the original hearing for a determination of Tariff as provided under Regulation 55 of the Business Regulation, 2004. Since the petitioner had participated in a consultative process and the determination of tariff was not adversarial in character. The NESCO further submits that Section 94(1)(f) of the Electricity Act,2003 and Regulation 70 of the Business Regulation, 2004 do not confer any right on an objector(petitioner) since it was contended that the principles of natural justice cannot be read into by implication as review appears to be in the nature of a legislative review of legislation and a review of subordinate legislation by a subordinate legislative body at the instance of an aggrieved person, i.e affected person or party concerned. In this regard, Mr. Sanjit Mohanty, learned senior counsel, appearing for the NESCO has placed reliance on the case of **Union of India v. Cynamide India Ltd & Others**(1987) 2 SSCC 720 and in particular, relied upon paragraph 28 of the said Judgment at page 751 which is quoted herein below:

xxx

xxx

xxx

- d) It has further been averred on behalf of NESCO that a review proceeding at the instance of an affected party has been provided in order to redress the grievance of the consumer/licensee. Therefore, the present petitioner being neither a consumer nor a licensee on the dates when the Tariff order and the review order were passed is to be treated as mere 'objector' who had exercised his right to submit objection pursuant to notice dated 28.12.2004 vide Annexure-3 and had participated in the hearing for determination

of Tariff for the year 2005-06. Such an objector, it was submitted, has no right to a notice of hearing in a review proceeding initiated at the instance of NESCO.

6.

- (a) Although no counter affidavit on behalf of the OERC was filed, Mr. Samareswar Mohanty, learned Senior Advocate appearing on behalf of OERC-opposite party No.3 has submitted his notes of argument Nos. 1,2 and 3 along with some documents and also filed certain additional documents by way of a petition dated 11.8.2006 bringing on recorded copy of the review application filed by NESCO marked as Annexure R-3/3 as well as a copy of the objection filed by the petitioner at the time of original tariff herein marked as Annexure R-3/4 along with the enclosures.
- (b) Mr. Mohanty, learned counsel for the OERC in response to the Objection raised by the petitioner regarding non-issue of notice to them at the time of hearing of the review petition has relied upon OERC's contention noted in paragraph-4 of the Note No.2 to the following effect:

“xxx xxx At the time of initiating the review petition, the Commission did not consider it appropriate to issue notice indiscriminately to the participants during Tariff herein because none of them had attacked to the then prevailing incentive formula..... The Commission has discretion in the matter of issue of public notice and invitation of comments/objections in respect of the petition. The petitioner was not entitled to notice because he was at that time or at the time of passing of the review order was not a consumer and he became a consumer after the review order was passed and the incentive formula as it was prevailing since 2001 was restored and the petitioner having entered into the

agreement with NESCO for being a consumer after such restoration.”

(c) In paragraph-5 of Note No.2, it is further averred as follows:

“xx xx The Commission, therefore, did not consider it appropriate to issue notice to the petitioner. The Commission would issue notice only to those who would be affected in praesenti by its order and not to those who might or might not become a consumer, the Commission would not indulge in speculation on who might be affected by its order.”

(d) In paragraph-8 of the said Note, it is further averred as follows:

“For review there cannot be a general pre-legislative consultation process (as contemplated in Reg. 53 (7) of the Business Regulations) all over again, especially when the scope of the review is very limited and confined to correction of an error in the formula for eligibility for incentive tariff. Reg. 53(7) of the Business Regulations provides for the kind of notice inviting the public for pre-legislative consultation. The Electricity Act, 2003, in Section 62 and 64 or any other provision do not directly provide for any such consultation, but the provision in the said Regulation has been made to ensure transparency and an effective participatory procedure at the pre-legislation stage. It would be absurd to repeat the same kind of general notice when a review narrowly confined in its scope is entertained. The Electricity Act, 2003 contemplates tariff proceeding as a time bound process which has to attain finality within a limited time in the interest of commerce. If the Hon’ble Court interprets the provisions of Reg. 9(3) and Reg. 53(7) read with Reg. 55 as requiring general notices and rehearing at any time, there is a review in the same manner as in original tariff

proceeding prices cannot be finally fixed within certainty and commerce will grind to a halt.”

- (e) Further, in Note No.3 filed on behalf of the OERC, the learned counsel in so far as the present issue is concerned, reiterated OERC’s stand in paragraphs-2.3 & 2.4 of the said note and interalia while reiterating the earlier contention submitted that under Sec.64 of the Electricity Act,2003 the Tariff proceeding is a pre-legislative consultative process and the general doctrine of audi alteram partem does not apply to such a legislative process since the Commission is not determining adversarial claims and therefore, the process here is only for the purpose of eliciting suggestions and objections for its consideration and submitted that principle of natural justice in its strict sense of audi alteram partem did not apply to such quasi judicial action. In support of this submission the learned counsel has placed reliance in the case of **State of U.P. vs. Renusagar Power Co.**, AIR 1988 SC 1737(Pr.885,p1765); **Union of India Vs. Cyanamide India**, AIR 1987 SC 1802(prs.5 and 6, pp1806).
- (f) It was further submitted on behalf of the OERC, in paragraph 2.4 of Note No.3 that the Electricity Act, 2003 does not provide for any pre decisional hearing. It is submitted that only in order to ensure transparency as mandated in Sec. 86(3) of the Act and in order to have a more effective consultation with consumers, the Commissioner has provided for a limited form of hearing in regulation 55 read with regulation 53(7) of the Business regulations. The extent and the manner of the pre legislative consultation is provided in Sec.64 (3) of the Act. It is categorically averred that no statutory right has been conferred on the members of the public for personal hearing. Only under regulation 55 of the

Business Regulations, discretion has been conferred on the Commission to hold a proceeding and to hear “such persons as the Commission may consider appropriate” and the Commission has also been vested with the discretion as to the procedure to be followed for such hearing. It is further claimed, though hypothetically, that in the extreme case the Commission may not hold an open proceeding, much less hear the members of the public, but such a step should be based on a proper and regular exercise of discretion and subject to judicial review. It is further submitted that “Tariff fixing exercise” has to be a one-off affair for a certain period based on economic parameters prevailing at a given point of time and any defect, deficiency or adverse impact can always be rectified for the next tariff period in the next tariff order. By its very nature, a tariff proceeding does not admit of protracted herein and the legislature has rejected any such financial approach in the interest of certainty and stability of process so that commerce may prosper with the least resistance from any quarter.

7.

- (a) In response to the aforesaid contentions, Shri S.Pal, learned counsel appearing for the petitioners submitted that by reading of the Opposite party No.2’s petition for review, it would be clear that the entire case of the NESCO for review rests on the ground that it had entered into a special agreement with four other parties (not the petitioner) on the basis of earlier tariff order dated 19.1.2001 which provided that “load factor” is to be calculated on the basis of contract demand(CD) or maximum demand(MD) whichever is higher and any variance thereto would cause immense loss to the NESCO. It is submitted that therefore that the application of

(2) Application where granted- Where the Court is of opinion that the application for review should be granted, it shall grant the same;

Provided that- (a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

Regulation 70 of the OERC (Conduct of Business) Regulation, 2004:

“70: Review of the Decisions, directions and orders:-

- (1) The Commission may on its own motion, or on the application of any of the person or parties concerned, within 90 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.
- (2) An application for such review shall be filed in the same manner as a petition under Chapter II of these Regulations.
- (3) The application shall be accompanied by such fee, if any, as may be laid down by Commission.

Referring to Regulations 8 and 9 of Chapter II of the Regulation, Shri Pal submitted that the effect of review is

statutorily structured and it can only be exercised in conformity with the statutory provisions. He further submitted that Section 94 of the Electricity Act, 2003 is on a reference to the provisions of the C.P.C in respect of the matters specified therein. Clause (f) of Section 94 includes the power of the Commission to review its decisions/orders. Accordingly to Shri Pal, Regulation 70 which confers the power of review and the procedural provisions of Chapter II for dealing with an application for review.

- (c) It is further submitted on behalf of the petitioners that the stand taken by the NESCO and OERC that the petitioner was not a consumer and therefore, not entitled to notice of the review proceeding, is unfounded in as much as the petitioner-company and its expected energy requirement with the incentive by the NESCO in its computation was placed before the OERC for the purpose of Tariff determination for the year 2005-06 as an expected consumer. It is further averred that subsequent to the notice issued by the OERC, the petitioner filed its objection and the OERC in its discretion took cognizance of its objection and permitted it the opportunity of hearing in course of the Tariff Proceeding. It is, therefore, submitted that the Tariff order dated 22.3.2005 was passed after hearing the petitioner in its capacity as future consumer and/or objector, but the order modifying the same in the review which is clearly to the detriment of the petitioner-company was passed without notice to it and without hearing it in violation of the provisions of the statute and the principles of natural justice. In such circumstance, Shri Pal submitted that the petitioner has a legitimate right of hearing in the review proceeding and also suggested that the review Tariff order can only be saved by restricting its application to the existing special agreement holders

of NESCO who have signed the agreement with NESCO pursuant to the Tariff Order of 2001.

- (d) To the contention raised by the OERC's counsel that giving notice and hearing would be impracticable, it is submitted that this is untenable because the change that was sought to be effected in the review application was only to have impact upon the four special agreement holders and only three or four EHT consumers. Therefore, had the notice been issued, the same would have suffice the requirement of law since it is only these persons who would be affected by the modification that has been sought in the review. In this respect, Shri Pal submitted that the order passed in breach of the principles of natural justice is a nullity. In support of his connection, Shri Pal relied upon in the case of **Ridge v. Baldwin**, (1963)2 All ER 66, at page 81, **State of Orissa V. Dr.(Miss) Binapani Dei and Others** AIR 1967 SC 1269(para-9) and **M/s. R.B.Shreeram Durga Prasad and Fatehehand Nursing Das V. Settlement Commission (IT & WT) and another** Air 1989 SC 1038 (para-6).
- (e) Shri Pal, further submitted that any controversy on the question whether the Tariff fixation power is Legislative/quasi-Legislative and the order of incentive is of any other character, is only academic or irrelevant as the present case is filed under the Electricity Act, 2003 and the Business Regulation, 2004 which expressly provide the procedure to be followed and the same having not been complied with, the review order is non-est in the eye of law. He submitted that the procedure for determination of Tariff requires a conjoint reading of the Act and Business Regulations, 2004. He submitted that while Section 64 of the Act lays down the procedure for determination of Tariff, sub-section(3)

thereof mandates that suggestions and objections received from the public shall be dealt with in the manner provided under the Rules and Regulations provided there under and since Business Regulation,2004 has been framed under 2003 Act. Therefore, the tariff has to be fixed under section 64(3) of the Act in compliance with the principles of natural justice to the extent recognized there under. Shri Pal further submitted that Chapter-II of the Business Regulation supplements the provisions of Section 64 of the Act by elaboration of that procedure and Chapter-VIII also supplements Section 64 of the Act. Learned counsel for the petitioner further submits that in fact and admittedly, the procedure envisaged in Chapter-II of the Business Regulation was followed while making the Tariff order dated 22.3.2005 after hearing objections of the petitioner and therefore, no justifiable reasons exist for a departure there from by the OERC while dealing with the application for modification/review.

8. The NESCO opposite party No.2 placed reliance on the decision in the case of **Union of India and another v. Cynamide India Ltd. And another** (1987) 2 SCC 720, in order to dispel the petitioners' contention that it had a right of notice and hearing on the review application. Relying on the aforesaid case, Sri Sanjit Mohanty, senior Advocate for NESCO submitted that the present proceedings relates to 'Tariff fixation' and the function of OERC is discharging that of a 'subordinate legislature' and, therefore, principles of natural justice are not attracted. In this respect, Sri Mohanty, learned senior counsel relied upon paragraphs-5 and 6 of the aforesaid decision which are quoted herein below:

“5. The second observation we wish to make is, legislative action, plenary or subordinate, is not subject to rules of natural justice. In

the case of Parliamentary legislation, the proposition is self-evident. In the case of subordinate legislation, it may happen that Parliament may itself provide for a notice and for a hearing—there are several instances of the legislature requiring the subordinate legislating authority to give public notice and a public hearing before say, for example, levying a municipal rate in which case the substantial non-observance of the statutorily prescribed mode of observing natural justice may have the effect of invalidating the subordinate legislation. The right here given to rate payers or others is in the nature of a concession which is not to detract from the character of the activity as legislative and not quasi judicial. But where the legislature has not chosen to provide for any notice or hearing, no one can insist upon it and it will not be permissible to read natural justice into such legislative activity.

6. Occasionally, the legislature directs the subordinate legislating body to make ‘such enquiry as it think fit’ before making the subordinate legislation. In such a situation, while such enquiry by the subordinate legislating body as it deems fit is a condition precedent to the subordinate legislation, the nature and the extent of the enquiry is in the discretion of the subordinate legislating body and the subordinate legislation is not open to question on the ground that the enquiry was not as full as it might have been. The provision for ‘such enquiry as it thinks fit’ is generally an enabling provision, intended to facilitate the subordinate legislating body to obtain relevant information from all and whatever source and not intended to vest any right in anyone other than the subordinate legislating body. It is the sort of enquiry such the legislature itself may cause to be made before legislating an enquiry which will not confer any right on anyone.

On an analysis of the law laid down by the Apex Court as noted hereinabove, it is clear that legislative action is not subject to rules of natural justice but it is also clear that in certain cases of subordinate legislation, the legislature may provide for notice and hearing. Then in such a case, non-observance of the statutory provisions, for complying with rules of natural justice, would invalidate the decision. Further, it is clear that where the Legislature has not chosen to provide any notice or hearing, no person can insist upon the same and it would not be correct to apply rules of natural justice into such an exercise. As a general principle, legislative action is not subject to natural justice but in the case at hand, we are dealing with a peculiar case of Tariff fixation and in such a case, the Court first of all has to ascertain whether or not Legislature has or has not chosen to provide for any notice/hearing.

9. In this regard, it becomes incumbent upon us to first of all ascertain the legislative mandate on the question of notice/hearing. The Electricity Act, 2003 was promulgated by the Parliament and received assent of the President on 25th May, 2003. So far as the State of Orissa is concerned, the necessary statutory provisions are Section 64 of the Electricity Act, 2003 read with Section 26 of the Orissa Electricity Reform Act, 1995. In terms of the aforesaid provisions, a licensee is required to make an application for determination of Tariff and such application is required to be 'published' and further that the Commission "after considering all suggestions and objections received from the public" shall issue an appropriate Tariff order. The statutory requirement has to be read along with the Orissa Electricity Regulatory Commission (Conduct of Business) Regulation, 2004 and in particular, Chapter-VIII thereof. Regulation 53 contemplates filing of the expected aggregate revenue reformation and publication thereof. Regulation 55 stipulates that the Commission "may hear such person as the Commission may consider appropriate".

In the case at hand, it is the admitted case that NESCO-opposite party No.2 had filed its annual revenue requirement (ARR) which had also been duly published in local newspapers for public information and calling for objection. The present petitioner, Jindal Stainless Ltd., have filed their objections/suggestions and it is further clear that the commission considered the petitioner-JSL to be an ‘appropriate party’ to be heard and accordingly, notice of hearing was issued to all “objectors whose objections have been admitted” vide Notes(Annexure-3) to the writ application, including the petitioner company.

Regulation 56 mandates that the Commission shall make an order and notify its decision to the licensee and such order is also required to be published for public information.

It would be appropriate to take note of procedural history of the case as contained in Tariff order 22.3.2005:-

ORDER

This order is initiated on the application filed by the DISTCOs, namely Central Electricity Supply Company of Orissa Ltd., (CESCO), North-Eastern Electricity Supply Company of Orissa Ltd., (NESCO), Western Electricity Supply Company of Orissa Ltd.,(WESCO), Southern Electricity Supply Company of Orissa Ltd.,(SOUTHCO), holder of the Orissa Distribution and Retail Supply License, 1/1999, 4/1999 and 2/1999 registered as Case Nos. 139, 141, 143 & 145 of 2004 respectively, for determination of their Annual Revenue Requirements (ARR) and fixation of Retail Supply Tariffs for the Financial Year(FY) 2005-06. A brief history of the case is as follows:

1. PROCEDURAL HISTORY

1.1 The DISTCOs are required to file the applications for determination of Annual Revenue Requirement (ARR) and revision of Retail Supply Tariff (RST) for the ensuing financial year with the

Commission by 30th November in accordance with Regulation 53 of OERC (Conduct of Business) Regulations, 2004 and Regulation 5 of OERC (Terms and Conditions for determination of Tariff) Regulation, 2004, Accordingly, the applications for ARR and revision of RSTs for FY 2005-06 were submitted by both WESCO and SOUTHCO before the Commission on 24.11.2004, NESCO on 25.11.04 and CESCO on 27.11.04 respectively.

1.2 After receipt of applications, publications were made in one leading English and one Oriya newspaper on 02.12.2004 inviting objections. The licensees were also instructed to file their rejoinder to the suggestions and objections by 31.12.2004.

1.3 The Commission decided to take into consideration and annual revenue requirements and tariff applications for the year 2005-06 along with annual revenue requirements and tariff applications for the year 2004-05 through a combined hearing, as the hearing for determination of ARR and Tariff revision for FY 2004-05 could not be conducted for the reasons stated in the relevant portion of Tariff Order for FY 2004-05. Further, the Commission has also decided to dispose of the following tariff related matters along with the aforesaid Revenue requirements and Retail Supply tariff Applications during the ensuing Tariff hearing.

- (i) NESCO's application for recognition of Regulatory Assets for the past losses from 1999-2000 to 2002-2003 registered as Case No.135/04.
- (ii) NESCO's application for special tariff for "Power intensive industries" for loads with contract demand of 25 MVA and above and less than 100 MVA, registered as case No.40/2004.
- (iii) Application of NESCO to keep in abeyance the implementation of Availability Based Tariff (ABT) till suitable meters for EHT & HT

consumers are in position and suitable infrastructure is physically available on the ground and completion of 100% consumer metering, registered combined Case No.65/2004.

These applications were taken up along with tariff hearing as the questions raised in those applications were tariff related. However, the orders in respect of those applications would be passed separately.

1.4 Based on such paper publications, the Commission received 18 Nos. of objections against CESCO, 18 Nos. of objections against NESCO, 21 Nos. of objections against WESCO & 15 Nos. of objections against SOUTHCO detailed as under:-

The objectors against NESCO were: (1) Jindal Stailless Limited, 50-HIG, BDA, Jaydev Vihar, Bhubaneswar-751013, (2) S.E.Railway, Garden Reach, Kolkota-700043, (3) Rohit Ferro Tech Pvt. Ltd.,620-A Saheed Nagar, Bhubaneswar,(4) Ferrof Alloys Corpon., Ltd.,GD-2/10, Chandrasekaharpur, Bhubaneswar-751023,(5) Balasore Alloys Limited, Balgopalpur-765020,Balasore,Orissa,(6) The Industrial Development Corporation of Orisa Ltd., (7) The tata Iron & Steel Co Ltd.,273, Bhouma Nagar, Unit-IV,Bhubaneswar-751001 (8)Orissa Small Scale Industries Association at Ajay-Binay Bhawan, Industrial Estate, Cuttack-753010,(9) MSP Steels (P) Ltd., Haladiguna, PO-Gobardhan, Dist-Keonjhar,(10) Utkal Chamber of Commerce and Industry Ltd., Plot No.1/1-C, Jayadev Vihar, Nayapalli, Bhubaneswar -15,(11) IDCOL Ferro Chrome & Alloys Ltd., Jajpur Road,(12) Orissa Consumer's Association, Debajyoti Upabhokta Kalyan Bhawan, Biswanath Lane, Cuttack-753002,(13) East Coast Railway, O/o the Chief Electrical Engineer, B-2, Rail Vihar, Chandrasekharpur, Bhubaneswar-751023,(14) Orissa Sponge Iron Manufacturers' Association, Plot No.532, Satya Nagar, Bhubaneswar-751007,(15) Bharat Sanchar Nigam Ltd., Telecom Electrical Circle, Bhubaneswar,(16) Industrial Promotion and Investment Corporation of

Orissa Limited, IPICOL House, Janapath, Bhubaneswar-22,(17) Industries department, Govt. of Orissa,(18) State Public Interest Protection Council, Talatelenga Bazar, Cuttack”.

In the case at hand, the petitioner has raised its grievance against original Tariff order dated 22.3.2005, since in the said proceeding, the petitioners had filed its objections and had been heard and, thereafter, the Tariff order was passed.

10. The other relevant provisions of the Code of the Business Regulations, 2004 for the present purposes are Regulations 69 and 70 which are quoted hereunder:

“69. Applicability of provisions of Indian Penal Code and Criminal Procedure Code-(1) In terms of Section 95 of the Act, the proceedings before the Commission shall deemed to be judicial proceedings and Commission shall be deemed to be a Civil Court as specified in the said Section read with applicable provisions of the Indian penal Code and the code of Criminal Procedure, 1973.

(2) The Extracts of the relevant provisions of the Indiana Penal Code and criminal Procedure Code are contained in Appendix 9 to these Regulations.

70. Review of the decisions, directions and others-(1) The Commission may on its own motion, or on the application of any of the person or parties concerned, with 90 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.

(2) An application for such review shall be filed in the same manner as a petition under Chapter II of these Regulations.

(3) The application shall be accompanied by such fee, if any, as may be laid down by Commission.”

It is extremely important to note that all proceedings before the commission are declared to be “judicial proceedings” and the Commission has also been declared to be a “Civil Court”.

11. In the light of the aforesaid provisions enacted under Electricity Act, 2003, and the Business Regulation 2004, it would be clearly seen that the proceeding before the Commission are deemed to be ‘judicial proceeding’. Normally right of notice and hearing are not vested rights per se but once any person files suggestions/objections and the said suggestion or objection are ‘admitted for hearing’ by the Commission, such a party or person would necessarily have to be construed to be an ‘interested party’ especially in view of the statutory provisions pointed out above. Therefore, we are of the view that Legislature as well as subordinate legislation, i.e., Electricity Act, 2003 and the Business Regulations, 2004 have clothed persons/parties, with a right of notice and hearing and the petitioner falls in that category.

Therefore, what has been laid down by the Hon’ble Apex Court in the Cynamide’s case(supra), squarely applies to the facts of this case, since the Legislature has made provision for notice and hearing and therefore notice and hearing ought/should have been given to the present petitioner.

Sri Pal, learned counsel for the petitioners-company has placed reliance on the Judgment of the Apex Court in the case of **West Bengal Electricity Regulatory commission v. CESC Ltd.**, AIR 2002 SC3588 wherein the Hon’ble Apex Court while considering the Electricity Regulatory Commission Act, 1988 of the State of West Bengal came to the conclusion in paragraph-43 that “the 1998 Act has both expressly and impliedly conferred such right of hearing on the consumers” and in paragraph-44 “The Regulation framed by the Commission are under the authority of subordinate legislation conferred on the Commission in

Section 58 of the 1998 Act. The Regulations so framed have been placed before the West Bengal Legislature, therefore, it has become a part of the statute.”

Drawing an analogy from the aforesaid finding of the Hon’ble Apex court, this Court finds that both Section 56 of the 1995 Reform Act and Section 182 of the Electricity Act, 2003, has vested the authority and power of rule making on the Commission. The Business Regulations, 2004 having been enacted by the Commission and having been laid before the State Legislature has become a part of the statute.

It is also relevant to point out herein that even in the Cynamide’s case (supra), the Hon’ble Apex Court concluded that the enquiry contemplated under the price control order is an enquiry during the legislative activity by a subordinate or delegated legislative body and such activity necessarily has to comply with the statutory conditions if any, and no implications of the natural justice can be read into it unless it is a statutory condition. But here the Electricity Act and the Regulations framed there under provide a statutory basis for a notice of hearing. Therefore, the fact situation of the present case is distinct and different from the fact situation that arose for consideration by the Hon’ble Apex Court in the case of Cynamide(supra) and in fact, similar fact situation arose for consideration by the Apex Court was in the case of West Bengal Electricity Regulatory Commission(supra).

12. Having come to the findings herein above, the next aspect that needs to be determined is whether the petitioners had a right to notice and hearing at the stage of review. In this regard, it is clear that Regulation 70 of the Conduct of Business Regulation stipulates that an ‘application for review’ shall be filed in the same manner as the petitions under chapter-II of this Regulation. Chapter-II of the Business Regulation clearly gives out that applications must be duly published inviting objections and/or

suggestions unless, of course, the Commission, for reasons to be recorded in writing, decides not to publish such notice. In the present case, although the OERC has been heard through its counsel, no counter affidavit has been filed but in this case, but three notes of argument have been filed by Sri Samareswar Mohanty, learned senior advocate appearing for OERC. In paragraphs 4 and 5 of Note No.2 Mr. Mohanty has sought to advance an argument that the Commission had discretion in the matter of public notice and that at the time of initiation of the review petition “the Commission did not consider it proper to issue notice in discriminatorily”. No doubt, under Regulation 8(4), a right is vested in the Commission to dispense with the issue of notice, yet, such a right has to be exercised in the manner stipulated, i.e., by passing an order indicating the reasons for such non-issue of notice. In the present case since no such written order nor any reason has been put forth as the basis for the non-issue of notice, no judicial cognizance of such a plea can be taken.

The OERC’s counsel advanced a further plea to justify non-issue of notice by submitting that the petitioner was not entitled to notice because at the time of passing the order, the petitioner was not a ‘consumer’ and that it became the consumer only after the review order was passed. Such a plea, unfortunately, merits no consideration in the view of the stipulation in Regulation 55 which vests the Commission with the authority to decide who may be the persons to be heard in the case and in the present case, such a decision has been taken by the Commission in favour of the petitioner vide Annexure-3 to the writ application. The petitioner-JSL’s objections having been ‘admitted’ they have been offered an opportunity of hearing at the stage of the original Tariff hearing and, therefore, to claim that the petitioner has no right to notice at the stage of review is wholly illogical and invalid at the eyes of law. If

the status of the petitioners-JSL was considered by the Commission to be that of 'appropriate parties' to be heard at the stage of original tariff hearing, then there can no justification to alter that status and change of views at the time of the review hearing. Even apart from the same, Regulation-55 vests discretion in the Commission to hear 'such person' as the Commission may consider appropriate. The term 'such persons' cannot be limited only the existing consumers alone. It is also a fact that opposite party No.2-NESCO had in their annual revenue reform and tariff application for 2005-06 included the expected supply of power to the petitioners-company during the said year. This is also an additional reason why the petitioners cannot be termed as 'outsiders' for the purpose of consideration of review application. Even apart from these reasons, it has been averred that apart from the earlier four existing special agreement holders, there are only other 3 to 4 parties in the category of EHT and HT consumer availing the 'incentive Tariff'. Therefore, if no public notice was required in the present case, it was still mandatory on the part of the Commission to issue notice to these 7-8 parties who are bound to be affected on account of the changes that are sought to be made on the basis of the review application. Such a notice to an affected party is fundamental to any adjudication of rights and liabilities and its absence makes the entire exercise unfair.

Learned counsel for the OERC has further sought to justify the non-issue of notice of review application on the ground that if such notice was given and rehearing was conducted then the Tariff licenses cannot be finally fixed with certainty and the Tariff proceedings of Commission would grind to a halt. This contention advanced by the learned counsel is wholly unwarranted and is in essence a desperate argument to somehow justify the non-issue of notice. The Tariff proceedings had already culminated in the fixation of price in the original Tariff order dated

22.3.3005. Review of such an order and consequence of passing of orders thereon, are distinct and different from the original Tariff order. If statutorily engrafted rules of natural justice are not complied and notices of hearing are not issued to the public or to the affected persons, the order of review can be entertained. Cannot be enforced those persons who are affected by the same.

Even in the case of Cynamide(supra), the Hon'ble Apex Court in paragraph-38 ultimately directed as follows:

“xx xx xx However, we think that it is necessary to give a direction to the Govt. to dispose of the review applications after giving a notice of hearing to the manufacturer xx xx xx”

In view of the aforesaid conclusions reached by us in so far as Issue No.1 is concerned, we are constrained to hold that Tariff review order dated 20.4.2005 stands vitiated in so far as the petitioner is concerned due to infraction of statute and rules of natural justice.

- 13 Since we have decided issue No.1 in favour of the petitioner, no necessity exists for dealing with Issue No.2. Since the order dated 20.4.2005 passed in the review application stands quashed, consequently the declaration sought for no more survives for consideration.
14. With regard to issue No.3 Mr. Pal, learned senior counsel for the petitioner placed reliance on various provisions of OERC Code,2004 and laid great stress on the meaning of the term “Load factor” as defined in Clause-2(v) of the OERC Code, 2004. In essence, the petitioners' contention was, that once the Commission has by way of regulation defined the ‘load factor’ under Regulation-2(y) of the Code, it no longer possesses any further authority to deviate from the said definition and such deviation ought to be held arbitrary since the regulations have a force of law and to such an extent, i.e., deviation may be declared to be unlawful and/or illegal. Based on such argument, Mr. Pal further pleaded

that the bills raised by NESCO-opposite party No.2 (in relation to energy charges) are, therefore, illegal and consequently sought for revision of bills for the period from September, 2005 to March, 2006.

Mr. Sanjit Mohanty, learned senior counsel for NESCO has strenuously referred to the aforesaid contentions advanced on behalf of the petitioner and submitted that it was no longer open to the petitioner to raise such an issue since it had signed the agreement dated 24.8.2005 which was much after passing of the Tariff review order dated 20.4.2005 and in Clause-6 of the said agreement, the parties have provided for a composite Tariff structure for availing of incentive tariff for higher load factor other than the normal Tariff as provided in paragraph-7.10 of the Tariff order dated 22.3.2005, on satisfying the eligibility conditions contained therein. Mr. Mohanty, further submitted that the formula for calculating incentive Tariff and discount thereon, i.e., contract demand(C.D) and maximum demand(M.D) whichever is higher has not been introduced on account of the review order dated 20.4.2005 but was in vogue since 2001 and has been continuing thereafter. Although this formula was contained in the agreement with the petitioner, is at variance with regulation-2(y) of the OERC Distribution Code, 2004, yet Section 61 and 62(3) of the Electricity Act, 2003 read with Clauses-4 and 7 of the OERC Regulation, 2004 vest the Commission with the power/authority to prescribe the manner in which the incentives/special Tariff may be given. He further relied upon Clause-7 of the OERC Regulation, 2004 and submitted that the said Regulation vests in the commission, the authority and right to provide Power Factor(PF) and load Factor(LF) related Tariff, in order to provide incentive for better power factor and rebate for high Load Factor. Mr. Mohanty, further contended that the commission is vested with the authority in law not only to fix the general Tariff to which the Code and definition may apply but also to provide for special Tariff

or incentive for separate class of consumers, i.e., HT/EHT consumers separately. Mr. Mohanty further contended that all HT/EHT consumers are eligible for availing incentive Tariff and, therefore, the Commission has not contravened Clause-2(y) of the OERC Code, 2004 and Clause-2(y) of the 2004 Code does not prohibit nor curtail the power of the Commission to deal for separate class of consumers.

Having considered the rival contentions of the parties on the aforesaid issue, we are of the view that, since we have quashed the review order dated 20.4.2005, no further declaration as sought for by the petitioner on this issue survives for our consideration. In this respect, we express no opinion in the matter.

15. So far as issue No.4 is concerned, the plea of the petitioner is that the “Demand Charge” refers to a charge on the consumer based on the capacity reserved for him by the licensee, whether the consumer utilizes such reserved capacity in full or not (Regulation-2(n) of the OERC Code, 2004). In essence, Mr. Pal learned counsel for the petitioner submitted that the “demand charge” on the basis of “contract demand” ought not to be applied in the case of the petitioner. He submitted that for computation of ‘Demand charge’ the quantity of energy referred to as “contract demand” in the agreement is not the capacity reserved by the NESCO- Opp. Party No.2 for the petitioner-Company. The petitioner has averred that the NESCO has only available energy amounting to 30.5 MW for supply to the petitioner and, therefore, it is the only quantity that can be said to be kept available for the petitioner and to levy ‘Demand Charge’ based on contract demand beyond 36.5 MW ought to be declared illegal. In this respect, the petitioner has relied upon the minutes of meeting dated 16.4.2004 held amongst the GRIDCO, NESCO and the petitioner in which it was recorded that available surplus power in Duburi area is 40 MW. The petitioner further relied upon the letter dated 13.3.2006 of the

OPTCL addressed to NESCO indicating that NESCO may not supply more than 36.5 MW to the petitioner-company.

The OPTCL have filed an affidavit dated 11.8.2006 in which it has been stated as follows:

“3. That to avail power from Kuchei Grid Sub-station of PGCIL, 132 KV link lines were drawn to the 132 KV. Bay meant for Jharkhand State. The link line was connected to the 220 KV line from Kuchei to Balasore under construction. The 220 KV line was again re-linked near Kailash Chandrapur to the old 132 KV Baripada-Balasore line. This arrangement was done to avail power at 132 KV from the 160 MVA Auto Transformers at Kuchei. An amount of about Rs.40.24 lakhs was spent by OPTCL for this purpose. This arrangement was complete on 10th May, 2006. Due to an accident at PGCIL, two people were electrocuted and hence the charging of the line was deferred.

4. That it is humbly submitted that although OPTCL line was ready by 10th May, 2006, as stated above, for evacuation of power at 132 KV from Kuchei 400/220/132 KV sub-station of Power Grid Corporation of India Limited(PGCIL) thereby opening possibility of extending more; power to the petitioner’s Company, the same did not materialize as the 160 MVA Auto Transformer at Kuchei Sub-Station of PGCIL filed leading to further deterioration of the power position as drawl from the Kuchei Sub-station of PGCIL at 132 KV completely stopped. As it appears till rectification of the failed Auto Transfer by PGCIL, more power cannot be allowed to the petitioner’s Company to safe-guard the interest of the other existing consumers and in order to prevent the total break-down of power transmission system.

5. That it is submitted that the drawl of more power by the petitioner beyond 36.5 MW as stated by NESCO in para-18 of its counter affidavit as per Dump Analysis Report (Annexure-F/2(series) may be

possible when there is less drawal in other Feeders at New-Duburi Substation limiting the maximum permissible drawal in the 220 KV line from Old-Duburi to New Duburi. But continuous supply beyond 36.5 MW is not possible due to present line constraints until the Auto Transformer of PGCIL at Kuchei is rectified.

Mr. Pal, placing reliance on the aforesaid paragraphs of the OPTCL counter affidavit submitted that the demand by NESCO on computation of “Demand Charges” based on contract demand is essentially a charge for power, which NESCO is not in a position to supply.

Mr. Sanjit Mohanty, learned senior counsel for the NESCO, on the other hand, submitted that the OPTCL’s letter dated 13.3.2006(Annexure-33) is wholly baseless and incorrect, inasmuch as the petitioner itself during the months of March, 2006 to July,2006 has drawn much more power, than 36.5 M.W and in this respect, he has placed reliance on the Dump Analysis (Annexure-F.2 series) and submitted that for the aforesaid months of March to July,2006, there was power variation from 45.480 MVA to 56.520 MVA.

On Analysis of the rival contentions of the parties, we are of the clear opinion that while exercising writ jurisdiction, it is not possible on the part of this Court to adjudicate these factual issues. On one hand, while the petitioner’s company claims that the NESCO is not capable of supplying power up to 36.5 KVA, on the other hand, NESCO has filed document to controvert the aforesaid contention and claimed that the petitioner-company has, in fact, drawn power much above that quantity.

In view of such factual controversy, we are left with no option but to decide the issue against the petitioner and in favour of opposite party No.2.

16. So far as Issue No.5 is concerned, Mr. Pal learned senior counsel for the petitioner submitted that the NESCO has illegally refused to reduce the

contract demand of the petitioner-company even though the same is permissible under the Code and even though allegedly it is not being able to supply the contract demand. In this respect, learned counsel for the petitioner submitted that by the letter dated 27.10.2005, the petitioner requested NESCO for revision of contract demand and the NESCO replied by its letter dated 3.11.2005 refusing to grant reduction on a plea that the revision violates the agreement which was executed on 24.8.2005. The petitioner once again requested NESCO on 22.11.2005 for reduction of contract demand and once again the NESCO turned down the said request by its letter dated 9.12.2005, interalia, stating therein that the contract demand with the petitioner had already been revised downward as per 1.10.2005 corrigendum and in terms of Regulation-66(2) of the Code, 2004, reduction of contract demand is not permissible within three months from the date of initial supply. The petitioner approached the G.R.F created under the Regulation by filling a complaint on 21.12.2005 and the same was rejected on 8.2.2006, which the petitioner claims, is without jurisdiction.

Learned counsel for the petitioner contended that while the original agreement was signed on 24.8.2005, there was a corrigendum issued on 1.10.2005 and the reduction of contract demand incorporated by way of such corrigendum cannot be treated as reduction under Regulation-66 of the Code. For the Said reason, the petitioner contended that non-reduction of contract demand is ex facie bad and perverse since the statutory provision under Regulations 66 to 69 of 2004 Code which confers power to reduce, was not even considered.

Learned counsel for the NESCO-opposite party No.2, on the other hand raised an objection that the petitioner-company had an alternative remedy against the order dated 8/9.2.2006 passed by the G.R.F and the petitioner had right to make a representation to the Ombudsman under

Regulation-7 of the OERC(Grievance Redressal Forum and Ombudsman) Regulation,2004. Apart from raising such an objection, learned counsel for the NESCO relied upon Clause-6 of the agreement dated 24.8.2005 and paragraph-8.27.1 of the Tariff order dated 22.3.2005 and submitted that the reasons given by them for rejecting the petitioner's request for reduction of contract demand is justified in law. Mr. Mohanaty, further submitted that the original agreement for supply was entered into with the petitioner on 24.8.2005 and reduction in contract demand was allowed by the opposite party with effect from 1.10.2005. Mr. Mohanty further submitted that the use of the word 'corrigendum' did not change the fact that the parties have agreed to a reduction of the contract demand with effect from the said date. Therefore, in terms of Regulation-66(2) no application for further reduction was entertainable for a period of three months there from, the meaning thereby, no application for reduction of contract demand was entertainable prior to 31.1.2006.

17. So far Issue No.6 is concerned, Mr. Pal learned Sr. counsel submitted that Rs.13.27 crores as additional security was required to be paid by the petitioner as per the phased contract demand and since the additional security was not paid by the petitioner, disconnection notice dated 18.3.2006 had been issued by the NESCO. The contention of the petitioner-company is based on the allegation that the NESCO did not have capacity of supplying more than 36.5 MW and the petitioner-company sought for reduction of contract demand which according to the petitioner-company was wrongly refused.

Learned counsel for the NESCO on the other hand, submitted that additional security deposit was payable by the petitioner in terms of its agreement entered into between the parties and, therefore, the demand for additional security deposit was in order and that they are justified in

issuing disconnection notice due to non-deposit of additional security deposit.

We have already decided IssueNo.5 in favour of the NESCO-opposite party No2 and, therefore, we are of the view that the question whether NESCO was/was not having the capacity of supplying more than 36.5 MW to the petitioner cannot be determined by us in view of the specific contrary evidence brought on record by the NESCO-opposite party No.2. We are of the view that since we have not entertained this prayer and have permitted the petitioner-company to approach the Ombudsman under Regulation-7 of OERC (Grievance Redressal Forum and Ombudsman) Regulation, 2004, we leave it open to the parties concerned to enforce their contractual rights, of course subject to outcome of the representation that may be filed by the petitioner-company before the Ombudsman and his adjudication thereon.

In so far as Issue Nos.7 and 8 are concerned, we are of the view that the bar of alternative remedy and maintainability of the writ petition against the NESCO is not attracted for determination of Issue No.1, i.e., challenge to the review order dated 20.4.2005(Annexure-6) on the ground of violation of the statutory procedure and rules of natural justice. So far as IssueNos.2 and 3 are concerned, the declaration sought for does not survive for consideration. So far as Issue No.4 is concerned, the same is decided in favour of the NESCO-opposite party No.2. In so far as determination of Issue No.5 and 6 are concerned, we are of the view that the same are barred from our consideration under the principle of alternative remedy and the writ petition is not maintainable to such extent.

We dispose of the writ application with the following directions:

- (i) The review orders dated 20.4.2005 passed by OERC (Annexure-6) is hereby quashed and declared invalid.

- (ii) The OERC is further directed that hearing may be given within two months from today and the review application to be disposed of within two weeks after conclusion of hearing.
- (iii) During pendency of the writ application before this Court, various interim directions have been passed on consideration of rival contentions of the parties relating to their pending bills. The said interim orders are hereby vacated. Hence parties are directed to abide by the ultimate order that may be passed by the Commission in the review application. All the payments made by the petitioners company for the period of September 2005 till March 2006 shall be subject to the order that may be passed by the OERC.

This writ petition is disposed of as above. There will be no order as to costs.

A.K.Ganguly, J.

I agree,

Sd: I.Mahanty. J

Sd: A.K.Ganguly.J

ORISSA HIGH COURT, CUTACK
8TH NOVEMBER, 2006/KCP