

HIGH COURT OF ORISSA : CUTTACK.

W.P.(C) NO.28024 of 2013

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

Executive Engineer,
Rourkela Electrical Division, WESCO,
Rourkela, Dist. Sundargarh

..... Petitioner

- Versus-

Grievance Redressal Forum,
Rourkela, Plot No.UU/9 Civil Township,
Rourkela, Dist. Sundargarh and another

..... Opposite Parties

For Petitioner : M/s. B.K. Nayak-1 and
D.K. Mohanty

For Opp. Parties : M/s. Sreejit Mohanty,
Debraj Mohanty and
A.K. Nath (O.P.2)

PRESENT:

THE HONOURABLE SHRI JUSTICE B.K. PATEL

Date of Hearing: 01.07.2014 :: Date of Judgment – 29.09.2014

B.K. PATEL, J. In this writ petition, the petitioner representing distribution licensee WESCO, has assailed the legality of order dated 11.11.2013 passed by Grievance Redressal Forum, Rourkela (for short 'the GRF') in Case No.57 of 2013 in which it was held that claim of the petitioner of reliability surcharge in the energy bills for the months of May and June, 2013 from opposite party no.2 was unjust and the petitioner was directed to revise the energy bills of opposite party no.2 for the months of May and June, 2013 waiving out the reliability surcharge from the bills.

2. Opposite party no. 2, situated at Kalunga Industrial Estate, is a mini steel plant, having contract demand of 2600 KVA, availing power supply from the industrial feeder which emanates from 132/33 KV grid substation on the strength of agreement dated 20.6.2012 at Annexure-1 entered into with WESCO. Clauses-6 and 7 of the agreement at Annexure-1 read as follows:

“(6) Charges to be paid by the Consumer: The Consumer shall pay to the Engineer for power demanded and electrical energy supplied under this agreement minimum monthly charges, ‘demand charges’, ‘energy charges’ and ‘other charges’ in accordance with the provisions of OERC Distribution (Conditions of Supply) Code, 2004 and as notified in the Tariff Notifications from time to time:

In Large Industry category.

Provided that annual sum payable by any individual consumer under the provision to Section 45 of the Indian Electricity Act, 2003, shall not be deemed to be part of the minimum monthly charges or demand charges, if any, payable by the consumer or the particular class of consumers under Regulations 84 and 85 of the OERC Distribution (Conditions of Supply) Code, 2004.

Provided further that the consumer shall pay electricity duty or such other levy, tax or duty as may be prescribed under any other law in addition to the charges, fuel surcharge and transformer loss payable under the OERC Distribution (Conditions of Supply) Code, 2004.

(7) The tariff and conditions of supply mentioned in this Agreement shall be subject to any revision that may be made by the Licensee from time to time.”

Thus, Clause-6 of the agreement specifically provides that opposite party no.2 is liable to pay, apart from minimum monthly charges, demand charges and energy charges, ‘other charges’ in accordance with provisions of the Orissa Electricity Regulatory Commission Distribution (Conditions of Supply) Code, 2004 (for short ‘the OERC Code) and as notified in the Tariff Notifications from time to time in Large Industry category. Orissa Electricity Regulatory Commission (for short ‘the OERC) Tariff Orders or

Notifications did not provide for 'reliability surcharge' earlier. However, reliability surcharge was made leviable on high end consumers under certain conditions as provided under paragraph 196 in the OERC Tariff Order for the financial year 2013-14 (for short 'the Tariff Order') which came into effect from 1.4.2013. Paragraph 196 of the Tariff Order read as follows:

"196. Reliability Surcharge

Many concerns, basically HT/ EHT Industries brought to the notice of the Commission regarding uninterrupted quality power supply to their units. Many process industries particularly connected with the dedicated feeders from the Grid of OPTCL and Primary sub-station of DISCOMs objected to the restrictions being imposed on their units by the DISCOMs in case of exigency with or without the express intimation of SLDC. While there is a need to supply uninterrupted power to high end HT/EHT consumers this has to be viewed in the overall perspective of a situation of system unavailability / power deficit where a large number of ordinary consumers suffer power cut during peak hours and also sometimes during the summer months. The Commission is, therefore, of the view that for getting uninterrupted power supply in this adverse scenario the high end consumer must compensate the DISCOMs who may otherwise would have imposed power cuts on those consumers. Therefore, we introduce a concept of reliability surcharge in this tariff order for FY 2013-14. The reliability surcharge shall be payable to start with such HT and EHT consumers who get power supply through dedicated feeders from OPTCL Grid sub-station or from the primary 33/11 KV sub-station of DISCOMs. The reliability surcharge shall be 20 paise per unit for all the units consumed by such HT and EHT consumers in the billing month. This surcharge is leviable over and above the bill amount based on normal tariff for that category of consumers after the rebate and penalty if any. The reliability surcharge is leviable provided following two conditions are satisfied.

- (a) If Reliability Index formula which is given below is at or more than 99 % in a month.

Reliability Index for dedicated feeder for the month

[1 SAIDI for the dedicated Feeder] x 100

24 x 60 x nos. of days in the month

and

- (b) The voltage variation at the consumer premises is as per Section 2.1 (Schedule 1) of OERC (Standard of Performance) Regulation, 2004. (underline supplied)

DISCOMs shall also attach the reliability index calculation and voltage variation report with the bill in case of levy of reliability surcharge. They are not required to pay any charges for this report to be attached with the bill. We also direct M/s. OPTCL to co-operate for ensuring uninterrupted power supply without restriction to such consumers.” (underline supplied)

3. In purported exercise of authority to impose reliability surcharge under paragraph 196 of the Tariff Order, WESCO levied reliability surcharge on opposite party no.2 in its energy bills for the months of May and June, 2013. Opposite party no.2 filed complaint bearing Case No.57 of 2013 challenging imposition of reliability surcharge on the ground that pre-conditions for levy of reliability surcharge as provided at paragraph 196 of the Tariff Order do not exist inasmuch as opposite party no.2 does not get power supply through dedicated feeder from OPTCL grid sub-station or from the primary 33/11 KV sub-station of the WESCO. WESCO filed objection against the complaint. On consideration of rival contentions and materials on record the GRF passed the order impugned in this writ petition on the basis of following findings:

“Tariff order of OERC for the FY 2013-14 at **Para-196** speaks about reliability surcharge for HT and EHT consumer. **Para-196** speculates that, the reliability surcharge shall be payable to start with such HT and EHT consumer who get power supply through dedicated feeder from OPTCL Grid substation or from the primary 33/11 KV substation of DISCOMs. The reliability surcharge shall be 20 paisa per unit for all the units consumed by such HT and EHT consumers in the billing month. This such as is leviable or all above the bill amount based on normal tariff for that category of consumers after the rebate and penalty if any.

From the above tariff order this forum understands that, getting power supply through dedicated feeder is a prerequisite for the purpose of claiming reliability surcharge. In the instant case the petitioner is getting power supply from 33 KV, Kalunga feeder emanating from 132/33 KV Grid substation, Rourkela which is not a dedicated feeder from OPTCL Grid to the petitioner’s industry. Around 15 Large Industries

consumers are also getting power supply from the said feeder as per the documents submitted by the Distribution Licensee.”

Thus, the GRF recorded the finding that opposite party no.2 is getting power supply from 33 KV, Kalunga feeder emanating from 132/33 KV grid substation which is not a dedicated feeder from OPTCL grid to the petitioner’s industry inasmuch as around 15 Large Industries consumers are also getting power supply from the said feeder as per the documents submitted by the WESCO. In such circumstances, opposite party no.2 does not satisfy the first prerequisite under paragraph 196 of the Tariff Order for getting power supply through dedicated feeder so as to be liable for payment of reliability surcharge.

4. It is not disputed that opposite party no.2 is getting power supply through feeder emanating from 132/33 KV grid substation, Rourkela through which feeder other Large Industries consumers are also getting power supply. Opposite party no.2 does not dispute that reliability index was more than 99 per cent and voltage variation was as per Section 2.1 (Schedule I) of the OERC (Standard of Performance) Regulation, 2004 (for short ‘the OERC Regulation’) during the months of May and June, 2013.

5. It was contended by the learned counsel for the petitioner that the GRF has committed illegality in holding that opposite party no.2 does not get power supply through dedicated feeder. Placing reliance on the decision of the Madhya Pradesh High Court in **K.S. Oils Ltd. –vrs.- Madhya Pradesh Kschetra Vidut Vitran Company Ltd., Bhopal & others:** AIR 2013 Madhya Pradesh 167 it was argued that a dedicated

feeder does not mean that it can be used only by a single consumer to run its unit. It was further argued that in the present case power supply has been given through the same feeder to the opposite party no.2 and other similar industrial units only. No supply of power is given through the feeder to any general consumer. There being no dispute that power supply to opposite party no.2 industry fulfills the criteria of reliability index as well as the standard of voltage variation as provided under subparagraphs (a) and (b) of paragraph 196 of the Tariff Order, reliability surcharge was rightly levied.

6. *Per contra*, it was contended by the learned counsel for opposite party no.2 that the first and foremost prerequisite for levy of reliability surcharge is supply of power through a dedicated feeder as is evident from paragraph 196 of the Tariff Order. The provision for levy of tariff is essentially a fiscal provision for which it is to be construed strictly. Paragraph 196 of the Tariff Order presupposes fulfillment of three conditions for levy of reliability surcharge. The very first condition is that reliability surcharge shall be payable by such HT and EHT consumers who get power supply through dedicated feeder from OPTCL grid substation or from the primary 33/11 KV substation of DISCOMs. Secondly, the reliability index must be more than 99 per cent. Third condition is that the voltage variation on the consumers' premises must be as per Section 2.1 (Schedule I) of the OERC Regulation. Distribution licensee cannot levy reliability surcharge in the absence of any of the three conditions. It was submitted that the term 'dedicated feeder' has not been defined either in the Electricity Act, 2003, or any of the Rules,

Regulations or Code applicable to Odisha including the OERC Code. In the Tariff Order also the term 'dedicated feeder' has not been defined. In ordinary parlance 'dedicated feeder' means a feeder which is connected to a single consumer. Even the OERC Code envisages supply of electricity through a feeder to a single consumer. Regulation 27 of the OERC Code provides for arrangement agreed to in writing for providing service line for exclusive use of a consumer. Admittedly, the feeder through which opposite party no.2 gets electricity supply has not been agreed upon to be used exclusively by opposite party no.2. It was further submitted that Regulation 2(f) of the Andhra Pradesh Electricity Regulatory Commission provides that 'dedicated feeder' means feeder emanating from substation where transformation to the required voltage takes place and feeds power to a single consumer having contracted capacity of minimum fifty percent of line capacity or more. Similarly, Regulation 5.3 of the Meghalaya State Electricity Regulatory Commission provides that the licensee shall not extend electric supply to any other consumer from the dedicated feeder. Clause 24 of Kerala Electricity Supply Code, 2014 provides that the service line and other equipment of a consumer with a dedicated feeder shall not be used to supply power to another consumer. Referring to paragraphs-6 and 11 of the judgment of the Appellate Tribunal For Electricity, New Delhi passed in Appeal No.109 of 2011 in the case of **Maharashtra State Electricity Distribution Co. Ltd. -vrs.- Maharashtra Electricity Regulatory Commission and R.L. Steels Ltd.** (MANU/ET/0132/2011) it was argued that dedicated feeder has been specifically referred to by the Appellate Tribunal for Electricity to be a

feeder where only one consumer is connected. It was further argued that all licensees under the Electricity Act are obliged to ensure uninterrupted quality power supply without voltage fluctuation or variation to the consumers. The consumer is not liable to pay any surcharge for availing services which licensees are obliged to provide. Reliability surcharge is envisaged by the OERC to be levied only on such HT and EHT consumers who get such quality supply through dedicated feeders. It cannot be levied on a consumer whenever in a particular month reliability index and voltage variation are in accordance with the standard prescribed in subparagraphs (a) and (b) of paragraph 196 of the Tariff Order, irrespective of the manner of use of the feeder.

7. From the admitted facts as well as averments and rival contentions made by the parties, it is evident that the petitioner distribution licensee also does not dispute that supply of electricity through a dedicated feeder is an essential prerequisite for levy of reliability surcharge. However, in spite of the fact that as many as about fifteen other Large Industries consumers are getting power supply through the same feeder, learned counsel for the petitioner contended that such feeder is a dedicated feeder. On the other hand, case of opposite party no.2 is that electricity supply is not given through a dedicated feeder. Therefore, the only issue which requires to be decided in this case is as to whether the feeder through which opposite party no.2 is getting electricity supply is a dedicated feeder or not.

8. None of the statutory provisions or Rules and Regulations applicable to the State of Odisha including the OERC Code provide for the

definition of the term 'dedicated feeder'. As has been stated at paragraph 196 of the Tariff Order, the fiscal concept of levy of reliability surcharge was introduced to start with such HT/EHT consumers who get power supply through dedicated feeders from OPTCL grid substation or from the primary 33/11 KV substation of DISCOMs. Learned counsel for the petitioner vehemently argued that the term 'dedicated feeder' has to be assigned the meaning as assigned by the Madhya Pradesh High Court in **K.S. Oils Ltd. -vrs.- Madhya Pradesh Kschetra Vidut Vitran Company Ltd., Bhopal & others** (supra) in which the sole question before the Court was as to whether distribution licensee can be allowed to provide power supply to any other consumer from the dedicated feeder provided to the appellant at appellant's cost. Upon reference to Clause 5.3 and placing reliance upon clause 4.9 of the M.P. Electricity Supply Code, 2004 (for short 'the M.P. Code'), the question was answered in the affirmative. Clause 5.3 of the M.P. Code reads as follows:

“5.3 Consumers desirous of getting power supply from dedicated feeders may request for such facility to the licensee. The dedicated feeder shall be extended from the Power Sub-station to the consumer's point of supply. In such cases the consumers shall be liable to pay the cost of Bay and all protection Switchgears and its accessories provided at the power sub-station for this feeder in addition to the cost of the feeder. On receipt of such request, the licensee will check the feasibility based on merits of providing a dedicated feeder to the consumer's premises. If found feasible, the consumer will be provided with a dedicated feeder and the consumer will be liable to pay additional charges as indicated in the Schedule of Miscellaneous Charges.”

Thus, it is evident that Clause 5.3 of the M.P. Code simply provides for modalities for providing dedicated feeder to a consumer. It is not a fiscal provision. Clause 4.9 of the M.P. Code reads as follows:

“4.9 The service connection/extension of distribution mains, notwithstanding that it has been paid for by the consumer, shall be the property of the licensee. The licensee shall maintain it at its cost and shall also have the right to use the same service connection/ extension for supply of energy to any other person but such extension or service connection should not adversely affect the supply to the consumer who paid for the extension of the distribution supply network.”

Thus, Clause 4.9 of the M.P. Code explicitly provides that service connection/ extension, cost of which has been paid by the consumer, can be permitted by the licensee to be used for supply of energy to any other person. In such circumstances, it was held that the licensee may provide connection to any other consumer from the feeder installed in accordance with Clause 5.3 of the M.P. Code.

9. In absence of any definition, the term ‘dedicated feeder’, understood in ordinary parlance, means a feeder provided for the exclusive use of a consumer. In the present case, admittedly, the feeder through which opposite party no.2 is getting power supply is used for power supply to other industries also. Provision for levy of reliability surcharge introduced for the first time during the financial year 2013-14 is a fiscal provision intended to levy the surcharge as one of the ‘other charges’ in terms of Clauses 6 and 7 of the agreement dated 20.6.2012 at Annexure-1 entered into between the parties. Therefore, the term ‘dedicated feeder’ has to be given a strict interpretation.

10. Learned counsel for opposite party no.2 has brought to the notice of the Court definition of the term ‘dedicated feeder’ assigned by the Electricity Regulatory Commissions of some other States.

11. Regulation 2(f) of the Andhra Pradesh Electricity Regulatory

Commission provides as follows:

“(f) **“Dedicated Feeder”** means feeder emanating from substation where transformation to the required voltage takes place and feeds power to a single consumer having contracted capacity of minimum fifty percent of line capacity or more. The Consumer shall bear the full line cost, including take off arrangements at Substation end of the Licensee. In such cases the billing meter shall be provided at the Licensee’s sub-station.” (underline supplied)

12. Regulation 5.3 of the Meghalaya State Electricity Regulatory

Commission provides as follows:

“5.3 Dedicated Feeder

Consumers other than 3 MVA & above including steel and other similar industries desirous of getting power supply from dedicated feeder may make a request for such facility to the licensee. The dedicated feeder shall be extended from the power substation to the consumer’s point of supply. In such cases the consumers shall be liable to pay the cost of Bay and all protection switchgears and its accessories provided at the power substation for this feeder in addition to the cost of the feeder. On receipt of such request, the licensee will check the feasibility, based on merit, of providing a dedicated feeder to the consumer’s premises. If found feasible, the consumer will be provided with a dedicated feeder and the consumer will be liable to pay additional charges such as supervision charges, etc. as approved by the Commission from time to time. The Licensee shall not extend electric supply to any other consumer from the dedicated feeder.” (underline supplied)

13. Similarly, Clause 24 of the Kerala Electricity Supply Code,

2014 provides as follows:

“24. The service line, meter and associated equipment deemed to be the property of the licensee.- (1) The whole of service line, meter and other associated equipment shall be deemed to be the property of the licensee and shall remain under his control so long as they are connected to the distribution system of the licensee.
(2) The licensee may use the service line and other apparatus to give supply to other consumers, if the supply to the consumer who has paid for such line and apparatus is not affected adversely:

Provided that the service line and other equipment of a consumer with a dedicated feeder shall not be used to supply power to another consumer.

(3) Even if the supply to the consumer who has paid for the line or equipment is disconnected, for whatsoever reason, the consumer shall permit the licensee, continued access to the service line and other equipment if they are required to give supply to other consumers, until alternate arrangements are made by the licensee:

Provided that no payment shall be due to the consumer for such access or facility.

(4) The licensee shall make all possible efforts to provide alternate arrangement or mutually acceptable arrangement for continuation of the installation at the existing place, as early as possible.” (underline supplied)

14. Appellate Tribunal for Electricity, New Delhi, constituted under Section 110 of the Electricity Act, 2003 at paragraphs 6 and 11 of the order passed in **Maharashtra State Electricity Distribution Co. Ltd. -vrs.- Maharashtra Electricity Regulatory Commission and R.L. Steels Ltd.** (supra) has observed as follows:

“6. On 13.11.2009, the Appellant submitted a petition being Case No.71 of 2009 before State Commission praying for allowing the Appellant to levy of low voltage surcharge to consumers connected on non-express feeders (more than one connection on the said feeder) at voltages lower than that specified in Standard of Performance Regulations. The Appellant also prayed that in case of dedicated feeders (where only one consumer is connected), the Appellant may be allowed to charge on the basis of consumption recorded by meters installed at sending end and receiving end whichever is higher.

Xx	xx	xx	xx	xx
Xx	xx	xx	xx	xx

11. The State Commission disposed of this petition in Case No.52 of 2010 through a Clarificatory order dated 9.11.2010. In this order, the State Commission clarified that under its Order dated 5.3.2010 the levy of 2 % extra units cannot be made if the power supplied was connected on dedicated feeder (only one connection on the said feeder). Levy of 2 % extra units was applicable only if consumer is connected on non-dedicated feeder (more than one connection on the said feeder).” (underline supplied)

Thus, the Appellate Tribunal For Electricity has clearly assigned the meaning of 'dedicated feeder' to be a feeder to which only one consumer is connected.

15. It is not disputed that the feeder through which opposite party no.2 gets power supply has never been agreed upon by the parties either in the agreement at Annexure-1 or in any subsequent instrument to be used exclusively by opposite party no.2. That goes to indicate that it was never meant to be a dedicated feeder. A close reading of paragraph 196 of the Tariff Order would reveal that the concept of reliability surcharge was introduced in view of objection raised by industries particularly connected with "dedicated feeders" from the Grid of OPTCL substation and primary substation of DISCOMs. Considering objections and the scenario of the system of availability/power deficit the OERC introduced the concept of levy of reliability surcharge to be payable, to start with, such HT and EHT consumers who get power supply through dedicated feeders. Thus, reliability surcharge was levied on the basis of objections raised by a class of consumers availing power supply through dedicated feeders to be payable by such HT and EHT consumers who get power supply through dedicated feeders. The expression "dedicated feeders" occurs twice in paragraph 196 of the Tariff Order. In the absence of any definition of the expression "dedicated feeder" provided under the Statutes, Rules, Regulations or the OERC Code, the OERC ought to have provided for a precise definition or meaning of the term "dedicated feeder" in the Tariff Order itself. That having not been done, no fault can be found with the meaning of the expression "dedicated feeder" assigned by

the GRF in the impugned order, such meaning being in consonance with the meaning and definition of “dedicated feeder” assigned by Electricity Regulation Commissions of other States as well as the Appellate Tribunal for Electricity which are essentially expert technical bodies. The meaning sought to be assigned by the petitioner to the term “dedicated feeders” would render the use of expression “dedicated feeders” by the OERC in paragraph 196 of the Tariff Order redundant. In the facts and circumstances of the case, the GRF has rightly held that the petitioner is not entitled to claim reliability surcharge from the opposite party no.2.

16. In view of the above, there is no merit in the writ petition. Accordingly, the writ petition is dismissed.

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B.K. Patel, J.