

Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 198 of 2009

Dated : 15th July, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson.
Hon'ble Mr. V.J. Talwar, Technical Member

In the matter of:

Gujarat Electricity Transmission Company Ltd
Sardar Patel Vidyut Bhawan, Race Course,
Vadodara -390007

Appellant

Versus

1. Central Electricity Regulatory Commission
2. Union Territory of Daman and Diu, Daman
3. Union Territory of Dadra and Nagar Haveli, Silvassa
4. Maharashtra State Electricity Distribution Company Limited, Mumbai
5. Gujarat Urja Vikas Nigam Ltd., Vadodra
6. Madhya Pradesh Power Trading Company Ltd., Jabalpur
7. Chhattisgarh State Electricity Board, Raipur
8. Electricity Department, Govt. of Goa, Panaji
9. Powergrid Corporation of India
10. Western regional Power Committee.

Counsel for Appellant:

Mr. M.G. Ramachandran

Counsel for Respondents: Mr Sakesh Kumar for R -2 & R-3
Mr Umapathi for R-6

J u d g m e n t

Per Hon'ble Shri V.J. Talwar, Technical Member

- 1 The Appellant, Gujarat Electricity Transmission Company Limited (GETCO) is a transmission licensee and State Transmission Utility (STU) in the state of Gujarat.
- 2 Central Electricity Regulatory Commission (Central Commission) is the 1st Respondent. 2nd & 3rd Respondents are Union Territories of Daman & Diu and Dadra Nagar Haveli respectively. 4th, 6th and 7th Respondents are distribution licensees in the states of Maharashtra, Madhya Pradesh & Chhatisgarh respectively. 5th Respondent is a generation company in Gujarat. 8th Respondent is state owned power department in the state of Goa. Respondent no. 9 is Central Transmission Utility. Respondent No. 10 is a Regional Power Committee in the Western Region.

3 The Central Commission vide its Order dated 31.7.2009 determined the charges for the use of Gujarat Transmission system for conveyance of central sector power to Union Territories of Daman & Diu (DD) and Dadra and Nagar Haveli (DNH). Aggrieved by this order of the Central Commission, the Appellant has filed this Appeal

4 Factual Matrix of the case is as under;

5 The Appellant is an undertaking of Government of Gujarat. It has been declared as State Transmission Utility of Gujarat State under Section 39 of the Electricity Act 2003. Respondents No. 2 and 3 have firm allocation from various Central Sector Stations of NTPC & NPC in Western Region. A Power Purchase Agreement had been entered into between NTPC and other entities in Western Region including Respondents No 2 and 3 to whom power had been allocated from NTPC's generating stations. The transmission network of the Respondent No 2 and 3 was not connected to the interstate transmission network owned and operated by

POWERGRID (R-9). Power allocated to the 2nd and 3rd Respondents is delivered by POWERGRID at different inter-connection points of the Appellant's transmission system and thereafter it is carried by the Appellant on its transmission system to 2nd and 3rd Respondents' system. The Appellant has stated that the following lines are used for delivery of power to these two Respondents.

Common transmission route between GETCO and Daman and Dadar Nagar Haveli system

- i) 400 kV Asoj – Ukai S/C (Asoj is CTU point)
- ii) 220 kV Ukai – Vav D/C
- iii) 220 kV Vav – Navasari D/C
- iv) 220 kV Navasari – Vapi D/C

Interconnection between Dadar Nagar Haveli and GETCO

- i) 220 kV Bhilad – Magarwada D/C
- ii) 66 kV Vapi – Dabhel
- iii) 66 kV Vapi – Kachigam

Interconnection between Diu and GETCO

- i) 400 kV Asoj – Jetpur S/C
- ii) 220 kV Jetpur – Keshod D/C
- iii) 220 kV Keshod – Timdi
- iv) 220 kV Timdi – Dhokadwa S/C
- v) 66 kV Dhokadwa – Uma S/C
- vi) 66 kV Una – Diu
- vii) 66 kV Kanasari – Diu

- 6 Wheeling charges for usage of the Appellant's system for supply to the Respondent No 2 and 3 were being determined based on decision taken in the 110th meeting of Western Regional Electricity Board (WREB) held on 22.5.1999. The methodology for calculation was suggested by CEA and was based on 'contract path method' i.e. usage of the facilities of the Appellant involved in the transmission. The transmission charges for usage of these facilities were shared by all the beneficiaries, pro rata to the extent of their allocation of central sector power.
- 7 By an order dated 28.2.2006, Gujarat Electricity Regulatory Commission (Gujarat Commission) determined the applicable transmission charges and applicable transmission loss adjustment for the use of Appellant's network effective from the date of the order. Thereafter, by order dated 6.5.2006, the charges were revised effective from 1.4.2006.
- 8 The Appellant claimed that the transmission charges and transmission loss adjustments determined by Gujarat

Commission are also applicable for conveyance of power to 2nd and 3rd Respondents and accordingly, it demanded payment of the transmission charges and adjustment for losses from them. Both the Respondents, however, did not make payment of transmission charges.

- 9 Thereupon, the Appellant and Gujarat Urja Vikas Nigam Ltd (R-5) filed Petition No.94 of 2006 before the Central Commission seeking the following reliefs:

“1. The Hon’ble Commission may kindly clarify that the “Appropriate Commission” having jurisdiction to determine the Transmission charges of the GETCO system being used incidental to transmission system of CTU for transmission of Central Sector and Bilateral power to the Union Territories of Daman & Diu and Dadra Nagar Haveli is GERC or CERC.

2. The Hon’ble Commission may direct Respondents 1 to 7 to make the payment of transmission charges as determined by Hon’ble Gujarat Electricity Regulatory Commission for the year 2005-06 and 2006-07 to GUVNL for utilization of Gujarat Energy Transmission Corporation Network for transmission of Central Sector and Bilateral power to DD and DNH as agreed in the 110th WRE Board Meeting held at Aurangabad on 22.5.99 and since the transmission charges as worked

out by erstwhile WREB secretariat for the year 2004-05 were provisionally applicable.

3. ...

4. ...

5. *In case, according to Hon'ble Commission, the "Appropriate Commission" in the instant case is CERC, the transmission charges may be determined for the GETCO transmission system being used incidental to transmission system of CTU for transmission of Central Sector and Bilateral power to the Union Territories of Daman & Diu and Dadra Nagar Haveli.*

6. ...”

10 The Central Commission vide its order dated 4.10.2006 disposed of this petition with the following observations:

“13. The petitioners during the hearing argued that in their view, GERC is the “Appropriate Commission” for determination of the transmission charges for the transmission system owned by GETCO and, according to the petitioners, the transmission charges were correctly determined by that Commission. It was, however, submitted that they would abide by the decision of this Commission in the present petition. It appears that the petitioners have been vacillating on the question of jurisdiction to determine the wheeling charges. On the one hand, they submit to the

jurisdiction of CERC, but on the other, they have prayed this Commission to determine the transmission charges for GETCO network.

14. Without expressing any opinion on the issue at this stage, we dispose of the present petition, without admitting, with the directions to the petitioners to examine the question of jurisdiction afresh, based on the interpretation of the provisions of the Electricity Act, 2003. The petitioners need to consider the different provisions of the Act and on being satisfied about the question of jurisdiction, make an appropriate application in accordance with the terms and conditions for determination of transmission charges notified by the Commission.”

- 11 Thereafter, Respondent No 2 filed a petition before the Gujarat Commission for determination of transmission charges for use of the Appellant’s network. In the meantime, Electricity Department of Goa (R-7) filed an Appeal being No. 150 of 2007 before this Tribunal challenging the Order of the Maharashtra Electricity Regulatory Commission (Maharashtra Commission) dated 28.6.2006 wherein Maharashtra Commission had, *inter alia* treated the

intervening transmission system of Maharashtra State Electricity Transmission Corporation Ltd. as part of the intra-State transmission system for wheeling of power from the Central Generating Stations and /or WREB pool of power to the State of Goa. Taking note of the pendency of the above Appeal, Gujarat Commission, vide its order dated 22.1.2008 disposed of the above petition, with the following directions:

“[9] We have carefully considered the submissions made by the representatives of the parties. It is admitted fact that same issue regarding jurisdiction is pending before the Appellate Tribunal for Electricity. The judgment of the Appellate Tribunal would be binding and therefore, we dispose of the present petition by saying that order of Appellate Tribunal will be binding to the parties. If the judgment is in favour of GETCO, the Appellant would have to pay the transmission charges as determined by the Commission in the relevant Tariff Order for GETCO. Nevertheless the Appellant would be free to approach the Commission in case any further clarification is required.

[10] We order accordingly.”

- 12 In the mean time this Tribunal vide its order dated 17.12.2007, decided that the State Commission has no jurisdiction to determine tariff for inter-State lines including the intervening lines of the transmission company in Maharashtra in relation to conveyance of electricity from the State of Maharashtra to Goa.
- 13 The Appellant, therefore, again approached the Central Commission for exercising the jurisdiction to determine the tariff for conveyance of electricity through its transmission system from the State of Gujarat to Respondent No 2 and 3 for the period 28.2.2006 and onwards.
- 14 The Central Commission vide its order dated 3.2.2009 decided the methodology for determining the charges for conveyance of electricity through intervening transmission facilities of the Appellant and directed Western Regional Power Committee to work out the charges based on the this methodology payable by the Respondent No.2 & 3.

- 15 Pursuant to above direction of the Central Commission, Western Regional Power Committee (WRPC) determined the charges payable by Respondent No. 2 & 3 on 3.3.2009. WRPC filed its report before the Central Commission.
- 16 The Central Commission disposed of the petitions filed by the Appellant by Order dated 31.7.2009. Aggrieved by this Order dated 31.7.2009, the Appellant has filed this Appeal.
- 17 Mr. M.G. Ramachandran, the learned counsel for Appellant raised and advanced a number contentions as under:
- I. The Central Commission has determined the transmission charges for use of the inter-state transmission network of the Appellant for wheeling of electricity to the Respondent No. 2 & 3 following the contract path method, which is contrary to the Regulations framed by the Central Commission. In terms of Open Access Regulations 2004, framed by the Central Commission, the transmission charges are to be levied on postage stamp basis.

- II. Contract path method is necessarily being that the beneficiary is supposed to draw power on specified path only. This means that the line should be in a position to carry required quantum of electricity from point of injection to point of drawal without there being any need to utilize other transmission network of the Appellant. In case the other part of the transmission network of the Appellant is used in addition to the specified contract path, the transmission charges cannot be determined on the contract path method.
- III. The reliance of the Central Commission on section 35 and 36 of the Electricity Act 2003 is misplaced. Section 35 of and 36 of the Electricity Act 2003 have no application in the present case as the same applies only in case of surplus capacity available which is directed to be used by an order of the appropriate commission under section 35. The said provisions have no application in the present case where the

transmission capacity is reserved and the transmission charges are determined as applicable to the regular transmission line and not to the surplus capacity.

- IV. The Appellant is a regulated entity with its total Annual Revenue Requirement is determined by the Gujarat Commission. All the entities in the state of Gujarat using transmission system of the Appellant are required to pay transmission tariff on the basis of postage stamp method. By adopting different methods for calculation of transmission charges, the total revenue requirements of the Appellant cannot be recovered.
- V. There is a fundamental flaw in the calculation of the transmission charges by the Central Commission even applying the contract path method. The calculation of the Western Regional Power Committee as adopted by the Central Commission shows that the entire energy accounting is done on an average basis and not on maximum utilization or on peak utilization basis. This

aspect, though specifically pointed out in the representations filed by the appellant, has not been dealt with by the Central Commission.

- VI. The transmission charges determined by the Central Commission have been made retrospectively applicable by the Central Commission from 1.4.2004. The petition filed by the Appellant was for determination of tariff only from 1.4.2006. Till such time, the beneficiaries had paid the transmission charges as agreed to in the Regional Electricity Board meeting in the year 1999. In the circumstances, there was no occasion for the Central Commission to reopen the settled issues which were not in dispute in the petition filed by the Appellant before the Central Commission. Even in the case of charges as determined by the Central Commission are to be applied, the same ought to be applied prospective and not retrospective.

18 While challenging the admissibility of the Appeal on being time barred, Sh Sakesh Kumar, the Learned Counsel for the Respondent No. 2 & 3 submitted the following contentions:

- I. The present Appeal has been filed against the order dated 31.07.2009 by which the Central Commission approved the rates calculated by Western Regional Power Committee. The Central Commission Vide its order dated 03.02.2009 had laid down guidelines and principles for determination of charges to be paid for conveyance of central sector share of the Respondent No. 2 & 3 through intervening transmission facilities of the Appellant. In this order dated 03.02.2009, it was left to the Western Regional Power Committee to do the calculation based on the principles formulated by the Commission. The matter was kept pending till the calculations were made by Western Regional Power Committee and to verify if the calculations are in line

with the principles decided and directions given in the main order of the Central Commission dated 03.02.2009. The appellant has not challenged the order dated 03.02.2009, which has become final. In the present Appeal only the computation of charges made by Western Regional Power Committee could be challenged. However, it was not the case of the Appellant that the computation is not in accordance with the parameters fixed by the Central Commission but in the garb of challenging the computation order, the appellant has not challenged the order dated 03.02.2009 which has become final. In other words the appellant is trying to challenge the Decree itself in execution proceedings.

- II. On merits of the Appeal and other issues raised by the Appellant, Sh Sakesh Kumar reiterated the findings of the Central Commission in its orders dated 3.2.2009 and 31.7.2009.

19 Sh Umapathi, Learned Counsel of the Respondent 6 would submit that:

- I. The arrangement regarding conveyance of central sector power through the Appellant's system is based on Bulk Power Supply Agreement between NTPC and all beneficiaries of Western Region including the Appellant and the Respondent No. 2 & 3. This agreement provided that transmission system of POWERGRID and /or beneficiary states shall be utilized for wheeling of power. The charges for such wheeling shall be decided mutually with the help of Western regional Electricity Board (now Western Regional Power Committee). However, because of non-consensus on the rate of transmission charges, the matter was referred to CEA which determined charges for period 1992-99 vide order dated 18.5.1999.
- II. The CEA in its order had adopted the contract path method as the basis for determination of wheeling

charges. CEA had also considered the average MW drawal from the system as the basis for allocation of these charges.

- III. The Central Commission has elaborately discussed the two options i.e. postage stamp method or contract path method in its Order dated 3.2.2009. The Central Commission has held that the contract path method is the only method which is in accordance with the National Electricity Policy and Tariff Policy.
- IV. The Gujarat Commission in its order dated 21.1.2008 in petition no. 910/2007 had also made the following observations:

“The wheeling of Central sector power to the beneficiaries of WR may not be treated at par with any other open access consumer, CPP or IPP located in Gujarat Electric system. Non existence of direct CTU transmission line for supply of Central Sector power to the petitioner was a collective decision of Standing Committee on Power system planning in Western Region (having members from WR constituents), keeping in view

overall requirement of regional transmission system as a whole and availability adequate transmission system for transmission of Central sector power to DD and DD. By principal of estoppel, GETCO cannot back out under the pretext of open access regulations for interstate transmission.”

- V. In regard to determination of charges retrospectively, Respondent no. 6 reiterated the findings of the Central Commission and further submitted that retrospective determination of tariff is not a new phenomenon. Respondent 6 relied upon the minutes of 110th meeting of WREB held on 22.5.1999. In this meeting while GEB and MSEB had propagated in favor of determination of tariff retrospectively from June 1992, MPEB, predecessor of Respondent 6, had opposed it. WREB had accepted retrospective application of tariff and accordingly determined the tariff w.e.f. 1992. It is not now open to the Appellant to contend to the contrary on retrospective application of tariff.

20 In the light of the submissions made by the parties, we deem it fit to frame six questions that may arise for consideration in this Appeal. Those questions are as follows:-

- I. Whether the Appeal filed against the Central Commission's impugned Order dated 31.7.2009 challenging the methodology adopted for determination of applicable charges for use of transmission lines belonging to the Appellant is maintainable in the absence of any independent challenge to the Central Commission's order dated 3.2.2009?
- II. Whether transmission lines of the Appellant utilized in conveyance of central sector shares of the Respondent No. 2 & 3 are intervening transmission facilities in terms of Section 35 & 36 of the Electricity Act 2003 or a part of transmission network in terms of section 39 of the Act?

- III. Whether the Central Commission has rightly adopted the contract path method while determining charges for usage of specified transmission network of the Appellant for conveyance of Central Sector Shares of the Respondent No. 2 & 3?
- IV. Whether the Central Commission has rightly given retrospective effect for determination of applicable charges i.e. from 1.4.2004 when the Appellant had approached the Central Commission for determination of such charges as may be applicable for the period from 1.4.2006?
- V. Whether by adopting different methods for calculation of transmission charges, the total revenue requirements of the Appellant could not be recovered and the Appellant's interest would suffer on this account.
- VI. Whether the Central Commission has rightly approved the calculations of the Western Regional Power Committee making entire energy accounting on

average basis and not on the basis of maximum utilization of the capacity during the relevant period?

21 We shall now deal with each of the above questions one by one.

22 First question to be decided as to whether the Appeal filed against the Central Commission's Order dated impugned order dated 31.7.2009 challenging the methodology adopted for determination of applicable charges for use of transmission lines belonging to the Appellant is maintainable in the absence of any independent challenge to the Central Commission's order dated 3.2.2009?

23 The Appellant has submitted that the Central Commission's Order dated 3.2.2009 was only an interim order. The Central Commission passed its final order only on 31.7.2009. No doubt that the guidelines and principals for determination of charges were enunciated by the Central Commission in order dated 3.2.2009, but the same were reaffirmed in later order dated 31.7.2009. Thus the later order dated 31.7.2009

was final order and the Appellant has every right to challenge findings of the Central Commission as per this order.

- 24 On the other hand learned counsel for the Respondent No. 2 & 3 and Respondent No. 6 stoutly refuted the contention of the Appellant and submitted that order dated 3.2.2009 was final order as far as setting guidelines and principles for determination of charges are concerned; by the said order, the Central Commission had directed Western Regional Power Committee to work out the charges based on principles formulated by the Central Commission in its order dated 3.2.2009; the impugned order dated 31.7.2009 was only a compliance order and verified whether the calculations made by Western Regional Power Committee were in conformity with the principles decided and directions given in the main order of the Central Commission dated 03.02.2009. The Appellant could have challenged the main order dated 3.2.2009 within the specified time frame;

Appellant having preferred not to challenge the main order dated 3.2.2009 with in time, it is not open to him now to challenge the findings of the main order dated 3.2.2000 through the challenge to the compliance order dated 31.7.2009.

25 To this contention of learned counsel for the Respondent No. 2 & 3, learned counsel for the Appellant submitted that the Appeal against the order dated 3.2.2009 was not preferred as the Appellant was not aware of its outcome and that it is only after the calculations made by Western Regional Power Committee indicated that the transmission charges had reduced further, the Appellant decided to challenge the contract path method adopted by the Central Commission for determining the transmission charges for use of its transmission system.

26 We are unable to accept to the reasons adduced by the Appellant for not challenging the Central Commission Order dated 3.2.2009. From the Appellant's own submission, it is

evident that the Appellant would have accepted the principles laid down by the Central Commission if the calculations of made by WRPC had gone in their favour. This only shows that the Appellant had no objection to the methodology adopted by the Central Commission but have only objection to final outcome of the exercise.

27 Admittedly the Appellant had filed petitions before the Central Commission being no. 64/2008 & 67/2008 for fixation of and adjudication on the transmission charges for use of the Gujarat transmission system for conveyance of central sector power to Union Territory of Daman & Diu and Dadra Nagar and Haveli respectively. The Central Commission merged both the petitions and passed two common orders. First order was passed on 3.2.2009 and second order was passed on 31.7.2009. The main contention of the Appellant is that the first order was only an interim order and second order was final order. The Respondent No. 2 & 3 on the other hand claim that first

order was main order, so far as issue at hand is concerned, and second order was only a compliance order.

28 In our opinion when two or more orders are passed against the same petition, the sequence of orders does not define the nature of the orders. It is the wordings and content of the respective orders which would decide as to whether order was final or not. With a view to decide whether the order dated 3.2.2009 was final or not, let us examine the findings of the Central Commission. Relevant findings of the Central Commission in its order dated 3.2.2009 read as under:

“32. We are conscious of the fact that in the interim order dated 21.7.2004 in Petition No 6/2004 in the matter related to determination of wheeling charges for the use of Orissa transmission system for transmission of power to MPSEB under the 2001 tariff Regulation for the period 2001-04 , the Commission had stated that after implementation of open access regulations, charges shall be payable under those regulations. However, we are of the opinion that the matter relating to use of State transmission system for conveyance of power to other licensees is more appropriately covered under Sections 35 and 36 of the Act. These explicit statutory provisions cannot be ignored. We are therefore proceeding by specifying method of

calculation of the transmission charges in the present case. In due course, the Commission will come out with draft regulations under Section 36 of the Act so as to deal with the issue of determination of transmission charges for intervening inter-State transmission facilities.

33. Above discussion leads one to the conclusion that it is appropriate to apply Contract Path method in preference to Postage Stamp method, The following distinct consideration in favour of this method cannot be overlooked:

(a) This method fits in well with the philosophy contained in the National Electricity Policy and Tariff Policy.

(b) It is in line with Sections 35 sand 35 of the Act, which require determination of transmission charges for intervening transmission facility. Therefore, these sections read with conclusion drawn by the Appellate Tribunal imply that in cases such as the present one, to the extent possible, specific transmission elements used in conveyance of power have to be identified.

(c) The Contract Path method was the agreed arrangement for the period beginning 1992-93 till GETCO raised the issue in the form of Petition 94/2006 filed in August 2006.

(d) Probably because the method is just and fair. In fact, the same was specified by the Commission in the 2001 regulations during the tariff period 2001-04 for determination of charges in case the parties were not able to reach to an agreement.

.....

.....

38. Based on the above, we direct Member Secretary, Western Regional Power Committee to submit to the Commission detailed calculation of the transmission

charges for transmission of power to DD and DNH within one month of issuance of this order. The calculations shall be made based on following guidelines:

(a) The transmission assets used for transmitting power to DD and DNH shall be identified as under:"

.....

.....

- 29 From the above findings of the Central Commission in its Order date 3.2.2009, it is clear that the Central Commission had taken a categorical decision to adopt the contract path method and directed Western Regional Power Committee to submit detailed calculations of the transmission charges for transmission of power to the Respondent No. 2 & 3.
- 30 In view of above, we do not accept the submission of the Appellant and we agree with the contention taken by the Respondent No. 2 & 3 that the order dated 3.2.2009 was final order in regard to adoption of contract path method.
- 31 Despite the above findings, we are not inclined to dismiss the Appeal merely on this technical ground. The Appellant has statutory right of Appeal against any order of the

Appropriate Commission. Admittedly the Appeal has to be filed within 45 days from date of impugned order. Appeals filed after 45 days can be admitted on application for condonation of delay. This Tribunal had been admitting the delayed Appeals after condoning the delay. In the present Appeal, of course, there is no interlocutory application for condonation of delay. However, we are inclined to decide the issue on merits as the Appeal has already been admitted.

32 The next question for our consideration as to whether the transmission lines of the Appellant utilized in conveyance of Central Sector share of the Respondent No. 2 & 3 are intervening transmission facilities in terms of Section 35 & 36 of the Electricity Act 2003 or a part of transmission network in terms of section 39 of the Act.

33 In order to appreciate the point in issue, it will be necessary to set out the relevant provisions of Sections 35, 36 and 39 of the Act:

35. Intervening transmission facilities.—The Appropriate Commission may, on an application by any licensee, by order require any other licensee owning or operating intervening transmission facilities to provide the use of such facilities to the extent of surplus capacity available with such licensee:

Provided that any dispute, regarding the extent of surplus capacity available with the licensee, shall be adjudicated upon by the Appropriate Commission.

36. Charges for intervening transmission facilities.—(1) Every licensee shall, on an order made under section 35, provide his intervening transmission facilities at rates, charges and terms and conditions as may be mutually agreed upon:

Provided that the Appropriate Commission may specify rates, charges and terms and conditions if these cannot be mutually agreed upon by the licensees.

(2) The rates, charges and terms and conditions referred to in sub-section (1) shall be fair and reasonable, and may be allocated in proportion to the use of such facilities.

Explanation.—For the purposes of sections 35 and 36, the expression “intervening transmission facilities” means the electric lines owned or operated by a licensee where such electric lines can be utilised for transmitting electricity for and on behalf of another licensee at his request and on payment of a tariff or charge.

.....

39. State Transmission Utility and functions.—(1) The State Government may notify the Board or a Government company as the State Transmission Utility:

...

(2) The functions of the State Transmission Utility shall be—

(a) to undertake transmission of electricity through intra-State transmission system;

....

(d) to provide non-discriminatory open access to its transmission system for use by—

(i) any licensee or generating company on payment of the transmission charges; or

...” {emphasis added}

34 The perusal of above sections would make it clear that the Act has made two distinct provisions enabling any licensee to use the transmission system of another licensee. Principles of harmonious construction of statute demand that these two provisions are to be interpreted in such a way that application of one must not make other provision otiose or redundant.

35 We would now proceed to examine the issue in the light of above observation.

36 Sh M G Ramachandran, learned counsel for the Appellant would submit that Sections 35 of and 36 of the Electricity Act 2003 have no application in the present case as the same applies only in case of surplus capacity available which is directed to be used by an order of the Appropriate Commission under section 35. He also submitted that the said provisions have no application in the present case where the transmission capacity is reserved and the transmission charges are determined as applicable to the regular transmission line and not to the surplus capacity.

37 We are unable to agree with this contention of the Appellant for the following two reasons:

- i. Acceptance of this contention would make the provisions of section 35 & 36 otiose and redundant.
- ii. Scrutiny of sections 35, 36, 38, 39 and 40 of the Act would reveal that the Central Commission does not have jurisdiction to determine the transmission charges

for use of transmission system of State Transmission Utility or Intra-state transmission licensee. The Central Commission's jurisdiction in this regard is restricted to:

- a. Specify the payment of transmission charges and surcharge thereon for use of the transmission system belonging to the CTU under section 38 of the Act and other inter-state transmission licensees under section 40 of the Act,
- b. Specify rates, charges and terms and conditions for use of intervening (inter-state) transmission facilities, if these cannot be mutually agreed between the licensees under section 36 of the Act.

Undoubtedly, the Appellant is a State Transmission Utility in the state of Gujarat and is deemed transmission licensee of Gujarat Commission under section 39 of the Act. By virtue of Section 86 (1) (a)

read with Section 181 (2)(i), Gujarat Commission is the Appropriate Commission and only Gujarat Commission has jurisdiction to determine transmission charges for use of the Appellant's system in terms of section 39 of the Act. The Central Commission would gather jurisdiction to determine charges for use of the Appellant's transmission system by another licensee only under sections 35 & 36 of the Act.

38 The Central Commission, while dealing with the issue of its jurisdiction, in suo muto proceedings in petition no 48/2003 had also expressed similar views. Relevant extract of the Central Commission's order in this suo muto proceedings dated 14th November 2003 is reproduced below:

“8. Under Section 35, the Appropriate Commission may, on an application by any licensee, by order require any other licensee owning or operating intervening transmission facilities to provide the use of such facilities to the extent of surplus capacity available with such licensee. Any dispute, regarding the extent of surplus capacity available with the licensee, shall be adjudicated upon by the Appropriate Commission. As

mandated by Section 36 (1), every licensee shall, on an order made under Section 35, provide his intervening transmission facilities at rates, charges and terms and conditions as may be mutually agreed upon. However, the Appropriate Commission may specify rates, charges and terms and conditions if these cannot be mutually agreed upon by the licensees.

9.

10. *In the light of above statutory provisions, the jurisdiction of the Central Commission is as follows:-*

(a) To specify by regulations the provisions for non-discriminatory use of inter-state transmission system as defined in Clause (36) of Section 2,

(b) To specify the payment of transmission charges and surcharge thereon for use of the transmission system belonging to the CTU and other inter-state transmission licensees,

...

(f) To specify rates, charges and terms and conditions for use of intervening (inter-state) transmission facilities, if these cannot be mutually agreed between the licensees.

39 Further, this Tribunal in the matter of Electricity Department, Government of Goa Versus Maharashtra Electricity regulatory Commission being Appeal no. 150 of 2007 has held that system of Maharashtra Transmission Utility used

for conveyance of electricity for Goa is intervening transmission system and only the Central Commission has jurisdiction to determine charges payable in such matters. The relevant portion of this Tribunal's Judgment is reproduced below:

*"5. We, therefore, find that firstly MERC has no jurisdiction to determine tariff of inter-State transmission line including the **intervening lines of MSETCL** and, therefore, the directions of MERC to make inter-State transmission tariff applicable to quantum of electricity transmitted to Goa is in contravention to the provisions of the Act. The learned counsel for the respondent Commission has also fairly conceded the legal position as explained above.*

*6. In view of the above, we allow the Appeal and set aside the impugned order dated 28th June, 2006 insofar as it relates to recovery of transmission charges for the **intervening transmission system of MSETCL when it is used as inter-State transmission line**. We also direct that no coercive action is to be taken to disrupt transmission of electricity to Goa and direct MSETCL to continue to **accept payment of transmission charges as per the existing prevailing regional norms determined by CERC** and raise the new bill accordingly and adjust the payments, if made,*

*from the date the impugned order has come into effect.”
{emphasis supplied}*

40 Finally, let us now examine the findings of the Commission in its order dated 3.2.2009. The relevant extract of the Central Commission’s order is reproduced below:

“29 Our attention has also been drawn to Sections 35 and 36 of the Act reproduced below:

...

30. Plain reading of these sections reveals that the case in hand falls in the category of intervening transmission facility as defined in the explanation to Section 36. In the present case, intervening transmission facility owned by the petitioner is used for conveyance of power to Respondents Nos 1 and 2 which are deemed to be licensees in terms of third proviso to Section 14 of the Act. We have noted that in general, the term used in the Act is ‘transmission system’ and only in these two sections the term ‘transmission facility’ has been used. In our opinion, this clearly implies that for the purpose of Sections 35 and 36, the transmission assets specifically used for the transaction have to be identified. During hearing, Shri D. Khandelwal appearing for MPPTCL had argued that since Section 36 talks about intervening transmission facility, the Commission is required to identify the intervening transmission facility and not to apply postage stamp rate determined by GERC. In this

context, he submitted copy of the judgment dated 31.10.2007 of the Appellate Tribunal in the matter of Hindalco Industries Ltd (appellant) Vs West Bengal State Electricity Regulatory Commission & others. In the said judgment, the Appellate Tribunal had directed WBERC to calculate wheeling charges taking into account applicable distribution network cost. Expanding on the term 'applicable network', the Appellate Tribunal had held that CESC had network at various voltage levels, but since the appellant was drawing power at 33 kV, there was no reason as to why it should pay for LT lines which are not being used. Though facts of the present case are not exactly same as the case decided by the Appellate Tribunal, the basic principle adopted by the Appellate Tribunal in the above case is capable of application in the present case before us. Thus there is a need to identify applicable transmission elements which are used for conveyance of power to Respondents Nos 1 and 2."

- 41 The submission made by the Appellant that Sections 35 and 36 of the Electricity Act 2003 have no application to the present case as the same applies only to the case of surplus capacity available and not where transmission capacity is reserved is misconceived.

42 Scrutiny of records placed before us would reveal that Regional transmission system is planned keeping in view the overall regional requirements. Since the consumption of the Respondent No. 2 & 3 was not significant in the initial stages of system development, no direct CTU link was envisaged for them. Surplus capacity available with the intervening transmission system of the Appellant was utilized to transfer the share of the Respondent No. 2 & 3. As the load demand of the Appellant and the Respondent No. 2 & 3 increased over the time, the surplus capacity got reduced considerably. Necessity of direct link between systems of the Respondent No. 2 & 3 with CTU was felt and same was established by Central Transmission Utility in 2005-06. Thus, only surplus capacity available with the Appellant's system was utilized till it was available. When the available surplus capacity became inadequate, a direct link from CTU system to the system of the Respondent No. 2 & 3 was established. If the capacity in the Appellant's transmission system was

reserved for the Respondent No. 2 & 3, as claimed by the Appellant, then there was no need to establish the direct link with CTU system.

43 In view of above discussions, we hold that transmission system of the Appellant involved in the conveyance of central sector share to the Respondent No. 2 & 3 is intervening transmission system in terms of section 35 and 36 of the Act. Hence we do not find any reason to interfere with the findings of the Central Commission.

44 Next question for our consideration as to Whether the Central Commission has rightly adopted the contract path method while determining charges for usage of specified transmission network of the Appellant for conveyance of Central Sector Shares of the Respondent No. 2 & 3?

45 Sh M G Ramachandaran, the learned counsel for the Appellant submitted that the Central Commission had adopted the Postage stamp method for determining the transmission charges in its Open Access (in Inter-state

Transmission) Regulations, 2004. These Regulations are binding and the Central Commission ought to have followed the same while fixing the transmission charges for usage of the Appellant's transmission system by the Respondent No. 2 & 3.

44 The Appellant has heavily relied on the Central Commission's orders dated 14.11.2003 and 31.1.2004. The Appellant's arguments revolve around the Central Commission's Tariff Regulations, 2001, Tariff Regulations, 2004 and Open Access Regulations, 2004. In the Order dated 31.1.2004, the Central Commission had held that clause 4.9 of the notification dated 26.3.2001 dealing with wheeling charges shall not be applicable after the regulations on open access in the inter-state transmission have come into force.

45 Let us have a relook at the provisions of Section 35 and 36 of the Act along with relevant provisions of Tariff

Regulations, 2001, Tariff regulations, 2004 and Open Access Regulations 2004.

46 Section 35 & 36 of the Act dealing with intervening transmission facilities are reproduced below:

“35. Intervening transmission facilities.—*The Appropriate Commission may, on an application by any licensee, by order require any other licensee owning or operating intervening transmission facilities to provide the use of such facilities to the extent of surplus capacity available with such licensee:*

Provided that any dispute, regarding the extent of surplus capacity available with the licensee, shall be adjudicated upon by the Appropriate Commission.

36. Charges for intervening transmission facilities.—*(1) Every licensee shall, on an order made under section 35, provide his intervening transmission facilities at rates, charges and terms and conditions as may be mutually agreed upon:*

Provided that the Appropriate Commission may specify rates, charges and terms and conditions if these cannot be mutually agreed upon by the licensees.

(2) The rates, charges and terms and conditions referred to in sub-section (1) shall be fair and reasonable, and may be allocated in proportion to the use of such facilities.” { emphasis added}

...

47 Perusal of above sections would indicate that one of the essential feature of section 36 is the rates and charges at which the intervening facilities of a licensee could be availed of are firstly to be mutually agreed. The role of the Appropriate Commission would come in to play only when there is no mutual agreement arrived at.

48 Let us now examine whether such provision of mutual agreement between the parties has been made in Tariff Regulations 2001, Tariff Regulations 2004 and Open Access Regulations 2004.

49 Clause 4.9.2 of Tariff Regulations 2001 dealt with wheeling of power through transmission system of STU/state utility and read as under:

“4.9.2 Wheeling through SEB/State Utility system:

*4.9.2.1 In case of wheeling of power through SEB/state utility system, the importing utility and the wheeling utility shall endeavour **to mutually agree on wheeling charges as well as transmission losses. In such cases, approval of the Commission shall not be required.** However, the wheeling utility shall not deny*

use of its system merely on the basis of non-agreement on wheeling charges.

4.9.2.2 If the parties are not able to agree on the wheeling charges, the Contract Path method shall be used for calculation of wheeling charges. Monthly transmission charges of this path would be payable in proportion to contracted power vis-à-vis SIL of the lines in the contracted path. The monthly transmission charges for the contract path shall be calculated as per the provisions of this notification.”
{emphasis added

50 Regulation 16 of the Open Access Regulations 2004 dealing with transmission charges is reproduced below:

“16. The transmission charges for use of the transmission system of the transmission licensee for inter-state transmission shall be regulated as under, namely: (i) The annual transmission charges shall be determined and after deducting the adjustable revenue from the short-term customers, these charges shall be shared by the long-term customers in accordance with the terms and conditions of tariff notified by the Commission from time to time.”

51 Whereas, simple reading of clause 4.9.2 would indicate that provisions contained in it were in line with the provisions of Section 36 of the Act, there is no such provision of mutual

agreement in Open Access Regulations 2004. Regulations framed by Appropriate Commission under the Act are Subordinate Legislation. Subordinate Legislation cannot overrule or deviate from provisions of Parent Act. Accordingly, we conclude that Open Access Regulations, 2004 being not in conformity with the provisions of Section 36 of the Act would, therefore, not be applicable in cases of intervening transmission facilities covered under Section 35 & 36 of the Act.

52 The Central Commission has dealt with the issue in hand in detail in its Order dated 3.2.2009. The relevant portion of the said Order is reproduced below:

“32. We are conscious of the fact that in the interim order dated 21.7.2004 in Petition No 6/2004 in the matter related to determination of wheeling charges for the use of Orissa transmission system for transmission of power to MPSEB under the 2001 tariff Regulation for the period 2001-04, the Commission had stated that after implementation of open access regulations, charges shall be payable under those regulations. However, we are of the opinion that the matter relating to use of State transmission system for conveyance of power to other licensees is more appropriately covered

under Sections 35 and 36 of the Act. These explicit statutory provisions cannot be ignored. We are therefore proceeding by specifying method of calculation of the transmission charges in the present case. In due course, the Commission will come out with draft regulations under Section 36 of the Act so as to deal with the issue of determination of transmission charges for intervening inter-State transmission facilities.

33. Above discussion leads one to the conclusion that it is appropriate to apply Contract Path method in preference to Postage Stamp method, The following distinct consideration in favour of this method cannot be overlooked:

(a) This method fits in well with the philosophy contained in the National Electricity Policy and Tariff Policy.

(b) It is in line with Sections 35 and 35 of the Act, which requires determination of transmission charges for intervening transmission facility. Therefore, these sections read with conclusion drawn by the Appellate Tribunal imply that in cases such as the present one, to the extent possible, specific transmission elements used in conveyance of power have to be identified.

(c) The Contract Path method was the agreed arrangement for the period beginning 1992-93 till GETCO raised the issue in the form of Petition 94/2006 filed in August 2006.

(d) Probably because the method is just and fair. In fact, the same was specified by the Commission in the 2001 regulations during the tariff period 2001-04 for determination of charges in case the parties were not able to reach to an agreement.” {Emphasis added}

53 From the findings of the Central Commission referred to above it can be seen that the Central Commission has held that the contract path method is in line with the National Tariff Policy and Sections 35 and 36 of the Act and was just and fair.

54 Finally, the Appellant has placed strong reliance on phrase 'transmission charges' used in Sections 38, 39 and 40 of the Act. The Appellant has contended that transmission charges can be determined only under these sections. Undoubtedly transmission charges for open access customers are to be determined under the provisions of these sections. However, the present case comes within ambit of sections 35 & 36 of the Act. As brought out above Section 36 of the Act provides for usage of intervening transmission facilities at rates and charges to be mutually agreed. It further provides that such rates and charges are to be reasonable and fair. Thus charges to be levied under section 36 are different from transmission charges covered under sections 38 to 40 of the

Act. Accordingly their basis for determination can also be different.

55 In the light of above discussions, we are in agreement with the findings of the Central Commission and hold that the Contract Path Method was the only method which would meet the requirements of Section 35 & 36 of the Act. The question is answered accordingly.

56 Next Question for our consideration as to whether the Central Commission has rightly given retrospective effect for determination of applicable charges i.e. from 1.4.2004 when the Appellant had approached the Central Commission for determination of such charges as may be applicable for the period from 1.4.2006?

57 Findings of the Central Commission on the issue read as under:

“25. The first issue to be addressed is the date from which transmission charges determined pursuant to these petitions shall be applicable. The petitioner has prayed that transmission charges be determined from

28.2.2006, the date on which GERC had issued orders prescribing transmission charges and loss adjustments. However, during the hearing held on 7.8.2008, in response to query of the Commission, learned counsel for the petitioner submitted that transmission charges would need to be determined from 1.4.2006 onwards and they would not make any claim for the period prior thereto. As has been pointed out by the respondents, Regulation 4.9.2 of the Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2001 (the 2001 regulations) notified on 26.3.2001 specifically dealt with wheeling system of SEB/State utility. It may be pointed out that prior to the Act the term 'wheeling' was used to denote third party use of the transmission system. However, these regulations were applicable only up to 31.3.2004, after which the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004, (the 2004 regulations) notified on 26.3.2004 become applicable from 1.4.2004 to 31.3.2009. The 2004 regulations do not have any specific provision for use of SEB/STU network for third party transmission. **Thus, with effect from 1.4.2004, there is a vacuum with regard to determination of transmission charges for use of transmission system of a utility, which is neither buyer nor seller of the power flowing through this system.** Therefore, we are in agreement with MPPTCL that we have to determine transmission charges with effect from 1.4.2004.”{Emphasis added}

58 Thus the Central Commission has categorically held that after 1.4.2004 there was a vacuum with regard to determination of charges for usage of intervening transmission facilities. We have also held in para 50 above that Open Access Regulations, 2004, being not in conformity with the provisions of Section 36 of the Act, would not be applicable in cases of intervening transmission facilities covered under Section 35 & 36 of the Act.

59 Since there were no effective Regulations since 1.4.2004 to determine charges for usage of intervening transmission facilities, the Central Commission has rightly given retrospective effect for determination of applicable charges. The question is answered accordingly.

60 The next question for our consideration as to whether by adopting different methods for calculation of transmission charges, the total revenue requirements of the Appellant cannot be recovered and the Appellant would suffer on this account.

61 The apprehensions of the Appellant that by adopting different methods for recovery of transmission charges it would not be able to recover its total revenue requirements is unfounded. We would like to clarify that in regulatory regime the Appropriate State Commission would determine the total ARR of the licensee after taking in to account all the assets of the utility. The revenue received from open access customers, such as Captive Wind Turbine Generators, and other licensees utilizing intervening system etc., would be considered as part of non-tariff income. Non-tariff income of the transmission licensee would be subtracted from the total ARR of the utility and net ARR is recovered from distribution licensee(s). It would be pertinent to mention here that in the state of Gujarat, the transmission charges are not recovered uniformly on 'postage stamp' basis from all users of transmission system. Captive Wind Turbine Generators in Gujarat pay transmission & wheeling charges in kind as some percentage of the electrical energy transmitted. Thus

different methods of recovery of transmission charges are already in place in Gujarat and without prejudice to the interests of the Appellant.

62 The question is answered accordingly.

63 Next issue before us for our consideration is whether the Central Commission has rightly approved the calculations of the Western Regional Power Committee making entire energy accounting on average basis and not on the basis of maximum utilization of the capacity during the relevant period?

64 In order to appreciate the point in issue, it will be necessary to examine the decisions taken at REB/RPC level.

65 The records placed before us indicate that for the first time the issue was taken up in Western Regional Electricity Board's 110th meeting held on 22.5.1999. In this meeting it was decided to accept the methodology adopted by CEA for calculation of annual charges since June 1992 payable to GEB/MSEB for wheeling central sector power to the

Respondent No. 2 & 3. Relevant portion of minutes of meeting is reproduced below:

“Member (G&O), CEA observed that it was a disputed issue referred to CEA and having decided on the principles, the decision of CEA for fixing the rates since June 1992 should not be reopened. Chairman MSEB/WREB agreed with the views of Member (G&O), CEA. The Board decided to accept the methodology adopted by CEA for calculation of annual wheeling charges since June 1992 payable to GEB/MSEB for wheeling central sector power to DD & DNH and Goa respectively”

66 The calculations sheets submitted by CEA vide its letter dated 18.5.1999 and adopted by WREB in 110th meeting held on 22.5.1999 revealed that CEA had apportioned annual fixed charges (of the intervening transmission facilities) in the ratio of average ‘MW’ drawal during the year and Surge Impedance Loadings of the concerned lines. The relevant portion of CEA’s letter dated 18.5.1999 is reproduced below:

“ (i) Contract Path Method’ has been used for working out the wheeling charges. The contacted path is the

EHV transmission of the wheeling system from the delivery point of central sector system to the point of supply to the recipient system. The contacted path for Goa and DNH & DD considered are:

(ii)....

(iii) The annual fixed charges has been apportioned to wheeling of central sector power in the ratio of average 'MW' drawal during the year and SIL of the 400/220 kV lines..."

67 This method of apportionment of wheeling charges in ratio of average 'MW' drawal during the relevant year and SIL of the lines had been in use since 1992. The Appellant had not questioned this principle of apportionment throughout the period. Western Regional Power Committee has adopted exactly the same method of apportionment. The issue has attained finality through usage and we are not inclined to reopen it at this stage.

68 The question is answered accordingly.

69 Summary of our findings.

- I. We do not agree with the contention of the Appellant and we accept the submission made by the Respondent No. 2 & 3 that the Central Commission's order dated 3.2.2009 was final order in regard to adoption of contract path method.**
- II. Transmission system of the Appellant involved in the conveyance of central sector share to the Respondent No. 2 & 3 is intervening transmission system in terms of section 35 and 36 of the Act. Therefore, we do not find any reason to interfere with the findings of the Central Commission.**
- III. We are in agreement with the findings of the Central Commission and hold that the Contract Path Method was the only method which would meet the requirements of Section 35 & 36 of the Act.**
- IV. Since there were no effective Regulations since 1.4.2004 to determine charges for usage of intervening transmission facilities, the Central**

Commission has rightly given retrospective effect for determination of applicable charges.

- V. In regulatory regime, the Appropriate State Commission would determine the total ARR after taking in to account all the assets of the utility. The revenue received from open access customers, such as Captive Wind Turbine Generators, and other licensees utilizing intervening system etc., would be considered as part of non-tariff income. Non-tariff income of the transmission licensee would be subtracted from the total ARR of the utility and net ARR is recovered from distribution licensee(s). It would be pertinent to mention here that in the state of Gujarat, the transmission charges are not recovered uniformly on 'postage stamp' basis from all users of transmission system. Captive Wind Turbine Generators in Gujarat pay transmission & wheeling charges in kind as certain**

percentage of the electrical energy transmitted as approved by the Gujarat Commission. Thus different methods of recovery of transmission charges are already in place in Gujarat without prejudice to the interests of the Appellant.

VI. The method of apportionment of wheeling charges in ratio of average 'MW' drawal during the relevant year and SIL of the lines had been in use since 1992. The Appellant had not questioned this principle of apportionment throughout the period. Western Regional Power Committee has adopted exactly the same method of apportionment. The issue has attained finality through usage and we are not inclined to reopen it at this stage.

70 In view of our above findings, we do not find any ground to interfere with the impugned order of Central Electricity Regulatory Commission dated 31.7.2009. Hence, Appeal

being devoid of merit is dismissed. However, there is no order as to cost.

71 Pronounced in the open court today the 15th July, 2011.

(V J Talwar)

Technical Member

(Justice M Karpaga Vinayagam)

Chairperson

INDEX : REPORTABLE/NON-REPORTABLE