

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal No. 1 of 2006

Dated this 11th day of July 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

Indian Aluminium Company Limited
(since known as HINDALCO Industries Limited)

.....Appellant

Versus

1. West Bengal Electricity Regulatory Commission
Kolkata - 700106
2. CESC Limited
Kolkata - 700001
3. State Transmission Utility,
West Bengal State Electricity Board
Kolkata - 700091
4. The State Load Despatch Centre (SLDC) West Bengal
Howrah
5. Eastern Regional Load Despatch Centre (ERLDC)
Kolkata - 700033

.....Respondents

Counsel for the Appellant Mr. Avijeet Kumar Lala & Mr. P.S.Narasimha,
Advocates

Counsel for the Respondents Mr. Pratik Dhar, Mr. C.K. Rai, Mr. Sameer
Chakravarty, Ms. Gauri Rasgotra &
Mr. P. Mukhopadhyay, Advocates

JUDGMENT

1. This appeal has been preferred by Hindalco Industries Ltd. Formerly known as Indian Aluminium Company Limited seeking for the following reliefs :-
 - (a) Allow this appeal by holding that the findings arrived at by Respondent No.1 – The West Bengal Electricity Regulatory Commission with regard to the consumership status of the appellant vis-à-vis CESC, the obligation of CESC to supply backup power to the appellant and declaring State Load Despatch Centre as the nodal agency in the appellant's case are illegal, unfounded and contrary to law and, consequently to set aside the same; and
 - (b) To permit the appellant to make fresh application before the Nodal Agency for open access; and
 - (c) To hold that the wheeling charges determined by the Respondent No.1 – Commission is arbitrary and unsustainable being contrary to the Act and the regulation made by the Commission; and
 - (d) Pass such further or other orders as may be deemed fit and proper to meet the ends of justice.

2. Heard Mr. Avijeet Kumar Lala, Advocate for the appellant, Mr. Pratik Dhar and Mr. C.K. Rai, Advocates for the first respondent, Dr. Sameer Chakravarty, Advocate, for respondent No.2 along with Ms. Gauri

Rasgotra, for the Eastern Regional Load Despatch Centre, the fifth respondent, Mr. P. Mukhopadhyay.

3. The appellant's case and contentions are summarised herein. The appellant, a public limited company claims to be a leading manufacturer of non-ferrous segments of Aluminium and Copper. The appellant has an aluminium rolled products factory at 39, G.T. Road, Belurmath, Howrah with a capacity of 45000 tonnes per annum. It is one of the oldest factory providing direct employment to 800 persons. The appellant is a power intensive industry. The electricity for the appellant's factory is obtained from CESC Limited (Second Respondent) at a Contract Demand of 8.5 MW at the voltage of 33 KV through Bellur Receiving Sub-station. The appellant invested more than Rs.5 crores towards installation of 33 KV Sub-station at its factory premises. The present composite cost of power supplied by CESC works out to Rs.420 per unit, it is one of the highest tariff and the operation of the unit has become unviable.
4. The appellant on 31.10.2003 applied to the first Respondent Commission for open access to wheel captive power from its power plant at Hirakud, Orissa to the said factory under Section 9 and 42 of The Electricity Act, 2003. On principle, the Power Grid Corporation of India, West Bengal State Electricity Board and Orissa Power Transmission Corporation Limited which are the concerned utilities accorded 'No Objection' to the proposed wheeling of power by the appellant from Hirakud to Belur. The appellant applied to the first respondent for necessary permission and consent. When the application was pending, as a result of the Order of the Merger passed by the Bombay and Calcutta High Courts, the Indian Aluminium Company stood transferred to HINDALCO Industries.

5. On 31.10.2003, the first respondent Commission allowed open access to wheel power as applied for but at the same time the Commission held that the appellant shall cease to be a consumer of CESC and its status as such vis-à-vis CESC, from which it has earlier drawn power. The Commission further held that the appellant is being granted open access cannot claim supply of backup power from CESC as a matter of right and it would be liable to pay additional surcharge to CESC in terms of proviso to Section 42(4) of the Act. The Commission directed that the State Load Despatch Centre shall be the nodal agency. The Commission fixed the wheeling charges at 83.54 paise/kwh for the year 2005-06 which is being challenged as irrational. While accepting the open access granted by the first respondent, the appellant is challenging the remaining part of the Order or directions of the Commission so far as it is against it as illegal.
6. It is contended that the Order dated 21.11.2005 passed by the first respondent is wholly illegal, arbitrary and unsustainable as the first respondent has completely misdirected itself in law with respect to the consumership status of the appellant vis-à-vis CESC, the obligation of CESC to supply backup power to the appellant, the levying of surcharge on the appellant and also holding that the State Load Despatch Centre as the nodal agency in the appellant's case. It is also contended that wheeling charges fixed by the Commission has been fixed most arbitrarily and it has been calculated erroneously in complete disregard to the scientific methodologies and empirical data available and the norms prescribed in this regard.
7. The Commission, it is contended, has lost sight of the fact that the appellant sought for short term open access for wheeling captive power while agreeing to pay the fixed charges towards demand charge

to CESC for the supply of electricity under the independent and existing agreement of supply. It is also contended that the existing agreement for supply of power will continue to subsist and the appellant shall remain the consumer of power with CESC. The appellant contends that the Order of the Commission rescinding the existing contract of supply by a distribution licensee so long as the consumer observes the terms and conditions of the contract and does not commit any breach thereof is illegal. The appellant further contends that the grant of open access will not entail an automatic cessation of its existing and independent contract for supply of power with CESC. The approach of the Commission that CESC could be under no obligation to supply backup power to the appellant is erroneous. The obligation to supply backup power arises from existing agreement entered by the appellant with the CESC for supply of power. It is obligatory for CESC to supply backup power.

8. It is contended that the interpretation placed on Section 42(4) of the Act by the Commission is erroneous and the imposition of additional surcharge is not sanctioned by law and it is liable to be set aside. It is pointed out that being an Inter-State Transmission of power which is governed by the Regulations framed by the CERC, the nodal agency for the short term transmission access has been prescribed as the Regional Load Despatch Centre of the region, where point of withdrawal of electricity is situated and therefore the appointment of the State Load Despatch Centre as the nodal agency is contrary to Regulation and liable to be set aside. It is also submitted that the appellant may contemplate wheeling only a part of its load requirement and take the balance from CESC with a reduced contract demand and consequently the direction issued by the Commission is illegal.

9. Before we frame the points for consideration, it is essential to record the issues posed by Commission, the findings recorded by Commission and the conclusion of the Regulatory Commission. The Regulatory Commission after considering the respective contentions advanced by the parties before, it posed the following questions for its consideration:-
- (i) Whether the power generating plant of the HINDALCO located at Hirakud qualifies to be treated as captive power plant in terms of Rule 3 of The Electricity Rules, 2005.
 - (ii) What should happen to the consumership status of HINDALCO when open access is granted? What are the consequences thereof?
 - (iii) Whether the contract for supply of electricity by distribution licensee to a consumer ceases on a grant of open access?
 - (iv) Whether the role of State Commission in respect of open access is limited only to the determination of the wheeling charges and surcharges thereof as contended by CESC Limited?
 - (v) Whether the West Bengal Electricity Regulatory Commission has power to determine wheeling charges fix tariff, levy surcharges and other charges on grant of open access?
 - (vi) Whether the area distribution licensee – CESC is obliged to provide backup power to HINDALCO on its being granted open access? And if so, on what charges and terms and conditions?

- (vii) Whether additional surcharge under Section 42(4) of The Electricity Act, 2003 is liable to be levied on HINDALCO in case open access is granted?
- (viii) Whether the open access sought for by HINDALCO is a short term open access or long term open access to wheel 9 MW power from Hirakud to its factory at Belurmath?

The Commission also raised other peripheral issued but it may not be necessary to refer to the same as the points framed are comprehensive to decide the appeal.

10. On a consideration of the materials placed, the West Bengal Electricity Regulatory Commission held that the Hirakud Power Plant is a captive generating plant of HINDALCO as the Rule 3 of Electricity Rules has been satisfied. On the second question, the Commission concluded that on being granted open access, HINDALCO shall cease to be a consumer of the area distribution licensee, viz., CESC Limited. As regards the backup power HINDALCO cannot, on being granted open access, claim supply of backup power by CESC as a matter of right but it could enter in an agreement with CESC for supply of backup power. HINDALCO has been allowed to enjoy short term open access but it has to meet all the necessary requirements laid down in the WBERC (Terms & Conditions for Open Access) Regulations, 2005 and WBERC (Terms & Conditions for Open Access – Schedule of Charges, Fees and Formats for Open Access) Regulations, 2005. The Commission held that the State Load Despatch Centre shall be the nodal agency for grant of short term open access to the appellant.

11. The Commission determined the wheeling charges at 83.54 paise/kwh and the same shall be subject to appropriate annual revision. The Commission also concluded that the HINDALCO is liable to pay additional surcharge and the distribution licensee has been directed to submit a report to the Commission identifying and quantifying the stranding of assets arising solely out of migration of open access customer from captive route and thereafter quantum of additional surcharge payable by the open access customer shall be assessed and determined.
12. Being agreed by the said Order of the commission dated 21.11.2005, the present appeal has been preferred in so far as the order is against the appellant while seeking for various reliefs set out above.
13. Before us the learned counsel, appearing on either side, made their submission apart from submitting written arguments. We have considered respective contentions advanced, analysed the material papers placed before us as well as the written submissions submitted by the appellant as well as the contesting respondents.
14. The following points are framed for consideration in this appeal:-
 - (A) Whether the direction of the West Bengal State Electricity Regulatory Commission that the appellant shall cease to be a consumer of CESC limited as a condition for availing open access is sustainable? Whether in terms of The Electricity Act, 2003 a consumer who applies for open access should disassociate itself with the area DISCOM?

- (B) Whether the appellant has to sever its existing consumer relationship with CESC Limited, the area DISCOM for grant of open access?
- (C) Whether the area DISCOM is obliged to supply standby energy to the appellant and if so, under what conditions?
- (D) Whether appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003 on being permitted to receive supply from a person other than the distribution licensee of the area?
- (E) Which are the Regulations which govern the inter-State open access applied for by the appellant?
- (F) Whether the direction of WBERC that the State Load Despatch Centre shall be the nodal agency for inter-State open access applied for by the appellant is contrary to Regulation and liable to be interfered?
- (G) Whether the wheeling charges fixed by the West Bengal State Electricity Regulatory Commission is legally sustainable, valid, fair and reasonable?
- (H) How the energy accounting should be made and settled for the transmission of the electricity through open access? What is the term and the procedure to be followed in energy accounting by the concerned parties?
- (I) To what relief, the appellant is entitled to?

15. It is convenient to take up points A to C as they overlap each other. Concedingly open access from the appellant's CPP in Orissa to its plant in Belurmath in West Bengal is an inter-State transmission, as defined in Section 2(36) of The Electricity Act 2003. There is no controversy that the appellant has applied for short term open access. For the remaining portion of the transmission facility within the State of Orissa as well as the Powergrid is concerned, already open access has been approved.
16. Only in respect of the section of the length of 5 KM which falls within the State of West Bengal an application was moved by appellant before the State Commission. It is pointed out by the appellant that 2 KMs out of 5 KMs length is the dedicated transmission line built up at the cost of appellant as seen from the appellant's stand.
17. The Commission has proceeded on a wrong premise that it has no jurisdiction or power to determine tariff once open access is permitted and therefore, any consumer seeking such open access should cease to be a consumer of area distribution licensee. This view of WBERC cannot be legally sustained. Such a conclusion has been arrived at by the Commission on an erroneous interpretation of Section 86(1) (a), Section 42 and Section 49 of The Electricity Act 2003 as well as by losing sight of the object behind the said provisions. This interpretation, in our view cannot be sustained. The view of the Commission runs counter to Sections 42 (2); (4) and Section 62 of The Act. As already held neither Section 38 (2) (d) nor Section 39 (2) (d) nor Section 42 (2) which provides for open access warrants or stipulates that an existing consumer who seeks for open access shall cease to be a consumer of the area DISCOM / distribution licensee.

We have already held so in Appeal No.34 of 2006 Bhusan Steel vs. W.B.E.R.C.

18. In law and as per statutory provisions so long as the appellant desires to continue its relationship with the area distribution licensee and agree to abide by the stipulations, there can be no direction or compulsion to sever its contractual relationship as a consumer of the area DISCOM. In the present case, the appellant as already pointed out, had agreed to comply with the existing terms and conditions of supply and is ready to remit all the charges prescribed as a consumer of electricity to CESC Limited. It is rightly pointed out that the appellant has not sought for any variation with respect to its being a consumer of CESC for the connected load of 8.5 MW at 33 KV nor it has sought for any reduction in demand charges or energy charges or other charges consequent to open access being allowed in its favour.

19. We are to point out that Sub-Section (2) of Section 42 of The Electricity Act 2003 mandates the State Commission to introduce open access in such phases and subject to such conditions, including cross subsidies and other operational constraints, having due regard to all the relevant factors including such cross subsidies and operational constraints. Sub-Section (4) of Section 42 provides that where the State Commission permits a consumer to receive supply of electricity from a person other than the distribution licensee of its area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of its obligation to supply. Nothing in the The Electricity Act 2003 which either directs or mandates that a consumer who applies for open access should cease to be a consumer of the area

- DISCOM. Section 39(2) enumerates that the State Transmission Utility to provide non discriminatory open access to its transmission system for use by any consumer as and when open access is provided under Section 42(2) on payment of transmission charges.
20. The provisions of The Electricity Act 2003 on the other hand enables a consumer to continue as the consumer of the area DISCOM so long as the consumer is willing to pay the charges prescribed and comply with the terms and conditions as stipulated. Section 43 of The Electricity Act 2003 provides that every distribution licensee shall on an application by the owner or occupier of any premises supply electricity within its area of supply within one month from the date of receipt of an application in this behalf subject to the applicant paying the requisite charges. There is no doubt that CESC Ltd. has the universal obligation to serve all the consumers within the area of supply. Admittedly the appellant's plant in Belurmath is connected to CESC system and the appellant is an existing consumer, as defined in Section 2 (15) of The Electricity Act 2003. The appellant without any reservation agreed to continue its contractual obligations with the CESC Ltd. even on its being granted short term open access.
21. As already pointed out, Section 43 mandates that the area licensee shall supply power so long as the consumer remits the charges prescribed as per Tariff Notification and as provided in Section 45 of The Electricity Act 2003. Section 48 enables the distribution licensee to impose certain additional conditions when open access is permitted.

Section 49 which has a bearing reads thus:-

“49. Agreements with respect to supply or purchase of electricity.-Where the Appropriate Commission has

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

22. It is to be pointed that Section 49 of The Electricity Act 2003 provides for an agreement being entered between an open access consumer and the distribution licensee for supply or purchase of electricity on such terms and conditions, including the tariff as may be agreed upon by them. Section 56 of The Electricity Act 2003 provides for disconnection of supply in default of payment by the area DISCOM, which applies to all consumers, whether the consumer has been permitted open access or not.
23. On a careful consideration of various provisions of The Electricity Act, 2003 we find that there is no provision in the Act which mandates that the existing consumer, like the appellant, should cease to be a consumer of electricity from the area distribution licensee or sever its connection as a consumer with the said area distribution licensee merely because short term open access is applied for and allowed for interstate transmission from its CPP. The appellant has unequivocally made it clear that the appellant is willing to pay the charges prescribed by the area distribution licensee including demand charges, energy charges and other charges for the connected load of 8.5 MW in the same manner as in the case of identically placed industrial consumers in the area and the appellant is ready and willing to remit the charges payable to the area distribution licensee.
24. There is no reason or rhyme to hold that the appellant on being granted open access should sever its existing contractual relationship with the area distribution licensee or shall cease to be a consumer of

the area DISCOM/ Licensee. Section 49 of The Act provides for an agreement being entered into when open access is allowed to consumers for supply or purchase of electricity on such terms and conditions including tariff as may be agreed upon. We do not find any justifiable reason for the direction issued by the Regulatory Commission in this respect. The West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 also do not impose such a condition. In fact, Regulation 12 of the said Regulations provides for entering into a commercial agreement with a distribution licensee and abide by various conditions relevant thereto. Regulation 13.4 also in no way provides for issue of such a direction.

25. We are unable to appreciate the view of the Commission that the appellant cannot demand supply of back-up power from the CESC Ltd. as a matter of right even though nothing could prevent the appellant to enter into a separate agreement for supply of back-up power on terms and conditions mutually acceptable to both. None of the provisions of The Act or the Rules framed thereunder or the Regulations framed by the West Bengal State Electricity Regulatory Commission has been placed before us to show that the appellant should sever its relationship as a consumer with CESC on its being granted open access. So long as the appellant is agreeable to pay the charges prescribed in this behalf to an identical industry, the appellant, an existing consumer cannot be directed to sever its relationship with area distribution licensee. The construction placed on Section 42 (3) of The Electricity Act runs counter to the very section. The object and scope of the provision has been lost sight and as an existing consumer the appellant could continue its relationship. Such a construction cannot be appreciated as it runs counter to plain

- meaning of the provisions of the Act. Section 42(3) enables an existing consumer of an area DISOCM Licensee requires supply of electricity from a generating company or any licensee other than the area licensee, such consumer may require the Distribution Licensee for wheeling of electricity in accordance with Regulations framed by Regulatory Commission and area DISCOM is to act as a common carrier.
26. All that Section 42 (3) provides that a distribution licensee shall be a common carrier providing non-discriminatory open access when the consumer seeks for open access and wheeling power in accordance with the Regulations made by the State Commission. Hence, we hold that the WBER Commission has no justification nor authority nor warrant nor jurisdiction to direct the appellant to sever its status as a “consumer” with WBSEB. Such a condition is not contemplated to be imposed while allowing an application for open access in terms of The Electricity Act 2003 or Regulations framed there under either by CERC or WBERC.
27. Taking up the next point for consideration, concedingly the short term open access sought for is an inter-State transmission as it involves in the present case, the transmission lines of the Orissa Electricity Board, Orissa Transmission Corporation, the Power Grid Corporation and at the end, the CESC transmission system. Section 2 (43) defines “inter-State transmission” and the present transmission from CPP of the appellant at Hirakud, to the appellant’s plant is an inter-State transmission. Section 2(36) is an inclusive definition. The definition reads thus:-

“2(36) “inter-State transmission system” includes-

- (i) *any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;*
- (ii) *the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;*
- (iii) *the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.”*

The transmission in respect of which the appellant moved for open access is an inter State Transmission and there is no dispute in this respect.

28. As regards point D regarding payment of additional surcharge, being statutory liability in terms of Sec. 42(4) the learned counsel did not Press the point but contended that in terms of National Tariff Policy, the additional surcharge is payable only if it is conclusively demonstrated that the obligation of a licensee continue to be stranded, we are unable to agree, hence this Point is answered against appellant holding that the appellant is liable to pay additional surcharge on the charges of wheeling, as may be fixed by State Commission in terms of Section 42(4) of the Act.
29. Taking up Point E & F, the inter-State transmission is governed by the Regulations framed by The Central Electricity Regulatory Commission and there is no dispute in this respect. Sub-Section (2) of Section 38 also provides that the Central Transmission Utility shall provide open access to any consumer under Sub-Section (2) of Section 42 on payment of transmission charges and a surcharge thereon as may be specified by the Central Commission. The appellant has concedingly applied for short term open access.

30. Section 79 enumerates the functions of the Central Commission. In exercise of powers conferred under Section 178, the CERC has already framed The Central Electricity Regulatory Commission (open Access in inter State Transmission) Regulations 2004 and the same are referred as “Central Regulations”. In terms of the Central Regulations anything less than 25 years is considered to be a short-term open access, and it is the said Regulations that alone apply to the case on hand. Therefore, the appellant has to be treated as a short-term consumer under the Central Regulations. To treat the appellant otherwise and in terms of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005 and the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access – Schedule of Charges, Fees & Formats for Open Access) Regulations, 2005 is not correct nor it could be sustained in law. The said Commission having taken the view that in regard to wheeling, the Central Regulations alone will apply, it automatically follows that the status of the appellant as a “short-term” or “long-term open access” should also be decided in accordance with the Regulations framed by the Central Commission.
31. The contrary view taken by the Commission cannot be sustained and liable to be interfered. We have already held that the Regulations framed by the CERC, with respect to the inter-State open access prayed for by the appellant is applicable and accordingly the appropriate authority shall decide the status of the appellant in terms of the said Regulations and not in terms of the Regulations framed by the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations 2005.

32. The nodal agency, as rightly contended by appellant on the facts in respect of inter-state open access, sought for the State Load Despatch Centre cannot be the nodal agency. This point has already been considered in Appeal No.34 of 2006 Bhushan Steel vs. WBERC & others and it was held that in respect of inter state open access the Eastern Regional Load Despatch Centre shall be the nodal agency. The learned counsel for the Commission in the written submissions accepted this position. This point is answered in favour of appellant holding that Regional Load Despatch Centre shall be the nodal agency and the view of the Commission that the State Load Despatch Centre is nodal agency deserves to be reversed.
33. As regards Point G, no doubt wheeling charges requires to be paid by the appellant. The WBERC has fixed the wheeling charges at 83.54 paisa/KWH. In this respect, it is pointed out that Regulation 14.3 (b) of WBERC (Terms & Conditions) Regulations, 2005 is the Regulation that governs for fixation of wheeling charges.

Regulation 14.3(b) reads thus:-

“Wheeling Charge:

The Wheeling charges will represent the charges for the use of distribution systems or associated facilities of a distribution Licensee for conveyance of electricity on distribution systems and associated systems and will be derived based on distribution network cost, units salable by the licensee to the consumers and units wheeled by the all Open Access Customers in the Network and as may be determined on these basis by the Commission from time to time.”

34. That apart, clause 4.2 of WBERC (Terms and Conditions for Open Access – Schedule of Charges, Fees & Format for Open Access) Regulations, 2005. The said Regulation reads thus:-

*“Wheeling charges:
Wheeling charges for use of Distribution System or associated facility of a Distribution Licensee for use of Open Access Customers including Captive Generating Plants shall be derived based on distribution network cost and total number of units sold by the licensee to its consumers & total number of units wheeled for Open Access customers. Such charges shall be expressed in paise per unit.”*

35. It follows that in calculating wheeling charges for the distribution system or associated facilities are to be assessed on applicable distribution network cost, units saleable and units wheeled by all open access customers in the network. The learned counsel for appellant contends that as per CERC (Open Access in Inter-State Transmission) Regulations and WBERC (Terms & Conditions for Open Access – Schedule of Charges, Fees & Formats for Open Access) Regulation, the wheeling charges of the Distributing system should be 0.25 time for short term open access. However, we find from Para 26.0 of the order appealed against, there is no detailed discussion in this respect except holding that 83.54 paisa/KWH shall be the wheeling charges. No particulars been disclosed is the main grievance and Regulations governing wheeling charges have not been applied correctly. The second respondent has stated in its submission that the WBERC determined the wheeling charges in case of WBSEB for 2005-06 at the rate of 56 paisa/KWH and a copy also was filed. In the circumstances with respect to fixation of wheeling charges the matter deserves to be remitted back to WBERC for fresh consideration in the light of the relevant Rules and affording opportunity to appellant. The authority shall take note of the fact that open access

within the Distribution area of CESC is applied to a distance of 5 KM and out of 5 KM, 2 KM distance is appellants dedicated transmission line put up at its costs.

36. Taking up the Point H, viz., “Energy Accounting”, it is represented by the learned counsel for the appellant that so far it has not been possible to finalize the energy accounting issues on a bilateral basis with the CESC. It is admitted that the power from the appellant’s captive plant is being transferred from one State to the other through open access. Regulations 17 to 21 of The Central Electricity Regulatory Commission (Open Access in Inter-State Transmission) Regulations 2004 and The Indian Electricity Grid Code (IEGC) notified by the Central Commission are applicable and it governs the “Energy Accounting” of such open access in Inter-State transmission.
37. Regulation 21, of The Central Electricity Regulatory Commission (Open Access on inter-State Transmission) Regulations 2004 as amended by notification, dated the 21st February, 2005), provides that with respect to the drawal of reactive energy shall be governed by regulations applicable in the State. The said Regulation reads thus :-

21. “The reactive energy drawals and injections by the embedded customers shall be governed by the regulations applicable within State concerned”.

In this respect it is pertinent to note that WBERC (Terms and Conditions for Open Access – Schedule of Charges, Fees and Format for Open Access) Regulations 2005 notified on 21st September, 2005, prescribe the following in the matter of reactive energy charges, while providing open access for transfer of power through West Bengal State Transmission System.

38. The charges payable towards energy accounting and system to be adopted is prescribed by Regulations. The material portion of WBERC (Open Access) Regulations reads thus:

“4.3. Reactive Energy Charges:-

If the voltage at the point of drawal is below 97% of the normal voltage, the open access customer shall pay @ 6 paise/kVARh to the concerned licensee for drawal of reactive energy at the drawal point. If at the injection point the voltage is higher than 103% of normal voltage, the open access customer shall pay @ 6 paise/kVARh to the concerned licensee for injection of reactive energy at the point of injection. Both drawal and injection of reactive energy shall be measured at 15 minutes time block along with voltage.”

It will be therefore, reasonable for the licensee to charge for the reactive energy as per clause 4.3 of the West Bengal Electricity Regulatory Commission (Terms and conditions for Open Access – Schedule of charges, Fees and Formats for Open Access) Regulations, 2005.

39. As far as accounting for active energy is concerned it is relevant and useful to refer to CERC (Open Access in inter-State Transmission) Regulations 2004 as amended by Notification dated 21st February, 2005. Regulation 18 which is relevant reads thus:

“Unscheduled Inter-Change (UI) charges

- 18(i) *The mismatch between the scheduled and the actual drawal at drawal point(s) and scheduled and the actual injection at injection point(s) shall be met from the grid and shall be governed by UI pricing mechanism applicable to the inter-state transactions;*
- (ii) *A separate bill for UI charges shall be issued to the direct customers and in case of the embedded customers, a composite UI bill for the State as a whole shall be issued, the segregation for which shall be done at the State level”.*

That apart, the above Regulations 16, 17 and 18 of the Central Regulations are also relevant for energy accounting.

40. Keeping in view, that the appellant even after providing facility for open access continues to be a consumer of the licensee, as concluded by us in the aforesaid paras above, the appellant shall pay to CESC Ltd. all charges such as demand charges, energy charges etc. as a consumer for continuing the connection as a consumer. For settling the energy account related to transfer of active power from the Captive Power Plant in Orissa to the appellant's plant at Belurmath in West Bengal, the following broad aspects and the above referred Regulations are required to be considered by WBERC:

- i) On supply side in Orissa.
Captive Power Plant will furnish a day-ahead, generation schedule to Orissa SLDC who in turn shall furnish generation schedule to ERLDC. In case actual generation by CPP varies, UI charge, as applicable, has to be settled by Captive Power Plant with SLDC.
- ii) On Drawal side.
HINDALCO Ltd. shall furnish a day – ahead Demand Schedule to WBSLDC. In case the Actual Demand equals the Captive Power Plant (in Orissa) generation schedule (Less transmission losses) no payment for Active Energy will fall due to WBSEB.

41. However, any variation in Actual Demand to the Scheduled Demand will be dealt as UI charge. In case Hindalco Industries Ltd. needs

power over and above the Scheduled Generation of its captive plant in Orissa (less transmission losses) from the grid, then it must specify the power requirement and furnish the total Schedule Demand to WBSLDC, a day-ahead. This additional active energy demand must be paid for by Hindalco Industries Ltd. to CESC as a consumer. However, if the actual power drawal is still more than the Scheduled Demand, the appellant must pay for the additional over drawal and above the Scheduled Demand at the prevailing UI rates. Similarly, any under-drawal below the Scheduled Demand but above the Generation Schedule from the CPP (Less transmission losses) will be settled at the prevailing UI rates. When no power is scheduled from the Captive Power Plant and the appellant requires power, it will be supplied by CESC at its normal tariff rates as applicable to identical industries.

42. In the light of the above discussions, we direct the West Bengal State Electricity Regulatory Commission to consider the above aspects involved in transmission consequent to grant of open access arrive at a suitable energy accounting methodology according to law and issue such direction or directions as it deems fit after affording an opportunity of hearing to either side. On the third point, we order in the above terms.
43. As a result of our discussions, we record our findings as hereunder:-
 - (I) On point 'A', we set aside the direction of WBSERC and hold that the appellant should continue its contractual relationship as a consumer of CESC and it need not cease its consumership status.

- (II) On point 'B', we set aside the direction of WBSERC and hold that the appellant is not called upon to sever its existing consumer relationship with CESC.
- (III) On point 'C', we hold that so long as the appellant abides by the subsisting terms and conditions as are applicable to identical industries, the DISCOM is obliged to supply and the standby energy has to be supplied subject to the terms to be agreed between CESC and the appellant.
- (IV) On point 'D', we hold that the appellant is liable to pay additional surcharge on the charges for wheeling in terms of Section 42(4) of The Electricity Act, 2003.
- (V) On point 'E', we hold that it is the CERC Regulations which govern the inter-State open access applied for by the appellant.
- (VI) On point 'F', we hold that the nodal agency for the inter-State open access applied for by the appellant is the Regional Load Despatch Centre and not the State Load Despatch Centre as ordered by the WBERC.
- (VII) On point 'G', while setting aside the fixation of wheeling charges by the West Bengal State Regulatory Commission, we remand the matter to the said Commission for being considered denovo in the light of the observations and according to the relevant statutory provisions.
- (VIII) On point 'H', we direct the West Bengal Electricity Regulatory Commission to issue appropriate directions and lay down the

energy accounting after affording opportunity to the appellant and all connected parties.

44. In the result, the appeal is allowed in the above terms and with respect to fixation of wheeling charges it is remanded to the second Respondent WBSEER Commission and so also to lay down and prescribe the Energy Accounting after affording opportunity to both parties. Before parting, we take note of the fact that any further delay in providing open access applied for, will result in hardship besides it would cause loss. Hence, we direct the West Bengal State Electricity Regulatory Commission to take up fixation of wheeling charges and “Energy Accounting” expeditiously lay the standards for fixing the “Energy Accounting” and issue such or other appropriate directions as it thinks fit in this respect.
45. It is also well open to the said Commission to forthwith allow open access to the appellant pending its directions to fix wheeling charges as well as “Energy Accounting”, if the appellant comes forward without prejudice to its contentions with a consent affidavit to accept energy account as well as undertakes to pay wheeling charges as may be fixed by the Commission on as the case may be.
46. The parties shall bear their respective costs.

Pronounced in open court on this 11th day of July 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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