Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Dated : 5th August, 2011

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

Appeal No. 171 of 2010

In the matter of:

West Electric Supply Company Ltd
N/1, 22 IRC Village, Nayapalli, Bhubneswar Appellant

Versus

1. Orissa Electricity Regulatory Commission
   Vidyut Niyamak Bhawan
   Unit VIII, Bhubaneswar.
2. OCL Iron and Steel Ltd
   Vill: Lamloi. P.O. Garvana
   Rajgangpur, Orissa
3. Grid Corporation of Orissa
   Janpath. Bhubneswar.
4. OCL India Ltd.
   Rajgangpur, Orissa Respondents

Counsels for Appellant Mr Suresh Tripathy
Counsels for Respondents Mr Rutwik Panda for (R 1)

Mr M G Ramachandran,
Mr R S Nanda,
Mr Ranbeer Singh
Mr Shaki Akhtar for (R 2)
Mr R B Sharma for (R 3)
Mr R M Patnaik for (R 4)

AND

Appeal No. 187 of 2010

In the matter of:

M/s. OCL Iron and Steel Ltd
Vill: Lamloi. P.O. Garvana
Rajgangpur, Orissa Appellant

Versus

1. Orissa Electricity Regulatory Commission
   Vidyut Niyamak Bhawan
   Unit VIII, Bhubaneswar.
2. West Electric Supply Company Ltd
   N/1, 22 IRC Village, Nayapalli, Bhubneswar
3. Grid Corporation of Orissa
   Janpath. Bhubneswar.
4. OCL India Ltd.
   Rajgangpur, Orissa Respondents

Counsels for Appellant Mr M G Ramachandran
Mr R S Nanda,

	Mr Ranbeer Singh	
	Mr Shaki Akhtar	
Counsels for Respondents	Mr Mr Rutwik Panda	for (R 1)
	Mr Suresh Tripathy	for (R 2)
	Mr R B Sharma	for (R 3)
	Mr R M Patnaik	for (R 4)

JUDGEMENT

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

1. In Appeal No. 171 of 2010, West Electric Supply Company (WESCO), a distribution licensee in the state of Orissa, is the Appellant. Orissa Electricity Regulatory Commission (State Commission) is the 1st Respondent. M/s OCL Iron and Steel Ltd (Steel Company) is the 2nd Respondent. GRIDCO is the 3rd Respondent and M/s OCL (Cement Company) is the 4th Respondent.

2. In Appeal No. 187 of 2010 M/s OCL Iron and Steel Ltd (Steel Company) is the Appellant. Orissa Electricity Regulatory Commission (State Commission) is the 1st Respondent.

WESCO, distribution licensee in Orissa is the 2nd Respondent. GRIDCO is the 3rd Respondent and M/s OCL (Cement Company) is the 4th Respondent.

3. These Appeals have been filed by the Appellants aggrieved by the Order dated 26.8.2010 passed by the State Commission. Since, the issues are the same, common judgment is being rendered in both the Appeals. For the sake of convenience, WESCO, the Appellant in Appeal No. 171 of 2010 who is the 2nd Respondent in Appeal No. 187 of 2010 is being referred to as the Appellant. M/s OCL Iron and Steel Ltd (Steel Company), the Respondent No. 2 in Appeal No. 171 of 2010 and the Appellant in Appeal No. 187 of 2010 is being referred to as the 2nd Respondent in the following paragraphs of this judgment.

4. The short facts are as under:

5. The 2nd Respondent, (Steel Company) has a Captive Generation Plant having installed capacity of 14 MW. It has surplus power of 4 MW. This surplus power was being supplied to 4th Respondent, M/s OCL India Ltd. (Cement Company)

through an independent 11 KV feeder. At the same time 4th Respondent (Cement Company) is also a consumer of the Appellant, WESCO having a Contracted Demand of 43.5 MVA availing power supply at 132 KV. Thus Cement Company sourced a portion of its power requirement from Steel Company and balance from the Appellant WESCO. The Appellant WESCO levied cross subsidy surcharge for power drawn by the 4th Respondent Cement Company from the 2nd Respondent Steel Company as an Open Access Consumer.

6. The 4th Respondent Cement Company had filed a petition before the State Commission being Case No. 10 of 2008 praying for direction to the Appellant, WESCO for not charging cross subsidy surcharge as it was a captive consumer. State Commission in its Order dated 1.12.2008 held that Cement Company was not a captive consumer and, therefore, was liable to pay cross subsidy surcharge to the Appellant WESCO as an Open Access consumer. This order of State Commission was challenged by the 4th Respondent Cement Company in

this Tribunal being Appeal no 20 of 2008. This Tribunal upheld the order of State Commission vide its Order dated 3.9.2009. The open access transaction was stopped on 07.09.2009 by 4th Respondent Cement Company.

7. In the meantime, State Commission in Case No.6-20 of 2009 dtd.30.06.2009 observed that '*GRIDCO should leave no stone unturned to mop up as much power as possible from all sources including Captive Generating Plants (CGP)'*. Similarly, State Commission further observed that "*individual CGP may sign agreement with GRIDCO or the DISCOMs covering the volume and duration of supply of firm power as may be mutually agreed upon."*

8. In pursuance of this observation of the State Commission, 3rd Respondent GRIDCO signed a Power Purchase Agreement (PPA) with the 2nd Respondent Steel Company on 14.10.2009. It was proposed in the PPA that Captive Generation Plant (CGP) of 2nd Respondent Steel Company can supply power at 11 KV voltage level to the 3rd Respondent GRIDCO. This

power could be utilized by the 4th Respondent, Cement Company. The meter installed at premises of the 2nd Respondent Steel Company can be considered as billing meter by GRIDCO. Data Dump of this meter was required to be supplied to GRIDCO by the Appellant WESCO. PPA further provided that GRIDCO shall sell this power to the Appellant WESCO at Bulk Supply Tariff (BST). The Appellant WESCO shall bill 4th Respondent Cement Company at Retail Supply Tariff (RST) as per State Commission's prevalent Tariff Order.

9. Accordingly, it was sought that necessary arrangement be made to send the soft copy (on CD) of data dump of the energy meter installed at the premises of 2nd Respondent Steel Company every month to GRIDCO through the representative of Steel Company for verification at the Energy Billing Centre (EBC) of GRIDCO and processing the same for payment.

10. 4th Respondent Cement Company submitted a 'No Objection Certificate' confirming that it does not have any objection for

evacuation of power by 2nd Respondent Steel Company through its existing electrical system to GRIDCO.

11. On 30.10.2009 WESCO, the Appellant informed 3rd Respondent GRIDCO that since Cement Company is a consumer of WESCO and was receiving supply from CGP of Steel Company through Open Access earlier, WESCO was examining the matter from legal, technical and regulatory framework.

12. On 30.10.2009 GRIDCO intimated to WESCO that it would raise bulk supply bills on WESCO after deducting 0.5% from 11 KV metering data towards wheeling loss to equate the supplies at 33 KV to WESCO. GRIDCO in this letter opined that the payment of Open Access charges and transmission charges were not leviable as the supply was being supplied to WESCO only.

13. On 13.11.2009 GRIDCO instructed WESCO calling for immediate starting of transaction and that WESCO should co-operate with supplying dumped metering data to Steel

Company and should not insist on payment of cross-subsidy and wheeling charges. GRIDCO further stated that WESCO stands to gain out of transaction by getting power at Bulk Supply Purchase (BSP) rate and selling to Cement Company at Retail Supply Rate (RST) which includes some elements of cross subsidy.

14. On 01.12.2009, 2nd Respondent Steel Company filed a petition before State Commission calling for adjudication of disputes under Section 86 (1) (f) of the Electricity Act, 2003 relating to supply of surplus power from CGP of Steel Company to GRIDCO Ltd. at 11 KV through the 11 KV bus of Cement Company.

15. The Commission in its interim Order dated 16.12.2009 held that the dispute had arisen out of lack of proper communication between the parties. It further observed that in the acute power deficit situation in the State, it should be the endeavour of all the parties to utilize full available surplus power of CGPs. It advised GRIDCO to take immediate step for drawal of surplus

power of CGP to the State Grid and WESCO should provide necessary co-operation in this regard. It further opined that power should not be bottled up on technical reasons which can be sorted out latter.

16. The Commission decided to adopt an approach of conciliation and directed all the parties in the issue to settle the matter through mutual discussion and pending a final decision regarding commercial arrangement, the injection of surplus power of CGP of Steel Company to the State Grid would continue and commercial arrangement would be given effect to from the date of injection of surplus power.

17. Several rounds of discussions among the parties were held but parties could not reach a consensus.

18. After hearing the parties at length, the State Commission framed six issues to resolve. These issues along with crux of the State Commission's findings in its impugned order dated 26.8.2010 are as given below:

I. **Issue 1:** Whether there is a dispute between the licensee and the generating company which can be adjudicated under Section 86 (1) (f) of the Electricity Act, 2003?

Findings: State Commission held that the injection of power from Steel Company to the state grid is amenable to the Regulation by the State Commission. When a licensee objects to the manner of injection of power by a captive generating plant, then it is certainly a dispute between a generating company and licensee in terms of Section 86(1)(f) of the Act. Accordingly, State Commission is certainly empowered to adjudicate this dispute as per Section 86 (1) (f) of Electricity Act, 2003."

II. **Issue 2:** Whether the PPA between GRIDCO and Steel Company is binding on WESCO?

Findings: On this issue Steel Company as well as WESCO submitted before the State Commission that

the impugned PPA was a subject matter of a contract under Contract Act, therefore, beyond the scope of adjudication under the Electricity Act 2003. The State Commission held that nothing should be done contrary to established procedures of Law.

III. **Issue 3:** Whether Cement Company India Ltd. is agreeable to this proposal of GRIDCO?

Findings: The State Commission held that the Cement Company had not given acceptance to the billing procedure provided in the PPA.

IV. **Issue 4:** Whether the transaction between Cement Company and Steel Company shall always be through Open Access?

Findings: The State Commission held that the Steel Company and Cement Company are free to accept

any mode for transfer of power within the ambit of law."

V. **Issue 5:** What is the status of the 11Kv line between Cement Company (a consumer of DISCOM) and Steel Company a separate industrial unit, having its own generating company but not a consumer of DISCOM .Whether wheeling charge to DISCOM is payable or not?

Findings: The State Commission held that the subject 11 KV line along with associated system is a part of the distribution system of WESCO and it is entitled for wheeling charge for evacuation of surplus power from the CGP of Steel Company to the State Grid.

VI. **Issue 6:** Whether there can be supply to a consumer at two voltage levels i.e. 132 KV and 11 KV levels?

Findings: The State Commission held that in the present case power to Cement Company can be

injected at both the voltage i.e. 132 KV and 11 KV so that residual power of CGP can be evacuated."

19. Aggrieved by the State Commission's order, both the Appellant WESCO and the 2nd Respondent Steel Company have filed the present Appeals before this Tribunal.

20. Mr. Suresh Tripathy, the learned counsel for the Appellant urged a number of contentions which are as follows:

I. The sole purpose of this agreement was to frustrate the judgment of this Tribunal in Appeal No. 20 of 2008 dated 3.9.2009.

II. The agreement in question was entered into without taking the Appellant WESCO into confidence. The Appellant was neither a party to the said agreement nor was interested to become a party. Agreement that is contingent upon 'another person' agreeing to perform certain act and the said 'another person' does not agree to perform its act as sought for, is a contingent contract

and in view of the above, the agreement in question (PPA) is void.

III. There was not a single correspondence with the Appellant either by the 2nd Respondent Steel Company or by the 3rd Respondent GRIDCO prior to the execution of the agreement. Nothing was demanded from the Appellant so as to be either repudiated or maintaining silence for bringing the petition at hand as a 'dispute'. Since there was no dispute, there was no occasion to determine. If at all there was a dispute, it was between 2nd Respondent Steel Company and 3rd Respondent GRIDCO to which the Appellant can't be dragged.

IV. That agreement in question was to deprive the Appellant from its legitimate claim on account of cross subsidy and wheeling charges. Agreement was, therefore, unlawful since it was defeating the law and caused an injury to the Appellant.

V. That the agreement in question is otherwise bad in law as much as it violates the provisions of Section 43 of Electricity Act, 2003 and Clause 28 of the State Commission (Condition of Supply) Code, 2004. Section 43 of the Electricity Act emphasizes duty of licensee to supply electricity on request by the consumer. Since there is no request from 4th Respondent Cement Company to supply at 11 kV, there can't be any supply of power to it at 11kV. Similarly, Clause 28 of the State Commission (Condition of Supply) Code, 2004 stipulates that supply shall be at a single point at the outgoing terminals of the licensee. Therefore, supply of power is to be effected at a single point. In the absence of an application from 4th Respondent Cement Company to receive supply at 11 KV, WESCO cannot provide the same at it would in violation of the provisions of Section 43 and Clause 28 stated above.

VI. That State Commission's direction in the impugned order to supply power at 11 kV but charge the same at EHT rate is against the Commission's own Tariff Order and against Section 62 (3) of the 2003 Act. If the proposed arrangement is ultimately allowed, then such sale to Cement Company would have to be at HV rate prescribed in Commission's tariff order and not at EHV rate.

VII. That the 11 kV line in question is very much part of distribution system of the Appellant in terms of Section 2 (19) of the Act read with Rule 4 of Electricity Rules 2005.

VIII. That both the 2nd Respondent Steel Company and 3rd Respondent GRIDCO had accepted the fact that the line in question belonged to the Appellant WESCO as evident from clause 2 of the Agreement.

IX. That the 2nd Respondent had prayed, in petition no. 139 of 2009 filed by the 2nd respondent before the State Commission, for direction to the Appellant to give immediate clearance for usage of 11 kV line

21. The very admission of 2nd Respondent Steel Company through its prayer that the Appellant's clearance was required has settled the matter that the line is part of its distribution system.

22. Mr. M G Ramachandran , the learned counsel for the 2nd Respondent (in Appeal no. 171) in refuting the above contentions raised by WESCO, submitted the following:

I. The said PPA was entered in pursuance of State Commission's order dated 30.6.2009 to mop up surplus power from CGP's in the state to mitigate acute power shortage.

II. The agreement was entered upon in pursuance of Commission's Order Dated 30.6.2009. The Appellant, being a regulated entity under Electricity Act 2003, is bound by the directions of the State Commission.

III. The Appellant was not entitled for any cross subsidy. Under proposed arrangement Steel Company would sell its surplus power to 3rd Respondent GRIDCO. GRIDCO

would sell it to WESCO at Bulk Supply Tariff. WESCO would sell it further to Cement Company at applicable Retail Supply Tariff. These are three independent sets of commercial transactions. This arrangement is exactly similar to any other existing arrangements where GRIDCO procure power from different sources and supplies to distribution licensees at Bulk Supply Tariff. Distribution licensee supplies power so received from GRIDCO to their consumers at applicable Retail Supply Tariff.

IV. The 11 kV line in question had been constructed, operated and maintained by the 2nd Respondent itself. It is, therefore, a dedicated line in terms of Section 9 of the Electricity Act 2003. Since it is not a part of the distribution system, WESCO is not entitled for any wheeling charges.

23. The Mr R B Sharma, the Ld Counsel for GRDICO submitted that that earlier when power flow from Steel Company to

Cement Company was allowed under open access, though supply to cement Company was at two points, the Appellant had no objection as they were getting cross subsidy surcharge and wheeling charges. Now, technically the same arrangement is being objected to only because there would not be any cross subsidy.

24. In the light of rival contentions referred to above urged by the learned counsel for parties, following questions would arise for consideration:

I. Whether the agreement between 3rd Respondent GRIDCO and 2nd Respondent Steel Company dated 14.10.2008 was a valid agreement especially in view of this Tribunal's Order dated 3.9.2008 in Appeal No.20 of 2008.

II. Whether agreement between GRIDCO and Steel Company is binding on the Appellant, particularly when it was not party to such an agreement.

III. Whether State Commission has jurisdiction under Section 86 (1) of Electricity Act 2003 to adjudicate in the dispute.

IV. Whether the Appellant is entitled for Cross subsidy even under the arrangement suggested by the State Commission.

V. Whether supply at more than one point is permissible under Electricity Act 2003 or Regulations framed there under.

VI. Whether the State Commission can direct the licensee to charge certain consumer at the rate different from the applicable rate as per prevalent tariff order.

VII. Whether the 11 kV feeder between Steel Company and Cement Company is a dedicated transmission line in terms of Section 9 of the Electricity Act 2003 or is a part of Distribution System of distribution licensee in terms of Section 2(16) of the Act.

VIII. Whether the Appellant is entitled for any wheeling charges from 2nd Respondent for wheeling its power over 11 kV line in question here.

25. We shall now deal with each question one by one.

26. First question to be decided as to whether the agreement between 3rd Respondent GRIDCO and 2nd Respondent Steel Company dated 14.10.2008 was a valid agreement especially in view of this Tribunal's Order dated 3.9.2008 in Appeal No.20 of 2008.

27. Ld Counsel for the Appellant WESCO has argued that the sole purpose of this agreement was to frustrate the judgment of this Tribunal in Appeal No. 20 of 2008 dated 3.9.200.

28. Ld. Counsel for 2nd Respondent Steel Company denied this and submitted that the said agreement was entered into in pursuance of State Commission's order dated 30.6.2008 to mop up surplus power from CGP's in the state to mitigate acute power shortage.

29. We fail to appreciate the stand taken by the Appellant. In our opinion, the application of this Tribunal's Order in appeal no. 20 of 2008 had effect only till Steel Company supplied power to Cement Company under open access mode i.e. on that particular transaction. It ceased to have any effect the moment the above arrangement was discontinued by the Cement Company on 7.9.2009. It would have been operative only if Steel Company supplied power directly to Cement Company under open access.

30. Next question for our consideration as to whether agreement between GRIDCO and Steel Company is binding on WESCO, the Appellant. Particularly when it was not a party to such an agreement?

31. Ld Counsel for the Appellant argued that the agreement in question was entered into without taking WESCO into confidence. Agreement that is contingent upon 'another person' agreeing to perform certain act and said 'another person' does not agree to perform its act as sought for is a

contingent contract and in view of the above, the agreement in question (PPA) is void.

32. On the other hand, Ld. Counsel for the Steel Company 2nd Respondent vehemently opposed the contention of the Appellant and submitted that the agreement was entered into in pursuance of Commission's Order Dated 30.6.2009, and WESCO, the Appellant, being a regulated entity under Electricity Act 2003, is bound by the directions of the State Commission.

33. It would be pertinent to examine the State Commission's concluding findings and directive in impugned order which read as under:

> *"Orissa is undergoing a severe power shortfall in the current year. There should not be any impediment for maximization of all available resources and all effort should be made for evacuation of surplus power of CGP to the grid. The Commission will fail in discharging its statutory function if a viable commercial arrangement for power evacuation is not imposed on all the parties forthwith.* ***Therefore, we direct that GRIDCO, WESCO, Steel Company and Cement Company must sign a***

Quadripartite Agreement mentioning all technical and commercial details in such a way that surplus power of Steel Company shall be procured by GRIDCO and shall be sold to WESCO at the BSP rate. WESCO shall sell it to Cement Company at the Retail Supply Tariff of EHT category. *" {emphasis added}*

34. From the above observations of the State Commission, it is obvious that the State Commission had annulled the disputed agreement and directed the concerned parties to enter in to fresh Quadripartite Agreement mentioning all technical and commercial details etc. In our considered opinion, the State Commission had adopted correct approach and hence it need not be interfered with.

35. Next question for our consideration as to Whether State Commission has jurisdiction under Section 86 (1) of Electricity Act 2003 to adjudicate upon the dispute?

36. In view of directions issued by the State Commission to enter in to fresh agreement as discussed above, this issue has become irrelevant.

37. Next question for our consideration as to whether the Appellant is entitled for Cross subsidy even under the arrangement suggested by the State Commission?

38. WESCO has claimed that its interest would suffer as much as it has been denied of cross subsidy which it was entitled under old arrangement.

39. On the other hand Steel Company has submitted that WESCO would be supplying electricity to 4th Respondent Cement Company at RST, which includes an element of cross subsidy.

40. Let us examine this issue in detail.

41. The components of retail tariff are:

I. **Average Power Purchase Costs**
II. **Transmission Charges** including
   a) Intrastate transmission charges
   b) Interstate transmission charges
   c) SLDC Charges
   d) RLDC Charges
III. **Distribution Charges** including
   a) Depreciation
   b) RoE
   c) Interest on Loan
   d) Interest on Working Capital
   e) O&M Charges
      Employees Cost
      A&G Expenditure

R&M Expenditure

IV. **Cross subsidy**

Positive for subsidizing
Negative for subsidized

42. The Sum of charges at (i), (ii) and (iii) above constitutes Annual Revenue Requirement (ARR) of the distribution licensee. Average Cost of Service (CoS) is determined by dividing ARR by total sale to all categories.

$$\text{Average Cost of supply} = \frac{\text{Annual Revenue Requirement}}{\text{Total Sale by licensee}}$$

43. Effective Tariff for particular category is evaluated by dividing total revenue expected to be received from that category divided by total sale to that category.

$$\text{Effective Tariff for category} = \frac{\text{Total Revenue expected from category}}{\text{Total Sale to that category}}$$

44. Cross subsidy surcharge for a particular category is the difference between average cost of supply and effective tariff for that category as determined above.

45. All of the above charges, including cross subsidy surcharge, are built in the Retail Supply Tariff (RST) of embedded consumer of distribution licensee.

46. From the above discussion, it would emerge that distribution licensee's interests are fully covered if he gets all the components of retail tariff. In the present case WESCO, the Appellant, would be supplying electricity to the Cement Company at Retail Supply Tariff (RST) which includes cross subsidy component. Therefore, the Appellant would not be entitled for any additional cross subsidy surcharge as claimed by him.

47. Next question before us for consideration as to whether supply at more than one point is permissible under Electricity Act 2003 or Regulations framed there under.

48. The Ld Counsel for GRIDCO submitted that earlier when power flow from Steel Company to Cement Company was allowed under open access, though supply to cement Company was at two points, the Appellant had no objection as

they were getting cross subsidy surcharge and wheeling charges but now, technically the same arrangement is being objected to only because there would not be any cross subsidy.

49. In our opinion the submission made by GRDICO is not factually correct. It is true that Cement Company was getting supply at two points under open access. But under that arrangement there were two distinct commercial arrangements. Whereas the supply at 132 kV was released as a consumer under Section 43 of the Act, the supply at 11 kV was under open access on payment of cross subsidy & wheeling charges. However, there would be only one commercial arrangement under the proposed arrangement. Consumption at both the points will have to be added and billed as single consumption at EHT tariff. Moreover Maximum Demand (MD) recorded at 15 minutes interval by both meters will have to be added to arrive at simultaneous maximum demand of Cement Company during the billing period. Thus

both connections i.e. at 132 kV and 11 kV are to be treated as single connection. The Appellant had submitted that it would have no objection in treating the two connections independent of each other. Consumption at 132 kV to be billed at EHV rate and consumption at 3.3 kV to be billed at HT rate.

50. In the light of above, let us examine the Regulation 28 of State Commission's Supply Code. Regulation 28 of Supply Code provide as under:

> *"Unless otherwise agreed to, the supply shall be at a single point at the out-going terminals of the licensee, i.e…,"*

51. In terms of this regulation, supply has to be made at a single point unless agreed to by supplier and consumer. In the present case supplier WESCO has in fact objected to give supply at more than one point. In order to remove stalemate, the State Commission had invoked Power to remove difficulties provided under Regulation 112 of its Supply Code. It is reproduced below:

"Power to remove difficulties

112. If any difficulty arises in giving effect to any of the provisions of these Regulations, the matter may be referred to the Commission who after consulting the parties affected may pass any general or special order, not inconsistent with the provisions of the Act, which appears to it to be necessary or expedient, for the purpose of removing the difficulty."

52. From the above, it is clear that State Commission has power to remove the difficulties. However, this power can be invoked upon being referred to and also after consulting the parties affected. The Appellant in its Appeal has submitted that invoking Regulation 112 of Supply Code by the State Commission was wholly improper and uncalled for on following grounds:

a. No difficulty had arisen for giving effect to Clause 28.
b. Neither the Appellant nor Cement Company had referred the case to the Commission as required under Regulation 112.
c. Appellant was never consulted by the State Commission as required under Regulation 112.

53. In the light of above, we are of the view that State Commission has not followed its own Regulations. The State Commission could have directed the Appellant that supply to 4th Respondent OCL at 11 kV could be treated as a separate connection. With such an arrangement the overall objective of mopping up surplus power available within the state would have been achieved without violating any provision of the Act or Regulations.

54. Next issue before us is as to whether the State Commission can direct the licensee to charge certain consumer at a rate different from applicable rate as per prevalent tariff order.

55. The Appellant has submitted that the State Commission's direction in the impugned order to supply power to the Cement Company at 11 kV but charge the same at EHT rate is against the Commission's own Tariff Order and against the provisions of Section 62 (3) of the Electricity Act 2003. If the proposed arrangement is ultimately allowed, then such sale to Cement Company would have to be at HV rate prescribed in

Commission's tariff order and not at EHV rate as directed by the Central Commission in impugned order

56. On perusal of records available with us, it appears that the issue was not raised before the State Commission. The State Commission has given this direction in the impugned order. The relevant portion of impugned order is reproduced below:

> *"**The sale to OCL at 11 KV shall be treated as EHT sales of WESCO** and load factor for billing shall be calculated accordingly. The present contract demand of OCL shall continue unless OCL requests for a change. As maximum demand of 4 MW at 11 KV side shall have negligible impact in comparison to 43.5 MVA contract demand of OCL, we direct that simultaneous maximum demand shall be calculated by arithmetic sum of 132 KV and 11 KV maximum demand indicator through time synchronization of both the apex meters. **The transformation loss at OCL end, shall be computed as 0.5% of the energy input." {Emphasis Added}***

57. Since the Appellant has raised the legality of the State Commission's direction on application of EHT rate on supply serviced at 11 kV i.e. HT level, we deem it appropriate to examine and dispose this issue on merits.

58. Let us examine the provisions of Section 62 (3) of 2003 Act which reads as under:

> *"62 (3) **The Appropriate Commission shall not**, while determining the tariff under this Act, **show undue preference to any consumer of electricity** but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required." {Emphasis supplied}*

59. Bare reading of this Section would imply that the Act does not permit the Appropriate Commission to show undue preference to any consumer. However, the Commission may differentiate the tariff based on certain parameters defined in the Section itself. Voltage is one of such parameters. The Appropriate Commission may fix different rates of tariff for consumers drawing power at different voltages say at 11 kV and 132 kV. But the Act does not permit the State Commission to direct the distribution licensee to charge tariff from a particular consumer

at rate other than the rate for specified for similarly placed consumers.

60. Since supply to the Cement Company from surplus of power of Steel Company would be at 11 kV, application of EHT tariff, even after adjustment of 0.5% towards transformation losses, would amount to undue preference to Cement Company by the State Commission as well as would amount to discrimination against similarly placed consumers.

61. However, as the issue was not raised at the State Commission level, we give liberty to the Appellant to raise the issue with the State Commission at the appropriate stage.

62. Next question for our consideration as to whether 11 kV feeder between Steel Company and Cement Company is a dedicated transmission line in terms of Section 9 of the Electricity Act 2003 or is a part of Distribution System of distribution licensee in terms of Section 2(16) of the Act?

63. The Appellant, WESCO has argued that as per provisions of Section 2(16) read with Rule 4 Electricity Rule 2005, the line in

question is a part of its distribution system. On the other hand Ld Counsel for the Respondent No.2 stoutly opposed the contention of the Appellant and submitted that 11 kV line is a dedicated transmission line in terms of Section 9 of Electricity Act 2003.

64. In order to appreciate the point at issue, it will be necessary to set out the relevant provisions of the Act and Rules and Regulations made there under along with the findings of the State Commission.

65. Findings of the State Commission on this issue are quoted below:

> *"(e) Now, let us examine the basic crux of the issue i.e. the status of the 11 KV line between Cement Company (a consumer of DISCOM) and CGP of Steel Company. For a proper appreciation of the issue involved, it is required to look into the history of the case. Initially the Cement Company, OSIL and CGP were a single entity called Cement Company having 132 KV connectivity with the State Grid. The 11 KV interconnection between its Cement Unit with Steel Unit having a CGP was constructed, maintained and operated by them. Due to a de-merger at the company level the Cement Unit (*

Cement Company) having connectivity at 132 KV with State Grid remained as consumer of DISCOM and the Steel Unit with CGP remained as a separate independent entity. The 11 KV interconnection continued to remain in service mostly in floating condition so that CGP could run in a synchronism state with the Grid as well as to draw occasional emergency supply from the Grid.

In the case No.20 of 2008, the Commission, while adjudicating the case of surplus power transfer between CGP of Steel Company to Cement Company, has observed that the 11 KV dedicated line between the two companies for the purpose of power transaction should be treated as a deemed distribution system of the DISCOM and, therefore, the transaction will fall under Open Access power transfer category. Hence, the DISCOM is entitled for cross-subsidy charges and other charges, as applicable for open access. The order of the Commission is upheld by ATE.

We, therefore, reiterate our view that even though the 11 KV line is constructed, maintained by the Steel Company, for the subject transaction as narrated above the 11 kV line shall be treated as deemed distribution system of the DISCOM.

We have noted the argument of the learned counsel that as per Section 9(1) of the Electricity Act, 2003, that any person may construct, maintain or operate Generating Plant including CGP and dedicated transmission line. The 11 KV line between Steel Company and Cement Company should, therefore, be treated as a dedicated

transmission line of CGP of Steel Company and, therefore, transmission /wheeling of power through this 11 kV line shall not attract any transmission or wheeling charges as are applicable for the DISCOM's distribution system. We agree with the contention of the learned Counsel that a Generating Company may construct, maintain and operate a transmission line as per the law but we hold the view that such a Generating Company should terminate its line with due permission at the Sub-station of either a Transmission Utility or a Distribution Utility for evacuation of power either to a State or Central Grid. It cannot terminate its line at the internal 11 KV supply system of a consumer of DISCOM (having CD with DISCOM at 132KV). And, therefore, for the sole purpose of evacuation of its power to the State Grid it cannot claim the right to evacuation without consent of DISCOM and without paying legitimate charge of DISCOM. The subject 11KV line is remaining in service due to past legacy and keeping the line in a charged condition is necessary mainly in the interest of the CGP of M/s. Steel Company to run the CGP unit duly synchronised with the Grid. M/s. Cement Company has no objection to continue the 11KV line in a floating condition, even though it has no intention to draw power from the CGP through Open Access. However, if the CGP wants to evacuate its surplus power to the State Grid through the above line, it need to first evacuate the power through the DISCOM at 11KV and DISCOM in turn is deemed to have drawn equivalent power from State Grid at 132 KV level for supplying to its consumer i.e. M/s. Cement Company. ***Therefore, the subject 11KV line along with associated system shall***

> ***be deemed to be a part of the distribution system of WESCO. The DISCOM - WESCO is entitled for wheeling charge, and 0.5% agreed transmission/transformation loss for the purpose of surplus power evacuation by the CGP of Steel Company to the State Grid- GRIDCO.*** *We do not find any justification to deviate from our stated stand that wheeling charge is payable to the DISCOM.*" {emphasis added}

66. From the above findings, it is clear that the State Commission has held that line in question is a part of distribution system of distribution licensee.

67. Let us now examine the various provisions of the Electricity Act 2003 to determine the status of line in question.

68. Distribution System has been defined in Section 2(19) of the Act and is reproduced below:

> *"(19) "distribution system" means the system of wires and associated facilities* ***between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers****;" {emphasis added}*

69. Distribution system has further been elaborated in Rule 4 of Electricity Rules 2005 as under:

> ***"4. Distribution system.—The distribution system of a distribution licensee*** *in terms of sub-*Section *(19) of* Section *2 of the Act shall also include electric line, sub-station and electrical plant* ***that are primarily maintained for the purpose of distributing electricity*** *in the area of supply of such distribution licensee notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others".*

70. Conjoint reading of these two provisions would suggest that the aforesaid line is a part of distribution system as it is connected between generating station (Steel Company) and point of connection to the installation of consumer (Cement Company).

71. Sh M G Ramachandran Ld counsel of the 2nd Respondent Steel Company emphatically submitted that the line in question is part of distribution system of Steel Company but not that of distribution licensee.

72. We would now examine and decide the issue before us based on the provisions of the Electricity Act 2003 and Regulations made under therein.

73. As per definition given in Section 2(19) of the Act read with Rule 4 of Electricity Rules 2005, the Distribution system is set of wires and lines etc. primarily used for distribution of power. Only distribution licensee who has been issued license by the Appropriate Commission under Section 14 of the Act or person who has been exempted to obtain such license under Section 13 of the Act can distribute power under the Act. Steel Company is neither a distribution licensee nor had been exempted from obtaining a license. Thus it cannot own a distribution system.

74. Admittedly Steel Company is a Captive Generating Plant (CGP). A CGP can construct, maintain and operate a dedicated transmission line under Section 9 of the Act which is reproduced below:

> ***"9. Captive generation.***—*(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:"*

75. Dedicated transmission line has been defined in Section 2(16) as reproduced below:

> *"(16) "dedicated transmission lines" means any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generating station referred to in Section 10 to any transmission lines or sub-stations or generating stations, or the load centre, as the case may be;"*

76. Thus Steel Company being a Captive Generating Plant can own maintain and operate a dedicated transmission line only and not a distribution system. The line in question connects electric plant of CGP of Steel Company to premises of Cement Company, a consumer of the Appellant, WESCO. It does not fit in to the definition of dedicated transmission line.

77. Therefore the line in question is part of distribution system of distribution licensee i.e. WESCO.

78. The Respondent No 2, the Steel Company claimed that the line had been constructed by it at its own cost and therefore, the line belongs to them. On the other hand, WESCO claims that the line is part of its distribution system.

79. In order to resolve this issue we would refer to the provisions of the Electricity Act 2003 and the State Commission's Supply Code.

80. Section 46 of Electricity Act 2003 empowers the Distribution Licensee to recover expenditure reasonably incurred in providing any electric line or electrical plant in accordance with the Regulations framed by the State Commission. Section 46 of the Act is reproduced below:

> ***"46. Power to recover expenditure.***—*The State Commission may, by regulations, authorise a distribution licensee to charge from a person requiring a supply of electricity in pursuance of section 43 any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of giving that supply."*

81. The State Commission has framed Distribution Supply Code incorporating the provision of Section 46 of the Act. Clause 27

of State Commission's Supply Code provides that the entire service line, irrespective of who has paid the cost of such service line, shall be the property of the licensee. Clause 27 of Supply Code is reproduced below:

> ***"27.*** *The entire service line, notwithstanding that whole or portion thereof has been paid for by the consumer, shall be the property of the licensee and shall be maintained by the licensee who shall always have the right to use it for the supply of energy to any other person unless the line has been provided for the exclusive use of the consumer through any arrangement agreed to in writing."*

82. Section 46 of the Act authorise any distribution licensee to recover the cost incurred in providing electric line in persuasion of supply to a consumer. It could be a LT line or HT line, depending upon quantum of load requirement of consumer. State Commission have, through Regulations viz., Distribution Supply Code, provided that the said line could be laid by Distribution Licensee or by Consumer himself. In case line is laid by licensee, he would be entitled to recover the cost of the

same as per provisions of the Regulations. Thus in both cases, whether the line is constructed by the consumer or by the licensee, cost of the line has to be borne by the consumer.

83. Thus the 11 kV line in question is the property of Distribution licensee as per section 46 of the Act read with Clause 27 of the Supply Code.

84. In view of above discussions we conclude that the 11 kV line from CGP of the 2nd Respondent, Steel Company to premises of the Cement Company is part of distribution system of distribution licensee i.e. the Appellant WESCO.

85. Next issue to be decided is whether distribution licensee is entitled for wheeling charges for utilization of its distribution system.

86. Wheeling has been defined in Section 2(76) of the Electricity Act 2003 and is quoted below:

> *"(76) "wheeling" means the operation whereby the* ***distribution system and associated facilities of a transmission licensee or distribution licensee****, as the case may be, are* ***used by another person for the***

conveyance of electricity on payment of charges *to be determined under Section 62;"*

87. From the above definition it is clear that wheeling would involve three ingredients viz.,

I. Usage of distribution system of distribution licensee,
II. Such usage has to be by another person
III. Usage can be only on payment of charges.

88. The line is question is distribution system of the Appellant WESCO. As per impugned order of the State Commission, the Respondent Steel Company would be selling its surplus power to GRIDCO and metering would be done at receiving end i.e. at Cement Company. Thus transfer of power from Steel Company to GRIDCO would take place at Cement Company's installations. Till power is transferred to GRIDCO it remains with the 2nd Respondent Steel Company and therefore another person in terms of Section 2 (76) of the Act would be the Steel Company. Steel Company would be liable to pay wheeling charges for usage of the Appellant WESCO's distribution

network in line with the state Commission's Order dated 26.8.2010.

89. Therefore, we are of the view that the 2nd Respondent Steel Company is liable to pay the wheeling charges for usage of this line for export of its power to GRIDCO.

90. Summary of our findings:

I. **We fail to appreciate the stand taken by the Appellant that the purpose of the Agreement is to frustrate the judgment of the Tribunal. In our opinion the application of this Tribunal's judgment in appeal no. 20 of 2008 had effect only till Steel Company supplied power to Cement Company under open access mode i.e. on that particular transaction. It ceased to have any effect the moment the above arrangement was discontinued by the Cement Company on 7.9.2009. It would have been operative only if Steel Company supplied power directly to Cement Company under open access.**

II. **The State Commission had annulled the disputed agreement and directed the concerned parties to enter in to fresh Quadripartite Agreement mentioning all technical and commercial details etc. In our considered opinion, the State Commission had adopted correct approach.**

III. **The distribution licensee's interests are fully covered if he gets all the components of retail tariff. In the present case WESCO, the Appellant, would be supplying electricity to the Cement Company at Retail Supply Tariff (RST) which includes cross subsidy component. Therefore, the Appellant would not be entitled for any additional cross subsidy surcharge as claimed by him.**

IV. **We are of the view that State Commission has not followed its own Regulations. The State Commission could have directed that supply to OCL at 11 kV could be given as a separate connection.**

V. **Since supply to the Cement Company from surplus of power of Steel Company would be at 11 kV, application of EHT tariff would amount to undue preference to Cement Company by the State Commission and would amount to discrimination against similarly placed consumers. However, as the issue was not raised at State Commission level and also not during hearings before this Tribunal, we give liberty to the Appellant to take the issue with the State Commission at the appropriate stage.**

VI. **The 11 kV line from CGP of the 2nd Respondent, Steel Company to premises of the Cement Company is part of distribution system of distribution licensee i.e. the Appellant WESCO.**

VII. **The 2nd Respondent Steel Company is liable to pay the wheeling charges for usage of this line for export of its power to GRIDCO.**

91. In view of our above findings, we do not find any ground to interfere with the impugned order of Orissa Electricity Regulatory Commission dated 26.8.2010. Hence, both the Appeals being devoid of merits are dismissed. However, there is no order as to cost.

92. Pronounced in the open court today the 5th August, 2011.

(V J Talwar) (Justice M Karpaga Vinayagam)

Technical Member Chairperson

INDEX: REPORTABLE/~~NON-REPORTABLE~~