Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

Dated: **1st November, 2010**

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No. 3 of 2007

In the matter of:

HINDALCO Industries Limited,
Belur Works, 39 Grand Trunk Road,
P.O. Belurmuth-711 202
Howrah, West Bengal. ... Appellant

Versus

1. **West Bengal Electricity Regulatory Commission**
   FD-415A, Poura Bhawan, 3rd Floor,
   Sector-III, Bidhannagar,
   Kolkata-700 106

2. **CESC Limited**
   CESC House, Chowrangee Square,
   Kolkata-700 001

3. **West Bengal State Electricity Board,**
   4th Floor, A Block, Vidyut Bhawan,
   Block-DJ, Sector-II, Bidhannagar,
   Kolkata-700 091

4. The Chief Engineer,
State Load Despatch Centre, West Bengal,
Danesh Sheikh Lane, Andul Road,
Howrah.

5. The Asst. General Manager,
Eastern Regional Load Despatch Centre
14, Golf Club Road,
Kolkata-700 033 ... Respondents

Counsel for Appellant(s)	**Mr. Vikas Singh, Sr. Adv.** **Mr. Pradyuman Dubey**
Counsel(s) for Respondent(s)	**Mr. Shanti Bhushan, Sr. Adv.** **Mr. M.G. Ramachandran,** **Mr. Mr. Sanjeev Kapoor,** **Mr. Rajat Jerival.** **Mr. Pratik Khar,** **Mr. C.K. Rai &** **Mr. MohanSingh for R-1**

JUDGMENT

1. HINDALCO Industries Ltd. is the Appellant. This Appeal 3/07 is directed against the order dated 16.1.2006 passed by the West Bengal Electricity Regulatory Commission (State Commission) fixing the wheeling charges payable by the Appellant for using the distribution system of the CESC Ltd., the 2nd Respondent herein.

2. The above Appeal, i.e. 3/07 had already been disposed of by this Tribunal on 31.10.2007 allowing the Appeal and remanding the matter to State Commission, West Bengal, 1st Respondent for fresh consideration.

3. As against this Judgment of this Tribunal, both the Respondents in this Appeal, namely State Commission as well as CESC Limited filed the Appeals before the Hon'ble Supreme Court. Ultimately, the Hon'ble Supreme Court by the order dated 22.04.2010 set aside the Judgment of the Tribunal and remanded the matter to this Tribunal for fresh consideration of all the issues by the Tribunal itself. In pursuance of the said order, this Appeal is again taken up for fresh consideration. The necessary facts may be stated

herein to understand the core of the controversy. They are as follows:-

4. HINDALCO Industries Limited, the Appellant herein is a manufacturer of Aluminium and copper. It has a factory at Belur Mutt, West Bengal within the distribution license area of CESC Ltd., the 2nd Respondent herein.

5. The Appellant is having an existing agreement for Contract Demand of 85 MW with CESC, Ltd., the 2nd Respondent herein, and drawing power at the voltage of 33 kV through the dedicated lines from the Belur Mutt receiving substation of CESC. For this purpose the Appellant has installed a 33 kV sub-station at its premises.

6. The Appellant has a captive power plant at Hirakund, Orissa. It has a surplus power of

approximately 9 MW which the Appellant decided to give through Open Access to its Belur Unit in West Bengal. Therefore, the Appellant filed an application on 27.12.2004 before the State Commission seeking permission for Open Access to wheel its surplus captive power from the captive power plant at Hirakund, Orissa to its Belur plant in West Bengal. The distance between the captive power plant at Hirapur, Orissa and the Belur Mutt plant in West Bengal is about 555 kms. Out of this distance, 550 kms fall within the jurisdiction of West Bengal State Electricity Board, Orissa Power Transmission Corporation Limited and the POWERGRID,Eastern Region. For this distance, wheeling charges for transmission of power were fixed at 9.57 paise per kWh. In respect of the remaining 5 kms, the Appellant approached the West Bengal State

Commission and sought permission for Open Access and determination of wheeling charges falling within the domain of CESC Limited, the 2nd Respondent herein.

7. The State Commission by the order dated 21.11.2005 allowed Open Access and fixed the wheeling charges at 83.54 paise per kWh. for the FY 2005-06. Even though the wheeling charges for transmission of power were fixed as 9.57 paise per kWh for 550 kms. of network by the Electricity Board and POWERGRID Corporation and the Appellant put up its dedicated transmission line in 2 kms. out of the balance distance of 5 Kms., the State Commission fixed 83.54 paise per kWh as wheeling charges for transmission of power for the remaining distance of 3 kms.

8. On being aggrieved by the aforesaid order dated 21.11.2005 passed by the State Commission, the Appellant earlier challenged the same before the Tribunal in Appeal No. 1/06.

9. The Tribunal after hearing the parties delivered the judgment on 11.07.2006 and set aside the order levying wheeling charges as 83.54 paise per kWh fixed by the State Commission and remanded the matter to the State Commission for fresh determination of the same, holding that the State Commission did not give a detailed reasons with reference to the fixation of wheeling charges of 83.54 paise per kWh for 3 Kms. and directing to assess the wheeling charges on the basis of the applicable distribution network cost.

10. Upon such Remand, the matter was again heard by the State Commission. Ultimately, the State Commission decided by its order dated 16.11.2006,

affirming its earlier order by determining the wheeling charges at the same price namely 83.54 paise per kWh, giving the reasons and details of the methodology adopted for determining the said wheeling charges. Again being aggrieved by the aforesaid order, the Appellant on 21.12.2006 filed this Appeal in Appeal No. 3 of 2007 mainly contending that the State Commission did not abide by the directions given in the Order of Remand passed by this Tribunal in its order dated 11.07.2006 inasmuch as the State Commission did not assess the wheeling charges on the basis of applicable distribution network cost.

11. The Tribunal entertained this Appeal No. 3/07 and heard the Learned Counsel for the parties. Ultimately, the Tribunal by the judgment dated 31.10.2007 allowed the Appeal No. 3/07, set aside the impugned order dated 16.11.2006 passed by the State

Commission and again remanded the matter back to the State Commission for determining the matter afresh for determining the wheeling charges in the light of the observations made by this Tribunal.

12. As against this judgment, both the Respondents, i.e. the State Commission as well as the CESC Ltd. filed separate Appeals before the Hon'ble Supreme Court. After hearing the Learned Counsel for the parties, the Hon'ble Supreme Court by its order dated 22.04.2010 allowed the Appeals, set aside the judgment passed by this Tribunal dated 31.10.2007 and remanded the matter to the Tribunal for fresh consideration of all the issues by the Tribunal itself. That is how this Appeal has again been taken up for fresh consideration as directed by the Hon'ble Supreme Court.

13. Let us now quote the observations made by the Hon'ble Supreme Court in the order dated 22.04.2010, while remanding the matter to this Tribunal for consideration of all the issues afresh:

"12 *This specific submission made by the Appellant with regard to the maintainability of this Appeal was an important issue which needs consideration by the Tribunal. Numerous issues, which have been raised in this Appeal on merits, were also raised before the Tribunal which seems to have escaped the notice of the Tribunal rendering its decision vulnerable. In our opinion, it would be in the interest of justice to remand the matter back to the Tribunal for fresh consideration of all the issues after taking into consideration the factual and legal submissions made by the Appellant. In view of the above, both the appeals per se are allowed. The order passed by the Tribunal is set aside.*

The Appeals are remanded back to the Tribunal to be decided afresh on merit in accordance with law, preferably within a period of 3 months of the receipt of certified copy of this Order."

14. In pursuance of this order, we will now consider all the issues, including the issue of maintainability raised in this Appeal for consideration afresh in accordance with law and decide the same by taking into consideration the factual and legal submissions made by the Appellant and the Respondents.

15. The following are the questions which have been raised by both the parties:

(i) Whether the Appeal filed by the Appellant is maintainable when the Appeal itself becomes infructuous since in the relevant period, i.e.

2005-06, no wheeling was done by the Appellant in which event the Appellant cannot claim to have been aggrieved?

(ii) Whether the wheeling charges determined by the State Commission are to be calculated on the basis of the applicable distribution network cost or the entire distribution network cost of the CESC?

(iii) Whether the Appellant is entitled to get the benefit of erecting a 2-km dedicated transmission line at its own cost which forms part of the distance of 5 kms. over which the electricity is to be wheeled by the Appellant?

(iv) Whether the wheeling charges applicable to the Appellant which is availing short-term Open Access are liable to be at 0.25 times of

wheeling charges applicable to long-term Open Access?

(v) Whether the State Commission is liable to modify the Energy Accounting Mechanism laid down by it in the impugned order by providing for an eventuality where the Appellant becomes entitled to earn credit at UI rates from the Respondent-2, CESC Limited in the case of underdrawl against the scheduled supply of power from the captive generation?

(vi) Whether the Appellant is required to enter into any other agreement to obtain power from the 2nd Respondent, CESC Ltd. including back-up or stand-by power for the time the wheeled power from captive power plant is unavailable?

16. The first issue with regard to maintainability of the Appeal. Let us now deal with this issue. The Learned Counsel for the 1st Respondent, i.e. State Commission specifically seeks to object to the maintainability of the instant Appeal on the following grounds:

(a) The present Appeal filed by the Appellant Hindalco Industries Limited relates to the Prayer sought for by the Appellant before the State Commission for fixing wheeling charges for the FY 2005-06. The Appellant challenged this order passed by the State Commission dated 16.11.2006 determining the wheeling tariff for the FY 2005-06. Admittedly, in that period, no electricity was wheeled by the Appellant. That apart, wheeling charges were determined by the State Commission for the

subsequent periods, namely FY 2006-07, 2007-08, 2008-09 and 2009-10. Once the wheeling tariff is determined for the subsequent years, the previous year's tariff, i.e. FY 2005-06 does not exist. Moreover, these subsequent orders have not been challenged by the Appellant. Therefore, the present Appeal against the order levying the wheeling charges in respect of the FY 2005-06 has become infructuous.

(b) While passing the judgment dated 11.07.2006, remanding the matter, the Tribunal directed the State Commission to allow Open Access to the Appellant pending its fixation of wheeling charges as well as Energy Accounting, if the Appellant comes forward to file consent affidavit to accept the

energy account and to give undertaking to pay wheeling charges as fixed by the State Commission at the end. In pursuance of the said order, the State Commission also directed the Appellant to file such consent affidavit before the State Commission to this effect pending finalization of wheeling charges. However, the Appellant had not chosen to file the same as it was not interested to wheel any power. Under those circumstances, the Appellant cannot claim to have been aggrieved over the impugned order, within the meaning of section 111 of the Electricity Act and the Appeal is not maintainable.

17. With regard to this point of maintainability, the Learned Counsel for the Appellant would make the following reply:

(A) The point in regard to the maintainability had not been raised before the Tribunal earlier. Mere mention about the maintainability in the Written Submission filed by the Commission cannot substitute the pleadings through its counter. In the absence of the specific plea in the counter with regard to the maintainability, the raising of the question of maintainability of the Appeal before the Tribunal would not amount to pleading as held by the Hon'ble Supreme Court in decision 2002 (5) SCC 337 and 2007 (2) SCC 468 *State of Rajasthan and Anr. V. H.V. Hotels Pvt. Ltd. and Anr.*

(B) Even though the present Appeal relates to an order passed by the State Commission determining the wheeling charges for the FY 2005-06, the challenge in the present Appeal is in relation to the principle and methodology applied by the State Commission in determining the wheeling charges which was followed for the subsequent years also and, therefore, it requires adjudication over the said principle and methodology once for all in this Appeal.

(C) The principal issue in this case is as to whether the wheeling charges are payable by an Open Access user to distribution company on the basis of the cost of entire distribution network or on the basis of the cost of such distribution network that is actually used by the Open Access user for carrying its electricity. This is

independent of the periodicity of the order fixing the wheeling charges. Moreover, the Appellant was unable to wheel due to the prohibitive, illegal and arbitrary wheeling charges fixed by the Sate Commission due to which the Appellant is aggrieved. Therefore, the Appeal is maintainable.

18. We have carefully considered the submissions made by the Learned Counsel for the parties on this issue. The main objection raised by the Learned Counsel for the State Commission regarding maintainability of the Appeal is two-fold: (1) The wheeling charges for FY 2005-06 had been fixed long back and for the subsequent periods, the wheeling charges had been fixed which have not been challenged and, therefore, the present Appeal becomes infructuous: (2) The Appellant admittedly, so far has

never wheeled the energy in pursuance of the said order and so he cannot be claimed to have been aggrieved.

19. Before dealing with the merits over the question of maintainability, it would be proper to consider the plea of the Appellant objecting to the rights of the Respondents to raise this question. The Appellant has raised the preliminary objection with regard to the question of maintainability of this Appeal raised by the State Commission contending that inasmuch as the said question had not been raised earlier in the counter filed by the State Commission in the present Appeal before the Tribunal, the State Commission is now estopped from the raising the question of maintainability of the Appeal. This preliminary objection raised by the Appellant deserves outright rejection on a simple ground that the Hon'ble Supreme

Court remanded the matter to this Tribunal for considering the said issue holding that the said question of maintainability was earlier raised by the State Commission before the Tribunal but the same was not considered by the Tribunal. In view of this order, we are duty bound to consider the said issue. Accordingly, we may proceed on the merit to consider the maintainability issue.

20. According to the Appellant, the wheeling charges for 3 kms. fixed by the State Commission is on the higher side namely 83.54 paise per kWh whereas the transmission charges for the 550 kms. is only 9.57 paise kWh and if Appellant is compelled to pay the exorbitant wheeling charges, the Appellant would be put to hardship. In this case it is stated that the Appellant earlier filed the Appeal No. 1/06 as against as the order passed by the State Commission on

21.11.2005, fixing wheeling charges as 83.54 paise per kWh and in this regard, this Tribunal by the order dated 11.7.2006 set aside the said order and remanded the matter back to the State Commission holding that the rates fixed by the State Commission should not be on the basis of cost of entire distribution network and it should be on the applicable network cost but even then the State Commission by the order dated 16.11.2006 reaffirming its own earlier order determined the wheeling charges at the same price namely 83.54 paise per kWh and thereby they are aggrieved and hence the Appellant has filed this Appeal. These factual aspects, as indicated in the chronological events would clearly indicate that the Appellant has been approaching the Tribunal more than once aggrieved over the principle and methodology adopted by the State Commission in

fixing the wheeling charges. It is true that the present Appeal relates to an order passed by the State Commission in respect of the period, FY 2005-06. But what has been challenged in the present Appeal as well as in the earlier Appeal is the principle adopted by the State Commission in determining the wheeling charges. Therefore, we are of the view that the Appellant is well within its rights, as an aggrieved person, to approach the Tribunal to challenge the methodology adopted by the State Commission in fixing the wheeling charges which have been followed for subsequent years also. Merely because the orders passed in subsequent years have not been challenged and merely because it had not wheeled any electricity in pursuance of the order passed by the State Commission, it cannot be said that the Appellant is not aggrieved.

21. According to the Appellant, the composite cost of wheeling electricity imposed on the Appellant is exorbitant and commercially unviable and thereby the Appellant is restrained from conducting any wheeling. Thus, it is clear that the impugned order has deprived the Appellant of the opportunity to wheel the electricity due to prohibitive wheeling charges. In that manner the Appellant is prejudiced and affected. That apart, the Act does not require that the incurring of actual losses is the criteria to be able to challenge the order passed by the State Commission before the Tribunal. In our opinion, all the subsequent orders passed by the State Commission in respect of the subsequent years determining the wheeling charges would not put a bar on the Appellant to challenge the order passed for FY 2005-06 especially when the orders in respect of subsequent years had not been made in pursuance

of the application filed by the Appellant whereas the impugned order in respect of FY 2005-06 had been passed in the application made by the Appellant before the State Commission. For the very same reason, it has to be held that the Appellant cannot be faulted with for his failure to challenge those subsequent orders passed by the State Commission for subsequent period. Therefore, the present Appeal cannot be held to be not maintainable on the objection raised by the Respondent, which is not a valid one.

22. Under these circumstances, we are to hold that the Appeal filed by the Appellant on being aggrieved over the impugned order is maintainable. The first point is answered accordingly.

23. Let us now analyse the other issues relating to the validity of the wheeling charges determined by the State Commission. According to the Appellant, the

wheeling charges payable by the Appellant have been wrongly determined by the State Commission on the basis of entire distribution network cost of the CESC, Respondent-2 instead of the network actually used by the Appellant, despite the directions of this Tribunal to determine on the basis of applicable distribution network cost. Further, it is stated by the Appellant that the regulations namely West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005, i.e. Open Access Regulations, 2005 and the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access-Schedule of the charges, fees and formats for Open Access) Regulations, 2005, i.e. 'Open Access Charges Regulations, 2005' do not apply to the entire network cost but it applies to the

applicable distribution network cost actually used by the Appellant.

24. In reply to the above submissions, the Learned Counsel for both the State Commission (1st Respondent) as well as the learned Senior counsel for CESC Limited (2nd Respondent) have submitted that the said charge has been determined strictly in accordance with Open Access Regulations, 2005 as well as the Open Access Charges Regulations, 2005 and these Regulations which deal with entire network cost would be applicable to the present case, and in the absence of challenge to these Regulations, the validity of the determination of wheeling charges, by the State Commission cannot be questioned.

25. We will now deal with this.

26. According to the Appellant the word 'applicable' as contained in the earlier Order of Remand dated 11.07.2006 passed by this Tribunal should be interpreted and understood by the State Commission as applicable voltage-wise and applicable distribution network cost alone.

27. There is no controversy that the wheeling charges payable by the Appellant is to be decided based on the terms contained in the Regulations framed by the State Commission. In the light of the above plea of the Appellant, we have now to see whether such an interpretation could be given on the basis of the relevant regulations. The Regulations 14.3(b) of the West Bengal Electricity Regulatory Commission (Terms & Conditions for Open Access) Regulations, 2005 and Regulation 4.2 of the W.B.E.R.C. (Terms and

Conditions for Open Access – Schedule of Charges) Regulations, 2005 are relevant. They are quoted below:

"Open Access Regulations of 2005

14.3 (b) Wheeling Charges

Wheeling charges will represent the charges for the use of distribution systems or associated facilities of a distribution licensee for use of Open Access customer including the captive generating plant shall be derived based on distribution network cost, units salable by the licensee to the consumers and units wheeled by all Open Access customers in the network and as may be determined on these basis by the Commission from time to time. "

Open Access Charges Regulations of 2005

4.2 *Wheeling Charges*

Wheeling charges for use of Distribution System or associated facility of a Distribution Licensee for use

of Open Access Customers including a Captive Generating Plant shall be derived based on distribution network cost and total number of units sold by the licensee to its consumers and total number of units wheeled for Open Access customers. Such charges shall be expressed in paise per unit.

Wheeling charges payable to the Distribution Licensee in the year of publication of this Regulation shall be as decided by the Commission on the basis of available data. For subsequent years, Distribution Licensees shall submit details relating to computation of wheeling charges to the Commission for its approval."

28. The reading of the above two Regulations would show that neither Regulation 14.3 (b) nor Regulation 4.2 of the relevant Regulations has stated anywhere

that wheeling charges are to be based on the applicable distribution network cost or applicable voltage-wise network. The term "applicable" means whatever will be applicable as per the concerned Regulation. It is further clear from the perusal of the above Regulations that there would be only a single wheeling charge for all the Open Access customers in a particular area for using the distribution network of a particular distribution licensee. These Regulations do not say that there will be different wheeling charges for different Open Access customers nor does it stipulate that the different wheeling charges are to be based on the voltage at which Open Access customers receive supply of electricity from the distribution licensee.

29. As indicated above, the Regulation 14.3(b) of the Open Access Regulations, 2005 and Regulation 4.2 of

the Open Access – Schedule of Charges Regulation, 2005 do not use the term "voltage-wise". The reasons behind that is that such Regulations were made on "Postage Stamp" method. In the earlier Remand Order passed by the Tribunal it was in fact specified that the State Commission shall determine the wheeling charges on the basis of the Regulations. This means, the State Commission has to take into consideration the relevant provision of all the Regulations applicable to the instant case. It is also clear from the said order of Remand of the Tribunal, that the Tribunal held that the Regulations 14.3(b) of the Open Access Regulations, 2005 and Regulation 4.2 of the Open Access – Schedule of Charges Regulations, 2005 govern the fixation of wheeling charges and directed the State Commission to fix the wheeling charges according to the relevant statutory provisions. The

only reason for remanding the matter by the Tribunal was that the order of the State Commission earlier passed had not disclosed the detailed discussion and reasons in respect of the determination on wheeling chargers at 83.54 paise per kWh. It is clear that the Tribunal did not direct the State Commission to fix the wheeling charges on the basis of voltage-wise. Similarly, the Regulations also do not permit the State Commission to determine the wheeling charges on voltage basis.

30. It is to be pointed out in this context that in the Draft Tariff Regulations framed by the State Commission and published on 23.09.2005, the State Commission had dealt with the wheeling charges and it attached Form 1.27. This provides detailed methodology for computation of wheeling charges. The said form specifically provided for wheeling charge to

be decided on the basis of total distribution cost divided by the total unit sold to the consumer and total units wheeled, i.e. overall units. In other words, the Tariff Regulations do not provide for determination of wheeling charges voltage-wise. Thus it becomes evident that the intention of the State Commission at that stage was not to provide in the Tariff Regulations voltage-wise wheeling charges. The State Commission could have used a clear expression in these Draft Regulations and final Regulations providing for voltage-wise wheeling charges to be determined if it had intended to do so in these Regulations published on 23.09.2005 or 21.11.2005.

31. It is noticed that National Tariff Policy notified by Central Government on 6.1.2006 provides at para 8.5.5 that the wheeling charges should be determined on the basis of same principles as laid down for intra-

state transmission charges and in addition it would include average loss compensation of the relevant voltage level. For Inter-state transmission charges the Tariff policy mandates that CERC has to develop tariff framework sensitive to distance, direction and quantum of power flow to be implemented by 1st April, 2006. The Central Commission has already issued Regulations in June, 2010 for sharing of Inter-State Transmission Charges and Losses which are to come in force from 1.1.2011. The Tariff Policy at para 7.1(7) envisages that after the implementation of the proposed framework for the inter-state transmission a similar approach should be implemented by State Commission in next two years for the intra-state transmission, duly considering factors like voltage, distance, direction and quantum of power flow. Thus, the policy directions of the Central Govt. for future

intra-state transmission tariff and wheeling charges is for a new framework where voltage is also to be considered a factor for determination of the charges. However, the tariff policy clearly mandates that the distribution loss level compensation should include average loss for the relevant voltage. The Regulations presently notified by the State Commission do have loss level voltage wise but the wheeling charges are based on 'Postage stamp' method.

32. According to the Appellant, "applicable" should mean applicable to only that part of the total distribution network cost which is to be actually used by the Appellant. In other words, the total distribution network cost not being used by the Appellant is not to be considered as applicable to this case. In short, it is the contention of the Appellant that only that part of the distribution network cost which arises from actual

use of the wires and the system by a group of consumer should be taken into account instead of taking all the distribution cost of all the consumers.

31. As referred to earlier, the reading of Regulations of the Open Access Regulations 2005 and Open Access – Schedule of Charges Regulations, 2005 would indicate that the wheeling charges are based on the cost of the entire distribution system of distribution licensee and not based on the specific level of distribution network used for conveyance of the electricity of the Open Access customer. This would be clear from the details of the components for calculation of wheeling charges which are given below:

(i) Distribution network cost;

(ii) Total number of units sold by licensee to its consumers; and

(iii) Total number of units wheeled for Open Access customers.

34. Accordingly, what needs to be considered is the total number of units sold to the consumers and total number of units wheeled. It is not restricted to the number of units sold by the licensee to any particular category of consumer or supplied at any particular voltage level. Similarly, the factor to be considered is the total number of units wheeled for Open Access customer and not the total number of units wheeled at any particular voltage level. If the two aspects of calculation of wheeling charges relate to the entire units sold to the consumer and the entire units wheeled for Open Access customers, irrespective of the category of consumer or the voltage level at which electricity is wheeled are taken into consideration, it cannot be said that the distribution network cost is related to any particular category of Open Access

customer or a particular level at which electricity is wheeled.

35. It is to be reiterated that Regulations do not use the word "voltage-wise". This Tribunal in para 33 of the 1st Order of Remand dated 11.07.2006 specifically mentioned the Regulation 14.3(b) of the Open Access Regulation 2005 and 4.2 of Open Access – Charges Regulations, 2005 which govern the fixation of wheeling charges. The word "that govern" clearly show that this Tribunal referred and relied upon these Regulations and for that reason these Regulations were fully quoted. Subsequently in para-35, the Tribunal used the world "applicable" to mean such Regulation which governs the fixation of wheeling charges. So, both the Regulations as well as the order of the Tribunal do not give any guidelines or directions to fix the tariff voltage-wise. On the contrary, this

Tribunal mentioned in its order that the wheeling tariff is to be determined on the basis of above Regulations.

36. The WBERC (Terms and Conditions of Tariff) Regulations 2005 also provide for the methodology and criteria for determining the wheeling charges and in particular under Form No. 1.27, the determination of wheeling charges have to be made on the basis of the total distribution cost divided by the total units sold to the consumers and the total units wheeled, and not on the basis of voltage-wise cost.

37. Section 181 of the Electricity Act provides for powers of the State Commission to frame Tariff Regulations. Section 61 provides for the guideline for framing such regulations. Section 62 provides for determination of tariff for wheeling electricity. The wheeling charges is in the nature of a tariff contemplated in section 62 of the Act. Schedule-4 of

the WBERC (Terms and Conditions of Tariff) Regulations 2005 i.e. Tariff Regulations of 2005 have laid down the principle of Terms and Conditions for determination of tariff for wheeling of electricity.

38. Similarly para 1.2 of Schedule-4 of the Tariff Regulations,2005 provides that the tariff so determined would be payable for wheeling of electricity by a Distribution System User who has been allowed Open Access to the distribution system of a Distribution Licensee. Para 2 of the Schedule provides that the wheeling charges of the distribution licensee shall provide for the recovery of the gross aggregate revenue requirements relating to the distribution business of the distribution licensee for the financial year, reduced by the amount of non-tariff income, expenses incidental to selling and distribution of energy, income from other business, to the extent

specified in the Regulations and Net receivable UI charges for the previous year.

39. Para 8.2 of the schedule provides that the wheeling charges will represent the charges for use of distribution system or associated facilities of distribution licensee for conveyance of electricity on distribution system . This will be derived based upon the distribution network cost, units saleable by the licensee to the consumers and units wheeled by all the Open Access customers in the network, as may be determined on this basis by the State Commission from time to time. Form 1.27 of the regulations relating to wheeling charge clearly provides that the various costs mentioned in Items 1 to 21 had to be added up to determine the gross total expenses of the distribution licensee for the year and from this the figures relating to items 23 to 26 have to be deducted

and the figure so arrived at has to be divided by the sum total of units sold to own consumers and the units wheeled and the resultant has to be the wheeling charges in paise per unit. This formula is a part of the Regulations.

40. The Regulations do not contemplate the determination of different wheeling charge for different Open Access consumers who might be using different parts of the distribution system. Thus, the combined reading of all the Open Access Regulations would lead to the conclusion that for determining the wheeling charges, the total distribution cost of the network would be the determining factor and not the voltage-wise cost of the network.

41. A detailed methodology for determination of wheeling charges is provided in the Tariff Regulations notified on 21.11.2005 after following the process of

circulating the draft regulations, inviting comments and considering and finalizing the same. Extracts from Schedule 4 dealing with wheeling charges is given below:

" 2.1 *The wheeling charges of the Distribution Licensee shall provide for the recovery of the gross aggregate revenue requirement relating to the Distribution Business of the Distribution Licensee for the financial year, as reduced by the amount of non-tariff income, expenses incidental to selling and distribution of energy and income from Other Business and shall comprise the following:*

"Gross Aggregate Revenue Requirement:

(a) Return on Equity;

(b) Income-tax;

(c) Financing cost;

(d) Depreciation, including advance against depreciation and amortization of intangible assets;

(e) Operation and maintenance expenses;

(f) Interest on working capital and deposits from consumers and Distribution System Users;

(g) Insurance premium payable;

(h) Contribution to Reserve for unforeseen exigencies;

(i) Variation in foreign exchange rate to the extent not recognized as interest;

(j) Other allowances, if any; and

(k) Effect of Rebate / Surcharge.

Wheeling charges = Gross aggregate revenue requirement, as above, minus

(1) Non-tariff income;

(2) Expenses incidental to selling and distribution of energy, viz. billing, collection etc.

(3) Income from Other Business, to the extent specified in these Regulations; and

(4) Net receivable UI charges for the previous year, if any".

"8.2 *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 saleable by the licensee to the consumers and units wheeled by all the Open Access customers in the network and as may be determined on these basis by the Commission from time to time.*

8.3 All items of revenue requirement of the Distribution Licensee excluding generation cost and cost of power purchase as specified

in these Regulations shall be the cost of Distribution Licensee for the purpose of wheeling.

8.4 The wheeling charges shall be computed taking into account the projected units sold and wheeled through Distribution Licensee's network and within the ensuing tariff period.

42. Form 1.27 of the Tariff Regulations details the calculation procedure for determination of wheeling charges. It is apparent from the above Regulations as well as from Form 1.27 that the Tariff Regulations intend to arrive at a single figure of wheeling charge for all categories of consumers and not a number of voltage-wise wheeling charge figures, as contended by the Appellant.

43. Accordingly, the term distribution network cost appearing in Regulation 4.2 of the Open Access Charges Regulations should necessarily be the entire distribution network cost.

44. If the wheeling charges for open access customers are to be determined according to distribution network actually used in the wheeling, it may result in anomalous position. For example, a consumer residing at close proximity to a generating station may ask for a lower wheeling charge, as only a part of the network is being used for providing him with electricity supply. This may lead to an anomalous situation, with different wheeling charges being determined for every individual consumer of the licensee. This is not intended in the Regulations.

45. In the above context, the expression "applicable distribution network cost" used by the Tribunal in the

1st Remand Order cannot be said to mean that the Tribunal had directed the distribution network cost to be determined based on the relevant voltage level.

46. The Appellant has also argued that the National Tariff Policy envisages that wheeling charges should be determined on the basis of the applicable distribution network cost. Let us examine this issue now. Clause 8.5.5 of the Policy provides for wheeling charges for distribution system as under:

> "*8.5.5 Wheeling charges should be determined on the basis of same principles as laid down for intra-state transmission charges and in addition would include average loss compensation of the relevant voltage level.*"

47. The above policy, therefore, refers to the principle as laid down in the intra-State transmission charges

for determination of wheeling charges and thereafter it states that the loss compensation should be based on the average applicable at the relevant voltage level. The relevant Clauses for intra-state transmission charges is clause 7.1 of the Tariff Policy. It envisages that after implementation of the proposed frame work for inter-state transmission system to get the transmission system users to share the total transmission cost in proportion to their respective utilization of the transmission system, the State Commission should implement similar approach in next two years for the intra-state transmission, duly considering factors like voltage, distance, direction and quantum of flow. The Central Commission has since notified CERC (sharing of Inter-state Transmission Charges and Losses) Regulations, 2010 in June, 2010 for inter-state transmission system according to the

proposed frame work which shall come into force from 1.1.2011.

48. It is expected that the State Commission in future will also implement similar approach for intra-state transmission tariff and wheeling charges and voltage will also be considered a factor for determination of wheeling charges according to the provisions of the tariff policy. Adoption of the new frame work will go a long way in rationalizing the Intra-state Transmission and wheeling charges and encouraging open access. However, at present there is no provision in the Regulations to determine wheeling charges on the basis of cost of actual network used in wheeling or on voltage basis. Further, the recovery of the distribution network cost in cash is distinct and separate from adjustment of the number of units for loss level prevalent at the system which is to be done in kind.

For loss level the Tariff policy clearly envisages average loss for relevant voltage level.

49. The Tariff Policy deals with transmission pricing in Clause 7.1 under the head "Transmission Pricing". It states in Clause 7.1 (2)(3) & (4) as under:

> *"(2) The National Tariff Policy mandates that the national tariff framework implemented shall be sensitive to distance, direction and related to quantum of power flow. This would be developed by CERC taking into consideration the advice of CEA. Such tariff mechanism should be implemented by 1st April, 2006.*
>
> (3) *Transmission charges, under this framework, can be determined on MW per circuit kilometer basis, zonal postage stamp basis, or some other pragmatic variant, the ultimate objective being to*

get the transmission system users to share the total transmission cost in proportion to their respective utilization of the transmission system. The overall tariff framework should be such as not to inhibit planned development / augmentation of the transmission system, but should discourage non-optional transmission investment."

"(7) After the implementation of the proposed framework for the inter-state transmission, a similar approach should be implemented by SERCs in next two years for intra-state transmission, duly considering factors like voltage, distance, directions and quantum of flow".

According to clause 8.5.5 of tariff policy the same principle as laid down for intra-state transmission charges has to be used for determination of wheeling charges.

50. The Central Commission has since notified the Regulations under the new framework of transmission charges for Inter-state transmission system in June, 2010 which will come into force from 1.1.2011. The State Commission has to implement similar approach in intra-state transmission charges and wheeling charges according to the tariff policy duly considering voltage, distance, direction and quantum of flow. The State Commission is now at liberty to change over to the new framework for inter-state transmission charges and wheeling charges. We would advise the State Commission to initiate the process of determination of wheeling charges on a rational basis as per the provisions of the Tariff Policy. This will go a long way in encouraging open access in intra-state transmission and distribution system.

51. In so far as the loss level adjustment is concerned, the State Commission had duly applied the adjustment for the distribution losses based on the relevant voltage level. The Open Access Regulations, 2005 clearly provide for the same in Regulations 14.8 and 14.9 which read as under:

> "*14.8* ***Transmission Loss Allocable***
>
> *The allocable transmission loss for the transmission and associated systems will depend on conveyance of electricity on various voltages and will be adjusted in kind i.e. reduced from the energy injected based on the principles specified by Central Commission.*
>
> *14.9* ***Distribution Loss Allocable***
>
> *The allocable T & D loss for the distribution and associated systems will depend on conveyance of*

electricity on various voltages and will be adjusted in kind, i.e. reduced from the energy injected based on the loss fixed by the Ciommission from time to time. Presently the T & D loss for different voltage level will be as under for the purpose of this regulation:

EHV	-	*4% of the energy at the point of injection at this voltage level.*
HV	-	*8% of the energy at the point of injection at this voltage level.*
LV & MV	-	*As will be notified from time to time by the Commission.*"

52. Neither the Electricity Act, 2003, nor the Tariff Policy provide for any specific requirement to determine the distribution network cost based on the cost applicable to a particular category of consumers. However, the Tariff Policy provides for new framework for Inter-state Transmission charges to be decided by

the Central Commission with the objective of apportioning the total transmission cost to the transmission users in proportion to their respective utilization. Similar approach has to be implemented by the State Commissions for Inter-state transmission charges and wheeling charges. It is, therefore, open to the State Commission to adopt such determination of the distribution network cost based on the cost applicable to a relevant voltage level as per the provisions of the Tariff Policy, in future.

53. As regards the direction given by the Tribunal that the State Commission should take note of the fact that the open access is applied only for a distance of 3 KMs out of 5 kms., it is to be stated that the State Commission has been following the Postage Stamp method for all consumers. As the entire distribution network system of CESC Limited is integrated, the

distribution network cost to be applied to the open access customers need to be the same irrespective of the distance involved as per the present Regulations.

54. It has been contended by the Appellant that wheeling tariff is not applicable to him because of the proviso to Para 1.2 of Schedule 4 of the Tariff Regulations 2005, as the Appellant is maintaining the consumership with CESC Limited.

55. Relevant portion of Schedule 4 of the Tariff Regulations 2005, relied upon by the Appellant is being quoted below:

> *"1.2 The Regulations contained in this Schedule shall apply in determining tariff payable for wheeling of electricity by a Distribution System User who has been allowed open access to the*

distribution system of a Distribution Licensee in accordance with the Open Access Regulations:

Provided however that own consumers of the Distribution Licensee shall not be required to pay any tariff under this Part."

56. The contention urged by the Appellant on this Clause is not tenable.

57. 'Wheeling' means, as per Section 2(76) of the Electricity Act, 2003:

"*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.*

58. Thus, usage of distribution system is termed as "Wheeling". A person who is purchasing electricity from the distribution licensee and a person who is purchasing/drawing energy from a source different from the distribution licensee, would both require to use the distribution system of the licensee for conveying (wheeling) power to the destination, i.e. the consumers' premises.

59. Purchase of electricity from the distribution licensee will involve paying inter alia, retail energy charge which is determined by the State Commission from time to time. Such retail energy charge for energy purchased from the distribution licensee includes network charge, i.e. in these cases wheeling charge gets merged into retail energy charge. Therefore, no separate payment is necessary.

60. While in the other case, a person who wishes to draw energy from a source different from the distribution licensee (either in full or in part) is not required to pay retail energy charge to the extent of his drawl from other sources – therefore, network usage charge is to be paid by him separately under a stand alone nomenclature of Wheeling Charge.

61. Let us now see who is 'Consumer?

'Consumer' means as per Sec. 2 (15) of the Electricity Act, 2003:

> *"Consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the*

time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;"

62. Therefore merely getting connected to the distribution system as per the Act confers consumership on a person. Going by the argument of the Appellant, all such person would not have to pay any wheeling charge whatsoever. This argument is not a valid one. Therefore, any person, in case he wants to procure power from sources other than the distribution licensee will obviously have to pay usage of network charge (wheeling charge) to the extent of such drawl.

63. Hence proviso to Clause 1.2 quoted in paragraph 50, exempts the consumers of the distribution licensee, only to the extent of their purchased energy

from the distribution licensee. However, to say that this proviso exempts payment of wheeling charge for all persons who are connected to the system primarily for drawing energy from a separate source using the distribution licensee's network, will be doing violence to the provision. This will render the entire concept of wheeling charge otiose.

64. The correct interpretation therefore will be that, a consumer is not liable to pay wheeling charge to the extent of energy purchased from the distribution licensee.

65. The Appellant has a contract for supply corresponding to its full demand with the Respondent-2, the distribution licensee under which it is liable to pay charges for the contracted capacity and energy drawn from the distribution licensee. Payment of this charge entitles the Appellant to get full

contracted power from CESC at a rate determined by the Commission when his other source of supply fails. The purpose of this charge is therefore, different and it does not relieve him from the obligation of payment of wheeling charge for the electricity wheeled.

66. In the present case, the Appellant has not intended to reduce the contracted power from the Distribution Licensee even after availing open access for a part of its requirement. Thus, the Appellant is liable to pay demand charges corresponding to the contracted power to the Distribution Licensee whether it draws the full quantum or not. The demand charges payable to the Distribution Licensee include a percentage of component of expenses of distribution system network. The network cost is also included in the wheeling charges. Thus, the Appellant may have to pay part of the distribution network costs twice in demand

charges and also in wheeling charges. Such open access consumers who continue to have supply contracts with the distribution companies corresponding to the full demand even after availing open access need special consideration for some reduction in wheeling charges. The present regulations do not provide for the same but the Commission may consider the same for future.

67. As per Regulations of the State Commission, wheeling charge has to be computed as per Form 1.27, where all units flowing through the distribution system is the denominator. In case as per the proviso wheeling charge was not to be charged, then in column-B of the Form 1.27 these exclusions would have been specifically excluded as these units would not have earned any revenue.

68. Another point that has been raised by the Appellant is that short-term Open Access customer should be asked to pay wheeling charge i.e. 0.25 times of the wheeling charge payable by a long-term Open Access customer. This is said to be in accordance with the provisions of the Central Commission Open Access Regulations, 2004 and also in accordance with the West Bengal Open Access – Schedule of Charges, Regulations, 2005.

68. This is not correct. As a matter of fact, the Central Commission Regulations 2004 cannot provide for anything concerning wheeling charges payable by another person for use of the distribution system and associated facilities of the Respondent which is a distribution licensee and not a transmission licensee. On the other hand, the State Commission has to go by the provisions of the concerned Regulations namely

4.2 of the Open Access – Schedule of Charges Regulations, 2005. Under those circumstances, the State Commission determined the wheeling charges payable by any Open Access consumer in FY 2005-06 for using distribution system and associated facilities of the respondent distribution licensee shall be 83.54 kWh.

70. In the impugned order, the State Commission has given the clear particulars through annexure containing a set of detailed calculations how the wheeling charges have been determined for the FY 2005-06, considering the Regulation which was in existence then. As mentioned above, the first Order of Remand passed by this Tribunal set aside the first order of the State Commission only on the reason that there was no detailed discussion with reference to the determination of charges at 83.54 paise per kWh. Now

the present impugned order, as mentioned earlier, has given full particular relating to the calculations. As such the finding on this aspect given by the State Commission in the impugned order is perfectly valid. Thus, this point also answered accordingly.

71. The next point relates to the Energy Accounting. As per the Regulations, a reliable communication for fax and text transfer between the point of drawl by the Open Access customer and the State Load Dispatch Centre shall be established by the Open Access customer at its own cost. In other words, the responsibility for maintenance shall be borne by the Open Access customer. Fax machines shall be installed by them at drawl point and at captive power plant for passing on the schedules and for exchange of messages.

72. A Nodal Officer shall be identified by the Appellant for single point exchange of information with State Load Dispatch Centre. E-mailing facility shall be also provided by the Open Access customer and charges payable by the Open Access customer including other terms and conditions shall be governed by the West Bengal Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005, Open Access Regulations - Schedule of Charges Regulations 2005 and the Central Commission (Open Access Inter-State transmission) Regulations, 2004.

73. In the case of the Appellant, the UI pricing mechanism shall be applicable. However, in this case the regional injection point being located in Orissa, accounting at this end shall be carried out by the Orissa State Load Dispatch Centre. The injection at inter-State transfer point will be accounted by the

Eastern Regional Load Dispatch Centre. Therefore, the State Commission is basically concerned with the scheduling, energy accounting and UI pricing at the drawl end which is located in the West Bengal system. As regards the submission of the Appellant relating to the Energy Accounting, already directions have been given by this Tribunal in the earlier order dated 11.07.2006. Therefore, the State Commission has complied with the said directions of the Tribunal. Consequently no further directions are required in this regard. This issue is answered accordingly.

74. The next point relates to the supply of stand-by/back-up power by the distribution licensee to the Open Access customers. In the earlier order passed by the Tribunal, it is held that the Open Access customer may continue to be a consumer of the concerned distribution licensee even after being granted Open

Access. It is also further held that the Appellant can demand supply of back-up power from CESC Limited, the 2nd Respondent. Further, even the second Order of Remand passed by the Tribunal dated 31.10.2007, referred to the affidavit which has been filed by the CESC Limited relating to the back-up power and as such the controversy in respect of this claim does not arise.

75. The State Commission also in the impugned order has made it clear "so long as the Hindalco remains an industrial consumer of CESC Limited on the same terms and conditions that are enforced for similar consumers of CESC, the latter is obliged to supply stand-by energy to Hindalco if Hindalco so wants. Hindalco and CESC Limited will however, be required to enter into a bilateral agreement through which the supply of stand-by energy will be determined."

76. In view of the directions given by the State Commission in the impugned order dated 16.11.2006 and also the affidavit filed by the CESC Limited, as referred to in para 17 of the order of the Tribunal, this issue does not survive.

77. <u>SUMMARY OF OUR FINDINGS</u>:

1. **The Respondents have raised the Preliminary Objection with regard to the question of maintainability of this Appeal. Objecting to the said Preliminary Objection, the Appellant contended that the question of maintainability had not been raised earlier before this Tribunal through the counter and, therefore, the Respondents are estopped from raising this question of maintainability of the Appeal. This objection regarding estoppel raised by the**

Appellant cannot be entertained as the matter has been remanded by the Hon'ble Supreme Court to this Tribunal specifically for considering the issue of question of maintainability of the Appeal holding that the State Commission earlier raised this question before the Tribunal but even then, the same was not considered by this Tribunal. Hence, we are duty bound to consider the said issue. Accordingly, the objection regarding estoppel is rejected.

2. The learned Counsel for the Respondents contend that this Appeal is not maintainable. This does not deserve acceptance. It is true that the present appeal filed by the Appellant, relates to the

order passed by the State Commission in respect of the period FY 2005-06. But what has been challenged in the present Appeal as well as in the earlier Appeal filed by the Appellant, is the principle and methodology adopted by the State Commission in determining the charges. Merely because the orders passed in subsequent years fixing the charges have not been challenged by the Appellant and merely because he had not wheeled any electricity in pursuance of the order passed by the Commission in that particular year, it cannot be said that the Appellant is not aggrieved. As a matter of fact, the subsequent orders in respect of the other years by the State Commission, State Commission were not at the instance of the

Appellant through their application whereas the impugned orders in respect of the Financial Year 2005-06 had been passed in the application made by the Appellant before the State Commission. Further, the impugned order had virtually deprived the Appellant of the opportunity of wheeling the electricity due to the prohibitive and exorbitant wheeling charges. In this manner, the Appellant has been prejudiced and affected. Under these circumstances, this Appeal filed by the Appellant as aggrieved person is maintainable.

3. **According to the Appellant, the wheeling charges payable by the Appellant have been wrongly determined by the State Commission on the basis of the entire**

distribution network costs of the CESC Limited instead of such costs of the distribution network actually used by the Appellant, in violation of the directions of this Tribunal. It cannot be disputed that the wheeling charges payable by the Appellant are to be decided on the basis of the terms contained in Regulations framed by the State Commission. The relevant Regulations 14.3(b) of the Open Access Regulation, 2005 and Regulation 4.2 of the Open Access (Schedule of Charges) Regulation, 2005 would not show that these Regulations have stated anywhere that wheeling charges are to be based on the "applicable distribution network costs" or "applicable voltage wise network". The term `applicable' means as

whatever will be applicable as per the concerned Regulations. These Regulations do not provide that there will be different wheeling charges for different open access customers nor does it stipulate that the different wheeling charges are to be based on the voltage at which the open access customers receive supply of electricity from the distribution licensee. In other words, both these Regulations do not use the term `voltage wise' as these Regulations were made on `Postage Stamp Method'. The Tribunal in the earlier remand order did not direct the State Commission to fix wheeling charges on the basis of the voltage. Similarly, the Regulations also do not provide for the State Commission to

determine the wheeling charges on voltage wise or network basis. The Tribunal used the word `applicable' to mean the relevant Regulations which govern the fixing of the wheeling charges. Under Form No.1.27, the determination of the wheeling charges has to be made on the basis of the total distribution cost divided by the total units sold to the consumer and wheeled and not on the basis of the voltage wise network costs. Thus, the complete reading of all the open access Regulations would clearly indicate that for determining the wheeling charges, the total distribution costs of the network would be the determining factor and not the voltage wise network costs of the network.

4. The Appellant's contention is that the National Tariff Policy envisages that the wheeling charges should be determined on the basis of the applicable distribution network costs. The National Tariff Policy envisages that after the implementation of the proposed framework for inter-State Transmission System to get the transmission system users to share the total transmission cost in proportion to their respective utilisation of the transmission system the State Commission should implement similar approach in next two years for the intra State Commission, duly considering the factors like voltage, distance, direction and quantum of flow. Similar approach has to be adopted for

wheeling charges for the distribution system as per the Tariff Policy. The Central Commission has since notified the Regulations for charges for Inter-State Transmission System according to the proposed framework in June 2010 which will come into force w.e.f. 1.1.2011. As such, the `Postage Stamp Method' is still prevalent for Inter-State and Intra-State Transmission System charges. However, at present, there is no provision in the Regulations to determine the wheeling charges on the basis of the cost of actual network used in wheeling or on voltage basis. The Central Commission has since notified the CERC (Sharing of Inter-State Transmission Charges and Losses)

Regulations, 2010 in June, 2010 for inter-state transmission system according to the framework proposed in the Tariff Policy which will come into force from 1.1.2011. The State Commission is at liberty to change over to the new framework for Inter-State Transmission Charges and wheeling charges as per the Tariff Policy for future. Therefore, we would advise the State Commission to initiate the process of determination of wheeling charges on a rational basis as per the provisions of the National Tariff Policy for future.

5. According to the Appellant, the wheeling tariff is not applicable to him because of the proviso to Para 1.2 of the Schedule-4 of the Tariff Regulations, 2005, as the Appellant is

maintaining the consumer-ship of CESC Limited. This contention is not tenable. The usage of the distribution system is termed as `wheeling'. A person who is purchasing electricity from the Distribution Licensee and a person who is drawing energy from a source different from that of the Distribution Licensee would both require to use the Distribution System of the Distribution Licensee in wheeling power to the destination. Therefore, any person who wants to procure power from sources other than the Distribution Licensee, will obviously have to pay usage of network charges to the extent of such drawl. Hence, the Proviso to Clause 1.2 exempts the consumer of the Distribution Licensee only

to the extent of that purchased energy from the Distribution Licensee. Therefore, the contention that the Proviso exempts the Appellant of wheeling charges for all persons who were connected to the system primarily for drawing energy from a separate source using the Distribution Licensee Network cannot be construed to be tenable as it would amount to doing violence to the Proviso. The correct interpretation would be that the consumer is not liable to pay wheeling charges to the extent of energy purchased from the Distribution License.

6. According to the Appellant, the short term Open Access Customers should be asked to pay wheeling charges, that is, 0.25 times of the wheeling charges payable by a long term

Open Access Customers. This is said to be in accordance with the provisions of the Central Commission Regulations, 2004 and State Commission Regulations, 2005. This is not correct. The Central Commission Regulations, 2004 cannot provide for any thing concerning wheeling charges payable by another person for the use of Distribution System and associated facilities of the Distribution Licensee. On the other hand, the State Commission has to go by the provisions of the Open Access Charges Regulations, 2005. In the light of the above, the State Commission determines the wheeling charges for using Distribution System and associated facilities of the Respondent being the Distribution Licensee

as 83.54 paise per kWh. The first order of remand passed by the Tribunal would show that the earlier order passed by the State Commission was set aside only on the ground that there was no detailed reasons given in the said order with reference to the determination of charges at the rate of 83.54 paise per KWh. Now, in the present impugned order, the State Commission has given full particulars relating to the calculations. Therefore, the finding on this aspect, given by the State Commission in the impugned order, is perfectly justified.

7. The next point relates to the energy accounting. As per the Regulations, the reliable communication for fax and text transfer between the point of drawl and the

State load dispatch Centre shall be established by Open Access Customer at his own cost. In other words, the responsibility for maintenance shall be borne by the Open Access Customer. A nodal officer shall be identified by the Appellant for Single Point Exchange of information with State Load Dispatch Centre. E-mailing facility shall also be provided by the Open Access Customer and the charges payable by the Open Access Customer shall be governed by the WBERC (Terms & Conditions of Tariff) Regulations, 2005, Open Access Regulations, 2005, Open Access Schedule of Charges) Regulations, 2005 and the Central Commission (Open Access Inter-State Transmission) Regulations, 2004. Therefore,

the State Commission is basically concerned with the scheduling of energy accounting and U.I. pricing at the drawl end which is located in the West Bengal System. As regards the energy accounting, already directions have been given by the Tribunal in the earlier order dated 11.7.2006. In pursuance of the order, the State Commission has already complied with the said directions. Consequently, no further directions are required in this regard.

8. The last point relates to the supply of stand-by/back-up power by the Distribution Licensee to the Open Access Customer. In the earlier orders passed by the Tribunal, it is held that the Open Access Customers may continue to be consumers of the

concerned Distribution Licensee, even after being granted the Open Access. It is also held in that order that the Appellant can demand supply of back-up powers from the Distribution Licensee. To this effect, an Affidavit has also been filed by the CESC Limited relating to the back-up power. This also is referred to in the 2nd order of remand passed by the Tribunal dated 31.10.2007. In accordance with the said directions, the State Commission also in the impugned orders,held that the CESC Limited (Respondent No.2) is obliged to supply stand-by energy to HINDALCO if the Appellant so wants. Since the above directions have been given by the State Commission in the light

of the Affidavit filed by the CESC Limited, this issue does not survive.

78. In the light of the above findings, we do not find any flaw in the conclusions arrived at by the State Commission in the impugned order. Therefore, this Appeal, though maintainable, is dismissed as devoid of merits. However, we direct the State Commission to take note of our directions given above in paras 50 and 66 for future.

79. No order as to cost.

(RAKESH NATH) (JUSTICE M.KARPAGA VINAYAGAM)
TECHNICAL MEMBER CHAIRPERSON

Reportable/Non-Reportable

Dated: 1st November, 2010