

**In the Appellate Tribunal for Electricity,**  
**New Delhi**  
**(Appellate Jurisdiction)**

**Appeal no. 25 of 2014**

**Dated: 10<sup>th</sup> May, 2016**

**Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member**  
**Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of:**

**M/s. SESA Sterlite Limited**  
**Sesa Ghor 20 EDC Complex Patto,**  
**Panjim, Goa – 403 001**

**...Appellant(s)**

**Versus**

- 1. Odisha Electricity Regulatory Commission** **...Respondent No.1**  
**Bidyut Niyamak Bhavan, Unit –VIII**  
**Bhubaneswar – 751 012**
- 2. Grid Corporation of Orissa Limited** **...Respondent No.2**  
**(GRIDCO Ltd.)**  
**Janpath, Bhubaneswar – 751 022**
- 3. State Load Despatch Centre** **...Respondent No.3**  
**SLDC Building, GRIDCO Colony**  
**P.O. Mancheswar Railway Colony**  
**Bhubaneswar – 751 017**

**Counsel for the Appellant** : **Mr. Rajiv Nayyar**  
**Mr. Amit Kapur**  
**Ms. Poonam Verma**  
**Mr. Akshat Jain**  
**Mr. Sameer Jain**  
**Ms. Kirti Mishra**

**Mr. Satyajit Ganguly  
Mr. Lalit Tandon  
Mr. Manoj Agarwal  
Mr. Rohit Venkat**

**Counsel for the Respondent : Mr. G. Umapathy,  
Mr. Rutwik Panda  
Mr. Anshu Malik for R-1**

**Mr. Raj Kumar Mehta  
Mr. Elangobam P.S.  
Mr. Abhishek Upadhyay  
Ms. Himanshi Andley  
Ms. Ishita C. Das Gupta  
Ms. Mansha Monga for R-2**

**Mr. Pradeep Misra  
Mr. Manoj Kr. Sharma  
Mr. Suraj Singh for SLDC**

## **JUDGMENT**

### **PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER**

The present Appeal has been filed by M/s. SESA Sterlite Limited **(hereinafter referred to as “Appellant”)** under Section 111 of the Electricity Act, 2003 challenging certain financial and wrongful disallowance by Odisha State Electricity Regulatory Commission **(hereinafter referred to as “State Commission/Respondent No.1”)** in the impugned order dated 12.06.2013 in Case No. 117 of 2009, 31 of 2010 and 56 of 2012.

The Appellant herein is a generating company in terms of Section 2(28) of the Electricity Act, 2003 and has set up a 4x600 (2400 MW) thermal power plant at Brundamal, Jharsuguda, Odisha and is a successor company of M/s. Sterlite Energy with effect from 01.01.2011. Since during the pendency of the proceedings before the State Commission, Sterlite Energy stood merged with the main parent company SESA Goa Limited with effect from 01.01.2011 as approved by the High Court of Bombay and Madras High Court on 03.04.2013 and 25.07.2013 respectively, the name of the merged successor entity is SESA Sterlite Limited, the Appellant/Applicant herein.

2. Odisha State Electricity Regulatory Commission is a statutory authority constituted under the Electricity Regulatory Commission Act, 1998 with specific powers vested under Section 86 of the Electricity Act, 2003.
  
3. M/s. GRIDCO Ltd. (**hereinafter referred to as “Respondent No.2”**) was incorporated on 20.04.1995 under the Companies Act, 1956 as a wholly owned government of Odisha undertaking and is

presently engaged in bulk purchase and sale of power to the Discoms located in the State of Odisha.

4. Facts of the Appeal

- i) Pursuant to execution of Memorandum of Understanding (MOU) on 26.09.2006 between the government of Odisha and Sterlite Energy Limited for installation of a thermal power plant of 2400 MW capacity at an estimated expenditure of Rs. 7481 cores within a period of 45 months, Principal Power Purchase Agreement (PPA) was executed between M/s. Sterlite Energy and M/s. GRIDCO on 28.09.2006. On the same day i.e 28.09.2006, the Respondent No. 2 filed petition before the State Commission for approval of this PPA vide Case No. 44 of 2006.
- ii) Based on the directions given by the State Commission vide its Order dated 20.08.2009, the amended PPA was signed between M/s. Sterlite Energy and GRIDCO on 20.08.2009.
- iii) On 01.10.2009, in accordance with the aforesaid directions of the State Commission, Respondent No. 2 filed an application before the

State Commission for approval of the principal PPA dated 28.09.2006 and the amended PPA dated 20.08.2009 for purchase of power from the 2400 MW thermal power project vide Case No. 117 of 2009.

- iv) As per the directions of the State Commission vide its interim Order dated 30.07.2010, a consolidated PPA was executed between Respondent No. 2 and the Appellant on 19.12.2012 which was submitted for approval of the State Commission on 29.12.2012.
  
- v) The provisions regarding supply of power by the Appellant to the Respondent No. 2 as contained in the consolidated PPA dated 19.12.2012 read as follows;
  - (a) The Capacity allocated to GRIDCO shall be up to 25% of the installed capacity of the Thermal Power Station of Sterlite Energy.
  
  - (b) GRIDCO shall at all times have the right to purchase 25% of the power sent out from the Thermal Power Station. The auxiliary

consumption determined by the appropriate Commission shall however, be adjusted in the above calculation.

- (c) GRIDCO will be entitled to receive the entire infirm power from the Thermal Power Station at variable cost.
- (d) Sterlite Energy will make available the entire power generated from the first Unit of 600 MW capacity to GRIDCO and the Appellant shall not go for trading of power from the first Unit. Such supply of power by Sterlite Energy to GRIDCO will never be less than 25% of the total generation from the first Unit as well as from all the subsequent Units as provided in the PPA.
- (e) The tariff payable by GRIDCO to Sterlite Energy will be determined by the Odisha Commission.

As per the Appellant, this project achieved financial closure on 31.03.2012.

- vi) M/s. Sterlite Energy vide its submissions dated 30.04.2013 conveyed to the State Commission, the resolution of the board

meeting of its company held on 26.10.2010, wherein it was resolved that in view of the support required by Sterlite Energy which was wholly owned subsidiary of Sterlite Industries, the outstanding loan of Rs. 4217.51 crores to Sterlite Energy be converted to 'Nil' interest during loans with effect from 01.08.2010 payable on demand and as such Sterlite Energy had requested the State Commission to treat the above deployment of free reserves of the holding company as equity/quasi equity and the same treatment as provided in the Central Commission's tariff Regulation, 2009 should be given and requested to treat the equity in excess of 30% normative equity levels as normative loan and allow interest on this normative loan. Also informed the State Commission that Sterlite Energy is going to be merged with its parent company and other group companies and a new company named as SESA Sterlite Limited is going to be formed in a scheme of amalgamation with the appointed date on 01.01.2011 and in this regard approval of High Court of Bombay(Goa Bench) was received on 03.04.2013. Approval of Madras High Court was awaited at that time. However, the approval of Madras High Court for the merger and amalgamation has also been received on 25.07.2013.

- vii) The Appellant stated that out of the 4 units of 600 MW each, unit 2 was commissioned first on 10.11.2010 and is also the only unit to be connected to the state grid. As per the PPA dated 28.09.2006 as amended on 20.08.2009 and 19.12.2012, the Appellant started supply to Respondent No. 2 from Unit 2 from 10.11.2010 onwards. The other 3 units are connected to the Power Grid Corporation of India Limited (CTU) network.
- viii) As per the PPA with Respondent No. 2, the Appellant will make available the entire power generated from the first Unit of 600 MW capacity to Respondent No.2 and shall not go for trading of power from the first unit.
- ix) Due to the alleged transmission constraints and evacuation problems, power generated from Unit 2 is being supplied to Respondent No. 2 through the State transmission network. In view of the lower capacity utilization of Unit 2 connected to state transmission network on account of transmission constraints, the



Appellant is incurring excess auxiliary consumption and heat rate for the power being supplied to Respondent No.2.

- x) Power has been supplied to Respondent No. 2 at adhoc tariff ranging from Rs. 2.43 per KWH from 10.11.2010 to 31.03.2011 and thereafter at the rate of Rs. 2.75 per KWH till the June, 2013.
  
- xi) The State Commission issued interim Order dated 04.04.2012 holding that price of linkage coal should be considered first while calculating variable charges of generation and based on this premise the adhoc tariff being paid by Respondent No. 2 is quite reasonable. The Appellant filed the Review petition No. 56 of 2012 seeking the following relief;
  - (a) Diverting linkage coal earmarked for Units-I and III under different FSAs to Unit-II is not legally tenable.
  - (b) Fuel cost payable to Sterlite Energy shall be on weighted average fuel cost of the station as the whole.

(c) Finding that rate of provisional tariff @ 2.75 Rs./u is reasonable is without reason and/or inquiry into the costs incurred in setting up the plant and generating power.

xii) The State Commission issued a combined order dated 12.06.2013 (Impugned Order) *interalia* holding/approving as under;

“(a) Contention of M/s. Sterlite Energy to treat 0% loan of its parent company as quasi equity in view of CERC Regulation regarding debt-equity component is untenable.

(b) Considering the surplus funds invested by the Holding Company in Sterlite Energy as ‘actual’ loans bearing 0% interest, the Weighted Average Rate of Interest is 5.55%.

(c) The coal procured through administered price mechanism on the basis of long term PPA should not be diverted for merchant sale of power.

- (d) Coal requirement for the drawal is less than linkage coal available to Sterlite Energy. Thus, without resorting to blending of linkage coal with e-auction or imported coal the requirement of coal for export of power to GRIDCO will be well within linkage coal available with Sterlite Energy.
- (e) Normative auxiliary consumption of 36 MW for generation of 400 MW is calculated at 9% for Unit-II knowing the fact that the system is connected to OPTCL network. Subsequently, after the commissioning of other Units, the normative auxiliary consumption has been calculated at 6% as these Units are connected to PGCIL grid, and thus has been averaged out on each COD.
- (f) The Station Heat Rate has been considered at 2500 Kcal/Kwh till 18.08.2011 since the generating Units were running at partial load due to transmission constraints, and thereafter as 2443.11 Kcal/Kwh i.e.  $1.065 \times$  Design Heat Rate of 2294 Kcal/Kwh with effect from 19.08.2011.

(g) Sterlite Energy to submit the revised bills of monthly Fixed Charges based on the approved Annual Fixed Charges and the month-wise Energy Charges as per the Formula given in the Order.”

xiii) The Appellant filed a petition for review of the above order vide Case No. 54 of 2013 which was disposed off by the State Commission vide its review order dated 25.09.2013. As per the Appellant, the State Commission has wrongly interpreted review petition to the limited period prior to the appointed date that is 01.01.2011 and ruled that the Review Petition has been limited to the period prior to the period of merger. The State Commission ruled out contention of the Appellant treating the loan received from its parent as equity citing the same is beyond the scope of review. The State Commission declined to review its order stating that whole impact of the High Court orders on debt equity structure of the generating units can only be known when the accounts of the M/s. Sterlite Energy get merged with M/s Sterlite Industries and final consolidated audited accounts of the merged entity, that is, M/s. SESA Sterlite are available to the State Commission. The State Commission has also vide its review order ruled out to consider the

errors as mentioned in the Review Petition on Auxiliary Power Consumption, Station Heat Rate and coal cost and disposed off the Review Petition without any relief or direction.

xiv) Aggrieved by the Impugned Order read with its Review Order issued by the State Commission, the Appellant has filed this Appeal.

5. In the light of the above, the following issues emerge for our consideration;

**(i) Whether the State Commission has erred in refusing to treat the funds invested by the promoters in the generation plant as equity pursuant to the binding merger scheme as approved by the High Court of Bombay and Madras High Court and has erred in respect of interest on normative debt component as well as weighted average interest on these loans?**

**(ii) Whether the State Commission has erred in considering only linkage coal cost for computation of variable cost and disallowing the Actual Auxiliary Consumption and**

**Station Heat Rate for the period till the alleged transmission constraint is resolved?**

6. We have heard at length the learned counsel Mr. Amit Kapur for the Appellant, Mr. G. Umapathy, learned counsel for the State Commission, Mr. Rajkumar Mehta, learned counsel for the Respondent No. 2 and Mr. Pradip Misra, learned counsel for Odisha State Load Despatch Centre and considered their written submissions and arguments put forth by the rival parties and the following issues emerged for our consideration;

- a) The Appellant submits that though it had tied up long term loan of Rs. 6150 crores through consortium led by SBI at an interest rate of 11.50% per annum, however, with a view to improve its cash flow, it has primarily financed itself through funds from its parent company that is Sterlite Industries by way of Commercial Paper. The State Commission ought to have considered this component as equity in light of its amalgamation with other group companies to form a new company namely SESA Sterlite Limited with the appointed date as 01.01.2011 as the same was approved by the High Court of Bombay

and Madras High Court. It is submitted that by operation of law, the merger relates back to the appointed date which in this case has been 01.01.2011.

- b) The Appellant submits that prior to the merger, the total amount invested by Sterlite Energy by way of equity stood at Rs. 1201.50 crores and that invested by Sterlite Industries by way of loan stood at Rs. 8019.61 crores out of which Rs. 4217.51 crores was by way of 0% loan from free reserves. After the merger, the inter-company loan stand cancelled in accordance with the merger scheme and an amount of Rs. 6519.61 crores has to be treated as equity invested in the project in addition to Rs. 1201.50 crores and as such the loan amount got reduced to Rs. 1738.20 crores.
- c) The Appellant alleged that in the Impugned Order, the State Commission has stated that in the absence of Generation Tariff Regulations for the State of Odisha, it relied upon the CERC Tariff Regulations, 2009. By passing the Impugned Order, the State Commission has failed to comply with the Central Commission's Regulations in letter and spirit. As per the Central Commission's

Regulations, 2009, investment made from free reserves to fund the capital cost of the project shall be reckoned as paid up capital for the purpose of computing Return on Equity as long as such internal resources are actually utilized for meeting capital expenditure of the generating station. Having established that the investment has been made from the free reserves of the holding company and that these funds have been actually utilized for meeting capital expenditure of the generating stations, the Appellant fails to understand why the State Commission in the Impugned Order has not treated the same as equity.

- d) As per the Appellant, amount of free reserves invested by SESA Sterlite Limited in Sterlite Energy ought to be treated as equity post 01.01.2011 and the State Commission ought to have allowed Return on Equity on the entire equity base that is equity up to the normative level of 30% of the approved capital cost, as per Tariff Regulations, 2009 of the Central Commission.
- e) The Appellant further submits that denial of the normative debt component of the free reserves/surplus funds invested by Sterlite



Industries in Sterlite Energy is clearly in violation of the Central Commission's Tariff Regulations, 2009. The State Commission in its Impugned Order has disallowed to consider free reserves/surplus funds invested by Sterlite Industries post 01.01.2011, in excess of the normative limit of 30% equity as normative debt whereas as per the Central Commission's Regulation, 2009, this is considered as normative debt and it should be entitled to earn normative interest on the total loan in lieu of return on equity. The notional rate of interest on the total loan including the normative debt ought to have been considered whereas the State Commission has considered the weighted average rate of interest on the actual loan amount.

- f) The Appellant further alleges that even the computation of weighted average interest rate on the actual loan amount as considered in the Impugned Order is also incorrect as the State Commission has considered the free reserves of Rs. 4217.51 crores from holding company having an interest rate of 0%.

The State Commission ought to have computed the weighted average rate of interest by considering only the actual loan amount

and ought to have applied the interest rate so calculated on the total loan amount including the amount of normative debt in accordance with the Central Commission's Regulations, 2009.

- g) The Appellant submits that pursuant to the approval of merger by the High Court of Bombay and Madras High Court, the actual loan amount of Rs. 8257.81 crores availed by Sterlite Energy as on 31.03.2013 has been reduced to Rs. 1738.20 crores as the remaining amount of 6519.60 crores has become equity and as such, correct computation of weighted average rate of interest on the actual loan amount, post merger, should have been considered.
- h) The Appellant submits that the State Commission has failed to appreciate since the power is being supplied from the generating station, the cost of coal utilization for the entire power plant that is 2400 MW has to be considered for tariff determination in accordance with Central Commission's Regulations, 2009. Even in light of the fact that the Respondent No. 2 is entitled to procure 25% of the power generated from the power plant of the Appellant, the proportionate pooled cost of coal utilised ought to be considered.

The State Commission should have allowed the average cost on coal utilized for the generation of power from the power plant that is average of cost of linkage coal as well as the cost of coal procured through e-auction/import. In light of the fact that the power is being supplied to the Respondent No. 2 from its generating station of 2400 MW, the average coal cost utilized for the entire station should be considered. The Appellant submits that the variable charges approved by the State Commission for Respondent No.2's purchase of power are much lower than those approved for purchase of power by Respondent No. 2 from other generating stations.

- i) The Appellant further submits that due to the Respondent No.2's failure to evacuate contracted capacity from bus bars of the power station as per the provisions of the PPA, the Appellant has suffered on account of higher State Heat Rate ("**SHR**") because of the underutilization as well as increased auxiliary consumption. Due to part load operation, auxiliary consumption in terms of percentage is higher than the norms as evident from the actual auxiliary consumption for the past two financial years which is 10.80% and 10.45% respectively which is much higher than the norms for no

fault of the Appellant since Respondent No. 2 is under-drawing in the range of 280 MW to 450 MW. In view of the transmission constraints, the State Commission has relaxed the norms of 6% auxiliary consumption by allowing as under;

- (a) 9% for the period from 10.08.2010 to 29.03.2011
- (b) 7.2% for the period from 30.03.2011 to 18.08.2011
- (c) 6.75% for the period 19.08.2011 to 25.04.2012.
- (d) 6.5% for the period from 26.04.2012 to 31.03.2013
- (e) 6% for the financial year 2013-14.

The Appellant states that the State Commission in its Impugned Order has failed to consider the auxiliary consumption of 10.3% considering the average generator loading at 350 MW and has ignored the fact that the transmission capacity of the 220 KV line between the Sterlite Energy and Budhipadar sub-station of OPTCL is 350 MW and not 400 MW and accordingly, the State Commission ought to have computed the auxiliary consumption at 350 MW instead of 400 MW which would have worked out to 10.3%.

- j) The Appellant further submits that the State Commission in its Impugned Order has disallowed the actual Station Heat Rate of 2874 KCAL/KWH and allowed Station Heat Rate at 2443.11 KCAL/KWH with effect from 19.08.2011 that is COD of unit 3 and 2500 KCAL/KWH prior to that. As per the Central Commission's Regulations, 2009, the Station Heat Rate should be considered at 100% maximum continuous rating. Further, in the present case, the generation has been restricted due to the transmission constraints and as a consequence of the same, the actual Station Heat Rate should have been allowed.
- k) The Appellant submits that having not considered the actual Auxiliary Consumption and Station Heat Rate by the State Commission in its Impugned Order, the Appellant has suffered adversely for the reasons beyond its control since the transmission constraints have restricted the power injection to the tune of 350 MW only which are solely on account of non-availability of requisite transmission capacity for evacuation of the entire contracted capacity of the Respondent No.2.

- l) The Respondents while contesting the Appellant's submissions for treatment of surplus funds infused by the Appellants' holding company be deemed as equity in addition to Rs. 1201.50 crores. The Respondents submitted that amalgamation have been approved by the Madras High Court after the issuance of the Impugned Order by the State Commission.
- m) The Respondents further submitted that in its Review petition relating to the Impugned Order, the Appellant brought to the notice of State Commission that due to amalgamation, the debt equity structure has undergone change necessitating the re-determination of tariff based on the new debt equity structure.
- n) The Respondents submits that the issue of merger of Sterlite Energy into its parent company was not before the State Company when the Impugned Order was passed and review petition as mentioned above was dismissed by the State Commission in light of the fact that any relief on the basis of the merger cannot be provided during the pre-merger period and the full impact of High Court's orders of merger of Sterlite Energy with its parent company was not

ascertained by the Appellant in the absence of the final consolidated accounts duly audited of the new entity.

- o) The Respondents further stated that the State Commission considered while passing the Impugned Order the Central Commission's Tariff Regulations, 2009 applicable for the period 2009-14 for determining the tariff of the Appellants for the financial year upto 2013-14 starting from the commercial operation of the generating stations. Since all the four units commissioned in phases, the State Commission determined the tariff for the different block periods from the first unit's COD. This Unit 2 was the first unit which achieved the COD on 10.11.2010 and the last unit that is unit no. 4 achieved the COD on 26.04.2012. The State Commission considered the Central Commission's Regulation, 2009-14 for determination of the Station Heat Rate ("**SHR**") and auxiliary power consumption. As per Regulation 26(ii)(B) of Central Commission's Tariff Regulations, 2009-14, the heat rate norms for the coal based thermal generating stations is 1.065 Design Heat Rate (KCAL/KWH) where the Design Heat Rate of generating unit means Unit Heat Rate guaranteed by the supplier at conditions of 100% MCR, 0%

make up, design coal and design cooling water temperature/back pressure. Though the Appellant stated before the State Commission that they qualify for the design heat rate but due to part load operation as caused by the transmission restriction resulted into non drawal of full 600 MW by the Respondent No. 2, the Appellant claimed Station Heat Rate of 2874 KCAL/KWH. The State Commission considered the views expressed by the Appellant and specified 2500 KCAL/KWH. However, it specified Station Heat Rate as 2443.11 KCAL/KWH that is 1.065 multiplied by Design Heat Rate of 2294 KCAL/KWH with effect from 19.08.2011.

As per the Respondents, the Station Heat Rate should be considered as 2294 KCAL/KWH i.e. design heat rate as the transmission constraints as alleged by the Appellant are misconceived.

As regards norms for Auxiliary Power Consumption, the Respondents stated that as per Regulation 26(iv)(a)(ii) of the Central Commission, the Appellant is eligible for a normative auxiliary consumption of 6% of the total generation and that ought to have



been considered by the State Commission since the alleged transmission constraints resulted into partial loading for reasons attributable to the Appellant.

- p) Even for the determination of the debt and equity component of the project, the Impugned Order of the State Commission is based on clause 12 of the Central Commission's Regulation, 2009 which states as under:

“for a project declared under commercial operation on or if 01.04.2009, if the equity actually deployed is more than 30% of the capital cost, equity in excess of 30% shall be treated as normative loan.

Provided that where equity actually deployed is less than 30% of the capital cost, the actually equity shall be considered for determination of tariff.”

On the plea of Appellant, that it had deployed surplus funds of holding company by way of Rupee loan with zero interest which is

payable on demand, the Respondents submitted that the State Commission scrutinized the audited accounts submitted by the Appellant and observed that for financial year ending on 31.03.2011, 31.03.2012, 31.03.2013, total paid up capital for computation of Return on Equity remains static at Rs. 1201.50 crores. The Respondent submitted that as regards the Appellants' contention on consideration of the 30% of the project cost to be treated as equity on normative basis as per Central Commission's guidelines, it is to be based on the audited accounts for these years which clearly indicate the equity as Rs. 1201.51 crores. Hence, the same can be considered for computation of Return on Equity. It is also submitted that the contention of the Appellant that the loan made from the parent company will be partially converted to equity to attain normative level of 30% at a future date has no relevance which cannot be taken as basis for determination of tariff. It is always the equity infused which would attract the return as ascertained from the audited accounts of the Appellant and hence the State Commission in its Impugned Order has very rightly considered the equity infused as Rs. 1201.50 crores. Therefore, the State Commission has considered prorata equity of Rs. 300.375 crores for each unit since

there are 4 units of 600 MW each. The Respondents further stated that the total component from Sterlite Industries Ltd. as on 31.03.2013 is Rs. 8019.61 crores out of which Rs. 4217.51 crores has been considered at 0% interest as per the documents furnished by the Appellant. The said Rs. 4217.51 crores at 0% interest is payable on demand to the parent company. As regards, the Appellants' arguments to justify the interest component at the rate of 11.50% per annum as payable in the term loan being availed by the Appellant be payable even for this component which has been infused as loan by the parent company at 0% interest, the Respondents submitted that if there is no interest payable as in the present case, then there is no financial cost for the Appellant which can be considered for computation of the tariff since no interest on notional basis can be so charged to tariff.

- q) The Respondents stated that the State Commission even determined the specific secondary fuel oil consumption as per the Central Commission's Tariff Regulations, 2009 and the Appellants contention in this regard is untenable.

- r) As regards the transmission constraints as alleged by the Appellant which resulted into higher specific heat rate as well as higher auxiliary power against the normative ones on account of partial loading, the Respondents submitted that as per Clause 4 of the consolidated PPA dated 19.12.2012, it is clearly stated that it is the Appellants' obligation to make the power available at the bus bar of the grid station of OPTCL at Budhipadar and refuted the prima facie observations of the State Commission in its Impugned Order related to the transmission constraints.

On the Appellants contention of transmission constraints in the 220 KV D/C between the generating station to the Budhipadar sub-station, the Respondents alleged that different stand was taken by the Appellant at different times with regard to the conductor used in the 220 KV line which initially was proposed as Moose conductor then changed to ACSR Zebra conductor and in the note filed by the Appellant on 20.08.2014 it was proposed as ACSR Moose conductor and then subsequently proposed as AAAC Moose conductor and this has impacted adversely for no fault on the part of Respondents. In their opinion, the different stand at different places

on use of type of conductor by the Appellant was for the undue benefit by manipulating the capacity of transmission line in question.

- s) As per the Central Electricity Authority planning criteria, the thermal loading limit of ACSR Moose conductor (597 sq. mm) is 798 Amps per circuit at 45°C ambient temperature and 85°C conductor temperature which would be facilitating transmission capacity of the line to the tune of 274 MW per circuit that is 548 MW for the Double Circuit Line. Even the ACSR Moose conductor (597 sq.mm) having thermal loading of 749 Amps per circuit at 48°C Ambient temperature and 85°C conductor would have facilitated the transmission capacity of 514 MW for the Double Circuit.
- t) The Respondents stated that through the same transmission network, the Appellant has been exporting more than 450/500 MW power on numerous occasions as per the records of the State Load Despatch Centre which justifies beyond doubt that there was no transmission constraints. Even from the records of the State Load Despatch Centre, it is ascertained that since October, 2012 the Appellant has been submitting the schedule of more than 500 MW

and the SLDC has been accepting the said schedule submitted by the Appellant. But the Appellant has been unable to adhere to the schedules thereby causing severe power shortfall to the Respondent No. 2.

- u) The Respondents further submitted that the 220 KV DC line having ACSR Moose conductor is well capable to transmit 550 MW power safely which is clearly established as above and therefore, there was no transmission constraint in the said transmission line as alleged by the Appellant.
  
- v) The Respondents further submitted that the State Commission in its Order dated 04.04.2012 categorically stated that they were not satisfied with the logic of transmission constraints as alleged by the Appellant, however, while considering the transmission constraints as alleged by the Appellant in its Impugned Order, they did not provide any reason for differing from the observations in its earlier order dated 04.04.2012. Even this cannot be construed as admission on the part of the State Commission in respect of the transmission constraint so alleged by the Appellant.

7. After having carefully perused the submissions made and the arguments put forth by the rival parties, our considerations on the various issues raised by the Appellant are as under;
- a) As regards the issue of amalgamation, it is observed that the appointed date is 01.01.2011, as approved by the Madras High Court on 25.07.2013 and High Court of Bombay on 03.04.2013. Subsequent to the approval accorded by Madras High Court, we have observed that the audited accounts of the amalgamated entity were not submitted to the State Commission till the passing of the Impugned Order.
- b) We have also observed that the State Commission at the time of passing the Impugned Order i.e. 12.06.2013 was made aware of the amalgamation scheme duly approved by the Madras High Court. However, Madras High Court approval was accorded on 25.07.2013, which was after the date of passing of Impugned Order.

- c) On the submissions of the Appellant that they drew the attention of the State Commission by informing them that it is shortly going to be merged with a new company under the scheme of amalgamation with an appointed date as 01.01.2011 and the auditors are expected to sign the audited accounts shortly, we are clear in our mind that no State Commission in anticipation of approval of the High Court can give effect to the amalgamated entity.
- d) In such a situation the State Commission could have considered only the audited account details which were made available to them by way of audited accounts of the entities before merger. At that point of time, the documents to this effect as submitted by the Appellant indicated only the equity portion as Rs. 1201.51 crores, which was appropriately considered by State Commission.
- e) We now look at the Review Order passed by the State Commission on 25.09.2013 wherein the Appellant submitted before the State Commission, the orders of the High Court of Bombay (Goa Bench), dated 03.04.2013 and Madras High Court dated 25.07.2013 granting merger of Sterlite Energy Limited which was a subsidiary of Sterlite



Industries Limited along with other subsidiaries with its holding company i.e. the Appellant, with effect from 01.01.2011. The Appellant prayed that due to the above merger, their business capital structure has undergone complete change which requires fresh view of equity and loan component of the generating project. The State Commission observed that such Review Petition lost its relevance due to the above amalgamation and declined review of its Impugned Order dated 12.06.2013 on the ground that full impact of High Court orders on the debt and equity structure of the generating units can only be known when the accounts of the present Applicant can be merged with the holding company and audited consolidated accounts are made available to the State Commission.

- f) We do find that the State Commission's requirement of the audited accounts for ascertaining new capital structure of the amalgamated entity for giving any consideration in terms of the tariff determination is not out of place and justified in the context of the various applicable Regulations, that is, Central Commission's Regulations, 2009-14 since these were adopted by the State Commission in absence of their own Tariff Regulations at that point of time.

- g) We are of the considered view that pursuant to the amalgamation, the consolidated audited accounts of new company as and when made available before the State Commission, communicating therein the revised debt equity structure of the new entity with all other relevant details, for determination of tariff, would be examined appropriately by the State Commission.
- h) Hence, we are of the considered opinion that the State Commission has not erred in considering the audited accounts as made available to it at that point of time and without giving any effect to the amalgamated entity in absence of Madras High Court approval for such amalgamation scheme.
- i) In the light of the above, we decide this issue against the Appellant.
8. Now we take up the other issue as contested by the Appellant regarding the transmission capacity limitation which restricted evacuation of power from the Appellant's generating station and resulting into partially loading of the units, which has caused higher auxiliary power consumption and higher Station Heat Rate ("**SHR**") as compared to Operating Norms as specified in the prevailing Regulations and as a consequence of which the financial losses are

suffered by the Appellant. We have perused the relevant documents submitted by the Respondents vis-à-vis the Appellants claims on account of restricted power evacuation and are making the following observations.

- a) As per the relevant provisions contained in the consolidated PPA between the Appellant and the Respondent No. 2 dated 19.12.2012, the capacity allocated to the Respondent No. 2 was 25% of the installed capacity of the subject thermal power station. The Respondent No. 2's share of power ought to be made available to Respondent No. 2 by the Appellant at the bus bar of OPTCL nearest EHV sub-station at required voltage level, and the OPTCL as State Transmission Utility ("**STU**") with the help of Government of Odisha, will assist the Appellant in getting clearances/approvals within the state jurisdiction with clear stipulation that all the responsibility for obtaining such clearances/approvals shall remain with the Appellant and the Appellant would need to bear cost of;
  - i. dedicated transmission line from their generating plant to the designated Grid Sub-station of the STU at available voltage level.

- ii. interfacing at both the ends including works at the Grid Sub-station, cost of Bays etc.
  - iii. Replacement/up-gradation/augmentation of existing equipments/ transmission system(s) if any of STU.
- b) The above works were required to be carried out by the Appellant as per the specifications and requirement of licensees/utilities and after commissioning of the project, the Appellant was required to transfer these lines and infrastructure at STU sub-station end to the STU as transfer of assets for the maintenance by the STU, at the charges to be decided by licensee/utility and paid by the Appellant. This was with a clear understanding that if the Appellant desires to evacuate further power beyond state share, they may strengthen the transmission system and also to bear the state transmission charges as applicable.
- c) From the above it is observed that for installation of transmission system up to the STU bus bar was the Appellant's responsibility and the role of the STU and the Government of Odisha was limited only

to providing assistance in obtaining the state statutory clearances to the Appellant.

- d) The generating station of the Appellant is connected to STU network at Budhipadar grid sub-station through 220 KV double circuit line.
  
- e) It is also observed there have been frequent change in stand by the Appellant with regard to its proposal for type of the conductor planned to be used in the 220 KV lines, initially from moose conductor then to ACSR Zebra conductor and thereafter ACSR Moose conductor etc. which impacted the readiness of the said 220 KV line.
  
- f) Based on the system study report, considering the 220 KV double circuit line on the ACSR Moose conductor, the STU confirmed that 550 MW of power can be safely evacuated with the certification that in the past on various occasions, the Appellant has exported 450-500 MW power through these lines with no adverse impact on the system. Though the Appellant was continuing to provide schedule for 564 MW of power after excluding the auxiliary power

consumption, the net power export has been much less than the schedule of 564 MW on various occasions.

There has been reference made to various reports relating to selection of conductor specifications by the rival parties but we would not like to go into such details as the above works were to be carried out by the Appellant as per the specifications and requirements of the licensees/utilities

- g) There is no doubt in our mind regarding the bus bar of Budhipadar sub-station of the STU is the point of delivery of power, as per relevant provisions of the consolidated PPA.
  
- h) As regards the other issue contested by the Appellant stating the generating unit identification for supply of requisite power to the Respondent No. 2 on account of COD of 4 units at different time, we would not like to go into these issues as they pertain to the commercial arrangements agreed to between the parties from time to time, in order to facilitate contingent measures.

- i) Now the issue before us as alleged by the Appellant pertains to restricted power evacuation capacity resulting into partial loading affecting adversely the performance parameters such as Auxiliary Power Consumption and SHR.

The State Commission in its Impugned Order dated 12.06.2013 accepted the transmission constraint as alleged by the Appellant and stated that since the transmission planning programme of OPTCL for evacuation of power from upcoming IPPs which is under process, the Respondent No. 2/OPTCL may approach the Commission for suitable amendment of the Clause in the consolidated PPA, if necessary after finalization of the same. Till then, the present practice of evacuation from the power station of Appellant will continue.

- j) The State Commission in its Impugned Order accepted that due to transmission constraint, the Appellant has not been able to generate at full capacity and to inject the state full quota of power to the State

Transmission system and determined the auxiliary power consumption based on the existing transmission capability.

- k) In light of the above, the transmission constraint from the bus bar of the generating station upto the Budhipadar sub-station of the OPTCL has been accepted by the State Commission in its Impugned Order after going through the relevant data furnished by the parties and the same has been reaffirmed by the Tribunal's order dated 28.03.2014.
- l) We do not have any doubt that at the time of passing of Impugned Order, the State Commission would have gone into all the requisite details on the transmission capacity and the prevailing constraints in evacuation of power form Unit-II of the generating station.
- m) We have also observed that the State Commission's earlier order dated 30.03.2010 took into account the OPTCL's confirmation that considering the upstream evacuation condition beyond its Budhipadar Grid, about 250 to 350 MW power maximum can be drawn up from the first unit of the Appellant.
- n) Since the term of transmission capacity is a dynamic function, one can determine it only in real time situation at a given point of time. In its Impugned Order dated 12.06.2013, the State Commission had



ascertained the transmission scenario in real time situation and considered the transmission constraint for this issue. There could have been instances when in few time clocks of 15 minutes each when there have been relatively higher quantum of evacuation. The transmission line in question might cater to higher load at some instances but the point which we have to see for our consideration is what quantum of power could be transmitted in the sustainable mode on continuous basis. In our opinion, the State Commission is in a better position to ascertain the grid constraints keeping in view the requisite data of the State Load Despatch Centre on this issue in question.

- o) After accepting the State Commission's considered view of 400 MW of power transmission in sustainable mode for the transmission line in question for that specific period, the auxiliary power consumption as well as Station Heat Rate (on technical consideration) as considered by the State Commission in its Impugned Order would stand justified. Hence, we would not like to interfere with the State Commission's finding in this regard in its Impugned Order.
- p) Therefore, the second issue on the operating parameters seeking upward revision by the Appellant as discussed above arisen due to

the alleged transmission constraints is also decided against the Appellant.

In light of the above conclusions, both the issues formulated by us as above emanating from the Appeal are decided against the Appellant.

**ORDER**

Since the issues have been decided against the Appellant, the present Appeal is hereby dismissed and the Impugned Order dated 12.06.2013 passed by the State Commission is hereby re-affirmed.

No order as to costs.

Pronounced in the Open Court on this **10<sup>th</sup> day of May, 2016.**

**(I.J. Kapoor)**  
**Technical Member**

**(Justice Surendra Kumar)**  
**Judicial Member**

√  
**REPORTABLE/NON-REPORTABLE**  
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