Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 24 of 2011

Dated: 18th October, 2012

Present: HON'BLE MR. JUSTICE KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

IN THE MATTER OF:

In the matter of:
Orissa Power Transmission Corporation Limited
Janpath, Bhubaneswar, Orissa .... Appellant

Versus

1. **Orissa Electricity Regulatory Commission .... Respondent(s)**
   Bidyut Niyamak Bhawan, Unit-VIII
   Bhubaneswar -751012, Orissa

2. **Western Electricity Supply Company of Orissa Limited**
   Regd. Office – Plot No.N/22, IRC Village, Nayapalli
   Bhubaneswar – 751015, Orissa

3. **North Eastern Electricity Supply Company of Orissa Ltd.**
   Regd. Office Plot No.N/22, IRC Village
   Nayapalli
   Bhubaneswar – 751015, Orissa

4. **Southern Electricity Supply Company of Orissa Ltd.**
   Regd. Office Plot No.N/22, IRC Village
   Nayapalli
   Bhubaneswar – 751015, Orissa

5. **Central Electricity Supply Utility of Orissa (CESU)**
   Regd. Office – 2nd Floor, IDCO Tower
   Janpath
   Bhubaneswar – 751 022, Orissa

Counsel for the Appellant(s): **Mr. R.K. Mehta**
Mr. Antaryami Upadhyay
Mr. David A.

Counsel for the Respondent(s): **Mr. Rutwik Panda for R-1**

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant, Orissa Power Transmission Corporation Limited (OPTCL) is a wholly owned company of the Government of Orissa and a transmission licensee. Orissa Electricity Regulatory Commission is the first Respondent. Respondent 2 to 5 are the distribution licensees in the state of Orissa.

2. This Appeal has been filed by the Appellant against the order dated 19.07.2010 passed by the Orissa Electricity Regulatory Commission ("State Commission") approving Business Plan of the Appellant for the 5-year period from 2008-09 to 2012-13 setting out certain financial parameters essential for determination of Annual Revenue Requirement and transmission tariff of the Appellant for the control period between 2008-09 and 2012-13.

3. The learned Counsel for the Appellant has submitted that the said Principles set out in the impugned Order have been followed by the State Commission in the Tariff Order for FY 2008-09 and FY 2009-10 as well as for the FY 2010-11; the Appellant has already challenged the Tariff orders for FY 2009-10 and FY 2010-11 by way of Appeals before this Tribunal being Appeal No. 90 of 2009 and Appeal No. 110 of 2010 and that the same principles are likely to be followed by the State

Commission for the remaining period of the Business Plan i.e FY 2011-12 and FY2012-13.

4. The Appellant has further submitted as follows:

"In case the Financial Parameters laid down in the impugned Order are followed while determining Annual Revenue Requirement and Transmission Tariff for FY 2011-12 and FY 2012-13, the Annual Revenue Requirement of the Appellant will not be adequately met and lack of sufficient funds will adversely affect the functioning of the Appellant. It will also not be possible for the Appellant to comply with the various directions issued by the State Commission for improvement of the Transmission System. The Appellant would be left with a huge gap in the ARR for FY 2011-12 as well as FY 2012-13 which is required to be filled in order to meet the actual costs of the Appellant. The in-principle disallowance by the State Commission under various heads is contrary to the principles laid down by this Tribunal in several judgments."

5. It is noticed that the Appellant has challenged the in-principle disallowance under the following heads:

i) Repair and Maintenance (R&M) Expenses;
ii) Interest on Short Term Loan/Working Capital;
iii) Administration & General Expenses;
iv) Interest on Loans;
v) Other Income/ Miscellaneous Receipts

6. It is noticed that this Tribunal has delivered its judgments in Appeal no. 90 of 2009 on 11th April 2012 and in Appeal no. 110 of 2010 on 19th April 2012. We shall deal with each of the issues listed above taking into account the findings of this Tribunal in these Appeals.

7. The first issue is related to disallowance on Repair and Maintenance Expenditure.

8. The learned Counsel for the Appellant made the following submissions

i. The State Commission has erred in holding that it would review the pattern of spending during the current financial year of 2010-11 which would set the tone of the capability of the Appellant to spend on R&M expenses for the balance years of the control period of 2011-12 and 2012-13.

ii. The inability to spend the amount allocated in the previous year cannot be the basis for disallowing the amount required towards R&M Expenses for the next year. This principle has been accepted by the Hon'ble Tribunal in the judgment dated 08.10.2010 in Appeal No. 55 to 57 of 2007 wherein this tribunal has categorically held that *"the mere fact that OPTCL (R-2) was unable to utilize the amount allocated towards Repair & Maintenance Charges in the Previous Year cannot be a ground to deny the Repair & Maintenance Charges to the OPTCL on the basis of norms for the subsequent year"*.

iii. In case sufficient funds required by the Appellant towards R&M expenses are not available, the Appellant will not be able to carry out the directions of State Commission for improvement and maintenance of the Transmission System. Lack of sufficient funds towards R&M Expenses would adversely affect the functioning of the Appellant resulting in disruption of power supply to the State.

9. In reply to above contentions of the Appellant, the State Commission has submitted that it has categorically observed in the Impugned Order that the Appellant has been incapable of spending entire amount approved by the State Commission for R&M and actual expenditure falls

substantially short of the approved amount year after year for the last 11 years.

10. We find from the records available with us that the Appellant could not utilise the entire amount approved by the State Commission towards R&M expenses for R&M in its ARR. In fact, the actual expenditure has been far less than the approved amount during last 12 years as shown in table below:

Sl. No.	**Year**	**Approved**	**Actual**	% Utilization
1	1999-00	19.84	9.51	47.93%
2	2000-01	14.67	9.90	67.48%
3	2001-02	15.99	8.81	55.10%
4	2002-03	17.43	9.35	53.64%
5	2003-04	13.35	7.03	52.66%
6	2004-05	14.07	4.59	32.62%
7	2005-06	14.80	6.94	46.89%
8	2006-07	36.00	11.31	31.42%
9	2007-08	47.00	16.52	35.15%
10	2008-09	54.00	15.66	29.00%
11	2009-10	47.00	25.14	53.49%
12	2010-11	60.00	28.32	47.20%
Total	**1999-2011**	**247.15**	**99.62**	**40.31%**

11. It is clear from the above table that on an average, the Appellant could utilise only around 40% of the amount approved by the State Commission. It is true that the Tribunal in Appeal no. 55 to 57 of 2007 held that the non-utilization of amount in the previous year cannot be the ground to deny funds for the current year. However, if the performance of the utility does not improve year after year and the utility fails to utilise the approved amount, further approving funds which the utility cannot utilise for the purpose it has been approved, would amount to avoidable increase in retail tariff and extra burden on consumers. It may be noted that term used in the findings of this Tribunal in its judgment in appeal no. 55 to 57 of 2007 is *'the previous year'* and not previous years.

12. Let us now examine the findings of the Tribunal in its judgments in Appeals no. 90 of 2009 and 110 of 2010. The findings of Tribunal in Appeal no. 90 of 2009 on the issue reads as under:

> *"4.3* ***Repair and Maintenance (R&M) Expenses:***
>
> *The Appellant had claimed a sum of Rs.123.74 crores towards R&M expenses against which the State Commission had allowed Rs.47 crores. As per the accounts audited by the CAG the actual R&M expenses are Rs.26.14 crores which has since been trued up by the State Commission. Thus the claim of the Appellant under this head does not survive." {Emphasis added}*

13. The findings of the Tribunal in Appeal no. 110 of 2010 on the issue are reproduced below:

> *"8. The third issue is regarding Repair & Maintenance expenses.*
>
> *8.1 According to the Appellant, the State Commission should have allowed Rs.98.14 crores for Repair and Maintenance expenses as per its claim.*
>
> *8.2 The State Commission in its reply has stated that the Repair and Maintenance of Rs.60 crores was allowed keeping in view the past trends of actual expenditure under this head. Further the actual Repair and Maintenance expenditure for the FY 2010-11 as per the audited accounts was only Rs.28.32 crores, which is much less than that approved by the State Commission.*
>
> *8.3 In view of the above submissions of the State Commission we find that there is no substance in the contention of the Appellant and the same is rejected." {Emphasis added}*

14. In view of above we hold that there is no merit in the contentions of the Appellant on the 1st issue and the same is rejected accordingly.

15. The next issue is related to disallowance of interest of short term loan/working capital.

16. The very same issue had been raised by the Appellant in Appeal no 90 of 2009 and the same had been rejected by this Tribunal. The relevant portion of the Tribunal's judgment in Appeal no. 90 of 2009 is quoted below:

> *"10.3 The State Commission has also noticed in the impugned order that it was not justified to allow the interest on Working Capital since the transmission charges were the first charge being recovered from the bulk supply payment bill of the distribution licensees. Further, the rebate allowed to Appellant has been considered as a part of the revenue requirement for the FY 2009-10.*
>
> *10.4 In view of the above submission of the Respondents distribution licensees and in the light of the findings of the State Commission, we do not find any reason to interfere with the order of the State Commission regarding interest on Working Capital. Accordingly, the claim of the Appellant is rejected."{Emphasis added}*

17. In view of the above findings of the Tribunal in Appeal no. 90 of 2009 reproduced above, we find that there is no merit in the claim of the Appellant and so the claim on this issue is accordingly rejected.

18. The third issue for consideration is related to Administration and General Expenses. This issue also had been raised by the Appellant in Appeal no 110 of 2010 against tariff order for the year 2010 – 11 and the same had been rejected by this Tribunal in its judgment dated 19th April 2012. The relevant portion of the Tribunal's judgment reads as under:

> *"9.2 According to the State Commission, the Administrative and General expenses are controllable in nature and, therefore, the Commission was justified to factors in inflation (WPI) over the base figure of the previous year and approve an amount of Rs.15.14 crores for the FY 2010-11. The base figure adopted by the State Commission was the approved figure for the previous year as the detailed break up of the audited data was not available.*
>
> *9.3 According to the Ld. Counsel for the Respondent nos. 2, 3 and 4, in the absence of the audited accounts for the FY 2008-09, the*

State Commission correctly allowed an escalation of 5.5% (WPI) over the approved account of Rs.14.35 crores for the FY 2009-10. Further, the Appellant has always failed to submit the audited accounts in time before the finalization of the ARR.

9.4 In view of the above, we do not find any infirmity in the approach of the State Commission in deciding the Administrative and General expenses in the impugned order. However, the State Commission shall consider the actual Administrative and General expenses as per the audited accounts during the true up for the FY 2010-11."

19. The approach taken by the State Commission for determination of A&G expenses for FY 2010-11 has been set out in the impugned Order which has been upheld by this Tribunal. The claim of the Appellant is accordingly rejected.

20. Fourth issue for consideration is related to disallowance of Interest on Loans.

21. The Appellant has submitted that the State Commission has disallowed the interest in respect of the new loans proposed to be availed by the Appellant for new infrastructure projects during the Financial Year without appreciating that the ARR / Transmission Tariff applications are filed in November and in the absence of the proposed loan for new infrastructure projects, the Appellant will not be able to undertake the said projects and consequently the functioning of the Appellant would be adversely affected.

22. The above contention of the Appellant is misconceived and is liable to be rejected on the ground that the interest on loan is not revenue expenditure but is of capital expenditure in nature. Accordingly, interest on loan availed for capital works is capitalised as Interest during Construction (IDC) and is added in the capital cost of the asset when the asset is put to use. In this connection it is important to examine the

observations of the State Commission in the impugned Order dated 19.7.2010 which is reproduced below:

> *"The interest on old existing loans is allowed as pass through in the ARR as per terms and conditions stipulated in the loan document. As regards the new loans to be availed during the control period of Business Plan the Commission allows the same based on the projects approved by the Commission and actual loan availed for those period (sic projects)."*

23. The State Commission in its reply has categorically stated that the actual interest liability of the Appellant shall be passed in the ARR. The State Commission has further submitted that it has never debarred the Appellant to take new loans from financial institutions for its new infrastructure projects, as approved by the Commission.

24. In view of the clarification furnished by the State Commission, we do not find any reason to interfere with the order of the State Commission regarding this issue and accordingly the issue is decided against the Appellant.

25. The fifth and last issue is regarding Miscellaneous Receipts. The learned Counsel for the Appellant has contended that the state Commission was not justified in holding that while determining its ARR it would take into consideration the Receipts towards wheeling, supervision and other receipts on the basis of latest cash flow statements and would pro-rate the same to arrive at annualized amount against Miscellaneous Receipts; the amount reflected in the cash flow statement is a matter of truing up and cannot be made the basis for estimating the Miscellaneous Receipts as the future collection of Inter State Wheeling Charges, Supervision Charges and other Miscellaneous Income is not certain; the same should, therefore, be excluded from the Miscellaneous Receipts;

and that the Truing up exercise can be done after the Accounts are Audited by CAG.

26. The above contention of the Appellant is again misconceived and is liable to be rejected for the reason that the Annual Revenue Requirement of any licensee is determined by making pro-rata projections of various parameters based on certain predefined assumptions. This practice of pro-rata projections is recognised and is being followed by all the Commissions.

27. This issue was also raised by the Appellant in Appeal no. 110 of 2010 filed against the tariff order for the year 2010-11 passed by the Commission. The claim of the Appellant was rejected by this Tribunal in its judgment dated 19th April 2010 the relevant portion of which is quoted as under:

> *"14.1 According to the Ld. Counsel for the Appellant, the State Commission had erroneously overestimated the Miscellaneous Receipts and the same needs to be corrected based on the audited accounts.*
>
> *14.2 According to the State Commission the Miscellaneous Receipts were estimated based on the latest cash flow statement submitted by the Appellant for the FY 2009-10 upto November, 2009 which was prorated for the whole year and considering the transmission charges towards wheeling to CGPs for the energy of 310 MU approved for the FY 2009-10.*
>
> *14.3 According to Ld. Counsel for the Respondents 2, 3 and 4, the State Commission has correctly estimated the Miscellaneous Receipts. Further, the distribution licensees have drawn more quantity of power than approved by the State Commission and the Appellant would have earned additional revenue on this account.*
>
> *14.4 We have carefully examined the findings of the State Commission given in paragraph 340 of the impugned order. We do not find any infirmity in the methodology adopted by the State Commission. The Ld. Counsel for the Appellant has also not indicated how the Miscellaneous Receipts should have been*

estimated. However, the actual Miscellaneous Receipts shall be considered by the State Commission while truing up the accounts for the FY 2010-11."

28. The methodology adopted by the State Commission in the tariff order for 2009-10 impugned in the Appeal no. 110 of 2010 is same as enunciated in the impugned Order of the State Commission dated 19.7.2010. Thus the claim of the Appellant on this issue is also rejected.

29. Summary of our Findings

i. It is noted that on an average the Appellant could utilise only around 40% of the amount approved by the State Commission for Repair and Maintenance. We are in full agreement with the Tribunal's finding in Appeal no. 55 to 57 of 2007 that the non-utilization of amount in the previous year cannot be the ground to deny funds for the current year. However, if the performance of the utility does not improve year after year and the utility fails to utilise the approved amount, further providing the funds which the utility cannot utilise for the purpose it has been approved, would amount to avoidable increase in retail tariff and extra burden on consumers.

ii. In view of the findings of the Tribunal in Appeal no. 90 of 2009 rejecting the claim of the Appellant in regard to interest on working capital, we find no merit in the claim of the Appellant and the same is accordingly rejected.

iii. The approach adopted by the State Commission for determination of A&G expenses for FY 2009-10 has been set out in the impugned Order which has been upheld by this

Tribunal in its judgment in Appeal no 90 of 2009. The claim of the Appellant is accordingly rejected.

iv. **The State Commission in its reply has categorically stated that the actual interest liability of the Appellant shall be passed in the ARR. The State Commission has further submitted that it has never debarred the Appellant to take new loans from financial institutions for its new infrastructure projects, as approved by the Commission. In view of the clarification furnished by the State Commission, we do not find any reason to interfere with the order of the State Commission and accordingly the issue is decided against the Appellant.**

v. **The contention of the Appellant regarding Miscellaneous Receipts is misconceived and is liable to be dismissed on the ground that the Annual Revenue Requirement of any licensee is determined by making pro-rata projections of various parameters based on certain predefined assumptions. This practice of pro-rata projections is recognised and is being followed by all the Commissions.**

30. At this stage we are constrained to point out that the present Appeal is an outcome of non-availability of proper Tariff Regulations specifying the terms and conditions for determination of tariff for transmission and generation. In terms of Section 61 of the Electricity Act 2003, every Commission is mandated to frame tariff regulations specifying terms and conditions for determination of tariff. Section 61 of the 2003 Act is set out as under:

61. Tariff regulations.—*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—*

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi-year tariff principles;

(g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

……"

31. Bare reading of Section 61 read with Section 181(zd) of the Act would make it clear that it is obligatory for the Commissions to specify the terms and conditions for determination of tariff.

32. However, we notice that the present Tariff Regulations, 2004 of the State Commission lays down only general principles as per Section 61 of the Act for determination of transmission tariff without specifying the terms and conditions for determination of transmission tariff.

33. The Hon'able Supreme Court in PTC Vs CERC (2010) 4 SCC 603 has held that this Tribunal has powers under Section 121 of the Act to direct the Commission to perform its statutory function of framing the

Regulations. The relevant portion of Hon'ble Supreme Court's observation in this case is quoted below:

> *"…It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by Appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify Grid Code having regard to Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-station and generating plants. Basically, a grid is a network. Section 2(33) defines "grid code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "grid standards" to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip.* ***In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73.*** *One can multiply these illustrations which exercise we do not wish to undertake."{Emphasis added}*

34. This Tribunal in para 15 of its judgment in Appeal no. 110 of 2010 delivered on 19.4.2012 had directed the Commission as under:

> *"15. We notice that the present Tariff Regulations, 2004 of the State Commission lays down only general principles as per Section 61 of the Act for determination or transmission tariff. We, therefore, direct the State Commission to take immediate steps to formulate specific Tariff Regulations for transmission of electricity, if not done so far."*

35. Accordingly, we expect that, in compliance with the above directions of this Tribunal, the Commission must have taken appropriate action to frame and notify the specific Tariff Regulations for transmission of electricity. Therefore, we direct the Commission to report the compliance of above direction by 1st January, 2013.

36. In the light of our above findings, we do not find any reason to interfere with the impugned order of the State Commission. The Appeal is accordingly dismissed being devoid of merits. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice Karpaga Vinayagam)
Chairperson

Dated: 18th October, 2012

REPORTABLE/~~NOT REPORTABLE~~