

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTION, NEW DELHI**

**Appeal No. 71/06 & IA No. 89/06
Appeal No. 72/06 & IA No. 90/06 and
Appeal No. 7306 & IA No. 91/06**

Dated this 13th of December 2006

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

Western Electricity Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar

... Appellant
in appeal No. 71 of 2006

Southern Electricity Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar

... Appellant
in appeal No. 72 of 2006

North Eastern Electricity Supply Co. of Orissa Ltd.
123-A, Mancheshwar Industrial Estate,
Bhubaneswar

... Appellant
in appeal No.73 of 2006

Versus

1. The Orissa Power Transmission Corpn. Ltd.
Janpath, At/Po: Bhubaneswar-22
2. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit VII, Bhubaneswar,
Distt: Khurda, Orissa.
3. Department of Energy, Govt. of Orissa.

4. Mr. Jaidev Misra, N4/98, Nayapalli,
Bhubaneswar.
5. Utkal Chamber of Commerce & Industry
N-6, IRC Village Nayapalli,
Bhubaneswar.
6. Orissa Consumer's Association & FOCO,
Biswanath Lane, Cuttak.
7. Confederation of India Industry,
8, Forest Park, Bhubaneswar.
8. M/s. NESCO, Janugang, Balasore
9. M/s. Jindal Stainless Ltd.,
50,HIG,Jaidev Vihar, Bhubaneswar
10. State Public Interest Protection Council,
Talengabazar, Cuttak.
11. Mr. R.P. Mohapatra,
775, Jaidev Vihar, Bhubaneswar
12. National Aluminum Company Ltd.,
Bhubaneswar.

...Respondents 1 to 12
In all the three appeals

Counsel for the appellants : Mr. S. Ganesh, Sr. Advocate
Mr. Sayed Naqvi, Advocate

Counsel for the respondents : Suman Kukrety, Advocate for
first Resp.
Mr. M.G. Ramachandran &
Mr. Anand K. Ganeshan,
Advocate for OERC

Mr. R.K. Mehta, Sr. Advocate &
Mr. S.S. Misra & Mr. N.K.Niraj,
Advocate for Respondent No. 1
Mr. R.M. Patnaik, Advocate for
Respondent Nos. 12,14 & 15
Mr. Sanjey Sen for Govt. of
Orissa.

J U D G M E N T

1. Appeal No. 71 of 2006 has been preferred by the Western Electricity Supply Company of Orissa Ltd., a distribution licensee in the North/Western part of the State of Orissa, challenging the orders passed by the Orissa Electricity Regulatory Commission (OERC for brevity) on 23.3.2006 in case No. 43 of 2005. The appellant seeks to set aside the orders dated 23.3.2006 passed by the OERC (respondent No.2) fixing the transmission tariff of the first respondent Orissa Power Transmission Corporation Ltd.; for a direction, directing determination of transmission tariff by adopting uniform principles, determining appropriate phasing off advance against depreciation and appropriate transmission losses and computing revenue realization on the basis of data submitted pertaining to transmission assets.

2. Appeal No. 72 of 2006 has been preferred by the Southern Electricity Supply Company of Orissa Ltd. challenging the very same orders relating to transmission tariff and seeks for identical reliefs as in Appeal No. 71 of 2006.
3. In Appeal No. 73 of 2006, the appellant North Eastern Electricity Supply Company of Orissa Ltd. also challenged the very same order of OERC dated 23.3.2006 in case No. 43 of 2005 approving ARR and transmission tariff of the first respondent for F.Y. 2006-07 and prays for identical reliefs as in Appeal No. 71 of 2006.
4. As these three appeals, arise out of the very same order passed by the second respondent, Orissa Electricity Regulatory Commission, these appeals are consolidated and taken up together for hearing.
5. Common arguments were advanced by the same learned counsel appearing for the appellant in all the three appeals

and so also by the same set of learned counsel appearing for the contesting respondents. The appellants in all the three appeals are distribution licensees, licensed to distribute power within their respective distribution areas by the second respondent Commission. Though they have common grievance with respect to the transmission tariff as determined by the second respondent Regulatory Commission, they have preferred independent appeals.

6. Heard Mr. S. Ganesh, Sr. advocate appearing along with Mr.S.Naqvi advocate for the appellant in the three appeals, Mr.R.K. Mehta, advocate for the first respondent, Orissa Power Transmission Corporation Ltd., Mr. M.G. Ramachandran, advocate for the second respondent, OERC, Mr. Sanjay Sen, advocate for Government of Orissa, Mr. S.S. Misra, advocate for 11th respondent, Mr. Sandeep Mahapatra, advocate for Dutt & Mennon Advocates, Mr. A.K. Gupta, advocate for respondent No. 12 and Mr. R. Patnaik and Mr.K.N.Tripathi advocates appearing for other respondents.

7. The tariff payable to Orissa Power Transmission Corporation Ltd. (hereinafter referred to as OPTCL for brevity) in respect of transmission of electricity, as determined by the second respondent regulatory commission, is for the period commencing from 1st March, 2006. The appellants in each one of the appeals contended that the approval of ARR and determination of tariff by the Regulatory Commission is contrary to the National Tariff Policy dated 6th January, 2006, which provides that depreciation shall be at the rate notified for the purpose of tariff as well as accounting and that there should be no advance against depreciation. The regulatory commission has illegally permitted advance against depreciation amounting to Rs. 48.09 Crores, contrary to National Tariff Policy which policy is also binding on all the respondents in terms of Section 61 of The Electricity Act 2003.
8. Secondly, it is contended that the Regulatory Commission has allowed repair and maintenance costs (R&M expenses) without reference to past trends as reflected in the earlier tariff and without advertent and considering the objections raised by the

appellants during tariff hearings. It is pointed out that Rs. 36 Crores allowed towards R&M expenses is exorbitant while R&M expenses for F.Y. 2004-05 & 2005-06 were Rs. 7.03 Crores and Rs. 4.59 Crores respectively. According to the appellant Rs. 5.16 Crores alone should have been allowed by the Regulatory Commission towards R&M expenses by allowing 6% upward revision over the actual expenses incurred during earlier year.

9. Thirdly, It is contended that the Regulatory Commission has permitted Rs. 12.59 Crores towards contingency reserves to be passed on through tariff, while there is no provision in the tariff regulations framed by OERC for pass-through of contingency reserves. It is further contended that in terms of Section 61 (1)(a) of The Electricity Act 2003, which prescribes that the commission shall be guided by the National Electricity Policy and Tariff Policy. No regulations pertaining to contingency expenses has been framed or specified by the Regulatory Commission and therefore allowance towards contingency by the Regulator is not in accordance with law.

10. Fourthly, it is contended that the income earned by inter-state wheeling, which was in the order of Rs. 11.75 Crores for F.Y. 2004-05 should have been taken into consideration with a reasonable increase of transmission units and the same should have been fixed at Rs. 15 Crores for F.Y. 2006-07, as the amount earned by wheeling of power being on interstate sales.

11. Lastly, it is contended that the transmission tariff deserves to be reduced atleast by 7 paisa per unit in terms of the regulations. It is contended that the fixation of transmission tariff is exorbitant, based on a misconception and misdirection and the same deserves to be reduced considerably, which would be in the interest of the appellant Discoms as well as the consumer public. It is also pointed out that the transmission loss should have been fixed at 3.58% as against 4% fixed by Regulatory Commission. The cumulative effect of the above contentions, according to the appellants, would result in considerable reduction of transmission tariff and the

same would enable the appellants sustain themselves in the distribution of power within their respective licensed area.

12. On behalf of the first respondent, OPTCL, it is contended that no interference is called for with respect to the approval of revenue requirement and transmission tariff determination ordered by the Regulatory Commission. It is contended that the depreciation allowed by Regulatory Commission is too low, and it is not even 1/4th of the total depreciation, claimed by OPTCL. The rate of depreciation allowed by the Regulatory Commission is in accordance with the regulations framed by the Regulatory Commission. It is further contended that there is no illegality in allowing advance against depreciation, when allowable depreciation is not sufficient to cover up loan repayment liability.

13. Nextly, it is contended that there is no illegality in allowing depreciation in advance nor there is a contravention of Section 61 and 62 of The Electricity Act 2003, nor it is violative of Regulation 56 (2) (i) (b) of the CERC (terms and conditions of

tariff) Regulations 2004. The allowance of Rs. 43.51 Crores towards advance against depreciation is not liable to be interfered. It is contended that the provisions of National Tariff Policy is only a guideline and not mandatory in nature. Section 61 (a) of The Electricity Act 2003 also enables the Central Regulatory Commission to specify the terms and conditions for determination of tariff to transmission licensees, which shall be undertaken only in terms of statutory provisions.

14. It is contended by the first respondent that no interference is called for with respect to repair and maintenance expenses allowed by the Regulatory Commission at Rs. 36.00 Crores as against the claim of Rs. 116.65 Crores, advanced by the first respondent. There is no justification to reduce the repair and maintenance expenses and the same should have been allowed as claimed by the first respondent Transmission Corporation. It is also contended that provision of contingency reserve is essential for a transmission licensee, a state transmission utility, with a transmission network of the length

of 460.50 Ckt. K.M. as detailed by the contesting first respondent. It is also pointed out that Orissa, a state which is highly prone to natural calamity like cyclone, flood etc., the provisions of contingency reserves is a must and no interference is called for in this respect.

15. It is further pointed out that in the absence of principles and methodology or other statutory requirements, the commission should have acted strictly in terms of Section 61 (a) of the Act. The inter-state wheeling income earned has also been taken into consideration and there is neither merit nor substance in the various contentions advanced by the appellant in each one of the three appeals. The transmission loss of 4.49% allowed is not liable to be interfered and the contention that transmission loss should have been fixed at 3.5%, is without substance.

16. Mr. M.G. Ramachandran learned counsel appearing for OERC contended that the Commission has rightly allowed advance against depreciation as provided by the Tariff Regulations

and there could be advance against depreciation and it is not liable to be interfered and more so when the Regulations in force provide and are binding on the parties. As regards repair and maintenance cost, it is contended that as against a claim of Rs. 116.65 Crores the commission has allowed only a minimum Rs. 36 Crores, and no interference is called for in this respect. The surplus or deficit always could be ascertained while truing up and subject to prudent check. As regards the contingency reserves, the tariff Regulation, in no way prohibits and till Regulations are framed, the commission is well founded in allowing contingency reserves, even though there is no regulation. It is pointed out by Mr. M.G. Ramachandran learned counsel appearing on behalf of the Regulatory Commission that Approval of ARR being an estimate, there could be a revision of tariff and adjustment could be ordered at the end of the year. The other learned counsel appearing for other respondents supported Mr. Mehta and Mr.M.G.Ramachandaran.

17. On a consideration of the above common contentions, following points are framed for consideration in this appeal:

- (A) Whether advance against depreciation is permissible while approving ARR and allowed to pass through in the tariff or liable to be interfered?
- (B) Whether the allowance of Rs. 36.00 Crores towards R&M expenses deserves to be sustained or liable to be interfered?
- (C) Whether the contingency reserves provided for and approved by the Regulatory Commission is liable to be interfered?
- (D) The inter-state wheeling income earned by the Transmission Corporation is liable to be excluded or taken into consideration for fixing ARR and in determining the transmission tariff?
- (E) Whether the transmission loss as approved by the second respondent is liable to be interfered?
- (F) Whether the transmission tariff fixed by OERC is liable to be interfered in this appeal?

(G) To what relief, if any?

18. Before taking up the above points framed for consideration, it is essential to refer to the statutory provisions of The Electricity Act 2003 under which Annual Revenue Requirement of a transmission licensee and determination of transmission tariff are undertaken. Section 61 of The Electricity Act 2003 provides that the appropriate commission subject to the provisions of the said Act specify the terms and conditions for the determination of “transmission tariff”. In determining transmission tariff the commission shall be guided by, among others; (a) The principles and methodology specified by the Central Commission for determination of the tariff applicable to transmission licensees; (b) the transmission of electricity is to be 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) National Electricity Policy and Tariff

policy etc. Section 64 of The Electricity Act 2003 prescribes the procedure to be adopted before a tariff is fixed. In terms of Section 86 (i) (a) of The Electricity Act 2003, the State Commission is required to determine the tariff for transmission, wheeling, supply etc. Now let us take up the above points for consideration.

19. There is no doubt that the first respondent is a transmission licensee, as defined in Section 2 (73) of The Electricity Act 2003 and by virtue of the deeming fifth proviso to Section 14, read with the Transfer Notification dated 9.6.2005 issued by the government of Orissa. The first respondent has been notified as State Transmission Utility. The first respondent, Transmission Utility came to be constituted and became operational by virtue of the Notification dated 9.6.2005 issued by Government of Orissa under The Orissa Electricity Reform (Transfer of Transmission and related activities) Scheme 2005, a statutory Scheme notified under Section 39, 131, 133 and 134 or The Electricity Act 2003 read with Section 23 and 24 of The Orissa Electricity Reform Act 1995. In terms of clause 4

of the Scheme the first respondent Transmission Undertaking came into being and assets were transferred as detailed in Schedule-A of the said Notification including liabilities, personnel and proceeding concerning transmission. As on 31.3.2005, as seen from the said scheme the provisional balance sheet of the first respondent OPTCL has already been incorporated in the said scheme. In the balance sheet, fixed assets, loans and advances, loan funds, current liabilities and provisions etc. were notified. Based upon the transfer scheme, the assets as set out in schedule A and assets and liabilities as seen in part-II of the said scheme, stand vested or allocated or taken over by the first respondent OPTCL.

20. The first respondent moved the second respondent Regulatory Commission for approval of its Annual Revenue Requirement (ARR) and determination of its transmission tariff for the year 2006-07. The first respondent projected revenue requirement of Rs. 407.34 Crores at 25 Paise per unit which includes energy sale to CPP, wheeling of IPP power, wheeling of NALCO power and the sale of power to the four Discoms in the state

of Orissa. After due Notification, hearing the objectors and the transmission licensees, the second respondent Regulatory Commission while applying an integrated approach, determined the transmission tariff to be effective from 1.4.2006 and to continue it until further determination @ 22 Paisa per unit of energy transmitted, which shall be payable by the Discoms and CPPs. This determination is the subject matter of present challenge before us.

21. The Commission, on a consideration, allowed certain claims made by the Transmission Undertaking and disallowed certain of its claims and passed the tariff order, which is impugned in this appeal. The tariff determination by the Commission is being challenged. However, we are of the considered view the entire approach of the commission cannot be branded as illegal excepting for a limited extent. The commission has taken into consideration of not only relevant materials in determining the transmission tariff, but also matters which it ought not to have been taken into consideration in such exercise.

22. Taking up point A, the Commission allowed advance against depreciation and this is being challenged. It is contended by the counsel for the appellant that the amount allowed as advances against depreciation is illegal and liable to interfered, on the sole reasoning that such an allowance runs counter to the National Tariff Policy published by the Central Government on 16.1.2006 under section 3 of The Electricity Act 2003. We have already referred Section 61 of The Electricity Act 2003 in this respect. It is a fact that the National Tariff Policy prescribes that advances against depreciation is not to be permitted. The National Tariff Policy was published on 6.1.2006. Factually the Regulatory Commission the second respondent herein held its sitting on 6.2.2006, with respect to approval of ARR and determination of transmission tariff. The tariff order came to be passed by the second respondent Regulatory Commission on 23.3.2006. In our considered view, the Commission ought to have taken into consideration of the National Tariff Policy and ought not have allowed advance against depreciation.

23. Mr. M.G. Ramachandran, learned counsel appearing for Regulatory Commission contended that the time gap between the publication of the tariff policy and the determination of transmission tariff is so close and therefore the second respondent commission cannot be found faulty. Though this contention is attractive, the commission had more than two months time and it is not the stand of the respondent that the commission was not aware of the tariff policy published on 6.1.2006. The Regulatory Commission being responsible and highest specialist forum at the state level may not be justified in pleading ignorance of the National Tariff Policy. The Transmission Corporation, it is pointed out, has not even made a claim in this respect. We are of the considered view that the Regulatory Commission ought not to have allowed advance against depreciation and the order of the commission to this extent deserves to be interfered. In the circumstances, we set aside the allowance of advance against depreciation of the sum of Rs. 48.09 Crores. Point A is answered against the respondents and in favour of the appellant.

24. Taking up Point B, namely repair and maintenance cost, the commission has allowed on an estimated claim under this head at Rs. 36.00 Crores as against Rs. 14.08 allocated for previous year, while Rs. 4.59 Crores was allowed for F.Y. 2004-05 based on CERC norms. Though the actual expenditure incurred under this head was far below as seen from Table -12 of the tariff order. However, the Commission while taking note of the interruptions occurring in the EHT transmission system due to snapping of conductors, burning of jumpers, damage to transmission towers, failure of equipments at various sub-stations and on a overall consideration of the ground realities has allowed the said sum of Rs. 36.00 Crores. The Commission also took note of the fact that the first respondent hitherto is unable to spend the entire amount allowed/approved in the earlier tariff order and the actual amount spent was far less. However, we do not propose to set aside the entire amount allowed by the commission with respect to R&M expenses, as ultimately it is subject to prudent check during truing up exercise and the

commission may have to modify its tariff depending upon the actual expenses that may be incurred during the year in question. As per CERC norm, the amount allowable on the basis of area network is at 5.6% and it may not exceed Rs. 7.5 Crores. Taking a liberal view, we double the same and allow Rs. 15.00 Crores under this head. The commission shall also examine whether the entire amount allocated for R&M expenses has been spent on the earlier years and verify whether those amounts have been taken into consideration at the stage of truing up exercise. Point-B is answered against the respondent by reducing the R&M expenses from Rs. 36.00 Crores to Rs. 15.00 Crores for the tariff year in question.

25. Taking up Point C, contingency reserves is a must in all projects and the amount allocated under the head contingency reserves, if it remains unspent in the truing up exercise, it will be reverted. Though a reference is made to the National Tariff Policy in this respect and it is contended that no regulations have been framed and hence it is illegal to allow. However, we are of the considered view that there is no illegality in the

allocation under the head of contingency reserves. It is not a condition precedent to frame a regulation in this respect. In this respect Mr. M.G. Ramachandran learned counsel for the Regulatory Commission is well founded in placing reliance on the pronouncement of the Hon'ble Supreme Court in Uttar Pradesh State Electricity Board Vs. City Board Mussorie & others reported in 1985 2 SCC 16. However, we find that the commission has allocated Rs. 12.59 Crores towards contingency reserves. In our view it is on the higher side, we are not persuaded to interfere since allocation even though it is on higher side, and it is closer to R&M expenses. It is needless to add that the commission while undertaking trueing up exercise may undertake prudent check of the expenses incurred out of the contingency reserves and in case of surplus, the same shall be taken into consideration and the transmission tariff shall be re-fixed accordingly. Under this head during the last tariff year the claimant made a claim around Rs. 6.00 Crores, which was disallowed. Taking an overall view, we allow Rs. 5.00 Crores under this head and

disallow the remaining portion. This comes to one third of R&M expenses.

26. Taking up Point D, as regards the interstate wheeling income, the said income is liable to be included, but it has been taken into consideration as an income of the first respondent while approving ARR and determination of the transmission tariff. An amount of Rs. 5.00 Crores alone had been taken. It is too low, when compared to the amount earned during last year. The amount that has been estimated under this head by the Commission, for the whole years is less than the amount already earned by way of wheeling charges for the first half of the financial year. An amount of Rs. 17.50 Crores was approved under this head for the F.Y. 2005-06. Taking into consideration of the statement made, which figure is not controverted, we estimate the income from interstate wheeling and increase it to Rs. 17.50 Crores, which shall be subject to verification during truing up exercise. The estimated income under this head deserves to be increased to Rs. 17.50 Crores and there will be a modification of the revenue receipts under

the head interstate wheeling income. This point is answered in favour of the appellants.

27. As regards Point E, the transmission loss, taking into consideration of the amount allowed, it is again an estimate. Reduction of transmission losses by the first respondent should be resorted to by the first respondent, but the same could be finalized only at the stage of truing up exercise and therefore we leave it open, at this stage, while declining to interfere.

28. On Point F, since we have answered Point A in favour of the appellant, Points B, C, D partly in favour of appellants and we have issued directions with respect to Point E, we set aside the order of second respondent Regulatory Commission in Case No. 43 of 2005 passed on 23.3.2006 and we direct the second respondent Regulatory Commission to re-determine the transmission tariff within eight weeks from the date of communication of this judgment and give effect to our directions. We hasten to add that no other point was argued

and in other respects we confirm the order of the Commission. Till re-determination of tariff the appellants shall continue to pay the tariff as already determined by the OERC on 23.3.2006 but subject to ultimate orders and adjustment of payments as may be warranted.

These appeals are allowed in the above terms and the parties shall bear their respective costs. Consequently IA No. 89, 90 and 91 of 2006 are closed as having become infructuous.

Pronounced in the open court on this the 13th day of December, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member

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