

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 55, 56 & 57 of 2007**

**Dated 8<sup>th</sup> November, 2010**

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**Appeal No. 55 of 2007**

**In the matter of:**

**Western Electricity Supply Company  
of Orissa Ltd. (WESCO),  
123-A, Mancheswar Industrial Estate,  
Bhubaneswar** ... **Appellant**

**Versus**

- 1. Orissa Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar-751 012**
- 2. Orissa Power Transmission Corporation Ltd.  
(OPTCL),  
Janpath, At/PO Bhubaneswar-751 022**
- 3. State Public Interest Protection Council,  
Talengabazar, Cuttack, Orissa.**
- 4. Sambalpur District Consumer Federation,  
Balaji Mandir Bhawan,  
Khetrajpur, Sambalpur.**



**Appeal No. 56 of 2007**

**In the matter of:**

**Northeastern Electricity Supply Company  
of Orissa Ltd. (NESCO),  
123-A, Mancheswar Industrial Estate,  
Bhubaneswar**

**... Appellant**

**Versus**

- 1. Orissa Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar-751 012**
- 2. Orissa Power Transmission Corporation Ltd.  
(OPTCL),  
Janpath, At/PO Bhubaneswar-751 022**
- 3. State Public Interest Protection Council,  
Talengabazar, Cuttack, Orissa.**
- 4. Sambalpur District Consumer Federation,  
Balaji Mandir Bhawan,  
Khetrajpur, Sambalpur.**
- 5. Confederation of India Industry, (CII),  
8, Forest Park,  
Bhubaneswar.**
- 6. Shri R.P. Mahapatra,  
Plot No. 775 (Pt.), Lane-3,  
Jayadev Vihar, Bhubaneswar, Orissa**
- 7. KVK Nilanchal Power Private Limited,  
Jayadev Vihar,  
Bhubaneswar**

8. **National Aluminium Company Ltd.  
(NALCO)  
Nayapati,  
Bhubaneswar.**
9. **Nava Bharat Ventures Limited,  
Kharagprasad, Dhenkal.**
10. **M/s Confederation of Captive Power Plant  
(CCGPO), Bomikhal, Rasulgarh,  
Bhubaneswar.**
11. **Indian Metals & Ferro Alloys Ltd (IMFA,  
Rasulgarh,  
Bhubaneswar. ... Respondent(s)**

**Counsel for Appellant**                      **Mr. Buddy A. Ranganadhan**  
**Mr. Hasan Murtaza**  
**Counsel for Respondent(s)**              **Mr. R.K. Mehta,**  
**Mr. Antaryani Upadhyan,**  
**Mr. Lakhi Singh for**  
**GRIDCO/OPTCL**  
**Mr. Rutwik Panda for OERC**

**Appeal No. 57 of 2007**

**In the matter of:-**

**Southern Electricity Supply Company  
of Orissa Ltd. (SOUTHCO),  
123-A, Mancheswar Industrial Estate,  
Bhubaneswar                                      ... Appellant**

**Versus**

1. **Orissa Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar-751 012**



**Counsel for Appellant**

**Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza**

**Counsel for Respondent(s)**

**Mr. R.K. Mehta,  
Mr. Antaryani Upadhyan,  
Mr. Lakhi Singh for  
GRIDCO/OPTCL  
Mr. Rutwik Panda for OERC**

## **JUDGMENT**

**PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. These appeals 55/07, 56/07 and 57/07 have been filed challenging the order dated 22.03.2007 passed by the State Commission in the application filed by the Orissa Power Transmission Corporation Limited (OPTCL) seeking approval of the ARR and Transmission charges for the FY 2007-08.

2. These appeals have been filed by the Distribution Companies, namely, Western Electricity Supply Company of Orissa (WESCO), North-Eastern Electricity

Supply Company of Orissa (NESCO) and Southern Electricity Supply Co. of Orissa (SOUTHCO). The facts of the case are as follows:

3. The Appellant in Appeal No. 55/07 is the Western Electricity Supply Company of Orissa (WESCO). It is engaged in the distribution and retail supply of electricity in the western part of the State of Orissa. The 1<sup>st</sup> Respondent is the Orissa Electricity Regulatory Commission (**State Commission**). The 2<sup>nd</sup> Respondent is the Orissa Power Transmission Corporation Limited (OPTCL) which is a transmission licensee. OPTCL (R-2) filed an Application for approval of the ARR and determination of Transmission tariff for the FY 2007-08 on 30<sup>th</sup> November 2006. Accordingly, State Commission fixed the Tariff through its Order. As

against this Order dated 22.3.2007, WESCO has filed this Appeal.

4. The Appellant in Appeal No.56/07 is North-Eastern Electricity Supply Company of Orissa (NESCO). It is a licensee carrying out distribution and retail supply of electricity to the North-eastern part of the State of Orissa. The 2<sup>nd</sup> Respondent is Orissa Power Transmission Corporation Limited (OPTCL). The Respondent-2 filed an application for approval of the ARR and determination of Transmission tariff for the FY 2007-08 on 30<sup>th</sup> November 2006. Accordingly, the State Commission passed the Order dated 22.3.2007. As against this Order, NESCO has filed this Appeal.



5. Appeal No. 57/07 has been filed by the South Eastern Electricity Supply Company of Orissa (SOUTHCO). In this case the 2<sup>nd</sup> respondent OPTCL filed an Application before the State Commission for approval of the ARR and determination of transmission tariff for the FY 2007-08. As against this Order dated 22.3.2007, SOUTHCO has filed this Appeal.

6. In the meantime, the orders passed by the State Commission in respect of the transmission tariff relating to the FY 2006-07 was challenged by the Appellants before the Tribunal. Those Appeals were allowed by the Tribunal by the Judgment dated 13.12.2006. Through this judgment, the State Commission was directed to re-determine the transmission tariff for FY-2006-07 in the light of the observations made by the Tribunal in this regard.

7. Accordingly, the Appellant submitted their supplementary submissions before the State Commission for determination of the transmission tariff for the FY 2006-07. However, OPTCL, the 2<sup>nd</sup> Respondent (R-2) herein filed the Appeal challenging the Judgment of the Tribunal dated 13.12.2006 before the Hon'ble Supreme Court on 21.05.2007 and the said Appeal is still pending.

8. Now, in these Appeals filed by the Distribution Companies, we are concerned with the impugned order determining the transmission tariff for FY 2007-08 passed by the State Commission dated 22.03.2007.

9. In these Appeals, the following issues have been raised by the Appellant.

- (i) Advance against depreciation;
- (ii) Repair and Maintenance expenses;

- (iii) Larger Contingency Reserves; and
- (iv) Capitalization of interest cost.

10. On these issues, the following arguments have been advanced by the Appellants.

(A) (I) The first issue is relating to the Advance Against Depreciation. The State Commission, in the impugned order, allowed an amount of Rs. 31.22 crores as Advance Against Depreciation over and above Rs. 48.09 crores already allowed towards depreciation in favour of the OPTCL (R-2). The State Commission, in the impugned order, granted Advance Against Depreciation in violation of the National Tariff Policy and also the direction issued by the Tribunal in its earlier judgment.

(II) Assuming that the Advance against depreciation could be allowed, the same is not in accordance with the Regulations of the Central Commission. Under the said Regulations, advance against depreciation could be granted only if the accumulative payment of loan exceeds the cumulative depreciation till the given date. The State Commission did not consider the said claim in the light of the above Regulations.

(III) Even when the National Tariff Policy specifically prescribes that there would be no need to provide Advance against depreciation, the State Commission ought not to have allowed the same without there being any emergent circumstances for the same.

(B) (I) Next Issue is Repair & Maintenance Expenses.

The huge amount of Rs. 47 crores has been projected towards Repair & Maintenance expenses for the year in question. This is despite the fact that from 1990 to 2006, the expenses actually incurred by the Transmission licensee towards R&M expenses was only Rs.9.37 crores. Even in respect of the Financial Year (FY) 2006-07, the State Commission had earlier approved a sum of Rs.36 crores.

(II) In the Appeal against the same, the Tribunal had reduced it to Rs. 14 crores. The audited figures of transmission licensee for FY 2007-08 show that the Transmission licensee had actually spent only Rs. 16.51 crores.

Therefore, the R&M expenses for the year in question may be limited to the said amount actually spent subject to the prudent check.

- (C) I. The third issue is Larger Contingency Reserves. The State Commission allowed a larger Contingency Reserve for the transmission licensee than what is reasonable. The State Commission allowed a sum of Rs. 10.49 crores towards Contingency Reserve which is almost  $2/3^{\text{rd}}$  of the R&M expenses actually incurred in the FY 2007-08. The reasonable Contingency Reserve should be only in the range of  $1/3^{\text{rd}}$  of the R&M expenses.
- II. The National Tariff Policy prescribes that before granting any contingency reserve, the

State Commission must define the contingencies in the Regulation, proposed to be covered by the Contingency Reserve. The State Commission has not prescribed any such contingencies in the Regulation. Therefore, the State Commission was not justified in allowing any Contingency Reserve.

- (D) (I) The next issue is capitalization of interest cost. The State Commission has considered the entire interest cost as revenue expenses payable without capitalizing the interest payable on loans taken for ongoing projects which are yet to be completed. In the impugned order, the State Commission observed that the work in progress of the licensee amounted to Rs. 859.92 crores which is of a very tall order. The delay of

the ongoing projects has added to Interest During Construction (IDC) which has raised the cost of the project.

- (II) The State Commission has not considered any capitalized interest at all. In the impugned order, the State Commission observed that in the FY 2007-08, in addition to the gross fixed charges to the tune of Rs. 146.76 crores, the work in progress as on 31.03.2007 would be 683.88 crores. Despite this, the State Commission has allowed a sum amounting to Rs. 859.92 crores. This is wrong. The State Commission has not projected any part of the interest payable by the licensee as capital cost.

11. In reply to these points urged by the Learned Counsel for the Appellant, the Learned Counsel for the



State Commission as well as OPTCL, the Respondents have made their following submissions:

(A) Advance Against Depreciation:

(I) The allowance of advance against depreciation has been challenged in these Appeals on the ground that the same is in violation of National Tariff Policy, the Regulations and the judgment of the Tribunal dated 13.12.2006. This is not correct. Section 61 of the Act provides that the Appropriate Commission shall be guided by the principles and methods specified by the Central Commission, National Electricity Policy and the National Tariff Policy. As per the Central Commission's Regulations, transmission charges shall be computed in the manner,

under 'Loan Repayment Amount' as per Regulation 56(ii), subject to a ceiling of 1/10<sup>th</sup> of loan amount as per Regulation 54 minus depreciation as per Schedule. The proviso to this clause provides that advance against depreciation shall be allowed if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year. It is further provided that the advance against depreciation shall be restricted to the extent to the difference between the cumulative repayment and cumulative depreciation up to that year.

- (II) Under the Orissa Commission Regulation, 2004, the Commission shall be guided by the principles as laid under section 61 of the Act, 2003 while determining the tariff. In the order

dated 13.12.2006 of the Tribunal, the Tribunal had disallowed the advance against depreciation on the ground that the same was contrary to the National Tariff Policy. The Tribunal while holding so, has not taken note of the National Tariff Policy in the correct prospective. The gist of the policy with regard to depreciation is that the Central Commission shall notify the rate of depreciation in such a manner that there should be no need for any advance against depreciation. Unless the Central Commission notifies such rate of depreciation, advance against depreciation cannot be denied.

- (III) In this case, the Orissa Commission computed the depreciation on the basis of pre-1992 rate of depreciation and allowed advance against

depreciation to ensure its financial viability and also to ensure that the transmission company OPTCL meets its principal repayment obligation. Thus, the Commission has given clear reasoning for the allowance of Advance Against Depreciation.

(B) Repair & Maintenance Cost:

I. The contention of the Appellants in these appeals is that since the transmission company OPTCL has not been able to utilize the amount allocated towards Repair and Maintenance in the previous year, the State Commission is not justified in allowing a sum of Rs. 47 crores towards Repair & Maintenance cost. It is to be stated that a sum of Rs. 47 crores towards Repair & Maintenance has been allowed by the

State Commission on the basis of Repair and Maintenance Accounts Plan submitted by OPTCL. Admittedly, when these details were submitted by OPTCL before the Commission, the Appellant did not raise any objection to the scope of work.

- II. As per Long Term Tariff Strategy dated 18.06.2003, the transmission company was eligible for a sum of Rs. 113.13 crores towards R&M expenses. The fact that the transmission licensee was unable to utilize the amount allocated towards R&M in the previous year, cannot be taken to be a ground to deny R&M cost to the OPTCL on the basis and norms for the subsequent year since the transmission licensee is required to carry out its obligation for efficient management of the transmission system in the

State. Therefore, the reasons given in the impugned order for the allowance of sum of Rs. 47 crores towards R&M cost is fully justified.

(C) (I) In regard to Contingency Reserve, the OPTCL has proposed Rs. `10.49 crores for the FY 2007-08. According to OPTCL, the requirement of Contingency Reserve in a natural calamity prone State like Orissa need not be overemphasized. Investment towards Contingency Reserve relates to an emergency fund to meet the expenses towards unforeseen calamities.

(II) The State Commission, after due deliberation allowed a total of Rs. 12.59 crores on account of provision towards Contingency Reserve in the ARR for OPTCL. The State Commission is

awaiting the audited accounts of OPTCL for financial year 2006. After getting the same, the State Commission will take necessary steps for verification and would make suitable adjustments for truing up on the basis of actual investments.

- (D) In regard to interest on loan, it is to be stated that excepting Rs. 228.90 crores, which is proposed to be availed of, all other loans are old and approved by the State Commission.

12. In the light of the above rival contention, the following questions may arise for consideration:

- I. Whether the State Commission was right in granting Advance Against Depreciation to the OPTCL (R-2) which is contrary to the

principles avised by the Tribunal in Order dated 13.12.2006 and the Tariff Policy?

- II. Whether the State Commission was right in allowing more amounts to the Contingency Reserve?
- III. Whether the State Commission is erred in granting more amount towards the Repair & Maintenance Charges which is contrary to the Order dated 13.12.2006 passed by the Tribunal?
- IV. Whether the State Commission was right in estimating the interest Cost to be a pass through in the Annual Revenue Requirement of OPTCL (R-2) by not considering the Interest to be capitalized?



13. Taking note of the above Questions in the context of the rival contention urged by the parties, we may analyze the above issues.

14. Before dealing with the above issues raised in these Appeals, it would be appropriate to consider the Preliminary Objections raised by the Learned Counsel for the Respondents with regard to the locus standi of the Appellants in filing these Appeals. According to the Learned Counsel for the Respondent (OPTCL), the order dated 22.03.2007 passed by the State Commission determining the ARR and transmission tariff of OPTCL for FY 2007-08 has never affected in any manner the distribution companies and, therefore, the Appellants, distribution companies cannot be considered to be a person aggrieved who can appeal.

15. The submission made by the Learned Counsel for the Appellant on this point is as follows:

“The entire transmission cost determined as payable by the Appellants to the OPTCL under the impugned order has been allowed as a pass through in full in the ARR and the retail supply tariff order dated 23.03.2007. As such the Appellants are not affected by the impugned order. In case the transmission tariff is reduced, the retail supply tariff order will have to be appropriately modified and the ARR of distribution companies also will have to be proportionately reduced. Till 2005-06, these Appellants have never challenged the transmission tariff order since the entire power purchase cost in the said order was allowed as

a pass through. Appellants have chosen to challenge this order alone even though they are not affected in any manner by the impugned order. Consequently they cannot be considered to be the person aggrieved. They cited the following authorities:

- (1) *Thammanna vs. K. Veera Reddy* (1980) 4 SCC 62.
- (2) *Babua Ram vs. State of U.P.* (1995) 2 SCC 689.
- (3) *Northern Plastics vs. Hindustan Photo Films* (1997) 9 SCC 452
- (4) *Banarsi vs. Ram Phal* (2003) 9 SCC 606

These decisions would lay down the principles that a person aggrieved alone can file an Appeal. A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision

has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. A person aggrieved do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A person aggrieved must be a man who has suffered legal grievance, a man against whom a decision has been pronounced. Applying the above principle laid down by the Hon'ble Supreme Court in the above judgments, it is stated that the distribution companies cannot be held to be a person aggrieved since neither any legal rights of the distribution companies have been infringed nor have they suffered any injury or prejudice by virtue of the impugned order since the entire power purchase cost has been allowed as a pass

through in full in the ARR & transmission tariff order in favour of the distribution companies, and therefore, the distribution companies do not have a locus standi to challenge the impugned order. On the other hand, it is contended by the Appellant that even though their entire power purchase cost and expenses were provided for in full in the ARR & transmission tariff order, their retail supply tariff fell short of their revenue requirement and as such they are entitled to challenge the transmission tariff order in order to appropriate their pecuniary benefits which they may obtain by such challenge to fill up the gap in their revenue requirements.”

16. We have carefully considered the rival contentions urged by the Learned Counsel for the parties on this

Preliminary objection. According to the Appellant, the transmission tariff payable by the Appellants to the GRIDCO has been constantly increasing over the past several years and on the other hand, there has been no increase in the retail supply tariff which the distribution licensee namely the Appellants are allowed to charge from their consumers. Since almost entire power procurement of the distribution licensee is from GRIDCO, the Appellants, the distribution licensee have a vested legal right in the reduction of transmission tariff. As a matter of fact over the years till 2007-08, there has been an uncovered revenue gap in the ARR of the distribution licensee. If the Appellants were to succeed in getting the transmission tariff reduced, the Appellants would have more financial cushion to absorb its legitimate expenses and also to build up its reserves for capital investment, etc.

17. In view of the statement made by the Appellants that while the transmission tariff payable by the distribution companies has been constantly increasing over the past several years, there has been no corresponding increase in the Retail Supply Tariff and hence the Distribution licensees have a valid, genuine and legal right to have the transmission tariff reduced as much as possible, we feel that the Appellants have got a right to file the Appeal. Further, it is contended by the learned Counsel for the Appellant that over the years till 2007-08 there is always an uncovered revenue gap in the ARR of the distribution licensees and the contention that the entire transmission tariff is allowed as a pass through in the ARR of the distribution licensee is factually incorrect.

18. In view of the above situation, we are to hold that these Appeals are maintainable as the Appellants have got some vested legal rights in claiming for the reduction of the transmission tariff which would result in the rights being accrued to the Distribution Licensee to charge the Retail Supply tariff from their consumers in direct proportion. This point is answered accordingly.

19. Let us now consider the questions as referred to hereinabove.

(A) The first issue is relating to the Advance Against Depreciation. According to the Appellant, the order impugned is in violation of the National Tariff Policy and also against the dictum laid down by this Tribunal in its judgment dated 13.12.2006. On the contrary it is submitted by the Learned Counsel appearing



for Respondents that the claim for Advance Against Depreciation has been allowed by the State Commission on the basis of Tariff Regulations framed by the State Commission as well as the Central Commission, which cannot be challenged in this Tribunal.

- B) Section 61 of the Electricity Act, 2003 provides that the Appropriate Commission shall be guided by the Central Commission's guidelines and methods specified by the Central Commission, as well as the National Electricity Policy and the National Tariff Policy. As per Regulation 56(ii)(b) of the Central Commission's Tariff Regulations, 2004, prevailing during the period 2004-09, Advance Against Depreciation is permitted to transmission licensee in addition

to allowable depreciation. The Advance Against Depreciation shall be permitted if the cumulative repayment up to a particular year exceeds the cumulative depreciation up to that year. It also provided that Advance Against Depreciation in a year shall be restricted to the extent of the difference between the cumulative repayment and cumulative depreciation up to that year. The Advance Against Depreciation is also subject to a ceiling of 1/10<sup>th</sup> of loan amount minus depreciation as per schedule.

- (C) The National Tariff Policy, 2006 provides that the Central Commission may notify the rate of depreciation in respect of generation and transmission assets and there would be no need for any Advance Against Depreciation.

Under the Orissa Commission Regulations, 2004, i.e., Regulation 3(a), the State Commission shall be guided by the principles as laid down in Section 61(a) to 61(i) of the Electricity Act, 2003. The conjoint reading of the relevant Regulations and the Sections of the Electricity Act, 2003 would make it evident that the indication given in the National Tariff Policy with regard to depreciation is that the Central Commission shall notify the rate of depreciation in such a manner that there should be no need for any Advance Against Depreciation. This means unless the Central Commission notifies such rate of depreciation, the Advance Against Depreciation cannot be denied on the basis of the policy. The policy by its very nature applies

prospectively and cannot be applied retrospectively.

- (D) In the present case, the Orissa State Commission computed the depreciation on the basis of pre-1992 rate of depreciation and allowed the Advance Against Depreciation to ensure the financial viability and also to ensure that the transmission company, namely the 2nd Respondent, OPTCL meets its principal repayment obligation. So while allowing the Advance Against Depreciation, the State Commission has given all these reasons which are in consonance with the Regulations of the Central Commission as well as the State Commission.

(E) It is vehemently contended by the Appellant that the earlier judgment of this Tribunal on this issue has not been followed. In order to verify with reference to this submission, we have gone through the earlier judgment dated 13.12.2006 passed by this Tribunal. The perusal of the said judgment would indicate that the Tribunal came to the conclusion that the claim for Advance Against Depreciation cannot be allowed as the same was contrary to the National Tariff Policy. In the light of the above observations, we have carefully gone through the National Tariff Policy. A thorough reading of the National Tariff Policy would make it clear that the Central Commission shall notify the rate of depreciation in such a manner that there would be no need for any Advance Against

Depreciation. This cannot be taken to mean that there is a prohibition under the National Tariff Policy for allowing the claim for Advance Against Depreciation.

- (F) As indicated above, the conjoint reading of the Regulation 56 of the Central Commission's Tariff Regulations, 2004 and Regulation 3(a) of the State Commission and the National Tariff Policy would make it clear that the State Commission is empowered to allow the Advance Against Depreciation to ensure the financial viability of the OPTCL as well as to ensure that it meets its principal repayment obligation. Therefore, we do not find any infirmity in the conclusion arrived at by the State Commission with reference to the claim for Advance Against

Depreciation. Accordingly, we reject the contention of the Appellant.

20. The next issue is relating to Repair & Maintenance (R&M) cost.

(A) According to the Appellant since the OPTCL had not been able to utilize the amount allocated towards Repair & Maintenance Charges in the previous year, the State Commission was not justified in allowing a sum of Rs. 47 crores in favour of the OPTCL towards the said charges. Refuting this contention, the Learned Counsel for the Respondent, while justifying the order of the State Commission, would submit that this amount of Rs. 47 crores towards Repair &

Maintenance Charges was allowed by the State Commission on the basis of R&M Action Plan submitted by the OPTCL and therefore, the order impugned with regard to this claim is justified.

- (B) On this aspect, it has to be stated that the mere fact that OPTCL was unable to utilize the amount allocated towards R&M charges in the previous year cannot be a ground to deny the R&M charges to the OPTCL on the basis of norms for the subsequent year since the OPTCL is required to carry out its obligation for efficient management of the transmission system in the State. That apart, as per Long-Term Tariff Strategy, in para 5.6.2.3, promulgated by the State Commission in



its order dated 18.06.2003, OPTCL, the transmission company has become eligible for a sum of Rs. 113.30 crores towards R&M expenses @ 5.4% of the estimated book value of the gross fixed assets.

- (C) The State Commission has been monitoring the R&M works of the OPTCL by taking up periodical reviews and engaging an independent team of experts to monitor and report the progress of the R&M works being undertaken by the OPTCL. According to the 2<sup>nd</sup> Respondent, the OPTCL is sincerely trying to put the transmission network on sound footing in order to ensure quality and uninterrupted supply of power. This apart, OPTCL is required to accommodate enhanced flow in

the transmission system in order to meet the increased demand and in view of the rapid industrialization of the State as well as the demand of Open Access customers.

(D) In this case, it is relevant to quote the observations made by the State Commission with reference to this issue.

“ 5.4.2 **Repair & Maintenance Expenses**

5.4.2.1 *OPTCL has proposed an amount of Rs. 54.00 crore towards repair and maintenance expenses for 2007-08. While projecting the figure the licensee has taken into consideration the approved figure of the Commission for 2006-07 and applied the escalation of 50% over it to arrive at the proposed figure for the year 2007-08. OPTCL has submitted that it was formulating a plan to augment the R&M works in order to keep its*

*lines and sub-stations in a proper working condition to maintain uninterrupted and quality power supply in the State and with this aim in view ,it intended to increase the R&M expenses progressively to achieve the relevant norm prescribed by this Commission.*

*5.4.2.3 It is revealed from the table that the actual expenditure for each year is always less than the approved figure. In reply to the query raised during hearing OPTCL in its written submission stated that the low level of expenditure on R&M was due to fund constraints. After OPTCL became operational, there have been no fund constraints as it is getting paid its revenue fully by GRIDCO on demand. Therefore, OPTCL has undertaken a lot of measures to spend higher amount on R&M. During April, 2006 and January, 2007 of the FY 2006-07, OPTCL has already spent Rs. 11.67 crore. Purchase orders amounting to more than Rs. 20*

*crore have been placed and materials are expected to be delivered by February, 2007. OPTCL commits that it will be able to spend Rs. 36 crore for the FY 2006-07 as approved by the Commission.*

*5.4.2.4 The transmission system of OPTCL is the backbone of the power system of Orissa. The Commission holds the view that the lines and sub-stations of OPTCL should be kept in proper conditions to ensure uninterrupted and quality power supply in the State. Unless the transmission system is maintained properly, the DISCOs who are the real beneficiary would be put in trouble and the entire power system would be in complete jeopardy.*

*5.4.2.6 The Commission also desires that the operation and maintenance of OPTCL should be suitably brought at par with the lines and sub-stations*

*being maintained by entities like the Power Grid Corporation of India.*

*5.4.2.7 The Commission expresses grave concern about the interruption occurring in the EHT transmission system due to snapping of conductors, burning of jumpers, damage to transmission towers, failure of equipment at various sub-stations causing dislocation of power supply which can hardly be tolerated in view of growing importance for maintaining continuity and quality of power supply in the developing industrial economy of the State. Theft of tower members and conductors have almost reached a menacing proportion that requires serious attention of not only of OPTCL but also the law and order authorities of the Govt. of Orissa. The Commission directs that the OPTC should have in place an appropriate security mechanism for continuous monitoring of various transmission lines to prevent*

*failure of such lines. The OPTCL was also directed in course of the tariff hearing to prepare a master plan for renovation and modernization of their existing transmission network and submit the same to the Commission for completion of such maintenance in a definite time frame.*

*5.4.2.9 After having said this we would like to say that Orissa has entered a phase of industrial resurgence which requires quality power supply of international standards if industrial units are to utilize their capacity to the fullest extent.*

*5.4.2.10 There has been phenomenal growth of railway traction which obviously requires uninterrupted power supply for 24 hours for 365 days in a year. This step is the case of many other sophisticated industries. In view of that, OPTCL shall have to gear up its maintenance to supply uninterrupted power of proper quality. In view of*

*this, we disagree with the contention of some of the objectors that the R&M projection is on the higher side considering that there has been persistent failure on the part of the licensee to maintain the system up to the desired level for which it requires more money for R&M works. This is besides that the DISCOs have not objected during public hearing to the proposed expenditure of Rs. 54 crore stated by OPTCL. In view of that, we are permitting OPTCL to incur expenditure on R&M work to the tune of Rs. 54 crore less Rs. 7 crore i.e. 150% of the unspent amount of 2006-07.*

*5.4.2.11 It was raised by some of the objectors that the expenditure on R&M should be capitalized and not be charged to revenue for a particular year. If the R&M expenses have to be capitalized, the company has to go for a loan capital which is again to be recovered over a period of time. As on 31<sup>st</sup> March, 2008 the loan liability*

*of OPTCL will be around Rs. 1319 crore. We do not intend to add further loan capital for this utility. The proposed expenditure now allowed should be recovered in one year as it will have a small impact on the tariff at consumer end. In view of that, we have decided to allow the R&M expenses of Rs. 47 crore for the year 2007-08 as a pass through in the revenue requirement of the year 2007-08”.*

(E) The paragraphs quoted above would indicate that detailed and proper reasonings have been given by the State Commission to allow a sum of Rs. 47 crores toward R&M costs. Therefore, we have no hesitation to hold that there is no infirmity in the finding given by the State Commission on this issue. Accordingly, we



confirm the same while rejecting the submissions made by the appellant.

21. The next issue is relating to the Larger Contingency Reserve (CR).

(A) According to the Appellant, the Contingency Reserve should be in the range of 1/3<sup>rd</sup> of R&M expenses only as per the earlier judgment of this Tribunal dated 13.12.2006 and, that too, it can be allowed only when the contingencies are prescribed by the State Commission through Regulations which have not been framed yet.

(B) Contingency Reserve which has been allowed in the present case is to the tune of

Rs. 10.49 crores and which is less than 1/3<sup>rd</sup> of the Repair & Maintenance expenses. Therefore, it cannot be contended that the earlier judgment of the Tribunal has been violated. That apart, the submission with regard to the absence of the Regulations prescribing the contingencies was actually rejected by the Tribunal in the earlier judgment dated 13.12.2006. The relevant extracts from the judgment dated 13.12.2006 is quoted below:

*“ 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".*

- (C) The Learned Counsel for the Respondent has relied upon 1985(2)SCC16 (UPSEB Vs. City Board) to justify the order of the State Commission allowing the claim for Contingency Reserve. The same is 1985 (2) SCC 16 *UPSEB V/s City Board*. In this decision it has been held “framing of regulations is not condition

precedent for grant of relief and that relief cannot be denied on the ground that the regulations have not been framed”.

(D) Further, the provision of Contingency Reserve is essential for a deemed transmission licensee like the OPTCL with a vast transmission network comprising of approximate line length of 460.50 Ckt-KM of 400 KV, 3859,19 Ckt-KM of 220 K V, 4673.91 Ckt-KM of 132 KV lines and 147 Nos. of 220 KV Bays, 506 Nos. of 132 Bays and 624 Nos. of 33 KV Bays besides owning about 81 sub-stations spread across the State of Orissa.

(E) Moreover, in the State like Orissa, which is highly prone to natural calamities like cyclone

and flood every now and then, the provision of Contingency Reserve to meet such contingencies is quite desirable.

- (F) Further, it has been brought to our notice that truing up exercise has been done in the tariff order for 2010-11 by the State Commission on the basis of the audited accounts up to 2008-09 and in such truing-up the actual receipts and expenditure of the OPTCL under various heads have been duly taken into consideration. In the light of the above facts stated, the allowance of Rs. 10.49 crores towards CR for FY 2007-08 in the impugned order is fully justified and the objections of the Appellant in this regard is devoid of any merit.

22. The next issue is capitalization of interest cost.
- (A) According to the Appellant, the State Commission has considered the entire cost as revenue expenses payable without capitalizing the interest payable on loans taken for ongoing project which are yet to be completed. On the other hand, the Learned Counsel for the Respondent submitted that the State Commission has capitalized a part of the revenue expenditure and as such the submission made by the Learned Counsel for the Appellant on this aspect cannot be sustained.
- (B) As pointed out by the Learned Counsel for the Respondent, Table 32 contained in the impugned order projects that a part of the

revenue expenditure has been capitalized. Table 32 is quoted below:

**Table 32****Rs. In crores**

<b>Transmission Cost</b>	<b>Proposed by OPTCL</b>	<b>Approved by Commission</b>
Employees cost	187.04	142.52
R&M Cost	54.00	47.00
A&G cost	14.79	15.71
Interest on Loan	131.51	60.86
Depreciation	52.95	48.10
Advance against depreciation	84.18	31.22
GRID Co-ordination Committee Expenses	.56	1.56
Sub-total	526.03	346.97
Less expenses capitalized	4.91	3.74
Total	521.12	343.23
Special Appropriation	138.33	23.01
Return on Equity	8.40	0.00
Contingency Reserve	10.49	10.49
Grand Total	678.34	376.73
Less Inter-State wheeling	3.00	3.00
Net Transmission Cost	675.34	373.72
Total transmission in MU		16963
Transmission tariff (p/u)		22.03
Transmission tariff (p/u) rounded to		22.00

(C) On this aspect, the Learned State Commission has given the following findings:

*“5.5.4 The year-wise asset addition from 1996-97 to 2005-06 is as per the annual accounts and provisional accounts submitted by undivided GRIDCO and OPTCL. For the year 2006-07, OPTCL had proposed an addition of asset to the tune of Rs. 176.04 crore. The Commission scrutinized the figure given in TRF-2 of the filing made by OPTCL. It is found that as on 31.03.2006, the work in progress of OPTCL amounts to Rs. 859.92 crore which is of a very tall order. As long as the same are not transferred to the assets in use, the benefit is not passed on to consumers. The delay in completion of the ongoing projects has added to interest during construction which has raised project cost. Further, OPTCL does not make cost*



*benefit analysis of delaying a project and also the revenue earning thereof. Therefore, the Commission directs OPTGCL to furnish its plan of action for capitalization of this work in progress. Considering the huge amount blocked under this head, an amount of Rs. 176.04 crore towards asset addition proposed by OPTCL for FY 2007-08 is approved by the Commission”.*

- (D) Moreover, it is pointed out by the Learned Counsel for the Respondent that in the truing-up exercise undertaken by the State Commission in the ARR and transmission tariff order for 2010-11, the State Commission has adjusted a sum of Rs. 2.86 crores and Rs. 0.58 crores towards capitalization for FY 2006-07 and FY 2007-08 respectively on the basis of the

accounts audited by the Comptroller & Auditor General.

- (E) In view of above, the contention of the Appellant with regard to capitalization of interest cost does not deserve acceptance. As such, we do not find any infirmity in the findings rendered by the State Commission on the issues raised by the Appellants in these Appeals.

**23. SUMMARY OF OUR FINDINGS:**

- (i) The conjoint reading of the relevant Regulation, namely, Regulation 56(ii)(b) of the Central Commission, Regulation 3(a) of the State Commission, Tariff Policy and the provision of the Electricity Act, 2003 would make it clear that the National**

**Tariff Policy provides with regard to Depreciation that the Central Commission shall notify the rate of Depreciation in such a manner that there should be no need for any Advance Against Depreciation. This means that unless the Central Commission notifies such a rate of Depreciation, the Advance Against Depreciation cannot be denied on the basis of the Policy. In the present case, the Orissa State Commission computed the Depreciation on the basis of the pre-1992 rate of Depreciation and allowed the Advance Against Depreciation to ensure the financial viability and also to ensure that the Transmission companies, namely, OPTCL (R-2) meets its principal repayment**

**obligation. While allowing the Advance Against Depreciation, the State Commission has given all the reasons which are in consonance with the Regulations of the Central Commission as well as the State Commission. Therefore, we do not find any infirmity in the conclusion arrived at by the State Commission with reference to the claim for Advance Against Depreciation.**

- (ii) 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, since OPTCL is required to carry on its obligation for efficient management of the Transmission System in the State. The State Commission has been monitoring the Repair & Maintenance works of the OPTCL (R-2) by taking up periodical review and engaging an independent team of experts to monitor and report the progress of the Repair & Maintenance works being undertaken by the OPTCL. The Transmission System of OPTCL is the backbone of the power system of the State of Orissa. The lines and sub-stations of OPTCL should be kept in proper conditions to ensure uninterrupted and quality power supply in the State. Unless**

**the Transmission System is maintained properly, the Distribution Companies who are the real beneficiaries would be put into trouble and the entire power system would be in complete jeopardy. Orissa has sent a phase of industrial resurgence which requires quality power supply of international standard, if industrial units are to utilize the capacity to the fullest extent. We find there are proper reasoning given by the State Commission in the impugned order to allow a sum of Rs.47 crores towards Repair & Maintenance cost. Therefore, we confirm the findings given by the State Commission on this issue.**

**(iii) In regard to allowing the claim in respect of larger Contingency Reserve, it has to be stated that State like Orissa which is highly prone to natural calamities like cyclone and floods every now and then, the provision of Contingency Reserve to meet such contingency is quite desirable and reasonable. It may not be correct to contend that the Contingency Reserve can be allowed only when the Regulations were framed with regard to that. This contention in this regard urged by the learned Counsel for the Appellant has been rejected by this Tribunal in the earlier Judgment dated 13.12.2006 holding that it is not a condition precedent to frame Regulations in this respect while allowing**

**the claim for Contingency Reserve. The provision of Contingency Reserve is essential for a Deemed Transmission Licensee like the OPTCL with a vast Transmission Network. Therefore, the finding in this regard of the State Commission is also confirmed.**

- (iv) According to the Appellant, with reference to the Capitalization and Interest Cost, the State Commission has considered the entire cost as Revenue Expenses payable without Capitalized Interest payable on loans taken for On-going Projects which are yet to be completed. This is not correct in view of the fact that the State Commission has capitalized only a part of**



**the Revenue Expenditure. Further, Table 32, referred to in the impugned order, projects that only a part of the Revenue Expenditure has been capitalized. Moreover, the truing up exercise which was undertaken subsequently by the State Commission, the State Commission has adjusted a sum of Rs.2.86 crores and Rs.0.58 crores towards the capitalization for the FY 2006-07 and FY 2007-08 respectively on the basis of the accounts audited by the Comptroller and Auditor General. Therefore, the contention of the Appellant with regard to Capitalization of Interest Cost also is rejected.**

24. In view of the above conclusions, we deem it proper to dismiss these Appeals as being devoid of merits. Accordingly, these Appeals are dismissed. However, there is no order as to cost.

**( Justice P.S. Datta)      (Rakesh Nath)(Justice M. Karpaga Vinayagam)**  
**Judicial Member      Technical Member                      Chairperson**

**Reportable/Non-Reportable**

**Dated: 8<sup>th</sup> November, 2010.**