

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 94 of 2011

Dated: 21st December, 2012

**Present: HON'BLE MR. JUSTICE PARTHA SAKHA DATTA, JUDICIAL MEMBER
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,**

IN THE MATTER OF:

**M/s T S Alloys Limited
(Formerly known as M/s Rawmet Ferrous Industries Limited)
N-3/24, Nayapalli,
Bhubaneswar, Odisha**

.... Appellant

Versus

- 1. Odisha Electricity Regulatory Commission Respondent(s)
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha**
- 2. Orissa Power Transmission Corporation Limited
Janpath, Bhubaneswar, Odisha**
- 3. GRIDCO Limited,
Janpath, Bhubaneswar**
- 4. Central Electricity Supply Utility of Orissa (CESU)
Regd. Office – 2nd Floor, IDCO Tower
Janpath, Bhubaneswar – 751 022, Odisha**

**Counsel for the Appellant(s): Mr M G Ramachandran
Mr R M Patnaik
Mr Dhananjaya Mishra
Mr P P Mohanty**

Counsel for the Respondent(s): Mr. B K Nayak along with

**Rutwik Panda for R-1
Mr. R.K. Mehta for R-2 along with
Mr. Antaryami Upadhyay
Mr. David A.**

Ms. M Sarada for R-4

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant, M/s T. S. Alloys Limited (formerly known as M/s Rawmet Ferrous Industries Limited) is a consumer of electricity in the area of supply of the 4th Respondent Central Electricity Supply Utility of Orissa (CESU).
2. The Odisha Electricity Regulatory Commission (Commission) is the first Respondent. The second Respondent the Orissa Power Transmission Corporation Limited (OPTCL) is the State Transmission Utility and a deemed transmission licensee in the state of Odisha. Respondent no. 3 GRIDCO is a trading licensee in the State of Odisha. The Respondent no. 4 is the distribution licensees in the state of Odisha.
3. This Appeal has been filed by the Appellant challenging the Review Order in Case no. 63 of 2006 dated 26.4.2011 passed by the Odisha Electricity Regulatory Commission (Commission).
4. The facts of the case are briefly described below:
5. The Commission initiated suo-moto proceedings being Case No. 36 of 2005 pursuant to performance review of the Distribution Licensees. In these proceedings all the stake holders of the power

sector of Odisha were made parties. The Commission disposed of the petition by an order dated 22.7.2006 with following directions:

“26. OPTCL is the licensee for transmission and possess expertise in the field of transmission. The feeders emanating from the grid substations upto the consumer premises for the EHT consumer can be treated as an exclusive feeder. The recovery of cost constructed by the OPTCL can be done by following the remunerative norms from the revenue generation through levy of transmission charge. Yardstick shall have to be applied for investment in transmission so that where the scheme is non-remunerative, a portion of investment has to be borne by the customer.

27. The Commission had already prescribed a procedure through Regulation for determination of remunerative norms for distribution network. The same concept can mutatis mutandis be applied for creation of transmission network.

***28. These EHT feeders constitute a part and parcel of the EHT transmission line which has to be built, owned and operated by the OPTCL to ensure optimal utilization of the generation and transmission asset. To avoid delay in construction by the transmission licensee, the prospective consumer can construct a line on behalf of OPTCL and handover the same to OPTCL perpetually and in such an instance, the OPTCL shall be entitled only to the supervision charge of 6% of the gross estimate.** The point of interface between OPTCL and the distribution licensee shall be the point of interconnection at the EHT consumer premises. Following the remunerative norms any expenditure incurred by the prospective consumer on behalf of OPTCL can be reimbursed by OPTCL through energy bill to be served by the concerned DISTCOs through mutual agreement.*

*“29. The Commission finds no justification for collection of Rs.10 lakh per MW from the prospective consumer for construction of lines and s/s upto the load centre to be developed by OPTCL after due regulatory approval which has to be financed by OPTCL following prudent financial practices. **However, the Commission shall have no objection if prospective consumers come forward***

voluntarily for giving loan to the transmission company at the prevailing bank rate.”

6. On 17.10.2006 the 2nd Respondent OPTCL filed a Review Petition being Case No. 63 of 2006 for Review of the order dated 22.07.2006 with the following prayers:
- (i) *to exempt OPTCL from the duties/responsibility for power supply to EHT consumers which falls under the domain of Distribution licensees;*
 - (ii) *to allow supervision charge @ 16% over the total project outlay in lieu of 6% allowed; and*
 - (iii) *to permit OPTCL to collect Rs.10 lakh/MW as infrastructure loan as is being collected to ensure commitment from and realistic assessment of power projection by the prospective EHT consumers till such time a mechanism is developed on cost sharing between DISTCOs/GRIDCO/OPTCL and approved by OERC.*
7. The Appellant Company, who was not a party originally in Case No. 36 of 2005 filed a writ petition in the High Court of Odisha in W.P.(c) No. 14529/2008 praying for the execution of the Commission's Order dated 22.7.2006. The High Court of Odisha, taking cognisance of the review petition filed by the 2nd Respondent OPTCL disposed of the said writ petition by order dated 7.4.2010 refusing to interfere and directed the Appellant Company to approach the Commission and also directing the Commission to dispose of the review petition filed by the 2nd Respondent OPTCL as expeditiously as possible..
8. Thereafter, the Appellant filed a claim petition before the Commission for recovery of money and also opposing the Review Petition filed by OPTCL (R-2) as being not maintainable. The OPTCL, the review petitioner before the Commission and the 2nd

Respondent herein raised the preliminary objection that the Appellant has no right to bring a fresh claim of money against OPTCL in the ongoing proceedings of Review Petition. The Commission by an order dated 9.11.2010 overruled the objection raised by the M/s Rawmet ferrous Industries Limited, the Appellant herein with regard to maintainability of the Review Petition filed by OPTCL (R-2).

9. The Commission disposed of the Review Petition by an order dated 26.04.2011 with certain directions. In regard to the Appellant's claim petition the Commission observed as under:

“56 As opined in para 53 to 55, we at this stage, are not in a position to offer our comments on the existing agreement of ‘Infrastructure Loan’ made between the EHT consumer with OPTCL including the agreement of M/s Rawmet Ferrous Industries as details and circumstances of the agreement and validity of the loan and/or condition of repayment is not known to us. We, however, opine that the practice of asking for an infrastructure loan as a part of connectivity agreement should stop from the date of this order. We further hold that there should not be any question of adjustment of any loan advanced with that of the energy charges of the consumer, as the billing and payment of energy charges is between the consumer & the DISCOM. The Transmission utility is not involved in the process. Similarly, the infrastructure loan already taken/given or agreed to be taken up on or before the date of this order will be governed/regulated as per the agreement already entered into and there is no question of any immediate refund of such infrastructure loan already taken/given as clarified in para 55.”

10. Aggrieved by the above direction given in the Review order dated 26.04.2011, the Appellant has filed this Appeal.

11. The learned Counsel for the Appellant made the following submissions:

- a) The Commission in its order dated 22.7.2006 in Case no. 36 of 2005 has categorically held that there was no justification for collection of Rs 10 lakh per MW by OPTCL (R-2) from prospective EHT consumers for upgrading the upstream system under the grab of 'Infrastructure Loan' Once the Commission passed the Order dated 22.7.2006, it was not open to the OPTCL (R-2) not to follow the same and claim any charges which was not approved by the Commission and in the present case expressly prohibited in the Order. Despite the specific order of the State Commission prohibiting the collection of Infrastructure loan. The OPTCL (R-2) did not cease to collect the Infrastructure loan as a condition for giving services. The Respondent No. 2 had continued with the above practice in blatant violation of the Commission's order dated 22.7.2006 and, therefore is liable to be proceeded against under Section 142 of the Act. The Appellant has signed the agreement with the OPTCL (R-2) under duress as it was in dire need of supply and the Commission has allowed such an agreement forced upon the Appellant by the 2nd Respondent to be the basis for shifting the implication of the Order dated 22.7.2006.
- b) The Commission having decided that Supervision Charges should be at the rate of 6% of the project cost in its order dated 22.7.2006, applied the same only prospectively from the date of Impugned Order i.e. from 26.4.2011 despite the fact that the Commission in its earlier Order dated 22.7.2006

has fixed the supervision charges at 6% only and the same had not been modified by the Impugned Order. Collection of supervision charges at a rate higher than the rate approved by the Commission was patently illegal and is deliberate wrong action on the part of the Respondent no. 2. Instead of taking action against the Respondent No. 2 for violating its order, the Commission has impliedly given sanction to such illegal action by directing that the supervision charges at 6% shall be applicable prospectively in the impugned order.

12. Refuting the allegation of duress the learned Counsel for the OPTCL (R-2) submitted that on 30.10.2004 the Appellant had first requested the GRIDCO to grant permission for supply of 30 MW with effect from January, 2006. Thus the submission of the Appellant that it had been without power for 2 years and as such had no option but to execute the Infrastructure Agreement is factually incorrect. After some interchanges of correspondences in regard to arrangement of supply, the OPTCL (R-2) on 30.3.2005 granted permission of supply of 20 MW to the Appellant on certain terms and conditions which had been accepted by the Appellant vide its letter dated 5.7.2005 voluntarily and specifically agreeing to execute the agreements including payment of Infrastructure loan. The Commission disposed of the Case no. 36 of 2005 by its order dated 22.7.2006. The said order permitted voluntary giving of Infrastructure Loan. On 27.7.2006 OPTCL (R-2) intimated the Appellant to sign the agreement for infrastructure loan. The OPTCL filed Review Petition on 17.10.2006 against the Commission's order dated 22.7.2006 passed in Case no. 36 of 2005. On 23.10.2006 the Appellant voluntarily gave an undertaking

to execute Bi-partite agreement with OPTCL (R-2) for 30 MW of power and also to deposit Rs 10 lakh per MW towards Infrastructure Loan. Thus, the submission of the Appellant that the OPTCL (R-2) had collected a sum of Rs 1.5 crore as first instalment of Infrastructure loan by exerting pressure or coercion on the Appellant for power supply is misconceived and baseless. The OPTCL has never compelled the Appellant or any other EHT consumer to sign any loan agreement.

13. Based on the rival contentions of the parties, the following questions would arise for our consideration:

- I. Whether the Appellant Company had signed the Infrastructure Loan agreement voluntarily or on demand by the 2nd Respondent?
- II. If on demand, whether the 2nd Respondent had violated the direction of the Commission given in its Order dated 22.7.2006?
- III. If so, whether the Commission has erred in not granting relief to the Appellant?
- IV. Whether the 2nd Respondent has violated the Commission's order dated 22.7.2006 by demanding supervision charges at rate of 16% instead of 6% as approved by the Commission in its order dated 22.7.2006?

14. We shall now deal with each of the questions framed above. Question No. 1 to 3 are related to the issue of Infrastructure Loan and would be dealt together. The fourth question is related to issue

of supervisions charges. We would now deal with the first set questions relating to Infrastructure Loan.

15. It would be profitable to retrace some of the events chronologically as given in table below. The events can be divided in two groups, events took place before passing of Commission's order dated 22.7.2006 and events took place thereafter.

<u>Date</u>	<u>Events</u>
<u>Group I</u> <u>Events took place prior to Commission's Order</u>	
14.10.2004	The Appellant wrote a letter to CESU, Distribution Licensee, for supply of 30 MW power to its proposed Ferro Alloy Plant.
30.10.2004	CESU requested OPTCL (then GRIDCO) to grant permission, estimate etc. for supply of 30 MW power at 132 KV to their location at Ananthapur, Athagarh, Cuttack.
03.12.2004	OPTCL (then GRIDCO) issued permission letter to the Appellant to avail the power at 132 KV from 220/132 KV Grid Sub-Station, Bidanasi through construction of a feeder bay at Bidanasi Grid Sub-Station and associated 132 KV transmission line (7.5 kms) from the above Grid Sub- Station to their proposed site with other terms and conditions. Condition 3 relates to Agreement stating as "You have to execute a bipartite agreement with GRIDCO to deposit Rs 10 Lakhs per MW of you total maximum demand as an interest bearing loan to Gridco..."
10.12.2004	The Appellant vide letter dated 10.12.2004 intimated to the OPTCL that availing power supply from Bidanasi

Grid Sub- Station would have the following disadvantages to them Viz:

- (a) It would take more than 2 years for construction and their project would be delayed which was planned to be commissioned in March 2006;
- (b) Cost of construction of the line would be very high.

Therefore, the Appellant requested OPTCL (R-2) to re-examine the issue of connectivity considering other alternatives.

15.02.2005 Vide letter dated 15.02.2005 the Appellant suggested an alternative for availing power to their Plant. It was suggested that the existing 132 KV Chaudwar – Mancheswar Single Circuit line passes in close proximity to their plant site could be Looped In and Looped Out (LILO) for availing power to their plant which would save the Appellant crucial time in constructing the line and a lot of expenditure in availing power supply.

The Appellant through the same letter gave consent that they will abide by all the terms and conditions of OPTCL (R-2).

30.03.2005 The Appellant wrote another letter to OPTCL (R-2) accepting that the 132 kV Chaudwar – Mancheswar Single Circuit line proposed to be LILOOed was actually Chandaka – Bidanasi 132 kV line and requested OPTCL to reconsider their proposal.

02.07.2005 OPTCL granted permission for supply of 20 MW power to the Appellant with Terms & Conditions. **Condition 1 required the Appellant to lay 132 kV LILO line at his own cost and Condition no. 2 of the letter relate to Agreement and conveys (a) Agreement for Infrastructure Loan: “You have to execute a**

bipartite agreement with GRIDCO to deposit Rs 10 Lakhs per MW of you total maximum demand i.e. Rs 2.00 Crores, as an interest bearing loan to Gridco...”

05.07.2005 The Appellant vide letter dated 05.07.2005 accepted all the terms & conditions mentioned in the permission letter of OPTCL.

17.07.2006 OPTCL informed the Appellant that the LILO arrangement agreed to vide letter dated 2.7.2005 can handle only 15 MW of load and directed the Appellant to construct alternative arrangement by LILO arrangement of 132 kV Chainpal – Aarati – Choudwar line. The **temporary arrangement of LILO of Chandaka – Bidnasi line would be only for six months**. Thus, by this letter OPTCL (R-2) had directed the Appellant to construct two 132 kV lines at his own costs

(i) LILO of Chandaka – Bidnasi 132 S/C line as a temporary arrangement for six months only.

(ii) LILO of Chainpal – Aarati – Choudwar 132 kV S/C line as permanent arrangement

22.07.2006 By its Order dated 22.07.2006 OERC disposed of Case No. 36 of 2005 with certain directions. The said order permitted voluntary giving of Infrastructure Loan.

Group II Events took place after Commission’s Order

27.07.2006 Vide letter dated 27.07.2006 the OPTCL intimated the Appellant following clauses of OPTCL’s permission granted on 2.7.2005 stood amended... :

Clause 1: Connectivity....

(i) 30 MW of power at 132 kV will be extended to your proposed site through LILO arrangement of the existing Chainpal – Aarati – Choudwar 132 kV line...

(ii) Clause 2 : Agreement

(i) Agreement for Infrastructure Loan: **You have to execute a bipartite agreement with GRIDCO to deposit Rs 10.00 Lakh per MW of your maximum demand i.e. Rs 300.00 Lakh as an interest bearing loan to OPTCL.**

(iii) Clause 5: Construction:...

(iv) The following clause has been included in addition.

(v) Clause 13...

- 10.10.2006 The Appellant signed Power Supply Agreement with CESU (R-4) for supply of 15 MW of power.
- 17.10.2006 Review Petition OPTCL against the Order dated 22.07.2006 passed by the Commission in Case No. 36 of 2005.
- 23.10.2006 The Appellant gave an undertaking to execute Bi-partite agreement with OPTCL for 30 MW of power and also to deposit Rs. 10 Lakhs per MW towards Infrastructure loan.
- 30.10.2006 The Appellant availed power by LILO arrangement of 132 KV Chandaka – Bidanasi line temporarily.
- 5.12.2006 OPTCL directed the Appellant to deposit Rs 36,59,343 as supervision charges calculated at rate of 16%.
- 13.12.2006 The Appellant objected to demand of supervision charges @16% citing the Commission's order dated 22.7.2006.

- 30.12.2006 Appellant deposited a sum of Rs. 10 lacs towards infrastructure loan
- 03.01.2007 OPTCL wrote to Appellant that the OPTCL has already filed a review petition against the Commission's order dated 22.7.2006 and the matter is sub-judice.
- 07.04.2007 Appellant executed the bipartite Agreement with OPTCL
- 10.04.2007 The Appellant deposited 1st installment of loan amount.
- 13.04.2007 Appellant availed power through the Chainpal – Choudwar line and temporary connection was disconnected.
16. Following propositions would emerge from the above narrated sequence of events:
- a) The Appellant's works are Power Intensive Unit and were scheduled to be ready by March, 2006 and it was in need of supply by that time to run its plant.
 - b) On 2.7.2005 the OPTCL (R-2) agreed to the proposal of LILO of Chandaka – Bidnasi 132 kV S/C line to supply power to the Appellant. The LILO line was to be constructed by the Appellant at its own cost.
 - c) Later, on 17.7.2006, the OPTCL changed its stand and suggested another alternative arrangement of LILO of 132 kV Chainpal – Aarati – Choudwar S/C line to be constructed by the Appellant at its own cost. Earlier arrangement of LILO of 132 kV Chandaka – Bidnasi S/c line would be allowed only for 6 months and the Appellant was directed to restrict its power drawal on this line to

15 MW till permanent arrangement of LILO of Chaipal – Aarati – Choudwar line is completed .

- d) The very fact that the Appellant agreed to both the arrangements i.e. LILO of 132 kV Chandaka – Bidnasi line as temporary arrangement for six months and LILO of 132 kV Chandaka – Aarati- Choudwar line at its own costs would reflect that the Appellant was in urgent need of supply to run its plant.
- e) On 3.12.2004 and again on 2.7.2005 the OPTCL (R-2) communicated the terms and conditions for connectivity to the Appellant including the condition that the Appellant “**have to execute Infrastructure Loan agreement**”. It is to be noted that both these communications were prior to Commission’s order dated 22.7.2006.
- f) The Commission passed order in Case no. 36 of 2005 observing that “*the Commission finds no justification for collection of Rs 10 lakh per MW from the prospective consumer for construction of lines and s/s upto the load centre to be developed by OPTCL after due regulatory approval which has to be financed by OPTCL following prudent financial practices. However, the Commission shall have no objection if prospective consumers come forward voluntarily for giving loan to the transmission company at the prevailing bank rate*”.
- g) Despite the above findings of the Commission in its order dated 22.7.2006, OPTCL wrote to the Appellant on 27.7.2006 informing it of certain amendments in the terms and conditions for supply. Amended clause 2 clearly states that “**you have to execute a bipartite agreement with GRIDCO to deposit Rs 10.00 Lakh**

per MW of your maximum demand i.e. Rs 300.00 Lakh as an interest bearing loan to OPTCL .

h) In this letter dated 27.7.2006 the OPTCL did not refer to the Commission's order dated 22.7.2006 and choice to the Appellant about voluntarily deposit of Infrastructure Loan.

17. The learned Counsel for the 2nd Respondent OPTCL stated that the Commission had permitted voluntary giving of Infrastructure Loan by the prospective consumer. While giving connectivity permission the 2nd Respondent OPTCL, vide letter dated 2.7.2005 had requested the Appellant for bipartite agreement for Infrastructural Loan @ Rs 10 Lakh per MW subject to willingness and readiness of the Appellant. In support of this contention, he had quoted relevant portion of OPTCL's letter dated 2.7.2005 as reproduced below:

"2. Agreement

*(a). Agreement for infrastructure loan: you have to execute a bipartite agreement with OPTCL to deposit Rs. 10.00 Lakhs per MW of your maximum demand i.e. Rs. 2.00 Crores, as an interest – bearing loan to OPTCL. The above fund will be utilized by OPTCL for system augmentation / capacity up gradation of OPTCL transmission system. The details of the terms and conditions and agreement form will be supplied to you after receipt of your acceptance of the terms, and **the agreement shall be executed subject to your willingness and readiness and only after receipt of your acceptance of the terms and conditions as stated below**".*

18. According to the 2nd Respondent, the Appellant, vide its letter dated 5.7.2005, had voluntarily and specifically agreed to execute the Agreement.

19. The above contentions of the 2nd Respondent OPTCL are misplaced for the reason that both the communications relied upon by him are prior to the Commission's order dated 22.7.2006. The 2nd Respondent OPTCL had written another letter to the Appellant on 27.7.2006 communicating certain amendments of the terms and conditions of permission for connectivity. In this letter clause 2 related to agreement had also been amended. The relevant portion of OPTCL's letter dated 27.7.2006 is reproduced below:

No. TR/WKL/IV/161/Vol.II/1947

Dated 27.07.06

M/s Rawmet Ferrous Industries Privatae Limited

N-1, A/28, IRC Village,

Nayapalli, Bhubaneswar-751 015

***Sub: Power supply to your plant site at Anantapur,
Athgarh, Dist: Cuttack***

- Ref: (1) ***This office permission letter no. TR/WKL/IV/161/2004/136 dated 02.07.2005.***
(2) *This office letter TR/WKL/IV/161/2004/1369 dated 25.05.2006*
(3) *Your letter no. RFI/04/604/0067/2382 DATAED 22.06.2006.*
(4) *Letter no. 4381 dated 24.06.2006 of SGM (CP), OPTCL in your address.*
(5) ***This office letter no. TR/WKL/IV/161/2004/1835 dated 17.07.2006***

Dear Sirs,

*With reference to above cited and based on the technical feasibility assessed through a system study conducted by you at OPTCL for the year 2006-07, **the following clauses of this officer permission letter under reference (1) read with this office letter under reference (5) above, are amended to the extent as stated below:***

...

Clause no. 2 Agreement

The clause is amended as follows:

- (i) Agreement for infrastructure loan: You have to execute a bipartite agreement with Gridco to deposit Rs. 10.00 Lakhs per MW of your maximum demand i.e. Rs. 300.00 lakhs, as interest bearing loan to OPTCL.*
- (ii) All other terms and conditions of the clause shall remain unchanged.*

20. The above letter was issued after passing of the Commission's order dated 22.7.2006 and there was no mention of the Commission's directive on Infrastructure Loan. There was no indication to the Consumer that he may give loan voluntarily. On the other hand, the letter conveyed that Infrastructure Loan Agreement had to be executed.
21. Having perused all the records made available to us, we are of the view that the tenor of the letters from OPTCL to Appellant reflects the dominating and commanding position of the OPTCL while dealing with the consumers.
22. Another fact that would point that OPTCL was demanding the Infrastructure Loan from prospective consumer even after 22.7.2006 would emerge from the Commission's Review Order dated 16.4.2011 which directed the OPTCL to stop demanding Infrastructure Loan from prospective EHT consumers. The Commission finding in this regard is reproduced below:

"The practice of asking for 'Infrastructure Loan' from any consumer's of DISCOM or from any generator for the dedicated feeder/dedicated transmission lines as a condition of connectivity agreement should stop from the date of the order."

23. The Above direction of the Commission establishes beyond doubt that the OPTCL was demanding Infrastructure Loan as a

precondition for connectivity and cannot now claim that the Appellant came forward voluntarily to give Infrastructure Loan.

24. From the above discussions it is evident that the Appellant did not deposit the amount voluntarily but deposited the same 'On demand'. The question is answered accordingly.
25. Once it is decided that the Appellant Company has signed Infrastructure Loan Agreement on demand, the question would arise as to whether the 2nd Respondent had violated the Commission's Order dated 22.7.2006 by demanding the Infrastructure Loan from the Appellant.
26. It would be desirable to quote the Commission's Order dated 22.7.2006 to answer this question.

“the Commission finds no justification for collection of Rs 10 lakh per MW from the prospective consumer for construction of lines and s/s upto the load centre to be developed by OPTCL after due regulatory approval which has to be financed by OPTCL following prudent financial practices. However, the Commission shall have no objection if prospective consumers come forward voluntarily for giving loan to the transmission company at the prevailing bank rate”

27. The above findings of the Commission would convey following three propositions:
 - i. The demand of Infrastructure Loan by OPTCL was unjustified;
 - ii. The Commission would have no objection if the consumer come forward voluntarily for giving loan;

- iii. The Transmission Company would give interest at prevailing bank rate.
28. The filing of the Review Petition no. 63 of 2006 by the 2nd Respondent praying for permission to collect Rs 10 Lakh/MW as Infrastructure Loan would make it clear that the 2nd Respondent OPTCL had correctly understood the above findings of the Commission as Commission's directive to stop collecting Infrastructure Loan. Neither the 2nd Respondent OPTCL made any prayer for stay of operation of Commission's Order 22.7.2006 nor the Commission had stayed its order. Therefore, the Commission's order was fully operative till the Commission disposed of the review petition in Case no. 63 of 2006 by its order dated 16.4.2011. The 2nd Respondent OPTCL has violated the Commission's order dated 22.7.2006 by demanding Infrastructure Loan from the Appellant.
29. The Commission's order dated 22.7.2006 clearly mentioned that loan is to be taken at prevailing bank rate. The agreement signed between the parties shows that the OPTCL had agreed to pay interest at 6% per annum. However, the OPTCL in its own submissions has stated that it would be paying interest at 6% as against bank rate of 9% to 10%. Thus, the 2nd Respondent has violated the Commission's order on this count also.
30. It is, therefore, clear that the 2nd respondent had violated the Commission's order dated 22.7.2006. The question is answered accordingly.
31. The third question is as to **whether the Commission has erred in not granting relief to the Appellant?**

32. The learned Counsel for the Appellant submitted that the State Commission has, by its Impugned Order dated 26.4.2011, shifted the implementation of its own order dated 22.7.2006 where in had prohibited the 2nd Respondent OPTCL to collect the Infrastructure Loan from the prospective consumers as a condition for providing connectivity. The Commission has proceeded on a completely wrong premise in dealing with the agreement between the Appellant and the 2nd Respondent. The Commission ought to have looked into the circumstances under which the agreement was signed.
33. As already discussed above, the Commission in its order dated 22.7.2006 has held that the collection of Infrastructure Loan from the prospective EHT consumers was unjustified. The Commission in its Review Order dated 16.4.2011 has directed the 2nd respondent OPTCL to stop demanding the Infrastructure Loan from prospective EHT Consumer as precondition of connectivity. Having done so, the Commission ought to have looked into the circumstances under which the agreement was signed and decided the issue accordingly. Commission should have examined the aspect related to violation of its own order by the 2nd Respondent OPTCL which has admittedly continued to demand Infrastructure Loan from prospective EHT Consumers in complete violations of Commissions order.
34. This Tribunal in its judgment dated 14.12.2012 In Appeal No. 30 of 2012 filed by the OPTCL against the same Impugned Order has held that the transmission licensee cannot collect any amount from the consumer except the transmission charges under open

access. Our findings in Appeal No. 30 of 2012 in OPTCL versus OERC are quoted below:

We fully appreciate and concur with the findings of the Commission which are well reasoned. Admittedly, the Appellant is a State Transmission Utility and a deemed transmission licensee. The functioning of the Appellant is governed by Part V of the Act dealing with Transmission of Electricity. Section 39 deals with State Transmission Utility and its functions and Section 40 provides duties of Transmission Licensee. These Sections do not permit the Appellant to collect any charges from the Consumer. Section 41 deals with other business of transmission licensee, which enable the transmission licensee to carry out other business using the assets of transmission business. It does not permit the licensee to collect amount from consumers to create asset for transmission business. In fact, the Act does not permit the transmission licensee to collect any amount directly from a consumer except transmission charges under open access. The Appellant has prayed for permission to collect infrastructure loan from prospective EHT consumers for upgrading upstream transmission network required for free flow of power to such 'prospective consumer'. Augmentation of transmission network could be required to meet the ever increasing demand of existing LT consumers also. In such case the complete expenditure would have to be met by the Appellant from its own resources. Prospective EHT consumers can not be discriminated only because they might have made huge investments in setting up industry and are in urgent need of power and can be forced to shell out the 'infrastructure loan'.

35. Thus, the 2nd respondent was not entitled to collect the Infrastructure Loan from prospective EHT consumers.
36. The next question is related to supervision charges. The Commission in its order dated 22.7.2006 has authorized the 2nd Respondent OPTCL to collect supervision charges at 6% of total cost of the project. On 5.12.2006 the 2nd Respondent OPTCL demanded Rs 36,59,343.00 from the Appellant as supervision

charges. The Appellant objected to the demand as the supervision charges were worked out at rate of 16% of the total cost of line as against the approved rate of 6% by the Commission. The 2nd respondent OPTCL insisted upon collection of supervisions charges at 16% stating that the Review Petition had been filed before the Commission and the matter was, accordingly, sub-judice.

37. Let us examine the Commission's order dated 22.7.2006 and the prayer made by the 2nd Respondent OPTCL in its Review Petition in case no 63 of 2006. The relevant extracts of Commission's order 22.7.2006 read as under:

*“These EHT feeders constitute as part and parcel of the EHT transmission line which has to be built, owned and operated by the OPTCL to ensure optimal utilization of the generation and transmission asset. **To avoid delay in construction by the transmission licensee, the prospective consumer can construct a line on behalf of OPTCL and handover the same to OPTCL perpetually and in such an instance, the OPTCL shall be entitled only to the supervision charge of 6% of the gross estimate.** The point of interface between OPTCL and the distribution licensee shall be the point of interconnection at the EHT consumer premises. Following the remunerative norms any expenditure incurred by the prospective consumer on behalf of OPTCL can be reimbursed by OPTCL through energy bill to be served by the concerned DISTCOs through mutual agreement.”*

38. The 2nd respondent OPTCL had made the following prayers in its review petition:

- (i) to exempt OPTCL from the duties/responsibility for power supply to EHT consumers which falls under the domain of Distribution licensees;*
- (ii) **to allow supervision charge @ 16% over the total project outlay in lieu of 6% allowed; and***

(iii) *to permit OPTCL to collect Rs.10 lakh/MW as infrastructure loan as is being collected to ensure commitment from and realistic assessment of power projection by the prospective EHT consumers till such time a mechanism is developed on cost sharing between DISTCOs/GRIDCO/OPTCL and approved by OERC.*

39. Thus, neither the 2nd Respondent OPTCL made any prayer for stay of operation of Commission's Order 22.7.2006 nor the Commission had stayed its order. Therefore, the Commission's order was fully operative till the time when the 2nd Respondent had raised a demand of supervision charges worked out at 16%.

40. It is settled law that mere filing of Appeal would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed.

41. In *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (2005) 1 SCC 705 Hon'ble Supreme Court has held that

“ It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same.”

42. In *Madan Kumar Singh Vs District Magistrate, Sultanpur*, (2009) 9 SCC 79 Hon'ble Supreme Court has reiterated the same and has held that:

“ 20. It is trite to say that mere filing of a Petition, Appeal or Suit, would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed.”

43. In the present case the 2nd respondent did not make any prayer for stay of Commission's order and, therefore, the same was operative when the demand for supervision charges was made. The 2nd respondent ought to have followed the Commission's order and collected only 6% of total cost of the line as supervision charges. The 2nd Respondent has violated the Commission's order by charging 16% supervision charges.
44. In the light of above findings, we find it appropriate to direct the Commission to pass consequential order keeping in view the above observations within two months from date of this judgment.
45. The appeal is allowed. However, there is no order as to costs. Pronounced in open court on 21st December 2012.

(V J Talwar)
Technical Member

(Justice Partha Sakha Datta)
Judicial Member

Dated: 21st December, 2012

REPORTABLE/~~NOT REPORTABLE~~