

BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal No. 98 of 2007

Dated this 04th day of January, 2008

Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Powergrid Corporation of India Ltd.

Suadamani, Plot No.2,
Sector29,
Gurgaon – 122 001,
Haryana

... Appellant

Versus

1. **Central Electricity Regulatory Commission**
Through its Secretary,
6th Floor, Core-3,
SCOPE Complex,
Lodhi Road,
New Delhi – 110 003.

2. **North Eastern Regional Electricity Board**
North Eastern Regional Power Committee
Through its Member Secretary,
Rosalina,
Nongrimbah Road,
Laitumkhrah,
Shillong - 793 003.

3. **North Eastern Electric Power Corp. Ltd.**
Through its Chairman-cum-Managing Director,
Brokland Compound,
Lower New Colony,
Shillong – 3.

4. **National Hydro Electric Power Corp. Ltd.**
Through its Chairman-cum-Managing Director
NHPC Complex,
Sector – 33,
Faridabad – 121 003.

5. **Assam State Electricity Board**
Through its Chairman-cum-Managing Director
Bijulee Bhawan,
Paltan Bazar,
Guwahati – 781 001

6. **Meghalaya State Electricity Board**
Through its Chairman,
Lanjingshai,
Short Round Road,
Shillong – 793 001.

7. **Department of Power**
Through its Secretary & Commissioner (Power)
Government of Arunachal Pradesh,
Itanagar,
Arunachal Pradesh – 791 111.

8. **Power and Electricity Department**
Through its Jt. Secretary (Power),
Government of Mizoram,
Mizoram, Aizwal.

9. **Electricity Department**
Through its Principal Secretary (Power)
Government of Manipur,
Keishampat,
Imphal.
10. **Department of Power**
Through its Commissioner & Secretary (Power)
Government of Nagaland,
Kohima.
11. **Tripura State Electricity Corp. Ltd.**
Through its Commissioner (Power)
Govt. of Tripura,
Agartala – 799 001. ... Respondents

For the Appellant : Mr. M. G. Ramachandran, Adv.
Mr. Anand K. Ganesan, Adv.
Ms. Swapna Seshadri, Adv.
Mr. Ramnesh Jerath, Adv.
Mr. Rohit Shukla, Adv.

For the Respondents : Mr. Kailash Vasudev, Sr. Adv.
Mr. Manish Goswami, Adv.

Mr. H. Phookan, Adv. along with
Mr. Kumud Goswami, Sr. Mgr. ASEB
for Resp. No.5

Mr. Sunil Murarka for Resp. No.11
Mr. Anup Mahanta for Resp. No.6

Mr. Mahananda Debbarma,
AGM(Comml.), TSECL and

Mr. A.Das, SM, TSECL,

Mr. T. Rout, Jt.Ch.(Legal),
Mr. N. Bhandari, Dy.Ch.(E) and
Mr. B. Sree Kumar, AC(Legal) for CERC

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

1. The Power Grid Corporation of India Ltd. (PGCIL for short) the appellant herein, is a Central Govt. enterprise engaged in interstate transmission of electricity. It also undertakes the functions of Central Transmission Utility (CTU for short) and Regional Load Despatch Center (RLDC for short). The Central Electricity Regulatory Commission (CERC or Commission for short), the respondent No.1 herein, has been regulating the tariff to be charged by the appellant since its constitution under the Electricity Regulatory Commissions Act 1998 (ERC Act for short). The CERC continues to fix the tariff for the appellant after the enactment of the Electricity Act 2003, hereinafter referred to as the Act, being the Central Commission under the Act. The tariff fixation is guided by Section 61 & 62 of the Act. The ERC Act guided tariff determination by the provisions of Section 28. Both the Acts recognize grant of subsidy as independent of tariff

determination. The CERC is required to fix tariff on Commercial principles so that the utilities receive their revenue requirement including reasonable return and are not required to subsidise any particular or class of consumer. The Central and the State Govt. could provide subsidy in the manner in which they found appropriate. For the block year 1997-2002, tariff for the appellant was fixed project-wise under the norms notified by the Ministry of Power (Govt. of India) on 16.12.1997. Transmission tariff in the country is based on tariff norms, terms & conditions, as notified by Govt. of India/CERC from time to time. However, for the North Eastern Region (NER for short) Uniform Common Pool Transmission Tariff (UCPTT for short) method has been adopted. UCPTT is an arrangement for charging transmission tariff for the transmission system used for evacuation of power to NER States which is applied (on paisa per kWh basis) on the total kWh of Central sector energy drawn by each State and accounted for by North Eastern Region Electricity Board (NEREB for short) in its Regional Energy Accounts. UCPTT rate is derived by pooling together the annual transmission charges for the Central Sector lines and sub-stations and the State owned lines which have been identified as being used for wheeling Central Sector power.

2. The UCPTT rate was fixed 35 p/kWh (the share of the appellant being 31.61618 paise + 3.38382 paise for State Sector lines) by NEREB in its 42nd meeting held on 13.11.97. The UCPTT rate of 35p/kWh was derived by taking into account the capital expenditure of the appellant (annual transmission charges as per UCPTT formula) of NER transmission system & also capital investment (annual transmission charges as per UCPTT formula) in the state section lines being used for carrying Central Sector Power up to 01.04.1998. This was subject to final decision being taken by the Government of India on the relief package to North Eastern Region.

3. The appellant filed petition No. 40/2000 for approval of tariff for the period commencing from 01.02.2000 relating to three transmission assets (i) Kathalguri Transmission System (ii) Kopili extension stage I Transmission System & (iii) 132 kV Augmentation Scheme in NER constructed by appellant in the NER. The appellant claimed that tariff be fixed as per the Government of India notification No. 2/3/POWERGRID/Tariff/97 dated 16.12.97 i.e. on commercial basis. The respondent beneficiaries (two of whom are respondents in this appeal) said that although the tariff works out to 90 Paise per kWh for the energy transmitted on the regional network, the high cost was on account of inadequate generation at the

Central Generating Stations in the region and the inability to use the transmission facility of the appellant fully and therefore the tariff should continue to be 35 Paise per kWh.

4. By Order dated 1.1.2002 passed in Petition No. 40 of 2000, the Central Commission directed that the respondent beneficiaries would be liable to pay transmission charges at the rate of 35 Paise per kWh of the power transmitted in the region for the period 1.2.2000 to 31.3.2004 or till such time the power generation matching the transmission capacity was available in the region, whichever is earlier. The Central Commission further observed that the difference between the actual tariff and the tariff of 35 Paise per kWh approved by the Central Commission should be provided to the appellant from the relief package under consideration with the Central Government for the North Eastern Region. The following portion from the above order needs to be extracted for full appreciation of the facts:-

“13. In the light of the foregoing, we direct that the respondents shall be liable to pay the transmission charges @ 35 paise/kwh of the power transmitted in the region. This tariff shall be applicable from 1.2.2000 to a period upto 31.3.2004 or till such time the power generation matching the transmission

capacity is available, whichever is earlier. However, we wish to advise the Central Government to finalize an appropriate relief package of the NE region. If the Central Government finalize relief package, then the difference between actual tariff and the tariff of 35 paise/kWh which we have ordered shall be provided from the relief package to the petitioner. If this does not happen, petitioner would have to bear the difference. We expect that the petitioner, however, would pursue the matter and obtain an early favourable decision from the Central Government. The petitioner may get this petition revived in that eventuality. As a corollary of this direction, the petitioner need not file transmission tariff petitions for any other transmission system in the region since other transmission systems get covered by these directions, which are in the context of the power transmitted and not based on the terms and conditions notified by the Ministry of Power on 16.12.97.

14. We take this opportunity to impress upon the Central Government that it should coordinate the activities of the agencies involved in construction of transmission system and the generation of power so

that transmission capacity matches with the generation of power since otherwise it results in wasteful expenditure, as in the present case.

Review Petition No. 110/2000

15. In terms of its order dated 22nd September, 2000, the Commission had directed the respondents to pay a provisional tariff @ 35 paise/unit from the date of commercial operation of the assets. The petitioner, PGCIL has sought review of the Commission's order dated 22nd September, 2000 and the petition is registered as Review Petition No. 110/2000. The Review Petition was also listed along with the main petition. In the Review Petition, the petitioner has claimed that it is entitled to full tariff as per the norms and factors prescribed by Ministry of Power in the notification dated 16.12.97 and not @ 35 paise/kWh of the electricity transmitted. We have confirmed the provisional tariff of 35 paise/kWh through this order as noted above.

16. In view of our findings and directions in Petition No. 40/2000, the Review Petition No. 110/2000 stands dismissed.”

5. Out of the 35 Paise per kWh, the appellant received only 31.616180 p per kWh. The balance 3.383820 Paise was shared by other transmission licensees viz. Assam State Electricity Board (ASEB), Meghalaya State Electricity Board (MeSEB), Nagaland, Tripura & Manipur who were beneficiaries of the transmission facilities themselves. The appellant in its petition No.13/2004 seeking implementation of the order of 1.1.2002 prayed that it be paid at least 35 Paise per kWh as approved by the Central Commission. The CERC decided the petition vide an order dated 06.09.04 with the following direction:

“4. According to the petitioner, in view of the Commission’s order dated 1.1.2002, it was entitled to charge tariff at the rate of 35 paise per kWh w.e.f. 1.2.2000. However, It is being actually paid at the rate of 31.616180 paise per kWh out of 35 paise per kWh approved by the Commission and the balance of 3.383820 paise per kWh is shared by the beneficiaries of the North Eastern Region as per details given in the table below:

TABLE

		Share
(a)	POWERGRID	31.616180 paise
(b)	ASEB	1.919840 Paise
(c)	MeSEB	0.306150 Paise

(d)	Nagaland	0.230560 Paise
(e)	Tripura	0.342630 Paise
(f)	Manipur	0.584640 Paise
		35.00 Paise

5. We have considered the submissions. The regional tariff in the North Eastern Region was paid at the rate of 35 paise per kWh under the Uniform Common Pool Transmission Tariff (UCPTT) agreed to by all concerned with effect from 1.4.1998. The UCPTT tariff of 35 paise was being shared since 1.4.1998 as indicated in the above table, due to the fact that at that time the transmission system owned by the petitioner had only a limited connectivity in NER, and certain state-owned lines had to be necessarily used to facilitate transmission of power from central generating stations to certain State/parts of NER, notably Tripura, Arunachal Pradesh, North Assam etc. It is understood that the above sharing of UCPTT was proportionate to notional usage of State-owned lines for the above purpose as obtaining in 1998.

6. Respondent 1 has continued to prepare the regional energy accounts accordingly even after issue of the order dated 1.1.2002. According to

Respondent 1, the Commission's order dated 1.1.2002 confirms the continuation of UCPTT concept, the total UCPTT rate of 35 paise per kWh, and its sharing as per original UCPTT scheme. This has been refuted by the petitioner. The petitioner has contended that based on the said order, the transmission charges are payable to it at the rate of 35 paise per kWh with effect from 1.2.2000. This contention of the petitioner, that the entire transmission charge of 35 paise/kWh should be accruing to it, is apart from other arguments, drawing strength from the following observation in the order dated 1.1.2002.

“If the Central Government finalise relief package, then the difference between actual tariff and the tariff of 35 paise/kWh which we have ordered, shall be provided from the relief package to the petitioner. If this does not happen, petitioner would have bear the difference”.

A reading of the above could lead one to believe that the Commission had intended payment on the entire 35 paise/kWh to the petitioner. There is thus

some force to the argument put forth by the petitioner.

7. It follows from the record that many more transmission lines had been commissioned by the petitioner in the North-Eastern Region by 1.2.2000. With improved connectivity provided by the petitioner's system, the requirement of SEB-owned lines for transmission of power from the central generating stations would have come down. On both counts i.e., increased number of petitioner's lines and reduced number of SEB-owned lines, the petitioner's share in UCPTT could have gone up, and it would be understandable for the petitioner to expect payment of the entire or substantial part of 35 paise/kWh to it.

8. On the other hand, the concept of UCPTT agreed to in the NEREB forum has so far not been disbanded (nor specifically approved) by this Commission. It has, however, been referred to in various orders of the Commission in connection with transmission charges for NER. The rate of 35 paise/kWh since confirmed by the Commission has also been derived from the consensus in NEREB. However, the formula for sharing of the UCPTT has not been gone into by

the Commission. It was expected that it would be appropriately revised from 1.2.2000 (or some appropriate date by NEREB, the forum which worked out the original sharing formula. We have been given to understand that there has been very little progress in this direction. This is the cause of discomfiture of the petitioner as the petitioner is unable to recover its legitimate dues. The NERE Board seems to be conscious of this fact. Therefore, in the hearing on 22.6.2004, the Member Secretary, NEREB had also submitted that there was a need for review on this account. He stated that the matter was on the agenda of the meeting of NERE Board, to be held on 31.7.2004, a committee was proposed to be constituted for a detailed study of this aspect, and the final recommendations were likely to be available by 31.8.2004. We direct that the petitioner and the respondents should place all the details in regard to utilization of the transmission lines for evacuation of power from the central generating stations before the Committee to be constituted by NERE Board. We also direct the Member Secretary, NEREB to expedite determination of the revised UCPTT sharing formula for the period from 1.2.2000 to 31.3.2004 based on the studies conducted by the Committee. In case the

issue is not resolved by 1.10.2004 at NEREB, the parties are at liberty to approach the Commission.”

6. The appellant moved an application, being No.3/05 dated 5.01.05, for implementation of order dated 6.9.2004 in petition No.13/04 on the allegation that NEREB was evincing no intention or commitment to resolve the issue, as directed by the Hon'ble Commission. The appellant complained that the issue was not getting due and serious attention at NEREB forum as POWERGRID voice was getting subsided in view of majority of NER constituents at NEREB forum and that POWERGRID was not getting its due share of UCPTT tariff and was suffering tremendous financial loss. The appellant claimed that it was entitled to the entire 35 paise of the UCPTT tariff. The prayer in the petition was as under:

“I) To consider inclusion of all central sector transmission lines commissioned after 1998 under the UCPTT scheme and thereby modifying the investment on POWERGRID transmission assets from Rs.434.39 crores upto 1998 as included in the UCPTT scheme at present to Rs.1592.94 crores under the UCPTT scheme in order to calculate the increased share of POWERGRID tariff under UCPTT.

II) *To exclude from the UCPTT scheme all intra state transmission lines owned by the NER states as they are solely utilized to transmit power either from constituents' own generating units or from CTU delivery points to other load centres within their states. Some of these lines are not even in service since 01.02.2000.*

III) *To exclude the inter-state transmission lines owned by the NER states from the UCPTT scheme as they are no longer required after the commissioning of CTU lines as some of the inter-state lines are not even in operation since 01.02.2000.*

IV) *To allow transmission tariff to POWERGRID @ 35 P/kWh in view of Hon'ble Commissions directive at Para 3.1 of this petition.*

V) *To calculate energy for transmission tariff in the Regional Energy Account (REA) considering Hon'ble Commissions directive vide para 12 & 13 of its order dated 06.09.2004 of POWERGRID petition No. 13/2004.*

VI) *To pass such other further order(s) which this Hon’ble Commission may deem fit and proper in the facts and circumstances of the case.”*

7. In the petition the appellant claimed that its network may alone be sufficient to evacuate the central sector power and may entitle it to entire 35 paise UCPTT per units. On direction of the Commission, the NEREB proposed the following apportionment in its report dated 23.09.05.

Constituent	Upto December 2002	Jan 2003 to March 2004	April 2004 to May 2004	June 2004 to December 2004	January 2005 to July 2005
POWERGRID	33.900301	33.995626	34.006728	33.864863	33.668547
ASEB	0.719517	0.657148	0.649884	0.784769	0.768377
MeSEB	0.108623	0.099207	0.098111	0.099207	0.097135
Nagaland	0.076211	0.069605	0.068836	0.069605	0.271047
Tripura	0.113913	0.104039	0.102889	0.124676	0.122072
Manipur	0.081434	0.074375	0.073553	0.074375	0.072821
Total	35.000000	35.000000	35.000000	35.017496	35.000000

8. Subsequently in order to clearly indicate the first period “upto December 2002” the Member Secretary sent a clarification vide his letter dated 21.04.06 proposing the following apportionment:

Constituent	February 2000 to December 2000	January 2001 to September 2001	October 2001 to December 2002
POWERGRID	33.877564	33.894439	33.900301
ASEB	0.734394	0.723353	0.719517
MeSEB	0.110869	0.109202	0.108623
Nagaland	0.077787	0.076617	0.076211
Tripura	0.116269	0.114521	0.113913
Manipur	0.083117	0.081868	0.081434
Total	35.000000	35.000000	35.000000

9. The Commission in its order dated 09.05.2006 disposed of petition No. 3/2005 and offered a simplified apportionment by saying the following :

“13. A careful perusal of the above tabulations shows that apportioning change is very minute between February 2000 to December 2000, January 2001 to September 2001 and October 2001 to December 2002. Similarly, the apportioning change between January 2003 to March 2004 and April 2004 to May 2004 is miniscule. We, therefore, have decided simplified UCPTT apportioning as follows :

Constituent	February 2000 to December 2002	January 2003 to May 2004	June 2004 to December 2004	January 2005 and onwards
POWERGRID	33.877564	33.995626	33.864863	33.668547
ASEB	0.734394	0.657148	0.784769	0.768377
MeSEB	0.110869	0.099207	0.099207	0.097135
Nagaland	0.077787	0.069605	0.069605	0.271047
Tripura	0.116269	0.104039	0.124676	0.122072
Manipur	0.083117	0.074375	0.074375	0.072821
Total	35.000000	35.000000	35.017496	35.000000

14. Accordingly, Member Secretary, shall issue details of net amounts payable/receivable by different agencies based on the revised sharing formula specified in para 13 within three months from the date of this order.”

10. The ASEB & Tripura State Electricity Corporation Ltd. filed review petitions being No. 72/06 & 3/2005 respectively. ASEB in its review petition expressed the following grievances:

“a) Allowing retrospective revision of UCPTT share with effect from 01.02.2000 in utter disregard of the earlier decision of the said commission vide its order dated 01.01.2002 on the same subject.

b) Sharing of UCPTT is now made based on capital cost which is not at all in line with UCPTT concept adopted in NEREB forum. As on date, de-pooling of UCPTT is done based on annual chargeable costs of central sector and state sector agencies as per calculation furnished in ANNEXURE-4.”

11. ASEB further pointed out that on account of retrospective operation of the order dated 09.05.06, ASEB has to pay back a

substantial amount of transmission charge to the tune of around Rs.31.1498 Crores for the period of February 2000 to May 2006 and that there was little scope to pass on such huge past arrear to the general consumer and ASEB also does not have any reserve fund to meet such liability. The Tripura State Electricity Corporation Ltd. filed the other similar review petition.

12. Both the petitions were disposed of by the impugned order dated 31.10.06. The CERC in this impugned order has further disclosed that the Member Secretary of NERPC (successor of NEREB) vide his letter dated 05.06.06 informed the Commission that some error had occurred in the sharing of UCPTT for the period of June to December 2004. Vide another letter dated 15.06.06 he again submitted revised tables for various periods based on revised cost of the NER intimated under PGCIL's letter dated 07.06.06. Yet another revision in the table was made based on revised cost of NER assets intimated by PGCIL vide its letter dated 24.07.06. The revised sharing formula finally intimated by the Member Secretary, NERPC is as under:

Constituent	2/2000- 12/2000	1/2001- 9/2001	10/2001- 12/2002	1/2003- 3/2004	4/2004- 5/2004	6/2004- 12/2004	1/2005- 7/2005
PGCIL	33.680532	33.704037	33.712086	33.841119	33.853696	33.690816	33.465764
ASEB	0.863309	0.847930	0.842664	0.758240	0.750010	0.891357	0.885403

Manipur	0.097708	0.095967	0.095371	0.085816	0.084885	0.084476	0.083912
MeSEB	0.130331	0.128009	0.127214	0.114469	0.113227	0.112682	0.111929
Nagaland	0.091441	0.089812	0.089255	0.080313	0.079441	0.079059	0.312328
Tripura	0.136679	0.134244	0.133410	0.120044	0.118741	0.141610	0.140664
Total	35.000000	35.000000	35.000000	35.000000	35.000000	35.000000	35.000000

13. On considering the pleas raised by the parties during the hearing of the review petition, the Commission found that it had been called upon to resolve two basic issues – The first issue related to the basis of the computation of the revised sharing formula. The review petitioners questioned the basis of capital cost of transmission assets and asked for revival of the earlier practice of annual transmission charges for apportionment of the 35 Paise / unit. This plea of the review petitioners did not find favour with the Commission. The Commission found that the representatives of the petitioners had reconciled to the computation based on capital cost and ruled that the issue did not survive.

14. The only other issue to be resolved was whether the revised sharing as suggested by the NERLDC could be implemented prospectively or retrospectively. The Commission noted that the plea of the petitioner that the load of 5-6 years of arrears would escalate the already high consumer tariff was the sole ground for the review. The Commission, in the impugned order, however, does not examine this plea. Instead it observed that the issue of sharing was raised for the first time

by the appellant, PGCIL, in petition No. 13/2004 and thereafter in the petition No. 3/2005 and held that, therefore, the revised sharing formula would be applicable only from 01.04.04. The Commission also observed that the date of implementation of the new formula had not been settled in the order under review. The relevant part of the impugned order needs to be read closely and hence is being extracted below:

“19. The transmission tariff in NER is being charged at UCPTT rate, which is in terms of paise per unit, operational since 1992. The present UCPTT rate of 35 paise/kWh is effective from 1.4.1998. The petitions were filed by PGCIL for approval of tariff for certain newly commissioned assets in NER. In one such case (Petition No.40/2000), the Commission decided to continue the UCPTT rate of 35 paise/kWh up to 31.3.2004 in view of the surplus transmission capacity not being made use of by the State Utilities in NER. The relevant excerpts of the Commission’s order dated 1.2.2002 in petition No.40/2000 are given hereunder:

“12. The transmission schemes in respect of which tariff approval has been sought were approved by the Central Government to match with the future generation of power by NEEPCO. It is on record that except Kathalguri gas plant, no other generating plant connected with these transmission schemes had been put to commercial operation by 1.2.2000, the date from which tariff has

been claimed by the petitioner. There is thus an excess of transmission capacity and the respondents are not deriving any benefit out of such excess capacity. Under these circumstances, the respondents cannot be made liable to pay the transmission charges for the excess capacity. In fact, from the petition itself we find that PIB, while approving the revised cost estimates for Kathalguri transmission system, advised the petitioner to enter into a back-to-back commercial agreement with the generating utility and seek grant/compensation in case of delay or non-commissioning of the unit as per schedule. It becomes evident that even PIB did not intend the respondents to be burdened with extra tariff because of non-availability of generation commensurate with the transmission capacity. Therefore, tariff of these transmission schemes cannot be fixed under the notification dated 16.12.97.

13. In the light of the foregoing, we direct that the respondents shall be liable to pay the transmission charges @ 35 paise/kwh of the power transmitted in the region. This tariff shall be applicable from 1.2.2000 to a period up to 31.3.2004 or till such time the power generation matching the transmission capacity is available, whichever is earlier. However, we wish to advise the Central Government to finalise an appropriate relief package for the NE region. If the Central Government finalises relief package, then the difference between actual tariff and the tariff of 35 paise/kwh which we have ordered, shall be provided from the relief package to the petitioner. If this does not happen, petitioner would have to bear the difference. We expect that the petitioner, however, would pursue the matter and obtain an early favourable decision from the Central Government. The petitioner may get this petition revived in that eventuality. As a corollary of this direction, the petitioner need not file transmission tariff petitions for any other transmission system in the region since other transmission systems get covered by these directions, which are in the context of the power transmitted and not based on the terms and conditions notified by the Ministry of Power on 16.2.1997”.

20. From the above, it is observed that the Commission had approved the UCPTT rate of 35 paise/unit, effective from 1.4.1998 in Petition No.40/2000 without going into the question of sharing of the charges by the different parties. This

question was not the subject matter of that petition. The intention behind continuation of 35 paise/unit was to maintain status quo up to 31.3.2004, which should imply status quo on apportionment of 35 paise/unit also. PGCIL did not raise the issue of sharing of UCPTT rate of 35 paise/unit till it filed Petition No. 13/2004 in February 2004, wherein it claimed the entire UCPTT charge of 35 paise/unit by giving some interpretation of the order dated 1.2.2002. However, in this petition also, the Commission did not approve the re-apportionment since the matter was said to be under consideration of the Committee formed by NEREB. These aspects have not been considered by the Commission in its order dated 9.5.2006. Accordingly, the case for review has been made out.

21. Since the only issue to be decided is the date of implementation of the revised formula and the parties have made their submissions on merits, we are deciding this issue in these proceedings. In view of the discussion in the preceding paras, we consider it appropriate that the revised sharing formula be implemented from 1.4.2004, that is, from the financial year immediately following the filing of

Petition no. 13/2004 and from the beginning of the financial year of filing of petition No. 3/2005 wherein the issue of apportionment was decided. This also takes into consideration the order dated 1.2.2002 in Petition No. 40/2000 wherein it was decided to continue the existing UCPTT rate of 35 paise/unit, up to 31.3.2004. We do not find enough merit and rationale in the contention of the petitioners to implement the revised formula form (sic-from) the date of issue of the order in Petition No. 3/2005 on 9.5.2006.”

15. The appellant challenges this order on the ground that the appellant had added substantial transmission assets in the NER before 2000 and therefore the Commission should have revised the apportionment of UCPTT as per the appellants share of transmission assets in the entire NER as on 2000. It is also submitted that there was no ground to exercise the power of review. At the time of hearing arguments the learned counsel for the appellant also attempted to dispel the Commission's view that at no time earlier to 2004 the appellant raised the demand for reallocation of the UCPTT revenue. We will now proceed to examine each of these grounds.

16. The first ground to be taken up is whether the Commission was right in exercising the power of review. The power of review is provided for in section 94(1)(f) of The Electricity Act 2003. The power of the Commission to review its own orders is similar to the power of a civil court to review its orders viz. as is available U/O 47 rule 1 of the Civil Procedure Code. The grounds on which review was sought were two namely (i) the basis of computation i.e. the capital cost of transmission assets was wrong and (ii) whether the revised sharing could be implemented retrospectively or prospectively. The first ground was rejected by the Commission. The second ground was based on the plea that loading of 5 to 6 years of arrears would further escalate Commission's tariff. We can quote the following part from the impugned order to examine the nature of the plea:

“According to the petitioner, the consumers’ tariff are fixed by State Commissions on the basis of Annual Revenue Requirement (ARRs) of the State Power Utilities for the prospective period. The consumers tariff is already very high in NER, tariff in the State of Assam being the highest in the country. It is submitted by the petitioners that loading of 5-6 years arrears would further escalate the consumer’s tariff,

giving shock to them. This is the sole surviving ground for review.”

17. The Commission has allowed the prayer for review but on grounds entirely different from those on which review was sought. The ground on which the order of 9.5.2006 is reviewed is:

“PGCIL did not raise the issue of sharing of UCPTT rate of 35 paise/unit till it filed petition No. 13/2004 in Feb., 2004 wherein it claimed the entire UCPTT charge of 35 paise/unit giving some interpretation of the order dated 1.2.2002. These aspects have not been considered by the Commission in its order dated 9.5.2006. Accordingly the case for review has been made out”

18. As such it is a suo moto review and not a review on the application of the respondents. The appellant, it can be presumed, responded to the review petition and to the grounds raised therein. There is nothing to indicate that this ground raised suo moto, was the subject matter of hearing before the Commission.

19. Mr. M.G. Ramachandran learned counsel for the appellant has taken us through the record to satisfy the Tribunal that this is an incorrect finding on facts. Let us first see the nature of the claim of the appellant in petition No. 40/2000. The appellant after stating the capital investment in the three new transmission assets set out the claim for tariff in absolute terms as under:

“ Kathalguri Transmission system:

<i>Period</i>	<i>Amount in Rupees Lakhs</i>		
	<i>Annual Transmission Tariff</i>		
	<i>Misa-Balipara</i>	<i>Balipara-Tezpur</i>	<i>Bongagaon Balipara</i>
<i>1999-2000 (for 2 months)</i>	<i>679.16*</i>	<i>11.47*</i>	<i>900.98*</i>
<i>2000-2001</i>	<i>4079.80</i>	<i>68.87</i>	<i>5507.68</i>
<i>2001-2002</i>	<i>4079.80</i>	<i>66.98</i>	<i>5511.36</i>

Kapali Extension Stage-I Transmission system:

<i>Period</i>	<i>Amount in Rupees Lakhs</i>
	<i>Annual Transmission Tariff</i>
<i>1999-2000 (For two months)</i>	<i>63.81*</i>
<i>2000-2001</i>	<i>381.74</i>
<i>2001-2002</i>	<i>382.07</i>

132 kV Augmentation Scheme in NER:

Amount in Rupees Lakhs

<i>Period</i>	<i>Annual Transmission Tariff</i>
<i>1999-2000 (For two months)</i>	<i>378.27*</i>
<i>2000-2001</i>	<i>2263.47</i>
<i>2001-2002</i>	<i>2268.40</i>

** Prorata tariff"*

20. Admittedly, applying the notification dated 16.12.97 the tariff for the appellant would have come to 90 paise per unit. Having thus claimed much more than 35 paise, there was no occasion for the appellant to claim readjustment of the shares. What the appellant pointed out in the petition No. 40/2000 before the Commission was how its investment in the transmission system had gone up.

21. The order dated 1.1.2002 acknowledges the investment put in by the appellant. Nonetheless, the legitimate dues were denied to the appellant for reasons already indicated in the earlier part of this judgment. Eventually the order dated 1.1.2002 disposed of the petition No. 40/2000, directing the respondents, including the review petitioners to pay a tariff of 35 paise per unit to the appellant. In its order dated 1.1.2002, the commission could also say that instead of 35 paise per

unit the appellant would be paying something like 33 paise per unit leaving the balance amount to be shared by other licensees in the NER. The order dated 1.1.2002 when read along with Petition No. 40/2000 leads to the conclusion that instead of granting the tariff of 90 paise per unit as per the Notification dated 16.12.2007, the appellant was being granted only 35 paise per unit. Will it be proper to say that the appellant never wanted any raise in its share in the UCPTT rate of 35 paise per unit at that time and therefore the revised sharing formula cannot be applied from the year 2000? What was granted on the Petition No. 40/2000 was 35 paise per unit. The revised sharing formula actually takes away what was granted by the Commission then. The revised sharing formula is worked out much later in the year 2006. The appellant, for some reasons has accepted revised sharing formula. Can it be said that the formula cannot be applied w.e.f. 2000 or 2002 for want of there being any demand in this respect? The answer is categorically no.

22. It can be further confirmed from the subsequent order dated 6.9.2004 in Petition No. 13/2004 in which the appellant brought it to the notice of the Commission that in spite of the order dated 1.1.2002 under which it was entitled to charge tariff @ 35 paise per unit w.e.f. 1.2.2000, it was actually being paid @ 31.616180 paise per unit out of 35 paise per unit

approved by the Commission and balance 3.383820 paise was being shared by the beneficiaries of the NER. The Commission in this order has even said that on account of increase in the number of appellant's lines and decrease in the number of SEB-owned lines, the appellant's share in UCPTT could have gone up and it would be understandable for the petitioner to expect the payment of the entire or substantial part of 35 paise/kWh to it. Thus as revised by the Commission, the appellant has been accepting and has been asking for 90 paise or at least the entire 35 paise per kWh w.e.f. 1.2.2000 onwards.

23. Further since the tariff has been restricted to only 35 paise per unit and the appellant had a legitimate claim for higher tariff, the Commission directed to expedite the determination of revised UCPTT formula w.e.f. 1.2.2000 to 31.3.2004.
24. This order dated 6.9. 2004 does not seem to have been challenged by the respondents. The order establishes that the appellant's claim for the entire 35 paise per unit was in existence in the year 2002. The direction to re-determination or revise the UCPTT sharing formula was, in fact, less than the relief prayed for.

25. When even this relief was not being actualized the appellant filed the Petition No. 3/2005 asking for implementation of the earlier order passed in Petition No. 40/2000 and 13/2004. Even in this petition the appellant reiterated its demand for entire 35 paise/kWh. But in the order dated 9.5.2006 the Commission approved of the UCPTT sharing formula as contained in its paragraph No. 13 w.e.f. Feb., 2000. Thus the finding in the impugned order to the effect that the appellant did not raise the issue of raise or hike in the share for UCPTT rate till it filed the petition No. 13/2004 and hence the revised sharing formula could not apply since 2002, is incorrect. The ground for reviewing order dated 9.5.2006 is non-existent. The review itself is done on the basis of an error of appreciation of facts.
26. The impugned order is liable to be set aside on this short ground. However, it will be appropriate to examine as to whether there was any error in giving the benefit of revised sharing formula w.e.f. 2002. It has been accepted by the Commission that the sharing of UCPTT revenue would be based on capital cost of the transmission assets of different players in the field. Therefore, higher the share of a player in the total transmission assets higher will be its share in the UCPTT revenue. Since it is the duty of the Commission to fix the tariff, and in the present case also to determine the share

of each player in the UCPTT, it was a duty enjoined on the Commission to consistently revise the UCPTT sharing formula so as to make the formula correspond to the respective shares of the players in the capital investment in the transmission assets of NER. The Commission was required to revise formula every time, the appellants added a new asset or every time the other players reduced their assets. Whenever, there was a change in the composition of the shares of the different players in the assets/capital cost, revision in the sharing formula was called for. For this reason also, it was totally wrong for the commission to say that the new sharing formula can be applied only from 2004 and not from 2002.

27. It is also wrong to say that the relief given to the appellant is a relief given with retrospective effect. The appellant has been asking for the relief from the year 2000 when the Petition No. 40/2000 was filed. The subsequent petitions are only petitions asking for implementation of the order in Petition No. 40/2000 dated 1.1.2002. The relief given is, therefore, not retrospective. The prayer of the appellant was prospective. So was the relief.

28. The ground pleaded by the respondents for review namely when loading the respondents with 5-6 years of arrears would give tariff shock to the consumers has not weighed with the

commission itself. Hence, we do not need to consider the same.

29. In view of the above, we allow the appeal and set aside the impugned order and dismiss the two review petitions No.72/06 & 3/06. The appellant will be entitled to cost of the present appeal from the two review petitioners namely Tripura Electricity Corporation Ltd. and Assam Electricity Board.

Pronounced in open court on this **04th day of January, 2008.**

(Ms. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member

The End