In the Appellate Tribunal for Electricity
(Appellate Jurisdiction)
New Delhi

Appeal No. 153 of 2012

Dated : 29th January, 2014

Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Justice Surendra Kumar, Judicial Member

In the matter of:

East Coast Railway,
Head Quarters Office, ECoR Sadan
Chandra-Sekharpur,
Bhubaneswar-751 017, Orissa
through Chief Electrical
Distribution Engineer ….. Appellant

Versus

1. Orissa Electricity Regulatory Commission
Bidyut Niyamak Bhavan,
Unit VIII, Bhubaneswar – 751 012

2. Central Electricity Supply Utility of Orissa (CESU)
2nd Floor, IDCO Towar, Janpath, Bhubaneswar – 751 022

3. North Eastern Electricity Supply Company of Orissa
Ltd. (NESCO), Januganj, Balasore – 756 019

4. Southern Electricity Supply Company of Orissa
Ltd. (SOUTHCO), Courtpeta, Berhampur – 760 004
Ganjam Distt., Orissa

5. Western Electricity Supply Company of Orissa Ltd.
(WESCO), Burla- 768 017,
Sambalpur (Distt.), Orissa …. Respondents

Counsel for the Appellant(s)	:	Mr. Anand K. Ganesan Ms. Swapna Seshadri
Counsel for the Respondent(s)	:	Mr. R.K. Mehta Mr. Antaryami Upadhyay for R-2

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT, 2003 AGAINST IMPUGNED TARIFF ORDER DATED 23rd MARCH 2012

JUDGMENT

HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

The instant Appeal has been directed against the impugned tariff order dated 23rd March, 2012 passed by the Orissa Electricity Regulatory Commission (in short OERC) in respect of Annual Revenue Requirement & Tariff Proposals submitted by 4 Distribution Companies (DISCOMs) in Orissa state viz Central Electricity Supply Utility of Orissa (CESU), Southern Electricity Supply Company of Orissa (SOUTHCO), Western Electricity Supply Company of Orissa Ltd, (WESCO) & North Eastern Electricity Supply Company of Orissa Ltd. (NESCO) for the year 2012-13 for determination of distribution tariff, in respect of electric supply in Orissa state, wherein learned OERC had increased the demand charges for the H.T. & E.H.T. Railway Traction supply from existing Rs.200/- per KVA to Rs.250/- per KVA i.e. @ Rs.50/- per KVA and energy charges from Rs.4.70/KWH to 4.90/KWH i.e. @ 20 paise per KWH unit for E.H.T. Railway Traction and from Rs.4.75/KWH to

Rs.4.95/KWH i.e. @ 20 paise per KWH unit for the HT Railway Traction, for the year 2012-13, effective from 01.04.2012.

2. The Appellant is aggrieved by the unreasonable tariff hike directed by Learned OERC for the financial year 2012-13, ignoring the fact that unlike the HT Bulk Consumer/Industrial (large power), who are working for personal gains, the Appellant is a public utility serving the common mass of the country and is a major contributor to the growth and development of the national economy. The unreasonable power tariff hike determined by Learned OERC in the case of the Appellant would put additional burden on rail users and consumers and impede the Appellant's growth as a low cost mass transport system.

3. That the Appellant is also aggrieved by the Commission's views mentioned in para 249 in the impugned tariff order 2012-13 dated 23rd March, 2012 passed by OERC regarding metering to Railway Traction, in which the Commission mentioned that `**most of the EHT consumers are being billed on the basis of grid meter, Railways should not have any objection for few of their traction supplies on that account**'.

The views of OERC will affect the Appellant, as all the DISCOMs in the state may initiate billing for Railway Traction based on Licensee's Grid meter

ignoring the meters provided at consumer premises i.e Railway Traction sub-station premises, which is in force since 1980 i.e. Reform era of Orissa State Electricity Board (OSEB). The DISCOMs like CESU and NESCO already implemented Grid meter billing instead of Consumer meter billing, as per the views of Learned OERC.

4. The issues involved in this Appeal are as follows :-

i) Railway Traction should be treated as a separate category because of its peculiar nature and importance.

ii) Railway Traction Tariff is unreasonably high and is more than other EHT/HT Consumers.

iii) Tariff is heavily loaded with cross subsidy.

iv) Metering by CESU should be done at the premises of the consumer.

5. The facts of the case leading to the present Appeal are as follows :-

A. That the Appellant East Coast Railway, under Union of India, which is also a nodal Railway for dealing tariff related issues in Orissa state and operates under the Ministry of Railways and is one of the largest/bulk/EHT and prestigious consumer in Orissa state and avails EHT power supply at 132 KV for electric traction at sixteen traction sub-stations aggregating contracted demand of about 147 MVA in Orissa region with a consumption of 485 MU and paying annual bills

amounting to approximately Rs.269 Crores. In addition to this, South Eastern Railway, which also operates under the Ministry of Railways also avails traction supply at 220 KV/132 KV at 9 points with about 158.5 MVA Contract Demand and 377 MU energy consumption and paying Rs. 209 Crores per annum. Besides, South East Central Railway, which also operates under Ministry of Railways also avails traction supply at 132 KV at one traction sub-station with 17 MVA Contract Demand 55.89 MU energy consumption and paying Rs.29.43 crores per annum. Over all the Appellant Railways, Union of India, herein contributes a very substantial portion of their revenue towards electricity supply and have never defaulted in payments and draw a consistent load throughout the year, in Orissa state. The Appellant therefore is entitled to a reasonable tariff, lower than that fixed for other HT & EHT Consumers.

B. That the Respondents No. 2 to 5 i.e. CESU, NESCO, SOUTHCO & WESCO are awarded the Distribution Licences by Orissa Electricity Regulatory Commission (OERC) under the provisions of Orissa Electricity Reform Act, 1995 as retail supply licensees in the State of Orissa.

C. That the benefits of the Railway Traction System to the society are as follows :-

i) Major contributor to the growth and development of national economy and at the same time keeps it moving and accordingly called the life line of the country.

ii) The Railway's electric traction is capable of utilizing any primary source of energy including renewable sources of energy, thereby leading to energy security for the nation.

iii) The said system is the most efficient and eco friendly mode of transport with least carbon dioxide (CO2) emission, thereby helping in mitigating the problem of global warming and climate change which further helps reducing the burden of state

iv) Appreciable reduction in journey time for passenger as well as goods traffic

v) Energy consumption for freight trains hauled by electric traction is lower as compared to the equivalent load hauled by diesel on road. This in turns reduces import of diesel oil, thereby, saving precious foreign exchange and reduction in dependence on fast depleting petroleum based energy.

In view of the above, it is apparent on the face of it that the Appellant is catering to the Indian economy as a whole, and being the public utility serving the common masses of the country and does not have a profit motive.

D. That the para 8.3 of National Tariff Policy dated January 6, 2006 issued by Ministry of Power, states that the tariff must be linked to cost of service. For achieving the objective that tariff progressively reflects the cost of supply of electricity, the SERCs were directed that they would notify roadmap within six months with a target that latest by the end of year 2010-11, tariffs are within± 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy. Accordingly, Regulatory Commissions like APERC, CSERC in the country decreased the tariff for Railway Traction and other EHT consumers during the period whereas the Learned OERC has continued with the same tariff for 9 years i.e. from 2001-2002 to 2009-2010 and never tried to reduce the cross subsidy and stated that the target as per National Tariff Policy was already achieved in Orissa state.

E. That the learned OERC, after attending the hearings at Appellate Tribunal for Electricity at New Delhi, on Appeal Nos. 102,103 & 112 of 2010, relating to RST order 2010-2011, after sensing the wrong method adopted by Learned OERC while fixing the tariffs since many years, invited suggestions/opinions on the amendment to the Regulation 7 (C) (iii) of OERC (Terms and Conditions for Tariff Determination) Regulations, 2004 and amended vide notification dated 30.05.2011, subsequently published in Odisha Gazette on 10.08.2011, as follows, without taking objectors views into consideration.

Amendment to Regulation 7(C) (iii) :

'For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve of all consumers of the state taken together and average tariff applicable to such consumers shall be considered'.

F. The learned OERC after a stable tariff for 9 years i.e. from 2001-2002 to 2009-2010, all of a sudden increased the average tariff for EHT category (Railway Traction is one of the EHT category) by 23.9% during 2010-2011 and by 21.7% during 2011-2012 and again by 8.7% during the current year 2012-2013 (Table-48 of OERC Tariff Order 2012-13).

G. Respondent No.1 has increased the Demand charge per KVA from Rs.200/- to Rs.250/- i.e. by 25% and KWH energy rate from Rs.4.70 to Rs.4.90 i.e by 4.25% during 2012-2013, for EHT Railway Traction Category, causing an extra burden to the appellant even though there was no such enhancement proposals by Respondents 3,4 & 5, the 3 DISCOMs in the state, in their ARR & Tariff proposals.

The cross subsidy loaded in case of Railway Traction Tariff continues to be unreasonably high.

H. That this Hon'ble Tribunal passed the Judgements dated 30.05.2011 & 02.09.2011 against Learned OERC Tariff Orders for the years 2010-2011 & 2011-2012 respectively and directed the Learned OERC –

a) to determine voltage wise cost of supply

b) to calculate on the basis of cost of supply to the consumer category

c) cross subsidy is not to be increased but reduced gradually

d) the tariff of each of the consumer categories are within ± 20% of average cost of supply

e) to ensure in all future tariff orders that cross subsidies to different consumers are to be determined as per the directions given in the judgment.

I. That the learned OERC implemented all the above directions of Hon'ble Tribunal but not implemented redetermination of tariff for financial year 2010-11 & 2011-12 and mentioned that the CESU's appeal no. D 28345/2011 and 8135 of 2011 before the Hon'ble Supreme Court of India and WP (C) No. 8409 of 2011 before High Court of Orissa and appeals of GRIDCO & DISCOMs pertaining to BST, RST & transmission charges for the year 2010-2011 & 2011-2012 are pending before this Tribunal.

J. That learned OERC during its tariff order dated 23.03.2012 for financial year 2012-2013 once again considered average cost of supply for the whole state only and not determined the cost of supply consumer wise, category wise, in spite of Appellant's request and even failed to mention the target year for achieving the cost of supply, consumer wise, category wise, 100% metering etc. in near future.

6. The following submissions have been made on behalf of the Appellant:-

i) That the Appellant Railway is a public utility serving the common masses of the country and does not have a profit motive. The Appellant is a major contributor to the growth & development of national economy by keeping the nation's economy moving.

ii) That a high power tariff charged by DISCOMs in Orissa state will put additional burden on rail users and would result in the impediment in the growth of a low cost mass transport system.

iii) That the Appellant is drawing electricity at high voltage (132 KV/220 KV) which involves negligible T&D loss, pilferage, etc.

iv) That the Appellant's tariff is heavily loaded by cross-subsidy given to other classes of consumers. The commission has completely disregarded the Tariff Policy and undermined the importance of electrification of Railway traction and the need to ensure a tariff closer to the cost of supply. In the same breadth, the Learned Commission had ignored and not fixed the tariff for Railway traction on the basis of consumer wise, category wise cost of supply and had not given due regard to the important public function of transportation carried out by it.

v) That in terms of Section 61(g) of the Electricity Act, the appropriate commission shall be guided by the objective that tariff progressively reflects the cost of supply of electricity.

Further, the Learned OERC has however passed on a huge burden of cross subsidy on the Appellant.

vi) That the Appellant can not be made to suffer because of inefficiency of DISCOMs in Orissa. A considerable time has passed & DISCOMs yet not worked out the category wise cost of supply and not ensured 100% metering for billing purpose. Cost of supply to Railway will be much lower than average cost of supply for the state. If tariff based on category wise cost of supply is resorted to, the Appellant's tariff would come to be the lowest. Appellant takes power from licensee at 132 KV/220 KV. Railway bears all the cost of 132/25 KV substations and 132 KV/25 KV substations are owned & maintained by the Appellant. In case of supply at 132 KV/220 KV, the system losses are at the lowest level as the technical losses are the least and distribution & other commercial losses are non-existent.

vii) That the Appellant is availing power supply at 132 KV/220 KV from respondent no.2 to 5. It is submitted that for Railway Traction the required supply voltage is 25 KV. The Appellant takes supply from licensee at 132 KV/220 KV and as such incur extra expenditure to utilize power at voltages lower than 132 KV/220 KV. The Appellant has to bear all the cost of infrastructure 220 KV to 25 KV/132 KV to 25 KV substations and

also operation and maintenance cost of 220 KV to 25 KV/132 KV to 25 KV substations. T&D losses, pilferage, thefts etc. are very low at the high voltage & same tantamount to saving to the licensees. Therefore, some special rebate should be given to the Appellant.

viii) That the OERC failed to determine the exact cost of supply to Railway traction category and fixed the tariff along with other EHT consumers. Also, the actual unit rate works out as Rs.5.84 for Railway Traction (EHT), whereas Learned OERC projected the average unit rate for EHT category consumers including Railway traction @ Rs.5.51 per unit, is not correct as it is less by about 33 paise per unit.

ix) That the cross subsidy level for railway traction category is 26.8%, but Learned OERC in table no. 49 of the impugned tariff order mentioned as 19.66% along with other EHT consumers, which is not correct and also more than± 20% of average cost of supply, as notified by Ministry of Power. Hence, the tariff to Railway Traction is on higher side and is required to be re-determined.

x) That the Govt. of Orissa has followed the principle of subsidy withdrawal policy and has been mentioning from time to time that the efficiency of DISCOMs is to be improved by improving their

standards. But, it is fact that since, formation of these DISCOMs, every year the DISCOMs achievement in reduction of losses, 100% metering and service of standards, efficiency etc. are well below the commission's targets. But, instead of improving the efficient working, DISCOM-CESU had proposed higher tariff where as the other 3 DISCOMs NESCO, WESCO & SOUTHCO had not proposed any enhancement of tariff for EHT Railway traction. Even though, there was no proposal by these three DISCOMs, the learned OERC enhanced tariff for the Appellant thereby burdening the Railways.

xi) That the Railway is one of the important consumers in Orissa state with an aim of providing a safe, reliable and economic transport to the public. Railways, therefore, require reliable and uninterrupted power supply for meeting requirements of public at large. The Commission in a discriminatory manner has approved unreasonably higher tariff for the Appellant which caters to the people and goods for the whole of eastern India. Railway plays an important and indispensable function of mass transportation of people and goods across the country and therefore, cannot be subjected to such unreasonable levels of cross subsidy & that too on average cost of supply which is much higher than average cost of supply to Railway as stated above. The tariff fixed by

OERC for supply to the Appellant is unreasonable, arbitrary, restrictive and without any proper justification. Therefore, the same is liable to be reduced to a level which is reasonably closer to the average cost of supply to Railway.

xii) That the Learned OERC even failed to furnish any suitable reason, whatsoever for rejecting the Appellant's claim for reasonable tariff for the railway traction. No suitable reason or justification has been given by learned OERC for fixing such high traction tariff for FY 2012-13.

xiii) That Railway Traction category accordingly clubbed with all other EHT consumers, but in turn, Railway Traction category not allowed similar rebates offered to other EHT consumers such as TOD tariff, load factor based incentive tariff etc. In other states, Railway Traction category is dealt separately, due to its importance and nature of supply availed & load pattern, for example Andhra Pradesh-HT-V, Chhattisgarh HT-I, Madhya Pradesh-HV-I, Maharashtra- HTP-V and Jharkhand -Railway Traction Service(RTS).

xiv) That the Railway Traction is availing supply at higher voltage of 220 KV/132 KV in which there will be very small losses. Hence, the actual cost of supply to Railway Traction is much less when compared to other EHT and HT category consumers. Also with

the additional incentives/rebates such as off peak energy rebate, load factor incentive energy, the actual unit rate of other EHT consumers are less than the Railway Traction.

xv) That the Railway's request for a separate category due to its importance and public utility like other states, was also not considered by the learned OERC.

xvi) That the Learned OERC, even though kept stable tariff for the period during 2001-2009 but indirectly helped DISCOMs by creating additional revenue from EHT consumers including Railway like enhancement of PF incentive limits from 0.95 to 0.97, decreasing power factor incentive rate from 1% for 0.5% rise to 1% for 1% rise, enhancement of PF penalty limitations from 0.90 to 0.92, & revision of over drawl penalty clauses by way of reducing the non peak hours from earlier 1000 hrs to 1800 hrs and 2200 hrs to 0600 hrs to the present 0000 hrs to 0600 hrs only, with drawl of 120% over drawl during off peak period, if there is over drawl during other than off peak hours etc.

xvii) That the Appellant is also aggrieved by the Commission's views mentioned in para 249 in the impugned tariff order 2012-2013, dated 23rd March 2012 regarding metering to Railway Traction in which the OERC mentioned that `*most of the EHT consumers are being billed on the basis of grid meter, Railways should not*

have any objection for few of their traction supplies on that account'. The views of the Learned Commission are against the CEA Regulations, OERC Regulations, Forum of Regulators model supply code, verdicts of this Appellate Tribunal and also contradictory to the Commission's earlier views in many of their own orders.

xviii) That the Learned OERC vide para 249 of the impugned Tariff order also mentioned that `Railway being connected to the intra state transmission system comes under ABT. However, it is mentioned that the Railway Traction is neither paying the charges as per ABT nor availing open access in the state.

7. Per contra, the learned counsels for the Respondents have made the following submissions:-

(I) That the impugned order dated 23.03.2012 passed by Orissa Commission/OERC relating to the annual revenue requirement and retail supply tariff has been challenged mainly on the issues of determination of category wise cost of supply vis-a-vis average cost of supply and un-economic tariff loaded with cross subsidy, railway as a public utility ought to be given different tariff category and not to be clubbed with other HT and EHT categories, metering point and TOD tariff. Regarding determination of category wise cost of supply

vis-a-vis average cost of supply and un-economic tariff loaded with cross subsidy, the following points have been raised :-

i) That the tariff has been determined on the basis of the Average Cost of supply and not on the basis of the Category wise cost of supply. The dispensation granted by the OERC is keeping in accord with the amended Regulation 7(c) (iii) of the Commission's Tariff Regulations.

ii) That further even in the Judgments of this Tribunal dated 30-5-2011 in Tata Steel Vs OERC in Appeal No. 102 of 2010, followed in Judgment dated 2-9-2011 in Vishal Ferro Alloys Vs OERC Appeal No. 57 of 2011, this Tribunal was pleased to hold that tariff need not be a mirror image of cost of supply.

The cross subsidy needs to be computed transparently on the basis of category-wise or voltage-wise basis, in order to determine whether there is any increase or decrease in cross subsidy. This Tribunal was also inter-alia, pleased to hold that in line with the NTP, the tariff needs to be within ± 20% of the Average Cost of Supply. These principles were again reiterated in the latest Judgment of this Tribunal dated 23-9-2013 in Appeal No. 52 of 2012 titled Ferro Alloys Corpn. Vs OERC.

iii) That in the present case the tariff for the category of the Appellant, namely, EHT is already within ± 20% of the Average cost of supply. This is evident from the fact that the Average cost of supply for the state is Rs 4.61 per Unit. As calculated by the Commission, the average revenue realisation for the category as a whole is Rs 5.51 per unit. Hence the same is equal to 19.66% above the Average cost of supply (ACOS).

iv) That the Appellant has sought to contend that its effective tariff is Rs 5.84 per Unit and hence it is more than 20% of the ACOS. This is fundamentally wrong, since cross subsidy has to be calculated for the category as a whole and not as per the tariff of any individual consumer. This is evident from the NTP which provides that the tariff for a "category" of consumers should not exceed ± 20%.

v) The learned counsel for the Respondents has further submitted that if the effective tariff is within ± 20% of the ACOS, the Order of the Commission needs no interference. Reference in this regard may be had to the Judgment of this Hon'ble Tribunal dated 31-5-2013 in Appeal No. 179 of 2012 titled Kerala HT & EHT Consumers Association vs KERC.

8. Regarding the issues like Railways as a public utility ought to be given different tariff category and not to be clubbed with other HT & EHT Industries and also the tariff should be lower than other HT & EHT categories as Railways have to bear the cost of infrastructure, the following submissions have been raised on behalf of the Respondents :-

a) That the issue of Railways having a right to be treated differently from other HT and EHT consumers has been conclusively determined in the Judgment of this Hon'ble Tribunal dated 23-5-2012 in **Appeal No. 75 of 2011** in Union of India through Southern Railway Vs TNERC & Anr in **paras 6 to 16** thereof. The right to a separate category or differential treatment having been rejected on the grounds raised by the very same appellant in that appeal, the very same argument could not be raised albeit on different grounds in this appeal.

b) The issues that the Railways have to suffer the cost of infrastructure and tariff of railways should be lower than HT & EHT categories has been decided against the Appellant by this Tribunal in Appeal No. 75/2011 Union of India through Southern Railways Vs. TNERC & Anr. Vide Judgement dated 23.05.2012. The judgement dated 23.05.2012 of this Tribunal has also considered that the Railways do not have to suffer load shedding unlike other HT and EHT consumers and hence the Railways are already treated differently

even in the present tariff order, the Railways have been given the same benefit as is evident form page 106 para 248 of the impugned order.

9. Regarding issue of TOD tariff, the Respondents' counsels have made following submissions :-

A. That the Commission has directed that ToD tariff will not be applicable to railway traction.

B. That the railways having a very unbalanced 2 phase load, their consumption introduces higher harmonics in the system and in fact ought to have a higher tariff than other HT and EHT consumers.

C. That this issue has also been held against the Appellant in the aforesaid **judgment dated 23-5-2012 in paras 44 and 45**. In the said paragraphs this Hon'ble Tribunal was inter alia, pleased to consider the benefits available to the Railways by exemption from ToD tariff.

10. Regarding issue of metering, it has been submitted by learned counsel of the Respondents that –

A. the Commission has considered the issue and held at **page 107 para 249** of the impugned Order that the Railways ought not to complain about being billed from the Grid Meter.

B. the cost of infrastructure such as lines and substation etc having been admittedly borne by the Railways, the losses on account of such equipments ought to be borne by the Railways.

C. if the meters were located at the substation end rather than at the grid point, the losses of the dedicated lines and the sub-stations etc would have to be borne by the system rather than by the Railways for whom such infrastructure is exclusively utilized.

D. Clause 56(4) of OERC Distribution (Conditions of Supply) Code 2004 states as under:

"Clause 56(4): In case of a feeder directly taken to the consumer's premises for his exclusive use from the licensee's sub-station or from the transmission licensee, the metering arrangement shall be done at the consumer's premises or, at the licensee's sub-station itself. In the event the Commission allows supply of electricity directly from a generating company to consumer on a dedicated transmission system, the location of the meter will be as per their mutual agreement. When the metering arrangements are installed in the consumer's premises, subject to regulation 56(3), the position of the service cut-outs or circuit breakers and meters shall be so fixed as to permit easy access to the employees of the licensee at any time.
All EHT & HT consumers shall provide independent entry to the meter or metering cubicle. All efforts should be made to ensure un-obstructed access to the meter by a representative of the licensee."

From the above it can be inferred that, the metering arrangement can be done at the Consumer's premises or at the licensees's Sub-station itself.

E. Further, the aforesaid Clause states that, the location of the meter will be as per mutual agreement. In the current instance, the traction loads are supplied from the transmission licensees and the appellant has also agreed to the provision of Grid metering.

F. In the impugned Order the State Commission has vide Para 249 reiterated its view regarding the metering point and the technical reason for which the metering is done at the Grid end. Extracts of the Para 249 of the RST Order for FY 2012-13 is as below:

> "249. Regarding metering to railway traction the Commission likes to reiterate its views made in Para 360 of RST order for FY 2011-12. Clause 7(1)(D) of CEA (Installation and Operation of Meters) Regulations, 2006 provides that the appropriate Commission shall decide the location of the meter for the consumer directly connected to the inter-state transmission system or intra-state transmission system who have to be covered under ABT and has been permitted open access by the Appropriate Commission or any other system not covered above. Railway being connected to the intra-state transmission system comes under above provision of Regulation. Railways draw unbalanced two phase power from OPTCL system. Due to this their line loss may be higher than any other EHT consumer who draw power at three phase which Railways should willingly bear. When most of the EHT consumers are being billed on the basis of grid meter, railways should not have any objection for few of their traction supplies on that account."

11. Regarding railway traction high tariff, respondents have made the following submissions:-

i) That Railway Traction is treated at par with other EHT consumers. Nowhere in the country, a special lower tariff is fixed for Railways. As a matter of fact, Railway traction tariff in Odisha is much less than most of the other states.

ii) That all EHT category of consumers except Railways have adopted standard voltage with 3 phase network system since Generating Stations normally generate at 11 KV which is then upgraded to 132 KV, 220 KV, 400 KV, 750 KV so as to reduce transmission losses. While all EHT consumers, except Railways, take 3 phase power supply at 220 KVA/132 KVA and step down to their required voltage in order to avail quality system voltage, Railway traction being exceptional takes 2 phase power supply at 132 KVA which in turn causes system imbalance and generates higher harmonics in the system. As observed by the Commission in para 248 of the impugned order, Railway traction tariff should have been higher than that of any balanced EHT 3 phase load but the commission has not done so and has kept the Railway Traction Tariff at par with other EHT consumers.

12. The Learned Counsels for the Respondents have lastly submitted that the object of fixing a higher power factor is to induce the consumers to maintain higher power factor. It is for this reason that the power factor is fixed

at 0.97. Thus, if the consumer's power factor is above 0.97, they would get incentive. There is no penalty for power factor between 0.92-0.97. However, if the power factor goes below 0.92, the consumer is liable to pay penalty. The power factor incentive and power factor penalty as fixed by the Commission is fully justified. The submission of the Appellant that Power Factor incentive beyond 0.97 is not being extended to it, is without any basis is not correct. The benefit of Power Factor Incentive beyond 0.97 as applicable to EHT Consumers has been given to the Appellant for Financial year 2012-13.

It has also been argued on behalf of the learned State Commission that the Appellant is also getting slab rate incentive like all other HT and EHT consumers as provided in para 263 of the impugned order.

13. This Tribunal while deciding Appeal No. 75 of 2011 titled Union of India through Southern Railway Vs. Tamil Nadu Electricity Regulatory Commission & Anr. Vide judgment dated 23.05.2012, has made following observations:-

> *"**17.** Second question for our consideration as to **whether directive issued by Ministry of Power, Government of India in 1991 is binding on the State Commissions constituted under Electricity Act, 2003. Also whether the Appellant is entitled for concessional tariff by virtue of it being a public utility?***
>
> *18. This question has already been dealt with by this Tribunal in Appeal No. 11 of 2011 and had been decided against the Appellant. The relevant portion of judgment in Appeal no. 11 of 2011 is reproduced below:*

"43. A comprehensive treatment is called for to conveniently address the issues. Having read the contents of the memorandum of appeal of the Northern Railways it appears that the grounds are more generic than are based on specifics and the appeal raises a fundamental question whether the appellant, definitely a public utility directly under the control of the Government of India, deserves to be specially treated in view of the circular of the Ministry of Energy dated 1st of May, 2001(sic 1991) and the recommendation of the Public Accounts Committee. That the appellant caters to the needs of the general public, that it contributes to the growth of the economy of the nation, that it is not necessarily a commercial institution, that it has its own network and transmission lines , that it is not responsible for transmission and distribution losses which can be attributed to other consumers, that it receives electrical energy at high voltages to the advantage of the distribution companies fail to carry much force firstly because with the advent of economic reforms said to have been initiated by the Government in the early nineties the concept of what should be the attitude of the public utilities in its service to the society has definitely undergone a change and the appellant cannot any longer say that since it serves the people without any profit motive it requires special treatment from the respondents nos. 2 and 3 because to say so is to forget that the respondent no. 2 & 3 are equally Government companies and they are right when they say that they are also equally public utilities and they cannot be asked to run on noncommercial principles, for to do so is to wind up their concerns. It is for the appellant to lay down its own policy, but the circular emphasized upon in the memorandum of appeal was dated much prior to the reforms in the electricity sector and similarly the recommendation of the Public Accounts Committee extracted in one sentence out of context has to be read in the context of the totalities of the factuality presented therein which we do not know. What is, important, therefore, is the law, and we are called upon to examine whether the facts have been appropriately appreciated by the State Commission and the law as it now stands has been properly applied."

19. It is settled law as laid down by this Tribunal as well as by the Hon'ble Supreme Court that even the policy directions issued under

section 108 of the Act relating to fixation of tariff are not binding on the State Commission and the powers of State Commission in the matter of determination of tariff cannot be curtailed. Thus, the direction contained in Ministry of Power's letter dated May 1991 cannot be held to be binding on the State Commission so far as determination of tariff is concerned.

20. Accordingly, this question is also answered as against the Appellant."

14. This Tribunal in its judgment dated 23.05.2012 in Appeal No. 75 of 2011 has also dealt with the issue raised before us on behalf of the appellant and observed as follows:-

"41. The plea of the Appellant is that it is drawing power at 110 kV from the Electricity Board's grid by laying 110 kV line and 110/25 kV substation at its own cost and therefore, it is entitled for lesser demand charges. This is untenable for the reason that under Section 46 of the 2003 Act, the licensee is entitled to recover expenditure incurred in providing the electric line and electric plant for giving supply to any consumer under section 43 of the Act. The Electricity Board is charging the cost of service line even from a domestic LT consumer. Other 135 EHT consumers taking supply at 110 kV or above also provide the cost of these facilities. The Appellant Railways was required to pay such charges even in case it preferred to take supply at 33 kV or 11 kV. In such a case the Appellant Railways was also required to provide 33/25 kV or 11/25 kV substation as the traction is at 25 kV. So there is nothing exceptional for the Appellant Railways in providing the cost of 110 kV lines and 110/25 kV Sub station at their own cost.

42. Drawal of power at 110 kV or above for consumers with heavy power demand is technical requirement. Theoretically, any load can be met even at 400 volts. However, that would require large number of circuits depending upon the power requirement. Managing large number of parallel circuits would be techno-economically unviable and unpractical. Accordingly, the State Commission has fixed the voltage levels for drawal of power. Undoubtedly, drawal of power at EHT level would result in lesser distribution losses, the same would be true for other EHT consumers also."

15. This Tribunal also observed that the appellant Railways is not subject to the time of the day tariff and is exempted from the time of the day tariff. The appellant -Railways is also not being subjected to power cuts which are imposed on other similarly placed HT consumers. Thus, power cuts are around 30% during normal hours and upto 90% during peak hours. The benefit to the appellant-Railways by way of exemption in power cuts cannot be measured in monetary terms but undoubtedly it is huge.

16. This Tribunal in Appeal No. 79 of 2005, also held that:

> "47……….it *needs to be pointed out that the Railways require uninterrupted power supply and such uninterrupted power supply reduces the available quantity of energy to various other categories of consumers. Ensuring uninterrupted power supply by the respondent Nos 2 to 6 is a factor which places the Railways in a different category than other consumers. Therefore, the Railways cannot complain of discriminatory treatment in the matter of fixation of tariff for the railway traction."*

17. This Tribunal, while deciding Appeal No. 75 of 2011 also had occasion to consider the submissions raised before us by the Railways and after going through the provisions of Section 62 (3) Electricity Act, 2003, observed that the perusal of Section 62(3) of the Act would indicate that while the State Commission is debarred from showing undue preference to any consumer, it is left to the discretion of the State Commission to differentiate between tariffs of the consumers based on various factors. The Commission has not

differentiated the tariffs on the basis of load factor, voltage, total consumption of electricity during any period or the geographical position of any area. The Commission has chosen to differentiate only on the basis of power factor, time of day and for the purpose of which the supply is required. This Tribunal did not find any fault with the differentiation adopted by the State Commission for determining the tariff for various categories of consumers.

18. The issue regarding fixation of cross-subsidy with respect to the cost of supply at respective voltage of supply and to reduce the cross-subsidy burden on the Railways has also earlier been decided by this Tribunal in Appeal No. 75 of 2011 against the Railways. This Tribunal in Appeal No. 75 of 2011 also considered the submissions of the same appellant Southern Railways whether the practice adopted by the other State Commissions is binding on a particular State Commission. This Tribunal in paragraph no. 79 of the judgment of Appeal No. 75 of 2011 observed that Section 62(3) of the Electricity Act does not put restriction on the State Commission to differentiate the tariffs on lagging power factor only and to ignore the leading power factor. While exercising such powers, each State Commission has to take into consideration local conditions and other relevant factors only and the methodologies adopted by other Commissions have no relevance. This issue was also decided against the appellant by holding that one State Commission is not bound by the practice followed by the other State Commissions.

19. In judgment dated 07.01.2014 in Appeal no. 248 of 2012 in the matter of West Central Railway vs. Rajasthan Electricity Regulatory Commission this Tribunal held that

> *"By not creating a separate category for Railway traction, the State Commission has not violated any provision of the Electricity Act, or Tariff Policy or the Tariff Regulations. Admittedly in some other States the State Commissions have created a separate category for Railway traction. However, this could not be a sufficient ground for accepting the contention of the Appellant for directing the State Commission to consider creation of a separate consumer category for the Appellant for FY 2012-13. The State Commission is not bound by the practices followed by other State Commissions as held by this Tribunal in the case of Union of India through Southern Railway Vs. Tamil Nadu Electricity Regulatory commission & Another reported as 2012 ELR APTEL 1041."*

20. The above findings would squarely apply in the present case.

21. Regarding voltage-wise cost of supply this Tribunal in Appeal no. 248 of 2012 has held as under:

> *"14. We do not agree with the contention of the Appellant that the tariff has to be determined according to the cost of supply or voltage-wise cost of supply. This Tribunal in the various judgments including judgment dated 30.5.2011 in Appeal no. 102 of 2010 & batch in the matter of Tata Steel Vs. Orissa Electricity Regulatory Commission has clearly held that the tariff need not be the mirror image of actual cost of supply or voltage-wise cost of supply. The voltage-wise cost of supply has to be determined to compute and reflect the cross subsidy transparently and to ensure that the cross subsidy is not increased but only reduced gradually. However, the variation of categorywise tariff with respect to overall average cost of supply has also to be determined to satisfy the provision of the Tariff Policy that the tariffs are within ±20% of the average cost of supply (overall) by FY 2010-11.*

15. According to the Respondents, Tariff Regulation 126 of the State Commission provides that average cost of supply and realization from a category of consumer shall form the basis of estimating the extent of cross subsidy and that the Commission shall endeavour to determine the tariff in such a manner that it progressively reflects the average cost of supply and the extent of cross subsidy to any consumer category is within the range of ±20% of average cost of supply by the FY 2010-11.

16. We agree that the State Commission has to determine the average cost of supply and to ensure that the tariffs are within ±20% of the average cost of supply (overall average cost of supply) to satisfy the provision of its Tariff Regulations and Tariff Policy. However, the voltage-wise cost of supply has also to be determined to transparently determine the cross subsidy with respect to actual cost of supply. Accordingly, we direct the distribution licensees to furnish the necessary data to the State Commission in the future tariff/ARR exercise and the State Commission shall determine the voltage-wise cost of supply in line with the dictum laid down by this Tribunal in various cases including Tata Steel case, to transparently reflect the cross subsidy. However, we are not suggesting that the tariffs should have been fixed as mirror image of actual cost of supply or voltage-wise cost of supply or that the cross subsidy with respect to voltage-wise cost of supply should have been within ±20% of the cost of supply at the respective voltage of supply. The legislature by amending Section 61(g) of the Electricity Act by Act 26 of 2007 by substituting 'eliminating cross subsidies' has expressed its intent that cross subsidies may not be eliminated.

17. The Tariff Policy provides that the State Commissions have to notify a road map for reduction of cross subsidy to ensure that tariffs are within ±20% of the cost of supply by FY 2010-11. From the example given in the Tariff Policy, it is clear that the intent of the Tariff Policy is to ensure that the tariffs should at least be ±20% of the overall average cost of supply by FY 2010-11. However, the Tribunal in the various judgments has laid down the dictum that the 'cost of supply' as referred to in Section 61(g) of the 2003 Act is the actual or voltage-wise cost of supply and not average (overall) cost of supply for the distribution licensee. Thus, actual or voltage-wise cost of supply has also to be determined to transparently reflect the cross subsidy and to ensure that the cross subsidy with respect to actual cost of supply or voltage-wise cost of supply is gradually reduced. Therefore, the State Commission has also to determine the voltage-wise cost of supply to transparently reflect the cross subsidy and to ensure that the cross subsidy is gradually reduced and not increased."

Thus, the State Commission has to ensure that the tariffs are within ±20% of the average cost of supply in accordance with the Tariff Policy as also it own Regulations. But the voltage-wise cost of supply has also to be determined to transparently determine the cross subsidy with respect to actual cost of supply and to ensure that the cross subsidy is gradually reduced and not increased.

22. As the tariff of the HT/EHT consumers category including Railways is within ±20% of the overall average cost of supply, we do not find any reason to interfere with the impugned order. However, the State Commission should have determined the voltage-wise cost of supply and cross subsidy with respect to voltage-wise cost of supply for each consumer category to transparently determine the cross subsidy as per the dictum laid by this Tribunal. We therefore direct the State Commission to determine the voltage-wise cost of supply for FY 2012-13 to transparently reflect the cross subsidy and utilize the same for comparison in the future tariff orders.

23. After considering the rival submissions made by the learned counsel for the parties and going through the impugned order, we find no substance or force in the submissions made on behalf of the appellant. Most of the submissions have earlier been rejected by this Tribunal while deciding the

aforesaid appeal. The contentions raised in this appeal on behalf of the appellant are not *res integra*. The appellant cannot be allowed to raise the same submissions again and again particularly when the same have already been rejected after due consideration by this Tribunal.

24. We do not find any reason to interfere with the order regarding determination of tariff for Railways. However, we have given some directions for future for determination of voltage-wise cost of supply. Accordingly, this appeal is dismissed since it has no merits and the impugned order dated 23rd March, 2012 passed by the learned Orissa Electricity Regulatory Commission (OERC) is hereby affirmed. No order as to costs.

Pronounced in open Court on this 29th day of January, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ REPORTABLE/~~NON-REPORTABLE~~