

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 2nd January, 2013

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

Appeal No. 52 of 2011

IN THE MATTER OF:

M/s Ferro Alloys Corporation Limited
Randia, Bhadrak
Odisha

.... Appellant

Versus

1. Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha

2. North Eastern Electricity Supply Company of Orissa
N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022, Odisha

.... Respondent(s)

Appeal No. 67 of 2011

IN THE MATTER OF:

M/s Tata Steel Limited
Plot No 273, Bhouma Nagar,
Unit IV, Bhubaneshwar,
Odisha

.... Appellant

Versus

1. **Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha**

2. **North Eastern Electricity Supply Company of Orissa
N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022, Odisha** Respondent(s)

Appeal No. 68 of 2011

IN THE MATTER OF:

**M/s OCL India Limited
P.S. Raingangpur, Dist Sundergarh
Odisha** Appellant

Versus

1. **Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha** Respondent(s)

2. **Western Electricity Supply Company of Orissa
N/22, IRC Village, Nayapalli
Bhubaneswar – 751 022, Odisha**

Appeal No. 69 of 2011

IN THE MATTER OF:

**M/s Balasore Alloys Limited
(Formerly known as Ispat Alloys Limited)
Balgopalpur, P.O. Rasulpur
Balasore, Odisha** Appellant

Versus

- 1. Odisha Electricity Regulatory Commission Respondent(s)
Bidyut Niyamak Bhawan, Unit-VIII
Bhubaneswar -751012, Odisha**
- 2. North Eastern Electricity Supply Company of Orissa
N/22, IRC Village, Nayapalli
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. Buddy Ranganathan for R-2
Mr. Hasan Murtaza**

ORDER

- 1. All the four Appeals listed above have been filed against the Order of the Odisha Electricity Regulatory Commission dated 21.1.2012 were heard together and are disposed of by the following common judgment.**
- 2. All the Appellants in all these Appeals are large industrial consumers of the 2nd respondent distribution licensees. The first Respondent is the Odisha Electricity Regulatory Commission (Commission).**
- 3. These Appeals have been filed under Section 111 of the Electricity Act, 2003 against the order dated 21.1.2012 passed by the Odisha Electricity Regulatory Commission (hereinafter referred**

to as the '**Commission**') in the remand proceedings for re-determination of cross-subsidy in tariff as per the Judgments of this Tribunal in Appeal Nos. 102, 103 & 112 of 2010 dated 30.05.2011 and in Appeal No. 57, 67-73 of 2011 dated 2.9.2011 and Order dated 30.09.2011 of Hon'ble Supreme Court in Civil Appeal No.8093 of 2011. The Appellants are aggrieved of the impugned order in as far as:-

(i) The Commission has not implemented the orders of this Tribunal by re-determining and giving effect to the revised tariff applicable to Appellant's category of consumers for the tariff years 2010-11 and 2011-12 on the ground that the tariff of other category namely domestic consumers is subject matter of proceedings in the High Court of Odisha and there is stay of revised tariff applicable to domestic consumers.

(ii) The Commission has exceeded the scope of remand proceedings in dealing with host of other issues and in considering extraneous aspects when the Commission was required only to re-determine the tariff as per the directions contained in the orders of this Tribunal. The State Commission had no jurisdiction or power to deal with the correctness of the conclusions reached by this Tribunal.

4. The relevant facts of the case are described briefly in chronological order in the table below:

<u>Date</u>	<u>Event</u>
20.03.2008	The State Commission by an order determined the

retail supply tariff for financial year 2008-09.

30.04.2008 Aggrieved by the above the order dated 20.03.2008 passed by the State Commission, three EHT consumers of the State filed writ petitions being W.P. (C) No. 6624, 6625 & 6626 of 2008 before the High Court of Odisha.

16.03.2010 The High Court decided the Writ Petitions No. 6624, 6625 & 6626 of 2008 dated 16.03.2010 and specifically directed as under:-

“10. However, in order to avoid multiplicity of litigations and taking into consideration the entire facts of the case, including subsequent developments, namely pendency of tariff proceeding for the year 2010-11 before the OERC, this Court directs the OERC to strictly comply with the requirement of Sections 61 and 62 of the Electricity Act, 2003 and Regulation 7(c)(iii) of Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2004 while fixing the tariff for the financial year 2010-11. Further, the Orissa Electricity Regulatory Commission is also directed to fix the cost of supply at various voltage i.e. EHT, HT, LT and the Orissa Electricity Regulatory Commission shall also indicate the cost of tariff for each category and indicate the extent of cross subsidy existing and the plan of action to reduce it over a period of time as envisaged in Section 61(g) of the Electricity Act, 2003 and Regulation 7(c)(iii) of Orissa Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2004. With the aforesaid directions, the writ applications are disposed of.”

20.03.2010 The Commission passed the retail supply tariff order for the financial year 2010-11 in respect of Respondent No.2.

- 26.04.2010 Being aggrieved by the retail supply tariff order dated 20.03.2010 passed by the Commission for the financial year 2010-11, the three EHT consumers of the State filed appeals before this Tribunal, being Appeals No.102, 103 & 112 of 2010.
- 30.11.2010 The 2nd Respondent filed its petition for determination of its Annual Revenue Requirements and tariff before the State Commission for the financial year 2011-12.
- 18.03.2011 The Commission passed the retail supply tariff order for the financial year 2011-12 in respect of Respondent No.2.
- 21.04.2011 Being aggrieved by the retail supply tariff order dated 18.03.2011 passed by the State Commission for the Financial Year 2011-12, some of the EHT consumers including the Appellants herein filed appeals before this Tribunal, being Appeal Nos. 57, 67 to 73 of 2011.
- 30.05.2011 This Tribunal disposed of the Appeals No.102, 103 & 112 of 2010, wherein the Retail Supply Tariff for the financial year 2010-11 was set aside and this Tribunal further directed to re-determine the tariff within next six months i.e. end of November 2011.
- 20.08.2011 The Commission filed a Review Petition before this Tribunal to review the direction passed in its Order

dated 30.05 2011 related to determination of cross subsidy based on cost of supply to each category of consumers.

02.09.2011 This Tribunal disposed of the Appeals Nos .57, 67 to 73 of 2011, confirming the judgment of this Tribunal in Appeal No. 102, 103 and 112 of 2010 dated 30.5.2011 setting aside the Retail Supply Tariff for the financial year 2011-12 and the Tribunal further directed to re-determine the tariff by 30th November 2011

30.09.2011 Being aggrieved by the order dated 02.09.2011 passed by this Tribunal, one EHT consumer namely M/s Adhunik Metaliks Limited filed a Civil Appeal No. 8093 of 2011 before the Hon'ble Supreme Court.

30.09.2011 The Hon'ble Supreme Court dismissed the Civil Appeal No. 8093 of 2011 with the following observations

“We see no reason to interfere with the Impugned Order passed by the Tribunal, save and except – we give four weeks time to the Appellant to pay the amount under Notice dated 16.9.2011. Respondent No. 2 will not take any steps for a period of four weeks.

We hope that the Regulatory Commission would be in position to dispose of the case remitted to it by November 30, 2011. If, for any reason, the matter could not be disposed of by November 30, 2011, liberty is given to parties to move this court for grant of further period.

We make it clear that, in the event of the Regulatory Commission coming to conclusion that there are parties, who are affected in the matter of fixation of tariff, on remand, it may consider giving notice to all the affected

parties in it's own discretion.

The civil appeal, accordingly, stands disposed of.”

07.09.2011 The Central Electricity Supply Undertaking, one of the Distribution Licensee in Odisha, also filed a Civil Appeal No. 8135 of 2011 before the Hon'ble Supreme Court raising the following points of Law:

I. Whether the Learned Tribunal was justified in setting aside the Annual Revenue Requirement and Retail Supply Tariff order dated 18th March, 2011 of the Orissa Electricity Regulatory Commission (OERC) and remanding the matter to OERC with the direction to re-determine the Tariff for Financial Year 2011-12 (01.04.2011 to 31.03.2012) after determining the Cross-subsidies in accordance with the judgment dated 30.05.2011 in Appeal No. 102 of 2010 on the basis of cost of supply of each consumer category, without even impleading much less hearing the various categories of consumers who are likely to be affected by the re-determination of Tariff by OERC pursuant to the impugned judgment?

II. Whether the directions of the Hon'ble Tribunal in judgment dated 30.05.2011 in Appeal No. 102 of 2010 run contrary to the National Tariff Policy?

III. Whether the Hon'ble Tribunal was justified in directing re-determination of Cross subsidies on the basis of cost of supply of each category inspite of appreciating that the determination of cost of supply to different categories of consumers is a difficult exercise in view of non-availability of metering data and segregation of the network cost?

IV. Whether the Hon'ble Tribunal was justified in directing the determination of the Average Cost of Supply as per the formula devised by it even though according to the Tribunal itself determination of voltage wise cost of supply as per the said formula will not be very accurate?

V. Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of

cost of supply of each category even though the Forum of the Regulators Constituted under Section 166 of the Electricity Act, 2003 has recommended Cross subsidization on the basis of average cost of supply for the State as a whole for the time being keeping in view the prevailing situation in the power sector?

VI. Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of cost of supply of each category even though the State Advisory Committee constituted under Section 87 of the Electricity Act, 2003 has also advised the OERC to adopt a preferential lower Tariff for Low Tension (LT) Consumers like domestic Consumers, Small Commercial Establishments and Agricultural Consumers etc. who are directly affected by increase in the Tariff, for the reason that consumers of the other categories like Industrial Consumers and Commercial Establishments who avail electricity supply at High Tension (HT) and Extra High Tension (EHT) pass on the cost of Electricity Supply as a cost of their products?

VII. Whether the Hon'ble Tribunal was justified in directing re-determination of Tariff on the basis of cost of supply of each category relying upon Regulation VII (c) (iii) of the OERC (Terms & Conditions for Determination of Tariff) Regulations, 2004 even though the said Regulations have since been amended by the fifth amendment w.e.f. 10.08.2011?"

13.10.2011 Being aggrieved by the order dated 02.09.2011 passed by this Tribunal, the Commission filed Civil Appeals No. 9136 – 9143 of 2011 before the Hon'ble Supreme Court raising following questions of Law:

“QUESTION OF LAW:-

The present Appeal raises the following substantial questions of law for determination of this Hon'ble Court:

I. Whether the learned Appellate Tribunal for Electricity

was justified in passing the impugned judgment dated 02.09.2011 following its judgment dated 30.05.2011 even though OERC has filed Review Petitions before the learned Tribunal for review of the judgment dated 30.5.2011?

*II Whether the Learned Tribunal was justified in setting aside the Annual Revenue Requirement and Retail Supply Tariff order dated 18th March, 2011 of the Orissa Electricity Regulatory Commission (OERC) and remanding the matter to OERC with the direction to re-determine the Tariff for Financial Year 2011 – 12 (01.04.2011 to 31.03.2012) after determining the Cross-subsidies on the basis of cost of supply of each consumer category, **without even impleading much less hearing the Domestic LT consumers (forming approximately 80% of the total consumers of the State of Orissa) who are likely to be adversely affected by the re-determination by OERC in accordance with the directions of the Appellate Tribunal?***

III. Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011-12 after determining the Cross-subsidies on the basis of cost of supply of each consumer category relying on Regulation 7 (c) (iii) even though Regulation 7 (c) (iii) of OERC (Terms and condition for determination of Tariff) Regulations, 2004 has been amended Vide Notification dated 30.5.2011 and published in the Gazette on 10.08.2011.....

IV. Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011-12 after determining the Cross-subsidies on the basis of cost of supply of each consumer category contrary to the Tariff Policy?

V. Whether the learned Tribunal was justified in directing redetermination of Tariff for FY 2011-12 after determining the cross-subsidies on the basis of cost of supply of each consumer category even though the State Advisory Committee (SAC) constituted under Section 87 of the Electricity Act, 2003 has advocated before OERC to have preferential lower tariff for LT

consumers considering their capacity to pay as tariff applicable to them directly affects them, whereas all other categories like HT, EHT Industrial consumers and Commercial consumer taking power at bulk, the electricity tariff is nothing but a “Pass Through” item in their business activities. The State Commissions are duty bound to give due consideration to the advice of SAC for protection of the interest of all consumers after considering cash subventions of the State Govt., if any.

VI. Whether the learned Tribunal was justified in directing re-determination of Tariff for FY 2011 -12 after determining the cross-subsidies on the basis of cost of supply of each consumer category even though the formulation of Bulk Supply Tariff Order and Retail Supply Tariff Order is an integrated exercise and re-determination of the Retail Supply Tariff in accordance with the directions of the learned Tribunal will necessitate the re-determination of Bulk Supply Tariff also.

VII. Whether the learned Tribunal was justified in entertaining the Appeal filed by the Respondent HT/EHT Industries challenging the Retail Supply Tariff order dated 18.03.2011 of OERC for FY 2011-12 even though the HT and EHT category of consumers (which includes the respondents herein) had filed Writ Petition before the Hon”ble High Court of Orissa being W.P. (C) 8451 of 2011 through their Association namely Utkal Chamber of Commerce & Industry challenging the very same Retail Supply Tariff order dated 18.03.2011 of OERC for FY 2011-12?

Along with these Civil Appeals No. 9136 -9143 of 2011, the Commission also filed an I.A. No 2 in Civil Appeal no. 8093 before the Hon’ble Supreme Court for clarification of the order dated 30.09.2011 passed by the Hon’ble Supreme Court in the appeal no. 8093 raising almost identical grounds as were

raised in the these Civil Appeals.

- 08.11.2011 The Hon'ble Supreme Court dismissed the Civil Appeals No. 9136- 9143 of 2011 along with I.A. No. 2 in Civil Appeal No. 8093 of 2011 seeking clarification/ modification of the Order dated 30.9.2011.
- 30.11.2011 After the dismissal of the second appeals being 9136-9143 of 2011 by the Hon'ble Supreme Court on 8.11.2011, the Commission sought to withdraw the Review Petitions. By Order dated 30.11.2011, the Review Petitions were dismissed as withdrawn.
- 15.11.2011 Commission issued public notice relating to hearing on the issue of cross subsidy in tariff for different categories of consumers for FY 2010-11 and 2011-12 pursuant to orders/directions of the Hon'ble Supreme Court.

***“ORISSA ELECTRICITY REGULATORY
COMMISSION***

BIDYUT NIYAMAK BHAVAN, UNIT-VIII

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LAW/ATE-06/2011/

Date- 15.11.2011

From
Secretary
OERC

To

Sub:- Hearing on issue of Cross-Subsidiary in

determination of Retail Supply Tariff for different categories of consumers for the FY 2010-11 and 2011-12 as per Order dated 30.09.2011 of the Hon'ble Supreme Court of India in Civil Appeal No. 8093 of 2011.

NOTICE

Sir,

Please take notices that, the Commission shall take up hearing on 24th and 25th November, 2011 at 11 A.M. in the Hearing Hall of the Commission at Bhubaneswar on issue of Cross-subsidiary in tariff for different categories of consumers for the FY 2010-11 and 2011-12 pursuant to the Order/directions dated 30.09.2011 of the Hon'ble Supreme Court of India passed in Civil Appeal No. 8093 of 2011 directing implementation of the Judgment dated 30.05.2011 and 02.09.2011 of the Hon'ble Appellate Tribunal for Electricity. A background note on the subject is attached to this notice. You are hereby directed to be present in person or through your authorized representative or duly constituted attorney before the Commission on the date, time and place mentioned above.

The Order dated 30.09.2011 of the Hon'ble Supreme Court of India and the Judgment dated 30.05.2011 and 02.09.2011 of the Hon'ble Appellate Tribunal for Electricity is available in the Commission's website www.orierc.org

***By the Order of the Commission.
Secretary***

24.11.2011 The Commission held hearings in the matter.
&
25.11.2011
28.11.2011 The Appellant filed its written note in the aforesaid matter.

21.01.2012 State Commission passed the impugned order.

5. The learned Counsel for the Appellant submitted that the Commission has, by passing the Impugned Order, acted in defiance of the principles of judicial discipline which demand that

the directions of this Tribunal in the Remand Orders should have been given effect to. Failure to implement the same cannot be justified on the ground of pendency of similar proceedings before other fora, as the principles of judicial discipline demand following orders of higher authorities unless and until the said orders of the higher authorities have been interfered with. This principle of judicial discipline is enshrined in Section 111 of the Act, by providing that the first appeal from the State Commission lies before the Tribunal. Unless an order of the Tribunal is set aside or interfered with by the Supreme Court of India, which is vested with the right of second appeal under Section 125 of the Act, the principles of judicial discipline demand that the State Commission abide by and give effect to the orders and directions of the Tribunal. Moreover, the stay order issued by the High Court of Orissa, which pertained exclusively to the tariff of LT category of consumers could not have affected the ability of the Commission to implement and give effect to the Remand Orders. The observations of the Hon'ble High Court of Odisha on 30.3.2012 in the Public Interest Litigation in relation to the computation of cross-subsidy in tariff may not be used to justify the decision of The Commission in the Impugned Order as the Hon'ble High Court has categorically stated itself that the correctness of fixation of tariff was not a matter on which it was inclined to exercise jurisdiction, and directed the petitioners to approach the relevant statutory for the same. Therefore, the observations of the Hon'ble High Court in relation to the computation of cross-subsidy in tariff were *obiter dicta*, which do not have authoritative effect under the well-established doctrine of *stare decisis*. The scheme of tariff determination under the Act support the principle of determining

cross-subsidy on the basis of 'actual cost of supply' (in other words, 'voltage-wise cost of supply') and the principle of determination of cross-subsidy on the basis of 'average cost of supply' as seemingly espoused by the Commission is not in consonance with the Act, the Tariff Policy, the Electricity Policy or the applicable provisions of The Commission Tariff Regulations.

6. Refuting the allegations made by the Appellant regarding the defiant attitude of the Commission the Learned Counsel for the Commission argued that as per the directions of this Tribunal and Hon'ble Supreme Court the Commission initiated the remand proceeding by issuing notices to all the petitioners including all the objectors of original tariff proceeding for redetermination of cross-subsidy for FY 2010-11 and 2011-12 in Case No. 140-143/2009 and 146-149/2010 and heard all the parties present and disposed of the remand proceeding through an order on 21.01.2012 within the stipulated time as allowed by Hon'ble Supreme Court. In obedience to the direction of this Tribunal the Commission in its Impugned Order has fully complied all the direction of this Tribunal. The crux of the issue of this Appeal is whether the 'cross-subsidy in tariff' is required to be determined based on 'voltage wise cost of supply' or 'Average cost of supply' to the State as a whole. In this regard the Hon'ble High Court of Odisha in WP(C) No. 8409 of 2011 dtd. 30.03.2012 in the matter of Retail Supply Tariff of FY 2011-12 in para 10 has held as under:

"10. xxxxxxxxxxxx

We may state here that a conjoint reading of Section 61 (g) of the Electricity Act and Paragraph 8.3.(2) of the National Tariff Policy makes it clear that it does not provide for any category of consumers and it is also an admitted fact that

there is no methodology provided for computing cross-subsidy. Such computation may be the average cost of supply or cost of supply voltage wise or cost of supply to various consumer categories.

At present the OERC is guided by the notion of subsidy by average cost of supply for the State as a whole, which has been recommended by the Forum of Regulators (FOR) and, in our considered opinion also, the same is a practical solution, at least in the present context of the Indian Power Sector.

11. At last, we may make it very clear that computation of surcharge is totally different from computation of tariff and Regulation 7.B (c), III. as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers.

*Hence, though the writ application filed by Utkal Chambers of Commerce was withdrawn, the argument advanced by Mr. Pitamber Acharya is fallacious and the **computation made by the OERC on the basis of average cost of supply to the State as a whole is not illegal but the same is in accordance with the National Tariff Policy.***

7. According to the learned Counsel for the Commission, the Commission has completely adhered to the mandate of Electricity Act, Regulation and Tariff Policy and the same has been vindicated by the division bench of the Hon'ble High Court of Odisha in the above conclusive findings. The above findings given by the Hon'ble High Court in the public interest litigation cannot be considered as *obiter dicta*. The Hon'ble High Court had observed that determination of subsidy by average cost of supply as recommended by the Forum of Regulators is the correct principle for determination of cross subsidy only after hearing all the parties and after going through the relevant provision of the Act, Regulations and the Tariff policy and after analyzing the same. Further, the Commission's orders on ARR of power utilities for

various years are pending for adjudication before this Tribunal. The process of tariff determination and approval of Annual Revenue Requirement are mutually dependant. Therefore, any re-determining tariff by the Commission in turn would result re-determination of ARR of utilities and it would have vitiated the proceeding in the higher fora.

8. In view of seriousness of the allegations made by the Appellants, it is essential to critically examine the findings of the Commission in the Impugned Order dated 22.1.2012. The Commission had framed six issues for consideration as under:

Issue (i): The pan-Indian perspective regarding cross-subsidy in Tariff.

Issue (ii): The basis of present order of Hon'ble ATE on cross-subsidy

Issue (iii): The basis for deviating from the erstwhile Regulation 7 (c) (iii) of OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 for determining cross-subsidy by OERC.

Issue (iv): Present status of category-wise cross-subsidy based on average cost of supply.

Issue (v): Implementation of Hon'ble ATE's Direction in their Order dtd. 30.05.2011 and 02.09.2011.

Issue (vi): Implication of retrospective revision of Retail Tariff consequent upon Hon'ble ATE's Order

Issue (vii): Other Legal implication

9. After framing the above seven issues, the Commission discussed each one of those issues and gave its findings. Relevant extracts of the Commission's findings on these issues are quoted below:

10. Commission's findings on first issue relating to pan-indian perspective regarding cross-subsidy in tariff:

“Further, it has been pointed out that the Forum of Regulators are of the opinion that in view of the prevailing condition of the distribution network, the cross subsidy is to be worked out voltage wise based on the average cost of supply for all types of consumers taken together and not on the basis of cost of supply for the particular group of consumers. The Forum of Regulators (FOR) while deliberating in their 25th meeting held on 29.07.2011 at Suraj Kund, Delhi-NCR on “Model Tariff Guidelines” have decided as follows on Cross-subsidy /

Tariff Design: “Cross subsidy/Tariff Design □ SERC would notify revised road map within six months from the notification of these Regulations (Model Tariff Guidelines) with a target that latest by the end of year 2015-16 tariffs are within ±20% of the average cost of supply. □The road map would also have intermediate mile stones, based on the approach of a gradual reduction in cross subsidy.

Tariff Design □SERC shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.”

*The Central Govt. have constituted the Forum of Regulators (FOR) in pursuance to Section 162(2) of the Electricity Act, 2003. This Forum consists of the Chairperson of the Central Commission and Chairpersons of the State Commissions. The functions of the Forum of Regulators have been set out in Rule 4 of the Forum of Regulators Rules, 2005, which has been made in exercise of powers conferred under Section 176(1) read with Section 166(2) and (3) of the Electricity Act, 2003. One of the functions under rule 4(vi) of the said rule is to evolve measures for protection of consumers and promotion of efficiency, economy and competition in the power sector. **Hence, the Forum of Regulators is a statutory body under this Act and its decisions and findings are to be taken as a guiding principle for taking decisions under the various matters regarding implementation of the provisions of the Electricity Act, 2003.** {emphasis is ours}*

...

31. Therefore, from the above contentions it has been concluded that, from an all-India perspective, cross-subsidy in tariff should be based on average (overall) cost of supply for the State taken as a whole as stipulated under Para 8.3.2 of Tariff Policy, 2006 and para 5.5.2 of National Electricity Policy, 2005 as well as guidelines adopted on “Model Tariff” by the Forum of Regulators. Nevertheless, the Commission is of the view that it should defer to the direction of the Hon’ble ATE and examine the possibility to carry out the direction and effectuate the intention of Hon’ble Tribunal. {emphasis is ours}

Issue (ii): The basis of present order of Hon’ble ATE on cross-subsidy

32. The definition of cross-subsidy does not find mention anywhere in the Act or Policies. In the Regulation framed by OERC way back in the year 2004, much before the notification of Tariff Policy and National Electricity Policy issued on 06.01.2006 and 12.02.2005 respectively, there are provisions for calculation of cross-subsidy for certain purposes. The erstwhile Regulation 7(c) (iii) of Odisha Electricity Regulatory Commission (Terms and Condition of Determination of Tariff), Regulation, 2004 which came into force w.e.f. 10.06.2004 states as follows:

“For the purpose of computing cross-subsidy the difference between cost-to-serve that category and the average tariff realization of that category shall be considered”.

This is the basis on which Hon’ble ATE has directed the Commission to re-calculate cross-subsidy in tariff for the year FY 2010-11 and 2011-12, following its own Regulation. The Commission, as claimed by certain consumer groups, and concurred in by Hon’ble ATE, is to be guided by the above definition. The HT and EHT Industries argue in favour of the above Regulation because of the fact that if category wise cost of supply is determined as per our Regulation and then Tariff Policy of Govt. of India is applied over it, then their power tariff would come down

considerably, no matter it be at the cost of enhancement of Tariff for LT consumers.

33. However, it has been contended, especially by those representing LT consumer categories, that the inconsistency of the erstwhile Regulation 7 (c) (iii) of OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 with the provisions of Para 8.3.2 of Tariff Policy, 2006 and Para 5.5.2 of National Electricity Policy, 2005 together with subsequent amendment of the said Regulation notified on 30.05.2011 and published in the Odisha Gazette on 10.08.2011, which is stated below, were not brought to the notice of the Hon'ble ATE for their kind appropriate appreciation.

7(c) (iii) as amended on 30.05.2011 and published in Odisha Gazette dtd. 10.08.2011 "For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve all consumers of the State taken together and average tariff applicable to such consumers shall be considered."

...

36. It has been argued, especially on behalf of the LT consumer categories, that if the position indicated in all the above paras would have been brought to the kind notice of Hon'ble ATE, perhaps their findings/directions would have been different. They urge that the Hon'ble ATE has not impleaded and heard them and, therefore, the judgment of the Hon'ble Tribunal is not binding on them. The Commission has no intention of examining the legality of the judgment of the Hon'ble ATE, **but in redetermining tariff, the Commission has to consider the adverse impact on the LT consumers and other stakeholders as stipulated by Hon'ble Supreme Court which has been mentioned in Para 4"**

Issue (iii): The basis for deviating from the erstwhile Regulation 7 (c) (iii) of OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 for determining cross-subsidy by OERC.

37. It is submitted before the Commission that the Regulation 7(c) of the OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 which came into force on 10.06.2004 deals with the surcharge to be levied on wheeling consumers who want to avail open access. The said Regulation 7(c), extracted below, deals with the manner in which surcharge will be determined by the State Commission: "7(c) Surcharge

(i) Surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

(ii) The Commission may adopt requisite principles for computing surcharge, which shall compensate for the entire loss of cross subsidy for any given consumer category for which supply is given, as the Act clearly states that such surcharges shall be utilized to meet the requirements of current level of cross-subsidy. The entire amount of cross-subsidy lost by the incumbent licensee needs to be compensated.

(iii) For the purpose of computing cross-subsidy, the difference between cost-to-serve of that category and average tariff realization of that category shall be considered."

38. It is argued that the said **Regulation 7(c)(iii) is applicable only for the limited purpose of determination of surcharge that a wheeling consumer shall pay, when he opts for open access to take supply from a person other than the incumbent distribution licensees, and only in that case cross subsidy to be computed is the difference between the cost to serve that category and the average tariff realization from that category.**

39. Odisha being pioneer in the electricity reform has framed the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 (effective from 10.06.2004) in pursuance to Electricity Act, 2003 which came into force w.e.f. 10.6.2003. However, in compliance with Section 3 of the Electricity Act, 2003 the Central Govt. have notified the Tariff Policy on 6th January, 2006. Para 8.3.2 of the Tariff Policy,

2006 notified by the Central Govt. on 6.1.2006 stipulates that the tariff is to be kept within + 20% of the average cost of supply. For the sake of ready reference the said provision is extracted below:-

8.3.2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC 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.

For example if the average cost of service is Rs.3 per unit, at the end of year 2010-11 the tariff for the cross subsidized categories excluding those referred to in para 1 above should not be lower than Rs.2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs.3.60 per unit.”

40. Thus, it is argued, the Tariff Policy, 2006 notified by the Central Govt. in pursuance to Section 3 of the Electricity Act, 2003 stipulates that the tariff for different categories of consumers should be within + 20% of the average cost of supply. Since the Tariff Policy, 2006 came into force on 06.1.2006 after the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004, which came into force from 10.6.2004, the provision of Tariff Policy will prevail. Further, since the Tariff Policy, 2006 flows from the Electricity Act, 2003 and it is a policy of Central Govt. issued as mandated under Section 3 of the Electricity Act, 2003 this would prevail over the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004. **It is submitted that this is precisely the reason that even though the erstwhile Regulation 7(c)(iii) was in operation from 10.6.2004, since the Tariff Policy, 2006 came into force from 06.1.2006, the Commission while determining tariff for different categories of consumers voltage-wise has been working out cross subsidy based on the average cost of supply. This is in compliance with the Tariff Policy, 2006 which have prevailed over Regulation 7(c)(iii) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004, assuming that the said provision is applicable to tariff-setting.**

However, conformably to the Tariff Policy, 2006, the Commission have now amended the provision of 7(c)(iii) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 vide their notification dated 30.5.2011 after finalisation of the proceeding initiated by OERC vide case No.9 of 2011. This has been notified in the Orissa Gazette on 10.8.2011 which is extracted below:- (Amended portion in bold letter)

...

The amendment does away with a different mode of computation even for the purpose of surcharge.

41. It is further argued that **electricity is a concurrent subject under Entry No. 38 of List II of the 7th Schedule of the Constitution of India. Framing of Regulation by the State Electricity Regulatory Commission is a subordinate legislative function under the Electricity Act, 2003 which is a Central legislation. According to the provisions of the Article 254 of the Constitution of India, if any provision of law made by the Legislature of a State is repugnant to the provisions of law made by Parliament which Parliament is competent to enact law with respect to one of the matters enumerated in the Concurrent List, the law made by the Legislature of the State shall to the extent of the repugnancy be void.** It is true that the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 for the State of Orissa and the later Tariff Policy instrument of the whole country owe their origins to the same parent Act but it is submitted by objectors on behalf of the LT consumers that the spirit of Art.254 of the Constitution would nevertheless apply to these two pieces of subordinate legislation and Regulation 7(c)(iii) of the State Regulation should be so interpreted as not to be in conflict with the later, all-India Tariff Policy instrument of the Central Government. Conflict, it is submitted, would be avoided if the scope of Regulation 7(c)(iii) is confined to cross-subsidy for the purpose of compensatory surcharge imposed upon open access applicants for the benefit of incumbent distribution licensees. **The argument is reasonable.**

...

...

...

47. *The Regulatory Commission by virtue of the powers conferred upon it under Section 62(3) of the Electricity Act, 2003 can fix different tariffs for different class of consumers basing on various technical/ economic/ geographical factors. Further, the geographical and economic factors of one State differ from those of another State. Taking the ground realities in view, OERC has fixed the tariff for LT, HT & EHT consumers by keeping the cross subsidy for HT & EHT consumers within +20% of average cost of supply taking all consumers taken together. Now, in re-determining tariff, even though the Commission becomes (technically) able to calculate cross subsidy of HT and EHT categories on the basis of cost of supply for each of these categories, the Commission has to consider the ground realities in respect of LT categories as well as HT and EHT categories for fixing their respective tariffs.*

Issue (iv): Present status of category-wise cross-subsidy based on average cost of supply.

48. *In Commission's RST order for 2010-11 and 2011-12 it had adopted the tariff for EHT and HT consumers at 80% load factor but the Hon'ble ATE in their order dated 30.05.2011 have disapproved of the same and have prescribed the formula for calculating the average tariff as given below vide para 35 of their aforesaid order.*

Average Tariff realisation for a category = Total expected revenue to be realized from that category as per ARR/ Total anticipated sale to that category as per ARR

In other words, the Commission should not assume ARR based on the expected sales at 80% load factor. Accordingly, cross subsidy based on the above formula prescribed by ATE has been recalculated.

49. *Based on the average tariff voltage wise, let us examine present status of cross subsidy as per average cost of supply*

taken for the State as a whole which is in consonance with Tariff Policy and National Electricity Policy

...

From the above table it is seen that cross-subsidy in percentage in relation to voltagewise average tariff has decreased in 2011-12 from the level of 2010-11, though they remain above $\pm 20\%$ band stipulated in the Tariff Policy. Even in case of LT Domestic category, General Purpose category, LT Industrial (S) category and Large Industry category etc. the cross-subsidy have been taking a declining trend. ... In this context it may be noted that Order of Hon'ble ATE states that cross-subsidies are reduced gradually as per provisions of the Act. Further, the Para 8.3.2 of Tariff Policy, 2006 stipulates that "latest by the end of 2010-11 Tariffs are within $\pm 20\%$ of the average cost of supply. The road map would also have intermediate mile stones based on the approach of a gradual reduction of cross subsidy". The stipulation to keep the tariff within $\pm 20\%$ of the average cost of supply and gradual reduction of cross-subsidy are to be read conjointly. It means that there should be gradual reduction of cross-subsidy so as to reach the benchmark level of $\pm 20\%$ of the average cost of supply. Once that benchmark of $\pm 20\%$ is reached it should operate within that limit and should not exceed that $\pm 20\%$ limit. It is pertinent to mention here that the FOR while prescribing guidelines for Model Tariff have stipulated that latest by end of the year 2015-16 tariffs are within $\pm 20\%$ of the average cost of supply. The tariff settings by the Commission follows the approach agreed to in the Forum of Regulators (FOR).

Issue (v): Implementation of Hon'ble ATE's Direction in their Order dtd.30.05.2011 and 02.09.2011.

51. Despite the requirement envisaged under para 8.3.2 of the Tariff Policy that tariffs are to be kept + 20% of the average cost of supply and the requirement in para 5.5.2 of Electricity Policy that consumers of very poor categories may be given special support in terms of tariff which are cross-subsidized and that for such designated group of consumers tariff would be at least 50% of the average (overall) cost of supply, the Commission is required to follow the Hon'ble ATE's

direction to calculate cost of supply voltage-wise for cross-subsidy purpose in their order dated 30.5.2011 and order dated 02.09.2011.

...

53. We have noted the Hon'ble ATE's direction in its order dt.30.05.2011 to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in that Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act. Hon'ble ATE in their Order dtd. 02.09.2011 in Para 5 has directed as follows:

“The crux of the findings given in the above paragraphs are as follows:

a. The State Commission is required to determine voltage-wise cost of supply.

b. The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.

c. The cross subsidy is not to be increased but reduced gradually.

d. The tariff of each of the consumer categories is to be within $\pm 20\%$ of the average cost of supply.

e. The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

As per the above order of ATE it is quite clear that they direct that the tariff for each consumer category has to be determined on the basis of 'cost of supply' for that category. The Commission has taken suo motu action for amendment of the aforesaid Regulation 7(c)(iii) long back through public hearing. Much before the Appellant category of consumers filed Appeal at the Hon'ble ATE

against the Commission's tariff order for 2010-11 and 2011-12 and the amended the Regulation as per OERC notification dtd. 30.05.2011 were published in the Odisha Gazette in August, 2011, the Appellant category of consumers, i.e., EHT consumers along with other stakeholders had actively participated in the proceedings at the Commission for the amendment of the Regulation vide order dtd. 30.05.2011 in Case No. 9 of 2011 for which Public Notice was issued on 29.11.2010 and published on 30.11.2010. The Commission is of the view that future tariff orders would be governed by the amended Regulation assuming though not admitting that the said provision of Regulation 7(c)(iii) is applicable to calculation of cross-subsidy for regulatory tariff orders as distinct from compensatory cross-subsidy imposed on open access applicants in order to compensate incumbent DISCOMs – the Hon'ble ATE has not pronounced upon this distinction. However, the Commission at the present limited position, without going into these controversies, desires to calculate the voltage-wise cost of supply as per the simplified formula as given in para 31-35 of Hon'ble ATE order dtd. 30.05.2011 as far as practicable. The Commission in compliance with the Hon'ble ATE directions, hereby determines in the subsequent paragraphs the cross-subsidy on the basis cost of supply at EHT, HT and LT voltage and ensures that the cross-subsidy for the appellant category of consumers and others for 2011-12 do not increase on that of 2010-11.

54. In obedience to Hon'ble ATE's Order the Commission has attempted to comply with the above directions.

...

56.

In view of all the reasons as indicated above read with the reasons discussed under Issue No. (iii), all of which are sub-judice in the Hon'ble High Court, the Commission is finding difficult to re-determine the Tariff for FY 2010-1011 and FY 2011-12 and most respectfully holds the view that Tariff can be reworked only after, and subject to, decision of the High Court. In fact, Hon'ble ATE has also directed the Commission in their Order dtd. 02.09.2011

*vide Para 5 (d) to ensure that tariff of each of the consumer categories is to be within $\pm 20\%$ of the average cost of supply. The Commission is committed to reduce it as per the direction of Hon'ble ATE and Para 8.3.2 of Tariff Policy. **In this context it is to be noted that the Forum of Regulators while approving Model Tariff Regulation have stipulated that latest by the year 2015- 16 tariff are within $\pm 20\%$ of the average cost of supply. The OERC would make all attempts to stick to this road map to reduce the present level of cross-subsidy so that tariffs are kept within $\pm 20\%$ of the average cost of supply for all consumers taken together by end of the year 2015-16.***

*58. In pursuance to the direction of Hon'ble ATE we have reworked the cost of supply voltage-wise and consequently re-determined the level of cross-subsidy for the year 2010-11 and 2011-12 as set out in Para 54 and explained in Para 55 **but variation in tariff for 2010-11 and 2011-12 has not been worked out for the reasons and circumstances explained in Para 56 read with the position explained under issue No. (iii) i.e. para 37 to 47, all of which are sub judice in the High Court.***

Issue (vi): Implication of retrospective revision of Retail Tariff consequent upon Hon'ble ATE's Order

59. The Retail Supply Tariff fixed for the distribution companies consists of more than 80% of the cost of supply on account of cost of power purchase from GRIDCO, transmission charges payable to OPTCL and charges payable to SLDC. The remaining amount represents the distribution cost which includes salary and pension, interest payment, depreciation, return on equity etc. If the retail tariff for 2010-11 is to be modified on account of re-determination of cross subsidy basing on the cost of supply for the voltage wise, it will necessarily call for modification in the rate of power purchase cost (BST), transmission charges, SLDC charges etc., keeping in view the revenue gap to be addressed. Since the financial year 2010-11 is over it is not practically possible to effect retrospective revision in retail tariff, BST rate, SLDC charges etc. Further, since more than nine months have passed from the current financial year 2011-12, similar difficulties will be encountered. Moreover, GRIDCO, OPTCL, SLDC, OHPC and four distribution

companies have filed their tariff application for 2012-13 on or before 30.11.2011 as per Regulation 53 (1) of OERC (Conduct of Business) Regulations, 2004 read with Regulation 5 (1) (A) of OERC (Terms and Conditions of Determination of Tariff), Regulations, 2004. **Since the tariff process for the year 2012-13 has already started w.e.f. 01.12.2011, exercise for redetermination of tariff for 2011-12 will necessitate refiling of tariff applications beyond the time limit fixed by the aforesaid Regulations.**

60. In this context it may be noted that if retail tariff for LT category of consumers are modified, **it may not be possible to realize the differential amount from the LT consumers who in general are low end consumers and their affordability is comparatively low.** This is evident from the fact that out of the total arrear outstanding at Rs.3772.09 crore as on 31.3.2011, the arrear pertaining to LT consumers is Rs.3394.83 crore which constitutes 90% as per the details given below:-

...

....

Issue No. (VII) Other Legal implication

63. **The implementation of Hon'ble ATE's Order would entail re-fixation of Retail Tariff for different categories of consumers. The re-fixation of tariff would change the Annual Revenue Requirement (ARR) of DISCOMs which would in turn result in refixation of BSP of GRIDCO and transmission charge of OPTCL and SLDC charge of SLDC.** The ATE in their order dated 30.5.2011 and 02.9.2011 have directed OERC to re-determine the Cross Subsidy for different consumer after determining the cost of supply voltage wise. It is to be noted that BSP order for 2010-11 and 2011-12, Transmission tariff order for 2010-11 and 2011-12, RST orders for 2010-11 and 2011-12, have been challenged in Hon'ble ATE and the same are pending for adjudication, the details of which are given below:-

...

64. Further, the RST order for 2011-12 has been challenged in the Orissa High Court in shape of a Writ Petition bearing No.8409 of 2011. The stay on revised tariff for LT domestic consumer for 2011-12 is still in force. Since both BST and RST orders for 2010-11 and 2011-12 are sub judice in ATE and the RST order for 2011-12 sub judice in the Orissa High Court, it is not advisable at this stage to revise the cross subsidy and for that matter the RST order for 2010-11 and 2011-12 on the ground of redetermination of cross subsidy as directed by Hon'ble ATE.

...

66. The Commission accepts the contention of objectors that tariff-setting is a regulatory process and tariff is used as an instrument of regulation; for this the Commission has to factor in various inputs at grass-root level and act upon its perception of facts and trends in economy of the State in general and the electricity market in particular; and for this purpose the Act has conferred on the Commission large discretion in regard to the regulatory matter.

67. There is force in the argument of some objectors that tariff proceeding is a quasilegislative proceeding and not a judicial proceeding involving determination or adjudication of rights of specific parties before the Commission on the basis of evidence adduced by them. This is not a proceeding for determining ex post facto a lis between specific parties in respect of their accrued interests and rights but seeks to pass an order which will operate in futuro. A Tariff Order affects a large indeterminate class of people and has an immense cascading impact on the whole economy, which is why a special regulating body has been entrusted with the task of tariff-setting. The quasi-legislative character of tariff-setting has been repeatedly held by the Apex Court, vide Shri Sitaram Sugar Co. Ltd. & Anr. vs. Union of India, AIR 1990 SC 1277, prs. 31-45, pp.1292-1295; Union of India vs. Cynamide India, AIR 1987 SC 1802, prs 5-7, pp.1806-1811; Tulsipur Sugar Co. Ltd. vs. Notified Area Committee, Tulsipur, AIR 1980 SC 882, prs. 5-10, pp. 886-889; State of UP vs. Renusagar Power Co. & Ors., AIR 1988 SC 1737, pr.75, p.1761; Pawan Alloys & Casting Pvt. Ltd. & Anr. vs.

UP State Electricity Board & Ors., AIR 1977 SC 3910, pr.38, p.3929, West Bengal Electricity Regulatory Commission vs. CESC Ltd., AIR 2002 SC 3588, prs. 39-40, pp.3600-3601. It is quasi-legislative because it does not emanate from sovereign legislative authority or its delegate but it is inherently legislative in character affecting a large, indeterminate population. Sections 62 and 64 of the Electricity Act, 2003 do not even provide for formal hearing of those who give objections and suggestions in response to public application of a licensee for setting tariff. Section 64(3) provides for “considering” all suggestions and objections received from the public. This is of the nature of pre-legislative consultation of interest groups, provided for in many statutes. However, in order to make tariff proceeding more participative, and in the interest of transparency contemplated in Section 86(3) of the Act, the Commission has provided in Regulation 55 of the OERC (Conduct of Business) Regulations, 2004 that the Commission ‘may’ hear such persons as it may consider appropriate in respect of revenue calculations and tariff proposals and the procedure for hearing shall be in such manner as the Commission may decide from time to time. This specific provision in the said Regulations in respect of tariff proceedings and it overrides the general provisions in Clauses (3) to (6) of Regulation 8 of the said Regulations. Transparent pre-legislative consultation of interest groups does not convert the proceeding into a judicial or quasi-judicial proceeding, nor does it convert regulatory body into a judicial tribunal, though the regulator in other situations (e.g. cancellation of licence) has a duty to proceed judicially.

68. It is argued, especially by representatives of LT consumers, that in quasi-legislation, such as price-fixing, no one can complain that he sustains a loss or damage. Any such loss or damage is *damnum sine injuria* (i.e. a damage which amounts to actionable injury in the eye of law). However, the quasi-legislation should attempt to be just to all stakeholders in the light of public interest and overall interest of electricity industry as well as principles set forth in Clauses (a) to (i) of Section 61 of the Electricity Act, 2003.

69. In this context it is worthwhile to note the contention based on Section 95 of the Electricity Act, 2003 to the effect that all proceedings before the appropriate Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 (perjury) and 228 (intentional insult, interruption in judicial proceeding) of the Indian Penal Code (45 of 1860) and the appropriate Commission shall be deemed to be a Civil Court for the purpose of Section 345 and 346 of the Code of Criminal Procedure 1973 (2 of 1974) [these provisions deal with procedure for offences aforesaid]. This is a special deeming provision only for the purpose of empowering the Commission for proceeding for the offences of perjury and intentional insult, etc. The fiction created by the Act does not go beyond its specific purpose and does not convert the regulatory body into a civil court for all purposes and does not convert what is inherently a quasi-legislative proceeding into a judicial proceeding. A fiction of law is always strictly construed and kept confined to its own purpose.

70. Tariff proceeding is a continuous process and tariff is set on the basis of periodicity (at present from year to year). It is not intended by the Act that Tariff Order should be bogged down in litigations thereby paralysing the market correction and other regulatory process set in motion by the Commission. Any error in the Order of the Commission can always be corrected in the subsequent order and a tariff setting exercise is not to be undertaken more frequently than once in a year for any reason ordinarily (Section 62 (4) of the Act) so that uncertainty which is against Multi-Year Tariff principle is avoided. Therefore, any interference at this stage at the instance of only HT ad EHT consumers not only throws the economy of the State out of gear but also deprive many interest groups to put forth their grievances.

Conclusion and order

72. In view of the discussion made above, we conclude as under:

(a) As per the direction of Hon'ble ATE's Order dtd. 30.05.2011 (as enumerated in Para 31 to 35) and order dtd.

02.09.2011 we have determined the voltage wise cost of supply for the year 2010-11 and 2011-12 (Refer Para 54 & 55 of the Order);

(b) The cross-subsidy in tariff has been calculated on the basis of cost supply to the consumer category availing supply in three distinct voltage, i.e., EHT, HT and LT for the year 2010-11 and 2011-12 (Para 54 & 55);

(c) The cross-subsidy in Tariff for the year 2011-12 has not been increased but has been reduced in comparison with the year 2010-11 (Para 55);

(d) The tariff of each voltage-wise consumers has been calculated on the basis of the average cost of supply keeping the cross-subsidy in declining trend from year to year (Para 49); and

(e) The re-determination of tariff for the FY 2010-11 and 2011-12, as per Hon'ble ATE order is not feasible at this stage in view of the stay on revised tariff for FY 2011-12 on LT domestic consumers by Hon'ble Orissa High Court as well as pendency of the BST, Transmission Charges and Retail Supply Tariff Order both for 2010-11 and 2011-12, challenged in Hon'ble ATE by the licensee.

73. This Order is subject to the result of Appeal filed by CESU in Appeal No. D 28345/2011 and 8135 of 2011 before the Hon'ble Supreme Court of India and the outcome of the Writ Petition bearing W.P.(C) No. 8409 of 2011 pending in Hon'ble High Court of Orissa as well as the appeal filed in Hon'ble ATE by GRIDCO, DISCOMs and others against the BST, Transmission Charges & RST Order for 2010- 11 and 2011-12.”

11. The findings of the Commission given in the above paragraphs are summarised below:

- a) From an all-India prospective, cross-subsidy in tariff should be based on average cost of supply for the State as a whole as stipulated in Tariff Policy and National Electricity Policy as well as guidelines adopted on “Model Tariff” by the Forum of Regulators, a statutory body created under the Act and its decisions and findings are to be taken as guiding principles for taking decisions under various matters in regard to implementations of the provisions of the Act.
- b) This Tribunal has relied on the regulation 7(c) (iii) of the Commission’s Tariff Regulations, 2004. Regulation 7(c)(iii) is applicable only for the limited purpose of determination of surcharge that a open access consumer has to pay. It has no application in tariff determination.
- c) The Regulation 7(c)(iii) is inconsistent with the Tariff Policy, 2006 and has, accordingly, been amended to be in line with the provisions of Tariff Policy, 2006.
- d) The Commission while determining tariff for different categories of consumers has been working out cross subsidy based on average cost of supply in compliance with the Tariff Policy, 2006 which would prevail over Regulation 7(c)(iii) of the Tariff Regulations, 2004.
- e) Electricity is a concurrent subject under Entry No. 38 of List II of the 7th Schedule of the Constitution of India. Framing of Regulation by the State Electricity Regulatory Commission is a subordinate legislative function under the Electricity Act, 2003 which is a Central legislation. According to the provisions of the Article 254 of the Constitution of India, if any provision of law

made by the Legislature of a State is repugnant to the provisions of law made by Parliament which Parliament is competent to enact law with respect to one of the matters enumerated in the Concurrent List, the law made by the Legislature of the State shall to the extent of the repugnancy be void.

- f) The Commission has taken suo motu action for amendment of the aforesaid Regulation 7(c)(iii) long back through public hearing. Much before the Appellant category of consumers filed Appeal before this Tribunal against the Commission's tariff order for 2010-11 and 2011-12 and the amended the Regulation as per OERC notification dtd. 30.05.2011 were published in the Odisha Gazette in August, 2011,
- g) Despite the requirement envisaged under para 8.3.2 of the Tariff Policy that tariffs are to be kept +/- 20% of the average cost of supply, the Commission is required to follow the Tribunal's direction to calculate cost of supply voltage-wise in their order dated 30.5.2011 and order dated 02.09.2011. In determining tariff, the Commission has to consider the adverse impact on the LT consumers and other stake holders as stipulated by the Hon'ble Supreme Court.
- h) The Commission is finding difficult to re-determine the Tariff for FY 2010-1011 and FY 2011-12 and holds the view that Tariff can be reworked only after, and subject to, decision of the High Court.

- i) There is force in the argument of some objectors that tariff proceeding is a quasi-legislative proceeding and not a judicial proceeding for the following reasons:
- i. It involves determination or adjudication of rights of specific parties before the Commission on the basis of evidence adduced by them.
 - ii. The quasi-legislative character of tariff-setting has been repeatedly held by the Apex Court.
 - iii. It is quasi-legislative because it does not emanate from sovereign legislative authority or its delegate but it is inherently legislative in character affecting a large, indeterminate population.
 - iv. Sections 62 and 64 of the Electricity Act, 2003 do not even provide for formal hearing of those who give objections and suggestions in response to public application of a licensee for setting tariff. Section 64(3) provides for “considering” all suggestions and objections received from the public. This is of the nature of pre-legislative consultation of interest groups, provided for in many statutes.
 - v. Transparent pre-legislative consultation of interest groups does not convert the proceeding into a judicial or quasi-judicial proceeding, nor does it convert regulatory body into a judicial tribunal, though the regulator in other situations (e.g. cancellation of licence) has a duty to proceed judicially.
 - vi. The provisions of Section 95 of the Electricity Act, 2003 to the effect that all proceedings before the appropriate

Commission shall be deemed to be a judicial proceeding are the special deeming provision only for the purpose of empowering the Commission for proceeding for the offences of perjury and intentional insult, etc. The fiction created by the Act does not go beyond its specific purpose and does not convert the regulatory body into a civil court for all purposes and does not convert what is inherently a quasi-legislative proceeding into a judicial proceeding. A fiction of law is always strictly construed and kept confined to its own purpose.

- j) Tariff proceeding is a continuous process and tariff is set on the basis of periodicity (at present from year to year). It is not intended by the Act that Tariff Order should be bogged down in litigations thereby paralysing the market correction and other regulatory process set in motion by the Commission. Any error in the Order of the Commission can always be corrected in the subsequent order and a tariff setting exercise is not to be undertaken more frequently than once in a year for any reason ordinarily (Section 62 (4) of the Act) so that uncertainty which is against Multi-Year Tariff principle is avoided. Therefore, any interference at this stage at the instance of only HT ad EHT consumers not only throws the economy of the State out of gear but also deprive many interest groups to put forth their grievances.

12. Based on rival contentions of the parties and the findings of the Commission following questions have arisen for consideration:

- I. Whether the Commission is justified in declining to implement the directions of this Tribunal in its Judgment

dated 30.5.2011 in Appeal No. 102,103 & 112 of 2010 on the ground that stay on revised tariff for FY 2011-12 on LT domestic consumers by Odisha High Court even though there was no pending case before any court against the Tariff Order for FY 2010-11 and no appeal had been filed against this Tribunal's judgment dated 30.5.2011?

- II. Whether the Commission is justified in declining the implements of the directions of this Tribunal in its Judgment dated 2.9.2011 in Appeal No. 57,67 to 73 of 2011 even when the 2nd Appeal filed by the Commission had been dismissed by the Hon'ble Supreme Court?
- III. Whether the directions of this Tribunal in these judgments are contrary to the Tariff Policy?
- IV. Whether this Tribunal was bound to consider the 'impending amendment' of the Regulation 7(c)(iii) of OERC Tariff Regulations, 2004, notified on 10.8.2011 in its Judgment dated 30.5.2011 in relation Retail Tariff Oder for FY 2010-11 passed by the Commission on 18.3.2010 and Judgment dated 2.9.2011 in relation to Retail Tariff Order for FY 2011-12 passed by the Commission on 19.3.2011?
- V. Whether the Tariff Policy issued by the Central Government in the year 2006 has over-riding effect of the Commission's own Regulations?
- VI. Whether the Tariff Fixation exercise carried out by the State Commissions is **quasi-legislative** function of the Commission and accordingly this Tribunal does not have

jurisdiction over the Tariff Orders passed by the State Commissions?

13. These are very fundamental issues raised by the Commission in the Impugned Order and would have very large impact on the power sector of this country. We are, therefore, of the considered view that it would be appropriate that these issues are deliberated by the Full Bench of this Tribunal.
14. The Appeal shall be placed before the Hon'ble Chairperson of this Tribunal for constitution of Full Bench in view of the issues involved particularly the issue No. VI having substantial importance of law.

(V J Talwar)
Technical Member

(Justice Partha Sakha Datta)
Judicial Member

Dated: 2nd January, 2013

REPORTABLE/~~NOT REPORTABLE~~