

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

**Appeal No. 186 of 2011**

**Dated: 7<sup>th</sup> December, 2012**

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

**IN THE MATTER OF:**

**Orissa Power Transmission Corporation Limited**  
**Janpath, Bhubaneswar, Orissa** .... **Appellant**

**Versus**

- 1. Orissa Electricity Regulatory Commission** .... **Respondent(s)**  
**Bidyut Niyamak Bhawan, Unit-VIII**  
**Bhubaneswar -751012, Orissa**
- 2. Western Electricity Supply Company of Orissa Limited**  
**Regd. Office – Plot No.N/22, IRC Village, Nayapalli**  
**Bhubaneswar – 751015, Orissa**
- 3. North Eastern Electricity Supply Company of Orissa Ltd.**  
**Regd. Office Plot No.N/22, IRC Village**  
**Nayapalli**  
**Bhubaneswar – 751015, Orissa**
- 4. Southern Electricity Supply Company of Orissa Ltd.**  
**Regd. Office Plot No.N/22, IRC Village**  
**Nayapalli**  
**Bhubaneswar – 751015, Orissa**
- 5. Central Electricity Supply Utility of Orissa (CESU)**  
**Regd. Office – 2<sup>nd</sup> Floor, IDCO Tower**  
**Janpath**  
**Bhubaneswar – 751 022, Orissa**

**Counsel for the Appellant(s):**                      **Mr. R.K. Mehta**  
   **Mr. Antaryami Upadhyay**  
   **Mr. David A.**

**Counsel for the Respondent(s): Mr. Rutwik Panda for R-1**

**JUDGMENT**

**PER MR. V J TALWAR TECHNICAL MEMBER**

1. The Appellant, Orissa Power Transmission Corporation Limited (Appellant) is a wholly owned company of the Government of Orissa and a transmission licensee. Orissa Electricity Regulatory Commission is the first Respondent. Respondent numbers 2 to 5 are the distribution licensees in the state of Orissa.
2. This Appeal has been filed by the Appellant challenging the Order dated 18.03.2011 passed in Case No. 145 of 2010 by the Orissa Electricity Regulatory Commission pertaining to the determination of Annual Revenue Requirement (ARR) and Transmission Tariff of the Appellant for the financial year 2011-2012.
3. The Appellant has challenged the disallowance under the following heads:
  - i) Employees Cost;
  - ii) Terminal Benefits;
  - iii) Repair & Maintenance Expenses;
  - iv) Administration and General (A&G) Expenses;
  - v) Interest on Loan;
  - vi) Pass through Expenses;
  - vii) Return on Equity and
  - viii) Misc. Receipts.

4. Let us examine the first issue regarding Employee's costs. The Appellant has submitted that the Commission has disallowed a sum of Rs. 74 Crores on account of Salaries, HRA, payment of arrears on account of 6<sup>th</sup> Pay Commission report and increase in DA to be considered in the Employees Cost.
5. The learned Counsel for the Appellant has made the following submissions on this issue:
  - (a) As per the principles laid down by the Commission in earlier orders, the Appellant has projected the audited figures for salaries i.e. Basic Pay and Grade Pay for FY 2009-10 at 3% to arrive at Rs 92.91 Crores. However, the Commission has allowed only Rs 62.12 Crores towards the Salaries.
  - (b) The Commission has allowed at 15% HRA instead of 20% actually allowed by the Appellant to its employees.
  - (c) The State Commission has allowed the arrears of salary and pension on account of the 6<sup>th</sup> Pay Commission in three equal instalments for a period of three years from the FY 2010-11 to FY 2012-13. The amount allowed for the FY 2010-11, 2011-12 and 2012-13 were Rs. 49.04 crores, Rs 49.04 crores and Rs 49.05 crores respectively. However, in accordance with the decision taken by the Government of Orissa, the Appellant had disbursed the arrears in two instalments, i.e. Rs.58.85 crores (40%) in the FY 2009-10 and Rs.88.28 crores (60%) in the FY 2010-11. The State Commission was, therefore, not justified in allowing the 6<sup>th</sup> Pay Commission arrears in a staggered manner over three years.

Accordingly, the Appellant is entitled to carrying cost of Rs 3.92 Crores on account of deferment of recovery of the arrears in the ARR.

- (d) The rate of DA approved by the Government of India is 65% with effect from 01.01.2012. The DA rate was 45% at the time of filing of the ARR application during November, 2009. On the basis of the anticipated rise of 3% in each rise of DA, the annual average DA for 2011-12 was evaluated by the State Commission at 55%. Thus, the State Commission incorrectly disallowed Rs.27.69 crores under the head of Dearness Allowance.
6. The Learned Counsel for the Commission submitted that the Commission in its order for FY 2011-12 have extensively dealt employees cost in para 220 to 227 which are self explanatory and supported with proper justification. The Appellant's contention that Commission was not justified in departing from the principle followed consistently in previous years. This statement is not correct as the reason for departing the earlier principle has been given in para 223 to 227 which is reproduced below:

*"223. With the broad analysis of employees cost as mentioned in above Para, the item-wise (major item) analysis of employees cost of OPTCL is discussed as under:*

**Salaries (Basic and Grade Pay):** Under the head OPTCL estimates an amount of Rs.98.57 cr. during FY 2011-12 as against an amount of Rs.62.12 cr. approved by the Commission during FY 2010-11. While estimating the amount, the licensee has relied upon the audited data for FY 2009-10, which shows an amount of Rs.92.91 crore towards basic pay and grade pay. Over the figure of 2009-10 the licensee has assumed 3% escalation annually to determine the figure of Basic Pay + Grade pay. On scrutiny of the provisional accounts for 2009-10, it is found that provision towards

6<sup>th</sup> pay Commission and wage revision arrear has already been included in the figure of Rs.92.91. Therefore, while estimating the annual impact of Basic pay + GP for 2011-12, the arrear impact should have to be excluded from the base figure of Rs.92.91 crore discussed above. This has not been followed by the licensee.

224. Therefore, for a realistic assessment of Basic Pay + G.P for 2011-12, the Commission called for the data of break-up of salary drawn during last 4 months. OPTCL in compliance to query submitted this data shown in table below:

**Table-33**

(Rs. crore)

<b>Month</b>	<b>Basic Pay</b>	<b>GP</b>	<b>DA</b>	<b>HR A</b>	<b>Others</b>	<b>Total</b>
August, 2010	4.44	0.69	1.53	0.70	0.35	7.71
September, 2010	4.47	0.68	1.25	0.69	0.34	7.43
October, 2010	4.44	0.69	1.44	0.70	0.33	7.60
November, 2010	4.47	0.68	1.49	0.70	0.34	7.68
Average for four months	4.46	0.69	1.43	0.70	0.34	7.62
Extrapolated for 12 months for FY 2010-11	53.52	8.28	17.16	8.40	4.08	

225. From the above table the Basic Pay + GP of the employees worked out to Rs.61.80 cr. (Rs.53.52 cr. + Rs.8.28 cr.) which is considered as the Base figure for the financial year 2010-11 for the purpose of estimation the Basic Pay + GP for the FY 2011-12.

226. In reply to query, OPTCL has mentioned the number of employees as under:

**Table – 34**

**Status of Employees in OPTCL**

<b>As on 01.4.2010</b>	<b>As on 01.4.2011</b>
<b>3655</b>	<b>3672</b>

227. The basic pay + GP for FY 2011-12 is determined after factoring in average number of employee and considering annual increment @3% on Basic Pay + Grade Pay extrapolated for 12 months for FY 2010-11 which works out to Rs.62.58 cr.”

7. With regard to reduction of HRA, the learned Counsel for the Commission made the following submissions:

i. While fixing the rate of HRA, the Commission scrutinized the data filed by the licensee in respect of the previous year. An analysis of the filing made by OPTCL in respect of previous years is given below:

	Rs. Cr.			
	2007-08 (Actual) (2009-10 filing)	2008-09 (Actual) (2010-11 filing)	2009-10 (Actual) (2011-12 filing)	2010-11 (Actual) (2012-13 filing)
Basic Pay + GP	47.90	68.26	92.91	74.72
HRA	5.62	7.94	9.79	9.14
% to Basic Pay + GP	11.73	11.63	10.54	12.23

ii. As seen from the above the percentage of HRA to Basic Pay + GP varies between 10.54% to 12.23% which is below the rate of 15% approved by the Commission. The Commission, is therefore, justified in allowing 15% of Basic Pay + Grade Pay considering the fact that Appellant provides quarters to employees at different stations and therefore 20% flat on total Basic Pay + Grade Pay should not be allowed as HRA.

8. In view of the above well reasoned submissions made by the learned Counsel, we are of then opinion that the view taken by the Commission in relation to Salaries and HRA is correct and does not require any interference.

9. The issue regarding payment of Arrears on account of 6<sup>th</sup> Pay Commission and DA as per actual had been raised by the Appellant in Appeal No. 110 of 2010 and the relevant extracts of judgment dated 19.4.2012 is quoted below:

*“The Ld. Counsel for the Appellant has submitted that the arrears on account of the 6<sup>th</sup> Pay Commission report have been paid in two instalments during the FY 2009-10 and the FY 2010-11 for Rs.58.85 crores (40%) and 88.28 crores (60%) respectively as per the order of the State Government. Thus, we feel that the payment of arrears should be allowed by the State Commission as per the actual disbursement along with the carrying cost during the true up. The State Commission should also consider the actual payment of DA during the FY 2010-11 in the true-up.”*

10. The Commission has carried out true up exercise for the year 2010-11 and we are sure that the Commission has implemented the directions issued in the above quoted judgment with regard to carrying cost for arrears on account of 6<sup>th</sup> Pay Commission Arrears.
11. As regards payment of DA is concerned, it is to be noted that the Commission approves ARR and tariff for licensee on certain assumptions and the Commission is expected to carry out true up filling in the gaps between the assumptions and the actual after prudence check. In case payment of DA for FY 2011-12, the Commission has taken weighted average of 55% as against actual of 58% which could be determined only after the end of the year. The Commission would consider the difference in approved DA and actual DA at the time of next true up.
12. The second issue is regarding the Terminal Benefits.
13. The learned Counsel for the Appellant contended that the State Commission allowed a sum of Rs.176.36 crores only towards the

terminal benefits as against the claim of the Appellant for Rs.630.19 crores. The State Commission did not accept the report of the Actuary appointed by the Appellant and appointed M/s. Darashaw & Company as Actuary. The report of M/s. Darashaw & Company was considered by the State Commission in the Tariff Order for the FY 2011-12. The Appellant has submitted that the report of Actuary M/s Darashaw & Company suffers from serious infirmities such discounting rate of 7.5.% as against 8% considered by the Actuary appointed by the Appellant and based on employee data as on 31.3.2009. On the other hand the report of the Actuary appointed by Appellant is based on employee data as on 31.3.2010. According to the Appellant, the State Commission should have accepted the report of the Actuary appointed by the Appellant as it was based on more realist data.

14. This issue has been decided by this Tribunal in its judgment dated 11.04.2012 in Appeal no.90 of 2009 filed by the Appellant challenging the Tariff Order for the FY 2009-10. The relevant finding is reproduced *below*:

*“12.1. Terminal Benefits:- As the Actuary Reports disputed by the Appellant is not before us in this Appeal we are not in a position to give any finding on this issue. As suggested by the Appellant, the Tribunal may consider this issue in the Appeal filed by the Appellant challenging the Tariff Order for the FY 2011-12. Thus this issue would not survive as far as this Appeal is concerned.”*

15. The main grievance of the Appellant is that the Commission has relied upon the report of the Actuary appointed by the Commission and had rejected the report of the Actuary appointed by the Appellant. The Commission should have accepted the report of the Actuary appointed by the Appellant as it was based on updated data and correct assumptions.

16. The Commission has submitted a detailed reply giving the reasons for allowing an amount of Rs.176.36 crore as terminal benefit and the circumstances under which the Commission has appointed Actuary and also the reasons for rejecting the report of the Actuary appointed by the Appellant. The counter reply of the Commission is reproduced below:

*“In reply the Commission would like to mention that reasons for allowing an amount of Rs.176.36 cr. has been given in para 235 to 238 of the tariff and 2011-12 which is reproduced below:*

*“235. Regarding terminal benefit liability of employees and existing pensions as mentioned in item (a) the estimated projected liability of Rs.630.19 crore is as per the actuarial valuation report done by OPTCL. The details are shown in the following table:*

**Table – 35**  
**Details of Actuarial Valuation**

(Rs. Crore)

Sl. No.	Terminal Benefits	Projected Actuarial Liability as on 31.03.2008 (Approved by OERC)	Actuarial Valuations as on 31.03.2010	Projected Actuarial Liability as on 31.03.2012	Additional fund Requirement
	<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5=(4-2)</b>
1	Pension	241.95	448.41	509.01	267.06
2	Pension in payment	390.32	756.45	808.48	418.16
3	Gratuity	31.66	64.40	73.88	42.22
4	Leave Encashment	38.72	61.58	66.63	27.91
5	<b>Total</b>	<b>702.65</b>	<b>1330.84</b>	<b>1457.99</b>	<b>755.34</b>
6	PF				0.50
7	Pass through for FY 2009-10				29.33
8	Pass through for FY 2010-11				96.32
9	<b>GRAND TOTAL (5+6-7-8)</b>				<b>630.19</b>

236. The Commission on 08.12.2009 appointed M/s. Darashaw & Company Pvt. Ltd., Mumbai as actuary for undertaking assessment of pension, gratuity and leave encashment liability of employees of four DISCOMs and OPTCL upto 31.3.2009 with projection for the financial year 2009-10 and 2010-11.

237. M/s. Darashaw & Co. the actuary have submitted the report and the final report has been sent to the concerned licensee through e-mail. A summary of such valuation vis-à-vis the corpus availability in respect of the licensee is given in table below:

**Table – 36**  
**Acturial Valuation as given by the Actuary M/s DARASHAW, Mumbai**  
**(Rs. Crore)**

	<b>OPTCL</b>	<b>WESCO</b>	<b>NESCO</b>	<b>SOUTHCO</b>	<b>CESU</b>
<b>31.03.09</b>					
<i>Pension</i>	843.66	290.91	267.44	271.37	528.46
<i>Gratuity</i>	53.84	32.77	30.38	28.22	54.32
<i>Leave</i>	52.08	34.24	29.74	27.61	62.42
<b>Total</b>	<b>949.58</b>	<b>357.92</b>	<b>327.56</b>	<b>327.2</b>	<b>645.20</b>
<b>31.03.10</b>					
<i>Pension</i>	864.87	301.97	278.2	281.22	552.8
<i>Gratuity</i>	59.12	36.52	32.61	31.16	57.71
<i>Leave</i>	58.02	37.13	32.37	30.68	67.7
<b>Total</b>	<b>982.01</b>	<b>375.62</b>	<b>343.18</b>	<b>343.06</b>	<b>678.21</b>
<b>31.03.11</b>					
<i>Pension</i>	885.10	310.17	285.88	293.18	571.63
<i>Gratuity</i>	66.09	38.69	36.17	34.13	61.53
<i>Leave</i>	64.67	40.1	35.85	33.84	73.41
<b>Total</b>	<b>1015.86</b>	<b>388.96</b>	<b>357.9</b>	<b>361.15</b>	<b>706.57</b>

**Table – 37**  
**Expected Corpus Availability**  
**(Rs. Crore)**

	<b>OPTCL</b>	<b>WESCO</b>	<b>NESCO</b>	<b>SOUTHCO</b>	<b>CESU</b>
<i>OB As on 01.4.99/Fund transfer from GRIDCO to DISCOMs</i>	184.07	70.77	68	67.39	138.56
<i>Allowed by the Commission</i>					
<i>1999-00</i>	11.68	6.71	5.62	7.78	0.00
<i>2000-01</i>	25.22	6.27	7.07	7.07	0.00
<i>2001-02</i>	27.74	7.92	7.00	6.63	6.09
<i>2002-03</i>	30.52	8.08	7.21	6.81	6.27
<i>2003-04</i>	33.57	8.96	7.56	7.57	6.90
<i>2004-05</i>	117.54	11.30	8.35	9.40	3.25
<i>2005-06</i>	40.62	12.06	8.92	10.03	3.51
<i>2006-07</i>	44.68	12.07	9.55	9.73	13.19
<i>2007-08</i>	55.38	16.36	15.30	13.97	18.28
<i>2008-09</i>	51.34	37.02	25.16	24.49	48.10
<i>2009-10</i>	76.94	37.04	27.19	20.53	49.68
<i>2010-11</i>	140.20	51.81	51.13	58.22	75.84

	<b>OPTCL</b>	<b>WESCO</b>	<b>NESCO</b>	<b>SOUTHCO</b>	<b>CESU</b>
<i>Sub-Total</i>	655.43	215.6	180.06	182.23	231.11
<b>Grand Total</b>	<b>839.5</b>	<b>286.37</b>	<b>248.06</b>	<b>249.62</b>	<b>369.67</b>

**Table – 38**  
**Differential Funding requirement as per valuation**  
**(Rs. Crore)**

<i>Licensee</i>	<i>Valuation as per Actuary (as on 31.3.2011)</i>	<i>Expected corpus availability</i>	<i>Difference to be funded</i>
<i>OPTCL</i>	1015.86	839.5	176.36
<i>WESCO</i>	388.96	286.37	102.59
<i>NESCO</i>	357.9	248.06	109.84
<i>SOUTHCO</i>	361.15	249.62	111.53
<i>CESU</i>	706.57	369.67	336.90

238. It is seen from the above table that as on 31.3.2011 the differential liability to be funded works out to Rs.176.36 crore in respect of OPTCL. The Commission allows the entire differential amount of Rs.176.36 crore as a pass through in ARR for the FY 2011-12.”

In para 9.2.2. the petitioner alleged that the report of the actuary appointed by the Commission suffers from serious infirmities and OERC was not justified in determining the terminal benefits on the basis of actuary report. The petitioner mentioned four reasons for disagreement with the report of independent actuary appointed by the Commission.

In reply Commission would like to mention that, the circumstances under which Commission decided to appoint independent actuary M/s. Darashaw & Co. has been mentioned in para 234 to 236 of the tariff order for 2009-10 which is reproduced below:

**“Terminal Benefits**

234. For the year 2009-10, OPTCL has estimated an amount of Rs.228.81 crore towards terminal benefit. OPTCL in its submission has stated that in FY 2008-09, the Commission had allowed deficit funding of a corpus fund of Rs.131.63 crore based on provisional actuarial valuation of Rs.702.65 crore upto 31.03.2008.

Subsequently, the same actuary did the final actuarial valuation upto 31.03.2008 as per which the terminal liability worked out to

*Rs.843.02 crore. After adding nearly Rs.40 crore for 2008-09, the terminal liability as on 31.03.2009 comes to Rs.883.80 crore. Thus, differential amount of Rs.181.15 crore (Rs.883.80 crore – Rs.702.65 crore) is proposed to be recovered during 2009-10. Besides the above, the installment amount of the deficit funding of the corpus along with the carrying charge aggregating to Rs.47.61 crore allowed by the Commission for 2008-09 is added to the above amount of Rs.181.15 crore to arrive at the proposed figure of Rs.228.81 crore.*

**235. The Commission analyzed the proposal of OPTCL and observed that there was no uniformity of the data provided by OPTCL to the actuary to determine terminal liability as on 31.03.2008. The same actuary quoted different figures at different times to confuse the Commission. Although the actuarial valuation done as per the direction of the Commission is a provisional one, the variation between actual and provisional figures should not be so large.**

**236. In view of the above, the Commission is not convinced with the report of valuation and directs for an independent valuation upto 31.03.2010 again for proper assessment, taking into consideration the impact of 6<sup>th</sup> Pay revision. After receiving the actuarial valuation report, the Commission would take necessary steps to fund the same. “**

Accordingly, the Commission through public notice dtd.15.07.2009 in daily newspaper invited Expression of Interest (EOI) for empanelment of actuary for valuation of terminal liabilities of the licensee in Odisha by 31.07.2009. Since no response was received within the scheduled date, the Commission on 30.09.2009 wrote letters to 13 independent actuary including M/s.Bhudev Chatterjee (the actuary appointed by OPTCL Ltd.) to submit their expression of interest by 20.10.2009. In response to the letter only two actuaries i.e. M/s. Darashaw and Company Pvt. Ltd., Mumbai and M/s.Watson Wyatt Worldwide, Kolkata submitted the Expression of Interest (EOI). The Commission after scrutinizing the EOI engaged M/s. Darashaw and Company Pvt. Ltd. to conduct the actuarial valuation of terminal liabilities of OPTCL and four DISCOMs (WESCO, NESCO, SOUTHCO & CESU) upto 31.03.2009 with projection upto 31.03.2011. The data were called for from OPTCL based on the format submitted by actuary.

**The actuary submitted its report to the Commission on 16.12.2010, which were transmitted to OPTCL through e-mail**

***on 14.01.2011 and the hard copy was sent to them vide letter No.610 dtd.08.04.2011***

***After receipt of the report OPTCL did not give any comment or objection to the report submitted by the independent actuary.***

*In view of above, the allegation made by the petitioner that (a) the valuation is one year back (b) valuation made by OERC is combination of OPTCL & DISCOMs and (c) adoption of different parameters followed by the actuary has no basis. Further, the Commission would like to mention that the Commission has no expertise in conducting actuarial valuation but to rely on the report submitted by the independent actuary.*

*Hence, the allegation made by the petitioner that the report of the actuary appointed by the Commission suffers from serious infirmities has no basis.” {emphasis added}*

17. In view of the detailed reply of the Commission giving detailed rational for rejecting the report of the Actuary appointed by the Appellant and also that the Appellant did not give any comment or objection to the report of the Actuary appointed by the Commission, we are of the view that the Commission has correctly determined the Terminal Benefits on the basis of report of the independent Actuary and is not liable to be interfered with. The issue is decided against the Appellant.
18. The third issue for consideration is related to Repair and Maintenance (R&M) expenditure. Though the Appellant has challenged the disallowance under Repair and Maintenance head in the Memorandum of Appeal, the Learned Counsel for the Appellant did not press this issue in oral arguments as well as in his written note of arguments. The issue has been raised by the Appellant in Appeal No. 24 of 2011 and this Tribunal had decided the issue against the Appellant. The findings of this Tribunal in Appeal No. 24 of 2011 are reproduced below:

*10 We have observed from the records available with us that the Appellant could not utilise the entire amount approved by the*

State Commission for R&M in its ARR. In fact the actual expenditure has been far less than the approved amount during last 12 years as shown in table below:

<b>Sl. No.</b>	<b>Year</b>	<b>Approved</b>	<b>Actual</b>	<b>% Utilization</b>
1	1999-00	19.84	9.51	47.93%
2	2000-01	14.67	9.90	67.48%
3	2001-02	15.99	8.81	55.10%
4	2002-03	17.43	9.35	53.64%
5	2003-04	13.35	7.03	52.66%
6	2004-05	14.07	4.59	32.62%
7	2005-06	14.80	6.94	46.89%
8	2006-07	36.00	11.31	31.42%
9	2007-08	47.00	16.52	35.15%
10	2008-09	54.00	15.66	29.00%
11	2009-10	47.00	25.14	53.49%
12	2010-11	60.00	28.32	47.20%
<b>Total</b>	<b>1999-2011</b>	<b>247.15</b>	<b>99.62</b>	<b>40.31%</b>

11 It is clear from the above table that on an average the Appellant could utilise only around 40% of the amount approved by the State Commission. We are in full agreement with the Tribunal's finding in Appeal no. 55 to 57 of 2007 that the non-utilization of amount in the previous **year** cannot be the ground to deny funds for the current year. However, if the performance of the utility does not improve year after year and the utility fails to utilise the approved amount, further approving funds which the utility cannot utilise for the purpose it has been approved, would amount to avoidable increase in retail tariff and extra burden on consumers. It may be noted that term used in the findings of this Tribunal in its judgment in appeal no. 55 to 57 of 2007 is 'the previous year' and not previous years.

12 Let us now examine the findings of the Tribunal in its judgments in Appeals no. 90 of 2009 and 110 of 2010. The findings of Tribunal in Appeal no. 90 of 2009 on the issue reads as under:

**“4.3 Repair and Maintenance (R&M) Expenses:**

*The Appellant had claimed a sum of Rs.123.74 crores towards R&M expenses against which the State Commission had allowed Rs.47 crores. As per the accounts audited by the CAG the actual*

*R&M expenses are Rs.26.14 crores which has since been tried up by the State Commission. Thus the claim of the Appellant under this head does not survive.” {Emphasis added}*

13 *The findings of the Tribunal in Appeal no. 110 of 2010 on the issue are reproduced below:*

*“8. The third issue is regarding Repair & Maintenance expenses.*

*8.1 According to the Appellant, the State Commission should have allowed Rs.98.14 crores for Repair and Maintenance expenses as per its claim.*

*8.2 The State Commission in its reply has stated that the Repair and Maintenance of Rs.60 crores was allowed keeping in view the past trends of actual expenditure under this head. Further the actual Repair and Maintenance expenditure for the FY 2010-11 as per the audited accounts was only Rs.28.32 crores, which is much less than that approved by the State Commission.*

*8.3 In view of the above submissions of the State Commission we find that there is no substance in the contention of the Appellant and the same is rejected.” {Emphasis added}*

14 *In view of above we find that there is no valid ground in the contentions of the Appellant and the same is rejected accordingly.*

19. Accordingly, the issue is decided against the Appellant
20. The fourth issue is related to disallowance of Administration and General (A&G) Expenses.
21. According to the Appellant the State Commission should have been allowed Rs.38.34 crores towards the Administrative and General expenses as per its claim. The learned Counsel for the Appellant made the following submissions in support of its claim:
  - (a) The State Commission has allowed a sum of Rs.18 crores towards A&G expenses against the claim of the Appellant for Rs.28.34 crores. The proposed A&G expenses include property related expenses, communication, professional

charges, conveyance, travelling, license fee etc. It is submitted that lack of sufficient funds towards A&G expenses would adversely affect efficient functioning of Appellant.

- (b) The actual expenditure has always been higher than the approved figures in the last 4 years.
- (c) The Commission has allowed A&G expenses with escalation of 9.4 % (rate of inflation as measured by WPI) over the approved amount of previous year approved figure without checking the prudence of expenditure and without giving any reason for disallowing the amount in previous tariff order towards A&G expenses and has disallowed the same mechanically.
- (d) The A&G Expenses need to be calculated based on the escalation on the basis of percentage over previous audited figures audited by CAG after prudence check.
- (e) Section 61 of the Electricity Act, 2003 provides that the appropriate Commission shall specify the terms and conditions for determination of Tariff and in doing so shall be guided by the principles laid down in the said Section. In the OERC Tariff Regulation 2004 it is provided that while determining Transmission Tariff the Commission shall be guided by the principles laid down in Section 61. Comprehensive Regulations have not been framed by OERC for determination of Transmission Tariff.

22. According to the State Commission, the Administrative and General expenses are controllable in nature and, therefore, the Commission was justified to factor in inflation (WPI) over the base figure of the previous year and approve an amount of Rs.18.00 crores for the FY 2011-12. The base figure adopted by the State Commission was the approved figure for the previous year as the detailed break up of the audited data was not available.
23. In view of the above, we do not find any infirmity in the approach of the State Commission in deciding the Administrative and General expenses in the impugned order. However, the State Commission shall consider the actual Administrative and General expenses as per the audited accounts during the true up for the FY 2011-12.
24. The fifth issue is regarding disallowance of Interest on Loans. The Appellant has stated that the Commission was not justified in disallowing the interest in respect of State Govt. loan to the tune of Rs.0.26 Crore on the basis of Govt. Notifications dated 29.01.2003, dated 06.05.2003 and dated 06.01.2010. These notifications are no more in force. Assumption of Commission regarding extension of benefit under Govt. Notifications stated above is not justified in view of the letter dated 28.02.2011 of the Department of Energy, Govt. of Orissa. The Appellant had claimed a sum of Rs 68.94 crores towards interest on new long term infrastructure loan. The State Commission has incorrectly disallowed a sum of Rs 49.71 crores on the ground that the receipt of loan amount during the FY 2011-12 was uncertain. The projection towards interest on loan capital was based on facts and evidential documents and, therefore, the State Commission should have allowed the same.

25. According to the State Commission, the interest on new long term loan was disallowed as the receipt of loan amount for the FY 2010-11 was uncertain.
26. In view of the above, the State Commission is directed to consider the actual interest on the loan taken by the Appellant on the new projects capitalized during the FY 2011-12 in the true up.
27. The sixth issue for consideration is related to Pass through expenses.
28. According to the Appellant, the State Commission has erred in disallowing the pass through expenses on the basis of the alleged surplus.
29. According to the reply filed by the State Commission, the Appellant had posted a surplus of Rs.236.54 crores as per the truing up exercise upto the FY 2009-10.
30. According to Ld. Counsel for the Respondent nos.2, 3 and 4, the State Commission had undertaken the truing up exercise upto the FY 2007-08 and found that there is surplus profit earned by the Appellant. The Appellant had computed the amount upto 2007-08 without considering the audited figures of the FY 2008-09. Thus, there is no justification in allowing Rs.74.46 crores as pass through expenses.
31. We find that the State Commission has dealt with the issue in paragraphs 333 and 335 of the impugned order in detail. We notice that the State Commission has computed the surplus of the Appellant for FY 2006-07, 2007-08, FY 2008-09 and FY 2009-10 as Rs. 41.99 crores, Rs.37.72 crores and Rs.97.03 crores and 59.80 crores respectively and accordingly correctly disallowed the claim of pass through of Rs.127.25 crores.

32. We do not find any infirmity in the finding on this issue. Accordingly, this issue is decided against the Appellant.
33. The seventh issue before us for consideration is regarding Return on Equity.
34. The learned Counsel for the Appellant has made the following submissions:
- a) The Appellant has claimed an amount of Rs.24.81 crore towards return on equity on a share capital of Rs.160.07 crore. The Appellant in its filing had stated that at the time of de-merger of GRIDCO effective from 01.04.2005, the equity share capital of Appellant was Rs.60.07 crore leaving the balance equity share capital with GRIDCO. In addition the State Govt. had agreed to part finance transmission projects being set up in remote areas to the extent of Rs.100 crore by way of equity contribution over a period of 3 years commencing from 2008-09. Appellant had received Rs.48.06 crore from State Government till 4.2.2011 i.e date of public hearing. The State Government had also sanctioned the balance amount of Rs.51.94 crore. vide its order dated 23.3.2011 and the same had also been received on 26.3.2011 through Demand Draft No. 461057 dated 25.3.2011.
  - b) However, the Commission has allowed return on equity value of Rs.48.05 crore being infused by State Govt. to be utilized for the transmission project being set up in remote areas. For the balance amount of 51.95 crore the Commission has directed that return on equity will be allowed as and when it is actually received.

- c) Regarding equity of Rs.60.07 cr. which is inherited by Appellant at the time of de-merger of GRIDCO into GRIDCO and Appellant, Commission in their reasoned order vide Para 292 of the tariff order for FY 2009-10 disallowed Return on Equity on the above amount. In line with earlier order, the Commission also disallowed Return on Equity on above amount of Rs.60.07 crore for the year 2010-11.
- d) Return on Equity (RoE) of Rs. 24.81 Crore during FY 2011-12 @ 15.5 % pre tax basis as per Regulation 15 of CERC regulations, 2009 on the original equity investment as well as additional investment made by the Appellant i.e on Rs.160.07 Crore, may be allowed.

35. Let us examine the findings of the Commission in the Impugned Order quoted below:

*“324. OPTCL has claimed an amount of Rs.24.81 crore towards return on equity on a share capital of Rs.160.07 crore. OPTCL in its filing had stated that at the time of de-merger of GRIDCO effective from 01.04.2005, the equity share capital of OPTCL was Rs.60.07 crore. leaving the balance equity share capital with GRIDCO. In addition the State Govt. has agreed to part finance transmission projects being set up in remote areas to the extent of Rs.100 crore by way of equity contribution over a period of 3 years commencing from 2008-09. Till date OPTCL has received Rs.48.06 crore from State Govt. and balance amount of Rs.51.94 cr. as communicated by the State Govt. in DoE vide letter No.IV-BT-7/2011/309 dtd.14.01.2011 will be made available for equity share investment by the State in OPTCL during the FY 2010-11. The details of receipt of equity share capital as mentioned by OPTCL is given below:*

**Table – 62**

<b>Sl. No.</b>	<b>Date of Receipt</b>	<b>Sanction Order No. and Date</b>	<b>DD No. and date</b>	<b>Amount (Rs. in cr.)</b>
1	31.03.09	R&R-I-01/2009-	160298	23.04

		3560 dt.25.03.09	dt.30.03.09	
2	31.03.09	R&R-I-01/2009-2003 dt.24.02.09	313714 dt.30.03.09	0.01
3	09.10.09	R&R-I-01/2009-9464 dt.11.09.09	387299 dt.07.10.09	5.0
4	01.07.10	R&R-I-01/2009-4826 dt.01.06.10	153892 dt.28.06.10	20.0
		<b>Total</b>		<b>48.05</b>

325. Commission feels that OPTCL is entitled to get return on equity value of Rs.48.05 cr. being infused by State Govt. to be utilized for the transmission project being set up in remote areas. **For the balance amount of 51.95 cr. the return on equity will be allowed as and when it is actually received.**

326. Regarding equity of Rs.60.07 cr. which is inherited by OPTCL at the time of de-merger of GRIDCO into GRIDCO and OPTCL, Commission in their reasoned order vide Para 292 of the tariff order for FY 2009-10 disallowed Return on Equity on the above amount. In line with earlier order, the Commission also disallows Return on Equity on above amount of Rs.60.07 crore for the year 2010-11.

327. The Commission, therefore, allows return @ 15.5% on the equity value of Rs.48.50 cr. as stated above. Thus, the Commission approves Return on Equity for an amount of Rs.7.45 cr. during FY 2011-12 as against OPTCL's claim of Rs.24.81 cr."

36. Perusal of the above findings of the Commission would indicate that the Commission has allowed Return on Equity on the amount infused by the Government of Orissa in creation of assets. The balance amount the Commission has agreed to consider as and when received. It is to be noted that the Equity qualifies for return only when the assets created from such equity is put to use. The details submitted by the Appellant indicate that the State Government had sanctioned an amount of Rs 51.95 crores only on 23.3.2011 and the Appellant received the same on 26.3.2011. Thus, the Commission has correctly disallowed any equity on this amount.

37. In the light of above discussions the issue is answered accordingly against the Appellant.
38. The seventh issue is related to miscellaneous receipts.
39. The Learned Counsel for the Appellant contended that the State Commission had taken a sum of Rs.43.77 crores on account of Miscellaneous Receipts based on the Cash Flow Statement of the Appellant for the period April, 2010 to February 2011, 2010, which also included income from supervision charges, short term open access charges and other receipts. Estimating the miscellaneous receipts from inter-state wheeling based on the Cash Flow Statement for the FY 2010-11 by the State Commission was incorrect.
40. According to the Ld. Counsel for the Appellant, the State Commission had erroneously overestimated the Miscellaneous Receipts and the same needs to be corrected based on the audited accounts.
41. According to the State Commission the Miscellaneous Receipts were estimated based on the latest cash flow statement submitted by the Appellant for the FY 2010-11 upto February, 2011 which was prorated for the whole year and considering the transmission charges towards wheeling to CGPs for the energy of 310 MU approved for the FY 2010-11.
42. We have carefully examined the findings of the State Commission given in paragraph 340 of the impugned order. We do not find any infirmity in the methodology adopted by the State Commission. The Commission in its reply has confirmed that every year truing up exercise is undertaken based on audited accounts. Thus, the actual Miscellaneous Receipts

shall be considered by the State Commission while truing up the accounts for the FY 2011-12.

43. At this stage we are constrained to point out that the present Appeal is an outcome of non-availability of proper Tariff Regulations specifying the terms and conditions for determination of tariff for transmission and generation. In terms of Section 61 of the Electricity Act 2003, every Commission is mandated to frame tariff regulations specifying terms and conditions for determination of tariff. Section 61 of the 2003 Act is set out as under:

**61. Tariff regulations.**—*The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—*

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
- (e) the principles rewarding efficiency in performance;*
- (f) multi-year tariff principles;*
- (g) that the tariff progressively, reflects the cost of supply of electricity, and also, reduces and eliminates cross-subsidies within the period to be specified by the Appropriate Commission;*
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
- (i) the National Electricity Policy and tariff policy:*

.....”

44. Bare reading of Section 61 read with Section 181(zd) of the Act would make clear that it is obligatory for the Commissions to specify the terms and conditions for determination of tariff.
45. We notice that the present Tariff Regulations, 2004 of the State Commission lays down only general principles as per Section 61 of the Act for determination of transmission tariff without specifying the terms and conditions for determination of transmission tariff.
46. The Hon'able Supreme Court in PTC Vs CERC (2010) 4 SCC 603 has held that this Tribunal has powers under Section 121 of the Act to direct the Commission perform its statutory function of framing the Regulations. The relevant portion of Hon'ble Supreme Court's observation in this case is quoted below:

*“...It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by Appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify Grid Code having regard to Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-station and generating plants. Basically, a grid is a network. Section 2(33) defines "grid code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "grid standards" to mean standards specified under Section 73(d) by the Authority. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. **In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake.**” {Emphasis added}*

47. We, therefore, reiterate the direction given by this Tribunal in its judgment in Appeal no. 110 of 2010 delivered on 19.4.2012 to take immediate steps to formulate specific Tariff Regulations for transmission of electricity in accordance with Section 181(zd) read with Section 61 of the Act.
48. In the light of our above findings, we do not find any reason to interfere with the impugned order of the State Commission. Subject to the directions made in the body of the judgment, the Appeal is accordingly dismissed. However, there is no order as to costs.

**(V J Talwar)**  
**Technical Member**

**(Justice Partha Sakha Datta)**  
**Judicial Member**

Dated: 7<sup>th</sup> December, 2012

REPORTABLE/~~NOT REPORTABLE~~