

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 30 of 2012

Dated: 14th 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. Industrial Promotion & Investment Corporation of Orissa**
IPICOL House, Janpath
Bhubaneswar
- 3. GRIDCO Limited,**
Janpath, Bhubaneswar
- 4. North Eastern 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 – 2nd Floor, IDCO Tower
Janpath, Bhubaneswar – 751 022, Orissa
- 6. Southern Electricity Supply Company of Orissa Ltd.**
Regd. Office Plot No.N/22, IRC Village
Nayapalli
Bhubaneswar – 751015, Orissa

- 7 **Western Electricity Supply Company of Orissa Limited**
Regd. Office – Plot No.N/22, IRC Village, Nayapalli
Bhubaneswar – 751015, Orissa
- 8 **M/s Project Development Consultants**
F/6, BJB Nagar,
Bhubaneswar
- 9 **M/s Hind Metals and Industries Limited,**
Canal Road, Kandasar
Nelco Nagar, Angul, Orissa
- 10 **Rawmet Ferrous Industries Limited**
2 B Fortune Towers, Chandrasekharapur
Bhubaneswar

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

Counsel for the Respondent(s): Mr. B K Nayak
Rutwik Panda for R-1
Mr M G Ramachandran for R-10
Mr R M Patnaik
Mr Dhananjaya Mishra
Mr P P Mohanty
Ms. M Sarada for R-5

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 has been notified as State Transmission Utility by the State Government under Section 39 of Electricity Act 2003 and a deemed transmission licensee.

2. Orissa Electricity Regulatory Commission (Commission) is the first Respondent. Respondent - 3 GRIDCO is a trading licensee in the state of Orissa. Respondent number 4 to 7 are the distribution licensees in the state of Orissa. Respondent number 8 to 10 are EHT consumers.
3. This Appeal has been filed by the Appellant challenging the Orders dated 22.7.2006 passed in Case No. 36 of 2005 and Review Order 26.4.2011 passed in Case No. 63 of 2006 by the Orissa Electricity Regulatory Commission (Commission).
4. The facts of the case are briefly described below:
5. The Commission initiated suo-moto proceedings being Case No. 36 of 2005 pursuant to performance review of the Distribution Licensees. In these proceedings all the stake holders of the power sector of Orissa were made parties. The Commission disposed of the petition by an order dated 22.7.2006 with following directions:

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

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

28. These EHT feeders constitute a part and parcel of the EHT transmission line which has to be built, owned and operated by the OPTCL to ensure optimal utilization of the generaton and

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

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

6. The Appellant filed a Review Petition being Case No. 63 of 2006 for Review of the order dated 22.07.2006 with the following prayers:
- (i) to exempt OPTCL from the duties/responsibility for power supply to EHT consumers which falls under the domain of Distribution licensees;
 - (ii) to allow supervision charge @ 16% over the total project outlay in lieu of 6% allowed; and
 - (iii) to permit OPTCL to collect Rs.10 lakh/MW as infrastructure loan as is being collected to ensure commitment from and realistic assessment of power projection by the prospective EHT consumers till such time a mechanism is developed on cost sharing between DISTCOs/GRIDCO/OPTCL and approved by OERC.
7. The Commission disposed of the Review Petition by an order dated 26.04.2011 with the following directions:-

- “(a) *The power of review is not circumscribed or to be made only if there is a clerical mistake or error apparent on the face of the record. It can be exercised, if there are other sufficient reasons. In the instant case, there was need to bring out clarity and distinction with regard to supervision charges, infrastructure loan, remunerative cost analysis, load centre, role of DISCOMs, Transmission utility vis-à-vis the user of EHT lines. Hence, it called for a detailed review in order to remove the doubts and bring out clarity of role of DISCOMs, Transmission utility and the EHT user etc.*
- b) *Any obligation to supply of power to any prospective EHT consumer and all commercial dealings and/or contract demand revision of existing EHT consumers lies with DISCOM only. DISCOMs need to take up the necessary interaction with the Transmission licensee on behalf of the consumer as a part of its business obligation.*
- c) *All 132 KV and above lines/system (including dedicated EHT feeder) are part of the Transmission system. The practice of metering arrangement at the EHT consumer premises, at the cost of consumer, could be initiated for billing purpose as DISCOM’s drawl from GRIDCO as well as DISCOM’s billing to the consumer.*
- d) *After completion and successful charging of the dedicated feeder, the ownership of the EHT line/system should be handed over to M/s OPTCL on payment of the cost of the system at a reasonable basis. The consumer should be freed from further maintenance expenses and responsibility.*
- e) *The principle of remunerative calculation, which has been provided in the OERC Distribution (Condition of Supply) Code, 2004, for creation of distribution network, will also mutatis mutandis be applied for creation of transmission network.*
- f) (i) *In case dedicated EHT lines/system is constructed and charged by the ‘User’ itself, OPTCL is entitled for 6% supervision charge. Testing fee of Electrical Inspector is not included and this should be borne by the User as an additionality.*
- (ii) *In case the dedicated lines/system is designed, erected and commissioned by OPTCL on behalf of the User, then OPTCL shall charge 16% departmental charge (including testing fee of the*

Electrical Inspector). The total capital cost including departmental charge payable by the User shall be approved by the Commission.

- g) The practice of asking for 'Infrastructure Loan' from any consumer's of DISCOM or from any generator for the dedicated feeder/dedicated transmission lines as a condition of connectivity agreement should stop from the date of the order. However, the infrastructure loan already taken or agreed to be taken on or before the date of this order will be governed/regulated as per the agreement already entered into and there is no question of any immediate refund of such infrastructure loan already taken/given.*
- h) There should not be any question of adjustment of loan advance with the energy bill of the consumer, as the billing and payment of energy charges is between the consumer & the DISCOM and Transmission utility is not involved in the process.*
- i) The 'remunerative cost' analysis be taken up immediately for any likely relief of the user for its capital investment on the dedicated feeder including the infrastructure loan paid by them to M/s. OPTCL".*

8. Aggrieved by some of the direction given in the Original Order dated 22.7.2006 and the Review order, the Appellant has filed this Appeal.

9. Assailing the directions given in the impugned Orders the learned Counsel for the Appellant made very elaborate submissions as listed here under:

- a) The Commission was not justified in giving directions on issues not raised by the Appellant in the Review Petition. The Commission has acted beyond its jurisdiction in giving direction related to supervision charges where line is erected and commissioned by the Appellant on behalf of the Consumer and completely stopping the practice of 'Infrastructure Loan' from the prospective consumer as a condition of connectivity.

- b) Since the obligation to supply electricity is of the Distribution Licensee, the corresponding obligation to construct EHT line upto the consumer premises is also of the Distribution Licensee. Having rightly held that the obligation to supply power is of the Distribution Licensee, the Commission erred in holding that responsibility of construction of EHT line should remain with the Transmission Licensee. These observations of the Commission are contrary to the Scheme of the Act.
- c) The Commission has erred in holding that the Remunerative Norms for creation of Distribution Network will apply “mutatis-mutandis” to Transmission Network.
- d) The only issue with regard to the Supervision Charges in the suo-moto order dated 22.07.2006 was in respect of Supervision Charges in respect of the work undertaken by the consumer under the Supervision of the Appellant and there was no reference in respect of work undertaken by the Appellant either in original suo-moto order dated 22.7.2006 or in the review petition. However, the Commission has given directions even with regard to Supervision Charges in respect of the work undertaken by the Appellant on behalf of consumer in the Review Order dated 24.06.2011. The said directions are without jurisdiction as the Commission does not have any suo-moto power of review.
- e) The Appellant being the transmission licensee and having expertise in the field of transmission, can undertake the construction and / or supervision of the construction of the EHT service lines of the consumer (whether being executed by the concerned DISTCO or by the consumer himself on behalf of

DISTCO) on payment of Supervision Charges in accordance with the provisions of Section 41 of the Act (Other business of transmission licensee).

- f) The Supervision Charges of 6% of the gross estimate as ordered by the Commission apparently in consonance with the Supervision Charges allowed to the DISCOMs for identical purpose is very meagre keeping in view the extent of work to be carried out by the OPTCL.
- g) After payment of Supervision charges and transfer of the line to the Appellant, the Consumer is freed from payment of any charges for maintenance of line for all times.
- h) The Commission has already considered the Supervision Charges collected by OPTCL as the miscellaneous income in the ARR of the Appellant and any interference would adversely affects the ARR of the Appellant.
- i) The Appellant OPTCL is short of funds for improvement / upgradation of the Transmission System. Even for availing loan from the financial institutions, corresponding equity is required. OPTCL being a Government Company has only limited equity and cannot, therefore, avail loans required for improvement / upgradation of the vast Transmission Network.
- j) In most cases, power supply to the industry is feasible from the nearest grid sub-station, but the connectivity conditions require upgradation at the upstream level like upgrading the auto-transformer capacity, conductor size etc. The funding for such upgradation work is partly met from the infrastructure loan amount.

- k) Most of the time, the industries project their power requirement over-ambitiously and thus request commitment for huge quantity of power. When the infrastructure loan condition is imposed, they drastically cut down their requirement and make realistic assessment of the power requirement.
10. The learned Counsels for the Commission and Respondent No. 5 and 10 made submissions supporting findings of the Commission.
11. Based on the rival contentions of the parties, the following questions would arise for our consideration:
- I. Whether the Commission has power to enlarge the scope of the Review Petition filed by the Appellant and giving the directions with regard to issues which were not the subject matter of the Review Petition?
 - II. Whether any of the directions given in the Impugned Review Order are not related to subject matter of the Review Petition?
 - III. Whether line connecting the transmission network of the Appellant and the consumer's premises (herein after referred to as last mile connection) is part of transmission network of distribution network of distribution licensee?
 - IV. Whether the scheme for sharing of service line expenditure on remunerative principles for distribution can be applied to the Appellant mutatis mutandis?
 - V. Whether the Commission has rightly fixed the supervision charges at 6% instead of 16% which had been collected by the Appellant?

VI. Whether the Commission has rightly denied the Appellant to collect the “Infrastructure Loan” from prospective EHT consumers?

12. We shall now deal with each of the questions framed above one by one. The first question for consideration is as to whether the Commission has power to enlarge the scope of the Review Petition filed by the Appellant and giving the directions with regard to issues which were not the subject matter of the Review Petition?
13. The learned Counsel for the Appellant contended that the Commission has given directions on the issues which were not raised in the Review Petition. According to the Appellant, the law is well settled that the power of review is not inherent power. It must be conferred by law either specifically or by necessary implication. Only the High Courts and the Supreme Court, created under the Constitution of India have the plenary jurisdiction and can exercise inherent powers. Statutory Commissions can only exercise power when conferred by the Statute. The Commission has power to review its own decisions under Section 94(1)(e) of the Electricity Act 2003 as the same powers as vested in the Civil Courts under the CPC. Under the CPC any person considering himself aggrieved can apply for the review. Thus, the Commission can review its own decision only upon filing of review petition by any aggrieved person and the Commission does not have any powers to review suo-moto. Therefore, the Commission can adjudicate only on the issues which have been raised in the review petition.
14. While agreeing with the proposition that under CPC, the Commission could not have gone beyond the review petition filed by the Appellant, the learned Counsel for the Commission submitted that the Regulation

70 of the Commission's Conduct of Business Regulations vests with the Commission the powers to review on its own motion.

15. The learned Counsel for the Appellant submitted that the regulations framed by the Commission giving inherent powers/ powers to review on its own motion are ultra-vires of the Electricity Act 2003. He has relied on the judgment of Hon'ble Supreme Court in the case of *Nautam Prakash Vs K K Thakkar (2006) 5 SCC 330*.
16. It is well settled law that this Tribunal is not competent to examine the validity of the Regulations framed by the Appropriate Commission. However, we have powers to examine as to whether the regulations had been applied correctly or not. Let us quote the Regulation 70 of OERC Conduct of Business Regulations.

70 Review of the decisions, directions and orders:-

(1) The Commission may on its own motion, or on the application of any of the person or parties concerned, within 90 days of the making of any decision, direction or order, review such decision, directions or orders and pass such appropriate orders as the Commission thinks fit.

17. Perusal of the regulation quoted above would indicate that the Commission has power to review its decision either on its own motion or on application of any person. Therefore, the question would arise as to whether the review proceedings before the Commission were initiated on its own motion to review within ninety days or upon the application filed the Appellant. Admittedly, the proceedings were initiated on the review petition filed by the Appellant and, therefore, the provisions of CPC and rules framed there under would apply.
18. Accordingly, the Commission have powers to adjudicate only on the issues which had been raised by the Appellant in the review petition.

The principles of the provisions of Order 47 Rule 1, CPC govern all the situations and we could not have anything to say or add beyond the law that speaks for itself.

19. The second question for consideration is as to **whether any of the directions given in the Impugned Review Order are not related to subject matter of the Review Petition?**

20. According to the Appellant the Commission has given following two directions in the Review Order acting beyond its jurisdiction.

(i) In case the dedicated lines/system is designed, erected and commissioned by OPTCL on behalf of the User, then OPTCL shall charge 16% departmental charge (including testing fee of the Electrical Inspector).

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

21. In order to decide whether these directions are on the issues which had not been raised by the Appellant in the review petition, we have to look to the relevant portion of original order in Case No. 36 of 2005 dated 22.7.2006, the prayer made before the Commission in the review petition and the relevant portion of the Review Order dated 26.4.2011. We would first deal with the 1st direction related to supervision charges as quoted above. The relevant portion of Commission's order dated 22.7.2006 reads as under:

“When a consumer is asked to undertake the capital work, the estimated cost shall be calculated on the aforesaid basis. The licensee is entitled to get 6% of the total estimated capital

expenditure towards inspection fees for checking and ensuring that the capital works has been done as per the standards pertaining to safety and security. The licensee should ensure inspection of works by the Electrical Inspector.” {emphasis added}

22. It is clear from the above that the Commission’s approval for supervision charges at 6% relates only to the works which were to be taken up by the consumer itself. It did not refer to works which were to be taken up by the Appellant. Now let us refer to the prayer of the Appellant in the Review Petition being Case No. 63 of 2006 which is quoted as under:

...

- (i) to exempt OPTCL from the duties/responsibility for power supply to EHT consumers which falls under the domain of Distribution licensees;*
- (ii) to allow supervision charge @ 16% over the total project outlay in lieu of 6% allowed; and***
- (iii) to permit OPTCL to collect Rs.10 lakh/MW as infrastructure loan as is being collected to ensure commitment from and realistic assessment of power projection by the prospective EHT consumers till such time a mechanism is developed on cost sharing between DISTCOs/GRIDCO/OPTCL and approved by OERC.*

23. Thus, the Appellant has requested for review of supervision charges from 6% to 16%. Clearly the request was related to the works to be taken up by the consumers and not the works which were to be taken up by the Appellant. Now let us examine the directions given in the Review Order impugned herein.

“(i) In case dedicated EHT lines/system is constructed and charged by the ‘User’ itself, OPTCL is entitled for 6% supervision charge. Testing fee of Electrical Inspector is not included and this should be borne by the User as an additionality.

(ii) In case the dedicated lines/system is designed, erected and commissioned by OPTCL on behalf of the User, then OPTCL shall

charge 16% departmental charge (including testing fee of the Electrical Inspector). The total capital cost including departmental charge payable by the User shall be approved by the Commission.”

24. Conjoint reading of the Commission’s Order dated 22.7.2006, review petition and Commission’s Review order dated 26.4.2011 would make it amply clear that the direction at (ii) was neither given in order dated 22.7.2006 nor prayed for in the review petition. The issue relating to supervision charges with respect of works taken up by the Appellant on behalf of consumer was not an issue before the Commission in case no. 35 of 2005. It was also not an issue raised by the Appellant in the Review Petition. Therefore, the Commission did not have power to give ruling on this issue in review order as discussed in para 18 above.
25. Now we will deal with the Second direction of the Commission viz., *“the practice of asking for ‘Infrastructure Loan’ from any consumer’s of DISCOM or from any generator for the dedicated feeder/dedicated transmission lines as a condition of connectivity agreement should stop from the date of the order.”*
26. The relevant portion of the Commission order dated 22.7.2006 is reproduced as under:

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

27. From the above it is clear that the Commission had observed that there is no justification for collection of Rs 10 lakh per MW from the

prospective consumer for building the backup transmission network. Let us now quote the prayer of the Appellant.

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

28. Conjoint reading of the Commission’s order and Appellants’ prayer would indicate that the Appellant had understood that the Commission had stopped it from collection of Rs 10 Lakh/MW from prospective consumers and therefore prayed for Commission’s permission. The Appellant in its prayer did not ask for deletion of the second sentence in the direction relating to prospective consumer coming forward voluntarily to pay the ‘infrastructure loan’. This observation of the Commission was quite benign. Why any authority would have any objection if a consumer comes forward to give interest bearing loan to get its job expedited. The Commission, through this observation indicated that the interest so paid would be pass thru in the ARR. Now let us examine the direction in the Impugned Review order dated 26.4.2011 which is quoted below.

*“The upgradation of backbone transmission network, with proper ‘cost benefit’ analysis in any case is approved by the Commission and, **therefore, demanding for any infrastructure loan from any consumer’s of DISCOM by the Transmission licensee should stop from the date of this order.** However, the infrastructure loan already taken or agreed to be taken on or before the date of this order will be governed/regulated as per the agreement already entered into and there is no question of any immediate refund of such infrastructure loan already taken/given. User, however, is entitled for its due relief as per the remunerative cost calculation.” {emphasis added}*

29. Bare perusal of above would indicate that the Commission has stopped the **demanding of any infrastructure loan from any consumer**. Thus, the Commission has reiterated its earlier direction given in its Order in Case No. 36 of 2005 dated 22.7.2005. This direction cannot be held as direction on the issue not raised in the review petition. The Appellant has raised the issue related to the 'infrastructure loan' and the Commission has further clarified its direction given in its Order dated 22.7.2006.
30. Our above findings are restricted to the question as to whether the directions given in the Impugned Review Order are not related to subject matter of the Review Petition and are not on the correctness of these directions.
31. The third question for consideration is as **to whether the line connecting the transmission network of the Appellant and the consumer's premises (last mile connection) is part of transmission network of the Transmission Licensee or part of the distribution network of Distribution Licensee?**
32. The learned Counsel for the Appellant made very elaborate submissions on this issue contending that the last mile connection is part of distribution network. The gist of his submissions are given below:
- a) Under the Scheme of the Electricity Act 2003, the obligation to supply is of the Distribution licensee. Section 42 of the Act casts upon the Distribution Licensee to develop, operate and maintain and efficient distribution system within its area of supply. Section 2(19) read with Rule 4 of Electricity Rules 2005 would make it abundantly clear that any line connecting with consumer's premises is part of distribution network.

- b) The Commission has accepted that all consumers including EHT consumers are the consumers of concerned distribution licensee. Any obligation to supply power to any prospective EHT consumers and related commercial dealing lies with distribution licensee. The distribution licensee on their part would take up Transmission Utility for construction of any new EHT lines or system as required. Similarly, for the existing EHT consumers, any maintenance or operational procedure for dedicated EHT line, the distribution licensee would interact with the Appellant as per provisions of the Grid Code.
- c) In para 48 of the Impugned Review Order the Commission has held as under:

*“48. OPTCL is required to construct the transmission lines up to the load centre but in the absence of clear cut definition in the Electricity Act, 2003 or clear cut clarification by the Commission, OPTCL would construct the transmission lines up to the grid substations or to the distribution substations which should be treated as the load centre **and not to the premises of the EHT consumers.**”*

- d) Having rightly held the above propositions, the Commission has erred in holding that the responsibility of construction of EHT lines should remain with the Appellant.
33. Per-contra the Learned Counsel for the 10th Respondent contended that any EHT line including last mile connection is part of transmission network as defined in Section 2(72) read with definition of substation as per Section 2(69) of the Act. He further submitted that in terms of Section 39 of the Act, it is the duty of the STU to ensure development of efficient intra-state transmission network from generating stations to load centres. The Consumer’s premises is a load centre as per the judgment

of this Tribunal in Appeal No. 139 and 140 of 2007 in case of *Nalwa Steel and Power Limited Vs Chhatisgarh Electricity Regulatory Commission*.

34. The learned Counsel for the Appellant has relied upon the definition of distribution network defined in Section 2(19) read with Rule 4 of Electricity Rules 2005.

“Section 2 (19) “distribution system” means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers;

Electricity Rules 2005

Rule 4. Distribution System - *The distribution system of a distribution licensee in terms of sub-section (19) of Section 2 of the Act shall also include electric line, sub-station and electrical plant that are primarily maintained for the purpose of distributing electricity in the area of supply of such distribution licensee notwithstanding that such line, sub-station or electrical plant are high pressure cables or overhead lines or associated with such high pressure cables or overhead lines; or used incidentally for the purposes of transmitting electricity for others”.*

35. According to these provisions the Distribution network is a system of wires between delivery point on the transmission lines or generating station and point of connection to the consumer’s installation. It also includes the electric line, sub-station and electric plant that are primarily maintained for the purpose of distributing electricity notwithstanding that such line... is high pressure cables or overhead lines. We have to examine as to whether an EHT line emanating from an EHT substation of the transmission licensee and connects a consumer’s installation fits in to this definition of distribution network or not. Evidently, the last mile connection is a line is between delivery point on the transmission line and point of connection on the consumer’s premises and is primarily

used for distribution of electricity to such consumer. Therefore, it qualifies to be part of distribution network.

36. The learned Counsel for the Respondent no.10 contended that any EHT line connecting generating station and substation directly or through other sub-stations is a transmission line. Every EHT consumer would necessarily have a substation within its premises. Therefore, an EHT line from a substation owned by transmission licensee to consumer's substation would qualify to be a transmission line within the meaning of transmission line defined by Section 2(72) read with definition of sub-station defined in Section 2(69) of the Act. These subsections are quoted below:

(69) “ sub-station” means a station for transforming or converting electricity for the transmission or distribution thereof and includes transformers, converters, switchgears, capacitors, synchronouos condensers, structures, cable and other appurtenant equipment and any buildings used for that purpose and the site therof;

(72) “transmission lines” means all high pressure cables and overhead lines (not being an essential part of the distribution system of a licensee) transmitting electricity from a generating station to another generating station or a sub-station, together with any step-up and step-down transformers, switch-gears and other works necessary to and used for the control of such cables or overhead lines, and such buildings or part thereof as may be required to accommodate such transformers, switch-gear and other works.

37. Bare reading Section 2(72) would indicate that the definition of transmission line a residual definition. All high pressure cables and over head lines which are not essential part of distribution system of a licensee are transmissions lines. Therefore, we have to examine as to whether a line in question is a part of distribution network or not. If it is not a part of distribution network, only then it could be transmission line.

As we have observed in para 35 above that last mile connection is part of distribution network, therefore, it cannot be a transmission line.

38. Next requirement for a line to be a transmission line is that the line must be transmitting electricity. Can supply to consumer be treated as transmission of electricity? The answer is 'no'. Supply of electricity to a consumer is universal service obligation casted upon distribution licensee under section 43 of the Act and accordingly, supply to a consumer is distribution and cannot be termed as transmission of electricity.
39. Next requirement is that it must be connected with a generating station or a substation. According to the learned Counsel for the Respondent, every EHT consumer would necessarily have a substation. Substation has been defined in Section 2(69) as a station for transforming electricity for transmission or distribution thereof. Can an arrangement for stepping down electricity at consumer's installations be held as substation as defined in Section 2(69) of the Act? Does this arrangement meant for transmission or distribution of electricity? The answer would again be 'no'. No person can transmit or distribute electricity without a license under the Act. Therefore, the arrangement of stepping down electricity for consumer's own use cannot be held to be a substation as defined in the Act.
40. The learned Counsel for the Respondent no. 10 further contended that as per Section 39 of the Act, the Appellant, being a STU, is obliged to ensure development of efficient intra-state transmission system for smooth flow of electricity from generating stations to load centres. A consumer premises has been held to be a load centre by this Tribunal in Appeal No. 139 & 140 of 2007 in the case of *Nalwa Steel and Power*

Limited. The above contention is wholly misplaced and is liable to be rejected for the following reasons:

- a) The judgment in Nalwa Steel and Power case had been rendered in the context of Dedicated Transmission Line constructed by a Captive Generating Plant and has no application in the facts of the present case. The issue in that case was as to whether a dedicated transmission line emanating from a captive generating plant terminates at two points.
- b) The Act defines a consumer as a person who is supplied with electricity for his own use by a licensee and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee. It does not differentiate between persons on the basis of the quantum of electricity requirement. A person requiring hundreds of MW or a fraction of kW of electricity (BPL consumer) is a consumer under the Act. If premises of an EHT consumer can qualify to be a load centre under section 39 of the Act, the same would be true for a BPL consumer. Can we hold that the STU is obligated to ensure smooth flow of electricity up to premises of a BPL consumer? If so, what is the need of a distribution licensee? It is the duty of a distribution licensee to develop, operate and maintain distribution system to meet universal service obligation casted upon it under Section 43 of the Act.
- c) Section 38 of the Act casts the same duties on CTU as Section 39 casts on STU i.e. to ensure development of an efficient, co-ordinated and economical system of inter-State transmission lines **for smooth flow of electricity from generating stations to the**

load centres. No stretch of imagination would support the contention that Section 38 mandates the CTU i.e. POWERGRID is to ensure smooth flow of power to any consumer, let alone the BPL consumer.

41. In the light of above discussion we are of the view that a line between transmission system and a consumer's premises is a part of distribution system.
42. Natural offshoot of above finding would be lead to the question as to whose responsibility would be to erect, operate and maintain such EHT lines. Section 42 of the Act mandates the distribution licensee to develop, operate and maintain distribution network. Thus it would be the duty of the distribution licensee to erect, operate and maintain the EHT lines as part of its distribution network. However, if the distribution licensee decides that it does not have expertise to carry out these jobs, it can entrust the same to the transmission licensee on mutually agreed terms duly approved by the Commission. We would like to mention that many generating companies have entrusted these assignments in relation to dedicated transmission lines to concerned STU.
43. The fourth question for our consideration is as to whether the scheme for sharing of service line expenditure on remunerative principles for distribution can be applied to the Appellant mutatis mutandis?
44. In view of our findings to last question above that last mile connection belongs to Distribution Licensee and accordingly remunerative principles would apply to it through distribution licensee only.

45. The fifth question before us for consideration is as to whether the Commission has rightly fixed the supervision charges at 6% instead of 16% which had been collected by the Appellant?
46. The learned Counsel for the Appellant contended that the Commission has reduced supervision charges from 16% to 6% which is too meagre as compared to the quantum of work the Appellant is expected to carry out. He made the following submissions in support of his contentions:
- a) The Appellant being the transmission licensee and having expertise in the field of transmission, can undertake the construction and / or supervision of the construction of the EHT service lines of the consumer (whether being executed by the concerned the distribution licensee or by the consumer himself on behalf of the distribution licensee) on payment of Supervision Charges in accordance with the provisions of Section 41 of the Act (Other business of transmission licensee).
 - b) The Supervision Charges of 6% of the gross estimate as approved by the Commission apparently in consonance with the Supervision Charges allowed to the distribution licensees for identical purpose, is very meagre keeping in view the extent of work to be carried out by the Appellant.
 - c) The Supervision by the Appellant will in general cover the following aspects:
 - a. Supervision of survey works: Preliminary, detailed, check and contour survey, checking of profiles, tower schedules and route alignments, land schedules etc.
 - b. Checking of soil investigation data.

- c. Assistance in obtaining various statutory clearances and publication of statutory notifications.
 - d. Checking and approval of drawings, designs, technical specifications of all EHT equipments such as power transformers, switchgears etc., structures, line materials, control protection schemes, cable schedules & approval of vendors.
 - e. Pre-delivery inspection of all EHT equipments and materials at the manufacturers' works.
 - f. Supervision of construction works like foundation and erection of equipments etc.
 - g. Final checking and testing of the equipments.
 - h. Arrangement of line clearances.
 - i. Assistance in the inspection of Electrical Inspectorate.
 - j. Charging of the electrical installations.
- d) Most of these activities like elaborate survey and documentation required for EHT lines are not required in HT and LT lines. The volume of works like checking of drawings etc. and consequent man-hour and technical expertise involved are many times more than that of HT/LT lines. When critical equipments like transformers, AB switch, conductor, HG fuses, PSC poles, joists etc. are available in the state, almost all materials for EHT lines and bays are procured from outside the State. the Appellant incurs additional expenditure for deputing inspecting officers to outside state for inspection of materials.

- e) In view of the above, a committee was formed by the erstwhile GRIDCO to revise the norms of deposit works, and accordingly, the supervision charges of 16% in the event a beneficiary executes the work, has been adopted.
- f) the Appellant provides all its technical expertise developed over 50 years, technical specification, supervises the work to ensure quality and provide all support for statutory clearances for the Extra High Voltage (EHV) system, for which 16% supervision charges is fully justified.
- g) It may also be stated that OERC has already considered the Supervision Charges collected by the Appellant as the income of the Appellant in the Annual Revenue Requirement (ARR) and Transmission Tariff Orders and any interference would adversely affect the ARR of the Appellant.
- h) The Supervision Charges at 16% are at par with such charges being levied by other States as well as by PGCIL:-
- i) After payment of Supervision Charges and Transfer of the Line to the Appellant, the consumer is freed from payment of any charges for maintenance of the line for all times.
- j) In case of Chhattisgarh State Power Transmission Co. Ltd. vs. M/s. R.R. Energy (Appeal No. 166 of 2010) reported in 2011 ELR (APTEL) 898 this Tribunal has upheld the Supervision Charges @ 15%. Relevant Extract from the judgment is quoted below:-

“58. We find that the above observations of the State Commission are well reasoned. Levy of 15 per cent supervision charges are justified in cases where an asset is established by consumer and is handed over to licensee for operation and maintenance. The rationale for such view is that since the asset is

to be maintained by licensee for whole of its life. Licensee has to replace any part of the asset which got defective during life time at his costs; he is entitled to claim supervision charges. Thus, we do not find any reason to interfere with the findings of the State Commission.”

47. The findings of Commission in the impugned Review order read as under:

*“52. We observe that the submission of OPTCL mixes up ‘departmental charges’ claimed by the Central PWD and State Govt. Deptt. for planning, designing and execution on behalf of the client organisation with that of ‘erection & supervision charge’. We feel that where the dedicated EHT line is constructed voluntarily by the User itself, as per the Standards and specification of OPTCL, at its own cost and the responsibility of OPTCL lies only for approval of drawings and erection supervision, then a charge of 6% supervision charge should be sufficient. In this place, the Commission stress the point that the 6% supervision charges will be applicable for the entire estimate including supply portion and not only on the part of the erection cost. As per the existing order, the 6% supervision charge also includes the cost of inspection fee payable to the Electrical Inspector before charging the line. We order that the User, constructing the line should, at its own cost, pay the inspection fees and obtain the permission of the Electrical Inspector for charging of the line. The inspection fee shall not be part of the 6% supervision charge to be paid to M/s OPTCL. **The 6% supervision charge is meant for approval of design/construction drawing and to ensure that the material as erected and quality of erection are as per the prescribed standard..”** {emphasis added}*

48. From the above it is inferred that the Commission has approved supervision charges at 6% for approval of design/construction drawings and to ensure that the materials as erected and quality of erection are as per prescribed standards. Thus, in case the consumer opts to erect the line by himself, the responsibility of the Appellant is restricted to approval of drawings and erection supervision and 6% of entire estimated cost including the cost of material for approving the drawings and erection

supervision appear to be adequate. The Commission has rightly rejected the prayer of the Appellant to enhance the supervision charges to earlier level of 16%.

49. The contention of the Appellant that reduction in Supervision Charges would affect its ARR is misconceived. The charges actually collected by the Appellant as supervision charges would be accounted for in revenue receipt during the year and deducted from its ARR as miscellaneous receipts and other components of ARR would remain intact. For example if the Appellant receives Rs 160 crores as supervision charges, same would be considered as revenue receipt and deducted from ARR. If, instead of Rs 160 crores the Appellant received only Rs 60 crores, then only RS 60 crores would be deducted. In a regulatory regime the licensee gets only the Return on Equity as income and all other expenditure on actual basis subject to prudence check. There would not be any impact of change in supervision charges on licensee's income i.e. RoE.
50. Accordingly, the issue is decided against the Appellant.
51. The sixth question for our consideration is as to whether the Commission has rightly denied the Appellant to collect the "Infrastructure Loan" from prospective EHT consumers.
52. The learned Counsel for the Appellant submitted that the Appellant is short of funds for improvement / upgradation of the Transmission System. Even for availing loan from the financial institutions, corresponding equity is required. OPTCL being a Government Company has only limited equity and cannot, therefore, avail loans required for improvement / upgradation of the vast Transmission Network. Infrastructure Loan has its origin in the Minutes of Meeting dated

19.10.2004 between the Principal Secretary, Department of Energy, C.M.D. GRIDCO, C.M.D. of DISCOMs, C.M.D., IPICOL and representatives of various Industrial Units. The Infrastructure Loan is utilised to upgrade the upstream system. The industrial consumers have tendency to project very ambitious power requirement but with Infrastructure loan condition they cut down their requirement and may reasonable assessment of their power requirement. The learned Counsel for the Appellant further submitted that there is no bar in the Act for collection of infrastructure loan. The Appellant has power to collect such loan as per the provisions of Section 41 and 86(1)(c) of the Act. The Appellant collects this loan from prospective consumers at a nominal interest of 6% as against 9% to 10% which is the interest rate of commercial banks. The benefit of lower rate is passed on to consumers.

53. Per-contra, the learned Counsel for the Respondent No. 10 submitted that construction of EHT Transmission Line to the premises of the consumer is the duty of OPTCL and as such OPTCL cannot take any Infrastructure Loan from such consumers. No consumer would voluntarily agree to give loan and all consumers are forced to give loan is without any basis.
54. The findings of the Commission in the Impugned Review Order are as under:

“53. Regarding the continuance of Infrastructure loan of Rs.10 lakh/MW and the claim of suitable enhancement, OPTCL argues that even though the cost of dedicated EHT feeder is fully borne by the sole user, it has to bear additional cost on account of upgradation of back-up network in order to supply quality power to the prospective consumers. OPTCL further argues that as per their past experience, normally the EHT consumer make a requisition of higher drawl than their requirement causing unnecessary bottled-

up high network cost without any benefit. The infrastructure loan work as a check point for the prospective user to assess its requirement correctly. We do not find any justification for such a claim. We have already stated that any user (including dedicated EHT consumer) are the consumers of the DISCOM and they should give their requisition only to DISCOM. DISCOM on its part, after due prudency check shall interact with the Transmission licensee for need of dedicated EHT lines for sole consumer or upgradation of S/S to cater to other consumers including the prospective EHT consumer. The need for upgradation and maintenance of a strong 220 KV and 400 KV backbone network is a normal planning exercise of Transmission utility with constant interaction with the Distribution utility.

54. Regarding the second argument that the prospective user holds the transmission capacity without any immediate use, we are of the opinion that it is the duty of DISCOM to have prudency check and enter into the agreement of contract demand for fixed charge payment with its consumer while interacting with the Transmission licensee for any likely upgradation of back-up network. We are not convinced with the submission of OPTCL that EHT consumer unnecessarily holds larger capacity without any immediate use, while the same time pays the higher fixed charge to DISCOM without actually availing the capacity. The condition of infrastructure loan as a check point for proper assessment of capacity is not correct, rather we tend to agree with the User's argument that the payment of infrastructure loan is a compulsion and never a voluntary Fixed Deposit scheme for them. It may be understood that any upgradation and/or new construction of EHT system is being made on the basis of request of DISCOM, by the Transmission licensee, although the User of the dedicated feeder pays for the initial cost, being the sole beneficiary. The User, in any case, is entitled for usual relief under remunerative cost analysis in due course of time.

55. The upgradation of backbone transmission network, with proper 'cost benefit' analysis in any case is approved by the Commission and, therefore, demanding for any infrastructure loan from any consumer's of DISCOM by the Transmission licensee should stop from the date of this order. However, the infrastructure loan already taken or agreed to be taken on or before the date of this order will be governed/regulated as per the agreement already entered into and there is no question of any immediate refund of

such infrastructure loan already taken/given. User, however, is entitled for its due relief as per the remunerative cost calculation.”

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

56. In view of above discussions, we do not find any reason to interfere with the directions of the Commission. The issue is accordingly decided against the Appellant.
57. In the light of our above findings, the Appeal is partly allowed to the extent indicated in paragraphs 24 and 44 in the body of the judgement. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice Partha Sakha Datta)
Judicial Member

Dated: 14th December, 2012

REPORTABLE/~~NOT REPORTABLE~~