IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

Appeal No. 175 of 2016

Dated: 30th May, 2024

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s. Vedanta Limited
1st Floor, Fortune Tower,
Chandrashekharpur,
Bhubaneshwar, Odhisa – 751023. …Appellant(s)

Vs.

1) The Secretary
Odhisa Electricity Regulatory Commission
Bidyut Niyamaka Bhawan, Unit-III,
Bhubaneshwar, Odhisa – 751012.

2) Authorised Officer
WESCO Utility (WESCO)
At/PO: Burla, Sambalpur,
Odhisa – 768017.

3) The Authorised Officer
NESCO Utility (NESCO),
Corporate Office : Januganj,
Balasore – 756019.

4) The Authorised Officer
SOUTHCO Utility (SOUTHCO),
Corporate Office : Courtpeta,
Berhampur – 760004.

5) Principal Secretary to Government

Department of Energy,
Govt. of Odhisa, Bhubaneshwar,
Odhisa – 751001.

6) The Managing Director,
M/s. Swain & Sons Power,
Tech Private Limited,
Swati Villa, Surya Vihar,
Link Road, Cuttack – 751013.

7) Shri R. P. Mohapatra
Retd. Chief Engineer & Member (Gen, OSEB)
Plot No. 775 (pt), Lane-3,
Jaydev Bihar, Bhubaneshwar – 751013.

8) The Managing Director
M/s. Factor Power Limited,
At/PO: Randia, Dist. Bhadrak – 756135.

9) The Chairman,
M/s. Visa Steel Limited,
Kalinganagar Industrial Complex,
At/PO: Jakhapuura,
Dist – Jajpur, Odhisa – 755026. ….Respondent(s)

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Hemant Singh
Mr. Nishant Kumar
Mr. Tushar Srivastava
Mr. Ambuj Dixit
Ms. Jyotsna Khatri
Mr. Shariq Ahmed
Mr. Mridul Chakrobarty
Mr. Chetan Garg
Ms. Ananya Mohan
Mr. Matrugupta Mishra
Ms. Shikha Ohri
Mr. Nimesh Kr. Jha
Mr. Saahil Kaul

Counsel for the Respondent(s) : Mr. G. Umapathy, Sr. Adv.
Mr. Rutwik Panda
Mr. Anshu Malik
Ms. Nikhar Berry for R-1/OERC

Mr. Raj Kumar Mehta
Mr. Abhishek Upadhyay
Ms. Himanshi Andley
Mr. E. P. Singh for R-2&4/
WESCO and SOUTHCO

Mr. Arunav Patnaik
Ms. Mahima Sinha
Mr. Shikhar Saha
Ms. Bhabna Das
Mr. Karun Pahwa
Ms. Kanika Singh for R-5/SGoO

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The captioned Appeal has been filed by M/s. Vedanta Ltd. (in short "Appellant") challenging the common Order dated 11.04.2016 (in short "Impugned Order") passed in Case Nos. 61 of 2015, 62 of 2015, 63 of 2015 and 64 of 2015 by the Odisha Electricity Regulatory Commission (in short "State Commission" or "OERC") regarding approval of open access charges for the FY 2016-17 applicable to open access customers for use of Intra-State transmission/ distribution systems.

Parties

2. The Appellant is a company registered under the Companies Act, 1956, and is an entity created out of a Scheme of Arrangement & Amalgamation (in short "Scheme") carried out within the group companies with effect from 01.01.2011/ 01.04.2011 in line with approval of the High Court of Bombay and the Madras High Court, having setup a 1.6 million tonnes per annum Aluminium Smelter Plant with a 1215 MW Captive Generating Plant and a 2400 MW Thermal Power Plant at Bhurkahamunda in the district of Jharsuguda in Odisha.

3. Respondent No. 1 is the Odisha Electricity Regulatory Commission constituted under the provisions of the Odisha Reforms Act, 1999 and is the State Commission vested with the powers under the Electricity Act, 2003 (in short "Act") to adjudicate the disputes in hand.

4. The Respondents Nos. 2, 3 & 4 are the distribution licensees (in short "Discoms") in the State of Odisha and have filed petition before the State Commission seeking approval of Open Access Charges for FY 2016-17.

5. Respondent no. 5 is the Principal Secretary, Dept. of Energy, Govt. of Odisha.

6. Respondent Nos 6, 7, 8 and 9 are the companies/ individuals *inter-alia* has objected to the application of Discoms for approval of open access charges for FY 2016-17 in addition to the objections raised by the Appellant

Factual Matrix

7. The Respondent No. 2 (in short "WESCO") filed application being Case No. 62 of 2015 before the State Commission for approval of open access charges for the FY 2016-17, pursuant to it, on 11.12.2015, the State Commission issued a public notice inviting views/ suggestions/ objections from the public on the application of WESCO regarding approval of open access charges for FY 2016-17.

8. The Appellant filed its objection on 15.01.2016 challenging the methodology of calculation of Open Access Charges by WESCO.

9. Thereafter, the State Commission has tagged all cases filed by all the distribution licensees being Case no. 61 of 2015 by NESCO, Case no. 62 of 2015 filed by WESCO, Case no. 63 of 2015 by SOUTHCO, and Case no. 64 of 2015 by CESU and conducted Public Hearing on the approval of Open Access Charges for the financial year 2016-17.

10. On 11.04.2016, the State Commission by a common order (in short "Impugned Order") disposed of all the cases and rejected the calculation methodology and views submitted by the Appellant during the hearing, the Appellant submitted that the State Commission in the Impugned Order has not provided the calculation methodology as to how the computation of open access charges are derived.

11. The Appellant, further, submitted that the DISCOMS operating in the State of Odisha are under obligation to purchase power solely from GRIDCO, having been granted status of Deemed Trading Licensee under respective Bulk Supply Agreement by the OERC under the 5th proviso to Section 14 of the Electricity Act,

2003, thus, GRIDCO plays the role of an Aggregator or Trader on behalf of the DISCOMs, also admitted by the State Commission in its order dated 21.03.2016 in Case No. 54 of 2015, in the matter of approval of Aggregate Revenue Requirement and determination of Bulk Supply Price of GRIDCO for the FY 2016-17, further, the State Commission vide its Order dated 21.03.2016 has determined the ARR, wheeling and Retail Supply tariff for the FY 2016-17 in the application filed by NESCO, WESCO, SOUTHCO and CESU in Case No. 57, 58, 59 and 60 of 2015.

12. Being aggrieved by the Impugned Order including various observations made therein and rejection of views of the Appellant by the State Commission, the Appellant filed the captioned Appeal.

Submissions of the Appellant

13. The Appellant submitted that the State Commission ignoring its own Regulations, computed the Cross Subsidy Surcharge (in short "CSS") for FY 2016-17 in terms of the formula stipulated under the amended National Tariff Policy, 2016 (in short "NTP, 2016") while disposing of the Petitions filed qua determination of Open Access Charges including Transmission/ Wheeling Charge, Surcharge and Additional Surcharge for FY 2016-17 by the respective Discoms of the State.

14. The Appellant placed the following issues before our consideration:

(i) that, the State Commission ought to have applied the formula/ methodology for determination of CSS on "Avoided Cost Method" as provided under the OERC (Determination of Open Access

Charges) Regulations, 2006 instead of the Amended National Tariff Policy, 2016; and

(ii) that, the present appeal is not barred by the doctrine of Res-Judicata and an independent adjudication of the impugned Order was necessitated in order to maintain the scales of justice.

15. It is submitted that the methodology for determination of CSS is statutorily provided under the OERC (Determination of Open Access Charges) Regulations, 2006 (in short "2006 OA Regulations") read with the OERC (Terms and Conditions for determination of wheeling tariff and retail supply tariff) Regulations, 2014 (in short "2014 Tariff Regulations"), in terms thereof, it is stated that Regulation 4(2)(ii) & (iv) of the 2006 OA Regulations statutorily mandate computation of CSS as per the principle of "Avoided Cost Method".

16. The Regulation 7.74 of 2014 Tariff Regulations of the State Commission also mandates applicability of the relevant provisions of the 2006 OA Regulations for determination of CSS, therefore, the "Avoided Cost Method" is the statutory route for computation of CSS.

17. In fact, the relevant 2006 OA Regulations of the State Commission also followed the "Avoided Cost Method" as provided under the National Tariff Policy, 2006.

18. Argued that the State Commission in the impugned Order completely deviated from the statutory route provided under its own 2006 OA Regulations while computing CSS without substantiating as to the reasons behind such a step

and whether such a course of action could at all was justified in the eyes of law, further, in doing so, the State Commission categorically held that it was applying the formula for computation of CSS as per Clause 8.5.1 of the amended Tariff Policy, 2016, which did not mandate application of "Avoided Cost Method" while computing CSS, as such, this is completely contrary to the statutory principle laid down under the 2006 OA Regulations, mandating "Avoided Cost Method" to be applied qua computation of CSS.

19. Submitted that it is settled principle of law that Regulations framed by the Appropriate Commission under the provisions of the Electricity Act, 2003 are in the nature of delegated/ subordinate legislation, and the same would always gain primacy over any policy (*the National Tariff Policy, 2016 in the present case*), this proposition of law is relevant because till the time NTP 2016 was notified, the legal provision in the State of Odisha statutorily and mandatorily provided for computation of CSS under a particular formula (*Avoided Cost Method*) without any amendment thereto, therefore, the State Commission ought not to have digressed from such route, by adopting the methodology provided by NTP, 2016 which was clearly teething the framework of 2006 OA Regulations.

20. This Tribunal in the full bench judgment dated 24.03.2015 passed in *Appeal No. 103 of 2012* titled *Maruti Suzuki India Limited v. Haryana Electricity Regulatory Commission & Anr.*, authoritatively held that the National Electricity Policy and the Tariff Policy framed under Section 3 of EA 2003, cannot override Regulations framed under Section 61 read with Sections 178 and 181 of the EA 2003, the relevant extracts of the said Judgment are set-out hereinbelow:

"52. We shall now turn to Issue 'B'. It reads thus:

B) Whether in view of the decisions, the decision of the Hon'ble Supreme Court in PTC India Limited V. Central Electricity Commission (2010) 4 SCC and RVK Energy Private Limited V. Central Power Distribution Co. of Andhra Pradesh Limited (2007 ELR (APTEL) 1222):

(i) A Tariff policy framed under Section 3 of the Electricity Act, 2003 can override Regulations framed under Section 61 read with Section 178/181 of the Electricity Act, 2003?

(ii) The Regulations notified by the State Commission under Section 181 of the Electricity Act can specify any different methodology or formula for calculation of cross subsidy surcharge?

We have already extensively referred to the Constitution Bench judgment in P.T.C. India Ltd. We have held that judgment of this Tribunal in R.V.K. Energy is not applicable to the present case. P.T.C. India Ltd. has clarified the legal position. At the cost of repetition we may state that Regulations framed under Sections 178 and 181 of the said Act have a primacy over the orders passed by the Regulatory Commissions in discharge of their functions enumerated in Section 61 read with 62, 79 and 86 of the said Act because they are framed under the authority of subordinate legislation. Hence, National Electricity Policy and Tariff Policy framed under Section 3 of the said Act cannot override Regulations

framed under Section 61 read with Sections 178/181 of the said Act. Ideally, National Electricity Policy, Tariff Policy and the Regulations are expected to be in tune with the provisions of the said Act. Regulations notified by the State Commission under Section 181 of the said Act can specify methodology or formula for calculation of cross-subsidy surcharge which is different from the one mentioned in the Tariff Policy. But it must be in consonance with the provisions of the said Act. Further, if the State Commission is specifying a different formula than that stipulated in the Tariff Policy, it should give reason for adopting a different formula and why the formula given in the Tariff Policy was not adopted in the context of the tariff determination of the concerned distribution licensee."

21. As such, from plain reading of the aforesaid judgment, it can be seen that the methodology/ protocol laid down under National Electricity Policy/ National Tariff Policy framed under Section 3 of the EA 2003 is merely a guiding principle and that the Regulatory Commissions framing Regulations under Sections 178 or 181 of the EA 2003 is statutorily of binding nature, furthermore, this Tribunal held that any methodology or formula determined by the State Commission for computation for CSS can be in deviation from the route contemplated under the Tariff Policy, however, these Regulations have to be within the four corners and in consonance with the provisions and framework of the EA 2003.

22. Reliance is further placed the judgment passed by the Supreme Court in *PTC India Limited v. Central Electricity Regulatory Commission,* reported in *(2010) 4 SCC 603,* submitting that Regulations/ Delegated Legislation or Subordinate

Legislation cannot be ignored as they have possessed of the requisite force of law, the statutory provisions or law shall prevail over any policy document, the relevant extract of the said judgment is set-out hereinbelow:

> *"37. On the question of law, learned counsel submitted that the right to appeal under Section 111 in respect of an adjudicatory/administrative order cannot be defeated by colouring the decision as a regulation. In this connection learned counsel submitted that the rules/regulations framed by the executive under an Act are the law whereas regulations made by the statutory authority itself are not the regulations under which it functions, but the regulation-making itself is its function. In the former case, it is possible to argue that the authority which is the creature of the statute cannot question the vires of the statute, in the latter case, the authority is not the creature of the regulation framed by itself, hence the sanctity given to the former is far greater than the sanctity given to the latter."*

23. Also cited the Order dated 01.12.2016 passed by the Rajasthan Electricity Regulatory Commission passed in Petition No. 817/2006, wherein it rejected the argument of the Distribution Licensees of the State that determining CSS as per the amended Tariff Policy, 2016 as against the existing Regulations framed by the State Commission without any amendment was glaringly illegal and lawfully untenable, the relevant extract of the said order is reproduced hereinbelow:

> *"31. We have considered the rival submissions. On such consideration, the Commission agrees with the views of the Objectors*

that the formula as contained in the Regulations has to be followed for determination of the CSS as the Regulations which are in force have not been changed as per new National Tariff Policy, 2016. As held by the Hon'ble APTEL, Regulations being statutory in nature override the changed Policy till they are amended. Therefore, the Commission proceeds to determine the CSS in the present petition based on the formula provided in Tariff Regulations, 2014."

24. Accordingly, argued that from the above extracts, it is clear that the then existing 2006 OA Regulations being statutory in nature, ought to have mandatorily overridden the route contemplated under the NTP, 2016 until such Regulations were amended for necessary prospective application, which is a contention advanced without prejudice to the case of the Appellant.

25. Reliance is also placed on the settled legal position that any statutory provision, much less a substantive provision which is not procedural in nature, unless amended, repealed or struck down by a Constitutional Court needs to be followed in letter and spirit, without any deviation or ignorance under law, reference is made to the judgment of the Supreme Court in *Prem Chand Garg v. Excise Commr.*, reported in *1962 SCC OnLine SC 37*, wherein it was held as follows:

"*12. … … … The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent*

with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. ... ...

13. In this connection, it may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be used by this Court, for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties."

26. The Appellant submitted that the sole contention raised by the State Commission during the said hearing in the present appeal was that this Tribunal in its Judgment dated 29.05.2018 passed in *Appeal Nos. 283 of 2014 & Batch* titled *M/s Sesa Sterlite Limited v. OERC & Ors.*, wherein, a challenge was made to the calculation of component "C" for the purpose of determination of CSS, has settled the issue, further, submitted that the full bench judgment of this Tribunal dated 24.03.2015 was passed three years prior to the afore-referred judgment of 29.05.2018 passed by this Tribunal, therefore, a line of argument was taken that the principles governing res-judicata would apply squarely to the present Appeal.

27. The Appellant countering the merit of such contention of the Respondent and without prejudice to the case of the Appellant, submitted that in the very same order dated 29.05.2018, this Tribunal also passed categorical directions upon the

State Commission to work out a methodology for computation of CSS per the NTP, 2016 in its forthcoming orders i.e., prospective orders, the relevant portion of the said order is extracted hereinbelow:

> "*12. (c) (v) In view of the facts and circumstances of the case, we are of the considered opinion that it is the responsibility of the State Commission to follow the provisions of NTP for computation of CSS as envisaged therein. The State Commission is hereby directed to work out some methodology so that the computation of component 'C' could be carried out by it as per the provisions of NTP in its forthcoming orders on OA charges.*"

28. The argument regarding res-judicata is itself erroneous fundamentally for the reason that it has been long established qua matters related to tariff, the principles of res-judicata have no application, since tariff/ CSS is determined on a year-to-year basis, in this regard, reliance is placed upon the judgment passed by the Supreme Court in *Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited* reported in *(2009) 6 SCC 235,* the relevant extract is quoted as under:

> *"34. While exercising its power of review so far as alterations or amendment of a tariff is concerned, the Central Commission stricto senso does not exercise a power akin to Section 114 of the Code of Civil Procedure or Order 47 Rule 1 thereof. Its jurisdiction, in that sense, as submitted by Mr. Gupta, for the aforementioned purposes would not be barred in terms of Order 2 Rule 2 of the Code of Civil Procedure or the principles analogous thereto.*

35. Revision of a tariff must be distinguished from a review of a tariff order. Whereas Regulation 92 of the 1999 Regulations provides for revision of tariff. Regulations 110 to 117 also provide for extensive power to be exercised by the Central Commission in regard to the proceedings before it.

36. Having regard to the nature of jurisdiction of the Central Commission in a case of this nature, we are of the opinion that even principles of res judicata will have no application.

… … …

38. The Central Commission, as indicated hereinbefore, has a plenary power. Its inherent jurisdiction is saved. Having regard to the diverse nature of jurisdiction, it may for one purpose entertain an application so as to correct its own mistake but in relation to another function its jurisdiction may be limited. The provisions of the 1998 Act do not put any restriction on the Central Commission in the matter of exercise of such a jurisdiction. It is empowered to lay down its own procedure.

… … …

40. Regulations 92 and 94, in our opinion, do not restrict the power of the Central Commission to make additions or alterations in the tariff. Making of a tariff is a continuous process. It can be amended or

altered by the Central Commission, if any occasion arises therefor. The said power can be exercised not only on application filed by the generating companies but by the Commission also on its own notion."

29. As such, from a reading of the aforesaid judgment, it can be evidently seen that the principles governing res-judicata are completely inapplicable to tariff proceedings, as the same are continuous in nature, in similar fashion, CSS being a component of tariff is determined on a year-to-year basis, the principles of res-judicata are not attracted.

30. Reliance is placed upon the judgments of this Tribunal, whereby the said Tribunal has time and again held that each tariff order is a separate proceeding and that different treatment ought to be given to different tariff orders, in this context, reference is made to the following judgments:

(i) Judgment dated 13.01.2009 passed in *Appeal No. 133 of 2007* titled *Delhi Transco Limited v. Delhi Electricity Regulatory Commission & Ors.,* wherein it held as follows:

"15. It is not disputed by the counsel appearing before us that each assessment year of a tariff order gives rise to a fresh cause of action and can be challenged separately. It is also accepted at the bar that the principles of res judicata will not apply to the facts of this case.

… … …

17. Although the appellant did not challenge the earlier tariff orders it did oppose the proposition that was adopted by the Commission

namely that the appellant should be denied the right to recover its revenue requirement to the extent of the past receivables. The appellant has been asking the Commission to transfer the 80% of the past receivables to it. In fact the accounts position of the appellant reflects the factual position namely that the past receivables have not been received by it and these accounts have not been held to be incorrect or flawed by the Commission. It cannot be said that the appellant has accepted the Commission's method in this regard for such an unduly long time that following the principles in the judgments mentioned above the appellant can be non-suited on the ground that it is challenging a settled position of fact or law. The view taken by the Commission that past receivable, not received by the appellant, be deemed to have been received by the appellant borders absurdity. Since each tariff order is distinct and separate the appellant would be fully justified in approaching this Tribunal to challenge the impugned order vis a vis the year 2006-07."

(ii) Judgment dated 29.04.2016 passed in *Appeal Nos. 185 of 2013 and 264 of 2013* titled as *Bhaskar Shrachi Alloys Ltd. v. CERC & Anr.,* wherein this Hon'ble Tribunal rejected the plea of the Appellants as regards applicability of principle of *res judicata* in the case of tariff determination. The relevant portion of the said order is set-out hereinbelow:

"*11.6) We have gone through the fact and circumstances of the matters before us in these appeals and also gone through the*

principle of res adjudicata and estoppel, as provided under Civil Procedure Code and the authorities cited on these points. In view of the above, we do not find any perversity or infirmity in the findings recorded by the Central Commission on these issues. The contentions raised on behalf of the appellants on these issues have no merits and are liable to be spurned. The learned Central Commission while passing the Impugned Order has considered all the contentions raised in these appeals and addressed them in a just, proper and legal way. The Central Commission has allowed the said claims of additional capitalization on proper justification on being satisfied with the material and data supplied by DVC before the Central Commission. The learned Central Commission has complied with the judgment of this Appellate Tribunal in the same spirit in which this Appellate Tribunal pronounced the said judgment on the said aspects of the issues involved in these appeals. Hence, all these three issues (A), (B) and (C) are decided against the appellant."

31. It is thus submitted that the impugned Order suffers a grave defect, which has resulted in stark illegality so far as computation of CSS by State Commission is concerned for the relevant period, as such, relying upon the earlier order of 29.05.2018 passed by this Tribunal, it cannot at all be urged that the present Appeal deserves to be kept unadjudicated in terms of merits and legal submissions which need an independent analysis based on the said appeal, without any applicability of the said principle.

Submission of the Respondent No. 1, OERC

32. The State Commission submitted that the issues raised in the present appeal have already been decided by this Tribunal in its Judgment dated 29.05.2018, passed in Appeals No. 283/2014, 141/2015, 30/2016 & 31/2016 titled *M/s. Sesa Sterlite Ltd./ M/s. Vedanta Ltd. Vs. the State Commission and Ors., f*or the FY 2010-11 to FY 2015-16, wherein at para 7, this Tribunal decided identical issues raised by the Appellant, which are all-most same as in the present appeal, thus in view of the above, the present appeal is liable to be dismissed, further, the Appellant has challenged a portion pertaining to calculation of component "C" of the Tribunal's judgment before Supreme Court, being C.A. Nos. 11090-11093 of 2018 titled *M/s. Vedanta Vs. the State Commission and Ors*, the said appeals are pending before Supreme Court.

33. The Appellant sought following relief before the State Commission, as under:

> *"In the aforesaid facts and circumstances, the objector requests that this Hon'ble Commission may be pleased to:*
>
> a) Consider the facts and circumstances mentioned by the Objector.
>
> b) Direct that the calculation of Cross Subsidy Surcharge to be done as per the formula laid down in the National Tariff Policy and the approved Tariff orders of the Hon'ble Commission.
>
> c) Direct that the Energy Charge Corresponding to a Load Factor of 100% may only be used in the determination of tariff or "T" component.

d) Direct that the "C" component should be the cost of procurement of power by GRIDCO from the top 5% at the margin excluding liquid based generation and renewable power.

e) Kindly allow to file our revised objection along with our calculation for determination of open access charges once the power procurement price of GRIDCO from various generators and Retail Supply Tariff order for FY 2016-17 is approved by the Hon'ble Commission.

f) Ensure that the Cross Subsidy Surcharge is progressively reduced and lay down a roadmap for the same.

g) Provide an opportunity to the Objector to be heard in person prior to the finalization of the decision in the matter. The Objector believes that such an approach would provide a fair treatment to all the stakeholders and eliminate the need for a review or clarification."

34. The Impugned Order was passed by the State Commission as per NTP and as per approved Tariff Order and 100% load factor. The relevant portion of impugned order is extracted herein below;

"9. The Open Access Charges (Transmission/ Wheeling Charges, Surcharge and Additional Surcharge applicable to open access customers for use of Intra- state transmission/ distribution system) under the provisions of the Act were first fixed by the Commission for 2008- 09 in its order dated 29.03.2008 in Case No. 66, 67, 68 & 69 of 2006. ***The detailed procedures and methodologies for computation of surcharge for different consumer categories had***

been elaborately described in the said order. Subsequently, the Commission has passed several orders for succeeding years on Open Access Charges applicable to open access customers for use of Intra- State transmission/ distribution system basing on the same principle. In the meantime, Ministry of Power on 28.01.2016 has notified the new Tariff Policy. The Commission is also to be guided by the same Policy. The Commission, therefore, has adopted the consistently the same principle for calculating wheeling Charges, Surcharge and Additional Surcharge applicable to open access customers for use of Intra-State transmission/ distribution system for the current year i.e FY 2016-17.

10. We have certain uniqueness in the structural and functional aspects of power sector in the State. DISCOM utilities purchase power from GRIDCO where all the PPAs of the Generators have been assigned. The GRIDCO has been declared as 'State Designated Agency' to procure power from the Generators to meet the requirements of the State. Therefore, GRIDCO purchases both high cost thermal power and also low cost hydro power and supplies this pooled power to the DISCOM utilities at bulk supply price fixed by the Commission. GRIDCO also discharges the obligation for purchase of Renewable Energy for the consumers of the DISCOMs. Accordingly, GRIDCO becomes a virtual generator for DISCOM utilities. ***The bulk supply price of GRIDCO is the unique power purchase price of DISCOMs without any differentiation of low or high cost marginal Transmission Utility (OPTCL) for transmitting power in its EHT***

network to be delivered at inter- connection points with the DISCOMs. Hence, for our purpose cost of power purchase by DISCOM utilities is sum of BSP of respective DISCOM utility and transmission charges.

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12. The Commission now adopts 'C' in the formula equal to BSP of respective DISCOMs as followed in the earlier years and as explained in the preceding paragraphs. Similarly 'T' is the tariff at 100% load factor including demand charges for the respective voltage level. The Wheeling charges 'D' is as determined from the distribution cost approved for the FY 2016-17 and 'L' is presently 8% at HT level whereas for EHT there is no requirement of incorporation since it has already been accounted for in the Bulk Supply Price of the DISCOM utilities."

35. Thus, in view of this Tribunal's observation in the judgment and the reasoning of the State Commission's Order, nothing survives in the present appeal.

36. Without prejudice to the above, it is submitted that the present Appeal is barred by the principle of estoppel and res judicata in as much as the method of calculation is concerned, the State Commission has been adopting the same methodology since 2009 while determining the open access charges, particularly the cross subsidy surcharge and the Appellant, SESA, formerly known as Vedanta Aluminum SEZ (in shot VAL DTA & VAL SEZ) have been making payment of CSS on the bills raised by WESCO (the then distribution company) in line with the rate fixed by the State Commission, further, the issue of CSS by SESA (formerly known

as VAL SEZ) has attained finality by virtue of the Supreme Court Judgment dated 25.04.2014 passed in Civil Appeal No. 5479 of 2013 (2014 (8) SCC, 444) titled ***M/s SESA Sterlite Ltd. V/s the State Commission and ors.,*** wherein the Supreme Court has held that SESA (erstwhile VAL SEZ) is a consumer of WESCO and thus liable to pay the cross subsidy surcharge, also held as under:-

> *"----The law provides that open access in distribution would be allowed by the State Commissions in phases. For this purpose, the State Commissions are required to specify the phases and conditions of introduction of open access.*
> *24. However open access can be allowed on payment of a surcharge, to be determined by the State Commission, to take care of the requirements of current level of cross-subsidy and the fixed cost arising out of the licensee's obligation to supply."*

37. Further, the High Court of Orissa vide judgment dated 30.03.2012 in W.P No. 8409 of 2011 titled *Keonjhar Navanirmana Parishad & ors. Vs State of Orissa and others* upheld the method for computing CSS, at paras 10 and 11 of the judgment the Court has held as;

> *"10 We may State here that a conjoint reading of section 61 (g) of the Electricity Act and Paragraph- 8.3 (2) of the National Tariff Policy makes it clear that it does not provide for any category of consumers and it is also an admitted fact that there is no methodology provided for computing cross-subsidy. Such computation may be the average cost of supply or cost of supply voltage wise or cost of supply to various consumer categories.*

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

"11. At last, we may make it very clear that computation of surcharge is totally different from computation of tariff and Regulation- 7.3 (c), as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers.

38. The above judgment has attained finality, as no appeal was preferred by any party.

39. The State Commission has been broadly adopting the same principle and methodology for determination of CSS since 2009, in earlier occasion the appellant was making payment of CSS on the bill raised by the erstwhile distribution licensee (WESCO) without any objection.

40. Further, the Ministry of Power vide notification dated 20.01.2016 notified the Revised Tariff Policy, wherein, the Policy provided discretion to State Commission to determine CSS on the basis of ground realities, also in the said Tariff Policy, the issue of CSS and Additional Surcharge for Open Access has been dealt as follows:

"8.5 Cross-subsidy surcharge and additional surcharge for open access

8.5.1 National Electricity Policy lays down that the amount of CSS and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.

A consumer who is permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and, in addition, the CSS. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. A consumer would avail of open access only if the payment of all the charges leads to a benefit to him. While the interest of distribution licensee needs to be protected it would be essential that this provision of the Act, which requires open access to be introduced in a time-bound manner, is used to bring about competition in the larger interest of consumers.

SERCs may calculate the cost of supply of electricity by the distribution licensee to consumers of the applicable class as aggregate of (a) per unit weighted average cost of power purchase including meeting the Renewable Purchase Obligation; (b) transmission and distribution losses applicable to the relevant

voltage level and commercial losses allowed by the SERC; (c) transmission, distribution and wheeling charges up to the relevant voltage level; and (d) per unit cost of carrying regulatory assets, if applicable.

Surcharge formula:

S= T – [C/ (1-L/100) + D+ R]

Where

S is the surcharge

T is the tariff payable by the relevant category of consumers, including reflecting the Renewable Purchase Obligation

C is the per unit weighted average cost of power purchase by the Licensee, including meeting the Renewable Purchase Obligation

D is the aggregate of transmission, distribution and wheeling charge applicable to the relevant voltage level

L is the aggregate of transmission, distribution and commercial losses, expressed as a percentage applicable to the relevant voltage level

R is the per unit cost of carrying regulatory assets.

Above formula may not work for all distribution licensees, particularly for those having power deficit, the State Regulatory

Commissions, while keeping the overall objectives of the Electricity Act in view, ***may review and vary the same taking into consideration the different circumstances prevailing in the area of distribution licensee.***

Provided that the surcharge shall not exceed 20% of the tariff applicable to the category of the consumers seeking open access."

41. The State Commission after hearing all the stakeholders, objectors including the present appellant passed a reasoned order/direction in accordance with law, the relevant paragraphs are 7 to 23 at page 41 to 46 of the Appeal Memorandum.

"A. **COMPONENT OF "T" OF THE SURCHARGE FORMULA.**

The Hon'ble Tribunal on the issue of Component "T" has held as follows; "We have heard the learned counsel appearing for the Appellant and the learned counsel appearing for the Respondents and also gone through the RST order for FY 2014-15 and after considering the same we are in agreement to the methodology adopted by the State Commission for calculation of component 'T' which was also being done on similar principles in earlier orders which were accepted by all the concerned. We also observe that as per the formula for CSS in NTP there is no such specific requirement of load factor for calculation of component 'T' and hence it is left to the State Commission to interpret and deal accordingly the same to meet the requirement of provisions envisaged in the Act and NTP. Accordingly,

we do not see any legal infirmity in the decision of the State Commission on this count also.

B. **Progressive reduction of CSS.**

The State Commission reduces the CSS in a progressive manner. The relevant finding on this is at para 14, page 44 of the Impugned Order. For ready reference, the same is quoted herein;

> **"14. As per mandate of the Electricity Act, 2003 under Section 42 the cross subsidy surcharge is to be reduced progressively. The Commission is authorized to evolve a methodology for such reduction. Basing on the suggestions during the hearing in the last year so also in the current proceeding, the Commission have considered the reduction in cross subsidy in past years. The cross subsidy surcharge has been reduced by the Commission from 70% level in 2015- 2016 of the computed value (based on the formula prescribed in the tariff Policy and now termed as levied surcharge) to 65% this year.**

TABLE -6

Leviable Surcharge, Wheeling Charge & Transmission Charge for Open access consumer 1MW & above for FY 2016-17

Name of the licensee	Cross Subsidy Surcharge (P/U)		Wheeling Charges P/U applicable to HT consumers Only	Transmission Charges for Short Term Open access Customer (applicable for HT & EHT consumers)
	EHT	HT		

CESU	143.58	95.58	53.18	Rs. 1500/MW/ day or Rs. 62.5/MWh
NESCO Utility	126.03	65.82	69.61	Rs. 1500/MW/day or Rs. 62.5/MWh.
WESCO Utility	126.68	83.45	43.58	Rs. 1500/MW/day or Rs. 62.5/ MWh.
SOUTHCO Utility	191.03	141.02	62.63	Rs. 1500/MW/day or Rs. 62.5/MWh.

42. The Surcharge is to be levied on Open Access Customer under Section 42 (2) of Act, 2003 while determining the surcharge, the State Commission has to keep in view the loss of cross-subsidy from such consumer who opt to take supply from a person other than the incumbent Distribution Licensee.

43. In Orissa, GRIDCO being the deemed trading licensee, is the State aggregator of power *inter-alia* purchases power from different sources including renewable sources and resells the same to DISCOMs at bulk supply price (BSP) fixed by the State Commission, in order to ensure a uniform retail tariff throughout the State, all the four DISCOMs of the State meet their requirement of power only through GRIDCO as all the subsisting PPAs with generators are made with the later, therefore, in such scenario of single buyer model of power purchase it is prudent to accept the BSP as approved by the Commission as the cost of power purchase for respective DISCOM.

44. Further, the main objective of tariff policy is to ensure financial viability of the sector as well as protection of consumer's interest, accordingly, the surcharge is

to be calculated, further, the views of the State Commission have already been mentioned in the order dated 29.03.2008, the relevant extract of Para-39 of the said Order is reproduced below:

> *"The fixation of the surcharge need to be realistic so that the extent of compensation available to the DISCOMs do not reduce drastically so as to affect their financial viability and, at the same time, give a signal to the enterprising consumers that they can source their power from generators and other licensees for optimizing their efficiency."*

45. In view of the above, the State Commission has taken the appropriate method for calculation of CSS considering the real situation of the State, hence, the submission of the Appellant is liable to be rejected.

46. Further, submitted that the electricity tariff structure of Odisha has been fully rationalized voltage-wise, essentially it consists of two major component i.e demand charge, which is billed in Rs/KVA/Month and another is energy charge expressed in paise/Kwh, where, in energy charge, the State Commission has formulated graded slab tariff for HT & EHT consumer with the intention that more industries are running in higher load factor, accordingly, the State Commission for FY 2016-17 has approved the energy charge as given below:

Slab rate of energy charges for HT & EHT consumers (Paise/Unit)

Load Factor (%)	**HT**	**EHT**
=<60%	525 p/u	520 p/u
>60%	420 p/u	415u

47. From the above, it is observed that the consumption upto 60% load factor for EHT consumers will be charged at a rate of 520 P/U and the consumption above 60% load factor i.e. incremental energy billed at the rate of 415 P/U. It does not mean that at a load factor of 100%, the tariff would be 415 P/U. For 100% load factor the tariff would be upto 60% @520 P/U and consumption from 60 to 100% load factor i.e. incremental energy at a rate of 415 P/U, Section 62 of Act, 2003 empowers the State Commission to determine tariff for retail sale of electricity, while doing so, the State Commission is guided by NEP and Tariff Policy under Section 61(i) of Act, hence, In conformity to para 8.3.2 and para 5.5.2 of NTP, the State Commission framed regulation 7(c)(iii) of the State Commission (Terms and Conditions of Determination of Tariff) Regulations, 2004 which is reproduced below:

> ***"7 (c) (iii)***
>
> *For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve all consumers of the State taken together and average tariff applicable to such consumers shall be considered."*

48. It would be seen from the above the State Commission in line with the mandate of National Electricity Policy and Tariff Policy has managed to keep cross-subsidy among the subsidised and subsidising category of consumers in the State within ± 20%, the State Commission at this stage would like to make it abundantly clear that the above cross subsidy is meant only for Retail Supply Tariff fixation in the state applicable to all consumers (except BPL and agriculture) and not to be confused with cross subsidy surcharge payable by open access consumers to the DISCOM, the cross subsidy & Cross subsidy surcharge are two

different components. The cross subsidy surcharge is payable for loss of cross subsidy to the DISCOM.

49. The Supreme Court in 2016 (9) SCC 134 titled *Sai Bhaskar Iron Ltd. v/s A. P Electricity Regulatory Commission and Ors* has held as follows:

> **In Re: Formula of FSA and its vires:**
>
> *22. In the backdrop of the aforesaid provisions, we now advert to the first submission whether Regulation 45-B is ultra vires to the provisions of Section 26 (9) of the Act of 1998 or Sections 61 and 62 (4) of the Act of 2003. Regulation 45-B deals with the determination of fuel surcharge. 'Fuel surcharge' has not been defined in the Act of 1998 or the Act of 2003. The Commission has the power under Section 26 (2) to prescribe the terms and conditions for determination of the licensee's revenue and tariffs. Section 26 (9) enables the Commission to vary fuel surcharge which is to be determined as per the formula prescribed by Regulation.* ***Thus the commission has been given the legislative power to prescribe the fuel surcharge formula by way of making Regulation and to include such factors as it considers appropriate for determination of fuel surcharge.*** *Under Section 61 of the Act of 2003 the Commission has the power to specify the terms and conditions for determination of tariff. It is pertinent to note that under the Act of 2003 Commission has adjudicatory, legislative as well as advisory powers. It has to consider under section 61 (b) commercial principles in regards to the generation, transmission, distribution and supply of electricity. Under Section 61 (d) the Commission has to frame the conditions with*

regard to safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner."

Submission of the Respondent No. 5, Govt. Orissa

50. It is submitted that as per Regulation 4(2)(iv) of the Orissa Electricity Regulatory Commission (Determination of Open Access Charges) Regulations, 2006, the CSS shall be computed as under:

"Cross-subsidy surcharge shall be computed by the licensee as the difference between (1) the tariff applicable to relevant category of consumers and (2) the cost of the distribution licensee to supply electricity to the consumers of the applicable class, and the same shall be submitted for necessary approval of the Commission."

51. Further, the Tariff Policy 2016 which was notified on 28.01.2016, provides:

"Surcharge formula:

S= T –[C/ (1-L/100) + D]+R

Where S is the surcharge

T is the tariff payable by the relevant category of consumers, including reflecting the Renewable Purchase Obligation

C is the per unit weighted average cost of power purchase by the Licensee, including meeting the Renewable Purchase Obligation

D is the aggregate of transmission, distribution and wheeling charge applicable to the relevant voltage level "

L is the aggregate of transmission, distribution and commercial losses, expressed as a percentage applicable to the relevant voltage level

R is the per unit cost of carrying regulatory assets

52. The State Commission while passing the Impugned Order has held as under:

"The Commission now adopts 'C' in the formula equal to BSP of respective DISCOMs as followed in the earlier years and as explained in the preceding paragraphs. Similarly 'T' is the tariff at 100% load factor including demand charges for the respective voltage level. The wheeling charges 'D' is as determined from the distribution cost approved for the FY 2016-17 and 'L' is presently 8% at HT level whereas for EHT there is no requirement of incorporation since it has already been accounted for in the Bulk Supply Price of the DISCOM utilities."

53. Further, submitted that the grievance of the Appellant is that the cost of supply of power i.e. the component 'C', in the calculation of cross subsidy surcharge has been considered based on the Bulk Supply Price at which power is sold by GRIDCO to the individual DISCOMs instead of the weighted average cost of power purchase of top 5% at the margin of the power purchased by GRIDCO.

54. At the outset it is submitted that the Bulk Supply Price at which power is sold by GRIDCO to individual DISCOMS has been considered by the State Commission for arriving at the cost of the distribution licensee to supply i.e. the

component 'C' while calculating Cross Subsidy Surcharge since 2009, the same methodology has been used since then and the Appellant had not raised any protest and had been making payments as per the Cross Subsidy Surcharge determined by the Commission, therefore, the instant Appeal is barred by estoppel.

55. It is submitted that the Appellant only challenged the methodology adopted by the Commission for the first time in Appeal No. 283 of 2014, which came to be dismissed by this Tribunal in its judgment dated. 29.05.2018 in Appeal No. 283 of 2014, Appeal No. 141 of 2015, Appeal No. 30 of 2016 & IA No. 82 of 2016 & Appeal No. 31 of 2016 & IA No. 84 OF 2016, wherein this Tribunal has held categorically that:

> *"From the above it is clear that the State Commission has passed the order in accordance with relevant provisions of the Act and the OA Regulations and has adopted the principle for considering BSP for the purpose of determination of cost of supply by the Discom. The reasoning given by the State Commission is just and reasonable, does not call for our interference.*
>
> *It is observed that the State Commission has been adopting the same principle for determination of OA charges for subsequent years as adopted in the order dated 29.3.2008 for the purpose of calculation of CSS after considering the relevant provisions of the OA Regulations. It is also observed that the same was done keeping in view the functional and structural scenario of Odisha power sector. Thus the order dated 29.3.2008 became the principal order for the State*

Commission to determine the OA charges. The stakeholders also accepted the said order and were making requisite payments. The Appellant was also making the payments of CSS based on the said order. Based on the Impugned Order, the Appellant has also accepted to make payment of CSS in MoM. Looking at all aspects of the case we are of the opinion that as of now we do not find merit in interfering with the Impugned Order. Further, it is significant to note that the State Commission after evaluation of the oral, documentary and other relevant materials available on file and by assigning valid and cogent reasons in the Impugned Order has rightly dismissed the claim of the Appellant, hence interference of this Tribunal does not call for."

56. Therefore, the methodology adopted by the State Commission has been approved by this Tribunal.

57. It is submitted that in Orissa, GRIDCO being the deemed trading licensee, is the State aggregator of power, meaning thereby, that It purchases power from different sources and resells the same to the DISCOMs at the Bulk Supply Price fixed by the State Commission, this was necessary to maintain a uniform retail tariff throughout the State and all the four DISCOMs of the State meet their requirement of power only through GRIDCO, thus, in such scenario of a single buyer model of power purchase, it is prudent to accept the Bulk Supply Price as approved by the Commission as the cost of power purchase for respective DISCOMs.

58. Also submitted that it is not prudent to ascribe the weighted average cost of power purchase of top 5% at the margin by GRIDCO to any particular DISCOM, because the power procured by GRIDCO has already been pooled at its end before it is resold to the DISCOMs, hence, there is no alternative but to accept the Bulk Supply Price of respective DISCOMs as the power purchase cost for calculation of Cross Subsidy Surcharge and this method of calculation was adopted by the Commission since 2008.

59. It is pertinent to note that while challenging the earlier determination of cross subsidy surcharge based on the aforementioned principle, the Appellant relied upon the Tariff Policy 2006, which provides that:

> *"Surcharge formula:*
> *S = T – [C (1+ L / 100) + D]*
> *Where S is the surcharge*
> *T is the Tariff payable by the relevant category of consumers;*
> *C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power*
> *D is the Wheeling charge*
> *L is the system Losses for the applicable voltage level, expressed as a percentage"*

60. However, in the instant Appeal, the Appellant has taken an objection to the application of the 2016 Tariff Policy by the State Commission, accordingly, argued that the Appellant cannot pick and choose when to apply the tariff policy as is favorable to it, in any case, the mode of determination of cost of supply proposed by the Appellant i.e. to consider weighted average cost of power purchase of top

5% at the margin of the power purchased by GRIDCO has already been rejected by this Tribunal.

61. Further, while dismissing the earlier appeal preferred by the Appellant on this issue, this Tribunal observed that:

> *"The State Commission is hereby directed to work out some methodology so that the computation of component 'C' could be carried out by it as per the provisions of NTP in its forthcoming orders on OA charges."*

62. In light of the above, the State Commission's reliance on the 2016 Tariff Policy dated 28.01.2016 for determination of cross subsidy charges for FY 2016-17 cannot be faulted.

63. In light of the above, it is submitted that there is no arbitrariness in the surcharge formula prescribed by the State Commission considering the ground realities and this Tribunal's direction in the earlier appeal.

64. It is submitted that the component 'T' i.e. the tariff applicable to the relevant category of consumer has also been miscalculated by the Appellant, in fact, 'T' has been considered by the Commission at 100% load factor, at 100 load factor, the Appellant has considered 'T' as Rs. 4.54/ kwh by simply adding Rs. 4.15/ kwh (energy charges) with Rs. 0.39/ kwh (demand charge), whereas the energy charges at 100% load factor are calculated by considering the energy charges for energy consumed up to 60% of load factor at the rate of Rs. 5.20 / kwh and for consumption beyond 60% of load factor at the rate of Rs. 4.15/ kwh, therefore,

while arriving at the tariff for 100 % load factor, the average of energy charges for consumption up to 60% and consumption beyond 60% would be considered, accordingly, the applicable energy charges would be Rs. 4.79 / kwh and not Rs. 4.15 /kwh as considered by the Appellant.

65. It is further pertinent to mention that the Cross Subsidy Surcharge has been reduced by the State Commission progressively, in line with the mandate of the National Electricity Policy and Tariff Policy and has managed to keep cross-subsidy among the subsidised and subsidising category of consumers in the State within ± 20%.

66. It is also submitted that the present appeal is barred by principle of constructive res-judicata, as the Supreme Court in Civil Appeal No. 5479 of 2013, *SESA Sterlite Limited v OERC* has already held that the Appellant is liable to pay cross subsidy surcharge.

67. That the State Commission's Order is just, proper and legal, therefore, the appeal filed by the appellant has no merit and as such liable to be dismissed.

Observation and Conclusion

68. There are only two issues which need to be decided by this Tribunal:

a. Whether the captioned appeal is barred by the doctrine of *res judicata*?

b. Whether the State Commission is right in following the NTP, 2016?

69. The Respondent No.1 submitted that this Tribunal in its Judgment dated 29.05.2018, passed in Appeals No. 283/2014, 141/2015, 30/2016 & 31/2016 titled *M/s. Sesa Sterlite Ltd./ M/s. Vedanta Ltd. Vs. the State Commission and Ors., f*or the FY 2010-11 to FY 2015-16, has decided identical issues raised by the Appellant, thus in view of the above, the present appeal is barred by the doctrine of *res judicata*, further, the Appellant has challenged a portion pertaining to calculation of component "C" of the Tribunal's judgment before Supreme Court, being C.A. Nos. 11090-11093 of 2018 titled *M/s. Vedanta Vs. the State Commission and Ors*, the said appeals are pending before Supreme Court.

70. Considering, that the aforesaid judgment of this Tribunal has been challenged in the Supreme Court and no stay has been granted, as informed, it may be appropriate to decide both the issues, i.e. issue of *res judicata* and application of NTP, 2016.

71. This Tribunal in the aforesaid judgment, as quoted above, has held as under:

> *"From the above it is clear that the State Commission has passed the order in accordance with relevant provisions of the Act and the OA Regulations and has adopted the principle for considering BSP for the purpose of determination of cost of supply by the Discom. The reasoning given by the State Commission is just and reasonable, does not call for our interference.*
>
> *It is observed that the State Commission has been adopting the same principle for determination of OA charges for subsequent years as adopted in the order dated 29.3.2008 for the purpose of calculation of*

CSS after considering the relevant provisions of the OA Regulations. It is also observed that the same was done keeping in view the functional and structural scenario of Odisha power sector. Thus the order dated 29.3.2008 became the principal order for the State Commission to determine the OA charges. The stakeholders also accepted the said order and were making requisite payments. The Appellant was also making the payments of CSS based on the said order. Based on the Impugned Order, the Appellant has also accepted to make payment of CSS in MoM. Looking at all aspects of the case we are of the opinion that as of now we do not find merit in interfering with the Impugned Order. Further, it is significant to note that the State Commission after evaluation of the oral, documentary and other relevant materials available on file and by assigning valid and cogent reasons in the Impugned Order has rightly dismissed the claim of the Appellant, hence interference of this Tribunal does not call for."

72. The Appellant submitted that the State Commission, while ignoring its own Regulations, has followed the NTP, 2016, the issue has already been dealt and decided by the earlier aforesaid judgment dated 29.05.2018 rendered by this Tribunal, the relevant extract is quoted as under:

"12. We have heard the learned senior counsel appearing for the Appellants and the learned counsel appearing for the Respondents and we have gone through the written submissions of the Appellants and the Respondents on various issues raised in the instant Appeal and after thorough evaluation of the entire relevant material available

on records the following issues that arises for our consideration are as follows:-

a) *In the present Appeals the Appellants are mainly aggrieved by the methodology adopted by the State Commission in the Impugned Orders for computation of components 'C' and 'T' used in the formula of CSS.*

b) *First, we take Questions of Law raised by the Appellant at S. No. 7. a) to 7. c) together as they are interrelated for computation of CSS. On Question No. 7. a) i.e. Whether the State Commission has erred in calculating the component 'C' and 'T' of the CSS formula?, On Question No. 7. b) i.e. Whether the State Commission while calculating component 'C' of the CSS formula has wrongly calculated the Weighted Average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power in violation to the surcharge computation formula prescribed in the NTP in paragraph 8.5.1? and on Question No. 7. c) i.e. Whether the State Commission has wrongly calculated the component 'T' i.e. Tariff at 100% load factor payable by the EHT consumer while determining the CSS payable by EHT consumer using prescribed formula in NTP?, we observe as herein below:*

   i. *To answer these questions let us first examine the findings of the State Commission in the Impugned Order on this issue. The relevant extract from the Impugned Order is reproduced herein below:*

"11. In this connection, the formula for computation of surcharge prescribed in the tariff policy in para 8.5.1 is quoted as under:

Surcharge formula:

S = T – [C (1+ L / 100) + D]

Where

S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

Now we adopt the same principle as in the past laid out in the Tariff Policy for determination of cross-subsidy surcharge considering the uniqueness of the power sector of the State in structural and functional area as follows:

T = applicable tariff for EHT and HT consumers at 100% load factor

C = Power Purchase cost plus transmission & SLDC charge payable by DISCOMs.

Since Odisha follows single buyer model, the power is purchased from different generators first and then pooled at

GRIDCO end. The same power is resold to DISCOMs at a price called Bulk Supply Price as approved by the Commission and includes the intra-State transmission loss. This is the power purchase cost of DISCOMs. In addition to that DISCOMs are to pay transmission charges to OPTCL and SLDC charges for the power purchased by them.

L = loss at HT 8% (assumed) since EHT loss is already in the BSP.

D = Wheeling charge levied by DISCOMs for power handled in HT = Distribution cost of DISCOMs/ Input units at HT

12. The wheeling charge is determined in pursuance to our Regulation which prescribes the adoption of same methodology as transmission for determination of the same. Since we have been following postage stamp method for determination of transmission charges we adopt the same for the determination of wheeling charge in the above formula considering only HT units handled by the system.

13.<u>For the year 2014-15, the Commission have approved the following Bulk Supply Price in respect of four distribution companies.</u>

1. *CESU 265.00 per KWH*
2. *NESCO 280.00 per KWH*
3. *WESCO 286.00 per KWH*
4. *SOUTHCO 185.00 per KWH*

In addition to that DISCOMs are to pay transmission charge @ 25 paise / Unit and SLDC charge as determined the Commission for the current year. All these constitute power purchase cost (C) of the DISCOMs.

---------"

The State Commission while referring to the formula provided in NTP for CSS, adopting similar principle as followed by it in earlier years and based on peculiar situation of the State power sector which follows single buyer model has calculated the component 'C' considering power purchase cost of Discom which includes BSP, transmission & SLDC charge payable by Discom.

The State Commission has considered the component 'T' as applicable tariff for EHT and HT consumers at 100% load factor for computation of CSS.

ii. *Now let us analyze the provisions of the NTP. The relevant extract is reproduced herein below:*

"8.5.1 ..... .

Accordingly, when open access is allowed the surcharge for the purpose of sections 38,39,40 and sub-section 2 of section 42 would be computed as the difference between (i) the tariff applicable to the relevant category of consumers and (ii) the cost of the distribution licensee to supply electricity to the consumers of the applicable class. In case of a consumer opting for open access, the distribution

licensee could be in a position to discontinue purchase of power at the margin in the merit order. Accordingly, the cost of supply to the consumer for this purpose may be computed as the aggregate of (a) the weighted average of power purchase costs (inclusive of fixed and variable charges) of top 5% power at the margin, excluding liquid fuel based generation, in the merit order approved by the SERC adjusted for average loss compensation of the relevant voltage level and (b) the distribution charges determined on the principles as laid down for intra-state transmission charges. Surcharge formula:

S = T – [C (1+ L / 100) + D]

Where

S is the surcharge

T is the Tariff payable by the relevant category of consumers;

C is the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power

D is the Wheeling charge

L is the system Losses for the applicable voltage level, expressed as a percentage

The cross-subsidy surcharge should be brought downprogressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11."

As per NTP surcharge is the difference between the tariff applicable to the relevant category of consumers ('T') and the cost of the distribution licensee to supply electricity to the consumers of the applicable class ('[C (1+ L / 100) + D]'). The cost of supply to the consumer consists of three components namely 'C', 'D' & 'L'. The component 'C' is to be calculated based on weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power. The component 'D' is the wheeling charge and the component 'L' is the system Losses for the applicable voltage level.

iii. *The Appellant has contended that for computation of 'C', the weighted average cost of the costliest stations' top 5% at the margin for GRIDCO should have been considered by the State Commission and not the BSP of the Discom. According to the Appellant, this is in violation to the NTP formula / principle prescribed by the State Commission. The State Commission and the Discom have contended that they have been following said principle as done in the Impugned Order since 2009 and which has not been contested.*

iv. *As per the Discom, the Appellant has also agreed to pay the CSS amount as per the Impugned Order in the meeting held with the Discom in 6 instalments & has also paid 3 instalments and it is not open to the Appellant to open the issue once it has agreed to make payment as per the Impugned Order.*

v. *The Appellant has also contested that the State Commission has not followed the OA Regulations notified by it. Let us examine the same. The relevant extract from the OA Regulations is reproduced herein below:*

> *"4 (2) Surcharge*
>
> *(i) Surcharge to be levied on open access customers under Section 42(2) of the Act, shall be determined by the Commission keeping in view the loss of cross subsidy from these customers opting to take supply from a person other than the incumbent distribution licensee.*
>
> *(ii) Avoided cost method shall be used to determine the cost of supply of electricity to consumers of the applicable class.*
>
> *(iii) The methodology for computing such cost is as follows:*
>
> *(a) As a first step, the projected capacity that is likely to move away due to open access will be estimated.*
>
> *(b) Since, it will avoid purchase of power from marginal sources of supply, the weighted marginal cost of power purchase (fixed plus variable costs) from such sources would be considered as avoided cost of power purchase.*
>
> *(c)To that avoided cost, other charges viz. applicable transmission and wheeling charges will be added to arrive at the cost of supply.*
>
> *(iv) Cross-subsidy surcharge shall be computed by the licensee as the difference between (1) the tariff applicable*

to relevant category of consumers and (2) the cost of the distribution licensee to supply electricity to the consumers of the applicable class"

From the above it can be seen that for arriving at the cost of supply to the applicable class of consumers the State Commission has adopted the principle of avoided cost. The cost of supply would comprise of weighted marginal cost of power purchase (fixed plus variable costs) from marginal sources of supply plus applicable transmission and wheeling charges. Further, CSS to be computed as the difference between the tariff applicable to relevant category of consumers and the cost of the distribution licensee to supply electricity to the consumers of the applicable class.

vi. *The provisions in the OA Regulations are similar to that of the NTP regarding computation of CSS. As per NTP 'C' is the weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power. However, the State Commission has defined 'C' as 'Power Purchase cost plus transmission & SLDC charge payable by Discoms.'To our mind, the cost of such power purchase also includes other applicable components on it like transmission charges and SLDC charges. The State Commission in the Impugned Order has considered component 'C'that is the sum of BSP inclusive of EHT losses, transmission charges and SLDC charges. Further 'L' is the losses at HT voltage level and 'D' is the wheeling charges. All these taken together*

forms second part of the NTP formula i.e. cost of the distribution licensee to supply electricity to the consumers of applicable class.

vii. *It is also observed that the State Commission in view of the peculiar situation of the power sector in the State of Odisha in structural and functional area has been calculating component 'C' based on the BSP determined by the State Commission in the tariff order for the Discom which is the average price at which the Discom purchase power from GRIDCO. The State Commission has submitted that this principle has been adopted by it based on the order dated 29.03.2008 in Case No. 66, 67, 68 & 69 of 2006 for OA charges. The relevant extract from the Impugned Order is reproduced herein below:*

> *"8. The Open Access Charges (Transmission / wheeling Charges, Surcharge and Additional Surcharge applicable to open access customers for use of Intra-state transmission/ distribution system) under the provisions of the Act were first fixed by the Commission for 2008-09 in its order dated 29.03.2008 in Case No. 66, 67, 68 & 69 of 2006. The detailed procedures and methodologies for computation of surcharge for different consumer categories have been elaborately described in the said order. Subsequently, the Commission has passed many orders for different years on Open Access Charges applicable to open access customers for use of Intra-state transmission/ distribution system based on the same principle. The Commission have also adopted the*

same principle for calculating wheeling Charges, Surcharge and Additional Surcharge applicable to open access customers for use of Intra-state transmission/ distribution system for the current year i.e. FY 2014-15"

From the above it can be seen that State Commission has adopted the principles for determination of OA charges as done vide its order dated 29.3.2008.

viii. *Now it is important for us to consider the order dated 29.3.2008. The relevant extract from the order is reproduced herein below:*

"In the matter of: Approval of Open Access Charges (Transmission/wheeling Charges, Surcharge and Additional Surcharge applicable to open access customers for use of Intra-state transmission/ distribution system) in accordance with Section 39 and 42 of the Electricity Act, 2003 read with the provisions of Chapter II (Charges for Open Access) of OERC (Determination of Open Access Charges) Regulations, 2006.

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12. In Orissa, the single-buyer model prevails, with GRIDCO as the sole supplier to the DISTCOs. Differential Bulk Supply price is fixed for four distribution utilities of the state. This has become necessary to maintain a uniform retail tariff through out the State. Power is procured by the DISTCOs at bulk supply prices as they purchase their entire requirement from GRIDCO at present. However, where GRIDCO cannot

meet their demand, DISTCOs have the liberty, of purchasing power from CGPs and other sources in addition to the purchase of power from GRIDCO. Such a situation or stage is yet to take place as GRIDCO is meeting their full demand at present. Therefore, for the purpose of determination of cost of supply by the distribution utility we shall be considering the rate at which each distribution company purchases power form the GRIDCO.

From the above it is clear that the State Commission has passed the order in accordance with relevant provisions of the Act and the OA Regulations and has adopted the principle for considering BSP for the purpose of determination of cost of supply by the Discom. The reasoning given by the State Commission is just and reasonable, does not call for our interference.

ix. *It is observed that the State Commission has been adopting the same principle for determination of OA charges for subsequent years as adopted in the order dated 29.3.2008 for the purpose of calculation of CSS after considering the relevant provisions of the OA Regulations. It is also observed that the same was done keeping in view the functional and structural scenario of Odisha power sector. Thus the order dated 29.3.2008 became the principal order for the State Commission to determine the OA charges. The stakeholders also accepted the said order and were making requisite payments. The Appellant was also making the payments of CSS based on the said order. Based on the*

Impugned Order, the Appellant has also accepted to make payment of CSS in MoM. Looking at all aspects of the case we are of the opinion that as of now we do not find merit in interfering with the Impugned Order. Further, ***it is significant to note that the State Commission after evaluation of the oral, documentary and other relevant materials available on file and by assigning valid and cogent reasons in the Impugned Order has rightly dismissed the claim of the Appellant, hence interference of this Tribunal does not call for."***

73. It is seen from the aforequoted extract that this Tribunal has dealt the issue in detail regarding the provisions of 2006 OA Regulation, the Tariff Policy 2006 and the prayers of the Appellant herein versus the Orders passed by the State Commission in 2008 and thereafter, in fact, identical issue has been dealt by this Tribunal while dismissing the said appeal by the Appellant herein on similar grounds.

74. It cannot be disputed that the cost at which the electricity is supplied to individual Discoms of the State is same and is supplied by GRIDCO at the *Bulk Supply Price* as approved by the State Commission and includes the intra-State transmission loss, therefore, determination of C based on "*the Weighted average cost of power purchase of top 5% at the margin excluding liquid fuel based generation and renewable power",* shall be nothing but the Bulk Supply Price.

75. Therefore, the State Commission is justified in determining 'C' on the basis of Bulk Supply Price, as also ruled by this Tribunal in the aforequoted judgment, the State of Orissa has a unique setup as far as purchase of electricity by the

Discoms is concerned, it follows single buyer model whereby GRIDCO procures power on behalf of all the Discoms as an intermediary Trader and supplies the bundled power at bundled price to the Discoms, as such the component 'C' is calculated considering power purchase cost of Discom which is nothing but the BSP including transmission & SLDC charge payable by Discom.

76. It is important to note the 2006 OA Regulations, the relevant extract is reproduced as below:

CHAPTER-II

Charges for Open Access

4. Open Access Charges. *- Open Access Customers shall pay the following charges for the use of the intra-State transmission/ distribution system which shall be regulated as follows :*

(1) Transmission/Wheeling Charges - (i) Open access customers connected to the intra-State transmission/ distribution systems shall pay the transmission and wheeling charges as applicable to the appropriate licensees, as the Commission may determine from time to time.

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(2) Surcharge - (i) Surcharge to be levied on open access customers under Section 42(2) of the Act, shall be determined by the Commission keeping in view the loss of cross-subsidy from these customers opting to take supply from a person other than the incumbent distribution licensee.

(ii) Avoided cost method shall be used to determine the cost of supply of electricity to consumers of the applicable class.

(iii) The methodology for computing such cost is as follows -

(a) As a first step, the projected capacity that is likely to move away due to open access will be estimated.

(b) Since, it will avoid purchase of power from marginal sources of supply, the weighted marginal cost of power purchase (fixed plus variable costs) from such sources would be considered as avoided cost of power purchase.

(c) To that avoided cost, other charges viz, applicable transmission and wheeling charges will be added to arrive at the cost of supply.

(iv) Cross-subsidy surcharge shall be computed by the licensee as the difference between (1) the tariff applicable to relevant category of consumers and (2) the cost of the distribution licensee to supply electricity to the consumers of the applicable class, and the same shall be submitted for necessary approval of the Commission.

(v) The amount of such surcharge shall be utilised to meet the current level of cross-subsidy paid by the category of consumers applicable to electricity supply of open access customers and shall be paid to the distribution licensee of area of supply where the premises of the customer availing open access is located.

(vi) The surcharge and cross-subsidy shall be progressively reduced and eliminated in the manner as the Commission may lay down for reduction and elimination of cross-subsidies in its regulations or revised tariff order issued from time to time

keeping in view the Long-Term Tariff Strategy and the Business Plan approved by the Commission.

(vii) Surcharge should be calculated by the licensees and approved by the Commission.

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77. It can be seen from above that the State Commission while specifying the methodology to be followed as "*Avoided cost method",* also specified the method to be followed as "*(a) As a first step, the projected capacity that is likely to move away due to open access will be estimated, (b) Since, it will avoid purchase of power from marginal sources of supply, the weighted marginal cost of power purchase (fixed plus variable costs) from such sources would be considered as avoided cost of power purchase, and (c) To that avoided cost, other charges viz, applicable transmission and wheeling charges will be added to arrive at the cost of supply.*

78. As observed by this Tribunal in the aforesaid Order, there are no costs attached to marginal sources of supply in respect of any of the Discoms, it is the electricity price i.e. Bulk Supply price at which the electricity is deemed to be purchased by each Discom as such the price of each unit of purchase is same.

79. We are inclined to accept the contention of the Respondent that it is not prudent to ascribe the weighted average cost of power purchase of top 5% at the margin by GRIDCO to any particular DISCOM, because the power procured by GRIDCO has already been pooled at its end before it is resold to the DISCOMs, hence, there is no alternative but to accept the Bulk Supply Price of respective

DISCOMs as the power purchase cost for calculation of Cross Subsidy Surcharge and this method of calculation was adopted by the Commission since 2008.

80. Therefore, 2006 OA Regulations read with the 2016 NTP is what the State Commission has followed and as such the contention of the Appellant that the State Commission has not followed its own Regulations is misconceived, it is due the peculiar scenario that is followed in the State of Orissa.

81. Accordingly, in the State of Orissa, there will not be any impact of determining 'C' on the basis of "*avoided cost".*

82. The Appellant placed reliance on various judgment ruling that the Statutory Policy cannot override the Regulations under the Act, the issue has never been raised since 2008, the year when the first order was passed by the State Commission, further, such a scenario was existing and continued and till it was challenged, for the first time, by the Appellant in the Appeal No. 283 of 2014, however, after detailed examination, this Tribunal passed the judgment dated 29.05.2018, rejecting all the contentions of the Appellant on merit.

83. We find that the issue has already been settled by this Tribunal through the said judgment and also the issue of *"Bulk Supply Price"* has been settled and therefore, the issue of marginal cost/ avoided cost.

84. Considering the above, we also endorse the issue in hand as has already been settled by this Tribunal vide the aforesaid judgment.

85. It is also important to note here that the Act (section 42) mandates that the Tariff for OA customers/ consumers shall not be determined by the State Commission, however, the Surcharge and the wheeling charges shall be determined by the State Commission, as such, the Surcharge or the Cross Subsidy Surcharge for OA consumers is determined separately and not as part of the Tariff Order.

86. Also, the High Court of Orissa vide judgment dated 30.03.2012 in W.P No. 8409 of 2011 titled *Keonjhar Navanirmana Parishad & ors. Vs State of Orissa and others* ruled that *"computation of surcharge is totally different from computation of tariff and Regulation- 7.3 (c), as it stood prior to amendment and as it stands at present, is only applicable to surcharge and surcharge is only levied on wheeling consumers"*.

87. As submitted by the Respondent and not disputed by the Appellant that the above High Court judgment has attained finality, as no appeal was preferred by any party, the decision of the High Court is final.

88. Undisputedly, the State Commission has been following the same principle and methodology for determination of CSS since 2009,which has been upheld by this Tribunal also, further, the appellant was making payment of CSS on the bill raised by the erstwhile distribution licensee (WESCO) without any objection in the previous years.

89. *Therefore*, the reliance of the Appellant on the decision of the Supreme Court in *Uttar Pradesh Power Corporation Limited v. National Thermal Power Corporation Limited* reported in *(2009) 6 SCC 235* is misplaced, as such the

contention of the Appellant that doctrine of "*Res Judicata*" does not apply in the instant case is misconceived and rejected.

90. Therefore, the methodology of determination of Cross Subsidy Surcharge as adopted by the State Commission since 2008 and never challenged by the Appellant, we find the issue in hand suffers from the doctrine of "Res Judicata" and on merit also.

91. We, therefore, upheld the Impugned Order passed by the State Commission.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 175 of 2016 is dismissed as devoid of merit.

PRONOUNCED IN THE OPEN COURT ON THIS 30th DAY OF MAY, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

pr/mkj