

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

Appeal No. 63 of 2016

Dated: 9th April, 2024

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

In the matter of:

M/s. Orissa Power Consortium Ltd.
6-2-913/914, 3rd Floor
Progressive Towers, Khairatabad,
Hyderabad – 500004.

...Appellant

Vs.

- 1) Odisha Electricity Regulatory Commission
Bidyut Niyamak Bhawan, Unit – VIII,
Bhubaneswar, Odisha – 751012.
- 2) GRIDCO Ltd.
Through its Chairman-cum-Managing Director,
Janpath, Bhubaneswar, Odisha – 751022.
- 3) PTC India Ltd.
Through its Group Head, Operation & Maintenance,
2nd Floor, NBCC Lower,
15, Bhikaji Cama Place,
New Delhi – 110066.
- 4) Department of Water Resources,
Government of Odisha,
Through its Principal Secretary,
Bhubaneswar, Odisha – 751001.

....Respondent(s)

Counsel for the Appellant(s) : Mr. M. G. Ramachandran, Sr. Adv.
Mr. Tarun Johri
Ms. Shikha Singh
Mr. Ankit Saini
Mr. Ankur Gupta

Counsel for the Respondent(s) : Mr. Rutwik Panda
Ms. Anshu Malik for R-1

Mr. Raj Kumar Mehta
Ms. Himanshi Andley
Mr. Abhishek Upadhyay for R-2

Mr. Ravi Prakash
Mr. Varun Pathak
Mr. Raheel Kohli
Mr. Nitish Gupta
Ms. Rimali Batra
Ms. Krishma Dayama
Ms. Saroj Bala
Ms. Shruti Awasthi
Ms. Soumya Sharma
Mr. Samir Malik
Mr. M. Kaushik
Ms. Noor Rampal
Ms. Shivangi Vaid
Mr. Kaynat Sheikh
Mr. Aditya Diwan
Ms. Pooja Nuwal for R-3

Mr. Arunav Patnaik
Mr. Shikha Saha
Ms. Anandini Kumar for R-4

JUDGEMENT

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

1. The instant Appeal has been filed by the Appellant i.e. M/s. Orissa Power Consortium Ltd. (in short "OPCL") challenging the Order dated 04.02.2016 (in short "Impugned Order") passed by the Odisha Electricity Regulatory Commission (in short "State Commission" or "OERC") in Case No. 15/2015 filed by the Respondent No.1 whereby the State Commission despite specifically observing that the Project was commissioned during Financial Year (in short "FY") 2009-10 during the period that OERC norms were not notified, and therefore, the tariff of the Project has to be determined as per the Central Electricity Regulatory Commission (Terms and condition for Tariff Determination from Renewable Sources) Regulations, 2009 (in short "Regulations, 2009"), as decided by the OERC, however, the State Commission determined the tariff in respect of the said Project on the basis of the normative capital cost in accordance with the CERC Regulations, 2009 but strangely applied the Capacity Utilization Factor (in short "CUF") of 35% as per the OERC order dated 14/09/2010 passed for the Renewable Power Projects to be set up in the State of Orissa, contrary to the CERC Regulations, 2009.

2. The Appellant is aggrieved by the decision of the State Commission on the following issues:

- a. Applied the CUF at 35% instead of 30% and determined the levelized tariff of the 20 MW Project at Rs. 3.42 per Kwh;

- b. Applied the Capital cost as per the CERC norms of Rs 5 crore per MW with the increased CUF of 35% instead of 30% as against higher capital cost incurred by the Appellant; and
- c. Allowed the Appellant to recover only 25 paise per kW for the cost of transmission infrastructure as against the claim of the Appellant of reimbursement of the expenditure of Rs. 23.17 Cr.

3. The Appellant is a company incorporated under the provisions of the Companies Act, 1956 and the amendment made thereafter, *inter-alia* has set up a 20 MW Hydro Electric Power Plant (to be referred hereafter as “HEP”) in the State of Orissa.

4. The Respondent No.1, OERC is the Regulatory Commission vested with the powers under the Electricity Act, 2003 (in short “Act”) and is responsible for adjudicating the dispute in hand.

5. The Respondent No.2, GRIDCO is a company engaged in the business of bulk purchase and sale of power on behalf of four distribution companies in the State.

6. The Respondent No.3, PTC is a trading licensee, having been granted Inter State Trading licence by the Central Electricity Regulatory Commission (in short “CERC”).

7. The Respondent No.4 is a public authority under the administrative control of Government of Odisha.

Factual Matrix of the Case: -

8. On 27.01.1995, the Appellant and the Government of Odisha entered into a Memorandum of Understanding for development and implementation of the 20 MW Samal Hydro Electric Project (in short "SHEP") comprising of (5) units of Four (4) MW to be set up in the State of Orissa, separately, the Government of Odisha granted the Techno Economic Clearance (in short "TEC") to the Project inter-alia the total capital cost of the SHEP as decided later by the State Technical Committee (in short "STC") is Rs.154.84 crores.

9. The Appellant submitted that the Respondent No.2, initially, refused to purchase power generated from the Project, accordingly, the Appellant signed a Power Purchase Agreement (in short "PPA") on 21.10.2004 with the Respondent No. 3, PTC for sale of energy generated from Project at the Inter-connection point which was defined as the physical touch point at 132 kV Samal sub-station of the Company where the 132 KV grid of GRIDCO is connected through the HEP's Tie Line, therefore, the Respondent No.3 was obligated to purchase the entire electricity generated, however, excluding the auxiliary power and the transmission / transformation losses up to the Delivery Point.

10. The main issues which are disputed by the contesting parties are i) the capital cost of the SHEP and ii) the CUF, consequently, the determination of tariff under Section 62 of the Act *inter-alia* based on various parameters including the two disputed parameters.

11. It is important to note here that the tariff, as defined under the PPA, quoted as under: -

“Tariff means the tariff payable for the power and energy from the Project subject to the approval of the Appropriate Commission.”

12. Subsequently on 25.05.2006, the Appellant and the Respondent No.4 signed and executed an Operational Agreement and thereafter, the Appellant and Govt. of Odisha entered into an Implementation Agreement on 16.05.2007, for setting out the terms and conditions for development and implementation of the project.

13. Separately, on 26.05.2009, the Respondent No. 2 i.e. GRIDCO and Respondent No. 3 i.e. PTC entered into a Power Sale Agreement (in short “PSA”) for sale of power purchased by the Respondent No.3 from the project developed by the Appellant and in turn sold to Respondent No. 2.

14. It is important to note here that the Respondent No. 3 is the trading licensee in terms of the Act and is entitled to receive only the trading margin over and above the tariff for the SHEP, therefore, the PPA and PSA are the binding contracts for the respective parties.

15. The Annexure A to the aforementioned PSA executed between the Respondent No.2 and Respondent 3 reads as under: -

“The Tariff payable shall be as determined in the PPA which is as per CERC Tariff Regulations or as determined by the Appropriate Commission plus PTC’s margin of 4 paisa/ kwh.”

16. Thus, the terms and conditions PPA and PSA are interlinked and are binding on the contesting parties herein.

17. Therefore, the Tariff of the SHEP is required to be determined in terms of the above, i.e. either as per CERC Regulations or as determined by the State Commission, the determination shall be as per section 62 of the Act, however, as submitted by the Appellant and not disputed by the Respondents, the State Commission has not notified the relevant regulations for determination of tariff under section 62.

18. The SHEP was commissioned and achieved the Commercial Operation (in short “COD”) on 20.10.2009 and since, then the electricity generated is supplied to the Respondent No.3.

19. Subsequently, the Respondent No. 2 filed a Petition being Case No. 101/2009 before the OERC for the purpose of approval of the PSA dated 26.05.2009 executed with the Respondent No.3, *inter-alia* praying for approval of the purchase of power from the Project on payment of cost of 88% of power i.e. excluding the free power, with 4 paise per unit of trading margin thereon to PTC.

20. Consequently, the OERC vide its order dated 01.10.2009 approved the PSA dated 26.05.2009 with a provisional tariff of Rs. 3.10 per unit (inclusive of 4 paisa

trading margin to PTC) on the saleable energy, additionally, directed the Respondent No. 2 and the Appellant to take up the matter with the State Technical Committee (STC) for early finalization of the capital cost of the Project for the purposes of determination of tariff of the Project.

21. The OERC, further, directed the parties to mutually agree on the tariff as arrived within the parameters fixed by CERC and to file and appropriate application before the OERC for final tariff determination on saleable power of the Project.

22. The relevant Regulations i.e. CERC Regulations, 2009 were notified by CERC on 16.09.2009, prior to COD of the project, wherein the Regulation 5 specified the Control period under the Regulations as three (3) years, of which the first year was effective from the date of notification of the Regulations and ending on 31.03.2010, further, provided that the tariff determined as per these Regulations for the Projects commissioned during the Control period shall continue to be applicable for the entire duration of the tariff period, also, the Regulation 10 provided that the generic tariff shall be determined on levelized basis for the tariff period.

23. The Regulation 28 of the CERC Regulations, 2009 provided that the normative capital cost for small hydro projects during the First Control Period (FY 2009-10) for the projects between 5MW to 25MW shall be Rs. 500 lakhs per MW and the Regulation 30 provided that the Capacity Utilization Factor (CUF) for small hydro project located except in Himachal Pradesh, Uttarakhand and Northern Eastern States shall be 30%.

24. Separately, the OERC vide its order dated 14.09.2010 passed in Petition No. 37/2008 (Suo Moto), while determining/approving the generic project capital costs for projects between 5MW to 25MW to Rs. 550 lakhs/MW, determined the levelized tariff of Rs. 3.64/- per kwh, *inter-alia* held that the same shall be applicable for the projects commissioned during the Control period commencing from the FY 2010-11 and shall continue to be applicable for the RE Projects for the entire duration of the Tariff Period.

25. In the light of the above order dated 14.09.2010, the Appellant, on 21.09.2010, filed a Petition No. 138/2010 for determination of tariff for sale of energy generated from the Project, consequently, the OERC in continuation of its earlier order dated 01.10.2009 passed in Case No. 101/2009 (titled *GRIDCO v/s M/s PTC India Ltd & Ors.*) re-determined the provisional tariff of the Project as Rs. 3.64/- per kwh on saleable power of 88% (excluding free power of 12% to the State) including 4 paisa PTC margin, towards procurement of power by the Respondent No.2, *inter-alia*, **further directed Respondent No. 2 to take expeditious action for approval of completed capital cost of the Project by STC and to submit the final tariff calculations for approval of the final purchase price of power from the Project.**

26. Thereafter, on 18.03.2011, the Appellant filed a Review Petition being Case No. 17 of 2011 praying for review of the order dated 14.01.2011, which was disposed of by the OERC vide its order dated 19.05.2011 partly allowing the Review Petition, **also observing that the present tariff for the small hydroelectric projects is not sufficient to pay back the loans incurred by**

these generating stations, the extract of para 27 of the said order is quoted as under: -

“

- i. *The tariff for the 100% of power supplied by the Samal Barrage SHEP of M/s OPCL and that of Middle Kolab and Lower Kolab SHEPs of M/s MPL is fixed at Rs. 3.64 per unit.*
- ii. *PTC's trading margin as usual is fixed at 4 paise per kwh for 100% of power supplied by these stations to GRIDCO.*
- iii. *Therefore, the total tariff for the power purchase from these stations shall be Rs. 3.64 plus Rs. 0.04 which equals Rs. 3.68 per unit.*
- iv. *In the absence of cost data of the above generating stations duly approved by the STC **and in view of the fact that the present tariff for the above SHEPs is not sufficient enough to pay back the loans incurred by these generating stations, the Commission fixes the above tariff as an interim measure till the time of availability of the cost data for final determination of tariff.***
- v. *In case the final tariff based on cost data turns out to be different from this generic tariff, both the above generators and GRIDCO shall adjust their payables and receivables accordingly from the future bills.”*

27. Further, the OERC, in Para 36 of the above order dated 19.05.2011, held as under: -

“b. The commission allows Samal Barrage of M/s OPCL and Lower Kolab and Middle Kolab SHEPs of M/s MPL to avail the generic tariff fixed by the Commission in its generic tariff order dated 14.09.2010 applicable for Small Hydro Electric Projects commissioned during FY 2010-11 to 2012-13, though these projects have been commissioned earlier. Since these stations are selling power to PTC and PTC in turn selling this power to GRIDCO by executing a separate agreement, the Commission is also to determine the procurement price of GRIDCO on the purchase of this power from PTC for use of the State Consumers. The Commission fixes Rs. 3.68 per kwh (inclusive of 4 paise per kwh as trading margin of PTC) towards procurement of this power by GRICO from PTC as observed in Para 27 above.

d. Since the cost of transmission lines as shown by generators is the part of the Project cost, this shall be factored into when the final tariff will be determined.

g. The above price fixed by the Commission shall be applicable from the date of commercial operation of the projects and continue for the entire tariff period

i.e. 13 years from COD. The energy purchased by GRIDCO prior to the date of commercial operation of the projects shall be paid by GRIDCO at the price fixed by the Commission for Co-generation plants for that period, which shall include the PTC's trading margin of 4 paise per kwh."

28. The STC, in its 51st meeting held on 22.05.2012, concluded/ determined the final capital cost of SHEP to be Rs. 154.84 Crores including the Power evacuation/ transmission line cost of Rs. 23.17 Crores, and the same was conveyed, on 18.06.2012, by the Principal Chief Electrical Inspector to the Chief Engineer (P)-cum-CEI (G) that the final Project cost as fixed by the State Technical Committee is Rs. 154.84 Crores.

29. Consequently, the Appellant vide its letter dated 25.07.2012 requested the Respondent No.2 to file necessary Petition before the State Commission for fixation of final tariff of the Project, further, stating that the Appellant is not able to service the Quarterly Term Loan instalments to PFC/REC, however, despite repeated follow-ups, the Respondent No.2 failed to approach the State Commission for determination of the final tariff of the Project.

30. Additionally, the Appellant vide its letter dated 13.09.2014 also requested Respondent No.2 for reimbursement of Rs. 33,04,317/- towards 100% Water Royalty Demand charges and Rs. 3,93,392/- towards 50% of SLDC charges as per the order dated 19.05.2011.

31. Failed to get any response, the Appellant once again vide letter dated 14.10.2014 requested the Respondent No.2 to reimburse the SLDC and Water Cess charges incurred by him which was to the tune of Rs.36,97,709/- as non-payment of the outstanding dues of the Appellant is further resulting in the Appellant being unable to pay its debts to its lenders.

32. Separately, on 17.01.2015, the Appellant requested the Water Resources Department, Govt. of Odisha for issuance of a clarification to the Samal Barrage Authorities that the Appellant is exempted from payment of royalty charges, for its non-consumptive use in power generation for the first 5 years of operation i.e. from October, 2009 to September, 2014.

33. The Appellant informed that based on the orders passed by the OERC granting provisional tariff for Rs. 3.64/ kwh, the Appellant on 07.05.2015 raised invoice for sale of energy to Respondent No.2, however, making it clear that the invoice is being raised by considering the provisional tariff of Rs. 3.64/kwh on the Net Energy exported to the Grid, whereas, supplementary bill for differential amount as per the CERC Regulations and PPA will be submitted to the Respondent No.3 separately for release of payment on determination of final tariff.

34. The Appellant, on 14.05.2015, filed a Petition before the State Commission for determination of final tariff for the Power project with a prayer that the tariff may be fixed as Rs. 4.76 per kwh, arrived at based on CUF of 30% and the Capital cost of Rs. 5 crores / MW for Project plus transmission cost of Rs. 23.17 crores and trading margin of 4 paise per kwh payable to PTC as against the project cost of Rs. 154.84 crores including Rs. 23.17 crores for the Transmission line cost, w.e.f.

the date of commissioning of the Project i.e., 20.10.2009 as against the eligible levelized Tariff of Rs.5.90/kwh which works out based on the actual and STC approved Capital cost of Rs.154.84 Crores and actual yearly generation from Project COD to Sep-2023 and average generation for balance period.

35. It is, thus, clear that in the Memorandum of Appeal filed by the Appellant, the Appellant has prayed for the determination of tariff as per the CERC Regulations, 2009 *inter-alia* at the rate of Rs. 4.76 per kwh from the date of the COD of the Project, which is inclusive of the tariff towards cost of transmission line of Rs. 23.17 crores incurred by the Appellant and the trading margin as against the higher tariff to be arrived at based on the actual determined capital cost and the CUF of 35%.

36. On the contrary, the State Commission has applied the CUF of 35% instead of 30% as per CERC Regulations, 2009, however, considered the Capital cost of Rs 5 crore per MW as per the CERC norms and determined the levelized tariff of the 20 MW Project at Rs. 3.42 per kwh, additionally, allowed only 25 paise per kW for the cost of transmission infrastructure as against the claim of the Appellant of reimbursement of the expenditure of Rs. 23.17 Cr.

37. We find the approach of the State Commission highly arbitrary and unreasonable, by picking up parameters inconsistently and irrationally, and not following the norms set out by its own orders.

38. It is the argument of the Appellant that the State Commission has erroneously applied CUF at 35% as against CERC normative CUF of 30%, despite specifically concluding that tariff of the Project is to be determined as per CERC

Regulations, 2009 which *inter-alia* having been notified on 16.09.2009 prior to commissioning of the Project and is applicable for determination of tariff of the Project, further, submitted that no State Regulations were notified by State Commission at the time of COD of the Project on 20.10.2009, therefore, tariff of Project should be determined as per CERC Regulations, 2009 plus the transmission cost and trading margin.

39. Further, submitted that the State Commission vide order dated 07.11.2023 in Petition No. 94 of 2023 (*Suo-Moto*) considered CUF at 30% instead of CUF of 35% while notifying the norms for determination of generic tariff of Renewable Energy Sources for control period from 2023-24 to FY 2025-26.

40. We find it difficult to accept such an approach of the State Commission, once the CUF of the upcoming projects has been taken at 30%, the State Commission ought to have decided the CUF of recently commissioned projects or otherwise determined the tariff, strictly, either as per CERC norms or based on the actual determined cost by the STC and CUF of 35% as per norms decided by it.

41. The Appellant argued that the reason for actual energy generated in the various years is more than the CUF of 30%, cannot be a justification for determination of CUF percentage at 35% instead of 30%, when actual Project Capital Cost of Rs.154.84 crores is not considered, the parameters have to be normative, the State Commission should have proceeded on the basis of 5 Crores per MW of Capital Cost and 30% CUF and in addition the actually approved transmission line cost by the State Technical Committee, i.e. 23.17 Crores.

42. It is his claim that the above fixation at 35% was not based on any scientific study of water flow and also not based on the study of any small hydro projects established in the State of Odisha including that of the Appellant which was commissioned on 20.10.2009, also no data with respect to the CUF of the project in the last 20 years had been collected or presented or taken note of by the State Commission whereas the CERC in its detailed order based on the water flow in different areas of the country and after duly carrying out categorisation of the States determined the CUF to be 30%, accordingly, there is no justification or rationale for the State Commission to have considered the higher CUF of 35% and more so applied it to the Appellant's project as on 15.10.2014, the State Commission dealing with the generic tariff for FY 2013-14 onwards had accepted the fact that the CUF be revised to 30%, accordingly, having passed the order dated 15.10.2014 revising the CUF to 30% for the years 2013-14 onwards there is no reason for the State Commission to determine CUF at 35% in the Impugned Order.

43. The Appellant reiterated that while the Central Commission vide order dated 03.12.2009 had determined the CUF at 30% for Small Hydro Projects and the same was maintained by the Central Commission for the subsequent periods, the State Commission had by order dated 14.09.2010 and vide the Impugned Order, has proceeded on 35% CUF, these orders were passed after the order dated 01.10.2009, wherein the State Commission, directed the determination of tariff in the Appellant's case, with parameters fixed by the Central Commission and by order dated 14.10.2011, directed Respondent No, 2 to expedite the approval of the completed capital cost, in terms of the order dated 01.10.2009, more

importantly, in all the subsequent generic tariff orders, namely dated 15.01.2014, 16.02.2019 and 04.12.2023, the State Commission has fixed the CUF of 30% only.

44. Such a consideration and revision by the State Commission clearly stipulates that the practical CUF for the small hydroelectric projects in the State is 30%.

45. On being asked, the Appellant accepts the determination on the normative basis, even though claiming actually incurred cost of Rs.6.5835 Crores /MW much more than Rs. 5 Crores per MW and even the State Technical Committee had assessed it at more than 5 Crores per MW as detailed under the head Capital Cost, thus, claiming that the decision in the Impugned Order for CUF at 35% is arbitrary and patently erroneous, the State Commission completely ignored the Capital Cost of Rs. 154.84 Cr. determined by STC as directed by it through the Respondent No. 2, the non-consideration of the STC's approved capital cost of Rs. 154.84 cr. is itself contrary to the State Commission's Order dated 01.10.2009 wherein, Respondent No. 2 was directed to pursue and take expeditious actions for approval of the completed Capital Cost of the Project by STC and to submit the same for determination of final tariff of Project.

46. Further, argued that the State Technical committee having considered all the relevant aspects, proceeded to restrict the Capital cost of the project at Rs 154.84 crores inclusive of Rs 23.17 crores towards transmission line, thus, excluding the transmission line cost the capital cost for the power project was approved at Rs 131.67 crores, accordingly, the per MW capital cost thus works out to Rs. 6.584 Crores per MW.

47. In the light of the above, the Appellant submitted that the minimum eligible levelized tariff of Rs.4.76/kwh is based on the CERC normative Cost of Rs.5.0 cr./MW at the CUF of 30%, plus the cost of transmission line whereas, the tariff for 35 years shall be Rs.4.97/kwh based on the STC approved Project Capital Cost of Rs.154.87 crores at the CUF of 35%, and in the event of consideration of STC approved Capital cost of Rs.154.84 Crores and actual yearly generation from 20.10.2009 (COD) to Sep-2023 and average generation for balance period, the actual levelised Tariff for 35 years works out to Rs.5.90/kwh, thus, there is no reasonable basis or studies carried out or justification for the State Commission to consider CUF of 35% and reduce the capital cost and levelized tariff much lower than what it works out to be based on CUF of 30%.

48. It cannot be disputed that in case the tariff is to be decided by the State Commission under section 62 of the Act, the tariff would have been determined on the basis of prudent capital cost of the project including the transmission cost i.e. Rs. 154.84 crores with CUF of 35% as considered by the State Commission plus trading margin of PTC, however, the Appellant has claimed much lower tariff of Rs. 4.76 per kwh, as such the tariff as claimed by the Appellant can only be allowed in the interest of the consumers, further the CUF of 35% as considered by the State Commission is higher and contrary to the CUF as considered vide later orders i.e. 30%.

49. It is also his argument that the State Commission has itself in the generic order dated 15.01.2014 has determined a capital cost of Rs. 6 Crores per MW and CUF of 30% and not 35%, further, in the subsequent order dated 16.02.2019, the

State Commission had determined the capital cost at Rs. 7.07 Crores per MW with 30% CUF and in the latest order dated 04.12.2023, the capital cost has been determined at Rs. 9 Crores per MW and CUF of 30%, which have not been disputed by the Respondents.

50. It is, thus, clear that the CUF as accepted by the State Commission for the future projects to be commissioned is 30% whereas the COD of the SHEP is 20.10.2009, however, the final tariff was determined only on 15.10.2014 when the State Commission has reviewed and decided CUF for small hydroelectric projects as 30% only.

51. Regarding the transmission line cost, the Appellant submitted that the reimbursement of 25 Paise/kwh towards recovery of costs of transmission infrastructure is not based on any norms specified by CERC for FY 2009-10 nor by OERC, rather, same is based upon transmission tariff determined by State Commission considering the fixed costs as approved in the ARR of OPTCL, the same cannot be the basis as the OPTCL cost is of the entire transmission system developed over long time and there are overall reduction in cost per circuit kilometer and not comparable to the isolated dedicated transmission line laid down by the Appellant, further, the capital cost of Rs. 23.17 Cr. towards transmission line is to be added to capital cost of the Project and should be passed on to the Appellant through tariff.

52. The Appellant, further, submitted that the obligation to provide evacuation system for the Renewable power generation is of the State Distribution Utility/Distribution Licensee, however, in the present case the Appellant was

required to construct the dedicated transmission line, while in the Impugned Order the State Commission has accepted that the Appellant is entitled to the transmission line cost to be serviced through tariff, but has restricted the servicing to Rs 0.25 per kwh instead of Rs 0.9268 per kWh in respect of the capital cost of Rs.23.17 crores as per the CERC norms.

53. The Appellant submitted that the full cost details and audited accounts were submitted to the State Commission and the State Technical Committee had not disputed the cost of Rs 23.17 crores.

54. On being asked, none of the Respondents disputed the aforesaid cost further, there was no attempt in the proceedings to show that the cost incurred by the Appellant was imprudent in any manner, we find the decision of the State Commission by reducing the transmission cost servicing as arbitrary and is liable to be set-aside.

55. On the contrary the submissions of the Respondent No. 2 are noted in the succeeding paragraphs, the facts as already quoted are not repeated hereunder.

56. On 16.09.2009 CERC notified CERC (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations, 2009, having the following salient points:

- These Regulations did not provide for any Project Specific Tariff of SHEPs.

- Regulation 12 provided that Capital Cost shall be inclusive of all Capital Work including Plant & Machinery, Civil Work, Erection & Commissioning,
- Financing and IDC as well as Evacuation Infrastructure upto Inter-Connection Point.
- Cost of Evacuation Infrastructure beyond the Inter-Connection Point was to be borne by Transmission/Distribution Licensee.
- As per the said Regulations, CERC determined Generic Levelised Tariff for RE Projects for the year 2009-10 vide order dated 03.12.2009.

57. On 14.09.2010, OERC passed the Tariff Order for Renewable Energy Projects to be set up in the State of Odisha, in the said order, OERC fixed the Normative Capital Cost as Rs. 5.5 Crore per MW for the Small Hydro Projects between 5 and 25 MW Projects during the Control Period 2010-11 and 2011-12 and the Capacity Utilisation Factor (CUF) was fixed as 35%, as against 30 % in the CERC Regulations.

58. The Respondent No. 2, in reply to case no. 15 of 2015, has submitted that levelised Project Specific Tariff was determined as Rs. 4.14/ kwh based on the Capital Cost as approved by STC minus Transmission Cost of Rs.23.17 Crore as per order dated 14.09.2010 of OERC, it was further submitted that the Cost of Evacuation System amounting to Rs. 23.17 crore was to be borne by OPTCL which can be declared as STU asset, it was also submitted that taking into consideration the actual generation from the project, the Tariff may further reduce as it was determined with a normative CUF of 35% and any excess generation has not been factored in.

59. We find no merit in the above submission of the Respondent No. 2 as on being directed to submit the calculation of tariff with STC approved cost and CUF of 35%, the Respondent has submitted the calculation sheet without the calculation based on the CUF of 35%, also the prudent cost as incurred by the generating company for the commissioning of the dedicated transmission line ought to be allowed as part of the capital cost of the generation project.

60. The Calculation Sheet as submitted by the Appellant wherein at Item No. 4 is based on the CERC Norm i.e. Capital Cost @ Rs. 5.5 Crore Per MW, CUF of 30% and Transmission cost of Rs. 23.17 Crores as determined and approved by the STC. The Sheet is reproduced as below:

“TARIFF COMPARISON UNDER DIFFERENT SCENARIO FOR 20 MW OPCL SHEP”

Sl. No.	Tariff Norms OERC/ CERC	Project Cost (Rs. Cr.)	Transmission Cost (Rs. Cr.)	Total Cost	CUF	Tariff (Rs./ KWH)	Remarks
1	CERC	154.84	Included in Project Cost	154.84	46%	3.78	As per STC approved Project Cost & Actual CUF
2.	CERC	154.84	Included in Project Cost	154.84	60.06%	2.89	As per PSA – CUF
3.	CERC	154.84	Included in Project Cost	154.84	62.80%	2.77	As per PPA- CUF
4.	CERC	100	23.17	123.17	30.00%	4.76	Claim of Developer
5.	CERC	100	23.17	123.17	46.00%	3.10	As per Actual CUF
6.	OERC	110	23.17	133.17	46.00%	3.19	OERC Cost + Transmission +46% CUF
7.	OERC	154.84	Included in Project Cost	154.84	46.00%	3.63	STC Cost (Including Transmission) + 46% CUF

61. The Respondent No. 2 submitted that while determining the Tariff, the OERC has taken into consideration the Normative Capital Cost as Rs. 5 Crore per MW based on CERC Tariff Regulations, 2009, accordingly, OERC has taken the Capital Cost of the 20 MW Project as Rs. 100 crores, however, on account of the greater availability of water in the State of Odisha compared to other parts of the Country and the extended monsoon period, OERC has taken the Capacity Utilisation Factor (CUF) as 35% on the basis of its order dated 14.09.2010 as against 30 % in the CERC Regulations, accordingly, has arrived at the Tariff of Rs. 3.42 per kwh, further, allowed 25 paise per kwh for recovery cost of Transmission Infrastructure as allowed to State Transmission Utility (STU) (OPTCL), thus, the levellised Tariff of the project to Rs. 3.67 per kwh (Rs 3.42 plus 25 paise = Rs. 3.67 per kwh), and, after including the PTC margin of 0.4 Paise per kwh, OERC determined the final Tariff as Rs. 3.71 per kwh.

62. This itself is contrary to the subsequent orders passed by the State Commission where the State Commission has reviewed the CUF and fixed it at 30%.

63. We decline to accept such a contention which is totally unjust and unreasonable, accordingly, such a decision of the State Commission deserves rejection.

64. Further, argued that it is not open to the Appellant to contend that Actual Project Cost determined by State Technical Committee (STC) at Rs. 154.84 Crore (which includes the Transmission Line Cost of Rs. 23.17 Crore) and Normative

CUF of 30% as per CERC Tariff Regulations should be taken into consideration for determination of Tariff, accordingly, further, submitted that in case Actual Project Cost determined by State Technical Committee (STC) at Rs. 154.84 Crore which includes the Transmission Line Cost of Rs. 23.17 Crore is to be considered, Actual Average CUF of 45.54% (factoring the Auxiliary consumption of 1%, CUF is 46%) achieved by the Appellant during the period of operation from 2010-11 to 2022-23 should be taken into consideration for determination of Tariff.

65. It cannot be disputed that as per the decision of the State Commission and the terms & conditions of the PSA, the tariff is to be decided by the State Commission under section 62 of the Act or otherwise has to be determined as per CERC norms, considering the instant case, as relevant regulations were not notified by the State Commission, the tariff ought to have been determined as per CERC norms.

66. Also stated that while the Average CUF corresponding to the committed Annual Design Energy for the period of 30 years as per the Power Supply Agreement (PSA) between GRIDCO and PTC was 60.06%, as per the Power Purchase Agreement (PPA) between OPCL and PTC the CUF was 62.80%, also submitted the actual CUF for the years 2010-11 to 2022-23, which indicated CUF varying from 28% to 56% and in case 75% dependability is considered, it will be 37% as against what the Respondent has placed before us.

67. The Respondent No. 2 informed that the Appellant has prayed for a Tariff of Rs. 4.76 per kwh and therefore, cannot claim any tariff over and

above Rs 4.76, which is arrived on the basis of CERC norms, the figure of Rs. 4.76 per kwh has not disputed by either party.

68. On being asked whether the Appellant and the Respondents agree for the lower tariff of Rs. 4.76 per kwh as against the tariff claimed by the Appellant during the hearing, the Respondents denied.

69. Separately, Respondent No. 4 countered the issue of demand letter dated 10.02.2017, however no such issue was raised by the Appellant during the court proceedings, as such the contentions of the Respondent No. 4 against the prayer of the Appellant seeking stay of such letter are irrelevant and are not recorded and considered.

70. The Respondent No. 1, submitted that while adjudicating the Suo-Moto Petition No. 37 of 2008, a thorough study of different projects of SHEPs in various sites of the State has been done in terms of the CERC norms, thereafter on 14.09.2010 an order was passed, where the normative were prescribed, the said order attained finality as no stakeholder including the present appellant had challenged the same.

71. Further, added that the State Commission, in the present Impugned Order, has duly taken into consideration the above-mentioned order dated 14.09.2010 and quoted as under

"18. Subsequently OERC in its order dated 14.09.2010 passed in Sou-Moto petition in Case No. 37/2008 has also determined the generic

levellised tariff for renewable energy sources applicable for SHEPs to be commissioned during the control period i.e. from FY 2010-11 to 2012-13.”

72. We are taking a strong exception to such a submission by a Regulatory Body, the State Commission, while relying upon the aforesaid order, has not brought out the fact that the said order is applicable only for the projects commissioned during the control period starting from the year 2010-11, whereas the project (SHEP) in dispute was commissioned in the year 2009-10, it is only after going through the order, it has been observed, the Commission hereby directed to refrain from such acts.

73. Further, the said order mandates for determination of generic tariff whereas the issue in hand relates to determination of project specific tariff, we are satisfied that the said order is not applicable to the present case, therefore, we decline to consider the said order for the purpose of adjudicating the Appeal.

74. The State Commission further submitted that in the present case the State Commission determined the project-specific tariff @ Rs. 3.71 per KWh including the trading margin of PTC of Rs. 0.40 by taking project cost @ Rs. 5 Cr per MW with 35 % CUF after considering all the relevant factors.

75. On being asked the reason for considering the CUF of 35% as against the CERC norm of 30% while considering the normative capital cost as per CERC norms, the State Commission failed to provide any rationale except placing reliance on the aforesaid order which is not applicable in the instant case and

submitted that the State Commission has the powers to consider any parameter as it thinks to be appropriate in the interest of justice.

76. The State Commission also given the reason for the CUF @ 35% in the said order, which is quoted herein, *"Because of greater availability of the water in the State compared to other parts of country, considering the extended monsoon period and better hydrology, the Capacity Utilization Factor (CUF) has been taken at 35% as per State regulation and studies conducted by OERC the levelised tariff of said 20MW SHEP of M/s OPCL."*

77. The design energy inter-alia the CUF is decided on the basis of data for several continuous years and not based on a single year data which has an extended monsoon and better hydrology, the State Commission could not place any study report before us as claimed by it as per its arguments, additionally, the State Commission after reviewing the CUF, reduced and fixed it at 30% for the year 2013-14 onwards.

78. It is the unreasonable justification given by the State Commission that the order is passed in consonance with the object of Section 61 of the Electricity Act, which says efficiency, economical use of the resources, consumer interest etc., no facts were placed before us on how such a claim is made.

79. Reliance was also placed by the State Commission on the OERC (Conduct of Business) Regulations, 2004, particularly Regulations 76 and 79 which provide that the State Commission can adopt a procedure, which may vary of any regulations, if so required, the Regulations 76 and 79 are quoted hereunder: -

"76. Saving of inherent power of the Commission: -

(2) Nothing shall bar the Commission from adopting a procedure, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing deems it necessary or expedient.

79. Power to dispense with the requirement of the Regulations: -

The Commission shall have the power, for reasons to be recorded in writing and with notice to the affected parties, dispense with the requirements of any of the Regulations in a specific case or cases subject to such terms and conditions as may be directed."

80. The above reliance on Regulation 76 and 79 is totally irrelevant as the State Commission has neither notified any regulation based on which the tariff was determined nor has the powers to modify the CERC Regulations,

81. The State Commission, on the issue of transmission line cost, has submitted that the issue on cost of evacuation of power (132KV double circuit line for 20 MW power evacuation), the State Commission has allowed a reasonable cost after given proper reasons as *"23. It is contended by the petitioner that a 132KV double circuit line has been constructed for evacuation of power and an expenditure of Rs.23.17 crone has been incurred. GRIDCO submitted earlier that the construction cost stated by the petitioner was very high since 132 KV Double Circuit transmission lines which has a carrying capacity of around 150MW is not justified for 20MW power evacuation of the Petitioner's project. The power evacuation from*

the project could have been done through a 33 KV double circuit line instead of 132 KV Double Circuit line. Therefore, this cost should not be allowed and increased expenditure in transmission should not be included in the project cost.”.

82. We find no merit at this stage, the transmission line was constructed after obtaining the approval of the State Government and in line with the contractual agreement with the Respondents, the cost, as submitted by the Appellant has been approved by the STC, as such there is no reason to dwell upon further on this issue, once tariff is to be determined based on normative costs.

CONCLUSION

83. The State Commission vide the Impugned Order at para 21 has specifically holds that

*“In the agreement between M/s PTC India and M/s. OPCL it was also mentioned that the tariff determination shall be as per CERC guidelines. The subject 20 MW SHEPs of M/S OPCL was commissioned during FY 2009-10. At that time OERC norms were not notified. **Therefore, the tariff was to be determined as per CERC Regulations, 2009 for this project which is also agreed by the Petitioner.**”*

84. Such an order binds the State Commission, also it cannot be disputed that as per the decision of the State Commission and the terms & conditions of the PSA, the tariff is to be decided by the State Commission under section 62 of the

Act or otherwise has to be determined as per CERC norms, considering the instant case, as relevant regulations were not notified by the State Commission, the tariff ought to have been determined as per CERC norms *inter-alia* on the basis of capital cost as Rs. 5 crores per MW plus the cost of transmission line and CUF of 30%.

85. We find it difficult to accept the approach of the State Commission, once the CUF of the upcoming projects has been taken at 30%, and there is no justification or rationale for the State Commission to have considered the higher CUF of 35% and more so applied it to the Appellant's project as on 15.10.2014, the State Commission dealing with the generic tariff for FY 2013-14 onwards had accepted the fact that the CUF be revised to 30%, accordingly, having passed the order dated 15.10.2014 revising the CUF to 30% for the years 2013-14 onwards there is no reason for the State Commission to determine CUF at 35% in the Impugned Order.

86. Such a consideration and revision by the State Commission clearly stipulates that the practical CUF for the small hydroelectric projects in the State is 30%, also clear that the CUF as accepted by the State Commission for the future projects to be commissioned is 30% whereas the COD of the SHEP is 20.10.2009, however, the final tariff was determined only on 15.10.2014 when the State Commission has reviewed and decided CUF for small hydroelectric projects as 30% only.

87. It is the prudent practice that the design energy has to be determined on the basis of continuous flow of water for 20 years or more for small hydro projects and

not on the basis of single year which has extended monsoon, further, the OERC has decided to determine the tariff either on the basis of CERC norms or under section 62 on its own, it ought not to have followed a mix of the two and that to without notifying the relevant regulations as per the mandate of the Act, even in the absence, it than ought to have considered the actual capital cost of the project.

88. It also cannot be disputed that based on the STC approved cost and CUF of 35%, the tariff shall be worked out to be Rs. 4.97 per kwh as informed by the Appellant during the course of the hearing, which is much higher as compare to the tariff to be determined as per CERC Regulations, 2009 and also held by the State Commission as aforequoted.

89. The Appellant during the course of the hearing has moved an application for amending the Tariff Rs. 4.76 per kwh, however, the same was not agreed as the tariff ought to have been determined based on CERC norms.

90. On being asked, none of the Respondents disputed the cost of the transmission line in dispute, further, there was no attempt in the proceedings to show that the cost incurred by the Appellant was imprudent in any manner, we find the decision of the State Commission by reducing the transmission cost servicing as arbitrary and is liable to be set-aside.

91. We find merit in the contentions of the Appellant and decline to accept the contentions of the Respondents which are totally unjust and unreasonable, accordingly, such a decision of the State Commission deserves rejection.

92. The Appellant has also pleaded that the Appellant has been subjected to substantial under recovery on account of the above tariff determination in the Impugned Order, the Power Purchase Agreement (PPA) entered into between the Appellant and PTC provides for delayed payment surcharge on the delay in payment of bills/tariff entitlement.

93. We accept the prayer, the Appellant is entitled to recover the differential amount i.e. difference of the tariff of Rs. 4.76 per kwh and the tariff as received for the supply of electricity from the COD i.e. 20.10.2009 till the date of this judgment, along with the delayed payment surcharge as per the PPA on compounding basis, accordingly, the Appellant shall raise the supplementary invoice on Respondent No. 3 for the said amount.

94. In pursuant to the supplementary invoice raised by the Appellant, the Respondent No. 3, within 15 days, shall raise the consequential invoice on the Respondent No. 2 (GRIDCO) which in turn shall make the said payment for the differential amount along with delayed payment surcharge within three (3) months from the date of the invoice raised by Respondent No. 3.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 63 of 2016 has merit, the tariff of the SHEP of the M/s Orissa Power Consortium Ltd. is fixed at Rs. 4.76 per kwh for the saleable energy with capital cost of Rs. 5 crores per MW with CUF of 30% plus the transmission cost of Rs. 23.17 crores and trading margin of PTC.

The Impugned Order dated 04.02.2016 passed by the Odisha Electricity Regulatory Commission in Case No. 15/2015 is set aside to the extent as concluded herein above.

The Appeal and pending IAs, if any are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 9TH DAY OF APRIL, 2024.

**(Virender Bhat)
Judicial Member**

**(Sandesh Kumar Sharma)
Technical Member**

pr/mkj