

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO. 4, CHUNOKOLI, SHAILASHREE VIHAR,
BHUBANESWAR-751021**

**Present : Shri G. Mohapatra, Officiating Chairperson
Shri S. K. Ray Mohapatra, Member**

Case No. 43 of 2005 and Case No. 56 of 2006

In the Matter of: Compliance with the common judgment dated 05.10.2023 passed by the Hon'ble Supreme Court of India in the Civil Appeal No.414 of 2007 and connected Civil Appeal Nos 417 & 759 of 2007, 463, & 572 of 2011, 2939-41 & 2942-43 of 2011, 3595-97 of 2011, 2674 of 2013, 10251-63 of 2013, 2625-38 of 2014, 3858-60 of 2014, 1380-82 of 2015 and 8037-39 of 2015 in the matter of different tariff Orders of the Commission, in so far as the Transmission Tariff of OPTCL is concerned.

ORDER

Date of Hearing: 02.07.2024

Date of order: 24.07.2024

The Hon'ble Supreme Court of India, vide the common judgment dated 05.10.2023 while disposing of Civil Appeal No.414 of 2007 and connected Civil Appeal Nos 417 & 759 of 2007, 463 & 572 of 2011, 2939-41 & 2942-43 of 2011, 3595-97 of 2011, 2674 of 2013, 10251-63 of 2013, 2625-38 of 2014, 3858-60 of 2014, 1380-82 of 2015 and 8037-39 of 2015 on the matter of different tariff Orders of the Commission, has been pleased to issue the following directions:

- i. *The order impugned in Civil Appeal No.414 of 2007 is modified as stated in paragraphs 29 and 34 above. This appeal, only to that extent, is partly allowed;*
 - ii. *The order impugned in Civil Appeal No.417 of 2007 is modified in terms of paragraph 40 above. This appeal is partly allowed only to the above extent;*
 - iii. *The rest of the appeals are dismissed;*
 - iv. *The Commission shall proceed to implement the impugned orders of the Appellate Tribunal as modified above; and*
 - v. *The Commission shall pass consequential and incidental orders in accordance with law.*
2. In obedience to the Hon'ble Apex Court order as stated above, the Transmission Tariff orders of this Commission for the FY 2006-07 (in Case No 43/2005) and FY 2007-08 (in Case No 56/2006) were reopened. Accordingly, the Commission issued Public Notice dated 01.03.2024 to intimate the Respondents, who were parties in the original tariff proceedings before the Commission, to file their written submissions/objections or

suggestions, if any. The respective representatives of WESCO, NESCO & SOUTHCO, GRIDCO and OPTCL appeared before the Commission on the date of hearing.

3. In response to the Judgment of Hon'ble the Apex Court's in Civil Appeal No.417/2007 and Civil Appeal No. 2939-41of 2011 relating to the Transmission Tariff orders of the Commission for the FY 2006-07 & FY 2007-08 respectively, some of the submissions of OPTCL are reproduced below:

“15. That, Hon'ble Commission vide order dated 19.03.2012 have trued up the ARR of WESCO, NESCO, SOUTHCO, CESU and GRIDCO & OPTCL up to financial year 2010-11(Case No- 29,30 & 31/2007 and 6,7 & 8/2012). Where, all the component on the above subject have been trued up.

16. It is therefore submitted that since the Hon'ble Commission has already trued up the issue related to FY 2006-07 &2007-08, the direction of the Hon'ble APTEL and Supreme Court will have no impact on Transmission Tariff”.

4. Other than OPTCL, no other Respondents have any response to the Hon'ble APEX Court's Judgment dated 05.10.2023 pertaining to Transmission Tariff orders of this Commission for the FY 2006-07 (in Case No 43/2005) and FY 2007-08 (in Case No 56/2006).
5. The Commission heard the matter in extenso and decided to dispose of the matter strictly as per the afore-stated directions of the Hon'ble Apex Court. OPTCL had approached the Hon'ble Supreme Court in Civil Appeal No. 417/2007 against the order of the Hon'ble APTEL in Appeal Nos. 71, 72 and 73 of 2006 which are related to the Transmission Tariff (TT) order of this Commission for the FY 2006-07. Similarly, DISCOMs (WESCO, NESCO & SOUTHCO) had approached the Hon'ble Apex Court in Civil Appeal Nos. 2939-41of 2011 against the order of the Hon'ble APTEL arising out of Appeal Nos. 55, 56 and 57 of 2007 which are related to the Transmission Tariff order of OERC for FY 2007-08.
6. In Civil Appeal No. 417/2007, which is related to Transmission Tariff order of this Commission for the FY 2006-07, the Hon'ble Supreme Court has directed as follows:

“CIVIL APPEAL NO.417 OF 2007

40. This appeal is preferred by M/s. Orissa Power Transport Corporation Limited (OPTCL). The issue concerns TT and ARR of OPTCL for the financial year 2006-2007. The three DISCOMS challenged the order of the Commission. The first issue was regarding the Commission allowing the advance against depreciation. The

Appellate Tribunal held that the National Tariff Policy published by the Government of India on 16th January 2006 under Section 3 of the Electricity Act does not permit allowing advance against depreciation. Under clause (i) of Section 61 of the Electricity Act, the Commission has to be guided by the National Tariff Policy. Therefore, the Appellate Tribunal rightly held that what is not permissible, per the National Tariff Policy, cannot be allowed by the Commission. However, the finding of the Appellate Tribunal on this issue for the subsequent financial year 2007-2008 is to the contrary, which we have approved while deciding Civil Appeal nos.2339-2341 of 2011. Hence, the said finding requires interference. Hence, we restore the order of the Commission on this aspect.

41. *As regards the repair and maintenance cost, the Appellate Tribunal observed that the amount allowed towards repair and maintenance cost will be subject to prudent check during the truing-up exercise. However, the Appellate Tribunal reduced the estimated claim of Rs.36 crores allowed by the Commission to Rs.15 crores on the basis of CERC (Central Electricity Regulatory Commission) norms by holding that as per the said norms, the amount will not exceed Rs.7.5 crores. Though the amount of Rs.7.5 crores was allowable as per the guidelines of CERC, the Appellate Tribunal allowed Rs.15 crores by taking a liberal view. There is no reason to interfere with this finding. The decision for the financial year 2007-2008 records that a sum of Rs.7 crores remained unspent during the financial year 2006-2007. To that extent, for the financial year 2007-2008, the cost was reduced by Rs.7 crores.*
 42. *As regards the contingency reserves, the Appellate Tribunal rightly observed that if the amount allocated remains unspent, in the truing-up exercise, it will be reverted. Though the National Tariff Policy did not expressly allow contingency reserves, the Appellate Tribunal, for the reasons recorded, directed to allow the sum of Rs.5 crores under this head.*
 43. *Regarding the interest on wheeling income, the Appellate Tribunal found that for the financial year 2005-2006, the Commission approved a sum of Rs.17.50 crores. The Commission had approved a sum of Rs.5 crores. The Appellate Tribunal allowed the estimated income to be increased to Rs.17.50 crores consistent with what was allowed for the immediately earlier year.*
 44. *As regards the transmission loss, the Appellate Tribunal rightly directed that the rejection of transmission loss could be finalised only at the stage of the truing-up exercise, and therefore, the said issue was left open.*
 45. *Ultimately, a direction was issued to the Commission to rework TT in the light of the findings. The findings of the Appellate Tribunal are based on material on record, which do not call for interference except what is held in paragraph 40 above."*
7. In the above judgement, the Hon' ble APEX Court has restored the order of this Commission in respect of allowance of advance against depreciation. However, the Hon' ble APEX Court has directed this Commission to rework the Transmission Tariff in the light of the findings of the Hon'ble Appellate Tribunal with regard to Repair & Maintenance Cost, Contingency Reserves, Interest on Wheeling Income and Transmission Loss for the FY 2006-07. It is pertinent to mention here that during the

pendency of Civil Appeal No. 417 of 2007 before the Hon'ble Apex Court, this Commission had carried out truing up exercise of each component of ARR and Transmission Tariff of OPTCL for the FY 2006-07 to 2010-11 in Case No. 07 of 2012 by Order dated 19.03.2012. The truing up exercise is based on Multi-Year Tariff principle considering controllable and uncontrollable cost as specified in Regulation 6.3 of the OERC (Terms & Conditions for Determination of Transmission Tariff) Regulation, 2014. Since the truing up exercise has been completed, the estimation in the Transmission Tariff order for the FY 2006-07, which was subject matter of challenge before the Hon'ble APTEL on the ground of inflation under certain items of ARR, has lost its relevance. This is because of the fact that during the truing up of accounts for the FY 2006-07 in Case No. 07 of 2012, the actual income and expenditure basing on the audited accounts has taken into consideration. As a result, the direction of the Hon'ble Supreme Court in Civil Appeal No. 417 of 2007 is deemed to have been complied with by now calling for no further action by this Commission.

8. Now, we proceed to give effect to the order of the Hon'ble Apex Court in Civil Appeal Nos. 2939-41 of 2011 arising out of the order of Hon'ble APTEL in Appeal Nos. 55, 56 and 57 of 2007 which is related to the Transmission Tariff order of this Commission for the FY 2007-08. In Civil Appeal Nos. 2939-41 of 2011, the Hon'ble Apex Court has directed as follows:

“CIVIL APPEAL NO.2939-2941 OF 2011

46. *Civil Appeal Nos.2939-2941 of 2011 have been preferred by WESCO, NESCO and SESCO against the impugned order dated 8th November 2010 passed by the Appellate Tribunal in Appeal Nos.55, 56 and 57 of 2007. These appeals relate to the Commission's order dated 22nd March 2007 determining the ARR and TT of OPTCL for the financial Year 2007-2008. There were four issues raised in the appeals, which read thus:*

- a. Advance against depreciation of Rs.31.22 crores allowed by the Commission;*
- b. Repair and maintenance expenses of Rs.47 crores;*
- c. Larger contingency reserves of Rs 10.49 crores allowed by the Commission;*
and
- d. Capitalisation of interest cost.*

We have perused the findings recorded by the Appellate Tribunal on the four points. While dealing with the first issue, the Appellate Tribunal has purported to explain its earlier judgment dated 13th December 2006. By relying upon the National Tariff Policy, the Appellate Tribunal held that under the said policy, there is no absolute prohibition on allowing the claim for an advance against depreciation. The policy provided that the CERC will notify the rates of depreciation so that there would be no need for any advance against depreciation.

However, it was found that CERC has not notified the said rates. So long as such rates are not notified, there will not be any prohibition on allowing the advance against depreciation. The Appellate Tribunal recorded that the State Commission is empowered to allow the advance against depreciation to ensure the financial viability of OPTCL. There is nothing placed on record to show that CERC had notified the rates of depreciation. Hence, there is no illegality in this finding.

47. *While dealing with the second issue regarding repair and maintenance cost, the Appellate Tribunal has recorded a finding of fact. The Appellate Tribunal examined the reasons given by the commission and came to the conclusion that, on facts, the reasons given for allowing the sum of Rs.47 crores towards repair and maintenance expenses was proper. The Commission had observed that during the public hearing, DISCOMS have not objected to the proposed expenditure of Rs.54 crores. However, a sum of Rs.7 crores, being unspent amount for the earlier year, was deducted. A very detailed finding recorded by the Commission in paragraph 5.4.2 of its order, was approved by the Appellate Tribunal on facts.*
 48. *While dealing with the issue of larger contingency reserves, the Appellate Tribunal concluded that in a State like Orissa, which is highly prone to natural calamities like floods, cyclones, etc., the provision of contingency reserves to meet such larger contingencies is desirable. Hence, the Appellate Tribunal confirmed the allowance of Rs.10.49 crores permitted by the Commission. Moreover, it was observed that the truing-up exercise has been done in the tariff order for the Financial Year 2010-2011 by the State Commission based on the audited accounts up to 2008-2009 and in such truing-up exercise, the receipts and expenditures under various heads of OPTCL have been duly taken into consideration.*
 49. *As regards the capitalisation of interest cost, it was found that in the truing-up exercise undertaken by the Commission, the State Commission has adjusted the sum of Rs.2.86 crores and Rs.0.58 crores towards capitalisation in the financial year 2006-2007 and financial year 2007-2008 respectively. The Appellate Tribunal rightly rejected the contention of the appellants regarding failure of the Commission to capitalise the interest payable on the loans for ongoing project, which are yet to be completed.*
 50. *Therefore, in our view, no substantial question of law arises in this appeal except on the first issue."*
9. Since the Civil Appeal Nos. 2939-41 of 2011 have been dismissed by the Hon'ble Apex Court, the Orders dated 08.11.2010 of the Hon'ble APTEL in Appeal Nos. 55, 56 and 57 of 2007 have been confirmed. The Hon'ble APTEL in the said orders, had directed as follows:

"23. SUMMARY OF OUR FINDINGS:

- (i) *The conjoint reading of the relevant Regulation, namely, Regulation 56(ii)(b) of the Central Commission, Regulation 3(a) of the State Commission, Tariff Policy and the provision of the Electricity Act, 2003 would make it clear that the National Tariff Policy provides with regard to Depreciation that the Central Commission shall notify the rate of Depreciation in such a manner that there should be no need for any Advance Against Depreciation. This means that unless the Central Commission notifies such a rate of Depreciation, the Advance Against Depreciation cannot be denied on the basis of the Policy. In the present case, the Orissa State Commission*

computed the Depreciation on the basis of the pre-1992 rate of Depreciation and allowed the Advance Against Depreciation to ensure the financial viability and also to ensure that the Transmission companies, namely, OPTCL (R-2) meets its principal repayment obligation. While allowing the Advance Against Depreciation, the State Commission has given all the reasons which are in consonance with the Regulations of the Central Commission as well as the State Commission. Therefore, we do not find any infirmity in the conclusion arrived at by the State Commission with reference to the claim for Advance Against Depreciation.

- (ii) The mere fact that OPTCL (R-2) was unable to utilize the amount allocated towards Repair & Maintenance Charges in the Previous Year cannot be a ground to deny the Repair & Maintenance Charges to the OPTCL on the basis of norms for the subsequent year, since OPTCL is required to carry on its obligation for efficient management of the Transmission System in the State. The State Commission has been monitoring the Repair & Maintenance works of the OPTCL (R-2) by taking up periodical review and engaging an independent team of experts to monitor and report the progress of the Repair & Maintenance works being undertaken by the OPTCL. The Transmission System of OPTCL is the backbone of the power system of the State of Orissa. The lines and sub-stations of OPTCL should be kept in proper conditions to ensure uninterrupted and quality power supply in the State. Unless the Transmission System is maintained properly, the Distribution Companies who are the real beneficiaries would be put into trouble and the entire power system would be in complete jeopardy. Orissa has sent a phase of industrial resurgence which requires quality power supply of international standard, if industrial units are to utilize the capacity to the fullest extent. We find there are proper reasoning given by the State Commission in the impugned order to allow a sum of Rs.47 crores towards Repair & Maintenance cost. Therefore, we confirm the findings given by the State Commission on this issue.*
- (iii) In regard to allowing the claim in respect of larger Contingency Reserve, it has to be stated that State like Orissa which is highly prone to natural calamities like cyclone and floods every now and then, the provision of Contingency Reserve to meet such contingency is quite desirable and reasonable. It may not be correct to contend that the Contingency Reserve can be allowed only when the Regulations were framed with regard to that. This contention in this regard urged by the learned Counsel for the Appellant has been rejected by this Tribunal in the earlier Judgment dated 13.12.2006 holding that it is not a condition precedent to frame Regulations in this respect while allowing the claim for Contingency Reserve. The provision of Contingency Reserve is essential for a Deemed Transmission Licensee like the OPTCL with a vast Transmission Network. Therefore, the finding in this regard of the State Commission is also confirmed.*
- (iv) According to the Appellant, with reference to the Capitalization and Interest Cost, the State Commission has considered the entire cost as Revenue Expenses payable without Capitalized Interest payable on loans taken for On-going Projects which are yet to be completed. This is not correct in view of the fact that the State Commission has capitalized only a part of the Revenue Expenditure. Further, Table 32, referred to in the impugned order, projects that only a part of the Revenue Expenditure has been capitalized. Moreover, the truing up exercise which was undertaken subsequently by the State Commission, the State Commission has adjusted a sum of Rs.2.86 crores and Rs.0.58 crores towards the capitalization for the FY 2006-07 and FY 2007-08 respectively on the basis of the accounts audited by the Comptroller and*

Auditor General. Therefore, the contention of the Appellant with regard to Capitalization of Interest Cost also is rejected.

24. In view of the above conclusions, we deem it proper to dismiss these Appeals as being devoid of merits. Accordingly, these Appeals are dismissed.”

10. In view of the above order of the Hon’ble APTEL, it is clear that the Appeals of DISCOMs (WESCO, NESCO & SOUTHCO) in Appeal Nos. 55 of 2007, 56 of 2007 and 57 of 2007 pertaining to Transmission Tariff order of OPTCL dated 22.03.2007 for the FY 2007-08 in Case No. 56 of 2006 of this Commission have been dismissed. As a result, the order of this Commission dated 22.03.2007 passed in Case No. 56 of 2006 has been upheld. Hence, there is no scope for further action on this matter and order of the Hon’ble Apex Court in Civil Appeal Nos. 2939-41 of 2011 have accordingly been fully complied with by this Commission.
11. Further, as true-up exercises for the FY 2006-07 and FY 2007-08 have been completed, the directions of the Hon’ble APTEL & the Hon’ble APEX Court in their Judgments will have no impact on the Transmission tariff.
12. In view of the compliance as above of the order of the Hon’ble Supreme Court in Civil Appeal No. 417 of 2007 and Civil Appeal Nos. 2939-41 of 2011, the Case No. 43 of 2005 (Transmission Tariff order of this Commission for the FY 2006-07) and Case No.56 of 2006 (Transmission Tariff order of this Commission for the FY 2007-08) are hereby closed in so far as the matter pertaining to the Transmission Tariff of OPTCL is concerned.

Sd/-
(S. K. Ray Mohapatra)
Member

Sd/-
(G. Mohapatra)
Officiating Chairperson