

**ORISSA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR – 751 012

**Present : Shri B.K. Das, Chairperson
 Shri S.K. Jena, Member
 Shri K.C. Badu, Member**

Case No.76/2007

M/s. Rohit Ferro-tech Ltd.,
Industrial Growth Complex, Kalinga nagar At Rahana,
P.O. Jakhapura-755 026, Dist. Jajpur
- Vrs. -

.... **Petitioner**

Orissa Power Transmission Corporation Ltd.,
Bhubaneswar

.... **Respondent**

For the petitioner : Mr. Dhaneswar Mohanty, Advocate

For the respondent : Mr. N.C. Panigrahi, Sr. Advocate
 Mr. L.N. Mohapatra, Advocate
 Mr. S.R. Panigrahi, Advocate

Date of Hearings : 14.05.2008

Date of Order : 30.05.2008

ORDER

Hearing taken up on the maintainability of the case. The preliminary objection of the Respondent to the reply dtd.11.03.2008 of the petitioner on maintainability of its application and the citations of AIR and Supreme Court cases, OLR and three cases of the Commission filed by both parties are taken into record.

2. Heard.

3. The learned counsel for the petitioner stated that his client has filed this petition before the Commission for adjudication of dispute that hire charges for the temporary use of Paradeep Feeder-II Bay No.17 (217) demanded by the

respondent OPTCL is arbitrary and illegal and that return of such amount paid against such demand is only a consequential relief. The prayer of the petitioner is as follows:

- (a) declare the hire charges for the Paradeep Feeder-II, Bay No.17 (217) claimed by the licensee OPTCL from the petitioner M/s. Rohit Ferro Tech Ltd. for the period of 21.11.2006 to 09.10.2007 as arbitrary and illegal
- (b) direct the Respondent OPTCL to refund the amount of hire charges of Rs.66,42,197/- paid by the petitioner to the respondent along with interest @18 %
- (c) direct the respondent not to adjust any amount claimed as hire charges for the 220 KV Paradeep Feeder (Bay No.17) from the infrastructure loan of Rs.4.0 crore which was paid by the petitioner in year 2005.
- (d) pass such order as deemed fit for the violation of the statute by the respondent.

4. The learned Counsel for the petitioner submits that claim of hire charges over and above the normal transmission tariff is contrary to law as per Section 62(6) of the Electricity Act, 2003 (hereinafter referred to as the Act) and such hire charges should not be adjusted against infrastructure loan of the petitioner. He also stated that the petitioner having no other way had to deposit the hire charges in installments amounting to Rs.66,42,197/- for power supply to its factory. In letter No.TR/WKL/iv/148/Vol-ii/2851 dtd.05.10.2007, the respondent had intimated to the petitioner, the total hire charges upto 30.09.2007 as Rs.96,50,476/- and that an amount of Rs.30,08,279/- out of this amount has been adjusted from the infrastructure loan amount of Rs.4.0 crores. He also further stated that the amount collected by OPTCL was without the approval of this Commission and was in excess of the tariff as determined by the Commission. He has not submitted the provisions of law under which he has filed this petition even though on the previous hearing on question of admission, this issue had been raised. He, however, states that the prayer of the petitioner is incidentally a money claim, the Commission has jurisdiction to adjudicate on the basis of claim for hire charges. Further, the respondent has no authority to levy hire charges without prior intimation and without obtaining the orders thereon from this Commission as per

the provision of Section 41 of the Act. Regarding these issues the learned Counsel for the petitioner has relied on the following decision of the Hon'ble Supreme Court reported in (2004) I S.C.C 195, *BSES Ltd. Vrs. Tata Power Company Ltd.* quoted below:

“ the objects and reasons of the Act show that the main functions of the State Electricity Regulatory Commission shall be :

- i) to determine the tariff for electricity – wholesale, bulk, grid and retail,
- ii) to determine the tariff payable for the use of the transmission facility and
- iii) to regulate power purchase and procurement process for the transmission utilities

“..... therefore it would be proper to interpret the Act *in broad manner and not in a narrow or restrictive sense in so far as the jurisdiction of the Commission is concerned*, so that the purpose for which the Act has been enacted may be achieved.”

Relying on this decision he further contends that

“ tariff determination is under jurisdiction of the State Commission, and that the Commission has the exclusive power to determine the tariff – after the enforcement of the Act with effect from 10.06.2003, and that the tariff approved by the Commission is final and binding and it is not permissible for the licensee, utility or anyone else to charge a different tariff. Moreover, charging of a tariff which has not been approved by the Commission is an offence punishable under section 45 of the Electricity Reforms Act, 1995. If the licensee increases the tariff arbitrarily the consumer will have no option but to pay the same. In order to guard against such an eventuality, provision has been made that while granting a license conditions may be imposed and further, no tariff can be implemented unless the same has been approved by the Commission.”

5. The learned counsel for the petitioner has also cited another Supreme Court decision in AIR 2008 SC 976, *Maharashtra Electricity Regulatory Commission Vrs. Reliance Energy Ltd. & Others* and AIR 2007 SC 2912, *Central Power Distribution Company & Others Vrs. Central Electricity Regulatory Commission*

and another in support of his contention that the Commission may direct refund of collections illegally made.

6. Mr. N.C. Panigrahi, Sr. Advocate appearing for the Respondent OPTCL stated that the petitioner had sought the direction of the Commission to the OPTCL to refund the amount of hire charges which was already paid by the petitioner for temporary utilization of the unused 220 KV bay No.17 (217) at New Duburi Sub-station to avail power and not to deduct any balance hire charges as may be demanded, from the infrastructure loan amount of Rs.4.0 crore deposited by the petitioner. He also stated that there is no provision under the Electricity Act, 2003 to enable the petitioner to make an application as laid in the present proceeding nor to enable this Commission to entertain such application as the petitioner is not a licensee or generating company. Hence, it is contended, the application of the petitioner is liable to be dismissed in limini. In support of his contention, Mr. Panigrahi, Sr. Counsel for the respondent cited the decision of the Hon'ble Supreme Court of India i.e. 2006(II) OLR (SC)-536, *State Inspector of Police, Visakhapatnam Vrs. SuryaSankaram Karri* to the effect that a statutory functionary must act in a manner laid down in the statute.
7. Mr. Panigrahi, Sr. Counsel for the Respondent stated that this is a claim for recovery of money with interest which is not maintainable before this Commission. The assertion that the petitioner has prayed for adjudication of dispute is also not tenable since Section 86(1)(f) of the Act provides for adjudication of dispute between the licensee and the generating company while the petitioner is an industry and neither a licensee nor a generating company.
8. He also submitted that assuming but not admitting that if the action of the respondent is illegal, arbitrary, unauthorized and contrary to the provisions of law or regulations framed there-under, the remedy to recover money on account of such illegal action is cognizable by the Civil Court or any other appropriate forum of law and not by this Commission. Moreover, under Section 145 of the Act, the Civil Courts jurisdiction is not specifically barred for grant of relief claimed by the petitioner. The decision referred to by the petitioner such as 2004 (1) SCC 195

and AIR 2007 SC 2912 are not applicable to the facts of this case, since those decisions are on different contexts.

9. Mr. Panigrahi, Sr. Counsel for the Respondent OPTCL also submitted two orders of this Commission in OERC Case Nos.30/2002 and 19/2005 which dealt with the limitations of the Commission as far as recovery of compensation under the Act is concerned. In support of his contention he further cited two cases of Supreme Court (in (2006) 3 SCC 581) at para 67 and 69 where in the Apex Court held that an action by way of policy decision or otherwise at the hands of statutory authority must be in consonance with the statutory rules and *not de hors the same*. As such there is no provision in the Act or Regulation framed by the Commission thereunder to give direction regarding recovery of excess hire charges, if any, paid to OPTCL by the petitioner i.e. M/s. Rohit FerroTech Ltd.
10. Mr. Panigrahi Sr. Counsel for the Respondent OPTCL further submitted that neither Section 142 of the Act nor Regulation 76 of OERC (Conduct of Business) Regulations, 2004 confers any such power on the Commission to entertain and dispose of the application. It is well settled position of law that the statutory authority or quasi-judicial authority is bound by the provisions of the Act under which it is created and can have jurisdiction in respect of matters specifically provided for in the statute and cannot have extensive jurisdiction like a Civil Court to entertain all matters of civil nature which are not specifically conferred by the Statute. So the application of the petitioner as laid has no merit for admission by the Commission and it would be liable to be rejected in limine.
11. After hearing the parties and perusal of the records, the Commission observes that the crux of the problem is whether “hire charges” which were not specifically defined in the Act, were within the meaning of “tariff” as determined by the Commission and whether the licensee can carry out an unregulated activity without approval of the Commission. The Counsel for the respondent has submitted that this issue has not been raised by the petitioner in the petition. The Commission may pass orders only on the issues raised in the petition. Be that as it may, the Commission is faced with a jurisdictional difficulty in dealing with this issue.

12. This application has been filed by an industrial consumer against OPTCL, the licensee under the Electricity Act, 2003. Section 86 of the Electricity Act, 2003 deals with the function of the State Commission. Under the provisions of sub-section (1)(f) of Section 86, the Commission shall adjudicate upon the disputes *between a licensee and a generating company and to refer the dispute for arbitration*. The petitioner in the present case is neither a licensee nor a generating company and the Act does not empower adjudication between an individual and a licensee like OPTCL just because tariff is being determined by the Commission.
13. Besides the above, the petitioner submitted that they have come before this Commission, as the Transmission Licensee, under Section 41 of the Electricity Act, 2003, can engage in any other business for optimum utilization of its assets, with prior intimation to the Appropriate Commission. This also provides that a portion of the revenues derived from such business may be utilized for reducing the charges for transmission and wheeling. The petitioner has approached this Commission only after entering into an undertaking/agreement with the licensee for utilization of a feeder and have not intimated the Commission earlier and the dispute has been raised after utilization of the assets. It is also to be observed that the licensee should have given prior intimation to the Commission for realization of some revenue for optimum utilization of the assets and it has to be reflected in the income statement of the appropriate year. These issues would arise only after resolution of the important issue whether the Commission can proceed in the case treating its hire charges “as a part of tariff”.
14. Tariff has been defined in Sec.26(7), Explanation (b) of the Orissa Electricity Reforms Act, 1995, though this has not been defined in the Electricity Act, 2003. According to OER Act, 1995, “tariff” means a schedule of standard prices or charges for specified services which are applicable to all such specified services provided to the type or types of customers specified in the tariff.
15. It may also be noted that in Supreme Court Case No.195 of 2004, the issue relating to tariff has been pleaded which is quoted as under:

Para-16, Page-208 - The word “tariff” has not been defined in the Act. “Tariff” is a cartel (sic) of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff. x x x x x x

More or less this is in agreement with the definition provided in OER Act, 1995. Under Section 61 of the Electricity Act, 2003 -

“the Appropriate Commission shall, subject to the provisions of the Act, specify the terms and conditions for the determination of the tariff and in doing so shall be guided by the following” x x x x x

Section 61(a) of the Act states that: -

While determination of tariff of transmission, the State Commission shall be guided by the principles of the methodologies specified by the Central Commission for determination of tariff applicable to Transmission licensee under Section 61(a) of the Act, 2003.

Under Section 62 of the Act, 2003, under the heading Determination of Tariff.

“(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of the Act for (a) supply of electricity, (b) transmission of electricity, (c) wheeling of electricity, (d) retail sale of electricity.”

16. The Commission has framed the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004. In Chapter-II of the said Regulation, the Commission has prescribed that the tariff shall be determined for (A) Supply of power from the generating company to a distribution company, (B) Transmission of electricity, (C) Wheeling of electricity and (D) retail sale of electricity.
17. To interpret ‘Transmission’ we may refer to Section 2(74) of the Electricity Act, 2003 which defined that “transmit means conveyance of electricity by means of transmission lines and the expression “transmission” shall be construed accordingly.” So, in the Regulation, the Commission prescribed the transmission tariff and the Regulation does not provide for determination of hire charges. However earnings, if any, out of hire charges meant for optimum utilization of

assets as said earlier has to be taken as a part of income of the licensee in accordance with Section 41 of the Electricity Act, 2003 and it need not be determined by the Commission as it does not find place in the Regulations.

18. The discussion in paras 14-16 above lead to the conclusion that where a particular service is provided by a licensee to an individual consumer on the basis of specific agreement, such service not being made available in general of a category or type of consumers, the charge agreed upon for such service is not a “tariff”. Therefore the “hire charge” in the instant case does not come within the term “tariff”. Hiring out of unused assets by OPTCL would rather come within the purview of “other business” in Section 41 of the Act. Violation, if any, of the provisions of the 1st and 2nd Proviso to Section 41 does not invalidate the collection / income of OPTCL from this “other business”. Nor can the petitioner (a consumer) move this forum on that account.
19. In view of the facts stated above, application of Regulation 76 of the OERC (Conduct of Business) Regulations, 2004 is inappropriate as the Commission can exercise its jurisdiction only within the ambit of the provisions of the Electricity Act, 2003. On the same analogy, the question of Section 142 of the Electricity Act, 2003, which is a penal provision, does not arise.
20. We also agree with the respondent that the matter of recovery, if any, regarding recovery of excess hire charges is beyond the scope of adjudication of the Commission.
21. In view of this, we are not inclined to admit the petition.

Sd/-
(K.C. Badu)
Member

Sd/-
(S.K. Jena)
Member

Sd/-
(B.K. Das)
Chairperson