

**ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
PLOT NO.4, CHUNUKOLI, SHAILASHREE VIHAR
BHUBANESWAR - 751 021**

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

Case No. 77/2007

M/s. Tata Sponge Iron Ltd. Petitioner

Vrs.

M/s. OPTCL Respondents

**In the matter of: Proceeding on remand by order dated 20.10.2022 of the Hon'ble
APTEL passed in Appeal No.179/2017.**

AND

In the matter of: **An application challenging the inaction of OPTCL refunding excess supervision charges collected from the applicant company in respect of construction of 220 KV S/C line on D/C tower from Joda Grid Sub-Station to M/s. Tata Sponge Iron Limited, Joda with one no. 220 KV feeder bay at Joda Sub-Station.**

For Petitioner: Shri P.P. Mohanty, Advocate

Respondent: Shri L.N. Mohapatra, Advocate

ORDER

Date of hearing: 06.12.2022

Date of order: 14.12.2022

This order is occasioned consequent upon remand of this case pursuant to the order dated 20.10.2022 passed by the Hon'ble Appellate Tribunal for Electricity (APTEL) in Appeal No. 179 of 2017.

2. Brief fact of the Case is that M/s. Tata Sponge Iron Ltd. is a company registered under the Companies Act, 1956 and manufactures sponge iron at its factory at Bileipada. To support its sponge iron production, the Petitioner has installed two Captive generating plants of 7.5 MW and 18.5 MW, respectively in its factory premises, which are operated by using waste heat of its Kiln No.1, 2 & 3. The Petitioner Company has filed this case under Section 86(1)(f) of the Electricity Act, 2003 for adjudication of the dispute as to re-fundability of the supervision charges collected from it by the Respondent - OPTCL in respect of construction of dedicated transmission line of 7.1

km of 220 kV S/C line on D/C tower from Joda Grid Sub-Station to M/s. Tata Sponge Iron Ltd., Joda with one no. 220 kV feeder bay at Joda Grid Sub-Station. For the said purpose, the Petitioner Company requested the Respondent-OPTCL to sanction the estimate and fix up supervision charges. The Chief Engineer (T.P), OPTCL, vide his letter dated 20.10.2005, had given technical sanction for construction of 220 kV S/C line on D/C tower from Joda Grid Sub-Station to the Petitioner's premises and further had directed to execute the work after payment of supervision charges. The total amount of construction of 220 kV line and bay at Grid was estimated at Rs.12,01,87,600/- and supervision charge was fixed at Rs.1,98,30,800/-.

3. The AGM (Elect.), OPTCL, Jharsuguda in his letter dated 3.11.2005 pursuant to letter No.1192 dated 20.10.2005 of the Chief Engineer (T.P), OPTCL had directed the Petitioner-Company to deposit a sum of Rs.1,98,30,800/- towards supervision charges for construction of 220 kV line and bay before starting the work. Accordingly, the Petitioner - Company had deposited a Demand Draft of Rs.56,63,400/- after deducting TDS and Education Cess from the total amount of Rs.60.00 lakhs towards part payment of Supervision Charges. Subsequently, on 11.02.2006, the Petitioner - Company had submitted another demand Draft amounting to Rs.56,63,400/- after deducting TDS and Education Cess from the total amount of Rs.60.00 lakhs towards further part payment of Supervision Charges towards construction of the aforesaid line and bay. After said part payment of Rs.120.00 lakhs (including deduction of TDS & Education Cess) towards supervision charge, the Petitioner - Company had requested OPTCL to review and re-examine the sanctioned estimate, as the estimated amount of Rs.12,01,87,600/- was considered to be on higher side for a line of 7 Km and its bay, as the total value of the project considering all costs was found to be Rs.7,41,74,111/-. Thereafter, on 30.12.2006, the petitioner - company had approached the Respondent - OPTCL for charging of the said line as the project work including bay at Joda Grid was completed. In response to the said request of the Petitioner - Company, the Respondent - OPTCL had asked for deposit of the differential amount against supervision charges based on the initial estimate. The Petitioner - Company, to avoid further delay in commissioning of the aforesaid line, had deposited the balance amount of Rs.73,99,987/- after deducting TDS and Education Cess towards supervision charges on protest as per the initial letter of the Respondent – OPTCL bearing No.TR/WKL/IV/ 175/2005/1192 dated 20.10.2005. By letter dated 03.02.2007, the Petitioner - Company had submitted

the details of actual expenditure of construction for 220 kV line and bay amounting to Rs.7,41,05,000/- instead of Rs.12,01,87,600/- as estimated earlier.

4. The Petitioner - Company further had submitted that being a captive generating plant, the Petitioner - Company can construct, maintain and operate dedicated transmission line as per Section 9 of the Electricity Act, 2003 and hence the Petitioner-Company is not required to pay the supervision charges as claimed by the Respondent - OPTCL in respect of construction of its 220 kV line from its CGP to Joda Grid Sub-Station and bay at the said Sub-station. In the present case, since the Respondent – OPTCL has not constructed and executed the aforesaid line with bay, for and on behalf of the Petitioner's company, the levy of supervision charges is illegal, arbitrary, bad in law and violates the provisions of the Electricity Act, 2003 and Rules made thereunder. The aforesaid 220 kV line & bay at Joda Grid Sub-Station was constructed by the approved Contractor of the Respondent - OPTCL under supervision of its Engineers and the same was approved by the Electrical Inspector upon deposit of all statutory dues required for energisation. Therefore, the Petitioner - Company is not liable to pay the supervision charges, and is entitled to get refund of the same as both the Chief Engineer (T.P), OPTCL and the Asst. General Manager (Electrical), OPTCL, Jharsuguda in their letter dated 23.02.2007 & 01.03.2007 respectively had admitted for refund of the same. Hence, the present case was filed by the Petitioner – Company M/s. Tata Sponge Iron Ltd. invoking the provisions under Section 86(1)(f) of the Electricity Act, 2003. In the above circumstances, the Petitioner - TSIL has requested that the Commission may direct the Respondent - OPTCL to revise the technical sanction in respect of order dated 20.10.2005 on the basis of actual expenditure incurred by the Petitioner - Company and to refund the excess supervision charges collected illegally from it and, therefore, the Commission may decide the present case as per the provisions of Section 86(1)(f) of the Electricity Act, 2003 inasmuch as the captive generating plant of the Petitioner - Company is treated as a generating Company in terms of the provisions of Sections 2(28), 2(29) & (30) of the Electricity Act, 2003.
5. The Respondent - OPTCL had objected to the case brought by the Petitioner - TSIL before this Commission invoking its jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 on the ground that the Petitioner - TSIL is not a generating

company, there being no dispute raised as would involve a licensee, in one hand, and a generating company, on the other, within the scope of the said provisions of law.

6. This Commission, by its interim Order dated 01.12.2008, had rejected the said objection by referring to the meaning of the expression ‘generating company’ defined under Section 2(28) of the Electricity Act, 2003 and held that a Captive Generation Plant (“CGP”) is a generating station and, thus, the owner of such CGP is a generating company.
7. The Order dated 01.12.2008 of this Commission was challenged by the Respondent – OPTCL, not by way of an appeal under Section 111 of the Electricity Act, 2003 before the Hon’ble APTEL, but by a Writ Petition vide W.P.(C) No. 2056 of 2009 invoking writ jurisdiction of the Hon’ble High Court of Orissa. The Writ petition was disposed of by the Hon’ble High Court of Orissa, by their judgment dated 09.02.2016, with specific observation that the Petitioner – TSIL is not liable to pay the supervision charges for the dedicated line.
8. A reference may be made to the order dated 09.02.2016 passed by Hon’ble High Court of Orissa in W.P. (C) No.2056 of 2009. The extract of the said order which are felt to be relevant, are reproduced hereunder.

“7. Admittedly, the opposite party no.1-Company produces electricity from its generating station for the purpose of giving power supply to the premises, thereby it generates electricity within the meaning of Section 2(29) of the Act. The meaning attached to “generating station” or “station” under Section 2(30) of the Act is also satisfied to the extent that opposite party no.1-Company has its generating station having two separate captive power plant within the meaning of section 2(8) of the Act, thereby the, opposite party no.1- Company is a generating company within the meaning of Section 2(28) of the Act itself. The opposite party no.1 being a generating company within the meaning of section 2(28) of the Act having two separate captive generating plants within the meaning of Section 2(8) of the Act, any dispute between the licensee and the generating company, can be adjudicated upon under Section 86(1)(f) of the Act. Section 9 of the Act also states about “Captive generation”. Section 2(16) defines “Dedicated Transmission Lines” which means any electricity supply line for point to point transmission which are required for the purpose of connecting electric lines of electric plants of a captive generating plant referred to in section 9 or generating station referred to in section 10 to any transmission lines or sub-stations or generating stations or the load centre, as the case may be. Therefore, the opposite party no.1-Company is to transmit the surplus power generated in the captive power plant from its generating station as referred to Section 10 of the Act through its transmission line to its grid sub-station at Joda. Therefore, it is not required to pay the supervision charges.

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11. Considering the law laid down by the Apex Court in the above mentioned cases and applying the same to the present context, having considered the provisions of the Act so far it relates to the opposite party no.1 - Company vis-à-vis the petitioner whereby a conclusion can be drawn that the petitioner being a 'licensee' and the opposite party no.1- being a "generating company", the dispute between the two can be resolved by the Commission in view of the provisions contained under Section 86(1)(f) of the Act and as such, the application filed before such Commission is maintainable. It is nobody's case that the opposite party no.1 has no captive generating plant, rather unequivocally the parties have admitted that the opposite party no.1 has two separate captive generating plants within its premises for its own consumption. But if any surplus power is there then the same can be transmitted through the dedicated transmission line to the Grid station for utilization by others. Therefore, when surplus power is being transmitted through the dedicated transmission line, no supervision charge should be demanded by the Petitioner (Respondent – OPTCL herein).

12. In view of the foregoing discussions, it is made clear that the Commission has got jurisdiction to adjudicate the disputes between the petitioner(OPTCL) and the Opp. Party No.1(M/s. TSIL) being a licensee and generating Company respectively under Sec. 86(1)(f) of the Act and as such, the application filed before such Commission is maintainable. Thus, the impugned order dated 01.12.2008 passed by OERC in Case No.77 of 2007 vide Annexure-5 to the writ petition is upheld. Consequently, the writ petition merit no consideration and the same is dismissed. No cost."

9. This Commission took note of the above observations of the Hon'ble High Court of Orissa and on that basis, observed and held in para 10 of its order dated 29.03.2017 in Case No. 77 of 2007 as under:

"10. Accordingly, both the petitioner and the Respondent have filed their written note of submission along with copies of the letters dated 06.09.2004 and 01.10.2004. After going through the case records, considering the content of the letter, written submissions and arguments made during hearing and specifically the directions/observations of the Hon'ble High Court of Orissa in W.P.(C) No.2056 of 2009 wherein the Hon'ble Court has observed that "it is nobody's case that the Opp. Party no.1 (Petitioner-Company) has no captive generating plant, rather unequivocally the parties have admitted that the Opp. Party no.1 (M/s. TSIL) has two separate captive generating plants within its premises for its own consumption. But if any surplus power is there then the same can be transmitted through the dedicated transmission line to the Grid station for utilization by others. Therefore, when surplus power is being transmitted through the dedicated transmission line, no supervision charge should be demanded by the Respondent-OPTCL herein." We come to the conclusion that Hon'ble High Court has unequivocally decided the matter regarding payment of supervision charges. Therefore, the case pending here automatically crumbles."

10. Feeling aggrieved and dissatisfied with the decision taken by this Commission, the Respondent – OPTCL had approached the Hon'ble APTEL in Appeal No.179 of 2017 whereafter the Hon'ble APTEL, after hearing both the parties, has set aside the order dated 29.03.2017 in Case No.77/2007 of this Commission and remanded back the matter to this Commission with their direction to hear the matter afresh and pass

necessary orders thereon. Relevant extract of the judgement of the Hon'ble APTEL is as follows.

"8. It must be noted here that in the course of scrutiny as to whether the order of the State Commission on the objection to the maintainability of the proceedings taken out by TSIL was correct or not, the High Court observed as under:

"5. On the basis of the facts pleaded above and arguments advanced by the respective parties, the sole question that falls for consideration before this Court is whether the Commission is justified in holding that the application is maintainable in view of the provisions contained in Section 86(1)(f) of the Act in order to adjudicate upon the dispute between the licensee and the generating company."

9. The answer to the question depended on the view taken on the issue as to whether the CGP owner is a generator. The issue thus formulated has been answered in affirmative by the High Court through observations (in paras 11 & 12) upholding the view of State Commission that it possesses the necessary jurisdiction under Section 86(1)(f) of the Electricity Act, 2003 to adjudicate the dispute between the parties herein.

10. The issue as to whether the supervision charges could have been collected did not arise in the proceedings before the writ Court. The order under challenge by the writ petition only questioned the maintainability of the petition instituted by TSIL before the State Commission. The High Court itself noted this in para 5 of its order making it abundantly clear that the question of jurisdiction of the State Commission to entertain such a petition under Section 86(1)(f) of the Electricity Act, 2003 was the "sole question" being addressed by it. The High Court answered the said question in favour of TSIL, thereby upholding the view taken by the State Commission. To that extent, the decision became final and binding. There is no discussion in the order of the High Court as to in exercise of which power, or by what authority, the supervision charges have been collected by the appellant and paid, without demur at that stage, by TSIL. In these circumstances, the observations in para 7 & 11 that TSIL was "not required" to pay the supervision charges or (as mentioned in para 11) that no supervision charges "should be demanded" are not based on any inquiry into that aspect. Such observations are nothing but obiter dicta and cannot be treated as conclusive or binding. All that the High Court decided was to uphold the maintainability of the petition, the issue as to whether levy of supervision charges was justified being the subject matter that would survive for adjudication by the State Commission.

11. In the above facts and circumstances, we cannot uphold the observations of the State Commission in (para 10 of) the impugned order. We must add that we do not understand what was meant by the State Commission when it observed that the case pending before it "automatically crumbles". Such sentence is vague, neither here nor there.

12. Thus, the appeal is allowed. The impugned order of the State Commission to the extent thereby the proceedings on the petition of first respondent were drawn to a close treating the observations (of the High Court) that "no supervision charges should be demanded" as unequivocally conclusive or decisive are held to be incorrect and, thus, set aside."

11. As per the directives of the Hon'ble APTEL, the Commission was required to pass the consequential order on the issue as to whether levy of supervision charges as claimed by the Respondent – OPTCL was justified or sustainable.

12. We have considered the submissions of the Petitioner – TSIL and the Respondent – OPTCL and have scrutinised the record. After hearing the parties, this commission feels that it is pertinent to again refer to the observations of the Hon’ble High Court of Orissa, vide order dated 09.02.2016 in W.P. (C) No.2056 of 2009. Hon’ble High Court have been pleased to observe in the following words :-

“it is nobody’s case that the Opp. Party no.1 (Petitioner-Company) has no captive generating plant, rather unequivocally the parties have admitted that the Opp. Party no.1 (M/s. TSIL) has two separate captive generating plants within its premises for its own consumption. But if any surplus power is there then the same can be transmitted through the dedicated transmission line to the Grid station for utilization by others. Therefore, when surplus power is being transmitted through the dedicated transmission line, no supervision charge should be demanded by the Respondent-OPTCL herein.”

Needless to mention that it is admitted fact that surplus power was to be transmitted through the dedicated line as observed by the Hon’ble High Court. That being the factual position which is not disputed by either side, the Commission cannot ignore the observation of the Hon’ble High Court. There is no reason before this Commission to take a view different from view taken by the Hon’ble High Court.

13. It is argued by the learned counsel for the Respondent – OPTCL that the challenge before the Hon’ble High Court of Orissa being not related to the issue as to whether or not supervision charge can be demanded by Respondent – OPTCL, the observation of the Hon’ble High Court as aforesaid cannot be treated as a direction or a decision to be followed by the Respondent - OPTCL and equally the same cannot divest this Commission of its jurisdiction to decide the said issue on merit after hearing the parties. We are however unable to accept the arguments so advanced by the learned counsel for Respondent – OPTCL, for the reasons to follow.
14. It is true that the Respondent – OPTCL had approached the Hon’ble High Court of Orissa challenging the interim order of this Commission dated 01.12.2008 vide which the jurisdiction of this Commission had been affirmed to entertain and decide the question raised by the Respondent - OPTCL. Hon’ble High Court while deciding the writ petition filed by the Respondent – OPTCL affirmed the jurisdiction of this Commission and made the observations as quoted herein before. For the sake of clarity it may be stated here that the observation of Hon’ble High Court is under challenge in a Review Application bearing No. RVWPET No.96 of 2017 preferred by the Respondent – OPTCL. Said Review Application is under judicial consideration before the Hon’ble High Court of Orissa. Notwithstanding the fact that the writ petition had been filed

concerning the question of jurisdiction of this Commission, it cannot be said that the observation so made by the Hon'ble High Court is unconnected to the issue involved substantially in this case. Considering the situation from that angle, this Commission is unable to agree with the Respondent – OPTCL that the observation made by the Hon'ble High Court was either uncalled for or not binding on the parties. To put it in otherwords, this Commission cannot reopen the issue which has already been answered by the Hon'ble High Court of Orissa vide the observations made in their order dated 09.02.2016 passed in W.P.(C) No.2056 of 2009.

15. Accordingly, the case is disposed of and the proceeding is closed.

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

Sd/-
(G. Mohapatra)
Officiating Chairperson