

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 3 of 2007  
and I.A. No.5 of 2007**

**Dated: October 31, 2007**

**Present: Hon'ble Mr. Justice Anil Dev Singh, Chairperson  
Hon'ble Mr. H.L. Bajaj, Technical Member**

HINDALCO INDUSTRIES LTD.  
(formerly known as Indian Aluminium Co. Ltd.)  
a company incorporated under the Companies Act, 1956,  
Belur Works, 39, Grand Trunk Road,  
P.O. Belurmatah, PIN 711 202,  
Howrah, West Bengal

... Appellant

Versus

- (1) West Bengal State Electricity Regulatory Commission  
FD-415A, Paura Bhawan, 3<sup>rd</sup> Floor,  
Sector-III, Bidhannager,  
Kolkata – 700 106
- (2) The Managing Director,  
CESC Limited,  
CESC House, Chowrangee Square,  
Kolkata – 700 001
- (3) The Secretary,  
State Transmission Utility,  
West Bengal State Electricity Board,  
4<sup>th</sup> Floor, A Block, Vidyut Bhawan,  
Block-DJ, Sector-II, Bidhannagar,  
Kolkata – 700 091.

- (4) The Chief Engineer,  
The State Load Despatch Centre (SLDC) West Bengal,  
Danesh Sheikh Lane, Andul Road,  
Howrah.
- (5) The Asstt. General Manager  
Eastern Regional Load Despatch Centre (ERLDC)  
14, Golf Club Road,  
Kolkata – 700 033

... Respondents

- For the Appellant : Mr. Jayant Bhushan, Senior Advocate  
Mr. Narendera M. Sharma and  
Mr. Rohit Jain. Advs.
- For the respondent(s) : Mr. Pratik Dhar and Mr. C.K. Rai,  
Advs. for WBERC  
Mr. M.G. Ramachandran with  
Mr. Sanjeev Kapoor and  
Mr. Avinash Menon, Advs. for CESC

### ORDER

1. This appeal is directed against the order of the West Bengal Electricity Regulatory Commission (for short WBERC/Commission), dated December 16, 2006 in appeal No.1 of 2006. The appellant is a manufacturer of Aluminium and Copper. It has a factory at Belurmath, West Bengal. The appellant is having an existing Contract Demand Agreement for 8.5 MW with the CESC Limited and draws power at a voltage of 33 KV through

dedicated lines from the Belurmath receiving Sub-Station of CESC. For this purpose, the appellant has installed a 33 KV Sub-Station at its premises.

2. The appellant has a captive power plant at Hirakud, Orissa. On October 31, 2003, the appellant filed an application under Sections 9 and 42 of The Electricity Act, 2003, before the Commission seeking permission for open access to wheel surplus captive power of an approximately 9 MW from its power plant to its Belur factory. The distance between the captive power plant at Hirakud, Orissa and Belurmath plant in West Bengal is about 555 kilometers, out of which 550 kilometers falls within the jurisdiction of WBSEB, OPTCL and Eastern Region for which wheeling charges for transmission of power works out to be 9.57 paise per unit. Thus for transmission of power up to 550 kilometers, the appellant has to pay 9.57 paise per unit. However in respect of remaining five kilometers, which fall on the side of the State of West Bengal, the appellant is required

to pay wheeling charges at the rate of 83.54 paise/kWh as fixed by the WBERC by its order dated November 21, 2005. It needs to be noted that out of these five kilometers, the appellant at its own cost has put up two kilometer long dedicated transmission line. The relevant part of the order of the Commission dated November 21, 2005 reads as follows :-

*“26.0 Thereafter, actual of working of open access should follow, naturally depending-upon availability of capacity as laid down in the Regulations on open access. Payments of various charges / fees should follow the provisions of the Regulations dealing with fees, charges and formats. There are still two items on which specific orders from the Commission will be required. The first one concerns the quantum / rate of additional surcharge, while the second one concerns the wheeling charge which will have to be determined by the Commission in terms of Regulation 14.3(b) and Regulation 14.5(b) respectively of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005. We have since determined the wheeling charges applicable to CESC Limited for the year 2005-2006 based on factors like distribution network cost, units saleable by the distribution licensee to its consumers, units to be wheeled by the open access customer etc. and the same has worked out to 83.54 paise per kWh. This will be revised appropriately,*

*needless to add, by the Commission every year.”*

3. Aggrieved by the order passed by the Commission, the appellant filed an appeal before this Tribunal. The Tribunal by its order dated July 11, 2006 set aside the fixation of wheeling charges by the WBERC and remanded the matter to the Commission for being considered *de novo*. While remitting the matter, it was observed as follows :-

*“35. It follows that in calculating wheeling charges for the distribution system or associated facilities are to be assessed on applicable distribution network cost, units saleable and units wheeled by all open access customers in the network. The learned counsel for appellant contends that as per CERC (Open Access in Inter-State Transmission) Regulations and WBERC (Terms & Conditions for Open Access – Schedule of Charges, Fees & Formats for Open Access) Regulation, the wheeling charges of the Distributing system should be 0.25 time for short term open access. However, we find from Para 26.0 of the order appealed against, there is no detailed discussion in this respect except holding that 83.54 paisa/kWh shall be the wheeling charges. No particulars been disclosed is the main grievance and Regulations governing wheeling charges have not been applied correctly. The second respondent has stated in its submission that the WBERC*

*determined the wheeling charges in case of WBSEB for 2005-06 at the rate of 56 paisa/kWh and a copy also was filed. In the circumstances with respect to fixation of wheeling charges the matter deserves to be remitted back to WBERC for fresh consideration in the light of the relevant Rules and affording opportunity to appellant. The authority shall take note of the fact that open access within the Distribution area of CESC is applied to a distance of 5 KM and out of 5 KM, 2 KM distance is appellant's dedicated transmission line put up at its costs."*

4. Thus it is apparent that the Bench was of the view that the WBERC on remand should *inter alia* work out the wheeling charges for the distribution system or associated facilities on applicable distribution network cost.
5. The Commission by its order dated November 16, 2006 again came to the conclusion that the wheeling charges payable by any distribution licensee in 2005-06 for using the distribution system and/or associated facilities of CESC Limited shall be 83.54 paisa/kWh.

6. Aggrieved by the order passed by the Commission, the appellant has filed the instant appeal. The main grievance of the appellant is that the Commission did not abide by the direction given by this Tribunal in its Order dated July 11, 2006 inasmuch as the Commission did not assess the wheeling charges for the distribution system or associated facilities on applicable distribution network cost of 33 KV, which was required to be utilized for wheeling of surplus captive power from the power plant of the appellant.
7. On the other hand, it is the case of the respondents that the WBERC has complied with our order dated July 11, 2006 and the wheeling charges have been determined in the light of the relevant rules after affording opportunity to the appellant. It was also canvassed that the appellant had not taken up the plea in the earlier proceedings before this Tribunal, emanating from the order of the WBERC, dated November 21, 2005, that the wheeling charges should be based on the cost of network

used for wheeling electricity at a particular voltage viz., 33 KV. As a sequitur, it was contended that the appellant not having urged the point in the earlier proceedings before this Tribunal that the wheeling charges be assessed on the basis of distribution network cost at the level of 33 KV, this Tribunal by its order dated July 11, 2006 did not hold that the Commission should determine the wheeling charges based on network cost of 33 KV. According to the learned counsel, the applicable network cost does not mean cost of 33 KV distribution network. The learned counsel for the respondents submitted that the Commission rightly fixed the wheeling charges taking into consideration the entire distribution network cost.

8. We have considered the submission of the learned counsel for the parties. It will be appropriate to first deal with the submission of the learned counsel for the respondents that the appellant had failed to raise the issue before us in the appeal filed against the order of the

Commission, dated November 21, 2005. In para 5.8 of the Memo of Appeal, the appellant had specifically raised the plea by stating that the appellant was a high voltage consumer drawing power at 33 KV and the distribution network cost at this voltage level is much lower when compared to the average distribution cost, which also includes cost for medium and low voltage distribution. The appellant had remonstrated in its pleading that the Commission had fixed wheeling charges by wrongfully taking into account the average distribution cost irrespective of particular and distinct fact situation of the appellant. In the written submissions filed in the appeal No.1 of 2006, the appellant specifically raised the plea that being an HT consumer it falls in existing and separate category of consumers and its wheeling charges has to be necessarily calculated taking distribution cost at its voltage level into account. At this stage, it will be apposite to set out the plea raised by the appellant in Paras G, I and J of its written submissions:

- “g. The appellant is a HT consumer drawing power at 33 kV, and is, therefore, situated above the MV and LT consumers in the chain of Network Flow. By virtue of it being a HT consumer the appellant falls in a distinct and separate category of consumers, and its wheeling charges has to be necessarily calculated taking distribution cost at its voltage level into account.*
- i. The necessary consequence of application of this wrongful distribution network cost is that the appellant is being made to cross-subsidize the MV and LT consumers, and is, thus, unjustly been levied with a surcharge. Such cross-subsidization or levying of surcharge is neither contemplated nor permissible in the Electricity Act, 2003 specially with respect to wheeling of Captive Power.*
- j. Wheeling charges for open access is determined under Clause 14.3 (b) of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulations, 2005, dated 30.06.2005 and Clause 4.2 of the West Bengal Electricity Regulatory Commission (Terms and Conditions for Open Access – Schedule of Charges, Fees & Formats for Open Access) Regulations, 2005, dated 21.09.2005. Copy of the same has been submitted by Respondent No.2 vide its submission dated 20.02.2006. The said clauses does not contemplate that average or total distribution cost be taken into account for calculating the wheeling charges for any open access consumer consuming power at a particular voltage level.”*

9. Having regard to the contents of the Memo of Appeal

and the written submissions, there is no manner of doubt that the appellant urged that the wheeling charges for the use of the distribution system should be derived on the basis of applicable distribution network cost, units saleable and units wheeled by all open access customers in the network for particular class of consumers. Taking a view in respect of the aforesaid plea of the appellant, this Tribunal by its order, dated July 11, 2006 had directed the Commission to calculate wheeling charges for the distribution system or associated facilities based, *inter alia*, on applicable distribution network cost. The order was clear and the Commission ought to have given effect to it.

10. Admittedly, the CESC has EHT system, 33 kV Distribution System, 20 KV, 11KV, 6 KV & 33 KV distribution system (IV) LT system. There is no reason for the Commission to ask the appellant to pay wheeling charges for the entire distribution

system when electricity is transmitted to it through 33 KV distribution system.

11. CESC has various systems for supply of electricity. It has EHT system, 33 KV Distribution System, 20KV, 11KV, 6 KV & 33 KV distribution system and LT system. There is no reason for the Commission to ask the appellant to pay wheeling charges for the entire distribution system when electricity is transmitted through its 33 KV distribution system. It does not stand to reason why 33 KVA consumer should pay for the LT lines which are not being used for transmission of electricity to it. The WBERC has fixed 83.54 paise/KWH as the wheeling charges. The relevant provisions that govern the wheeling charges are Regulations 14.3(b) of the West Bengal Electricity Regulatory Commission (Terms and Conditions) Regulations, 2005 and clause 4.2 of the West Bengal Electricity Regulatory Commission (Terms

and Conditions for Open Access – Schedule of Charges, Fees and Format for Open Access) Regulations, 2005. These provisions need to be set out for facility of reference.

*“Regulation 14.3(b) of the West Bengal Electricity Regulatory Commission (Terms & Conditions) Regulations, 2005:-*

*“Wheeling Charge:*

*The Wheeling charges will represent the charges for the use of distribution systems or associated facilities of a distribution Licensee for conveyance of electricity on distribution systems and associated systems and will be derived based on distribution network cost, units salable by the licensee to the consumers and units wheeled by the all Open Access Customers in the Network and as may be determined on these basis by the Commission from time to time.”*

*Clause 4.2 of WBERC (Terms and Conditions for Open Access – Schedule of Charges, Fees & Format for Open Access) Regulations, 2005.*

*“Wheeling charges:*

*Wheeling charges for use of Distribution System or associated facility of a Distribution Licensee for use of Open Access Customers including Captive Generating Plants shall be derived based on distribution network cost and total number of units sold by the Licensee to its consumers & total number of units wheeled for Open Access customers. Such charges shall be expressed in paise per unit.”*

12. According to Regulation 14.3, the wheeling charges represent the charges for the use of distribution systems or associated facilities of a distribution licensee, for conveyance of electricity on distribution systems and associated systems and the charges are to be calculated on the basis of distribution network cost, units saleable by the licensee to the consumers and units wheeled by all the open access customers in the network.
13. Similarly clause 4.2 of the West Bengal Electricity Regulatory Commission (Terms and Conditions of Open Access – Schedule of Charges, Fees and Format for Open Access) Regulations, 2005, lays down the method for deriving the wheeling charges. They are to be based on distribution network cost and total number of units sold by the licensee to its customers and total number of units wheeled for open access customers.
14. The aforesaid Regulations do not state that the wheeling charges are to be based on total or entire network cost. The Judgment rendered by the Tribunal dated July 11,

2006, clearly lays down that cost shall be calculated on the basis of 'applicable network.' Simple question to be asked is, which is the 'applicable network' for transmitting electricity to the appellant. The answer obviously is that applicable network is the 33 KV distribution system on which the electricity is being rolled to the appellant. No further elaboration is required.

15. The Commission ought to have acted in consonance with the aforesaid decision of the Tribunal. Both Judicial discipline and propriety require the Commission to comply with the orders of the Tribunal, irrespective of its own views in the matter.
16. In the circumstances, therefore, the matter needs to be remitted to the Commission for fresh determination of the wheeling charges on the basis of applicable network of 33 kV distribution system.

17. In respect of the submission of the appellant relating to back-up power, an affidavit has been filed by the CESC. In view of the affidavit, the controversy in respect of this point does not survive. The CESC is bound by the stand taken by it in its affidavit.
18. As regards the submission of the appellant relating to energy accounting, already directions have been given by us in our Order dated July 11, 2006. In view of that Order, no further directions are required to be given.
19. It was submitted by the learned senior counsel for the appellant that after passing of the order, dated July 11, 2006, by us, the Commission took steps to amend the Regulations with a view to bypass our Judgment. We have considered the contention but we find that no evidence has been adduced to show that the steps taken to amend the Regulations by the Commission stemmed from its desire to bypass our Judgment. In an appropriate case, where an allegation of deliberate side stepping of our order by the Commission is proved,

action in accordance with law will have to be taken. We hope and trust that such a situation will not arise and the Commission will act in accordance with our orders, unless & until they are stayed or set-aside by the Hon'ble Supreme Court or any other court of competent jurisdiction.

20. In the result, the impugned order of the WBSERC dated December 16, 2006 is set aside. The matter is remitted to the Commission for fresh determination of the wheeling charges on the basis of applicable network of 33 kV distribution system and for compliance of the order of this Tribunal dated July 11, 2006.

21. The appeal is disposed of.

**( H.L. Bajaj )**  
**Technical Member**

**( Anil Dev Singh )**  
**Chairperson**

Dated: October 31, 2007