

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.210 of 2012

Dated: 13th Nov. 2013

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**Bharat Aluminum Company Limited.,
Balconagar, Korba,
Chhattisgarh-495684**

..... Appellant(s)

Versus

- 1. Chhattisgarh State Power Transmission Company Limited
(CSPTCL), Vidyut Sewa Bhawan,
Danganiya,
Raipur-492 013**
- 2. State Load Dispatch Centre
Chhattisgarh State Power
Transmisison Co. Ltdf.,
Dangania, Raipur-492 013**
- 3. Chhattisgarh State Electricity Regulatory Commission
Irrigation Colony, Shanti Nagar,
Raipur-492 001**

..... Respondent(s)

**Counsel for the Appellant : Mr.Sanjay Sen
Ms. Shikha Ohri
Mr. Anurag Sharma
Mr. Hemant Singh**

Counsel for the Respondent(s): Ms. Suparna Shrivastava
Mr. Girish Gupta for R-1 & 2
Mr. C K Rai,
Mr. Ravin Dubey for R-3

J U D G M E N T

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON**

1. Bharat Aluminium Company Limited is the Appellant herein.
2. By the order dated 26.6.2012, the Chhattisgarh State Commission dismissed the Petition filed by the Appellant seeking for the refund of the Transmission Charges.
3. Aggrieved over this order, the Appellant has filed this Appeal.
4. The short facts are follows:
 - (a) The Appellant is a manufacturer of Aluminium. It has a Captive Power Plant having capacity of 810 MW at Korba, Chhattisgarh.
 - (b) The Chhattisgarh State Power Transmission Company Limited is the First Respondent. This is a successor Company of State Electricity Board of Chhattisgarh.
 - (c) The State Load Dispatch Centre is the Second Respondent. This is under the administrative control of

the Transmission Company (R-1). Chhattisgarh State Commission is the 3rd Respondent.

(d) The Appellant, being the Captive Power Plant, after meeting its captive consumption exports 170 MW of power on Short Term basis through Inter-State Open Access.

(e) On 31.3.2011, the State Commission issued the Tariff Order for the Financial Year 2011-12 in respect of transmission charges for the intra-state transmission system of the Respondent No.1.

(f) In terms of the said Tariff Order, the Transmission Charges for use of intra-state transmission charges were fixed as Rs.270/MW.

(g) The State Load Dispatch Centre (R-2) sent directive letters on 27.4.2011 and 30.4.2011 indicating that as per the tariff declared by the State Commission for the Financial Year 2011-12, the rate of Short Term Open Access transactions was fixed at Rs.270/MWh w.e.f 9.4.2011 for use of State Grid.

(h) The Appellant, through its representation dated 19.5.2011, requested the State Commission that the directives issued by the State Load Dispatch Centre be kept in abeyance till the time the procedure is approved by the State Commission. The Appellant also wrote a

letter to the Chief Engineer, State Load Dispatch Centre making the similar prayer requesting for refund of the Transmission Charges w.e.f. 9.4.2011.

(i) There was no response. Several letters thereafter, were sent to the State Load Dispatch Centre.

(j) On 8.6.2011, the State Load Dispatch Centre issued a declaration regarding the liability of the Appellant to pay Open Access Charges.

(k) Thereafter, a representation was sent to the State Commission seeking for the intervention by taking into consideration of the difficulties of the Appellant in implementation of the directives fixing Transmission Charges w.e.f 9.4.2011. However, there was no fruitful result.

(l) Therefore, on 9.9.2011, the Appellant filed a Petition before the State Commission seeking a review of the relevant Regulations and praying for the refund of the excess amount paid by the Appellant and also for publishing a detailed procedure as envisaged under Regulation 42 of the State Commission's Regulations, 2011. However, by the impugned order dated 26.6.2012, the State Commission rejected the said Petition by denying the prayer for refund.

(m) Aggrieved over this order, present Appeal has been filed by the Appellant.

5. The learned Counsel for the Appellant has assailed the impugned order on the following grounds:

(a) The State Commission passed the impugned order without considering the fact that the Central Commission alone is the competent authority to regulate the Inter-State sale of electricity. Similarly, the Central Commission alone has the jurisdiction to regulate the Inter-State transmission of power. The Central Commission's Regulations, 2008 encompasses transactions which utilises the State system as incidental to the Inter-State Transmission of electricity. The State Commission in the impugned order has failed to consider the inconsistency between the Central Commission's Regulations, 2008 and the State Commission's Regulations, 2011.

(b) The State Commission passed the impugned order erroneously holding that the increase in transmission charges by the State Commission can be applied to power scheduled in advance prior to the implementation of the revised charges i.e. before 9.4.2011 for the period after 9.4.2011. The State Commission ignored the provisions of the Central

Commission's Regulations, 2008 which specifies that transmission charges for the use of State network shall not be revised retrospectively. The revised charges would apply only for the power scheduled after 9.4.2011.

(c) The State Commission has totally ignored the Regulations 32 of the State Commission's Regulations, 2011 which clearly provides that notwithstanding anything contained in the State Commission's Regulations, the procedure for Inter-State Short Term Open Access shall be as per the Central Commission's Regulations, 2008. In case of any inconsistency between the provisions of these Regulations, the Central Commission's Regulations will have supremacy in relation to the Inter-State Open Access transactions. This has been omitted to be considered by the State Commission.

(d) The State Commission while passing the impugned order failed to discuss or deal with the scope in relation to the Central Commission's Regulations as well as the State Commission's Regulations and the retrospective applicability of the State Commission's Regulations. This approach is quite wrong.

(e) The State Commission failed to take note of the fact that the State Load Dispatch Centre was incorrectly trying to impose the new Transmission tariff issued by the State Commission for the first time with immediate effect. This is not permissible for the reason that under the Central Commission's Regulations, transactions are capable of culmination 03 months in advance in terms of Regulation 9 of the Central Commission's Regulations, 2008. Therefore, for such transactions, where advance scheduling has been made, the application for the transmission charges under the tariff order had a retrospective effect. As such, the retrospective application was in violation of the last proviso of the Regulations 16 of the Central Regulations, 2008. Due to the impugned order, the Appellant was being doubly charged since the Regional Load Dispatch Centre had already charged the buyer at the rate of Rs.80 per MWH in terms of Regulations 16 of the Central Regulations, 2008. However, the State Load Dispatch Centre was illegally collecting and levying differential amount in terms of the tariff order. This is illegal.

6. Refuting these grounds, the learned Counsel for the State Commission (R-3) as well as the learned Counsel for the

contesting Respondents (R-1 and 2) made their submissions in support of the impugned order.

7. Keeping in view of the above rival contentions, it would be appropriate to frame the following questions for consideration:

(a) Whether the State Commission while passing the impugned order, has ignored the fact that the Central Commission alone is competent authority to regulate the Inter-State sale of electricity and no provision inconsistent with the Central Commissions Regulations, 2008 which deal with the Open Access in Inter-State Transmission can be applied for Inter-State sale of Electricity?

(b) Whether the State Commission has erroneously held that the increase in transmission charges by the State Commission can be applied on the power scheduled in advance prior to the implementation of the revised charges i.e. before 9.4.2011 in contravention of the Central Commission's Regulations?

(c) Whether the State Commission while passing the impugned order failed to settle the issues arising on account of the inconsistency between the Central Commission's Regulations 2008 and State

Commissions Regulations, 2011 and the transmission tariff issued by the State Commission for the Financial Year 2011-12 ?

(d) Whether the impugned order has been passed by the State Commission in violation of the procedure for payment of transmission charges for using the State Grid as specified under Regulations 16(3) of the Central Commission's Amendment Regulations, 2009?

(e) Whether the State Commission has passed the impugned order erroneously while ignoring the Regulations 32 of the State Commission's Inter-State Open Access Regulations, 2011, which clearly provides that notwithstanding anything contained in the said Regulations, the procedure for Inter-State Short Term Open Access shall be as per the Central Commission's Open Access Regulations in Inter-State Transmission Regulations, 2008?

8. Before dealing with these questions, let us refer to the prayers made by the Appellant in the Petition filed before the State Commission:

“a. Review the Chhattisgarh State Electricity Regulatory Commission (Connectivity Intra State Open Access) Regulations, 2011 and grant the following relief:

(1)..... (2).....

(3) Refund of transmission charges collected by State SLDC for schedule cleared prior to 09.04.2011.

b. Review the CSERC Tariff Order, 2011-12 with respect to reduction in Short Term Open Access Transmission Charges in line with charges by CERC/Most of other SERC's.....”

9. The State Commission while rejecting the above prayers, through the impugned order dated 26.6.2012, passed the following directions with some observations. The relevant portion of the order is reproduced below:

“7. Based on all the written submissions made in the Petition and also the pleadings made during the course of hearing, our issue wise observations are as follows:

(A) The First Issue is regarding implementation of proper procedure under Clause 42 of the Regulations. It is to be noted that detail procedure can be enforced only if it is approved by the Commission. The utility had submitted detail procedure. But after due deliberations with stake holders, it was observed that some provisions mentioned in the detail procedure were not consistent with the Open Access Regulations, 2011. Hence the utility was asked to submit the detail procedure, which is still awaited. The detail procedure shall be made effective only after consultation with affected parties and after the due regulatory process and approval of the Commission.

(B) Second issue is regarding review of tariff order 2011-12. It is pertinent to mention that an appeal has been preferred by the licensee before the Hon'ble APTEL. As of now, tariff order of

2012-13 has also been passed. Therefore, the Commission is in the opinion that it may not be possible to review the tariff order 2011-12 at this stage. Otherwise, also considering the provisions of Regulations 23 of the CSERC (Conduct of Business) Regulations 2009, the request made for review of tariff order for FY 2011-12 cannot be considered.

(C) The third issue is regarding refund of transmission charges collected by SLDC for schedule cleared prior to 09.04.2011. It is to be noted that the tariff order has to be passed on an annual basis. Tariff determined in Tariff order 2010-11 is effective from 09.04.2011. Tariff for supply of power by CSPGCL to CSPDCL is effective from 09.04.2011. The retail consumers of the State are required to pay tariff as per latest tariff order. The transmission charges payable by CSPDCL to CSPTCL for long-term use were revised from 09.04.2011. So, the plea of Petitioner that short term power scheduled before 09.04.2011, for short term power transactions after 09.04.2011 shall not be revised, does not appear reasonable.

When the power was scheduled before 09.04.2011, tariff determination was already under process. It is an annual exercise and like all other users of the State Grid, Short-term Open Access customers using State Grid shall also be required to pay Open Access Charges as determined by the State Commission from time to time.

(D) The Fourth Issue is regarding review of Open Access Regulations, 2011. The Commission is likely to review the revised Open Access Regulations, 2011. The Regulations may

be finalised after due regulatory process and cannot be dealt with in this Petition.

8. *In view of the above observations, we close the case only with a direction to Respondent No.2 i.e. SLDC that it should submit the draft of the detailed procedure as required under Regulation 42 of the CSERC (Connectivity and Intrastate Open Access) Regulations, 2011 at the earliest possible.”*

10. The State Commission in the impugned order gave the following reasons for rejecting the claim of the Appellant:

(a) The Appellant is required to pay intra-State Open Access charges as determined by the State Commission as per tariff orders passed annually by the State Commission.

(b) Transmission tariff determined in tariff order dated 31.3.2011 is effective from 09.04.2011 and this tariff is effective for transmission of power taking place after 09.04.2011 i.e. in prospective manner. Therefore, this is not retrospective revision of tariff.

(c) Tariff Order is applicable to all across the board inclusive of Chhattisgarh State Power Distribution Company Ltd., (CSPDCL).

(d) When the power was scheduled before 09.04.2011, tariff determination was already under process. It is an annual exercise and like all other users of the State Grid, Short Term Open access

customers using State Grid shall also be required to pay open access charges as determined by the State Commission from time to time.

(e) Review of the Tariff Order dated 31.3.2011 at this belated stage cannot be done. Otherwise also considering Regulation 23 of the CSERC (Conduct of Business) Regulations, the review of the tariff order dated 31.3.2011 cannot be done.

11. Keeping in mind the above observations and findings of the State Commission, we shall now discuss the main issues raised in this Appeal.
12. The main point which arises for consideration in this Appeal is whether the Appellant being a Generator, which exports about 170 MW of power on Short Term basis through Inter-State Open Access is liable to pay transmission charges in accordance with the tariff order dated 31.3.2011 issued in pursuant to the Chhattisgarh State Electricity Regulatory Commission (Connectivity and Intra State Open Access) Regulations, 2011 w.e.f. 9.4.2011 from which this tariff is applicable.
13. According to the Appellant, the Appellant is not liable to pay Transmission Charges as the same is against the provisions of the Central Commission's Open Access Regulations, 2008 and as such, the State Commission has no jurisdiction

to decide the issue and the Central Commission alone as per the Central Commission's Regulations, 2008 would be competent to decide the issue.

14. It is further case of the Appellant that since the scheduling was done much in advance prior to 9.4.2011, the Appellant is liable to pay the Transmission Charges as existed on the date of the scheduling i.e. transmission charges as specified by the Central Commission in Regulation 16 of the Central Commission's Open Access Regulations, 2008. Apart from Regulations 16, the Appellant also relied upon Regulations 9 of the Central Commission (Procedure for Advance Scheduling for Bilateral Transactions) Regulations, 2008.
15. At the outset, it shall be stated that u/s 79 (1) (c) & (d) of the Electricity Act, 2003, it is the Central Commission who is responsible for regulating Inter-State transmission of electricity and determining the tariff for the same. U/S 86 (1) (a) (c) of the Electricity Act, 2008, it is the function of the State Commission who is to determine the tariff for intra-State transmission and facilitate intra-State transmission of electricity. Admittedly, the tariff applicable in the present case is intra-State Transmission tariff.
16. As mentioned earlier, the Appellant relies upon both Regulations 9 and 16 of the Central Open Access Regulations, 2008. Regulation 9 deals with procedure for

advance scheduling for bilateral transactions. It provides for advance scheduling for bilateral transaction wherein the application for Inter-State transaction could be submitted to the nodal agency upto the fourth month from the month of the application and the nodal agency has to convey its acceptance or otherwise to the applicant latest by the fifth day of the second month. The Regulation 9 only deals with advance scheduling and does not deal with the transmission tariff applicable to Inter-State transmission of electricity.

17. Regulation 16 of the Central Open Access Regulations, 2008 deals with the provisions pertaining to Inter-State transmission charges applicable to bilateral Inter-State transmission and Inter-State transactions wherein the Intra-State Utilities and Intra-State network are involved with certain riders.
18. Let us refer to Regulation 16 of the Central Commission Regulations, 2008 which reads as under:

“Transmission Charges

16. (1) In case of bilateral transactions, the transmission charges at the rate specified hereunder shall be payable by the short-term customer for the energy approved for transmission at the point or points of injection:

<i>Type of Transaction</i>	<i>Transmission charges(Total) (Rs./MWh)</i>
<i>(a) Bilateral, intra-regional</i>	<i>80</i>
<i>(b) Bilateral, between adjacent regions</i>	<i>160</i>

(c) *Bilateral, wheeling through one or more intervening regions* 90

(2) In case of the collective transactions, transmission charges at the rate of Rs. 100/MWh for energy approved for transmission separately for each point of injection and for each point of drawal, shall be payable.

(3) The intra-State entities shall additionally pay transmission charges for use of the State network as determined by the respective State Commission in addition to the charges specified under clauses(1) and (2):

Provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable at the rate of Rs.80/MWh for the electricity transmitted:

Provided further that non-fixation of the transmission charges by the State Commission for use of the State network shall not be a ground for refusal of short-term open access:

Provided also that the transmission charges payable for use of the State Network shall be conveyed to the Regional Load Dispatch Centre concerned who shall display these rates on its website:

Provided also that transmission charges for use of the State network shall not be revised retrospectively”

19. On perusal of the Regulation 16 (3) along with the provision of Section 86 of the Act, 2003, it is evident that Regulations

only provide stop gap arrangements for transmission charges for Intra-State transmission and applicable only till such time the Intra-State transmission tariff is not determined by the State Commission.

20. In other words, the first proviso of Regulation 16 (3) specifying transmission charges for Intra-State transmission system lost its significance as soon as the Intra-State transmission tariff is determined by the State Commission. In the present case, the Intra-State transmission tariff has been determined by the State Commission through MYT tariff order dated 31.3.2011 which came into force on 9.4.2011. Under this order, the Intra State entity undertaking transmission of power w.e.f. 9.4.2011 is required to recover transmission charges as determined by the State Commission and not by the Central Commission's Regulations 2008.

21. The Appellant heavily relied upon the last proviso of Section 16. It speaks only about the bar of retrospective revision of the tariff. In other words, it means that after the transactions have taken place, the transmission charges shall not be revised with retrospective effect. This provision would not apply to the present case since the charges are made effective only from 9.4.2011 i.e. prospectively. Advance scheduling does not mean that transactions are concluded.

It is only about booking of the transmission corridor for the transaction.

22. The tariff determination is an annual exercise. Every year, the tariff for transmission and wheeling is likely to change. The effect of increase or decrease is based on annual basis.
23. It is the contention of the Appellant that the Chhattisgarh State Commission (Connectivity and Intra-State Open Access) Regulations, 2011 could be implemented only after the detailed procedure as mentioned in Regulation 42 of the State Commission's Regulation, 2011 were approved. This contention is misplaced. The Regulation 42 speaks of the detailed procedure for implementation of Intra-State Open Access **and not Inter-State Open Access.**
24. In this context, it would be worthwhile to refer to the relevant provisions of the State Commission's Regulations 2011. They are as follows:

"2. Extent of Application

These regulations shall apply to open access customers for use of intrastate transmission system and/or the distribution systems of licensees in the State, including such system when it is used in conjunction with interstate transmission system".

Regulation 4 deals with the Scope of the CSERC Regulations, 2011:

These Regulations, after they come into force, shall be applicable to the grant of connectivity to the State grid,

use of intra-State transmission system and/or distribution system including such system when it is used in conjunction with inter-state transmission system for long-term open access, medium-term open access and short-term open access,

Provided.....”

“5. Eligibility for open access

(1) Subject to the provisions of these regulations, intra-State users or an applicant seeking open access for one MW and above shall be eligible for open access to the intra-state transmission system of the STU and/or any other transmission licensee and/or distribution system of distribution licensee.

(2) Such open access shall be available for use by an open access customer on payment of such charges as may be determined by the Commission from time to time.

(3).....

(4).....

(5).....

“32. Inter-State open access

Notwithstanding anything contained in above Regulations, procedure for inter-State short- term Open Access shall be as per Central Electricity Regulatory Commission (Open Access in inter-State Transmission) Regulations, 2008, or its statutory re-enactments, as amended from time to time.

Provided further that all applicants intending to use the State grid for short-term inter-State open access shall be required to fulfil the eligibility criteria as specified under Regulation 5 of these Regulation and while submitting application for short-term inter-State open access shall follow Regulation 12(2) of these Regulation.”

“Charges for using State Grid

33. Open Access Charges

The licensee/SLDC providing open access shall levy only such fees and/or charges as specified by the Commission from time to time. The principles of determination of the charges shall be as under.

(1) Transmission Charges –

The transmission charges for use of the transmission system of the STU/ transmission licensee for intra-state transmission shall be regulated as under:

(a) The transmission charges for use of the intra-State transmission system shall be recovered from the long-term open access customers and the medium-term open access customers in accordance with terms and conditions of tariff specified by the Commission from time to time. These charges shall be as determined by the Commission under section 62(1)(b) of the Act, and shall be applicable as per the tariff order issued by the Commission from time to time. These charges shall be shared by the long-term open access customers and medium-term open access customers as per allotted capacity proportionately.

.....

(b) The transmission charges shall be payable by the short-term open access customer for the energy approved /contracted for bilateral transaction at the point or points of injection. The energy approved shall be computed by considering the reserved capacity for bilateral transaction. The transmission charges payable by a short-term open access customer for the use of intrastate transmission system shall be

calculated in accordance with the following methodology:

.....

(c) The revenue thus earned from the short-term open access customers by the STU/transmission licensee for bilateral transaction and collective transaction in a month shall be directly disbursed to the long term and medium term customers to reduce the transmission charges of the long-term and medium term open access customers for the successive months in proportion to monthly charges payable to them. The STU/ transmission licensee shall maintain separate account for the revenue earned from short-term customers and shall submit it to the Commission.

“42. Detailed Procedure for implementation

(1) Subject to the provisions of these regulations, the State Transmission Utility after consultation with distribution licensee and SLDC shall submit the detailed procedure within 60 days of notification of these regulations in the Official Gazette to the Commission for approval. The detail procedure shall be approved after inviting suggestion/ comments from all the affected parties for implementation.

.....”

25. The above provisions of the State Commission's Regulations 2011 have been framed for use of Intra State transmission system or the Distribution Systems of the licensees in the State. It does not in any manner transgress upon the Central Commission's Open Access Regulations, 2008.

- 26.** According to learned Counsel for the State Commission, the additional criteria specified in the State Commission's Regulations, 2011 is to prevent misuse of State Grid and as such it does not go contrary to the Central Commission's Regulations in any way. We find substance in this submission.
- 27.** According to the Appellant for the purpose of payment of transmission charges for bilateral transactions under short term inter-State Open Access, the annual tariff orders of the State Commission have been applied in a manner that there is a retrospective levy and collection of transmission charges for using the transmission network of the State while undertaking inter-State transmission, though this is in contravention of the Central Commission's Open Access Regulations, 2008 since the 2008 Regulations categorically prohibit retrospective levy of the transmission charges on transactions undertaken through Short Term Open Access by scheduling them in advance.
- 28.** The controversy in this Appeal relates to the transmission charges levied on the Appellant for Open Access transactions undertaken in the months of May, June and July, 2011 by using the State Grid.
- 29.** Transmission of electricity is an activity which falls within the jurisdiction of both the Central Commission and the State

Commission under the Act, 2003. Both the Central and State Commissions are competent to frame their respective Regulations in that behalf. Open Access in transmission is also an incident falling under the respective jurisdiction of both these Commissions. As such, both are competent to frame Open Access Regulations within their respective areas of jurisdiction.

30. Central Commission framed the Inter-state Open Access Regulations in 2008. The State Commission has framed the Intra-State Open Access Regulations, 2005 as replaced by State Commission Intra-State Open Access Regulations, 2011.

31. The definition for the term “Inter-State Transmission System” is provided in Section 2(36) of the 2003 Act which reads as under:

(i) *Any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;*

(ii) ***The conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such Inter-State transmission of electricity:***

(iii)”

32. The perusal of sub clause (ii) above shows that inter-State transmission may involve conveyance of electricity across

some intervening States. There may also be conveyance within the said intervening States incidental to such inter-State transmission. In other words the inter-State transmission may also involve conveyance within and intervening State an incident to inter-State transmission. However, if there is a conflict between the Central Commission's and State Commission's Regulations, the Central Commission's Regulations will prevail over the State Commission's Regulations.

- 33.** Thus, it is evident that 2008 Regulations contain provisions regarding concurrence of State Load Dispatch Centre when the proposed bilateral transaction has an intra-State utility as a buyer or a seller. 2011 Regulations of the State Commission also state that they would apply to open access customer for use of intra-State transmission system including such a system when it is used in conjunction with inter-State transmission system.
- 34.** The question then arises is this : "which are the two Regulations referred to above occupying the same field of inter State transmission under Short Term Open access are to govern bilateral inter State transaction?". The answer to this question is found available in Regulation 32 of 2011 Regulations. This Regulation 2011 lays down that notwithstanding the provisions of the Regulations, the procedure for inter State Short Term Open Access is to be

followed as per the Central Commission's Regulations except that when an Applicant is intending to use the State Grid for Short Term inter State Open Access.

35. Thus, the legislative field is clearly given to the Central Commission so far as the procedure for inter-State short term open access is concerned and to the extent that the State Grid is intended to be used in the procedural requirements applicable to the users of the State transmission network is made applicable. This is in consonance of the scheme of the inter-State transmission system under the 2003 Act. The procedure laid down in 2008 Regulations is therefore, the governing procedure which is relevant in the present case.

36. The procedure prescribed under the 2008 Regulations for undertaking Short Term Open Access Transaction is given as follows:

- (i) An open access customer intending to avail open access for use of transmission line or associated facilities for such lines on inter-State transmission system is required to make an application to the nodal agency in accordance with the Regulations (Regulation 6 (1)). Such an application is to contain details such as names and location of supplier and buyer, contracted power to be scheduled etc.,

(ii) Wherever the proposed bilateral transaction has a State utility or an intra-State utility as a buyer or seller, concurrence of the State Load Dispatch Centre is to be obtained in advance and submitted along with the application to the nodal agency (Regulation 8(1)).

(iii) Bilateral transactions under Short Term Open Access are permitted to be scheduled in advance up to a period of four months and an application for such advance scheduling is to be made to the nodal agency in the manner set out in Regulation 9. When the nodal agency accepts the application so made, the transmission corridor as also the bilateral transaction to be undertaken, stands booked for the quantum of power stated in the application to be conveyed under Short Term Open Access (the “contracted power”);

(iv) Application for grant of Open Access during the first month are to be considered on first come first serve basis and such transactions are to be scheduled subject to availability of the required transmission capacity (Regulation 11 (1)).

(v) The open access schedules that have been accepted by the nodal agency in advance can be cancelled or revised downward by the Applicant by giving a notice in the prescribed manner and in such

an event, the transmission charges are also payable in accordance with the revised schedule (Regulation 14). The contracted energy can thus be revised or cancelled at the behest of the applicant;

(vi) When for the reason of transmission constraints or to maintain grid security it becomes necessary to curtail power flow on a transmission corridor, the transaction already scheduled may be curtailed in the manner decided by Regional Load Dispatch Centre (RLDC) if in its opinion such curtailment is likely to release the transmission constraints and is likely to improve grid security. In such a case, the transmission charges are payable pro-rata in accordance with the curtailed schedule (Regulation 15(1), (3)). In this manner, the energy scheduled in advance can also be curtailed by RLDC in view of system constraints or in the interest of grid security;

(vii) In case of bilateral transaction for use of the Inter State transmission system, the transmission charges at the rates specified in the Regulations are payable by the Applicant for the energy approved (as opposed to energy contracted) for transmission at the points of injection (Regulation 16 (1)).

(viii) Intra-State entities shall pay the transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges for use of Inter-State transmission system as specified in Regulation 16(1)(Regulation 16(3)). However, in case the State Commission has not determined the transmission charges for the use of intra-state network, the charges at the rate as specified in the first proviso of Section 16(3) will be payable and non-fixation of transmission charges by State Commission for use of State network shall not be a ground for refusal of short term open access.

37. From the perusal of the above procedure, contemplated in 2008 Regulations, it has become evident that when an application for advance scheduling is accepted, all that happens is that the transmission corridor for the transaction requested for by the Applicant is booked. The quantum of energy to flow under the transactions is subject to various contingent factors which may revise the contracted quantum. Ultimately, the charges are to be paid for the energy which is approved for transmission. There is also no conflict in the Regulations of the State Commission and the Central Commission.

38. The fundamental issue underlying the present controversy namely the applicable transmission charges between the

parities is applicable transmission charges payable for use of State network during the course of Inter State transmission under Short Term Open Access.

39. In this context, Regulation 16 (3) is relevant. The same is reproduced below:

“(3) The intra-State entities shall pay transmission charges for use of the State network as fixed by the respective State Commission in addition to the charges specified under Clause (1) and(2):

Provided that in case the State Commission has not determined the transmission charges, the charges for use of respective State network shall be payable for the energy approved at the rate of Rs.80/MWh for the electricity transmitted:

Provided further that non-fixation of transmission charges by the State Commission for use of the State network shall not be a ground for refusal of short – term open access:

Provided further that transmission charges for use of the State network shall be conveyed to the Regional Load Despatch Centre concerned for display these rates on its web site:

Provided also that transmission charges payable for use of the State network shall not be revised with retrospective effect”.

40. In terms of sub clause (3), intra-State entities while undertaking bilateral inter-State Open Access transmission of electricity under short term are required to additionally pay

transmission charges for use of the State network as determined by the respective State Commission.

41. The term intra State entity is defined in the Regulations. It means a person whose metering and energy account is done by the State Load Dispatch Centre or by any authorised State Utility. In this case, the Appellant is one such intra-State entity. As such, when undertaking inter-State transaction under Short Term Open Access, it is required to additionally pay transmission charges for use of the State network as determined by the State Commission. Transmission charges are fixed by the State Commission under its annual tariff orders. This means that the Appellant is required to pay such transmission charges for use of State network as are determined by the State Commission under its annual tariff orders in force.

42. As indicated earlier, the Regulation 16 (3) is followed by 4 provisos. They are as follows:

(a) In case, the State Commission has not determined the transmission charges, the charges for use of State network are payable at the rate of Rs.80/MWh for the electricity transmitted.

(b) Non-fixation of the transmission charges by the State Commission for use of the State network shall not be a ground for refusal of short-term open access.

(c) The transmission charges for use of State network are to be intimated to the Regional Load Dispatch Centre concerned for display on its website;

(d) Transmission charges are not to be revised with retrospective effect.

43. Thus, this Regulation mandates that the intra-State Utilities like the Appellant to pay transmission charges for use of State network and those charges are to be determined by the State Commission in its tariff order.

44. While reading this Regulation namely 16(3) altogether with its 4 provisos, 2 principles of statutory interpretation have to be kept in mind.

(a) The statute must be read as a whole in its context. When the question arises as to the meaning of a certain provision in a statute, it is proper to read its provision in its context. The context here mean, (1) the statute as a whole (2) the previous State of law (3) other Statutes in pari-materia (4) the general scope of the statute and (5) the mischief it was intended to remedy. Every clause of a statute should be construed with reference to the context and other clauses of the Act so as to make a constant enactment of the whole statute relating to the subject matter. To ascertain the meaning of a clause in a statute, the Court shall look at

the whole statute, at what precedes and what succeeds and not merely at the clause itself. How far and to what extent each part of the statute influences the meaning of the other part would be different in each given case;

(b) The normal function of a proviso is to accept something out of the enactment or to qualify something enactment therein but for the proviso would be within the preview of the enactment. When one finds a proviso to a Section the natural presumption is that but for the proviso, the enacting part of the Section would have included the subject matter of the proviso. Thus, a proviso is not to be construed normally as nullifying the enactment or as taking away completely a right conferred by an enactment.

45. Applying these two principles of interpretation, when we look at Regulation 16 (3), the position that emerges is as follows:

(a) Intra-State entities like the Appellant are to pay transmission charges for use of State network as determined by the State Commission in its annual tariff orders.

(b) However, when the State Commission has not determined the transmission charges, the charges for use of State network would be payable for energy approved at the rate of Rs.80/MWh.

(c) The first proviso covers the case where transmission charges have not been determined at all by the State Commission. This situation would not apply to the present case. As such, the first proviso does not become operative.

(d) Non-fixation of the transmission charges by the State Commission for use of the State network shall not be ground for refusal of short-term open access. The second proviso covers the condition when the State Commission has not determined the charges for State network. In such a condition the charges as decided by the Central Commission in the first proviso shall be applicable for use of the State network.

(e) The intra-State entities are to pay transmission charges for use of the State network as determined by the State Commission in its annual tariff orders. However, such, charges are to be intimated to the Regional Load Dispatch Centre for display on its website.

(f) The third proviso, thus remains operative at all times during the inter-State Open Access transactions by an intra-State entity. The display of the transmission charges on the website of Regional Load Dispatch Centre is relevant in the context of the Applicant who is

scheduling a bilateral transaction. The Applicant is required to pay Open Access charges including transmission charges when his application for advance scheduling is approved.

(g) Therefore, operation of the third proviso does not reach to affect the bilateral transactions that has already scheduled in the previous tariff year. Since the transaction in question in the present Appeal has already been scheduled in advance in the previous tariff year, the delayed notification of transmission charges for the next tariff year to the Regional Load Dispatch Centre on 8.6.2011 is of no consequence as it does not affect the transaction forming the subject matter of the present Appeal.

(h) As indicated above, the intra-State entities are to pay transmission charges for use of State network as determined by the State Commission. However, the said transmission charges are not to be revised with retrospective effect. It means that whatever transmission charges are applicable at the time when the actual transaction and actual use of the transmission system is taking place, they are payable by the open access customer. This applicable transmission charges for the energy approved for the transmission are not to be revised retrospectively so as

to affect transaction having already taken place. The prohibition for retrospectively in the 4th proviso of Regulation 16 (3) is to be viewed in this context only.

(i) In any case, advance scheduling leads to booking of the transmission corridor, for the approved quantum of electricity but the actual electricity ultimately flowing under the transaction may vary on account of various contingency factors.

46. The above referred principles would reveal the scheme of the payment of the transmission charges as set out in the Regulation. In fact, on different occasions when transmission charges have been reduced under a notified tariff order, the Appellant has sought for refund of the transmission charges already paid by it. Admittedly, the difference in transmission charges has been refunded by the 1st Respondent (Transmission Company) to the Appellant. Having accepted the refund in acknowledgement of the manner in which Regulation 16 (3) operates, the Appellant cannot now be heard to contend that the additional demand by the transmission company on account of upward determination of transmission charges by the State Commission.

47. As pointed out the by the learned Counsel appearing for the State Commission, the Appellant has tried to re-open the

tariff order dated 31.3.2011 which has already reached the finality through the Petition No.49 of 2011.

48. It is settled principle of law that once an order is passed, the same can be re-opened only by way of review before the same authority or by way of an Appeal before the higher authority. The Appellant without taking recourse to any one of the above means, is indirectly trying to re-open the MYT tariff dated 31.3.2011 which is not permissible as per Regulation the State Commission.

49. Summary of Our Findings:

- i) The Appellant has to pay the transmission charges for use of the intra-state transmission system at the rate determined by the State Commission by its transmission tariff order dated 31.3.2011 with effect from 9.4.2011.**
- ii) The Central Commission's Open Access Regulations provide for payment of transmission charges for use of the State network as fixed by the State Commission in addition to the charges specified for the inter-state transmission system. The first proviso of Regulation 16(3) regarding the charges fixed by the Central Commission for use of State network shall be applicable only under the**

condition when the charges for the State network are not determined by the State Commission.

- iii) Advance scheduling for bilateral transaction and payment of transmission charges in advance are only to facilitate advance booking of the transmission corridor. The scheduling is also subjected to revision or curtailment as per the Regulations.
- iv) If the transmission charges for Intra-State transmission system are revised by the State Commission after the advance scheduling made by an applicant with the nodal agency for inter-state transmission, but before the date of actual use of the intra-state transmission, the difference in the transmission charges as applicable on the dates of actual use and as paid when the advance scheduling was made has to be paid by the user of the transmission system. However, the transmission charges can not be revised by the State Commission after the actual use of the Intra-State transmission system as per the fourth proviso to Section 16(3) of the Central Commission's open access Regulations, 2008. In this case there is no retrospective revision of the intra-State transmission charges by the State

Commission. Therefore, the transmission charges for intra-State transmission as applicable on the date of actual use of transmission system have to be paid for by the Appellant.

- v) There is no inconsistency between the Central Commission's Regulations, 2008 and the State Commission's Regulations, 2011 for open access.**
- vi) There is no violation of procedure as laid down in the Central Commission's Regulation, 2008 in the present case.**

50. In view of the above findings, we find no merits in the Appeal. Hence, the same is dismissed. However, there is no order to costs.

51. Pronounced in the open court on 13th day of November, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 13th Nov. 2013

✓ ~~REPORTABLE/NON-REPORTABLE~~