

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

1. **Dr. Pramod Deo, Chairperson**
2. **Shri Bhanu Bhushan, Member**
3. **Shri R. Krishnamoorthy, Member**

Petition No. 10/2000

In the matter of

Petition for fixation of wheeling charges. .

And in the matter of

Madhya Pradesh Electricity Board, Jabalpur

..Petitioner

Vs

Grid Corporation of Orissa Limited, Bhubaneswar

..Respondent

The following were present:

1. Shri Sakesh Kumar, Advocate, MPSEB
2. Shri Deepak Srivastava, MPSEB
3. Shri V.R. Reddy, Senior Advocate, GRIDCO
4. Shri R.K.Mehta, Advocate, GRIDCO
5. Shri Premjit, Advocate, GRIDCO
6. Shri Abhay Yadav, Advocate, GRIDCO
7. Shri Sunil Murarka, Advocate, GRIDCO

**ORDER
(DATE OF HEARING: 12.8.2008)**

This petition was filed by the petitioner seeking direction to the respondent to accept the wheeling charges @ 10 paise/kWh determined by the Central Electricity Authority (hereinafter "CEA") in December 1997 for transmission of power on the transmission system owned by the respondent, to be enforced from 1.1.1998.

2. The Commission, vide its order dated 23.10.2000 had directed that the wheeling charges for conveyance of electricity through the transmission system owned by the respondent were payable by the petitioner @ 10 paise/kWh with effect from 1.1.1998, as decided by the CEA. The respondent filed an appeal before the Hon`ble High Court of Orissa against the said order dated 23.10.2000. The Hon`ble High Court by its order dated 6.12.2007 set aside the Commission's order dated 23.10.2000 and remanded the matter to the Commission for fresh consideration of the limited issue, whether the wheeling charges were to remain at 10 paise/kWh or were to be enhanced upto 17.5 paise/kWh. For facility of reference, we are extracting hereunder the relevant portion of the order of the Hon`ble High Court:

“Considering the submissions made by learned counsel for both the parties, in my considered view, the pleadings of the respective parties as well as the supporting documents relating to the rival contention/claims raised by the learned counsel for both the parties, have to be gone into in detail for arriving at a just conclusion/decision in the matter. While exercising its appellate jurisdiction, it may not be possible for this court to go beyond the material already available on record and also it may not be possible to take a final decision in the matter relating to fixation of price of wheeling charges, keeping in view the rival contentions made by the learned counsel for both the parties with regard to so called agreements etc. which are disputed questions of fact. As such the Central Electricity Regulatory Commission (CERC), which is an expert body as regards the dispute in question, shall be the better forum/authority to decide the matter, after going through all these disputed questions of fact.

In view of the above, it will be just and proper to remit back the matter to the Central Electricity Regulatory Commission (CERC) for adjudication of the dispute with regard to determination of the price towards wheeling charges per KWH afresh so that the matter can be finally decided there.

As such keeping in view the fact that Madhya Pradesh Power Trading Company Ltd has not filed any appeal challenging the order dated 23.10.2000 in fixing the price of wheeling charges at the rate of 10 paise per KWH, order dated 23.10.2000 is set aside only for the purpose of reconsideration of the dispute to the extent:

“as to whether the wheeling charges shall remain confined to 10 paise per KWH or it will be enhanced for a price may be up to 17.5 paise per KWH.”

and accordingly, the matter is remitted back to the CERC for fresh adjudication and to take a final decision in the matter by giving a chance of hearing to both the parties, on filing of their respective documents in support of their contention, at the time of hearing.”

3. Pursuant to the order of the Hon'ble High Court, the proceedings have been revived. The Commission vide its order dated 13.3.2008 directed the parties to file additional documents, if any. Certain documents have been filed by the parties.

4. In the first instance, we recapitulate the basic facts necessary for adjudication of the dispute. In May 1997, the petitioner had been allocated by the Central Government power from the NTPC generating stations located in Eastern Region. Prior thereto when the matter of allocation of power to the petitioner was under consideration, in a meeting held in February 1997, it was decided that the petitioner was required to pay wheeling charges to the respondent, in addition to the transmission charges payable to PGCIL, for use of the respondent's transmission network for conveyance of power to the petitioner. In the said meeting held during February 1997, the petitioner is reported to have suggested to levy wheeling charges on per unit basis. In that meeting, it was indicated by the respondent that wheeling charges were payable @ 12% of the energy charges in accordance with the notification of Orissa Government, but agreed to charge @ 10% of the energy charges, subject to concurrence of its Board of Directors. In the meeting, the respondent is also said to have explained the difficulties in releasing the power in inter-connected mode and also expressed its inability to extend power to the petitioner by isolating one of the generating units at Ib TPS owned by Orissa Power Generation Corporation Ltd. (OPGC) and running it in parallel with the petitioner's system. The respondent requested the petitioner to avail power in radial mode, on which the

petitioner is said to have expressed its reservations and difficulties and insisted that isolation of one generating unit of Ib TPS was the only viable alternative. In this manner, there was no agreement on the rate of wheeling charges and the mode of transmission.

5. After the meeting, the petitioner by its FAX message dated 4.4.1997, offered to the respondent to pay wheeling charges @ 17.5 paise/kWh, the rate charged by the respondent from APSEB for conveyance of power, and sought a confirmation of the rate. The respondent in its reply dated 9.4.1997 informed the petitioner that subsequent to the meeting held in February 1997, the Orissa Electricity Regulatory Commission (OERC) by its order dated 12.3.1997, applicable from 1.4.1997, had decided that the transmission charges for the respondent's system were payable @ 40 paise/kWh plus the transmission losses @ 7½% and that any rate other than that decided by the OERC was not acceptable.

6. The CEA was also seized of this issue. The CEA by its letter dated 28.4.1997 informed the respondent that the former's studies had revealed that the transmission charges (including transmission losses) worked out to be in the range of 1 paisa/kWh to 7 paise/kWh, and proposed to levy wheeling charges @ 10 paise/kWh, with a view to seeking the respondent's concurrence to the proposal. In reply, by its letter dated 3.5.1997, the respondent pleaded with the CEA to fix the wheeling charges for use of its transmission services by the petitioner in a fair manner, while pointing out that the principle adopted by the Central Government for fixing the transmission charges for the transmission system of PGCIL could be applied while fixing the wheeling charges for use of to the respondent's transmission system by the petitioner.

7. It appears that the petitioner by its FAX message dated 5.5.1997, again approached the respondent to agree to the wheeling charges @ 17.5 paise/kWh. In response thereto, the respondent by its letter dated 6.5.1997 agreed to accept payment of wheeling charges @ 17.5 paise/kWh provisionally but also confirmed that the final decision of the CEA/MOP on the issue was acceptable to it. Based on the above communication from the respondent, the petitioner had opened LC on 9.5.1997 in favour of the respondent and communicated to the respondent vide its letter dated 21.8.1997 as follows:

“Accordingly, irrevocable Letter of Credit for a sum of Rs 2 crores has been opened on 9.5.1997 by MPEB in favour of GRIDCO for payment of wheeling charges for availing supply from NTPC’s stations of Eastern Region through GRIDCO transmission system @ 17.5 paise/unit subject to final decision by CEA, New Delhi.”

8. Thereafter, the respondent started billing the petitioner @ 17.5 paise/kWh, offered by the latter in its FAX messages dated 4.4.1997 and 5.5.1997 on provisional basis. The respondent, however, continued its efforts to persuade the CEA to fix the wheeling charges at higher rate and there is lot of documentary evidence on record in this regard.

9. The CEA by its subsequent letter dated 27.5.1997 confirmed that the involvement (wheeling) charges were “decided at 10 paise/kWh net to be paid to GRIDCO”. The rate decided was said to be based on further studies carried out by the CEA and the EREB, with which the officers of the respondent were also associated. The respondent pursued the matter with the CEA with full vigour and force to agree to the higher rate or at least rate of 17.5 paise/kWh proposed by the petitioner. The issue was finally discussed in a meeting held on 16.12.1997, chaired by the Chairman, CEA, whereat it was pointed out that wheeling charges of 17.5

paise/kWh demanded by the respondent were on the higher side. In that meeting Member (G&O), CEA pointed out that the wheeling charges of 10 paise/kWh already decided, included transmission charges @ 2.5 paise/kWh and transmission losses @ 7.5 paise/kWh. The representative of the respondent, however, reiterated that the OERC had decided the charges of 40 paise/kWh for transmission and that it would not be possible to agree to the wheeling charges at a rate less than 17.5 paise/kWh. The petitioner's case is based on the deliberations of the meeting held on 16.12.1997. In the meeting it was also decided that the matter regarding demand of the respondent for wheeling charges @ 17.5 paise/kWh payable to the respondent would be taken up by CEA/MOP with Government of Orissa. There is nothing on record to show whether the matter was taken with the State Government and if so, what the outcome was.

10. Taking note of the above broad facts, the Commission by its order dated 23.10.2000 decided the rate of wheeling charges at 10 paise/kWh.

11. The case of the petitioner is that rate of wheeling charges decided by the CEA after proper studies, had become final as it was not challenged by the respondent before any forum and the present petition seeks enforcement of the decision of the CEA. It was urged on behalf of the petitioner that payment of wheeling charges @ 17.5 paise/kWh conveyed by it was not agreed to by the respondent who recovered the charges at this rate only as a provisional measure with the explicit understanding that the charges decided by the CEA/Ministry of Power were finally applicable. Learned counsel for the petitioner contended that inasmuch as the respondent had not accepted the charge @ 17.5 paise/kWh, it could not seek to bind the petitioner to this rate which was acted upon by the respondent as an interim arrangement and

provisionally. On the scope of the present proceedings based on the remand order of the Hon'ble High Court, he contended that there was no warrant for taking a view different from that taken earlier through a reasoned and speaking order based on the complete analysis and appreciation of evidence on record. He emphasized the Commission should reiterate the earlier decision, without further examination.

12. Refuting the petitioner's claim, the learned senior counsel for the respondent urged that the CEA had no statutory power or jurisdiction under the Electricity (Supply) Act, 1948 or any other law in force, to determine the wheeling charges. He argued that the question of filing a petition for enforcement of the decision of the CEA was, therefore, misconceived. He pointed out that the petitioner through its FAX message dated 4.4.1997 had agreed to pay the wheeling charges @ 17.5 paise/kWh as fixed for conveyance of power to APSEB. He further submitted that the petitioner through its subsequent FAX message dated 5.5.1997 again requested for transmission of power with wheeling charges @ 17.5 paise/kWh, whereupon the respondent through its letter dated 6.5.1997 confirmed conveyance of power through its network. The learned senior counsel contended that respondent's letter dated 6.5.1997 was addressed in the course of continuing exchange of correspondence between the parties but cannot be said to have resulted in a binding agreement. Refuting the existence of any agreement between the parties, he urged for fresh consideration of the matter, without being influenced by the observations made in order dated 23.10.2000 since set aside by the Hon'ble High Court and sought dismissal of the petition.

13. We have gone through the pleadings and the written submissions and have heard the learned counsel for the parties. Accordingly, we proceed to dispose of the

matter within the framework of the order of the Hon'ble High Court extracted hereinabove. Notwithstanding the petitioner's insistence for summary disposal of the dispute, we proceed to consider the dispute afresh in view of the remand of the matter by the Hon'ble High Court.

14. *Prima facie* the dispute pertains to the period up to 31.3.2001. Thereafter, the Commission had framed and notified terms and conditions of tariff which, *inter alia*, made provisions for computation of wheeling charges for inter-State transmission of electricity.

15. The question that falls for our consideration is whether there was any agreement between the parties in regard to payment of charges @ 17.5 paise/kWh, as claimed by the respondent or, determination of wheeling charges was left to the CEA. Before answering the question it is necessary to take note of the provisions of the Contract Act, 1872. In terms of Clause (a) of Section 2 of the Contract Act, when one person signifies his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to have made a proposal. According to Clause (b), when the person to whom the proposal is made signifies his assent thereto, the proposal is said to have been accepted and it becomes a promise. Section 7 of the Contract Act further lays down that in order to convert a proposal into a promise, the acceptance must be absolute and unqualified and be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. In the light of these provisions of the Contract Act, it has been established that acceptance must be conclusive and a counter-proposal is no acceptance. It is further established that the counter-proposal

which destroys the original proposal and makes it dead is not capable of acceptance, unless renewed.

16. From the evidence available on record it is gathered that the respondent had charged wheeling charges @ 17.5 paise/kWh from APSEB for use of its transmission network. On that basis, the petitioner had offered to pay the wheeling charges at this rate by its FAX message dated 4.4.1997. This offer was not accepted by the respondent, who insisted that the transmission charges were to be paid @ 40 paise/kWh + transmission losses @ 7½% as decided by the OERC for transmission of power within the State. The petitioner again approached the respondent by its FAX message dated 5.5.1997 to pay wheeling charges @ 17.5 paise/kWh, the rate initially offered. The response of the respondent to this offer was to accept the rate of 17.5 paise/kWh as an interim arrangement, and on provisional basis, with a further stipulation that final decision of CEA/MOP in this regard will be acceptable to it. It would thus be seen that the offers made by the petitioner to pay wheeling charges @ 17.5 paise/kWh were rejected by the respondent. On the contrary, the respondent, in its letter dated 9.4.1997 proposed wheeling charges @ 40 paise/kWh + transmission losses @ 7½% as decided by the OERC for intra-State transmission of electricity. This communication of the respondent amounts to making a counter-proposal. On the second occasion, the respondent agreed to accept the wheeling charges @ 17.5 paise/kWh as an interim measure and on provisional basis on the ground that it had communicated its views on the subject to the CEA and categorically informed the petitioner that final decision of the CEA/MOP was acceptable. This itself amounts to rejection of the petitioner's second proposal also since there was no unequivocal acceptance of the petitioner's offer. In the subsequent communications and the

meetings held to resolve the matter, the respondent sought to persuade the authorities to implement the rate offered by the petitioner. It was, however, too late. There is no evidence on record to show that the petitioner offered to pay wheeling charges @ 17.5 paise/kWh after rejection of its offer conveyed by the FAX message dated 5.5.1997. We, therefore, have no hesitation to conclude that there was no binding agreement between the parties in regard to payment of wheeling charges @ 17.5 paise/kWh.

17. This takes us to the second limb of the question, that is, whether or not the parties had agreed to act upon the rate of wheeling charges decided by the CEA. From the facts narrated above, it is observed that the CEA vide its letter dated 28.4.1997 had proposed to levy wheeling charges @ 10 paise/kWh and sought concurrence of the respondent to the proposal. The respondent, not satisfied with the rate proposed by the CEA, again took up the matter with the CEA for reconsideration of its view. In the above circumstances, in response to the petitioner's FAX message dated 5.5.1997, the respondent categorically and unequivocally stated that final decision of CEA/MOP was acceptable to it even though it agreed to provisionally accept the wheeling charges @ 17.5 paise/kWh offered by the petitioner. In the same letter, the respondent advised the petitioner to open Letter of Credit (LC). The petitioner, acting on the advice, opened LC on 9.5.1997. While reporting compliance, the petitioner under its letter dated 21.8.1997 informed the respondent that it had opened irrevocable LC for a sum of Rs.2 crore in favour of the respondent for payment of wheeling charges for availing supply through the respondent's transmission system @ 17.5 paise/kWh, subject to final decision by the CEA. It follows that the respondent's proposal of fixation of wheeling charges by the CEA was

accepted by the petitioner, leading to a firm and enforceable contract. We, therefore, find that the agreement between the parties was to accept the wheeling charges decided by the CEA.

18. The learned senior counsel for the respondent had contended that there was no formal agreement between the parties and only exchange of correspondence took place. This argument of the learned senior counsel does not have any force. It is not necessary that in all cases there should be a formal written agreement. A contract may be concluded through the conduct of the parties. Sub-section (4) of Section 7 of Arbitration and Conciliation Act, 1996 gives statutory recognition to the agreements arrived through exchange of correspondence. It cannot be denied that a binding contract bestowing legal rights can be concluded through the exchange of correspondence. This is what has happened in this case. It was also argued by the respondent that the CEA had no statutory power or jurisdiction under any law to determine the wheeling charges and in the circumstances the question of seeking enforcement of decision of the CEA by the petitioner should not arise. The learned senior counsel referred to certain provisions of the Electricity (Supply) Act, 1948, applicable at the relevant time to lay emphasis on the CEA's functions, which according to the learned senior counsel, did not include power to determine the wheeling charges. We are not impressed by this argument of the learned senior counsel. For deciding the matter before us, it is not necessary for us to examine the question whether or not the CEA had statutory power to fix the wheeling charges. We have just to point out that it was the respondent who insisted on fixation of wheeling charges by the CEA and categorically and unequivocally conveyed it to the petitioner that wheeling charges fixed by the CEA would be accepted. There can be no denial

of the fact that CEA is a technical expert body. Reposing faith in the expertise of the CEA, the parties themselves agreed to accept its decision. The parties, having agreed to the determination of wheeling charges by the CEA, cannot be permitted to repudiate the CEA's decision for the mere fact that it was not meeting the expectations of a party or was not convenient to it. We thus conclude that the parties had authorized the CEA to determine the wheeling charges. The decision of the CEA was not implemented by the respondent. Because the resolution of the dispute is within the jurisdiction of the Commission (a point conceded by the respondent in earlier round of proceedings) it was justified for the petitioner to approach the Commission for implementation of the CEA's decision.

19. Here we may also take note of the fact that in the meeting held on 16.12.1997, it was decided to take up the matter of the respondent's claim for 17.5 paise/kWh with the Government of Orissa. Although there is nothing further on record in that direction we are of the view that the intention was to approach the State Government to persuade or prevail upon the respondent to accept the wheeling charges decided by the CEA.

20. From the plethora of evidence placed on record by the parties it unequivocally follows that the CEA had decided the rate of 10 paise/kWh for use of the respondent's transmission network.

21. It was also argued on behalf of the respondent that initially the petitioner was availing power in the radial mode through 220 kV Budhipadar-Korba-Bhatapara transmission line. But the petitioner represented to the respondent that due to high

frequency, the former was unable to utilize the power drawn in the radial mode and the consumers in the State were protesting and refusing to draw the power. The petitioner requested that its original proposal for running two units of Ib TPS and synchronizing part of Orissa grid with Western grid. The respondent accepted the petitioner's request. It was pointed out by the respondent that it had to suffer losses by acting on the petitioner's insistence, which need to be compensated. In this manner also, the respondent sought to justify the rate of 17.5 paise/kWh. Even this argument of the respondent does not contain any logic. The rate of 10 paise/kWh decided by the CEA was based on techno-economical studies with which the respondent was properly involved. From the documents on record it is seen that the CEA while fixing the wheeling charges @ 10 paise/kWh took into account the losses suffered or likely to be suffered by the respondent. It is significant to note that there has been no physical flow of electricity and the power flow has been taking place through displacement method. In any case, it is not necessary for us to go into the question of losses suffered by the respondent for the reason that the parties had agreed to abide by the CEA's decision on fixation of wheeling charges.

22. In view of the foregoing discussion, we direct that the petitioner shall be liable to pay the wheeling charges @ 10 paise/kWh as decided by the CEA for the period from 1.1.1998 to 31.3.2001. The excess recovery, if any, made by the respondent, shall be refunded in six equal month installments commencing from October 2008. The petition stands disposed of accordingly.

Sd/-
(R. KRISHNAMOORTHY)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(DR. PRAMOD DEO)
CHAIRPERSON

New Delhi dated 30th September 2008