

BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHIPetition No.10/2000Present:

1. Shri S.L. Rao, Chairman
2. Shri D.P. Sinha, Member
3. Shri G.S. Rajamani, Member
4. Shri A.R. Ramanathan, Member

In the matter of

Petition for Fixation of Wheeling Charges

And in the matter of

Madhya Pradesh Electricity Board ...Petitioner

VS

Grid Corporation of Orissa Ltd., ...Respondent

The following were present:

1. Shri Satish Agnihotri, Advocate, MPEB....Petitioner
2. Shri Rohit Singh, Advocate-do-
3. Shri S.P.Degwekar, SE(Comm.), MPEB-do-
4. Shri R.K. Mehta, Advocate, GRIDCO...Respondent
5. Shri N.N.Mahapatra, EE (Comm.), GRIDCO-do-

ORDER**(Date of Hearing 16th August, 2000)**

The petitioner, Madhya Pradesh Electricity Board, has filed this petition seeking a direction to Grid Corporation of Orissa Ltd., the respondent, to accept the wheeling charges @ 10 paise per kwh, as fixed by CEA in December, 1997, for transmission of power on the transmission system owned by the respondent, to be enforced from January, 1998.

2. According to the petitioner, it had been allocated 75 MW of power from NTPC stations in Eastern Region, which has been revised from time to time and at present the allocation in its favour is 300 MW w.e.f. 1.10.99. The petitioner is to pay wheeling charges for use of the respondent's transmission system for transfer of power from the Eastern Region. Initially, the petitioner agreed to make payment of wheeling charges @ 17.5 paise per kwh to the respondent. However, CEA had decided the rate of wheeling charge of 10 paise/kwh, comprising of transmission charge of 2.5 paise/kwh and transmission loss of 7.5 paise/kwh, but the respondent did not agree to a rate below 17.5 paise/kwh. The matter was followed up by the petitioner with CEA. But in view of the insistence of the respondent for payment of wheeling charges @ 17.5 paise/kwh, the issue could not be resolved and the petitioner has been paying the charges @ 17.5 paise/kwh provisionally. Accordingly, CEA finally vide its letter dated 9/20 Aug., 1999, advised the petitioner to take up the matter with the Commission for appropriate decision since in the meantime, the jurisdiction to regulate inter-state transmission tariff was transferred to the Commission. The petitioner has averred that it has been paid wheeling charges of 1 paisa/kwh for use of its transmission system for transfer of surplus power from Eastern Region to Kerala SEB, though the respondent had been paid wheeling charges @ 17.5 paise/kwh by Kerala SEB.

3. The respondent in its reply took a preliminary objection in regard to the Commission's jurisdiction to determine the wheeling charges, since according to the respondent, there existed a special bilateral agreement, whereby the petitioner had agreed to pay wheeling charges @ 17.5 paise/kwh and that the Commission has no jurisdiction to determine wheeling charges for any period prior to 15.5.99. The preliminary objection was later on withdrawn and the learned Counsel for the respondent confined his arguments to the merits of the claim. In view of this, we are not recording our findings on the preliminary objection on the question of jurisdiction.
3. On merits, the respondent has stated that a meeting of officials of MPEB, GRIDCO and EREB was held on 14/15.2.97 to discuss the technical and commercial aspects of transfer of surplus power from Eastern Region. In the said meeting, the respondent demanded the wheeling charges as 12% of the energy charges for the energy imported, but subsequently agreed to consider wheeling charges at 10% of the energy charges, subject to concurrence of its Board. At the said meeting, the petitioner suggested that wheeling charges should be levied on per unit basis, as is being done by PGCIL. The suggestion made by the petitioner was not agreed to by the respondent.
3. Orissa Electricity Regulatory Commission issued an order dated 12.3.97, whereby it levied the transmission charges @ 40 paise per unit plus 7-1/2% transmission loss for wheeling of energy on the respondent's transmission system within the State of Orissa. In view of this decision of Orissa Electricity Regulatory Commission, the respondent informed the petitioner on 9.4.97 that it would not be possible for them to accept any tariff other than that fixed by the Regulatory Commission for transmission of energy to the petitioner. Prior to that on 4.4.97, the petitioner had sent a fax message to the respondent, requesting it to consider levying of wheeling charges of 17.5 paise per unit as had been fixed by it for transfer of surplus power from Eastern Region to APSEB. In the fax message, the petitioner requested for a confirmation of the rate offered. It is the case of the respondent that acting on the offer made by the petitioner, it undertook transmission w.e.f. 19th May, 1997.
3. According to the respondent, Government of India had adopted ***Postage Stamp Method*** for payment of transmission charges to PGCIL and the same principle should apply for calculation of wheeling charges payable to it. CEA, while arriving at rate of 10 paise/kwh, adopted the ***Contract Path Method***. The rate decided by CEA could not be adopted for the purpose of calculation of wheeling charges since the rate arrived at by CEA was as a result of studies in Radial Mode and the transmission was actually undertaken by fragmentation of a portion of the State Grid. It is further averred that while fixing wheeling charges @ 10 paise/kwh, CEA did not take into account the capital employed, O&M charges, interest, ROE, depreciation, etc. Therefore, the wheeling charges fixed by CEA were not acceptable to it. The surplus power was supplied to APSEB, KSEB and TNEB, through the use of transmission system owned by the respondent and the wheeling charges were paid @ 17.5 paise/kwh, the rate agreed to between the Chief Ministers of Orissa and Andhra Pradesh. The respondent has averred that for the purpose of exporting power to the petitioner, the respondent had to synchronise a part of its system with Western Region system, on account of which it faced the operational problems and it resulted in commercial losses. It is averred that CEA had no jurisdiction to determine the wheeling charges, in view of the bilateral agreement. It has prayed for an additional recovery @ 21 paise/kwh since according to the respondent, it is not financially and commercially viable to wheel such power at a rate below 38.5 paise/kwh.
3. An additional affidavit has been filed by the petitioner on 31.7.2000, placing on record a copy of the respondent's letter dated 6.5.97 and certain other documents indicating that final of CEA/MOP on wheeling charges would be acceptable to it. In reply, the respondent has filed a further affidavit on 3.8.2000. The respondent has explained the background of the letter dated 6.5.97 that in writing this letter the respondent's reasonable expectation was that CEA would fix the rate between 17.5 to 40 paise/unit, after taking all relevant factors into consideration and by balancing the interests of both parties. The written submissions have been filed by the parties on conclusion of hearing.
8. One of us (Shri D.P. Sinha, Member) was associated with CEA's decision to fix wheeling charges @ 10 paise/kwh, as Member (Grid & Operations). At the hearing, we enquired from the parties whether any one of them had any objection to his being on the bench hearing the present petition. The parties did not object to his participation in the proceedings.
9. We have considered the rival contentions and perused the documents placed on record by the parties. We have not come across any document to show that the respondent ever conveyed its acceptance to the rate of 17.5 paise/unit offered by the petitioner through the fax message dated 4-4-1997. On the contrary, the respondent through its letter dated 6.5.97 informed the petitioner that final decision of CEA/MOP on the quantum of wheeling charges would be acceptable to it. It was also suggested by the respondent that as an interim arrangement, the petitioner should make provisional payment of 17.5 paise per unit towards transmission charges for use of the respondent's transmission system up to Budhipadar. Accordingly, the petitioner conveyed its acceptance to the respondent through letter dated 21.8.97 to pay wheeling charges @ 17.50 paise per unit, subject to final decision by CEA.

10. It appears that the question of determination of wheeling charges for inter-regional transfer of power from Eastern Region to Western Region was being considered by CEA even before transmission of power to the petitioner was undertaken by the respondent. CEA, through its letter dated 27.5.97, informed the respondent that based on the studies carried out and keeping in view the real time usage of the respondent's transmission system and loss and gains caused by such usage, the wheeling charges were decided at 10 paise per kwh, net to be paid to the respondent.
11. A meeting was held on 16.12.97 by the Chairman, CEA regarding implementation of recommendations of the Committee on High Frequency Operations in the Eastern Region. In the said meeting, a view was expressed that the wheeling charges of 17.5 paise per unit demanded by the respondent were on the higher side. The representative of the respondent informed that the charges @ 17.5 paise per unit were offered based on the agreement between Chief Ministers of Orissa and Andhra Pradesh and that it would not be possible to agree to a lower rate. CEA, however, felt the rate of 10 paise per kwh was reasonable. It was decided that the matter regarding wheeling charges would be taken by CEA/MOP with Government of Orissa.
12. In the light of the above factual matrix, we propose to examine whether there was any agreement between the parties for payment of wheeling charges @ 17.5 paise/kwh. In accordance with provisions of Section 2 of the Indian Contract Act, 1872, when a person signifies to another 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 make a proposal. When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted and a proposal, when accepted becomes a promise. Every promise and every set of promises, forming the consideration for each other, is an agreement. An agreement enforceable by law is a contract.
13. A conjoint reading of the provisions of the Contract Act shows that the parties become bound only after the acceptance of an offer. However, when a counter-offer is made by the offeree, it makes the offer to lapse and the same is not capable of being accepted thereafter. The learned authors, Pollock and Mulla, on Indian Contract Act at page 100 of the 10th Edition have observed as under:

"In English law to make a contract, there must be an offer and unreserved acceptance of the offer. If the offer is rejected, there may be a counter-offer, but that kills the original offer. The offeree cannot revert to the original offer and purport to accept it. Similarly, if the offer is accepted but on another term e.g. of price is introduced, the original offer is destroyed and cannot be accepted unless renewed."

The position is similar in Indian Law.

14. The petitioner, through its fax message, dated 4-4-1997, offered the wheeling charges @ 17.5 paise/kwh and sought a confirmation from the respondent. The respondent, however, does not seem to have conveyed its acceptance to the offer made by the petitioner. But the respondent in its letter dated 6-5-1997, conveyed to the petitioner to make provisional payment of 17.5 paise/kwh towards transmission charges for use of its transmission system and reassured the petitioner that final decision of CEA/MOP would be acceptable to it. The petitioner communicated its acceptance to the proposal made by the respondent in the letter dated 21-8-1997 in the following words:

"Accordingly, irrevocable Letter of Credit for a sum of Rs. 2 crore 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 p/u, subject to final decision by CEA, New Delhi. It may be mentioned here that we have been making payment of wheeling charges to GRIDCO at the rate of 17.5 p/u provisionally."

"The Member (G&O), CEA, vide his letter dated 27.5.1997 conveyed his decision to pay the wheeling charges by MPEB to GRIDCO at the rate of 10 paise/unit. It is desired that GRIDCO vide letter dated 24.6.1997 requested the CEA for review of the decision and allow the rate of 17.5 paise/unit. We have not heard anything from you or CEA regarding the decision of the CEA on the above request."

"In view of the above, it is informed that MPEB shall make the payment of wheeling charges as per the final decision conveyed by CEA under letter dated 27.5.1997 at the rate of 10 paise/unit from August, 1997 onwards in accordance with your acceptance conveyed vide letter dated 6.5.1997. The differential amount paid for the period from 19.5.1997 to 31.7.1997 shall also be adjusted in future bills."

15. It thus transpires that the offer made by the petitioner to pay wheeling charges @ 17.5 paise/kwh had not been accepted by the respondent. The respondent in his affidavit, filed before us on 3-8-2000 has not disputed the contents of letter dated 6-5-1997, but has attempted to explain that it was the respondent's reasonable expectation that CEA would fix the rate between 17.5 to 40 paise/kwh. This further lends support to our finding that the offer made by the petitioner had not been accepted by

the respondent. The respondent on the other hand, made a counter-offer authorising CEA to finally decide the rate of wheeling charges and till such a decision, the petitioner shall continue to pay the charges @ 17.5 paise/kwh on provisional basis. Thereafter, the offer made by the petitioner could not be revived in view of the legal position noted above. The counter-offer made by the respondent has been accepted by the petitioner by conduct and expressly through its letter dated 21-8-1997. We are of the firm opinion that it is the counter-offer made by the respondent authorising CEA to decide finally the wheeling charges, that has resulted into an enforceable contract and the charges paid by the petitioner @ 17.5 p/kwh were provisional, subject to adjustment. This finding of ours also disposes of the objection taken by the respondent that determination of wheeling charges by CEA was without justification.

16. The learned counsel for the respondent has argued that there has not been final determination of wheeling charges by CEA. We have earlier noticed that by letter dated 27th May, 1997, CEA proposed the wheeling charges @ 10 paise/kwh. In the meeting held by Chairman, CEA, it had been pointed out that the joint studies carried by CEA with EREB and GRIDCO had revealed that the transmission losses in Orissa system were reduced on account of wheeling of power to Western Region. After detailed studies CEA had "fixed" a wheeling charge of 10 paise/kwh. At another meeting held on 4-12-1998, under the Chairmanship of Member (G & O), CEA and attended by, among others, the representatives of the respondent, it was observed by CEA that the rate being charged by the respondent was not in line with the recommendations of the Working Group set up by Chairman, CEA in respect of tariff for inter-regional exchanges, including wheeling charges. It was observed that wheeling charges needed to be reviewed in the broader interest of promoting supply of power from surplus areas to deficit areas as well as on consideration of uniformity of norms. Member (G & O), CEA, again informed the respondent on 1-4-1999 that the agreement between the Chief Ministers of Andhra Pradesh and Orissa for payment of wheeling charges @ 17.5 paise/kwh is bilateral and need not be applied in inter-regional transfers with other states. We thus find that CEA has all along maintained that the wheeling charges are payable @ 10 paise/kwh. However, as this rate was not accepted by the respondent, and CEA lacked an enforcing machinery and in the meeting held on 16-12-1997, it was decided that the matter regarding wheeling charges payable to the respondent would be taken up with Government of Orissa. The further efforts to persuade the respondent to accept the wheeling charges fixed by CEA did not meet with any success and, therefore, CEA advised the petitioner to take up the matter with the Commission for appropriate decision. In the above noted factual position, we are satisfied that CEA had finally fixed the wheeling charges @ 10 paise/kwh based on the recommendations of the Study Group, though the decision has not been implemented as such.

17. It was next contended by the learned counsel for the respondent that the wheeling charges are payable in accordance with the Postage Stamp Method whereas CEA has worked out the wheeling charges as per the Contract Path Method. We do not find any stipulation in the respondent's letter dated 6-5-1997 that the wheeling charges were to be calculated on the Postage Stamp Principle, as the decision was left to CEA/MOP. The recommendations of the Working Group in respect of Tariff for inter-Regional Exchanges, including wheeling charges have been placed at Annexure XII to the petition. The respondent was duly represented on the Working Group which had recommended that wheeling charges for transmission of firm power from intermediary SEBs/utility systems shall be calculated by the Contracted Path Method. Therefore, we do not find any force in the contention of the respondent that the wheeling charges should be paid by using the Postage Stamp Method.

18. It has been further contended on behalf of the respondent that initially the power supply was commenced in "radial mode" in view of the request contained in the petitioner's fax message dated 14-5-1997. CEA has fixed the wheeling charges @ 10 paise/kwh for wheeling in "radial mode". However, wheeling was in radial mode only for a short period from 19-5-1997 to 5-6-1997 and thereafter supply is being continued in "fragmentation mode". We do not find any distinction having been made in the agreement for calculation of wheeling charges based on the "mode" of transmission. The criteria for calculation of wheeling has been done based on the criteria suggested by the Working Group, which does not take into consideration the mode of transmission. Therefore, the contention raised by the respondent deserves to be rejected.

19. It is further contended on behalf of the respondent that other SEBs (APSEB, Tamilnadu SEB, Kerala SEB, Gujarat SEB, Daman & Diu and Dadra & Nagar Haveli) have also paid the wheeling charges @ 17.5 paise/kwh based on the advice of CEA and, therefore, there is no justification for making any exception in the case of the petitioner. We find from record that APSEB, TNEB and Kerala SEB had agreed with the respondent for payment of wheeling charges @ 17.5 paise/kwh. However, in the present case, it was agreed that the wheeling charges should be decided by CEA. Therefore, the respondent is bound to accept the charges fixed by CEA and should not find alibis for not accepting the rate decided by CEA.

20. According to the respondent, it has reflected the amount received from the petitioner towards the wheeling charges @ 17.5 paise/kwh in the filing before OERC for determination of bulk supply tariff of 1998-99 and 1999-2000. In case the petitioner is permitted to raise the issue at this stage, it would upset the settled position and cause irreparable loss and prejudice

to it. We are not convinced by this argument for the reason that the respondent cannot be permitted to wriggle out of its contractual obligations on this ground. However, we will take this into account while dealing with the relief aspect.

21. Lastly, it has been argued by the learned counsel for respondent that on account of transmission of power by fragmentation of I b TPS and Hirakud system and synchronisation of the state grid with Western Regional System, it had suffered operational and commercial losses. This averment has been denied by the petitioner who has contended that the respondent has gained in the transaction. The parties have placed huge data on record to support their respective claims. We do not propose to analyse the entire data. We consider it appropriate to refer to the letter dated 1/20-4-1999, by CEA, an independent body, which has been relied upon by both the parties. Para 3 of the said letter dated 1/20-4-1999 is extracted below:

"3. A close look of I b TPS for the past period reveals that there is significant improvement in its PLF due to utilisation of its output in Western Region and Southern Region. PLF of I b TPS during current year (upto January, 1999) is about 77% compared to 62-63% during 1997-98 and 1996-97. Thus, the performance of I b TPS has, in fact, considerably improved after its isolation from Eastern Region and synchronisation with the Western Region"

22. Earlier, in the meeting held on 16-12-1997, by Chairman CEA, it was noted that " the joint studies carried out by CEA with EREB and GRIDCO had revealed that the transmission losses in Orissa system are reduced on account of wheeling of power to Western Region". In view of this, we cannot accept the argument canvassed on behalf of the respondent that it had suffered operational and commercial loses on account of transmission of power to the petitioner. In any case, it cannot be a lawful and valid ground to repudiate the wheeling charges fixed by CEA, based on the agreement between the parties.

23. On consideration of all the aspects of the matter, we allow this petition and direct that the wheeling charges are payable by the petitioner to the respondent @ 10 paise/kwh w.e.f. 1-1-1998, as decided by CEA. This direction is confined to payment made by the petitioner for its exclusive share. The respondent has submitted that the refund of the amount, if any, would upset its budgetary position. On consideration of this submission, we direct that the excess payments made by the petitioner so far shall be adjusted against the charges becoming due in future. We make it clear that we have allowed this petition on consideration of the material placed before us, that the respondent had agreed to accept the wheeling charges determined by CEA. Our decision will not apply to cases where parties had themselves agreed on the quantum of wheeling charges payable.

24. No order as to costs.

Sd/-

(A.R. Ramanathan)
Member

Sd/-

(G.S.Rajamani)
Member

Sd/-

(D.P. Sinha)
Member

(C)

New Delhi dated the 23rd October, 2000.