

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

**Appeal No. 116 of 2011**

**Dated: 29<sup>th</sup> November, 2012**

**Present: HON'BLE MR. JUSTICE PARTHA SAKHA DATTA, JUDICIAL MEMBER**  
**HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,**

**In the matter of**

1. **North-eastern Electricity Supply Company of Orissa Ltd.,**  
N1/22, IRC Village, Nayapalli,  
Bhubaneswar-751015
2. **Western Electricity Supply Company of Orissa Ltd.,**  
N1/22, IRC Village, Nayapalli, Bhubaneswar.
3. **Southern Electricity Supply Company of Orissa Ltd.,**  
N1/22, IRC Village, Nayapalli, Bhubaneswar. ... **Appellants**

**VERSUS**

1. **Odisha Electricity Regulatory Commission,**  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar 7510102, Dist: Khurda, Orissa.
2. **The Grid Corporation of Orissa Ltd.,**  
Janpath, Po: Bhubaneswar-751022 ...**Respondents.**

**Counsel for the Appellant : Mr Buddy A Ranganathan**  
**Mr Hasan Murtaza**

**Counsel for the Respondent : Mr R K Mehta for R- 2**  
**Mr Rutwik Panda for Commission**

## **JUDGMENT**

### **PER MR. V J TALWAR, TECHNICAL MEMBER**

1. The Appellants North-eastern Electricity Supply Company of Orissa, Western Electricity Supply Company of Orissa and Southern Electricity Supply Company of Orissa are the distribution licensees in the State of Odisha. The Odisha Electricity Regulatory Commission (Commission) is the 1<sup>st</sup> Respondent herein.
2. The Respondent No.2 the Grid Corporation of Orissa Ltd. (GRIDCO) is a bulk supplier in the State of Orissa and as per the aforesaid order a deemed licensee under 5<sup>th</sup> proviso of Section 14 of the Electricity Act 2003, read with Government of Orissa`s Transfer Notification No 6892 dated 9.6.2005. As per the Transfer Notification, Respondent No 2 is to undertake bulk purchase and bulk supply activity.
3. The 2<sup>nd</sup> Respondent GRIDCO had filed a petition before the Commission for Approval of Bulk Supply Price (BSP) for FY 2011-12 on 30<sup>th</sup> November 2010 and the Commission passed the Order on Bulk Supply Price (BSP) for FY 2011-12 on 18<sup>th</sup> March 2011 increasing the Bulk Supply Price for the Appellants substantially. Aggrieved by the Impugned Order of the Commission dated 18.3.2011 the Appellants has filed this Appeal.
4. At this stage it would be desirable to mention that in proceedings of Appeal No. 188 of 2010 filed by the Appellant against the BSP order for FY 2010-11the Tribunal desired to understand the legal status of

GRIDCO (R-2). Learned Counsel for the 2<sup>nd</sup> Respondent submitted that GRIDCO is a deemed trading licensee under 5<sup>th</sup> Proviso of Section 14 of the 2003 Act and is responsible for procurement of power and bulk supply to all the four distribution licensees in the state as per provisions of Orissa Electricity Reforms Act 1995. He further stated that the concept of bulk supply being not inconsistent with any of the provisions of the 2003 Act and has therefore been saved in terms of Section 185 of the Act. It was also mentioned that there are other states such as Andhra Pradesh, Uttar Pradesh, Madhya Pradesh, Haryana, Gujarat etc who have adopted the same model. The issue has, therefore, larger ramifications as any observation by this Tribunal of the legal status of GRIDCO may have direct or indirect impact on power sector of these states. Accordingly, it was decided to delink the issue from the present proceedings and take up by larger Bench at appropriate time after hearing all the concerned states. We would, therefore, like to clarify that our observations in the present case may not be taken as approval to the 'Single Buyer Model' in vogue in these States. With these observations we would now proceed further in the present case.

5. The Appellant has raised seven issues in this Appeal for our consideration. These are:
  - I. Whether the Commission was right in estimating a lower quantum of power availability to GRIDCO?
  - II. Whether the Commission was right in not considering the sale of surplus power outside the State by GRIDCO?

- III. Whether the Commission was right in doing the Truing Up for GRIDCO provisionally?
  - IV. Whether the Commission was right in allowing the repayment of loan principal as pass thru in the ARR of GRIDCO?
  - V. Whether the Commission has right in allowing Rs.311.56 Crores as pass through towards excess payment made by GRIDCO towards FPA for NTPC Stations?
6. We shall now deal with each of the above issues one by one. The first issue before us for consideration is as to **whether the Commission was right in estimating a lower quantum of power availability to GRIDCO?**
7. The issue in question for consideration had also been raised by the Appellants in Appeal No. 58 & 59 of 2007 and this Tribunal in its judgment dated 9.11.2010 has decided the same against the Appellants in the following terms:

*“18. The first issue is regarding under-estimation of the quantum of the power procurement.*

*(A) According to the Appellant, the quantum of availability of power from the hydro power stations of the State should have been computed on the basis of actual drawal from the said stations during the previous year and not on the basis of design energy. It is not disputed that as a matter of established practice, the quantum of the power procurement from various hydro power stations is always based on the projections by the generators. Accordingly, the GRIDCO's hydro power purchase projection was based on the Generation Plan submitted by the Orissa Hydro Power Corporation (OHPC). The GRIDCO has projected the power purchase from OHPC stations based on*

*the latest Generation Plan submitted by the OHPC. Under the generation order, the State Commission has determined the availability during FY 2007-08 and the cost of supply of the same by OHPC in a transparent manner after public hearing. Admittedly, the Appellants distribution companies were party to the said proceedings. This order passed by the State Commission in respect of FY 2007-08 was not challenged. Consequently the said order has become final. Such being the case, it may not be open to the Appellants to challenge the said order indirectly in the present Appeal. The availability of hydro power can never be estimated on the basis of the actual generation during the previous year. Since the quantum of availability of hydro power depends entirely on the rainfall which being a natural phenomenon is always uncertain, it will be extremely risky to estimate the quantum of generation on the basis of actual generation in the previous year. It can never be predicted that since rainfall in this year is good, it will be good in the next year also. As such, the State Commission cannot formulate the tariff on the basis of uncertainties which are dependent on vagaries of nature.*

*(B) The ARR application has been filed in this case in the month of November of the previous year. At the time of finalization of ARR during the months of February-March in the following year, it is difficult to assess the actual rainfall and the reservoir level. Therefore, the availability is always projected on the basis of the design energy. The reservoir level as on 01.10.2006 is not relevant for the FY 2007-08 since the water in the reservoir on that day may have lasted only up to May 2007, i.e. 2 months into the FY 2007-08. The Tribunal in its earlier judgment directed for re-computation of hydro power in respect of FY 2006-07, based on the actual figures for 5 months basis and the projection on that basis up to March 2007. The earlier order passed by the Tribunal did not actually lay down some other principle that quantum of availability from the hydro stations as a matter of norms has to be estimated on the basis of actual drawl during the previous year. It is submitted by the Learned Counsel for the Appellants that since the Tariff Regulations of the State Commission do not provide the principle for determination of generation tariff, the provisions*

*relating to the determination of tariff for retail sale as per Regulation 5(4) should have been applied. This contention is not valid since the said regulation cannot be applied to generation tariff as the regulation only provides for estimation of quantum of power purchase of distribution companies on the basis of actual purchases made during the previous year.*

*(C) As per Regulation 3 (a), the State Commission shall be guided by the principle laid down in sections 61(a) to (i) of the Electricity Act, 2003 while determining the generation tariff. It is also provided under section 61(a) of the Electricity Act, 2003 that the State Commission has to be guided by the Central Commission's Regulations for Determination of Tariff applicable to generation companies. On this issue, the Learned Counsel for the Appellants relied upon some of the cases decided by this Tribunal in Appeal No. 251/06, Appeal No. 76/07 and Appeal No. 60/07. Those authorities decided by the Tribunal would be of no help to the Appellants since the said judgments did not involve drawal from hydro stations. The Appellants relied upon the judgment of Hon'ble Supreme Court in Mohinder Singh Gill case in 1978 (1) SCC 405. This judgment also has also no application to the facts of this case. In the present case, the State Commission gave a finding on this issue only on the basis of the order of the State Commission determining the ARR and generation tariff order of the OHPC for FY 2007-08, in which the quantum of availability of power from the hydro power station has been determined . As indicated above, the said order has not been challenged.*

8. In view of the decision arrived at by this Tribunal in Appeal no. 58 & 59 of 2007, this point is decided against the Appellant accordingly.
9. The second issue for consideration is as to **whether the Commission was right in not considering the sale of surplus power outside the State by GRIDCO?**
10. This issue had also been raised earlier by the Appellants in Appeal Nos. 88 of 2009 and also by the 2<sup>nd</sup> Respondent in Appeal No. 106 of

2010 against the BSP orders passed by the Commission for FY 2008-09 and 2010-11 respectively. This Tribunal in its Judgment dated 1<sup>st</sup> March 2012 in Appeal No. 106 of 2010 had confirmed the principle laid down by it in its earlier judgment dated 30<sup>th</sup> August 2011 on the same issue in Appeal no. 88 of 2009 filed by the GRIDCO against the BSP order for FY 2009-10. The relevant extract of judgment dated 1<sup>st</sup> March 2012 is quoted below:

*“10. In respect of issue No. (e), i.e. **“Bridging of the Revenue Gap”**, the same is covered by Para No.8.5 of the above judgment. Para 8.5 of the above judgment is quoted below:*

*“8.5. We agree with the contention of learned counsel for the Appellant that the State Commission should have decided the BSP after considering income from the estimated sale of surplus energy. The actual income from UI and trading for FY 2007-08 may not give the correct picture for FY 2009-10 due to growth in demand. For estimating income from the trading of surplus power available in the state for FY 2009-10, the assessment of requirement and availability of electricity for the FY 2009-10 has to be made. In this case the State Commission appears to have decided to leave the revenue gap with the intent of keeping the BSP at the current level. The proposed support of the State Government to the distribution licensees for augmentation of distribution system is not likely to impact the BSP. The Judgment of the Tribunal dated 9.11.2010 in Appeal Nos. 58 and 59 of 2007 referred to by the Respondents will not be of any help in this matter. **In view of above we decide this issue in favour of the Appellant and direct the State Commission to true up the financials of the Appellant for FY 2009-10***

*and allow actual costs with the carrying cost”.*  
{emphasis added)

11. In view of the decision arrived at by this Tribunal in Appeal no. 88 of 2009 and confirmed in Appeal no. 106 of 2010, this point is decided in favour of the Appellant.
12. Third issue for consideration is as to **whether the Commission was right in doing the Truing Up for GRIDCO provisionally.**
13. The issues has been considered and decided by the Full Bench of this Tribunal in Appeal no. 58 & 59 of 2007 as under:-

*“22. The next issue is with regard to truingup.*

*(A) According to the Appellant, on the basis of Transfer Scheme, the Appellants took over the business of distribution companies with effect from 01.04.1999 and as such the period from 1996-97 to 1998-99 should not have been taken into consideration by the State Commission for the purpose of truingup.*

*(B) The issue of truing-up in the present case has to be appreciated in the context of peculiar fact situation in the State of Orissa. The truing-up is adjustment of actual revenue and expenditure against the approved revenue and expenditure based on estimation by the State Commission. It is submitted by the Learned Counsel for the Respondent that a person or entity in management of the licensee is not relevant to truing-up exercise since the burden of truing-up falls on the consumer.*

*(C) If the bulk supply tariff goes up, there has to be increase in the retail supply tariff in direct proportion. The GRIDCO started its commercial operation from 01.04.1996 pursuant to the Reforms Act and Orissa Electricity Reform (Transfer of Undertaking Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996. These rules have been framed by the Government of Orissa in exercise of the power conferred by the Orissa Electricity Reform Act, 1995.*



*(D) The GRIDCO is a licensee to carry out the business of transmission and retail supply of electricity from 01.04.1996. With disinvestment of distribution business from GRIDCO to the 4 distributions from 01.04.1999, the GRIDCO carried on the business of transmission and bulk supply of electricity in Orissa. The above disinvestment of distribution business by GRIDCO to the distribution companies was made pursuant to Orissa Electricity Distribution Companies Rules 1998.*

*(E) Subsequently on enactment of Electricity Act, 2003, restricting the transmission licensee to engage in the business of trading, the transmission business of GRIDCO was transferred to Orissa Power Transmission Corporation Limited (OPTCL) from 01.04.2005 under the 2005 Transfer Scheme. Since then GRIDCO has been engaged in the business of bulk supply and trading in electricity.*

*(F) The GRIDCO disinvested 51% of the equity holding in all the accounts of Appellant namely WESCO, NESCO and SOUTHCO through a process of International Competitive BIDDING. The prospective investors including the present management, i.e. Reliance, were provided with the Bid Documents including the Tariff Orders of State Commission for FY 1996-07 and 1997- 08, and also the tariff proposal for 1998-99. The GRIDCO being the holding company of the distribution companies retained operational losses in the 3 distribution companies for the period from 26.11.1998 to 31.03.1999 as per provisions of the Transfer Scheme. The purpose of retaining these losses during operation of the distribution companies as separate entities was to allow the distribution companies to carry on their retail supply business with a clean slate.*

*(G) The restructuring and unbundling of erstwhile State Electricity Board has resulted in creation of different utilities which are required to operate within the regulatory framework. The GRIDCO being a licensee since 01.04.1996, is entitled to recover its costs through tariff which was not allowed earlier. While disinvestment of 51% of equity was done, no representation by the GRIDCO was made to the effect that the past losses will not be considered in the tariff of GRIDCO and Government of Orissa will take over such losses or liabilities.*

*From 01.04.1996 GRIDCO has been functioning as a licensee for discharging various functions and its tariffs have been determined by the State Commission on an annual basis.*

*(H) As a licensee, the GRIDCO is entitled to truing-up of its costs and revenue on completion of audit of accounts. The State Commission has done the truing-up exercise up to 1998-99 while disposing the tariff proposal of the GRIDCO. This truing-up exercise has been done from 1996-97 i.e. first year of its operation after unbundling of erstwhile State Electricity Board. Whatever obligations have been incurred by the GRIDCO as a part of regulatory process have to be provided for by the State Commission. Profit and loss of GRIDCO pursuant to enforcement of Reform Act with effect from 01.04.2006 have to be trued-up. The period of regulation cannot be bifurcated unless there is specific provision of subsidy by State Government or some other measure in the Transfer Scheme. The entity in management is not relevant for truing-up as entity may keep changing hands but the juristic entity remains uninterrupted. In case the management of distribution companies changes even then the liabilities of the distribution companies will have to be truedup. The relevance has been placed upon 1998 Transfer Scheme This Scheme only limits the liability of the distribution companies. It does not provide that the regulatory losses of GRIDCO will not be trued-up.*

*(I) The regulatory treatment of past losses and liabilities for the purpose of determination of tariff does not place the distribution companies in any adverse position because of bulk supply tariff fixed by the State Commission becomes power purchase cost to the distribution companies. This cost is allowed to be recovered by the distribution companies in full in the tariff fixed by the State Commission while approving the retail supply tariff. It is contended by the distribution companies that as a consequence of the truing-up for FY 1996-97 and FY 1998-99, the State Commission is seeking to impose liabilities prior to 01.04.1999 on the distribution licensees contrary to the 1998 Transfer Scheme. This submission is not correct since as a result of the truing-up no liability is being imposed on the distribution companies and the ultimate benefit or burden of*

*truingup is passed on to the consumer as a part of tariff. Therefore, the submission of the Appellants with regard to truing-up does not deserve acceptance.”*

14. The learned counsel for the Appellants submitted that this issue is also pending in the Appeal No. 2942-43 of 2011 before the Hon'ble Supreme Court. As the Hon'ble Supreme Court has not granted any stay, the decision of this Tribunal in Appeal No. 58 & 59 of 2007 shall be applicable in this case also.
15. The fourth issue for our consideration is as to **whether the Commission was right in allowing the repayment of loan principal as pass thru in the ARR of GRIDCO?**
16. This issue is also covered by the earlier Full Bench judgment of this Tribunal in its Judgment dated 09-11-2010 in Appeals No. 58 & 59 of 2007 relating to the Bulk Supply Tariff passed by the Commission for the FY 2007-08. Relevant extracts of the above judgment is quoted below:

"21...

*(E) In our opinion, the Annual Revenue Requirement should include the 'cost' incurred by the licensees in carrying out its business. The cost of loan is the 'interest' paid by the licensees. Similarly the 'cost' of equity is 'Return on Equity'. Thus interest and ROE can be booked to Revenue Requirement or Tariff. The principal repayment of loan or the capital cost of a project cannot form a part of revenue requirement. In the present case, charging the principal amount of loan taken for payment of generator's bill by GRIDCO to its revenue requirement will result in double counting of the expenses. Let us take an example. Suppose GRIDCO took a loan of Rs. 100/- to pay the generator's bill during 2000-01. The power purchase cost of Rs. 100/- will be included in the ARR of 2000-01 and accordingly*

*the Bulk Supply Tariff of GRIDCO will be determined. Suppose the repayment of principal falls due @ 20/- per annum during 5 years period from 2001-02 to 2005-06. Thus principal of Rs. 100/- is repaid between 2001-02 to 2005-06 by GRIDCO. If principal repayment of Rs. 20/- per annum i.e. Rs. 100/- is charged to ARR during 2001-02 to 2005-06 along with interest on loan, it would result in GRIDCO recovering Rs. 200/-, i.e. Power Purchase cost of Rs. 100/- recovered in ARR of 2000-01 and repayment of principal of Rs. 100/- included in ARR of subsequent 5 years against the actual Power Purchase Cost of Rs. 100/-. Further, the outstanding of Rs. 100/- of Distribution Licensees will still remain in the books of accounts of Distribution Licensees as Liability and in the books of accounts of GRIDCO as Asset. Thus booking of principal repayment of loan to revenue requirement is wrong and against the fundamental accounting principles. Neither receipt of loan nor its principal repayment could be included in the ARR as cost or revenue.*

*(F) The State Commission in order to ensure that GRIDCO meets its obligation to pay the principal amount of loan has devised a methodology which is against the accounting principles. In our opinion, the correct remedy has to be found in the root of the problem i.e. the inability of the Distribution Licensees to make good the past arrears of power purchase dues due to their poor financial health. The Tribunal in its judgment dated 08.11.2010 in Appeals No. 52 to 54 of 2007 filed by the appellants Distribution Licenses have set aside the order of the Commission in ARRs and retail supply tariff for FY 2007-08. It has been noted that the monies collected by the Distribution Licensees are escrowed to GRIDCO to service Bulk Supply Tariff Bills and loan repayment. Consequently the Distribution Licensees have no control over cash flows and have to approach the State Commission and GRIDCO for relaxation of escrow to meet essential expenses. The distribution system assets are also hypothecated to GRIDCO making it difficult for them to raise loans from Financial Institutions for infusion of funds for improvement of distribution system. While the State Commission has set up distribution loss targets as per the Long Term Tariff Strategy order dated*

*18.06.2003 and Business Plan order dated 28.02.2005 but provisions for financial restructuring and targets of infusion of funds were not implemented. This Tribunal in the said judgment has directed the State Commission to revisit the issue of Truing up and amortization of regulatory assets.*

*(G) Though in normal circumstances we are not in favour of creating the regulatory assets under business as usual conditions,. in the present circumstances where the principal payment of the loans taken by GRIDCO in the past have to be made by GRIDCO and the Distribution Companies are not in a position to pay, creation of regulatory assets in the ARR of the Distribution Licensees would be a viable option. These regulatory assets could be serviced through the Retail Supply Tariff in future so that payments could be made by the Distribution Licensees to GRIDCO for past dues as per the directions of the State Commission. This will ensure that the past arrears are wiped off in the books of accounts and balance sheet of GRIDCO and the Distribution Licensees. This point is accordingly decided in favour of the appellants. We direct the State Commission to take necessary action in the matter as per the above directions and directions given in the Tribunal's judgment dated 08.11.2010 in Appeal Nos. 52 to 54 of 2007".*

17. So, the above decision of the Tribunal would squarely apply to the present facts of the case as well. Accordingly, this point is answered in favour of the Appellant.
18. The fifth issue is as to **whether the Commission was right in allowing Rs.311.56 Crores as pass through towards excess payment made by GRIDCO towards FPA for NTPC Stations?**
19. The learned counsel for the Appellant made few elaborate submissions to indicate that the FPA for NTPC stations should not have been allowed by the Commission. We are not inclined to accept the submissions of the Appellant. This Tribunal in catena of

judgments has held that actual power purchase costs have to be allowed subject to prudence check. In this case the generator concerned is NTPC whose tariff is fixed by the Central Commission and also the formula for FPA has been specified in the Central Commissions Regulations. Under these circumstances, the Commission has rightly allowed the FPA charges. The issue is accordingly decided against the Appellant.

20. In view of our above findings, the Appeal is partly allowed as indicated above. No order as to costs.

**(V J Talwar)**  
**Technical Member**

**(Justice Parth Sakha Datta)**  
**Judicial Member**

Dated: 29<sup>th</sup> November, 2012

REPORTABLE/~~NOT REPORTABLE~~