

**WIN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NOS. 112, 113 AND 114 OF 2013**

**Dated: 11<sup>th</sup> February, 2014**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

**IN THE MATTER OF:**

**APPEAL NO. 112 OF 2013**

Western Electricity Supply Company of  
Orissa Ltd. (WESCO),  
A company incorporated under the provisions  
Of the Companies Act, 1956 and having its  
Registered office at Plot No. – N1/22,  
IRC Village, Nayapalli, Bhubaneswar-751015 .... Appellant

Versus

1. Odisha Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII  
Bhubaneswar 751102,  
Dist. Khurda, Odisha
2. Sambalpur District Consumers' Federation,  
Balaji Mandir, Bhavan, Khetrajpur,  
Sambalpur-768003
3. Sundargarh District Employee Association,  
AL-1, Basanti Nagar, Rourkela-769012
4. The Secretary, PRAYAS Energy Group  
C/o, Amrita Clinic  
Athawale Corner, Karve Road  
Deccan Gymkhana, Pune 411 004 .... Respondents

**APPEAL NO. 113 OF 2013**

North Eastern Electricity Supply Company of  
Orissa Ltd. (NEESCO),  
A company incorporated under the provisions  
Of the Companies Act, 1956 and having its  
Registered office at Plot No. – N1/22,  
IRC Village, Nayapalli, Bhubaneswar-751015 .... Appellant

Versus

1. Odisha Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII  
Bhubaneswar 751102, Dist. Khurda, Odisha
2. Orissa Consumers' Association,  
Balasore Chapter, Balasore-756126
3. The Secretary, PRAYAS Energy Group  
C/o, Amrita Clinic Athawale Corner, Karve  
Road, Deccan Gymkhana, Pune 411 004 .... Respondents

**APPEAL NO. 114 OF 2013**

Southern Electricity Supply Company of  
Orissa Ltd. (SOUTHCO),  
A company incorporated under the provisions  
Of the Companies Act, 1956 and having its  
Registered office at Plot No. – N1/22,  
IRC Village, Nayapalli, Bhubaneswar-751015 .... Appellant

Versus

1. Odisha Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII  
Bhubaneswar 751102, Dist. Khurda, Odisha
2. Grahak Panchayat,  
Friends Colony, Partakhemundi  
Dist.: Gajapati- 761200
3. The Secretary, PRAYAS Energy Group  
C/o, Amrita Clinic  
Athawale Corner, Karve Road  
Deccan Gymkhana, Pune 411 004 .... Respondents

Counsel for the Appellant(s) ... Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza  
Mr. Aditya Panda

Counsel for the Respondent(s) ... Mr. Rutwik Panda &  
Mr. Prasanta Sen for R-1

## **JUDGMENT**

### **PER HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**

These Appeals have been preferred by the 3 Private Distribution Licensees in the State of Orissa namely; Western Electricity Supply Company of Orissa Ltd. (WESCO); North Eastern Electricity Supply Company of Orissa Ltd. (NEESCO) and Southern Electricity Supply Company of Orissa Ltd. (SOUTHCO) against the Retail Supply Tariff (RST) Order dated 20.03.2013 passed by the Orissa Electricity Regulatory Commission (in short, 'Orissa Commission') under Section 111 of the Electricity Act, 2003 in case no. 104 of 2012, 105 of 2012 & 106 of 2012 respectively, inter-alia determining the tariff to be charged by the three Discoms for retail supply of electricity in the F.Y. 2013-14. The Impugned Order is common to all the three Appeals and the issues raised are the same. Hence, all the three Appeals have been heard together and are being decided by this common Judgment.

2. The brief facts of the case are reproduced below:
- (i) Each of the Appellants is a Distribution Company having operations in the State of Orissa and is registered under the provisions of the Companies Act, 1956 and is inter-alia, a Distribution and Retail Supply Licensee in the State of Orissa.
  - (ii) The Respondent No.1 is the Orissa Electricity Regulatory Commission constituted under the provisions of the Electricity Act, 2003 and is the Regulator in the State of Orissa. Other respondents are the Consumer Representatives.

- (iii) All the Appellants had filed applications before the Respondent No.1, the Orissa Commission, being Case No. 104 of 2012, 105 of 2012 and 106 of 2012 dated 30.11.2012 respectively for approval of their Annual Revenue Requirement (ARR) and Retail Supply Tariff (RST) for FY 2013-14.
  - (iv) To the Appellants proposal, several objections were received from various parties and replies to all the points/issues raised were submitted to the objectors with a copy to the Orissa Commission. The Orissa Commission after hearing the parties passed an Order on the application of the Appellants for approval of ARR and RST for FY 2013-14 on 20.3.2013 (Impugned Order). The Retail Supply Tariff for DISCOMs was determined by a Common Order.
  - (v) The Impugned Order has been challenged by the DISCOMs/Appellants through these Appeals pleading that while determining the Retail Supply Tariff (RST) for FY 2013-14 to the extent, the learned Orissa Commission, in an erroneous manner, has:-
    - (a) set Unrealistic Distribution Loss Targets,
    - (b) disallowed Expenses to be incurred on terminal liabilities,
    - (c) disallowed Administration and General Expenses and,
    - (d) truing up for FY 2011-12
3. Thus, there are following four issues raised in the present Appeals:
- i. Distribution losses:
  - ii. Employees cost (actuarial valuation for terminal benefits)
  - iii. Administration & General (A&G) expenses such as Auto Meter Reading, Spot Billing and Energy Audit, RTI expenses and Cess etc; and
  - iv. Truing up for FY 2011-12
4. We have heard the learned counsel for the Appellants and learned counsel for the Respondents. We have also gone through the lengthy Written Submissions filed by the rival parties.

5. The learned counsel for the Appellants has raised the following issues making detailed submissions:

**(A) Issue No.1: Distribution Losses**

- (i) In the impugned Order the Orissa Commission has once again not implemented and in fact sought to violate the earlier binding judgments of this Tribunal on the issue.
- (ii) In the Division Bench Judgment dated 13.12.2006 in Appeal No. 77/2006 and batch, this Tribunal was inter alia pleased to direct (in para 27 thereof) that the Commission would have to re-look at the aspect of determination of the Distribution Losses and to take a practical view on the basis of the ground realities.
- (iii) Again in Judgment dated 8.11.2010 of the Full Bench of this Tribunal, this Tribunal was inter alia pleased to find in para 20 to 22 of the Judgment that the Distribution Loss Targets set by the Commission were unrealistic and unachievable. This Tribunal also held that merely fixing distribution loss targets without considering that the financing for the same has not been received by the Licensees was wrong.
- (iv) Even though the Orissa Commission has preferred Appeals against both the aforesaid Judgments in the Hon'ble Supreme Court of India, the Appeals stand admitted for final hearing; but the operation of the said judgments has not been stayed by the Hon'ble Supreme Court. As such the principles laid down and directions given by this Tribunal are necessarily to be implemented by the State Commission.
- (v) While so, in a batch of matters pertaining to the Retail Supply Tariff for the years 2008-09 to 2012-13 the same were disposed of by a common Judgment dated 3.7.2013 by this Tribunal in Appeal Nos. 26-28 of 2009, observing in para 17.15 as follows:

*“17.15 To sum up, the loss level trajectory has to be reset by the State Commission from 2008-09 to 2012-13 in light of the judgment of the Tribunal in Appeal nos. 77 of 2006 and batch and 52 of 2007 and batch and also the findings in these Appeals referred to in the preceding paragraphs. The distribution loss trajectory has to be redetermined keeping in view ground realities*

*that the requisite funds for augmentation of the distribution system have not been made available to the Appellants. However, the loss level trajectory has to be reduced gradually from 2006-07 to 2012-13 and in no case, it should increase. The State Commission shall then true up the accounts of the Appellants for the above period with the revised loss levels. Accordingly directed.”*

The Orissa Commission has also preferred an appeal to the Hon'ble Supreme Court which is still to be listed for admission. The Appellants have also preferred a Review Petition against certain observations therein on the increase of Distribution Losses which has been since been dismissed.

- (vi) It is submitted that once again this Tribunal was graciously pleased to reiterate the findings in the earlier Division Bench and Full Bench Judgments and was further pleased to direct the Commission to re-determine the Distribution Losses for the entire period in question.
- (vii) As such the issue of Distribution Loss targets is completely covered by the aforesaid Judgment. This is more particularly so since if the Distribution Loss Tariff is re-set from 2006-07 to 2012-13, the Distribution Loss Tariff for 2013-14 (which is the subject matter of the present appeal) would automatically have to be reset.
- (viii) In the impugned Order, the Orissa Commission has once again, despite noticing the Division Bench and the full Bench Judgment passed by this Tribunal, adopted and stuck to its old stand which has already been set aside on three different occasions by this Tribunal.
- (ix) In the impugned Order the Orissa Commission has sought to rely on a Judgment of the Supreme Court reported in West Bengal Electricity Regulatory Commission V/s CESC Ltd. **AIR 2002 SC 3615** to support its view that the Distribution Losses are controllable. The ratio of the said judgment of the Supreme Court as per the Appellants was not applicable to the case in hand for the following reasons:

- (a) The aforesaid judgment of the Supreme Court was rendered with reference to the Distribution Loss Targets set by that Commission in that case;
- (b) In the present case there is already a pending dispensation that the Orissa Commission must reset the loss targets. The question of whether the losses are controllable or not is a question which the Commission could, if at all, have gone into only after resetting the loss
- (c) In the present case the Orissa Commission has not re-set the targets at all.
- (d) In any event even the Supreme Court judgment has held inter alia that “a loss be it transmission or distribution is not **totally**, beyond the control of the company which effect is **established by the admissions made by the Respondent company.....**”
- (e) Hence, firstly, the Hon’ble Supreme Court had relied upon the admissions of the distribution licensee in that case that the distribution losses were “not totally beyond the control of the company”. Secondly, the Supreme Court was inter alia pleased to hold that even such losses are not **totally** beyond the control of the licensee.
- (f) It is therefore clear that the Orissa Commission has misread and sought to quote out of context the observations of the Supreme Court in the impugned order.
- (g) The Orissa Commission in the impugned order dated 20.3.2010 sought to rely upon a Business Plan Order for the 2nd control period namely FY 2008-09 to FY 2012-13. The Commission has sought to contend that the loss targets in the said Business Plan Order have been followed by the Commission since the Business Plan Order had not been challenged by the Appellant. This approach of the Orissa Commission is wrong inter alia, for the following reasons:-

- (aa) The said Business Plan Order was already relied upon by the Commission in determining the tariff for the period 2008-09 to 2012-13, which was the subject matter of the appeals which were disposed of by the Judgment dated 3.7.2013 of this Tribunal and the loss targets in that Business Plan Order have already been set aside by this Tribunal.
- (bb) Accepting the said arguments this Tribunal was **in para 17.13 internal page 68-69 of the Judgment pleased to** direct resetting of the very same distribution loss target which had been mentioned in the Business Plan Order dated 20.3.2010.

**(B). Issue No.2: Employees Cost (Actuarial valuation of Terminal Benefits)**

- (i) In the impugned Order the Orissa Commission has adopted the actuarial valuation done by the Commission in the year 2009 and projected the requirements of the terminal benefits found on that basis for 4 years on the basis of a percentage escalation.
- (ii) According to the Appellants the aforesaid issue is also covered by the Judgment of this Tribunal dated **3.7.2013 in para 25.6 at internal pages 102 to 103 of the Judgment**. In the said para this Tribunal was inter alia, pleased to find that there is an inordinate delay in getting the report of Actuary appointed by the State Commission and in the absence of the Actuary Report the State Commission had been deciding the terminal liability provisionally since 2009-10 which is not proper. This Tribunal also directed the State Commission to either expedite the report of its Actuary or else rely on the report of the Actuary appointed by the Appellant.
- (iii) The impugned order has in fact done precisely to the contrary. Whilst not considering the Actuary Report produced by the Appellant, the Orissa Commission continues to rely upon the old

Actuary Valuation undertaken by the Commission and provisionally estimating a percentage increase on the same.

**(C). Issue No.3: A&G Expenses**

- (i) In the impugned Order the Commission has disallowed certain A&G expenses inter alia on the ground that the same are controllable and the DISCOM would only be entitled to an escalation of normal A&G expenses over the previous years.
- (ii) However certain expenses such as Spot Billing and Energy Audit are covered by the aforesaid Full Bench Judgment and also the Judgment dated 3.7.2013 of this Tribunal.
- (iii) As regard expenses such as Cess and RTI related expenses it is respectfully urged on behalf of the Appellants that expenses of Cess are a statutory liability as per the Building and Other Construction Workers Act 1996 and the Building and other Construction Workers Welfare Cess Act 1996. It is further urged that the expenses on RTI are also in accordance with the statutory responsibilities necessarily to implement the provisions of the RTI Act.
- (iv) In the impugned order the Orissa Commission has not considered the aforesaid expenses at all much less the prudence of such expenses. Equally the Commission has not, in the order doubted the fact that such expenses have been incurred and will have to be incurred by the DISCOM. The Commission has only negated such expense on the ground that the only given a permissible increase on a percentage increase over the previous year's amount.
- (v) Equally the Commission has not even given a finding that such expenses are part of "normal A&G expenses" and have in any event already been catered for.
- (vi) In the circumstances the rationale given in the impugned order does not take into account the fact that an expense incurred to satisfy a statutory responsibility has necessarily to be recovered in the tariff.

- (vii) There is also no norm given in the Regulations by which such abnormal A&G expenses statutorily needed to be expended could be curtailed by the Commission.

**(D) Issue No.4: Truing up for 2011-12**

- (i) The Commission has in the impugned Order carried up the truing up for the year 2011-12. The entire truing up exercise has been undertaken by the Commission in the impugned Order in **one para and one table**.
- (ii) That there are no reasons given, no explanation, no justification and the Appellant is unable to find out as to which amount has been allowed, which amount has been disallowed.
- (iii) It is settled law that reasons are the window into the mind of the maker of the order. In the absence of such reasons, it is not possible to know as to what the order has in fact considered or not considered.
- (iv) That the truing up carried in the impugned order is contrary to the principle laid down by this Tribunal in **Judgment dated 3.7.2013 which is to be found at internal page 128 para 29.3**. In the said para this Tribunal was pleased to find that the truing up order (in that case) only indicated the basis and summary of truing up and comparison of the revenue gap. This Tribunal was pleased to hold that the truing up order should have clearly indicated the truing up of expenses under various heads and the manner in which the truing ups have been carried out by the Commission.
- (v) In the circumstances this Tribunal was graciously pleased to remand the matter to the Commission to undertake the truing up after considering the details of the Appellant's claim.
- (vi) In the present case as well the Commission has done precisely the same thing. It has merely rejected the so called principle of truing up once again simply by giving the table of the comparison of revenue gap.

(vii) Ex-face the impugned order has not considered any of the claims of the Appellant.

6. Sh. Rutwik Panda, Advocate who argued for the Orissa Commission, has also made the following counter submissions:

- (i) That the present appeals are not maintainable, as the appellants have not made necessary parties.
- (ii) That the appellants tried to frustrate the Business Plan Orders (MYT Orders), which have attained finality.
- (iii) That the Orissa Commission has revised the Retail Tariff upward in FY 2010-11, 2011-12 and 2012-13 as 22.20%, 19.74% and 12% of the Tariff for FY 2009-10, 2010-11 and 2011-12 respectively. In the present Tariff Order, the Orissa Commission has approved a minimal increase of 2.4% above the tariff of 2012-13.
- (iv) That in the present appeals, there are no averments/allegations against the Orissa Commission that it has violated any rules or regulations while determining the tariff.
- (v) That the Annual Revenue Requirement shows a +ve Gap. There is also no dispute on this issue by DISCOMs in their appeals.
- (vi) That after the second approved Business Plan Order for FY 2008-09 to FY 2012-13 passed in Case No. 41, 42 and 43 of 2007 and Case No. 22 of 2008 dated 20.3.2010 passed by the Orissa Commission, the State Government, Department of Energy issued a Gazette Notification on 21.10.2010, where the State agreed to give financial assistance to the Appellants-DISCOMs and prescribed a detailed procedure for it. So the plea of non-infusion of funds by the Appellants is not correct. The Appellant companies, from the date of its inception till date (in the last 14 ears) have not invested anything in their Orissa Distribution Companies, which was also observed by the Hon'ble High Court of Orissa in its Judgment dated 30.03.2012 in W.P.(C) No. 8409 of

2011 in the matter of Keonjhar Navanirman Parishad and Others v/s State of Orissa and Others.

- (vii) We have gone through the Judgment dated 30.3.2012 of the Hon'ble Orissa High Court, Cuttack. It is disclosed from the Judgment that the Hon'ble Orissa High Court was hearing an application under Article 226 and 227 of the Constitution of India in which Petitioner No. 1 & 2 claimed to be working throughout the State of Orissa for upliftment of poor and downtrodden, and protection of their interest. One of the Petitioners, Arun Kumar Sahoo, who claimed himself to be bona fide consumer of electricity, filed a writ petition with a prayer to direct the State of Orissa, represented through the Commissioner-cum-Secretary, Energy Department, (O.P.1), Orissa Electricity Regulatory Commission (O.P.2) and Orissa Hydro Power Corporation Ltd (OHPC) (O.P. 3) to take immediate steps for improvement of generation of electricity to meet the requirement of consumers in the State and to comply with directions issued by OERC from time to time within a time frame. Two more prayers were also made by the petitioner before the Hon'ble Orissa High Court namely; to direct the Orissa Commission (OERC) to ensure compliance of its orders passed from 2004 till date within a time frame and also to call for the tariff orders passed by the OERC on the applications filed by the licensees-opposite parties for the FY 2011-12, quash the same and not to implement the said tariff orders.
- (viii) The following contents find place in para 14 of Judgment of the Hon'ble Orissa High Court.

“14. ....

*According to learned counsel for the petitioners, though the DISCOMs have persistently failed and defaulted in complying with the directions issued by the OERC, no action has been taken against them.*

*A serious allegation has been made by the petitioners that though a direction has been given by the OERC to infuse owner's capital by the DISCOMs, from the audited accounts of WESCO, NEESCO*

*and SOUTHCO for the financial year 2009-10, it is revealed that there has been no infusion of owner's capital by the DISCOMs."*

- (ix) By the Judgment dated 30.3.2012, the Division Bench of the Hon'ble Orissa High Court, Cuttack in the case of Keonjhar Navanirman Parishad and others v/s State of Orissa and others disposed of the Writ Petition. For our purpose, we are citing the relevant clause 5 & 6 enumerated at page 40 of the Judgment:-

*"(v) As it is complained by different DISCOMs that huge amount of bills are pending with different Departments and Organizations of the State Government as well as the State Government Undertakings, we direct such State Government Organizations/Undertakings of the State Government to pay the electricity dues and in case of any dispute, the admitted dues be paid by end of April, 2012, failing which DISCOMs are at liberty to disconnect the power supply by giving them seven days' notice.*

*(vi)As it is found that certain orders have been passed by the OERC in case Nos. 140, 142, 145 and 146/2009, we direct the OERC to take effective steps for implementation and compliance of its own orders by giving a time frame to the respective parties, because, mere passing of orders will have no meaning if it remains unimplemented. The OERC should take effective steps, even penal action against the violators for non-compliance of its orders without showing any sympathy to them. The OERC should also take steps to direct the DISCOMs to up-grade the new distribution transformers on priority basis, complete the audit of each distribution system and also ensure that financial investment of funds by DISCOMs is raised for development and improvement of the existing system of generation and transmission."*

7. Sh. Rutwik Panda, the learned counsel for the Respondent Orissa Commission regarding the issue of **distribution loss**, has further submitted as follows:

- (a) that this Tribunal in para 17 of the Judgment dated 03.07.2013 passed in Appeal No. 27 of 2009 and other appeals has dealt with the performances of DISCOMs on the issue of distribution losses.

- (b) that the Commission has dealt the issue of estimation of distribution loss in Para 170 of the RST Order for FY 2013-14 dated 20.03.2013. The trajectory of targets for distribution loss reduction has been approved in two Business Plan orders of the Commission for Control Period 2003-04 to 2007-08 in Case No. 115/2004 dated 28.02.2005 and 2008-09 to 2012-13 in Case No. 41, 42 & 43 of 2007 and 22/2008 dated 20.03.2010 respectively. The Commission while fixing the target of distribution loss for FY 2003-04 (the initial year of first Control Period) had relied on the submissions made by the DISCOMs regarding their own distribution loss and fixed the targets for the same year as per the actual distribution loss of the DISCOMs.
- (c) that the Gulf between actual distribution loss and the target set by the Orissa Commission has been increased year after year as in none of the years the Appellants have achieved the target level set for them. Their distribution loss has in fact increased over the years instead of even marginal improvement. This is contrary to what they had submitted before Souvan Kanungo Committee considering the increase in EHT sales which is a zero loss business for DISCOMs.
- (d) That the Souvan Kanungo Committee in its report submitted in the year 2001-2002 suggested mid-course correction of reform. The contention of the Appellants that the Commission has fixed unrealistic and unachievable Loss reduction targets is misleading and an attempt to hide their own inefficiency. After 14 years of privatization, none of the privatized DISCOMs has started energy audit, DTR metering, feeder metering in full scale. When actual loss level through energy audit is not correctly known, claiming for realistic reduction of the same is ridiculous.
- (e) that the Appellants failed to submit the Business Plan filing within the due date and, therefore, the process got delayed for finalizing the Business Plan which entails review, public hearing and passing of Order. The Orissa Commission had asked for

submission of Business Plan during May, 2012 and, the Appellant after much delay, finally submitted its Business Plan during December, 2012. In the meantime, due to ARR filing by 30.11.2012, it was not possible to fix the new Business Plan targets for the next control period within such short time to be considered for ARR of 2013-14. The Orissa Commission, therefore, in order to obviate such a situation considered to fix the targets for distribution loss, AT&C loss and collection efficiency for FY 2013-14 at the same level as that of approved targets for FY 2012-13 in the last Business Plan Order.

- (f) that the Orissa Commission, as regards the sales, in ARRs during the control period approves the sales of DISCOMs by considering power purchase allowed and applying the distribution loss based on the set target loss level for that year as approved in the Business Plan Order. This is top down approach of determination of quantum of sales. The Commission adopts this method being empowered through Para 5(3)(b) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 which provides for methodology of computation of sales. The Orissa Commission in its various Business Plan Orders has approved the realistic and achievable loss targets which were then applicable for computation of sales as per the said Regulation.

8. Per contra, the learned counsel for the Orissa Commission, on the issue of **Employees Cost**, has made the following submissions:

- (i) that the amount allocated in this category is a Provisional one and when the audited account becomes available the same shall be adjusted accordingly.
- (ii) that The Commission has calculated the corpus requirement as on 31.03.2013 by assuming a 5% increase on the corpus requirement as on 31.03.2012. The Orissa Commission in the impugned order has cited the reasons for allowing provisionally the terminal benefits to the Licensees, particularly, in para 232 of

the RST Impugned Order dated 20.03.2013. The relevant extract of such is reproduced below:-

*“232. Commission have been appointing independent actuary to undertake assessment of pension, gratuity and leave encashment liability of the employees of four DISCOMs (WESCO, NESCO, SOUTHCO & CESU) and OPTCL. Commission engaged M/s Darashaw & Company Pvt. Ltd., Mumbai as actuary for undertaking assessment of pension, gratuity and leave encashment liability of the employees of four DISCOMs (WESCO, NESCO, SOUTHCO & CESU) and OPTCL upto 31.03.2009 with projection for FY 2009-10 and FY 2010-11 during the FY 2010-11. The Commission in line with the earlier years, during FY 2011-12 undertook the process of appointment of independent actuary for assessment of pension, gratuity and leave encashment liability of the employees of four DISCOMs (WESCO, NESCO, SOUTHCO & CESU) and OPTCL upto 31.03.2010 with projection for FY 2010-11 and 2011-12. The Commission after due process appointed an independent actuary M/s Darashaw & Company Pvt. Ltd., Mumbai for undertaking such valuation. However, the said actuary expressed its inability to undertake such assignment due to circumstances beyond their control. In the meantime filing of ARR by Licensee was due on 30<sup>th</sup> November 2011 and therefore Commission in such an event decided that terminal benefit to the Licensees may be allowed provisionally based on the last assessment of actuary which can be updated periodically within a gap of 3 to 5 years.”*

- (iii) that it is evident from the impugned Tariff Order that due to unavoidable circumstances mainly because of the refusal of actuary to conduct the assignment, commission decided to allow provisionally the funding of pension corpus. This requirement would however be adjusted in the subsequent valuation to be got conducted by the Orissa Commission. Therefore, contention of the Appellants in this regard is devoid of any substance because the Appellants have not funded the pension corpus to the extent provisionally for the liability made in the ARR in clear violation of the License Conditions,
- (iv) that the Appellants have obligation towards payment of pension, gratuity and all other applicable terminal benefits to the

employees of the company mandated under Orissa Electricity Reform (Transfer of Assets, Liabilities, Proceedings and Personnel of GRIDCO to Distribution Companies) Rules, 1998. For meeting such terminal obligations, a corpus is to be maintained, which was transferred by GRIDCO while divesting its distribution business to the Appellants company. GRIDCO while divesting its distribution business to the appellant companies on 31.03.1999 transferred fund towards pension corpus to the tune of Rs.67.36 cr. to meet the obligation of pension, gratuity and leave encashment. Subsequently, Commission in successive tariff orders from FY 1999-2000 till FY 2011-12 has allowed further Rs.243.01 cr. towards funding of corpus. Accordingly, as on 31.03.2012, the expected funds in such corpus should be to the tune of Rs.310.40 cr. However, on scrutiny of ARR filing for FY 2013-14, it is seen that each of the Appellants has only combined corpus of Rs.59.92 cr. in the pension and gratuity corpus which is only one third of the expected corpus.

- (v) that the Orissa Commission in line with its observation in the RST order 2013-14 and MYT principles for 2<sup>nd</sup> and 3<sup>rd</sup> control period have now engaged an independent Actuary to undertake actuarial valuation of four DISCOMs and OPTCL of Orissa up to 31.03.2013 with projection upto 31.03.2014 and 31.03.2015. The Commission after receiving the recommendations on actuarial valuation of the terminal benefits from such Actuary would accordingly make suitable provisions in the ARR of DISCOMs for FY 2014-15.

#### 9. **Administration and General (A&G) Expenses**

On this issue also the learned counsel for the Orissa Commission has tried to vindicate the stand taken by the Orissa Commission submits that the findings in the impugned order are perfect and correct which require no interference in this Appeal.

10. **Truing Up**

The learned counsel for the Orissa Commission again attempted to defend the impugned RST Order saying that the Commission has finalized the truing-up upto FY 2010-11, in respect of all the Licensees including the present Appellants in Case No. 29, 30 and 31 of 2007 and Case Nos. 6, 7 and 8 of 2012 vide Order dated 19.03.2012. According to the truing up order, the DISCOMs have landed up with positive true-up gap. With the aforesaid counter submissions, the learned counsel for the Orissa Commission has lastly submitted that the appeals have no merits and the appeals are liable to be dismissed with costs.

11. Upon hearing the rival submissions made by both the parties and going through the material on record and perusal of the impugned order, the following facts are undisputed:

(a) that this Appellate Tribunal in the matter of North Eastern Electricity Supply Company Ltd. v/s Orissa Electricity Regulatory Commission & Ors. in Appeal No. 77, 78 and 79 of 2006 vide Judgment dated 13.12.2006 had directed the Orissa Commission to take a relook of the entire matter while undertaking Truing-Up exercise and the Commission need not stick to its earlier view, but it shall have a relook in this respect by taking a practical view of the ground realities instead of proceeding on assumption and surmises. This Appellate Tribunal was sure that the Commission will take a relook of the matter and grant the benefits to the DISCOMs. The learned Orissa Commission has challenged the Judgment dated 13.12.2006 passed by this Appellate Tribunal before the Hon'ble Supreme Court in Civil Appeal No. 759 of 2007 which is said to be still pending before the Hon'ble Supreme Court.

(b) that the Full Bench of this Appellate Tribunal in the matter of WESCO, NEESCO and SOUTHCO Orissa Ltd. v/s Orissa Electricity Regulatory Commission & Ors. in Appeal No. 52, 53 & 54 of 2007 vide Judgment dated 08.11.2010 also held that the targets fixed by the Orissa Commission are very high and are considered unrealistic.

The Distribution Licensees have given valid reasons for non-availability of funds for strengthening of the distribution system which is necessary to reduce the losses. The finding of the Orissa Commission on this issue rendered to the unrealistic distribution loss of targets was held unacceptable by this Tribunal.

- (c) that the Full Bench Judgment dated 08.11.2010 of this Tribunal has also been challenged by the Orissa Commission in CA No. 3595–3597 of 2011. Thus, both the Judgments dated 13.12.2006 in Appeal No. 77–79 of 2006 and 08.11.2010 in Appeal No. 52–54 of 2007 of this Tribunal are under challenge in the Hon'ble Supreme Court of India at the instance of the respondent no.1, Orissa Commission.
- (d) that the aforesaid Civil Appeals have been admitted before the Hon'ble Supreme Court of India for final hearing but the operation of the Judgments of this Tribunal has not been stayed by the Hon'ble Apex Court as yet.
- (e) that the principles of law laid down and direction given by this Tribunal in the aforesaid judgments dated 13.12.2006 and 08.11.2010 are not being implemented by the learned Orissa Commission on the pretext that the Civil Appeals against the said judgments are pending before the Hon'ble Supreme Court even though the operation of the said judgments has not been stayed by the Hon'ble Supreme Court and the said judgments are still in operation and are binding upon the learned Orissa Commission. As such the principles laid down and directions given by this Tribunal in the said judgments are necessarily to be implemented by the Orissa Commission.
- (f) that this Appellate Tribunal vide Judgment dated 03.07.2013 passed in Appeal Nos. 26, 27 & 28 of 2009 and batch in the matter of SOUTHCO, WESCO, NEESCO & Ors. Vs OERC & Ors. has also directed the learned Orissa Commission that the loss level trajectory has to be reset by the State Commission from 2008-09 to 2012-13 in the light of the judgments of this Tribunal in Appeal Nos. 77 of 2006 and batch and 52 of 2007 and batch and the distribution loss

trajectory has to be re-determined keeping in view ground realities that the requisite funds for augmentation of the distribution system have not been made available to the Appellants. The loss level trajectory has to be reduced gradually from 2006-07 to 2012-13 and in no case, it should increase. The learned Orissa Commission was also directed that it shall true-up the accounts of the Appellants for the above period with the revised loss levels.

(g) That it has been brought to the notice of this Tribunal that Judgment dated 03.07.2013 of the Tribunal has also been challenged by the Orissa Commission before the Hon'ble Supreme Court which is still listed for admission.

12. After carefully and seriously considering the counter submissions and going through the material on record, now, we proceed to decide the aforesaid issues:

(A) **Issue No.1 : Distribution Losses:**

Since the issue of distribution loss has been decided by the Division Bench judgment dated 13.12.2006 in Appeal No. 77 of 2006 and batch by this Tribunal and also by judgment dated 08.11.2010 of the Full Bench of this Tribunal in Appeal No. 52 – 54 of 2007 and also by judgment dated 03.07.2013 of this Tribunal in Appeal Nos. 26 – 28 of 2009 and batch, the same principles and conclusions of this Tribunal are hereby upheld and reiterated by us in the present appeals also. There is no reason to deviate or differ from any of the findings or preposition of law laid down by this Tribunal in the previous judgments which are under challenge before the Hon'ble Supreme Court, particularly when no interim/stay order or operation of the said judgments has been stayed by the Hon'ble Supreme Court. In spite of there being no interim order or stay order against the said judgments of this Tribunal, the learned Orissa Commission has persistently not complied with the judgments of this Appellate Tribunal. Reasons are best known to it. The judicial discipline demands that the Appellate Tribunal's or Appellate Court's judgments should be implemented and complied with in letter and spirit by the subordinate

authorities, commissions or the court without any if & but, particularly, when the operation of the said judgment has not been stayed by the higher Appellate Court or Higher Forum. If this practice is allowed to prevail, that would create judicial anarchy in the country which is not permissible under the Constitution of India. Merely filing an appeal or Special Leave Petition, or any other petition in the Higher Court cannot be a ground to justify non-compliance of the judgments of the Appellate Tribunal, particularly, when the previous Retail Supply Tariff Orders were challenged before this Tribunal in the form of appeals which were decided by this Tribunal by quashing the Orissa Commission's impugned order with certain observations and directions. Due to non-implementation of the aforesaid judgment of this Tribunal by the Orissa Commission, the appellants DISCOMs are helpless except for running from pillar to post, anyhow to pursue the Orissa Commission to take action in the matter according to law.

The issue of distribution loss targets is completely covered by the aforesaid Judgments of this Tribunal. This is more particularly so since if the Distribution Loss Tariff is re-set from FY 2006-07 to 2012-13, the Distribution Loss Tariff for FY 2013-14 (which are the subject matter of the present appeals) would automatically have to be reset.

We have also gone through the ruling reported in *W.B.E.R.C. Vs. CESC Ltd.* AIR 2002 SC 3615 which observed that the distribution losses are controllable. In the reported case, it was also observed by the Hon'ble Supreme Court that a loss be it transmission or distribution is not totally beyond the control of the company which effect is established by the admissions made by the respondent company. In the reported case, there was an admission of the distribution licensee and Hon'ble Supreme Court had relied upon the said admission, when the Hon'ble Apex Court held that even such losses are not totally beyond the control of the distribution licensee. The Business Plan orders have already been considered by this Tribunal in the aforesaid Judgments and this Tribunal does not find it fit to reconsider the said Business Plan orders.

Thus, this issue of distribution loss is decided in favor of the Appellants and all the findings recorded on this issue by the learned Orissa Commission in the impugned order are hereby set-aside as the findings are against the previous Judgments of this Tribunal which are completely binding upon the learned Orissa Commission.

**(B) Issue No.2 : Employees Cost (actuarial valuation for terminal benefits)**

This issue is also covered by the Judgment dated 03.07.2013 of this Tribunal in Appeal No. 26–28 of 2009, 160 to 162 of 2010 & batches and 147–149 of 2011 and 193-196 of 2012.

The main argument of the learned counsel for the Appellant on this issue is that this Tribunal vide Judgment dated 03.07.2013 in Appeal No. 26-28 of 2009 & batch has found that there is an inordinate delay in getting the report of Actuary appointed by the State Commission and in the absence of Actuary Report the State Commission has been deciding the terminal liability provisionally since 2009-10 which is not proper. The State Commission was directed by this Tribunal to either expedite the Report of its Actuary or else rely on the report of the Actuary appointed by the Appellant. The impugned order has in fact done precisely to the contrary. Whilst without considering the Actuary Report filed by the Appellant, continues to rely upon the old Actuary Valuation undertaken by the Orissa Commission and provisionally estimating a percentage increase on the same. This issue is also, being contrary to the view or preposition of law laid down by this Appellate Tribunal, decided in favor of the Appellants and all the findings recorded in the impugned order in support by the Orissa Commission are hereby quashed.

**(C) Issue No. 3: Administration & General (A&G) Expenses**

The Orissa Commission has disallowed A&G expenses observing that the Distribution Losses are controllable. However, certain expenses such as Spot Billing and Energy Audit are fully covered by the Full Bench Judgment dated 08.11.2010 of this Tribunal in Appeal No. 52-54 of 2007 and also by the Judgment dated 03.07.2013 of this Tribunal in Appeal No.

26-28 of 2009 and batch. The important submission of the learned counsel for the Appellants on this issue is that expenses such as Cess and RTI expenses are a statutory liability and such expenses have to be made necessarily to implement the provisions of the RTI Act. The learned Orissa Commission in the impugned order has not considered these expenses at all much less the prudence of such expenses. The Orissa Commission in the impugned order has nowhere doubted that such expenses have been incurred and will have to be incurred by the DISCOMs in performing their statutory responsibilities. The learned Orissa Commission has only disallowed such expenses on the ground that only a given permissible increase on a percentage increase over the previous year's amount will serve the purpose. This approach of Orissa Commission is not sound and proper. The Orissa Commission has not recorded any finding that such expenses are part of normal A&G expenses and have already been spent. Further elaborating the submissions the learned counsel for the Commission has further said that the rationale given in the impugned order does not take into account the fact that an expense incurred to satisfy a statutory responsibility has necessarily to be recovered in the tariff. Further, there is no norm given in the Regulations by which such abnormal A&G expenses statutorily needed to be expended could be curtailed by the Orissa Commission. On this issue also we are fully in agreement with the submissions made by the learned counsel for the Appellants and the findings on the issue recorded by the Orissa Commission are also quashed and this issue is also decided in favour of the Appellants.

(D) **Issue No. 4: Truing up for FY 2011-12**

Since the entire truing up exercise has been undertaken by the Orissa Commission in the impugned order in only one para and one table without giving any reason or explanation or justification and also considering the fact that truing up carried out in the impugned order is contrary to the principles laid down by this Tribunal in the Judgment dated 03.07.2013 observing that truing up order (in that case) only

indicated the basis and summary of truing up and comparison of the revenue gap.

In the aforesaid Judgment dated 03.07.2013, this Tribunal has held that the truing up order should clearly indicate the truing up of expenses under various heads and the manner in which truing ups have been carried out.

The learned Orissa Commission has adopted the same method as done by it on previous occasions and merely rejected the so-called principle of truing up once again simply by giving the total of the comparison of revenue gap without considering the claims of the Appellants. The Orissa Commission is directed to give a detailed order regarding the truing up explaining the expenses allowed or disallowed. Without such explanation, it is not possible to examine the correctness of the true up order. This issue is also decided in favor of the Appellants.

13. The important question of law involved in these three Appeals as vehemently argued by the learned counsel for the Appellants is whether the learned Orissa Commission is justified in not implementing and complying with the judgments of this Appellate Tribunal simply on the ground of pendency of civil appeals before the Hon'ble Supreme Court particularly when the execution or operation of the judgments of this Tribunal has not been stayed or suspended by the Hon'ble Apex Court?

14. The learned Orissa Commission filed a Civil Appeal No. 759 of 2007 before the Hon'ble Supreme Court against the judgment of this Tribunal dated 13.12.2006 passed in Appeal Nos. 77, 78 & 79 of 2006 whereby this Tribunal directed the Orissa Commission to take a relook of the entire matter while undertaking true-up exercise without sticking to its earlier views believing the Orissa Commission shall have a relook in this respect by taking a practical view of the ground realities instead of proceeding on assumptions and surmises. While giving this direction to the Orissa Commission, this Tribunal was sure that the Orissa Commission will take a relook of the matter and grant the benefits to the DISCOMs. The Civil

Appeal before the Hon'ble Supreme Court is said to be still pending for disposal.

15. The learned Orissa Commission also filed Civil Appeal Nos. 3595-3597 of 2011 before the Hon'ble Supreme Court against the Full Bench decision dated 08.11.2010 of this Tribunal passed in Appeal no. 52-54 of 2007 whereby this Tribunal again held that the targets fixed by the Orissa Commission are very high and are unrealistic. These Civil Appeals are also said to be pending before the Hon'ble Supreme Court.

16. Thus principles of law and dictum laid down and directions given by this Tribunal in the aforesaid judgment dated 13.12.2006 and 08.11.2010 are not being implemented by the Orissa Commission on the pretext that the Civil Appeals against those judgments are pending before the Hon'ble Supreme Court even though the operation of the said judgments passed by this Tribunal has neither been stayed nor any interim order has been passed by the Hon'ble Supreme Court as yet. Likewise, the learned Orissa Commission is also said to have filed appeal against the judgment dated 03.07.2013 of this Tribunal passed in Appeal no. 26-28 of 2009 & batch which is said to be at the stage of admission.

17. The relevant provisions in this regard are given in Order XLI Rule 5 of The Code of Civil Procedure, 1908, which is reproduced below:

*"5. Stay by Appellate Court – (1)An appeal shall not operate as stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay or execution of such decree.*

*[Explanation. – An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from*

*the Appellate Court of the order for the stay or execution or any order to the contrary, be acted upon by the Court of first instance.]”*

18. The Hon’ble Supreme Court in *Ratansingh v Vijaysingh & Ors.* reported in (2001) 1 Supreme Court Cases 469 in para 9 observed as follows:

*“9. Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation. But if the appeal results in a decree that would supersede the decree passed by the lower court then it is the appellate court decree which becomes enforceable. When the appellate order does not amount to a decree there would be no supersession and hence the lower court decree continues to be enforceable.”*

19. The Hon’ble Supreme Court again in *Atma Ram Properties (P) Ltd. v Federal Motors (P) Ltd.* reported in (2005) 1 Supreme Court Cases 705 in para 8 has observed as follows:

*“8. It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below.”*

20. The settled law on the aforementioned point is that mere pendency of an appeal in the higher court against the judgment or order of the lower Appellate Court/Tribunal shall not be a ground to stay the enforcement of the said judgments or orders passed by the lower court/Regulatory Commission. The learned Orissa Commission has kept the issue pending at its own level, whims and fancies just on the ground that the appeals are pending before the Hon’ble Supreme Court, even though there is no stay on the enforcement or operation of the said judgments of this Tribunal by the Hon’ble Supreme Court.

21. After considering the above legal position, this view of the learned Orissa Commission of not implementing and enforcing the judgments of this Appellate Tribunal is not proper and correct. We think, if this practice is allowed to continue without any proper guidance by this Tribunal to the Regulatory Commissions, this would create judicial indiscipline and

anarchy in the judicial hierarchy of the Justice delivery system provided by law. The learned Orissa Commission is expected and directed either to obtain a stay order or interim order from the Hon'ble Supreme Court in the aforesaid appeals within a period of two months from today, otherwise implement the said judgments of this Tribunal positively in which appeals are pending before the Hon'ble Supreme Court and send compliance report to this Tribunal after the expiry of two months. The non-implementation of the aforesaid judgments of this Tribunal is creating confusion between the litigant parties and by implementation of the aforesaid judgments of this Tribunal the learned Orissa Commission also can correct or rectify all the infirmities and errors, etc. after complying with the directions given by this Tribunal in the aforesaid judgments and then the issues pending for years will be finally settled this way or that way bringing to an end the whole impasse.

22. In view of the above discussions, all the issues referred to above are decided in favour of the Appellants. In terms of the findings, the learned Orissa Commission is directed to implement the same immediately. Consequently, all these Appeals are allowed. There is no order as to costs.

**Pronounced in open Court on this 11<sup>th</sup> day of February, 2014.**

**(Justice Surendra Kumar)  
Judicial Member**

**(Rakesh Nath)  
Technical Member**

**√ REPORTABLE/NON-REPORTABLE**

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