

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 188 of 2010

Dated: 21st December, 2012

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,**

**North-eastern Electricity Supply Company of Orissa Ltd.,
N1/22, IRC Village, Nayapalli,
Bhubaneswar-751015**

... Appellant

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.
3. Western Electricity Supply Company of Orissa Ltd.,
N1/22, IRC Village, Nayapalli, Bhubaneswar.
4. Southern Electricity Supply Company of Orissa Ltd.,
N1/22, IRC Village, Nayapalli, Bhubaneswar

...Respondents.

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

Counsel for the Respondent Mr Anand Ganeshan for R- 2
Mr Rutwik Panda for Commission

JUDGMENT

PER MR. V J TALWAR, TECHNICAL MEMBER

1. The Appellant North-eastern Electricity Supply Company of Orissa Limited is one of the distribution licensees in the State of Orissa. The Odisha Electricity Regulatory Commission (State Commission) is the 1st Respondent herein.
2. The Respondent No.2 the Grid Corporation of Orissa Ltd. (GRIDCO) is a bulk supplier in the State of Orissa and a deemed licensee under 5th proviso of Section 14 of the Electricity Act 2003, read with Government of Odisha'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 3rd and 4th Respondents are the other distribution licensees in the State of Odisha.
4. The 2nd Respondent GRIDCO had filed a petition before the Commission for Approval of Bulk Supply Price (BSP) for FY 2010-11 on 3rd November 2009 and the State Commission passed the Impugned Order on Bulk Supply Price (BSP) for FY 2010-11 on 20th March 2010 increasing the Bulk Supply Price for the Appellant substantially from Rs1.30/kWh to Rs 1.95/kWh i.e. by 50%.
5. Aggrieved by the Impugned Order of the Commission the Appellant has filed this Appeal.
6. The Appellant has raised seven issues in this Appeal for our consideration. These are:
 - i) The total quantum of power available in arriving at the expected revenue by ring fencing the sale of surplus power to other states while determining the Bulk Supply Price (BSP).
 - ii) Increasing the BSP while not factoring the revenue from export of power ;
 - iii) Delay in finalisation of truing up exercise and change in the principles of truing-up;

- iv) Allowance of repayment of loan principal as pass through in the ARR of GRIDCO ;
 - v) Determination of BSP without considering power regulation;
 - vi) Charges for Energy overdrawal ;
 - vii) Charges for Demand overdrawal
7. We shall now deal with each of the above issues one by one. Issues number (i) and (ii) mentioned above are interconnected issues and they would be taken up for consideration together. These issues are related to **the total quantum of power available in arriving at the expected revenue by ring fencing the sale of surplus power to other states while determining the Bulk Supply Price (BSP) and increase in BSP without factoring the expected revenue from export of power.**
8. The learned Counsel for the Appellant has made following submissions on these issues:
- a) The State Commission has not considered the earnings of GRIDCO from the sale of surplus power outside the State only on the ground that a negative gap of Rs 806.15 crore had been left in the approved ARR of

GRIDCO and the Commission expected that the said gap would be covered through export earnings, UI charges and recovery of arrears from DISCOMS.

- b) It is indisputable that from the Year 2006-07 onwards till date, the State Commission has been "Ring Fencing" the revenues of GRIDCO from such export sales. However, the State Commission had included the earning from export sales in the ARR for FY 2005-06.
- c) Once the Commission has accepted that revenue from such export sales is to be trued-up in the ARR in the subsequent year, there can be no justification whatsoever from factoring in such revenue when the Tariff is fixed at the beginning of the tariff year.
- d) Consciously omitting an item of revenue or cost in the Tariff determination, when the Commission accepts that such item would be trued-up at the end of the year is contrary to settled principles of prudence in Tariff fixation.
- e) In principle, all costs and revenues attributable to the electricity business ought to be taken into account in the ARR. Hence there is no warrant for leaving out the

revenues or the costs of power sold outside the state in the ARR and then truing it up after the year is over.

- f) This issue had been raised before this Tribunal in Appeal Nos. 74-76 of 2006, which was disposed of by a Division Bench of this Tribunal vide its judgment dated 13-12-2006 in favour of the Distribution Licencees.
 - g) The same issue was again raised before this Tribunal for FY 2007-08 in Appeal Nos. 58 and 59 of 2007 which were disposed of by the Full Bench of this Tribunal vide its judgment dated 09-11-2010 against the Appellant. However, the Tribunal in its judgment had observed that since the aforesaid amounts were trued-up in the ARR of the subsequent years, the issue did not survive in that year.
 - h) The Tribunal may, therefore, lay down the principle for treating such export earnings for Tariff fixation in future years.
9. The learned Counsel for the GRIDCO (R-2) supporting the Commission's findings in the Impugned Order had made following submissions:

- a) More than 86 % of the total cost of GRIDCO is power purchase cost. GRIDCO does not have any control over the power purchase cost which is regulated and determined by the Regulatory Commissions, either Central Commission or State Commission, under the Electricity Act, 2003.

- b) Following the hiving off the transmission business to the Transmission licensee with effect from 1.4.2005, GRIDCO has virtually no fixed assets on its books. However, it continues to carry the burden of the past liabilities raised over a period of time to service operational losses and non-payment of arrears by the distribution licensees in the past.

- c) GRIDCO in the past had surplus power on account of high hydro electricity availability and the demand of electricity in the State being low. On account of the above, GRIDCO was in a position to export electricity outside the State and also earn money through the Unscheduled Interchange mechanism. However, the surplus power with GRIDCO has greatly reduced on account of higher demand in the State and lower power availability from various sources. GRIDCO has in fact

been forced to draw extra power at higher cost on account of deficit in the State. Thus, the prospect of earnings through export and unscheduled interchange mechanism is very low and virtually nil.

- d) The past liabilities of GRIDCO are to be serviced from the non-core activities of GRIDCO, namely, earnings from export of power and from unscheduled interchange charges, which earnings have been greatly diminished.
- e) The distribution licensees have been in consistent default of their obligations to pay for the electricity supplied by GRIDCO. The State Commission has also on various occasions deprecated the functioning of the distribution licensees including the Appellant as not fulfilling their obligations. On account of the above, GRIDCO is under severe financial crisis and there is a substantial regulatory asset which has not been as yet recovered by GRIDCO.
- f) The contention of the Appellant that the export earnings of GRIDCO are not accounted is misconceived. On the other hand, the State Commission year on year leaves a substantial uncovered deficit in the revenue

requirements of GRIDCO and holds that the same is to be recovered from the export earnings and UI charges.

- g) The State Commission has observed that even for the past year and the present year, there was a substantial deficit which could not be met from export earnings and the same was treated as Regulatory Asset. It is submitted that GRIDCO has also challenged the methodology of the State Commission to leave a substantial gap every year and not covering the same in its revenue requirements and tariff, thereby causing a substantial loss in revenue to GRIDCO.
 - h) In case the export earnings are to be factored in the tariff orders and not at the stage of true up, the entire revenue requirements of GRIDCO should be covered and the export earnings should be factored on a realistic basis based on the actual for the previous years.
10. We have heard the learned counsel for the Appellant and 2nd Respondent GRIDCO. Let us now refer to the findings of the Commission on the issue in the Impugned Order reproduced below:

"Export of Power & UI Income

222. The revenue from power trading to other States since FY 2003-04 and through Unscheduled Interchange (UI) are taken into GRIDCO's account every year for which the losses and the loans were substantially reduced. All revenues and costs are reflected in the Annual Accounts of GRIDCO which have been finalized and audited up to the end of FY 2008-09. However, this has not been possible during the last two years due to non-availability of surplus power. 34

223. The earning from UI Charges has reduced substantially due to drastic reduction of hydro power because of depleting reservoir levels at various Hydro Stations which was key to such operations. Further due to increased State Demand for Power, the surplus power scenario in the supply front has drastically changed. In fact, in some of the months during the current FY 2008-09, GRIDCO has overdrawn under UI mechanism.

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312. After having determined the quantum of power purchase for the DISCOMs, the Commission has to estimate the quantum of energy lost on account of transmission at EHT within the State for delivery to the DISCOMs. The Commission has taken into account the sale to CGPs and approves the emergency drawal by CGPs at 10 MU for 2010-11 as projected by GRIDCO. The detailed requirement of power purchase for use within the State is projected in the table below:

Table – 22
Purchase of Power by GRIDCO for State Use for FY 2010-11
(Figures in MU)

<i>Name of the DISCOMs</i>	<i>Commission's Approval for 2009-10</i>	<i>GRIDCO's Proposal in ARR 2010-11</i>	<i>Commission's Approval for 2010-11</i>
<i>CESU</i>	<i>6045.0</i>	<i>6670.00</i>	<i>6420.0</i>
<i>NESCO</i>	<i>4285.0</i>	<i>5140.0</i>	<i>5122.0</i>
<i>WESCO</i>	<i>6430.0</i>	<i>6451.0</i>	<i>6244.0</i>
<i>SOUTHCO</i>	<i>2161.0</i>	<i>2585.0</i>	<i>2368.0</i>
<i>TOTAL DISCOMs</i>	<i>18921.0</i>	<i>20846.0</i>	<i>20154.0</i>
<i>CGP</i>	<i>10.0</i>	<i>10.0</i>	<i>10.0</i>
<i>TOTAL SALE</i>	<i>19831.0</i>	<i>20856.0</i>	<i>20164.0</i>
<i>Transmission loss at EHT in MU (DISCOMs Purchase only)</i>	<i>788.38 (@ 4.0% Transmission loss)</i>	<i>937.1 (@ 4.3% Transmission loss)</i>	<i>839.75 (@ 4.0% Transmission loss)</i>
<i>Total Purchase</i>	<i>19719.38</i>	<i>21793.10</i>	<i>21003.75</i>

313. The Commission is approving the energy drawal for FY 2010-11 after considering the projections made by DISCOMs and hence there should not normally be any variations from the approved drawal. The Commission has also fixed the monthly drawal limit for each licensee in the aforesaid RST order of the DISCOMs. The licensees should limit their monthly drawal to the approved quantum of energy by reducing distribution Loss. The licensees must also try to stick to the annual energy drawal as approved by the Commission.

...

492 From the above table, it is found that GRIDCO after meeting all expenses would still be left with a negative gap of Rs.806.15 crore. The Commission expects that the same gap shall be bridged through export earning, UI charges and recovery of arrears from DISCOMs over and above their current BSP dues.

Bridging the gap in the account of GRIDCO

493. The Commission had approved procurement of 19719.37 MU energy by GRIDCO from different sources at an estimated cost of Rs.2923.80 crore for the year 2009-10 at an average power purchase price of 148.27 paise per unit meant for sale to distribution companies in the State. However, the Bulk Supply Tariff approved by the Commission for sale to the distribution companies for 2009-10 was 122.20 paise per unit. The gap between the revenue realization and the revenue requirement of GRIDCO for 2009-10 was approved at Rs.637.69 crore but including principal repayment by GRIDCO for Rs.245.16 crore, the total gap left was Rs.882.85 crore. The gap was supposed to be bridged by profit to be earned through trading of power and/or UI mechanism etc or by borrowing from financial institutions with Govt. guarantee and in that case the interest on such borrowing was to be allowed as carrying cost in the ARR of 2010-11. In the current year upto January, 2010, GRIDCO landed in a net deficit of Rs.915.12 cr (Para-457) as per the data submitted by GRIDCO in its cash flow statement upto January, 2010. The above amount does not include the repayment of principal of Rs.245.16 cr as discussed above. As stated in para-458 above the net cash deficit including principal repayment would, therefore, amount to Rs.1160.28 cr which Commission treats as Regulatory

Asset provisionally. This figure may be revised after the audited data for the year 2009-10 are available to the Commission and the same will be amortized over a period of six years starting from FY 2010-11.

494. Taking into account the requirement of energy projected by GRIDCO and the DISCOMs for the year 2010-11, the Commission has approved 21003.75 MU of energy for purchase by GRIDCO from different generators based on least cost criterion for the year 2010-11. Based on the cost of generation determined for the generators, the average power purchase cost per unit comes to 174.58 paise. Thus, the cost of procurement of power by GRIDCO from the generators for the year 2010-11 comes to Rs.3666.85 crore. After taking into account the salary cost, interest payment and A&G expenses of Rs.204.39 crore, Special Appropriate towards repayment of loans amounting to Rs.366.31 cr (Rs.266.39 cr + Rs.99.92 cr) and that of OHPC amounting to Rs.4.89 crore, net revenue requirement works out to Rs.4242.44 crore. Against this, revenue realization anticipated from DISCOMs at the approved bulk supply price of 170.25 paise/unit comes to Rs.3431.19 crore for the FY 2010-11. After taking into account the Misc. Revenue of Rs.5.10 crore, there will be a gap of Rs.806.15 crore for the year 2010-11. Commission expects this gap to be met by earning from trading, UI, recovery of arrears from DISCOMs over and above the current BSP and subvention from Govt. Shortfall, if any, after such adjustment shall be a recognized as regulatory asset and carrying cost thereof shall be passed on to the ARR for the FY 2011-12 onwards. Govt. may also consider to provide a special budgetary support to GRIDCO for enabling it to pay the power purchase cost

to the generators in time and release the full amount of R&M expenditure to the distribution companies after adjusting the amount received from the DISCOMs in the escrow account towards transmission charges, SLDC charges, bulk supply price and current salary expenditure of the employees. This will help the DISCOMs in improving the quality of supply by taking repair and maintenance work in time. DISCOMs on their part must take systematic and coordinated efforts to ensure 100% billing of the power supplied and realize the current tariff bills in full.”

11. The above discussion made by the State Commission would reveal that it has first determined the power requirement of each of the DISCOM and then projected the power procurement requirement by GRIDCO (R-2) for sale within the state and then determined the power purchase costs of the GRIDCO based on least cost criterion. Thus power purchase costs accounted for in the ARR of the GRIDCO (R-2) relates only to the power requirement within the State of Odisha and does not include the cost of surplus power. Thus, the State Commission has not considered the power purchase cost for the surplus power as well as the revenue likely to be earned from such surplus power in the ARR of 2nd Respondent GRIDCO. It is noticed that while approving the ARR of GRIDCO for FY 2010-11, the State Commission has left an uncovered gap of Rs 806.13 crore in the Impugned Order indicating that the same would be bridged

through export earnings and shortfall if any will be accounted for as regulatory asset. It is to be pointed out that in the true up Order dated 19.3.2012, the State Commission has carried out the truing up exercise for FY 2010-11 taking into consideration the actual revenue and power purchase cost for surplus power. This is in line with the judgment of Full Bench of this Tribunal in Appeal No. 58 and 59 of 2007 relevant portion of which is quoted below:

“19....

(b)In the present case, the State Commission has not considered the cost of power to be purchased as well as the revenue to be earned from trading of surplus power outside the State. Further, it is to be pointed out that in the true-up order dated 23.03.2009 for FY 2009-10, the State Commission has carried out the truing-up exercise and updated the same up to FY 2007-08. In such truing-up, the State Commission has taken into consideration the actual receipts and expenditure of GRIDCO. In the said order, the State Commission has clearly stated that income from export of power is accounted for in the truing-up exercise after availability of audited accounts. Therefore, the contention of the Appellants that the State Commission has not taken revenue from trading into consideration is not tenable. Consequently this issue of revenue from sale of surplus power does not survive”

12. Interestingly, the same issue had been raised by the 2nd Respondent GRIDCO in Appeal No. 106 of 2010 against the

same Impugned Order wherein the GRIDCO had prayed for inclusion of cost as well as revenue from surplus power for determination of BSP for FY 2010-11. Thus, the relief sought for by GRIDCO in Appeal No. 106 of 2010 was same as that of the Appellant in the present Appeal. Surprisingly both the contesting parties have sought for same relief (i.e. inclusion of revenue from export in the ARR of GRIDCO) in their respective Appeals but contested the same in the counter appeals. This Tribunal in its Judgment dated 1st March 2012 in Appeal No. 106 of 2010 had confirmed the principle laid down by it in its earlier judgment dated 30th 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 1st 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)

13. In view of the decision arrived at by this Tribunal in Appeal No. 88 of 2009 and in Appeal No. 106 of 2010. These issues are decided accordingly in favour of the Appellant
14. The third issue for consideration is related to **delay in finalisation of truing up exercise and change in the principles of truing-up.**
15. The learned Counsel for the Appellant has made the following contentions:
 - a) The comparison of truing-up figures would show that the revenue gap for the same year keeps on changing every time a truing-up exercise is carried out by the

Commission. Further, the Commission is following a different set of principles for making Truing-up Exercise. A bare perusal of the extracts of the tariff orders would show that over the years, the truing-up figures have been constantly changing but there is no reasoning or explanation evident from the tariff orders as to what has caused such change.

- b) There has to be some amount of certainty and transparency in the proceedings conducted by the Commission.
- c) Transparency is a statutory requirement under Section 86(3) of the Electricity Act. If it is necessary to change a particular principle of truing-up by the Commission, the State Commission would be bound to give notice of such change to invite objections & suggestions on the same and to have a hearing prior to effecting such change. Further the Order itself must be a self speaking one which clearly brings out the changed principle as also the reasons for such change.
- d) The truing-up exercise carried out over the years is clearly contrary to Section 64(3) of the Act and of Section 86(3) of the Act.

16. The learned counsel for the Respondent GRIDCO submitted that there are no grounds of challenge made by the Appellant in the memo of Appeal. The Appellant has raised the issue in regard to change of true up values and also change in principles of truing up only during oral submissions at the time of hearing and in the written note of arguments. Thus, the issue, not being a subject matter of challenge in the memo of appeal, ought to be rejected. He further added that there is no merit in the arguments made by the Appellant on this regard and made the following submissions:

- a) The Appellant has only filed a statement showing that there have been changes in the truing up practice of the State Commission. The Appellant has not shown any material or process which has been wrongly or incorrectly adopted by the State Commission at any point of time. The State Commission has adopted the well known and accepted principles for truing up the finances of GRIDCO.
- b) There cannot be any question of challenge to the truing up carried out by the Commission on a general basis

without showing any specific imprudence in the principles adopted by the State Commission.

- c) On the other hand, the State Commission has not been able to finalize the truing up exercise on account of the pendency of the receivables audit of the distribution licensees and the orders to be passed thereon. The State Commission has held as under:

“479. However, Commission is of the opinion that outcome of the orders on receivable audit has some bearing on the income of GRIDCO and hence decides to undertake final truing up exercise after pronouncement of order on receivable audit.”

- d) In the circumstances and considering that the Appellant has not shown any imprudence in the costs and expenses incurred by GRIDCO and the principles adopted by the State Commission, the arguments of the Appellant are without any merit.

17. The main grievance of the Appellant is related to change in revenue gap for the same year and adoption of different set of principles every time the truing up exercise is carried out by the Commission. Per-contra, the learned counsel for the GRIDCO (R-2) stated that the Commission has adopted well established principles of truing up.

18. Let us examine the relevant portions of the Tariff Orders for FY 2009-10 and 2010-11 reproduced below:
19. Relevant extracts of Commission's Tariff order on ARR of GRIDCO for FY 2009-10

“Truing Up for GRIDCO

416. The Commission had undertaken truing up exercise of GRIDCO from the FY 1996-97 to 2005-06 in the BSP order 2007-08 (para 5.35.11.1). In the said Order, Commission stated that the exercise was provisional subject to finalization after hearing from stakeholders namely GRIDCO and four DISCOMs.

...

419. Regarding receivable audit, WESCO, NESCO & SOUTHCO have submitted the report to the Commission. CESU is yet to submit the report on receivable audit. After getting the report from three DISCOMs, Commission conducted a hearing and directed GRIDCO to file its comments on the said reports. GRIDCO submitted its comments on 18.08.2008 to the Commission. The Commission again directed WESCO, NESCO and SOUTHCO to file their views on the comments of GRIDCO to which they have submitted their replies on 27.09.2008. After going through the comments of GRIDCO and DISCOMS, it is revealed that there is disagreement on many issues pertaining to the receivables audit. 420. In view of the above, Commission is of the opinion that, this issue needs to be deliberated among all the stakeholders viz. GRIDCO, DISCOMS, State Govt. etc. to arrive at a final settlement. For this purpose, if considered appropriate,

the Commission will conduct a separate hearing and after eliciting the views of all the stakeholders shall pass appropriate order on the matter.

...

421. However, the Commission in continuation to the earlier truing up exercise has updated the same on provisional basis upto FY 2007-08 i.e. the year of availability of audited accounts. The table below shows the up-dated True-up requirement of GRIDCO.

Table 39

(in Rs Crores)

Financial Year	Gap in revenue requirement	Gap in revenue from sale of power	Total gap (for the year)	Add: approved gap in ARR allowed by the Commission	Gap considered for true up	Cumulative Gap (+/-) (Rs. In Crore)
1996-97						-295.00
1997-98	-325.65	5.86	-319.79	0.68	-319.11	-614.11
1998-99	-244.23	-420.39	-664.62	0.19	-664.43	-1278.54
1999-00	-237.01	244.14	7.13	-30.91	-23.78	-1302.32
2000-01	-360.22	194.43	-165.79	0	-165.79	-1468.11
2001-02	15.06	65.61	80.67	43.59	124.26	-1343.85
2002-03	-296.51	-264.11	-560.62	0	-560.62	-1904.47
2003-04	-84.95	586.13	501.18	0	501.18	-1403.29
2004-05	-102.67	322.13	219.46	217.35	436.81	-966.48
2005-06	-403.92	384.32	-19.60	15.72	-3.88	-970.36
2006-07	-175.75	1028.86	853.11	-504.52	348.59	-621.77
2007-08	148.57	902.41	1050.98	-464.86	586.12	-35.65

422. The true up requirement as arrived in BSP order 2007-08 has undergone certain changes due to adoption of different principle such as (i) considering the depreciation as per approval of the Commission instead of audited figure, and (ii) exclusion of interest on State Govt. loan from total interest liability.

423. Commission is of the opinion that the outcome of the order on receivable audit has some bearing on the income of GRIDCO and hence decides to undertake final truing up exercise after pronouncement of the order on receivable audit.” {emphasis added}

20. Relevant Extracts of Commission’s Tariff order on ARR of GRIDCO for FY 2010-11

“Truing up for GRIDCO

475. In the last tariff order, Commission had undertaken truing up exercise of GRIDCO upto FY 2007-08 based on the audited accounts. Now audited accounts upto FY 2008- 09 is available. **The existing principle adopted in the previous tariff order is amended in respect of certain components of cost and accordingly the Commission updated the truing up exercise upto 2008-09. A table showing truing up exercise upto FY 2008-09 is depicted below.**

Table 59

(In Rs Crores)

Financial Year	Gap in revenue requirement	Gap in revenue from sale of power	Total gap (for the year)	Add: approved gap in ARR allowed by the Commission	Gap considered for true up	Cumulative Gap (+/-) (Rs. In Crore)
1996-97						-295.00
1997-98	-310.15	5.86	-304.29	0.68	-303.61	-598.61
1998-99	-236.10	-420.39	-656.49	0.19	-656.30	-1254.91
1999-00	-230.33	244.14	13.81	-30.91	-17.10	-1272.01
2000-01	-359.42	194.43	-164.99	0	-164.99	-1437.00
2001-02	13.74	65.61	79.35	43.59	122.94	-1314.06
2002-03	-297.86	-264.11	-561.97	0	-561.97	-1876.03
2003-04	-79.79	586.13	506.34	0	506.34	-1369.69
2004-05	-73.19	322.13	248.94	217.35	466.29	-903.40
2005-06	-403.92	384.32	-19.60	15.72	-3.88	-907.28
2006-07	-175.47	723.02	547.55	-504.52	43.03	-864.25
2007-08	149.93	902.41	1052.34	-464.86	587.48	-276.77
2008-09	-410.14	938.76	528.62	-410.05	118.27	-158.20

476. The following principles are adopted while undertaking truing up exercise.

a) Power Purchase cost is allowed on actual basis.

b) Employees cost is allowed on actual basis

c) R&M cost is allowed on actual basis.

d) A&G cost is allowed as per actuals subject to the limit approved in the ARR.

e) Interest on loan amount is allowed on actual basis except interest on loan from State Govt.

f) Depreciation is allowed as per actuals upto the FY 2000-01. From 2001-02 onwards, depreciation is calculated in line with Hon'ble High Court order i.e. at pre-revalued cost of asset and pre-92 rate notified by Govt. of India.

g) Income from interest payable by WESCO, NESCO & SOUTHCO on bond value of Rs.400 core shown in audited accounts for the FY 2006-07 has not been considered in truing up exercise since the matter is subjudice. “ {emphasis added}

21. Perusal of above extracts would reveal the following propositions:

I. The Commission has carried out truing up exercise after receiving the audited accounts of the GRIDCO.

II. There have been variations in the revenue gap for the same year in the truing up exercise for FY 2009-10 and FY 2010-11.

- III. Admittedly, the Commission has adopted different set of principles while carrying out trueing up exercise for these two years.
22. Since every true up exercise would necessarily have impact on retail consumer tariff, the principles laid down in Section 64 of the Electricity Act 2003 are required to be essentially followed. The Commissions established under Electricity Act 2003 are quasi-judicial authorities. It is settled law that quasi-judicial authorities are required to pass self speaking orders. The State Commission has neither given any reason for variation in the revenue gap for the same year nor for change in principles adopted in two trueing up exercises.
23. In the light of above discussions, the State Commission is directed to seek comments from all stake holders for any trueing up exercise if future including for any change in principle for trueing up in accordance with the provisions of Section 64 of the Act.
24. This issue is decided in favour of the Appellant.
25. The fourth issue for consideration is related to **allowance of repayment of loan principal as pass through in the ARR of GRIDCO.**

26. This issue is 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".

27. So, the above decision of the Tribunal would squarely apply to the present facts of the case as well. Accordingly, this point is also answered in favour of the Appellant.

28. The fifth issue is regarding **determination of BSP without considering power regulation**. The learned counsel for the Appellant has admitted that this issue arises in the RST Order for the relevant year and not in BSP Order and did not press for the same. The issue is accordingly dropped.
29. The sixth and seventh issues are related issues relating to **demand and energy over drawals by the Appellant** and they are taken together for consideration.
30. The learned counsel for the Appellant contended that the State Commission has imposed penalty for excess drawal by any distribution licensee (DISCOM) by way of actual charges for such overdrawal. According to the learned counsel for the Appellant, there is no clarity in the impugned order and is also unworkable. He made following submissions in support of his contentions on these issues;
- a) The impugned BSP Order provides for penalty for overdrawal by any distribution licensee on the basis of the actual cost of power purchase charges plus transmission loss and transmission cost. This is contrary to the RST Order for FY 2010-11 which provides month wise scheduled drawal by each DISCOM and it also provides that any deviation from

the drawal schedule by DISCOMs shall be dealt accordingly with the OERC (Intra-State ABT) Regulation, 2007 and related orders of the Commission (para 495 of RST order).

- b) If GRIDCO overdraws beyond its scheduled drawal from the Regional Grid, GRIDCO, would be liable to pay only the Unscheduled Interchange (UI) charges for the overdrawn quantum in terms of the Central Commission's UI Regulations and energy charges only for the scheduled drawal. No energy charges for over drawn quantum would be payable. On the other hand, if the Appellant overdraws from the grid, the Appellant would have to pay full charges for the actual energy drawn by it from the grid at approved BSP irrespective of its scheduled drawal and also the additional charges for the over drawn quantum of energy at actual cost of power purchase by GRIDCO. It is not clear whether the charges for any excess drawal from the grid on actual basis, as suggested in the impugned order, are in addition to the purchase of power at BSP or in lieu of the cost of power purchase;

- c) It would not be possible for GRIDCO to know the actual cost of power purchase of the quantum of power over drawn by the DISCOM from the Grid. Hence the dispensation is infact unworkable.
- d) The impugned dispensation does not take into account the ground realities. For example, at a point of time, two of the four DISCOMS in the State might be over drawing whilst the other two DISCOMS might be under-drawing by the same amount, in such an event the net drawal by GRIDCO from the Grid will not exceed its allotted capacity. Hence despite the fact the GRIDCO would not have to pay any amount for the increased drawal of the two over-drawing DISCOMS, at that point of time, the two over-drawing DISCOMs would be forced to pay the overdrawl charges to GRIDCO. This would result in unjust enrichment to GRIDCO.
- e) The BSP is actually a single part tariff which already includes a component of fixed cost and variable cost of GRIDCO. Hence, for every unit over drawn, the Distribution Licencee had already paid the full BSP for each overdrawn unit and as per the ABT Regulation paid the UI rates as mentioned in the Regulations.

Hence, to pay an additional amount towards fixed charges for overdrawn units is in effect a triple jeopardy since there is already a charge for overdrawl of energy.

- f) To impose payment of transmission charges plus transmission losses for the overdrawan quantum would result in double jeopardy. In the ultimate analysis, the Distribution Licencees would have to pay the total transmission charges to OPTCL and in any event, all transmission losses are already factored into the BSP determined by the State Commission;
31. The learned counsel for the 2nd Respondent GRIDCO fully supported the Commission's directions on the issue in the Impugned Order. He clarified in his submissions that although the State Commission had notified the Intra-state ABT Regulations in the year 2007 itself, but the same have not been implemented so far. Thus, the State Commission's observations in para 495 of RST Order relating to overdrawal charges as per Intra-state ABT Regulations are of no consequence. He further clarified that the State Commission has specified month wise drawl schedule for each of the Distribution licensee in RST Order for FY 2010-11 and any excess drawal over and above such scheduled

drawal in particular month would have to be paid by the overdrawing licensee at actual cost of power purchase. However, he failed to explain that in the absence of Intra-state ABT as to how so called actual cost power for any overdrawal attributable to each of the licensee would be calculated at the end of the month.

32. Since the period in question i.e. FY 2010-11 is already over and any excess payment made by the GRIDCO would be accounted for in the truing up exercise for FY 2010-11, any further discussion on the issue would be of academic nature. The fact of the matter is that the scheme proposed by the State Commission in the Impugned Order lacks clarity. Principally we agree that if GRIDCO has procured additional power at higher rate, either on short term basis or through UI mechanism, to meet excess requirement of the DISCOMs, it has to be compensated. The State Commission should, therefore, implement its own Intra-state ABT Regulations notified in the year 2007 at the earliest. Till the Intra-state Regulations are notified, State Commission is required to evolve a detailed procedure for compensating GRIDCO for overdrawal by DISCOMs in consultation with all the stake holders.

33. The issue is decided accordingly.

34. Summary of our Findings

- a) **In view of the decision arrived at by this Tribunal in Appeal no. 88 of 2009 which was affirmed in Appeal no. 106 of 2010, the issues related to surplus power of GRIDCO and revenue from such surplus power are decided accordingly in favour of the Appellant**

- b) **With regard to delay in trueing up and change in trueing up principles, it is to be noted that every true up exercise would necessarily have impact on retail consumer tariff and the principles laid down in Section 64 of the Electricity Act 2003 are required to be essentially followed. The Commissions established under Electricity Act 2003 are quasi-judicial authorities. It is settled law that quasi-judicial authorities are required to pass speaking orders. The State Commission has neither given any reason for variation in the revenue gap for the same year nor for change**

in principles adopted in two truing up exercises.

- c) The decision of the Tribunal in Appeal Nos. 58 and 59 of 2009 on the issue of allowance of repayment of loan in the ARR of GRIDCO would squarely apply to the present facts of the case as well. Accordingly, this point is answered in favour of the Appellant.**
- d) The scheme for overdrawal charges proposed by the Commission in the Impugned Order lacks clarity. Principally we agree that if GRIDCO has procured additional power at higher rate, either on short term basis or through UI mechanism, to meet excess requirement of the DISCOMs, it has to be compensated. The State Commission is, therefore, directed to implement its own Intra-state ABT Regulations notified in the year 2007 at the earliest. Till the Intra-state Regulations are notified, Commission is required to evolve a detailed procedure for compensating**

**GRIDCO for overdrawal by DISCOMs in
consultation with all the stake holders.**

35. In view of the above findings, the Appeal is allowed.
However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice Karpaga Vinayagam)
Chairperson

Dated: 21st December, 2012

REPORTABLE/~~NOT REPORTABLE~~