

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

Appeal No.88 of 2009

Dated 30th August, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

**GRIDCO Ltd.,
Janpath, Bhubaneswar-751022,
ORISSA**

... Appellant

Versus

- 1. Orissa Electricity Regulatory Commission,
Bidyut Niyamak Bhawan, Unit-VIII,
Bhubaneswar-751 012.**
- 2. Western Electricity Supply Company of Orissa Limited,
Regd. Office – Plot No. N/22, IRC Village,
Nayapalli,
Bhubaneswar-751 015.**
- 3. North Eastern Electricity Supply Company of Orissa Limited,
Regd. Office – Plot No. N/22, IRC Village,
Nayapalli,
Bhubaneswar-751 015.**
- 4. Southern Electricity Supply Company of Orissa Limited,
Regd. Office – Plot No. N/22, IRC Village,
Nayapalli,
Bhubaneswar-751 015.**
- 5. Central Electricity Supply Utility of Orissa,
Regd. Office – 2nd Floor, IDCO Tower,
Janpath,
Bhubaneswar-751 022.**

Counsel for the Appellant(s): Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan, Ms. Swapna Seshadri
Ms. Ranjitha Ramachandran

Counsel for the Respondent(s): Mr. Rutwik Panda for R-1
Mr. Buddy A. Ranganadhan,
Mr. Hasan Murtaza &
Ms. Saswat Patnaik for R-2 & 4
Mr. Shiv K. Suri for R-5

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by GRIDCO Ltd. challenging the order dated 20.3.2009 passed by the Orissa Electricity Regulatory Commission determining the Annual Revenue Requirement and tariff of the Appellant for the FY 2009 -10.

2. GRIDCO is an unbundled utility of the erstwhile Orissa State Electricity Board and has been vested with the function of bulk purchase of electricity and supply to the distribution licensees in the State of Orissa.

3. The State Commission is the Respondent No 1. The second to fifth Respondents are the distribution licensees of Orissa.

4. The facts of the case are as under:

4.1. On 1.11.2008 GRIDCO, the Appellant herein, filed an application before the State Commission praying for revision of Bulk Supply Price allowed by the State Commission to the Appellant for the FY 2008-09 as there was deficit on its actual revenue as compared to what was allowed by the State Commission in the tariff for the FY 2008-09. On 1.12.2008, the Appellant filed an application before the State Commission being case No. 62 of 2008 for approval of its Annual Revenue Requirement (ARR) and determination of Bulk Supply Price ('BSP') to the Respondents 2 to 5 during the FY 2009-10.

4.2. After the tariff filing, the Appellant on 10.12.2008 filed another application regarding the revenue deficit for the FY 2008-09 which was expected to be Rs. 591.08 Crores and prayed for allowing the same by upward revision of the BSP.

4.3. By the order dated 20.3.09 the State Commission decided the ARR and tariff of the Appellant for the FY 2009-10. In this order despite taking note of the applications dated 1.11.2008 and 10.12.2008, the State Commission has not dealt with the same.

4.4. Aggrieved by the order dated 20.3.2009 passed by the State Commission, the Appellant has filed this Appeal.

5. The Appellant has raised the following issues in the Appeal:

- i) Inadequate cost allowed for supply of electricity beyond the projected quantum;

- ii) Reduced interest on loan
- iii) Disallowance of interest /repayment of loan taken to meet deficit in tariff
- iv) Reduction in Employees expenses
- v) Disallowance of Return on Equity
- vi) Disallowance of other legitimate expenses
- vii) Non bridging of the revenue gap
- viii) Liquidation of outstanding dues including recovery of the deficit for FY 2008-09.

6. However, the learned Counsel for the Appellant did not press item nos. (iv) (Reduction in Employees Expenses) and (vi) (Disallowance of other Legitimate Expenses) which could be considered by the State Commission in the True-up exercise. Issue No. i) and vii) are connected issues and are required to be dealt with together. On the remaining

issues, learned Counsel for the Appellant argued assailing the findings of the State Commission. On the other hand the learned counsel for the distribution licensees, Respondents 2 to 5 herein, argued in support of the findings of the State Commission.

7. After hearing the learned counsel for the parties and examining the documents filed in the case, the following questions would arise for our consideration:

- i) Whether the State Commission has erred in directing the Appellant in selling power to the distribution licensees at a rate lower than the Appellant's cost?
- ii) Was the State Commission correct in restricting the interest on loan by rejecting interest payable to the State Government for the loan amount and Pension Trust Bonds?

- iii) Was the State Commission correct in not allowing the interest on debt taken by the Appellant to meet the revenue shortfall in the past?
- iv) Has the State Commission erred in not allowing Return on Equity to the Appellant?
- v) Was the State Commission correct in considering an amount of Rs. 170 Cr. as recoverable from the distribution licensees against past recoverable considering that in past the distribution licensees have never paid full amounts as determined by the State Commission?

8. Let us take up the first issue regarding direction to recover at lower BSP than the actual rate.

8.1. According to learned counsel for the Appellant, the State Commission estimated the average rate of power purchase for FY 2009-10 for the Respondents 2 to 5 at

148.27 paisa per kWh. However, the Appellant was directed to sell the power at 122.20 paise per kWh, thus making the Appellant to suffer a loss of about 26 paise per kWh. The reason given by the State Commission is that the difference has to be adjusted against the Unscheduled Interchange (UI) and trading income. In the absence of the estimates, there could not be any adjustment of such income. On the other hand, the Appellant suffered a revenue gap of Rs 625 Crores in the FY 2008-09 which has not been considered by the State Commission for adjustment in the ARR for the FY 2009-10.

8.2. According to learned counsel for the Respondents 2 to 5, the State Commission has given the position of receipt of trading and UI charges as filed by the Appellant in its cash flow statement up to December, 2008 totaling Rs. 354.50 Crores. The Appellant had already given its export earning of Rs. 953.85 Crores from UI and

Rs.318.56 Crores from trading of surplus power for 2007-08. Thus, the State Commission was justified in holding that the gap shall be bridged through export and UI earnings. The State Commission has also decided that any excess drawal of energy by the distribution licensees would be payable at the actual cost of power purchase plus transmission charges and transmission loss.

8.3. We find that the State Commission has approved the entire cost of power purchase of Rs. 2923.80 Crores in the ARR and accordingly worked out the total ARR of Rs. 2949.80 Crores for FY 2009-10. However, it left revenue gap of Rs 637.69 Crores to be bridged through export earning, UI charges and recovery of receivables from the distribution licensees over and above Rs. 170 Crores already taken into account in the ARR.

8.4. We notice that the State Commission in paragraph 446 of the impugned order has also considered increase in

bulk supply tariff to meet the expected revenue shortfall which will result in increase in retail supply tariff and sought the comments of the State Government on the probable rise in tariff. After getting a response from the State Government that it was considering giving support to the distribution licensees for metering and replacement of some equipments and in augmentation of distribution system, decided to retain the BSP for the distribution licensees at 122.2 paise per kWh i.e. at the same level as for FY 2008-09.

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.

8.6. We find from the submissions of the learned counsel for the Respondent distribution licensees that the net deficit of the Appellant at the end of January, 2010 had

been dealt with by the State Commission in its order dated 20.3.2010 while deciding the ARR and BSP for the Appellant for FY 2010-11. However, the State Commission has to true up the financials for the full year including the remaining period of the FY 2009-10.

9. The second issue is regarding interest on loan.

9.1. According to learned counsel for the Appellant, the State Commission has restricted the quantum of interest on loan to Rs. 101.62 Crores instead of Rs. 128.40 Crores by rejecting the interest payable on the State Government loans of an amount of Rs. 20.07 Crores and Pension Trust Bonds of Rs. 6.81 Crores. In case of interest payable on State Government loans, in the past, a notification issued by Government of Orissa provided for freezing of interest payment only for a period of 5 years. However, the said period has since expired and the interest amount is now payable to Government of Orissa and have been duly

shown as liability by the Appellant. Further, the Appellant is actually paying an interest of Rs. 6.81 Crores on Pension Trust Bonds which has been disallowed by the State Commission without giving any reason. During the FY 2008-09, the Appellant had to borrow a sum of Rs. 400 Crores to meet the deficit arising in its revenue and the request of the Appellant to allow the interest on such loans accruing during 2009-10 has not been considered by the State Commission.

9.2. According to the learned counsel for the Respondent distribution licensees, the debt service of the State Government loan was kept in abeyance as per Government of Orissa notification dated 29.1.2003 till 2005-06 or the sector turn around whichever is earlier. Further, the State Commission had requested the State Government for an extension of this facility till the sector turns around. The State Commission, accordingly, did not consider the

interest on State Government loan for the FY 2006-07 to the FY 2009-10. This amount has also not been incurred by the Appellant and in the past the Appellant had accepted the order of the State Commission in this regard. Also the Appellant is not entitled to interest on Pension Trust Fund since the entire liability of the Pension Trust Fund is being met in the ARR of OPTCL, the State Transmission licensee. Further, the application of the Appellant for servicing of loan taken to meet the revenue gap of 2008-09 was filed on 13.3.2009 after the completion of public hearing on 3.2.2009. This prayer was not part of the original Petition filed by the Appellant for ARR/tariff for 2009-10. Thus, the State Commission has rightly not considered the Application filed subsequently.

9.3. The relevant extracts of the impugned order regarding interest on loan are reproduced below:

“Interest on Loan

394. During financial year 2008-09 GRIDCO had projected an amount of Rs. 128.49 crore towards interest on long-term liability; the detailed calculation of which is submitted in TRF-3. Commission observed that GRIDCO has not shown any addition of new loan during 2008-09 and 2009-10. All the loans up to 31.03.2008 are approved loan on which Commission has been allowing interest every year. The Commission dealt with this matter in last year's tariff order extensively (para-383 to 390 of BSP order 2008-09). In line with earlier order for FY 2008-09, the Commission allows interest on all the loans except loan from State Govt., and Pension Trust Bond”.

Thus, the State Commission has followed its tariff order for FY 2008-09 to determine the interest on loan for FY 2009-10.

9.4. The relevant extracts of the State Commission's order dated 20.3.2008 regarding Appellants' ARR and tariff for

FY 2008-09 is reproduced below:

*“ 387. **State Govt. Loans:** GRIDCO in its ARR had considered an amount of Rs. 162.54 crore of loan from State Govt. as on 31.03.2006. The interest impact of the above loan as claimed in the ARR of the year 2008-09 is Rs.20.07 crore. The debt service of the above loan was kept in abeyance as per Govt. of Orissa Notification dated 29.01.2003 till 2005-06 or the sector turns around whichever is earlier. The Commission does not consider the impact of loan to be passed on to ARR during 2008-09 as this was also done for 2006-07 and 2007-08 with a request to State Govt. to extend this facility as the sector is yet to turn around.*

*390. **Pension Trust Bond:** GRIDCO has proposed an amount of Rs.20.56 crore on the Bond value of Rs.271.91 crore issued by GRIDCO to Pension Trust Fund. The Commission has allowed interest on the bond value in past years on provisional basis, pending finalization of actuarial valuation of Terminal liabilities by independent actuary. Now that the Commission has*

decided to accept the valuation of the actuary, and addressed the issue of funding the unfunded liability of the trust fund in OPTCL order, the Commission do not consider the interest impact to be passed on to the ARR for 2008-09”.

9.5. We find that the State Government had kept debt service of the loan in abeyance only till FY 2005-06 or sector turn around, whichever is earlier. This period has since elapsed. The State Commission has taken up the matter with the State Government but the State Government has so far not accepted the request. Admittedly, the Appellant has not actually paid the interest to the State Government. In these circumstances, the loan payment remains the liability of the Appellant.

9.6. This is not a desirable position. The State Commission and the Appellant should take up the matter with the State Government to finalise its position in the

matter at the earliest. If the State Government does not agree to extend the date in a reasonable time, then the State Commission should pass on the same in the ARR of the Appellant.

9.7. As regards the interest on Pension Trust Bond, the Appellant's contention is that it is claiming such portion of the interest on the Pension Trust contribution payable by them. On the other hand, the learned counsel for the Appellant argued that the same is being serviced in the ARR of the Transmission Licensee. The State Commission is directed to verify the claim of the Appellant in the True up of the financials of FY 2009-10 and decide the matter accordingly.

10. The third issue is regarding reduced amount of interest/repayment of loan taken by the Appellant to meet the deficit in tariff.

10.1. Learned counsel for the Appellant has submitted that the Appellant in the past was not allowed tariff to the extent it was entitled to charge on the supply of electricity to the distribution licensees. Consequently, the deficit amount in tariff was required to be funded by the Appellant by borrowings from the banks.

10.2. The Appellant had claimed an aggregate amount of Rs. 866.32 Crores as pass through in the tariff for the year 2009-10 comprising of Rs. 394.09 Crores towards repayment of principle, Rs. 399.66 Crores as against the deficit/gap relating to the year 2008-09 and an amount of Rs. 72.57 Crores payable to Orrisa Power Generation Corporation Ltd. on account of tariff revision relating to previous period. According to learned counsel for the Appellant, the State Commission has not allowed Rs. 399.66 Crores on the ground that the same may be recouped through UI charges and trading income of the

Appellant during 2009-10. This is not the correct approach as the State Commission itself had recognized that the trading/UI income has greatly reduced. According to him, the State Commission has further erred in denying the arrears of Rs. 72.57 crores payable to OPGCL as the amended PPA is yet to be approved by the State Commission.

10.3. According to learned counsel for the Respondents, the distribution licensees, the issue of repayment of loan had already been dealt with in the Tribunal's Judgment dated 9.11.2010 in Appeal Nos. 58 & 59 of 2007 in the matter of Western Electricity Supply Co. of Orissa vs. OERC & Ors. and NESCO vs. OERC & Ors. wherein the Tribunal had held that the principal repayment of loan cannot form a part of the revenue requirement. This Judgment has been challenged in the Hon'ble Supreme

Court but the said order has not been stayed by the Hon'ble Supreme Court.

10.4. Learned counsel for the Respondent distribution licensees has further argued that the audited accounts of the Appellant for FY 2008-09 show a surplus of Rs. 98.14 Crores for that year. Thus, the question of the Appellant carrying forward a loss of Rs. 399.66 Crores for the year 2008-09 would not arise. Further, the payment to OPGCL on account of arrears has been rightly disallowed by the State Commission as the amended PPA between the Appellant and OPGCL is yet to be signed and submitted to the State Commission for approval. This amount is yet to be paid by the Appellant to OPGCL. Moreover, the distribution licensees also have to be refunded the amount on account of incentive paid in excess for the FY 2007-08 and FY 2008-09 due to revision in benchmark PLF of OPGCL from 68.8% to 80%.

10.5. We find that the issue of repayment of principal amount of loan had already been decided by the Tribunal in its Judgment dated 9.11.2010 in Appeal Nos. 58 and 59 of 2007. The relevant extract of the Judgment is reproduced below:

“(C) In Our opinion, the ARR should include the ‘cost’ incurred by the licensee in carrying out its business. The cost of loan is ‘interest’. Similarly cost of equity is ‘ROE’. This interest and ROE can be booked to Revenue Requirement or Tariff. The principal repayment of loan cannot form a part of revenue requirement. In the present case charging the principal amount of loan taken for generator’s bill by GRIDCO to the revenue requirement will result in double counting of expenses”.

10.6. As regards the shortfall for FY 2008-09, we notice that the State Commission has not carried out the true up for the FY 2008-09 in the impugned order, as the same was not part of the Petition of the Appellant. The State Commission has recorded the following with regard to shortfall of

2008-09:

“407. The present position of receipt of trading and UI charges as filed by GRIDCO in its cash flow statement (upto December, 2008) is given in table below:

Rs. in Crore	
<i>UI Charges</i>	<i>- 270.20</i>
<i>Trading</i>	<i>- 24.34</i>
<i>ICCL NALCO</i>	<i>- 60.01</i>

Total: 354.55

408. The Financial year 2008-09 is not yet over. Hence, it is difficult to assess the exact income from trading and UI Charges during 2008-09 to bridge the gap allowed by the Commission. Therefore, after receipt of audited accounts for FY 2008-09 and short-fall if any accrued thereof would be adjusted with the approved

gap to be recognized as regulatory asset and the carrying cost will be passed on to ARR in FY 2010-11”.

Accordingly, the State Commission is directed to carry out the true up for FY 2008-09 and allow the shortfall with carrying cost and also consider the claim of the Appellant regarding the arrears payable to OPGCL.

11. The fourth issue is regarding return on equity.

11.1. According to learned counsel for the Appellant, the State Commission has not allowed ROE of Rs. 60.62 Crores on the ground that the State Government was considering freezing of return to the Appellant. There is no notification of the Government in this regard. According to the provisions of the Electricity Act, 2003 and National Tariff Policy and the Tariff Regulations, the Appellant is entitled to ROE. The State Commission is not bound to follow the direction of the State Government and

has to decide the tariff as per the provisions of the Act, the Policy and the Regulations.

11.2. According to the learned counsel for the Respondent distribution licensees, the Tariff Regulations do not provide for any ROE to the Appellant, since the Regulations do not have any provision for fixation of BSP. Further, the Appellant has virtually no assets. The State Government which is the shareholder of the company also does not want any ROE on the equity component of GRIDCO's balance sheet. The State Commission has also recorded in the impugned order that on verification of audited accounts upto 2004-05, it is found that the addition of share capital shown in the Balance sheet after 1996-97 includes only the grants received towards R&M expenses and rehabilitation assistance.

11.3. Let us now examine the findings of the State Commission regarding ROE. The relevant extracts are

reproduced below:

“424. GRIDCO had projected an amount of Rs.60.62 crore towards Return on Equity @ 14% on equity capital of Rs.432.98 crore for the FY 2009-10.

425. At the time of vesting of the transmission and distribution business with GRIDCO by the State Govt. on 01.04.1996, the Equity Share Capital was Rs.327.00 crore. During the subsequent years upto FY 2004-05, there were additional infusions of equity capital of Rs.165.98 crore by the State Govt. raising the total equity of GRIDCO to Rs.492.98 crore. At the time of de-merger of GRIDCO effective from 01.04.2005, the equity share capital of OPTCL was stated at Rs.60 crore, leaving the balance equity share capital with GRIDCO. The equity share capital issued to Govt. of Orissa was both in consideration of cash and other than cash. Therefore, the licensee claimed ROE @14% on the equity share capital of Rs.432.98 crore.

426. *The Commission in earlier orders referred to the GoO Notification of 29.1.2003, wherein it has been stated that GRIDCO and OHPC should not be entitled to any return in equity till the sector becomes viable or FY 2005-06 whichever is earlier. Further, in partial modification of earlier notification, the Govt. of Orissa in its letter no. 5302 dtd. 6.5.2003 stated the following “GRIDCO and OHPC shall not be entitled to any Return on Equity (ROE) except in respect of the new projects commissioned after 01.04.2006 till the sector becomes viable or end of 2005-06 whichever is earlier.” The Commission would like to clarify that correspondence has been made with Govt. of Orissa to clarify the status of the notification dtd. 29.1.2003, as it has great impact on Tariff. Govt. while communicating their views/comment in their letter No.1704 dtd. 17.02.2009 in response to the Commission’s letter No.2807 dtd. 31.12.2008 have stated as under:*

“In the matter of extension of the moratorium period and other dispensation stipulated in Energy Department Notification No.1068/R&R-I-2/2002

dt.29.01.2003 upto 2011-12 it is stated that Finance Department has already concurred in the proposal of keeping in abeyance of up-valuation of assets of GRIDCO/OTCL & OHPC and freezing of RoE to GRIDCO & OHPC from the year, 2006-07 to 2010-11. The matter is going to be placed before the State Cabinet for a decision after which the same will be communicated.”

427. As regards infusion of capital for the new project, the Commission verified audited accounts of GRIDCO upto 2004-05. It is found that the addition of share capital shown in the balance sheet after 1996-97 includes only the grants received from DFID towards R&M expenditure and rehabilitation assistance. As per Project Memorandum signed between Govt. of India and Govt. of Orissa and DFID, the above amount has been shown under share deposit account pending allotment of shares for non-receipt of approval from Govt. of Orissa.

428. Keeping in view of the above facts, the Commission does not allow return on equity to GRIDCO for the Year 2009-10”.

Thus the State Commission has not allowed ROE keeping in view the communication from Government of Orissa regarding proposal to freeze the ROE of the Appellant for FY 2006-07 to 2010-11 and that the infusion of additional share capital shown in the balance sheet after 1996-97 includes only the grants. Thus the State Commission has not decided the issue merely on the basis of communication from Government of Orissa.

11.4. Let us now consider the status of the Appellant and the Regulations of the State Commission. According to the Appellant, it is a deemed trading licensee under 5th Proviso of Section 14. The relevant Section is reproduced below:

14. Grant of licence.- *The Appropriate Commission may, on application made to it under section 15, grant any person licence to any person –*

- (a) to transmit electricity as a transmission licensee; or*
- (b) to distribute electricity as a distribution licensee; or*
- (c) to undertake trading in electricity as an electricity trader,*

in any area which may be specified in the licence:

.....

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act.”

Section 131(2) of the Act is reproduced below:

“(2) Any property, interest in property, rights and liabilities vested in the State Government under sub-section (1) shall be re-vested by the State Government in a Government company or in a company or companies,

in accordance with the transfer scheme so published along with such other property, interest in property, rights and liabilities of the State Government as may be stipulated in such scheme, on such terms and conditions as may be agreed between the State Government and such company or companies being State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be :

Provided that the transfer value of any assets transferred hereunder shall be determined, as far as may be, based on the revenue potential of such assets at such terms and conditions as may be agreed between the State Government and the State Transmission Utility or generating company or transmission licensee or distribution licensee, as the case may be”.

Thus, the Act has a provision for formation of generation company, transmission licensee and distribution licensee as a result of re-organization of the

State Electricity Board. There is no provision for an entity responsible for bulk procurement and supply to the distribution licensee.

11.5. Section 5.3.4 of National Electricity Policy stipulates that the Act prohibits the State Transmission Utility/ transmission licensee from engaging in trading and that PPAs with generating companies would need to be suitably assigned to the distribution licensees.

11.6. Section 8.4(2) of the Tariff Policy stipulates as under:

“The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses”.

Thus the National Electricity Policy and the Tariff Policy also do not have any provision of a deemed trading licensee for bulk supply of power to the distribution licensees of the state and ROE for such deemed licensee but stipulate that the distribution licensees have to procure power on their own.

11.7. Section 86 (j) of the Act provides for fixation of trading margin by the State Commission in the intra-state trading of electricity, if considered necessary.

11.8. The Regulations of the State Commission also do not provide for deemed trading licensee and ROE for the same.

11.9. Admittedly the Appellant does not own any assets whose capital cost is required to be serviced. Its expenses are being reimbursed through the BSP determined by the State Commission. We also do not find any provision in the

Act, the Policy or the Regulations which provides for ROE to the Appellant.

11.10. In view of the above, we do not feel any justification for intervening with the decision of the State Commission not allowing the ROE to the Appellant. This issue is thus decided against the Appellant.

12. The fifth issue is regarding consideration of recoverables from the distribution licensees.

12.1. According to learned counsel for the Appellant, the State Commission has considered an amount of Rs. 170 Crores as receivable from the distribution licensee, thereby reducing the revenue requirements of the Appellant without considering the track record of the distribution licensees who never paid the full amounts determined by the State Commission. Against Rs. 219.83 Crores as payable by the distribution licensees for FY 2008-09 as

determined by the State Commission, the actual payment made till 10.2.2009 was Rs. 116.46 Crores.

12.2. According to the learned counsel for the Respondent distribution licensees, there is no provision in the BSP order for ensuring the distribution licensees to pay the past dues.

12.3. We agree with the Appellant that the assessment made by the State Commission for receivables from the distribution licensee was not on realistic based on the past track record of the distribution licensees, as recorded in the impugned order. Accordingly, we direct the State Commission to true up the financials of the Appellant for FY 2009-10 on the basis of the audited accounts.

13. **Summary of our findings**

13.1. The first issue is regarding non-bridging of the revenue gap of the Appellant. We find that the State

Commission has left a revenue gap of Rs. 637.69 Crores in the ARR to be bridged through earnings from UI and trading without making an estimate of surplus power likely to be available during the year. Accordingly, the State Commission is directed to true-up the financials of the Appellant for FY 2009-10 and allow the actual cost with the carrying cost.

13.2. The second issue is regarding interest on loan extended by the State Government and Pension Trust Bonds. We find that the State Government had kept the debt service of the loan in abeyance till FY 2005-06 or sector turn around, whichever is earlier. The period has since elapsed. The Appellant has not actually paid the interest to the State Government but the amount remains the liability of the Appellant. This is not a desirable position. Accordingly, the State Commission

and the Appellant are directed to take up the matter with the State Government to finalise its position in the matter at the earliest. As regards the interest on Pension Trust Bond, the State Commission is directed to verify the claim of the Appellant after taking into account the amount being serviced in the ARR of OPTCL and decide the matter during the true-up of financials of the Appellant for FY 2009-10.

13.3. The third issue is regarding the servicing of loan taken to meet the deficit in tariff in the past. The issue regarding repayment of principal amount of loan had already been decided by this Tribunal in its Judgment in Appeal Nos. 58 & 59 of 2007 wherein it was held that the principal repayment of loan cannot form a part of the revenue requirement. For the shortfall of FY 2008-09 the State Commission is

directed to carry out the true up and allow the shortfall with the carrying cost and also consider the arrears payable to OPGCL.

13.4. Regarding ROE, we do not find any provision in the Act, the Policy or the Regulation which provides for ROE to the Appellant. Hence, we do not want to interfere with the decision of the State Commission not allowing the ROE to the Appellant.

13.5. Regarding the recoverables from the distribution licensee, we direct the State Commission to true up the financials of the Appellant for the FY 2009-10 on the basis of the audited account.

14. In view of the findings referred to above, the Appeal is partly allowed, to the extent indicated above, without any

cost. The State Commission is directed to give effect to the directions given in this judgment.

15. Pronounced in the open court on this **30th day of August, 2011.**

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE / NON-REPORTABLE

VS