

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

**Appeal No. 58, & 59 of 2007**

**Dated 9th November, 2010**

**Present Hon'ble Mr. Justice M. Karpaga Vinayagam,  
Chairperson  
Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta,  
Judicial Member**

**Appeal No. 58 of 2007**

**In the matter of**

**Western Electricity Supply Company  
of Orissa Ltd. (WESCO),  
123-A, Mancheswar Industrial Estate,  
Bhubaneswar**

**... Appellant**

**Versus**

**1. Orissa Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar-751 012**

- 2. Grid Corporation of Orissa Ltd.  
(GRIDCO),  
Janpath, At/PO Bhubaneswar-751 022**
- 3. State Public Interest Protection Council,  
Talengabazar, Cuttack, Orissa.**
- 4. Orissa Consumers' Association & FOCO,  
Biswanath Lane, Cuttack.**
- 5. Ferro Alloys Corporation Ltd.,  
GD-2/10, Chandrasekharpur,  
Bhubaneswar.**
- 6. Sambalpur District Consumer Federation,  
Balaji Mandir Bhawan,  
Khetrajpur, Sambalpur.**
- 7. Confederation of India Industry, (CII),  
8, Forest Park,  
Bhubaneswar.**
- 8. Shri R.P. Mahapatra,  
Plot No. 775 (Pt.), Lane-3,  
Jayadev Vihar, Bhubaneswar, Orissa**
- 9. M/s Confederation of Captive Power Plant  
(CCGPO)  
Bomikhal, Rasulgarh,  
Bhubaneswar.**
- 10. Parikhita Swain,  
258(P), Cuttack Road,**

**Bhubaneswar.**

**11. Utkal Chamber of Commerce & Industry,  
N/6, IRC Village, Nayapalli,  
Bhubaneswar.**

**12. Mr. Jayadev Mishra,  
N-4/98, Nayapalli,  
Bhubaneswar.**

**Counsel for Appellant**

**Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza**

**Counsel(s) for Respondent(s)**

**Mr. R.K. Mehta,  
Mr. Antaryani Upadhyay,  
Mr. Lakhi Singh for  
GRIDCO/OPTCL  
Mr. Rutwik Panda for OERC**

**Appeal No. 59 of 2007**

**In the matter of**

**Northeastern Electricity Supply Company  
of Orissa Ltd. (NESCO),  
123-A, Mancheswar Industrial Estate,  
Bhubaneswar**

**... Appellant**

**Versus**

**1. Orissa Electricity Regulatory Commission,  
Niyamak Bhawan, Unit-VIII,  
Bhubaneswar-751 012**

- 3. Grid Corporation of Orissa Ltd.  
(GRIDCO),  
Janpath, At/PO Bhubaneswar-751 022**
  
- 3. State Public Interest Protection Council,  
Talengabazar, Cuttack, Orissa.**
  
- 4. Orissa Consumers' Association & FOCO,  
Biswanath Lane, Cuttack.**
  
- 5. Ferro Alloys Corporation Ltd.,  
GD-2/10, Chandrasekharpur,  
Bhubaneswar.**
  
- 6. Sambalpur District Consumer Federation,  
Balaji Mandir Bhawan,  
Khetrajpur, Sambalpur.**
  
- 7. Confederation of India Industry, (CII),  
8, Forest Park,  
Bhubaneswar.**
  
- 8. Shri R.P. Mahapatra,  
Plot No. 775 (Pt.), Lane-3,  
Jayadev Vihar, Bhubaneswar, Orissa**
  
- 9. M/s Confederation of Captive Power Plant  
(CCGPO)  
Bomikhal, Rasulgarh,  
Bhubaneswar.**

10. **Parikhita Swain,  
258(P), Cuttack Road,  
Bhubaneswar.**
11. **Utkal Chamber of Commerce & Industry,  
N/6, IRC Village, Nayapalli,  
Bhubaneswar.**
12. **Mr. Jayadev Mishra,  
N-4/98, Nayapalli,  
Bhubaneswar.**

... Respondent(s)

**Counsel for Appellant**

**Mr. Buddy A. Ranganadhan  
Mr. Hasan Murtaza**

**Counsel(s) for Respondent(s)**

**Mr. R.K. Mehta,  
Mr. Antaryani Upadhyay,  
Mr. Lakhi Singh for  
GRIDCO/OPTCL  
Mr. Rutwik Panda for OERC**

## JUDGMENT

**PER HON'BLE JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. Western Electricity Supply Company of Orissa (WESCO)  
and North-eastern Electricity Supply Company of Orissa (NESCO)  
are the Appellants herein.

2. Challenging the impugned order dated 22.03.2007 passed by the Orissa State Electricity Regulatory Commission (**State Commission**), these two Appeals have been filed before this Tribunal. These appeals relate to the Bulk Supply Tariff passed by the State Commission for the FY 2007-08. The short facts are as under.

3. The Appellants are distribution companies in the State of Orissa. 1<sup>st</sup> Respondent is the State Commission. The 2<sup>nd</sup> Respondent is GRIDCO which is a bulk supplier in the State of Orissa. As per the Transfer Notification, the GRIDCO will undertake bulk purchase and bulk supply activities and should not undertake any transmission activity. The GRIDCO being bulk supplier filed an application before the State Commission in case No. 55/06 for approval of their ARR and determination of bulk supply tariff for FY 2007-08 on 30.11.2006. The Appellants filed their respective objections to the said proposal. The State

Commission heard the parties on 15.02.2007 and passed the order on 22.03.2007. By this order, the State Commission has increased the bulk supply tariff including the transmission charges by 25% on an average, 45% in the case of WESCO in Appeal No. 58/07 and 23% in the case of NESCO in the case of Appeal No. 59/07, with respect to FY 2007-08

4. In the meantime, the Appellant along with two other distribution companies filed their applications before the State Commission for approval of their retail supply tariff on 30.11.2006. The State Commission passed the order in the said applications on 23.03.2007. In the said order, the State Commission has not increased the retail supply tariff.

5. Earlier in the previous year the State Commission passed order on 23.03.2006 on the GRIDCO's application for approval of ARR and Bulk Supply Tariff for FY 2006-07 in case No. 42 of 2005. Aggrieved by the order of the State Commission, the

Appellants filed Appeals before the Tribunal in Appeal Nos. 74 to 76 of 2006. The Tribunal passed order on 13.12.2006 setting aside the bulk supply tariff for FY 2006-07 and remanded back the matter to the State Commission for re-determination of the same. In pursuance of the same, the Appellant submitted supplementary submissions. In the meantime, in the order passed in this Appeal on 13.12.2006, the GRIDCO has preferred an Appeal before the Hon'ble Supreme Court, which is pending. In the present appeals we are only concerned with the bulk supply tariff passed by the State Commission on 22.03.2007 in respect of FY 2007-08, which is the subject matter of challenge in these appeals.

6. In these appeals the following seven issues have been raised:

- (i) Underestimation of the quantum of power procurement by GRIDCO;
- (ii) Treatment of Income from sale of energy by GRIDCO outside the State;



- (iii) Interest on loan;
- (iv) Repayment of principal amount of loan;
- (v) Truing-up;
- (vi) Miscellaneous income; and
- (vii) Allocation of interest

7. The arguments advanced by the Learned Counsel for the Appellants on these issues are as follows:

(A) **Under-estimation of the quantum of power procurement by GRIDCO.**

GRIDCO being the bulk supplier procures its power from (1) Hydel Stations in the State; (2) Central Generating Stations; (3) Thermal Power Stations within the State; and (4) Captive Generating plants within the State. In the FY 2007-08, GRIDCO proposed a total power procurement of 16,663 million units (MUs) excluding the transmission loss. This included 5884.24 MU from the Hydel Stations based

on the design energy of the hydel plants. The appellants, the Distribution Licensees have proposed the projected power procurement from Hydel Stations to a tune of 7,720 MUs. The contention of the Distribution Licensees, namely the appellants, is that the figure of actual generation in the past ought to be taken since the reservoir level as on 01.10.2006 was the same, if not more than the reservoir level as on 01.10.2005 and 01.10.2004. The same contention was raised in respect of procurement from Thermal Power Stations, since in the previous two years the actual generation from such thermal stations corresponded to a Plant Load Factor (PLF) of over 90%. In respect of the hydel plants within the State the estimation of availability of power for procurement ought to be on the basis of actual power generated by the hydel stations in the previous years read in conjunction with the actual reservoir level for the year in question. In respect of the thermal stations, the

estimation of available power should be on the basis of actual generation of thermal station in the previous year.

If the estimation of available power to be procured is to be on the basis of actual past figures, the available power to be procured by the GRIDCO would be far higher than the estimation of such availability on the basis of norms or the design energy. If that be so, it would result in a lower per unit cost of power procurement and consequently a lower rate per unit of the bulk supply tariff. On the other hand, the State Commission has projected the available power for procurement by GRIDCO on the terms of the design energy of the hydel plant in the State of Orissa and on the basis of the Central Commission's norms of PLF i.e. 80% in respect of thermal units. This issue was raised earlier before the Tribunal. While dealing with the question whether quantum of power procurement without reference to the actual is liable to be interfered with, the Tribunal held that the

availability of cheap hydel power and other central sources including TSTPS, FSTPS, CPPs have been omitted to be considered and the said omission has resulted in a serious prejudice to the Distribution Companies. Therefore, the State Commission was directed to consider this issue again to assess the procurement cost of power from various sources including hydel. An identical issue was raised before the State Commission in respect of the present year. However, the State Commission has not considered the question of the actual power procurement for determination of the power purchase cost. It is the settled law as laid down by this Tribunal, 'in the absence of norms laid down, the State Commission has to take into account the actual figure of cost in the ARR.' But unfortunately, the State Commission has ignored the actual figures. On the other hand, it has simply applied the normative value and failed to apply the principle as enunciated by the Tribunal to consider the materials of actual figure of power

procurement in the previous year placed by the Appellants before the State Commission.

(B) **Treatment of Income from sale of energy by GRIDCO outside the State (termed as export)**

The GRIDCO exported certain quantity of surplus power outside the State. In the ARR of GRIDCO, the State Commission has not taken into account the revenue attributable to the said power which was sold by GRIDCO outside the State. The State Commission has also excluded the cost of such power from the ARR of GRIDCO. The State Commission had artificially taken out from the ARR the revenue attributable to such export sales of GRIDCO. The State Commission cannot pick and choose what items or revenue could be included in the ARR. As long as revenue is related to the electricity business, it must be included in the ARR. The State Commission cannot permit a licensee to collect and retain any revenue outside the

ARR. By doing so, the licensees are conferred upon the return higher than the rate of return envisaged in the Regulations. Hence by taking out an item of the revenue from the ARR the State Commission is artificially seeking to raise the Bulk Supply Price. The treatment made by the State Commission in the FY 2006-07 and 2007-08 has been a complete departure from the treatment of this item in the past year by the State Commission.

In the present case, the appellants estimated amount of revenue attributable to export sales is taken at Rs. 1125 crores and the cost of such power at Rs. 174.8 crores. The net revenue of Rs. 950/- crores has been artificially kept out of the ARR. If such revenue was included in the ARR, the Bulk Supply Price would be reduced by Rs. 950 crores. Now the audited figures of GRIDCO are available. As per these figures the net income comes to Rs. 801 crores. The very same point has been raised before this Tribunal in

respect of earlier years to the effect whether the export earnings could be excluded from the revenue of the GRIDCO. The Tribunal has directed the State Commission to include the export earnings by GRIDCO by export of power outside the State and the same shall be taken as a revenue earned for the GRIDCO. Despite having so held in the above order, in the truing-up order passed by the State Commission on 23.03.2010, the State Commission held that only the costs have been trued up and not the revenue. Even if the State Commission has to take into account in the truing-up for the concerned years, the State Commission shall provide the carrying cost on such true up in accordance with the ratio laid down by the Tribunal.

(C) **Interest on Loan**

This issue can be divided into 3 parts: (1) *REC loan*: In respect of this loan, the State Commission held that the interest on the loan would be charged at 8.5% per annum.

However, the interest in the tariff order has been charged at 12.15%. (2): *REC Working Capital Loan*: GRIDCO has proposed an amount of Rs. 4.60 crores. The State Commission allowed an amount of Rs. 4.69 crores, i.e. more than what is proposed; and (3) *Pension Trust Fund*: The GRIDCO has proposed a payment of Rs. 17.08 crores but the State Commission allowed an amount of Rs. 19.09 crores. This is also more than the actual cost.

(D) **Repayment of principal amount of loan taken by GRIDCO**

The State Commission, in its impugned order, allowed a sum of Rs. 464.86 crores as a cost in the ARR. This amount represents the repayment of principal amount of loan taken by GRIDCO to pay off its outstanding dues to its supplier. The repayment of the principal amount of loan cannot be treated as an expense in the ARR. If the principal payment is treated as an expense then receipt of loan must be also



treated as an income of the licensee. In other words, the concept of repayment of liability cannot be treated as expense to the ARR as a liability. The very same issue has been raised in the earlier appeal and the Tribunal has set aside such payment in the previous tariff order. It is specifically held by the Tribunal that there is neither logic nor reason to allow the said amount to pass through in tariff. If the loans are outstanding it is for the GRIDCO to seek for recovery or re-schedule it in a manner known to law from the concerned distribution companies. On that score the State Commission ought not to have allowed the said amount to pass through. The appellants have placed their suggestions for the mode and manner for repayment of such loans. The amount equivalent to the amount required to be paid by the distribution companies to the GRIDCO may be amortized as the regulatory asset in the distribution companies' ARR.

(E) **Truing-up:**

In the earlier order passed by the Tribunal, the State Commission was directed to conduct the regular truing-up. In the current year, i.e. FY 2007-08, the State Commission has conducted a truing-up exercise. In the truing-up exercise, the State Commission also sought to true up losses suffered by the GRIDCO in the years 1996-97 to 1998-99. Under the Transfer Scheme dated 25.11.1998, the distribution licensees were incorporated with a fixed position of assets and liabilities that they would take over with effect from 01.04.1999. Now the additional liability for the past period is sought to be recovered from the appellants. The State Commission in the impugned order has imposed liabilities for the past period, i.e. prior to 01.04.1999 amounting to Rs. 1145.66 crores on the distribution licensees. This is contrary to the National Electricity Policy.

(F) **Miscellaneous Income**

The GRIDCO has consistently over the past several years earned and received certain miscellaneous income year after year. The State Commission ought to have projected those miscellaneous income in the ARR. The State Commission merely true-up such amount and included the said miscellaneous income in the true-up carried out, denying the benefit of such income at the time when the bulk supply price was determined. Therefore, the State Commission may be directed to consider including the miscellaneous income in the projection of ARR for each year on the basis of audited figures of previous year.

(G) **Allocation of Interest:**

In the ARR, the State Commission has included an amount towards interest which is to be recovered from the Appellant's distribution licensees. The allocation of interest from GRIDCO to the distribution licensees ought to be the

basis of the outstanding position of each distribution licensee in respect of and not on the basis of off-take of each distribution licensee from GRIDCO. The recovery of such interest may be done by an adjustment 'below the line' but not as a component of the bulk supply price. The quantum of payment of interest by each distribution licensee to GRIDCO is dependent upon the quantum of energy purchased by each licensee. Hence the payment of interest by each distribution licensee does not correspond to individual outstanding with the GRIDCO. This issue has been covered by the earlier judgment of the Tribunal. The Tribunal held in that judgment that the State Commission ought to have passed on the interest cost in the ARR as income receivable from distribution companies in the ratio of outstanding payable by respective distribution company. So this finding by the Tribunal is applicable to the present case.

8. The replies made by the Learned Counsel for the Respondent on these issues are as follows;

(A) In regard to the issue regarding the quantum of power procurement, it is submitted that the contention of the Appellant that the quantum of availability of power from the hydro power stations should have been computed on the basis of actual drawal from the said stations during the previous year and not on the basis of design energy, is not tenable. Since the quantum of hydro power depends entirely on the rainfall which is always uncertain, it will be risky to estimate the quantum of generation on the basis of actual generation in the previous year. Therefore, the finding given on this aspect by the State Commission is perfectly valid.

(B) In regard to the issue relating to treatment of income from the sale of energy by GRIDCO outside the State, the Appellant has stated that the State Commission has arbitrarily taken out

the revenue attributable to export sale by GRIDCO from the ARR. This statement is factually incorrect. In view of the risk and uncertainties involved in the trading of surplus in the larger interest of the consumer, the State Commission is changing the earlier pattern of including a hypothetical uncertain figure towards expected revenue from export sales of surplus power and UI rates. It is always open to the State Commission to make a departure from the methodology adopted in the previous year.

- (C) In respect of interest on loan, the Appellant submitted that the State Commission has allowed interest only @ 8.5% but in computation the interest has been allowed @ 12.15%. This contention is not correct. If the table-40 as well as para 5.34.6 are read together, it is evident that the table would indicate that there is an allowance of 12.15% which represents average estimated rate of interest of REC loans but in the computation what is allowed is 8.5% in accordance with para

5.34.6 Regarding REC working capital, although originally GRIDCO had proposed a sum of Rs. 4.60 crores as interest in ARR application, subsequently the same was reworked by the State Commission on the basis of documents and correct figure of Rs. 4.69 crores was arrive at. Similarly, in Pension Trust Fund also the State Commission against the original claim of Rs. 17.08 crore by GRIDCO reworked the same and allowed Rs. 19.09 crores on the basis of the documents. The calculation errors can always crop up in the accounts and the same can be rectified by the State Commission during verification.

- (D) The next issue is repayment of principal. On this issue the Appellant stated that the State Commission has erred in allowing a sum of Rs. 464.96 crores towards repayment of principal which is against the spirit of the judgment dated 13.12.2006 of this Tribunal in the appeals in respect of the FY 2006-07. This aspect has been clarified in the impugned

order that the loans in respect of which repayment of principal has been allowed were taken by the GRIDCO for payment of the generator bills on account of non-payment of the power purchase dues by the distribution companies. It is because of the distribution companies not making payment of the outstanding dues, the State Commission has to devise a mechanism for repayment of dues. There is nothing wrong in this.

- (E) The next issue is truing-up. According to the appellant, as per Transfer Scheme, the appellants took over the business of distribution companies with effect from 01.04.1999 and as such the period from 1996-07 to 1998-99 should not have been taken into consideration by the State Commission for the purpose of truing-up. This submission is not correct. The truing-up is adjustment of actual revenue and expenditure based on the estimation of the State Commission. The utility in management of the licensee is not relevant to truing-up



exercise since the burden of truing-up falls on the consumer. If the bulk supply tariff goes down or goes up, there has to be reduction or increase in retail supply tariff in direct proportion. Therefore, there is no merit in this contention.

- (F) The next issue is Miscellaneous Income. It is contended by the Appellants that the State Commission ought to have considered some amount of miscellaneous income in the ARR of GRIDCO on the basis of actual miscellaneous income in the previous year. The miscellaneous income in the case of GRIDCO and the distribution companies, the Appellants, stand on different footing since the component of miscellaneous income differ in these two cases. In the case of Appellants, the State Commission has taken into consideration the miscellaneous income on account of interest on security deposit, meter rent, commission for collection of electricity duty, etc., which is predictable but in the case of GRIDCO the miscellaneous income is mainly on

account of rebate earned on timely payment of generation dues and interest on short-term deposits. This income cannot be anticipated or predicted since the State Commission is always leaving a large gap in the tariff. So this submission also is without any merit.

- (G) The next issue relates to allocation of interest. It is submitted by the Appellants that the interest on loan ought to be allocated to the Appellants on the basis of quantum of energy purchased by them but on the basis of the respective outstanding. The interest on loan is a component of the ARR of GRIDCO. The State Commission is not allocating ARR of GRIDCO to the Appellants component-wise. The State Commission has correctly allocated the ARR of GRIDCO amongst the 4 distribution companies in equitable manner so as to fix the uniform retail tariff for different categories of consumers of the State. Therefore, there is no merit in this contention also.

9. In the light of the rival contentions in respect of various issues, the following questions may arise for consideration:

- I. Whether the State Commission was right in estimating a lower availability of quantum of power, while the availability in prudent estimate will be significantly higher on account of higher hydro generation, signing of MOUs with CPPs and consideration of the past performance?
- II. Whether the State Commission was right in departing from its earlier orders by taking a sudden decision to ring fence exports, that too, within the control period which is contrary to the Long Term Tariff Strategy principles causing regulatory uncertainty?
- III. Whether the State Commission has correctly approved the Interest Cost?

- IV. Whether the State Commission was justified in allowing Rs.464.86 crores towards repayment of the principal contravening the directions issued by this Tribunal earlier?
- V. Whether the State Commission was justified to true up the losses suffered by the GRIDCO in the truing up exercise of the past period, whereas, under the Transfer Scheme, the Distribution Licensees were incorporated with a fixed position of assets and liabilities that they would take over with effect from 1.4.1999?
- VI. Whether the State Commission was right in not taking the uniform approach for all the licensees while approving the ARR for the year 2007-08 and in not taking into consideration of the fact that in the earlier years 2003-04 and 2005-06, miscellaneous income was based upon the actual figures?

VII. Whether the State Commission was right in including the amounts towards interest in the Annual Revenue Requirement while the allocation of Interest from GRIDCO to the Distribution Licensees ought to be on the basis of the outstanding position of each Distribution Licensee and not on the basis and off-take of each Distribution Licensee from GRIDCO?

10. Before analyzing these Questions, it would be appropriate to decide over the Preliminary Objections raised by the Respondents regarding the *locus standi* of the Appellants in filing these Appeals.

11. The Respondents have raised the question of locus standi of the Appellants on the ground that in spite of the fact that the entire amount payable by the distribution companies to GRIDCO in terms of bulk supply tariff order of GRIDCO for FY 2007-08 has been allowed as pass through in the ARR of the Distribution

Companies, the Distribution Companies have challenged the bulk supply tariff order of the GRIDCO even though they are not affected by it in any manner whatsoever. The gist of the arguments advanced on this point is as follows:

“Even though the entire power purchase cost payable to GRIDCO by the distribution companies has been allowed by the State Commission as a pass through in full in their retail supply tariff order, the Appellants have challenged the bulk supply tariff order on the ground that retail supply tariff order fell short of the bulk supply tariff order. Since the entire power purchase cost has been allowed in full as a pass through, there may not be any shortfall in the distribution companies on account of the bulk supply tariff. In case, the retail supply tariff falls short of the revenue requirement, the remedy for distribution companies in that case is to go back to the State Commission or challenge the retail supply tariff order alone claiming the different rates by way of truing-up

after proving their entitlement. Therefore, the Appeal filed by the distribution companies is not maintainable as they have no locus standi.

Under section 111 of the Electricity Act, only a person aggrieved by an order of the Commission alone can file an Appeal. The entire power purchase cost of Rs. 2259.21 crore determined as payable by the distribution companies to GRIDCO has been allowed as a pass through in full in the ARR and retail supply tariff order dated 23.03.2007. Therefore, the Appellants are not affected in any manner by the impugned order.”

12. The Learned Counsel for the Respondents have cited number of authorities to substantiate its plea that the Appellants cannot be said to be aggrieved person and, therefore, the Appeal cannot be maintained. They are as follows:

- (1) *Thammanna vs. K. Veera Reddy (1980) 4 SCC 62.*
- (2) *Babua Ram vs. State of U.P. (1995) 2 SCC 689.*
- (3) *Northern Plastics vs. Hindustan Photo Films (1997) 9 SCC 452*
- (4) *Banarsi vs. Ram Phal (2003) 9 SCC 606*

13. These decisions would lay down the principles that a person aggrieved alone can file an Appeal. A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. A person aggrieved does not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A person aggrieved must be a man who has suffered legal grievance, a man against whom a decision has been pronounced. Applying the above principle laid down by the Hon'ble Supreme Court in the above judgments, it is stated that the distribution companies cannot be



held to be a person \aggrieved since neither any legal rights of the distribution companies have been infringed nor have they suffered any injury or prejudice by virtue of the impugned order since the entire power purchase cost has been allowed as a pass through in full in the retail supply tariff order in favour of the distribution companies, and therefore, the distribution companies do not have a locus standi to challenge the impugned order.

On the other hand, it is contended by the Appellant that even though their entire power purchase cost and expenses were provided for in full in the retail supply tariff order, their retail supply tariff fell short of their revenue requirement and as such they are entitled to challenge the bulk supply tariff order in order to appropriate their pecuniary benefits which they may obtain by such challenge to fill up the gap in their revenue requirements.

14. We have carefully considered the rival contentions urged by the Learned Counsel for the parties. According to the appellant, the

bulk supply tariff payable by the appellants to the GRIDCO has been constantly increasing over the past several years and on the other hand, there has been no increase in the retail supply tariff which the distribution licensee namely the appellants are allowed to charge from their consumers. Since entire power procurement of the Distribution Licensee is from GRIDCO, the appellants, the Distribution Licensee have a vested legal right in the reduction of bulk supply tariff. As a matter of fact over the years till 2007-08, there has been an uncovered revenue gap in the ARR of the distribution licensee. If the appellants were to succeed in getting the bulk supply tariff reduced, the appellants would have had more financial cushion to absorb its legitimate expenses and also to build up its reserves for capital investment, etc.

15. In view of the statement made by the Appellants that while the bulk supply tariff payable by the distribution companies has been constantly increasing over the past several years, there has been no corresponding increase in the retail supply tariff and hence

the distribution licensees have a valid, genuine and legal right to have the bulk supply tariff reduced as much as possible, we feel that the Appellants have got a right to file the Appeal. Further, it is contended by the Counsel for the Appellant that over the years till 2007-08 there is always an uncovered revenue gap in the ARR of the distribution licensees and the contention that the entire bulk supply tariff is allowed as a pass through in the ARR of the distribution licensee is factually incorrect.

16. In view of the above statement, we are to hold that the appeals are maintainable as the appellants have got some vested legal rights in the reduction of the bulk supply tariff which would result in the rights being accrued to the distribution licensee to charge the retail supply tariff from their consumers in direct proportion. This point is answered accordingly.

17. Let us now discuss regarding the questions framed in these Appeals on the basis of the various Issues raised.

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

(A) According to the Appellant, the quantum of availability of power from the hydro power stations of the State should have been computed on the basis of actual drawal from the said stations during the previous year and not on the basis of design energy. It is not disputed that as a matter of established practice, the quantum of the power procurement from various hydro power stations is always based on the projections by the generators. Accordingly, the GRIDCO's hydro power purchase projection was based on the Generation Plan submitted by the Orissa Hydro Power Corporation (OHPC). The GRIDCO has projected the power purchase from OHPC stations based on the latest Generation Plan submitted by the OHPC. Under the generation order, the State Commission has determined the availability during FY 2007-08 and the cost of supply of the same by OHPC in a

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

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

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

- (C) As per Regulation 3 (a), the State Commission shall be guided by the principle laid down in sections 61(a) to (i) of the Electricity Act, 2003 while determining the generation tariff. It is also provided under section 61(a) of the Electricity Act, 2003 that the State Commission has to be guided by the Central Commission's Regulations for Determination of Tariff applicable to generation companies. On this issue, the Learned Counsel for the Appellants relied upon some of the cases decided by this Tribunal in Appeal No. 251/06, Appeal

No. 76/07 and Appeal No. 60/07. Those authorities decided by the Tribunal would be of no help to the Appellants since the said judgments did not involve drawal from hydro stations. The Appellants relied upon the judgment of Hon'ble Supreme Court in *Mohinder Singh Gill* case in 1978 (1) SCC 405. This judgment also has also no application to the facts of this case. In the present case, the State Commission gave a finding on this issue only on the basis of the order of the State Commission determining the ARR and generation tariff order of the OHPC for FY 2007-08, in which the quantum of availability of power from the hydro power station has been determined . As indicated above, the said order has not been challenged.

- (D) Further, it has been brought to the notice of this Tribunal that the State Commission has already carried out the truing-up exercise up to FY 2008-09 on the basis of audited accounts. In such a truing-up exercise, the State Commission has duly



taken into consideration the actual receipts and expenses of GRIDCO under various heads including the income received by GRIDCO from trading of export of surplus power. In view of the fact that for the FY 2007-08, the quantum of power was determined by the State Commission in the true-up on the basis of the projections of the generators and the State Commission has already taken the actual power purchase and power sale up to FY 2008-09 taking into consideration the audited accounts into consideration, the issue of quantum of power purchase does not survive.

19. The next issue is with regard to treatment of income from the sale of energy by GRIDCO outside the State.

(A) According to the Appellant, the State Commission has arbitrarily taken out the revenue attributable to export sales by GRIDCO from the ARR. This contention cannot be accepted. In the impugned order it is specifically stated that

in view of the risk and uncertainties involved in the trading of surplus power, the State Commission has changed the earlier pattern of including hypothetical and uncertain figure towards accepted revenue from export sales and has instead left a huge gap of Rs. 464.86 crores to be bridge by the revenue from such export of surplus power and UI charges. According to the State Commission, the GRIDCO is free to purchase additional power from any source and trade in the open market. The extra revenue earned through trading of power by GRIDCO shall bridge the gap to some extent in its ARR for FY 2007-08 and also reduce the burden of the consumers of the State by way of liquidating past liabilities. The direction of the Tribunal in its earlier judgment dated 13.12.2006 for inclusion of 943 crores as income from trading in the revenue of GRIDCO is based on the finding that the cost of power purchase had been included by the

State Commission but revenue from trading of such power was not included.

- (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 true-up exercise and updated the same up to FY 2007-08. In such true-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 true-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.

20. The next issue is interest on loan.

(A) According to the Appellants, the State Commission has held that REC loan would be charged @ 8.5% but in the computation in Table-40 interest has been allowed @ 12.15%. It has been stated by the Learned Counsel for the Respondent that under para 5.34.6 of the impugned order, the State Commission has held REC loan @ 8.5%. The figure of 12.15% in Table-40 represents the average estimated rate of interest on REC loan but in computation interest @ 8.5% has been allowed. It is pointed out by the Learned Counsel for the Respondent that although GRIDCO had proposed a sum of Rs. 4.60 crores as interest on REC working capital in the ARR application, subsequently the same was reworked by the State Commission on the basis of documents and the correct figure of Rs. 4.69 crores was arrived at.

(B) It is also pointed out that even though the GRIDCO originally proposed a sum of Rs. 17.08 crores as interest in the ARR application in respect of Pension Trust Fund, subsequently the same was reworked by the State Commission on the basis of documents produced by the Respondent and thereafter the correct figure of Rs. 19.09 crores was arrived at. The calculation errors can always crop up in the initial stage but the same can be rectified by the State Commission during the process of scrutiny. Therefore, the contention on this issue urged by the Appellant has no merit.

21. The next issue is repayment of principal of loan taken by GRIDCO mainly for payment to generators on account of non-payment of dues to be paid by the distribution companies..

(A) According to the Appellant, the State Commission has committed error in allowing a sum of Rs. 464.86 crores towards repayment of principal and this is against the

principles of accounting and against the directions which have been given by the Tribunal in its earlier judgment dated 13.12.2006. If the principal amount repayment of a loan were to be treated as an expense in the ARR, the receipt of loan must be treated as an income of the licensee. This amount pertains to amounts payable by the distribution companies to GRIDCO in the past towards the Bulk Supply which was already included in the ARRs of previous years. Hence including the same in the current year would amount to double counting. It is also submitted by the appellants that in the past the full payments to GRIDCO could not be made since the State Commission had not allowed retail supply tariff to cover the entire cost of the Distribution Companies. While the Bulk Supply Price had been constantly increasing, there was no corresponding increase in the retail supply tariff.

(B) According to the Learned Counsel for the Respondent, normally if the loan is taken to create an asset, depreciation is allowed for repayment of principal component of loan. However, in this case the loans were taken for payment of the Power Purchase Bills of Generators, due to non-payment of Power Purchase Bills of GRIDCO by the Distribution Licensees and not for creating any assets. The State Commission, by the order dated 20.07.2006 passed an order fixing the schedule for repayment of outstanding dues by the distribution licensees. Though the distribution licensees were parties to this order, the said order has not been challenged and as such it has become final. It is pointed out by the Respondent that in spite of this order, the distribution licensees had not paid the installments as per schedule approved by the State Commission. It is because the Distribution Companies failed to make the payment of the outstanding dues, the State Commission had to devise a mechanism for repayment of the principal.

(C) The State Commission in the impugned order has recorded that the appellant's distribution companies have been paying their monthly Bulk Supply Bills in full from March 2003. However, they have been hardly able to make any payment towards the arrear of outstanding Bulk Supply dues and the loan principal and accumulated interest. In order to ensure that the GRIDCO continues to meet its principal obligation in time and for efficient running of the system, it has agreed in principle to allow an amount of Rs. 464.84 crores towards appropriation in ARR.

(ED) The same issue was considered by the Tribunal in respect of the previous year FY 2006-07 in its judgment dated 13.12.2006. The finding of the Tribunal in its judgment dated 13.12.2006 are extracted hereunder:

*“22. We are taking up the points framed in these appeals for consideration hereunder. It is contended that the Regulatory*



*Commission had approved repayment of principal amount of Rs. 480 crore as pass through in the Tariff of the 1<sup>st</sup> Respondent, GRIDCO, and it is pointed out that there is no provision to pass through the repayment of principal in the OERC (Terms & Conditions for determination of tariff) Regulation 2004. There is no provision for the principal loan amount of Rs. 480 crores to pass through. It is also contended that servicing of loan alone is permissible and it could be allowed to pass through and not the principal amount of loan. It is also not in dispute that for the investment by way of equity return on equity is allowed. For want of funds if loan is raised and such loan is to be discharged from and out of the earnings and loan amount cannot be allowed to pass through tariff. Loan availed is a capital expenditure which cannot be allowed as a pass through the tariff. Mr. M.G. Ramachandran, the Learned Counsel appearing for the Regulatory Commission contended that the sum of Rs. 480 crores allowed is by way of*

*repayment of the loan taken for funding the energy dues payable by Discom. Normally repayment of loan is to be met through depreciation allowed and not otherwise. It is further contended that the sum of Rs. 480 crore allowed by the Regulatory Commission to pass through is a special appropriation to reduce the previous accumulated dues of DISCOM and thereby obviate the need to give appropriation in future to cover the loans.*

*23. In other words, it is contended that the said amount of Rs. 480 crore is not a simple case of re-payment of principal amount of loan borrowed for capital expenditure. It is a loan which GRIDCO raised to meet the financial obligation on the part of the distribution licensees towards cost of power due to GRIDCO. In our view, this contention advanced by Mr. M.G. Ramachandran cannot be sustained. On a consideration of the tariff order passed by the Regulatory Commission and the materials placed before us, it is clear that sum of Rs. 480 crore is an amount that has been claimed*

*by GRIDCO wards repayment of principal. Being a principal, the same cannot be allowed in law nor can it be allowed to pass through in the tariff of GRIDCO.*

.....

.....

.....

*27. It is pointed out that substantial portion of the loan has to be raised as BST tariff arrears has not been remitted by the DISCOMs. This is controverted. Be that so, a sum of Rs. 480.12 crore, it is claimed represents a loan raised by GRIDCO as DISCOMs have defaulted in remitting the cost of power supplied during the past. Even it be so, it follows that the entire Rs. 480.12 crore has already been passed through the cost of energy supplied in the past to the Discoms. Having allowed the said amount to pass through, merely because the outstanding due towards supply from Discoms are treated as a loan, it is not permissible for GRIDCO to*

*seek for pass through of the same amount in the next tariff year or following years.*

*28. If the amount is due during the past and payable by Discoms to the GRIDCO, it has to recover in a manner known to law or as per arrangement agreed to between GRIDCO and Discoms as an outstanding. Hence, it will be illogical to once again allow to pass through, the consumption charges once over, which remains unpaid and treated as loan in the tariff from Discom. Various loans are referred to in the tariff order by the Regulatory Commission and substantial portion of the loans are referable to the period prior to trifurcation and unbundling of the utilities. It cannot also be said that the loan amount was not towards capital investment.*

*29. Be it a capital investment or be it an outstanding amount from the Discoms towards energy supplied in the past, the same cannot be allowed to be passed over once again*

*through the tariff. There is neither logic nor reason to allow the said amount to pass through tariff. If the loans are outstanding, it is for the GRIDCO to seek for recovery or reschedule it in a manner known to law from the concerned Discoms. On that score the Regulatory Commission ought not to have allowed the said amount to pass through. ....”*

- (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.

22. The next issue is with regard to truing-up.

- (A) According to the Appellant, on the basis of Transfer Scheme, the Appellants took over the business of distribution companies with effect from 01.04.1999 and as such the period from 1996-97 to 1998-99 should not have been taken into consideration by the State Commission for the purpose of truing-up.
- (B) The issue of truing-up in the present case has to be appreciated in the context of peculiar fact situation in the State of Orissa. The truing-up is adjustment of actual revenue and expenditure against the approved revenue and expenditure based on estimation by the State Commission. It is submitted by the Learned Counsel for the Respondent that a person or entity in management of the licensee is not relevant to truing-up exercise since the burden of truing-up falls on the consumer.

- (C) If the bulk supply tariff goes up, there has to be increase in the retail supply tariff in direct proportion. The GRIDCO started its commercial operation from 01.04.1996 pursuant to the Reforms Act and Orissa Electricity Reform (Transfer of Undertaking Assets, Liabilities, Proceedings and Personnel) Scheme Rules, 1996. These rules have been framed by the Government of Orissa in exercise of the power conferred by the Orissa Electricity Reform Act, 1995.
- (D) The GRIDCO is a licensee to carry out the business of transmission and retail supply of electricity from 01.04.1996. With disinvestment of distribution business from GRIDCO to the 4 distributions from 01.04.1999, the GRIDCO carried on the business of transmission and bulk supply of electricity in Orissa. The above disinvestment of distribution business by GRIDCO to the distribution companies was made pursuant to Orissa Electricity Distribution Companies Rules 1998.

- (E) Subsequently on enactment of Electricity Act, 2003, restricting the transmission licensee to engage in the business of trading, the transmission business of GRIDCO was transferred to Orissa Power Transmission Corporation Limited (OPTCL) from 01.04.2005 under the 2005 Transfer Scheme. Since then GRIDCO has been engaged in the business of bulk supply and trading in electricity.
- (F) The GRIDCO disinvested 51% of the equity holding in all the accounts of Appellant namely WESCO, NESCO and SOUTHCO through a process of International Competitive BIDDING. The prospective investors including the present management, i.e. Reliance, were provided with the Bid Documents including the Tariff Orders of State Commission for FY 1996-07 and 1997-08, and also the tariff proposal for 1998-99. The GRIDCO being the holding company of the distribution companies retained operational losses in the 3 distribution companies for the period from 26.11.1998 to

31.03.1999 as per provisions of the Transfer Scheme. The purpose of retaining these losses during operation of the distribution companies as separate entities was to allow the distribution companies to carry on their retail supply business with a clean slate.

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

and its tariffs have been determined by the State Commission on an annual basis.

- (H) As a licensee, the GRIDCO is entitled to truing-up of its costs and revenue on completion of audit of accounts. The State Commission has done the truing-up exercise up to 1998-99 while disposing the tariff proposal of the GRIDCO. This truing-up exercise has been done from 1996-97 i.e. first year of its operation after unbundling of erstwhile State Electricity Board. Whatever obligations have been incurred by the GRIDCO as a part of regulatory process have to be provided for by the State Commission. Profit and loss of GRIDCO pursuant to enforcement of Reform Act with effect from 01.04.2006 have to be trued-up. The period of regulation cannot be bifurcated unless there is specific provision of subsidy by State Government or some other measure in the Transfer Scheme. The entity in management is not relevant for truing-up as entity may keep changing

hands but the juristic entity remains uninterrupted. In case the management of distribution companies changes even then the liabilities of the distribution companies will have to be trued-up. The relevance has been placed upon 1998 Transfer Scheme This Scheme only limits the liability of the distribution companies. It does not provide that the regulatory losses of GRIDCO will not be trued-up.

- (I) The regulatory treatment of past losses and liabilities for the purpose of determination of tariff does not place the distribution companies in any adverse position because of bulk supply tariff fixed by the State Commission becomes power purchase cost to the distribution companies. This cost is allowed to be recovered by the distribution companies in full in the tariff fixed by the State Commission while approving the retail supply tariff. It is contended by the distribution companies that as a consequence of the truing-up for FY 1996-97 and FY 1998-99, the State Commission is seeking to impose liabilities prior to 01.04.1999 on the

distribution licensees contrary to the 1998 Transfer Scheme. This submission is not correct since as a result of the truing-up no liability is being imposed on the distribution companies and the ultimate benefit or burden of truing-up is passed on to the consumer as a part of tariff. Therefore, the submission of the Appellants with regard to truing-up does not deserve acceptance.

23. The next issue is with regard to Miscellaneous Income.
  - (A) According to the Appellants, the State Commission ought to have considered some amount of miscellaneous income in the ARR of GRIDCO on the basis of actual miscellaneous income in the previous year, whereas the State Commission has taken the miscellaneous income into account in the case of other licensees including the distribution companies, the Appellants. In the case of the Appellants, the State Commission has taken into consideration the miscellaneous income on account of interest on security deposit, meter rent, commission for collection of electricity duty etc., which is



certain and predictable but in the case of GRIDCO the miscellaneous income is mainly on account of rebate on timely payment of generators dues and interest on short-term deposits. The miscellaneous income in the case of GRIDCO and distribution companies stand on different footing since the component of miscellaneous income is quite different in these two cases.

- (B) The income on account of the rebate on timely payment by GRIDCO to generators has been ignored by the State Commission inasmuch as the rebate allowed to distribution companies for timely payment of bulk supply tariff dues of GRIDCO was also not taken into consideration. As pointed out by the Respondent, the income on account of short-term deposits cannot be anticipated or predicted since the State Commission is always leaving a large gap in the tariff. In the FY 2006-07 and FY 2007-08, which years were exceptionally years on account of good monsoon, the

GRIDCO could earn some surplus which was prudently invested. It is pointed out that surplus earned as well as interest earned by the GRIDCO from such deposits have already been trued-up by the State Commission.

- (C) In view of the above reasons, the submissions made by the Appellants with regard to miscellaneous income is devoid of any merit.

24. The next issue is with reference to the allocation of interest.

- (A) According to the Appellant, the interest on loan ought to be allocated to the distribution companies not on the basis of quantum of energy purchased by them but on the basis of their respective outstanding. In this context, it is to be stated the interest on loan is a component of the ARR of GRIDCO. The State Commission is not allocating the ARR of GRIDCO to the distribution companies component-wise. The total ARR of GRIDCO is allocated among the distribution

companies in equitable manner so as to fix the uniform retail supply tariff for different categories of consumer of the State. In fact the Commission has decided different rates for Bulk Supply Tariff purchase for the four distribution companies depending on their mix of consumers with a view to have uniform retail supply tariff.

- (B) Moreover, in case the contention of the Appellant is accepted, it will not be possible for the State Commission to determine the uniform retail supply tariff. As a matter of fact, if the interest on loan is allocated on the basis of respective outstanding , then the Central Electricity Supply Utility will be affected and this cannot be done as the Central Electricity Supply Utility is not a party in the present Appeal. Therefore, there is no merit in this contention also.

25. **SUMMARY OF OUR FINDINGS:**

- (i) **The 1<sup>st</sup> issue is relating to the under estimate of the quantum of power procurement. According to the**

**Appellant, the quantum of availability of power from Hydro Power Stations of the State should have been computed on the basis of actual drawal from the said stations during the previous years and not on the basis of the design energy. This contention is misconceived. The availability of hydro power can never be estimated on the basis of the actual generation during the previous year. It cannot be disputed that the quantum of availability of hydro power depends entirely on the rainfall which being a natural phenomenon is always uncertain. Therefore, it will be extremely risky to estimate the quantum of generation on the basis of the actual generation in the previous year. As such, the State Commission cannot formulate Tariff on the basis of uncertainties which are dependent on vagaries of nature. It is contended by the appellants that the Tariff Regulations of the State Commission do not provide for the principle of determination of Generation Tariff. Therefore, the**

**provisions relating to the determination of Tariff for retail sale could have applied. This contention is not valid since the said Regulation cannot be applied to generation Tariff as the Regulation provides for estimation of Quantum of Power purchases of Distribution Companies on the basis of the actual purchases made during the previous year. As per the Regulations and provisions of the Act, the State Commission shall be guided by the Central Commission Regulations for determination of Tariff applicable to the Generation Companies. In the present case the State Commission gave a finding on this issue only on the basis of the earlier Order of the State Commission determining the Annual Revenue Requirement (ARR) and Generation Tariff Order for the Financial Year 2007-08. The said Order has never been challenged by the Appellants. Further, for the FY 2007-08, the Quantum of Power was determined by the State Commission in the truing up exercise on the basis of the**

**projections of the Generators and the State Commission has already taken the actual power purchase and power sale up to FY 2008-09 as per the Audited Accounts. In view of the above circumstances, this Issue of Quantum of Power Purchase does not survive.**

- (ii) The next issue is with regard to treatment of income from the sale of energy by GRIDCO outside the State. According to the Appellant, the State Commission has arbitrarily taken out the revenue attributable to the export sales by GRIDCO from the Annual Revenue Requirement. This contention cannot be accepted. It has been held by the State Commission that the GRIDCO is free to purchase additional power from any source and trade in the open market. The extra revenue earned through trading of power by GRIDCO shall bridge the gap to some extent in Annual Revenue Requirement for FY 2007-08 and also reduce the burden of the consumers**

**of the State by way of liquidating the power liabilities. 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. Admittedly, the State Commission has taken up the truing up exercises and in such a 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 exercises after availability of Audited Accounts. Therefore, this issue of revenue from sale of surplus powers does not survive.**

- (iii) The next issue is with regard to Interest on Loan. According to the Appellant, the State Commission has allowed interest at the rate of 8.5% but in the computation Table-40, interest has been allowed at the**

**rate of 12.15 %. Although GRIDCO has proposed a sum of Rs.4.60 crores as interest in the Annual Revenue Requirement application, subsequently, the same was re-worked by State Commission on the basis of documents and arrived at correct figure of Rs.4.69 crores. Similarly, even though GRIDCO originally proposed a sum of Rs.17.08 crores as interest in the ARR application in respect of pension, gratuity funds, subsequently, the same was re-worked by the State Commission on the basis of documents produced by the Respondents and arrived at the correct figure of Rs.19.09 crores. Therefore, the errors pointed out by the Appellant were rectified by the State Commission during the process of scrutiny. Therefore, this issue also has no merit.**

- (iv) The next issue is repayment of principal of loan taken by GRIDCO mainly for payment to generators on account of non-payment of dues to be paid by the distribution companies..**



**(A) According to the Appellant, the State Commission has committed error in allowing a sum of Rs. 464.86 crores towards repayment of principal and this is against the principles of accounting and against the directions which have been given by the Tribunal in its earlier judgment dated 13.12.2006. This amount pertains to amounts payable by the distribution companies to GRIDCO in the past towards the Bulk Supply which was already included in the ARR of previous years. Hence including the same in the current year would amount to double counting. It is also submitted by the appellants that in the past the full payments to GRIDCO could not be made since the State Commission had not allowed tariff to cover the entire cost of the distribution companies. While the Bulk Supply Price had been constantly increasing, there was no corresponding increase in the Retail Supply Tariff.**

- (B) According to the Learned Counsel for the Respondent, normally if the loan is taken to create an asset, depreciation is allowed for repayment of principal component of loan. However, in this case the loans were taken for payment of the Power Purchase Bills of Generators, due to non-payment of Power Purchase Bills of GRIDCO by the Distribution Licensees and not for creating any assets. It is because the distribution companies failed to make the payment of the outstanding dues, the State Commission had to devise a mechanism for repayment of the principal.**
- (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. Also the outstanding amount still remains as Liability in the accounts of Distribution Licensees and Asset in the books of accounts of GRIDCO. This booking of principal repayment of loan to revenue requirement is wrong and against the fundamental accounting principles. Thus this point is decided in favour of the Appellants**

**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 and results in double payment. In our opinion, the correct remedy has to be found in the root of the problem, i.e. inability of the Distribution Licensees to pay the past arrears due to their poor financial health. The State Commission is directed to take**

**necessary action on the directions given by the Tribunal in its judgment dated 08.11.2010 in Appeals No. 52 to 54 of 2007 on the ARR of the Distribution Licensees for FY 2007-08 and in para 21 (F) & (G) of this judgment.**

- (v) The next issue is with regard to truing-up exercise. According to the Appellants, the Appellants took over the business of the Distribution Companies with effect from 1.4.1999. As such, the period from 1996-97 to 1998-99 should not have been taken into consideration by the State Commission in for the purpose of truing up under the Transfer Scheme. The issue of truing-up in the present case has been appreciated in the context of peculiar facts and circumstances in the State of Orissa. Truing up is adjustment of Actual Revenue & Expenditure against the approved Revenue & Expenditure based on estimation by the State Commission. An entity in management of the Licensee is not relevant for truing up as an entity may keep changing**

**hands but the juristic entity remains uninterrupted. If the bulk supply tariff goes up, there has to be increase in the retail supply tariff in direct proportion. The GRIDCO as licensee has carried out the business of transmission and retail supply of electricity from 1.4.1996. With disinvestment of Distribution Companies business from GRIDCO to the four Distribution Companies from 1.4.1999, the GRIDCO carried on the business of transmission and bulk supply of electricity in Orissa. The above disinvestment of business of GRIDCO to Distribution Companies was made pursuant to the Orissa Electricity Distribution Companies Rules, 1998. Subsequently, on enactment of the Electricity Act, 2003, the business of trading and transmission of electricity by GRIDCO was transferred to Orissa Power Transmission Corporation Limited from 1.4.2005. According to the Appellant, as a consequence of truing-up for FY 1996-97 and FY 1998-99, the State Commission has imposed a**

**liability prior to 1.4.1999 on the Distribution Licensees contrary to 1998-99 Transfer Scheme. This submission is not correct since as a result of the truing up, no liability is being imposed on the Distribution Companies like the appellants and the ultimate benefit or burden of truing up is passed on to the consumer as part of the Tariff. Therefore, the submission of the appellant with regard to the truing up does not deserve acceptance.**

- (vi) The next issue is with regard to Miscellaneous Income. According to the Appellant, the State Commission ought to have considered the same amount of Miscellaneous Income in the Annual Revenue Requirement (ARR) of GRIDCO on the basis of the Actual Miscellaneous Income in the previous year. The Miscellaneous Income in the case of GRIDCO and the Distribution Companies stand on a different footing since the component of the Miscellaneous Income is quite different amongst these**

**two cases. The income on account of Short Term Deposits cannot be anticipated since the State Commission is always leaving a large gap in the Tariff in FY 2006-07 and FY 2007-08 which the years were exceptionally good years for hydel generation. On account of good monsoon, the GRIDCO earned some surplus which was prudently invested. The surplus earned as well as interest earned by the GRIDCO from past have admittedly been trued up by the State Commission. Therefore, this point also would fail.**

**(vii) The next issue is with reference to the Allocation of interest. According to the Appellant, the interest on loan ought to be allocated to the Distribution Companies not on the basis of the quantum of energy purchased by them but on the basis of their respective outstanding. It is to be pointed out that the interest on loan is a component of Annual Revenue Requirement of GRIDCO. The total**

**Annual Revenue Requirement of GRIDCO is allocated among the Distribution Companies in equitable manner so as to fix uniform Retail Supply Tariff for different categories of consumer States. For this reason, the State Commission has fixed different rates of Bulk Supply Tariff for the four Distribution Licensees in the State which have different mix of consumers load. Moreover, if the interest on loan is allocated on the basis of respective outstanding, then the Central Electricity Supply Utility will also be affected which is not a party to this Appeal. Therefore, there is no merit in this contention also.**

26. In the light of the above findings, except the 4<sup>th</sup> issue i.e. Repayment of the principal, we conclude that the reasonings given by the State Commission in the impugned order on other issues do not suffer from any infirmity. In view of above we set aside the order to the extent of 4<sup>th</sup> issue, i.e. Repayment of principal and confirm the findings on all the other issues. The State Commission



is directed to take necessary action as stated in para 21 (F) & (G) above.

The Appeal is partly allowed. No costs.

**(Justice P.S. Datta) (Rakesh Nath) (Justice M. Karpaga Vinayagam)**  
**Judicial Member Technical Member Chairperson**

Dated, the 9<sup>th</sup> November, 2010  
**Reportable/Non-Reportable**