

Before the Appellate Tribunal for Electricity
APPELLATE JURISDICTION, NEW DELHI

Appeal No. 74, 75 & 76 of 2006

Dated this 13th day of December, 2006

Present : Hon'ble Mr. Justice E. Padmanabhan – Judicial Member
Hon'ble Mr. H. L. Bajaj – Technical member

North Eastern Electricity Supply Co. of Orissa Ltd.	... Appellant in Appeal No. 74/06
Western Electricity Supply Co. of Orissa Ltd.	... Appellant in Appeal No.75/06
Southern Electricity Supply Co. of Orissa Ltd.	... Appellant in Appeal No. 76/06

Versus

1. The Grid Corporation of Orissa Ltd.
Janpath, Bhubaneswar – 22.
2. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar
3. Department of Energy, Govt. of Orissa
4. Mr. Jayadev Mishra,
N-4/98, Nayapalli, Bhubaneswar
5. Utkal Chamber of Commerce & Industry
N/6, IRC Village, Nayapalli,
Bhubaneswar
6. Sambalpur District Consumer Federation,
Balaji Mandir Bhawan, Khetrajpur,
Sambalpur
7. Confederation of India Industry (CII)
8, Forest Park, Bhubaneswar
8. Orissa Consumer's Association & FOCO,
FOCO, Biswanth Lane, Cuttack
9. National Institute of Indian Labour,

Beherasahi, Nayapalli, Bhubaneswar

10. IDCOL Ferro Chrome & Alloys Ltd.
Jajpur Road, Jajpur
11. Rourkela Chamber of Commerce and Industry
Chamber Bhawan, Chamber Point, Rourkela
12. M/s Tata Stel Co. Ltd.,
273, Bhouma Nagar, Unit-IV, Bhubaneswar
13. M/s. NESCO, Januganj, Balasore
14. Mr. R. P. Mohapatra,
775, Jayadev Vihar, Bhubaneswar
15. M/s Ferro Alloys Corporation ltd.
GD-2/10, Chandrasekharapur,
Bhubaneswar
16. M/s Jindal Stainless Ltd.,
50-HIG, Jayadev Vihar,
Bhubaneswar
17. Rural Development Dept.,
Govt. of Orissa, Orissa Secretariate,
Bhubaneswar
18. State Public Interest Protection Council
Talengabazar, Cuttack
19. Organization for Removing regional Imbalances
and Social Justice in Society (ORRISIS)
Kadambari Complex, Nayapara,
Sambalpur-1.

... Respondent in
all the Appeals

Counsel for the Appellant : Mr. S. Ganesh, Sr. Advocate
with Mr. Syed Naqvi, Advocate

Counsel for the Respondent: Mr. R. K. Mehta, Advocate with
Ms.Suman Kukrety, Advocate for
Grid Corp. of Orissa
Mr.M.G.Ramachandran, Advocate
for OERC

Mr. S. S. Mishra & Mr.N.K.Neeraj,
Advocate for Respondent No.1,
Mr.R.M.Patnaik, Advocate for
Respn. Nos. 12, 14 & 15
Mr. Sanjay Sen for Govt. of Orissa

J U D G E M E N T

1. Appeal No. 74 of 2006 has been preferred by M/s. North Eastern Electricity Supply Company of Orissa Ltd. a distribution licensee as against the orders of the 2nd respondent, Orissa Electricity Regulatory Commission, dated 23rd March, 2006 in Case No. 42 of 2005. The appellant has prayed for the following among other reliefs :

- “(a) Set aside the Order dated 23rd March 2006 (Annexure “B”) passed by Respondent No.2;*
- (b) To determine the Bulk Supply Tariff by considering the available surplus of revenue for FY 2004-05 and FY 2005-06 with GRIDCO following the truing up exercise and adopting uniform principles vis-à-vis amortization of regulatory assets and considering moratorium period, repayment period and repayment installments applicable for securitized liabilities to be allowed based on the proposal of Appellants.*
- (c) Consider reduction in the Bulk Supply Tariff by reduction in BST costs to the tune of Rs. 1023 Crores and setting aside the carry forward of revenue deficit for six consecutive years.”*

2. Appeal No. 75 of 2006 has been preferred by M/s. Western Electricity Supply Company of Orissa Ltd. as against the order of the 2nd respondent, Orissa Electricity Regulatory Commission, dated 23.03.2006 made in Case No. 42 of 2005. In this appeal, the appellant has prayed for identical reliefs as prayed for in Appeal No. 74 of 2006.
3. Appeal No. 76 of 2006 has been preferred by M/s. Southern Electricity Supply Company of Orissa Ltd., challenging the order dated 23.03.2006 in Case No. 42 of 2005 on the file of Orissa Electricity Regulatory Commission, the 2nd respondent herein. In this appeal also, the appellant has prayed for reliefs which are identical to the reliefs prayed for in Appeal no. 74 of 2006.
4. Heard Mr. S. Ganesh, Senior Advocate appearing along with Mr. Syed Naqvi, advocate for the appellant in all the appeals, Mr. M.G.Ramachandran, Advocate for the Orissa Electricity Regulatory Commission which is the 2nd respondent in all the appeals, Mr.R.K.Mehta, Advocate for the 1st respondent Grid Corporation of Orissa, M/s Sanjay Sen Mishra, advocate for Respondent No. 3 and 17 and Mr.N.K. Neeraj, Mr.A.Gupta, Mr.R.M.Patnaik for some of the respondents appearing in all the three appeals.
5. These three appeals arise out of the same tariff order passed by the Orissa Electricity Regulatory Commission in Case

No.42 of 2005 dated 23.03.2006 hence these appeals are consolidated and taken up together for hearing. Common arguments were advanced on behalf of the appellant in these appeals and so also on behalf of the respondents. Mr.M.G.Ramachandran and Mr.R.K.Mehta, advocates appearing for the 1st & 2nd respondent made detailed arguments while other learned counsel appearing for other respondents made their submissions apart from adopting the arguments advanced by Mr.M.G.Ramachandran and Mr.R.K.Mehta.

6. The appellants are three independent distribution companies having independent license to distribute power in three different areas of the State of Orissa. The appellants challenge the upward revision of bulk tariff as determined by the Orissa Electricity Regulatory Commission (OERC for brevity) and also complained that without corresponding increase in retail tariff the bulk tariff alone has been enhanced by OERC. The three Discoms have come forward with these appeals expressing common grievance and advancing identical contentions in these three appeals.
7. According to the appellants, the increase in the average bulk supply tariff is around 15% while the percentage of increase in variable charges to be paid by each one of the Discoms is around 20 – 23% and when there is no corresponding increase in retail supply tariff (RST). Hitherto

before, the combined tariff was determined both for energy transmitted and distributed. With effect from 01st April, 2006 separate tariff is fixed for transmission and the same is payable to Orissa Power Transmission Corporation Ltd. (OPTCL for brevity).

8. The Grid Corporation of Orissa Ltd. (GCOL for brevity) moved the 2nd respondent, Orissa Electricity Regulatory Commission for approval of its annual revenue requirement and determination of tariff for the year 2006-07 for bulk supply of electricity to the four distribution companies operating in the State of Orissa. The said application was notified and published, objections were called for, objections were submitted, and public hearings were held by OERC on various dates. In all about sixteen objections were filed before OERC including objections raised by the Discoms and by various consumer associations, Chamber of Commerce and other associations, representing the consumers in the State of Orissa. The representatives of the Discoms and various objectors were heard by OERC. The OERC after hearing all the concerned, who submitted application / objections proceeded to determine tariff under Sections 62, 64 and 86 (1) (b) of The Electricity Act 2003.
9. The projections of the demand of energy for the first six months of 2005-06 and actuals projected for 2006-07 as filed by GRIDCO in its BST and ARR application are as hereunder:

Table - 1

Average Maximum Demand Projection for 2006-07

Name of the Company	2004-05 (Actual)	Avg. of the actual for first six months of 2005-06	DISTCOs' Projection for 2006-07	GRIDCO's Projection for 2006-07
CESCO	621.67	710.69	814.50	717.80
NESCO	413.60	476.98	650.00	550.00
WESCO	582.70	636.42	995.52	658.69
SOUTHCO	255.30	283.36	310.91	287.27
Total DISTCOs	1873.27	2107.45	2770.93	2213.76

10. The actual energy requirement for 2004-05 for the first six months and the energy projected for 2006-07 as proposed by GRIDCO in its ARR filing is as found in Table-2, which is set out below:

Table – 2

Energy Projection for 2006-07

Name of the Company	2004-05 (Actual)	Actual for 1st six months of 2005-06	DISTCOs' Projection for 2006-07	GRIDCO's Projection for 2006-07
CESCO	4,079.46	2103.76	4409.92	4409.92
NESCO	2,824.00	1570.17	4200.00	4200.00
WESCO	3,912.90	2045.95	4,531.03	4,531.03
SOUTHCO	1,653.00	838.21	1836.30	1836.30
Total DISTCOs	12,469.36	6558.09	14,977.25	14,977.25
CPP	10	159.53		120.00
Total Sale	12,479.36	6717.2	14,977.25	15,097.25

11. The GRIDCO also has set out the availability of power and export of power as here under:

Item	Initial Projection for 2006-07 (MU)	Revised Projection for 2006-07 (MU)
Total power available	16326.24	16326.24
Proposed power sale to DISTCOs and CPP	15097.25	15097.25
Transmission loss initially was @ 5.05% and was later revised to 4.49%, over DISTCOs & CPP drawal only	802.96	709.73
Total procurement required for DISTCOs and CPP	15900.21	15806.98
Surplus available after meeting State Demand	426.03	519.26
The loss in transmission on account of wheeling to out side the state through EREB (MU) considering the loss level @ 2.94%	53.90	15.26
Balance power available for Export	372.13	504.00

12. GRIDCO estimated the total energy for four Discoms and the energy procurement at 16326.24 MU for 2006-07, which includes loss of 4.49% and CPP's drawal as well as export trading of 504 MU during the year.
13. The objectors filed detailed objections and opposed revision of bulk supply tariff. The OERC while approving the ARR determined the tariff for bulk supply, identically for all the four distribution companies, functioning in the State of Orissa. Such determination, according to the appellants

resulted in unwarranted upward revision of retail supply tariff (RST) ranging between 20 and 23% and when there is no corresponding increase in retail tariff determined by OERC in respect of all the appellants in these three appeals the upward revision is arbitrary and uncalled for. The three appellants have also preferred appeals as against the retail tariff determined by OERC and they are being dealt with separately.

14. The contesting respondents entered appearance and filed objections contending that no interference is called for with tariff determination by OERC and that average increase in bulk supply tariff is in the order of 14.08% and not 20 – 23% as sought to be made out by the appellants. The 1st respondent contended that the determination of bulk supply tariff and RST are two independent and different exercise and determination. It is also pointed out by the 1st respondent that OERC has determined bulk supply tariff based on its approval of annual revenue requirement of GRIDCO, while the retail supply tariff has been determined based on approval of ARR of the respective Discoms.
15. It is pointed out by the 1st respondent that increase in BST is necessitated because of the steep rise in the fuel cost and fuel surcharge, which the 1st respondent has to pay. It is also pointed out by the 1st respondent that there could be a hike in bulk supply tariff without a hike in retail supply tariff. Various contentions were advanced by the counsel

appearing for the appellants and contesting respondents as well as written submissions which are required to be considered in this batch of appeals.

16. On behalf of appellants, arguments were advanced in these three appeals under the following headings :
 - (i) Power procurement Quantum.
 - (ii) Cost of procurement.
 - (iii) Treatment of income from export.
 - (iv) Repayment of principal loan amount.
 - (v) Requirement of truing up exercise to be carried out for previous years.
 - (vi) High interest burden passed on to the appellants and
 - (vii) Determination of simultaneous maximum demand

17. Mr. S. Ganesh, learned senior counsel appearing for the appellant, elaborated his arguments under the above major headings while seeking the reliefs prayed for in these appeals. Per contra, Mr.R.K.Mehta learned counsel appearing for the 1st respondent, GRIDCO and Mr.M.G.Ramachandran, learned counsel appearing for the 2nd respondent, OERC, contended that there are absolutely no merits in these three appeals and that no interference is called for, with bulk supply tariff order passed by OERC, that various grounds and contentions advanced by appellants are devoid of merits and born out of frustration, misdirection and without substance. Both the parties filed written submission and as seen from the written

submissions, the appellants focused their arguments in respect of seven heads. Various other grounds raised in the appeals were not canvassed and those grounds do not require consideration.

18. We frame the points set out in the next Para for consideration in these appeals and take up the same for discussion. While dealing with the points, we shall refer to the factual matrix and technical details submitted with respect to each point. It is not necessary to set out the large details set out in tariff Petition leading to the tariff determination in these appeals. We shall refer to the factual matrix and relevant technical details, while considering the points framed for consideration.

19. On a consideration of various arguments advanced as well as written submissions submitted by the learned counsel for the appellants and contesting respondents in all the three appeals, we frame the following common points for consideration :
 - (A) Whether OERC acted illegally and with a mis-direction in allowing Rs.480 Crore, being the principal loan amount to pass through in the BST tariff of the GRIDCO?

 - (B) Whether the export earnings of power by GRIDCO has been rightly assessed? Whether the exclusion of export

earnings from the Revenue of GRIDCO is illegal and consequently the annual revenue requirement and tariff determination are liable to be modified ?

- (C) Whether the failure to undertake trueing up exercise by Regulatory Commission for the previous years suffers with illegality and liable to be interfered and consequential direction requires to be issued ?
- (D) Whether quantum of power procurement estimated by the GRIDCO and approved by the Regulator without reference to the actuals is liable to be interfered and modified?
- (E) Whether the cost of procurement as approved by the Regulatory Commission is liable to be interfered as excessive, arbitrary and suffers with errors?
- (F) Whether passing of higher interest burden to the Discoms is sustainable or liable to be interfered?
- (G) Whether the determination of simultaneous maximum demand (SMD) in MVA and the consequence of the demand and energy charged by OERC is sustainable or liable to be interfered?
- (H) Whether GRIDCO, the 1st respondent has a surplus of Rs.618 Crores as contended by the appellants? And

whether the said amount should be directed to be utilized to reduce BST and reduce the gaps in ARR?

(I) Whether the BST order dated 23rd March, 2006 is liable to be interfered or modified in these appeals?

(J) To what relief, if any, the appellants are entitled to?

20. Before taking up the points for consideration it is essential to refer the statutory provisions of The Electricity Act 2003. Section 60(1) provides that the appropriate Commission shall be guided by the principles and methodology specified by the Central Commission for determination of tariff for generation, transmission and distribution of electricity and they are to be conducted on commercial principles. The Commission is obligated to safeguard the consumers' interest and at the same time to see the recovery of the cost of electricity in a reasonable manner. Section 61 further provides that the tariff progressively reflects the cost of supply of electricity and while fixing the tariff, the National Electricity Policy and tariff policy shall be taken into consideration.

21. Section 62 provides for fixing of tariff with respect to supply of electricity by the generating company to a distribution licensee. Section 64 provides elaborate procedure for approval of annual revenue requirements and determination of tariff. Such fixation shall be done within one hundred

twenty days from the receipt of application and Sub Section (6) of Section 64 provides that a tariff order shall unless amended or revoked, continue to be in force for such period as may be specified in the tariff order. Section 86 prescribes the functions of the Commission. Section 86(1) (a) provides that the Commission shall determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail. Sub section (4) of 86 provides that in the discharge of functions under section 86 the Regulatory Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3 of the Act.

22. We are taking up the points framed in these appeals for consideration here-under. 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 1st 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 Crore 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 Crore 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 towards 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.

24. Going a step further, we would like to point out that even according to GRIDCO the said sum of Rs. 480 Crore is by way of outstanding dues towards past purchase of power by DISCOM. Mr. R.K.Mehta appearing for the utility contended that since GRIDCO has no fixed asset, the question of depreciation will not arise therefore, unless the amount is allowed to pass through in the tariff no cash will be available in the hands of GRIDCO to repay or service principal. It is pointed out by Mr.R.K.Mehta that as on 31.03.2006 GRIDCO has a total loan liability of Rs.3804 Crore and it is sought to be suggested that it is due to non-payment of dues by Discoms towards supply of power. It is an accumulated loan to the tune of Rs.1053 Crore. In other words, it is sought to be contended that loan is raised to tide over the crisis and to meet the demands of generator from whom power is drawn and supplied to Discoms during the past.
25. This contention of Mr. M. G. Ramachandran and Mr.R.K.Mehta, learned counsel appearing for respondents 1 & 2 bristles with inconsistency. The Commission has observed that it expects GRIDCO to manage its finance with deftness and competence by meeting its obligations towards cost of power purchased repayment of loan and other statutory liabilities. While holding so, the Commission has allowed payment of Rs. 480.12 Crore during 2006-07 to pass through and the said repayment will be replenished by

back to back arrangement with DISCOMS towards recovery of loan, interest and outstanding BST.

26. Mr. M.G.Ramachandran referred to Table 30 (Page 104 of the Tariff Order) with GRIDCO as on 31.03.07 owe Rs.1268.33 Crore to Government, Rs. 218 Crore to Institutions apart from secured loans and short term borrowings for cash deficit aggregating to the secured loans to six of the nationalized banks is in the order of Rs. 421.37 Crore. The GRIDCO also owe to Pension Trust Bond to the value of Rs. 421.82 Crore and in all the total loan payable by GRIDCO is in the order of Rs. 4490.39 Crore with an interest liability of Rs. 383.38 Crore. Out of the total loan amount of Rs. 3517.33 Crore, as assigned to GRIDCO and Rs.3240.82 Crore is the principal as per the segregated account of GRIDCO. There is sum discrepancy with respect to the loan as found in the Table 30 of the Tariff Order. The bonds as well as loan availed are for swapping. In this back ground let us consider the contention advanced by the learned counsel for respondents 1 & 2.
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 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 re-schedule 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. So also, the interest payable on the outstanding by Discoms, if any, to the GRIDCO it may not be allowed to pass through, since it is a liability of the Discoms which amount the GRIDCO has to recover it. Such interest liabilities also cannot be passed through the tariff. Though the argument was advanced with respect to the loan of Rs.480.12 Crore, it follows that the interest in respect to such outstanding due and payable to GRIDCO by DISCOM are the loan and interest which the GRIDCO has to recover from Discoms and not to be passed thru the tariff. Hence this point is answered in favour of appellants and against the Respondents.

30. According to the tariff order, an amount due to GRIDCO to finance dues payable by generators cannot also be allowed to pass through the tariff as it would amount to passing the same twice through the tariff on the consumers as well as on the Discoms and it is impermissible in law. When once cost of supply has been passed on to the consumers through the Discoms, it cannot be once again passed thru in the following years. Such a course is impermissible in law.
31. However, taking up the next point we do not find justification with the order of the Commission directing interest of Rs. 204.34 Crores to pass thru tariff. Before closing the discussion on these point, the Commission while

taking note of the fact that GRIDCO is due to the extent of Rs.1268.33 Crores towards Government Loans and Rs.1147.00 Crores being the interest liable as on 31.03.2007 yet when it comes to the amount outstanding to GRIDCO from the Government including the States of West Bengal, Bihar, Madhya Pradesh, Andhra Pradesh, Damodar Valley Corporation, Assam, Manipur, PTC, NVNL etc. amounting to Rs. 487.77 Crore remains due to GRIDCO. Merely advising GRIDCO to take expeditious steps is not sufficient on the other hand the said sum should be taken as an amount receivable from those State Governments being the revenue and should have been included in the expected revenue for the year in question. The State Government also owes a substantial sum to GRIDCO yet nothing has been indicated or directed as to the said outstanding amount, which could be set off against the loan payable to the State Government, which would reduce the interest liability of GRIDCO considerably.

32. In the circumstances, we set aside the direction of the Regulator in allowing Rs.490.50 being principal to pass through and at the same time we also direct the sum of Rs.475.77 Crore due from various States should be included in the receivables, set out in Table 16 (Page 67 of the Tariff Order). Thus the said two amounts take away GRIDCO from shortage to surplus to the level of Rs. 500 Crore. This makes all the differences and the benefit should go to

consumers through DISCOM. The point is answered against the respondents and in favour of appellants.

33. Taking up Point 'B', there is totally no justification to exclude the earnings of GRIDCO by export of power, which earning is considerable. In this respect as seen from Page 66 of the Tariff Order (Para 6.30.17.2) revenue from Export of power, the Commission has not considered. Revenue earned from trading of surplus power to outside States is of considerable quantum. The reason suggested being the revenue earning by GRIDCO from export of power involves more risk and uncertainties and same should not be fastened on consumers in terms of tariff burden. This reasoning is palpably unsustainable and runs counter to the very approach of the Commission in allowing expenses under this head. When the entire purchase of power procured by GRIDCO is taken into account and allowed as expenditure there is no reason to exclude the power which has been exported and substantial amount has been earned by GRIDCO. Assuming that GRIDCO purchased power from other sources and exported it, being activity of GRIDCO it has to be taken and included in the total revenues on account and there is no justification to exclude export earnings. The suggestion that such extra revenue earned could be used to bridge the gap and also reduce the burden of consumers by liquidating past liabilities is nothing but begging the question. Earnings by export is a revenue which GRIDCO should have been directed to include as part

of its revenue or atleast receivables during the course of the tariff period.

34. It is rightly pointed out by the learned counsel for the appellant that the GRIDCO had projected Rs. 133.56 Crore as income from exports, as seen from Table 8 of the Bulk Supply Price order for the FY 2007. In fact, the projection was revised to Rs. 133.56 Crore as against the initial projection of Rs. 98.16 Crore.
35. It is rightly pointed out that the very same Regulator with respect to the same GRIDCO in the earlier BSTs has included the export earnings for FY 2002-03, FY 2004, FY 2005 and FY 2006. The material portion of those BST tariff orders is extracted here under for ready reference :

“(i) In **BST Tariff Order for RY02 & 03**, vide clause 6.12.1 it has been stated that “This year another significant departure in our philosophy is to include power purchase from export to outside states as part of the total quantum of power purchase as we feel that export potential would reduce the overall financial burden of power purchase cost of GRIDCO ...”

(ii) In **BST Tariff Order for FY 04** vide clause no 5.9.1 it has been stated that “GRIDCO’s overall financial burden of power purchase cost would be reduced if export potential under a normal monsoon year is exploited properly”. Again in clause 5.9.3, it has been

stated that "... Hence, the Commission approves 90% of the total surplus power i.e. 2313.95 MU to be exported and the revenue earned on account of this to be adjusted in the ARR. In case GRIDCO is able to sell the balance 10% (i.e. 257.01 MU) of its export potentials the revenue generated out of such transaction shall be utilized towards excess power purchase cost due to hydrology failure during FY 2002-03..”

- (iii) **In Bst Order for FY 05**, OERC vide Clause 6.26.2 ruled that “The Commission scrutinized the proposal of GRIDCO and approves 4301.65 MU for export after meeting the state demand. The total revenue from export @220 p/u (reported by GRIDCO) works out to Rs.946.36 crore which is rounded up to Rs.946 crore.”
- (iv) **In BST Order for FY 06**, it has been stated vide Clause 6.24.2 that “Revenue from Export of Power: GRIDCO had proposed revenue earning of Rs.726.00 crore by way of export of 3300 MU to outside state at an average rate of 220 paise per unit. The Commission scrutinised the proposal of GRIDCO and approves 2808.28 MU for export after meeting the state demand. The total revenue from export @234.575 p/u (average of actual export rate for the period from 4/04 to 2/05) works out to Rs.658.75 crore.”
- (v) Again in **BST Order for FY06** vide Clause 6.24.3, the OERC has ruled that “In calculating the expected aggregate revenue for 2005-06, the revenue earning by

*GRIDCO from export of power has also been taken into account. The rate at which this power has been sold being higher than the procurement cost of GRIDCO, **this will benefit the consumers of the State in the form of reduction of Bulk Supply Tariff**. It is needless to emphasize that the extra revenue earned due to export of power will reduce the burden of the consumers of the State by way of liquidating the past liabilities of GRIDCO”*

36. In fact, the Discoms also in their objections pointed out the export potential based on power availability to the extent of 1288 MUs and also pointed out that GRIDCO had already entered into an agreement with Power Trading Corporation for export of export at an average price of Rs. 3.65 paisa per Unit, which would lead to a realization of Rs.470 Crore to GRIDCO. Yet this has not been adverted to nor considered by the OERC. No reason could be seen or read in the long winding tariff order.
37. The learned counsel for the appellant placed a copy of the order of Central Electricity Regulatory Commission passed in Petition No. 15 of 2006 and Interlocutory Application No. 10 of 2006 instituted by Mr. Gajendra Haldea, against the 1st respondent GRIDCO and Others. CERC commented that the average purchase price of power by GRIDCO is Rs.110.36 paisa per KWH while it has enriched itself by selling power at a higher rate. In fact for the years

commencing from 2000-2006 GRIDCO had exported power substantially and the same trend continues. The CERC has commented that GRIDCO has charged heavy margin and earned substantially by export of surplus power. These facts cannot be controverted nor it is controverted.

38. In Table 35, the Regulatory Commission has allowed a sum of Rs. 113.55 Crore towards loss due to adjustment in trading, Rs.12.28 Crore inter state, wheeling charges of Rs.1228 Crore. When loss in export has been allowed to be adjusted from the revenues of the GRIDCO, why export earnings of power should not be included. As seen from Paragraph 4.8, Page 26 EXPORT, Tariff Order GRIDCO has projected an export of 504 MU units after meeting the demand in the State. By such export of power, GRIDCO has earned Rs. 173.16 Crore as contended by appellants and the said sum should be taken as earnings of GRIDCO for the tariff year and there is no reason or rhyme to exclude the same. When the total cost of power purchased included 504 MUs, there is no reason at all to exclude the export sale of the same 504 MU. This point is answered in favour of appellants and against Respondents and accordingly there will be a direction to include the export earnings as well.
39. With respect to the past outstandings, the Commission should have ordered for creation of the regulatory asset and for consequential further directions which would be in the interest of all concerned. The income from trading export

during the particular year cannot be excluded, lest it is not and it will not reflect fair value of revenue earnings. It is contended by Mr.M.G.Ramachandran the learned counsel appearing for GRIDCO, that even if GRIDCO earns more than Rs. 943 Crore as contended by appellants by export of power, the same will be taken into account while truing up and adjustments. Such adjustments in truing up will not result in passing on the benefit if it is not included in the annual revenue during the tariff year concerned nor is it factored into account while determining tariff.

40. The appellant have placed materials to show that so far Rs.943 Crore have already been earned by export of power by GRIDCO that being the un-controverted factual position we do not find any justification to exclude the export earnings during the tariff year. The issue is answered in favour of the appellant and against the respondents.
41. We direct Regulatory Commission to include the estimated earnings by export as total cost of purchase of power is included in the exported units of power, stands included. We direct the Regulatory Commission to include the total amount received including the profits by export of power by GRIDCO outside the State and the same shall be taken as revenue earnings of the GRIDCO in the year in question (in the order of Rs. 943 Crore) and as such exports bring substantial amount to the coffers of GRIDCO.

42. Nextly we shall take up the point regarding determination of simultaneous maximum demand (SMD) in MVA and the consequential determination of demand and energy charges. In this respect arguments were advanced on either side while referring to Table 13 of the Impugned Tariff Order. In the tariff order dated 23rd March, 2006, the Regulatory Commission has assessed the quantum of power purchased, as reflected in Paragraph 6.
43. As seen from Table 13 of the tariff order, the Regulatory Commission granted its approval for purchase of power by GRIDCO for the year 2006-07 to be utilized within the State. The GRIDCO proposed Rs.14,977.25 MUs, while the Commission has approved only Rs.13,188.14 MUs for the year 2005-06. However, for 2006-07, the GRIDCO proposed Rs.14,977.25 MUs and the Regulator also accorded approval for Rs. 14,683 MUs. This is an increase by 11% for the tariff year 2006-07. The aggregate of the above is in respect of all the four Discoms in the State of Orissa.
44. Yet the Regulatory Commission in arriving at a simultaneous maximum demand in terms of MUA as seen from Table 14, Paragraph 6.2, wherein it has been stated that the bulk supply price do take in a component of demand charge, which is calculated on the basis of the estimated purchase of power by the Discoms. In the ARR by the Discoms for retail supply tariff, a proposal was submitted for Rs. 2396.35 MVA but OERC approved

demand in terms of MVA at Rs. 2226.26 MVA. It is true that Regulator has observed that there has been an upward trend during the last quarter during the year 2005-06 and it also indicated that the same trend will continue in the ensuing year. While 11% increase in the purchase of power by Discoms for 2006-07 has been approved, the regulator has not taken the same into account for determination of the SMD in terms of MVA. In this respect, no reason has been assigned by the Regulator as it is an apparent omission and this warrants interference in this appeal.

45. It is the settled position that the demand of Discoms is to be considered in this respect. The Commission should have considered the increase of 11% for the whole year and also allowed consequential MVA in the determination of demand and energy charges in the details set out in Paragraphs 6.33 of tariff order. It is fundamental that the Regulatory Commission should have also considered proportionate increase of 11% of MVA as well, which would definitely reduce the rate of energy charge per unit for the Discoms.
46. It is also submitted that the Regulator after taking into consideration of its approval of the increase in demand of 11% in MUs it should have taken into account consequential additional increase of 179 MVA (approximately) on the basis of increase in power purchase as approved by OERC. This according to the learned counsel for the appellants would yield an additional revenue of

Rs.43 Crore annually to GRIDCO @ 200 per KVA per month. As a result, the energy charge would stand reduced atleast by 3 paise per unit. The failure to take into consideration of this relevant material is fatal. It is rightly pointed out that it would amount to not taking into account the proportionate increase in average maximum demand i.e. an income of Rs.43 Crore which may accrue to GRIDCO, is left out apart from the income which may arise on account of increase in energy charges besides additional actual higher demand charges paid by Discoms and in all aggregating to Rs. 86 Crore.

47. The learned counsel for the respondents merely suggested that the Commission has provided 7% increase in MVA as per the actual drawal average for the last three months at the time of tariff finalization. It is further contended on behalf of respondents that MVA may not necessarily increase in proportion to MU increase, which MU availability is dependent on a number of aspects such as higher load factor utilization, demand supply management etc. It is also pointed out by Respondents 1 & 2 that it is subject to truing-up at the end of the tariff period. If such an omission is to be taken note of only after the tariff period in exercise of truing up, the damage already caused by way of increase in tariff may not at all be set right, it remains on paper and benefit will not be passed on to consumers. We are not persuaded to accept the argument advanced by Mr.M.G.Ramachandran and Mr.R.K.Mehta in this respect

submitted to the contra. In the circumstances, we direct the Commission to increase in proportion to the increase in total quantum of energy i.e. 11% and this increase may yield additional sum of Rs.43 Crore annually to GRIDCO as contended by the appellants. We sustain this contention advanced by appellants.

48. One of the other major grievance or complaint of the appellants being that truing up exercise has not been undertaken by the Regulatory Commission for FY 2003-2004 and 2004-2005, while it has been a consistent practice of all the State Electricity Regulatory Commissions to undertake truing-up exercise. According to the appellants, if truing up has been undertaken on a regular basis, the Regulator would not have failed to miss the actuals reported by way of sale of power, purchase of power, employees-cost, interest, depreciation, miscellaneous income, miscellaneous expenditure, reserves and other incomes which go into the ARR.

49. The learned counsel for the appellant has placed the following Table which according to him is the actual working and financial results of sale, purchase of power, employees cost, materials, depreciation, interest etc. of the GRIDCO during the years 2003-2004 and 2004-2005:

			FY 2003-04				FY 2004-05			
			Prop	Apprv	Audited	Truing Up	Prop	Apprv	Audited	Truing up

A	Income									
	Sale to Discoms	Rs Cr	1,600	1,554	1,522		2,877	1,631	1,626	-
	Other Income	Rs Cr	55	541	1,287		983	983	1,307	-
	Total	Rs Cr	1,656	2,095	2,809	2809	3,860	2,614	2,932	2,932
B	Expenditure									
	Power Purchase Costs	Rs Cr	1,668	1,649	1,595	1,595	1,975	1,812	1,729	1,729
	Employee Cost	Rs Cr	118	100	196	100	185	186	180	186
	Material	Rs Cr	13	13	7	13	18	14	5	14
	A&G	Rs Cr	20	14	19	14	19	15	50	15
	Interrest	Rs Cr	455	218	456	218	233	307	497	307
	Depreciation	Rs Cr	43	36	106	36	45	40	106	40
	Other Expenses	Rs Cr	2	1	14	1	2	2	28	2
	Total	Rs Cr	2,320	2,032	2,392	1,978	2,476	2,376	2,593	2,293
C	Special Appropriation									
	Previous losses	Rs Cr	917	-	-		1,372	9	-	-
	Contingency Reserve	Rs Cr	14	14	7		12	12	9	-
	Others	Rs Cr	-	49	-		-	-	-	-
	Total	Rs Cr	931	63	7	7	1,384	20	9	9
D	Clear Profit (A-B-C)				410	825			330	630
			(1,596)	0			0	217		

50. It is rightly contended that the 1st respondent GRIDCO has earned a substantial profits during 2003-2004, 2004-2005 respectively, Rs. 825 Crores and Rs. 630 Crores. The above figurers are to be verified by the Commission. Even during 2005-2006 the GRIDCO has earned profits, which has increased progressively. Had the truing up has been undertaken, financial position of GRIDCO could be assessed on actuals and figures and the omission to carry out truing up and failure to undertake prudent check has lead to many omissions and has affected the Discoms and ultimately the consumers prejudicially. In the circumstances, we direct

OERC to take up truing up which it has omitted to carry out during the previous years and the results of such truing up should naturally get reflected on the finances of GRIDCO and the benefit has to be passed on to the consumers through DISCOM.

51. We are confident that the Regulator will take up truing up exercise every year instead of postponing the same and such truing up exercise definitely is in the interest of the GRIDCO as well as consumers and the Discoms, besides it is an effective control and supervision of the affairs of the GRIDCO by the Regulator.
52. The next contention advanced by the learned counsel for the appellant is that the Regulator OERC ought to have passed on the interest cost in the ARR as income receivable from Discoms in the ratio of outstanding payable by respective Discoms, while the Regulator passed on the interest burden equally on all the Discoms irrespective of the quantum of outstanding dues and payable towards purchase of power.
53. This according to the learned counsel for the appellant works hardship and throws heavy and disproportionate burden on performing Discoms apart from they being penalized by such a procedure adopted by OERC. While WESCO, NESCO and SOUTHCO are made to pay a substantial amount, however the CESCO has been given a relief without reference to facts and the Regulatory

Commission ought to have passed on the interest liability on the basis of performance and in the ratio of outstanding, which would be the fair procedure in passing on the burden.

54. According to the learned counsel if such a fair procedure is adopted by OERC and taken into account, the following position would emerge :

		As approved by OERC 2006-07	As per Tariff Regulations 2006-07	Remarks
A(I)	Total Revenue Requirement (Table-37(H) of BST order)	2,278.96	1,798.96	Repayment of principal ought not be allowed.
(II)	Additional Cost of power to be procured for export (2185 MU @ 114 paise per unit)	-	249.00	(The last year export quantity @ avg rate 114 paise (refer Table-29 of BST order)
	Total of A	2,278.96	2,047.96	
B(I)	Expected Revenue	1,774.44	1,774.44	
(II)	Additional Revenue due to Demand Charges	-	86.00	Under estimation of the demand (MVA) of Discoms
(III)	Export Income including UI (assumed equal as of previous year)	-	743.00	
	<i>Total of B</i>	1,774.44	2,603.44	

C	<i>(GAP) / SURPLUS (B-A)</i>	(504.52)	555.48	

55. This calculation, as submitted by counsel for the appellant, deserves to be considered and the interest liability of each Discom has to be re-worked as rightly contended on behalf of the appellants.

56. Mr. R. K. Mehta, the learned counsel for the GRIDCO contended that by the impugned fixation of BST and by the upward revision of BST tariff Discoms cannot claim to be aggrieved parties, as they could always pass the BST to consumers and therefore, appeal is not maintainable by the Discoms. We have given our anxious consideration but we do not find merit in this objection. It may be that Discoms may pass on the BST tariff but if the BST tariff is given by adopting the wrong principles, erroneous approach and illegal procedure, the Discoms will be entitled to challenge the same, as it is an aggrieved party. This objection is rejected as untenable. The statutory provisions of 2003 Act do not provide for such an invidious difference, and an appeal is well maintainable by Discom against BST.

57. With respect to the ultimate result that may emerge in these appeals it is contended by learned counsel for the appellants, GRIDCO will have a clear surplus and there is no warrant or requirement at all to revise the BST as has

been ordered by OERC. We do find there is force in this argument in view of our earlier discussions and conclusions arrived at in respect of the various points analyzed. It would be appropriate to direct the OERC to re-determine the entire ARR and BST tariff of GRIDCO and we would be justified in setting aside the order of approval of ARR and tariff as determined by OERC for the year 2006-2007 for GRIDCO.

58. This is eminently a fit case, and appropriate to direct OERC to undertake fresh exercise with respect to ARR and determine the BST in the light of the above discussions. Though substantial tariff period has lapsed, yet to render substantial justice to all concerned we are inclined to set aside the impugned tariff order and remand the entire matter and direct OERC to take up the approval of ARR and fixation of BST for GRIDCO afresh and pass orders within a period of six weeks from the date of communication of this judgment after affording opportunity to parties to make their written submissions.
59. It is rightly contended that the availability of cheap hydel power and other central sources TSTPS, FSTPS, etc. including CPPs have been omitted to be considered and such omission has resulted in serious prejudice to the DISCOM as it has an impact on the total power procurement cost of GRIDCO. This means quantum of power purchase and cost has not been evaluated properly

as contended. Sufficient data has been furnished before us, which is not disputed seriously. However, it was contended that the hydel condition for the current year is favorable and it is an exception. Since we are setting aside and remanding the entire tariff fixation, we direct the OERC to consider this and assess the procurement cost of power from various sources including Hydel power. The details furnished by appellants in this respect, requires thorough examination in the hands of OERC. If the details are correct, the result follows automatically.

60. We are not persuaded by the contentions advanced by the learned counsel for respondents not to take such a contention of the appellants in this appeal though they are supported by facts. The consequence of failure to take into account the availability of power at a low cost, would result in higher BST and it will be on an erroneous premises or basis and fastening liability on Discoms, which they are not liable to bear or pass through to consumers at large, is per se illegal and unjust. This requires consideration in the remanded proceedings by the OERC.

61. The appellants, while controverting the statement on the effect of increase in BST has placed a statement showing the effect of increase in BST on DISCOM and the following figurers speak for themselves :

	Approved	Tariff Rate for	Tariff Rate for 2006-07	Average Bulk	Variable
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			2005-06						Supply Tariff			Charge
	Demand	Energy	Demand	Energy	Demand	Energy	Transmission	Energy	FY	FY	%	% Inc
	Charge	Charge	Charge	Tranmsissi	Charge	Charge	on Charge	on Charge	06	07	Inc	
Appellants	MVA	MU	Rs/KVA	R/U	Rs/KVA	P/U	P/U	P/U	Rs/U	Rs/U	%	%
1			2	3	4	5	6	7				
WESCO	664	4600	200	98.82	200	98.02	22	120.02	1.33	1.55	16	21%
NESCO	555	4169	200	86	200	81	22	103	1.18	1.35	14	20%
SOUTHCO	289	1750	200	75	200	70	22	92	1.15	1.32	15	23%
CESCO	719	4164	200	85	200	79	22	101	1.26	1.42	13	19%
Wesco Nesco Southco	1508	10519							1.24	1.43	15	

The contents of above tabular statement requires due consideration in the hands of OERC in the remanded inquiry and we direct the OERC to consider the effect of increase as reflected in the above Tabular Statement as well.

62. In the circumstances, the above three appeals are allowed the approval of ARR of GRIDCO for 2006-2007 and BST tariff as determined by OERC for 2006-2007 in Case No. 42 of 2005 are set aside and the entire matter is remitted back to OERC for de novo consideration in the light of above discussions and such an exercise shall be undertaken and shall be concluded within a period of six weeks from the date of communication of this judgment after affording an opportunity to the parties concerned to submit written submissions.

63. Though a number of other contentions were advanced, we would not be justified in examining each one of the contentions, instead we direct the appellants to raise all those contentions by way of supplemental representations before the Regulatory Commission, within three weeks from the date of communication, which the Commission shall consider, while undertaking approval of ARR and re-determine tariff, which is remanded back to the Commission by us.
64. Till the Regulatory Commission completes the de novo exercise of approval of ARR and determination of BST from the 15th December, 2006 onwards the Discoms shall pay the BST tariff at which they were paying before the impugned order and till OERC passes orders and depending upon the ultimate orders that may be passed, there could be ultimate adjustment of the amounts payable by Discoms to the GRIDCO, which OERC may direct.

The parties shall bear their respective costs.

Pronounced in open Court on this 13th day of December'06.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E. Padmanabhan)
Judicial Member

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