

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

**Interlocutory Application No. 177/07 in A. No. 58/07**

**&**

**Interlocutory Application No. 176/07 in A. No. 59/07**

Dated : 05<sup>th</sup> December, 2007

**Present : Hon'ble Mr. A. A. Khan, Technical Member  
Hon'ble Ms. Justice Maju Goel, Judicial Member**

**IA No.177/07 in A. No. 58/07**

Western Electricity Supply Co. of Orissa Ltd. ... Appellant  
Versus  
Orissa Electricity Regulatory Commission & Others ... Respondents

**IA No. 176/07 in A. No. 59/07:**

North Eastern Electricity Supply Co. of Orissa Ltd. ...  
Appellant  
Versus  
Orissa Electricity Regulatory Commission & Ors. ... Respondents

Counsel for the appellant : Mr. J. J. Bhatt, Sr. Advocate  
along with  
Ms. Anjali Chandurkar and  
Ms. Smietaa Inna, Advocates

Counsel for the respondents : Mr. Raj Kumar Mehta,  
Advocate along with  
Ms. Suman Kukrety, Advocate  
for GRIDCO

Mr. Rutwik Panda, Advocate

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**IA No. 177/07 in A. No. 58/07**

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**IA Nos. 176/07 in A. No. 59 of 2007**

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for OERC

**ORDER**

This order is to dispose of two interim applications, being Interlocutory Application Nos. 176 of 2007 & 177 of 2007 in Appeal No.59 of 2007 and 58 of 2007, respectively. The two applications have been filed at the concluding stages of arguments in the two appeals for peculiar reasons. The two appeals challenges the bulk supply tariff order made by the respondent No.1, Orissa Electricity Regulatory Commission ('OERC' for short) for the supply made by the respondent No.2, GRIDCO, which is a bulk supplier and trader for the year 2007-08. A similar BST order for respondent No.2 for the year 2006-07 passed by respondent No.1 had been set aside by this Tribunal in appeal Nos. 74, 75 & 76 of 2006 vide judgment dated 13.12.2006. The primary ground for setting aside the bulk supply order was the failure on the part of the respondent No.1 to take into account the revenue of respondent No.2, earned by export of power outside the State of Orissa. This Tribunal directed the respondent No.1 to re-determine the BST tariff for the year 2006-07 and meanwhile allowed the DISCOMs to pay BST tariff at the rate at which they were paying before the BST tariff order for the year 2006-07 was passed. The respondent No.1 filed an appeal against the judgment of this Tribunal dated 13.12.2006. It proceeded also to fix the tariff for the year 2007-08. The present two appeals arise

out of BST order for the year 2007-08. The main ground in these two appeals is that despite the judgment of this Tribunal the respondent No.1 has again failed to take into consideration the revenue of the GRIDCO from export of power while determining the annual revenue requirement of GRIDCO. While the final arguments were at the concluding stages in the present two appeals we were informed that the Honorable Supreme Court was about to hear the appeal before it and therefore the exercise of this Tribunal in proceeding to hear the present two appeals may prove to be futile in case the Supreme Court sets aside the judgment of this Tribunal. This submission weighed with this Tribunal. The appellants, WESCO and NESCO who are DISCOMs have filed the two interim applications in this situation praying that in view of their precarious funds situations, the impugned order dated 22.03.2007 be stayed with the condition that the appellants shall continue to pay BST tariff as determined for 2005-06. In the alternative, it is prayed that pending final disposal of appeal, all amounts collected by the appellants as their revenue and deposited with the respondent No.2 may be treated as an on account payment to be adjusted subject to outcome of proceeding and the respondent No.2 may be directed to allow the appellants to withdraw a sum equivalent to salaries and distribution costs as approved by OERC in its RST order dated 23.03.2007.

2) The funds position of WESCO and NESCO as given by them, is depicted in the following tabular statement :

<b>Statement of Bank Balance</b>		<b>WESCO</b>	<b>NESCO</b>
Sl. No.	Description	As on 30.09.07	As on 31.08.2007
1.	<b>ESCROW Account</b>	0.0133	8.51
2.	<b>Expenditure Account</b>	0.4050	2.67
3.	<b>Capital Works Account</b>		
(a)	Deposit Work	0.3021	4.51
(b)	PMU	0.0179	
(c)	APDRP	0.2192	0.53
(d)	MNP	0.0130	0.76
	<b>Total Capital Account</b>	<b>0.55</b>	<b>5.80</b>
4.	<b>Security Deposit Account</b>		
(a)	Current A/C	0.2031	
(b)	TDR A/C	57.4200	
(c)	Lien against LC	3.81	
	<b>Total Security Deposit Account</b>	<b>61.43</b>	<b>61.80</b>
5.	<b>JINDAL FUND AS PER HIGH COURT DECISION</b>		12.78
6.	<b>EMD</b>		0.41
7.	<b>IRLC Account</b>		
8.	<b>Overdraft Account</b>		
9.	<b>Short term loan</b>		
	<b>Grand Total</b>	<b>62.40</b>	<b>91.97</b>

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As per this tabular statement the total funds in the hands of WESCO is almost equal to total security deposit with it. The position of NESCO is no better. The amount other than the security deposit is not available to be used as they are specifically meant to cover some specific expenditure. The security deposit is not meant to be spent on the operation and maintenance of the DISCOMs and should not be exhausted by such diversion only because of the short term resource crunch.

3) As per the arrangement between the parties, covered by a BST agreement and the ESCROW agreement, all the tariff revenue earned by appellants are deposited in the ESCROW account and the appellants have no liberty to withdraw any amount from the ESCROW account. The appellants have been authorized by respondent No.2 to withdraw an amount equivalent to that required for payment of net salaries of the employees of the appellants. The appellants are, however, entitled to a rebate of 2% on the BST payable to the respondent No.2 in case an amount equal to BST is deposited in the ESCROW account within 48 hours of raising of bills in this behalf. This 2% rebate as heretofore been sufficient to meet the Operations and Maintenance (O&M) cost of the appellants. It is contended on behalf of appellants that while BST has increased by 28% and 10% for the two appellants over the 2006-07 level, and approximately 45% and 23% respectively over the 2005-06 rate, the RST recoverable by the appellants have increase by 2% over 2005-

06 level which has caused the cash crunch for the appellant. It is further submitted at the time of hearing that even the revenue recoverable by the appellants from the HT tariff is in jeopardy since the High Court vide an order dated 23.10.2007 in WP(C) No.13355 of 2007, Misc. Case No. 12190 of 2007 has passed an interim order in favour of HT consumers of WESCO allowing them to pay the tariff at the rate prevalent prior to 01.04.2007 till the next date of hearing. This has added to the woe of the WESCO.

4) The application for interim relief is vehemently opposed by respondent No.2. It is contended that the entire bulk supply price under the impugned order has been allowed as pass through in the retail tariff and therefore there is no justification whatsoever for grant of interim order in favour of appellants and that the appellants themselves are responsible for this situation on account of their inability to recover sufficient amount as revenue as they are unable to meet the target to reduce the technical and commercial losses in distribution. It is, further submitted that this Tribunal cannot relax the ESCROW agreement between the parties as the ESCROW agreement is not the subject matter of the present appeal. It is further submitted that there is sufficient fund available with the appellants to meet the expenses of its day to day operations. GRIDCO on its own part submits that it is also under obligation to pay for the power which it purchases from the generating companies and supplies to the DISCOMs including the appellants

and that unless it can recover the BST from the appellants it will not be possible for it to supply power to the appellants. The learned counsel, Mr.R.K.Mehta also submits that instead of attempting to deprive the respondent No.2 of the BST revenue the appellant should look for other sources to meet their O&M expenses.

5) We have carefully considered the submissions of both the sides. At the time of hearing of the interim application it was pointed out that for WESCO the O&M expenses approved by the OERC for 2007-08 was Rs.4.91 Crore per month. The O&M expenses similarly approved for NESCO was Rs.5.17 Crore per month. Both WESCO and NESCO have been getting the benefit of 2% rebate mentioned above. This 2% amounts to approximately Rs.1.8 Crore for WESCO and Rs.1.20 for NESCO. Thus the amount required to meet the O&M expenses for WESCO is Rs.3.11 Crore per month and for NESCO Rs.3.97 Crore per month. It is not disputed that if the BST tariff paid by these two DISCOMs to the respondent No.2 is taken to the level of 2005-06 the amount saved by the two DISCOMs will be more than the aforesaid amount of Rs.3.11 Crore per month and Rs.3.97 Crore per month. The respondent No.2 is reluctant to part with this amount and puts up ESCROW agreement as its shield.

6) The appellants who contend that the impugned BST tariff is bad on account of the OERC's failure to take into consideration

certain revenue earnings of GRIDCO, have a prima facie case in view of this Tribunal's judgment on the earlier BST order. That judgment has neither been stayed nor set aside so far. The high BST is one of the reasons for the resource crunch. The relief prayed for by the appellants is for a very brief period namely till the Supreme Court hears the matter which is likely in January, 2008 or till the impugned tariff order is in force i.e. 31<sup>st</sup> March, 2008. It may be added here that the matter is listed before the Supreme Court for hearing on 16<sup>th</sup> January, 2008 and it will be reasonable to expect the matter to be disposed by Supreme Court soon thereafter.

7) This court has not passed any order of stay of the impugned BST order. Despite the pendency of the appeal the appellants have continued to pay the BST to the GRIDCO as fixed by the impugned order. In the eventuality of the appellants succeeding in the appeal some amount will be repayable by the GRIDCO to the appellants. In this view of the matter, the prayer made for the interim applications are fair and reasonable.

8) So far as the ESCROW agreements are concerned, we feel that the two agreements are arrangements for payments in order to ensure that the GRIDCO recovers the present and past dues from the two DISCOMs. The ESCROW account does not create any obligations inter see the parties except their obligations to deposit the revenue in the ESCROW account. The amount payable by the



DISCOMs to the GRIDCO is determined by the tariff orders passed by OERC. If this tariff order itself is set aside the amount to be deposited in the ESCROW account will be reduced and some part of the deposit already made would become recoverable. In this view, ESCROW account cannot be said to be entirely independent of the disputes between the parties in the present appeals. The Honorable High Court of Bombay in Writ Petition No. 1205 of 2001 in *Dabhol Power Company Vs. Maharashtra State Electricity Board & Others* has held in its judgment dated 05<sup>th</sup> March, 2002 that the terms of a contract such as ESCROW and LC etc. are matters directly arising out of tariff issues and therefore this can also be regulated by Commission established under the Electricity Regulatory Commission Act 1998. The OERC is also exercising power akin to the power exercised by the Regulatory Commissions established under the Electricity Regulatory Commission's Act 1998. We are of the view that the petitioners should be granted the interim relief prayed for even if it means taking liberty with the ESCROW agreement to some extent.

9) We are not inclined to stay the impugned tariff altogether. For the last eight months the tariff order has been in force. Since we are very close to getting the final opinion from the Honorable Supreme Court it will not be fair to stay the BST order for the next four months of its operation. Nonetheless in view of the severe resource crunch faced by the appellants and the prima facie case we feel it

appropriate to accept the alternative prayer mentioned above, i.e. to treat the amounts towards BST paid by appellants as payment on account and to allow the appellants to withdraw sufficient amount to meet the operation and maintenance charges, as mentioned in paragraph 5 above, namely Rs.3.11 Crore per month for WESCO and Rs.3.97 Crore per month for NESCO from the ESCROW account. This will be over and above the employees' salaries which are already being withdrawn with the consent of the respondent No.2.

10) Accordingly, we allow the two applications for interim relief and direct that the amount deposited towards the BST in the ESCROW account be treated to have been made on account and the appellants be allowed to withdraw an amount of Rs.3.11 Crore per month and Rs.3.97 Crore per month respectively from the ESCROW account over and above the amount towards salaries till the judgment of Honorable Supreme Court or till 31<sup>st</sup> March, 2008 whichever is earlier.

**( Justice Manju Goel )**  
**Judicial Member**

**( A. A. Khan )**  
**Technical Member**