

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

AT NEW DELHI

APPELLATE JURISDICTION

APPEAL No. OF 2014

IN THE MATTER OF :

North Eastern Electricity Supply Company of

Odisha Ltd. (NESCO), a company incorporated under the provisions of the Companies Act, 1956 and having its registered Office at Plot No - N1/22, IRC Village, Nayapalli, Bhubaneswar & Corporate Office at Januganj, Balasore - 756019

... Appellant

Versus

1. Odisha Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar 751012
Dist: Khurda, Odisha

2. Commissioner & Secretary
Department of Energy
Government of Orissa
Odisha Secretariat
Bhubaneswar 751 001

3. Odisha Consumers' Association,
Balasore Chapter, At/PO : Rudhunga
Via/PS : Simulia, Distt. Balasore - 756 126

4. The Secretary,
PRAYAS Energy Group,
C/o. Amrita Clinic
Athawale Corner, Karve Road
Deccan Gymkhana, Pune 411 004

5. Central Electricity Supply Utility of Odisha,
2nd Floor, IDCO Towers,
Bhubaneswar - 751 022

... Respondents

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT 2003

1. Details of Appeal :

By the present appeal filed under Section 111 of the Electricity Act, 2003 [EA03], the Appellant challenges **(ANNEXURE – A)** the Order dated 22nd March 2014, received on 26th April 2014, passed in Case No. 87 of 2013 by the Odisha Electricity Regulatory Commission (“OERC”), Respondent No.1 herein, while determining the Retail Supply Tariff for FY 2014-15 to the extent, the OERC in an erroneous manner has (i) Set Unrealistic Distribution Loss Targets, ((ii) Disallowed Administration and General Expenses and carried out (iii) Truing Up for FY 2012-13 in an erroneous manner, (iv) Set erroneous principle for Escrow relaxation mechanism, (v) Disallowed genuine receivables from defaulter Govt consumers by making it conditional to a prepaid metering scheme , and (vi) Refusal to implementation directives of the Hon'ble ATE in :

- (a) Appeal Nos. 77, 78, 79 of 2006 dated 13th Dec 2006;
- (b) Appeal Nos. 52, 53, 54 of 2007 dated 8th Nov 2010;
- (c) Appeal Nos. 26-28 of 2009, 160-162 of 2010, 147-149 of 2011, 193-195 of 2012, 196 of 2012 dated 3rd July 2013;
- (d) Appeal 112-114 of 2013 dated 11th Feb 2014.

2. Date on which the Order Appeal against is communicated and proof thereof, if any :

RST Order dated 22.03.2014 for FY 2014-15 received on 26.04.2014 (Due to General Election code of Conduct as mentioned in para 469 & 470).

3. **The address of the Appellant for service is as set out hereunder :**

- (i) Postal address including Pin code:
Plot No.N-1/22, Nayapalli, IRC Village,
Bhubaneswar, Orissa PIN-751015.
All correspondence may be directed to the advocates
representing the Appellant.
- (ii) Phone No. including Mobile No. :
0674-2558737
- (iii) Email : md@nescoorissa.com,
- (iv) 0674-2558343
- (v) Address of Counsel with phone no., fax no., email :

Mr. Hasan Murtaza
Mulla & Mulla & Craigie Blunt & Caroe,
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Email : h.murtaza@hotmail.com; mullasdelhi@mullas.net

The address of the Respondents for service of all notices in the appeal are as set out hereunder :

- (i) Odisha Electricity Regulatory Commission,
Bidyut Niyamak Bhawan, Unit-VIII,
Bhubaneswar 751012, Dist: Khurda, Odisha.
Phone No. 0674-2393097; Fax No. 0674-2393306
Email : orierc@rediffmail.com
Address of the Counsel : not available
- (ii) Commissioner & Secretary
Department of Energy
Government of Orissa
Odisha Secretariat
Bhubaneswar 751 001
energy@ori.nic.in, 2322243
- (iii) Odisha Consumers' Association,
Balasore Chapter, At/PO : Rudhunga
Via/PS : Simulia, Distt. Balasore - 756 126
- (iv) The Secretary,
PRAYAS Energy Group,
C/o. Amrita Clinic
Athawale Corner, Karve Road
Deccan Gymkhana, Pune 411 004

(v) Central Electricity Supply Utility of Odisha,
2nd Floor, IDCO Towers,
Bhubaneswar – 751 022
Ph. 0674 - 2541727; Fax. 0674-2543125
Email : itadm,in@cescoorissa.com

5. **Jurisdiction** :

The Appellant declare that the said matter, the directions, decisions and order against which they seek redressal is within the jurisdiction of the Hon'ble ATE.

6. **Limitation** :

RST Order dated 22.03.2014 for FY 2014-15 received on 26.04.2014, copy whereof annexed.

7. **Facts of the Case** :

7.1 The Appellant is a Distribution Company having operations in the State of Odisha and is registered under the provisions of the Companies Act, 1956 and is inter alia, a Distribution and Retail Supply Licensee in western part of the State of Odisha.

7.2 Respondent No.1 is the Odisha Electricity Regulatory Commission (herein after referred as 'OERC') constituted under the provisions of the said Act and is also the Commission under the provisions of Section 82 of the Electricity Act, 2003 (hereinafter referred to as "the Electricity Act").

7.3 Respondent Nos. 2, 3 and 4 are the Consumer Representatives.

7.4 By reason of the process of reforms in the electricity sector, the Appellant is a licensee carrying out distribution and retail supply

in western part of the state of Odisha since 1st April 1999 along with other Distribution Licensees, namely, Western Electricity Supply Company of Odisha Ltd. (WESCO) and Southern Electricity Supply Company of Odisha Ltd. (SOUTHCO) (hereinafter referred to as "DISCOMS").

- 7.5 The Appellant filed an application before the OERC, being Case No. 87 of 2013 for approval of its Annual Revenue Requirement (ARR) and Retail Supply Tariff (RST) for FY 2014-15 on 30th November 2013. The extract of the application insofar as the same is relevant to the issues in question in the present petition, is hereto annexed and marked **ANNEXURE - B**. The Appellant craves leave to refer to the said ARR and RST proposals to facts.
- 7.6 To the Appellant proposals 35 objections were received from various parties and reply to all the points/ issues raised were submitted to the objectors with a copy to OERC. Appellant craves leave to refer to the objections and the rejoinder to the objections to the ARR and RST proposal, when produced.
- 7.7 OERC after hearing the parties passed an Order on the application of the Appellant for approval of ARR and Retail Supply Tariff (RST) for FY 2014-15 on 22nd March 2014. The RST for DISCOMs was determined by a Common Order. However on account of the general election to Lok Sabha and the State Legislative Assembly, and for reasons mentioned in para 469 and 470 of the impugned order, the Orders were made available on 26.04.2014.

7.8 OERC, on the application filed by GRIDCO Ltd, has also issued the Bulk Supply Price (BSP) Order on 22nd March 2014.

8.(a) **Facts in Issue** :

As stated in paragraphs 7 and 9 herein.

(b) **Questions of Law** :

8.1 Whether the OERC was right in determination of unrealistic distribution loss targets and AT & C losses to be achieved by the Appellant in FY 2014-15 totally ignoring the ground realities and in direct contravention of the previous directions of the Appellate Tribunal for Electricity and the Tariff regulations of the OERC.

8.2 Whether the OERC was right in disallowing Administrative and General Expenses and contingency reserve as proposed by the Appellants in their tariff proposal for FY 2014-15.

8.3 Whether the OERC was right in allocating high miscellaneous income by the DISCOM towards revenue receipt in the ARR.

8.4 Whether the OERC was right in carrying the Truing Up for FY 2012-13 without implementing the directions of the Hon'ble ATE with regard to the distribution loss targets and assuming notional sales.

8.5 Whether the OERC was right in not considering actual and other legitimate reasonable expenses audited costs in Truing Up for FY 2012-13 and miscellaneous income.

- 8.6 Whether the OERC was right in increasing the % of LT sales in the overall sales mix and simultaneously reduced the quantum of power purchase as had been projected by the appellant. Thereby, burdening the appellant with additional financial burden.
- 8.7 Whether the principles adopted by OERC for prioritizing the expenses that is to be incurred DISCOMs in the Escrow relaxations mechanism.
- 8.8 Whether OERC was right in disallowing electricity dues accruing from Govt consumers as receivables from Discoms, and making it conditional to the implementation of a pre-paid energy metering scheme.
- 8.9 Whether OERC was right in non implementation of the Orders of the Hon'ble ATE citing the reasons of pendency of appeals before the Hon'ble Apex Court.

9. **Grounds of Relief with Legal Provisions :**

- A. OERC has erred in determination of distribution loss targets and AT&C losses to be achieved by the Appellants in FY 2014-15. It erred by not considering the ground realities and approved such targets that are unrealistic and unachievable. The principles of such determination are also the subject matter of challenge before this Hon'ble ATE being Appeal of 115 of 2013 challenging the MYT Order for 3rd Control Period.

- B. OERC has erred in disallowing the genuine Administration & General Expenses proposed by the Appellant for FY 2014-15 which would affect the operational efficiency of the DISCOMs and compliance to the direction of OERC.
- C. That, OERC has erred in not following the principles laid out in Long Term Tariff Strategy (LTTS) Order dated 8th March 2003 and MYT Principles for the 3rd Control Period in doing the end of the Control Period review, truing up of the expenses and not following the letter and spirit the National Electricity Policy, Tariff Policy, Tariff Regulation, MYT Order etc. for accurately determining the base line losses and consequently the notional revenue.
- D. OERC erred in not considering the audited figures of other income towards Truing up.
- E. OERC has erred in not following its own principle and has inconsistent approach regarding Truing up of miscellaneous expenses while truing up for the FY 2012-13.
- F. OERC has erred in determining the provision for Bad & Doubtful Debts in truing up.
- G. OERC has erred in not taking into consideration the sales and power purchase projections made by the appellant and has instead added notional sales to the LT category and simultaneously reduced the quantum of power purchase.

- H. OERC has erred in putting salary expenses as 5th priority from the revenue incurred by the DISCOMs in the Escrow relaxation mechanism.
- I. OERC has erred in disallowing payment of current electricity dues of Govt consumers to Discoms in the ARR of FY2014-15 and linking the same to the installation of a prepaid metering scheme which is still at a generic stage thereby causing discrimination amongst the consumers.
- J. The Retail Supply Tariff Order for FY 2014-15 is challenged essentially under the following heads; which have been elaborated hereinafter :
 - (a) Unrealistic Distribution Loss Targets and Notional Revenue approved;
 - (b) Administrative & General Expenses;
 - (c) Contingency Reserve;
 - (d) Miscellaneous Income;
 - (e) Truing Up for FY 2013-14;
 - (f) Disallowance of Govt. Consumers in paying current electricity dues and linking the same to the installation of prepaid metering scheme;
 - (g) Prioritizing Salary Expenses in Escrow relaxation
 - (h) Non implementation of the Orders and directives of Hon'ble ATE passed from time to time.

9.J.1 **Unrealistic Distribution Loss Targets and Notional Revenue approved.**

The appellant taking into account the existing ground realities and the actual performance of FY 2012-13 and six months of FY 2013-14 i.e. (April 2012 to September 2013) has estimated sales and quantum of power procurement and proposed the target losses for FY 2014-15 which is as under :

Distribution Loss Projection

DISCOM	Audited Distribution Loss % (FY 2012- 13)	Actual Distribution Loss % (FY 2013- 14)	Proposed Distribution Loss % (FY 2014- 15)
WESCO	38.27	36.29	32.03
NESCO	34.93	33.84	30.46
SOUTHCO	44.00	41.27	36.52

The estimates were based on growth of BPL consumers pursuant to RGGVY and BGJY programs slow down in global economy. By virtue of which mineral based industrial based industries were affected and so on.

It is further submitted that, such determination of loss levels is contrary to the Tariff Regulation and bad in law.

A comparison of the proposed, approved and actual distribution loss over the two Control Periods is as below :

DISCOM		NESCO		
Control Period	Financial Year	Proposed Distribution Loss %	Approved Distribution Loss %	Actual Distribution Loss %
1st Control Period	2003-04		34.8	43.66
	2004-05		38	39.4
	2005-06		35	37.08
	2006-07		31.5	33.22
	2007-08		26	31.17
2nd Control Period	2008-09	27.59	25.5	34.57
	2009-10	29.26	23	32.52
	2010-11	28.3	18.46	32.75
	2011-12	27.66	18.4	34.28
	2012-13	29	18.35	34.98
3rd Control Period	2013-14	32.53	18.35	33.84
	2014-15	30.46	18.35	

It can be inferred from the above that on account of unrealistic distribution loss targets, the corresponding financial impact is Rs 2440.46 Cr for WESCO, Rs 1430.79 Cr for NESCO and Rs 1000.41 Cr for SOUTHCO up to the FY 2012-13.

For better appreciation, it is submitted :

- (a) That, T& D loss levels, on the basis of which, the ARR (Annual Revenue Requirement) of the DISCOMs are determined by the OERC have been grossly understated since inception. The baseline loss levels reported in the World Bank Staff Appraisal Report (SAR) of April 1996 on the basis of which the loss reduction trajectory from FY97 to FY03 was approved, was far from ground realities. The

consequent financial impact on account of understating baseline loss levels was to the tune of Rs 237 Crs (Wesco – Rs 121 Crs, Nesco – Rs 88 Cr, Southco –Rs 28 Cr) in the first two years of operation. The DISCOMs have consequently suffered large cash losses from inception. This has also impaired the ability of DISCOMs to allot resources for loss reduction efforts besides, in the absence of any subvention from the State, which was in the tune of Rs 250 Cr p.a, prior to reforms, the DISCOMs- WESCO, NESCO and SOUTHCO were left to fend for themselves.

- (b) Even the World Bank in its Mid-term Review Report has admitted the underestimation of the actual loss levels. The Mid-term Review Report mentions that **“Consultation with the Commission on the issue of recognizing the actual system loss levels and pass through of prior years’ financial losses, given that we all so severely underestimated GRIDCO’s system losses in 1996 and set unachievable performance targets”**. In fact, loss levels adopted for approving the tariff application in FY98 was estimated at 34.8% when actual loss levels for FY 97 was 49.47%. Similar unachievable targets were continued for subsequent years. As a result, tariffs were set on assumed losses which led

to under recoveries in cost and distribution companies in the absence of any subvention from the state government became cash deficit from day one.

- (c) **Committee of Independent Experts (Sovan Kanungo Committee)** - In May 2001, the Govt of Odisha constituted a Committee of Independent Experts under the Chairmanship of Sri Sovan Kanungo, I.A.S (Retd) to review the Power Sector Reforms in the State. The mandate of the Committee was to check as to whether the reforms in the electricity sector had proceeded on the desired lines, the corrective steps, if any, needed to be taken to ensure that the intended benefits of the reforms process flow to the targeted groups and specific steps that need to be taken to promote socially relevant objectives like Rural Electrification, Energisation of L.I. Points , providing electricity to the under privileged sections of the community , etc.
- i. Amongst several recommendations, the Committee suggested means of overcoming the cash deficit situation through a mix of tariff hike and interim financing. The Committee estimated an interim financing requirement to the tune of Rs 3240 Cr as a requirement to overcome the crisis, and suggested that World

Bank, DFID and Govt of Odisha come out with a package to fill the revenue gap in the intervening years. (The cash infusion never happened)

- (d) That, OERC framed the Terms and Conditions for determination of Tariff Regulation under Electricity Act 2003, wherein the method of the fixation of the loss reduction target is provided. The provision 5(3) of the said regulation is reproduced below :

"5. XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

(3) Distribution Loss

- (a) *To set the base line of distribution loss estimate, the Commission may either require the licensee to carry out proper loss estimation studies under its supervision, or initiate a study itself.*
- (b) *The Commission shall approve a realistic and achievable loss target for the year under review based on the opening loss levels, licensee's filings, submissions and objections raised by the stakeholders. This approved loss target will be used for computing sale of power to consumers for that year."*

Contrary to the aforesaid regulation OERC has fixed the unrealistic and unachievable Distribution Loss target without considering the prevailing level of distribution losses.

That, the **Abraham Committee Report**, and the, R-APDRP guidelines issued thereof, have also suggested a loss reduction strategy taking into account the existing loss levels. While other states have acted accordingly, the DISCOMs in Odisha

seem to have been denied a historic opportunity for a midcourse correction. With the APDRP funding the utilities loss reduction target supported by Abraham Committee is as under :

"AT&C Loss Reduction Targets

*The Task Force examined the targets set for AT &C losses reduction and after taking into consideration experience of the Utilities felt that the targets should be recast in a manner **that they are realistic and achievable based on the present level of AT&C losses in each State.** Accordingly the Task Force recommends the following targets depending on their present level of AT&C losses:*

- i) Utilities having AT&C losses above 40%:
Reduction by 4% per year*
- ii) **Utilities having AT&C losses between 30 & 40%: Reduction by 3% per year***
- iii) **Utilities having AT&C losses between 20 & 30%: Reduction by 2% per year***
- iv) Utilities having AT&C losses below 20%:
Reduction by 1% per year*

Against the recommendation of Abraham Committee for AT&C loss reduction of 4%, the OERC has given unrealistic and unachievable target of 22.68%.

- (e) That, the Letter (Copy attached as **ANNEXURE - C**) written by Joint Secretary, Ministry of Power to Secretary, Energy, GoO, dated 23-02-2011 regarding the need for realistic determination of baseline losses for successful implementation of R-APDRP. Extracts of Para-3 & 5 of the said letter is given as under :

- a. *"It is evident that for getting the benefits of APDRP, utilities have to improve AT&C Loss reduction over the base (starting) level not only in project area, but also at utility level. The correct and realistic determination of base (starting) AT&C loss level is very essential to gauge the improvement in loss reduction in subsequent years after implementation of R-APDRP.*
- b. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
- c. *In view of the above you take up the issue with OERC to determine the yearly loss levels of distribution utilities in Orissa accurately based on ground realities and not on notional basis."*

It is evident from above, that determination of actual loss levels is a prerequisite for availing funds under the R-APDRP scheme so that loss reduction strategy is achievable and people from Odisha are able to access central funds.

- (f) As mentioned, in the previous years, tariffs were determined on the basis of unrealistic loss levels. It is pertinent to mention that even those tariffs that were approved on the basis of notional losses did not cover the approved costs so as to avoid increase in retail supply tariffs. Neither was there any subsidy or subvention as in earlier years.

- (g) That, the observation of 13th Finance Commission vide Para 7.105 have observed that, in absence of timely tariff increase, the gap has increased and has impaired the financial condition of the distribution utilities across India. Extracts are as under :

"As against the enormous financial losses indicated above, subsidies in 2007-08 were of the order of Rs.16,950 crore. Thus, there is a large and burgeoning uncovered gap. The key reasons for the increasing gap can be summarized as follows:

- i) Inability of the state utilities to enhance operating efficiencies and reduce T&D losses adequately.*
- ii) High cost of short term power purchases. Several utilities have not planned capacity addition in time and are relying on short term purchases at high rates (an average of Rs.7.31 per kwh as compared to rs.4.52 per kwh in 2007-08). The inability to reduce T&D losses has increased the purchase levels and supply costs.*

- (h) **Absence of timely tariff increases has increased the gap and has impaired utility operations further. Some states have not raised tariffs for**

the past eight to nine years in spite of increasing deficits."

[In Orissa there was no average tariff increase for 9 years from 2001-02 to 2009-10]

- (i) That, the **National Tariff Policy** stresses on the need for a fair estimate of baseline losses, and consideration actual loss levels for setting forth realistic targets in the control period. In case of the Odisha DISCOMs, even after the elapse of the 1st Control Period and subsequent setting of targets in the Second Control Period, the concern relating to reassessment of baseline loss levels remain unanswered.
- (j) **Directions of the Appellate Tribunal** -That Hon'ble Appellate Tribunal for Electricity vide its order dated 13.12.2006, 08.11.2010, 03.07.2013 and 11.02.2014 in the appeal against OERC Order pertaining to FY 2006-07 to FY 2013-14, had directed for determination of realistic loss levels, but the same is yet to be implemented. Extracts of the Hon'ble ATE is placed below.
- i. **The Hon'ble ATE in Appeal No 52,53 and 54 of 2007** dated 8th November 2010, have stated as follows - " 21.....*In our opinion, there is force in arguments of the Appellants that the loss reduction targets have been approved by the State Commission in the impugned Order without keeping in view the ground realities....."*

ii. **The Hon'ble ATE in Appeal No 77, 78 & 79 of 2006** dated 13th December 2006, have stated as follows - " 27.....We hasten to add that the Commission need not stick to its earlier view, but it shall have a re-look in this respect by taking a practical view of the ground realities instead of proceeding on assumption and surmises. We are sure that Commission will take a re-look of the matter and grant the benefits to the DISCOMs"

iii. **The Hon'ble ATE in Appeal Nos. 26, 27 & 28 of 2009, Appeal nos.160, 161 & 162 of 2010, Appeal nos.147, 148 & 149 of 2011 and Appeal nos.193, 194, 195 & 196 of 2012 dated 3rd July 2013 stated as follows:**

"31 (i)..... the loss trajectory has to be reset keeping in view the ground realities.

..... Therefore, if the loss levels for 2006-07 and 2007-08 have to be changed it will have an impact on the loss level trajectory for the period 2008-13. Accordingly, the loss levels for the FYs 2008-09 to 2012-13 have also to be reset keeping in view the revision in loss level trajectory for 2006-07 and 2007-08 and the ground realities that the required funds could not be made available."

iv. **The Hon`ble ATE in Appeal Nos. 112, 113 and 114 of 2013 stated as follows-**

"12(A) Issue No.1 : Distribution Losses
Since the issue of distribution loss has been decided by the Division Bench judgment dated 13.12.2006 in Appeal No. 77 of 2006 and batch by this Tribunal and also by judgment dated 08.11.2010 of the Full Bench of this Tribunal in Appeal No. 52 – 54 of 2007 and also by judgment dated 03.07.2013 of this Tribunal in Appeal Nos. 26 – 28 of 2009 and batch, the same principles and conclusions of this Tribunal are hereby upheld and reiterated by us in the present appeals also. There is no reason to deviate or differ from any of the findings or preposition of law laid down by this Tribunal in the previous judgments which are under challenge before the Hon'ble Supreme Court, particularly when no interim/stay order or operation of the said judgments has been

stayed by the Hon'ble Supreme Court. In spite of there being no interim order or stay order against the said judgments of this Tribunal, the learned Orissa Commission has persistently not complied with the judgments of this Appellate Tribunal. Reasons are best known to it. The judicial discipline demands that the Appellate Tribunal's or Appellate Court's judgments should be implemented and complied with in letter and spirit by the subordinate authorities, commissions or the court without any if & but, particularly, when the operation of the said judgment has not been stayed by the higher Appellate Court or Higher Forum. If this practice is allowed to prevail, that would create judicial anarchy in the country which is not permissible under the Constitution of India. Merely filing an appeal or Special Leave Petition, or any other petition in the Higher Court cannot be a ground to justify non-compliance of the judgments of the Appellate Tribunal, particularly, when the previous Retail Supply Tariff Orders were challenged before this Tribunal in the form of appeals which were decided by this Tribunal by quashing the Orissa Commission's impugned order with certain observations and directions. Due to non-implementation of the aforesaid judgment of this Tribunal by the Orissa Commission, the appellants DISCOMs are helpless except for running from pillar to post, anyhow to pursue the Orissa Commission to take action in the matter according to law. The issue of distribution loss targets is completely covered by the aforesaid Judgments of this Tribunal. This is more particularly so since if the Distribution Loss Tariff is re-set from FY 2006-07 to 2012-13, the Distribution Loss Tariff for FY 2013-14 (which are the subject matter of the present appeals) would automatically have to be reset. We have also gone through the ruling reported in W.B.E.R.C. Vs. CESC Ltd. AIR 2002 SC 3615 which observed that the distribution losses are controllable. In the reported case, it was also observed by the Hon'ble Supreme Court that a loss be it transmission or distribution is not totally beyond the control of the company which effect is established by the admissions made by the respondent company. In the reported case, there was an admission of the distribution licensee and Hon'ble Supreme

Court had relied upon the said admission, when the Hon'ble Apex Court held that even such losses are not totally beyond the control of the distribution licensee. The Business Plan orders have already been considered by this Tribunal in the aforesaid Judgments and this Tribunal does not find it fit to reconsider the said Business Plan orders. Thus, this issue of distribution loss is decided in favor of the Appellants and all the findings recorded on this issue by the learned Orissa Commission in the impugned order are hereby set-aside as the findings are against the previous Judgments of this Tribunal which are completely binding upon the learned Orissa Commission."

OERC has not implementing the aforementioned direction of Hon'ble ATE stating the following reasoning :

"The Commission has taken note of the observation made by the Hon'ble ATE in the said order while approving the ARR of Licensee for FY 2011-12. The Commission in this regard has however preferred Civil Appeal against the above judgement of the Hon'ble ATE before the Hon'ble Supreme Court in the appeal, CA no. D 4688 of 2011."

Further, OERC in the Tariff Order for FY 2014-15 instead of implementing the directions of Hon'ble ATE has cited the following reasons :

"465. In the aforesaid Appeals relating to RST Order of FY 2006-07, 2007-08 and 2008-09 the Hon'ble ATE have already passed their orders. The Commission have subsequently preferred appeals against those Judgments of the Hon'ble ATE before the Hon'ble Supreme Court of India vide Civil Appeal No. 759 of 2007, Civil Appeal No. D.4688 of 2011 (Civil Appeal Nos. 3595, 3596 & 3597 of 2011).

466. The commission has also preferred Civil Appeal Nos.10251 to 10263 of 2013 against the Judgment dated 03.07.2013 passed in Appeal Nos. 160, 161 & 162 of 2010 in respect of RST Order for FY 2010-11, Appeal Nos. 147,

148, 149 of 2011 for RST Order for FY 2011-12, Appeal Nos. 193, 194 & 195 of 2012 for RST Order of FY 2012-13 and Judgment in Appeal No.196 of 2012 in respect of Truing up order of the Commission set-aside by the Hon'ble ATE before the Hon'ble Supreme Court of India. The Hon'ble Apex Court vide their order dated 06.01.2014 have admitted the above Civil Appeals and tagged with Civil Appeal No.414 of 2007 for analogous hearing.

467. The Commission has also now preferred Civil Appeal Nos.3858- 3860 of 2014 against the Judgment dated 11.02.2014 of the Hon'ble ATE passed in Appeal Nos. 112, 113 & 114 of 2013 in respect of RST Order for FY 2013-14.

468. Thus all the above matters are pending before the Hon'ble Supreme Court of India. In none of these cases CESU the other Distribution Company has preferred any appeal or has been impleaded as a respondent. When above appeals will be finally disposed of, the effect of those final judgments of the Hon'ble Apex Court shall be taken into consideration while determining tariff for ensuing years by the Commission."

That considering the position of CESU in the Odisha distribution sector, CESU is managed by OERC, thus how can the other DISCOM i.e. CESU can go for a appeal against its own management. The stand of OERC that the DISCOM CESU has not appeal the Order. Therefore the issue of OERC that DISCOMs to wait till Apex court passes Order is not justifiable.

Appellant submits that, OERC while accepting the actual loss levels and agreeing to utilize the same for monitoring the progress under the CAPEX programme has erred in adopting a separate loss level for determination of the ARR for FY 2014-15.

There exists an interrelationship between the loss reduction, ARR and the CAPEX Programme and approved revenues have to be sufficient enough to service loans incurred for the CAPEX programme, else it shall jeopardize the entire state.

- (k) That, OERC has erred in approving unrealistic loss reduction targets and approving sales in excess of that prayed for. That while approving the quantum of power purchased by the DISCOMs, the OERC has assumed higher sales in the LT category, which is 'notional' in nature. On account of such adjustment, the revenues are inflated to the extent of Rs 240.76 Cr for NESCO, the details of which are as under :

NESCO for FY 2013-14		
Sales in MU	Proposed	Approved
LT	1789.10	2359.92
HT	433.33	449.20
EHT	1542.83	1542.83
TOTAL	3765.25	4351.95
Sales (Rs in Cr)	Estimated	Approved
LT	660.71	871.51
HT	248.66	257.77
EHT	855.13	855.13
TOTAL	1764.50	1984.41
Energy Purchase in MU	5414.513	5330.00
Distribution Loss %	30.46%	18.35%
Distribution Loss Disallowed		12.11%

Additional units to sales (MU)		645.47
Notional Revenue in (RS Cr) @ LT Avg RST Rs 3.69 / Unit		240.76

Estimated Revenue at revised Tariff.

Consequently, OERC did not taken into account the realistic and achievable Distribution Loss levels proposed by the Appellant and approved the revenue of the DISCOM considering notional sales.

OERC while approving the sales and power purchase projections for the FY 2014-15 has not taken the assumptions made by the appellant and hence instead added notional sales to the LT category leading to high distribution loss and simultaneously reduced the quantum of power purchase.

Approval of Power Purchase and Sales for DISCOMs for FY 2014-15 (in MU)						
DISCOMs	NESCO		WESCO		SOUTHCO	
	Proposed	Approved	Proposed	Approved	Proposed	Approved
Purchase	5414.51	5330.00	7165.00	6820.00	3400.00	3340.00
EHT Sales	1542.83	1542.83	1490.00	1527.93	413.85	427.03
HT Sales	433.33	449.20	1313.00	1313.00	191.68	191.68
LT Sales	1789.10	2359.92	2067.00	2642.35	1552.79	1869.59
Total Sales	3765.26	4351.95	4870.00	5483.28	2158.32	2488.30

OERC increased the sales projection only by increasing the % of LT sales in the overall sales mix

and simultaneously reduced the quantum of power purchase as had been projected by the appellant and thereby burdening the appellant with additional financial burden.

9.J.2 **Administrative & General Expenses** :

The Appellants in their tariff proposal for FY 2014-15, have proposed approval of A&G expenses under two heads one being normal A&G expenses and the other being additional A&G expenses. In the case of NESCO Rs. 30.19 crore was claimed towards normal A&G expenses and Rs. 24.81 crore was claimed towards additional expenses, the details of which are as under.

NESCO Additional A&G Cost for FY 2014-15			
S.No	Description	Proposed (Rs Lacs)	Approved (Rs Lacs)
1	Normal A&G Expenses (A)	3019	1818
	Additional A&G Expenses (B)		
2	Spot Billing additional coverage	182.59	
3	Energy Audit-Recurring cost	26.23	
4	Implementation of Right to Information Act	25.61	
5	Cess on building construction and electrical installation	343.09	
6	Energy Police Station	227.09	25
7	Implementation of Intra State ABT	57.6	

8	AMR / Pre-paid metering	299.84	
9	IT automation	150.37	100
10	Manpower Assessment	9.63	
11	Customer Care Activities	21.94	100
12	Collection Incentives	370.5	
13	Inspection Fees	766.81	25
14	Compensation for electrical accidents	0	25
Total (B)		2481.3	250
Total (A+B)		5500.3	2068

It is most respectfully submitted that, while OERC has allowed additional expenses for activities such as Call centre and expenses towards IT automation, it has refused to allow expenses relating to certain "must do" activities like RTI compliance, AMR installations, building and construction worker's welfares cess, meter replacement cost etc in the Tariff Order; thereby, disallowed the actual expenses incurred by the DISCOMs towards afore mentioned activities.

Non-consideration of Expenses on Automated Meter

Reading Activities :

That OERC in the RST Order for FY 2012-13 has clearly directed the appellant to install AMRs for consumers having CD 20KW and above, which is as below :

"514. It is generally pointed out that the loss in case of EHT consumers is zero and in case of HT consumers it is 8%. But in reality this does not take into account unauthorized abstraction of electricity by these high end consumers. 100% checking of the meters of EHT & HT consumers should be periodically ensured by MRT staff. It was reported that some of these high end consumers are using technology like remote control mechanism to tamper or disable the meter temporarily and accordingly while conducting verification of their meters, appropriate instrument should be used to detect such bypassing meters. All high end consumers of contract demand of 20 KW above be invariably covered under AMR and their consumption pattern be analyzed both at Divisional and Headquarter office. Divisional Engineers be made accountable for proper billing and collection of such high end consumers of CD 20 KW and above."

However, no expenses have been allowed on this account towards operating costs of such AMRs and its operation in the RST Order FY 2014-15.

Non recognition of Cess payable

That Hon'ble Odisha High Court in WPC 3832 & 3833 dated 15.04.2010 have held that WESCO is liable to pay 1% Cess. In the circumstances, it is submitted that WESCO

was fully justified in claiming expenditure towards aforesaid items and OERC erred in not approving the said amount of Rs 55.00 Crores towards A&G Expenses. Copy of the Order of Hon'ble High Court is attached herewith as **ANNEXURE - D.**

The Appellants submit that, they are required to pay 1% cess on the construction carried out during the year as per Building and Other Construction Workers (RE&CS) Act 1996, being a sovereign levy ought to have been considered as a part of the A&G expenses. Further vide Judgment dated 18.11.2011 by the Hon'ble Supreme Court of India vide Civil Appeal Nos. 1830, 1831 and 1832 of 2008 that, it has been held as a legitimate cost. Copy of the Order is enclosed as **ANNEXURE - E.**

Non recognition of Spot Billing Costs

Observations of the Hon`ble ATE

Further Hon'ble ATE in its **Order dated 08.11.2010 in Case No – 52, 53 & 54 of 2007** had held that OERC had erred in not allowing the **Spot Billing and Energy Audit** Expenses. The relevant Para of the Order is as under :-

"In regard to Administrative and General Expenses, the State Commission has also disallowed the additional costs on account of distribution of spot billing on consumers and conducting of energy audit. These activities were initiated by the Appellants as non introduction of the spot billing and not conducting energy Audit were some of the grounds for seeking revocation of the license of the Appellants by the State Commission. However, the expenditure on carrying out their activities was not

*allowed in the ARR for FY 2007-2008 even though the Appellants had submitted details of the expenditure to the State Commission. **Therefore, findings of the State Commission on this issue can not be held valid.** Accordingly, this point is also answered in favour of the Appellants."*

OERC did not implement the aforementioned Order of Hon'ble ATE giving the following reasoning in Para – 419 of the impugned Order.

"419. The Commission has taken note of the observation made by the Hon'ble ATE in the said order while approving the ARR of Licensee for FY 2011-12. The Commission in this regard has however preferred Civil Appeal against the above judgement of the Hon'ble ATE before the Hon'ble Supreme Court in the appeal, CA no. D 4688 of 2011."

Non recognition of other A&G expenses :

Implementation of Right to Information Act: Further the Odisha Information Commission, Bhubaneswar vide its Order dated 8th August 2011 instructed DISCOMs to establish full-fledged RTI cells in respective units (copy enclosed as **ANNEXURE – F**) and consequently the OERC vide its letter no OERC/PIO/RTI-2010/661 dated 20.04.2011 informed the DISCOMs are bound to comply as per RTI Act 2005. (Copy of letter annexed as **ANNEXURE – G**)

Further Hon'ble ATE in its **Order dated 11.02.2014 in Case No – 112, 113 & 114 of 2013** had held that OERC had erred in not allowing the **RTI** Expenses. The relevant Para of the Order is as under:-

"12(C) Issue No. 3: Administration & General (A&G) Expenses

The Orissa Commission has disallowed A&G expenses observing that the Distribution Losses are controllable. However, certain expenses such as Spot Billing and Energy Audit are fully covered by the Full Bench Judgment dated 08.11.2010 of this Tribunal in Appeal No. 52-54 of 2007 and also by the Judgment dated 03.07.2013 of this Tribunal in Appeal No. 26-28 of 2009 and batch. The important submission of the learned counsel for the Appellants on this issue is that expenses such as Cess and RTI expenses are a statutory liability and such expenses have to be made necessarily to implement the provisions of the RTI Act. The learned Orissa Commission in the impugned order has not considered these expenses at all much less the prudence of such expenses. The Orissa Commission in the impugned order has nowhere doubted that such expenses have been incurred and will have to be incurred by the DISCOMs in performing their statutory responsibilities. The learned Orissa Commission has only disallowed such expenses on the ground that only a given permissible increase on a percentage increase over the previous year's amount will serve the purpose. This approach of Orissa Commission is not sound and proper. The Orissa Commission has not recorded any finding that such expenses are part of normal A&G expenses and have already been spent. Further elaborating the submissions the learned counsel for the Commission has further said that the rationale given in the impugned order does not take into account the fact that an expense incurred to satisfy a statutory responsibility has necessarily to be recovered in the tariff. Further, there is no norm given in the Regulations by which such abnormal A&G expenses statutorily needed to be expended could be curtailed by the Orissa Commission. On this issue also we are fully in agreement with the submissions made by the learned counsel for the Appellants and the findings on the issue recorded by the Orissa Commission are also quashed and this issue is also decided in favour of the Appellants."

Without prejudice to the pending appeal before Hon'ble Apex Court, DISCOMs appointed POIs and sought to put a structure in place for access to information. Yet OERC

erred in not allowing the expenses towards effective and proper implementation of RTI and organizing and establishing various Capacity Building initiatives and programmes. Besides, allocation of fund is also required for establishment of separate RTI Cell in Corporate, Circle and Division levels.

Thus it is respectfully submitted that aforementioned costs ought to have been approved.

9.J.3 **CONTINGENCY RESERVE**

The Appellant most respectfully submits that, the Distribution system in Odisha is more prone to natural calamities like cyclone, flood etc for which contingency provisions should be made, which has also been recognized by the Hon'ble Tribunal in their Judgment dated 13th December 2006 vide Appeal no. 71, 72 and 73 of 2006. The OERC in its Order on ARR and Tariff Petition of Odisha Power Transmission Corporation Limited (OPTCL) for FY 2006-07, FY 2007-08, FY 2008-09 and FY 2009-10 has also approved the contingency amount of Rs 12.59 Crore, Rs.10.49 crores, Rs 13.10 Cr and Rs. 9.08Crore respectively.

Again in the ATE Order dated 3rd July 2013 passed in Appeal nos. 26, 27 & 28 of 2009, Appeal nos.160, 161 & 162 of 2010, Appeal nos.147, 148 & 149 of 2011 and Appeal nos.193, 194, 195 & 196 of 2012, the Hon'ble ATE has observed vide Para 'V' of Clause 31 stating herein that,

the claimed for Contingency Reserve cannot be raised in the appeal stage unless the same claim has been filed as the part of the ARR petition before the State Commission. Accordingly, the licensee had sought for a provision for contingency reserve.

Further, the National Tariff Policy, vide Clause 8.2.1 Para '6' has stated that, the contingency reserve should be drawn upon the prior approval of the State Commission only in the event of contingency conditions specified through the Regulations by the State Commission. Accordingly, taking into consideration that, the State of Odisha is prone to natural calamities at regular intervals having witnessed in the last 100 years, 49 floods, 39 droughts and 11 cyclones, and taking into consideration the massive damage to the electrical infrastructure, it is prayed that Contingency Reserve be allowed for the licensee along with the guidelines/practice directions for use of such Contingency Reserve Fund.

The Power Distribution network has suffered the most damage in the recent cyclone Phailin and subsequent flood further justifies the requirement of contingency reserve for the Distribution Licensees. Accordingly, the Licensee had considered the Contingency @ 0.375% of Gross Fixed Assets at beginning of the year while estimating the ARR for the ensuing year FY 2014-15. The Licensee respectfully

submits to allow Rs. 3.89 Crore towards provision for contingency for FY 2014-15.

The Appellant most respectfully submits that the OERC need to allow contingency reserve in the ARR of the Appellant allowing Contingency Reserve. The amount disallowed by the OERC is given in the following table;

WESCO			
Year	Proposed in ARR	Allowed	Disallowed
2014-15	3.89	0	3.89
NESCO			
Year	Proposed in ARR	Allowed	Disallowed
2014-15	6.04	0	6.04
SOUTHCO			
Year	Proposed in ARR	Allowed	Disallowed
2014-15	2.25	0	2.25

The appellant submits that the OERC has not followed consistent approach in allowing Contingency Reserves to the DISCOMs in different years for different licensees. In the year i.e. FY 1999-00 to FY 2003-04 the provision for contingency is allowed.

The Appellant submits that it is more prone to incur the contingencies towards the flood, Cyclone and other natural calamities, OERC discriminated in disallowing the Contingency Reserve to the Appellant whereas allowed the

same to Transmission licensee, i.e., OPTCL. Odisha has always in alternative year have either flood or cyclone or draught. There is no fund allowed to reinstate services to the consumers.

9.J.4 **MISCELLANEOUS INCOME**

It is the submission of the Appellant that inclusion of meter rent as miscellaneous income/ revenue receipts in the ARR of the Discoms ought to be discontinued as expenditure on purchase of meters is treated as a capital expenditure. On several instances, the Discoms have been asked to provide for meters in social welfare schemes such as Mega Lift Irrigation points, which taking into account the precarious financial position is difficult. The OERC has also suggested the utilization of meter rent for procurement of meters. Accordingly, the meter rent which is allowed to be recovered up-to the cost of the meter is proposed to be used for purchase of new meters. Reference is made to Judgment of the Hon'ble ATE, which is as under -

"Appeal No 52, 53 and 54 of 2007-Clause 27-
The next issue is relating to Miscellaneous Income. The question which arises in the present issue is whether the Commission is correct in projecting the miscellaneous income such as one towards meter rent, commission for collection of electricity duty, miscellaneous charges, etc., in the Annual Revenue Requirement? On this issue the State Commission projected the miscellaneous income such as meter rent, commission for collection of electricity duty, miscellaneous charges, etc. According to the State Commission, since the nature of receipts of Delayed Payment Surcharge and over drawl penalty is not certain, the Commission excluded these amounts

*from miscellaneous receipts while considering the Annual Revenue Requirement. In this case, the cost of the meter has not been included as a cost to the Annual Revenue Requirement on the basis of the State Commission's policy. Therefore, the **meter rent ought not to be treated as revenue in the Annual Revenue Requirement.**"*

It is prayed that meter rent may not be taken into consideration while determination of the Annual Revenue Requirement of the Discom.

9.J.5 **TRUING UP EXPENES**

That, the OERC has dealt with the truing up of the ARR upto 2012-13 at Para 364 of the impugned Order. A summary of the Truing up in the order shows surplus of Rs.440.01crore, Rs. 98.68crore and Rs.130.30 Crore in 2012-13 for WESCO, NESCO and SOUTCO respectively whereas there is a book loss of Rs. 134.17 crore and Rs.79.90crore and Rs.35.95 crore after the booking of Regulatory Assets. Excluding the Regulatory Assets i.e the expected income in future, the losses would be Rs. 420.52Crore, Rs. 464.83Crore and Rs.193.79 Crore for WESCO, NESCO and SOUTCO respectively. The detail computation of Truing up is not provided in the impugned order. Hon'ble ATE in their Order dated 11th February,2014 in the Appeal No.112 of 2013 on RST Order 2013-14 directed as under ;

"(D) Issue No.4: Truing up for FY 2011-12: Since the entire truing up exercise has been undertaken by the Orissa Commission in the impugned order in only

one para and one table without giving reason or explanation or justification and also considering the fact that truing up carried out in the impugned order is contrary to the principles laid down by this Tribunal in the Judgment dated 03.07.2013 observing that truing up order (in that case) only indicated the basis and summary of truing up and comparison of the revenue gap.

In the aforesaid Judgment dated 03.07.2013, this Tribunal has held that the truing up order should clearly indicate the truing up of expenses under various heads and the manner in which truing ups have been carried out.

The learned Orissa Commission has adopted the same method as done by it on previous occasions and merely rejected the so-called principle of truing up once again simply by giving the total of the comparison of revenue gap without considering the claims of the Appellants. The Orissa Commission is directed to give a detailed order regarding the truing up explaining the expenses allowed or disallowed. Without such explanation, it is not possible to examine the correctness of the true up order. This issue is also decided in favor of the Appellants."

DISCOMs vide letter no. RO /378 dated 27.05.2014 have requested OERC to provide the details of computation of Truing up of ARR for FY 2012-13 which is not yet received (Copy of the DISCOMs letter is enclosed as **ANNEXURE-H**).

OERC has erred by not considering the legitimate expenses viz Provision for Bad & Doubtful Debt, Other Expenses, Contingency Reserve etc. as per the Audited Accounts submitted by DISCOMS and over and above notional sales on the basis of unrealistic normative losses are loaded which artificially create surplus in DISCOMs. Due to such an action of OERC in truing up for years together,

DISCOMs suffers from grave legal infirmity which made DISCOMs completely financially unviable, unmanageable and unsustainable, not even in a position to function efficiently with Escrow mechanism in force, no money left with licensees to maintain quality supply, attend breakdowns, take safety measures, cannot discharge statutory dues. The relevant extracts of the Audited Annual Accounts of the DISCOMs which has been submitted to OERC is attached herewith as **ANNEXURE - I**.

9.J.6 **Outstanding electricity from Govt Consumers as receivables of DISCOMs :**

It is the submission of the appellant that, OERC in this impugned Order has directed the DISCOMs to install pre-paid energy meters in government establishments including public sector undertakings, autonomous bodies, urban local bodies, govt. societies by 31.03.2013 and barred Govt Consumers to pay electricity dues accruing after this date and that the same shall not be treated as receivables for DISCOMs.

The licensee submits that Govt of Odisha vide its notification on 04.02.2013 directed for installation of Prepaid Meters Meter in government establishments including public sector undertakings, autonomous bodies, urban local bodies, govt. societies etc. at State, District and Block levels within (by 31.03.2013). i.e to cover approximately 18,000 govt consumers spread across three

discoms in 57 days!!.. There were no technical specifications and precedence/ experience of prepaid meters to serve as guidelines and Discoms were expected to start from scratch.

DISCOMs have already started installing pre-paid meters in such consumers but it is quite difficult to cover all such consumers in such a small duration, given the technical complexity of the scheme, the lack of precedence to rely and many factors beyond its control. In spite of many hurdles, the Discoms have initiated steps, the chronological sequence of which is as below.

Chronological Order of Prepaid Metering System Tender		
Sl	Events	Date
1	Dept of Energy Notification	04.02.2013
2	OERC order	01.03.2013
3	Tender floated by CSO	19.03.13
4	Pre-bid Meeting	08.04.13
5	Last date of submission of Bid	18.04.2013
6	Date Extended on request	25.04.13
7	Date Extended on request	09.05.2013
8	Date Extended on request	16.05.2013
9	Vendor Demonstration	19.06.2013
10	Techno-Commercial Evaluation Completed	26.06.2013
11	Demo of Prepaid metering system Before Energy Minister and Hon'ble Commission by M/S JnJ Power Systems Ltd	28.06.2013
12	Snap Bid	03.07.2013

13	Presentation by DISCOMs before Energy Secretary, CMD Gridco & all other Sr officials of Gridco & Energy Dept.	27.07.2013
14	Memorandum submitted before the Board of directors .	03.09.2013
15	Minutes of Board meeting Received	20.09.2013
16	CEA issues Letter on Functional Specs dated 18.2.2014	March 2014

The licensee further submits that even the technical specifications of single phase prepaid meter were determined as recently as March 2014, the technical specifications for three phase prepaid meter is yet to be finalized. The licensee seeks reference to the CEA order dated 18.2.2014 as in **ANNEXURE - J**. Under such circumstances to insist upon the Discoms in complying with an unrealistic timeline and thereafter bar govt consumers from paying their electricity dues and making it contingent upon installation of a prepaid meter by the Discoms is discriminatory and erroneous.

Therefore, treating the energy dues of Govt. consumers as non-receivables will affect the revenue stream of the DISCOM.

9.J.7 **Escrow Relaxation towards Salary Expenses** :

It is the humble submission of the appellant that, OERC in the impugned Order has placed the salary expenses as fifth priority in the escrow relaxation mechanism. It is to present before the Hon'ble ATE that, the sole purpose of

developing this escrow mechanism is to create an efficient, co-ordinate and economical distribution as well as financial system in the power distribution sector. All the revenues that are generated by the DISCOMs by the very efforts by their employees make the escrow account.

The arrangement made by OERC in the impugned Order for relaxation of escrow for different expenses incurred by DISCOMs are as below :

"Escrow Relaxation

397. From Current Revenue

- (a) *Annual Licence Fees to be paid by DISCOMs to OERC in full by 10th April every year as per the Clause 31.1 of the Licence Condition of DISCOMs.*
- (b)(i) *Transmission charges, BSP dues, SLDC charges of the current month of the current financial year, (ii) the unpaid amount of transmission charges, BSP dues and SLDC charges of any previous months of the current financial year, (iii) the energy bill of DISCOMs in respect of direct power purchase from CGPs or other agencies, if any and any other charges approved by the Commission from time to time.*
- (c) *Monthly Special R&M expenditure under Commission monitored Smart Metering, Energy Audit Schemes and SCADA centers, as approved by the Commission in the tariff order from FY 2014-15 onwards. The relaxation for successive months would be done only after submission of monthly progress report by DISCOMs to the Commission and GRIDCO.*
- (d) *Monthly R&M expenditure excluding special R&M as approved by the Commission in the tariff order from FY 2014-15 onwards.*
- (e) **Monthly Employees cost as approved by the Commission in the tariff order from FY 2014-15 onwards.**
- (f) *The monthly obligation for repayment of principal and interest in respect of loan obtained/to be*

obtained from the financial institutions for CAPEX programme/system improvement.

- (g) Average monthly obligation of the defaulted arrear transmission charges, BSP dues of the previous financial years, if any.*
- (h) The balance amount towards arrear of BSP dues worked out upto 31.3.2005 as approved in the securitization order of the Commission dated 01.12.2008."*

It is to submit that, DISCOMs have been prevented from availing escrow relaxation since February 2013, towards salary expenses which leads labour unrest. In order to avoid such situations DISCOMs have been forced to avail short term loan from various financial institutions and managing to pay the monthly Salary and wages to employees till date. Such situation cannot continue further and there is no more scope for availing any loan in future from any Banks. In the event of nonpayment or less payment of employee expenses (more specific Salaries), there is every possibility of large scale labour unrest in the DISCOMs, paralyzing the consumer services. The consequential de-motivation further hampers performance which will affect timely payment of BST Bills as well.

9.J.8 **Non Implementation of the Orders of the ATE, New Delhi :**

That Hon'ble Appellate Tribunal for Electricity vide its order dated 11.02.2014 in the appeal against OERC ARR & RST

Order pertaining to FY 2013-14, had directed the following suggestions, but the same is yet to be implemented.

That this Hon'ble Tribunal decided all the aforesaid issues in favour of the Petitioner (Appellant therein), vide its Judgment dtd.11.02.2014 and directed the Commission for strict compliance of the same within two months. The expression of displeasure on part of this Hon'ble Tribunal on the Commission for not implementing the directions of this Hon'ble Tribunal issued on previous occasions and as set out here-in-above, is quite evident from the said judgment dtd.11.02.2014. Relevant portion of the said Judgment is quoted herein below;

"13. The important question of law involved in these three Appeals as vehemently argued by the learned counsel for the Appellants is whether the learned Orissa Commission is justified in not implementing and complying with the judgments of this Appellate Tribunal simply on the ground of pendency of civil appeals before the Hon'ble Supreme Court particularly when the execution or operation of the judgments of this Tribunal has not been stayed or suspended by the Hon'ble Apex Court?"

xxxxxx

16. Thus principles of law and dictum laid down and directions given by this Tribunal in the aforesaid judgment dated 13.12.2006 and 08.11.2010 are not being implemented by the Orissa Commission on the pretext that the Civil Appeals against those judgments are pending before the Hon'ble Supreme Court even though the operation of the said judgments passed by this Tribunal has neither been stayed nor any interim order has been passed by the Hon'ble Supreme Court as yet. Likewise, the learned Orissa Commission is also said to have filed

appeal against the judgment dated 03.07.2013 of this Tribunal passed in Appeal no. 26-28 of 2009 & batch which is said to be at the stage of admission.

XXXXXXXXXX

- 20. The settled law on the aforementioned point is that mere pendency of an appeal in the higher court against the judgment or order of the lower Appellate Court/Tribunal shall not be a ground to stay the enforcement of the said judgments or orders passed by the lower court/Regulatory Commission. The learned Orissa Commission has kept the issue pending at its own level, whims and fancies just on the ground that the appeals are pending before the Hon'ble Supreme Court, even though there is no stay on the enforcement or operation of the said judgments of this Tribunal by the Hon'ble Supreme Court.**
- 21. After considering the above legal position, this view of the learned Orissa Commission of not implementing and enforcing the judgments of this Appellate Tribunal is not proper and correct. We think, if this practice is allowed to continue without any proper guidance by this Tribunal to the Regulatory Commissions, this would create judicial indiscipline and anarchy in the judicial hierarchy of the Justice delivery system provided by law. The learned Orissa Commission is expected and directed either to obtain a stay order or interim order from the Hon'ble Supreme Court in the aforesaid appeals within a period of two months from today, otherwise implement the said judgments of this Tribunal positively in which appeals are pending before the Hon'ble Supreme Court and send compliance report to this Tribunal after the expiry of two months. The non-implementation of the aforesaid judgments of this Tribunal is creating confusion between the litigant parties and by implementation of the aforesaid judgments of this Tribunal the learned Orissa Commission also can correct or rectify all the infirmities and errors, etc. after complying with the directions given by this Tribunal in the aforesaid judgments and then the issues pending for years will be finally settled this way or that way bringing to an end the whole impasse.**

22. In view of the above discussions, all the issues referred to above are decided in favour of the Appellants. In terms of the findings, the learned Orissa Commission is directed to implement the same immediately. Consequently, all these Appeals are allowed. There is no order as to costs."

It can be well inferred from the above observations of this Hon'ble Tribunal that, the Commission's non implementation of Hon'ble Tribunal's view has already been acknowledged by this Hon'ble Tribunal. The action of the Commission by not implementing the directives of this Hon'ble Tribunal has constrained the Petitioner for filing the present application for enforcement of the Order of this Hon'ble Tribunal.

10. Matters not previously filed or pending with any other Court:

The Appellant declare that they have not filed any Writ Petition or Suit regarding the matter in respect of which this Appeal has been made before any Court or any other authority nor any such Writ Petition or Suit is pending before any of them.

11. Specify below explaining the grounds for such relief (s) and the legal provisions, if any, relied upon:

Kindly refer to Para 9 above. The Appellant further crave leave and reserves its rights to add to, alter or amend the Appeal and/or grounds in support of the Appeal.

12. Details of Interim Application, if any, preferred alongwith this Appeal.

The Appellant do not prefer any separate Interim Application at this stage.

13. Details of Appeals, if any preferred before this Tribunal against the said Impugned Order/Direction, by Respondents with numbers, dates and interim order, if any passed in that Appeal:

No such Appeal has been preferred either by the Appellant or the Respondents against the above mentioned impugned order/direction.

14. Details of Index :

1. List of Dates and Events.
2. Memo of Appeal with Annexures.
(An index containing the details of the documents in chronological order relied upon is enclosed)

15. Fees for the Appeal :

A BANK draft of State Bank of India for sum of Rs. 1,12,000/- in favour of the Accounts Officer, Appellate Tribunal for Electricity, in respect of the fee for Appeal is enclosed.

16. List of Enclosures :

1. Vakalatnama
2. Demand Draft for Rs. 1,12,000/-.
3. Index Containing details of documents to be relied upon.

17. Whether the order appealed as communicated in original is filed? If not, explain the reason for not filing the same.

Yes, original filed.

18. Whether the appellant/s is ready to file written submissions/arguments before the first hearing after serving the copy of the same on Respondents.

Yes.

19. Whether the copy of memorandum of appeal with all enclosures has been forwarded to all Respondents and all interested parties, if so, enclose postal receipt/ courier receipt in addition to payment of Prescribed process fee.

Not forwarded, pending issue of notice.

20. Any other relevant or material particulars/details which the Appellant(s) deems necessary to set out :

At the time of hearing, if need be so.

21. **Reliefs Sought:**

In view of the facts mentioned in paragraphs 7 above and grounds set out in paragraphs 9 above, the Appellant pray that this Hon'ble ATE may be pleased to grant the following reliefs to the Appellant :

- (a) To consider the submission and direct OERC to fix the distribution loss targets by considering the above grounds as proposed by Appellants.
- (b) To allow A&G expenses and Contingency Reserve as proposed by the Appellants being critical in operations of DISCOMs;
- (c) To direct OERC not to consider the Meter Rent in the Miscellaneous Receipt of the DISCOM's ARR.
- (d) To direct OERC to determine the principles of truing up upfront and redetermine the truing up;
- (e) To direct OERC to allow govt consumers to pay their electricity dues and delink the prepaid metering scheme from payment;
- (f) To direct OERC to implement the directives of the ATE;

(g) For such other and further relief's as the nature and circumstances of the case may require.

Dated at Balasore this the 3rd day of June, 2014.

North Eastern Electricity Supply Company of Odisha Ltd.

Through

Mulla & Mulla & Craigie Blunt & Caroe
Advocates for the Appellant
502, Nilgiri Apartments
9, Barakhamba Road
New Delhi 110 001

DECLARATION

The Appellant abovenamed hereby solemnly declares that nothing material has been concealed or suppressed and further declares that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the originals/fair reproduction of the originals/true translation thereof.

Verified at Balasore on this the 3rd day of June, 2014.

North Eastern Electricity Supply Company of Odisha Ltd.

VERIFICATION

I, Trilochan Panda aged 52 years, S/o. Dibakar Panda, working as Managing Director of the Appellant, North Eastern Electricity Supply Company of Odisha Ltd., having its Registered Office at having its registered Office at Plot No. N1/22, IRC Village, Nayapalli, Bhubaneswar, at Balasore, do hereby verify that the contents of para 10, 12 to 20- are true to my personal knowledge derived from official record and para 1 to 9, 11 & 21 are believed to be true on legal advice and that I have not suppressed any material facts.

Verified at Balasore on this the 3rd day of June, 2014.

Appellant
North Eastern Electricity Supply Company of Odisha Ltd.

5. I say that nothing herein is false and no material has been concealed there from.

DEPONENT

VERIFICATION

Verified at Balasore on this the 3rd day of June, 2014 that the contents of the above Affidavit are true and correct to the best of my knowledge. Nothing material has been concealed nor withheld there from.

DEPONENT