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**Case No.1 of 2000**

2. The brief facts of the case is that three Export Oriented Ferro Alloys units, namely, M/s Ferro Alloys Corporation Ltd. (FACOR, for short), M/s Ispat Alloys Ltd. and M/s Tata Iron & Steel Company Ltd. (TISCO, for short) were availing power supply from the erstwhile OSEB by executing necessary agreements. During the year 1994-95, when the State of Orissa was reeling under acute power shortage, these three industries availed power supply from NTPC out of 15% unallocated quota to the tune of 130 MW during off-peak hours at NTPC tariff and on payment of wheeling charges to OSEB (now GRIDCO). The said supply was given by executing necessary supplementary agreements between GRIDCO and above industries which were renewed every year. The last agreement was executed by the EOUs with GRIDCO during June, 1998 for a period of one year to avail NTPC power which was effective from 1.4.98 and came to an end on 31.3.99.
3. On 7.10.99, the M.D., NESCO filed an application seeking approval of a special agreement w.e.f. 1.9.99 to 31.8.2000 between itself and the three export-oriented Ferro Alloys companies before the Commission. The Commission while disposing of the application held that approval of special agreement would bring about substantial change in the calculation of power purchase requirement, pool price determination, merit order purchase plan, total revenue requirement and impact on other categories of consumers. As such, the special agreement proposed by NESCO for allowing concessional tariff to EOUs was not approved and the petition for special agreement was dismissed. Against the above order of the Commission, the three EOUs went on appeal to the High Court of Orissa.
4. While disposing the appeals, the Hon'ble Court framed the following issues for consideration:
  - a) Whether the Export Oriented Ferro Alloys units are entitled to drawl of the NTPC Power?

- b) Whether it is legally permissible on the part of NESCO and the three Export Oriented Ferro Alloys units for supply of power at a lower rate of tariff than what is fixed by OERC?
  - c) Whether the Export Oriented Ferro Alloys units are to pay their electrical dues for the disputed period at NTPC rate as claimed by GRIDCO or at rates agreed upon under the special agreement as claimed by NESCO and Export Oriented Ferro Alloys units?
5. On issue No.I, the Hon'ble Court has recorded the finding that Export Oriented Ferro Alloys units are entitled to drawal of NTPC power till such time the said supply is backed by the orders passed by the Central Electricity Authority.
6. On issue No.II, the Hon'ble Court has directed the OERC for the approval of special agreement between NESCO and the three EOUs based on NESCO's affidavit that it would absorb the notional loss that would accrue on account of this special tariff.
7. On issue No.III, the Hon'ble Court has directed that the rate, at which the EOUs should pay for the disputed period, should be decided by the Commission after giving an opportunity to all the parties to make their submission in this regard.
8. We have heard the arguments of Counsels for NESCO, GRIDCO and the three EOUs. Counsel for NESCO has argued that with effect from 1.4.99, there has been no contractual arrangement between GRIDCO, EOUs and NTPC for supply of NTPC power directly to the EOUs. The Agreement for supply of NTPC power to EOUs expired on 31.3.99. Therefore, billing by GRIDCO at NTPC rate for supply of power after 1.4.99 is legally untenable. From 1.4.99 onwards, only NESCO holds the license for retail supply in the area of its jurisdiction at the rate determined by OERC. GRIDCO being holder of only Bulk Supply Licensee cannot provide retail supply directly to any consumer. The quantum of total power supplied to the EOUs was fully included and covered in the revenue requirement of NESCO for the year

1999-2000 and the same has been approved by the Commission. Hence, the tariff payable by the EOUs should be as per the rates envisaged in the special agreement and the cost of energy payable to GRIDCO would be as per the prevailing Bulk Supply Tariff.

9. According to the learned Counsel for NESCO, when there has been no drawal or less drawal of unallocated NTPC power, billing at the NTPC rate by GRIDCO i.e., a rate in excess of the rate determined by the Hon'ble Commission puts higher burden on NESCO. Further, even when GRIDCO was wrongly billing at NTPC rate, it was charging its energy bill raised on NESCO, the maximum demand at each of the supply point for the EOUs whereas according to the supplementary agreement executed by GRIDCO with EOUs, maximum demand was recoverable only in the proportion of the drawal during the peak hours to the total energy drawal by the respective EOUs in the month.
10. Counsel for GRIDCO argued that NESCO became a licensee with effect from 1.4.99 and applied to the Commission for fixing retail supply rate. NESCO did not project the additional power to be supplied to the EOUs during off-peak hours from 1.4.99 over and above their normal requirement of power. Hence, there was neither any intention nor preparedness of NESCO to supply power to EOUs during off-peak hours from 1.4.99. Otherwise, NESCO could have included the requirement of power for supply to EOUs while projecting the annual requirement of power.
11. Counsel for GRIDCO further contended that the supplementary agreement executed between GRIDCO and EOUs expired on 31.3.99. After expiry of the said agreement and in absence of any written agreement, the earlier agreement continued after 31.3.99 till 1.2.2001 which clearly indicates that GRIDCO is supplying NTPC power to EOUs and EOUs are getting NTPC power through GRIDCO. State Govt. and Central Govt. have only given suggestions for working out some arrangement in future for supply of power to EOUs by NESCO subject to approval by OERC.

12. Counsel for GRIDCO points out that GRIDCO being a creature as per Sec. 13 of the OER Act, 1995 is left with no alternative than to follow OERC Tariff orders from time to time. Based on OERC order dt.21.11.98 and 22.03.2000, GRIDCO was billing on off-peak NTPC power to Distribution Companies, i.e., NESCO & CESCO for four nos. of EOUs since April, 1999 till 21.01.2001 even though no formal agreement was there with EOUs after 31.8.99. As per OERC Bulk Supply Tariff order dt.19.01.2001, GRIDCO was not billing to EOUs after 1.2.2001 for their off-peak consumption.
13. Shri Parija, appearing on behalf of the three EOUs pleaded that in view of the direction of Orissa High Court, the special agreement entered with M/s NESCO for the period September, 1999 to August, 2000 may kindly be approved. According to him, the disputed period is the period from 1.4.99 to 31.1.2001. From the letters issued by Govt. of Orissa, meetings taken by Govt. of India and the meetings of Board of Directors of GRIDCO, it is clear that their intention was to give a competitive tariff to EOUs for survival of these industries and benefit to the company. Therefore, the special tariff of the aforesaid agreement period may be allowed for the period 1.4.99 to 31.8.99. During the period from 1.9.2000 to 31.1.2001, there was no agreement, as the special agreement effective from 1.9.99 to 31.8.2000 between NESCO and EOUs was not approved by OERC. Had the aforesaid special agreement been approved by OERC earlier, extension of the same would have been made till 31.1.2001 after which date the BST and RST were modified by OERC. Hence, he argued that special tariff mentioned in the agreement may also be allowed between 1.4.99 to 31.8.99 and 1.9.2000 to 31.1.2001. Further, in view of high efficiency of power intensive industries where units sold per KW of contract demand is maximum, system losses minimum due to power supply in EHT, high load factor due to uniform load, cost of power constituting a substantial part of the cost of production and foreign exchange earning capacity, Power Intensive Ferro Alloys Industries deserve a viable power tariff.
14. We have heard the argument of Counsels for NESCO, GRIDCO and EOUs. Our observations on various points raised in the arguments by the contending parties are as follows:

15. We find that in March 2000, CEA has issued orders where the three EOUs were allocated 110 MW of power. (Nava Bharat Ferro Alloys under CESCO and not a party to this proceeding was allocated 30 MW of power). This allocation of unallocated power of NTPC stations was in force till 30.4.2001, when, by another order of the even date, CEA withdrew the allocation of power of Central Generating Stations of Eastern Region in favour of EOUs in Orissa for the time being as they have not been drawing NTPC power since September, 1999. Thus, it is observed that in terms of the order of the Hon'ble High Court under Issue No.(i) valid allocation of CEA subsists during the period w.e.f 1.4.99 to 30.4.2001.
16. Special Agreement entered into between NESCO and EOUs for the period 1<sup>st</sup> September, 1999 to 31<sup>st</sup> August, 2000 is approved as directed by the Hon'ble High Court.
17. Pursuant to the direction of the Hon'ble Court under Issue No.3, we now proceed to deal with the rate at which EOUs should pay during the disputed period. The Hon'ble High Court has observed that "disputes have been raised in course of argument regarding the rates at which the payments are to be made by the EOUs during the disputed period for the purchase of power". During the course of the hearing the Commission sought clarification regarding the duration of the disputed period, in view of the fact that the petitioner NESCO has requested to approve the special agreement w.e.f. 1.4.99 as per the judgment of the Hon'ble High Court dt.25.9.01 passed in Misc. Case No.285/2000.
18. Counsels of the petitioner and the respondents stated that the disputed period should cover the period 1.4.99 to 31<sup>st</sup> January 2001 which included the period for which special agreement was requested i.e. from 1.9.99 to 31.8.2000.
19. The judgment dt.25.9.2001 has been delivered against four misc. application arising out of common order dt.22.3.2000 passed by the OERC in case No.1 of 2000. By the aforesaid order the OERC had rejected the application dt.7.10.99 filed by NESCO seeking approval of the special agreement of

NESCO with the 100% EOUs. In their application dt.7.10.99 to the Commission, NESCO had prayed for giving power supply to the EOUs as per the terms and conditions mentioned in para 11 of the draft agreement wherein it was stated that the agreement would remain valid from 1.9.99 to 31.8. 2000 unless terminated by either party. Therefore, the Hon'ble High Court of Orissa in their order has asked OERC to determine the rates for the period from 1.9.99 to 31.8.2000.

20. With regard to the rate to be charged for the duration of the special agreement period, GRIDCO has not drawn any power from NTPC during off peak hours from September 1999 onwards in spite of allocation of power for the EOUs by the appropriate authority. Therefore, the contention of GRIDCO that it has supplied NTPC power during off peak hours to EOU units is not corroborated by facts. As such, GRIDCO should not be entitled to recover at NTPC rate along with wheeling charges for that period from the EOU units. The Commission concurs with the demand of NESCO that the power has been supplied to EOUs by NESCO during that period of 01.09.99 to 31.08.2000 during the off peak hours. Therefore, the entire consumption of power by the EOU units for the period of 01.09.99 to 31.08.2000 both during peak and off peak hours should be treated as supply of power from NESCO. We, therefore, direct that GRIDCO should withdraw the bills raised on NESCO for EOU power supply at NTPC rate with wheeling charges and bill NESCO at the prevailing Bulk Supply Tariff. Since NESCO is willing to absorb the differential in the loss of revenue on account of supply of power at special rate in their affidavit dt.14.3.2000, the Commission as such approves the rates as proposed in the special agreement for the period of 1.9.99 to 31.8.2000. The loss of revenue on that account will not be passed on to the revenue account for the corresponding period.

21. The Commission would like to observe that the respondents, namely, FACOR and TISCO have raised that the period from 01.04.1999 to 31.08.1999 which was not covered by the special agreement should also be treated in a manner similar to the period 01.09.1999 to 31.08.2000. It needs to be mentioned here that the Managing Director, NESCO in an affidavit dt.29.11.99 in Case No.1/2000 has stated "that in view of the ... facts and circumstances the old

arrangement as per the special agreement made by the EOUs with the GRIDCO shall continue upto 31.8.99.”

22. It is seen from the global account for the months of April 99 to August 99 that NTPC power has been drawn by GRIDCO during the off peak hours from the unallocated quota meant for the EOUs. The parties concerned should take note of the observation of the Hon’ble High Court of Orissa in issue No.1 and take appropriate action to sort out the matter amongst themselves.

23. The next issue relates to the period between 01.09.2000 and 31.01.2001 which is not covered by special agreement. As per the submission before the Hon’ble High Court of Orissa and as seen from the global accounts for the said months no power has been drawn from unallocated quota of NTPC sources for supply to EOUs by GRIDCO. We hereby observe that the parties concerned should take note of our findings in para Nos.16 & 20 and take appropriate action in the matter.

With the above observation the case is disposed of.

**(B.C. Jena)**  
**MEMBER**

**(H.S. Sahu)**  
**MEMBER**

**(D.C. Sahoo)**  
**CHAIRMAN**