

Present : Shri D.K.Roy, Chairman
Shri H.S. Sahu, Member

M/s Grid Corporation of Orissa Ltd. **Petitioner**
- Vrs -

- **Respondents**

Date of Order : 31.07.2001

1. This proceeding arose out of an application filed by GRIDCO for securitisation of the payment of its amount due from Southern Electricity Supply Company of Orissa Ltd. (SOUTHCO, for short).
2. It has been alleged by GRIDCO, the Bulk Supply licensee, that it had entered into a Bulk Supply Agreement on 24.05.99 with SOUTHCO, a Distribution and Retail Supply Licensee, in terms of which the applicant supplies electricity in bulk to SOUTHCO on the terms and conditions contained in the said Bulk Supply Agreement. SOUTHCO is required to make payment to GRIDCO for supply of electricity as per the provisions in the Bulk Supply Agreement.
3. The Bulk Supply Agreement dated 24.05.99 inter alia, provides that:
"5.1(a) Within 14 days after the end of each month GRIDCO shall prepare and deliver to SOUTHCO an invoice (a “monthly invoice”) in accordance with the

Bulk Supply Tariff specifying all the amounts payable by SOUTHCO to GRIDCO under the terms of the Agreement or otherwise as per the directions of the Commission. GRIDCO shall give requisite details of the calculation of charges in respect of the relevant month in each Monthly Invoice.

(b) The amount of each Monthly invoice shall become payable by SOUTHCO on the date falling 30 days after the date of such Monthly invoice whereupon SOUTHCO shall pay the full amount of such Monthly invoice to GRIDCO without deduction set off or withholding on any account whatsoever unless, otherwise, agreed between GRIDCO & SOUTHCO".

4. The Bulk Supply Agreement further provides that SOUTHCO shall procure that within 10 days of the date of this Agreement, the Bank issues in favour of GRIDCO a Letter of Credit capable of being called or utilised by GRIDCO on simple demand to duly secure the payment of all amounts becoming due and payable from SOUTHCO to GRIDCO.
5. GRIDCO and SOUTHCO have also signed an Escrow Agreement dated 4.8.2000 in regard to Securitisation of payment of the amounts due from SOUTHCO. In terms of the said Escrow Agreement, M/s Union Bank of India (UBI, for short) has been appointed by GRIDCO and SOUTHCO to be the Escrow Agent. It is provided that in the event of default on the part of SOUTHCO in the payment of any amount due to GRIDCO on or before due dates under the Bulk Supply Agreement, GRIDCO shall be entitled to recover the amounts outstanding from the Escrow Account in accordance with the provisions of this Agreement. It further provides that so long there is any default in the payment of any amount due to GRIDCO on the due dates as provided in the Bulk Supply Agreement, SOUTHCO "irrevocably and unconditionally agreed that from the time the default occurs all receivables to the extent of default amount without exception from the electricity sold or supplied by SOUTHCO shall be deposited or caused to be deposited by SOUTHCO in the account maintained by the Escrow Agent".

6. GRIDCO & SOUTHCO have also signed a Loan Agreement dated 28th October, 1999 for payment of an amount of Rs.10566 crores together with interest at the fixed rate of 13.837% per annum in accordance with and at the times set out in Schedules to the agreement plus interest tax at the rate prevailing at the time of payment.
7. SOUTHCO has defaulted in payment of Bulk Supply Bills and Loan Instalment to GRIDCO to the tune of Rs.142.26 crores comprising, shortfall in payment of Bulk Supply bills (from April, 1999 to September 2000), D.P.S., repayment of loan instalment (from April, 1994 to October, 2000) and penal interest, due to non-payment of loan instalment.
8. GRIDCO has therefore prayed that the Commission should:
 - (i) Direct SOUTHCO to forthwith pay all outstanding amounts due to GRIDCO along with DPS applicable.
 - (ii) Direct SOUTHCO to rectify the breach in the fulfillment of agreements entered into with GRIDCO.
 - (iii) Direct SOUTHCO to put in place effective Escrow Mechanism as envisaged in Bulk Supply Agreement, Loan Agreement and the Escrow Agreement and duly fulfill and comply with the provisions of the said agreements including in regard to collection of receivables in the Escrow Account and establishment of the letter of credit.
 - (iv) Restrain SOUTHCO from utilising any part of its receivables contrary to agreement signed with GRIDCO.
9. In reply, SOUTHCO has submitted that it is not obliged to deposit all the receivables from consumers in various collection accounts to the Escrow Account maintained by Union Bank of India, Berhampur. Clause (4) of the Escrow of the Escrow Agreement provides that:

"Unless there is any subsisting default by SOUTHCO, SOUTHCO shall be entitled to utilise all or any of the monies in the Escrow Account. For so long as there is subsisting default by SOUTHCO, SOUTHCO shall not be entitled to utilise any of his monies in the Escrow Account till the payment and discharge of the amount in default in full including interest accrued thereon".

10. Thus SOUTHCO is entitled to utilise all or any of the monies in the Escrow Account, if there is no subsisting dues of GRIDCO. Further Clause (2) of the Escrow Agreement provides that:

"In the event of any default on the part of the SOUTHCO in the payment of any amounts due to GRIDCO on or before due date, under Bulk Supply Agreement, GRIDCO shall be entitled to recover the amounts outstanding from the Escrow Account in accordance with the provisions of this Agreement".

11. Thus GRIDCO will be entitled to recover its subsisting dues from the Escrow Account in the event there is a default on the part of SOUTHCO in paying GRIDCO's dues. Thus all the receipts/revenues realised from the consumers by the respondent, need not and should not be escrowed automatically. SOUTHCO should have sufficient funds at its disposal, which ordinarily come from the revenue receipts realised from its consumers, so as to meet its obligation or liability raised by GRIDCO in the shape of monthly invoices.
12. SOUTHCO has further submitted that the Commission has no power or authority under the Reform Act to enforce or direct payment of the amount becoming due from it to GRIDCO. The Commission is entitled or authorised to proceed to act as arbitrator to adjudicate and settle such dispute. But the Commission is not competent to enforce or direct payment of any dues to GRIDCO.
13. SOUTHCO has further stated that GRIDCO is raising energy bills in the Monthly Invoice, as per the old prevalent rate of @ 85.50 paisa per unit fixed for BST 1998-99, on the plea that BST 1999-2000 has been stayed by the Hon'ble High

Court in Misc. Appeal No.51/2000 filed by M/s WESCO against the 1999-2000 BST order of the Commission which came into force w.e.f. 01.02.2000. WESCO filed the Misc. Appeal as noted above, because the Commission fixed a higher rate of unit charge of energy supplied to it by GRIDCO, even though, the said rate (Rs.85.50 paisa/unit) was reduced to Rs.80.70 paisa/unit in case of other distributing companies including SOUTHCO. SOUTHCO has neither challenged the BST 1999-2000 before the Hon'ble High Court, nor it was a party to the Misc. Appeal No.51/2000. Therefore billing @ Rs.85.50 paisa/unit is contrary to BST order dt.31.12.99.

14. SOUTHCO has further averred that GRIDCO is bound to furnish all the requisite details of the calculation of charges in each monthly invoices whereas in the statement attached to the monthly invoices, GRIDCO furnished energy consumption in MU SMD (KVA) and some other details of no significance.
15. Further an Escrow Account has been opened by SOUTHCO with Escrow Agent, namely Union Bank of India, Berhampur and the said Account is operating now. GRIDCO has also been informed about the latest status of Escrow Mechanism. As regards Loan Agreement, it has been provided in the Transfer Rules that GRIDCO shall be responsible to finalise the accounts of SOUTHCO for the year ending 31.03.99 and to get the same duly audited. Since the accounts have not been finalised and audited, the amount payable on account of loan has not yet been determined. Therefore no Escrow arrangement is applicable to such Agreement.
16. After hearing the parties, we have decided to act as arbitrator to adjudicate the dispute between GRIDCO & SOUTHCO u/s 37(1) of the OER Act, 1995. One major area of dispute relates to meter reading and billing and hence Commission decided to bring the two sides to the table under expertise and supervision of the Director (Tariff) of the Commission.

17. Director (Tariff), OERC took up a meeting in connection with disputes regarding metering and billing relating to securitisation of payments on 26.02.2001. The following decisions were taken in the above meeting:

- i) Availability of meters of proper accuracy – Main and Check meters have been provided by GRIDCO at all supply points. The readings of existing meters to be adjusted to take care of the errors in accuracy of CTs/PTs.
- ii) Testing of meters – GRIDCO will take two months for testing of all meters of all Distcos with accu checks available with all Distcos. Until procurement of standard CT/PT the present arrangement of testing shall continue.
- iii) Method of measurement of simultaneous maximum demand – SMD calculated by GRIDCO includes the reactive power drawn by the Distcos at the point of metering which is not in accordance with the procedure stipulated in the BST order. Hence the SMD should be revised and billing be done accordingly.
- iv) Joint meter reading – It was advised that henceforth at the time of taking joint meter reading, the representative of Distcos should take down the meter reading at 00-00 hours at then end of each month.
- v) Auxiliary consumption – It was agreed that colony consumption should not be included in the auxiliary consumption.
- vi) Metering errors due to energy accounting – GRIDCO agreed to give year end adjustment, exact number of units claimed in the bill due to rounding off.
- vii) Rounding off errors in energy accounting should be taken up in the year end adjustment.
- viii) Inter Distcos interface metering – Testing of meters, CTs, PTs and other associated equipments will be arranged by the concerned Distcos. Testing and sealing of meters and associate equipments is to done jointly.
- ix) Errors in SMD readings in the pre-privatisation period has been accepted by GRIDCO.

We endorse the decisions taken in the above meeting and direct GRIDCO and SOUTHCO to follow them scrupulously.

18. Since many more issues cropped up during hearing, we decided to first identify the issues for adjudication. After considering the draft issues submitted by the parties, we identified the following issues for adjudication:

Issue No.1 : Whether the respondents (SOUTHCO and U.B.I.) have committed breach of Loan Agreement, Bulk Supply Agreement and Escrow Agreement?

Issue No.2: Whether the respondent No.1(SOUTHCO) has put in place the effective Escrow mechanism as per the Bulk Supply Agreement, Escrow Agreement and Loan Agreement and has duly complied with the provisions of the said agreement including with regard to collection of receivables and deposit the same into Escrow Account?

Issue No.3: Whether there is appropriate metering arrangements and satisfactory billing procedure?

Issue No.4: Whether the Respondent No.1 is liable to pay the Bulk Supply Tariff as per the order dated 21.11.1998 of OERC or as per the tariff order dated 30.12.1999 of OERC when Commission's order dt.30.12.1999 has been stayed and set aside by Orissa High Court and remitted back to OERC for redetermination in accordance with law?

Issue No.5: Whether as per clause 8 of the Escrow Agreement it is optional for Respondent No.1 to arrange letter of credit?

Issue No.6: Whether claims of petitioner in regard to Bulk Supply Bills, loans, interest and D.P.S. pertaining to period prior to 31.03.1999 should be treated as correct before finalisation and audit of accounts for the year 1998-99, and whether these amounts are recoverable through Escrow mechanisms?

Issue No.7: Whether Respondent No.1 is liable to pay penal interest and delayed payment surcharge as claimed by the petitioner?

Issue No.8: To what reliefs or relieves is the petitioners entitled to?

Issue No.9: Whether the Respondent No.1 is liable to pay the Bulk Supply Bill outstanding on 16.02.2001 as stated by the applicant, or the Bulk Supply bill amount as stated by the Respondent No.1?

19. While responding to Issue No.1 and 2 we have to refer to GRIDCO's letter dated 14th March 2001 addressed to the Principal Secretary, Department of Energy in which he has reported that SOUTHCO have confirmed that they have made arrangements for collection/deposit of their entire receivables through their accounts maintained with different Divisions and have ensured transfer of such deposits to the Escrow Account maintained with Union Bank of India, Berhampur Branch, Berhampur. In view of the confirmation received from SOUTHCO, the Escrow Agent, and other Banks regarding flow of all their entire collection of receivable to the Escrow Account ,maintained with Union Bank of India, Berhampur Branch, Berhampur for payment of the Bulk Supply Bills and loan installments of the GRIDCO to GRIDCO, GRIDCO has confirmed that the Escrow mechanism, as envisaged under Escrow Agreement has been put in place by SOUTHCO. In view of the categorical confirmation by GRIDCO we conclude that the Escrow Mechanism has been put in place by SOUTHCO as per the Bulk Supply Agreement, Escrow Agreement and Loan Agreement.
- 19.1 As per para 6 of the Bulk Supply Agreement entered into between GRIDCO and SOUTHCO, SOUTHCO irrevocably and unconditionally agrees to open Letter of Credit in favour of GRIDCO through the Escrow Agent within a period of 30 days of the Bulk Supply Agreement. Since Letter of Credit has not yet been opened, SOUTHCO and UBI are clearly in breach of Bulk Supply Agreement, Loan Agreement and Escrow Agreement.
20. As regards issue No.3, the matter has been dealt in para 17 above. GRIDCO and SOUTHCO should follow the decisions taken in the meeting taken by Director (Tariff) on 26.02.2001 and follow them scrupulously.

21. As regards Issue No.4 we have to go by the decision of Hon'ble High Court in staying the Bulk Supply Tariff Order dt. 30.12.99 and hence the BST is payable at the rate defined in OERC order dt.21.11.98 subject to modification if any on redetermination in pursuance of Hon'ble High Court's order.
22. As regards Issue No.5, about whether Letter of Credit is optional or not relevant to refer to para 6 of Escrow Agreement which provides that,

“SOUTHCO hereby irrevocably and unconditionally agrees to open letter of credit in favour of GRIDCO through the Escrow Agent within a period of 30 days of this Agreement, and undertakes to comply all terms and conditions to the satisfaction of the Escrow Agent for opening the Letter of Credit and or renewal thereof.”

Para 8 of the aforesaid Agreement provides that:

“ In the event of letter of credit (as provided in Para 6) is not opened by the stipulated date, or in the event, L.C. is not renewed for any reason whatsoever without prejudice to the rights of GRIDCO, Escrow Agent, SOUTHCO hereby agree and undertake that GRIDCO shall be entitled to recover all the amounts due to it from the Escrow Account by enforcing the first charge over the receivable of SOUTHCO in favour of GRIDCO in terms of Bulk Supply Agreement”.

- 22.1 From the above provisions, it is clear that, opening of L.C. by SOUTHCO is not optional. SOUTHCO should have opened Letter of Credit in favour of GRIDCO. In the event of L.C., not being opened or renewed due to unavoidable circumstances, then GRIDCO shall be entitled to recover the outstanding dues from the Escrow Account, by enforcing the first charge over the receivables of SOUTHCO.
23. As regards Issue No.6, we decide that the claims of the petitioner with regard to Bulk Supply Bills, loans, interest and DPS pertaining to the period prior to

31.03.1999 may be treated as provisional subject to audit of the accounts for the year 1998-99, and these amounts are recoverable through Escrow Mechanism subject to final adjustment after audit reports are available.

24. As regards Issue No.7, we do not consider it necessary to give any fresh finding as penal interest and D.P.S. shall be payable in accordance with Regulation and the Tariff order as applicable. Penal interest and DPS on the operative tariff shall be payable even if they may have to be modified on revision of the tariff on valid ground.
25. As regards Issue No.8, we decide that the petitioner is entitled to expeditiously recover its dues calculated on the basis of the order of OERC with regard to redetermination of tariff for 1999-2000 along with DPS/penal interest and further liable for fines and penalties if payments are not made in pursuance of orders of OERC.
26. As regards Issue No.9, we decide that the respondent is required pay the Bulk Supply Dues, as calculated on the basis of OERC tariff order dated 30.12.99 subject to revision if any on redetermination in pursuance of Hon'ble High Court's order.
27. Before concluding the proceeding, we have also to observe as follows:
 - (i) GRIDCO and SOUTHCO must strictly follow the terms and conditions laid down in the agreements viz., Bulk Supply Agreement, Loan Agreement, Escrow Agreement and Supplementary Escrow Agreement, they have entered into, for smooth functioning and settlement of commercial transactions.
 - (ii) GRIDCO and SOUTHCO should settle their billing disputes on the basis of the above order by 31st August and submit compliance by 10th September, 2001. If necessary they can take the assistance of Director (Tariff), OERC.

- (iii) SOUTHCO should take steps for payment of its arrear dues, calculated as per this order to GRIDCO by 31st August 2001 and report compliance by 10th September, 2001.
 - (iv) SOUTHCO shall open Letter of Credit by 31st August, 2001 as per the terms of Bulk Supply Agreement, Loan Agreement and Escrow Agreement and report compliance by 10th September, 2001.
 - (v) Failure to comply with aforesaid decisions of the Commission will invite penalties & fines.
28. To conclude, we adjudicate substantially in favour of GRIDCO as indicated in above paragraphs.

(H.S. SAHU)
MEMBER

(D.K. ROY)
CHAIRMAN