

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

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

- **Respondents**

Supply Tariff specifying all the amounts payable by NESCO 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 NESCO on the date falling 30 days after the date of such Monthly invoice whereupon NESCO 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 & NESCO".

4. The Bulk Supply Agreement further provides that NESCO 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 NESCO to GRIDCO.
5. GRIDCO and NESCO have also signed an Escrow Agreement dated 4.8.2000 in regard to Securitisation of payment of the amounts due from NESCO. In terms of the said Escrow Agreement, M/s Union Bank of India (UBI, for short) has been appointed by GRIDCO and NESCO to be the Escrow Agent and further,

"2. In the event of default on the part of NESCO 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.

3. 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, NESCO hereby 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 NESCO shall be deposited or caused to be deposited by NESCO in the account maintained by the Escrow Agent".

6. GRIDCO & NESCO have also signed a Loan Agreement dated 28th October, 1999 for payment of an amount of Rs.10484 lakhs 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. NESCO has defaulted in payment of Bulk Supply Bills and Loan Instalment to GRIDCO to the tune of Rs.262.31 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 NESCO to forthwith pay all outstanding amounts due to GRIDCO along with DPS applicable.
 - (ii) Direct NESCO to rectify the breach in the fulfillment of agreements entered into with GRIDCO.
 - (iii) Direct NESCO 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 NESCO from utilising any part of its receivables contrary to agreement signed with GRIDCO.
9. In its reply, NESCO has submitted that for supply of power to NESCO, GRIDCO the Bulk Supplier of Power, has been presenting the energy bills to NESCO in two separate tariffs, i.e. for consumption of power by three EOUs, situated in the

licensed area for power supplied during off-peak hours at the NTPC tariff rate plus wheeling charges and for the balance power supplied at the Bulk Supply Tariff rate . The Commission have not approved such two separate tariffs for Bulk Supply of power to NESCO.

10. Further GRIDCO has been charging the entire maximum demand recorded at each of the supply point for the EOUs, whereas even according to the supplementary agreement executed by the GRIDCO with EOUs, maximum demand would be recovered only in proportion of the peak drawl to the total energy drawl by the EOUs in any month.
11. It is revealed from the joint energy meter reading of Eastern Regional Electricity Board, Kolkata that no such unallocated power has been drawn by GRIDCO for the EOUs from September'99 onwards till date and even though, less power has been drawn before September'99, billing has been made by GRIDCO for the full quantum of off-peak drawl by the EOUs at NTPC rates.
12. The Commission has approved the Bulk Supply Tariff Rate of NESCO at 80.70 paisa/unit towards the energy charge and Rs.200/- per KVA towards demand charge effective from 01.02.2000. But while presenting the energy bills in respect of the consumption, excluding the off-peak hours consumption of EOUs, GRIDCO has been charging, NESCO at the rate of Rs.85.50 paisa/unit instead of 80.70 paisa/unit due to which excess billing has been done. When objected by NESCO, GRIDCO has replied that it is billing at 85.50 paisa instead of 80.70 paisa per unit, in view of the stay order passed by the Hon'ble High Court in Misc. Appeal No.51/2000 (WESCO V. OERC and others). However Court's order must be understood in the context of the relief sought for by WESCO and its scope cannot be expanded to other DISTCOS. At no point of time, NESCO has challenged the Bulk Supply Order passed by the Hon'ble Commission.
13. As per the terms of the agreement GRIDCO shall give requisite details of calculation of charges in respect of relevant month in each monthly invoice. In the

statement attached to the energy bill, GRIDCO is only furnishing the units alleged to have been consumed by the company from various points of supply. However GRIDCO is not furnishing the opening and closing meter reading which raises a doubt with regard to the actual consumption by NESCO.

14. As revealed from the above para, correct energy bills have not been submitted by GRIDCO from time to time, and due to non payment of the said incorrect and arbitrary energy bill, delayed payment surcharge has been imposed by GRIDCO. Since the energy bills have not been correctly revised, the company is not liable to pay the DPS and the energy bills are required to be revised from 04/1999 onwards.
15. As per terms of the Escrow Agreement entered into between GRIDCO and NESCO on 04.08.2001, GRIDCO shall be entitled to recover the amount outstanding against NESCO from the Escrow Account, in the event of default on the part of NESCO in payment of any amount due to GRIDCO. The payment of any amount due, refers to payment of lawful and correct demand raised by GRIDCO but not the arbitrary demands.
16. As per the terms of the Transfer Scheme Notification 26.11.98, GRIDCO shall be responsible to finalise the accounts of NESCO for the year ending 31.03.1999 and to get the same duly audited. Till date the accounts have not been finalised and audit has not been completed. Since the accounts have not been finalised, the amount payable under the loan agreement dated 28.10.1999 is not final and repayment schedule enclosed to said agreement can not be taken into consideration.
17. In a meeting held on 24.10.2000 between WESCO, NESCO, SOUTHCO and GRIDCO, it was decided that the three DISTCOs shall issue bonds to GRIDCO to the tune of Rs.350 crores, of which the share of NESCO comes to Rs.147 cores, which includes shortfall in payment of BST, DPS, upto August, 2000. Steps have already been taken as for the above minutes for issuance of power bonds for

settlement of the outstanding due from 01.10.2000. In view of this, upon issuance of power bonds, no outstanding is due to GRIDCO by the Company.

18. NESCO has further contended that, as per the Escrow Agreement dated 04.08.2000, from the time default occurs, on the part of NESCO in payments of its dues to GRIDCO, all receivables to the extent of default amount shall be deposited or caused to be deposited by NESCO, in the account maintained by the Escrow Agent. In the present case, since the energy bills have not been correctly raised, and since there is no default in payment of lawful dues of GRIDCO as provided under Bulk Supply Agreement, the flow of all receivables to the Escrow Account is not called for. Apart from that the proposal for opening L.C. is under active consideration of the Escrow Agent.
19. After hearing the parties, we have decided to act as arbitrator to adjudicate the dispute between GRIDCO & NESCO u/s 37(1) of the OER Act, 1995. We had felt that the crux of the problem lies with meter reading and billing and accordingly expert advice on meter reading and billing was called for.
20. 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 NESCO to follow them scrupulously.

21. Since many more issues cropped up during hearing, we have 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 (NESCO and U.B.I.) have committed breach of Loan Agreement, Bulk Supply Agreement and Escrow Agreement?

Issue No.2: Whether the respondent No.1(NESCO) 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 Respondent No.,1 should be billed by GRIDCO at NTPC rate for off-peak hours as approved by the Commission or as per the prevalent Bulk Supply tariff rate?

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?

22. With 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 NESCO 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, Balasore Branch, Balasore. In view of the confirmation received from NESCO, 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, Balasore Branch,

Balasore 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 NESCO. In view of the categorical confirmation by GRIDCO we conclude that the Escrow Mechanism has been put in place by NESCO as per the Bulk Supply Agreement, Escrow Agreement and Loan Agreement.

- 22.1 As per para 6 of the Bulk Supply Agreement entered into between GRIDCO and NESCO, NESCO 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, NESCO and UBI are clearly in breach of Bulk Supply Agreement, Loan Agreement and Escrow Agreement.
23. As regards issue No.3 about billing of EOUs during off-peak hours, the issue is in appeal by NESCO to the Hon'ble High Court, in Misc. Appeal No.285/2000 (M.D., NESCO V. OERC & GRIDCO) which is subjudice in the High Court. Once this case is disposed off, the exact amount outstanding in respect of EOU billing can be ascertained. We refrain from giving our finding whether billing has been made correctly.
24. As regards Issue No.4 we have to go by the decision's 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 OER order dt.21.11.98 subject to modification if any on redetermination in pursuance of Hon'ble High Court's order.
25. 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,

“NESCO 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, NESCO 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 NESCO in favour of GRIDCO in terms of Bulk Supply Agreement”.

- 25.1 From the above provisions, it is clear that, opening of L.C. by NESCO is not optional. NESCO 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 NESCO.
26. 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.
27. 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.
28. 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.

29. As regards Issue No.9, we decide that the respondent is required pay the Bulk Supply Dues, as calculated by on the basis of the order of OERC with regard to redetermination of tariff for 1999-2000.
30. Before concluding the proceeding, we have also to observe as follows:
- (i) GRIDCO and NESCO 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 NESCO should settle their billing disputes, other than the dispute on EOU bills, 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) NESCO 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) NESCO 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.

(H.S. SAHU)
MEMBER

(D.K. ROY)
CHAIRMAN