

**Case No.39/2001**

1. This proceeding arose out of direction issued by Hon'ble High Court, to the Orissa Electricity Regulatory Commission to take a fresh decision on the matters covered by Commission's various orders relating to the Escrow Contract amongst CESCO, GRIDCO and the Union Bank of India (for short, UBI) and the contract between GRIDCO and OPGC Ltd., and pass a fresh order thereon after hearing all the parties. Accordingly, notices were issued OPGC, GRIDCO, C.E.O., CESCO and UBI to present their cases on 11.01.2002. We have heard at length, OPGC, GRIDCO and C.E.O., CESCO. However, UBI was absent.
2. The main contention of OPGC is that, there has been a tripartite agreement between GRIDCO, OPGC and UBI, called Escrow Agreement dt.30.11.98 which, inter alia, provided that in the event of GRIDCO's failure to make payments either through L.C. or otherwise the amounts deposited in the GRIDCO Escrow Account shall be automatically transferred by Escrow Bank, without any further act did or thing to be done by GRIDCO or OPGC on a daily basis to OPGC. There is also another Escrow Agreement dt.11<sup>th</sup> July 2000 between GRIDCO, CESCO and UBI which provided that the first charge over the receivables of CESCO in favour of GRIDCO in terms of the Bulk Supply Agreement and the Loan Agreement shall be effective in favour of GRIDCO and GRIDCO shall be entitled to recover all the amounts due to it from the Escrow Account. Neither the Escrow Agent nor CESCO shall use the amount being in the Escrow Account for any purpose other than for making the payment of all the outstanding due from CESCO to GRIDCO.
3. There is a Bulk Supply Agreement between GRIDCO and CESCO dt.3.9.1999, which provides that GRIDCO's ability to supply Bulk electricity to CESCO is dependent upon and inter-related to GRIDCO securing sufficient electrical energy from generating companies and other relevant sources and in essence both are back to back

arrangements with all the consequences of one flowing to the other. In view of this, any change brought about in the payment mechanism under the CESCO Escrow Agreement would not only affect OPGC's right to receive payments into the GRIDCO Escrow Account but also affects OPGC's continued generation and supply of electrical energy to GRIDCO.

4. OPGC has argued that the Commission, while disposing of the case No.32 of 2001, relating to diversion of amount from CESCO Escrow Account, for salary and other incidental expenditures, have held that in view of the clear provisions of BST and the Escrow Agreement, diversion of funds by CESCO from receivables without depositing the same in Escrow Account, however, compelling circumstances may be is not justified. Therefore, the orders of the Commission permitting the Administrator (C.E.O., CESCO) to appropriate monies from the CESCO Escrow Account is clearly illegal and unsustainable.
5. OPGC has further held that orders of the Commission, relaxing the Escrow Arrangement and allowing C.E.O., CESCO to diver funds for salary and other preventive maintenance expenditures would prejudice the interest of OPGC in as much as they have the effect of depriving OPGC of its contractual rights to receive payments for electricity generated and supplied by it my bringing about a change in the payment mechanism/arrangement contemplated by the various agreements involving OPGC, GRIDCO, CESCO and UBI. By permitting the C.E.O., CESCO to appropriate moneys from the CESCO-Escrow Account till March, 2002, the Commission has interfered with the payment mechanism/arrangement envisaged in the Agreements. This in turn had the effect of OPGC being denied what is contractually due to it for the electricity generated and supplied by it to GRIDCO.
6. OPGC has contended that, the Bulk Supply Agreement specifically provides that the CESCO Escrow Agreement would continue till such

time CESCO and GRIDCO with the concurrence of OPGC and the UBI mutually agree to amend the CESCO Escrow Agreement. The aforesaid agreement authorize UBI to make payments from CESCO-Escrow Account to the GRIDCO Escrow Account and prohibit UBI /CESCO from making use of the amounts for any purpose other than the purpose for which such account was opened. Therefore, any change in the payment mechanism contemplated in the agreements cannot be brought about except with the concurrence of OPGC and UBI. To do so would seriously prejudice OPGC's right to receive payments under its contracts.

7. The Advocate for GRIDCO has argued that, the Commission has acted as an Arbitrator u/s 37(1) of the OER Act, 1995 to settle dispute between the two Licensees, namely GRIDCO and CESCO, regarding payment of arrear energy dues of GRIDCO by CESCO and in that context, held in case No.32/2001, that diversion of funds by CESCO from receivables without depositing the same in Escrow Account, for meeting the salary of staff and other incidental expenditures are irregular. However, subsequently, CESCO, the retail supply licensee, asked GRIDCO, the bulk supply licensee to stop supply of power. This would have led to the stoppage of supply of power to consumers in the license area. This is also a fundamental breach in CESCO's License Condition in as much as the basic purpose of the licensee is to maintain continuity in supply of electricity to consumers in the license area. So in order to ensure maintenance of continued supply of electricity in the Central Zone, the Commission has invoked the provisions of Sec.30(3), and vested the management and control of CESCO along with its undertakings, assets and interests in C.E.O., CESCO. Thus the C.E.O., CESCO is more like a receiver appointed by the Civil Court who is usually authorized to deduct the maintenance expenses as the first charge. Therefore C.E.O., CESCO has been permitted to appropriate from the revenue of CESCO, amount necessary to meet the salaries, wages and O&M expenses. The Advocate for C.E.O., CESCO, also pleaded justifying Commission's

order for relaxation of Escrow Account allowing CESCO to meet expenditure relating to salary, wages and O&M expenses on similar grounds.

8. We have heard the arguments of OPGC, GRIDCO and C.E.O., CESCO. GRIDCO had filed an application before the Commission for securitisation of payments of its dues from CESCO, in pursuance of Sec. 37(1) of the OER Act, 1995, which empowers the Commission to arbitrate disputes between the licensees. In the aforesaid application, GRIDCO has prayed, inter alia, that the Commission should direct CESCO to pay forthwith all the outstanding amounts due to the applicant along with DPS. While disposing of the above application of GRIDCO for securitisation of its dues from CESCO, the Commission has ordered in Case No.31/2000 that, CESCO and GRIDCO must strictly follow the terms and conditions laid down in the agreements they have entered into for smooth functioning and settlement of commercial transactions. However, CESCO violated the above orders of the Commission and did not deposit all the collecting of receivables made by way of sale of electricity to its consumers in the Escrow Account. As a result, GRIDCO made an application before the Commission for appropriate direction by the Commission to CESCO to comply with Commission order in Case No.31/2000, i.e. to follow the terms and conditions of the agreements they have entered into for smooth functioning of commercial transactions. In the aforesaid order, the Commission, while dismissing the plea of M.D., CESCO, that the diversion of fund became necessary in order to make payment towards salaries, wages and statutory dues and for maintenance of Distribution network had ordered that diversion of funds, utilising part of the receivables for other purpose is irregular.
9. However, subsequent to the passing of the above order, CESCO asked the Bulk Supply Licensee to stop further supply of power and any action for continuing supply of power would be at the risk of GRIDCO. This was a fundamental breach of CESCO's License

Condition in as much as the basic purpose of license is to maintain continuity of supply of electricity to consumers in the license area. This would have led to stoppage of supply of power to consumers in the licence area. The act of CESCO would have plunged a huge, densely populated area into total darkness.

10. In order to ensure maintenance of continued supply of electricity in the Central Zone, and to protect the interests of the consumer as well as public, the Commission invoked the provisions of Sec.30(3) of the OER Act, 1995 and vested the management and control of the undertaking of CESCO with all its assets, interests and rights with an officer of the State Govt., pending further enquiry into the matter. C.E.O., CESCO was also permitted to appropriate from the revenue of CESCO, the amount absolutely necessary to meet the salaries, wages and statutory dues of the employees and O&M expenses. Unless the C.E.O., CESCO was permitted to meet the administrative expenses, as stated above, it would not have been possible on his part to maintain the undertaking for power supply to central zone. The C.E.O., CESCO is like a receiver appointed by the Civil Court who was authorized to deduct maintenance expenses as first charge overriding the interests of the secured creditor.
11. It has been argued by the learned counsel for OPGC that, the Commission earlier in Case No.32/2001 has disallowed diversion of funds by CESCO from the receivables for payment of salary, wages etc. but now is permitting C.E.O., CESCO for diversion of funds for the above purpose. In this regard, it may be stated that in Case No.32/2001, the Commission was acting as arbitrator to settle disputes between the two licensees, namely, GRIDCO and CESCO and perforce had to follow strictly the terms of contractual arrangements between them. However, due to the lapses of CESCO, as narrated earlier, the duty of ensuring maintaining of continued power supply in the Central Zone devolved upon the Commission and in exercise of the power u/s 30(3) of the OER Act, 1995, the Commission vested the

management and control of CESCO with an appropriate officer as an interim measure. In order to enable the aforesaid officer to discharge his function effectively the Commission had to allow him to utilise a part of the receivables, for meeting the essential administrative expenses.

12. It is our humble view that, while discharging statutory obligations, in the interest of public and consumers at large, contractual arrangements between the utilities may have to give in Reliance is placed in the Supreme Court decision in case of V.S. Rice and Oil Mills Vrs. State of Andhra Pradesh, where the Hon'ble Supreme Court held as under (Para- 20).

Para 20 " . . . . . The word "regulate" is wide enough to confer power on the respondent to regulate either by increasing the rate or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices which S.3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors, which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. . . . . "

13. It is worth mentioning that Sec. 21(4)(b) of the OER Act, requires that, any arrangement for purchase of electricity by a supply or transmission licence from a Generating Company would require the consent of the Commission. Since generating companies are not within the purview of

regulatory control of the Commission, the rate at which transmission licensee will purchase power from the generating companies and the quantum of purchase are subject to scrutiny by the Commission. Admittedly the Power Purchase Agreement executed between OPGC and GRIDCO, Escrow Agreement between OPGC, GRIDCO & UBI and the Tripartite Agreement between GRIDCO, OPGC and State Govt. have not been approved by Govt. Therefore, claiming any benefit, under an agreement, namely Escrow Agreement between OPGC and GRIDCO, not approved by the Commission, which is void u/s 21(5) of the OER Act, 1995 is irregular.

The learned Advocate for OPGC has contended that Commission has taken note of such agreements, while arbitrating the disputes between GRIDCO and OPGC. However, taking note of such agreements does not ipsofacto, mean approval of such agreements by the Commission.

14. It may also be noted that, flow of funds to OPGC, after taking over management of CESCO by C.E.O., CESCO has been more and steady, compared to the period when AES was in charge of the management of CESCO. Therefore, OPGC should have little grievance in transfer of the management of CESCO by C.E.O., CESCO and diverting funds from Escrow Account purely for Administrative expenses than when AES was in charge of management of CESCO.
14. In view of the reasons indicated above, the Commission's orders dt.3.11.2001, 7.9.2001 and .10.2001 relaxing Escrow arrangement between CESCO, GRIDCO & UBI for diversion of funds for meeting salary, payment of statutory dues, O&M expenses and other incidental expenditures are proper and justified in the larger interest of the supply of electricity to the consumer and the public.

**(B.C. JENA)**  
**MEMBER**

**(H.S. SAHU)**  
**MEMBER**

**(D.C. SAHOO)**  
**CHAIRMAN**