

**ODISHA ELECTRICITY REGULATORY COMMISSION  
BIDYUT NIYAMAK BHAWAN  
PLOT NO. 4, CHUNOKOLI, SHAILASHREE VIHAR,  
BHUBANESWAR-751021  
\*\*\*\*\***

**Present: Shri U. N. Behera, Chairperson  
Shri S. K. Parhi, Member  
Shri G. Mohapatra, Member**

**Case No. 63/2019**

GRIDCO Ltd., Vrs. Reliance Infrastructure Ltd. & Others	.....	Petitioner
	.....	Respondents

**In the matter of:**      **Application under Section 86(1)(f) and Sub-Sections (2) & (3) of Section 158 of the Electricity Act, 2003 read with Section 10(2) and Section 37 of the OER Act, 1995 for arbitration and adjudication of the dispute for determination of the dues payable to the petitioner, on revocation of license of Reliance Infrastructure Ltd. managed DISCOMs, consequent upon the judgment dated 21.08.2017 of the Hon'ble APTEL in Appeal No.64 of 2015, confirmed by the Hon'ble Supreme Court in C.A. No. 18500 of 2017.**

**For Petitioner:**      Shri P. K. Mohanty, Sr. Advocate on behalf of GRIDCO Ltd.

**For Respondent:**      Shri Buddy Ranganathan, Advocate and Hasan Murtaza, Advocate on behalf of R-Infra Ltd., Shri Hemant Singh, Advocate on behalf of CMD, Reliance Infrastructure Ltd., Shri J. J. Bhatt, advocate on behalf of RIL Managed DISCOMs, Ms. Sonali Patnaik, ALO, DoE, GoO.

**ORDER**

**Date of Hearing: 27.07.2021**

**Date of Order: 27.10.2021**

The present petition has been filed by GRIDCO in view of the observation of Hon'ble APTEL in Appeal No. 64/2015 dated 21.08.2017 in the matter of revocation of licences of NESCO, WESCO and SOUTHCO which has been subsequently confirmed by Hon'ble Supreme Court in Civil Appeal No. 18500/2017 dated 24.11.2017. Hon'ble APTEL in their judgement in Appeal No. 64/2015 at para 56 had observed as follows:

*"It is for the State Commission to chart out future course of action after considering all the circumstances in proper perspective keeping public interest in mind. The Commission is expected to be just and must be guided by principles of equity and fair play."*

2. GRIDCO has submitted that the Commission had revoked the licenses of NESCO, WESCO and SOUTHCO in Case No. 55/2013 dated 04.03.2015 for the deficiency in various activities in violation of licence conditions, shareholder agreements, Electricity Act and Regulations there under. GRIDCO submits that these three companies were privatised through a bidding process. M/s. BSES had signed the Shareholder Agreement and the Share Acquisition Agreement on 31.03.1999 and took over the management of the said three companies w.e.f. 01.04.1999 after being successful bidder. The Bulk Supply Agreement was executed on 24.05.1999 between GRIDCO and the three DISCOMs effective from 01.04.1999. Hon'ble APTEL while confirming the order of the Commission in Case No. 55/2013 at para 47 in Appeal No. 64/2015 has observed that Reliance Infra Limited (RIL) had taken over 51% shares of the appellant DISCOMs at a sum of Rs.117 Crore. Having obtained controlling interest at Rs 117 crore it was expected to invest sufficient funds to improve performance of the DISCOMs. Instead of doing that RIL gradually diluted its shareholding from 51% to 0.002%. The shares were transferred to companies having no relevant experience in the power sector. This was in gross violation of disinvestment scheme, the provision of shareholder agreement, Section 17 of the Electricity Act and Section 21 of Orissa Electricity Reform Act. In view of the various orders of Hon'ble APTEL and Hon'ble Supreme Court now the dispute has been confined to the quantum of such loss recoverable as being not paid to the petitioner by RIL and DISCOMs. The shareholder agreement under clause 27.3 to 27.7 signed on 31.03.1999 provide to take recourse to the procedures envisaged under the Arbitration and Conciliation Act, 1996. Similarly, section 86 of the Electricity Act assigns the function of adjudication between the licensees with regard to determining the recoverable and receivable amount for the petitioner GRIDCO.
3. The petitioner GRIDCO prays that an amount of Rs.42,34,08,91,661/- stands recoverable from RIL and the RIL managed DISCOMs (NESCO, WESCO and SOUTHCO) out of which Rs.14,93,00,32,249/- relate to arrear BSP dues. Therefore these respondents may be directed to pay the above amount to the petitioner GRIDCO.
4. The respondent Reliance Infrastructure Limited (RIL) has stated that the petitioner has not made out a case with regard to existence of any alleged dispute between the petitioner and them. The present petition is not maintainable and the Commission has no jurisdiction to entertain, try and dispose of the same on the following grounds.

- The petitioner is not a licensee or a generating company. The RIL was never a licensee and/or amenable to the jurisdiction of the Commission.
  - Section 10 (2) and 37 of the OER Act are not applicable in the present case since neither the petitioner nor the present respondents are licensees.
5. The respondent RIL submits that the DISCOMs are separate legal entities. Therefore any amount if at all is recoverable due to them cannot be recovered from RIL. The shareholders cannot be sued for the actions of the legal entities i.e. incorporated separately. The petition suffers from misjoinder of parties. Any letter from the Commission for ascertaining recoverable dues from erstwhile DISCOMs cannot be a ground for filing of this petition. It is not understood how the present petition has been filed after two years from the judgment and order of APTEL. The petitioner has partially quoted para 56 of the judgment of Hon'ble APTEL. The petitioner has taken the help of a solitary sentence of that paragraph which says that the State Commission is to chart out future course of action. It is denied that there has been any mismanagement or negligence or illegal activity as alleged or at all. The petitioner was also a part of management of the DISCOMs having 49% shareholding therein and representation on their Board of Directors. The statement of alleged recoverable is barred by limitation. Reliance placed on section 158 of the Electricity Act is misconceived. The said section would come into operation only in the event of there being a dispute between licensees or between a licensee and a generating company which is not so in the present case. There is no question of this Commission being competent or empowered to intervene in this matter. In summary, this Commission has no jurisdiction to adjudicate in this case.
6. The respondent Reliance Managed DISCOMs (NESCO, WESCO & SOUTHCO) submit that a legal entity i.e. incorporated cannot be sued thorough its shareholders. The alleged claims are barred by limitation because this petition is filed on 28<sup>th</sup> October 2019 in respect of amounts alleged as on 4<sup>th</sup> March 2015. The tariff determined by the Commission was not sufficient to pay to GRIDCO after meeting the salary and other expenses. The Commission has failed repeatedly to implement the judgments of APTEL. The issue of distribution loss targets has been completely covered by judgment of the Hon'ble APTEL which requires distribution loss tariff to be reset for FY 2006-07 to 2013-14. The asset of DISCOM Utilities was being utilised by the three Utilities under the orders of the Commission without any compensation. The letter issued

by the Commission to ascertain the status of recoverable amount cannot be a ground for filing of this petition. The petitioner has filed this petition on the purported ground that RIL through its companies has violated the shareholder's agreement. Therefore the submission that present petition has been filed to recover the consequential loss to compensate the petitioner is misplaced. The petitioner through its various letters had informed the RIL managed DISCOMs that Rs.680.11 crore, Rs.742.36 crore and Rs.823.36 crore were outstanding respectively with NESCO, SOUTHCO and WESCO as on 31.03.2020. But in the present petition the petitioner is asking for settlement of outstanding dues of Rs.1443.75 crore, Rs.1001.04 crore and Rs.1789.28 crore respectively from NESCO, SOUTHCO and WESCO. This clearly establishes that the amount claimed is arbitrary and without any proof. The BSP dues outstanding as on 04.03.2015 has already been transferred to the account of the respective Utilities along with other creditors (current liabilities) as well as the amount receivable from consumers and all other receivables (current assets).

7. To a query of the Commission the respondent DISCOMs have stated that their registered office was shifted w.e.f. 01.04.2018 with full consent and approval of the Administrator-cum-CMD GRIDCO/OPTCL to a new address at Kalyani Market Complex, 1<sup>st</sup> floor, Unit-8, Bhubaneswar-751012 a property owned by OPTCL. The replies in this case have been filed by the respondent DISCOMs with the approval of the Board which has approved it in their meeting for all the three DISCOMs held on 30.09.2020.
8. In its rejoinder petitioner GRIDCO has stated that GRIDCO as state designated entity within the purview of Electricity Act, 2003 is the licensee for bulk supply of Electricity to others including distribution licensees. The Hon'ble Supreme Court, APTEL and Commission have overruled the objection of RIL to escape the responsibility to bear the liability. In the residuary power of revocation of licences, recovery of outstanding is one of the ingredients of the jurisdiction of the Commission. Section 158 of Electricity Act provides for arbitration by appropriate Commission in the same manner as that is provided under section 37 of the Reform Act, 1995. Both the provisions are in consonance with each other to the extent that the same shall be subject to the provisions of Arbitration and Conciliation Act, 1996. In order to exercise such power further power has been conferred on the Commission under section 10 of the Reform At, 1995 to adjudicate and enquire into the matter by undertaking such exercise as enumerated under the said provision. Such provision of section 10 of the Reform Act, 1995 is also in consonance with the

provisions of section 94 of the Electricity Act, 2003 where the power is given to the Commission for adjudication of the dispute like a Civil Court. Even otherwise once this Commission has taken cognisance of the fact, circumstances and crisis arising out of the matter then also in exercise of power under section 86 (2) of the Electricity Act it shall advise the State Government on all or any matters concerning generation, transmission, distribution etc. Thus, it is implied that GRIDCO, the state designated entity as such being the state government representative in respect of this matter has brought the matter and disputes to the notice of the Commission and has sought action from the Commission for recovery of dues from respondent RIL. On the basis of above submission, the petitioner has stoutly denied the contention raised by the respondent No.1 that the Commission has no jurisdiction to adjudicate the dispute and to give such relief as prayed for in the petition. It is the settled position of law that irrespective of the provisions under which the petition has been filed the court has the power to deal with the matter as per proper provision of law. Since the respondent No.1 had taken over the management control of DISCOMs, it is responsible for payment of outstanding dues of GRIDCO as a consequence to revocation of licence. It is incorrect statement of the Respondent No.1 that the cause of action relates to a date i.e. 04.03.2015 when the liability was not settled. The dispute on liability would not have been adjudicated at that point of time. Such dues as ascertained from audited balance sheet is now being raised and is payable to the petitioner by respondent No.1. Even accepting that dues sought to be recovered is money dues it is squarely coming within the period of limitation of three years. The contention of respondent No.1 as being separate legal entity has been rejected by Hon'ble APTEL and has been confirmed by the Hon'ble Apex Court.

9. We have heard all the rival submissions of the parties. The developments i.e. the fate of this proceeding as taken to different fora is known to one and all and it is felt proper to reproduce the orders those have been passed, culminating in the present stage.

10. **Order of the OERC in Case No 55 /2013 dt 4.3.2015- in revoking the license.**

*In view of the above, position of facts and law explained, the following Licences granted to the Licensees: NESCO - Licence No. 3/1999, dated 31.03.1999; WESCO - Licence No. 4/1999, dated 31.03.1999; SOUTHCO - Licence No. 2/1999, dated 31.03.1999; and NESCO, WESCO & SOUTHCO – in Case No. 21/2006 dated 27.10.2006 are, hereby, revoked under Section 19 of the Electricity Act, 2003 with immediate effect, i.e., from 4th March, 2015.*

*Necessary arrangements after such revocation as contemplated under Section 20 of the Act are being specified through a separate order. Let this order be communicated to NESCO, WESCO,*

*SOUTHCO, GRIDCO and Government of Odisha and be put up in the Commission's website. The case is accordingly disposed of.*

11. **Order of the OERC in Case No 55 /2013 in the matter of APPOINTMENT OF ADMINISTRATOR dt 4.03.2015**

*The Commission in their Order dated 04.03.2015 in Case No. 55/2013 have revoked the Licences of NESCO, WESCO and SOUTHCO (Distribution Companies) under Section 19 of the Electricity Act, 2003.*

*Consequent upon such revocation and considering the situation at hand due to such revocation of Licences of NESCO, WESCO & SOUTHCO and also keeping in view, the salient objectives and purpose of the Electricity Act, 2003 the Commission now in exercising powers conferred on it under Section 20 (1)(d) of the Electricity Act, 2003 vests the management and control of NESCO, WESCO and SOUTHCO utilities along with their assets, interests and rights with Chairman-Cum Managing Director, GRIDCO (CMD, GRIDCO) in order to ensure the maintenance of continued supply of electricity in the Northern, Western and Southern Zone (area of supply of NESCO, WESCO and SOUTHCO) in the interest of consumers and the public interest at large. This is an interim arrangement under Section 20 (1)(d) of the Electricity Act, 2003.*

*The Commission directs that the management and control of the utilities of NESCO, WESCO and SOUTHCO with all the assets, interests and rights shall vest with Chairman-Cum-Managing Director, GRIDCO with immediate effect and he shall manage the electricity supply activities in the revoked licensed area of NESCO, WESCO and SOUTHCO respectively till further orders of the Commission.*

*CMD, GRIDCO shall function under the supervision and control of the Principal Secretary, Department of Energy, and Government of Odisha as far as the administration of the Distribution Utilities is concerned.*

*The Commission may also give such further directions from time to time if it considers necessary for the smooth conduct of electricity supply business in the revoked licensed area as stated above. CMD, GRIDCO shall be entitled to constitute such committees composed of such persons, as he considers appropriate, including but not limited to those who are currently Directors of utilities, to be of assistance or guidance to him in the discharge of his functions.*

*In particular, it is further directed and clarified that*

*(1) CMD, GRIDCO shall be designated as "Administrator of NESCO, WESCO and SOUTHCO utilities" under the supervisory control of Principal Secretary, Department of Energy, Government of Odisha as far as Administration of NESCO, WESCO and SOUTHCO utilities are concerned.*

*(2) CMD, GRIDCO will have all the powers for management of NESCO, WESCO and SOUTHCO utilities and business and as such all the functions including financial functions shall be taken over by him.*

*(3) All existing employees and executive staff attached to the utilities of NESCO, WESCO and SOUTHCO shall function under the direction and administrative control of*

*Administrator and shall be accountable to him. Administrator as deemed proper may delegate certain functions to officers of the utilities.*

*(4) Administrator of NESCO, WESCO and SOUTHCO utilities shall submit such periodic administrative report to the Commission, as the Commission direct and the report shall include –*

- i. Measures taken for maintaining continued supply of electricity in an efficient and safe manner to consumers in licensed area.*
- ii. Maintenance of bulk purchase of power according to requirements.*
- iii. Steps taken for regular payment of salaries to employees, so as to avoid breakdown of services relating to power supply to consumers.*
- iv. Measures taken for efficient collection of revenue.*
- v. Measures taken for maintenance of infrastructure of power supply to consumers in the distribution utility area.*
- vi. Immediate commencement of Consumer Indexing and Energy Audit.*
- vii. Immediate steps both technical and administrative to reduce AT&C loss in the utility areas.*

*(5) The Central Service Office of NESCO, WESCO and SOUTHCO operating at Bhubaneswar shall be disbanded forthwith and the utilities as mentioned above shall not remit any fund to the Central Service Office located at Bhubaneswar.*

*(6) The utilities shall shift their registered office to their respective headquarters.*

*(7) The MD/CEO of the DISCOMs shall cease to be the employees of utilities/licensees and all of their functions with regard to licensed activities shall be dispensed with on the day the administrator takes over the utilities. The Administrator shall assume all the functions of MD/CEO.*

*(8) Any person who is not a regular employee of DISCOMs/utilities and has come from other organization on deputation or secondment shall be repatriated. Their services shall immediately be dispensed with and the administration shall ensure that no payment is made to them by the utilities after this order.*

*(9) All the data bases relating to licensed functions including consumer details, billing, collection, network and asset details, and financial transaction shall be taken over by the Administrator both from the CSO Office at Bhubaneswar and Corporate offices at respective Headquarters.*

12. **Orders by the Appellate Tribunal for Electricity at New Delhi in Appeal Case No 64 of 2015 & IA 92, 121 and 131 of 2015 dt 21.08.2017, as against the order of OERC Case No 55 /2013 dt 4.03.2015**

*Paragraph.47*

*Admittedly, RIL took over 51% shares in the Respondents. Having obtained controlling interest at a sum of Rs.117 crores, it was expected to invest sufficient funds to improve*

*performance of the Respondents. Instead of doing that, RIL gradually diluted shareholding from 51% to 0.002%. The shares were transferred to companies having no relevant experience in the power sector. This was in gross violation of disinvestment scheme, the provisions of the Shareholders Agreement and Section 17 of the Electricity Act and Section 21 of the Orissa Electricity Reforms Act. Even if the CLB, as stated by the Respondents and RIL, has approved the transfer of shares, from the perspective of the electricity sector, the State Commission found the same to be not in public interest. The State Commission cannot be faulted for it. Reliance is placed by the Respondents and RIL on the judgment of this Tribunal dated 13/12/2016 in Appeal No.75 of 2005 wherein the context of the Shareholders Agreement, this Tribunal has expressed that RIL ("the Respondents therein") being not licensee to distribute power is not amenable to the jurisdiction of the State Commission and the State Commission cannot issue any directions to it. But, we would like to reproduce last paragraph of the said judgment .It reads asunder:*

*"41. Before parting with this appeal we would like to point out that the appellant as well as respondents have taken up the responsibility of serving the consumers and they shall take every effort to see that the privatization in the State of Orissa is not defeated on hyper-technicalities and every effort should be made to continue the distribution of power effectively to the satisfaction of everyone, while avoiding friction and mutual misunderstandings and suspicions. We do expect that the appellant REL and contesting respondents continue to strive for the common purpose of serving consumers and the discussions, now being held in this behalf may be utilized to settle the disputes in the interest of Reform in the State of Orissa."*

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*54. The idea behind all these provisions appears to be to ensure that the utility is operated in an efficient manner so as not to cause any inconvenience to the consumers and if the State Commission feels that it is in public interest to sell the utility, effect its sale and after deducting the costs and expenses make over the remaining purchase money to the licensee. This scheme is based on equitable considerations. It is intended to enable the State Commission to adjust equities. In a given case the licensee may get a part of the purchase price. In another case if its financial condition is extremely stressed and its net-worth is negative and it is heavily indebted it may not get anything.*

*55. In our opinion this scheme does not rule out a sale by the Administrator appointed under Section 20(1)(d). Under Section 20(1)(e) the Administrator appointed under Clause (d) has to exercise such powers and discharge such functions as the Appropriate Commission may direct. Therefore, if the Appropriate Commission is so minded it can in public interest direct the Administrator to sell the utility. There is nothing in the relevant provisions which prevents the Administrator from selling the utility if the State Commission so directs. After all the Administrator is appointed to ensure that the utility is operated in efficient manner. The Administrator has to submit periodic reports to the State Commission. He is an appointee of the State Commission and the State Commission acts through him in public interest. If public interest requires, sale can be effected*



*through the Administrator. Pertinently, Section 20(1)(c) says that all the rights, duties, obligations and liabilities of the licensee on and from the date of revocation of the licence shall absolutely cease. As noted above Mr. Ranganadhan learned counsel appearing for the Respondents submitted that in view of this provision after revocation the licensee cannot sell his property. But in our opinion that does not create any impediment in sale. On the directions given under Section 20(1)(e), the Administrator can always sell the utility and adjust the equities. Pertinently by the second impugned order dated 04/03/2015 while appointing CMD of GRIDCO as the Administrator under Section 20(1)(d) of the Electricity Act, the State Commission has vested the management and control of the Respondents along with their assets, interests and rights in the Administrator. When rights are vested in the Administrator, the Administrator can sell the utility if a direction to that effect is given by the State Commission under Section 20(1)(e). But the sale is subject to the sanction of the State Commission. The licensees have no vested right to insist that the utilities be sold in a particular manner. In our opinion, in light of judgments of the Supreme Court, which we have quoted hereinabove, such a purposive construction of Sections 19 to 25 of the Electricity Act will help in achieving the object and purport of the Electricity Act.*

*56. Since a statement is made before us that the stage of sale has yet to come, the State Commission will have to take necessary steps as per the provisions of the Electricity Act in that direction. It is submitted on behalf of Respondent No.2 that it would have been highly inequitable to sell the utilities when the strategic investor i.e. Respondent No.5 - RIL, had merely invested Rs.117 crores to buy controlling interest in the Respondents and during their running crores of rupees have been lost, and outstanding dues of GRIDCO are worth approximately Rs.2600 crores. We do not want to comment on this aspect. But we want to make it clear that the provisions of the Electricity Act in respect of sale will have to be complied with. Whether the Respondents are entitled to any part of the purchase money if the sale is effected, is for the State Commission to decide after accounting is done when it sells the utilities. It is for the State Commission to chart out future course of action after considering all the circumstances in Judgment in proper perspective, keeping public interest in mind. The State Commission is expected to be just and must be guided by principles of equity and fair play.*

*57. In the view that we have taken, both the impugned orders are confirmed. The appeal is accordingly dismissed. Needless to say that all connected IAs shall also stand disposed of.*

13. **The following Order by the Apex Court on 24.11.2017 was passed in Civil Appeal no.18500 of 2017 (present respondent being aggrieved by the Orders in Appeal Case No 64 of 2015 & IA 92,121 and 131 of 2015 dt 21.08.2017, by the Appellate Tribunal.);**

*“We do not find any reason to interfere with the impugned order dtd.21.08.2017 passed by the Appellate Tribunal for electricity, New Delhi.....Appeal is dismissed.*

14. The petitioner GRIDCO has filed this application seeking direction for payment as per annexure-6 of the petition, (which was due as on 4.03.2015) running as under-

(Amount in Rs.)

Sl No	Particular	WESCO	NESCO	SOUTHCO	Total
1	<b>Cost of power</b>				
a	BSP dues	6453247408	5648432897	2738351944	14930032249
b	SLDC UI/DCM dues	2769423453	1256293266	643344888	4669061607
c	Dues securitized	2266895740	2076746947	2279561085	6623203772
d	Bond dues	-	489131360	1300000000	1789131360
	Sub-total ( a+b+c+d)	11579566601	9470604470	6961257917	28011428988
2	Interest on Bond	-	-	164500000	164500000
3	Transfer Scheme receivable	121008567	67397904	299082815	487489286
4	Other receivable	881155	2939548	814995	4635698
5	Salary of Nodal Vigilance Officer	1354	84903	1354	87611
6	Receivable towards industrial Corporation	-	35000	-	35000
7	Receivable towards CAPEX	972227387	984832273	719335029	2676394689
8	DSP on outstanding BSP dues	4631959844	3039693128	1545279426	9216932398
9	DSP Securitized	587187992	872000000	320200000	1779387992
	<b>Total Receivable</b>	<b>17892832900</b>	<b>14437587225</b>	<b>10010471536</b>	<b>42340891661</b>

15. Vide Order dt 04.03.2015 in Case No 55/2013, OERC revoked the license granted to NESCO (Licence No 3/1999 dt 31.03.1999), WESCO (Licence No4/1999 dt 31.03.1999) and SOUTHCO ( licence No 2/1999 dt 31.03.1999), with effect from 4.3.2015, under Section 19 of Electricity Act, 2003. Order under Section 20 was passed on self same date i.e on 4.03.2015, appointing the CMD, GRIDCO as Administrator. It may be stated here that 51% share of GRIDCO was transferred to BSES, with the approval of State Govt. of Odisha. Reliance Infra (Respondent No 1) is the successor of the BSES. In violation of Sec 17(3) of Electricity Act 2003 and that of Sec 21(2) of the Electricity Reforms Act, without taking prior permission of the OERC and also without incorporating any clause in the share holder Agreement and in the Article of Association (AOA) of the DISCOMs, it transferred its shares in favour of (1) Power Surfer Interactive (India)Limited, (2)BSES, Kerla Power Ltd, (3) BSES Andhra Power, (4) BSES Infrastructure Finance Ltd, on 31.3.2002 and in favour of (1) BSES Telecom Ltd, (2) BSES Management Service Pvt. Ltd and (3) BSES Holdings Private Ltd. on 31.3. 2003. The object of privatization was to infuse capital, better technology and trained manpower so as to reduce technical and commercial loss.

16. GRIDCO carries on the business of transmission and bulk supply of electricity and other related activities under an exclusive license issued by the commission, i.e. Odisha Electricity Regulatory Commission. Consequent upon enactment of Electricity Act, 2003, the transmission related activities of the Company were transferred and vested with Odisha Power Transmission Corporation Limited, a wholly owned undertaking of the State Government through Odisha Electricity Reforms (Transfer of Transmission and Related Activities) Scheme, 2005 with effect from 09.06.2005. After separation, GRIDCO is presently engaged in business of bulk purchase and bulk sale of power to the four Distribution Companies inside the State and trading of surplus power through traders to promote exchange of power with neighboring States in the country.
17. The Appellate forum while confirming the order of revocation of licenses asked the OERC to chart out future course of action after considering all the circumstances in proper prospective keeping public interest in mind. The Commission is also expected to be just and be guided by principles of equity and fair play.
18. The relevant portion of the order is quoted below;
- “It is for the State Commission to chart out future course of action after considering all the circumstances in proper perspective keeping public interest in mind. The Commission is expected to be just and must be guided by principles of equity and fair play”*
19. The present respondent being aggrieved by the aforesaid order in Appeal No.64/2015, preferred Civil Appeal no.18500 of 2017 against GRIDCO in the Hon’ble Supreme Court of India. The Apex Court Vide order dtd.24.11.2017, passed the following order;

*“We do not find any reason to interfere with the impugned order dtd.21.08.2017 passed by the Appellate Tribunal for electricity, New Delhi.....Appeal is dismissed.”*

**Given the background of the cases advanced by the parties, this commission formulates the following Points/Issues to adjudicate the claims.**

- I. Is the proceeding maintainable?**
- II. Whether the State Commission lacks Jurisdiction to decide the claim of the petitioner?**
- III. Is the claim advanced by the petitioner barred by time?**
- IV. Whether the petitioner has got locus-standi to seek the relief?**

**V. Whether the claim against the Respondent No 1 is maintainable?**

**VI. Whether the Petitioner is entitled to the amount claimed in annexure 6?**

### **FINDINGS**

20. We have taken all the Points/Issues together as they are interlinked, in order to avoid repetition.
21. In the process of Privatization 51% of equity was divested in the erstwhile BSES, the obligation of which was taken over by the RIL (Respondent No 1). Respondent-1 gradually diluted its share holding in the NESCO, WESCO & SOUTHCO from 51% to 0.02%. The shares were transferred to those companies which are having no experience in the power sector, in gross violation of the disinvestment scheme as evident from the bidding documents and the share Holders Agreement (SHA) as well as Sec 17 of the Electricity Act 2003 and Sec 21 of Orissa Electricity Reforms Act, 1995. On the top of that, the transfer of shares was made without the approval of the GRIDCO (Petitioner), which was a pre-requisite of the Article 6 of the Share Holder Agreement. Due to the aforesaid lapses and violations the petitioner sustained loss which has been held by us in the proceeding annulling/ revoking the license of the respondent companies U/S 19 of the Act and in appointing the CMD, GRIDCO as the Administrator, through our order dt 4.3.2015 in the case No 55/2013. The said order was appealed against in the APTEL through appeal No 64/2015. The appellate authority confirmed our orders. Aggrieved by the appellate Order, the respondents preferred Civil Appeal No 18500/2017 before the Hon'ble Supreme Court of India but the same was also dismissed and thereby our orders were confirmed. Consequently, revocation of license of the distribution companies reached its finality. The direction that OERC chart out future course of action after considering all the circumstances in proper perspective, bearing in mind that it involves public interest is the only consideration left to be examined.
22. The Respondent No. 1 has submitted that dispute involved in the present case does not fall within the ambit of Section 86 (1) (f) of the Act and consequently, this Commission does not have the jurisdiction to adjudicate the dispute. It has been submitted by the Respondent No. 1 that the petitioner has no legal rights to seek relief against the Respondent No. 1, as the dispute does not involve between the generating company and a licensee. Per contra, the Petitioner has submitted that the orders passed by the appellate forum and the Apex Court authorize the OERC to adjudicate the claim raised by the petitioner. Section 86 (1) (f) of the Act authorizes the

OERC to adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration. In other words, the jurisdiction of the Commission for adjudication of the dispute gets activated if the dispute involves either a generating company or a transmission licensee and the dispute pertains to regulation of tariff.

23. We refer one judgement of The Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog Vrs. CERC Case (AIR 2017 SC (SUPP) 43: 2017 (14) SCC 80) where Hon'ble Court has dealt with the issue of composite scheme of the Act as under:

*“It is clear that under Section 86, the State Commissions have only to deal with generation and sale of electricity within the State. When generation and sale takes place outside the State, as is the case here, the State Commission would have no jurisdiction under Section 86 and consequently Section 79(1)(b) has to be read as part of a scheme in which the moment generation and sale of electricity is inter-State and not intra-State, the Central Commission alone would have jurisdiction.”*

24. As per the above findings of the Hon'ble Supreme Court, the moment generation and sale of electricity takes place within the State, the State Commission is the appropriate Commission. Thus, it is now well settled that “power to regulate” is very wide and includes any issue incidental or consequential thereto so as to exercise the “power to regulate”. The term “regulate” is a broader term as compared to the term “determine” as used in Section 86 (1) (a). The Supreme Court, while discussing the term “regulation”, has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the DISCOMS. This aspect has been discussed in detail in the Judgments of the Hon'ble Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M. P. Electricity Board, D. K. Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. Vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513.”
25. Therefore, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply.

26. In the present case, the payment of charges in terms of the agreement entered into between the Petitioner and Respondent No.1 is nothing but part of terms and conditions of supply of electricity and any dispute arising in relation to the liability of such charges shall be dealt in terms of such agreement. Therefore, this State Commission has the jurisdiction to deal with such dispute under Section 86 (1) (f) of the Act by itself or by referring such dispute to the arbitration. The Respondent No. 1 has raised objection that the Petitioner is a trading licensee and that since the Petition involves a commercial dispute solely between a trading licensee and distribution licensees, it cannot be adjudicated by the Commission. The Respondent No. 1 has submitted that power of the Commission to adjudicate disputes is derived from provisions of Section 86 (1) (f) of the Act and that this power is in respect of Sections 86 (1) (a) to 86 (1) (d) of the Act only. It has submitted that disputes related to trading licensees is not covered under provisions of Section 86 (1) (f) of the Act and, therefore, this Commission does not have jurisdiction to adjudicate a dispute involving a trading licensee.
27. Per contra, the Petitioner has submitted that the dispute has arisen in course of supply of power from generating companies through the Petitioner in terms of back to back agreements entered into by the parties and that the issue whether the supply of power by a generating company to a trading licensee and supply of power by the trading licensee to the distribution companies shall be subject to the regulatory jurisdiction of the Regulatory Commission, is no longer res Integra, in view of the judgment of Appellate Tribunal in Appeal No.15/2011 (Lanco Power Ltd. v HERC). Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff.
28. The Appellate Tribunal, after considering the provisions of Sections 79, 86 and 66 of the Act, in its judgment dated 4.11.2011, has observed at Para 21 and at Para 61, as under:
- “So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*

*XXXXXX It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created."*

29. Where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation of the appropriate Commission. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amenable to the regulatory jurisdiction of OERC. Such an interpretation would defeat the rights of the consumers which are intended to be protected by the CERC or SERCs. In cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework.
30. Section 86 (1) (f) of the Act requires the State Commission to discharge the function of adjudicating upon the dispute between licensee and generating company and to refer any dispute for arbitration. Here, the distribution licensees are NESCO, WESCO and SOUTHCO. Hence the dispute between generating company and distribution licensees will cover all the players covered within this value chain. GRIDCO as state designated agency has been authorized to procure power from generating companies and supply it in bulk to the DISCOMs. Therefore, any dispute

between GRIDCO, the authorized agency for power procurement and the distribution licensee will have to be governed under Section 86 (1) (f) of the Act.

31. Thus, the contention of the Respondent No 1 that OERC cannot adjudicate the claim of the Petitioner is not acceptable. Besides, confirmation of the order of OERC by the Appellate forum and the Supreme Court of India, reaffirms our view in this regard.
32. We have considered the objection of limitation raised by the respondents. The Appeal no 64/2015 was disposed of by APTEL on 21.08.2017 and the Civil Appeal No. 18500 of 2017 was disposed of by Hon'ble Supreme Court on 24.11.2017. The cause of action was continuing all along having culminated on 24.11.2017. The present claim was filed vide this case No. 63/2019 on 28.10.2019, well within time and, therefore, is not barred by limitation.
33. In this backdrop the claim of the respondent questioning the authority of OERC, the right of GRIDCO to recover the claim and that the claim is barred by time are ruled out.

***Merits of the claim by the petitioner:***

34. Now we are discussing the merit of the claim *raised by the petitioner. In this context, we are mentioning the provision under section 20 of the Electricity Act 2003.*

*20. Sale of utilities of licensees-(1) Where the appropriate commission revokes under section 19 the licence of any licensee, the following provisions shall apply, namely-*

*XXXXXXXXXXXXXXXXXXXX*

*(c) all the rights, duties, obligations and liabilities of the licensee on and from the date of revocation of licence or on and from the date, if earlier, on which the utility of the licensee is sold to a purchaser, shall absolutely cease except for any liabilities which have accrued prior to that date.*

Hon'ble APTEL in Appeal no 64/2015 at para 56 has also observed as follows

*“But we want to make it clear that the provisions of the Electricity Act in respect of sale will have to be complied with. Whether the Appellants are entitled to any part of the purchase money if the sale is effected, is for the State Commission to decide after accounting is done when it sells the utilities. It is for the State Commission to chart out future course of action after considering all the circumstances in proper perspective keeping public interest in mind. The State Commission is expected to be just and must be guided by principles of equity and fair play. ”*

Citing the principle established in the case of State of Rajasthan and Others vs. Gotan Limestone Khanij Udyog, reported in AIR 2016 Supreme Court 510, Hon'ble Tribunal while holding RIL also responsible for mismanagement of DISCOMs has stated as follows at para 47 in the same judgement:



47. xxxxxxxxxxxxxxxx“*So this Tribunal warned the parties that privatisation should not be defeated on hyper-technicalities. Unfortunately, this advice was not heeded. In any case, no directions are issued by the State Commission to RIL in the impugned order. Having taken over the controlling interest in the Appellants, it is unfortunate that RIL is arguing that it is not a licensee and has no responsibility in this privatisation scheme.*”

In para 48 of the said order Hon’ble APTEL has further stated that

*“We reject the submission of Mr. Sitesh Mukherjee that the State Commission cannot pierce the veil. If the veil is pierced in this case, the impugned order will have to be confirmed without hesitation.”*

35. In the present case, the licence has been revoked with effect from 04.03.2015. Therefore, considering the provision under Section 20 (1) (c) of the Act and the observations of Hon’ble APTEL cited above, we hold that liabilities which have accrued prior to revocation of license is to be borne by the erstwhile licensee NESCO, WESCO, SOUTHCO and in turn, their managing investor RIL as per Annexure VI of the petition.
36. Regarding the amount of claim as noted in para 3 of this order, GRIDCO has claimed an amount of Rs.42,34,08,91,661/- recoverable from M/s. RIL and the RIL managed DISCOMs i.e. NESCO, SOUTHCO and WESCO. The RIL managed DISCOMs i.e. NESCO, SOUTHCO and WESCO as dealt in para 6 of this order have countered this claim stating that the petitioner had earlier informed that the combined claim of their companies are to the tune of Rs.2245.83 crore. But, they have not produced any document in support of such claim. Neither during the course of argument have they contradicted the claim figure of Rs.42,34,08,91,661/-. In view of this, we accept the claim of Rs.42,34,08,91,661/- made by GRIDCO. We also hold that besides the three RIL managed DISCOMs, RIL itself is squarely liable for settling the above claim of the petitioner.
37. With this observation, the case is disposed of.

**Sd/-**  
**(G. Mohapatra)**  
**Member**

**Sd/-**  
**(S. K. Parhi)**  
**Member**

**Sd/-**  
**(U. N. Behera)**  
**Chairperson**