

**ORISSA ELECTRICITY REGULATORY COMMISSION**  
**BIDYUT NIYAMAK BHAWAN**  
**UNIT-VIII, BHUBANESWAR - 751 012**

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**Case No.35/2005**

Sarat Chandra Mohanty	<b>Petitioner</b>
- Vrs. –	
Reliance Energy Ltd., and others	<b>Respondent</b>

For the Petitioner	:	Mr. Bikash Jena, Advocate
For the Respondent No.1	:	Mr. J. T. Bhatt, Sr. Advocate
For Respondent Nos. 2, 3 and 4	:	Mr. Sanjit Mohanty, Sr. Advocate
For Respondent No. 5		Mr. N.C. Panigrahi, Sr. Advocate
For Respondent No.6	:	Mr. B. Mishra, Joint Secretary, Dept. of Energy, Govt. of Orissa
<b>Date of Hearing</b>	:	<b>16.01.2006</b>
<b>Date of order</b>	:	<b>27.01.2006</b>

**ORDER**

The above proceeding was initiated on the basis of the Petitioner's application which essentially prays for action under S.19 or S.24 of the Electricity Act, 2003 against Respondent Nos. 2, 3 and 4. Respondent No.5, GRIDCO (a Govt. company) and Respondent No.6 (the State of Orissa) support the application, apparently because they perceive that their heavy financial dues against Respondent Nos. 2, 3 and 4 are in jeopardy and would be better protected in the hands of an Administrator

or a more efficient subsequent purchaser of the utilities. The matter was heard on 30.09.05, 07.10.05, 25.10.05, 04.01.06 and 16.01.2006. The orders and directions passed by the Commission on these dates may be referred to. The background of the case is narrated in detail below :-

2. The Commission has been hearing various matters concerning the three distribution companies in Orissa, namely, NESCO, SOUTHCO and WESCO which are under the management and control of Reliance Energy (previously known as BSES Limited) since the time of privatization of the distribution companies in the year 1999. In 1999, Grid Corporation of Orissa Limited transferred 51% of the equity shares with management control in the above three distribution companies to BSES Limited.

3. The above disinvestment of the shares in the three distribution companies was done through a competitive bidding and the bid terms and conditions were circulated to the bidders including BSES Limited. BSES was selected to acquire the shares with management control based on the bid submitted by BSES . BSES unconditionally accepted the bid terms and conditions.

4. At the time of such transfer of the majority shares and management control, GRIDCO, BSES Limited and/or the Distribution Companies executed documents, such as, Shareholders Agreement, Bulk Supply Agreement, Escrow Agreement, Hypothecation Agreement, etc. governing their inter se relationship.

5. The bidding documents envisaged technical and financial criteria to be fulfilled by the bidders to qualify for participating in the bid. BSES Limited qualified for bidding based on the technical and financial qualification possessed by BSES. The purpose of providing the above requirements was that the three distribution companies will have the technical and financial support from the selected bidder, namely, BSES in the conduct of its business and affairs.

6. The transaction documents mentioned above also provide for BSES Limited as the technical and financial member. The shareholders agreement executed by BSES Limited contained specific provisions for technical support and financing of the

distribution companies. The Bulk Supply Agreement, Escrow Agreement, Hypothecation Agreement etc. provided for specific obligation on the part of the distribution companies to duly pay and discharge the amounts becoming due from the distribution companies to GRIDCO under the Bulk Supply Agreement (for the bulk supply of electricity) and the loan agreement (for payment of the loan) It was envisaged that the distribution companies under the management and control of the BSES Limited shall maintain the business and activities of the distribution and retail supply of electricity in the respective areas of supply and in order to do so, the distribution companies should duly pay all the obligations arising in the course of business. The distribution companies were required to manage the business in the manner that they duly discharge the obligations and liabilities arising in the business including but not limited to payment of salaries, wages, etc. to the employees, bulk supply tariff and loan repayment to GRIDCO, payment to other creditors, meeting the O & M expenses.

7. Despite the above clear position envisaged in the bidding documents and the transaction documents, the three distribution companies did not pay the entire amount becoming due to GRIDCO. BSES Limited and the three distribution companies sought for and obtained accommodation from GRIDCO for deferment of payments becoming due to GRIDCO and also for relaxation of Escrow Agreement. In the tariff order dated 19.4.2002 in Case No.54, 55, 56, 57, the Commission also made certain relaxations based on the recommendations made by the Kanungo Committee and the Government of Orissa in turn accepted most part of the recommendations. All these were done recognizing that the three distribution companies require financial accommodation, though as per the bidding documents and the transaction documents, it was entirely the responsibility of the majority and controlling shareholder (BSES Limited/Reliance energy) to make the necessary arrangement.

8. As a result of the financial accommodation shown by GRIDCO as on 30.6.05, an amount of Rs.1814 crores had become due and outstanding from the three distribution companies to GRIDCO, as stated by Shri B. Mishra, Jt. Secretary, Dept. of Energy in his written submission.

9. Thus, at the instance of the three distribution companies and as supported by Reliance Energy Limited, significant accommodations have been given by Grid Corporation of Orissa Limited (GRIDCO) in the payment of the Bulk Supply Tariff and other dues becoming payable from the distribution companies to GRIDCO. The distribution companies had also sought for and have been allowed relaxation in the escrow arrangement established in favour of GRIDCO for payment of amounts becoming due to GRIDCO in priority to all other outgoings of the three distribution companies. The distribution companies have a binding agreement for the payment of the amounts due to GRIDCO as reflected in the Bulk Supply Agreement dated 24.5.99, Loan Agreement dated 28.10.99, Escrow Agreement dated 04.8.2000. These, together with the Shareholders Agreement constitute the bedrock of an arrangement for assured, adequate and uninterrupted power supply and the connected cash-flows. Reliance Energy (in place of BSES Limited) had acquired the majority shares with management control of the three distribution companies subject to the terms contained in the above agreements. The three distribution companies under the management and control of Reliance Energy are required to operate and maintain the distribution and retail supply of electricity in their respective areas of supply as per the Licence Terms and Conditions duly fulfilling the covenants and terms and conditions of the above agreements with GRIDCO and otherwise duly discharging all obligations arising in the course of their business. REL thus holds the key to the regulatory commitments of the distribution companies (Respondent No. 2, 3 and 4) and if REL resiles from its responsibility, the said distribution companies become unable to discharge the functions or perform the duties imposed on them by or under the provisions of the Electricity Act, 2003.

10. The three distribution companies under the management and control of Reliance Energy have not adhered to the terms and conditions of the agreement and substantial amounts have become due and outstanding to GRIDCO since 1.4.1999, when the management and control of the three distribution companies were acquired by Reliance Energy. As a result of such outstanding, GRIDCO has not been able to discharge its dues to NTPC Limited, which supplies electricity in bulk to GRIDCO and GRIDCO, in its turn, supplies in bulk to the three distribution companies. To accommodate the above, the three distribution companies issued bonds in the year 2000 re-scheduling the payment of principal in October 2005, October 2006 and

October 2007 and interest at the rate of 12.5% payable every six months. GRIDCO assigned these bonds in favour of NTPC. There has been a default on the part of the three distribution companies in servicing the above bonds. A substantial part of interest accrued on such bonds and the principal amount which fell due in October 2005 have not been paid. This has resulted in NTPC enforcing its claim against GRIDCO.

11. In the circumstances mentioned above, the Commission had initiated proceedings to evolve a scheme whereby the three distribution companies could be given further accommodation to discharge its liabilities and at the same time maintain its activities of distribution and retail supply of electricity. A business plan was received from the distribution companies through the Govt. of Orissa which required the Commission to resolve the imponderable issues. Such business plan required the support, amongst others, of the Reliance Energy Limited, the majority shareholder having management and control of the three distribution companies. M/s Reliance Energy Limited has not agreed to the Business Plan evolved to accommodate the three distribution companies. Rather, the stand taken by the Reliance Energy has been that it should not even be a party in the proceedings for finalization of the Business Plan and Reliance Energy cannot be subject to any order from the Commission in relation to such Business Plan, commitment to be given for the working of the Business Plan and generally in regard to the directions given to the three distribution companies.

12. The approach of REL that it shall not be willing to have anything to do with the implementation of the Business and it shall make no commitments to the support required for the business plan cannot be accepted. The Business Plan cannot be expected to succeed on the strength of the distribution companies only. If REL, as the majority and controlling shareholder, is not willing to lend its support to the implementation of the business plan, REL cannot also expect the other stakeholders to give accommodation to the distribution companies for the effective implementation of the business plan.

13. In the circumstances, the Business Plan which was considered and finalized by the Commission to accommodate the three distribution companies and also to

facilitate the operation and maintenance of electricity distribution in the State has not been implemented in view of the stand taken by the Reliance Energy and the three distribution companies. Having not implemented the Business Plan, they find themselves unable to seek any accommodation from GRIDCO, not even accommodation so far extended by GRIDCO. All amounts due and outstanding to GRIDCO have become payable by the three distribution companies. The three distribution companies should also ensure payment of money becoming due to GRIDCO in future without any default and without any accommodation.

14. If REL the majority shareholder of the distribution companies takes the indifferent stand, it clearly indicates that the distribution arrangements are about to collapse and distribution companies cannot maintain an efficient, coordinated and economical distribution system as required by S.42(1) of the Electricity Act, 2003 and cannot also maintain the standards of performance and quality of power supply specified under S.57 of the said Act.

15. On 04.01.06 and 16.01.06, the Counsel for the petitioner submitted that the Commission has been pleased to give sufficient chance to the Respondent No.1 to 4 to file their proper written replies to the issues framed and queries made in the orders of the Commission dated 30.9.2005, 07.10.05 and 25.10.05. The Commission in their order dt. 25.10.05 have categorically directed the Respondent No. 1 to 4 to resolve the issue of 400 crore NTPC bond to the satisfaction of the Commission, to resolve the issue of appointment of CEOs and manpower of DISTCOs and come up with a concrete plan with definite time frame for addressing the rest of the issues/queries raised in the Commission's order dt.30.09.2005 and 07.10.2005. Unfortunately, respondent No.1 to 4 have not complied with the orders of the Commission and have furnished vague, evasive and unsatisfactory replies. The submissions made by respondent No.1 (REL) that it is not amenable to the jurisdiction of the Commission and that it is under no obligation to fulfill the conditions of the shareholders agreement after expiry of the agreement on 01.4.04 are misconceived. In fact, in minutes of discussion held between GRIDCO and the Reliance Energy on 15.01.04, it was agreed that in order to finalise the business plan of three DISTCOs (Respondent No. 2 to 4), the validity period of shareholders agreement may be extended for a period mutually agreed between GRIDCO and

REL. GRIDCO in its letter dt.29.03.04 requested REL for extension of the shareholders agreement. REL in their letter dtd. 18.05.04 referred to clause No.15.1.2 of the shareholder agreement and stated that the said agreement stands terminated automatically on 1.4.04. The Commission while approving the business plan of three DISTCOs in Case No.115/04 by order dt. 28.02.05 had ordered for renewal of shareholders agreement as a package for accommodation of the request of the DISTCOs to securitise their payables to GRIDCO as a long-term loan to be recovered over a period of time.

16. The Petitioner further submitted that as per the license condition under Section 10.2(c) the distribution companies are required to execute work in a transparent manner going through the process of tendering etc. It appears that the three distribution companies are executing the work in a non-transparent manner for which action has been taken against one of CEOs of the three distribution companies. The petitioner therefore urges the Commission to institute an enquiry into the details of such works executed under distribution companies and the Commission may constitute a high power committee to audit the activities of the DISTCOs right from 01.04.99.

17. The Petitioner next pointed out as follows :-

- a) No effective steps have been taken by the DISTCOs for reduction of AT & C Loss, distribution loss, full fledged energy audit, spot billing in all the areas of DISTCOs and also procurement of R & M materials for maintenance of lines and sub-stations so that safe power supply would be extended to the consumers.
- b) A proposal was mooted by GRIDCO for infusion of additional capital into the DISTCOs through issue of equity share. REL requested to defer the issue till finalisation of the business plan. Although the business plan has been approved by the Commission since 28.02.05 there has been no infusion of capital by REL.

- c) REL and distribution companies are not taking steps to invest any fund for improvement of the distribution system, upgradation of transformers and renovation of old lines and substations for which the workers are being humiliated and assaulted by the consumers/public. Even the R & M amount sanctioned in the ARR of the DISTCOs by the Commission could not be spent by the distribution companies for procurement of materials because of intervention of Central Procurement Group (CPG) of REL with Headquarter at Bombay. This group is not permitting the distribution companies to procure their materials as a result of which a substantial portion of APDRP fund could not be utilized and the scheme has been curtailed by the Govt. of Orissa.
- d) REL and the distribution companies are violating the Companies Act, 1956 by not appointing the full time Managers/Managing Directors for each company.

18. In the meanwhile, the Commission has passed a number of orders directing the Respondent No. 1 to 4 to resolve the issues like clearance of Rs.400 crore NTPC bond, PFC/REC dues, liquidation of arrear BST bills of GRIDCO recruitment of manpower, taking up of full fledged energy audit in the entire area of each distribution company. But nothing tangible has been achieved so far due to callousness on the part of the holding company.

19. Shri N. C. Panigrahi representing GRIDCO, stated that the replies furnished by the respondent No.1 to 4 clearly shows that they are reluctant to address the issues raised by the Commission in its various orders dt.30.09.05, 07.10.05 and 25.10.05. He further stated that the Commission in its order dt. 25.10.05 had categorically directed to resolve the issue of 400 crore of NTPC bond to the satisfaction of the Commission. The said amount now stands at Rs.557.03 crores including interest as on 31.12.05. The distribution companies have not taken any steps to clear this amount. They have merely submitted an in principle sanction order of the Union Bank of India agreeing to extend the loan. Certain conditions put forth by the bank like first charge on receivables and fall back arrangements on GRIDCO in case of non-service of the loan by DISTCOs are not at all acceptable to GRIDCO. In fact, the responsibilities of ensuring service of the loan by DISTCOs should be taken by M/s. REL being the majority stakeholders of the three distribution



companies. In the meanwhile, due to failure of the distribution companies liquidating the Rs.400 crore NTPC bond, NTPC has adjusted incentives to the extent of Rs.287 crore payable to GRIDCO against Rs.400 crore, thus, entailing financial loss to GRIDCO. Therefore, while supporting the contention of the petitioner, he has prayed the Commission to make an interim arrangement suspending the licenses of the three distribution companies.

20. Shri B. Mishra, Joint Secretary, Department of Energy, Govt. of Orissa stated that APDRP funds could not be utilized by the three distribution companies controlled by REL. As a result of this, the State Govt. was deprived of the benefits of APDRP scheme which has been now limited to urban areas only. Regarding Rs.400 crore of NTPC bond he endorsed the arguments of GRIDCO and stated that REL and distribution companies are not resolving the issues by borrowing money from the bank and paying to GRIDCO which will in turn be paid to NTPC.

21. REL has 51% of the shares in the three distribution companies, namely, WESCO, NESCO & SOUTHCO, who are entrusted with distribution of electricity in Western, Northern and Southern part of Orissa respectively. The Shareholders Agreement between the BSES limited (now taken over by Reliance Energy Limited) and GRIDCO have expired in March 2004. In spite of persistent reminders by GRIDCO and the State Govt., Reliance Energy Ltd. has not come forward to extend the shareholder's agreement beyond March 2004. One of the clauses in the shareholder's agreement provided that the Investor should endeavour to obtain further finances to meet the financial requirements of distribution companies. Due to non-signing of the shareholders agreement, there is no obligation on the part of the shareholders namely REL to bring in additional finance to support the DISTCOs.

22. Shri B. Mishra further submitted that as on 30.6.05, the liability of the three distribution companies towards GRIDCO stands at about Rs.1814 crores towards outstanding BST dues and other loan repayments. GRIDCO being a commercial entity is unable to find ways and means for payment to its generators like NTPC, OHPC and repayment of its loan to financial institutions. The Investor, i.e. Respondent No.1 should have arranged funds to ensure liquidation of arrears of the

DISTCOs to GRIDCO as the DISTCOs are unable to repay these dues of GRIDCO from their own income.

23. Shri Mishra next pointed out that in the tariff order of 2005-06, the Commission has fixed a benchmark for reduction of distribution loss by 3% each year till 2007-08. The DISTCOs should achieve the target for this loss reduction. In the event of failure by the DISTCOs to achieve this target, the Investor should come forward to provide necessary fall back arrangement and arrange necessary funds to pay to GRIDCO towards BST dues and other loan repayments.

24. Shri Mishra contended that the Repair & Maintenance activities of the distribution companies leave much to be desired. Although the Commission while fixing the tariff allows 5.4% of the gross fixed assets (at the beginning of the year) to be recovered through tariff towards R&M expenses, the distribution companies do not spend that much as allowed to them in tariff. As a result there is a lot of public resentment due to non-maintenance of line and substations.

25. In reply to the above-mentioned allegations the statements of all the three distribution companies were stereotyped. Regarding liquidation of 400 crore NTPC bond they stated that they have received in principle sanction of Union Bank of India. No further action in this regard has been taken. Regarding appointment of CEOs and induction of manpower, the reply was that the steps have been taken by appointing National Productive Council for conducting enterprise-wise manpower assessment studies. As regards action plan of energy audit and 100% spot billing their replies were not focused to the point.

REL took the position that all these issues being related to distribution companies are to be addressed by them.

26. The Commission finds tour de force in the submissions of the Petitioners, as also of GRIDCO and Government of Orissa regarding the acts of commissions and omissions of the three distribution companies which have adverse impact on their licensed businesses and regulatory commitments. The Commission has carefully gone through the materials in support of the allegations and the defences of

Respondent Nos. 1, 2, 3 and 4. All the aforesaid defaults, misfeasance and malfeasance indicate that the affairs of the three distribution companies are not being carried on in the best interest of the company and also in the interest of the consumers and the general public. We summarize them as follows:-

- (a) Apparent refusal of REL to renew shareholders agreement, resulting in abdication by majority shareholder of Distcos of their responsibilities in discharging their regulatory obligations.
- (b) Failure to appoint Managers / MDs for the three Distcos, viz., WESCO, NESCO and SOUTHCO.
- (c) Failure to resolve the issue of servicing Rs.400 crore NTPC bonds.
- (d) Failure to evolve a convincing plan for meeting the outstanding PFC / REC, and IBRD loans and BST dues of GRIDCO.
- (e) Failure to mobilize counterpart funding in respect of APDRP scheme.
- (f) Non-infusion of capital.
- (g) Failure to take up full-scale energy auditing
- (h) Failure to introduce spot billing in entire areas of DISCOs.
- (i) Failure to recruit adequate manpower.
- (j) Failure to comply with Commission's orders dated 25.10.05, 03.10.05, 30.09.05.

27. Besides, the following serious allegations have been made by the Petitioner, Respondents No. 5 and 6 and the general public. The DISCTCOS, during this inquiry, have not been able to rebut these allegations:-

- (k) Failure in timely procurement of materials for different works
- (l) Failure to attend to maintenance of lines, upgradation of transformers, power supply for LI load.
- (m) Failure to procure materials in a transparent manner
- (n) Restricting power-supply through load-shedding to reduce the input energy
- (o) Failure to attend to maintenance of lines, upgradation of transformers, power supply for LI load.

- (p) Restricting power-supply through load-shedding to reduce the input energy.
- (q) Failure to achieve the target in T&D and AT&C loss reduction as fixed by the Commission.
- (r) Non-redressal of consumer grievances.

28. In the circumstances, the Commission is of the opinion that the distribution licensees (Respondent Nos. 2, 3 and 4) are unable to discharge the functions or perform the duties imposed on them by or under the provisions of the Electricity Act, 2003 and have persistently defaulted in complying with the directions given by the Commission under the said Act. Prima facie, they have violated the terms and conditions of their respective licences, and it is necessary in public interest to suspend the licences of the said distribution companies and appoint an Administrator for each such licensee to discharge the functions of the licensee in accordance with terms and conditions of licence.

29. It is, therefore, ordered that notice be issued in terms of the Proviso to S.24(1) of the Electricity Act, 2003 to Respondent Nos. 2, 3 and 4 to file their representations by 01.3.2006 against the proposed suspension of the licences of the said Respondents, serving copies on the concerned parties. A copy of this order shall accompany the notice. The case is posted for hearing on 08.3.2006.

30. The Commission also finds that after hearing the petitioner, GRIDCO, Government of Orissa, the three distribution companies and REL and considering the stand taken by the distribution companies and REL and their failure to satisfactorily deal with the serious allegations made against them, it is necessary and imminent to make some interim orders to protect the interest of the consumers at large. At this stage, pending further hearing the Commission considers it appropriate to appoint Special Officers and few other persons to assist the Special Officer to oversee the operation of the three distribution companies to the Commission and to file a status report on the activities and management of the three distribution companies. The following officers are being appointed as the Special Officers for all the three distribution companies, namely, NESCO, SOUTHCO and WESCO. The Special Officer shall have all the powers which a director of a company under the

Companies Act, 1956 can exercise to seek information, document and details of the operation and management of the Companies. The Special Officer is also authorised to demand from any officer or employee of the distribution companies any document or information as he considers appropriate and if so demanded the officer and employee shall duly provide the same to the Special Officer.

<b>Name of the Distribution Licensee</b>	<b>Name of the Special Officer</b>
1. NESCO	Shri S.P. Ghosh, Ex-Director, Commercial, GRIDCO
2. SOUTHCO	Shri P.N. Bisoi, Ex-Senior General Manager, GRIDCO
3. WESCO	Shri D.K. Satapathy, Jt. Director (Engineering), OERC

31. The Special Officer is empowered to employ any auditor or any other person for the purpose of assisting him in consultation with the Commission. The distribution companies shall also provide to the Special Officer the report of all operations on weekly basis in such form as he may require and in particular give the details of the expenditure incurred or payments made or procurement of materials or disposal of assets of the value in excess of Rs.1,00,000/-. The Special Officer shall file a report on the distribution companies within a month of this order.

32. No money can be repatriated by respondents No. 2, 3 and 4 to respondent No.1 (REL) without express approval of the Commission.

**-Sd-  
(S. K. JENA)  
MEMBER**

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

**-Sd-  
(D.C. SAHOO)  
CHAIRPERSON**