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ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
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Present: Shri G. Mohapatra, Officiating Chairperson
Shri S. K. Ray Mohapatra, Member

Case Nos. 44,45&46/2005, 58, 59 & 60/2006, 29, 30 & 31 of 2007, 65, 66
&67/2007,141, 142 & 143 of 2009, 147,148 & 149/2010, 94, 95 &96/2011, 104,
105 &106/2012, 86, 87 & 88/2013

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RIL Managed DISCOMs

..... Petitioners

Vrs.

GRIDCO Limited & Others

..... Respondents

IN THE MATTER OF: Proceedings in compliance to the directives passed in the order dated 05.10.2023 of the Hon'ble Supreme Court of India in Civil Appeal No.3858-60 of 2014 arising out of the Hon'ble Appellate Tribunal for Electricity vide judgment dated 29.11.2012 in Appeal Nos.116/2011 and connected Civil Appeals for revisiting of the earlier ARR & RST Tariff orders for the FY 2011-12 of the Commission passed in Case No. 144/2010.

For Petitioners:

Shri Buddy Ranganadhan, Learned Senior Counsel, Shri Dushyant Minocha, Learned Advocate & Shri Hasan Murtaza, Learned Advocate on behalf of M/s. Reliance Infrastructure Ltd. and erstwhile DISCOMs (WESCO, NESCO & SOUTHCO Ltd.).

For Respondents:

Shri R.K. Mehta, Learned Senior Counsel along with Shri B.K. Das, Sr. GM & Shri L.K. Mishra, DGM (F) R&T on behalf of GRIDCO Ltd., Shri Bibhu Charan Swain, the Authorized Representative of M/s. UCCI and Ms. Sonali Pattnaik, Manager (Legal), DoE, Government of Odisha.

ORDER

Date of Hearing:22.01.2025

Date of Order:06.02.2025

The present order is occasioned in the midst of the proceedings due to filing of petitions separately and individually by the three Distribution Licensees namely, TPNODL, TPWODL & TPSODL and three Consumer Associations namely M/s. UCCI, M/s. OASME, NOCCI & M/s. Power Tech Consultant purportedly under Order-1 Rule-10 of the Code of

Civil Procedure, 1908, seeking for their impleadment as parties to these Cases and participation in the de-novo hearing.

2. The Distribution Licensees namely TPNODL, TPWODL & TPSODL in support of their Petitions have submitted that:

- a) According to Order 1 Rule 10(2) of the CPC, the Commission can at any stage of the proceedings implead the present DISCOMs as parties. The Hon'ble Supreme Court of India in *Mumbai International Airport (P) Ltd. Vrs. Regency Convention Centre & Hotels (P) Ltd.*, (2010) 7 SCC 417, while interpreting the provisions under the CPC regarding impleadment of parties, elucidated as to who/what constitutes a 'necessary party' and 'proper party'. In terms of the above decision passed by the Hon'ble Apex Court, it is clear that a 'necessary party' is (i) a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court; and (ii) in the event that a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. Further, regarding 'proper party', it has been observed that a 'proper party' is the one who is not a 'necessary party', although it would be such a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all the matters in dispute. It is inconsequential as to whether a 'proper party' is a person in whose favour of /or against whom, any decree is to be made.
- b) In the event that there is a re-working of the earlier tariff order of the erstwhile DISCOMs and GRIDCO, there would be possibility that the implications of the same may affect the financials of the incumbent DISCOMs and also could affect the tariff of the consumers of the incumbent/present DISCOMs in terms of the implementation being sought by the erstwhile DISCOMs. Further, there is a lack of clarity and due consideration of the present consumer mix and vesting of the erstwhile DISCOMs with the present DISCOMs, which is imperative for adjudication of the present proceeding by the Commission. Thus, the present matter cannot be adjudicated in any manner without the presence/assistance and submissions of the incumbent DISCOMs. Therefore, the present DISCOMs are the necessary parties and ought to be impleaded in the present proceedings.
- c) Any implementation or consideration of the present proceedings without incumbent DISCOMs would be in the teeth of statutory framework provided under the Electricity Act, 2003, including but not limited to Sections 20 & 21 read with Section 64 of the Act. Non-inclusion of the incumbent DISCOM would be contrary to the judgement dated

05.10.2023 passed by the Hon'ble Supreme Court of India. Therefore, the absence of the incumbent DISCOMs in the present proceedings as 'necessary parties' would result in the entire proceedings void/non-maintainable in terms of the extant relevant statutory framework.

- d) In order to safeguard the public interest and ensure the adequate participation, the Commission had issued public notice in the present matter inviting the objections/suggestions. The incumbent DISCOMs in the State would be at the best position to safeguard the public interest inasmuch as the consumers of the State are concerned. The outcome of the present proceeding may affect the future tariff and would have a direct consequential impact on the consumption of the consumer and the ability to pay amongst various other consequences. Any data regarding the consumer consumption mix and recoveries can only be presented to the Commission by the incumbent DISCOMs. Any consideration and/or adjudication by the Commission without considering various aspects which are known only to the incumbent DISCOMs, will result in severe prejudice to the public at large. Therefore, the presence of the incumbent DISCOMs in the present proceeding is essential for an effective and complete adjudication of all the questions involved in the present matter.
- e) In the Vesting Order of the incumbent/present DISCOMs, this Commission has categorically held that with respect to treatment of past litigations, the present DISCOMs shall make all diligent efforts to contest the litigation, suits, claims etc. as if, it is a party to such litigation, suits, claims etc. to the satisfaction of the Commission. Thus, the incumbent DISCOMs would have the locus to be heard in the present matter.
- f) Subsequent to the judgement dated 05.10.2023 passed by the Hon'ble Supreme Court of India, this is the first opportunity for the stakeholders to consider the effect of redetermination of the components of tariff relating to the past periods. In case, the tariff for the earlier periods is modified in any manner whatsoever in the present proceeding, then the same needs to be considered in light of the implementation subsequent to the operation of law under Sections 19, 20 & 21 of the Electricity Act, 2003 and cannot be considered in a vacuum as has been submitted by the erstwhile DISCOMs before the Commission. Assuming but not admitting that re-determination process by the Commission leads to the consequence that there is a tariff deficit in earlier relevant periods, the implication of burdening the present consumption mix vis-à-vis deficit allowed to the consumer consumption mix of the earlier years and its consequential financial impact in light of the statutory and regulatory mandate will necessitate

consideration of the submissions of the incumbent DISCOMs and the due analysis of the effect of the operation of the Sections 19, 20 & 21 of the Electricity Act, 2003.

- g) In the event the Commission revokes the license of the erstwhile DISCOMs, then all the rights, duties, obligations and liabilities (subject to Section 20(1) (c) of the Act) would absolutely cease from the date of revocation of license except for any liabilities which have accrued prior to that date. Assuming that any rights that may have accrued on the erstwhile DISCOMs regarding the past period to recover the alleged deficit in the ARR or otherwise, the said rights would have been ceased by operation of law subject to exception of any liability that may have accrued for the past period. The Section 21(a) of the Electricity Act, 2003 provides the manner in which a utility is vested in the purchaser, wherein it is provided that upon the sale of utility to the purchaser, the utility is to be vested in the purchaser free of any debt, mortgage or any other obligation. In view of the above provisions, no claim, rights or entitlement of the erstwhile DISCOMs pursuant to operation of law under Sections 19,20 & 21 of the Electricity Act, 2003 is admissible before the Commission. Therefore, there is no locus for the erstwhile DISCOMs to be present before the Commission in the present proceedings.
- h) As on date, the erstwhile DISCOMs are not the Distribution Licensees. Thus, in terms of Section 64 (1) of the Electricity Act, 2003, they cannot file an application before the Commission seeking determination of tariff under Section 62 of the Electricity Act, 2003. In this matter, the present DISCOMs have relied upon the order dated 06.08.2019 passed by the Hon'ble APTEL in the case of *Reliance Infrastructure Ltd. V. MERC and others in IA No.477 and 1247 of 2019 in Appeal No.223 of 2015*, wherein the Hon'ble APTEL has held that application for determination of tariff can only be filed by a distribution licensee in terms of provisions of the Act. Moreover, in terms of the said order, the issue as to whether the incumbent distribution licensee is to be impleaded in case of re-determination of tariff of the erstwhile DISCOMs, is no longer res-integra. The above order was challenged before the Hon'ble Supreme Court in Civil Appeal No.7229-7234 of 2019. The said appeal was allowed by the Hon'ble Supreme Court of India to the limited extent of impleading the incumbent and the erstwhile DISCOMs in the facts of the said case as Appellants before the Hon'ble APTEL.
3. According to the present DISCOMs (TPNODL, TPWODL & TPSODL), they must be impleaded as parties to the present matter in view of the following:

- a) The present/incumbent DISCOMs are necessary parties to the present proceeding pursuant to which they must be impleaded in terms of Order 1 Rule 10 of the CPC;
 - i. The Hon'ble Supreme Court while remanding the matter to this Commission had observed the Odisha DISCOMs would have the locus to challenge the order of this Commission fixing the BST and ARR of GRIDCO.
 - ii. This Commission by way of the vesting order of the present DISCOMs, has categorically held that with respect to the treatment of past litigations, the present DISCOMs shall make all diligent efforts to contest the litigation, suits, claims, etc. as if it is a party to such litigation, suits, claims etc. to the satisfaction of this Commission.
 - iii. In terms of Section 20(1)(c) of the Electricity Act, 2003, upon the revocation of the licence of a licensee, all the rights of the erstwhile licensee would cease to exist.
 - iv. Under Section 64 of the Electricity Act, 2003, it is only a generator or a licensee, that can file an application seeking determination of tariff by the Commission under Section 62 of the Electricity Act, 2003. Thus, it is essential that the present DISCOMs (TPNODL, TPWODL & TPSODL) be made as a party to the present proceeding. Moreover, it is the erstwhile DISCOMs which must demonstrate their locus to the Commission.
 - v. There is no provision under the Act which envisages the payment of any past dues to a non-incumbent/erstwhile distribution licensees.
 - b) Without prejudice to the above, assuming but not admitting that the present incumbent DISCOMs are not necessary parties, even then at least the incumbent DISCOMs are 'proper parties' to the present proceedings, as their presence would be vital for complete and effective adjudication of the present matter.
4. That the erstwhile Distribution Licensees namely WESCO, NESCO & SOUTHCO who were the parties to the cases under the subject, on being served with the copy of the Petitions referred to above, have filed their written objections thereto challenging their maintainability on the ground, inter alia, that the present Distribution Licensees have no *locus standi* in the de-novo proceedings. The Counsel on behalf of the erstwhile Distribution Licensees namely WESCO, NESCO & SOUTHCO has submitted that-
- (a) The present DISCOMs (TPNODL, TPWODL and TPSODL) have filed their impleadment applications under Order 1, Rule 10 read with Section 151 of the Code of

Civil Procedure, 1908 read with the Regulation 76 of the OERC (Conduct of Business) Regulations, 2004 and chosen to press their applications without filing a rejoinder thereto. The Applicants having wilfully chosen to not deny or dispute the submissions made by the erstwhile DISCOMs, unequivocally results in the acceptance of the factual contentions made therein being accepted by the doctrine of non-traverse. Thus, on the basis of undisputed factual averments itself, the applications ought to be dismissed on this short ground alone.

- (b) The present remand proceedings arise out of the final judgement and order dated 05.10.2023 passed by the Hon'ble Supreme Court of India, wherein the Hon'ble Apex Court while upholding certain orders passed by the Hon'ble APTEL, has directed the Commission to implement the said orders passed by the Hon'ble APTEL pertaining to FY 1999-2000 to 2014-15. As such, the scope of the present remand proceedings being limited in nature, as a matter of law, the Commission can only implement the decisions of the Hon'ble APTEL, which formed the subject matter of the Judgement of the Hon'ble Supreme Court. It is not in dispute that the Applicants were not parties before the Hon'ble Supreme Court nor did they choose to implead themselves. As such, their applications must be considered in that view of the matter.
- (c) The present matter is a tariff proceeding, which is not a *lis* between parties. In the strict sense of the term, there are no 'parties' to the proceedings. There is only the Petitioner (i.e. the erstwhile DISCOMs) and the persons who would be covered under Section 64 of the Electricity Act, 2003. As such, the principles of Order 1 Rule 10 of the CPC are wholly inapplicable in the present proceedings. The Applicants, however, does not even have a right of audience in the present proceedings even under Section 64 of the Act. The Section 64 of the Electricity Act, 2003 identifies 'consumers' as persons concerned and therefore, the applicants cannot be impleaded in the present proceedings. The position of law in this regard has been clarified in the case of *Pushpendra Surana Vrs. CERC & Ors.* (2014 SCC OnLine APTEL 48).
- (d) The contentions of the Applicants, seeking impleadment to protect consumer's interest, is legally untenable, because there is nothing under the Act which enjoins a licensee like the Applicants to be the representative of consumer's interest in tariff related proceedings. In this case, some Consumer Organisations have entered into appearance before the Commission to protect the consumer's interest. More importantly, the Commission is the authority which has been statutorily vested with the powers to inter-alia protect consumer's interest. In fact, even the Government of Odisha is represented

to protect public interest. Thus, the Applicants can neither be considered as consumer for the purpose of the Act nor a representative of consumer's interest and as such, have not a necessary or proper parties in the present proceedings.

- (e) The Applicants have failed to establish as to how they are a 'necessary party' or proper party to the present proceedings in terms of the Order 1 of the CPC and their request to file their application at the belated stage, cannot be allowed in terms of the settled law. The test to determine whether a particular party is a necessary party to a proceeding under Order 1 Rule 10 of the CPC is that there must be a right or some relief against such parties in respect of the matter involved in the proceedings in question and it should not be possible to pass an effective decree in absence of such a party.
- (f) In their oral arguments, the Applicants have sought to justify their impleadment as being necessary parties with the ground that if the claims of the erstwhile DISCOMs are allowed, it would lead to a tariff shock to the existing consumers and now the electricity bills are being issued by them to the retail consumers. According to the erstwhile DISCOMs, even if such were the case, the Applicants would only be a collecting agent to collect whatever increase in tariff is allowed by the Commission and pass it over to the erstwhile DISCOMs. Further, even if their arguments were accepted, it would still not evoke any right to be impleaded as a party in the present proceedings. This Commission in its written submissions before the Hon'ble APTEL and the Hon'ble Supreme Court pertaining to the present matter had made specific averments that burden of the increased tariff would ultimately rest on the consumers and lead to tariff shock. The Hon'ble Supreme Court, after taking into consideration of the submissions made by all parties, have passed the judgement, directing this Commission to implement the orders of the Hon'ble APTEL. Since it is a remand proceeding, with a limited scope to implement the judgements passed by the Hon'ble APTEL and the Hon'ble Supreme Court, it is now not open for the Applicants to reagitate the same issue which have attained the finality especially when they consciously chose to not implead themselves before the Hon'ble Supreme Court.
- (g) Further, it is the settled position of law that an application for impleadment of party at a belated stage giving no reasons, cannot be allowed. In this regard reliance is placed upon the judgements in the case of *Ch. Surat Singh (dead) and others v. Manohar Lal & Ors. (1971) 3 SCC 889* and in the case of *Sheikh Yusuf s/o Haji Sheikh Usman & Ors. Vrs. Haji Mohammad Jamil Ahemad & Ors (2014 SCC OnLine Bom 4611)* and also the order passed by the Hon'ble CERC in Petition No.126/MP/2017. When the valuable rights

accrue to a party, they cannot be disturbed at a belated stage at the instance of a party who has been guilty of inaction. In the present case, the Applicants took no steps to raise their plea neither before the Hon'ble Supreme Court nor when the notice was issued by the Commission [See *Vidur Impex and Traders Private Limited & Ors v. Tosh Apartments Pvt Ltd & Ors. (2012) 8 SCC 384* and *Hazari Lal & Ors v. Custodian General of Evacuee Property and Others (1996 SCC OnLine Del 26)*]

- (h) The present proceedings were commenced in December, 2023 and the public notice was issued on 18.12.2023. The Applicants took no steps at all to come before the Commission even during the proceedings pertaining to BST and Transmission tariff matters, which is a direct cost to them. The present RST matters were already argued at length on 18.12.2024 and 20.12.2024 and were part-heard, when the Applicants chose to file the applications. The timing of the present filing gives rise to a serious concern as to the bona fides of the Applicants. Thus, the applications ought to be dismissed with cost.
 - (i) The arguments of the Applicants that the monies, if any, recovered pursuant to the implementation of the judgement of the Hon'ble Supreme Court, ought to come to the Applicants since the license of the erstwhile DISCOMs stands revoked, is based on the incorrect understanding of the facts of the case and more specifically the judgement of the Hon'ble Supreme Court. The Hon'ble Apex Court has categorically held that the revocation of the licenses would have no bearing whatsoever on the past claims of the erstwhile DISCOMs and any claim by them to seek recoveries for the past period, would be in the teeth of the judgment of the Hon'ble Supreme Court. In this regard, Para 78 of the judgement of the Hon'ble Supreme Court may be referred to.
 - (j) Without prejudice, while the Applicants have willingly come forward to seek recoveries in its favour, pursuant to the judgement of the Hon'ble Supreme Court, it has conveniently held back in relation to the claims raised by GRIDCO against the erstwhile DISCOMs. Although the submissions of the Applicants are denied, even on a demurrer, in the event the Applicants are held to be a beneficiary of the claims, by the same logic it must also be held liable to discharge the claims of GRIDCO against the erstwhile DISCOMs, if the same is found payable.
5. The Learned Senior Counsel appearing on behalf of the Respondent-the Department of Energy, Government of Odisha, however made the submissions that orders to be passed by

the Commission in the remand proceedings should not cause any adverse effect on the interest of the consumers of the State.

6. In course of the hearing, the Learned Senior Counsel appearing on behalf of the Respondent-M/s. GRIDCO Limited has not resisted aforesaid applications filed by the incumbent Distribution Licensees.
7. We have heard the Learned Counsel appearing on behalf of the present Distributions Companies viz-TPNODL, TPWODL & TPSODL, the Learned Counsels appearing on behalf of the erstwhile DISCOMs and the Learned Counsel appearing on behalf of the M/s. GRIDCO Ltd., coupled with the Representatives of the Consumers' Associations.
8. It be mentioned at the outset that the Cases under the subject are remand matters and this Commission is hearing them afresh in the de-novo proceedings pursuant to and in compliance with the orders passed by the Hon'ble APTEL and the common order dated 05.10.2023 of the Hon'ble Supreme Court of India passed in Civil Appeal No.2674 of 2013 and other writ petitions.
9. Needless to say, the present Distribution Licensees TPNODL, TPWODL & TPSODL were not the parties to the cases under the subject inasmuch as they were not the DISCOMs here at the relevant period of time. It is, however, the contentions of their Learned Counsel that since the final orders to be passed in the de-novo proceedings concerning the issues regarding tariff matters and ancillary issues shall have direct impact on their operational functions, rights and entitlements etc. with consequential impact on the consumers, they are the proper parties to the proceedings and there is possibility of their being seriously prejudiced in the event, they are not allowed to participate in the de-novo hearing of the cases.
10. Necessary parties are those parties, in whose absence, there cannot be any effective adjudication of the disputes and the proper parties are those, in whose absence, there may not be a complete and effective adjudication. The present Distribution Companies TPNODL, TPWODL & TPSODL, not coming under either category, cannot maintain their applications inasmuch as they have no cause of action vis-à-vis the tariff disputes relating to the years when they were not the licensees. In the remand matter, the Commission is now required to implement the directions/decisions and observations made by the Hon'ble APTEL and the Hon'ble Supreme Court of India, relating to the tariff issues for the years prior to vesting of the Distribution Licence to the present DISCOMs. To put in other words, the participation of the present Distribution Companies TPNODL, TPWODL & TPSODL in the remand Cases is not required either for effective adjudication or an effective and

complete decision in the issues involved. It is redundant to mention that the incumbent distribution licensees shall be at liberty to agitate their grievances, if any, in accordance with the Vesting Orders through separate proceedings and the same shall be taken into consideration according to law.

11. The Consumer Associations namely, M/s. UCCI, NOCCI, M/s. OASME & M/s. Power Tech Consultant appear to have participated earlier in the hearing of the cases before remand. Hence, the Commission allows them to participate in the de-novo hearing and make their submissions relevant to the issues. These Consumer Associations as well as the State Government, being the Respondents to the present proceedings, would safeguard the interests of the State consumers, as apprehended by the present DISCOMs.
12. The Petitions are accordingly disposed of, and the matter is scheduled to be heard on the date fixed i.e. 12.02.2025, through hybrid mode, as directed earlier.

Sd/-
(S.K. Ray Mohapatra)
Member

Sd/-
(G. Mohapatra)
Officiating Chairperson