IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

AT NEW DELHI

APPELLATE JURISDICTION

APPEAL No.   OF 2012

Southern Electricity Supply Company of
Orissa Ltd. (SOUTHCO), a company incorporated
under the provisions of the Companies Act,
1956 and having its registered Office at
Plot No - N1/22, IRC Village, Nayapalli,
Bhubaneswar … Appellant

Versus

1. Orissa Electricity Regulatory Commission,
   Niyamak Bhawan, Unit-VIII,
   Bhubaneswar 7510102
   Dist: Khurda, Orissa

2. Commissioner & Secretary
   Department of Energy
   Government of Orissa
   Odisha Secretariat
   Bhubaneswar 751 001

3. World Institute of Sustainable Energy (WISE)
   Plot No. 44, Hindustan Estates
   Road No. 2, Kalyani Nagar
   Pune 411 006

4. Prayas
   C/o. Amrita Clinic
   Athawale Corner
   Karve Road
   Deccan Gymkhana, Pune 411 004

5. Grahak Panchayat
   Friends Colony
   Paralakhemundi
   Distt. Gajapati 761 200 … Respondents

APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT 2003

1. Details of Appeal :

By the present appeal filed under Section 111 of the Electricity Act, 2003 [EA03], the Appellant challenges the Order dated 23rd March 2012 (Annexure A) passed in Case No. 96 of 2011 by the Orissa Electricity Regulatory Commission ("OERC"), Respondent No. 1 herein and the corrigendum No DIR(T)–389/2011/Vol–I/3105 dated 10th April 2012 (Annexure B) issued by OERC and received by SOUTHCO on 16th April 2012 and the Letter No. DIR(T)–3892011Vol–I/3286 issued by OERC dated 8th May 2012 (Annexure C) while determining the Retail Supply Tariff for FY 2012-13 to the extent OERC has (i) Introduced the "Take or Pay" scheme for EHT & HT consumers in an erroneous manner (ii) Set Unrealistic Distribution Loss Targets, (iii) Disallowed Employee Expenses, (iv) Disallowed Administration and General Expenses, (v) Allowed inadequate Tariff and (vi) Incentive for Leading Power Factor to meet the approved cost.

2. Date on which the Order Appeal against is communicated and proof thereof, if any :

i. Letter regarding "Take or Pay Tariff" dated 08.05.2012 received on 09.05.2012.
ii. Corrigendum on RST Order for FY 2012-13 regarding "Take or Pay Tariff" dated 10.04.2012 received on 16.04.2012.
iii. RST Order dated 23.03.2012 for FY 2012-13 received on 30.03.2012.

3(a). The address of the Appellant for service is as set out hereunder :

(i) Postal address including Pin code :

Plot No.N-1/22, Nayapalli, IRC Village
Bhubaneswar 751 015
Orissa PIN-751015
Phone : 0674-2558737
Fax : 0674-2558343, 0680-2202261
Email : md@southcoorissa.com

All correspondence may be directed to the advocates representing the Appellant.

(ii) Address of Counsel with phone no., fax no., email :

Mr. Hasan Murtaza, Advocate
Mulla & Mulla & Cragie Blunt & Caroe
502, Nilgiri Apartments
9, Barakhamba Road
New Delhi 110001
Phone : 011-23321501, 04, 07, 13 ;
Fax : 011-23321520
Mobile : 09871592299
Email : h.murtaza@hotmail.com, mullasdelhi@mullas.net.

3(b) The address of the Respondents for service of all notices in the appeal are as set out hereunder :

(i) Orissa Electricity Regulatory Commission,
Bidyut Niyamak Bhawan, Unit-VIII,
Bhubaneswar 751012
Dist: Khurda, Orissa
Phone No. 0674-2393097; Fax No. 0674-2393306
email: orierc@rediffmail.com

(ii) Commissioner & Secretary
Department of Energy
Government of Orissa
Odisha Secretariat
Bhubaneswar 751001
Email : energy@ori.nic.in, Ph. 2322243

(iii) World Institute of Sustainable Energy (WISE)
Plot No. 44, Hindustan Estates, Road No. 2
Kalyani Nagar, Pune 411 006
Tel.: 91-20-26613822, 26613855, Fax. +91-20-2661438
Email : wiseinfo@wisein.org

(iv) Prayas
C/o. Amrita Clinic
Athawale Corner, Karve Road
Deecan Gymkhana, Pune 411004
Ph. 020-25420720, 65205726, Fax. 020 25420337

(v) Grahak Panchyat,
Friends Colony
Paralakhemundi
Dist: Gajapati 761 200

5. Jurisdiction :

The Appellant declare that the said matter, the directions, decisions and order against which they seek redressal is within the jurisdiction of the Hon'ble ATE.

6. Limitation :

i. RST Order dated 23.03.2012 for FY 2012-13 received on 30.03.2012 is annexed and marked as **Annexure – A**.

ii. Corrigendum on RST Order for FY 2012-13 regarding "Take or Pay Tariff" dated 10.04.2012 received on 16.04.2012 is annexed and marked as **Annexure – B** & **B1**.

iii. Letter regarding "Take or Pay Tariff" dated 08.05.2012 received on 09.05.2012 is annexed and marked as **Annexure – C**.

7. Facts of the Case :

7.1 The Appellant is a Distribution Company in the State of Orissa registered under the provisions of the Companies Act, 1956 and is inter alia, a Distribution and Retail Supply Licensee in the southern part in the State of Orissa.

7.2 Respondent No.1 is the Orissa Electricity Regulatory Commission (herein after referred as 'OERC') constituted under the provisions of the said Act and is a Commission under the provisions of Section 82 of the Electricity Act, 2003 (hereinafter referred to as "the Electricity Act").

7.3 Respondent Nos. 4 and 5 are the Consumer Representatives.

7.4 By reason of the process of reforms in the electricity sector, the Appellant is a licensee carrying out distribution and retail supply to the southern part of the state of Orissa since 1st April 1999 along with other Distribution Licensees, namely, North Eastern Electricity Supply Company of Orissa Ltd. (NESCO) and Western Electricity Supply Company of Orissa Ltd. (WESCO) (hereinafter referred to as "DISCOMS").

7.5 The Appellant filed an application before the OERC, being Case No. 96 of 2011 for approval of its Annual Revenue Requirement (ARR) and Retail Supply Tariff (RST) for FY 2012-13 on 30th November 2011. The copy of the application being Case No. 96 of 2011 filed by the Appellant before Respondent No. 1 is hereto annexed and marked as **Annexure-D.** The Appellant craves leave to refer to the said ARR and RST proposals to facts.

7.6 To the Appellant proposals 13 objections were received from various parties and reply to all the points/issues raised were submitted to the objectors with a copy to OERC. Appellant craves leave to refer to the objections and the rejoinder to the objections to the ARR and RST proposal, when produced.

7.7 OERC after hearing the parties passed an Order on the application of the Appellant for approval of ARR and Retail Supply Tariff (RST) for FY 2012-13 on March 23rd, 2012. The RST for DISCOMs was determined by a Common Order.

7.8 OERC, thereafter issued a corrigendum to the RST Order, dated 10.04.2012 which was received on 16.04.2012.

7.9 Subsequently, an after receiving a letter from DISCOMs, OERC issued a letter relating to the "Take or Pay" aspect of the RST Order dated 8th May 2012 which was received on 9th May 2012.

7.10 OERC, on the application filed by GRIDCO Ltd, issued the Bulk Supply Price (BSP) Order on 23rd March 2012. Copy of the Order is annexed as **Annexure – E**, the petitioner crave leave to refer the Order during the proceedings.

8 (a) Facts in Issue :

As stated in paragraphs 7 and 9 herein.

(b) Questions of Law :

8.1 Whether the OERC was right in determination of unrealistic distribution loss targets and AT & C losses to be achieved by the Appellant in FY 2012-13 ignoring the ground realities and in contravention of the previous directions of the Appellate Tribunal for Electricity and the Tariff regulations of the OERC.

8.2 Whether the OERC was right in disallowing the legitimate dues of the employees towards Basic + Grade Pay, HRA, LTC, Terminal Benefits Fund and Other employee expenses.

8.3 Whether the OERC was right in disallowing Administrative and General Expenses as proposed by the Appellants in their tariff proposal for FY 2012-13.

8.4 Whether the OERC was right in assuming higher sales in HT and EHT without considering the proposal of the Appellant.

8.5 Whether the OERC was right in fixing the Retail Supply Tariff in such a manner that the DISCOMs could not be able to recover the Cost approved by OERC.

8.6 Whether the OERC was right in introducing the "Take or Pay" Tariff and special incentives without considering the same in the ARR of the DISCOMs and disregarding the directions of the ATE regarding computation of load factor in Appeal No 28, 29 and 33 of 2010.

9. Grounds of Relief with Legal Provisions :

9.1 OERC has erred in determination of distribution loss targets and AT&C losses to be achieved by the Appellants in FY 2012-13. It erred by not considering the ground realities and approved such unrealistic and unachievable targets that are unrealistic and unachievable in a year's time.

9.2 OERC has erred by not allowing the legitimate dues of the employees of the DISCOMS towards their Basic+ Grade Pay, HRA, LTC, Terminal Benefit fund requirement and other employee expenses despite the fact that actual audited figures for FY 2010-11 were available regarding Basic Pay and Grade Pay paid.

9.3 OERC has erred in disallowing the genuine Administration & General Expenses proposed by the Appellant for FY 2012-13 which would affect the operational flexibility of the DISCOMs and compliance to the direction of OERC.

9.4 OERC has erred in fixing the Retail Supply Tariff in such a manner that the Appellant could not be able to recover the Cost approved by OERC.

9.5 OERC has erred in introducing the "Take or Pay" tariff for EHT and HT consumers and providing special incentives for such consumers without factoring the same in the ARR of the DISCOMs and computation of load factor in contravention to the directions of the Hon'ble ATE.

9.6 The Retail Supply Tariff Order for FY 2012-13 is challenged essentially under the following heads; which have been elaborated hereinafter.

(a) Unrealistic Distribution Loss Targets and Notional Revenue approved.

(b) Computation of Revenue without factoring the special rebate/concession of "Take or Pay" Tariff computation of load factor without taking into consideration the directions of the Hon'ble Tribunal.

(c) Employee Costs

(d) Administrative & General Expenses

(e) Inadequate Tariff to meet the approved Cost.

(f) Incentive for leading Power Factor.

9.6.1 **Unrealistic Distribution Loss Targets and Notional Revenue approved.**

It is humbly submitted that OERC has erred in the determination of distribution loss targets and AT&C losses to be achieved by the Appellants in FY–2012-13.

That SOUTHCO, based on the actual AT&C loss levels of FY 2010-11 (being the previous year), and estimated AT&C loss levels for FY 2011-12 (being the current year) had proposed the AT&C Loss levels to be achieved for FY 2012-13 (for the ensuring year), in accordance with Regulation 5 (3) of the OERC (Terms & Conditions for Determination of Tariff) Regulation 2004, the details of which are as under.

SOUTHCO						
Performance Parameters	FY 2010-11 (Audited) (A)	FY 2011-12 (Estimated by Appellant) (B)	FY 2012-13 (Projected by Appellant) (C)	Loss reduction targets proposed by appellant (D)	OERC Approval for FY 2012-13 (E)	OERC Loss reduction targets in FY 2012-13 (F=B-E)
Distribution Loss	48.21%	46.80%	43.72%	3.08%	25.50%	21.30%
Collection efficiency	92.40%	96%	97%	1.00%	99%	3.00%
AT&C Loss	52.15%	48.93%	45.41%	3.52%	26.25%	22.68%

However, OERC without considering the ground realities, approved such unrealistic and unachievable performance targets that are difficult to achieve in an year's time.

For better appreciation, it is submitted :

a. That, T& D loss levels, on the basis of which, the ARR (Annual Revenue Requirement) of the DISCOMs are determined by the OERC have been grossly understated since inception. The baseline loss levels reported in the World Bank Staff Appraisal Report (SAR) of April 1996 on the basis of which the loss reduction trajectory from FY97 to FY03 was approved, was far from ground realities. The consequent financial impact on account of understating baseline loss levels was to the tune of Rs 237 Crs (Wesco – Rs 121 Crs, Nesco – Rs 88 Cr, Southco –Rs 28 Cr) in the first two years of operation. The DISCOMs have consequently suffered large cash losses from inception. This has also impaired the ability of DISCOMs to allot resources for loss reduction effirts Besides, in the absence of any subvention from the State, which was in the tune of Rs 250 Cr p.a, prior to reforms, the DISCOMs-WESCO, NESCO and SOUTHCO were left to fend for themselves.

b. Even the World Bank in its Mid-term Review Report has admitted the underestimation of the actual loss levels. The Mid-term Review Report mentions that **"Consultation with the Commission on the issue of recognizing the**

actual system loss levels and pass through of prior years' financial losses, given that we all so severely underestimated GRIDCO's system losses in 1996 and set unachievable performance targets". In fact, loss levels adopted for approving the tariff application in FY98 was estimated at 34.8% when actual loss levels for FY 97 was 49.47%. As a result, tariffs were set on assumed losses which led to under recoveries in cost and distribution companies in the absence of any subvention from the state government became cash deficit from day one.

c. **Committee of Independent Experts (Sovan Kanungo Committee)** - In May 2001, the Govt of Orissa constituted a Committee of Independent Experts under the Chairmanship of Sri Sovan Kanungo, I.A.S (Retd) to review the Power Sector Reforms in the State. The mandate of the Committee was to check as to whether the reforms in the electricity sector had proceeded on the desired lines, the corrective steps, if any, needed to be taken to ensure that the intended benefits of the reforms process flow to the targeted groups and specific steps that need to be taken to promote socially relevant objectives like Rural Electrification, Energisation of L.I. Points , providing electricity to the under privileged sections of the community , etc.

i. Amongst several recommendations, the Committee suggested means of overcoming the cash deficit situation through a mix of tariff hike and interim financing. The Committee estimated an interim financing requirement to the tune of Rs 3240 Cr as a requirement to overcome the crisis, and suggested that World Bank, DFID and Govt of Orissa come out with a package to fill the revenue gap in the intervening years. **(The cash infusion never happened)**

d. That, OERC framed the Terms and Conditions for determination of Tariff Regulation under Electricity Act 2003, wherein the method of the fixation of the loss reduction target is provided. The provision 5(3) of the said regulation is reproduced below ;

"5. XXXXXXXXXXXXXXXXXXXXXXXXXXXXX
(3) Distribution Loss
(a) To set the base line of distribution loss estimate, the Commission may either require the licensee to carry out proper loss estimation studies under its supervision, or initiate a study itself.
(b) The Commission shall approve a realistic and achievable loss target for the year under review based on the opening loss levels, licensee's filings, submissions and objections raised by the stakeholders. This approved loss target will be used for computing sale of power to consumers for that year."

Contrary to the aforesaid regulation OERC has fixed the unrealistic and unachievable Distribution Loss target without considering the prevailing level of distribution losses.

e. That, the **Abraham Committee Report,** and the, R-APDRP guidelines issued thereof, have also suggested a loss reduction strategy taking into account the existing loss levels. While other states have acted accordingly, the DISCOMs in Orissa seem to have been denied a historic opportunity for a midcourse correction. With the APDRP funding the utilities loss reduction target supported by Abrham Committee is as under ;

"AT&C Loss Reduction Targets

The Task Force examined the targets set for AT &C losses reduction and after taking into consideration experience of the Utilities felt that the targets should be recast in a manner ***that they are realistic and achievable based on the present level of AT&C losses in each State****. Accordingly the Task Force recommends the following targets depending on their present level of AT&C losses:*

i) *Utilities having AT&C losses above 40%: Reduction by 4% per year*

ii) ***Utilities having AT&C losses between 30 & 40%: Reduction by 3% per year***

iii) ***Utilities having AT&C losses between 20 & 30%: Reduction by 2% per year***

iv) *Utilities having AT&C losses below 20%: Reduction by 1% per year*

Against the recommendation of Abrham Committee for AT&C loss reduction of 4%, the OERC has given unrealistic and unachievable target of 22.68%.

f. That, the Letter (Copy attached as **<u>Annexure- F</u>**) written by Joint Secretary, Ministry of Power to Secretary, Energy, GoO, dated 23-04-2012 regarding the need for realistic determination of baseline losses for successful implementation of R-APDRP. Extracts of Para-3 & 5 of the said letter is given as under :

a. *"It is evident that for getting the benefits of APDRP, utilities have to improve AT&C Loss reduction over the base (starting) level not only in project area, but also at utility level. The correct and realistic determination of base (starting) AT&C loss level is very essential to gauge the improvement in loss* *reduction in subsequent years after implementation of R-APDRP.*

b. *xxxxxxxxxxxxxxxxxxxxxxxxx*

c. *In view of the above you take up the issue with OERC to determine the yearly loss levels of distribution utilities in Orissa accurately based on ground realities and not on notional basis."*

It is evident from above, that determination of actual loss levels is a prerequisite for availing funds under the R-APDRP scheme so that loss reduction strategy is achievable and people from Orissa are able to access central funds.

g. As mentioned, in the previous years, tariffs were determined on the basis of unrealistic loss levels. It is pertinent to mention that even those tariffs that were approved on the basis of notional losses did not cover the approved costs **so as** to avoid increase in retail supply tariffs. Neither was their any subsidy or subvention as in earlier years.

h. That, the observation of 13th Finance Commission vide Para 7.105 have observed that, in absence of timely tariff increase, the gap has increased and has impaired the financial condition of the distribution utilities across India. Extracts are as under :

"As against the enormous financial losses indicated above, subsidies in 2007-08 were of the order of Rs.16,950 crore. Thus, there is a large and burgeoning uncovered gap. The key reasons for the increasing gap can be summarized as follows :

i) Inability of the state utilities to enhance operating efficiencies and reduce T&D losses adequately.

ii) High cost of short term power purchases. Several utilities have not planned capacity addition in time and are relying on short term purchases at high *rates (an average of Rs.7.31 per kwh as compared to rs.4.52 per kwh in 2007-08). The inability to reduce T&D losses has increased the purchase levels and supply costs.*

i. ***<u>Absence of timely tariff increases has increased the gap and has impaired utility operations further</u>. <u>Some states have not raised tariffs for the past eight to nine years in spite of increasing deficits.</u>"***

[In Orissa there was no average tariff increase for 9 years from 2001-02 to 2009-10]

j. That, the **National Tariff Policy** stresses on the need for a fair estimate of baseline losses, and consideration actual loss levels for setting forth realistic targets in the control period. In case of the Orissa DISCOMs, even after the elapse of the 1st Control Period and subsequent setting of targets in the Second Control Period, the concern relating to reassessment of baseline loss levels remain unanswered.

k. **Directions of the Appellate Tribunal** -That Hon`ble Appellate Tribunal for Electricity vide its order dated 13.12.2006 and 08.11.2010 in the appeal against OERC Order pertaining to year 2006-07 & 2007-08, had directed for determination of realistic loss levels, but the same is yet to be implemented. Extracts of the Hon`ble ATE is placed below.

   i. **The Hon`ble ATE in Appeal No 52,53 and 54 of 2007** dated 8th November 2010, have stated as follows - " *21………..In our opinion, there is force in* *arguments of the Appellants that the loss reduction targets have been approved by the State Commission in the impugned Order without keeping in view the ground realities………..."*

ii. **The Hon`ble ATE in Appeal No 77, 78 & 79 of 2006** dated 13th December 2006, have stated as follows - " *27……..We hasten to add that the Commission need not stick to its earlier view, but it shall have a re-look in this respect by taking a practical view of the ground realities instead of proceeding on assumption and surmises. We are sure that Commission will take a re-look of the matter and grant the benefits to the DISCOMs"*

OERC is not implementing the aforementioned direction of Hon'ble ATE stating the following reasoning :

"*The Commission has taken note of the observation made by the Hon'ble ATE in the said order while approving the ARR of Licensee for FY 2011-12. The Commission in this regard has however preferred Civil Appeal against the above judgement of the Hon'ble ATE before the Hon'ble Supreme Court in the appeal, CA no. D 4688 of 2011.* "

l. For FY 13, the overall bulk supply tariff have increased by 34.81% while retail supply tariffs have increased by only 11.84% and there exists a wide gap of 23% between the AT&C losses approved and actual. Further the difference between the proposed loss levels and approved loss levels in units is added back to the approved retail sales leading to notional sales (i.e. unrealized revenue) so as to bridge the gap in ARR.

m. Appellant submits that, OERC while accepting the actual loss levels and agreeing to utilize the same for monitoring the progress under the CAPEX programme has erred in adopting a separate loss level for determination of the ARR for FY 13. There exists an interrelationship between the loss reduction, ARR and the CAPEX Programme and approved revenues have to be sufficient enough to service loans incurred for the CAPEX programme, else it shall jeopardize the entire state.

n. That, OERC has erred in approving unrealistic loss reduction targets and approving sales in excess of that prayed for. That while approving the quantum of power purchased by the DISCOMs, the OERC has assumed higher sales in the LT category, which is "notional' in nature. On account of such adjustment, the revenues are inflated to the extent of Rs 189.95 Cr for SOUTHCO, the details of which are as under :

SOUTHCO for FY 2012-13		
Sales in MU	**Proposed**	**Approved**
LT	1343.22	1682.73
HT	209.48	209.48
EHT	377.8	377.8
TOTAL	1930.5	2270.01
Sales (Rs in Cr)	**Estimated**	**Approved**
LT	441.92	575.75

HT	123.38	116.07
EHT	206.66	208.52
TOTAL	771.96	900.34
Energy Purchase in MU	3430.00	3047.00
Distribution Loss %	43.72%	25.50%
Distribution Loss Disallowed		18.22%
Additional units to sales (MU)		555.1634
Notional Revenue in (RS Cr)(LT average tariff @Rs 3.42 per unit)		189.95

Estimated Revenue at revised Tariff.

9.6.2 **Wrong appropriation by introducing "Take or Pay" Tariff principle**.

i. That, it is most respectfully submitted that, OERC has erred in introducing a special rebate for those HT & EHT consumers (having contract demand more than or equal to 100KW) and extending them a special concession of 50 P/U without accounting for the same in the licensees expected revenue.

ii. That, OERC vide Para 487(b) had introduced the concept of "Take or Pay" Tariff for all HT & EHT consumers having contract demand more than or equal to 100KW, subject to their willingness in writing to pay for energy charge as per actual drawl or 70% load factor of the "contract demand", modified by the corrigendum dated 10th April 2012 to maximum demand other than off peak hours per month whichever is higher.

iii. Such HT & EHT consumers shall also be allowed 50 paisa per unit as special concession on total consumption. It was also mentioned that for the calculation of the load factor the contract demand wherever mentioned in KVA, the actual power factor shall be taken into consideration.

iv. That, subsequently vide corrigendum no. DIR(T)-389/2011/VOL-I/3105 dated 10.04.2012 received on 16.04.2012, mentioned that on account of certain typographical errors, the RST Order would require corrections which are as under :

> ***"Para 487 (b) line 4***
>
> *'Energy charge as per actual drawal or 70% load factor of the **<u>contract demand</u>** per month' should be read as*
>
> *Energy charge as per actual drawal or 70% load factor of the **<u>maximum demand</u>** (other than off-peak hours) per month*
>
> ***Similarly Annexure-B Para (xi) line 3***
>
> *'Energy charge as per actual drawal or 70% load factor of the contract demand per month' should be read as*
>
> *Energy charge as per actual drawal or 70% load factor of the maximum demand (other than off-peak hours) per month*
>
> *xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx"*

v. Objecting to the corrigendum, the DISCOMs vide letter no. RO/CSO/596 dated 24.04.2012 prayed to OERC for withdrawl or modification of the corrigendum stating therein that, load factor computation for the purposes of the "Take or Pay" scheme should be on the basis of 70% load factor corresponding to contract demand or maximum demand other than off peak hours. Copy is placed as **Annexure – G**.

vi. It is the submission of the licensees that :

"a. That, the concept of Take or Pay is derived to curb the theft of electricity by encouraging the consumers with a concessional tariff on guaranteed quantum of energy off take or to pay for the same in case of lower drawl so that consumer shall desist from theft of power. With this guaranteed minimum energy off take method, the consumer is required to pay at least for that quantum and even the consumer prefers to pay for marginal higher quantum at concessional Tariff than to steal power.

b. That the very essence of the take or pay concept is lost by following the present corrigendum Order wherein units corresponding to 70% load factor will be calculated on the actual Maximum Demand recorded during other than off peak hours of the month.

c. That, the minimum off take by the consumer in terms of absolute energy is not guaranteed and thus, the revenue to the DISCOMs are also not guaranteed, even though the concessional tariff than *the normal tariff is extended. In the worst case, it may happen that the consumers get opportunity to bypass the energy meter and avail electricity either through hooking or otherwise during the hours other than off peak period and draws around 120% of Contract Demand during off peak hours. In the process, DISCOMs having no guaranteed energy charges shall end up passing on rebate & special rebate to these consumers to the tune of 60 Paisa per unit during off peak hours consumption and 50 paisa per unit during other than off peak hour consumption on the basis of less demand recorded other than off peak hours. In fact the net effect of the new tariff for FY 2012-13 would be reduced the revenue of EHT & HT by 30 paisa, which is not considered in the expected revenue of DISCOMs computed in Tariff Order.*

d. *That, said corrigendum Order is in the departure of the take or pay principles followed/directed by Hon'ble OERC in past.*

e. *That, due to the uncertainty in the load as well as revenue forecast, it may create problem with the DISCOMs for energy forecasting as well as liquidity.*

f. *Further, due to non-consideration of revenue loss in the approved annual revenue of DISCOMS, the DISCOMs will fall short of revenue and in turn would* *be unable to serve the liabilities of BST Bill, salary and other expenses on monthly basis."*

vii. It is submitted that OERC replied to the said letter specifically on Take or Pay Tariff stating that it desires for implementation of the scheme and that after 3 months of implementation the Commission will review the scheme considering the feedback of all the stake holders. Copy of the said letter is placed as Annexure C.

viii. It is the submission of the licensees that the reply from OERC did not address the concerns of the licensee, inasmuch that the same was contrary to past two precedents in previous tariff Orders regarding the "Take or Pay" principles causing the uncertainty of revenue flow of the DISCOMs.

ix. That, OERC direction to compute load factor on the basis of 70% of maximum demand (in off-peak hours) doesn't envisage the situation where the maximum demand becomes much less than the contract demand. For the purposes of illustration; a consumer with a contract demand of 250KVA and a maximum demand of 70KVA, being a signatory to the Take or Pay scheme will be required to pay 70% of load factor units on the maximum demand of 70KVA instead of up to 250KVA leading to a loss in revenue collection. It is worthwhile to state that even the directions of the Hon'ble Tribunal in Appeal No 28, 29 and 33 of 2010 regarding the aforesaid anomaly has not been considered. Extracts of the Appeal No 28, 29 and 33 of 2010 is as under :

"It is for the Commission to deliberate if it would adhere to the maximum demand formula in case the ***maximum demand is less than the contract demand*** *so as to ensure maximize consumption. With regard to the other point of projection of revenue for the purpose of fixing the tariff on the basis of the actuals there is likelihood of the increase of the revenue gap in as much as the recovery for the future might be lower than that of the preceding years per unit. This is the issue which we feel the Commission should engage themselves for consideration, so that the appellants are not put to loss due to change in tariff computation based on load factor instead of consumption ratio."*

x. That, the Appellant crave leave to withdraw the above ground, in the event of the OERC issued the review Order as per OERC letter dated 08.05.2012 with suitable relief to the Appellant at later date during proceeding before Hon'ble Tribunal.

9.6.3 **Employees Cost**

The appellant proposed employee expenses for FY 2012-13 on the following heads and approval of OERC is as under :

Rs. in Cr.

Sl.	DISCOM	SOUTHCO			
		2010-11	2011-12	2012-13	
		Actual	Approved	Proposed	Approved
1	Basic Pay + GP	57.95	51.94	63.71	55.7
2	Arrear 6th pay and Wage Board				
3	Addl. Emp. Cost			5.49	8.49
4	DA	15.03	28.57	46.19	40.11
5	Other allowance	1.04	1	1.15	1
6	Bonus	0.02	0.2	0.2	0.2
7	Total Emoluments (1 to 6)	74.04	81.71	116.74	105.5
8	Reimbursement. of medical expenses	2.46	2.6	3.19	2.79
9	Leave Travel Concession	0.01	0.09	0.1	0.1
10	Reimbursement of HR	7.98	7.79	11.47	8.36
11	Interim relief of Staff				
12	Encashment of Earned Leave				
13	Honorarium	0.0043			
14	Payment under workmen compensation Act	0.0002	0.15	0.15	0.15
15	Ex-gratia	0.0001		1.2	
16	Other Staff Costs	0.11	0.05	0.2	0.05
17	Total Other Staff Costs (8 to 16)	10.56	10.68	16.31	11.45
18	Staff Welfare Expenses	0.34	0.42	0.45	0.42
19	Terminal Benefits (Pension + Gratuity + Leave)	79.41	60.78	110.1	68.81
20	Total (7+17+ 18+19)	164.35	153.59	243.42	186.17
21	Less: Empl. cost capitalized				
22	Net Employees Cost	164.35	153.59	243.42	186.17

(Source Table-62 of RST Order for FY13)

The total employee costs (after capitalization) proposed for FY 2012-13 was to the tune of **Rs** 243.42 **Crs**.

In the impugned Order the approval of employee cost by OERC is discussed in paragraphs 331 to 356. A perusal of **Table 62** of the impugned Order which shows the proposed employee cost under various heads for FY 2012-13 and the approval thereof for FY 2012-13 would show that OERC has not allowed the legitimate dues towards Basic+Grade Pay, HRA, Terminal Benefit fund requirement and other employee expenses.

Though, the audited figures for FY 2010-11 are available regarding Basic Pay and Grade Pay paid and the actual amount of Basic Pay and Grade Pay paid during FY 2011-12, OERC did not consider the same and approved unilaterally lesser amount of Basic + Grade Pay for FY 2012-13.

Basic + Grade Pay:

Against an approved amount of Rs 51.94 Crores for FY 2011-12 towards Basic+Grade Pay, OERC allowed only Rs 55.7 Crores for FY 12-13 in spite of the fact that SOUTHCO is going to induct 250 no of employees during FY12-13 and 231 nos of employees are going to retire during FY13. However, OERC did not consider the above facts and approved lesser amount of Rs 55.7 Crore for FY12-13.

HRA

OERC in Para-344 of the impugned Order has allowed HRA @ 15% only with a justification that maximum no of employees are staying in the quarters. It is submitted that only a few no of employees are staying in official quarter, whereas the maximum no of quarters are vacant due to the fact that the condition of those quarters are so bad that no one can stay there. As per 6th Pay Commissions recommendation the minimum HRA payable is 18% of the Basic + Grade Pay. This is a departure from the principle adopted in the previous Tariff Orders and the actual expenses incurred by DISCOMs. Therefore OERC erred in allowing HRA@15%.

Terminal Benefit

OERC has not considered the Actuarial Valuation Liability submitted by the DISCOMs. It is worthwhile to mention that,

Hon'ble Commission in Para.6.1.1.16 of RST Order for 2007-08 had observed that :

> *"From the above tables it is observed that the fund requirement has gone up by more than three times over a period of 7 years which is surprising, given the fact that there has been a constant reduction of employee numbers as a result of superannuation and subsequent abolition of posts. The Commission has no expertise to dis-agree with the results of this actuarial valuation. The Commission agrees with the principle that pension, gratuity liability should be met from the earning of corpus fund only in full and the corpus fund should be created by the companies by regular contributions to the fund based on actuarial valuation."*

Accordingly, the actuarial valuation findings ought to have been taken on record.

That, OERC has erred in not considering the views of Discoms on the findings of the actuarial valuation of M/s Bhudev Chaterjee and instead allowing on a provisional basis the last valuation (3 years old) done by the Commission appointed actuary which was done as on to 31.03.2009 in 2009-10 with projection for FY 2009-10 and FY 2010-11.

It is the submission of the Appellants that legitimate costs cannot be denied on the sole ground that the actuary appointed by OERC refused to undertake the assignment.

In Table 62, OERC has approved terminal liabilities of the DISCOMs as set out therein. Insofar as SOUTHCO is concerned an amount of Rs. 68.81 crore has been allowed to the DISCOM towards terminal liabilities for FY 2012-13. This is as against the proposed amount based as actuarial valuation for FY 2012-13 of Rs. 110.10 crore.

Para 351 to 354 deal with the manner in which the actuarial valuation has been determined by OERC. The OERC has estimated the corpus required up to 31.03.2012 on the basis of a percentage on a projection which is incorrect to say the least. According to the gap between estimated corpus fund and corpus availability as on 31.03.2012 is understated.

9.6.4 **Administrative & General Expenses** :

The Appellants in their tariff proposal for FY 2012-13, have proposed approval of A&G expenses under two heads one being normal A&G expenses and the other being additional A&G expenses. In the case of SOUTHCO Rs. 25.21 crore was claimed towards normal A&G expenses and Rs. 16.81 crore was claimed towards additional expenses, the details of which are as under.

SOUTHCO FY 2012-13	**Proposal**	**OERC Approval**
Normal A&G Expenses (A)	25.21	13.67
Additional A&G Expenses (B)		
Automatic Meter Reading Activities	0.21	
Energy Audit, Prepaid meter	0.18	
Implementation of Right to Information Act	0.10	
Implementation of Intra State ABT	0.40	
Expense of Customer Care	2.52	0.50
IT Automation	0.06	2.00
Energy Police Station	5.33	1.00
Franchisee	4.80	
Training for Employees & Insurance	0.72	
Building & other Construction Workers Welfare Cess	0.58	
Shifting & replacement of meters	1.89	
Inspection fee towards SI works		1.00
Compensation for electrical Accidents		1.00
Total (B)	**16.81**	**5.50**
Total (A+B)	**42.02**	**19.17**

It is most respectfully submitted that, OERC has allowed additional expenses for activities such as Call centre and expenses towards energy police stations, it has refused to allow expenses relating to certain must to do activities like RTI compliance, AMR installations, building and construction worker's welfares cess, meter replacement cost etc in the Tariff Order; thereby, disallowed the actual expenses incurred by the DISCOMs towards afore mentioned activities.

Non recognition of Cess payable

That Hon`ble Orissa High Court in WPC 3832 & 3833 dated 24.02.2010 have held that WESCO is liable to pay 1% Cess. In the circumstances, it is submitted that SOUTHCO was fully justified in claiming expenditure towards aforesaid items and OERC erred in not approving the said amount of Rs 42.02 Crores towards A&G Expenses. Copy of the Order of Hon'ble High Court is attached herewith as **Annexure- H**.

The Appellants submit that, they are required to pay 1% cess on the construction carried out during the year as per Building and Other Construction Workers (RE&CS) Act 1996, being a sovereign levy ought to have been considered as a part of the A&G expenses. Further vide Judgment dated 18.11.2011by the Hon'ble Supreme Court of India vide Civil Appeal Nos. 1830, 1831 and 1832 of 2008 that, it has been held as a legitimate cost. Copy of the Order is enclosed as **Annexure- I.**

Non recognition of Meter Replacement Costs

Further as per OERC Order dated 28.02.2011 relating to MYT Principles, OERC has to allow expenses in addition to the normal A&G expenses for special measures undertaken by the DISCOMs towards reduction of AT&C Losses and collection efficiency. The relevant Para of MYT Order dated 28.02.2011 is as under:-

> *"In view of the submissions and facts the Commission would continue to allow normal Administrative and General Expenses @7% escalated over the base year value during the second control period also. In addition to above Commission would also **allow expenses in addition to the normal A&G expenses for special measures undertaken by the DISCOMs towards reduction of AT&C losses and improving collection efficiency**, after prudent check."*

However OERC has refused to allow such expenses in this regard. It is submitted that Spot Billing and replacement and shifting of meters are the first steps towards reducing the AT&C Loss and improving the Billing Efficiency which ought to have been allowed as a prudent cost.

Observations of the Hon`ble ATE

Further Hon'ble ATE in its **Order dated 08.11.2010 in Case No – 52, 53 & 54 of 2007** had held that OERC had erred in not allowing the **Spot Billing and Energy Audit** Expenses. The relevant Para of the Order is as under :

> *"In regard to Administrative and General Expenses, the State Commission has also disallowed the additional costs on account of distribution of spot billing on consumers and conducting of energy audit. These activities were initiated*

by the Appellants as non introduction of the spot billing and not conducting energy Audit were some of the grounds for seeking revocation of the license of the Appellants by the State Commission. However, the expenditure on carrying out their activities was not allowed in the ARR for FY 2007-2008 even though the Appellants had submitted details of the expenditure to the State Commission. ***<u>Therefore, findings of the State Commission on this issue can not be held valid</u>****. Accordingly, this point is also answered in favour of the Appellants."*

OERC did not implement the aforementioned Order of Hon'ble ATE giving the following reasoning in Para – 419 of the impugned Order.

"419. The Commission has taken note of the observation made by the Hon'ble ATE in the said order while approving the ARR of Licensee for FY 2011-12. The Commission in this regard has however preferred Civil Appeal against the above judgement of the Hon'ble ATE before the Hon'ble Supreme Court in the appeal, CA no. D 4688 of 2011."

<u>Non recognition of other A&G expenses</u> :

<u>Implementation of Intra State ABT :</u> The Commission vide its BSP Order Para 545 & 546 dated 23.03.2012 have directed for the implementation of intra State ABT in real time mode with commercial implications in Odisha with effective from 01.04.2012. Extracts of the Para 545 & 546 are as below :

"545. OERC (Intra-State ABT) Regulation, 2007 was published in Odisha Gazette on 14.02.2008. As per Regulation 1 (III) of OERC (Intra-State ABT) Regulation, 2007, it is in force with effect from the date of publication in the Official Gazette i.e from 14.02.2008.

546. The Commission vide its Order dated 07.02.2012 in Case No. 2 of 2012 has fixed the date of implementation of Intra-State ABT (Phase-I) in real time mode with commercial implication in the State of Odisha w.e.f 01.04.2012. The Commission reiterates its direction that any lapses in implementation of Intra-State ABT (Phase-I) with commercial implication beyond 01.04.2012 will not be entertained & action under Section 142 will be initiated against the Licensees, SLDC & the Officers responsible for derailing such implementation."

Yet OERC erred in disallowing such A&G cost to be incurred for such an expense.

Implementation of Right to Information Act: Further the Orissa Information Commission, Bhubaneswar vide its Order dated 8th August 2011 instructed DISCOMs to establish full-fledged RTI cells in respective units, copy enclosed as **Annexure – J** and consequently the OERC vide its letter no OERC/PIO/RTI-2010/661 dated 20.04.2011 informed the DISCOMs are bound to comply as per RTI Act 2005, copy of letter annexed as **Annexure – K**.

Without prejudice to the pending appeal before Hon'ble Apex Court, DISCOMs appointed POIs and sought to put a structure in place for access to information. Yet OERC erred in not allowing the expenses towards effective and proper implementation of RTI and organising and establishing various Capacity Building initiatives and programmes. Besides, allocation of fund is also required for establishment of separate RTI Cell in Corporate, Circle and Division levels.

Thus it is respectfully submitted that aforementioned costs ought to have been approved.

9.6.5 **Incentive for leading power factor**

It is most respectfully submitted that the OERC has introduced incentive for leading PF drawl which is not in accordance with the Regulations.

It is submitted that, OERC Regulations 2004 vide Clause 77 stated that, average PF has to be maintained up to a level failing which the DISCOMs would levy a penalty and disconnect supply following due procedures. The relevant Clause 77 is extracted is as under :

OERC Regulations – 2004

Clause 77: The consumer shall so arrange his installation that the average power factor of his load during any billing period is not less than 90%. Power factor penalty shall be levied if there is breach of the aforesaid requirement and supply of power may be disconnected if the power factor falls below 60%.

Provided that there shall be no disconnection without giving the consumer seven clear days notice in writing to show cause to the engineer why the supply of power should not be disconnected. If, after considering the reply to the so cause notice, the engineer decides to disconnect, he shall communicate his order to the consumer and disconnect supply after seven days such communication."

Subsequently, the aforesaid Clause 77 was amended wherein it was mentioned that average lagging PF of any load should not be less than 92%, failing which there should be levy of the PF penalty. The amended Clause 77 is extracted as under :

OERC Regulations – 2004 (as amended up to May 2011)

Clause 77: The consumer shall so arrange his installation that the average lagging power factor of his load during any billing period is not less than 92%. Power factor penalty shall be levied if there is a breach of the aforesaid requirement.

In the RST Order FY 2012-13, the state Commission apart from introducing incentive for improvement in PF has stated that all leading PF drawl for incentive purpose will be deemed to be unity PF. The extracts of Para 481 of the RST Order for FY 2012-13 is as under :

"OERC RST Order for FY 2012-13

Incentive for improvement in power factor

Para 481. The Commission decides that incentive for maintenance of high power factor shall be given as a percentage of the monthly Demand Charge and Energy Charge and shall be applicable to the HT/EHT consumers who are liable to pay power factor penalty. The rate of this incentive will be 1% for every 1% rise above the PF of 97% up to and including 100% on the monthly Demand

Charge and Energy Charge. All leading power factor drawl for incentive purpose will be deemed to be unity power factor"

It is the submission of the licensee that the state Commission ought to determine tariff as per the prevailing Regulations.

It is further submitted that, in case of leading PF, the current leads voltage in a capacitor and too much of capacitance causes low leading PF which is as bad as low lagging PF. The leading PF in such a situation causes high voltage and increased wire losses and hence the leading PF benefits are more situation specific. The same not being in the Regulation of the state Commission is bad in law and liable to be rejected.

It is further submitted that, leading PF is also dependent on the type of loads and the pattern of usages. The Appellant seeks kind reference to the Appeal no. 75 of 2011 between **Southern Railway v. Tamilnadu Electricity Regulatory Commission**, wherein it is stated that in a traction load wherein the power drawl is non-continuous, the capacitor banks over inject VAr which is detrimental to the system. A true copy of the Judgement passed by this tribunal in Appeal 75 of 2011 is annexed herewith as **Annexure L.**

It is submitted that as per Indian Electricity Grid Code and Odisha Grid Code the VAr Compensation should be such that the beneficiaries should not draw VAr from Grid particularly under low voltage conditions. Accordingly the leading VAr return and leading power factor condition is beneficial for the system when voltage is less than rated voltage and consumer should get incentive for such leading Var return. But leading Var return and leading power factor condition is harmful for the system when voltage is more than the rated voltage and beneficiary should be penalized for such leading Var return.

Similarly Lagging VAr drawal and lagging power factor condition is harmful to the system when Voltage is less than the rated voltage and consumer should be penalized. But Lagging VAr drawal and low lagging power factor condition in case of high voltage and voltage more than the rated voltage is beneficial for the system and consumer should get incentive.

But in the RST order at Para 481 it is stipulated that the rate of the incentive will be 1 % for every 1 % rise above the PF of 97 % up to and including 100 % on the monthly Demand Charges and Energy Charges. Such an incentive may be there to encourage consumer to maintain PF within 97 % to 100 %.

But as stipulated further in para 481 that the "All leading power factor drawl for incentive purpose will be deemed to be unity Power Factor "is not as per OERC amended Regulation 2004 and not in line with IEGC and OGC .

Hence for Leading VAr return the Leading power factor incentive should be given to consumer only when the voltage in the system is less than the rated voltage and leading power factor penalty should be imposed when voltage is more than the rated voltage in line with IEGC and OGC.

It is further submitted that, the appellant is to be prejudiced and suffer from sever financial strain on account of system instability.

Hence, appellant prays that incentive that has been allowed in the context of leading PF (treat the same as unity PF) is not in accordance with the Regulation and hence liable to be rejected.

9.6.6 **Inadequate Tariff to meet the approved Cost**

That, OERC has erred in fixing the Retail Supply Tariff and the Bulk supply Price fixed for the licensees in such a manner that it could not able to recover the Cost approved by OERC. Further OERC in the impugned Order has increased the RST by 11.15% and BST by 29.3%. Further OERC did not taken into account the realistic and achievable Distribution Loss levels proposed by the Appellant and approved the revenue of the DISCOM considering notional sales. The Bulk Supply Price philosophy of OERC has not backed by any computation of the BSP of the licensees see. There is no proper reasoning whatsoever as fixation of a particular BSP vs. 86.1(B) of the EA 2003.

The Hon'ble ATE in its Order dated 8th November 2010 in Appeal No. 52, 53 & 54 of 2007 in the matter of determination of Annual Revenue Requirement & Retail Supply Tariff for the year FY 2007-08 while addressing the issues of estimation of distribution loss targets by the Commission for DISCOMs have stated as under :

"37. ………………………………………………..

ii) The second issue is relating to unrealistic distribution loss targets. According to the Appellants, the State Commission has fixed unrealistic distribution loss targets without considering the ground realities. This Tribunal in its earlier Judgment dated 13.12.2006 in respect of ARR for 2006-2007 had specifically directed that State Commission to take a relook in this respect by taking a practical view of the ground realities instead of proceeding on assumption and premises while undertaking truing up exercise. According to the learned counsel for the State Commission, the distribution loss targets have been set up in accordance with Long Term Tariff Strategy Order dated18.06.2003 and Business Plan Order dated 28.02.2005. According to the Appellants the Business Plan also contained provisions for financial restructuring of distribution losses and targets of infusion of funds, which did not take place. The distribution companies were starved of finances as the tariffs approved by the State Commission did not cover the approved costs. Even though Bulk Supply Tariff has been increasing, there has been no increase in retail supply tariff since 2001-2002. In the FY 2007-2008 the approved reduction in the distribution losses with respect of the previous year was

11.5 % for WESCO, 6.8% for NESCO and 13 % for SOUTHCO. As such we feel that the targets set up by the State Commission for the FY 2007-2008 were unrealistic. This point is also decided in favour of the Appellants.

…………………………………………………………

…………………………………………………………

vi) The last issue is relating to the Truing up and amortization of regulatory assets. The truing up cannot be a process where the projections are compared with the projections. According to the Appellants, they had undertaken the audit of the past receivables as per the guidelines of the state Commission and submitted the same to the Commission in the month of March 2008. We, therefore, direct the State Commission to revisit this issue after taking into account the audit of the past receivables of the Appellants."

The distribution licensees are generally reached to financial halt with no money available for statutory dues, salary and urgent maintenance and expansion of network, threatening serious hazards to the consumers and citizens.

SOUTHCO (Rs.Crore)	Approved FY 2011-12	Approved FY 2012-13	Estimation FY 2012-13
Revenue from Sale of Power	716.79	900.32	771.96
Collection Efficiency	99.00%	99.00%	97.00%
Collection (A)	709.62	891.32	748.8
Power Purchase Cost including Transmission & SLDC Charges (B)	437.78	631.28	710.56

Balance amount available after meeting Power Purchase dues (C = A-B)	271.84	260.04	38.24
ARR approved excluding Power Purchase	248.06	274.84	274.84
GAP (+/-)	23.78	-14.8	-236.6

In this recent tariff and from the above it is clear that the appellant is not even in a position to sustain after payment of BST, Transmission & SLDC Charges to meet the approved expenses of Rs 274.84 Crore, as there is only 38.24 Cr left to meet the other expenses.

The RST hike was only to meet the increase in the Power Purchase cost and the balance available as per the approved ARR for FY 2011-12 is Rs. 271Crore is reduced to Rs.260Crore in FY 2012-13. Again the BSP bill has been increased to 437.78 Cr in FY 2011-12 to Rs 631.28 Cr for FY 2012-13.

10. Matters not previously filed or pending with any other Court :

The Appellant declare that they have not filed any Writ Petition or Suit regarding the matter in respect of which this Appeal has been made before any Court or any other authority nor any such Writ Petition or Suit is pending before any of them.

11. Specify below explaining the grounds for such relief (s) and the legal provisions, if any, relied upon :

Kindly refer to Para 9 above. The Appellant further crave leave and reserves its rights to add to, alter or amend the Appeal and/or grounds in support of the Appeal.

12. Details of interim application, if any, preferred along with this Appeal :

The Appellant do not prefer any separate Interim application except what is stated in the present appeal That the present cash flow of the Appellant is not adequate to pay even, the basic and mandatory salary to the employees and incur urgent & emergent electrical system maintenance expenses. The operation of the distribution licensees has reached a grinding halt due to unviable ARR and Tariff approved by OERC on hypothetical basis and is devoid of the ground realities. The huge deficit/gap situation of the Appellant have also affected the payment of power purchase bills during last year due to (1) higher assumption of Industrial consumption by the OERC thus the Appellant submission (2) coupled with stay of Hon'ble Orissa High Court on the Revised Tariff on a large segment of consumers (domestic category); the Appellant could not have billed and realized the higher Tariff. However, the Appellant was billed with the higher Power Purchase cost at increased rate during 2011-12. Thus, the appellant could not pay Rs. 31.04 crore to Gridco during last year and the demand of OERC vide letter no. DIR(T)-330/08/3400 dated 24.05.2012 enclosed as **Annexure - M**.

Here, it is pertinent to mention that the OERC continues to approved the ARR and also true-up the ARR of the Appellant on notional distribution loss level of around 25%-26% as against the actual loss level of around 44%, in spite of the direction of this Tribunal in two Appeals for consecutive Tariff Orders for FY 2006-07 and FY 2007-08. This has resulted to accumulated losses up-to 2010-11 of Rs.743.04 crore as per Audited Accounts of the appellant whereas the OERC in their Truing up computation upto 2010-11 has shown a surplus of Rs. 84.56 crore on hypothetical assumption of notional sales added by Rs. 595.04 crores, though actually not billed to consumers.

Rs in Cr.

DISCOM	**Accumulated Profit / (Loss) as per Audited Account**	**Surplus / Gap given as per Truing Up**	**Differenc e**	**Notional Sales assumed and added in True up**
WESCO	(526.67)	1156.86	1683.53	1299.4
NESCO	(730.99)	154.51	885.5	656.61
SOUTHCO	(743.04)	(84.56)	658.48	595.04
TOTAL	**(2000.7)**	**1226.81**	**3227.51**	**2551.05**

It is pertinent to mention here that this Hon'ble Tribunal not only directed for consideration of realistic loss levels in truing-up but also in its judgment in Appeal No. 100 of 2007)M/s KPTCL Vs. KERC and others) have stated that the assumption of notional sales is unfair and unjustifiable being the sale of power is an uncontrollable item.

The cash flow position of last year and the deficit/Gap even with new tariff for 1st two months of 2012-13 is submitted as under;

SOUTHCO Ltd.

The Cash deficit position of FY 2011-12 & 2012-13 (April & May)				
		` **in Crore**		
S.L. No	**Particulars**	**FY 2011-12**	**FY 2012-13**	
			April	**May**
1	Collection amount	546.18	45.25	49.62
2	BST Bill (Feb’11 to Jan’12 paid in April'12 & March'12)	465.58	48.87	51.97
	(Amount of Rs. 403.88 crore is paid for the same period)			
3	Gap over BST bill (-ve margin over BST)	**80.60**	**-3.62**	**-2.35**
4	**Mandatge essential expenses**	-	-	-
i	Employee cost paid	-137.68	-12.84	-12.15
ii	O&M expenses paid	-13.7	-1.19	-0.92
ii	Interest & License Fees	-12.53	-1.72	-0.53
	Total of (4)	**-163.91**	**-15.75**	**-13.6**
8	(Deficit) (3-4)	-83.31	-19.37	-15.95

Due to the above financial deficit as well as the Escrow mechanism, DISCOMs were forced and unable to honor employee trust funding. This has led to employees unrest and de-motivation, consequently impact the consumer services, also hampering the safety of the system and dragging the electrical distribution and the power sector in Odisha as a whole to collapse.

It needs to be noted that every 1% of AT & C Loss reduction by the Appellant is equivalent to Rs. 0.59crores per month, even with 5% AT&C loss reduction, which the licensee targets with most optimistic and ambitious basis, can gather additional revenue of Rs.3.0 crore per month, which is too insufficient to get over the monthly deficit of Rs. 15.87 crore. From the above, it may kindly be seen that the appellant is facing monthly deficit of Rs.12.87 crore to meet the bare minimum and essential, uncontrollable and unavoidable expenses so as to continue the electricity distribution and supply operations. The annual financial / cash flow position with improved performance would be as under;

The Average Annual Cash Gap in the FY 2012-13 as per new Tariff Order would be as under;		
S.L. No	Particulars	` in Crore
1	Annual Collection amount	648.00
2	Average Annual BST & Transmission Charges	588.00
3	**Balance Over BST**	**60.00**
4	Annual Employee Cost	186.12
5	O & M Expenses	28.32
6	**Annual Deficit.**	**-154.44**

Moreover OERC in the impugned Order directed for payment of full BST (Power Purchase) Bills as 1st priority before payment of the Basic Salary or bare minimum R & M expenses. All the revenue collected is deposited in the ESCROW Account. The hands and legs of the Appellant have also been tight bound and made completely crippled to carry out the much needed and essential expenses to maintain the distribution system. The referred clause No. 451 of impugned Order is extracted below:

"451. With the above stipulation as indicated in above Para and keeping in view the statutory requirement to protect the interest of the consumers and the need for timely payment of salary to the employees, the Commission has, therefore, decided that w.e.f. 01.04.2012 release of fund from the Escrow account by GRIDCO would be regulated in order of priority as indicated below :-

Escrow Relaxation

(A) From Current Revenue

(a) Current BST dues, current Transmission charges, SLDC charges and license fees payable by the Distribution Companies to OERC, the energy bill of DISCOMs in respect of direct power purchase from CGPs or other agencies, if any.

(b) Monthly Employees cost as approved by the Commission in the tariff order from FY 2012-13 onwards.

(c) Monthly R&M expenditure as approved by the Commission in the tariff order from FY 2012-13 onwards.

(d) The monthly obligation for repayment of principal and interest in respect of loan obtained/ to be obtained from the financial institutions for CAPEX program/system improvement.

(e) Average monthly obligation of the defaulted arrear BST of the previous years, if any.

(f) The balance amount towards arrear of BSP dues worked out up to 31.3.2005 as approved in the securitization order of the Commission dated 01.12.2008."

With the above direction and with prevailing tariff Order for FY 2012-13, consequently leaves –ve margin i.e. total collection is lower than the BSP Bill, the Appellant cannot even pay Rs 1/- towards salary or fuse wires purchase unless the BST Bill is paid in full.

In view of the above, the Appellant pray this Hon'ble Tribunal to kindly grant interim relief to draw at least the approved salary and 50% of the approved R&M amount out of escrow collection account prior to payment of the BST Bills by modification of the impugned Order dated 23.03.2012.

Presently, State of Odisha is facing severe power deficit which is about 700MW i.e. 30% power demand. Therefore, GRIDCO is not in a position to supply the OERC approved quantum of power. Due to restricted power supply, the margin (RST-BSP) approved sales by OERC is not realized. Further in HT/EHT consumer's sale has been approved more than the proposal of the appellant, due to which the revenue assumed by OERC in approved ARR is not really available. NESCO, WESCO & SOUTHCO have lost Rs 64 Cr, Rs 88 Cr and Rs 23 Cr respectively during the FY 2011-12 due to higher assumption of sales in HT / EHT consumptions.

Loss of Margin HT & EHT Category due to Non/Low drawl of Energy							
	OERC Approved Sale (MU) *(2011-12)	Actual Sale (MU) 2011-12	Loss of Sales (MU)	Loss Of Margin			Loss of Margin (Rs. In Cr)
				Avg. OERC Tariff*	BST**	Margin	
	A	*C*	*D=A-C*	*E*	*F*	*G=E-F*	*H=DXG*
WESCO							
EHT	1581	1364	217	5.35	2.87	2.48	54
HT	1317	1165	152	5.11	2.87	2.24	34

TOTAL	2898	2529	369				88
NESCO							
EHT	1892	1673	219	4.85	2.87	1.98	43
HT	550	468	82	5.43	2.87	2.56	21
TOTAL	2442	2141	301				64
SOUTHCO							
EHT	391	384	7	5.16	1.6	3.56	2
HT	220	162	58	5.27	1.6	3.67	21
TOTAL	611	546	65				23

OERC has introduced the new "Take or Pay" tariff in FY 2012-13 under which 50 paisa per unit special rebate has been allowed to all HT/EHT consumers which has not been factored in the OERC computation of expected revenue. The tariff of energy charged for HT/EHT consumers have been increased by 20 paisa per unit, the effective demand charges increased by 10 paisa per unit and with 50 paisa per unit special rebate the net tariff for HT and EHT has been decreased by 20 paisa (-50+20+10) per unit. Ironically, the OERC has taken average tariff of HT and EHT higher than the previous year average approved tariff, whereas the appellant shall recover at lower rate of 20 paisa / unit as studied above. The comparative average tariff is given in the following table;

SOUTHCO						
Type of Consumer	**FY 2011-12**			**FY 2012-13**		
	OERC Approved			**OERC Approved**		
	Unit Sale MU)	**Revenu (Rs. In Cr)**	**P/U Rate**	**Unit Sale MU)**	**Revenu (Rs. In Cr)**	**P/U Rate**
EHT	390.90	201.68	515.94	377.80	208.52	551.93
HT	219.80	115.87	527.16	209.48	116.07	554.09
Total	**610.70**	**317.55**	**519.98**	**587.28**	**324.59**	**552.70**

Therefore, Hon'ble ATE is humbly submitted that the "Take or Pay" tariff may be stayed till finalization of the Order.

Massive rural electrification is under taken in the State of Odisha. Out of total national outlay of Rs 38000 Cr under the RGGVY scheme, the allocation for the State of Odisha is about 10% i.e. Rs 3720 Cr. The highest rural electrification under RGGVY is carried out in Odisha. About 42 lakhs numbers of households is being targeted for electrification in Odisha state under this scheme, presently about 3 lakhs consumers have been added in each DISCOM with existing 4-5 lakhs consumers. With addition of 1 lakh domestic consumers, (120 MU LT sales in a year) affect the average overall distribution loss of the company by approximately 2%, thus with 3 lakhs of consumers already added have increased the overall loss by about 6%. The effect shall be much more when all the 42 lakhs of consumers would be added in the state. This distribution loss effect have not adjusted in fixation of the distribution loss targets for the DISCOMs (the all Odisha distribution loss target for FY 2011-12 was 21.71% and target for FY 2012-13 is 21.29%). The OERC has not considered the above facts and ground realities in the approved ARR.

Further, no revenue subsidy has been given by the State of Odisha for the FY 2012-13 where the tariff of irrigation and domestic category etc. has been lower than the 50% cost of supply. Further, the subsidy envisages the RGGVY scheme to match the gap between the Bulk Supply Price (input price) to franchisee and average tariff have neither been considered in tariff Order nor the State Govt. have provided the matching subsidy as committed in the quadripartite agreement executed by State Govt with GoI and DISCOMs.

The present situation does not only affect the standard services to the consumers, but also affect the proper upkeep and safety of electrical system. The system is becoming more vulnerable towards life. Considering the present grave and critical situation, unless the ATE kindly intervenes with urgently needed interim relief, to protect the Power distribution in the State of Odisha from collapsing. Thus, this urgent and emergent situation calls for the kind interim Order by Hon'ble ATE to make / enable the Appellant to discharge it's statutory functions.

In the above emergent circumstance, the appellant has sought for the following interim Order, interalia, granting the combination of following interim reliefs.

1. To allow the appellant to draw the approved salary and 50% of the approved R&M expenses every month before payment of monthly BST Bills. And
2. Grant interim Order to stay the Take-or-pay Tariff. and;
3. To grant 30 paisa per unit interim fuel surcharge collection from HT & EHT consumers till the revision of the RST by OERC as per the final order of Hon'ble ATE. And;
4. To direct Govt. of Odisha to extend the subsidy for irrigation and BPL consumer etc, as committed during FY 2011-12. And
5. Any other Order as deemed fit.

13. Details of Appeals, if any preferred before this Tribunal against the said Impugned order/ direction, by Respondents with numbers, dates and interim order, if any, passed in that appeal:

No such Appeal has been preferred either by the Appellant or the Respondents against the above mentioned impugned order / direction.

14. Details of Index :

1. List of Dates and Events.

2. Memo of Appeal with Annexures.

(An index containing the details of the documents in chronological order relied upon is enclosed)

15. Fees for the Appeal :

A BANK draft of Axis Bank for sum of Rs. 1,02,000/- in favour of the Pay & Accounts Officer, Appellate Tribunal for Electricity, in respect of the fee for Appeal is enclosed.

16. List of Enclosures :

1. Vakalatnama
2. Demand Draft for Rs. 1,02,000/-
3. Index Containing details of documents to be relied upon.

17. Whether the order appealed as communicated in original is filed? If not, explain the reason for not filing the same.

True copy of the Order filed.

18. Whether the appellant/s is ready to file written submissions/ arguments before the first hearing after serving the copy of the same on Respondents.

Yes.

19. Whether the copy of memorandum of appeal with all enclosures has been forwarded to all Respondents and all interested parties, if so, enclose postal receipt/courier receipt in addition to payment of Prescribed process fee.

Not forwarded, pending issue of notice.

20. Any other relevant or material particulars/details which the Appellant(s) deems necessary to set out :

At the time of hearing, if need be so.

21. Reliefs Sought :

In view of the facts mentioned in paragraphs 7 above and grounds set out in paragraphs 9 above, the Appellant pray that this Hon'ble ATE may be pleased to grant the following reliefs to the Appellant :

(a) To determine the ARR of Appellant and Retail Supply Tariff for FY 2012-2013 by considering the above grounds as proposed by Appellants.

(b) To determine the ARR of the Appellant and Retail Supply Tariff for the year 2012-13 on the basis of actual loss levels and adhere to the findings of the findings of the Abraham Committee in determining the trajectory for loss reduction.

(d) To allow employees costs and A&G expenses as proposed by the Appellants being critical in operations of DISCOMs;

(e) To direct OERC to determine the principles of truing up upfront.

(f) To determine the ARR of the Appellant in such a manner that the Tariff is adequate to meet the approved cost.

(g) For such other and further relief's as the nature and circumstances of the case may require.

Dated at New Delhi on this the   day of May, 2012.

Appellant

Southern Electricity Supply Company of Orissa Ltd.

Through

Mulla & Mulla & Craigie Blunt & Caroe
Advocates for Appellant
502, Nilgiri Apartments
19, Barakhamba Road
New Delhi 110 001

DECLARATION

The Appellant above named hereby solemnly declares that nothing material has been concealed or suppressed and further declares that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the originals/fair reproduction of the originals/true translation thereof.

Verified at New Delhi on this the   day of May, 2012

Appellant
Southern Electricity Supply Company of Orissa Ltd.

VERIFICATION

I, Suresh Kumar Chaudhury, Chief Executive Officer of the Appellant, Southern Electricity Supply Company of Orissa Ltd., having its Registered Office at having its registered office at Plot No - N1/22, IRC Village, Nayapalli, Bhubaneswar, presently at New Delhi, do hereby verify that the contents of paras 10, 12 to 20 are true to my personal knowledge derived from official record and para 1 to 9, 11 & 21 are believed to be true on legal advice and that I have not suppressed any material facts.

Verified at New Delhi on this the   day of May, 2012.

Appellant
Southern Electricity Supply Company of Orissa Ltd.

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

NEW DELHI

APPELLATE JURISDICTION

APPEAL No.   OF 2012

IN THE MATTER OF :

Southern Electricity Supply Company of Orissa Limited ... APPELLANT

VERSUS

Orissa Electricity Regulatory Commission and Others ... RESPONDENTS

AFFIDAVIT

I, Prashant Kumar Choudhury, Chief Executive Officer of the Appellant abovenamed, having my Office at Plot No. N1/22, IRC Village, Nayapalli, Bhubaneswar, do hereby solemnly affirm and state as follows :

1. I say that I am the Managing Director of the Appellant above named and as such I am familiar with the facts of the case.

2. I have read and understood the contents of the accompanying Appeal and Annexures thereto.

3. I say that the facts stated in the Appeal are based on information derived from the records of the Appellant and believed by me to be true.

4. I say that the Annexures to the Appeal are true copies of their respective originals.

5. I say that nothing herein is false and no material has been concealed there from.

DEPONENT

VERIFICATION

Verified at New Delhi on this the day of May, 2012 that the contents of the above Affidavit are true and correct to the best of my knowledge. Nothing material has been concealed nor withheld there from.

DEPONENT