

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI

APPELLATE JURISDICTION

APPEAL No. OF 2008

(AGAINST THE IMPUGNED FINAL ORDER DATED 12-08-2008 IN CASE No. 42 OF 2008 AND ORDER DATED 20-03-2008 PASSED IN CASE No. 65 OF 2007 BY THE ORISSA ELECTRICITY REGULATORY COMMISSION (OERC) FILED BY WESTERN ELECTRICITY SUPPLY COMPANY OF ORISSA (WESCO) SEEKING APPROVAL OF ANNUAL REVENUE REQUIREMENT (ARR) AND RETAIL SUPPLY TARIFF (RST) FOR FY 2008-09.)

IN THE MATTER OF :

Western Electricity Supply Company of
Orissa Ltd.(WESCO), incorporated under the provisions of
the Companies Act, 1956 and having its registered
Office at 123-A, Mancheswar Industrial Estate
Bhubaneswar ... APPELLANT

Versus

1. Orissa Electricity Regulatory Commission,
Niyamak Bhawan, Unit-VIII,
Bhubaneswar 7510102,
Dist: Khurda, Orissa
2. Orissa Consumers' Association, & FOCO,
Biswanath Lane, Cuttack, Orissa
3. Mr. Suryakanta Pati, Manager (Elec),
OCL India Ltd., At: 1/12, OCL New Colony
Po/Ps: Rajgangpur, Dist: Sundargarh, Orissa
4. Mr. A.P Mishra, VP,
M/s Larsen & Toubro Limited
Kansbahal Works: PO. Kansbahal,
Dist-Sundargarh, Orissa
5. Mr. Arjun Kumar, CEDE,
South Eastern Railway,
Garden Reach, Kolkata
6. Mr.Ramesh Mehta, President
M/s Rourkela Chamber of Commerce & Industry,
Chamber Bhawan, Rourkela
7. Mr. Ramesh Ch. Satpathy, Secretary
National Institute of Indian Labour, 302(B)
Beherasahi, Nayapalli, Bhubaneswar

8. Mr. Shyama Bihari Prasad,
M/s Top Tech Steel Pvt. Limited
F-4/31, Civil Township, Rourkela
Sundargarh
9. Mr. Sudarsan Goal
M/s Subh Ispat Limited, Jaibahal, Kalunga Road,
Rourkela, Dist: Sundargarh
10. Mr. Sunil Agarwal
M/s Shree Jaganath Alloys Pvt. Ltd.
Basanti Colony Road, Udit Nagar
Rourkela, Sundargarh
11. Mr. Amit Agarwal,
M/s Bajarangbali ReRollers Pvt. Ltd.
Lal Building Kacheri Road
Rourkela, Dist: Sundergarh
12. Mr. Suwendu Ku. Das
M/s Scan Steel Ltd. , Main Road
Rajgangpur, Dist: Sundergarh
13. Mr. Sitaram Agarwal
M/s Attitude Alloys Pvt. Ltd, Ghurudu Khamar
Vill: Bijayanagar, PO- Barkot, Dist: Deogarh
14. Mr. Sunil Choudhury, MD
M/s Omkar Steels Pvt. Ltd., F-9
Civil Township, Rourkela
15. Mr. Satya Sunder Kara
M/s Shree Metalicks Ltd., Gurudwara Road
Barbil, Dist.- Keonjhar
16. Mr. Gobardhana Pujari, General Secy.,
Sundargarh District Employer's Association
AL-1, Basanti Nagar , Rourkela
M/s Shree Metalicks Ltd., Gurudwara Road
Barbil, Dist.- Keonjhar
17. Mr. Surendra Das
General Manager, Nagarika Samiti
Rourkela
18. Mr. Susanta Kumar Pradhan
General Secretary, Resident Association,
Civil Town Ship, Rourkela
19. Mr. Chitaranjan Mohanty
Basanti Forum, Basanti Nagar
Rourkela

20. Mr. Nrusingh Charana Panda
M/s Grihasti Udyog, Chhend Basti
Rourkela
 21. Mr. Samir Kumar Mishra
Advocate, Belpahar,
Jharsuguda
 22. Mr. Sanjay Gagodia
M/s Scan Steel Ltd, Q-1,
Civil Township, Rourkela
 23. Mr . Balamukund Kadamwala,
M/s Lingaraj Feeds Limited,
Kachery Road, Rourkela, Sundargarh
 24. Mr. Pravakar Dora,
Advocate, 3rd Lane Vidya Nagar
Cooperative Colony, Rayagada
 25. Utkal Chamber of Commerce and Industry Ltd.,
N/6, I.R.C. Village, Nayapalli, Bhubaneswar
 26. Shri R.P. Mahapatra,
Plot No. 775(Pt), Lane-3,
Jayadev Vihar, Bhubaneswar, Orissa
 27. Mr. G.N Agarwal
Gen. Secy. Sambalpur District, Consumer
Federation Balaji Mandir Bhawan, Khetrajpur,
Sambalpur
 28. Mr. Jogendra Behera
Fellow Scholar, XIMB, Utility Regulation
Reserch Centre, XIMB, BBSR
 29. Mr. T.C Padhi
M/s Berhampur Cold Storage
Konisi, BED-1, Berhampur
- ... RESPONDENTS

Appeal under Section 111 of the Electricity Act 2003

1. Details of Appeal:

The present appeal is being filed under Section – 111 (2) of the Electricity Act, 2003 challenging the legality, propriety and validity of the Order dated 12-08-2008 passed in Case No. 42 of 2008 and Order dated 20-03-2008 passed in Case No. 65 of

2007 by the Orissa Electricity Regulatory Commission ("OERC") being one of the application filed by WESCO for approval of their ARR and determination of their Retail Supply Tariff for FY 2008-09. Copy of the Impugned Order dated 12-08-2008 and Order dated 20-03-2008 are annexed hereto and marked as **EXHIBIT 1 & 2.**

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

Date of the impugned order : 12.08.2008

Date of communication of the order : 26.08.2008

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

- (i) Postal address including Pincode:
Plot No.123, Sector-A, Zone A, Mancheswar Industrial Estate, Bhubaneswar, Orissa PIN-751010. All correspondence may be directed to the advocates representing the Appellant.
- (ii) Phone No. including Mobile No.: 0663-3296577, 0674-2582728, 09338010474, 09338233953
- (iii) Email : wesco@werscoorissa.com
- (iv) Fax: 0674-2586343, 0663- 2432115
- (v) MULLA & MULLA & CRAIGIE BLUNT & CAROE, 502, NILGIRI APARTMENTS, 9, BARKHAMBA ROAD, NEW DELHI-110001. PHONE: 23321501-04-07, FAX : 23321502, email: smieetaainna@mullas.net, mullasdelhi@mullas.net, smita.inna@gmail.com

4. 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.
Mobile No. : 09937085217
PhoneNo.0674-2393097,
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Kalindi Colony
New Delhi – 110065
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Mobile : 98100 20926

- (ii) Orissa Consumers' Association, & FOCO,
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email : not available
Address of Counsel : not available
- (iii) Mr. Suryakanta Pati, Manager (Elec),
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Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (iv) Mr. A.P Mishra, VP, M/s Larsen & Toubro Limited
Kansbahal Works: PO. Kansbahal,
Dist-Sundargarh, Orissa
Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (v) Mr. Arjun Kumar, CEDE, South Eastern Railway,
Garden Reach, Kolkata
Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (vi) Mr.Ramesh Mehta, President
M/s Rourkela Chamber of Commerce & Industry,
Chamber Bhawan, Rourkela
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email : not available
Address of Counsel : not available
- (vii) Mr. Ramesh Ch. Satpathy, Secretary
National Institute of Indian Labour, 302(B)
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email : not available
Address of Counsel : not available
- (viii) Mr. Shyama Bihari Prasad,
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F-4/31, Civil Township, Rourkela
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Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (ix) Mr.Sudarsan Goal
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Mobile, Telephone, Fax, not available
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Address of Counsel : not available

- (x). Mr. Sunil Agarwal
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email : not available
Address of Counsel : not available
- (xi) Mr. Amit Agarwal,
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email : not available
Address of Counsel : not available
- (xii) Mr. Suvendu Ku. Das
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Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (xiii) Mr. Sitaram Agarwal
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Vill: Bijayanagar, PO- Barkot, Dist: Deogarh
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Address of Counsel : not available
- (xiv) Mr. Sunil Choudhury, MD
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Address of Counsel : not available
- (xv) Mr. Satya Sunder Kara
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Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (xvi) Mr. Gobardhana Pujari, General Secy.,
Sundargarh District Employer's Association
AL-1, Basanti Nagar , Rourkela
M/s Shree Metalicks Ltd., Gurudwara Road
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Address of Counsel : not available

- (xvii) Mr. Surendra Das
General Manager, Nagarika Samiti, Rourkela
Mobile, Telephone, Fax, not available
email : not available
Address of Counsel : not available
- (xviii) Mr. Susanta Kumar Pradhan
General Secretary, Resident Association,
Civil Town Ship, Rourkela
Mobile, Telephone, Fax, not available
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Address of Counsel : not available
- (xix) Mr. Chitaranjan Mohanty
Basanti Forum, Basanti Nagar
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Mobile, Telephone, Fax, not available
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Address of Counsel : not available
- (xx) Mr. Nrusingh Charana Panda
M/s Grihasti Udyog, Chhend Basti
Rourkela
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Address of Counsel : not available
- (xxi) Mr. Samir Kumar Mishra
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Address of Counsel : not available
- (xxii) Mr. Sanjay Gagodia
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Address of Counsel : not available
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Mobile, Telephone, Fax, not available
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Address of Counsel : not available
- (xxiv) Mr. Pravakar Dora,
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(xxv) Utkal Chamber of Commerce and Industry Ltd.,
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(xxix) Mr. T.C Padhi
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Konisi, BED-1, Berhampur
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Address of Counsel : not available

All the Parties arrayed hereinabove were parties before the Commission

5. Jurisdiction:

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

6. Limitation:

The Appellant declares that the appeal is within the period specified in Sub-section (2) of Section 111 of the Electricity Act, 2003.

7. Facts of the Case:

- 7.1. The Appellant is 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 Licensees in the Western 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 Respondents Nos. 2 to 29 are parties who objected to the proposal submitted by WESCO for their ARR and Retail Supply Tariff.
- 7.4 By reason of the process of reforms in the electricity sector, the Appellant are licensees carrying out distribution and retail supply to the Western part of the state of Orissa since 1st April 1999 along with other two Distribution Licensees namely North Eastern Electricity Supply Company of Orissa Ltd.(NESCO) and Southern Electricity Supply Company of Orissa Ltd.(SOUTHCO) (hereinafter referred to as "DISCOMS"). The DISCOMS including Appellant have substantially improved their operations and performance in the last three years.
- 7.5 The Appellant filed the application before the OERC, being Case No. 65 of 2007 for approval of their Annual Revenue Requirement (ARR) and Retail Supply Tariff (RST) for FY 2008-09 on 30th November, 2007. The Appellant craves leave to refer to the said ARR and RST proposal when produced.

- 7.6 Twenty Eight objections to the WESCO's proposal 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 rejoinder to the objections to the ARR and RST proposal, when produced.
- 7.7 The 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 2008-09 on March 20, 2008, copy of the said Order dated 20-03-2008 passed in Case No. 65 of 2007 is marked as Exhibit 2. In the said RST order OERC has not increased the RST. It is submitted that OERC has not increased the RST in their last 9 tariff orders. OERC has also not considered the ARR as proposed by the Appellant.
- 7.8 The Appellant submitted in the public hearing for approval of ARR for 2008-09 taking into account the principles set out by this Hon'ble ATE in the Appeal No. 77, 78, 79 of 2006 which were ignored by OERC while determining the ARR of the Appellant in the Order dated 20-03-2008. Appellant submitted the petition in Case no 42 of 2008 before the OERC seeking review of the Order dated 20th March, 2008 on 20th June 2008. OERC disposed of the review petition vide their order dated 12.08.2008.
- 7.9 GRIDCO being the bulk supplier filed an application before OERC being Case No. 61 of 2007 for approval of their ARR and determination of Bulk Supply Tariff for FY 2007-08 on November 30, 2007 and the Appellant filed its objections along with other objectors to the said proposal. After hearing the objections,

OERC passed an order in GRIDCO's Application for approval of ARR and Bulk Supply Price for FY 2008-09 on March 20, 2008. The Appellant craves leave to refer to the said Order and the objections filed by the Appellant when produced.

7.10 OPTCL being the deemed transmission licensee filed a separate application before OERC being Case No. 62 of 2007 for approval of their ARR and determination of Transmission Tariff for FY 2008-09 on 30th November, 2007. The Appellant filed its objections to the proposal filed by OPTCL. OERC passed an order on application of OPTCL for approval of ARR and Transmission Tariff for FY 2007-08 on March 20, 2008. The Appellant craves leave to refer to the said Order and the objections filed by the Appellant when produced.

7.11 The Appellant alongwith other DISCOMs filed Appeals (Appeal no 77, 78 & 79 of 2006) before the Hon'ble ATE challenging the order dated 23.03.2006 passed by the Commission on the determination of ARR of DISCOMs and Retail Supply Tariff(RST) for the year 2006-07 with a prayer to set aside the said order; to which the Hon'ble ATE passed the final judgment on 13.12.2006 allowing the appeals. In the said order, Hon'ble ATE set aside the said order of the Commission and remanded back the entire matter to the Commission for re-determination of the ARR of DISCOMs and RST for the year 2006-07 considering the directions of the Hon'ble ATE. Further the Hon'ble ATE directed the Commission to complete the exercise within six week from the date of communication of the order. In order to assist the Commission for compliance to the direction of the Hon'ble ATE,

the Appellant submitted the Supplementary Submissions before the Commission on 5th January 2007. The Commission is yet to carry out the directions of the Hon'ble ATE and despite repeated requests and reminders caused grave financial injury to the Appellant. The order dated 13.12.2006 of the Hon'ble ATE is annexed as **EXHIBIT - 3** respectively.

7.12 OERC, the respondent No-1 preferred Civil Appeal (No 759 of 2007) on 06.02.2007 challenging the order of the Hon'ble ATE with an interim prayer to Stay on the operation of the order of Hon'ble ATE. Hon'ble Supreme Court heard the matter on 26th February 2007 and while admitting the Appeal the Hon'ble Court did not grant stay on the operation of the order of Hon'ble ATE as prayed for by OERC. The OERC is yet to carry out the direction of the Hon'ble Tribunal for re-determination of the tariff for the year 2006-07 within the stipulated time period of six weeks from the date of the order which ended on 24th January 2007; in the impugned order dated 23.03.2008, the principles set out by this Hon'ble Tribunal is also not followed.

7.13 The Appellant submit that the OERC's order on Bulk Supply Price (**EXHIBIT - 4** hereto) and Transmission Tariff (**EXHIBIT - 5** hereto) hitherto issued separately were composite in nature vis-a-vis the AAR & Retail Supply Tariff Order of DISCOMs. Both the said orders including the RST Order have a direct bearing on the financials of the Appellant and other DISCOMs and hence need to be considered on a composite basis while examining the grounds of relief mentioned hereinafter.

8. Questions of Law :

- 8.1 Whether the OERC was right in approving the ARR of the DISCOMs for 2008-09 without considering principles set out in the Order date 13.12.2006 in the Appeal No.77, 78 & 79 of 2006 by this Hon'ble ATE ?
- 8.2 Whether OERC is right in disallowing the actual interest on the NTPC bonds, disallowing the AT&C loss, setting unrealistic distribution loss targets, Non-allowance of the Terminal Benefit, consideration of higher miscellaneous income and disallowance of Contingency Reserve etc. for the year 2008-09 in the impugned Order in view of the Electricity Act, 2003 and Regulations framed thereunder by OERC and the Hon'ble Tribunals judgment dated 13th December 2006?
- 8.3 Whether the OERC was right by not following the directions given by the Hon'ble ATE in the Appeal No.77, 78 & 79 to re-determine the ARR of Appellant and Retail Supply Tariff for the year 2006-07 considering the principles set out on various issues, raised in the said Appeals?

9. Grounds of Relief with Legal provisions :

- 9.1 OERC failed to consider the directions given by the Hon'ble ATE on various issues raised in the appeal no 77, 78 & 79 while determining the ARR of DISCOMs and Retail Supply Tariff for the year 2007-08.
- 9.2 OERC failed to comply the directions passed by the Hon'ble ATE in the appeals No. 77, 78 & 78 of 2006 for re-determination of the ARR of Appellant and Retail Supply Tariff for the year 06-07.

- 9.3 The Appellant submit that OERC has erred in approving the Revenue Requirement of the Appellant and the Retail Supply Tariff thereby affecting the financial viability of the retail licensees, the Appellant and affecting its capacity to pay the employees salaries and incur necessary O&M expenses which would lead to an unmanageable situation of labour unrest, strike affecting the quality of power supply, consequent harassment of consumers.
- 9.4 OERC has erred in adopting non-uniform principles to determine the Annual Revenue Requirement and Bulk Supply Tariff, Transmission Tariff and Retail Supply Tariffs which have adversely affected the Appellant's financials.
- 9.5 The Retail Supply Tariff Order is challenged essentially under the following heads; which have been elaborated hereinafter;
- a. Employee Cost - Disallowance of the Terminal Benefits to Employees
 - b. Interest on the NTPC Bonds
 - c. Contingency Reserve
 - d. Disallowance of the AT&C Concept
 - c. Unrealistic Distribution Loss Targets
 - d. Miscellaneous Income
 - g. Truing up
 - h. Other Tariff issues
- 9.5.1 OERC has erred by disallowing the employee cost and the Administration and General Expenses. OERC has erred by not allowing the terminal benefits, instead OERC passed the liability towards the terminal benefits for the period prior the formation of the DISCOMs i.e before 1..4.1999 to

DISCOMs, which should have been retained with GRIDCO/GoO.

- 9.5.2 OERC has erred by not allowing the interest cost on the NTPC bonds as per the terms and conditions, which is incurred by the Appellant. This is contrary to the principle set out by this Hon'ble ATE
- 9.5.3 OERC has erred in setting high unachievable and unrealistic Distribution loss target to the Appellant, has not followed the principle set out by this Hon'ble ATE.
- 9.5.4 OERC has erred to estimate higher Miscellaneous Income for the year 2007-08; different principles are followed for different licensees, this is contrary to the principles set out by the Hon'ble ATE.
- 9.5.5 OERC failed to estimate the revenue in it's prescribed format and has not followed regulations, which is contrary to the principle set out by this Hon'ble ATE.
- 9.5.6 OERC has erred by disallowing the Contingency Reserve to the Appellant which is more prone to incur contingency expenses due to natural calamities. OERC has discriminated the transmission licensee and distribution licensee while allowing the contingency reserves.
- 9.5.7 OERC has erred, by not considering the truing up impact in the ARR by the Appellant in line with the principles, set out in the Tariff Policy and has not followed the principles, set out by this Hon'ble ATE.

9.6 **Financial Impact:** OERC failed to consider the financial impact of Bulk Supply Price, Transmission Tariff and Retail Supply Tariff order for FY 2008-09, the details of which is as under:

9.6.1 **EMPLOYEE AND A&G COST**

OERC has not considered the Actuarial Valuation Liability submitted by the DISCOMs, valuation done by the Actuary appointed by the OERC itself. OERC vide para 348 – 355 has erred to pass on to DISCOMs the deficit of the funding towards the terminal benefits prior to 1.4.1999 i.e. prior to the formation of the DISCOMs.

It is submitted that GRIDCO had done the valuation of the terminal liability as on 31.03.1999 of Rs.492.43Crore for the WESCO, NESCO, SOUTHCO, CESU & OPTCL, the details of which are as under;

Rs. in Crore

		OPTCL	WESCO	NESCO	SOUTHCO	CESU	Total
No. of Employees	Existing	5974	5562	4599	4674	8608	29417
	Retired	4493					4493
	Total	10467	5562	4599	4674	8608	33910
Pension of the existing employees		74.28	44.85	42.83	42.63	83.02	287.61
Gratuity		23.74	16.2	15.42	14.85	29.37	99.58
Leave		6.01	4.1	3.9	3.76	7.43	25.2
Pension in Payment		80.04					80.04
Total		184.07	65.15	62.15	61.24	119.82	492.43

OERC to ascertain the actual position amongst the conflicting claims made by the DISCOMs and GRIDCO, directed for the actuarial

valuation of the Trust funds of all four DISCOMs and OPTCL through an independent Actuary appointed by it. Mr Bhudev Chattrjee is appointed as Actuary by Hon'ble OERC for valuation of the Terminal Liabilities. The liabilities ascertained by Mr Chatterjee, independent actuary appointed by the Hon'ble Commission as on 31.3.2006 is as under: -

	OPTCL	WESCO	NESCO	SOUTHCO	CESU	TOTAL
No. of Existing Employees	4,586	4,654	4,134	3,600	6,547	23,521
No. of Existing Pensioners	6,116	1,020	1,096	732	1482	9714
Total	10,702	5,674	5,230	4,332	8,029	33,235

Rs. in Crore

Pension Liability of existing employees	207.65	155.21	107.12	124.66	247.75	842.39
Gratuity Liability of Existing Employees	27.15	31.96	26.17	22.82	32.34	140.44
Leave encashment	31.51	27.67	21.83	21.60	NA	102.61
Pension in Payment	377.23	78.59	76.08	41.88	96.68	670.46
Total	643.54	293.43	231.20	210.96	376.77	1,755.90

The comparison of the number of employees, employee cost and the actuarial liability as on 31.03.1999 and 31.03.2006 is placed in the following table.

	No of Employees		Employee cost		Actuarial Liability	
	31.03.1999	31.03.2006	1998-99	2005-06	31.03.1999	31.03.2006
OPTCL	10467	10702	▪	185.00	184.07	643.54
WESCO	5562	5674	▪	77.79	65.15	293.43
NESCO	4599	5230	▪	66.51	62.15	231.2
SOUTHCO	4674	4332	▪	61.22	61.24	210.96
CESU	8608	8029	▪	113.00	119.82	376.77
Total	33,910	33,967	277.10	503.52	492.43	1,755.90
Increase		0.2%		81.7%		256.6%

▪ Consolidated for all employees.

As is seen from the above table, Employee Costs has increased by 82% while the Actuarial Liability, which is a component of the employee costs, as on 31.03.2006 (Rs.1756 Crore) has increased by 256% when compared to liability on 31.03.1999 (Rs.492 Crore), with only a marginal increase in the number of employees and employee cost which implies that the Actuarial Liability as on 31.03.1999 was underestimated.

It is submitted that the Actuarial Liability as on 31.03.1999 was underestimated. It is mainly on account of the following factors;

- a) GRIDCO has not provided for the impact of the wage revision that was made effective in 1996-97 but announced at later date.
- b) The rate of return adopted by M/s.Charandas Gupta was much higher than the prevailing rates in FY 1999 which miserably led to create a lower corpus to meet the liabilities for future years.

Here, it is pertinent to mention that the considering the under provisioning of the terminal liability of the DISCOMs and GRIDCO as on 31.03.1999, there was an requirement for bullet higher provisioning approved by OERC to GRIDCO for Rs.113 crore in one year ie. in FY 2003-04 & also similar provision is allowed to OPTCL . Similar approval was not given to DISCOMs.

Hon'ble Commission also observed in Para.6.1.1.16 of RST Order for 2007-08 the same fact which supports / validates the DISCOMs views; the Observation of Hon'ble Commission is as under;

"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."

DISCOMs should not be burdened with the liability relating to prior period to 31.3.1999, which needs to be absorbed in the Profit and Loss Account prior to 31.03.1999. The Terminal Liability figures pertaining to the period as on 31.03.1999 as given in the DISCOMs Audited Accounts are available with the Hon'ble Commission. Further submitted that under the Transfer scheme Actuarial Valuation responsibility has assigned to GRIDCO, as Discoms were 100% subsidiaries, that does not mean that Actuary can carry out valuation based on unrealistic facts or on wrong assumptions and thereby permitted not to comply the Accounting Standards.

In a bid to exhibit true and fair positions in the accounts of the company coupled with the compliance of the mandatory Accounting Standard-15 laid down by ICAI, three Discoms made the provisions based on the valuation, for the period ended 31.03.1999, carried out by LIC, which is the largest and reputed Actuarial Valuer. The corpus earmarked by DISCOMs based on LIC valuation is at variance with the valuation carried out by Gridco through M/s Charandas Gupta. The details are as follows:

Orissa Discoms	WESCO	SOUTHCO	NESCO	Total
Actuarial Position (Pension, Gratuity and Leave)			Rupees in Crore	
1. As on 31.03.1999 :				
(a) GRIDCO's valuation as per M/s Charan Gupta Enterprise, Actuary	65.14	61.23	62.14	188.51
(b) Discoms valuation as per LIC, Actuary	173.65	167.52	160.54	501.71
(c) Difference (Disputed by GRIDCO) [b-a]	108.51	106.29	98.4	313.2
2. Provision made in subsequent periods				
<i>Provision made in subsequent periods, as per the valuation by LIC & KA Pandit from 1.04.1999 to 30.09.2006 (Seven Years)</i>	133.92	70.69	98.25	302.86
3. Total as on 30-09-2006 considering GRIDCO's as of 31-3-99 [1(a) + 2]	199.06	131.92	160.39	491.37
4. Total as on 30-09-2006 considering Discom's as of 31-3-99 [1(b) + 2]	307.57	238.21	258.79	804.57
5. Liabilities as on 30-09-2007 as per report of Bhudev Chatterjee (Actuary appointed by OERC)	322.82	248.22	267.32	838.36
6. Provision required for the year ended 30-09-2007 considering GRIDCO's valuation as of 31-03-1999, [5 - 3]	123.76	116.3	106.93	346.99
7. Provision required for the year ended 30-09-2007 considering Discom's valuation as on 31-03-1999, [5 - 4]	15.25	10.01	8.53	33.79

Seized of the matter and recognizing the gravity of the situation arising out of the huge gap between the said two valuations, serious qualification in the notes of the account by the Statutory Auditors year after year, etc; Hon'ble Commission directed for the actuarial valuation of the Trust Funds to establish the actual position through an Independent Actuary, Mr Bhudev Chattrjee, for NESCO, WESCO, SOUTHCO, CESU and OPTCL. The above table gives the details which show that the independent assessment made by Mr Bhudev Chattrjee, is quite close to the valuation determined by LIC in the case of three Discoms, Picture is no difference in case of Cesu too. DISCOMs to meet statutory obligation to employee transferred to the Discoms as on 31.03.99 it is essential that the aforesaid liabilities relating to

period prior to 31.3.1999, need to be treated in an equitable and impartial manner and absorbed in the Profit and Loss Account prior to 31.03.1999 of Gridco/GoO. Consequently the requisite funds be provided to the Trust of the employees and it should not be burdened the consumers of State by way of allowing in ARR in future years.

In view of the above, it is submitted that OERC has erred by not considering the terminal liability as per the Audited Accounts of the DISCOMs.

OERC has not also considered the expenditure on account of spot billing and Energy Audit which are essentially required to be incurred by the DISCOMs in order to reduce the AT&C Losses.

9.6.2 **INTEREST COST**

OERC allowed Interest of NTPC Bonds at the rate of 8.5% p.a where as, as per the terms and conditions of the Bond issue, the Interest rate is 12.5% p.a. Hon'ble ATE in its order dated 13th December, 2006 directed OERC to consider the interest at 12.5%, which is not considered. The financial Impact is Rs.22.40 Crore to the Appellant. (Rs.32.80Cr for NESCO, Rs.30.68cr for Southco)

9.6.3 **CONTINGENCY RESERVE**

The Appellant is more prone to incur the contingencies towards the flood, Cyclone and other natural calamities, OERC discriminated in disallowing the Contingency Reserve to the Appellant whereas allowed the same to Transmission licensee, i.e., OPTCL

9.6.4 **PROVISION FOR BAD AND DOUBT FUL DEBT -**

Disallowance of AT & C concept

The OERC has not taken into account the determination of revenue requirement on AT&C concept. The revenue requirement has been determined on the revenue basis with 2.5% being allowed as bad debts only. The balance is expected to be bridged by the efforts of the DISCOMs in the form of working capital. The impact of such disallowance is as under :

Rs. in Crore	WESCO	NESCO	SOUTHCO
AT&C impact	11.80	23.50	11.60
Carrying Cost allowed	1.18	2.35	1.16
Net Impact	10.62	21.15	10.44

9.6.5 **UNREALISTIC DISTRIBUTION LOSS**

OERC has erred in estimating the Distribution Loss by setting unrealistic and impracticable target of reduction of the Distribution Loss. The impact on this account would be Rs. 69.04 Crore to Appellant as detailed hereunder;

		NESCO	WESCO	SOUTHCO
Approved Dist. Loss 2007-08		26.00%	25.00%	30.00%
Losses 2007-08 (Estimated)		31.20%	36.10%	45.40%
Approved Dist. Loss for 2008-09		25.50%	25.00%	30.40%
Achievable Loss for 2008-09		31.20%	31.50%	39.30%
Excess loss approved		5.70%	6.50%	8.90%
LT Average Rate	Paise	195	187	187
INPUT approved		4660	5680	1980
Impact in Rs. Crore		51.80	69.04	32.95

9.6.6 MISCELLANEOUS INCOME

OERC considered the Miscellaneous income 2006-07 on the base which includes the Meter rent, Rebate on BSP, Interest from Bank, Commission of ED. All the aforesaid heads of misc. income are not realizable amounts and hardly any amount would be realized in 2008-09. OERC has erred to consider the rebate on the prompt BSP payment as a ARR income.

9.6.7 TRUING UP AND AMORTISATION OF REGULATORY ASSETS

OERC has erred by not doing the truing up of the ARR for the year 2007-08 and not allowed the recovery of the regulatory assets to the extent of the immediate requirement of the DISCOMs to meet the pressing outstanding towards NTPC bonds, statutory liabilities and other liabilities was required and proposed by the Appellant in their ARR for 2007-08.

9.6.8 Other Tariff Issues

- (i) OERC vide para 312 of the RST order in the heading "**Over Drawal Penalty Due to Excess drawal during Off peak Hours**" have stated that

"Therefore we take into consideration that we have allowed drawl by the industries during off peak hours to draw up to 120% of their contract demand without levy of any penalty. In view of that for the purpose of determination of load factor the demands recorded in hours other than off peak hours shall be the basis."

It is submitted before the Hon'ble Commission that under definition clause 2(y) of OERC (Conditions of Supply) Code 2004, load factor is defined s follows:

“**load factor** in case of contract demand of 100 KW and above is the ratio of the total number of units consumed during a given period to the total number of units that would have been consumed had the maximum demand been maintained throughout the same period and is usually expressed as a percentage, that is ,

Load factor in percentage= (Actual units consumed during a given period/Maximum demand in KW X Number of hrs during the period) X 100

‘**load factor**’ in case of loads up to and excluding connected load of 100 KW is the ratio of the total number of units consumed during a given period to the total number of units that would have been maintained throughout the same period and is usually expressed as a percentage, that is,

Load Factor in Percentage= (Actual units consumed during a given period/Contract demand in KW X Number of hrs during the period) X 100

Technically the load factor can be maximum 1 (one). However as per the tariff notification, since the off peak period is for 16 hours where one consumer can draw up to 120% of the CD without any penalty & for determination of load factor considering the CD of peak hour it is likely that an industry running at a load factor of more than 80% CD may operate at a load factor of more than 100%, which is contrary to the definition of load factor.

It is therefore submitted that OERC erred by not considering the Maximum Demand recorded during the entire month for calculation of load factor.

(ii) That, OERC has introduced a new category namely ‘Agro-Industrial Consumers’. The tariff for LT is 110 paise/ unit and for HT supply it is 100 paise/ unit. Regarding cold storage it is not clarified that whether it will be applicable to those consumers/ farmers who are producing the fruits, vegetables, fish, meat etc and keeping frozen until it is needed or to those who are doing trading/ business

i.e., procuring agricultural product during harvesting season and selling during off season.

Demand charge at LT: That the licensee has applied for raise of demand charge from Rs.50/ KW to Rs.200/ KVA for the consumers having CD 70 KVA to 110 KVA. Hon'ble Commission vide para 446 of the RST order have addressed the issue, it is mentioned that

Voltage of Supply

Demand Charge

LT

Rs.200/KVA/month

From the above it is not clear whether Demand Charge for the consumers having CD 70 KVA to 110 KVA will be applicable Rs.50/KW or Rs.200/KVA.

(iii) **Emergency Power Supply to CPPs/ Generating Stations.**

Regulation 80(15) of OERC Distribution (Condition of Supply) Code 2004, Industries Owning Generating Stations and Captive Power Plants availing Emergency Power.

"This category relates to supply of power to industries with generating stations including Captive Power Plants only for start-up of the units or to meet their essential auxiliary and survival requirements in the event of the failure of their generation capacity. Such emergency assistance shall be limited to 100% of the rated capacity of the largest unit in the Captive Power plant of Generating Stations."

The Hon'ble Commission has fixed tariff i) a flat rate of 420 paise/ KWH at EHT and 440 paise/ KWH at HT would apply (ii) while for others who draw only 25% capacity of highest unit would pay @ 380 paise/ kwh and 400 paise/kwh at EHT and HT respectively. If on verification it is established that SMD of DISTCOs has increased because of over-drawal by the CGP, Demand Charge @ 200/KVA shall be payable over the excess of contract demand for that industry in addition to the energy charges in case of (i) above.

That it is submitted for consideration of the Hon'ble Commission that incase of Grid failure, when the industries having CPP will

require start up power and simultaneously power for survival requirements which may be for hours, the SMD is likely to increase abnormally which may have adverse effect on the DISCOM as the maximum SMD recording during any 30 minutes slot of a month is taken into account for calculation of the SMD. It is therefore prayed before the Hon'ble Commission to amend the last line of clause 456 as produced below.

"If on verification, it is established that SMD of DISTCO has increased because of the drawl by the CGP, demand charges @ 200/KVA shall be payable for that industry in addition to the energy charges in case of (i) above."

9.7 OERC failed to appreciate that for the last five years there has been no default in payment of BST bills, however, the aforesaid huge adverse financial impact on account of BSP, Transmission Tariff and RST Orders for FY2008-09 will create cash deficits and would lead to default in payment of BST bills, employees' salaries and other statutory obligations.

9.8 OERC has erred by not considering the facts on record and in the process causing injustice to the DISCOMs and the consumers.

9.9 It is respectfully submitted that while determining the ARR and RST for FY 2008-09, OERC ought to have followed the order of the ATE dated 13th December 2006. It is respectfully submitted that the Hon'ble Supreme Court heard the matter on 26.02.2007 on application of stay and has not granted stay on the said order of this Hon'ble ATE in Civil Appeal (No. 759 of 2007) as prayed for by OERC. Only the Hon'ble Supreme Court admitted the matter. It is submitted that OERC has not yet proceeded to redetermine the RST and the ARR of Appellant for FY 2006-07 as

directed by this Hon'ble ATE in the said Order dated 13-12-2006. In view of the failure of OERC to re-determine ARR and RST for the year 2006-07 as directed by the said Order dated 13-12-2006, the effect and the impact of the tariff order for FY 2006-07 has not at all been taken into account by the OERC in the impugned order which, in the respectful submission of the Appellant, ought to have been done. Appellant further submits that it is unjust on the part of OERC to determine the ARR of Appellant for FY 2007-08 on 23.03.2007 without considering the principles as decided by this Hon'ble ATE in the order dated 13th December 2006 and without completing the re-determination of ARR of Appellant and RST for FY 2006-07.

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 but are praying for interim relief as stated here below.

It is submitted that the Appeal challenging the Retail Supply Tariff(RST) order , Sulk Supply Price(BSP) order for the year 2007-08 are under disposal of the Hon'ble Tribunal. In the interim Order this Hon'ble Tribunal passed the following direction;

"10) Accordingly, we allow the two applications for interim relief and direct that the amount deposited towards the BST in the ESCROW account be treated to have been made on account and the appellants be allowed to withdraw an amount of Rs.3.11 Crore per month and Rs.3.97 Crore per month respectively from the ESCROW account over and above the amount towards salaries till the judgment of Honorable Supreme Court or till 31st March, 2008 whichever is earlier."

The Appellant submits that similar interim order be passed allowing to withdraw the required O&M amount as approved by the OERC so that the operation and maintainance of the distribution assets can be done. If the O&M amount shall not be allowed to be drawn by Appellant from the escrow account, no amount would be available with Appellant; all collection made by the Appellant would flow to GRIDCO ESCROW Account and the Appellant would not be able to make payment even Salary & wages; minimum and urgent repair work of the Distribution system would not be carried out. This would result in the labour unrest, collapsing of the Distribution System, disruption of the

power supply to the major part of the state may plunge into darkness leading to law and order problem in the state.

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 ICICI Bank Ltd. for sum of Rs. _____-in favour of the 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.
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.

Yes original 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 relief to the Appellant:

- (a) To determine the ARR of Appellant and Retail Supply Tariff for the year 2008-09 by considering the above grounds as proposed by Appellants.
- (b) To consider the Provisions towards Terminal Benefits based on Audited figures of DISCOMs Accounts and segregating the requirements on or before 31.03.1999 from GRIDCO.
- (c) Direct OERC to implement the directions issued vide Order dated 13th December 2006 of this Hon'ble ATE on Appeal No.74, 75 & 76, 71, 72 & 73 and 77, 78 & 79 of 2006.
- (d) Pass further orders as required by this Hon'ble ATE.

Dated at Delhi this day of September, 2008.

Counsel for Appellant

Appellant

DECLARATION BY APPELLANT

The Appellant above named hereby solemnly declares that nothing material has been concealed or suppressed and further declares that the enclosures and types 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 at day of September 2008.

Counsel for Appellant

APPELLANT

Verification

I, Prasanta Kumar Pradhan, S/o. Shri Kasta Charan Pradhan, aged 53 years, working as Chief Executive Officer in the office of WESCO, Burla presently at New Delhi do hereby verify that the contents of the paras _____ to _____ are true to my personal knowledge / derived from official record and para _____ to _____ are believed to be true on legal advice and that I have not suppressed any material facts.

Date :

Place

Signature of the appellant or authorized officer

LIST OF DATES AND EVENTS

Sr.No.	Dates	Events
1.	30.11.2007	WESCO filed Application before OERC being Case No.65 of 2007 for approval of their ARR and Determination of Retail Supply Tariff for F.Y.2008-09
2	08.01.2008	Rejoinder to the objections received by the Appellant to the proposal of the ARR and Determination of Retail Supply Tariff for F.Y.2008-09
3	05.2.2008	OERC heard parties on DISCOM's Application for approval of their ARR and Retail Supply Tariff for F.Y. 2008-09
4	20.3.2008	OERC passed Order on DISCOM's Application for approval of ARR and Retail Supply Tariff for F.Y. 2008-09
5	20.06.2008	DISCOMs filed review petition before OERC
6	26.08.2008	WESCO received the order on the review petition
7	30.11.2007	OPTCL filed Application before OERC being Case No.62 of 2007 for approval of their ARR and Determination of Transmission Tariff for F.Y. 2008-09
8	10.1.2008	Appellants as also the two Discoms filed their objections to the proposal of OPTCL for approval of their ARR and Determination of Transmission Tariff for F.Y.2008-09
9	06.2.2008	OERC heard parties on OPTCL's Application for approval of ARR and Transmission Tariff for F.Y.2008-09
10	20.3.2008	OERC passed order on Application of OPTCL for approval of ARR and Transmission Tariff for F.Y. 2008-09
11	30.11.2007	Gridco filed Application before OERC being Case No.61 of 2007 for approval of their ARR and Determination of Bulk Supply Tariff for F.Y.2008-09

12	10.01.2008	Objections filed by the Appellants as also the two Discoms to the proposals filed by Gridco for their ARR and Determination of Bulk Supply Price for F.Y.2008-09
11	07.2.2008	OERC heard parties on Gridco's Application for approval of their ARR and Bulk Supply Tariff for F.Y. 2008-09
12	20.3.2008	OERC passed Order on Gridco's Application for approval of ARR and Bulk Supply Tariff for F.Y. 2008-09
13	20.3.2006	OERC passed Order on DISCOMs' Application for approval of ARR and Retail Supply Tariff for F.Y. 2006-07
14	01.05.2006	Appellant and the two Discoms preferred Appeals being Appeal Nos. 77,78 and 79 of 2006 before the Hon'ble Tribunal praying for quashing OERC's Order dated 23.03.2006
15	13.12.2006	The Hon'ble Electricity Tribunal by Common Order dated 13.12.2006 passed in Appeal Nos. 77,78 and 79 of 2006 disposed of the Appeals. Hon'ble ATE directed the Commission to re-determination the ARR of the Appellant for 2006-07 considering the suggestions made by ATE in the said order
16	05.01.2007	Appellant submitted the Supplementary submission before OERC in order to assist the OERC for re-determination of ARR and RST for the year 2006-07 as directed by Hon'ble Tribunal.
17	06.02.2007	OERC filed Civil Appeal before Hon'ble Supreme Court challenging the Order dated 13.12.2006 of Hon'ble ATE on Appeal no 77,78 & 79 of 2007 with interim prayer for stay.
18	26.02.2007	Hon'ble Supreme Court heard the matter, admitted the Appeal and stay is not granted.

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY

NEW DELHI

APPELLATE JURISDICTION

APPEAL No. OF 2008

IN THE MATTER OF :

Western Electricity Supply Company
of Orissa Limited

... APPELLANT

Versus

Orissa Electricity Regulatory Commission
and others

... RESPONDENTS

AFFIDAVIT

I, Prasanta Kumar Pradhan, CEO of the Appellant above named, having my Registered Office at 123-A, Mancheswar Industrial Estate, Bhubaneswar, do hereby solemnly affirm and state as follows :

1. I say that I am the Chief Executive Officer 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 Annexure 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 Annexure 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 on this the day of October, 2008 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

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
APPELLATE JURISDICTION

APPEAL No. 27 OF 2009

IN THE MATTER OF :

WESTERN ELECTRICITY SUPPLY
COMPANY OF ORISSA LIMITED ... APPELLANT

VERSUS

ORISSA ELCTRICITY REGULATROY
COMMISSION AND OTHERS ... RESPONDENTS

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IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
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APPEAL No. OF 2008

IN THE MATTER OF :

WESTERN ELECTRICITY SUPPLY
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