ODISHA ELECTRICITY REGULATORY COMMISSION
BIDYUT NIYAMAK BHAWAN
UNIT-VIII, BHUBANESWAR - 751 012
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Present: **Shri S. P. Nanda, Chairperson**
Shri K. C. Badu, Member
Shri B. K. Misra, Member

In the matter of: **Proceeding for re-determination of cross-subsidy in tariff as per Order of Hon'ble ATE in Appeal Nos. 102, 103 & 112 of 2010 dtd. 30.05.2011 and Appeal No. 57, 67-73 of 2011 dtd. 02.09.2011 and Order dtd. 30.09.2011 of Hon'ble Supreme Court in Civil Appeal No.8093 of 2011.**

AND

Case No. 140/2009

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of CESU for FY 2010-11 (On Remand).**

AND

Case No. 141/2009

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of WESCO for FY 2010-11 (On Remand).**

AND

Case No. 142/2009

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of NESCO for FY 2010-11 (On Remand).**

AND

Case No. 143/2009

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of SOUTHCO for FY 2010-11 (On Remand).**

AND

Case No. 146/2010

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of CESU for FY 2011-12 (On Remand).**

AND

Case No. 147/2010

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of NESCO for FY 2011-12 (On Remand).**

AND

Case No. 148/2010

In the Matter of: **An Application for Annual Revenue Requirement and Retail Supply Tariff of WESCO for FY 2011-12 (On Remand).**

AND

Case No. 149/2010

In the Matter of: An Application for Annual Revenue Requirement and Retail Supply Tariff of SOUTHCO for FY 2011-12 (On Remand).

.....Applicants

Date of Hearing: 24 & 25.11.2011 **Date of Order: 21.01.2012**

O R D E R

1. The Commission had issued Retail Supply Tariff Order for FY 2010-11 on 20.03.2010 revising the tariff of different categories of consumers. Being aggrieved by the said order of the Commission, three EHT consumers namely, M/s. Tata Steel Ltd., M/s. Ferro Alloys Corporation Ltd. and M/s. Balasore Alloys Ltd. had moved the Hon'ble Appellate Tribunal for Electricity and Hon'ble Tribunal in their order dtd.30.05.2011 in Appeal Nos.102, 103 & 112 of 2010 relating RST Order for FY 2010-11 directed the Commission to determine the variation of tariff of the appellants category with respect to average cost of supply for that category in terms of Regulation 7(c)(iii) the 0ERC (Terms And Conditions For Determination of Tariff) Regulations, 2004 (before Amendment) and provide consequential relief to the appellants in terms of the tariff policy, if any, after hearing all concerned. The State Commission was also directed to take action on consumer and audit metering and determination of cross subsidy based on actual cost of supply in accordance with direction given in that judgment.

2. On the appeal of M/s. Vishal Ferro Alloys Ltd. and 23 other industries in Appeal No.57, 67-73 of 2011 on the Retail Supply Tariff order for FY 2011-12 issued by the Commission on 18.03.2011, Hon'ble ATE in their order dtd.02.09.2011 in Para 5 had observed as follows:

   The crux of the findings given in the above paragraph are as follows:

   (a) The State Commission is required to determine voltage-wise cost of supply.

   (b) The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.

   (c) The cross subsidy is not to be increased but reduced gradually.

   (d) The tariff of each of the consumer categories is to be within ±20% of the average cost of supply.

(e) The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

3. In para 10 of the aforesaid Order dated 02.09.2011 the Hon'ble ATE further directed the Commission "to re-determine the tariff on cross subsidy" and the said exercise must be completed by 30th November, 2011 positively and till then the tariff of any category is not disturbed.

4. The Hon'ble Supreme Court of India in Civil Appeal No.8093 of 2011 on the appeal filed by M/s. Adhunik Metalik Ltd. on the orders of Tribunal dtd.02.09.2011 was not inclined to interfere in the said remand order. Hon'ble Apex Court vide their Order dtd. 30.09.2011 observed as follows:

"X X X X X

We hope that the Regulatory Commission would be in a position to dispose of the case remitted to it by November 30, 2011. If, for any reason, the matter could not be disposed of by November, 30, 2011, liberty is given to the parties to move this court for grant of further period.

We make it clear that, in the event of Regulatory Commission coming to the conclusion that there are parties, who are affected in the matter of fixation of tariff, on remand, it may consider giving notice to all the affected parties in it's own discretion.

The civil appeal, accordingly, stands disposed of.

No order as to costs."

5. As per above Order of the Hon'ble Supreme Court of India the Commission had issued Public Notice as well as individual notices on 15.11.2011 & 16.11.2011 to the persons/organizations/ consumer Counsels/ Stakeholders/ DISCOMs who had participated in the tariff proceedings before the Commission for FY 2010-11 & 2011-12 and also those who were parties before the Hon'ble ATE, New Delhi in Appeal Nos. 102, 103 & 112 of 2010 and in Appeal Nos. 57,67- 73 of 2011fixing the date of hearing on 24.11.2011 and 25.11. 2011on the issues of cross-subsidy in tariff for different categories of consumers for the FY 2010-11 & 2011-12. The above order of the Hon'ble Supreme Court requires the Commission to hear "affected parties" on all relevant matters affecting them.

6. Though the notices were issued to 307 individuals, out of them the following persons were present in the above proceeding namely:-

Shri M. G. Ramchandran, Advocate, Shri Ashok Kumar Parija, Sr. Advocate, Shri R. M. Pattanaik, Advocate , Shri P.P.Mohanty, Advocate, Shri Dillip Kumar Das, Advocate all on behalf of the HT & EHT Industries namely :-

M/s. Balasore Alloys Ltd., M/s Tata Steel Ltd. , M/s. Ferro Alloys Corporation Ltd., M/s. OCL India Ltd., M/s. Adhunik Metaliks Ltd., M/s. Vishal Ferro Alloys Ltd., M/s. Maruti Steel Mulding Pvt. Ltd., M/s. Chunchun Ispat Pvt. Ltd, M/s. Kishan Alloys Pvt. Ltd., M/s. Subh Ispat Ltd., M/s. Satguru Metals & Power Pvt. Ltd., M/s Banjrangabali Re-Rollers Pvt. Ltd., M/s Scan steel Ltd., M/s B P Roller Pvt. Ltd., M/s Bajaranga Steel & Alloys Ltd., M/s Deo Ispat Alloys Ltd., M/s Attitude Alloys Pvt. Ltd., M/s 21st Century Ferro & Alloys Pvt. Ltd., M/s Top Tech Steels Pvt. Ltd., M/s Maa Laxmi steels Pvt. Ltd., M/s Maa Tarini Industries Ltd., M/s Kalinga Sponge Iron Ltd., M/s Arun Steel Industries Pvt. Ltd., M/s Shri Radha Krishana Ispat Pvt. Ltd., M/s Sri Jagannath Alloys Pvt. Ltd., M/s Rexon Strips Ltd., M/s Maa Girija Ispat Pvt. Ltd., M/s Shree Salasar Casting Pvt. Ltd., M/s Sardha Saburi Steel Pvt. Ltd., M/s Refulgent Ispat Pvt. Ltd., M/s Shri Radharaman Alloys Ltd., M/s Sardha Rerollers Pvt. Ltd., M/s D.D Iron & Steel Pvt. Ltd., M/s Shreeram Sponge & Steels Pvt. Ltd., M/s Jagannath Sponge Pvt. Ltd., M/s Omkar Steels Pvt. Ltd., M/s Shree Astabinayak Steels Pvt. Ltd., M/s Sourav Alloys & Steel Pvt. Ltd., M/s Bajrangabali Alloys Pvt. Ltd., M/s New Laxmi Steel & Power Pvt. Ltd., M/s Auro Ispat (I) Pvt. Ltd., M/s Jay Jagannath Casting Pvt. Ltd., M/s IPI STEEL Ltd., M/s Sree Metaliks Ltd., M/s Hind Metal & Industries Ltd. & M/s Satyam Casting Pvt. Ltd.

7. The following persons represented the matter before the Commission on their individual capacity or on behalf of the industries/ organizations /institutions/ as they were authorised by them.

Shri R. P. Mohapatra, represented the matter on behalf of M/s. Rohit Ferro-Tech Ltd., Shri A.B. Rao, AEEE, Railway Traction, East Coast Railway, Shri Shyam Sundar Pansari, President, Western Orissa Cold Storage Association, Shri Suryakanta Pati, Sr. Manager (Elect.) M/s OCL India Ltd., Shri Ashok Agarwal, GM (Admn.) , M/s. Ashoka Ispat Udyog, Shri Pradeep Kumar Nath, AGM (Elect.), NALCO, Shri S. S. Kalia, President (Comm.) M/s JCL Ltd., Shri B.K.Lenka, CCO & COO, CESU, Shri L.R. Padhi, DGM (Law), CESU, Shri A.K.Bohra, CEO & CSO, WESCO, NESCO & SOUTHCO, Shri B.D.Ojha, AGM (Eco.), GRIDCO, Shri Prasant Kumar Das, GM

(Elect.), SLDC, Shri Dharmendra Nath Patra on behalf of OHPC, Shri Sukant Chandra Mohanty, Legal Consultant, DoE, GoO, Shri Abhisek Bharadwaj on behalf of Gram Vikash, Mohuda, Berhampur, Shri G.Dandapani and Shri Rajat Kumar Buxi on behalf of Orissa Consumer Association, Bhubaneswar, Shri S. Suryanarayan, District Judge (Rtd.), Shri Ananda Kumar Mohapatra, Analyst Power Sector & Expert in Applied Economics, Shri A.K. Sahani, Shri A.P.R. Rao for East Coast & South Eastern Railway, Shri S. K. Singh, Sr. GM (P& PD), M/s Visa Steel Ltd., Shri Ch. K.K.Mishra, President & Shri Ananta Bihari Routray, Secretary, Orissa Electrical Consumer Association, Shri Ramesh Chandra Satpathy, Secretary, Indian Institute of Labour, Shri K.N. Jena, Advocate on behalf of Orissa Consumer's Association, Shri Nilambar Mishra, Orissa Consumers Association, Balasore Chapter, Balasore, Shri Manmath Behera, ICE Factory Owner Forum, Balasore, Shri K.P. Panigrahi, Authorised Representative of Registrar, NIT, Rourkela, Shri Antaryami Routray, President, All Orissa Cold Storage Association, Shri Bibhu Prasad Swain, Sr. Consultant, Power Tech. Consultancy, Shri M.V. Rao on behalf of M/s Feero Chrome Ltd. & Shri A. Mohanty on behalf of M/s. Gorge Distributors Pvt. Ltd.

8. The written submissions were filed by East Coast Railway, Orissa Consumer Association, Balasore Chapter, Confederation of Citizen's Association, Bhubaneswar, Federation of Consumer Organization, Odisha, (FOCO) Cuttack, M/s GRIDCO Ltd., Odisha Consumer Association, Cuttack which are taken on record. The written submission submitted by others within 15 days period from the date of conclusion of hearing on 25.11.2011 stipulated by the Commission have also been taken into consideration.

Views of Participants in the Proceeding

9. **Advocate Shri M G Ramchandran and P.P. Mohanty on behalf of HT and EHT industries**

- The present proceedings are pursuant to the Orders dated 30th May 2011 and 2nd September 2011 passed by the Hon'ble Appellate Tribunal for Electricity in Appeal Nos. 102, 103 and 112 of 2010 and 57, 67 TO 73 of 2011.
- The proceedings are related to the aspects of re-determination of tariff for industrial consumers for the tariff period 2010-11 and 2011-12 based on the principles set out in the judgment of the Hon'ble Tribunal in the above Orders.

- The proceedings are to be held not only for the purpose of determination of tariff for the future period i.e from 1st April 2012 onwards but also for re-determination of tariff for the period 2010-11 and 2011-12. The objections raised to the effect that the Hon'ble Tribunal's Order only directs the State Commission to determine the cross subsidy elements only for the period 2010-11 and 2011-12 and implement the tariff based on the cross subsidy only for the period from 1st April 2012 onwards is patently erroneous and without any basis.

- He brought to the notice of the Commission the following:

  - The appeals of the industries had been allowed by the Hon'ble Tribunal;

  - The Order of the Commission determining the tariff for the period 2010-11 and 2011-12 has been set aside;

  - There is a direction for re-determination of tariff. There was no need for re-determination of tariff if the tariff has not been set aside by the Hon'ble Tribunal.

  - The Hon'ble Tribunal has further directed consequential relief to be given. The consequential relief necessary relates to re-adjustment of tariff of the industries for the period from 1st April 2010 onwards with necessary refund of the amount collected in excess pursuant to the tariff Orders of the Commission which no longer exists; and

  - The purpose of passing the order dated 2nd September 2011 permitting the continued application of the existing tariff determined by the Commission was clearly during the transition period and not permanently.

- In view of the above, he argued that there cannot be any issue on the scope of the present proceedings, namely:

  - It is related to re-determination of tariff for the period from 1st April 2010 onwards till 31st March 2012.

  - For the purpose of such re-determination the element of cross subsidy (in the cost of supply) prevalent in the system etc are to be determined;

- Consequential orders of adjustment of tariff, namely, the difference between the tariff collected by the Distribution Licensees pursuant to the Order of the Commission and tariff payable as per re-determination to be refunded to the industries with carrying cost.

- Any other interpretation would amount to violation of the directions given by the Appellate Authority, which direction was also reiterated by the Hon'ble Supreme Court in the Order dated 30.09.2011 passed in Civil Appeal No. 8093 of 2011 and order dated 08.11.2011 passed in Civil Appeal Nos. 9136-9143 of 2011 and I.A. No-2 in Civil Appeal No. 8093 of 2011.

- He also mentioned that the parties participating in the present proceedings are not entitled to question the manner in which the Hon'ble Tribunal or the Hon'ble Supreme Court had dealt with the matter, and call in question any infirmity in the proceedings before the Hon'ble Tribunal of having impleaded or not impleaded the domestic and other consumers before passing the Orders dated 30th May 2011 and 2nd September 2011.

- Similarly, the implications of the various Orders passed by the Hon'ble High Court of Orissa in the case of domestic consumers are not relevant for consideration in the present proceedings.

- The Consumers such as domestic and other categories are entitled to participate in the present proceedings and place their views on the issue before this Commission arising out of the remand order. They cannot urge other issues in the present proceedings. They can certainly point out the implications to their tariff, if any, arising out of the adjustment pursuant to the Orders dated 30th May 2011 and 2nd September 2011 and it will be for the Commission to deal with them as it considers fit and proper but this Commission cannot refuse to give effect to the Orders of the Hon'ble Tribunal on the ground that it may have other implications to the categories of consumers.

- The present proceedings cannot also go into the issues of socio-economic impact of various categories of consumers. The proceedings should be related to determination of the correct tariff for the EHT and HT consumers as per the principles laid down by the Hon'ble Tribunal in the Orders dated 30th May 2011 and 2nd September 2011.

- The Electricity Act enacted by the Parliament makes a departure from the previous electricity laws on the aspects of tariff design. Under the previous laws, the socio-economy aspects such as affordability, means to pay etc were relevant considerations.) The Electricity Act makes a departure in view of the above aspects having left to a high level of cross subsidy threatening the very existence of the Electricity industries as well as the impact on the industrial consumers who were subjected to extreme and high degree of cross subsidization, the Electricity Act, 2003 provided for the following basic aspects:

  - The tariff should be determined on commercial principles, economic basis and uninfluenced by the socio-economic reasons.
  - Objective, the tariff should be reflective of the cost of supply, cost of supply is the actual cost of supply to the categories of consumers i.e. category wise cost of supply and not average cost of supply.
  - The socio economic aspect was left to be determined by the State Government by providing subsidy.
  - Under the Tariff Policy, the tariff design has to be again based on the cost of supply and not average cost to supply. In fact, the Tariff policy can not provide for the determination of tariff on a methodology different from what is envisaged in Section 61 of the Electricity Act, 2003. If such an interpretation has to be made the Tariff Policy will ultra vires the Electricity Act, 2003. A subsidiary legislation or a delegated Legislation cannot over-ride the provision of the basic/plenary Legislation enacted by the Parliament.
  - The Electricity Act, 2003, the Tariff Policy as well as the judgements of the Hon'ble Tribunal all deal with the requirement to reduce the cross subsidy level. Section 61(g) itself talks about the progressive reduction in the cross subsidy.

10. **Shri R.P. Mahapatra on behalf of M/s Rohit Ferro Tech. Ltd.**

- OERC is duty bound to follow the procedure for calculation of cost of supply voltage-wise as directed by Hon'ble ATE dtd. 30.05.2011.

- The Tariff Orders of the Commission for FY 2010-11 and 2011-12 have been set aside by Hon'ble ATE and remanded back for fresh consideration as per the guidelines of the Hon'ble ATE.

- That the amended Regulation 7(c)(iii) came into effect from 10.08.2011, when it was notified in the Odisha Gazette. Therefore, the determination of tariff for the FY 2010-11 & 2011-12 by the Hon'ble Commission, in its' Orders dtd.20.03.2010 & 18.03.2011, based on the provisions of the amended Regulation is a contravention of the Statute. This also contravenes the specific Orders of the Hon'ble High Court, Orissa, dtd. 16.03.2010 in WP(C) Nos.6624-6626 of 2008.

- That the Commission has not determined the voltage-wise cost of supply in accordance with the judgment of the Hon'ble ATE in its' Order dtd.30.05.2011 and 02.09.2011. Further, the Commission has not also determined the average tariff realization of the category of the consumers, voltage-wise, in accordance with the Orders of the Hon'ble ATE.

  - That cross subsidy element in the tariff for EHT and HT consumers have decreased from FY 2010-11 to 2011-12 whereas cross-subsidy availed by LT consumers has increased during the same period.

  - The Tariff Policy notified by the Central Govt. provides that by the FY 2010-11, the cross subsidy shall be within ±20% of the average cost of supply. Against this, the actual %age is as follows:

    EHT : (+) 27.26%
    HT : (+) 29.39%
    LT : (-) 33.04%

- In its' various Tariff Orders for different years, it is observed that the tariff is being determined on the basis of the normative distribution losses approved by the Commission and not based on the actual loss data submitted by the DISCOMs.

- Instead of determining the energy to be purchased based on the projected sales and the normative distribution losses, the Commission has allowed the purchase of energy by the DISCOMs based on the units purchased in the previous years plus allowance for load growth. The sale of units at LT has been increased than what has been projected by the DISCOMs based on the normative distribution loss. However, the actual sales at LT in all the years

from 2006-07 to 2010-11 has been much less than the approved LT sale figures. The projection of much higher sale at LT, which is the subsidized category, has unnecessarily increased the tariff of the subsidizing HT & EHT categories.

- The Commission may take this into consideration and determine the actual sales and the required cross subsidies, which should reduce from year to year.

11. **Jayshree Chemicals Ltd.**

- Since, 01.04.2010 the power tariff has increased from Rs. 2.90 to 3.65 per KWh. Again there has been steep rise in power tariff from 01.04.2011 which has gone up from 3.65 to Rs. 4.70 per KWh and such increase has resulted in a loss of more than Rs. 1.00 crore per month to the Company.
- The tariff for power Intensive Industry in respect of Jayshree Chemicals Ltd. should not be more than Rs. 245+ 20% i.e total Rs. 2.94 per KWh.
- The Commission may be pleased to consider for redetermination of tariff in respect of Cross-Subsidy which ultimately will result in reduction of power Tariff as directed by Hon'ble Appellate Tribunal.

12. **Power-Tech Consultants:**

- Implementation of the order of ATE and re-determining the tariff considering cross subsidy as per direction of ATE will definitely affect the tariff for LT consumers like domestic, agricultural etc. The LT consumer are already affected in big way due to increase in the tariff. Thus, there will be public discontent for any increase in tariff in the mid financial year. But the other categories like industrial and large consumers can pass on the cost of electricity as a cost of their product. This is also against the advice of SAC to adopt a preferential lower tariff for low tension consumers.
- Further, redetermination of tariff in line with the direction of ATE is also not practically possible and feasible when there is a stay order on LT domestic tariff by Hon'ble High Court of Orissa for the year 2011-12. The Hon'ble High Court have also disapproved of the conduct of the Industries Association and imposed a cost of rupees One Lakh and allowed the association to withdraw the case at its risk. The High Court have also almost completed proceeding except hearing of OHPC submission. Re- determination of Tariff

on cross subsidy for 2010-11 & 2011-12 by calculating the cost of supply voltage wise instead of cost of supply to all consumers of the State taken together as calculated by Hon'ble OERC will disturb the existing level of cross subsidy leading to great tariff hike amounting to tariff shock to LT consumers of the State. Under the above circumstances to safeguard the interest of the LT consumers of the State, it will be prudent on the part of Hon'ble Commission to go for review petition against the order before Hon'ble Supreme Court either directly or through their authorized consumer forum.

- Initiating the process of hearing of the stakeholders at this stage without knowing the actual financial implication on the tariff will be a difficult task on the part of the stake holders to participate on the hearing. Hon'ble Commission cannot determine the tariff in the current hearing.
- In Odisha supplies are given in following voltage level i.e 220KV, 132KV, 33KV, 11KV and 0.4KV. In case Hon'ble ATE's order is followed the DISCOMs should separate their consumers by voltage level and apply to Commission for re-determination of tariff; otherwise, it will be a violation of the orders of ATE which will lead to further legal complication in future.
- But as presently there is a stay order by the Hon'ble High Court of Orissa on LT domestic tariff for FY 2011-12, the above fact can be appraised to Hon'ble Supreme Court by a review petition for review of their order dt 30.09.2011. Simultaneously, the implication of the order of the Supreme Court may also be appraised to the Hon'ble High Court.
- If the Hon'ble Supreme Court and ATE orders are to be implemented, then in order to safeguard the tariff of the LT consumers of the state, Commission may consider the followings:
  - The Govt. Of Odisha should provide grant to compensate in the form of subsidy to the LT consumers.
  - The Hon'ble Commission may explore the possibility of raising the demand charges and customer service charges of HT & EHT consumers to partly prevent the price hike of the LT consumes.
  - The DISCOMs should appeal before the Supreme Court for review of the order.

- The burden of price hike of LT consumer pertaining to the financial year 2010-11 & 2011-12 be carried forward to the next year.
- The DISCOMs should calculate the tariff considering cross subsidy issue and the revenue gap may be considered as pass through for the next tariff year 2012-13.

13. **Confederation of Citizens Association, Bhubaneswar**

- OERC has been following the principle of cross-subsidy as enumerated in National Electricity Policy and Tariff Policy notified by Govt. of India.
- For achieving the objective that tariff progressively reflects the cost of supply of electricity, the SERC would notify road map within 6 months with a target that latest by the end of year 2010-11 tariffs are within +/- 20% of the average cost of supply.
- In that connection, every year the Commission has been fixing cost of supply as average cost of supply for the State taken as a whole; otherwise, cost of supply would be different for different DISCOMs resulting in different retail price which is socially undesirable.
- Forum of Regulators (Constituted under Section 166 of the Electricity Act, 2003) has recommended Cross subsidization on the basis of average cost of supply for the State as a whole for the time being keeping in view the prevailing situation in the power sector.
- The State Advisory Committee advised to adopt a preferential lower Tariff for low Tension (LT) Consumers like domestic Consumers, Small Commercial Establishments and Agricultural Consumers etc. who are directly affected by increase in the tariff for the reason that consumers of the other categories like Industrial Consumers and Commercial Establishments can pass the electricity cost in their products.
- While determining the Annual Revenue Requirement of the Distribution Companies and the Retail Supply Tariff, OERC has to ensure that the Distribution Companies will be able to recover their Annual Revenue Requirement (ARR) from the Tariff. In order to achieve the said objective and at the same time balance the interest of various categories of consumers, OERC has to provide a subsidized Tariff for supply of Electricity to the LT

category comprising Domestic Consumers, Below Poverty Line (BPL) Consumers, Small Commercial Establishments like shops, Agricultural Consumers etc.

- In view of fifth amendment of Regulation – 7(c) (iii) of OERC (Terms & Conditions for Determination of Tariff) Regulations, 2004, the average cost-to-serve to all consumers of the State taken together will be considered for fixation of tariff. It is not logical to go back to old Regulations before amendment.
- The cost of supply to the consumers taking power at bulk (i.e HT and EHT category for Industrial & Commercial Purpose) will always be lower than the retail consumers (i.e LT-domestic and agricultural for self use). They will be charged more because of technical reasons, rather than their own fault.
- On the above premises of the National Tariff Policy, Recommendations of Forum of Regulators, Advice of State Advisory Committee, OERC's own Regulations 7(c)(iii) of OERC (Terms & Conditions for determination of Tariff) Regulations, 2004 and overall the interest of all consumers of the State, Average Cost of Supply for the state should be taken as a whole, not cost of supply voltage wise (LT, HT & EHT).

14. **Odisha Consumers' Association, Cuttack**

- Issue of cross subsidy in determination of Retail Supply Tariff for different categories of consumers for any year cannot be determined in isolation without considering whole gamut of the issues relating to the energy sector i.e generation, hydro power, captive power, renewable energy, transmission and distribution system etc. The Commission should take into consideration ground realities of socio-economic and geographical conditions of the consumers. The Commission should also consider agricultural growth and industrial growth of the State simultaneously. Furthermore, the order passed by the appellate authority is not binding on other stakeholders as they were not made parties to the proceeding.
- The Appellate Tribunal as well as the Hon'ble Supreme Court have not taken into consideration the prayer and pleading and issues raised now before the Hon'ble Orissa High Court (vide WP(C) No. 8409 of 2011) as regards to enforcement and implementation of various provisions of Electricity Act,

Rules and Regulations framed thereunder in determining the tariff and consequence thereof.

- Entire tariff order for all categories of the consumers would be recast/re-determined retrospectively after lapse of its operational period, which will create chaotic situation and condition in the system from the point of Generation to distribution and that too in breach or violation of the Order of the Hon'ble High Court.

- The HT and EHT consumers are all large industrial and commercial consumers. Whatever they pay towards the electrical charges till date as per tariff order, they can collect the same adding to the price of goods and services supplied to their own customers, distributors & traders, who have already realized the price inclusive of electricity tariff from the consumers who are the end user of their product. Reduction if any on the basis of the re-determination on the issue of cost on voltage wise may increase the LT tariff which neither be worked out nor can be realized from the different type/categories of LT consumer as a result of which entire business of the distribution companies and other generating and transmission companies will collapse and their liability will increase manifold which will ultimately go over to future years of A.R.R. of the licensees and the licensees are bound to carry forward the said loss in their A.R.R putting the burden on all categories of consumers in future which will also increase the Revenue gap.

- Regulation 7(c) (iii) of the OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 has no application to a proceeding for re-determination of general Tariff under Section 62 and 64 of the Electricity Act, 2003. The concept of surcharge is altogether different from the concept of general tariff under Section 62 and 64 of the Electricity Act 2003. The purpose of surcharge for Open Access is compensation to DISCOMs when a consumer applies for open access and it is determined on case to case basis, where as tariff is the general schedule of prices paid by all, who consume electricity. Whereas surcharge for Open Access involves only calculation of compensation with as much exactitude as possible, tariff is used as a potent instrument for regulating all the components of electricity market, for endeavouring to develop the market (Section 66 and Preamble) and for safeguarding against distortion or failure of the market – an ever present

danger in a privatised set up and calculation of average cost of supply covering the whole market has been found to be more appropriate for tariff purpose.

- The erstwhile Regulation 7(c)(iii) of Tariff Regulation dealing with surcharge is inconsistent with the Para 8.3.2 of the Tariff Policy relating to calculation of cross subsidy on the basis of "average cost of supply". If we apply erstwhile Regulation 7 (c) (iii) to tariff it will violate para 8.3.2 of the Tariff Policy. Tariff policy may ordain a different, more realistic and practicable mode of calculation of cross-subsidy for tariff purpose different from the mode of calculation in Regulation 7(c)(iii) which is intended for levying a compensatory amount on open access applicants.

- The provision of Regulation 7(c)(iii) aforesaid can't be taken into consideration into the tariff setting exercise under Section 62 and 64 of the Act, because it is impossible to implement the said provision, inasmuch as transmission and distribution line for supply to each of the three category (voltage-wise of consumers) is one and the same and has been built up with public and tax payers money spending from public exchequer for over the years and have not been segregated and the HT and EHT category of consumers are using the one and the same common line and metering arrangement for measuring of consumption of each category and same are not in one place and as such the existing accounting system can't segregate cost of supply to each category of consumers.

- The Regulation 7 (c) (iii) has been amended so as to compute average cost of supply instead of actual cost of supply for relevant category and also for purpose of determining surcharge for open access applicants, not to speak of tariff setting for all category of consumers, vide the OERC (Terms and Conditions for Determination of Tariff), Fifth Amendment Regulation 2011. This amendment would be applicable from the tariff year 2012-13 and same is not retrospective but prospective. Even so, the direction of Appellate Tribunal is illegal and *non est* and is not implementable or enforceable. Either the Appellate Authority has lost sight of this position of law or it was misled by appellants. The amendment has been brought because the law can't enforce the impossible – *lex non cogit ad impossibilia* (Law does not compel the impossible). Moreover the implementation of Regulation 7 (c) (iii) requires a

prolonged, capital intensive programme and a tariff order which is time bound by law can't wait till such implementation.

- The determination of price, i.e., tariff is also based on efficiency and standard of performance and improvement of system of transmission, generation, purchase of low cost electricity, arresting transmission and distribution loss. AT & C Loss and reduction of A&G cost thereon from year to year which has to be controlled progressively from year to year, but unfortunately it is going on increasing from year to year and the OERC is not taking any punitive action against the licensee as provided under law for the statutory violation, inaction & negligent actions. Furthermore, the licensees without investment of a single pie are carrying on the business in the system.
- The determination of tariff from year to year by the Commission is not a judicial or quasi-judicial proceeding activity and does not decide a lis between the contesting parties but it is a legislative function to determine the price of unit of electricity, in accordance with the provisions of the Act, Rules, Regulations and National Policy giving utmost consideration to protect the interest and right of the vast majority of the Consumers.
- In the instant case, the Appellate authority has transgressed its statutory mandate without considering whole gamut of things & has issued a direction which is not practicable and feasible and as such the same cannot be worked out and that too after the tariff period for the Year 2010-11 has elapsed and tariff order for the year 2011-12 is going to expire.
- Since revised Retail Tariff for LT domestic consumers for FY 2011-12 have been stayed by the Hon'ble Orissa High Court and challenge to the RST, BST and Transmission Charges orders of the Commission for year 2010-11 and 2011-12 have been pending in Hon'ble ATE, the Commission can't re-determine the retail tariff for 2010-11 and 2011-12 for different types of consumers at this stage and as such order dtd.30.05.2011 & 02.09.2011 of ATE cannot be implemented.

15. **Forum of Consumer Organization (FOCO)**

- In view of the pendency of Writ application W.P (C) 8409/2011 before the Hon'ble Orissa High Court, in which interim order has been passed & hearing is almost complete on the said issue also, as such in the fitness of things to

comply with the rule of law, this issue should be taken up, if necessary, after the Judgment is delivered in the said case. This Commission as O.P. No. 2 in the said proceeding has also taken stand in writing before the High Court, that such determination is not possible, feasible and tenable under law and that too after the period of Tariff is over.

16. **Shri Ramesh Ch. Satpathy representative of Indian Institute of Labour**

- Nowhere in India voltage-wise and category-wise cost of supply has been determined to calculate cross-subsidy in tariff. Hon'ble ATE's Order only to OERC in this regard is astonishing.
- Socio-economic condition of the people is of paramount importance. If the Act mandates for non-consideration paying capacity of the people, then the Govt. should pay subsidy to protect the interest of the consumers.
- HT and EHT consumers have suppressed the fact before Hon'ble ATE that the same issue of cross-subsidy is sub-judice in the Hon'ble High Court of Orissa.

17. **Shri Ananta Bihari Routray, Secretary, Orissa Electrical Consumer Association**

- If tariff is to be hiked due to re-determination as per Order of Hon'ble ATE then higher rebates should be allowed to keep it constant.
- Due to pendency of cases in other Courts, Hon'ble ATE's Order should not be implemented.
- Tariff should not be changed more than once in a year as per law vide Section 62(4) of the Electricity Act, 2003. Since the Commission in their suo-motu proceeding dated 18.06.2011 arising out of the disposal of the review petition of the State Govt. on the same date have already allowed downward revision of tariff of LT domestic consumers by way of a special rebate of Rs.1.50 per kwh subject to a maximum of Rs.75.00 per month over and above the permissible normal rebate for timely payment of the Retail Supply Tariff for 2011-12 cannot be again revisited.

18. **CESU**

- The principle of average cost of supply for the State taken as a whole should continue for determination of cross-subsidy; otherwise, different DISCOMs would have different Retail Supply Tariff which is difficult to administer.

- The Commission should follow the advice of State Advisory Committee, principle of cross-subsidy in National Electricity Policy, Tariff Policy and decision of FOR in this regard.
- If pre-amended version of OERC Regulation is adopted the cost of supply to the consumers taking power at bulk (i.e. HT and EHT category for Industrial & Commercial purpose) will always be lower than the retail consumers, who will be charged more because of technical reason, rather their own fault.
- As per AIR 1985 Supreme Court 1729, Tariff Policy-2006 must prevail over OERC (Terms & Conditions for Determination of Tariff) Regulations, 2004 on cost of supply.
- In view of appeal filed in the Supreme Court by CESU against the order dated 30.05.2011 and 02.09.2011 of ATE the Commission may not revisit the RST for 2010-11 & 2011-12 at this stage.

19. **NESCO, WESCO & SOUTHCO**

- NESCO, WESCO & SOUTHCO (the Reliance Infra managed DISCOMs) submitted as follows:
  - In terms of Section 61 (g) of Electricity At, 2003 the appropriate Commission shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Commission. Para 8.3.2 of Tariff Policy enjoins that for achieving the objective that tariff progressively reflects the cost of supply of electricity, the SERC would notify road map within 6 months with a target that latest by the end of year 2010-11 tariffs are within ±20% of the "average cost of supply".
  - The National Electricity Policy also envisages existence of some amount of cross-subsidy. As per Para 1.1 of National Electricity Policy, the supply of electricity at reasonable rate to rural India is considered essential for its overall development. Equally important is availability of reliable and quality power at competitive rates to Indian industry to make it globally competitive and to enable it to exploit the tremendous potential of employment generation. Similarly, as per Para 5.5.2 of the National electricity Policy, a minimum level of support

may be required to make the electricity affordable for consumers of very poor category. Consumers below poverty line who consume below a specified level, say 30 units per month may receive special support in terms of tariff which are cross-subsidized. Tariff for such designated group of consumers will be at least 50% of the "average (overall) cost of supply".

- Section 62 of the Electricity Act, 2003 empowers OERC to determine tariff for retail sale of electricity. While doing so, the Commission is to be guided by National Electricity Policy and Tariff Policy under the provision of Section 61 (i) of the said Act. We have already discussed the provisions regarding the reduction of cross-subsidy in the above two Policies of the Central Govt. The term cross-subsidy has not been defined in the Electricity Act, 2003, the National Electricity and the Tariff Policy. None of them also provide for methodology for computing cross-subsidy. The amount of cross-subsidy received /contributed by various consumer categories is dependent on the way the cost of supply is calculated. Such calculation may be:

  - Average cost of supply
  - Cost of supply voltage wise
  - Cost of supply to various consumer categories

  Depending upon the mode of calculation adopted, the cross-subsidy differs. However, the Clause 8.3 of the Tariff Policy requires tariff to be within ± 20% of the *average cost of supply* by 2010-11. Again as per para 5.5.2 of the National Electricity Policy, the Tariff for consumers of BPL category should be at least 50% of the *average (overall) cost of supply.* From conjoint reading of the above provisions of National Tariff Policy and Electricity Policy, the cost of supply can be construed to mean the average cost of supply by the Licensee at different voltage taken together.

- As regards to query of the Commission to suggest the methodologies to be adopted for determination of voltage-wise cost of supply in the absence of adequate metering DISCOMs submitted as under:

  - Allocation of low cost power to LT sector and high cost power to HT and EHT sector.

- Apportionment of distribution cost to all voltage categories irrespective of technical loss in proportion to Annual Gross Energy Consumption as directed by Hon'ble ATE.
- Allocation of the commercial loss among different voltage levels in proportion to Annual Gross Energy Consumption as directed by Hon'ble ATE.
- There should not be intra-voltage cross-subsidy and any cross-subsidy required for LT category should come from HT and EHT category.
- The retrospective implementation of Hon'ble ATE's Order for FY 2010-11 and 2011-12 shall be a herculean task to the licensees. The massive task of revising the tariff w.e.f. 01.04.2010 shall require revision of almost last 20 monthly bills of 32 lakhs consumers in the State of Odisha, that too some of the large and other consumers have stopped to avail the power supply. The important fact that while the revised tariff of domestic category has already been stayed by Hon'ble High Court and the licensee is not in a condition to recover the revised tariff from domestic category, further rise in tariff (expectedly) for domestic category shall only put the licensees in further liquidity crisis. In view of practical difficulties the order of Hon'ble ATE should be implemented prospectively, not retrospectively.
- As the audited accounts are available for past year, as per the Regulation of the Commission the expected revenue should match the ARR of the licensee.
- Actual cost of supply voltage level-wise will remain notional unless the real losses are factored in.
- Due to massive addition of RGGVY/subsidized consumers the quantum available for inter-voltage consumer subsidy may not be enough. Such a situation would also require external subsidy from the Govt. in order to ensure business viability and cost reflective tariff.
- Determination of voltage-wise cost of supply may lead to non-uniform RST.

20. **GRIDCO**

- While calculating cross-subsidy average cost of supply for the State as a whole should be taken as a basis and not voltage-wise cost of supply. If the principle decided by Hon'ble ATE is adopted, then the Tariff at higher voltage would go down and at lower voltage will go up due to higher losses in lower voltage. This would also result in changes in the ARR of DISCOMs. The BSP of DISCOMs has been fixed basing on the ARR and which is again dependent on the consumer mix of the particular DISCOM. If ARR changes then BSP payable to GRIDCO is to be revisited for two years i.e 2010-11 and 2011-12. This is not practically possible as BSP collected from DISCOMs have already been passed on to generators. The Commission has to take above issue into consideration before implementing Tribunal's Order.

- Regulations 7(c)(iii) of the OERC (Terms and Conditions for Determination of Tariff) Regulation, 2004 basing on which Hon'ble Tribunal has passed the Order dated 30.05.2011 already stands amended w.e.f 10.08.2011. It relates to Cross-subsidy surcharge payable by wheeling consumers and not for calculating cross-subsidy in Tariff. This matter may please be brought to the notice of the Hon'ble Tribunal in terms of review of their Order.

- The Commission has determined average tariff applicable to EHT, HT and LT consumers so that same could be compared to the average cost of supply on applicable voltage level. The Regulatory Commission, by virtue of the powers conferred upon it under Section 62(3) of the Electricity Act, 2003, can fix different tariffs for different class of consumers basing on various technical/economic/geographical factors. Further, the geographical and economic factors of one State differs from another State. Taking the ground realities into consideration, OERC has fixed the tariff for LT, HT and EHT consumers by keeping the cross subsidy for HT and EHT consumers within ± 20% of average cost of supply.

- Since both BST and RST orders for 2010-11 and 2011-12 are *sub judice* in ATE and the RST order for 2011-12 is *sub judice* in the Orissa High Court, it is not advisable at this stage to revisit the Cross subsidy and for that matter the RST order for 2010-11 and 2011-12 on the ground of redetermination of cross subsidy as directed by ATE.

- Moreover, had the Commission allowed cheap hydro power to LT consumers and costly thermal power to industries then average cost of power purchase and in turn average cost of supply on voltage basis would have been different. If loss is to be segregated between different voltages levels then power purchase cost must also be segregated voltage-wise. The Commission may kindly consider this proposal before implementing Hob'ble Tribunal Order.

21. **Views of State Govt.**

- Hon'ble ATE has directed Hon'ble OERC to revisit Retail Supply Tariff Order for FY 2010-11 and 2011-12 in terms of their observation on the issue of cross-subsidy. Hon'ble OERC while determining cross-subsidy has been scrupulously following the principle enumerated in Tariff Policy and Electricity Policy of Govt. issued under the Electricity Act, 2003. It is to be mentioned here that the cross-subsidy has not been defined anywhere in the Electricity Act, 2003.

  As per para 8.3.2 of Tariff Policy *for achieving the objective that tariff progressively reflects the cost of supply of electricity, the SERC would notify road map within 6 months with a target that latest by the end of year 2010-11 tariffs are within +/- 20% of the average cost of supply.*

- Therefore, while calculating cross-subsidy average cost of supply for the State as a whole should be taken as a basis and not voltage-wise cost of supply. If the principle decided by Hon'ble ATE is adopted, then the Tariff at higher voltage would go down and at lower voltage will go up due to higher losses in lower voltage. This would also result in changes in the ARR of DISCOMs. The BSP of DISCOMs has been fixed basing on the ARR and which again depends on the consumer mix of the particular DISCOMs. If ARR changes then BSP payable to GRIDCO is to be revisited for two years i.e. 2010-11 and 2011-12. This is not practically possible as BSP collected from DISCOMs have already been passed on to generators. The cumulative loss of GRIDCO upto 31.03.2011 has reached a level of Rs.2264.82 cr. including the regulatory asset of Rs.1414.31 cr. for 2009-10. The financial condition of GRIDCO may further deteriorate. Hon'ble Commission has to take above issue into consideration before implementing Tribunal's Order.

- Regulation 7 (c) (iii) of OERC (Terms and Conditions for Determination of Tariff) Regulation, 2004 basing on which Hon'ble Tribunal has passed the

Order dtd.30.05.2011 already stands amended w.e.f. 10.08.2011. It relates to Cross-subsidy surcharge payable by wheeling consumers and not for calculating cross-subsidy in Tariff. This matter may please be brought to the notice of Hon'ble Tribunal in terms of review of their Order.

- The Hon'ble Commission has determined average tariff applicable to EHT, HT and LT consumers so that same could be compared to the average cost of supply on applicable voltage level. The Regulatory Commission by virtue of the powers and functions conferred upon it can fix different tariffs for different class of consumers basing on various technical/economic/geographical factors. Further, the geographical and economic factor of one State differs from another State. Taking the ground realities into consideration, Hon'ble Commission has fixed the tariff for LT, HT & EHT consumers by keeping the cross subsidy for HT & EHT consumers (at load factor of 80%) within +20% of average cost of supply. Hence, the said order can't be faulted on the ground of alleged wrong fixation of cross subsidy.
- Tariff Order for 2010-11 and 2011-12 has been challenged in different Fora as follows:

  (a) Retail Supply Tariff Order for FY 2010-11 in Appeal Nos.160, 161 & 162 of 2010, RIL Managed DISCOMS have challenged the Retails Supply Tariff Order dated 20.3.2010 passed in Case No.141, 142 & 143 of 2009 of the Commission for FY 2010-11 before the Hon'ble ATE.

  (b) Bulk Supply Tariff Order for FY 2010-11: In Appeal No.106/2010, GRIDCO has challenged the BSP Tariff Order dated 20.03.2010, passed in Case No.144/2009 of the OERC.

  (c) Transmission Tariff for FY 2010-11: In Appeal No.110/2010, M/s OPTCL has challenged the Transmission Tariff Order dated 20.03.2010 passed in Case No.145 of 2009 before the ATE, New Delhi.

  (d) BSP Order for FY 2011-12: In Appeal No.116/2011, WESCO, NESCO & SOUTHCO have challenged BSP Order dated 18.03.2011 of the Commission passed in Case No.144/2010 for the FY 2011-12 before the Hon'ble ATE, New Delhi.

(e) RST order for FY 2011-12: In Appeal Nos. 188,189 & 190/2011, The RIL Managed DISCOMs have challenged the RST Order dated 18.03.2011 of the OERC passed in Case Nos. 147, 148 & 149/2010 for FY 2011-12 before the ATE.

(f) The RST order for 2011-12 has been challenged in the Orissa High Court in shape of a Writ Petition bearing No.8409 of 2011. The stay on revised tariff for LT domestic consumer is still in force.

- Since both BST and RST orders for 2010-11 and 2011-12 are *sub judice* in ATE and the RST order for 2011-12 *sub judice* in the Odisha High Court, it is not advisable at this stage to revise the Cross subsidy and for that matter the RST order for 2010-11 and 2011-12 on the ground of redetermination of cross subsidy as directed by ATE.

- Moreover, had the Hon'ble Commission allowed cheap hydro power to LT consumers and costly thermal power to industries, then average cost of power purchase and in turn average cost of supply on voltage basis would have been different. If loss is to be segregated between different voltage levels, then power purchase cost must also be segregated voltage-wise. The Commission may kindly consider this proposal before implementing Hon'ble Tribunal Order.

22. **Views of SAC**

- The present issue of cross subsidy was placed before the Members of the State Advisory Committee (SAC) constituted u/s.87 of the Electricity Act, 2003 in their 5th meeting held on dtd.11.11.2011. Almost all Members present except representative of Utkal Chamber of Commerce & Industries Ltd.(UCCI), opined that Commission should continue to determine the cross subsidy on the basis of average cost of supply as stipulated under para 8.3.2 of the Tariff Policy, 2006 of Govt. of India. A representative of Small Scale Industries submitted that while calculating profit of an industry average cost to produce different products is taken into consideration in relation to average price of the product in the market. The price of the product never varies with distance. Therefore, average cost to supply electricity should be taken into consideration irrespective of voltage level for calculating cross-subsidy. Representatives of UCCI, however, stated that they would like the Commission to determine the

cross subsidy voltage wise as directed by the ATE in their order dated 30.5.2011 for 2010-11 and order dated 02.9.2011 for 2011-12.

Analysis, Observation and Orders of the Commission

23. Mr. M. G. Ramchandran, Mr. P. P. Mohanty and Mr. R. P. Mohapatra on behalf of HT & EHT Industries have collectively stated that as per the direction of the Hon'ble ATE the Commission has to re-determine the tariff for industrial consumers and consequently for other categories of consumers for the period of 2010-11 and 2011-12 after calculating the cost of supply voltage wise as stipulated by the Hon'ble ATE. There cannot be any other interpretation of the order of the ATE. The various organizations/individuals representing LT consumers as well as the distribution companies, GRIDCO, State Govt and all members of SAC except the representative of industries have vehemently opposed the re-determination of Retail Tariff for 2010-11 and 2011-12 based on the cost of supply voltage-wise mainly on the ground that the Tariff Policy, 2006 and National Electricity Policy envisage that tariffs are to be determined based on the average (overall) cost of supply for all consumers taken together. They further have submitted that in view of the stay Order of the Hon'ble Orissa High Court on LT Domestic Tariff 2011-12 and appeals pending in Hon'ble ATE against the BST, Transmission Tariff and Retail Supply Tariff for both 2010-11 and 2011-12, the Commission cannot revisit the RST Order for 2010-11 and 2011-12 based on the cost of supply voltage-wise.

24. In view of the conflicting views expressed by the representatives of EHT & HT consumers and LT Consumers the Commission would like to address the various issues raised by the stakeholders during hearing as regards implementing the order of Hon'ble ATE. This is an exercise for redetermination of cross-subsidy in tariff for FY 2010-11 and FY 2011-12, after hearing all concerned, as directed by the Hon'ble ATE in para 41.5 of the Order dated 30.05.2011 in Appeal Nos.102, 103 and 112 of 2010 and para 8 of the Order dated 02.09.2011 in Appeal Nos. 57 and 67-73 of2011. The Hon'ble Supreme Court in the case of *Adhunik Metaliks Ltd.* vs. *OERC & Ors.*, C.A. No.8093 of 2011, arising from ATE's aforesaid order dated 30.05.2011 in Appeal No.71 of 2011 (clubbed with Appeal Nos. 57, 67, 68, 69, 70, 72, and 73 of 2011) has observed, "We make it clear that in the event of the Regulatory Commission coming to the conclusion that there are parties who are affected in the matter of *fixation of tariff on remand* it may consider giving notice to all the affected parties in its own discretion." Accordingly, the Commission has exercised its

discretion and issued notices to objectors and stakeholders. The Commission has had to consider the views of objectors and stakeholders on all matters affecting them as the aforesaid directions have been for redetermination of the entire gamut of tariff on remand consequent upon recalculation of cross-subsidy for HT and EHT consumers in the manner suggested by the Hon'ble ATE. It appears to the Commission that the Hon'ble ATE and the Hon'ble Supreme Court have advisedly directed redetermination of entire gamut of tariffs on remand, after hearing affected parties, because reduction of tariff for HT and EHT categories of consumers by reason of reduced cross-subsidy would result in further shortfall in the revenues of distribution licensees and ways have to be found to meet the increased shortfall of revenues. Moreover, the appellate authorities, in issuing the directions for redetermination, appear to have been conscious of the fact that the increased shortfall of revenues of distribution licensees would adversely impact on the DISCOMs' ability to pay for their power purchase and ensure continuity of power supply and to pay for OPTCL and SLDC charges and therefore it has been necessary to elicit the views of all stakeholders. The issues raised by the stakeholders are enumerated in the paragraph next following.

25. Issues raised by stakeholders:

(i) The pan-Indian perspective regarding cross-subsidy in tariff

(ii) The basis of present order of Hon'ble ATE on cross-subsidy

(iii) The basis for deviating from Regulation 7 (c) (iii) of OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 for determining cross-subsidy by OERC.

(iv) Present status of category-wise cross-subsidy based on average cost of supply.

(v) Implementation of Hon'ble ATE's Direction in their Orders dtd. 30.05.2011 and 02.09.2011.

(vi) Implication of retrospective revision of Retail Tariff.

(vii) Other Legal implication.

Aforementioned issues are discussed below:

Issue-(i): The pan-Indian perspective regarding cross-subsidy in tariff

26. It has been contended that there has been no mention of definition of cross-subsidy anywhere in the Tariff Policy, National Electricity Policy or Electricity Act, 2003. Though the definition of cross-subsidy does not find place in those policies, we get definite indication about it through certain policy instruments in Tariff Policy and National Electricity Policy. Objectors drew the attention of the Commission to the following portions of the said Policies:

Tariff Policy Para 8.3.2

"For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-2011 tariffs are within ± 20 % of ***the average cost of supply****. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.*

For example if the average cost of service is Rs 3 per unit, at the end of year 2010-2011 the tariff for the cross subsidised categories excluding those referred to in para 1 above should not be lower than Rs 2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs 3.60 per unit."

Electricity Policy 5.5.2

"A minimum level of support may be required to make the electricity affordable for consumers of very poor category. Consumers below poverty line who consume below a specified level, say 30 units per month, may receive special support in terms of tariff which are cross-subsidized. Tariffs for such designated group of consumers will be at least 50 % of the ***average (overall) cost of supply****. This provision will be further re-examined after five years."*

27. It has been argued that Tariff Policy and National Electricity Policy have been issued by Govt. of India under Section 3 of the Electricity Act, 2003. Similarly, the appropriate Commission is to be guided by those policies while determining tariff under Section 61(i) of the Electricity Act, 2003. The National Electricity Policy and the Tariff Policy are two policy instruments purposely created under provisions of Electricity Act to materialise the intention of the Parliament in enacting the Electricity Act, 2003. By conjoint reading of these two policies it can be inferred that cross-subsidy should be calculated basing on average cost (overall) of supply because the Tariff should not go beyond ±20% of the average cost of supply and not cost of supply of any particular category.

28. Further, it has been pointed out that the Forum of Regulators are of the opinion that in view of the prevailing condition of the distribution network, the cross subsidy is to be worked out voltage wise based on the average cost of supply for all types of consumers taken together and not on the basis of cost of supply for the particular

group of consumers. The Forum of Regulators (FOR) while deliberating in their 25th meeting held on 29.07.2011 at Suraj Kund, Delhi-NCR on "Model Tariff Guidelines" have decided as follows on Cross-subsidy / Tariff Design:

"Cross subsidy/Tariff Design

- *SERC would notify revised road map within six months from the notification of these Regulations (Model Tariff Guidelines) with a target that latest by the end of year 2015-16 tariffs are within ±20% of the average cost of supply.*
- *The road map would also have intermediate mile stones, based on the approach of a gradual reduction in cross subsidy.*

Tariff Design

- *SERC shall be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity."*

The Central Govt. have constituted the Forum of Regulators (FOR) in pursuance to Section 162(2) of the Electricity Act, 2003. This Forum consists of the Chairperson of the Central Commission and Chairpersons of the State Commissions. The functions of the Forum of Regulators have been set out in Rule 4 of the Forum of Regulators Rules, 2005, which has been made in exercise of powers conferred under Section 176(1) read with Section 166(2) and (3) of the Electricity Act, 2003. One of the functions under rule 4(vi) of the said rule is to evolve measures for protection of consumers and promotion of efficiency, economy and competition in the power sector. Hence, the Forum of Regulators is a statutory body under this Act and its decisions and findings are to be taken as a guiding principle for taking decisions under the various matters regarding implementation of the provisions of the Electricity Act, 2003.

29. With regard to a query of FOR on the question of prescribing preferential tariff for renewable energy under Section 86(1) (e), the opinion of Mr. Goolam E Vahanvati, Learned Attorney General of India is quoted below:

"Q(iv) Would the aforesaid charge under Section 86 (1) (e) be contrary to the requirement if any that tariff is to be worked out on the basis of the 'average cost of supply'?

Ans.: In my opinion, para 8.3.2 of the Tariff Policy which deals with average cost of supply will not be violated because Section 86(1) (e) and Section 62 (3) read with other portions of the National Electricity Policy and National Tariff Policy override Para 8.3.2. Further Section 62(3) clearly states that preferential tariffs may be imposed on consumers having due regard to the nature of supply and the purpose for which the supply of electricity is required."

The reasoning, it has been contended, applies with equal force to tariff for LT, HT and EHT consumers.

30. Gujarat Electricity Regulatory Commission while determining the ARR for 2011-12 to 2015-16 and tariff for 2011-12 in case of Madhya Gujurat Vij. Company Ltd., have adopted the average cost of supply which is quoted below (vide Para 10.1):

"The mandate of the NEP that the Tariff should be within plus or minus 20% of the average cost of supply by FY 2010-11 has been the guiding principle. In working out the cost of supply the Commission worked out the basis of average cost of supply, in the absence of relevant data for working out consumer category-wise cost of supply."

31. Therefore, from the above contentions it has been concluded that, from an all-India perspective, cross-subsidy in tariff should be based on average (overall) cost of supply for the State taken as a whole as stipulated under Para 8.3.2 of Tariff Policy, 2006 and para 5.5.2 of National Electricity Policy, 2005 as well as guidelines adopted on "Model Tariff" by the Forum of Regulators. Nevertheless, the Commission is of the view that it should not defer to the direction of the Hon'ble ATE and examine the possibility to carry out the direction and effectuate the intention of Hon'ble Tribunal.

<u>Issue (ii):</u> The basis of present order of Hon'ble ATE on cross-subsidy

32. The definition of cross-subsidy does not find mention anywhere in the Act or Policies. In the Regulation framed by OERC way back in the year 2004, much before the notification of Tariff Policy and National Electricity Policy issued on 06.01.2006 and 12.02.2005 respectively, there are provisions for calculation of cross-subsidy for certain purposes. The erstwhile Regulation 7(c) (iii) of Odisha Electricity Regulatory Commission (Terms and Condition of Determination of Tariff), Regulation, 2004 which came into force w.e.f. 10.06.2004 states as follows:

"For the purpose of computing cross-subsidy the difference between cost-to-serve that category and the average tariff realization of that category shall be considered".

This is the basis on which Hon'ble ATE has directed the Commission to re-calculate cross-subsidy in tariff for the year FY 2010-11 and 2011-12, following its own Regulation. The Commission, as claimed by certain consumer groups, and concurred in by Hon'ble ATE, is to be guided by the above definition. The HT and EHT Industries argue in favour of the above Regulation because of the fact that if category-wise cost of supply is determined as per our Regulation and then Tariff Policy of Govt. of India is applied over it, then their power tariff would come down considerably, no matter it be at the cost of enhancement of Tariff for LT consumers.

33. However, it has been contended, especially by those representing LT consumer categories, that the inconsistency of the erstwhile Regulation 7 (c) (iii) of OERC

(Terms and Conditions of Determination of Tariff) Regulation, 2004 with the provisions of Para 8.3.2 of Tariff Policy, 2006 and Para 5.5.2 of National Electricity Policy, 2005 together with subsequent amendment of the said Regulation notified on 30.05.2011 and published in the Odisha Gazette on 10.08.2011, which is stated below, were not brought to the notice of the Hon'ble ATE for their kind appropriate appreciation.

7(c) (iii) as amended on 30.05.2011 and published in Odisha Gazette dtd. 10.08.2011

"For the purpose of computing Cross-subsidy payable by a certain category of consumer, the difference between average cost-to-serve all consumers of the State taken together and average tariff applicable to such consumers shall be considered."

34. Hon'ble ATE vide their judgement dtd. 26.05.2006 in Appeal Nos. 4, 13, 14, 23, 25, 26, 35, 36, 54 & 55 of 2005 in Siel Ltd. Vs. PSERC & Ors. in para 109 has observed as follows:

"xxxxxxxxxxx But the policy has reached only up to average cost of supply. As per the Act, Tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted. We, however, hasten to add that we disapprove the view of the Commission that the words "Cost of Supply" means "Average Cost of Supply. xxxxxx"

35. Hon'ble ATE vide their Judgement dtd. 31.01.2011 in Appeal No. 41, 42, & 43 of 2010 in Kumaon Garhwal Chamber of Commerce Vs. Uttarakhand ERC & Ors. had observed in para 42 as under:

"Under Section 61 of the Electricity Act, 2003 in relation to tariff the Appropriate Commission has been vested with the jurisdiction to issue tariff regulations specifying the terms and conditions for determination of tariff. While issuing such regulations, the Appropriate Commission is to be guided by various factors specified in Section 61, including the National Electricity Policy and the Tariff Policy (see Section 61(i)). Therefore, the guidance available to the State Commission on tariff matters is from the National Electricity Policy and the Tariff Policy."

36. It has been argued, especially on behalf of the LT consumer categories, that if the position indicated in all the above paras would have been brought to the kind notice of Hon'ble ATE, perhaps their findings/directions would have been different. They urge that the Hon'ble ATE has not impleaded and heard them and, therefore, the judgment of the Hon'ble Tribunal is not binding on them. The Commission has no intention of examining the legality of the judgment of the Hon'ble ATE, but in redetermining tariff, the Commission has to consider the adverse impact on the LT consumers and

other stakeholders as stipulated by Hon'ble Supreme Court which has been mentioned in Para 4.

Issue (iii): The basis for deviating from the erstwhile Regulation 7 (c) (iii) of OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 for determining cross-subsidy by OERC.

37. It is submitted before the Commission that the Regulation 7(c) of the OERC (Terms and Conditions of Determination of Tariff) Regulation, 2004 which came into force on 10.06.2004 deals with the surcharge to be levied on wheeling consumers who want to avail open access. The said Regulation 7(c), extracted below, deals with the manner in which surcharge will be determined by the State Commission: "7(c) Surcharge

(i) Surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

(ii) The Commission may adopt requisite principles for computing surcharge, which shall compensate for the entire loss of cross subsidy for any given consumer category for which supply is given, as the Act clearly states that such surcharges shall be utilized to meet the requirements of current level of cross-subsidy. The entire amount of cross-subsidy lost by the incumbent licensee needs to be compensated.

(iii) For the purpose of computing cross-subsidy, the difference between cost-to-serve of that category and average tariff realization of that category shall be considered."

38. It is argued that the said Regulation 7(c)(iii) is applicable only for the limited purpose of determination of surcharge that a wheeling consumer shall pay, when he opts for open access to take supply from a person other than the incumbent distribution licensees, and only in that case cross subsidy to be computed is the difference between the cost to serve that category and the average tariff realization from that category.

39. Odisha being pioneer in the electricity reform has framed the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 (effective from 10.06.2004) in pursuance to Electricity Act, 2003 which came into force w.e.f. 10.6.2003. However, in compliance with Section 3 of the Electricity Act, 2003 the Central Govt. have notified the Tariff Policy on 6th January, 2006. Para 8.3.2 of the Tariff Policy, 2006 notified by the Central Govt. on 6.1.2006 stipulates that the tariff is to be kept within ± 20% of the average cost of supply. For the sake of ready reference the said provision is extracted below:-

8.3.2. For achieving the objective that the tariff progressively reflects the cost of supply of electricity, the SERC would notify roadmap within six months with a target that latest by the end of year 2010-11 tariffs are within ± 20% of the average cost of supply. The road map would also have intermediate milestones, based on the approach of a gradual reduction in cross subsidy.

For example if the average cost of service is Rs.3 per unit, at the end of year 2010-11 the tariff for the cross subsidized categories excluding those referred to in para 1 above should not be lower than Rs.2.40 per unit and that for any of the cross-subsidising categories should not go beyond Rs.3.60 per unit."

40. Thus, it is argued, the Tariff Policy, 2006 notified by the Central Govt. in pursuance to Section 3 of the Electricity Act, 2003 stipulates that the tariff for different categories of consumers should be within ± 20% of the average cost of supply. Since the Tariff Policy, 2006 came into force on 06.1.2006 after the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004, which came into force from 10.6.2004, the provision of Tariff Policy will prevail. Further, since the Tariff Policy, 2006 flows from the Electricity Act, 2003 and it is a policy of Central Govt. issued as mandated under Section 3 of the Electricity Act, 2003 this would prevail over the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004. It is submitted that this is precisely the reason that even though the erstwhile Regulation 7(c)(iii) was in operation from 10.6.2004, since the Tariff Policy, 2006 came into force from 06.1.2006, the Commission while determining tariff for different categories of consumers voltage-wise has been working out cross subsidy based on the average cost of supply. This is in compliance with the Tariff Policy, 2006 which have prevailed over Regulation 7(c)(iii) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004, assuming that the said provision is applicable to tariff-setting. However, conformably to the Tariff Policy, 2006, the Commission have now amended the provision of 7(c)(iii) of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 vide their notification dated 30.5.2011 after finalisation of the proceeding initiated by OERC vide case No.9 of 2011. This has been notified in the Orissa Gazette on 10.8.2011 which is extracted below:- (Amended portion in bold letter)

"7(c) Surcharge

(i) Surcharge to be levied on wheeling consumers shall be determined by the Commission keeping in view the loss of cross-subsidy from the consumers or category of consumers who have opted for open access to take supply from a person other than the incumbent distribution licensee.

(ii) The Commission may adopt requisite principles for computing surcharge, which shall compensate for the entire loss of cross subsidy for any given consumer category for which supply is given, as the Act clearly states that

such surcharges shall be utilized to meet the requirements of current level of cross-subsidy. The entire amount of cross-subsidy lost by the incumbent licensee needs to be compensated.

(iii) For the purpose of computing cross-subsidy payable by a certain category of consumer, the difference between cost-to-serve of all consumers of the State taken together and average tariff applicable to such consumers shall be considered."

The amendment does away with a different mode of computation even for the purpose of surcharge.

41. It is further argued that electricity is a concurrent subject under Entry No. 38 of List II of the 7th Schedule of the Constitution of India. Framing of Regulation by the State Electricity Regulatory Commission is a subordinate legislative function under the Electricity Act, 2003 which is a Central legislation. According to the provisions of the Article 254 of the Constitution of India, if any provision of law made by the Legislature of a State is repugnant to the provisions of law made by Parliament which Parliament is competent to enact law with respect to one of the matters enumerated in the Concurrent List, the law made by the Legislature of the State shall to the extent of the repugnancy be void. It is true that the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 for the State of Orissa and the later Tariff Policy instrument of the whole country owe their origins to the same parent Act but it is submitted by objectors on behalf of the LT consumers that the spirit of Art.254 of the Constitution would nevertheless apply to these two pieces of subordinate legislation and Regulation 7(c)(iii) of the State Regulation should be so interpreted as not to be in conflict with the later, all-India Tariff Policy instrument of the Central Government. Conflict, it is submitted, would be avoided if the scope of Regulation 7(c)(iii) is confined to cross-subsidy for the purpose of compensatory surcharge imposed upon open access applicants for the benefit of incumbent distribution licensees. The argument is reasonable.

42. It has been pointed out to the Commission that Para-8.3.2of the Tariff Policy, which has been further explained in the example given therein, that tariff for all categories of consumers i.e. cross-subsidizing categories as well as cross-subsidized categories (except lifeline consumers) should not normally go beyond $\pm$ 20% of the "average cost of supply". The rate of Rs.3.00 per unit in the example is the average cost of supply for all consumers taken together. It was submitted that the directions in the said judgment dated 30.5.2011 has been contrary to the Tariff Policy. As per the Tariff Policy, OERC had determined average cost of supply trying to keep the

subsidizing category of consumers taking power at EHT-132 KV or above within +20% of the average cost of supply. It was submitted that it has not been the intention of the Tariff Policy to calculate cost of service for each category of consumers. Had that been the intention of the Tariff Policy, in the example of Para 8.3.2 of the Tariff Policy, there would not have been one figure of Rs.3.00/unit and the limit of tariff for all categories of consumers would not have been between Rs.3.60 and Rs. 2.40.

43. It was further submitted that if the cost of supply applicable to the consumer categories at different voltage levels including tariff and cross-subsidy is determined for the respective categories, then the cost of supply to the consumers taking power at bulk (i.e. HT and EHT category for Industrial & Commercial purpose) will always be lower than the retail consumers (i.e. LT-domestic and agricultural for self use). This is clearly not the intention of Tariff Policy, as the Tariff Policy [vide para 8.3.1 and para 8.3.3] clearly provides for regulatory cross-subsidy support in tariff as well as cash subsidy support of State Govt. for the vulnerable categories of consumers.

44. It has been contended that, nationwide, views of other State Electricity Regulatory Commissions (SERCs), Forum of Regulators (FOR) and Ministry of Power have endorsed the average cost of supply for the purpose of determining regulatory cross-subsidy for the purpose of tariff-setting and Odisha should not be an exception. (Vide Issue No. i)

45. While approving ARR of the DISCOMs and determining tariff for the various categories of consumers of the State, the Commission has to ensure that the approved ARR of a DISCOM is matching with the revenue likely to be earned through the approved tariff. The Commission has to factor in various inputs at grassroots level including the advice of the members of the State Advisory Committee and act upon the perception of facts and trends of the economy of the State in general and electricity market in particular. One of the cardinal principles is that there should not be tariff shock to any category of consumers. The State Advisory Committee of the Commission (where representative of EHT consumers is also one of the members) had advised the Commission that both the 'Tariff' and 'Cross-subsidy' should be calculated on the basis of 'average cost of supply' only. No generalization or simplification on the basis of 'cost of supply' on voltage-wise will be appropriate for determination of tariff of a particular category of consumers. On the contrary, State Advisory Committee members further advocated that if the Commission wishes to calculate the cost of supply on voltage-wise basis, then cost of power purchase in

ascending order should be allocated at different voltage categories, i.e. energy received from the costly thermal generation to be allocated to EHT consumers whereas the subsidizing category of LT domestic and agricultural consumers will be allocated to the cheaper hydro generation of the State. GRIDCO and Govt. of Odisha in their written note have also supported the above views of the members of the SAC. Therefore, except the representative of Utkal Chamber of Commerce and Industries all Members of the SAC in the 5th meeting held on 11.11.2011 have strongly recommended that the Commission should adopt the average cost of supply for all consumers taken together for the purpose of calculating cross subsidy as envisaged under para 8.3.2 of the Tariff Policy, 2006. However, the representative of the Utkal Chamber of Commerce and Industry suggested that the cost of supply should be calculated voltage wise. In re-determining tariff, the Commission cannot ignore all these advices, especially when it has to consider the interests of all stakeholders.

46. The Commission has determined the average tariff applicable to EHT, HT and LT consumers, so that the same could be compared to the average cost of supply on applicable voltage level. The industrial association suggested that as per the Tariff Policy, the State Commission is mandated to charge maximum 20% more on EHT/HT consumers over the cost of supply to that category in the form of cross-subsidy and is further required to progressively reduce the cross-subsidy. But as per the Tariff Policy, Commission has determined average cost of supply for the State as a whole trying to keep the tariff of subsidizing category of consumers (the appellant's category of consumer i.e. industrial consumers taking power at HT-33 or 11 KV, EHT-132 KV or above) within +20% of the average cost of supply. The above principle is also in line with Tariff Policy of Government of India as well as the suggestions/opinions of Forum of Regulators (FOR). However, the Hon'ble Tribunal have directed redetermination of tariff after computing cross-subsidy of HT and EHT consumers on the basis of cost of supply of each of these categories and has required the Commission to apply a certain formula to derive an approximation to the cost of supply. The Commission has undertaken this exercise in subsequent paragraphs of this Order under Issue No. V.

47. The Regulatory Commission by virtue of the powers conferred upon it under Section 62(3) of the Electricity Act, 2003 can fix different tariffs for different class of consumers basing on various technical/economic/geographical factors. Further, the geographical and economic factors of one State differ from those of another State.

Taking the ground realities in view, OERC has fixed the tariff for LT, HT & EHT consumers by keeping the cross subsidy for HT & EHT consumers within +20% of average cost of supply taking all consumers taken together. Now, in re-determining tariff, even though the Commission becomes (technically) able to calculate cross-subsidy of HT and EHT categories on the basis of cost of supply for each of these categories, the Commission has to consider the ground realities in respect of LT categories as well as HT and EHT categories for fixing their respective tariffs.

<u>Issue (iv):</u> Present status of category-wise cross-subsidy based on average cost of supply.

48. In Commission's RST order for 2010-11 and 2011-12 it had adopted the tariff for EHT and HT consumers at 80% load factor but the Hon'ble ATE in their order dated 30.05.2011 have disapproved of the same and have prescribed the formula for calculating the average tariff as given below vide para 35 of their aforesaid order.

Average Tariff realisation for a category = Total expected revenue to be realised from that category as per ARR/ Total anticipated sale to that category as per ARR

In other words, the Commission should not assume ARR based on the expected sales at 80% load factor. Accordingly, cross subsidy based on the above formula prescribed by ATE has been recalculated.

49. Based on the average tariff voltage wise, let us examine present status of cross-subsidy as per average cost of supply taken for the State as a whole which is in consonance with Tariff Policy and National Electricity Policy.

	2010-11				2011-12			
Category of Consumers	**Avg. Cost of Supply (P/U)**	**Avg. Tariff (P/U)**	**Cross Subsidy (P/U)**	**% Cross Subsidy**	**Avg. Cost of Supply (P/U)**	**Avg. Tariff (P/U)**	**Cross Subsidy (P/U)**	**% Cross Subsidy**
LT Category								
Kutir Jyoti <30 units /month	327.27	100.00	-227.37	-69.5	408.87	100.00	-308.87	-75.5
Domestic <=100 units /month	327.27	160.00	-167.37	-51.1	408.87	265.00	-143.87	-35.2
Domestic >100, <=200 unit/month	327.27	265.00	-62.37	-19.1	408.87	337.50	-71.37	-17.5
Domestic >200 unit/month	327.27	313.33	-14.04	-4.3	408.87	368.33	-40.54	-9.9
General Purpose <=100 units/month	327.27	450.00	122.63	37.5	408.87	510.00	101.13	24.7
General Purpose >100, <=300 units /month	327.27	540.00	212.63	65.0	408.87	600.00	191.13	46.7
General Purpose >300units /month	327.27	536.37	209.30	63.9	408.87	596.67	187.80	45.9

	2010-11				2011-12			
Category of Consumers	**Avg. Cost of Supply (P/U)**	**Avg. Tariff (P/U)**	**Cross Subsidy (P/U)**	**% Cross Subsidy**	**Avg. Cost of Supply (P/U)**	**Avg. Tariff (P/U)**	**Cross Subsidy (P/U)**	**% Cross Subsidy**
Irrigation Pumping and Agriculture	327.27	122.18	-205.19	-62.7	408.87	122.18	-286.69	-70.1
LT Industrial (S) Supply	327.27	453.05	125.68	38.4	408.87	520.40	111.53	27.3
LT Large Industry	**327.27**	**482.71**	**155.34**	**47.5**	**408.87**	**542.71**	**133.84**	**32.7**
LT Category Avg. Tariff	327.27	219.21	-108.16	-33.0	408.87	300.34	-108.53	-26.5
HT Category								
Tariff at 80% Load Factor	327.27	383.68	56.31	17.2	408.87	482.43	73.56	18.0
Tariff at 70% Load Factor	327.27	398.49	71.12	21.7	408.87	497.77	88.90	21.7
Tariff at 60% Load Factor	327.27	418.24	90.87	27.8	408.87	518.24	109.37	26.7
Tariff at 50% Load Factor	327.27	436.88	108.51	33.1	408.87	535.88	127.01	31.1
Avg. HT Tariff	**327.27**	**423.59**	**96.22**	**29.4**	**408.87**	**524.92**	**116.05**	**28.4**
EHT Category								
Tariff at 80% Load Factor	327.27	379.93	52.56	16.1	408.87	477.43	68.56	16.8
Tariff at 70% Load Factor	327.27	394.20	66.83	20.4	408.87	492.77	83.90	20.5
Tariff at 60% Load Factor	327.27	413.24	85.87	26.2	408.87	513.24	104.37	25.5
Tariff at 50% Load Factor	327.27	430.88	103.51	31.6	408.87	530.88	122.01	29.8
Avg. EHT Tariff	**327.27**	**416.61**	**89.24**	**27.3**	**408.87**	**506.98**	**98.11**	**24.0**

N.B(i) Tariff for 5 KW load has been calculated for LT except Kutir Jyoti and Domestic category <100 units

(ii) % cross-subsidy means cross-subsidy as % of Average cost of supply.

From the above table it is seen that cross-subsidy in percentage in relation to voltage-wise average tariff has decreased in 2011-12 from the level of 2010-11, though they remain above ±20% band stipulated in the Tariff Policy. Even in case of LT Domestic category, General Purpose category, LT Industrial (S) category and Large Industry category etc. the cross-subsidy have been taking a declining trend. Similarly, in different load factors such as 70%, 60% and 50% and also on the average in HT and EHT cross-subsidy is reducing from the level what it was in 2010-11 in percentage term. The Learned Counsel for HT and EHT industries argued that the cross-subsidy should decrease in absolute term in relation to power purchase cost. We feel this is contrary to what has been envisaged in Tariff Policy which describes reduction in percentage term. The Learned Counsel further argued that once the ±20% band is reached it should not vary upward even within the prescribed ±20% limit. This contention of the Learned Counsel is not acceptable as policy makers have consciously prescribed the limit of ±20% in cross-subsidy as it would vary within that

band. Had it been not so, they would have prescribed a fixed percentage instead of a limit. It is to be further stated that as per Section 61(g) of Electricity Act, 2003 cross-subsidy is to be reduced and not eliminated. Therefore, it should vary within the prescribed limit. In this context it may be noted that Order of Hon'ble ATE states that cross-subsidies are reduced gradually as per provisions of the Act. Further, the Para 8.3.2 of Tariff Policy, 2006 stipulates that "latest by the end of 2010-11 Tariffs are within ±20% of the average cost of supply. The road map would also have intermediate mile stones based on the approach of a gradual reduction of cross-subsidy". The stipulation to keep the tariff within ±20% of the average cost of supply and gradual reduction of cross-subsidy are to be read conjointly. It means that there should be gradual reduction of cross-subsidy so as to reach the benchmark level of ±20% of the average cost of supply. Once that benchmark of ±20% is reached it should operate within that limit and should not exceed that ±20% limit. It is pertinent to mention here that the FOR while prescribing guidelines for Model Tariff have stipulated that latest by end of the year 2015-16 tariffs are within ±20% of the average cost of supply. The tariff settings by the Commission follows the approach agreed to in the Forum of Regulators (FOR).

50. Mr. R P Mohapatra, learned representative of some industries agitated before us that during tariff-setting, by adopting normative loss, the sales in LT level is fictitiously going up resulting in requirement of higher level of cross-subsidy from HT & EHT consumers. This type of argument is surely contradictory to his own view as the same representative argues before the Commission that due to huge distribution loss incurred by DISCOMs tariff of general consumers is taking up an upward trajectory. It would not be out of the place to mention here that if normative losses are not adopted, not only it would amount to incentivising the inefficiency of the DISCOMs but it would also inevitably lead to power regulation by DISCOMs as we are adopting top down approach in power purchase as per Tariff Regulation. The normative T&D loss adopted by the Commission in the Tariff Order of FY 2009-10 & 2010-11 is in accordance with the Multi-Year-Tariff (MYT) principle approved by the Commission.

Issue (v): Implementation of Hon'ble ATE's Direction in their Order dtd. 30.05.2011 and 02.09.2011.

51. Despite the requirement envisaged under para 8.3.2 of the Tariff Policy that tariffs are to be kept ± 20% of the average cost of supply and the requirement in para 5.5.2 of Electricity Policy that consumers of very poor categories may be given special

support in terms of tariff which are cross-subsidized and that for such designated group of consumers tariff would be at least 50% of the average (overall) cost of supply, the Commission is required to follow the Hon'ble ATE's direction to calculate cost of supply voltage-wise for cross-subsidy purpose in their order dated 30.5.2011 and order dated 02.09.2011.

52. The EHT industries have submitted that since they are drawing power directly through 220/132 KV lines, the DISCOMs are not required to incur any expenditure towards the cost of distribution and, in their case, the technical loss is zero. The HT industries similarly point out that though the technical loss may not be zero in their case and may be around 8%, the cost of distribution for them is negligible and more than 95% of the Distribution cost can be ascribed to the LT consumers. The LT consumers, on the other hand, argue that some of them are located near or around the hydro and thermal projects and they have suffered displacement and associated problems. In addition to that, in case of thermal projects and industrial consumption they have been facing pollution problems day in and day out. They further argue that the EHT & HT industries are loading the cost of electricity in the cost of their products or services through which the cost of electricity supplied to them is being recovered from the buyers of the products or services and they themselves do not bear any portion of the price of the electricity supplied to them. The LT consumers further argue that their affordability is limited and they cannot pass on the burden of cost of electricity supplied to them and they themselves have to bear the cost. They argue that the low-cost power of State Hydel Projects which is less than Re. 1 per unit should be supplied to them and accordingly their tariff should be substantially at lower side compared to the tariff for HT, EHT consumers who mostly pass on the cost of electricity to the ultimate buyer of their products or beneficiaries of their services and costlier power of Central Sector Thermal Projects whose cost of generation itself is more than Rs.3.50 per unit should be allocated to them. However, Hon'ble ATE in their order dt. 30.05.2011 and 02.09.2011 have taken a balanced view and stated that cost of distribution should be equitably distributed among the LT, HT & EHT consumers. Hon'ble ATE has observed in Para 36 of their Order dtd. 30.05.2011 as follows:

"We also don't accept the argument of the Learned Counsel for the Appellant that distribution losses and network cost in respect of Appellant consumer category will be nil. As stated above, the commercial losses of the distribution system have to be borne by all the consumers of the distribution licensee. However, as the distribution losses

reduce gradually, the cost of supply for the appellants' category will also reduce. We also can not grant any relief to the appellants on account of fixed charges for the distribution system assets and O&M expenses, etc. due to complexities involved in determining the segregated cost of service and in light of amendment of 2007 of the Act removing the provision for elimination of subsidies."

53. We have noted the Hon'ble ATE's direction in its order dt.30.05.2011 to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in that Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act. Hon'ble ATE in their Order dtd. 02.09.2011 in Para 5 has directed as follows:

The crux of the findings given in the above paragraphs are as follows:

a. The State Commission is required to determine voltage-wise cost of supply.

b. The cross subsidy is to be calculated on the basis of cost of supply to the consumer category.

c. The cross subsidy is not to be increased but reduced gradually.

d. The tariff of each of the consumer categories is to be within ±20% of the average cost of supply.

e. The State Commission is to determine cross subsidy for different categories of consumers within next six months from Financial Year 2010-11 onwards and ensure that in future tariff orders, cross subsidies for different consumer categories are determined according to the directions given in the judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.

As per the above order of ATE it is quite clear that they direct that the tariff for each consumer category has to be determined on the basis of 'cost of supply' for that category. The Commission has taken *suo motu* action for amendment of the aforesaid Regulation 7(c)(iii) long back through public hearing. Much before the Appellant category of consumers filed Appeal at the Hon'ble ATE against the Commission's tariff order for 2010-11 and 2011-12 and the amended the Regulation as per OERC notification dtd. 30.05.2011 were published in the Odisha Gazette in August, 2011, the Appellant category of consumers, i.e., EHT consumers along with other stakeholders had actively participated in the proceedings at the Commission for the amendment of the Regulation vide order dtd. 30.05.2011 in Case No. 9 of 2011 for which Public Notice was issued on 29.11.2010 and published on 30.11.2010. The

Commission is of the view that future tariff orders would be governed by the amended Regulation assuming though not admitting that the said provision of Regulation 7(c)(iii) is applicable to calculation of cross-subsidy for regulatory tariff orders as distinct from compensatory cross-subsidy imposed on open access applicants in order to compensate incumbent DISCOMs – the Hon'ble ATE has not pronounced upon this distinction. However, the Commission at the present limited position, without going into these controversies, desires to calculate the voltage-wise cost of supply as per the simplified formula as given in para 31-35 of Hon'ble ATE order dtd. 30.05.2011 as far as practicable. The Commission in compliance with the Hon'ble ATE directions, hereby determines in the subsequent paragraphs the cross-subsidy on the basis cost of supply at EHT, HT and LT voltage and ensures that the cross-subsidy for the appellant category of consumers and others for 2011-12 do not increase on that of 2010-11.

54. In obedience to Hon'ble ATE's Order the Commission has attempted to comply with the above directions. For the year 2010-11, the Commission has approved the Retail tariff adopting the normative distribution loss of 22.22% and for the year 2011-12 at 21.71%. The average technical loss of the State as per the sample study taken by the DISCOMs being 15% for LT and 8% for HT and 0% for EHT, total averaging to 14.38% for 2010-11 and 14.46% for 2011-12, the overall differential losses of 7.84% (22.22% - 14.38%) for 2010-11 and 7.25% (21.71%-14.46%) for 2011-12 are commercial losses which were earlier attributed to LT and have now been apportioned between EHT, HT & LT consumers in proportion to their energy consumption. Similarly, the distribution cost which includes Return on Equity, depreciation, O&M and Interest on Loan etc. has been equitably assigned to the respective categories based on the quantum of power supplied (gross input to that category basing on the apportionment of commercial loss and technical loss to different voltage level) to EHT, HT & LT consumers. Similarly, the power purchase cost has been apportioned among the EHT, HT and LT consumers basing on the same analogy of apportionment of distribution cost. Accordingly the cost of supply for EHT, HT & LT consumers have been worked out for the year 2010-11 and 2011-12 as indicated below. Similarly, the average tariff voltage-wise (total revenue of the voltage / total sales at that voltage) as stipulated by Hon'ble ATE vide Para 35 of their Order dtd. 30.05.2011 has been calculated and the tariff of EHT level and most of the HT categories are same in their respective voltage level.

Calculation of Cost of Power Supply at different Voltage Ends and cross-subsidy for the FY 2010-11 & 2011-12

	2010-11				2011-12			
	EHT	**HT**	**LT**	**Total**	**EHT**	**HT**	**LT**	**Total**
Approved in ARR								
Input to the system in MU				20,154.00				22,477.00
Total Distribution Loss %				**22.22%**				**21.71%**
Sale to Consumer (MU)	4,514.00	3,415.10	7,747.46	15,676.56	5,389.97	3,164.28	9,043.12	17,597.37
Total Loss MU				4,477.50				4,879.63
Based on Normative								
Technical Loss %	**0.00%**	**8.00%**	**15.00%**	**14.38%**	**0.00%**	**8.00%**	**15.00%**	**14.46%**
Input to the system in MU	20,154.00	15,640.00	10,973.70	20,154.00	22,477.00	17,087.03	12,555.79	22,477.00
Loss MU (Technical)	-	1,251.20	1,646.06	2,897.26	-	1,366.96	1,883.37	3,250.33
Sale to Consumer (MU)	4,514.00	3,415.10	9,327.65	17,256.75	5,389.97	3,164.28	10,672.42	19,226.67
Commercial Loss (MU)				1,580.19				1,629.30
Commercial Loss Prorated on Energy sale (MU)	***455.01***	***344.24***	***780.94***	***1,580.19***	***499.04***	***292.97***	***837.28***	***1,629.30***
Total Distribution Loss (Considering Tech. Loss + Commercial Loss) %	**2.26%**	**10.27%**	**24.13%**	**22.22%**	**2.22%**	**9.77%**	**23.39%**	**21.71%**
Cost at System Voltage								
Sale to Consumers (MU)	4,514.00	3,415.10	7,747.46	15,676.56	5,389.97	3,164.28	9,043.12	17,597.37
Loss %	**2.26%**	**10.27%**	**24.13%**	**22.22%**	**2.22%**	**9.77%**	**23.39%**	**21.71%**
Gross Input MU	4,618.26	3,805.85	11,729.89	20,154.00	5,512.36	3,506.76	13,457.89	22,477.00
Total Distribution Cost (Rs. Crore) (Prorated on Gross Input)	280.38	231.06	712.15	1,223.59	348.77	221.88	851.49	1,422.14
Distribution Cost (P/U)(Dist Cost/ sale)	**62.11**	**67.66**	**91.92**	**78.05**	**64.71**	**70.12**	**94.16**	**80.82**
Cost of Power Purchase +Tr. +SLDC (Rs. Crore) (prorated on energy sale)	895.60	738.05	2,274.73	3,908.39	1,415.76	900.65	3,456.44	5,772.86
Pooled **Power purchase + Tran. Charge**s + SLDC	193.93	193.93	193.93	193.93	256.83	256.83	256.83	256.83
Cost of Power Purchase Considering Loss (P/U)	**198.41**	**216.11**	**293.61**	**249.31**	**262.67**	**284.63**	**382.22**	**328.05**
Total Cost at Voltage end (P/U) (Cost of Power Purchase + Tra. + SLDC+ Dist. cost)	**260.52**	**283.77**	**385.53**	**327.37**	**327.37**	**354.75**	**476.38**	**408.87**
Average Cost of supply for the State	**327.37**	**327.37**	**327.37**	**327.37**	**408.87**	**408.87**	**408.87**	**408.87**
					With 10% rebate on avg. tariff on HT & EHT			
Avg. Trariff P/U	**416.61**	**423.59**	**219.21**		**456.28**	**472.43**	**300.34**	
Cross Subsidy (P/U) with respect to cost of supply voltage wise	156.09	139.82	(-)166.32		128.91	117.68	(-)176.04	
Cross Subsidy (%) with respect to cost of supply voltage wise	59.9%	49.3%	(-) 43.1%		39.4%	33.2%	(-) 37.0%	
Cross-subsidy with respect to average cost of supply for all consumer taken together	89.24	96.22	(-) 108.16		47.41	63.56	(-) 108.53	
Cross-subsidy (%)with respect to average cost of supply for all consumers taken together	27.25	29.39	(-) 33.03		11.59	15.54	(-) 26.54	

55. Hon'ble ATE in its order dt.30.05.11 has directed that in the absence of segregated network cost, it would be prudent to workout the voltage-wise cost of supply taking into account the distribution losses at different voltage levels as a first major step in the right direction (Para 32). The technical distribution system losses in the distribution network can be assessed by carrying out system studies based on the available load data (Para 32). In Para 33 of the same order, Hon'ble ATE has advised that the difference between the losses allowed in the ARR and that determined by the system studies may have to be apportioned to different voltage levels in proportion to the annual gross energy consumption at the respective voltage level. The Commission has considered the technical losses as 0%, 8% and 15% at the voltage level of EHT, HT & LT respectively. The Commission in the table above has made the exercise as per the direction of the Hon'ble ATE and worked out the total normative distribution losses (both commercial and technical) in the three voltage levels as 2.26%, 10.27% and 24.13% at EHT, HT & LT voltage level respectively. The same for the year 2011-12 works out to 2.22%, 9.77% and 23.39% for EHT, HT & LT respectively. Further, Hon'ble ATE has directed (Para 34) that "Power Purchase Cost which is the major component of tariff can be segregated for different voltage levels taking into account the transmission and distribution losses, both commercial and technical, for the relevant voltage level and upstream system. As segregated network costs are not available, all the other costs such as Return on Equity, Interest on Loan, depreciation, interest on working capital and O&M costs can be pooled and apportioned equitably, on pro-rata basis to all the voltage levels including the appellant's category to determine the cost of supply. Segregating Power Purchase cost taking into account voltage-wise transmission and distribution losses will be a major step in the right direction for determining the actual cost of supply to various consumer categories. All consumer categories connected to the same voltage will have the same cost of supply." Further, Hon'ble ATE has also opined that the pooled cost of power purchase is required to be considered to calculate the cost of supply instead of allocating different sources of power to different consumer categories. Accordingly, the exercise has been carried out. The pooled power purchase cost including transmission charges and SLDC charges for both the FY 2010-11 & FY 2011-12 works out to 193.93 P/U and 256.83 P/U respectively. Prorating the losses at different voltage levels, the cost of power purchase at EHT, HT & LT works out to 198.41 paise/Kwh, 216.11 paise/Kwh and 293.61 paise/Kwh at EHT, HT and LT level respectively. The same for the FY 2011-12 works out to 262.67 paise/Kwh, 284.63

paise/Kwh and 382.22 paise/Kwh at EHT, HT and LT level respectively. As advised, the total distribution cost (RoE, Interest on Loan, Depreciation, O&M etc.) has been prorated at three different voltage level to determine the distribution cost at each voltage level. The same works out to 62.11 paise/Kwh, 67.66 paise/Kwh, 91.92 paise/Kwh for EHT, HT & LT voltage level for the FY 2010-11. For the year 2011-12, the Distribution cost works out to 64.71 paise/Kwh, 70.12 paise/Kwh & 94.16 paise/Kwh. Thus, the cost of supply at voltage end of EHT, HT & LT categories of consumers works out to 260.52 paise/Kwh, 283.77 paise/Kwh and 385.53 paise/Kwh at three voltage level for the FY 2010-11 as against the average cost of supply for whole of the state taken together at 327.37 paise/Kwh. The same for FY 2011-12 works out to 327.37 paise/Kwh, 354.75 paise/Kwh and 476.38 paise/Kwh at EHT, HT & LT voltage level respectively as against the average cost of supply for whole of the state taken together at 408.87 paise/Kwh. Hon'ble ATE in Para 35 has given a formula for average tariff realization for a category which has already been discussed above at Para 48 of the present order. The average tariff per unit as per the Tariff order issued by the Commission works out to 416.61 paise/kwh, 423.59 paise/kwh and 219.21 paise/kwh respectively at three voltage levels. The average tariff for FY 2011-12 as per the Tariff Order issued by the Commission works out to 456.28 paise/kwh, 472.43 paise/kwh and 300.34 paise/kwh respectively. Accordingly, the cross subsidy being paid by EHT, HT & LT consumers are found to be 156.09 P/U, 139.82 P/U and (-) 166.32 P/U respectively for FY 2010-11. The same figures for 2011-12 are found to be 128.91 P/U, 117.68 P/U and (-) 176.04 P/U. From the above analysis it is found that the cross-subsidy in terms of paise per unit is decreasing in case of subsidising HT and EHT consumers, whereas it is increasing marginally in case of subsidised LT consumers. In percentage term, the cross-subsidy for FY 2011-12 is decreasing in comparison to that of 2010-11 in all categories. In case of EHT consumers it is reducing from 59.9% to 39.4%, for HT it is reducing from 49.3% to 33.2% and for LT it is reducing from (-) 43.1% to (-) 37% of the cost of supply voltage-wise. Similarly, with reference to the average cost of supply for all consumers taken together, the cross-subsidy for EHT has decreased from 27.25% in 2010-11 to 11.59% of the average cost of supply in 2011-12 for HT consumers cross-subsidy has declined from 29.39% in 2010-11 to 15.54% in 2011-12, for LT consumers the cross-subsidy has reduced from (-) 33.03% in 2010-11 to (-) 26.54% in 2011-12. Thus, both in percentage term as well as absolute term, the Cross Subsidy is in decreasing trend from year to year and Commission has consciously kept it within $\pm$ 20% by FY 2015-

16 as per the Road Map agreed to in the Forum of Regulators in accordance with the Tariff Policy without affecting any tariff shock to any category of consumers.

56. The representatives of LT consumers have vehemently opposed the re-determination of tariff for 2010-11 and 2011-12 at this stage based on the cost of supply voltage-wise as directed by the Hon'ble ATE in their order dated 30.05.2011 and 02.09.2011 on the following grounds.

i) A PIL bearing Writ Petition No.8409 of 2011 currently has been taken up for hearing analogously with WP(C) No.8451/2011, WP(C) No.8906/2011 and WP(C) No.11633/2011 filed by HT and EHT consumers. One Ashok Ispat Udyog has intervened in this case. The Petitioner in WP(C) No.8451/2011 (Utkal Chamber of Commerce) filed appeals through its members before the ATE also on the same issue and, while hearing was going on in Orissa High Court, it obtained a judgment in its favour from the ATE and produced it after closure of its argument and moved for withdrawal of its cases. The Hon'ble Orissa High Court has penalized the Petitioner in WP(C) No.8451/2011 for such forum-shopping and allowed withdrawal *at its risk.* Ashok Ispat Udyog has placed the judgment of the ATE on record in this case and has not withdrawn from the case; nor has another HT / EHT consumer in the analogous case of WP(C) No.11633/2011. In the result, the applicability of the judgment dated 02.09.2011 of the Hon'ble ATE in Appeal Nos.57, 67-73 of 2011 and also its judgment dated 30.05.2011 in Appeal Nos. 102, 103 and 112 of 2010 shall remain a question till Hon'ble High Court decides the matter. The LT consumers who would be directly affected by the Order dtd. 30.05.2011 and 02.09.2011 of Hon'ble ATE have not been made parties before the Hon'ble ATE and have not been heard. The LT consumers have complained before the High Court that the judgments of Hon'ble ATE in this regard are not binding on them as they were not made parties to such judgments.

ii) While there is a subsisting stay order of the Hon'ble High Court in respect of tariff for LT domestic consumers, the ATE in its judgment dated 02.09.2011 has directed the Commission to re-determine cross-subsidy in tariff of HT and EHT consumers by 30.11.2011 by applying the erstwhile Regulation 7(c)(iii) of the OERC (Terms And Conditions For Determination Of Tariff)

Regulations, 2004 and that is bound to raise the tariff of LT consumers with retrospective effect at the end of November, 2011.

iii) The HT and EHT consumers are all large industrial and commercial consumers. They have added the electricity tariff to prices of goods and services supplied to their own customers and *already realized the prices inclusive of electricity tariff.* Thus the incidence of electricity tariff has been on the customers of HT and EHT consumers and not on HT and EHT consumers themselves. In cases of export-oriented industries their customers abroad have already paid for electricity tariff. Now these HT and EHT consumers seek a reduction of the very same tariff by invoking the aforesaid Regulation 7(c)(iii). That would be a windfall for them at the cost of low-end LT consumers of Odisha – taxable income in terms of crores of rupees – but they want to disguise it as refund of (allegedly) illegally charged tariff. The game-plan is apparent but has been missed by the Hon'ble ATE. That is why they are hell-bent on getting the order of the Hon'ble ATE implemented and some of them are seeking the imprimatur of Hon'ble Supreme Court's interim order(s) to get the Hon'ble ATE's order implemented - the LT consumers argue.

iv) The implementation of the judgment dated 30.05.2011 of the Hon'ble ATE would mean re-opening of tariff for HT and EHT consumers and consequentially tariff for LT consumers as well for FY2010-11 after the tariff period is over and the tariff set therein has worked itself out and it will have direct impact on the Annual Revenue Requirements, revenue gaps, and tariffs of both FY2010-11 and FY2011-12. In other words, there will be total revision of two tariff orders after hearing all stakeholders. After revision, whereas reduced tariff of some categories of consumer can be adjusted in future bills, enhanced tariff of other categories cannot be realized through future bills and will only increase the revenue gaps.

v) Given the present state of transmission and distribution networks, metering arrangements and accounting system it is *impossible* to apply the erstwhile Regulation 7(c)(iii) of the OERC (Terms And Conditions For Determination Of Tariff) Regulations, 2004 the law cannot enforce the impossible. (*Lex non cogit ad impossibilia*).

vi) The erstwhile Regulation 7(c)(iii) of the OERC (Terms And Conditions For Determination Of Tariff) Regulations, 2004 does not apply to proceeding for determination of general tariff under Section 62 and Section 64 of the Electricity Act, 2003 for the following reasons:-

(a) Regulation 7(c) (iii) is a provision under the heading "Surcharge", and is related to computation of cross-subsidy as an element or part of surcharge. Surcharge is a *compensation* payable to the incumbent DISCOMs or transmission licensee by a consumer who applies for open access. The relevant provisions for surcharge of DISCOMs are Section 42 (2) and (4) which may be read with Section 39(2) (d) and Section 40 (c) of the Electricity Act, 2003 as regards surcharge realizable by transmission licensees. Where a consumer, by paying a higher tariff, is cross-subsidizing another category of consumers, he should not be allowed to evade it by availing open access and that is why compensation to the incumbent DISCOMs by way of surcharge covers current level of cross-subsidy in the aforesaid provisions. A set of regulations have been framed by the Commission under Section 181(i) to (n), (p) and (q) of the Electricity Act, 2003 to give effect to the aforesaid provisions of the said Act: the OERC (Determination of Open Access Charges) Regulations, 2006, in particular Regulation 4(2) thereof. The concept of surcharge is altogether different from the concept of general tariff under Section 62 and Section 64 of the Electricity Act, 2003. Surcharge is payable only when perchance a consumer applies for open access and it is determined on case to case basis whereas tariff is the general schedule of prices paid by all who consume electricity. The purpose of surcharge is compensation in a given situation, and the purpose of tariff is to fix prices and ensure adequate, smooth and fast cash-flow in electricity market in order that it may serve the consumers efficiently. Whereas surcharge involves only calculation of compensation with as much exactitude as possible, tariff is used as a potent instrument for regulating all the components of electricity market system, for endeavouring to develop the market as stipulated under Section 66 and Preamble of Electricity Act, 2003 and for safeguarding against distortion or failure of the market – an ever-

present danger in a privatized set-up – and calculation of average cost of supply covering the whole market has been found to be more appropriate for tariff purposes.

(b) In Odisha the Commission has from the beginning taken a policy decision to follow uniform (i.e. the same) retail tariff for each category of consumers. That is the settled policy. If cross-subsidy is calculated on the basis of actual cost (or, rather, normative cost based on actual cost) of supply for each distribution area, then cross-subsidy of each category of consumers will vary from one distribution area to another. For example, HT category of SOUTHCO would be providing much less cross-subsidy than HT category of WESCO. The higher cross-subsidy payers would complain of the inequality, and would complain that their effort for reducing costs does not benefit themselves but benefits subsidized categories of their as well as other distribution areas: there should not be, they would say, undue additional burden on them to bear social costs. All this can be obviated if there is uniform all-Orissa cross-subsidy for each category of consumers based on all-Orissa average cost of supply: all-Orissa average tariff can only be meaningfully compared with all-Orissa average cost of supply and the "regulatory" cross-subsidy can then be evenly distributed for consumers of the same category all over Orissa. From a regulatory point of view this policy can be legally justified, keeping in view the distinction from cross-subsidy for the purpose of compensatory surcharge imposed on open access consumers.

(c) Whereas surcharge and its associated cross-subsidy is governed by the set of aforementioned Regulations, tariff is fixed under Section 62 and Section 64 of the Electricity Act, 2003 in accordance with principles set forth in Section 61 of the said Act. Section 62(1) of the said Act contemplates tariff for (a) supply by generating companies to DISCOMs, (b) transmission of electricity, (c) wheeling of electricity, and (d) retail sale of electricity; and it does not provide for fixing surcharge in the event of a consumer applying for open access. By Regulation 4(2)(vii) of the OERC (Determination Of Open Access Charges) Regulations, 2006, the Commission determines surcharge on

case to case basis. Section 86(1)(a) of Electricity Act, 2003 confirms this proposition and the word "only" in the Proviso to the said provision indicates that the price paid by an open access consumer is a matter of negotiation and agreement with the supplier and the Commission is to "determine" only the wheeling *charge* and surcharge thereon for the particular category to which the open access consumer belongs (general tariff not being applicable to them). Clearly, the scope of general tariff under Section 62(1) read with Section 86(1) does not cover surcharges for open access consumers.

(d) Section 61(i) of the Electricity Act, 2003 read with Regulations 3 and 4 of the OERC (Terms and Conditions for Determination of Tariff) Regulations, 2004 require the Commission to follow Tariff Policy in setting tariff under Section 62 and Section 64 of the aforesaid Act. Tariff Policy is a statutory instrument of all-India application promulgated by the Central Government under Section 3 of the aforesaid Act in consultation with State Governments and the Central Electricity Authority. Para 8.3.2 of Tariff Policy relating to calculation of cross-subsidy on the basis of "*average* cost of supply" is inconsistent with Regulation 7(c)(iii) aforesaid dealing with surcharge. If we apply Regulation 7(c)(iii) to tariffs we will violate para 8.3.2 of the Tariff Policy. In tariff matters the Commission would be governed by Tariff Policy. Tariff Policy may ordain a different, more realistic and practicable mode of calculation of cross-subsidy for tariff purpose from the mode of calculation in Regulation 7(c)(iii) intended for levying a compensatory amount on open access applicants. The law does not ordain that there must be only one mode of calculation of cross-subsidy universally applicable for all purposes. Tariff Policy appears to have taken into account the all-India situation and varying stages of networking and metering arrangements and accounting systems in different areas rendering it impossible to determine cost of supply to consumers category-wise. In this connection this rationale has been clearly explained vide paras 386 to 392 of Retail Supply Tariff Order of the Commission for the year 2011-12.

(e) Hypothetically, while keeping cross-subsidy within the permissible band of +20% of the average cost of supply as per Tariff Policy and following the principle of progressive reduction, the Commission may yet keep the tariff of a subsidizing category (e.g. EHT consumers) at a high level because of regulatory and social considerations, such as ability of the industrial or commercial consumer to pass on the price to its customers, social cost of subsidizing the low-end, poor consumers of the State and protecting them from tariff shock, etc. These are matters of policy relevant to principles set forth in Section 61 of the Electricity Act, 2003 and are not subject to judicial review. See *Shri Sitaram Sugar Co. Ltd. & Anr.* vs. *Union of India*, AIR 1990 SC 1277, prs. 57, 58, p.1299; *Union of India* vs. *Cynamide India*, AIR 1987 SC 1802, pr.4, p.1805, pr.32, p.1819; *Association of Industrial Electricity Users* vs. *State of A.P. & Ors.*, AIR 2002 SC 1361, pr.11. Nor should the ATE substitute its own views for that of the Commission. To leave space for such policy considerations, the Legislature has amended the Electricity Act, 2003 by the Electricity (Amendment) Act, 2007 to the effect that cross-subsidy may not be eliminated, even in the context of surcharge for open access consumers, vide Section 5(i) of the latter (amending) Act. In the context of tariff-setting for all consumers such policy space is even more important.

(f) Assuming, though not admitting, that the provision of erstwhile Regulation 7(c)(iii) aforesaid may be imported into tariff-setting exercise under Section 62 and Section 64 of the Electricity Act, 2003, it has so far been found impossible to implement the said provision because transmission and distribution lines for supply to each the three categories (voltage-wise) of consumers have not been segregated and the HT and LT categories use common lines, and the metering arrangements for measuring consumption of each category are not in place, and existing accounting system cannot segregate cost of supply for each category of consumers. That is why the Commission has amended the Regulation 7(c)(iii) so as to henceforth compute 'average cost of supply' instead of actual cost of supply for the relevant category, even for the purpose of determining surcharge for open

access applicants, not to speak of tariff-setting for all consumers. Vide OERC (Terms And Conditions For Determination Of Tariff) (Fifth Amendment) Regulations, 2011. The amendment (effective from 10.08.2011) would be applicable from FY 2012-13. The amendment has been brought because the law cannot enforce the impossible – *lex non cogit ad impossibilia* (law does not compel the impossible). Moreover, the implementation of Regulation 7(c)(iii) requires a prolonged, capital intensive programme and a tariff order which is time-bound by law cannot await such implementation.

(g) Above all, the Hon'ble Supreme Court has not stayed the proceeding of the High Court of Orissa in W.P. (C) No. 8409 of 2011. Since the Hon'ble High Court is exercising the prerogative writ jurisdiction under Article 226 and 227 of the Constitution of India, the Judgment of the High Court in W.P.(C). No. 8409/2011 will prevail over all judgments, orders, directions to the contrary passed by the Hon'ble ATE.

57. In view of all the reasons as indicated above read with the reasons discussed under Issue No. (iii), all of which are sub-judice in the Hon'ble High Court, the Commission is finding difficult to re-determine the Tariff for FY 2010-1011 and FY 2011-12 and most respectfully holds the view that Tariff can be reworked only after, and subject to, decision of the High Court. In fact, Hon'ble ATE has also directed the Commission in their Order dtd. 02.09.2011 vide Para 5 (d) to ensure that tariff of each of the consumer categories is to be within ± 20% of the average cost of supply. The Commission is committed to reduce it as per the direction of Hon'ble ATE and Para 8.3.2 of Tariff Policy. In this context it is to be noted that the Forum of Regulators while approving Model Tariff Regulation have stipulated that latest by the year 2015-16 tariff are within± 20% of the average cost of supply. The OERC would make all attempts to stick to this road map to reduce the present level of cross-subsidy so that tariffs are kept within ± 20% of the average cost of supply for all consumers taken together by end of the year 2015-16.

58. In pursuance to the direction of Hon'ble ATE we have reworked the cost of supply voltage-wise and consequently re-determined the level of cross-subsidy for the year 2010-11 and 2011-12 as set out in Para 54 and explained in Para 55 but variation in tariff for 2010-11 and 2011-12 has not been worked out for the reasons and

circumstances explained in Para 56 read with the position explained under issue No. (iii) i.e. para 37 to 47, all of which are *sub judice* in the High Court.

Issue (vi): Implication of retrospective revision of Retail Tariff consequent upon Hon'ble ATE's Order

59. The Retail Supply Tariff fixed for the distribution companies consists of more than 80% of the cost of supply on account of cost of power purchase from GRIDCO, transmission charges payable to OPTCL and charges payable to SLDC. The remaining amount represents the distribution cost which includes salary and pension, interest payment, depreciation, return on equity etc. If the retail tariff for 2010-11 is to be modified on account of re-determination of cross subsidy basing on the cost of supply for the voltage wise, it will necessarily call for modification in the rate of power purchase cost (BST), transmission charges, SLDC charges etc., keeping in view the revenue gap to be addressed. Since the financial year 2010-11 is over it is not practically possible to effect retrospective revision in retail tariff, BST rate, SLDC charges etc. Further, since more than nine months have passed from the current financial year 2011-12, similar difficulties will be encountered. Moreover, GRIDCO, OPTCL, SLDC, OHPC and four distribution companies have filed their tariff application for 2012-13 on or before 30.11.2011 as per Regulation 53 (1) of OERC (Conduct of Business) Regulations, 2004 read with Regulation 5 (1) (A) of OERC (Terms and Conditions of Determination of Tariff), Regulations, 2004. Since the tariff process for the year 2012-13 has already started w.e.f. 01.12.2011, exercise for re-determination of tariff for 2011-12 will necessitate refilling of tariff applications beyond the time limit fixed by the aforesaid Regulations.

60. In this context it may be noted that if retail tariff for LT category of consumers are modified, it may not be possible to realize the differential amount from the LT consumers who in general are low end consumers and their affordability is comparatively low. This is evident from the fact that out of the total arrear outstanding at Rs.3772.09 crore as on 31.3.2011, the arrear pertaining to LT consumers is Rs.3394.83 crore which constitutes 90% as per the details given below:-

Net arrear Position (Rs. In Cr.)

	As on 31.3.2010			As on 31.3.2011			
Category	**Non-Govt**	**Govt & PSU**	**Total**	**Non-Govt**	**Govt & PSU**	**Total**	**% to total**
EHT	105.1	0	105.1	100.5	0	100.5	266
HT	92.3	162.86	255.16	107.32	169.44	276.76	7.34
LT	2882.55	250.73	3133.28	3119.7	275.13	3394.83	90.00
Total	3079.95	413.59	3493.54	3327.52	444.57	3772.09	100.00

61. The Commission approves the power purchase cost, transmission charges, SLDC charges and other expenditure for GRIDCO, SLDC etc., after prudent check and to meet the total expenditure of the concerned distribution licensee, revenue realization is estimated on a normative basis and adopting distribution loss as per Business Plan approved by the Commission for 2008-09 to 2012-13. The actual gap/surplus at the end of the financial year is very often more than the amount assessed by the Commission which is due to increase in quantum of power purchase, increase in average rate of power purchase cost and non-achievement of the loss level fixed by the Commission for the distribution companies etc. This would be seen from the table given below:-

Statement of Revenue approved by OERC vis-à-vis actual for GRIDCO

	Quantum of Power Purchased by GRIDCO (MU)	**Average Rate (P/U)**	**Total Cost of Power Purchased by GRIDCO (Rs. In Cr.)**	**Total Expenses of GRIDCO (Rs. In Cr.)**	**Total Revenue Realized (Rs. In Cr.)**	**Gap (Rs. In Cr.)**
Approved for 2009-10	19719.30	148.27	2923.80	3194.96	2312.11	(-) 882.85
Actual for 2009-10	20956.10	196.95	4127.34	4374.93	2834.24	(-) 1540.69
Approved for 2010-11	21003.75	174.58	3666.85	4242.44	3436.29	(-) 806.16
Actual for 2010-11 (Provisional)	21907.80	206.44	4522.71	5223.14	4315.43	(-) 907.71
Approved for 2011-12	23489.18	210.32	4904.30	6016.92	5270.87	(-) 746.05
Actual upto Sept., 2011 (Provisional)	12036.78	207.29	2495.06	2969.72	2810.14	(-) 159.58

Statement of Revenue approved by OERC Vis-à-vis actual for OPTCL

	Energy handled in OPTCL System (MU)	**Transmission Charge (P/U)**	**Total Expenses (Rs. In Crore)**	**Total Revenue Realized (Rs. In Cr.)**	**Surplus/ Gap (Rs. In Cr.)**
Approved for 2009-10	19231.00	20.50	394.15	394.24	(+)0.09
Actual for 2009-10	20036.48	20.50	378.25	438.05	(+) 59.80
Approved for 2010-11	20464.00	23.50	480.93	480.90	(-) 0.03
Actual for 2010-11 (Provisional)	21764.65	23.50	490.66	511.47	(+) 20.81
Approved for 2011-12	22877.00	25.00	572.50	571.93	(-) 0.57
Actual upto Sept., 2011 (Provisional)	13209.20	25.00	227.42	283.74	(+) 56.32

Statement of Revenue approved by OERC vis-à-vis actual for DISCOMs

	Quantum of Power Purchased in MU	Cost of power Purchase (Rs. In Cr.)	Total Expenses (Rs. In Cr.)	Total Revenue Realization (Rs. In Cr.)	Gap(-) /Surplus (+) (Rs. In Cr.)	Distribution Loss (%)	AT&C Loss (%)
Approved for 2009-10	18921.00	2709.45	3924.02	3886.99	(-) 37.03	24.45	25.96
Actual for 2009-10	19524.80	2810.44	4163.37	3928.32	(-) 235.05	37.37	40.96
Approved for 2010-11	20154.00	3908.39	5095.98	5148.17	(+)16.19	22.22	23.80
Actual for 2010-11 (Provisional)	21244.79	4258.88	5601.80	5186.12	(-) 446.26	38.34	42.62
Approved for 2011-12	22477.00	5772.86	7195.00	7248.04	(+)53.04	21.71	22.48
Actual upto Sept., 2011 (Provisional)	10,958.59	NA	NA	2707.82	-	38.28	43.29

62. From the above table it may be seen that for the year 2010-11, the Commission had approved total expenditure for all the distribution companies at Rs.5095.98 crore against which their revenue realization was assessed at Rs.5148.17 crore with a net surplus of Rs.16.19 crore but at the close of the year 2010-11 it is seen that while the total expenditure for the four distribution companies increased to Rs.5601.80 core, the revenue realization has been Rs.5186.12 crore resulting in a gap of Rs.446.26 crore in their account in place of the surplus of Rs.16.19 crore as was assessed. As per the practice the truing up exercise for 2010-11 is to be carried out based on the Multi Year Tariff Principle. After truing of exercise the regulatory assets are to be determined which would be duly factored in the tariff of the subsequent years. If the retail tariff for 2010-11 is now revisited retrospectively there would not be any chance of recovering the differential tariff from any types of consumers and it would merely result in accumulated regulatory assets which would unnecessarily burden the future consumers. Similar would be case for 2011-12 where nine (9) months have already elapsed. Tariff fixation by the Commission is in the nature of a Finance Bill and retrospective revision does not serve any purpose. In this connection the Apex Court in their order dated 06.03.2002 in Civil Appeal No. 2689 of 2001 in case of Industrial Electricity Users vrs. State of AP and others (2002) 3 SC 7011 have held that challenge to tariff order becomes in-fructuous as soon as the one year tariff period expires. Since the tariff period of 2010-11 has expired on 31.3.2011 and the Hon'ble Tribunal has directed revisiting of cross subsidy for the year 2010-11 which by implication entails revision of tariff for different category of consumers retrospectively, this exercise would be futile as held by the Hon'ble Apex Court of the country. Similarly, for the year 2011-12 since nine (9) months have already elapsed it would not be possible to collect differential amount from different consumers in case their tariff is enhanced towards later part of the current financial year.

Issue (vii): Other Legal implication

63. The implementation of Hon'ble ATE's Order would entail re-fixation of Retail Tariff for different categories of consumers. The re-fixation of tariff would change the Annual Revenue Requirement (ARR) of DISCOMs which would in turn result in re-fixation of BSP of GRIDCO and transmission charge of OPTCL and SLDC charge of SLDC. The ATE in their order dated 30.5.2011 and 02.9.2011 have directed OERC to re-determine the Cross Subsidy for different consumer after determining the cost of supply voltage wise. It is to be noted that BSP order for 2010-11 and 2011-12, Transmission tariff order for 2010-11 and 2011-12, RST orders for 2010-11 and 2011-12, have been challenged in Hon'ble ATE and the same are pending for adjudication, the details of which are given below:-

Retail Supply Tariff Order for FY 2010-11 : In Appeal Nos.160, 161 & 162 of 2010, RIL Managed DISCOMS have challenged the Retails Supply Tariff Order dated 20.3.2010 passed in Case No.141, 142 & 143 of 2009 of the Commission for FY 2010-11 before the Hon'ble ATE, New Delhi.

Bulk Supply Tariff Order for FY 2010-11: In Appeal No.106/2010, GRIDCO has challenged the BSP Tariff Order dated 20.3.2010, passed in Case No.144/2009 of the OERC.

Transmission Tariff for FY 2010-11: In Appeal No.110/2010, M/s OPTCL has challenged the Transmission Tariff Order dated 20.3.2010 passed in Case No.145 of 2009 before the ATE, New Delhi.

BSP Order for FY 2011-12: In Appeal No.116/2011, WESCO, NESCO & SOUTHCO have challenged BSP Order dated 18.3.2011 of the Commission passed in Case No.144/2010 for the FY 2011-12 before the Hon'ble ATE, New Delhi.

Transmission Tariff for 2011-12: In DFR Appeal No. 1195 of 2011 OPTCL has challenged the Transmission Tariff Order dtd. 18.03.2011 in Hon'ble ATE, New Delhi.

RST order for FY 2011-12: In Appeal Nos. 188,189 & 190/2011, The RIL Managed DISCOMs have challenged the RST Order dated 18.03.2011 of the OERC passed in Case Nos. 147, 148 & 149/2010 for FY 2011-12 before the ATE.

CESU has also challenged the order dated 30.5.2011 and 02.9.2011 of ATE in the Supreme Court in the matter of determination of Cross-subsidy vide Appeal No. D 28345/2011 and 8135 of 2011respectively.

64. Further, the RST order for 2011-12 has been challenged in the Orissa High Court in shape of a Writ Petition bearing No.8409 of 2011. The stay on revised tariff for LT domestic consumer for 2011-12 is still in force. Since both BST and RST orders for 2010-11 and 2011-12 are *sub judice* in ATE and the RST order for 2011-12 *sub judice* in the Orissa High Court, it is not advisable at this stage to revise the cross subsidy and for that matter the RST order for 2010-11 and 2011-12 on the ground of redetermination of cross subsidy as directed by Hon'ble ATE.

65. Some consumers argue that when Hon'ble ATE issued the order dtd. 30.05.2011 and 02.09.2011 the persons who were objectors to the Tariff proceeding in the Commission for the respective year have not been heard. The Hon'ble ATE have heard the few representatives of HT & EHT consumers only out of all the consumers. LT consumers which constitute more than 95% have not been given any opportunity of being heard before issuing their order of 30.5.2011 and 02.9.2011. However, after remand they have been served notices and heard by the Commission as directed by the Hon'ble Supreme Court. The Commission has to take their views into consideration along with view of HT and EHT consumers.

66. The Commission accepts the contention of objectors that tariff-setting is a regulatory process and tariff is used as an instrument of regulation; for this the Commission has to factor in various inputs at grass-root level and act upon its perception of facts and trends in economy of the State in general and the electricity market in particular; and for this purpose the Act has conferred on the Commission large discretion in regard to the regulatory matter.

67. There is force in the argument of some objectors that tariff proceeding is a quasi-legislative proceeding and not a judicial proceeding involving determination or adjudication of rights of specific parties before the Commission on the basis of evidence adduced by them. This is not a proceeding for determining *ex post facto* a *lis* between specific parties in respect of their accrued interests and rights but seeks to pass an order which will operate *in futuro*. A Tariff Order affects a large indeterminate class of people and has an immense cascading impact on the whole economy, which is why a special regulating body has been entrusted with the task of tariff-setting. The quasi-legislative character of tariff-setting has been repeatedly held

by the Apex Court, vide *Shri Sitaram Sugar Co. Ltd. & Anr.* vs. *Union of India*, AIR 1990 SC 1277, prs. 31-45, pp.1292-1295; *Union of India* vs. *Cynamide India*, AIR 1987 SC 1802, prs 5-7, pp.1806-1811; *Tulsipur Sugar Co. Ltd.* vs. *Notified Area Committee, Tulsipur*, AIR 1980 SC 882, prs. 5-10, pp. 886-889; *State of UP* vs. *Renusagar Power Co. & Ors.*, AIR 1988 SC 1737, pr.75, p.1761; *Pawan Alloys & Casting Pvt. Ltd. & Anr.* vs. *UP State Electricity Board & Ors.*, AIR 1977 SC 3910, pr.38, p.3929, *West Bengal Electricity Regulatory Commission* vs. *CESC Ltd.*, AIR 2002 SC 3588, prs. 39-40, pp.3600-3601. It is *quasi*-legislative because it does not emanate from sovereign legislative authority or its delegate but it is inherently legislative in character affecting a large, indeterminate population. Sections 62 and 64 of the Electricity Act, 2003 do not even provide for formal hearing of those who give objections and suggestions in response to public application of a licensee for setting tariff. Section 64(3) provides for "considering" all suggestions and objections received from the public. This is of the nature of pre-legislative consultation of interest groups, provided for in many statutes. However, in order to make tariff proceeding more participative, and in the interest of transparency contemplated in Section 86(3) of the Act, the Commission has provided in Regulation 55 of the OERC (Conduct of Business) Regulations, 2004 that the Commission 'may' hear such persons as it may consider appropriate in respect of revenue calculations and tariff proposals and the procedure for hearing shall be in such manner as the Commission may decide from time to time. This specific provision in the said Regulations in respect of tariff proceedings and it overrides the general provisions in Clauses (3) to (6) of Regulation 8 of the said Regulations. Transparent pre-legislative consultation of interest groups does not convert the proceeding into a judicial or quasi-judicial proceeding, nor does it convert regulatory body into a judicial tribunal, though the regulator in other situations (e.g. cancellation of licence) has a duty to proceed judicially.

68. It is argued, especially by representatives of LT consumers, that in quasi-legislation, such as price-fixing, no one can complain that he sustains a loss or damage. Any such loss or damage is damnum sine injuria (i.e. a damage which amounts to actionable injury in the eye of law). However, the quasi-legislation should attempt to be just to all stakeholders in the light of public interest and overall interest of electricity industry as well as principles set forth in Clauses (a) to (i) of Section 61 of the Electricity Act, 2003.

69. In this context it is worthwhile to note the contention based on Section 95 of the Electricity Act, 2003 to the effect that all proceedings before the appropriate Commission shall be *deemed* to be a judicial proceeding within the meaning of Sections 193 (perjury) and 228 (intentional insult, interruption in judicial proceeding) of the Indian Penal Code (45 of 1860) and the appropriate Commission shall be deemed to be a Civil Court for the purpose of Section 345 and 346 of the Code of Criminal Procedure 1973 (2 of 1974) [these provisions deal with procedure for offences aforesaid]. This is a special deeming provision only for the purpose of empowering the Commission for proceeding for the offences of perjury and intentional insult, etc. The fiction created by the Act does not go beyond its specific purpose and does not convert the regulatory body into a civil court for all purposes and does not convert what is inherently a quasi-legislative proceeding into a judicial proceeding. A fiction of law is always strictly construed and kept confined to its own purpose.

70. Tariff proceeding is a continuous process and tariff is set on the basis of periodicity (at present from year to year). It is not intended by the Act that Tariff Order should be bogged down in litigations thereby paralysing the market correction and other regulatory process set in motion by the Commission. Any error in the Order of the Commission can always be corrected in the subsequent order and a tariff setting exercise is not to be undertaken more frequently than once in a year for any reason ordinarily (Section 62 (4) of the Act) so that uncertainty which is against Multi-Year Tariff principle is avoided. Therefore, any interference at this stage at the instance of only HT ad EHT consumers not only throws the economy of the State out of gear but also deprive many interest groups to put forth their grievances.

71. One of the representatives of HT & EHT consumer group agitated before us that when there is a order of Hon'ble High Court of Orissa in WP(C) Nos. 6624-6626 of 2008 to scrupulously follow our own Regulation on cross-subsidy, and now adopting Central Govt. Notification on Tariff Policy amounts to contravention of the Order of the Hon'ble Court. We wish to point out here that the same issue is now under adjudication by Division Bench of Hon'ble High Court whereas the last Order was issued by a Single Judge Bench. Therefore, we will have to wait till the final disposal of the pending case in WP(C) No. 8409 of 2011; otherwise, the Commission will be entangled in a legal quagmire by revising its order from time to time which is not permissible under law.

Conclusion and order

72. In view of the discussion made above, we conclude as under:

(a) As per the direction of Hon'ble ATE's Order dtd. 30.05.2011 (as enumerated in Para 31 to 35) and order dtd. 02.09.2011 we have determined the voltage-wise cost of supply for the year 2010-11 and 2011-12 (Refer Para 54 & 55 of the Order);

(b) The cross-subsidy in tariff has been calculated on the basis of cost supply to the consumer category availing supply in three distinct voltage, i.e., EHT, HT and LT for the year 2010-11 and 2011-12 (Para 54 & 55);

(c) The cross-subsidy in Tariff for the year 2011-12 has not been increased but has been reduced in comparison with the year 2010-11 (Para 55);

(d) The tariff of each voltage-wise consumers has been calculated on the basis of the average cost of supply keeping the cross-subsidy in declining trend from year to year (Para 49); and

(e) The re-determination of tariff for the FY 2010-11 and 2011-12, as per Hon'ble ATE order is not feasible at this stage in view of the stay on revised tariff for FY 2011-12 on LT domestic consumers by Hon'ble Orissa High Court as well as pendency of the BST, Transmission Charges and Retail Supply Tariff Order both for 2010-11 and 2011-12, challenged in Hon'ble ATE by the licensee. (Para 63 and 64).

73. This Order is subject to the result of Appeal filed by CESU in Appeal No. D 28345/2011 and 8135 of 2011 before the Hon'ble Supreme Court of India and the outcome of the Writ Petition bearing W.P.(C) No. 8409 of 2011 pending in Hon'ble High Court of Orissa as well as the appeal filed in Hon'ble ATE by GRIDCO, DISCOMs and others against the BST, Transmission Charges & RST Order for 2010-11 and 2011-12.

74. With these observations as above from Para 23 to 73, the cases are disposed of accordingly.

Sd/-	**Sd/-**	**Sd/-**
(B. K. Misra)	**(K. C. Badu)**	**(S. P. Nanda)**
Member	**Member**	**Chairperson**