

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

- 1. Shri Ashok Basu, Chairperson**
- 2. Shri K.N. Sinha, Member**
- 3. Shri Bhanu Bhushan, Member**
- 4. Shri A.H. Jung, Member**

**Petition No.15/2006
with IA No.10/2006**

In the matter of

Seeking direction to Grid Corporation of Orissa Ltd., not to charge trading margin exceeding 4 paise/kWh, notified by the Commission.

And in the matter of

Shri Gajendra Haldea **Petitioner**

Vs

Grid Corporation of Orissa Ltd **Respondent**

The following were present:

1. Shri Gajendra Haldea
2. Shri Rajiv Yadav, Advocate for Shri Gajendra Haldea
3. Shri R.K. Mehta, Advocate, GRIDCO
4. Ms. Suman Kukrety, Advocate, GRIDCO
5. Shri S.C. Mahapatra, CMD, GRIDCO
6. Shri P.K. Das, Comp.Secy, GRIDCO
7. Shri Suhas Dey, GRIDCO
8. Shri R.C. Mishra, GRIDCO
9. Shri S.R. Sarangi, GRIDCO

**ORDER
(DATE OF HEARING : 5.4.2006)**

The petitioner, Shri Gajender Haldea seeks directions to the respondent, Grid Corporation of Orissa (GRIDCO) not to charge trading margin exceeding 4 paise/kWh, notified by this Commission and applicable to an inter-State electricity trader, whether the sale is effected by GRIDCO through the process of bids or otherwise. In addition, the petitioner has prayed for a direction to GRIDCO to file appropriate returns in the

forms prescribed by this Commission regarding purchase and sale transactions undertaken by GRIDCO.

2. The petitioner has averred that GRIDCO's average purchase price of electricity is Rs.110.36 paise/kWh, but it proposes to sell electricity to the utilities outside the State of Orissa, through the electricity traders at a rate of Rs.4.66/kWh. According to the petitioner, GRIDCO is an inter-state electricity trader as it sells electricity to other electricity traders for onward sale to the licensees outside the State of Orissa. The petitioner has argued that the entire transaction is of the nature of inter-State trading since it involves the transfer of electricity from the territory of the State of Orissa to the territory of another State through the medium of an inter-State electricity trader. The petitioner has made an interlocutory application to pray for an interim injunction to restrain GRIDCO from entering into any agreement for sale of electricity to any electricity trader in case such power is ultimately to be routed to a person outside the State of Orissa, through the inter-State transmission system, by violating the trading margin fixed by this Commission, or from giving effect to any such contract entered into for sale of power.

3. GRIDCO in its reply has stated that it is not governed by the Commission's notification on fixation of trading margin of 4 paise/kWh because its activity of bulk power supply to the distribution companies and disposal of marginal surplus power through the inter-State traders in terms of the approval accorded by Orissa Electricity Regulatory Commission (the Orissa Commission) in the Annual Revenue Requirement (ARR), is confined to the State of Orissa and no transaction has ever taken place outside that State. It has been contended that the transaction of sale of surplus power by GRIDCO is, thus, intra-State. GRIDCO has placed on record a copy

of the agreement dated 9.3.2006 signed with PTC (India) Ltd. for sale of power during the period 1.4.2006 to 30.9.2006. GRIDCO has specifically denied that it is an electricity trader.

4. Upon hearing, it became clear that interim relief prayed for could not be considered without detailed deliberation on merits of the issues involved. Therefore, with the consent of the parties, the main petition as also the interlocutory application were heard together and are being disposed of through this order.

5. In consonance with the federal structure of the country, the Electricity Act, 2003 (the Act), which came into force on 10.6.2003, envisages establishment of the Electricity Regulatory Commissions, at the Centre and the States, with demarcation of functions and powers to avoid overlapping. Broadly, the inter-State operations of the utilities are regulated by the Central Commission and the jurisdiction of the State Commission is over the utilities confining their activities within a particular State.

6. Under the Act, the licences for inter-State transmission and trading of electricity are granted by the Central Commission and the licences for intra-State transmission, distribution and trading by the respective State Commission. The Central Commission is assigned the task of fixing trading margin in the "inter-State trading of electricity" and the State Commissions with "intra-State trading of electricity." The Act thus, recognizes the concepts of inter-State trading and intra-State trading in electricity, but these terms have not been defined in the Act. The Act defines trading as "purchase of electricity for resale thereof". Under sub-clause (g) of clause (1) of Regulation 2 of the Central Electricity Regulatory Commission (Procedure, Terms & Conditions for grant of Trading Licence and other related matters) Regulations 2004, "inter-state trading" is

defined to mean as transfer of electricity from the territory of one State to the territory of another State by an electricity trader. Further, the “electricity trader” is defined under sub-section (26) of Section 2 of the Act to mean as “a person who has been granted a licence to undertake trading in electricity under Section 12”. As provided in Section 12 of the Act, no person can undertake transmission, distribution and trading in electricity unless he is authorized to do so by a licence issued under Section 14 or is exempt under Section 13. Section 14 empowers the Appropriate Commission to grant licence to undertake transmission in electricity as transmission licensee, distribution in electricity as distribution licensee and trading in electricity as an electricity trader to any person, on an application made by him. Various provisos to Section 14 exempt certain categories of persons from obtaining licence. ‘Inter-State transmission system’ on which reliance has been placed by the petitioner and ‘intra-State transmission system’ have been defined under sub-sections (36) and (37) of Section 2 of the Act as follows:

(36) “inter-State transmission system” includes –

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility;

(37) “intra-State transmission system” means any system for transmission of electricity other than an inter-State transmission system;

7. In the light of the above statutory provisions, the first issue to be considered is whether or not GRIDCO is an electricity trader under the Act.

8. The learned counsel for GRIDCO argued that by virtue of first proviso to Section 14 of the Act, it is deemed to be a licensee for bulk supply of electricity. The first proviso contemplates that a person shall be deemed to be a licensee under the Act if such person is engaged in the business of transmission and supply of electricity on the appointed date (10.6.2003) under the repealed laws or any Act specified in the schedule. The learned counsel submitted that prior to the commencement of the Act, it was granted licence by the Orissa Commission for bulk supply of electricity under the Orissa Electricity Reforms Act, 1995 (the Orissa Act) and the licence granted is still valid. The learned counsel strenuously argued that despite the fact that GRIDCO is undertaking bulk supply of electricity, it cannot be said to be an electricity trader contemplated in Section 12 of the Act.

9. For a view in the matter, it may be necessary in the first instance to take note of the historical background against which GRIDCO is presently functioning. The erstwhile Orissa State Electricity Board was unbundled and reorganized in 1996 under the Orissa Act. As a result of reorganization, GRIDCO and generating companies were created. GRIDCO was assigned the function of transmission, bulk purchase and distribution of electricity in the State. The generating companies were made responsible for generation of electricity, and its sale to GRIDCO. GRIDCO was further reorganized in 1999 and consequently the function of distribution of electricity was transferred to the distribution companies in the State. GRIDCO was left with transmission of electricity and bulk purchase of electricity and its bulk supply to the distribution companies under the licence given by the Orissa Commission. This position was continuing till 10.6.2003 when the Act came into force. It is seen that GRIDCO was undertaking transmission and bulk supply of electricity on 10.6.2003 when the Act came into force, under the Orissa Act.

10. Under first proviso to Section 14, GRIDCO was deemed to be a transmission licensee and a licensee for bulk supply of electricity on the appointed date. Under the fifth proviso to Section 14 of the Act, a Government company or company referred to in sub-section (2) of Section 131 of the Act and the company or companies created in pursuance of the Acts specified in schedule to that Act are deemed to be licensees. The Orissa Act is included in the schedule to the Act. Thus, by virtue of the fifth proviso to Section 14 of the Act also, GRIDCO, created under the Orissa Act which is specified in the schedule to the Act, was deemed to be a licensee for transmission and bulk supply of electricity on 10.6.2003. GRIDCO has been further reorganized on 9.6.2005 under Section 131 of the Act. By virtue of notification dated 9.6.2005, issued by the State Government of Orissa, a transfer scheme called the Orissa Electricity Reforms (Transfer of Transmission and Related Activities) Scheme, 2005 (the transfer scheme, for short), placed on record by GRIDCO, has been implemented. Under the transfer scheme, the State Government has created Orissa Power Transmission Corporation Ltd. to undertake transmission of electricity within the State. Thus, presently GRIDCO is performing the function of bulk supply of electricity under the licence granted by the Orissa Commission. By virtue of operation of first and fifth provisos to Section 14 of the Act, GRIDCO is presently deemed to be a licensee for bulk supply of electricity. GRIDCO's contention that it is not an electricity trader though deemed to be a licensee for bulk supply of electricity under the Orissa Act, needs to be examined further against the above factual background.

11. Trading has been defined in sub-section (71) of Section 2 of the Act to mean as purchase of electricity for resale thereof. GRIDCO is presently engaged in purchase of electricity from the central generating stations in Eastern Region as also the generating companies within the State, and is selling this electricity to the distribution

companies in the State. The surplus power available with GRIDCO is sold to the electricity traders, granted licence by this Commission for inter-State trading, through the process of competitive bidding. Under the licence granted to GRIDCO in 1997 by the Orissa Commission, as amended during 1999, a copy of which has been filed by GRIDCO, "bulk supply" has been defined as "the supply of electricity to other licensees for distribution by them". Thus, "bulk supply" for which licence has been granted, involves "bulk sale" to the distribution licensees. Thus, it is clear that by virtue of the licence granted by the Orissa Commission for bulk purchase and sale of power GRIDCO is undertaking trading in electricity as defined in the Act.

12. A perusal of the transfer scheme will further lend credence to the conclusion that GRIDCO is trading in electricity. Clause 2 (1) (l) of the transfer scheme defines "trading undertaking" to mean as "the undertaking related to activities of bulk purchase and bulk sale of energy presently being undertaken by the transferor and acts incidental and ancillary thereto." Clause 2 (1) (m) defines the "transferor" to mean as the Grid Corporation of Orissa Limited, a wholly owned undertaking of the State Government and a company incorporated under the Companies Act, 1956 with Registration No.15.03960 of 1995-96. Under Clause 3 of the transfer scheme, classification of undertakings of the transferor (GRIDCO) is given. It provides that the existing undertakings of the transferor (GRIDCO) shall stand classified as "transmission undertaking" and "trading undertaking." Clause 4 of the transfer scheme provides for transfer of transmission undertaking from GRIDCO to Orissa Power Transmission Corporation Ltd. It further states that the trading undertaking shall continue to vest in the transferor, GRIDCO.

13. It is of significance to notice that the transfer scheme does not refer to GRIDCO as an undertaking engaged in bulk supply of electricity but as a “trading undertaking.” Apart from referring to GRIDCO as a trading undertaking, the transfer scheme provides that GRIDCO is to undertake activities of bulk purchase and bulk sale of energy, which is covered under the definition of trading given under the Act.

14. The copy of the agreement dated 9.3.2006 filed by GRIDCO is entitled “POWER TRADING AGREEMENT (NO. GRIDCO/03/2006)”. The preamble of the agreement further states that this “Power Trading Agreement” (No. GRIDCO/03/2006) is entered on 9th day of March 2006 between PTC (India) Ltd and GRIDCO. This further reinforces that GRIDCO is undertaking trading in electricity, which can be done only by an electricity trader.

15. A combined reading of Sections 12 and 14 (including provisos thereto) and the factual background against which GRIDCO is functioning for the time being leads to the unambiguous conclusion that GRIDCO is an electricity trader within the meaning of the term defined in sub-section (26) of Section 2 of the Act.

16. The next question to be considered is whether GRIDCO is an inter-State electricity trader or intra-State electricity trader.

17. The petitioner has brought to our notice GRIDCO’s letter No. GM (PP)/TRADING/77/2003 (PART-I)/ dated 10.3.2005 to invite offers for sale for surplus power to State Electricity Boards/Power Utilities on short-term basis through power trading entities having licence from this Commission. According to this letter, the delivery point for sale of power was to be eastern boundary of inter-regional link

between Eastern Region and Western/Northern/Southern/ North-Eastern Regions for inter-regional sale and ex-GRIDCO boundary for sale within Eastern Region. The petitioner also relied upon clause 26 of the agreement dated 9.3.2006 signed between GRIDCO and PTC (India) Ltd, according to which the agreement is valid to the extent and for the period Open Access is provided by Nodal RLDC. Based on these facts, the petitioner has argued that the clear intention of GRIDCO was to sell electricity outside the State of Orissa and is accordingly indulging in inter-State trading in electricity. The petitioner very strongly contended that another inter-State electricity trader has been interposed for a limited purpose of transferring power outside the State, but nevertheless sale between GRIDCO and the inter-State electricity trader and between the inter-State electricity trader and distribution licensee outside the State constitutes one integrated transaction. It was submission of the petitioner that the inextricable link for sale of electricity by GRIDCO outside the State is not broken by interposing another inter-State electricity trader. The petitioner has, therefore, argued that since electricity is being traded on GRIDCO's behalf, it is to be deemed as an inter-State trading transaction by GRIDCO. Accordingly, the petitioner has argued that the directions sought are maintainable.

18. The petitioner during the course of his arguments, heavily relied on the decision of the Hon'ble Supreme Court in State of Andhra Pradesh Vs. NTPC (AIR 2002 SC 1895). The argument of the petitioner is that since electricity is transferred from State of Orissa to another State on an integrated transmission system, (the inter-State transmission system) GRIDCO should be deemed to be an inter-State trader. The petitioner sought to invoke clause (ii) of sub-section (36) of Section 2 of the Act, which defines inter-State transmission system, in support of his claim. He argued that when the intra-State transmission system is used for conveyance of electricity outside the

State, it is covered under the definition of inter-State transmission. On that analogy, the petitioner argued that GRIDCO is an inter-State electricity trader. The petitioner during the course of arguments had referred to the observations made by the Hon'ble Supreme Court in the case of State of Andhra Pradesh Vs NTPC (supra). The relevant portion of the observation emphasized by him is reproduced below:

“31. Though it may be permissible to fix the situs of sale either by appropriate State legislation or by Judge made law as held by the majority opinion in 20th Century Finance Corporation case, we would like to clarify that none of the two can artificially appoint a situs of sale so as to create territorial nexus attracting applicability of tax legislation enacted by any State sale in breach of Section 3 of the CST Act read with Articles 286 (2) and 269 (1) and (3) of the Constitution. No State legislation, nor any stipulation in any contract, can fix the situs of sale within the State or artificially define the completion of sale in such a way as to convert an inter-State sale into an intra-State sale or create a territorial nexus to tax an inter-State sale unless permitted by an appropriate central legislation. But this is exactly what the definition of ‘consumer’ in Clause 2(a) of the M.P. Electricity Duty act, 1949 has done.”

19. Learned counsel for GRIDCO clarified that bids for sale of surplus power were invited from the inter-State electricity traders granted licence by this Commission in view of advice of Chairperson of the Orissa Commission as contained in his D.O. No.CHP/2005/335 dated 10.3.2005, a copy of which has been produced at the hearing. He urged that after short-listing of the successful bidder, a contract is signed by GRIDCO with such bidder. By referring to different clauses of the agreement signed on 9.3.2006 between GRIDCO and PTC (India) Ltd, filed by GRIDCO with its reply, the learned counsel submitted that transaction for sale to the electricity trader was concluded in the State of Orissa and thereafter electricity is carried by such trader at its own risk.

20. We have considered the matter from various angles.

21. GRIDCO was created under the Orissa Act, passed by the Orissa State legislature, which extends only to the State of Orissa, and cannot have any extra-territorial operation. Its activities are regulated by the Orissa Commission under the State Act. It was granted licence for undertaking different activities from time to time under the State Act. The operations of GRIDCO are, therefore, by operation of law confined within the State of Orissa and not outside.

22. The provisions of the agreement dated 9.3.2006 placed on record by GRIDCO reinforce the above conclusion. Under clause 2 of the agreement, the delivery point for sale of GRIDCO's power is at the ex-bus of any of the sub-stations named therein, which are located within the State of Orissa. It further states that STU charges and losses, SLDC charges, if applicable, up to delivery point are borne by GRIDCO. Clause 3 of the agreement provides that transmission charges and losses up to the delivery point for sale of GRIDCO power are to be borne by GRIDCO. Clause 4 of the agreement provides that the Open Access charges applicable up to the point of delivery for sale are borne by GRIDCO and the charges after delivery point are borne by the trader. Clause 18 of the agreement insulates GRIDCO from any dispute between the customers of PTC (India) Ltd (the trader) in respect of sale under the agreement. It provides that GRIDCO would remain and be kept immune from any claim by any other person in respect of transmission/agreement made by PTC with any other utility and is indemnified from any such claim of any person against GRIDCO. Clause 23 of the agreement reiterates the principle contained in Clause 18 when it states that the agreement does not ensure to the benefit of any third party and is not to transfer to any other person, except as agreed therein. The terms of the agreement seen above confine the activities of GRIDCO within the boundaries of the

State. From this also it can be safely concluded that the rights and liabilities of GRIDCO for sale of electricity are limited to the State of Orissa.

23. The Hon'ble Supreme Court in State of A.P. Vs NTPC (supra) has observed that it is permissible to fix situs of sale either by appropriate State legislation or by Judge made law. However, the situs of sale cannot be fixed artificially so as to create territorial nexus attracting applicability of tax legislation enacted by any State legislature and tax on inter-State sale. The emphasis of the Hon'ble Supreme Court in the observations on which strong reliance has been placed by the petitioner are in the context of recovery of tax, since by artificially agreeing upon place of sale of goods, it may be possible to evade the provisions of the Central and State tax laws. As we have noted above, the Act specifically recognizes the concept of "inter-State transmission" and "intra-State transmission" and "inter-State trading" and "intra-State trading". The Law thus gives recognition to the sale/purchase/transmission of electricity within and outside the boundaries of a particular State. It is not possible for us to overlook the provisions of the Act, which makes a clear distinction between inter-State and intra-State activities of the utilities in the electricity sector. The transmission network in the country is inextricably intertwined. In case the contention of the petitioner is accepted, it will completely obliterate the distinction between "inter-State" and "intra-State" activities recognized by law. In that case, vast majority of the transactions will become "inter-State". This will render redundant a number of provisions of the Act. Therefore, such a construction is to be avoided.

24. In the case of State of AP Vs NTPC (supra) , the Hon'ble Supreme Court had examined the scope of inter-State sale of power. It was held as under:

“24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients: (i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale; the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes places independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element.”

25. According to the Hon'ble Supreme Court, when, goods move from one State to another pursuant to contract of sale, the sale concludes in such other State. Further, according to the Hon'ble Supreme Court, if the transaction of sale is within State A and the movement of goods takes place thereafter to State B, such transfer would be by or on behalf of the purchaser in State A alone. In such cases, the transaction would not be having any inter-State element as regards the sale in State A. The law laid down by the Supreme Court if extended to the transactions between GRIDCO and the inter-State electricity trader, would also mean that sale by GRIDCO to an inter-State electricity trader is within the State of Orissa.

26. The petitioner also placed strong reliance on the judgement in Indian Aluminium Co Vs State of Kerala [(1996) 7 SCC 637] referred to in State of A.P. Vs. NTPC (supra), wherein the Hon'ble Supreme Court considered characteristic quality of electricity. It noticed as under:

“It is common knowledge that for HT and EHT industries a sub-station at the place of manufacture or establishment or at its convenient place is set up and electricity is supplied to the sub-station and a minimum guarantee of payment is ensured therefor under the contract. But the question is whether the word 'supply' used in Section 3 of the Act would be construed to mean 'consumption' or 'sale' of electricity. From the

sub-station, electricity is connected to the industrial units through the meter put up in the factory. Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical high-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place. It is true that in the definitions given in the New Encyclopaedia Britannica, Vol. 4, p.842 cited before us, distinction between supply and consumption is stated but adopting a pragmatic and realistic approach, we are of the considered view that as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place. Charge will be quantified at a later date as per the recorded meter reading or escaped metering, as the case may be. The word 'supply' used in the charging Section 3 should, therefore, receive liberal interpretation to include sale or consumption of electricity as envisaged in Entry 53 of the State List."

27. The petitioner argued that since consumption of power sold by GRIDCO takes place in a State outside the State of Orissa, and sale and consumption are instantaneous as held by the Hon'ble Supreme Court, sale by GRIDCO is an inter-State sale of electricity. We are unable to agree. In case of Indian Aluminium Company (supra), the observations of the Hon'ble Supreme Court are in the context of sale of electricity to a consumer. The Hon'ble Supreme Court held that when the electricity passes through the meter of a consumer, consumption and sale take place simultaneously. In the case before us, the electricity reaches the consumer through the medium of inter-State electricity trader and the distribution licensee of the other State. Though the flow of electrons is continuous and uninterrupted, there is notional transfer of property from GRIDCO to the inter-State electricity trader the moment electricity passes the meters installed within the State of Orissa for measurement of electricity sold to the electricity trader, since the Act recognizes purchase of electricity by the electricity trader as a distinct activity. There is another sale by the inter-State

electricity trader to the distribution licensee and finally the consumer, through the distribution licensee. In case we accept the argument of the petitioner, this can amount to saying that GRIDCO is supplying power to a consumer outside the State of Orissa. To us this seems to be illogical. However, by extending the principle decided by the Hon'ble Supreme Court, sale of electricity by GRIDCO takes place within the State of Orissa as the sale by GRIDCO and purchase by the electricity trader gets clinched in that State, when electricity passes through the meters installed at the sub-stations in that State for measurement of the electricity sold to the inter-state electricity trader.

28. An issue somewhat similar to the issue raised in the present petition was considered by the Hon'ble Supreme Court in Mohd. Serajuddin Vs. State of Orissa [(1975) 2 SCC 47]. The appellant in that case was a registered dealer under the Central Sales Tax Act, 1956 carrying on the business of mining and exporting mineral ores to foreign countries. The appellant entered into four contracts for sale of chrome concentrates, two of them directly with foreign buyers and the other two through State Trading Corporation (STC). STC in turn entered into contract with foreign buyer. STC was recovering commission from the appellant for sale to foreign buyers. Under these circumstances, the question arose whether sale through STC was in the course of export by the appellant. The Hon'ble Supreme Court answered the question in negative. While interpreting the scope of sale in the course of export, the Hon'ble Supreme Court held that the appellant was not connected with the export which actually took place. The Hon'ble Supreme Court held that there must be a single sale which itself causes the export and there is no room for two or more sales in the course of export. To establish export, a person exporting and a person importing are necessary elements and the course of export is between them. The Hon'ble Supreme

Court observed that introduction of a third party dealing independently with the seller on one hand and with the importer on the other, breaks the link between the two for then there are two sales, one to the intermediary and the other to the importer. The Hon'ble Supreme Court held that the first sale is not in the course of export because the export commences with the intermediary. The Hon'ble Supreme Court laid down the principle that there must be a single sale which itself causes the export or is in the progress or process of export. The only the sale which can be said to be the cause of export is the sale which itself results in the movement of the goods from the exporter to the importer. So the test is whether there are independent transactions or only one transaction which occasioned the movement of the goods in the course of export.

29. When we apply the principles decided by the Hon'ble Supreme Court in the above judgement to the facts of the case before us, there is no doubt that it is the inter-State electricity trader who is responsible for the movement of electricity outside the State of Orissa and not GRIDCO. The fact that export of power outside the State of Orissa is made through an inter-state electricity trader does not have the effect of making GRIDCO the exporter where there is a direct contract between the inter-State electricity trader and the distribution licensee outside the State. The sale of electricity by GRIDCO to an inter-State electricity trader and further sale by such trader to a distribution licensee, are two independent transactions. The movement of electricity outside the State is by buyers from GRIDCO after property passed to them. So the sale by GRIDCO is not the inter-State sale.

30. From the documents on record, it is undoubtedly true that intention of GRIDCO was to transfer electricity outside the State of Orissa, when it invited offers for sale through the electricity traders granted licence by this Commission. But we have to

consider the practical aspects. Firstly, there was no scope for sale and consumption of power within the State as the power was surplus to the requirements of the State. Further, GRIDCO could not ignore the advice of the Orissa Commission as contained in Chairperson's DO letter dated 10.3.2005 adverted to above, though normally the decisions of a quasi-judicially authority are not communicated through DO letters, but by proper orders. Also, since the electricity was to be exported outside the State, it had to be through an inter-State electricity trader granted licence by this Commission. In our opinion, inviting of bids by GRIDCO for sale through the traders granted licence by this Commission cannot be faulted.

31. In our considered view, GRIDCO, though deemed to be an electricity trader, is an intra-State trader and is amenable to the jurisdiction of the Orissa Commission. Therefore, the trading margin of 4 paise/kWh, specified by the Commission in its notification dated 23.1.2006, published in the Official Gazette on 27.1.2006, does not apply to GRIDCO. Similarly, the requirement of submission of periodical reports by GRIDCO pursuant to this Commission's regulations also is not applicable. Accordingly, the prayers made in the application for direction to GRIDCO to charge trading margin of 4 paise/kWh, and other prayers which are incidental to the substantive question of status of GRIDCO, cannot be granted.

32. As we have seen above, the average purchase price of power by GRIDCO is 110.36 paise/kWh. From the copy of the agreement dated 9.3.2006, it is seen that the agreed price for sale of electricity at GRIDCO's delivery point is as under:

MONTH	ROUND THE CLOCK (00 to 24 Hrs = 24 hrs) Tariff in Paise/kWh	*OFF PEAK (00 to 17 Hrs & 23 to 24 Hrs = 18 Hrs) Tariff in Paise/kWh	EVEN PEAK (17 to 23 Hrs = 6 hrs) Tariff in Paise/kWh
April-06	461.00	456.00	476.00
May-06	466.00	461.00	481.00
June-06	466.00	461.00	481.00
July-06	466.00	461.00	481.00
August-06	466.00	461.00	481.00
September	466.00	461.00	481.00

* The average hourly drawal during morning peak (06 hours to 11 hours) should not be more than average drawal during balance off peak period of 13 hours.

33. It is obvious that GRIDCO has charged very heavy trading margins for sale of surplus power. In view of our finding that GRIDCO is deemed to be an intra-State electricity trader, we have not given any direction to GRIDCO to limit its profits on sale of electricity for consumption outside the State. We only hope that the concerned Commission will consider this aspect and pass an appropriate order for fixing the trading margin for the power traded by GRIDCO.

34. During the hearing, the petitioner brought to our notice that the Orissa Commission had been approving the ARR of GRIDCO based on filing to that effect by it. This position has been accepted by the learned counsel for GRIDCO. The petitioner pointed out that this was in contravention of the provisions of the Act, which does not envisage approval of ARR of a trader in electricity. In reply to that the learned Counsel for GRIDCO reiterated that GRIDCO is not an electricity trader but is deemed to be a licensee for bulk supply of electricity by virtue of the licence for bulk supply granted by the Orissa Commission in 1997 and amended in 1999, under the Orissa Act. We are not very happy with the situation placed before us. As we have already noted, Sections 12 and 14 of the Act recognize three types of licences, namely for transmission, distribution and trading of electricity. As per GRIDCO's own

admission, it is neither a transmission licensee nor a distribution licensee. The only category left is the electricity trader. In the case of an electricity trader, the Act envisages fixation of trading margin and not approval of the ARR. The licence for bulk supply of electricity under the Orissa Act, to the extent it is inconsistent with the provisions of the Act cannot be given effect in view of Section 185 of the Act. Also, the licence which is the statutory document has been granted to GRIDCO for bulk sale to the distribution companies within the State. The licence does not authorize GRIDCO to sell power to an electricity trader, though the Orissa Commission while approving ARR of GRIDCO has granted it liberty to purchase additional power from any source and trade in open market. Accordingly, the concerned State Commission may be required to reconsider the matters relating to bulk supply licence to GRIDCO and approval of its ARR.

35. With the above, the petition as also the interlocutory application stand disposed of.

Sd/-
(A.H. JUNG)
MEMBER

Sd/-
(BHANU BHUSHAN)
MEMBER

Sd/-
(K.N. SINHA)
MEMBER

Sd/-
(ASHOK BASU)
CHAIRPERSON

New Delhi dated the 1st May 2006