

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL NO.239, 240, 241, 243 of 2012, APPEAL No. 11,12 &160
OF 2013

Dated: 28th Nov, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER

APPEAL NO.239 of 2012

In the Matter of:

- 1. Amausi Industries Association
B-131/1, Amausi Industrial Area
Lucknow – 226 008**
- 2. Cold Storage Association
Water Works Road, Aish bagh
Lucknow – 226004**
- 3. Shri Rama Shankar Awasthi
301- Surabhi Deluxe Apartment
6/7 Dali Bagh, Lucknow – 226001**
- 4. M/s Tribhuvan Industries Ltd.
Gindan Khera, Nadar Ganj
Lucknow – 226008**
- 5. M/s Mamta Steel India Pvt. Ltd.
Peperpur (sanha)Amethi
C.S.M. Nagar U.P – 227405**
- 6. M/s. Kranti Steels Pvt. Ltd.
07km, Bhinga Road,
Bahraich, U.P. – 271801**
- 7. M/s Jai Jagadamba Metalloys Ltd.
B-12, UPSIDC Industrial Area Site – II
Unnao – 209801 U.P.**

**8. M/s Purva Alloys Ltd.
Plot No. 1423, Sarai Katiyan,
Purva Road Unnao, U.P - 209801**

..... Appellant(s)

Versus

**1. Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh**

**2. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh**

**3. Madhyanchal Vidyut Vitran Nigam Limited
4-A, Gokhle Marg, Lucknow – 226 001
Uttar Pradesh**

..... Respondent(s)

Counsel for the Appellant : Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. M. G. Ramachandran
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Interveners

APPEAL NO.240 of 2012

In the Matter of:

1. Chamber of Industries Gorakhpur
Udyog Vaban, Govt. Industrial Estate
Gorokhnath, Gorokhpur – 273015
2. Eastern UP, Chamber of Commerce and Industries
Vigyan Parishad Building,
Swami Dayanand Marg,
Near Indian Press Crossing,
Allahabad – 211002
3. Shri Rama Shankar Awasthi
301- Surabhi Deluxe Apartment
6/7 Dali bagh, Lucknow – 226001
4. U.P Chamber of Steel Industry
122*235, Plot No. 17,
Fazalganj, Kanpur - 208102

..... Appellant(s)

Versus

1. Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh
2. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh
3. Purvanchal Vidyut Vitran Nigam Limited
Purvanchal Vidyut Bhawan, Vidyut Nagar,
DLW, Varanasai – 221004

..... Respondent(s)

- Counsel for the Appellant : Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. M. G. Ramachandran
Ms. Swagatika Sahoo
- Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Interveners.

APPEAL NO.241 of 2012

In the Matter of:

1. **RANIA of Industries Association
Gate No. 202, Rania,
Kanpur Dehat – 209304**
2. **Agra Cold Storage Owners Association,
C/o Balkeshwar Ice and Cold Storage
Balkeshwar Road,
Agra – 282005**
3. **Shri Rama Shankar Awasthi
301- Surabhi Deluxe Apartment
6/7 Dali bagh, Lucknow – 226001**
4. **U.P Chamber of Steel Industry
122*235, Plot No. 17,
Fazalganj, Kanpur - 208102**

..... Appellant(s)

Versus

1. **Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh**

3. **Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh**

3. **Dakshinanchal Vidyut Vitran Nigam Limited
Urja Bhawan, 220KV Sub-Station
Agra-Mathura Bye Pass Road, Agra – 282007
Uttar Pradesh**

..... Respondent(s)

- Counsel for the Appellant : Ms. Swapna Seshadri
Mr. Anand K. Ganesan
Mr. M. G. Ramachandran
Ms. Swagatika Sahoo
- Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Intervenors.

APPEAL NO.243 of 2012

In the Matter of:

1. **Association of Steel Rolling Mills and Furnaces
10/A, Industrial Estate,
Merrut Road, Muzafur Nagar – 251003.**
2. **Association of Secondary Steel Manufacturers,
C/232, B.S. Road Industrial Area,
Gaziabad – 201001**
3. **Shri Rama Shankar Awasthi
301- Surabhi Deluxe Apartment
6/7 Dali bagh, Lucknow – 226001**
4. **M/s Star papers Mills Ltd.
Paper Mill Raod,
Sharnpur – 247001**

..... Appellant(s)

Versus

1. **Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh**
4. **Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh**
3. **Paschimal Vidyut Vitran Nigam Limited
Urja Bhawan, Victoriya Park, Meerut – 250001
Uttar Pradesh**

..... Respondent(s)

Counsel for the Appellant : Mr. M. G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Interveners.

APPEAL NO.11 of 2013

1. **Rathi Steels and Power Ltd.**
24/1A Mohan Corporative Industrial Estate
Sarita Vihar, Mathura Road
New Delhi - 110044
2. **Rathi Super Steels Ltd.**
S-210, Aditya Plaza, Plot No-4,
Community Centre, Karkardooma
Delhi - 110092
3. **K L Rathi Steels Ltd.**
1/5812, Loni raod,
Shahdra,
Delhi - 110032
4. **Kajaria ceramics Ltd.**
A-27-30, Industrial Area,
Sikandrabad, Dist Bulandshar
Uttar Pradesh - 203205

Versus

..... Appellant(s)

- 1 **Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh**

- 2 **Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh**

3. **Paschimal Vidyut Vitran Nigam Limited
Urja Bhawan, Victoriya Park, Meerut – 250001
Uttar Pradesh**

..... Respondent(s)

Counsel for the Appellant : Mr. B C Rai
Mr. Gaurav Agarwal

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Interveners.

APPEAL NO.12 of 2013

1. **Parmarth Industries Private Limited
10th Km Stone from Bijnor, Nagina Road,
District Bijnor – 246 701
Uttar Pradesh**

2. **Rama Paper Mills Ltd.**
12/22, East patel Nagar
New Delhi – 110 008

3. **Reema steels Pvt. Ltd.**
12/22, East patel Nagar
New Delhi – 110 008

4. **Parmarth Iron Pvt. Ltd.**
10th Km Stone from Bijnor, Nagina Road,
District Bijnor – 246 701
Uttar Pradesh

5. **Parmarth Steel and Alloys Pvt. Limited**
9th Km Stone from Bijnor, Nagina Road,
District Bijnor – 246 701
Uttar Pradesh

6. **Ramdoot Steels Pvt. Ltd.**
4th Km Stone from Noorpur, Tajpur Road,
Tehsil Chandpur District Bijnor – 246 701
Uttar Pradesh

7. **Jain Steels Pvt. Ltd.**
Mandawar Road, Bijnor
Uttar Pradesh - 246701

8. **Goel M G Gases Pvt. Ltd.**
A-4/2, South Side of G.T. Raod,
UPSIDC Industrial area,
Ghaziabad – 201009
Uttar Pradesh

..... Appellant(s)

Versus

- 1 **Uttar Pradesh Electricity Regulatory Commission**
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh

**3 Uttar Pradesh Power Corporation Limited
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh**

**3. Paschimal Vidyut Vitran Nigam Limited
Urja Bhawan, Victoriya Park, Meerut – 250001
Uttar Pradesh**

..... Respondent(s)

Counsel for the Appellant : Mr. B C Rai
Mr. Gaurav Agarwal

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra,
Mr. Daleep Kr. Dhayani &
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Suraj Singh
Ms. Awantika Manohar
Mr. Somesh Jha & Ms. Pyoli for
Intervenors.

APPEAL NO.160 of 2013

**1. Goyal M.G. Gases Pvt. Ltd.,
A-4/2 South Side4 of G.T. Road,
UPSIDC Industrial Area,
Ghaziabad, UP-201009**

..... Appellant(s)

Versus

**1 Uttar Pradesh Electricity Regulatory Commission
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow -226010
Uttar Pradesh**

4 **Uttar Pradesh Power Corporation Limited**
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh

3. **Paschimal Vidyut Vitran Nigam Limited**
Urja Bhawan, Victoriya Park, Meerut – 250001
Uttar Pradesh

..... Respondent(s)

Counsel for the Appellant : Ms. Swapna Seshadri
Mr. Shiv Kumar Pankha
Mr. Gaurav Agarwal

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh for R-1
Mr. Amit Kapur
Mr. Pradeep Misra for R-2 &3
Mr. Shashank Pandit for R-2 to R-3
Mr. Manoj Kr. Sharma for R-2&3
Mr. Vishal Anand
Mr. Gaurav Dudeja
& Ms. Pyoli for Interveners.

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,
CHAIRPERSON

1. The Appellants have filed all these Appeals challenging the impugned order dated 19.10.2012 passed by Uttar Pradesh State Commission (the first Respondent herein) in the matter of determination of ARR and Tariff for the Financial Year 2012-13.

2. The Appellants are High End Consumers. They take supply at high voltage in the area of service of the distribution licensees in the State of Uttar Pradesh, the third Respondents in these Appeals. The first Respondent is the State Commission who passed the impugned order dated 19.10.2012.
3. The learned Counsel for the Appellants assailing the Impugned Order dated 19.10.2012, has raised the following issues:
 - (a) Fixation of tariff without audited accounts for the period 2008-09 onwards despite the specific directions issued by this Tribunal in the Judgment dated 21.10.2011 in Appeal No.121 of 2010.
 - (b) Differences/discrepancies in Data and irregularities in the method of issuance of the tariff order
 - (c) Increase in the level of cross subsidy.
 - (d) Non recovery of past surplus of the Transmission Licensee.
 - (e) Allowing Bulk Supply Power to Torrent Power, a franchisee enterprise below the bulk power purchase price.

(f) No separate Tariff Petition for the licensees;

(g) Fixed Assets Register; Transparency and propriety etc.

4. On these grounds, the learned counsel for the Appellants as well as the Respondents made elaborate arguments for consideration of these issues.

5. Let us now discuss each of the issues one by one.

6. The **First Issue** is relating to the **Fixation of tariff without audited accounts for the period 2008-09 onwards despite the specific directions of the Tribunal in the Judgment dated 21.10.2011 in Appeal No.121 of 2010.**

7. According to the learned Counsel for the Appellants, the State Commission did not follow the specific directions of this Tribunal in Appeal No. 121 of 2010 relating to audited accounts and passed the Impugned order without submissions of the audited accounts by the Distribution Licensees in complete violation of the Tribunal's directions, provisions of the 2003 Act as well as Tariff Policy. Gist of the submissions made by the Appellants are as under:

(a) This Tribunal in the Judgment dated 21.10.2011 allowing Appeal No. 121 of 2010 had issued specific

directions to the State Commission for considering the audited accounts and also carrying out the truing up exercise in a timely manner. However, in the present proceedings, neither the Distribution Licensees nor the State Commission complied with those directions issued by this Tribunal.

(b) The State Commission passed the following Interim Orders dated 18.5.2012 directing the distribution licensees to submit the relevant data and audited accounts as per the directives of the Tribunal in Appeal No. 121 of 2010 and holding that if the tariff proposal and other required data are not submitted by the distribution licensees, the State Commission will decide to proceed sou-moto, for determination of the ARR/Tariff.

(c) Thereafter the Distribution Licensees filed their tariff proposal and some additional data on 24.05.2012 which were not to the knowledge of the Appellants and other consumers. Relying on such additional documents, which were also incomplete, the State Commission on 25.05,2012 admitted the ARR/Tariff petitions filed by the Distribution Licensees despite the deficiencies.

(d) The State Commission in the impugned order has not followed the principle laid down by this Tribunal. The Impugned order has been issued in violation of –

- i. Judgment dated 21.10.2011 of the Tribunal;
- ii. Provisions of the Electricity Act and National Tariff Policy and National Electricity Policy;
- iii. Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for Determination of Distribution Tariff) Regulation, 2006 and Conduct of Business Regulations;

(e) In the absence of a proper petition being filed by the distribution licensees, the pre-conditions for dealing with the petition for determination of revenue requirements and tariff were not satisfied and, therefore, the petition ought not to have been entertained and proceeded with.

(f) Under the Tariff Regulations, 2006, the distribution licensees are under a statutory obligation to submit their ARR/Tariff Petitions complete in all respects, as per the format specified in Annexure –A appended to the said Regulation by 30th November of each year for the ensuing financial year. The distribution licensees had not filed any ARR according to the said Tariff Regulations, 2006. The State Commission was to initiate suo-moto proceedings for tariff determination at the relevant time. The State Commission neither initiated any proceedings whatsoever

nor took any action against the licensees for default, let alone initiating any suo moto proceedings for determination of tariff. Thereafter, in the year 2012, the State Commission had fixed the ARR for 2010-11, 2011-12 and revised the tariff for 2012-13 on the same inconsistent and unreliable data submitted by the distribution licensees. Once the Statutory Regulations have been framed, the State Commission ought to follow the same without any deviation. The State Commission has not acted consistent with the above requirements.

8. The learned counsel for the Distribution Licensee, the Second Respondent made these submissions in support of the Impugned Order. They are as follows:

(a) The delay in submitting the audited accounts is not on account of the Discoms and was in fact because of the reasons beyond their control. Delay in filing audited accounts by Discoms arose on account of following reasons:-

(I) In compliance of the comments of the CAG of India dated 19.05.2011, the accounts for FY 2008-09 had to be revised and were revised on:

- | | | | |
|------|----------------|---|------------|
| (i) | MVVNL, Lucknow | - | 18.08.2012 |
| (ii) | DVVNL, Agra | - | 23.08.2012 |

- (iii) PVVNL, Meerut - 16.08.2012
- (iv) PuVVNL, Varanasi - 03.09.2012

(II) Although the U.P. Power Corporation Ltd. (UPPCL) started operating as a separate entity with effect from 26.07.2006, the assets and liabilities finally came to be vested in UPPCL only on 23.12.2010 (when Transfer Scheme was finally notified by U.P. Government). In the absence of Transfer Scheme and the provisional balance sheet, it was not possible to audit the accounts of the U.P. Power Corporation Ltd and the Discoms.

(iii) As per the procedure followed, the Discoms get its accounts audited by Chartered Accountants and thereafter, a supplementary audit is conducted by the CAG's office. The Chartered Accountants took more than one year for the finalization of accounts for the FY 2007-08 and 2008-09. After that, the CAG Office also took 3-4 months in finalising their comments. Hence, the delay could not be avoided by the Discoms and as such, it cannot be attributed on the Discoms.

(b) As regards, the Judgment rendered by this Tribunal dated 21.10.2011 in Appeal No. 121 of 2010, the Tribunal had issued time bound directions to the Discoms to submit audited accounts, It is to be noted that though the statutory transfer scheme was notified only on 23.12.2010, the

Discoms have tried their best to comply with directions in as much as the Audited Accounts for FY 2007-08 were submitted to the State Commission on 28.05.2012 along with Petition for Truing up for FY 2001 to FY 2008. Audited accounts for all the Discoms for FY 2008-09 and FY 2009-10 have also been submitted before the Commission on 17.01.2013. Audited accounts of all the Discoms for FY 2010-11 have since been submitted to the Commission on 13.03.2013 and True up Petition for the Period FY 2008-09 to FY 2010-11 have been filed before the Commission on 13/14-05-2013.

(c) The State Commission has already issued order on True-Up Petition of all Discoms for FY 2001 to FY 2008 on 21.05.2013. Audited Balance sheets of all the Discoms for FY 2011-12 have been submitted before the Commission on 27.06.2013.

- 9.** The learned Counsel for the State Commission made elaborate submissions in support of the impugned order. They are as follows:

(a) The State Commission has in true letter and spirit sought to implement the judgment dated 11.11.2011 in OP No.1 of 2011 whilst continuing to implement the Judgment dated 21.10.2011 in Appeal No.121/2010.

(b) The Judgment of this Tribunal dated 21.10.2011 did not set aside the impugned Order therein on the ground that Audited Accounts were not available before the Tariff for those periods were determined. This Tribunal affirmed the stand that the Audited Accounts were required not only for truing up but also for the purpose of making a realistic estimate of future tariff also.

(c) In fact, in the judgment of 21.10.2011, this Tribunal was pleased to affirm the principle that the State Commission has power to initiate suo-moto proceedings for tariff determination in case the licensee does not file petitions in time as per the Regulations. In the said Judgment the Tribunal had also re-emphasised the necessity to ensure timely filing of the Tariff Petition and also ensure timely determination of Tariff.

(d) As regards the requirement of Audited Accounts, this Tribunal has laid down the principle that the Audited Accounts were essentially required for a realistic estimation of the tariff, noting the fact that truing up proceedings for certain years were already underway. This Tribunal has recorded that in the prevailing circumstances the approach of the State Commission in determining the tariff on the basis of provisional accounts cannot be faulted.

(e) This Tribunal in its Judgment, dated 11.11.2011 in OP

No.1 of 2011 has laid down the dictum that the State Commission should not delay the process of Tariff determination indefinitely to await the Audited Account of the licensee.

(f) This Tribunal in the judgment dated 21.10.2011, did not hold that in the absence of Audited Accounts, tariff determination should not take place. In fact in a catena of Judgments, this Tribunal had consistently taken the view that tariff determination can and ought to be done even in the absence of Audited Accounts. Some of the said Judgments inter alia, are as under:-

(i) Appeal No.55 and 56 of 2011 in the matter of M/s Aditya Birla Chemicals (India) Limited Vs Jharkhand State Electricity Regulatory Commission & Anr

(ii) Appeal No.129 of 2007 in the matter of Jharkhand State Electricity Board Vs Jharkhand State Electricity Regulatory Commission.

(iii) Appeal No.124 of 2006 in the matter of M/s Kashi Viswanath Steel Limited Vs Uttaranchal Electricity Regulatory Commission & Ors.

(iv) Appeal No.268 of 2006 in the matter of M/s. Poddar Alloys (P) Ltd Vs Uttaranchal Electricity Regulatory Commission and Anr.

10. In the light of the rival contentions, let us deal with the issue.
11. According to the Appellant, the State Commission did not implement the directions of this Tribunal given in the judgment dated 21.10.2011 in Appeal No.121 of 2010 and passed the impugned order without getting audited accounts of the Distribution Licensees.
12. Let us refer to those directions given in our judgment in Appeal No.121 of 2010:

“6.8. Let us now discuss the issue regarding non submission of the audited accounts by the respondent licensees.

6.9. According to the Regulation 2.1 of the Tariff Regulations, 2006 the Annual Statement of Accounts should be submitted along with the tariff filing. According to the definitions in Regulation 1.3.1 the Annual Statement Accounts means the following statements:

i) Balance sheet, prepared in accordance with the form contained in Part-I of Schedule VI to the Companies Act, 1956;

ii) Profit & Loss Accounts complying with the requirements contained in Part-II of Schedule VI to the Companies Act, 1956;

iii) Cash flow statement, prepared in accordance with Accounting Standard on cash flow statement (AS-3) of the Institute of Chartered Accountants of India;

iv) Report of Statutory Auditors of the licensee;

v) Cost records, if any, prescribed by the Central Government under Section 209 (1)(d) of the Companies Act, 1956;

vi) Together with notes thereto and such other supporting statements and information as the Commission may direct from time to time.

6.10. According to the learned counsel for the respondents, audited accounts are required only in true up.

6.11 The Regulations clearly indicate the requirement of submission of the audited accounts. In our opinion, the audited accounts for the previous year are not only required in true up but are also needed for making realistic estimate of expenditure for the ensuing year. The licensees should have submitted audited accounts for FY 2007-08 and accounts for half yearly period for the FY 2008-09 for determining the ARR and tariff for FY 2009-10. We feel that the ARR/tariff determination exercise for the ensuing year should also consider the true up of financials for the previous financial year and the Annual Performance Review for the current financial year for a realistic estimation of the Annual Revenue Requirement for the ensuing year. However, for some reasons the audited accounts for the previous financial year are not available then at least the audited accounts for the year just prior to the previous year along with the provisional accounts for the previous year could be considered. However, in this case the audited accounts even for FY 2007-08 were not submitted.

6.13. According to learned ASG, the audited accounts till the FY 2006-07 had already been submitted. The audit for the FY 2007-08 has been completed by the CAG which will be submitted to the State Commission after the approval of the Board of Directors. The accounts for the FY 2008-09 and FY 2009-10 would be audited by the CAG by the end of the current financial year.

6.14. In the prevailing circumstances, we do not find fault with the approach of the State Commission in determining the tariff on the basis of the provisional accounts. However, instead of giving time bound directions for submission of the audited accounts, the State Commission seems to have reconciled with the unusual delay in submission of the audited accounts and have decided to true up the financials as and when the audited accounts are supplied by the licensees.

13. In the above judgments, it has been held by this Tribunal that the audited accounts of the previous year or year prior to previous year are necessary for accurate projections in the absence of the present year audited accounts.
14. In the said judgment, we have not issued any direction that the tariff determination exercise should not be held in the absence of the audited accounts.
15. On the other hand, we have referred to the judgment of this Tribunal in M/s. Aditya Birla Chemicals (India) Limited v Jharkhand State Electricity Regulatory Commission in the judgment dated 19.7.2011 wherein, we have accepted the

reasons given by the Jharkhand State Commission to relax the Regulations requiring the submissions of the audited accounts and permitted the State Commission to determine the ARR and Tariff even without audited accounts for the relevant years.

16. That apart, in another judgment dated 3.5.2007 in Appeal No.268 of 2006 in the case of M/s. Poddar Alloys (P) Ltd Vs Uttaranchal Electricity Regulatory Commission and Anr, this Tribunal has held that the provisional truing-up could be carried out even without the audited accounts.
17. The relevant portion of the said judgment is quoted below:

“21. It was expected that the Commission will mend its ways. But, regrettably the Commission seems to be determined to dither and defy and over-reach orders of this Tribunal in an indignant manner not becoming of a responsible institution. From the very beginning, when the Commission chose to wait for the Audited Accounts to implement Tribunal’s Order, the Commission’s intentions and reluctance to implement the order was obvious. That is why the Tribunal had to deprecate the conduct of the Commission. Regrettably, desire to dither on the decided issues and adamant attitude of the Commission remains unchanged. Normally, truing up exercise is undertaken on the basis of available data and information. Second and subsequent truing up exercises can be taken up when audited account figures are available. No public hearing is required for implementing the decisions of an appellate authority and yet the Commission went ahead with public hearing. Any direction made by the higher forum has to be complied with by the lower forum; otherwise, the hierarchy becomes meaningless as has been held by the Supreme Court. We observe that even the minimum standards of

behavior and conduct have been given a go by and that too despite this Tribunal's reprimand. We restrain ourselves at this stage and expect the Commission to realize its role to implement directions of this Tribunal.

18. Now it is clarified by the learned Counsel for the State Commission that the directions of this Tribunal in Appeal No.121 of 2010 have been complied with and audited accounts up to the Financial Year 2010-11 have now been furnished to the State Commission. It is also submitted that the Distribution Licensee has already submitted the true-up petition for the years 2008-09 to 2010-11. The learned Counsel for the State Commission also pointed out that the State Commission has already issued true-up orders up to the Financial Year 2008.
19. In view of the above submissions made by the learned Counsel for the Respondents, we are unable to hold that our directions issued in Appeal No.121 of 2010 have not been complied with by the State Commission.
20. This point is accordingly decided as against the Appellant.
21. The next issue is relating to **differences and discrepancies in the data submitted by the Distribution Licensee and the irregularities in the method of issuance of the Tariff Order.**
22. The learned Counsel on this issue, has made the following submissions:

- (a) Complete Tariff proposal and additional data filed by Distribution Licensees on 24.05.2012 were not supplied to the Appellants.
- (b) There were data discrepancy between the ARR Petition and the Public notice issued by Distribution Company.
- (c) Violation of principles of transparency in Section 86(1)(3)(c) of the Electricity Act, 2003.
- (d) Tariff Petitions were heard by three members but the Orders were signed and pronounced by only two members in a hurried manner.

23. On this issue, the learned counsel for the State Commission has made the following reply:

- (a) The State Commission in its order dated 25.6.2013 admitting the petitions of the Respondents, had clarified that it has considered all the data placed before it and directed the Respondents to place the same in the public domain.
- (b) The Appellants have not been able to make out any case as to what was the impact, if at all, in all the impugned order by reason of the so called differences in data.
- (c) The Affidavits filed by the Appellants would

clearly show that the so called differences in data are either very minor or non-existent and in fact the Appellants have not been able to show what prejudice if any, had been caused to the Appellants in this regard.

24. The learned Counsel for the Distribution Licensee also submitted the reply which is as follows:

(a) Not only the Appellants had the copy of the Tariff Proposal but Appellant No. 3 made presentations before the State Commission during public hearing in which they took objections with regard to the said Tariff Proposal. Evidently the tariff proposal submitted by Discoms on 24.05.2012, was supplied to Appellants. Even otherwise, complete tariff proposals were made available on the website of the distribution licensees.

(b) There was no data discrepancy as alleged by the Appellant. Perusal of the comparative chart supplied by the Appellant, on affidavit, would show that there was no major deviation in the figures submitted in ARR Petition and the figures published in Newspaper. The only major discrepancy exhibited by Appellant in its chart is with regards to losses (%). As per Appellant's chart the losses as per Newspaper publication is 24% while the Petition showed the same as 28.30%. It is to be noted that the losses referred to in the Public Notice clearly

indicated a Distribution loss which is 24% whereas losses referred to in the Petition were T&D losses as 28.30%.

25. Having heard the rival submissions of both the parties, it is evident that the grievance of the Appellants is that all the relevant and complete data had not been supplied to the Appellant by the Respondent.
26. In this context, we have to refer to Section 64 (2) and 64 (3) of the Electricity Act, 2003 which reads as under:

“Section 64

(1).....

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public-

(a) Issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force;

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

- 27.** On perusal of Section 64 (2), it is manifest that it requires the Distribution Licensee to publish the petition in such abridged form and manner, as may be specified by the State Commission.
- 28.** Section 64 (3) mandates the State Commission to issue the tariff order after considering all the comments and suggestions received from various stake holders.
- 29.** The conjoint reading of Section 64(2) and 64(3) of the Act, 2003 would reveal that the stakeholders are required to comment on the ARR petition admitted by the State Commission. After admission, the State Commission may require many more documents from the licensee to examine and validate the claims of the licensee. For example, the State Commission may require copies of the power purchase bills paid to generating companies or bills of the equipment purchased by the distribution licensee.
- 30.** All these documents are not necessary to be furnished to the consumers since those documents cannot be the subject matter of the scrutiny of the consumers.
- 31.** At this juncture, we shall look at this issue from a different angle.
- 32.** The Distribution Licensees are expected to file ARR by 30th November. It is only then State Commission will be is in a position to issue the Tariff Order by 31st March of the next year.

The Petition would include actual data for six months i.e. up to September and projected data for the next six months of the current year. Based on this data, the projections are made for the next year. During this process, since 120 days are available to the Commission to finalise the tariff order, the State Commission may, for the purpose of verify the projected data for six months, ask the licensees to submit details of the actual power purchase and category wise sale up to the month of December. The licensee will collect those details and submit it in the month of January. If all these data furnished by the licensees are required to be submitted to the consumers for their comments, then the tariff process would not be able to be completed to enable the State Commission to issue tariff order by 31st March. In such a situation, the tariff process would become unending and the tariff order could never be issued within the statutory limit of 120 days.

- 33.** The provision of seeking comments or suggestions from the consumers has been introduced in the Act to facilitate the Commission to complete the process in a transparent manner. It is settled law that the State Commission which is an expert body, would be competent to look into the available materials and decide the issue by adding the valid reason.
- 34.** Admittedly, the State Commission is expected to act transparently without any delay as per section 86(3) of the Act. The State Commission while taking the process in a

transparent manner has to issue the tariff order within time limit otherwise this would be questioned before this Tribunal which in turn would comment negative remarks against the State Commission.

- 35.** Therefore, the State Commission has to finish the process of tariff determination and issue the tariff order on the basis of the available information collected during the course of the process. The transparency cannot mean that all the consumers are to be involved at every step of tariff determination.
- 36.** Therefore, the allegations that there are differences/ discrepancies in the data and non furnishing of some of the data required by the State Commission from the licensees, cannot be said to be established in the absence of any impact.
- 37.** In the same issue, the learned counsel for the Appellants has also questioned the manner in which the tariff order was passed.
- 38.** The submissions of the Appellant in this regard are as follows:
 - (a) There is a serious infirmity in the manner of passing on the Impugned Tariff Order. The tariff petition was heard by all three Members of the State Commission, namely the Chairman as well as the two Members. All the Members of the State Commission after hearing the matter had reserved for the orders. However, the appointment of the Chairman had been set aside by a decision of the Allahabad High

Court but later, the same had been stayed by the Hon'ble Supreme Court. However, the Hon'ble Supreme Court ultimately by the Order dated 19.10.2012 pronounced the judgment at 10.45 AM dismissing the Appeal and confirming the Order of the Allahabad High Court. Hurriedly, on the very same day, the Tariff Order was signed by the other two Members and issued. The hasty disposal has been reflected in several paras of the Tariff Order which are contradictory and inconsistent. This aspect has brought the attention of media and other agencies which subsequently disclosed that on the very date of removal of the Chairman by the Order of the Hon'ble Supreme Court, the State Commission had made certain changes in the tariff order and pronounced it on the same day.

(b) The Distribution Licensees have relied on Section 93 of the Electricity Act, 2003 and Section 9 (3) of the UP Reforms Act, 1999. The Distribution Licensees have misunderstood the contention of the Appellant. The quorum may be two or even a single member. However, there is no propriety in quasi judicial proceedings when a matter is heard by three members, and the Order is passed only by two members. Order 18, Rule 15 of the Code of Civil Procedure, 1908 has no relevance to the present case.

39. The reply submissions of the Distribution Licensees is as

follows:

- (a) Section 93 of the Electricity Act, 2003 provides that any vacancy or defect in constitution of Commission will not invalidate the proceedings.
- (b) Section 82(4) of the Electricity Act, 2003 provides that State Commissions shall consist of not more than three Members including the Chairperson but has no minimum quorum requirement. Further, Section 9(3) of the UP Electricity Reforms Act, 1999 provides that two Members shall form the quorum of the State Commission.
- (c) Section 92(1) of Electricity Act, 2003 read with UPERC (Conduct of Business) Regulations, 2004 does not prescribe any quorum.
- (d) As per Section 94 of the Electricity Act, 2003 the Appropriate Commission shall have the same power for the purpose of inquiry or proceedings under Electricity Act, 2003 as are vested in a Civil Court under the Civil Procedure Code.
- (e) Order 18 Rule 15 of the Civil Procedure Code, 1908 is a special provision to obviate re-recording of evidence and rehearing of the suit where Judge is prevented by death, transfer or other causes from concluding the Trial. The Hon'ble Supreme Court has relied on Order 18 Rule 15 of the CPC in catena of judgment including in the case of

Rasiklal Manikchand Dhariwal Vs M.S.S. Food Products:
(2010) 2 SCC 196

40. The learned Counsel for the State Commission has made the following submissions:

(a) The process of preparing a Tariff Order stretches over many months and involves hundreds of days. Even in the present case, the tariff petition had been filed on 24.5.2012, the petitions were admitted on 25.6.2012 and the public hearings were held in August/September 2012. Hence by 19.10.2012, the ARR and Tariff Orders for all four Discoms for three years at a time were ready. No Tariff Order can be made afresh in a day. Merely because the order was signed on the same day on which Chairman's appointment was set aside, is only indicative of the fact that the orders were already ready even prior to 19.10.2012.

(b) The appointment of the Chairman having been set aside, the question of the Chairman signing the order could not obviously have arisen. Hence, it was only the remaining two Members who had heard the petition who could have signed the orders.

(c) Even assuming without admitting that the two surviving Members had to wait for the appointment of a new Chairman, such new Chairman could not sign the orders since such new Chairman would not have heard the tariff

petitions. In such an event, the entire hearing process would have to be gone through all over again. This would defeat the object of the provisions, prescribing the time frame.

41. We have carefully considered the submissions made by both the parties.
42. The similar issue relating to signing of the Tariff order only by two members came-up before this Tribunal in Appeal No.240/10 in Faridabad Industry Association Vs Haryana Commission. In this case, the public hearing was held in the presence of all the three members of the State Commission. However, one of the Members of the State Commission demitted the office during the period and the final orders were issued by the remaining two Members. This was questioned. This Tribunal has given the findings on this issue which are as follows:

“11. The sixth issue is regarding validity of the impugned order as it is not signed by the third Member who had heard the petition along with other Members when the representations of the objectors were considered by the State Commission on 18.2.2010.

11.1. According to the learned counsel for the appellant, the general principle of natural justice requires that all the persons who heard the matter are required to decide the matter. One of the Members who have heard the petition retired on 24.2.2010. According to Section 93 of the Act, no act or proceeding of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the Constitution of the Commission.

11.2. *The learned counsel for the respondents 2 and 3 stated that the objection by the appellants regarding quorum of the State Commission is untenable in view of the provisions of Section 93 of the Act. He also referred to Judgment in the matter of Iswar Chandra vs. S. Sinha (1972) 3 SCC 383, wherein the Hon'ble Supreme Court has held as under:*

“Where there is no rule or regulation or any other provision for fixing the quorum, the presence of the majority of members would constitute it as valid meeting & matters constitute it as valid meeting & matters considered there cannot be held to be invalid”.

11.3. *We notice that at the time of public hearing on 18.2.2010, three Members of the State Commission heard the objections filed by the consumers and various other groups. However, the order was passed on 13.9.2010. In the meantime, one of the Members retired on 24.2.2010, therefore, the order was signed by the Chairperson and remaining one Member. In this connection, Section 93 of the Act is reproduced below:*

“93. Vacancies, etc., not to invalidate proceedings - No act or proceedings of the Appropriate Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Appropriate Commission”.

11.4. *We do not find any force in the arguments of the learned counsel for the appellants that the general principle of natural justice would be applicable in this case. It has been held by the Hon'ble Supreme Court in the PTC case that the Electricity Act, 2003 is a complete Code. Therefore, in this case Section 93 of Page 52 of 57 Appeal No. 204 of*

2010 the Act will apply. Accordingly, we hold that the impugned order is valid”.

43. As pointed out by this Tribunal, in the above judgment, the impugned order in that Appeal was upheld. Section 93 of the Act would not allow the Act or proceedings of the Commission invalidated merely because there is a ground of existence of any vacancy or defect in the constitution of the appropriate Commission. The ratio of this case would squarely apply to the present case also.
44. Consequently, we have to hold that there is no irregularity in the procedure adopted by the surviving two members in signing the tariff order that too after the Chairman’s appointment was set aside by the Hon’ble Supreme Court. Accordingly, this issue is decided.
45. The **next issue** is relating to Increase in the **Level of Cross Subsidy Surcharge**.
46. On this issue, the learned Counsel for the Appellant has made the following submissions:
- (a) The State Commission has calculated the average cost of supply at Rs. 5.87 per unit without giving details as to how the State Commission has reached to such calculation. The National Tariff Policy for reduction in cross subsidy has not been considered properly by the State Commission.

(b) The findings of the State Commission are contrary to the provisions of the Electricity Act, 2003 and National Tariff Policy by which the cross subsidy is required to be brought down to the level of 20 % by the Financial year 2010-11. However, the State Commission has acted contrary to the above by determining tariff for domestic, private tube-wells and departmental employees by subsidizing at a rate lower than the maximum cap i.e. 20%.

(c) The Impugned Order of the State Commission is also contrary to the principles laid down by the Tribunal in the Judgment dated 30.05.2011 in Appeal Nos. 102,103 and 112 of 2010 regarding rationalization of Cross subsidy. The compliance of the National Tariff Policy means that no consumer category should pay less than 20% of the average cost of supply. Since the average cost of supply as per the State Commission itself is Rs. 5.87 per unit, no consumer category's tariff can be lower than Rs. 4.70 per unit whereas the State Commission has fixed the tariff for domestic category - LMV - 1 at Rs 2.92 per unit, private tube wells - LMV 5 at Rs. 1.15 per unit and Departmental Employees - LMV - 10 at Rs. 1.60 per unit. This is blatant violation of the principles laid down by this Tribunal in various judgments.

(d) Merely because the Appellant's category of consumers has been shown artificially to be within 20% range does not mean that the State Commission has

followed the Electricity Act, the National Tariff Policy and the judgments of the Tribunal.

47. The learned Counsel for the State Commission has made the following reply:

(a) The average cost of supply for FY 2012-13 is Rs. 5.87 per unit. It is admitted by the Appellant that the effective tariff for their category is Rs.6.08 per unit. Hence, it is obvious that the effective tariff of the appellant is well within the accepted range of +/- 20% of the average cost of supply.

(b) Hence, even assuming without admitting that there was an increase in cross subsidy as long as the cross subsidy is within the +/- 20% of the average cost of supply, the same cannot be faulted.

48. The learned Counsel for the Distribution Licensee has made the following submissions in justification of the impugned order:

(a) Although the State Commission in the Impugned Order calculated the average cost of supply at Rs. 5.87 per unit, however, the State Commission has only permitted recovery of Rs. 4.51/unit, which is 77% of the average cost of supply

(b) From the perusal of Table 9.3 of the Impugned Order, it is evident that all the consumer categories are within the

range of $\pm 20\%$ of the average cost of supply except three consumer categories which are below 20% of the average cost of supply.

(c) Appellant's category is within 20% range as prescribed under National Tariff Policy and it should not have any grievance on this count as it is not aggrieved by the Impugned Order.

- 49.** We have carefully considered the submissions made by both the parties. The main argument of the Appellant is that the tariff of the some of the subsidized consumers is less than 80% (-20%) of the average cost of supply.
- 50.** On the other hand, the Respondents have contended that so long as the tariff of the Appellant's category is within +20% of the average cost of supply, the Appellant cannot have any grievance.
- 51.** It is not disputed that the Appellant is within +20% of the average cost of supply. However, the contentions of the Appellants is misplaced to the extent that if the tariff of all the subsidized categories is brought within -20% i.e. increased to bring it within 80% of the average cost of supply, then the tariff of the subsidizing categories would have to be reduced correspondingly. This contention could be true if the tariff of all the subsidized categories is less than 80% of the average cost of supply. In the present case the tariff of only 3 categories of

subsidised consumers was less than 80%. The Tariff of other subsidised categories was higher than 80% of average cost of supply. Any additional revenue received by virtue of increase in tariff of the said 3 categories could be adjusted among other subsidized categories without affecting the tariff of the Appellant category.

52. This Tribunal in its judgment in Appeal no. 135 of 2010 (Polyplex Corporation Vs Uttarakhand Commission) has held that

“The Tariff Policy postulates that the category-wise subsidy has to be within ± 20 % of average cost of supply by the end of the year 2010-2011 and not the tariff for each and every consumer that is to say, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further.”

53. This ratio is equally applicable to the present set of facts. The question is decided accordingly.

54. Fourth Issue is related to **non-recovery of past surpluses of the Transmission Licensee.**

55. In the light of this Tribunal’s Judgment dated 9.4.2013 in Appeal No.242/2012 directing the State Commission to carry out truing up of accounts up to FY 2009-10 and adjust the surplus/differences in the ARR of the transmission licensee of the FY 2013-14, the Appellant has not pressed this issue

56. The fifth issue is regarding the **Power Purchase cost and other**

cost in excess of the legitimate claims and allowing supply of bulk power to Torrent Power - a franchisee at a price below the bulk power purchase price.

57. The learned Counsel for the Appellant has made the following submissions on this issue:

(a) The State Commission has allowed exaggerated power purchase costs to the Distribution Licensees. The Distribution Licensees are purchasing high cost power on short term basis without proper planning and without entering into long term PPAs at competitive rates. The State Commission ought to have initiated an enquiry into such power purchase by the Distribution Licensees and held against them for excess power purchase cost.

(b) One of the Distribution Licensees – Dakshin anchal Vidyut Vitran Nigam Limited has given a franchisee in the Agra area which has been given to Torrent Power Limited. The bulk supply price fixed by the State Commission for purchase of power by the distribution licensees is Rs. 2.64 per unit for FY 2011-12 and Rs. 3.75 per unit of FY 2012-13 and the same is being supplied to Torrent Power Limited at Rs 1.54 per unit for FY 2010-11, Rs. 1.55 per unit for FY 2011-12 and Rs.1.71 per unit 2012-13, Therefore, the consumers in all other areas are cross subsidizing the supply of power by Dakshinanchal Vidyut Vitran Nigam

Limited to Torrent Power Limited.

(c) The issue is not with regard to the power of the Distribution Licensee to appoint a franchisee but that if a franchisee is given by a Distribution Licensee in its area of operation, why should the consumers of the other Distribution Licensees bear the tariff burden on account of supply of cheaper power by one of the Distribution Licensees to the franchisee.

(d) The Rosa Power Plant was commissioned on 12 /13.3.2010. However, the necessary transmission evacuation facility (220 KV line) was not available due to the mistakes of the distribution licensee / transmission licensee/Rosa Power Supply Co. Ltd and the power could not be evacuated from the COD of Rosa Power Plant on 13.3.2010 for a period of 6 months till the transmission facility came. The power generated by Rosa in these 6 months was supplied to nearby rural areas. The licensees received fix amount per month from such consumers. The balance amount (i.e. the difference between the tariff paid to Rosa and fix charges recovered from rural consumers) cannot be passed on to the consumers.

(e) Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar

Pradesh. Any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore, becomes a tariff issue.

58. In reply to above submissions, the learned counsel for the State Commission has made the following submission:

(a) The aforesaid argument is irrelevant and immaterial since in determining the ARR of the distribution licensee the cost of power purchased by the licensee is the same. The revenue realized by the licensee is calculated at the rate at which energy is sold to the consumer, whether by the licensee directly or through its franchisee. Hence, the rate at which the franchisee draws power from the licensee is immaterial for the purpose of ARR determination of the licensee.

(b) In calculating the revenue of the licensee it is only the rate which the consumer ultimately pays which would be taken into account for determining the revenue in the ARR. Hence, whatever may be the transaction between the distribution licensee and the franchisee will not alter in any way the ARR of the licensee as a whole.

(c) The Appellant has also been unable to establish as to how the ARR has in any way been impacted by the so called difference in rates as mentioned above.

59. The learned Counsel for the Distribution Licensees has made the following submissions:

(a) The bulk supply price of Rs. 2.64 per unit has been fixed for the distribution licensee. The Discoms are unable to recover the bulk supply price of Rs. 2.64 per unit and are incurring heavy losses. The distribution in Agra was recovering only Rs. 1.27 per unit.

(b) In order to mitigate the situation, DVVNL initiated bidding process for identifying the Franchisee on the Input based Model, i.e., the franchisee will buy the electricity from the utility and shall pay the energy charges to the utility at a pre-determined rate. The franchisee will have to collect revenues from the consumers through raising bills so as to have sustainable commercial operation. The Torrent Power among all the bidders quoted the highest rate of Rs. 1.54 per unit for the first year and consequent increase every year. Accordingly, DVVNL entered into agreement with Torrent to operate as their franchisee.

(c) The payment made by Torrent Power Ltd a franchisee of DVVNL is based on Input unit on the basis of agreement entered into between Torrent Power Ltd and DVVNL.

(d) The *Hon'ble High Court of Bombay, Nagpur Bench in its judgment dated 12.02.2008 in W.P. No. 3701 of 2007; **Citizen Forum Maharashtra Vs state of Maharashtra** (Paras 45-51)* has upheld the power of distribution licensee to appoint distribution franchisee for the benefit of consumers.

(e) The delay in commissioning of Transmission lines relates FY 2009-10 and UP Transmission Licensee and the said issue cannot be raised in the present Appeal relating to Discoms.

- 60.** We have carefully considered the submissions made by both the parties. The crux of the submissions made by the Appellant is that the Franchisee is being supplied power at rate lower than the bulk supply rate of the Distribution Licensee itself. The shortfall in the revenue of the licensee is to be recovered from the consumers of the Licensee in the remaining area to meet its ARR.
- 61.** According to the Appellant, the State Commission has allowed higher power purchase cost to the Distribution Licensees.. It is further stated that the distribution licensees are purchasing high cost power on short term basis without proper planning and without entering into long term PPAs at competitive rates. But the State Commission has failed to initiate an enquiry into such power purchase by the distribution licensees.

62. According to the State Commission the ground urged by the Appellant is irrelevant and immaterial since in determining the ARR of the distribution licensee, the cost of power purchased by the licensee is the same and hence, the rate at which franchise draws power from the licensee is immaterial for the purpose of ARR determination of the licensee.

63. The reply statements of the Respondent including the State Commission are not only evasive but also not to the core of the issue raised by the Appellant.

64. On going through the impugned order it is clear that the State Commission has allowed the power purchase cost as claimed by the distribution licensee without considering the following salient aspects.

“ i) One of the Distribution Licensees – Dakshin anchal Vidyut Vitran Nigam Limited has given a franchisee in the Agra area which has been given to Torrent Power Limited. The bulk supply price fixed by the State Commission for purchase of power by the distribution licensees is Rs.2.64 per unit for FY 2011-12 and Rs.3.75 per unit of FY 2012-13 and Rs. and the same is being supplied to Torrent Power Limited at Rs.1.54 per unit for FY 2010-11, Rs.1.55 per unit for FY 2011-12 and Rs.1.71 per unit 2012-13, Therefore, the consumers in all other areas are subsidizing the supply of power by Dakshin anchal Vidyut Vitran Nigam Limited to Torrent Power Limited.

ii) The Rosa Power Plant was commissioned on 12/13.3.2010. However, the necessary transmission evacuation facility (220KV line) was not available due to the mistakes of the distribution licensee/transmission licensee/Rosa Power Supply Co. Ltd and the power could not be evacuated from the COD of Rosa Power Plant on 12/13.3.2010 for a period of 6 months, when the transmission facility came and maximum power generated by Rosa supply to nearby rural area in 6 months were licensees received fix amount per month from such consumers. This amount can not be passed on to the consumers. This aspect was raised by the Appellants but no finding has been given by the State Commission.

- 65.** The finding of the State Commission is only this:-“C) The Commission’s view: - 3.8.6 The Commission notes that M/s Torrent Power Ltd has been appointed input based franchisee by the licensee.”
- 66.** According to the distribution licensee, since the Torrent Power was chose as a input based franchisee which was improving recovery of the prices in a particular franchisee area and the franchise arrangement has been approved by the High Court of Bombay in W.P. No.3701 of 2007 and therefore there is nothing wrong in appoint Torrent Power as a franchisee. This contention by the Distribution Licensee is not relevant. The issue raised by the Appellants is not with reference to the power of the distribution licensee to appoint a franchisee. The real question

arises is this - "When a franchisee has been given by the distribution license in its area of operation, who should the consumers of the other distribution licensees bear the tariff burden on account of supply of cheaper power by one of the Distribution Licensees to the franchisee?"

- 67.** The contention of the Appellant appears to be attractive at first rush of blood. But there is something deeper. The issue in the present case can be addressed simply by saying that the Commission did not allow the Licensee to recover its full ARR. The approved average revenue recovery rate through tariff is only 77% of the average cost of supply. Thus, the Commission has left huge gap including the loss suffered due to lesser tariff to the franchisee.
- 68.** Let us tackle the issue from the root to settle it for once and all.
- 69.** The Licensee gathers power to distribute electricity in its area of supply through another person (Franchisee) from 7th Proviso to section 14 of the Act reproduced below:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

- 70.** The question arises as to why a licensee should appoint a franchise for a particular area. The licensee control large area

of supply. Some areas within its area of supply have higher losses than the average loss. The licensee may deem it fit to hand over such an area, where system losses are higher than the average losses in his area of supply to some franchise. It is to be noted that when losses are higher, the average revenue recovery rate would have to be lesser than average revenue recovery rate of the licensee. The franchise is expected to purchase power from the licensee and supply to the consumers at the same tariff fixed for other areas of the licensee. The franchise has to incur capital expenditure to reduce the losses to make the franchise business workable. If the franchise purchase power at average power purchase cost of the licensee and supply at tariff applicable to other areas, the franchise business will never become viable.

- 71.** There are many models of appointing the Franchisee and one of such model is 'on the basis of Input costs'. Under this model the Franchisee is sold electricity by the licensee at certain predetermined rate and the franchisee distributes the electricity in its area and recovers the costs at price not more than retail tariff of the Licensee. The Franchisee is responsible for the reduction of losses. The areas given to it for distribution is high loss area. The franchisee would earn profit only if he is able to reduce the losses to a certain level else he would suffer loss.
- 72.** The average revenue recovery rate of Agra was only Rs 1.27 per unit. The bulk supply rate for the licensee was Rs 2.64 per unit. Thus, the licensee was suffering a loss of Rs 1.37 per

unit to supply power in this area. Accordingly, the consumers of other areas would have been subsidizing this amount. With the appointment of a Franchisee at Bulk supply rate of Rs 1.54 per unit, the cross subsidisation by the consumers of other areas gets mitigated by 27 paise per unit.

- 73.** Accordingly, the issue is decided against the Appellants
- 74.** With regard to Rosa Power, it was contented that this is not a tariff related matter. Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar Pradesh. Any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore it becomes a tariff issue. In fact, this aspect was raised by the Appellant before the State Commission but no finding was given by the State Commission. Therefore, since the issue has not been decided by the State Commission it requires re-consideration by the State Commission and to decide the issue afresh.
- 75.** Other issues raised by the Appellant are of minor nature and would have no impact on the tariff. Therefore, these issues are of no consequences.
- 76.** In addition to the above issues, the Appellants in Appeal No 11 of 2013 and 12 of 2013 have raised following additional points to

our consideration.

- i. Estimation of unmetered supply in impugned tariff order based on the circular of UPPCL instead of ascertaining the sales forecast as per Tariff Regulations, 2006.
- ii. In absence of the fixed assets register, depreciation allowed arbitrarily on ad hoc basis without any verification as to actual use and existence fixed assets.
- iii. T&D loss allowed to be 28.75% against the estimated 26.96% without any rational and basis.

77. We shall now take up each of the above issues one by one. The first issue for our consideration is related to estimation of unmetered supply in impugned tariff order based on the circular of UPPCL.

78. The learned Counsel for the Appellant asserted that for the purpose of estimating the unmetered supply, the Commission has utilized a circular of the UPPCL as the basis. After enactment of Electricity Act, 2003 a circular of the UPPCL cannot be binding on the Commission.

79. Refuting the contentions of the Appellant, the learned Counsel for the commission made elaborate submissions as under:

- (a) There is nothing in the Impugned Tariff Order which suggests that the Circular of the UPPCL is binding on the Commission. Merely because the Commission uses a particular circular as the basis of estimating the unmetered sales, it does not mean that such circular is binding on the Commission.
- (b) If the Appellant's argument were accepted, merely because a quasi-judicial or judicial forum accepts an argument of a party, it must be deemed that the argument is binding on such party. It is submitted that such could never be the case.
- (c) However, without a latest / recent study available the question that arises is how does the Commission estimate unmetered sales without the normative values? Further, how can it proceed to estimate revenue of the unmetered category / sub-category of consumers without the normative values.
- (d) In the prevailing circumstances, the Commission used the only normative standard available - i.e the UPPCL Circular.
- (e) The Commission has however time and again directed the State Distribution Licensees to get the study done to arrive at the latest normative values for all unmetered consumer categories.
- (f) The Commission has subsequently done the true up of

period FY 2000-01 to FY 2007-08, but have not analysed the revenue received from each category as the data was not available. As the first year (base year) under UPERC Tariff Regulations was FY 2007-08 hence the Commission order / directed the licensees to provide category and sub-category wise revenue data. In order to obviate the possibility of the utilities loading theft on the unmetered category of consumers. Hence, it would not be proper to calculate the normative values from the audited figures but a proper study is required for the same to get the correct values / figures.

80. The learned Counsel for the 3rd Respondent DISCOMS made following submissions.

- (a) The 3rd Respondent has filed its Annual Revenue Requirement/Tariff Petition for FY2012-13 on 21.02.2012 as per methodology prescribed in the Tariff Regulations, 2006. The Tariff Regulations provides that ARR Petition shall contain details of the estimated expenditure and the expected revenue that Distribution Licensee projects that it will recover/incur in the ensuing Financial Year at the prevailing tariff. For estimation of revenue for ensuing year, sale forecasts are required. Licensee in its petition has submitted sale forecast for different categories of consumers. In the sale forecast licensee has estimated sale for the unmetered category of consumers on the basis of norms fixed by Uttar Pradesh Power Company Limited

(UPPCL) in 2001 before unbundling of erstwhile State Electricity Board. The Circular No. 2649/CUR/L-1 dated 20.07.2001 was issued by UPPCL to cope up with the problem to assess the energy consumed by various categories of unmetered consumers to account these units in its commercial reports. The circular further states that if meters are installed then only metered consumption shall be recorded in commercial reports. After formation of distribution companies, the same rationale is being used for accounting unmetered consumers in their respective areas. The Commission has also adopted the same norms for its projection as is evident from tariff order. Moreover, no fresh study has been carried out to revise the norms, as such licensee is relying on the norms fixed in 2001.

- (b) The Respondent files all the data along with its ARR Petition before the Commission and the Commission approves the ARR after due prudence check. The Commission in its Tariff order dated 19.10.2012 after due consideration has found the norms contained in the UPPCL aforesaid letter dated 20.07.2001 prudent and therefore, adopted the same.

- 81.** In the light of rival contention of the parties we shall now discuss the issue
- 82.** The issue of unmetered supply is not restricted only to the State of Uttar Pradesh but is prevalent in every State throughout the country especially in the agriculture sector. The Commission

has to adopt some normative value for estimation of the unmetered supply. In the absence of any scientific study made available to the Commission, the Commission has adopted the norms available at that relevant time. The Commission had been directing the distribution licensees to carry out study done for accurate estimation of consumption by unmetered supply. We accept the submissions made by the Commission and do not intend to interfere with the impugned order at present. However, we feel that the important issue cannot be postponed indefinitely at the hands of distribution licensees. We direct the Commission to get the required study done by itself through some expert consultant in a fixed time frame.

- 83.** Next issue for our consideration is related non availability of Fixed Asset Registers.
- 84.** The learned Counsel for the Appellant submitted that the Commission have been approving the depreciation in an arbitrary manner in the absence of Fixed Asset Registers. The Commission is expected allow depreciation on the book value of the assets in use which cannot be done in the absence of FAR.
- 85.** The learned Counsel for the Commission submitted that The Commission has repeatedly in the past and even in the present impugned order directed the licensee to maintain the Fixed Assets Register. Even in the impugned order the Commission has passed the same direction.

- 86.** The Commission in its Order dated 18.05.2012 recorded the submissions of the representatives of Discoms that they had already engaged an agency for the purpose and the work of streamlining the Fixed Register. Subsequently, in the Impugned Order the Commission has directed the Discoms to prepare a fixed asset register and detailed report as to how the Discoms are maintaining fixed asset register. The Discoms are endeavouring to complete the process of creating fixed asset register.
- 87.** The issue raised by the Appellants is an important issue. Fixed Asset Register is the very foundation of the distribution business. The parameters such as Return on Equity, depreciation etc depends on the entries made in the Fix Asset Register. The Commission has been giving directions to the distribution licensee to prepare the Fixed asset Register. In the light of categorical submission made by the Respondent Discom that they are endeavouring to complete the process of creating fixed asset register, we do not intend to interfere with the impugned order. However, we direct the Commission to fix a time frame for creating the Fix Asset Register by all the licensees under its jurisdiction.
- 88.** The third and last issue raised by the Appellant in these appeals is related to distribution losses considered by the Commission.
- 89.** The primary argument of the Appellant appears to be that the

Commission could not have approved a T&D loss higher than what was proposed by the licensee.

90. Under the Scheme of the Electricity Act, the Commission is a Regulator. In exercise of its powers as a Regulator, the Commission is not bound by the proposals of the licensee. If the licensee proposes a figure (of any cost item) that the Commission feels is too high, the Commission may reduce it. Equally, if the Commission feels that the licensee has underestimated a cost item, it may approve a higher number.
91. There is no principle of regulatory jurisprudence that the Commission must always approve a figure lower than what the licensee proposes. Ref in this regard may be had to the Judgment of the Supreme Court of India in **V. S. Rice Oil Mills Ltd Vs State of Andhra Pradesh - (1964) 7 SCR 456**; in the following terms:-

*“15.....On the other hand, if the words used in Section 3 (1) are not reasonably capable of the construction for which the appellants contend, **then it would be unreasonable and illegitimate for the Court to limit the scope of those words arbitrarily solely for the purpose of establishing harmony between the assumed object and the scheme of the Act.** Therefore, it is necessary to examine the words used in Section 3 very carefully. Let us first read **Section 3 (1)**:*

*“The State Government so far as it appears to them to be **necessary or expedient for maintaining,***

increasing or securing supplies of essential articles or for arranging for their equitable distribution and availability at fair prices may, by notified order, provide for regulating or prohibiting the supply, distribution and transport of essential articles and trade and commerce therein.”

Sub-Section (2), provides that without prejudice to the generality of the powers conferred by sub-section (1), an order made there under may provide for objects specified in clauses (a) to (k). The majority of these objects may not be applicable to the State, while conceivably, some may be applicable to it.”

...

20. Then it was faintly argued by Mr Setalvad that the power to regulate conferred on the respondent by Section 3 (1) cannot include the power to increase the tariff rate; it would include the power to reduce the rates. This argument is entirely misconceived. The word “regulate” is wide enough to confer power on the respondent to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3 (1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic

factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. That is why we do not think Mr Setalvad is right in contending that even though the respondent may have the power to regulate the price to which electrical energy should be supplied by it to the appellants, it had no power to enhance the said price. We must, therefore, hold that the challenge to the validity of the impugned notified orders on the ground that they are outside the purview of Section 3 (1) cannot be sustained.”

92. In the light of above, the issue is decided against the Appellants.

93. Summary of the findings

- (a) **Now it is clarified by the learned Counsel for the State Commission that the directions of this Tribunal in Appeal No.121 of 2010 have been complied with and audited accounts up to the Financial Year 2010-11 have now been furnished to the State Commission. It is also submitted that the Distribution Licensee has already submitted the true-up petition for the years 2008-09 to 2010-11. The learned Counsel for the State Commission also pointed out that the State Commission has already issued true-up orders up to the Financial Year 2008. In view of the above submissions made by the learned Counsel for the Respondents, we are unable to hold that**

our directions issued in Appeal No.121 of 2010 have not been complied with by the State Commission. This point is accordingly decided as against the Appellant.

- (b) Admittedly, the State Commission is expected to act transparently without any delay as per section 86(3) of the Act. The State Commission while taking the process in a transparent manner has to issue the tariff order within time limit otherwise this would be questioned before this Tribunal which in turn would comment negative remarks against the State Commission. Therefore, the State Commission has to finish the process of tariff determination and issue the tariff order on the basis of the available information collected during the course of the process. The transparency cannot mean that all the consumers are to be involved at every step of tariff determination. Accordingly, this issue is decided as against the Appellant.
- (c) As pointed out by this Tribunal, in its judgment in Appeal No. 240 of 2010 Section 93 of the Act would not allow the proceedings of the Commission invalidated merely because there is a ground of existence of any vacancy or defect in the constitution of the appropriate Commission. The ratio of this case would squarely apply to the present case also. Consequently, we have to hold that there is no irregularity in the procedure

adopted by the surviving two members in signing the tariff order that too after the Chairman's appointment was set aside by the Hon'ble Supreme Court. Accordingly, this issue is decided as against the Appellant. Accordingly, this issue is decided as against the Appellant.

- (d) This Tribunal in its judgment in Appeal no. 135 of 2010 (Polyplex Corporation Vs Uttarakhand Commission) has held that the Tariff Policy postulates that the category-wise subsidy has to be within $\pm 20\%$ of average cost of supply by the end of the year 2010-2011 and not the tariff for each and every consumer that is to say, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further. This ratio is equally applicable to the present set of facts. The question is decided accordingly. Accordingly, this issue is decided as against the Appellant.
- (e) The average revenue recovery rate of Agra was only Rs 1.27 per unit. The bulk supply rate for the licensee was Rs 2.64 per unit. Thus, the licensee was suffering a loss of Rs 1.37 per unit to supply power in this area. Accordingly, the consumers of other areas would have been subsidizing this amount. With the appointment of

a Franchisee at Bulk supply rate of Rs 1.54 per unit, the cross subsidisation by the consumers of other areas gets mitigated by 27 paise per unit. Accordingly, this issue is decided as against the Appellant.

- (f) Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar Pradesh. Any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore it becomes a tariff issue. In fact, this aspect was raised by the Appellant before the State Commission but no finding was given by the State Commission. Therefore, since the issue has not been decided by the State Commission it requires re-consideration by the State Commission and to decide the issue afresh. Accordingly, this issue is decided in favour of the Appellant.
- (g) The issue of unmetered supply is not restricted only to the State of Uttar Pradesh but is prevalent in every State throughout the country especially in the agriculture sector. The Commission has to adopt some normative value for estimation of the unmetered supply. In the absence of any scientific study made available to the Commission, the Commission has adopted the norms available at that relevant time. The Commission had

been directing the distribution licensees to carry out study done for accurate estimation of consumption by unmetered supply. We accept the submissions made by the Commission and do not intend to interfere with the impugned order at present. However, we feel that the important issue cannot be postponed indefinitely at the hands of distribution licensees. We direct the Commission to get the required study done by itself through some expert consultant in a fixed time frame. Accordingly, this issue is decided as against the Appellant.

- (h) The issue raised by the Appellants is an important issue. Fixed Asset Register is the very foundation of the distribution business. The parameters such as Return on Equity, depreciation etc depends on the entries made in the Fix Asset Register. The Commission has been giving directions to the distribution licensee to prepare the Fixed asset Register. In the light of categorical submission made by the Respondent Discom that they are endeavouring to complete the process of creating fixed asset register, we do not intend to interfere with the impugned order. However, we direct the Commission to fix a time frame for creating the Fix Asset Register by all the licensees under its jurisdiction. Accordingly, this issue is decided as against the

Appellant.

- (i) **There is no principle of regulatory jurisprudence that the Commission must always approve a figure lower than what the licensee proposes. Ref in this regard may be had to the Judgment of the Supreme Court of India in V. S. Rice Oil Mills Ltd Vs State of Andhra Pradesh - (1964) 7 SCR 456. Accordingly, this issue is decided as against the Appellant.**

94. In view of our findings, these Appeals are partly allowed. The State Commission is directed to pass the consequential orders in the light of our finding referred to above, after hearing the parties.

95. However, there is no order as to costs.

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 28th Nov, 2013

√REPORTABLE/NON-REPORTABLE