

**Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 04 of 2011**

**Dated : 15<sup>th</sup> December, 2011**

**Present: Hon'ble Mr. Rakesh Nath, Technical Member  
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

**In the matter of:**

Noida Power Company Limited  
Commercial Complex, H-Block,  
Alpha-II, Sector, Greater Noida – 201 308  
Uttar Pradesh

**...Appellant(s)**

Versus

Uttar Pradesh Electricity Regulatory Commission  
Kisan Mandi Bhawan,  
II Floor, Gomti Nagar  
Lucknow – 226 010  
Uttar Pradesh  
(through its Secretary)

**...Respondent (s)**

Counsel for the Appellant(s):

Mr. M.G. Ramachandran  
Mr. Anand K. Ganesan  
Mr. Vishal Gupta  
Mr. Mayank Mishra  
Mr. Sanjeev Kapoor  
Ms. Ranjitha Ramachandran

Counsel for the Respondent (s) :

Mr. Abhishek Baid  
Mr. Kunal Verma  
Mr. Ashok Kumar Singh

## **JUDGEMENT**

### **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

This appeal has been filed by Noida Power Company Ltd. against the order dated 14.10.2010 passed by the Uttar Pradesh Electricity Regulatory Commission (“State Commission”) deciding the Annual Revenue Requirement and tariff for the FY 2009-10 and true-up of the financials for the FYs 2006-07, 2007-08 and 2008-09.

2. The appellant is a distribution licensee undertaking distribution and supply of electricity in Greater Noida area. The State Commission is the respondent. The appellant’s grievance is that a substantial part of its claim of revenue requirements for the FY 2009-10 and actual expenses incurred during the FYs 2006-07 to

2008-09 have not been allowed by the State Commission.

3. The brief facts of the case are as under:

3.1 On 26.6.2007, the State Commission determined the Aggregate Revenue Requirement (“ARR”) and tariff of the appellant for the FY 2006-07 and true up of financials for the FYs 2004-05 and 2005-06. Further, the State Commission on 01.09.2008 determined the ARR and tariff of the appellant for the FY 2007-08 and the FY 2008-09 and true up of the FY 2006-07.

3.2 On 28.11.2008, the appellant filed a petition being No. 590 of 2008 before the State Commission seeking approval for its ARR and tariff for the FY 2009-10 and true up for the previous years.

3.3 The State Commission vide its order dated 14.10.2010 determined the ARR and tariff for FY 2009-10 and true up of financials for the FYs 2006-07 to 2008-09.

3.4 Aggrieved by the order dated 14.10.2010 of the State Commission, the appellant has filed this Appeal.

4. Ld. Counsel for the appellant has raised the following issues:

- (i) Assumption of increased sales revenue for FY 2009-10: The State Commission has applied to the appellant same retail tariff as determined for the four state owned distribution licensees vide a separate order dated 31.03.2010. The said tariff was made applicable to the appellant with effect from 15.04.2010 as per the implementation of the same

retail supply tariff throughout the State. Thus, the appellant raised bills on the consumers as per the then prevailing tariff during the entire tariff period from 01.04.2009 to 31.03.2010. However, the State Commission has determined the revenue from sale of power of the appellant for the FY 2009-10 at the tariff determined in the impugned order thus increasing the assumption of sales revenue by Rs.39.83 crores. Accordingly, the appellant is entitled to the correction of sales revenue along with carrying cost thereon, till the appellant is able to recover the same in full.

- (ii) Assumption of higher realization per kwh sold for the FY 2009-10: The State Commission while computing revenue from existing tariff had arbitrarily assumed higher weighted average

realization @ Rs.4.48 per kwh as against the actual weighted average realization @ Rs.4.25 per kwh till January, 2010 submitted vide the appellant's letter dated 16.04.2010. The arbitrary over estimation by the State Commission has resulted in assumption of increased sales revenue of Rs.13.49 crore as per the audited annual accounts for FY 2009-10. The appellant is entitled to correction in this regard along with the carrying cost.

- (iii) Assumption of lower sales volume and corresponding lower power purchase quantum for the FY 2009-10: The State Commission assumed lower sales volumes of 612.83 Million Units ("MUs) only as against 645.98 MU which should have been worked out as per the methodology adopted by the State Commission. The actual quantum of power

sold as per the audited accounts is 650.79 MUs. This has resulted in a shortfall of Rs.17.65 crore in the ARR, the cost of which needs to be allowed along with the carrying cost.

- (iv) Distribution losses for FY the 2007-08 and the FY 2009-10: In the impugned order, the State Commission while truing up for the FY 2007-08, adopted the distribution losses at 7.85%, as provisionally approved vide order dated 01.09.2008. In the subsequent FY 2008-09, the State Commission retained the loss level at 8%. The loss level for the FY 2007-08 was not fixed by the State Commission as a loss reduction trajectory and was only a provisional figure and was required to be adjusted based on the audited data available at the time of truing up.

In the FY 2009-10 also the State Commission has reduced the distribution loss target from 8% fixed for the FY 2008-09 to 7.75% without appreciating that the relevant financial year was already over and there was no occasion for the appellant to reduce the distribution loss. The total distribution loss of the appellant at 8% is minimum amongst the distribution licensee in the contrary and the reduction in the losses lower than 8% cannot be a norm on the ground that the licensee should any way progressively reduce the loss. Any achievement of reduction below 8% should be allowed as an efficiency gain and not fixed as a benchmark for the subsequent year. The appellant is being penalized for being efficient while other licensees in the State



are being allowed much higher loss level by the State Commission.

- (v) Disallowance of power purchase at marginal cost for the FYs 2006-07, 2007-08 and 2009-10: The disallowance of power purchase units on account of non-achievement of the distribution loss target should be at pooled power purchase cost instead of the highest marginal cost.
- (vi) Transmission charges for the FY 2009-10: The State Commission has allowed only 12.15 crore as transmission charges as against 13.57 crore actually paid by the appellant to outside entities such as POWER GRID and the State transmission licensee, as per the audited accounts.

(vii) Operation & Maintenance expenses for FY 2007-08, FY 2008-09 and FY 2008-09: The appellant has raised the following issues in respect of O&M expenses:

- (a) The State Commission instead of applying the Compounded Annual Growth Rate (CAGR) for each element of Operation & Maintenance ('O&M') expenses viz. Employees expenses, Administrative & General ('A&G') expenses and Repair & Maintenance ('R&M') expenses separately has proceeded on the consolidated CAGR. The CAGR should have been applied individually to each component of the O&M expenses in accordance with the Tariff Regulations.

- (b) The State Commission has not followed its regulations for the incremental O&M expenses in true up of the financials for the FY 2008-09.
- (c) In the FY 2009-10, the State Commission has wrongly deducted Rs.57 Lacs towards capitalization of O&M expenses in the FY 2009-10 even though O&M expenses for the base year i.e. FY 2007-08 had been determined by the State Commission after deducting expenses computed in that year on the fixed assets.
- (d) The State Commission while determining the O&M expenses for FY 2009-10 ought to have considered the statutory and other relevant expenses, viz., fees paid to the State Commission, advertising expenses for initiating competitive bidding for procurement of power, expenses incurred on demand side management,

functioning of Consumer Grievance Redressal Forum etc., in addition to the normative O&M expenses for day to day running and maintenance of the assets.

(viii) Servicing of Regulatory Asset for the FYs 2007-08, 2008-09 and 2009-10: The State commission has been leaving a revenue gap even on the admitted and allowed revenue requirements after due prudence check. Such revenue gap is treated as Regulatory Asset to be adjusted in future tariff so as to avoid immediate tariff shock. However, the State Commission has not been providing the financing cost of such revenue gap/regulatory asset. The State Commission also wrongly considered availability of surplus fund of Rs.19.64 crore determined in its tariff order dated 01.09.2008 recoverable from

UPPCL, whereas the appellant was restrained from recovering the same from UPPCL.

(ix) Interest & Finance charges for FYs 2007-08, 2008-09 & 2009-10: The State Commission has not allowed the financing charges such as processing fee, bank charges and other service charges which were incurred by the appellant for obtaining loans to fund the capital expenditure, regulatory assets and working capital requirements, in contravention to the Tariff Regulations.

(x) Interest on working capital for the FYs 2007-08, 2008-09 and 2009-10: The appellant has deposited an amount of Rs.11.28 crore as security deposit with UPPCL. The State Commission has wrongly considered the availability of aforesaid amount

towards working capital requirements thereby reducing the working capital loan requirements, contrary to its earlier tariff orders dated 26.06.2007 and 01.09.2008.

- (xi) Efficiency gain on swapping of loan for the FY 2009-10: The State Commission has passed on the entire benefit of loan swapping to the consumers without giving any benefit for the appellant, contrary to its Tariff Regulation:
- (xii) Bad debts: The State Commission has not taken into account the non-recovery of electricity duty from the consumers towards bad debts. For the FY 2009-10, the State Commission has wrongly allowed bad debts @ 0.69% of net sales instead of 0.75% of gross sales including electricity duty.

(xiii) Contingency Reserve for the FYs 2007-08, 2008-09 and 2009-10: The State Commission has not allowed the contingency reserve during FY 2009-10 on the ground of huge revenue gap. Even in the FYs 2007-08 and 2008-09 the State Commission has arbitrarily assumed hybrid approach for applying contingency reserves and approved the same at 0.25% of opening Gross Fixed Assets instead of 0.5% as allowed in the Tariff Regulations.

(xiv) Capitalization of interest for the FYs 2007-08, 2008-09 and 2009-10: As per Accounting Standard AS-16, the interest on borrowing of the funds for capital projects which get completed within one year cannot be capitalized and has to be charged as revenue expenditure in the profit and loss account. Despite

the above, the State Commission has wrongly directed capitalization of such interest during construction, which is contrary to the Tariff Regulations.

(xv) Consultancy fee taken as non-tariff income for the FY 2006-07: The State Commission has wrongly taken into account the consultancy fees earned by the appellant to reduce the revenue requirements of the appellant.

(xvi) Disallowance of 0.5% on the loans for the FY 2006-07: The State Commission in the FY 2006-07 has not allowed 0.5% on the loans availed as per the provisions of the Electricity (Supply) Act, 1948 despite the fact that Sixth Schedule to the 1948 Act



was made applicable by the State Commission during the said period.

(xvii) Capital expenditure for the FY 2007-08: The State Commission has arbitrarily approved the capital expenditure of Rs.88.89 crore as against Rs.89.07 crore on the basis of actual audited accounts.

(xviii) Tax for the FY 2009-10: In the FY 2009-10 the State Commission has erred in allowing taxes at Rs.2.48 crore instead of Rs.5.13 crore as per the audited accounts.

5. On the above issues the Ld. Counsel for the appellant made detailed submissions assailing the impugned order of the State Commission. On the other hand, the Ld. Counsel for the State Commission made submissions

supporting the findings in the impugned order. After examining the contentions of the parties, the following questions would arise for our consideration:

- (i) Has the State Commission erred in estimating the revenue from sale of power of the appellant for the FY 2009-10 by considering the retail tariff as determined in the impugned order even though the revised tariff was made effective from 15.04.2010?
- (ii) Whether the State Commission has erred in assuming higher sales realization per unit for the FY 2009-10?
- (iii) Whether the State Commission erred in estimating the lower sales volume and corresponding lower

power purchase quantum for the appellant for the FY 2009-10?

- (iv) Was the State Commission correct in considering the distribution losses at 7.85% in the true up of the FY 2007-08 below the benchmark of 8% fixed for the FY 2008-09?
- (v) Whether the State Commission was correct in fixing the distribution loss at 7.75% for the FY2009-10 even though the impugned order was passed after the financial year was over?
- (vi) Whether the State Commission was correct in disallowing the power purchase cost on account of actual distribution loss being higher than the

approved loss at the marginal cost instead of average cost of power purchase?

(vii) Whether the transmission charges for POWER GRID and State Transmission licensee were correctly provided for by the State Commission?

(viii) Whether the State Commission has allowed the O&M expenses correctly as per the Regulations?

(ix) Whether the State Commission has erred in disallowing the servicing of the Regulatory Assets created by the State Commission?

(x) Has the State Commission erred in not providing the financing charges as per the Regulations?

- (xi) Has the State Commission erred in considering the amount deposited by the appellant with UPPCL as available to the appellant towards the working capital requirement?
- (xii) Has the State Commission erred in not allowing sharing of benefits due to swapping of loans to appellant as per the Regulations?
- (xiii) Has the State Commission erred in disallowing the bad debts according to the claim of the appellant?
- (xiv) Has the State Commission erred in not allowing the contingency reserve as per the claim of the appellant?

(xv) Whether the State Commission was right in not allowing the interest on the capital projects which got completed within the year as revenue expenditure as per the Accounting Standard AS-16?

(xvi) Was the State Commission correct in deducting the consultancy fee earned by the appellant from the ARR for the FY 2006-07?

(xvii) Was the State Commission correct in not allowing the 0.5% on the loans allowed for the FY 2006-07 as per the provisions of the 1948 Act?

(xviii) Has the State Commission not considered the actual capital expenditure for the FY 2007-08 as per the audited accounts?

(xix) Has the State Commission not allowed the tax for the FY 2009-10 correctly?

6. Let us examine the first issue regarding revenue from sale of power.

6.1 According to Ld. Counsel for the appellant, the State Commission has wrongly considered the revised retail tariff while determining the revenue from sales even though the tariff was only made applicable after the completion of the FY 2009-10.

6.2 According to Ld. Counsel for the State Commission the revenue gap determined for the FY 2009-10 was approved on provisional basis and was subject to final true-up during the next ARR/tariff petition process. This

issue would be dealt with by the State Commission when the appellant files its true-up petition for the FY 2009-10 with all details and relevant records.

6.3 We notice that the State Commission has estimated the revenue from sale of power during the FY 2009-10 at the tariff approved in the impugned order. This is wrong, considering that the approved tariff has been made effective after 31.3.2010. The consumers have been billed by the appellant at the tariff prevailing during the FY 2009-10 and accordingly the revenue at the approved sales of 612.83 MUs should have been Rs.274.84 crore. The State Commission erred in estimating the revenue of Rs.314.67 crore at the tariff approved in the impugned order. Thus, the State Commission wrongly overestimated the sales revenue of the appellant. Accordingly, the State Commission is directed to true up



the revenue sales and allow the correction in ARR on account of excess revenue estimated for the FY 2009-10 with carrying cost.

7. The second and the third issues are interconnected and therefore being dealt with together. The second issue is regarding assumption of higher realization per unit of sale of electricity for the FY 2009-10. The third issue is regarding assumption of lower sales volume and corresponding lower power purchase quantum for the FY 2009-10.

- 7.1 According to the Ld. Counsel for the appellant the State Commission has incorrectly assumed higher weighted average realization per unit of sale and lower sales volumes.

7.2 According to the Learned Council for State Commission, the contentions of the appellant are based on the audited accounts which were not available at the time of consideration of ARR and tariff for the FY 2009-10. Further, actual unaudited data till January, 2010 available with the State Commission showed that actual sales were to the tune of 540.43 MUs which when pro-rated for 12 months worked out 648.51. The Commission based on the actual data till January, 2010 and past trends pegged the sales at 612.83 MUs.

7.3 The relevant paragraph relating to assessment of the energy sales for FY 2009-10 in the impugned order are reproduced below:-

**“6.3.2** *The energy sales projected by NPCL for FY 2009-10 are 732.36 MUs. However, the Commission had sought actual unaudited data from license till January 2010, wherein the total sales were to the*

*tune of 538.31 MUs. These sales if pro-rated for 12 months compute to 645.98 MUs.*

**6.3.3** *The Commission has observed that the sales projected by licensee in the petition are on much higher side than the actual levels. The projected growth over FY 2008-09 audited figures is approx 49% whereas the sales growth if compared with pro-rata sales of 645.98 MUs is around 32% over FY 2008-09 audited figures.*

**6.3.4** *The Commission based on the actual data till January 2010 and based on past trends has approved sales for each sub-category and accordingly has approved the total sales at 613 MUs which is a growth of 24.87% over FY 2008-09 audited figures of 490.79 MUs.”*

7.4 We find that the State Commission had computed the sales on pro-rata basis at 645.98 MUs based on the actual sales till January, 2010 as per the unaudited data of the Appellant. However, the State Commission arbitrarily reduced it to 613 MUs which resulted in increasing the weighted average realization as also reducing the power purchase quantum, affecting the revenues requirement of the

appellant. The State Commission is directed to true up the energy sales and power purchase quantum for the FY 2009-10 as per the audited accounts and allow the additional revenue requirement on this account to the appellant with carrying cost.

8. The fourth and the fifth issues are regarding the distribution loss for the FY 2007-08 and the FY 2009-10 respectively. Since both the issues are relating to distribution loss, the same are being dealt with together.

8.1 According to Ld. Counsel for the Appellant, the distribution loss for the FY 2007-08 decided vide order dated 01.09.2008 of the State Commission was considered at 7.85% because of some marginal discrepancy in sales figures and not fixed as a loss reduction trajectory, particularly in view of fixation of

loss level for the subsequent financial year 2008-09 at 8%.

8.2 According to Ld. Counsel for the State Commission, loss level for FY 2007-08 was fixed on the basis of actual unaudited data. Loss level once fixed cannot be changed in truing up.

8.3 We notice that the distribution loss level for the FY 2007-08 was approved by the State Commission's order dated 01.09.2008 at 7.85% on the basis of the actual unaudited data furnished by the appellant against the claim of the appellant at 8.02%. However, the loss level for the following year 2008-09 was fixed at 8%. The State Commission also recorded in the order dated 01.09.2008 that the benchmark for the FY 2008-09 was still retained at 8%. It is also noted that the order dated 01.09.2008

was issued after the FY 2007-08 was already over. Accordingly, the State Commission computed the distribution loss on the basis of the unaudited data of energy sales and power purchase quantum submitted by the appellant.

8.4 In the true up for the FY 2007-08, the appellant sought the distribution loss of 8%, as per the audited accounts.

8.5 We reproduce below the findings of the State Commission in this regard:

**“4.2 DISTRIBUTION LOSS:**

4.2.1. *The distribution loss approved by Commission for FY 2007-08 was 7.85% based on actual unaudited sales and purchase data. The licensee in the true-up has sought distribution losses at 8.0% for FY 2007-08.*

4.2.2 *Since the losses were approved at that time based on actual unaudited data, the Commission*

*doesn't feel it is prudent to approve losses at higher %. Accordingly the losses are approved/trued-up for FY 2007-08 at 7.85%.*

8.6 We notice that the loss level approved by the State Commission for the FY 2007-08 in the order dated 01.09.2008 was not based on any benchmark or loss reduction trajectory but was based on the actual unaudited sales and power purchase data available at that time. The loss level for the FY 2007-08 was also fixed on 01.09.2008 after the financial year was over. Now that the audited accounts are available, the loss level fixed on the basis of the unaudited accounts should be corrected in the true-up. In fact the loss level approved by the same order dated 01.09.2008 for the subsequent FY 2008-09 based on the benchmark was at 8%. That be the case, if the distribution loss level as per the audited accounts for the FY 2007-08 is 8%, the same

should be adopted in the true up for the FY 2007-08. 8% loss also happens to be the benchmark loss level for the following year. The loss level fixed as a loss reduction trajectory in the tariff order should normally not be changed in the true up. However, in view of the circumstances of the case where the target was fixed on the basis of the unaudited accounts after the year was over, we are directing to change the same to the benchmark of 8%. Accordingly, this issue is decided in favour of the appellant.

8.7 Regarding the distribution loss for the FY 2009-10, according to Ld. Counsel for the Appellant, the State Commission failed to appreciate that the relevant financial year was already over and there was no occasion for the appellant to reduce the distribution loss.

8.8 According to the Ld. Counsel for the State Commission, since 2006-07, the State Commission had been



approving substantial capital expenditure/system improvement expenditure. In view of this, the loss level ought to be kept at 7.75%.

8.9 Let us now examine the Regulations. The relevant Regulation is Regulation 3.2 which is reproduced below:

**“3.2 Energy loss:**

1. *Energy loss in the distribution system shall be called Distribution Loss.*
2. *Distribution loss above and up to a particular voltage level shall be calculated as the difference between the energy initially injected into the distribution system and the sum of energy sold up to that level and energy delivered to next voltage level. Energy sold shall be the sum of metered sales and assessment of un-metered sales based on approved norms. Percentage distribution loss above and up to a particular voltage level shall be expressed in terms of distribution loss up to that level as a percentage of the energy initially injected into the distribution system.*
3. *To set the base line of distribution loss estimate, the Commission may either require the licensee to carry*

*out proper loss estimation studies for assessment of technical and commercial losses under its supervision, or initiate a study itself.*

- 4. The study shall segregate voltage-wise distribution losses into technical loss (i.e. Ohmic/Core loss in the lines, substations and equipment) and commercial loss (i.e. unaccounted energy due to metering inaccuracies/inadequacies, pilferage of energy, improper billing, no billing, unrealized revenues etc.)*
- 5. The Commission shall based on the opening loss levels as derived from the above study, fix targets both long term and short term, for loss reduction to bring down the distribution losses (both technical and commercial) gradually within the acceptable norms of efficiency.*
- 6. Till such time the results of such a study become available, the Commission shall consider loss levels based on licensees proposal, the effort put in by the licensee for reducing the losses viz-a-viz desirability of such efforts, reality prevailing in the ground as well as achieved loss levels of similarly placed utilities within the State or other States. Based on the above considerations the long-term trajectory for distribution losses as specified in the first Tariff Order issued under these regulations shall be considered for determination of the ARR of the Distribution licensees for the future years. Considering the present power deficit situation, the calculation of the financial losses due to non-achievement of Distribution Loss targets will be based on the sales not achieved due to the excess*

*Distribution Losses. Any profit on account of over achievement of Distribution loss target shall be shared between the distribution licensee and the consumers as specified in Clause 4.11 of these regulations.”*

According to above Regulations, the State Commission has to carry out proper loss estimation studies either itself or through the licensee to set the baseline of distribution loss and fix up long term and short term targets for loss reduction. Till such study becomes available, the State Commission shall consider loss level based on licensee's proposal, efforts put up by the licensee to reduce the loss, reality prevailing in the ground and loss levels achieved in similarly placed utilities inside and outside the State.

8.10 It is noticed from the impugned order that the Appellant had carried out a study on voltage-wise distribution losses and submitted a report to the State

Commission on 12.11.2008. The State Commission after going through the report opined that the total losses projected at 8.05% (technical – 6.67% and commercial – 1.38%) are in line with the Commission's approval for FY 2006-07. The State Commission also noted the capital expenditure carried out by the appellant for FY 2005-06 to 2009-10. Further, the State Commission held the following in respect of the distribution loss level for FY 2009-10.

*“6.4.4. Further NPCL has a favourable consumer mix which supports in reducing distribution losses. Considering all these factors, Commission approves the distribution loss for FY 2009-10 at 7.75% which is marginal reduction of 0.25% from previous year loss of 8.00%.”*

8.11 We notice that the reduction of distribution loss level to 7.75% in FY 2009-10, 0.25% below the target of 8% fixed for the previous year, has been decided after the

relevant year was over. In our opinion the fixing up of the loss reduction target retrospectively after the relevant year is over is not correct. The State Commission has also not fixed the loss level according to the Regulations.

8.12 Admittedly, the distribution loss at 8% achieved by the appellant is one of the lowest in the country. Any reduction below 8% has to be based on a proper study along with specific measures required to be undertaken to achieve the same. It should be understood that reducing loss by 0.25% when loss level is high is different from a situation of reduction from a loss level of 8% which has to be planned carefully with specific loss reduction schemes along with incentive to the distribution licensee in the form of sharing the benefits.

8.13 In this connection, we refer to the sub sections (c & e) of Section 61 of the 2003 Act which stipulate that the Commission shall be guided by factors which would encourage efficiency, good performance and optimum investments and principles rewarding efficiency in performance in specifying the terms and conditions for the determination of the tariff.

8.14 The tariff policy also envisages promotion of efficiency in distribution and introduction of mechanism for sharing of excess profits and losses with the consumers. It would be prudent to set the target at the optimal benchmark so that the benefits of achieving lower loss level could be shared equitably between the

licensee and the consumer. In this particular case the direction for reduction in loss level by 0.25% below 8% was issued by the State Commission after the year was over.

8.15 Accordingly, we hold that fixing of loss reduction target to 7.75% during the year 2009-10 retrospectively is unsustainable and is not in conformity with the Regulations, provisions of the Act and the Tariff Policy.

8.16 In view of above the distribution loss for the FYs 2007-08 and 2009-10 shall be considered as 8%. These issues are accordingly decided in favour of the appellant.

9. The sixth issue is disallowance of power purchase at marginal cost during the FYs 2006-07 to 2009-10.

9.1 According to Ld. Counsel for the Appellant, the denial of power purchase cost on account of actual distribution losses being more than the approved losses should be at the average cost of power purchase and not at marginal cost of power purchase.

9.2 According to Ld. Counsel for the State Commission the quantum of power taken by the appellant from UPPCL at Bulk Supply Tariff approved by the State Commission is the cheapest power and has to be availed to the maximum extent. The rest of the power which is more than 50% of its consumption being procured and controlled by the appellant is from captive power plants and traders at high costs through short



term agreements. The power procurement arrangement of the appellant is unique and cannot be equated with that of other distribution utilities where pooled power purchase cost is applicable.

9.3 We find that the appellant has an arrangement for purchase of about 50% of its requirement (45 MVA) from UPPCL at the Bulk Supply Tariff applicable to the state distribution licensees as determined by the State Commission. We agree with the contention of the Ld. Counsel for the respondent that the power available from the UPPCL is the cheapest and available at fixed quantum of 45 MVA and, therefore, there is no option but to consume this power on merit order principle. The rest of the power is being procured by the appellant directly from the traders and captive power plants.

9.4 If the distribution loss is more than that approved by the State Commission, it would result in additional power purchase requirement. Such additional power has to be procured by the appellant from captive power plants and traders since the quantum supplied by UPPCL is fixed and is only to the extent of about 50% of its requirement. As the distribution loss quantum, the power purchase quantum and the cost are being determined on annual basis, the disallowance of cost of power purchase should logically be at the pooled rate of the power procured by the appellant from sources other than UPPCL, viz captive power plants and traders.

9.5 As regards the FY 2006-07, the true up of power purchase cost was decided by the State Commission in its order dated 01.09.2008 which was not challenged by the appellant. The State Commission in the impugned

order refused to relook into the matter. We, therefore, do not want to interfere in the matter which was decided in the earlier order 01.09.2008. We also notice that the claim of the appellant for the FY 2009-10 is on the basis of the audited accounts which were not before the State Commission at the time of passing the impugned order and is not maintainable in the present appeal. Moreover, in view of our findings regarding the distribution losses for the FY 2007-08, the issue regarding disallowance of power purchase cost on account of distribution losses would not arise for the FY 2007-08.

9.6 We are not convinced with the argument of the appellant that the average cost of power purchase will be applicable for disallowance of power purchase cost. The State Commission is directed to apply the average

cost of power procured by the appellant from sources other than UPPCL for disallowance of power purchase cost for the FY 2008-09.

10. The seventh issue is regarding transmission charges for the FY 2009-10.

10.1 According to the appellant, the State Commission has allowed only Rs. 12.15 crore for transmission charges as against the actual amount of Rs.13.57 crore paid as per the audited accounts.

10.2 We find that the claim of the appellant is based on the audited accounts for the FY 2009-10 which were not before the State Commission at the time of passing the impugned order. Therefore, this issue is not maintainable in the present appeal. The appellant

should make the claim for the actual amount of transmission charges before the State Commission at the time of true up of the financials for the FY 2009-10.

11. The eighth issue is regarding O&M expenses for FY 2007-08, FY 2008-09 and FY 2009-10.

11.1 The appellant has raised four issues relating to O&M expenses, viz. the computation of O&M charges for the base year i.e. 2007-08 on the basis of CAGR of last five years, incremental O&M expenses for FY 2008-09 and deduction of Rs.57 lacs in the FY 2009-10 and claim for statutory and other expenses.

11.2 On the computation of base year O&M expenses the Ld. Counsel for State Commission has contended that

the same was computed as per the Regulation 4.3. Regarding the other two issues regarding incremental O&M expenses for FY 2008-09 and wrong deduction of Rs.57 lacs in the FY 2009-10, the Ld. Counsel for the State Commission has admitted the contention of the appellant and agreed to carry out the necessary correction in the true up order for the FY 2009-10.

11.3 In view of above, we shall restrict our finding to the first and the fourth issues i.e. O&M expenses for the base year and statutory and other expenses.

11.4 Regulation 4.3 stipulates that the O&M expenses for the base year shall be calculated on the basis of historical/audited costs and past trend during the preceding five years.

11.5 We notice that the State Commission in the impugned order has computed the Compounded Annual Growth Rate (CAGR) for the O&M expenses for the period 2002-03 to 2006-07 and then applied the CAGR on the O&M expenses for the FY 2006-07 to determine the O&M expenses for the FY 2007-08. We find that the State Commission has determined the O&M expenses for the base year correctly and as per the Regulations.

11.6 The appellant has contended that the State Commission ought to have considered expenses on fees paid to State Commission, advertising expenses for inviting competitive bidding for power procurement expenses as desired vide management and expenses relating to the functioning of Consumer Grievances Redressal Forum.

11.7 We are in agreement with the contention of the Ld. Counsel for the appellant that the above statutory expenses should be allowed to the appellant over and above the normative O&M expenses. In this connection Regulation 22 of the Consumer Grievances Redressal Forum Regulations, 2007 is reproduced below.

**“22.0 Treatment of Expenses –**

*All reasonable costs incurred by the Distribution Licensee on the establishment and running of the Forum, shall be a pass through in the Annual Revenue Requirements filed by the Distribution Licensee after deducting the amount of fees collected by the Distribution Licensee under the regulations.”*



Accordingly the State Commission is directed to consider the statutory expenses of the appellant and allow the same, subject to produce check.

12. The ninth issue is regarding servicing of Regulatory Assets for the FYs 2007-08, 2008-09 and 2009-10.

12.1 According to Ld. Counsel for the appellant, the State Commission should have provided for servicing cost of the Regulatory Assets considering funding through debt and equity in the ratio of 70:30 till such time the revenue gap is adjusted in future tariff. Further the State Commission has adjusted the amount of Rs.19.64 crore that was to be recovered by the appellant from UPPCL but the recovery was restrained by the State Commission. The State Commission has also erred in approving

the debt: equity structure for the FY 2008-09 at 84:16 as against the prescribed debt equity ratio of 70:30.

12.2 According to Ld. Counsel for the State Commission, the appellant has been procuring large quantum of power through traders and has not made any long term arrangement for procurement of power. Accordingly, it is not entitled to carrying cost.

12.3 We notice that the State Commission has converted the total revenue gap of Rs.105.92 crore at the end of FY 2009-10 as Regulatory Asset but has not allowed any carrying cost on the revenue gap for the FYs 2007-08 & 2008-09 and has also not provided for any financing cost for the Regulatory Asset in the ARR of the FY 2009-10.

12.4 The reason recorded for not providing for any carrying cost/financing cost for the Regulatory Asset by the State Commission is as under :

*“8.14 Though the Regulation 6.12(3) provides for allowance of financing cost on regulatory assets, the Commission is of the opinion that if the license had planned its long-term/medium term power purchase appropriately, there would have been no revenue gap and no need for additional financing costs on regulatory asset. The Commission has been guiding the licensee since last 4 years to take correct steps towards power procurement, but the licensee has failed to do so”.*

12.5 Let us now examine the Regulations for Regulatory Assets. Regulation 6.12 is the relevant Regulation which is reproduced below:

**“6.12 Regulatory Asset:**

1. *Creation of Regulatory Asset only for the purposes of avoiding tariff increase shall not be allowed and it shall only be created to take care of natural causes or force majeure conditions or major tariff shocks. The Commission shall have the discretion of providing regulatory asset.*
2. *The use of the facility of Regulatory Asset shall not be repetitive.*
3. *Depending on the amount of Regulatory Asset accepted by the Commission, the Commission shall stipulate the amortization and financing of such assets, Regulatory Asset shall be recovered within a period not exceeding three years immediately following the year in which it is created.”*

Thus the Regulatory Asset is only to be created to take care of natural causes or force majeure conditions and not in the routine to avoid tariff increase. The Commission has to stipulate the amortization and financing of such assets, if created. The Regulatory Asset is also to be recovered within a period not exceeding three years.

12.6 We find that the State Commission has not followed its own Regulation and has created the Regulatory Assets, that too without any directions for amortization and financing of assets, to meet the revenue gap in the normal course which is not permissible.

12.7 In this connection, this Tribunal in its order dated 11<sup>th</sup> November, 2011 in OP No.1 of 2011 has held as under:

“62. *It is seen that some of the Commissions are leaving uncovered revenue gap in the ARR as a routine, with or without creating regulatory assets. The interest charges on the regulatory assets are also not being allowed in the ARR of the Tariff Order. This, in our view, is not in order as it may create a problem of cash flow for the distribution licensees which are already burdened with heavy debts. The cash flow problem may result in constraints in procurement of power by the distribution licensees and operation and maintenance of the distribution net work affecting the reliability of power supply to the consumers. This Tribunal in a recent Judgment in Appeal*

*no.192 of 2010 dated 28.07.2011 in the matter of Tamil Nadu Electricity Board, etc. has dealt with the issue of Regulatory Assets. The relevant extracts are reproduced below:*

*“8.4. Let us first examine the provisions of the Tariff Policy in this regard. The relevant extracts are as under:*

*“8.2.2 The facility of a regulatory asset has been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year. This should be done only as exception, and subject to the following guidelines:*

*a. The circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions. Under business as usual conditions, the opening balances of uncovered gap must be covered through transition financial arrangement or capital restructuring;*

*b. Carrying cost of Regulatory Asset should be allowed to the utilities;*

*c. Recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most and preferably within control period;*

d. *The use of the facility of Regulatory Asset should not be repetitive.*

e. *In cases where regulatory asset is proposed to be adopted, it should be ensured that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected”.*

*The tariff Policy stipulates creation of the regulatory asset only as an exception subject to the guidelines specified above. According to the guidelines the circumstances under which the regulatory assets should be created are under natural causes or force majeure conditions.”*

“8.8 *We are of the opinion that the regulatory asset created by the State Commission is not in consonance with the Tariff Policy and its own Regulations, Moreover, the impugned order does not provide for recovery of the regulatory assets with the carrying cost as envisaged in the Regulations and the Tariff Policy.”*

“8.10. *Now, the question arises whether the creation of the regulatory asset is in the interest of the distribution company and the consumers. The respondent no.1 will have to raise debt to meet its revenue shortfall for meeting its O&M expenses, power purchase costs and system augmentation works. It is not understood how the respondent no.1*

*will service its debts when no recovery of the regulatory asset and carrying cost has been allowed in the ARR. Thus, the respondent no.1 will suffer with cash flow problem affecting its operations and power procurement which will also have an adverse effect on maintaining a reliable power supply to the consumers. Thus, creation of the regulatory asset will neither be in the interest of the respondent no.1 nor the consumers.”*

- “8.12. According to Shri Rajah, learned Senior counsel for the appellants, the regulatory assets could not be created for the anticipated shortfall in revenue. We are in agreement with the contention of the Senior counsel. The Regulations clearly state that the Regulatory Asset can be created when the licensee could not fully recover the reasonably incurred cost at tariff allowed for reasons beyond his control under natural calamities and force majeure conditions. Thus, we hold that the creation of the regulatory assets on the basis of projected shortfall in revenue, that too without any directions for time bound recovery for the regulatory asset alongwith its carrying cost, is in contravention of the Tariff Policy and the 2005 Regulations”.
63. In this case the Tribunal held that the regulatory asset created by the State Commission was not in consonance with the



*Tariff Policy and the Tariff Regulations of the State Commission which clearly define the circumstances under which the regulatory asset can be created. Further, the creation of the regulatory asset without any directions for carrying cost and time bound recovery was neither in the interest of the distribution licensee nor the consumers.”*

“65. *In view of the analysis and discussion made above, we deem it fit to issue the following directions to the State Commissions:*

*(iv) In determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee”*

12.8 We also find that the State Commission has adopted the same retail supply tariff for the appellant as

determined for the state distribution licensees. In our opinion this is not a correct approach. There are wide dissimilarities between the state owned distribution licensee and the appellant. The state distribution licensees have high distribution losses, lower cost of procurement of power due to power being procured by the State owned UPPCL mostly out of allocation of power from the Central and State Sector generating stations, etc. On the other hand, the appellant is receiving less than 50% of its power requirement from UPPCL at its pooled cost and has very low distribution loss. The composition of consumer profile is also different for the appellant and the State owned distribution licensee. The Regulations also do not provide for adoption of same tariff as applicable to other distribution licensee for the appellant. Therefore, the ARR and tariff of the

appellant has to be determined independently according to Section 61 and 62 of the 2003 Act and the Regulations.

12.9 We also notice that the appellant had filed its petition for ARR/tariff for the FY 2009-10 on 28.11.2008 but the impugned order was issued by the State Commission only on 14.10.2010, i.e. after almost two years. According to Section 64(3) of the Act, the State Commission should have issued the tariff order within six months from receipt of the application. Consequently, the revised tariff was made applicable after the financial year 2009-10 was over. The delay in issuing the order by the Commission resulted in increase in revenue gap of the appellant.

12.10 We notice that the State Commission in the impugned order has approved the power purchase cost for FY 2009-10 and also trued up the power purchase cost for FY 2007-08 and 2008-09 which included the power purchase by the appellant from UPPCL, traders and captive power plants.

12.11 In paragraph 6.2 the State Commission has discussed the efforts made by the appellant in procurement of power on short, medium and long term basis and has directed the appellant to find out means to arrange long term power to curtail its Power Purchase Costs.

12.12 Having allowed the Power Purchase Cost and approved the Annual Revenue Requirement on that

basis, the carrying cost/financing cost has to be provided according to the Regulations.

12.13 We also direct the appellant to make sincere efforts for procurement of power on long term basis as per the directives of the State Commission. Till such time the long term arrangements are made, the appellant is also directed to procure power in short term only through a transparent competitive bidding process and through the power exchange.

12.14 The Ld. Counsel for the appellant has claimed Return on Equity on 30% of the revenue gap funded by the appellant from the promoters to be allowed till the revenue gap is fully recovered. We do not agree with the contention of the Ld. Counsel for the appellant. Apportioning of capital cost in the debt

equity ratio of 70:30 under the Regulations is for the purpose of Return on Capital. Return on Equity is permissible only on the capital assets and not on the revenue gap funding. The revenue gap funding from internal accruals of the appellant or from the promoters has to be considered as a debt and has to be serviced accordingly.

12.15 The Financial Year 2009-10 in which the Regulatory Asset was created is already over. It would, therefore, not be proper to set aside the creation of Regulatory Asset. We, therefore, direct the State Commission to take measures to amortize the Regulatory Asset and allow the carrying cost/financing cost on the Regulatory Assets according to its Regulations.

12.16 We also notice that the State Commission in capitalization of assets and computation of equity for the FY 2008-09 has allowed the debt: equity ratio as 84:16. No explanation has been given for the same and not providing debt: equity in 70:30 ratio as per the Regulations. We, therefore, direct the State Commission to provide for debt: equity ratio according to the Regulations.

We also notice that the State Commission has provided for surplus of Rs.19.64 crore for the FY 2006-07 when the recovery of the surplus from UPPCL is restrained by the State Commission and the amount is not available to the appellant. The State Commission in its counter affidavit dated 25.02.2011 has submitted that the appellant has never raised this

issue before the State Commission nor any claim for the said amount has been made by the appellant.

12.17. In view of the averment of the State Commission on the above issue we direct the State Commission to reconsider the true up of ARR for the FY 2007-08 in respect of surplus of Rs.19.64 crore for the FY 2006-07 shown in the ARR.

13. The tenth issue is regarding interest and finance charges for the FYs 2007-08, 2008-09 and 2009-10.

13.1 According to Ld. Counsel for the appellant, the State Commission has not allowed the financing charges required to be incurred for obtaining loans which are permissible as per the Regulations.



13.2 According to Ld. Counsel for the State Commission, for the FYs 2007-08 and 2008-09, while truing up, the State Commission has allowed the actual expenditure of Rs.1.25 crore and Rs.0.91 crore respectively. However for FY 2009-10, the State Commission has allowed finance charges @ 3% on new loans based on the trends of FYs 2007-08 and 2008-09. Accordingly, the finance charges on new loans of Rs.38.47 crore worked out to Rs.1.15 crore. Also the actual financing charges based on the audited accounts would be considered by the State Commission at the time of truing up of the financials for the FY 2009-10.

13.3 We notice that the State Commission has allowed Rs.1.15 crore as finance charges on new loan for the FY 2009-10 as against the claim of Rs.2.9 crore by the appellant. We also notice that the State Commission in

the true-up of the FYs 2007-08 and 2008-09 has allowed the financing charges as per the audited accounts at Rs.1.25 crore and Rs. 0.91 crore respectively. Thus the contention of the Appellant that the State Commission has not allowed the financing charges is wrong.

- 13.4 The appellant is now claiming financing charges of Rs.3.05 crore as per the audited accounts for the FY 2009-10. The audited accounts were not before the State Commission at the time of passing the impugned order. Therefore, the appellant cannot raise the claim for financing charges based on audited accounts in this appeal. The appellant should raise the issue at the time of true-up of financials for the FY 2009-10.

14. The eleventh issue is regarding interest on working capital for the FYs 2007-08, 2008-09 and 2009-10.

14.1 According to Ld. Counsel for the appellant, the appellant has deposited an amount of Rs.11.28 crore as security deposit with UPPCL which could not be considered to be available to the appellant towards working capital requirement.

14.2 According to Ld. Counsel for the State Commission the interest on working capital has been computed as per the Regulations.

14.3 We find that the State Commission in the impugned order has not giving any finding regarding consideration of amount deposited by the appellant with UPPCL as security deposit in working out the

interest on working capital. We, therefore, give liberty to appellant to place its submission before the State Commission at the time of true-up for the FY 2009-10 for consideration.

14.4 We do not find any reason to interfere with the impugned order on this issue in the present appeal.

15. The twelfth issue is regarding efficiency gain on swapping of loan for the FY 2009-10.

15.1 According to Ld. Counsel for the appellant the benefit on account of loan swapping/restructuring of debt should be shared between the appellant and the consumers as per the Regulation 4.11.

15.2 According to Regulation 4.8(i)(f) the benefit on account of loan swapping/restructuring of debts shall be shared between the distribution licensee and the Consumers in the proportion specified in Regulation 4.11. According to Regulation 4.11 the licensee is entitled to 50% of the gain, 25% has to be credited to the licensee's contingency reserve and the remaining 25% has to be passed on to the consumers.

15.3 According to the appellant at the fag end of the FY 2009-10, it has successfully swapped its existing loans of Rs.35 crore @ 13% per annum form Barclays Bank with a loan from Yes Bank Ltd @ 9.5% p.a. Since the benefit for such loan will arise in subsequent years, therefore, no amount has been claimed under this head during the FY 2009-10.

15.4 When the appellant has not made any claim on account of benefit from swapping of loan in the FY 2009-10, we do not understand why this issue has been raised by the appellant in this appeal? The claim should have been raised by the appellant in the true up petition for the FY 2009-10 before the State Commission.

15.5 We also take exception to the written submissions filed before us on this issue by the Ld. Counsel for the appellant which do not present the case in correct perspective.

15.6 The issue raised by the appellant regarding sharing of gains by loan swapping is not relevant to the present appeal and is, therefore, not maintainable.

16. The thirteenth issue is regarding bad debts for the FYs 2006-07, 2007-08 and 2008-09.
- 16.1 According to Ld. Counsel for the appellant the bad debts have not been allowed as per the claim even though it was within the permissible limit as provided in the Regulations.
- 16.2 According to Ld. Counsel for the State Commission, the appellant projected the bad debts at 0.69% and at 0.76% in the ARR/tariff petition for the FY 2009-10 and the same was allowed. For the FYs 2007-08 and 2008-09, the bad debts have been allowed at 0.66% and 0.78% as sought by the appellant. For the FY 2006-07 the State Commission had allowed bad debts @0.71% in the true up for FY 2006-07 in the tariff order for FY 2008-09 dated 01.09.2008.

16.3 The true up for the FY 2006-07 was decided by the order dated 01.09.2008. This said order was not challenged by the appellant. Therefore, we do not want to interfere with the order of the State Commission dated 01.09.2008.

16.4 We notice that for FYs 2007-08 and 2008-09 the State Commission has allowed provision of 0.66% and 0.78% respectively towards the bed debts as claimed by the appellant. The Tariff Regulation 4.4 provides for bed-debts with ceiling limit of 2% of revenue receivables. However, the amount of bad debt in absolute terms allowed is lower due to figure of revenue billed considered by the State Commission compared to the claim of the appellant. Accordingly, bad debts to the tune of Rs. 2 lakh for the FY 2007-08 and Rs.4 lakh for



the FY 2008-09 have remained uncovered against the claim of the appellant. According to the Ld. Counsel for the appellant, the State Commission has not taken into account the non-recovery of the electricity duty paid by the appellant to the State Government. When the consumers do not pay their bills, electricity duty is also not recovered from them. Therefore, there is no reason for the State Commission to have not allowed the non-recovery of electricity duty.

16.5 We find that the State Commission has allowed the required percentage of bad debts on the receivables from the consumers and has indicated the detailed calculations. The electricity duty is not a part of the ARR/Tariff and is being collected by the appellant directly on behalf of the State Commission and paid directly to the State Commission. Therefore, we feel that

the State Commission has correctly allowed the bad debts.

16.6 Regarding bad debts for the FY 2009-10, the State Commission has allowed the bad debts of 2.17 crore as against the claim of 3.85 crore by the appellant. The main reason for the difference is the provision of bad debts is due to difference in figure of revenue billed for the year assumed by the State Commission. The revenue billing for the FY 2009-10 is required to be trued up. Accordingly, the appellant is directed to file its claim for bad debts for the FY 2009-10 at the time of true up exercise.

17. The fourteenth issue is regarding contingency reserve, for the FYs 2007-08, 2008-09 and 2009-10.

17.1 According to Ld. Counsel for the appellant the State Commission should have provided the contingency reserve @ 0.5% of the opening gross fixed assets as per the Regulations.

17.2 According to Ld. Counsel for the State Commission the Regulation provides for contingency reserve up to 0.5% at the discretion of the State Commission. In the FY 2007-08 and 2008-09, the contingency reserve has been provided @ 0.25%. In the FY 2009-10, the State Commission did not allow the any provision for the contingency reserve in view of large revenue gap of the appellant.

17.3 Let us first examine the Regulation. Regulation 4.14 in this regard is reproduced below:

**“4.14 Contingency Reserve:**

1. *The Commission may consider provisions for contingency reserve up to 0.5% of opening gross fixed assets to be included in the ARR requirement of the licensee. The contingency reserve so created shall be utilized to meet cost of replacement of equipment damaged due to force majeure situations. The Licensee shall invest Contingency Reserve as allowed by the Commission in Government securities.*
2. *The interest on such securities shall be added back to this reserve.*
3. *The licensee shall be entitled to draw money from this reserve only with the prior permission of the Commission.*
4. *As per direction/ approval of the Commission a part of contingency reserve may be utilized to avoid any abnormal tariff hike.*
5. *The amount in this reserve shall not be treated as part of the equity reserve.”*

17.4 We notice that in the true up of FY 2007-08, the State Commission has observed that the appellant had claimed contingency reserve of 0.25% on closing gross fixed assets at Rs.0.47 crore. However, the State

Commission allowed the contingency reserve @ 0.25% on opening gross fixed assets at 0.31 crore. Thus the State Commission has correctly allowed the contingency reserve for the FY 2007-08. Similarly for the FY 2008-09 the State Commission has correctly allowed the contingency reserve @ 0.25% on opening gross fixed assets as against the claim of the appellant at 0.25% on closing gross fixed assets. The Regulations provide for contingency reserve of up to 0.5% on the opening gross fixed assets and not closing gross fixed assets, as claimed by the Appellant.

17.5 However, in the FY 2009-10, the State Commission has not allowed any contingency reserve as it would only increase the revenue gap.

- 17.6 The Regulations provide for consideration of contingency reserve upto 0.5% of opening GFA by the State Commission. Regulations also provide for using a part of the reserve to avoid any abnormal tariff hike.
- 17.7 In view of above we do not find any reason to interfere with the findings of the State Commission with regard to contingency reserve.
18. The fifteenth issue is regarding capitalization of interest.

18.1 According to Ld. Counsel for the appellant, the interest incurred on the borrowing of the funds for capital projects which gets completed within one year can not be capitalized and has to be charged as revenue according to Accounting Standard AS-16.

18.2 According to Ld. Counsel for appellant, the Commission is guided by the provisions of the Tariff Regulations which in some cases may not be in line with the provisions of the Accounting Standards issued by the ICAI. Further, the appellant was directed to devise a methodology for booking the interest changes during the construction period of the capital account and submit for the approval of the State Commission, but till date no such methodology has been submitted by the appellant.

18.3 The State Commission has worked out interest capitalization proportionately on interest on new long term loan considering actual capitalization through debt for FYs 2007-08 and 2008-09. For the FY 2009-10, the State Commission has assumed the interest on uncapitalized assets as 30% of interest on normative loans approved during the year. The appellant has not objected to the quantum of interest but want it to be considered as revenue expenditure instead of capitalization. We do not find any specific provision in the Regulations that the Accounting Standard AS-16 has to be followed for giving treatment to the interest on capital works completed within one year.



The State Commission has approved servicing of interest on capital projects through capitalization instead of allowing the same as revenue expenditure.

18.4 In view of above we do not find any reason to interfere with the findings of the State Commission in this regard.

19. The sixteenth issue is regarding consultancy fees taken as non-tariff scheme for the FY 2006-07.

19.1 According to the Ld. Counsel for the appellant, the consultancy fee earned by the appellant should not have been reduced from the ARR as no asset of the distribution business was used and manpower for the consultancy was used without affecting the distribution business.

19.2 We notice from the impugned order that the State Commission in the Tariff Order for FY 2006-07 dated 26.06.2007 had disallowed claim of the appellant in the income from consultancy business. Again in its Tariff Order dated 01.09.2008 while truing up the financials for the FY 2006-07 the State Commission had disallowed the claim of the appellant in this regard. These orders of the State Commission were not challenged by the appellant. In view of this we do not want to interfere with the findings of the State Commission made in the earlier orders.

20. The seventeenth issue is regarding allowance of 0.5% on the loans availed as per the provisions of the Electricity (Supply) Act, 1948 for the FY 2006-07.

20.1 We notice that this issue pertains to true up of the FY 2006-07 which was decided by the State Commission by its order dated 01.09,.2008. In the present case, the appellant had requested the State Commission to relook its decision in the earlier order dated 01.09.2008. However, the State Commission did not find any merit in relooking in the another (Paragraph 3.2 of the impugned order). The order dated 01.09.2008 was not challenged by the Appellant. Therefore, we do not want to interfere with the findings made by the State Commission in the earlier dated 01.09.2008. Hence, the contention of the appellant in this regard is rejected.

21. The eighteenth issue is regarding the capital expenditure for the FY 2007-08.

21.1 According to Ld. Counsel for the appellant, the State Commission has arbitrarily approved the capital expenditure of Rs.88.89 crore as against Rs. 89.07 crore on the basis of the audited accounts and the corresponding deemed debt was approved as 5.07 crore as against Rs.5.20 crore as per the audited accounts.

21.2 We have examined the details of the capital expenditure approved by the State Commission in the paragraph 4.6.2 and table 4.6. We find that the State Commission has correctly allowed total capex of 88.89 crore and after deducting the consumer contribution of Rs.20.36 crore, the net capex has been worked out as 68.53 crore. This has been divided into debt and equity in the ratio of 70:30. Since the actual equity was 25.62 crore, it has been restricted to 30% of net

capex i.e. 20.56 crore and the balance 5.06 crore has been considered as normative debt as per the Regulations.

21.3 We do not find any fault with the methodology used and the total capex which is taken as per the audited accounts of the appellant. Hence, this issue is decided against the appellant.

22. The nineteenth issue is regarding tax for FY 2009-10.

22.1 According to the appellant the State Commission has erred in allowing tax at Rs.2.48 crore instead of Rs.5.13 crore claimed as per the audited accounts.

22.2 We find that this issue has been again wrongly raised by the appellant in this appeal as the audited accounts

were not before the State Commission while passing the impugned order. This issue should have been raised before the State Commission before the State Commission in the true up application for FY 2009-10. This issue is, therefore, not maintainable in this appeal.

**23. Summary of our findings:**

- (i) **Assumption of increased sales revenue for the FY 2009-10: The State Commission has wrongly estimated the revenue from sale of power at the retail tariff approved in the impugned order which was made effective after the financial year was over. Accordingly the State Commission is directed to true up the revenue sales and allow the revenue gap on account of excess revenue estimated with carrying cost.**

**(ii) Assumption of higher realization per unit of sale of electricity and lower sales volume and corresponding lower power purchase quantum for the FY 2009-10: In our opinion the State Commission arbitrarily reduced the sales estimated on pro-rata basis on the actual data available till January, 2010 which resulted in increasing the weighted average realization per unit as also reducing the power purchase cost. The State Commission is directed to true up the energy sales and power purchase quantum for the FY 2009-10 as per the audited account and allow the revenue requirement on this account with carrying cost.**

**(iii) Distribution loss for the FYs 2007-08 and 2009-10: The distribution loss for the FY 2007-08 which was earlier determined by the State Commission after the year was over on the basis of unaudited data should be corrected in the true up to 8%, as per the audited data. For the FY 2009-10 also the State Commission has wrongly decided the target of loss reduction from 8% to 7.75% after the financial year was already over. Accordingly, the same should be corrected to 8%.**

**(iv) Disallowance of power purchase cost at marginal cost during the FYs 2006-07 to 2009-10: The disallowance of power purchase**



**cost for the FY 2007-08 would not arise in view of our findings regarding the distribution loss target. For the FY 2008-09, the State Commission is directed to apply the average cost of power purchase by the appellant from sources other than UPPCL for disallowance of power purchase cost. The claim for the FY 2009-10 is based on the audited accounts which were not before the State Commission at the time of passing the impugned order and hence not maintainable in the present appeal and has to be dealt with in the true up. We do not want to interfere with the findings for the true up of the FY 2006-07 decided in the earlier order dated 01.09.2008.**

**(v) Transmission charges for the FY 2009-10: The claim of the appellant is based on the audited accounts for the FY 2009-10 which were not before the State Commission when the impugned order was passed is not maintainable in the present appeal.**

**(vi) O&M expenses:**

**a) The State Commission has correctly determined the O&M expenses for the base year.**

**b) Regarding expenses for statutory expenses, the State Commission is directed to allow the same, subject to prudence check.**

**c) Regarding incremental O&M expenses for the FY 2008-09 and deduction of Rs.57 lakhs in the O&M expenses for the FY 2009-10, the State Commission has admitted the contention of the Appellant. Accordingly directed to correct the same in the true up.**

**(vii) Servicing of Regulatory Asset: We direct the State Commission to take measures to amortize the Regulatory Asset and also allow the carrying cost/financing cost on the Regulatory Assets according to the Regulations. Servicing of the Regulatory Asset has to be done as servicing of debt only and not as debt and equity in the ratio of 70:30 as claimed by the appellant. We have**

**also given directions to the appellant for procurement of power in Paragraph 12.13 for necessary action.**

**We also direct the State Commission to allow debt: equity for the FY 2008-09 as per the Regulations. The State Commission is also directed to consider the issue of the surplus of Rs.19.64 crore from UPPCL due to the appellant but restrained by the State Commission for recovery and included in the ARR.**

**(viii) Financing charges: The State Commission has correctly allowed the financing charges as per the audited accounts for the FY 2007-08 and 2008-09. The claim of the appellant for the**

**FY 2009-10 is based on the audited accounts which is not maintainable in the present appeal.**

**(ix) Interest on working capital: The State Commission has not given any findings regarding consideration of amount of Rs.11.28 crore deposited by the appellant with UPPCL as security deposit. We give liberty to the appellant to place its contention before the State Commission at the time of true up for the FY 2009-10.**

**(x) Sharing gain on swapping of loan for FY 2009-10: This issue is not maintainable in the present appeal.**

- (xi) **Bad debts: This issue is decided against the appellant as far as the claims for the FYs 2007-08 and 2008-09 are concerned. Regarding 2009-10, the appellant is directed to file its claim with the State Commission in the true up.**
- (xii) **Contingency reserve: We do not find any reason to interfere with the findings of the State Commission.**
- (xiii) **Capitalization of interest: We do not find any reason to interfere with the findings of the State Commission.**

- (xiv) **Consultancy fees for FY 2006-07:** we do not find any reason to interfere with the findings of the State Commission made in the earlier order dated 01.09.2008.
- (xv) **Balance of 0.5% on the loans availed as per the provisions of the 1948 Act for FY 2006-07:** We do not find any reason to interfere with the findings made by the State Commission in its earlier order dated 01.09.2008 which was not challenged by the appellant.
- (xvi) **Capital expenditure for the FY 2007-08:** The State Commission has correctly allowed the capital expenditure of Rs.89.07 crore on the basis of the audited accounts.

**24. In view of above, the Appeal is allowed partly as indicated above. The State Commission is directed to give effect to our findings. The appellant has also to take action on our directions regarding procurement of power. No order as to cost.**

**25. Pronounced in the open court on 15<sup>th</sup> day of December, 2011.**

**(Mr. Justice P.S. Datta)  
Judicial Member**

**(Mr. Rakesh Nath)  
Technical Member**

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**REPORTABLE/~~NON-REPORTABLE~~**

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