

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

**Appeal No. 121 of 2010 &
I.A. No. 83 of 2011**

Dated: 21st October, 2011

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

In the matter of:

1. Shri Rama Shankar Awasthi
Son of (Late) Shri G.P. Awasthi,
301-Surbhi Deluxe Apartment,
6/7 Dali Bagh, Lucknow, U.P.-226 001
2. M/s Ganpati Industries Limited
11, A/400, Ashok Nagar, Kanpur, U.P.- 208 012
Through its Managing Director,
Shri. Ganesh Chand Tiwari
3. M/s Trimurti Concast Private Limited,
Meerut Road, Muzzafar Nagar, U.P.-251 003
Through its Director, Shri Narendra Singh Pawar
4. M/s Kamla Cold Storage and Ice Factory
(A proprietorship concern)
Ahaswan, Badaun, U.P. – 243638
Its proprietor Shri Vijay Kumar Agarwal ... Appellants

Versus

1. Uttar Pradesh Electricity Regulatory Commission
through its Chairman,
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar, Lucknow- 226 010
Uttar Pradesh

2. Uttar Pradesh Power Corporation Limited
through its Chairman,
Shakti Bhawan, Extension
14, Ashok Marg, Lucknow-226 001
Uttar Pradesh
3. Paschimanchal Vidyut Vitran Nigam Limited
through its Managing Director,
Urja Bhawan, Victoria Park, Meerut-250001
Uttar Pradesh
4. Dakshinanchal Vidyut Vitran Nigam Limited
through its Managing Director,
Urja Bhawan, 220KV sub-station,
Agra-Mathura Bye Pass Road, Agra-282007
Uttar Pradesh
5. Purvanchal Vidyut Vitran Nigam Limited
Through its Managing Director,
Purvanchal Vidyut Bhawan, Vidyut Nagar,
DLW, Varanasi-221 004, Uttar Pradesh
6. Madhyanchal Vidyut Vitran Nigam Limited
Through its Managing Director,
4-A Gokhle Marg, Lucknow-226 001
Uttar Pradesh
7. Kanpur Electricity Supply Company Limited
Through its Managing Director,
8/4-6, Bangaliya Arya Nagar, Kanpur -228 001
Uttar Pradesh
8. Uttar Pradesh Power Transmission Corporation Ltd.
through its Chairman
Shakti Bhawan, Extension,
14, Ashk Marg, Lucknow- 226 001
Uttar Pradesh

Counsel for the Appellant(s): Mr. M.G. Ramachandran,
 Mr. Anand K. Ganesan
 Ms. Sneha Venkataramani

Counsel for the Respondent(s): Mr. Parag Tripathi, ASG
Mr. Pradeep Misra
Mr. Daleep Dhayani &
Mr. Anuj Bhandari for R-2 to 8

Mr. Kunal Verma &
Mr. K. Krishna Kumar for R-1

JUDGMENT

HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER

This appeal has been filed by Shri Rama Shankar Awasthi and Ors. against the order of the U.P. Electricity Regulatory Commission passed on 31.3.2010 approving the Annual Revenue Requirement and Tariff of the distribution licensees and the transmission licensee for the FY 2009-10. The appellants are the consumers of the distribution licensees.

2. The State Commission is the first respondent. U.P. Power Corporation Ltd. which undertakes bulk

purchase and bulk supply functions is the second respondent. The respondent no. 3 to 7 are the distribution licensees. The respondent no. 8 is the transmission licensee.

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

3.1. On 15.4.2008 the State Commission passed the tariff order for respondents 3 to 8 for the FY 2007-08 and 2008-09 without submission of the audit reports and balance sheet by the respondent distribution licensees.

3.2. The respondents 3 to 8 were under obligation to submit their ARR by 30.11.1008 for the FY 2009-10. However, the respondent no. 2 sought extension for time from time to time from the State Commission which were allowed. Finally, on 30.7.2009, the

respondent no. 2 filed the application for ARR for the FY 2009-10 on behalf of the respondents 3 to 8. The State Commission admitted the ARR on 10.11.2009. Thereafter, public notice was issued to invite objections to the ARR filed by the respondent no. 2.

3.3. The appellant no. 1 submitted written objections to the State Commission stating that the tariff should be determined strictly in accordance with the audited balance sheet as stipulated in the 2006 Regulations. The appellant no. 1 also raised some objections regarding subsidy recovered by the respondent distribution licensee, segregation of technical and commercial losses, etc.

3.4. Subsequently, the State Commission asked the respondents 2 to 8 to submit the audited statement of

accounts from FY 2000-01 to 2008-09, including CAG audited reports.

3.5. On 10.3.2010, the appellants filed Civil Misc. Writ Petition no. 12752 of 2010 before the Allahabad High Court. After hearing the parties, the High Court directed the State Commission to consider the representations of the appellants and to take further steps in accordance with the 2003 Act and the Regulations.

3.6. The State Commission passed the impugned order on 31.3.2010 and the revised tariff as per the impugned order was made effective from 15.4.2010 i.e. after the completion of the FY 2009-10.

3.7. Subsequently, the appellants filed Civil Misc. Writ Petition no. 20548 before the Allahabad High Court challenging the impugned order. The High Court on

26.4.2010 disposed of the Writ Petition and directed the appellants to approach this Tribunal. Accordingly, the appellants have filed this appeal.

4. The appellants have raised the following issues in the appeal.

4.1. Violation of procedures for issuance of the tariff order: According to the Tariff Regulations, 2006, the respondents are required to file the petition on or before the 30th of November of the previous year, furnish audited accounts for the period till 31st March of the year and furnish the provisional accounts for the period till the filing of the petition. None of these requirements were fulfilled by the respondents 2 to 8. The State Commission has observed in the impugned order about delay in filing of the tariff petition and non-submission of the audited accounts from FY

2005-06. The State Commission has also not considered the objection of the appellant and decided the tariff without the audited accounts in contravention to the provisions of the Act and the Regulations.

4.2. Non-filing of the audited accounts and other important data and true-up not done: The State Commission has failed to appreciate that the audited accounts and actual data are the basis on which the future year's projections are made in order to determine the tariff. In the absence of the audited accounts and actual data, tariff would only be determined on the estimates provided by the respondents 2 to 8. The State Commission can not award an increase in the tariff without perusing the data in support of such estimation. Further, there has not been any truing up of the financials of the

respondent distribution licensees since the year 2000-01, due to absence of the audited accounts. The respondents 3 to 7 have also failed to maintain the fixed assets registers despite the directions of the State Commission. However, the State Commission has continued to allow depreciation purely on ad-hoc basis without any verification that such assets are in use or ever existed. Further, no investment plans with cost benefit analysis has been filed by the respondent licensees for their capital expenditure.

4.3. Payment of subsidy by the State Government:

The State Commission has wrongly considered the commitments made by the State Government for providing subsidy in order to determine the tariff. As per Section 65 of the 2003 Act read with Regulation 6.10, any subsidy provided to any category of consumers must be paid by the State Government in

advance. Further the distribution licensees, respondents 3 to 7 herein, have been levying the system loading charges on the consumers without showing such charges on their balance sheets and without the consent of the State Commission. Despite raising of the objection specifically by the appellant no. 1 before the State Commission, the State Commission has allowed the respondents 3 to 7 to charge System Loading charges separately from the consumers, which is not permissible. Further, the State Commission in one time settlement of pending arrears allowed waiver of 100% late payment surcharge without even asking the State Government to comply with the provisions of Section 65 of the 2003 Act.

4.4. Other issues: In addition to the above key issues, the appellants had also raised several other objections

including un-metered supply of electricity by the respondents 3 to 7 and levy of minimum consumption guarantee charges without any statutory provision authorizing the respondents to impose such charges. However, these objections have not been considered by the State Commission.

5. On the above issues Shri Anand K. Ganesan, learned counsel for the appellants made exhaustive submissions assailing the impugned order of the State Commission. On the other hand, Shri Parag Tripathi, learned ASG appearing on behalf of the respondents 2 to 8 and Shri Kunal Verma appearing for the State Commission made extensive submissions in support of the findings of the State Commission. After hearing the rival contentions of the parties and examining the various documents on record, the following questions

would arise for our consideration:

- i) Whether the State Commission was correct in accepting the petition filed by the Respondent no. 2 belatedly that too without the audited accounts for the previous year and the actual expenditure incurred in the current year till the filing of the petition and determining the tariff purely on the estimates projected by the respondent no. 2?
- ii) Whether the State Commission was correct in allowing the depreciation without insisting on maintenance of asset register by the respondent licensees and without verifying that the assets are in use?
- iii) Whether the State Commission has erred in not carrying out truing up of the financials of

the respondent licensees for the previous years?

- iv) Whether the State Commission is correct in taking into account the subsidy from the State Government without such subsidy having been paid in advance in line with the provisions of the Act?
- v) Whether the State Commission is right in allowing charging of the System Loading Charges by the respondent distribution licensees?
- vi) Whether the State Commission can allow 100% waiver of late payment surcharge without asking the State Government to comply with the provisions of Section 65 of the Act?

vii) Whether the State Commission without considering the objections of the appellant regarding the un-metered supply and levy of minimum consumption guarantee charges has allowed the respondent distribution licensee to charge the same?

6. The first issue is regarding the acceptance of petition filed by the respondent no. 2 belatedly and without the audited accounts.

6.1. According to the appellant, the petition should not have been accepted.

6.2. According to learned counsel for the State Commission, since the State Government of Uttar Pradesh had not issued specific directions with regard to the tariff and other related matters the transmission company and distribution companies sought

extension of time on three occasions first till 10.1.2009 and again till 15.2.2009 and then till 31.3.2009 which was granted by the State Commission. In the meanwhile the Model Code of Conduct came into force from 3.3.2009 since the elections were declared and as a result the time was extended till 31.5.2009. Regulation 2.1.1 of the 2006 Regulations which provides for the time frame for filing of the tariff petition is not mandatory in nature in as much as it does not provide for the consequences in case the petition is not filed within the specified time. Further, the tariff determination cannot be kept in abeyance till the audited accounts are submitted. There is no requirement of filing audited accounts at the time of filing the petition for ARR. Further, since the licensee had not submitted the audited accounts despite repeated requests, the tariff determination was

conducted on the basis of the provisional accounts and as and when the audited accounts are supplied, the gap would be adjusted at the time of truing up.

6.3. According to learned ASG representing the respondents 2 to 8, the audited accounts are necessary only for true up exercise. However, the audited accounts till the FY 2006-07 had been submitted to the State Commission. The audit for FY 2007-08 has been completed by the CAG which will be submitted to the State Commission after the approval by the Board of Directors. The accounts for the FY 2008-09 and FY 2009-10 will be audited by the CAG by the close of the current financial year.

6.4. Let us first consider the issue of delay in filing of the petition.

6.5. According to the Conduct of Business Regulations and the Tariff Regulations, 2006 the respondent licensees had to file the tariff petition for the FY 2009-10 by 30.11.2008. The relevant Regulations are Regulation 135(1) of the conduct of Business Regulations and Regulation 2.1 of the Tariff Regulations, 2006, which are reproduced below:

“135 (1) Subject to the provisions of the applicable legal framework, each application for determination of tariffs, whether filed by a licensee or a generating company shall be filed on or before 120 days of the proposed implementation of tariffs.....”

“2.1 Filing of Annual Revenue Requirement and Tariff Application

1. The Distribution Licensee shall file the Aggregate Revenue Requirement (ARR)/Tariff petitions complete in all respect along with requisite fee as prescribed in the Commission’s Fee and Fine

*Regulations on or before 30th November of each year. The above Annual Revenue Requirement petition shall contain the details of the estimated expenditure and the expected revenue that it may recover in the ensuing financial year at the prevailing tariff. Information as per formats specified in **Annexure A** to these regulations shall form part of the ARR filings.*

.....

12. The Commission may initiate suo-moto proceedings for tariff determination in case the licensee fails to file its tariff revision petition in time; any gap on account of delay in filing/non filing will be on account of licensee”.

It is true the word used for filing the Tariff Petition on or before 120 days of the proposed implementation of Tariff by 30th November of each year is “shall”. Even if it is accepted that the filing of the Tariff Petition on or before 30th November is not mandatory because of the fact that in the Regulations no penal

consequences have been provided for committing breach of the provision, still then we cannot be agreeable to the action of the Commission in casually granting extension of time from time to time without insisting on the appellant to stick by at least the spirit of the law, keeping in mind that the proposed Tariff order is intended to be effective from the commencement of the financial year. According to the Regulation 144 of the Conduct Regulations of the Commission, the State Government has to provide details of the category /class of consumers to whom it wants to the licensee to charge a subsidized tariff, 120 days before the start of the financial year. Failure of the State Government to provide the details in time should not be a reason to delay the Tariff proceedings. In fact, the State Commission in its order dated 23.12.2008 had observed that the licensees could have

submitted full cost tariff proposals in the absence of any direction from the State Government regarding subsidy. However, despite this the State Commission continued to grant time extensions to the licensees. The reason given by the respondent licensees for seeking extension for filing of the Tariff petition from 30.11.2008 to 31.3.2009 was that the State Government has not issued specific directions with regard to tariff and other matters do not appear to be appropriate. The State Commission also has powers to initiate suo motu proceeding for tariff determination in case the licensee does not file the petition in time as per the regulations.

6.6. One of the main reasons for creation of the Electricity Regulatory Commissions as indicated in the Statement of Objects and Reasons of the 2003 Act, is distancing of Governments from determination of

tariff. Thus the State Government by not providing the details of the subsidized category/class of consumers in time could not be made to frustrate the basic intent of the Electricity Act of distancing of Governments from determination of tariff and giving all regulatory responsibilities to the State Commission.

6.7. However, delay in initiating the tariff proceedings could not be a reason for declaring such proceedings ultra virus and setting aside the impugned order. The State Commission has powers to deal with the delay in filing of the tariff petition by the licensees. In this case where the State Commission had granted the extension for filing the tariff petition. However, the State Commission and the respondent licensees may note our observations in paragraphs 6.5 and 6.6. The respondent licensees shall in future ensure timely submission of the ARR petition every year according to

the Regulations and the State Commission shall ensure that the ARR/tariff determination proceeding is initiated in time so that the tariff is decided before the commencement of the ensuing financial year. The delay by the State Government to provide information regarding proposed subsidized categories should not be a reason for filing the ARR late. In the absence of any communication from the State Government 120 days before the date of the proposed implementation of the tariff, the licensees could submit the full cost tariff proposal.

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 alongwith 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.

6.12. Learned counsel for the appellant has referred to the earlier order dated 15.4.2008 of the

State Commission regarding tariff order for FY 2007-08 and 2008-09 stressing the need for the audited accounts. The relevant extracts are reproduced below:

“2.4.6. As has been highlighted by the Commission in its previous Tariff Order also, the audited accounting information are important not only for truing up, but also from the point of view of correctly identifying the assets and liabilities of each of the licensees so as to enable the Commission to correctly identify and project the cost items like Operation & maintenance expenses, depreciation and interests. For this very reason the Commission has been again and again seeking the audited annual accounts from the licensees. The statutory audit for the balance sheets of Discoms in UP is pending from FY 2003-04 onwards which reflects a very sad state of affairs”.

It is not understood why the State Commission has taken a different position now that the audited accounts are required only for the truing up financials

as and when the audited accounts are supplied by the licensees.

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.

6.15. Therefore, we direct the respondents 3 to 8 to submit the audited accounts for the FY 2007-08 to the State Commission within one month of the date of this judgment. The audited accounts for the FY 2008-09 and 2009-10 should be furnished by 31.01.2011 and 31.3.2012 respectively to the State Commission. The State Commission shall initiate the true up exercise upto FY 2006-07 immediately, followed by the true up of the FY 2007-08, 2008-09 and 2009-10 immediately after the receipt of the respective audited accounts.

7. The second and third issues relating to verification of the assets and true -up of the financials respectively are interconnected and therefore, are being dealt with together.

7.1. According to the learned counsel for the appellant, the respondent distribution licensees have failed to

produce any records relating to fixed assets registers despite several directions by the State Commission. The State Commission has allowed depreciation purely on ad-hoc basis without any verification. Further, no investment plans with cost benefit analysis were filed by the licensees. There has not been any truing up of financials of the respondent licensees since the FY 2000-01.

7.2. According to the learned counsel for the respondents, the appellant did not raise any objection regarding maintenance of the fixed assets register and, therefore, the issue could not be raised at this stage.

7.3. We find from the application filed by the appellant before the State Commission that the issue of fixed assets register has not been raised specifically. However, the appellant has raised the issue of

verification of assets in view of absence of the audited balance sheet of the previous year.

7.4 The respondent no. 2 had submitted the unaudited statements of account of the licensees upto FY 2008-09 to the State Commission. The State Commission had considered the opening balance of Gross Fixed Assets as per the provisional accounts for FY 2008-09 submitted by the respondent no. 2, subject to review at the time of true-up. There is a substance in the contention of the appellant that depreciation might have been allowed on the assets yet to be capitalized. In this connection, it is pertinent to refer to the relevant extracts of the order which are reproduced below:

“5.6.3. UPPTCL has also submitted that actual capital investment during the FY 2007-08 and FY 2008-09 was Rs. 729.27 cr. and Rs. 850.94 cr.

respectively as against the envisaged capital investment plan of Rs. 1016 cr. and Rs. 1192 cr. respectively. This variation from the envisaged capital investment occurred due to certain policy issues as well as non-availability of government guarantee for drawl of financial institutional loans. This adversely affected the creation of assets due to which the depreciation and interest and finance charges had lower incidence than the approved levels. Here, the Commission would like to reiterate that it shall be undertaking true-up exercise for approved figures and the actual expenses incurred for the various years once audited accounts are finalized for past periods”.

“5.6.5. The Commission has undertaken data validation exercise for estimating the actual investments made by UPPTCL. From its provisional balance sheet for FY 2008-09 it was observed that actual achievement with respect to last year investment plan and approved investments were in the range of 50% - 75%. Hence the Commission has approved all other investments (Transmission

works, System improvement and others proposed to be funded through various funding agencies) to the extent of 70% for FY 2009-10. However, if the UPPTCL actually incurs expenditure in excess of the approval, the Commission may approve the same subject to prudence check and if found in consonance with the provisions of Transmission Tariff Regulations at the time of true up”.

“5.7.2 On account of lack of details of fixed assets register, the Commission has assessed depreciation on the basis of weighted average depreciation rates as against specific depreciation rates for each class of asset”.

“6.20.6 Similarly DISCOMS have also proposed investment of Rs. 2924 cr. under other works for FY 2009-10 to be carried out through Rs.2522 cr. of equity funding & rest through loans. The Commission has carried out analysis of past investments made by DISCOMS from provisional accounts of FY 2007-08 and FY 2008-09 wherein the investments for FY 2007-08 are approximately

*Rs. 2000 cr. against the investment plan of Rs. 2925 cr. as claimed in the last tariff filing. Similarly the investments for FY 2008-09 are approximately Rs.2200 cr. against the capital investment plan of Rs.4796 cr. as claimed in the last tariff filing. Hence it is noticed that the actual investments as provided in the provisional accounts are 68% for FY 2007-08 and 46% for FY 2008-09 when compared to planned investments. In this regard, the Commission approves **50%** of the investments proposed as interim measure with normative debt-equity ratio instead of debt-equity funding proposed by the DISCOMS for respective schemes. The prudence check with regards to actual amount spent under the said head / schemes will be undertaken at the time of true-up”.*

“6.21.5 The Commission had directed the DISCOMS to ensure that proper and detailed Fixed Assets Register are maintained at the field offices. The DISCOMS in response have intimated that necessary instructions have been issued to the

field offices with regards to this. However, no report has been submitted with regards to the methodology adopted for maintaining the same.

6.21.6 Hence, the Commission reiterates its direction to the DISCOMS to ensure that they maintain proper and detailed Fixed Assets Registers to work out the depreciation expense as specified in the Distribution Tariff Regulations and submit within two months from the date of issue of this Tariff Order a report to the Commission citing clearly as to how they are maintaining fixed assets registers for the various assets”.

7.5. The above observations and findings of the State Commission in the impugned order clearly establish that there is weight in the argument of the learned counsel for the appellants.

7.6. We find that the State Commission has already directed the licensees to maintain detailed Fixed

Assets Register. Maintenance of Fixed Asset Register by the licensee is also required according to the Tariff Regulations. The relevant Regulation is reproduced below:

“4.5 (9) The Licensee will maintain asset registers at each operating circle/division that will capture all necessary details on the asset, including the cost incurred, date of commissioning, location of asset, and all other technical details”.

The respondent licensees are directed to comply with the directions of the State Commission and submit a report in this regard to the State Commission within one month of this judgment.

7.7. Regarding true up of the financials of the respondent licensees we have already given the directions in paragraph 6.15 above.

8. The fourth issue is regarding subsidy by the State Government.

8.1 According to learned counsel for the appellant the subsidy has to be paid by the State Government in advance.

8.2 Learned counsel for the State Commission has submitted that the licensees have taken a commitment of advance subsidy from the State Government and as such the conditions of Section 65 are substantially met.

8.3 According to the learned senior counsel for the respondents 2 to 8, as per the tariff order total subsidy of Rs. 1341.80 Crores was to be given by the State Government which has been paid by the State during the FY 2009-10 . Hence no grievance can be raised by the appellant on this account.

8.4 In view of the submissions made by the learned senior counsel for the respondents, the issue regarding payment of subsidy by the State Government does not survive.

9. The fifth issue is regarding the System Loading Charges.

9.1. According to learned counsel for the State Commission, the levy of System Loading Charges is a matter under the Electricity Supply Code, 2005 and as such needs to be addressed before the appropriate forum.

9.2. According to learned senior counsel for the respondents 2 to 8, System Loading Charges are levied only once at the time of taking a new correction

as provided under clause 4.1 (b) of the UP Electricity Supply Code, 2005 and is not part of the tariff.

9.3. We are in agreement with the contention of the respondents that the System Loading Charges are levied accordingly to the Supply Code at the time of providing of electricity connection and is not a part of the tariff. If the appellant is aggrieved by the provisions of the Supply Code he has to challenge the same at the appropriate forum. However, we direct the State Commission to ensure that the works required to be carried out from System Loading Charges collected from the consumers is not capitalized for the purpose of determination of Return on Equity and interest on loan and there is no double counting of capital expenditure. This may also be ensured while truing up the financials. The State Commission shall also devise a mechanism to avoid the double counting.

10. The sixth issue is regarding waiver of late payment surcharge.

10.1. According to learned counsel for the appellant the State Commission can not allow waiver of late payment of surcharge without asking the State Government to comply with the provisions of Section 65 of the Act.

10.2. According to learned counsel for the State Commission, the appellant did not raise this objection before the State Commission either during the public hearing or in its written objections, and as such it cannot be permitted to raise the same at this stage. Further the provisions of Section 65 are not applicable to One Time Settlement. Also while allowing One Time Settlement of blocked arrears, the State Commission has clarified that the surcharge waiver shall not be

allowed to be passed through onto consumers in future tariff or true up exercise.

10.3. Learned senior counsel for the respondents 2 to 8 has submitted that the One Time Settlement Scheme was adopted in order to recover old dues. The late payment surcharge which has been waived has not been allowed to pass through in the tariff, hence no grievance can be raised on this ground.

10.4. We find that the appellant had raised the issue of waiver of amount under One Time Settlement Scheme in its suggestions/objections dated 22.12.2009 before the State Commission.

10.5. The findings of the State Commission with regard to One Time Settlement ('OTS') Waiver Scheme

are as under:

“6.27 ONE TIME SETTLEMENT (OTS) WAIVER SCHEMES:

6.27.1 As per clause 12 the General Provisions of the Tariff Order for FY 2006-07 & clause 10 of the General Provisions of Tariff Order FY 2008-09; the DISCOMS were allowed to launch two surcharge waiver scheme (One Time Settlement Scheme) for recovery of blocked arrear and impact of such waiver were allowed to pass through in ARR for ensuing year with conditions as laid down, therein.

6.27.2 DISCOMS have claimed Rs.54.46 cr. as waiver amount passed onto the Consumers for FY 2007-08 & FY 2008-09.

6.27.3 In view of the DISCOMS submission, the Commission allows waiver amount. But, this

amount shall be subject to true-up when the audited accounts are finalized for respective years.

6.27.4 Moreover, the Commission on 5th of February, 2010 issued an order on OTS schemes for FY 2009-10. In this order, it is stated that the surcharge waiver will not be a pass through in any future tariff / true-up exercise”.

10.6. We find that the State Commission had given directions to the distribution licensees for OTS Scheme in the Tariff Orders for the FY 2006-07 and the FY 2008-09 to launch two surcharge waiver schemes for recovery of the blocked arrears. Further the State Commission by its order dated 5.2.2010 on OTS Scheme for the FY 2009-10 had decided that the surcharge waiver will not be a pass through in any future tariff/true up exercise. The tariff orders for the FY 2006-07 and 2008-09 and order dated 5.2.2010 are not part of the present appeal. Further, the State

Commission has already decided that the surcharge waiver will not be a pass through in any future tariff/true up exercise.

10.7. In view of above, the issue relating to OTS does not survive.

11. The seventh issue is regarding unmetred supply and levy of minimum consumption charges.

11.1. According to the appellant, the State Commission has not considered these issues which were raised in the objections filed before the State Commission.

11.2. We find that the State Commission has dealt with the issue in paragraphs 4.6.5 and 4.6.6 of the impugned order and has given a reasoned order in this regard. On the other hand, the appellant has not

raised any objection to levy minimum consumption charges but wants that the minimum charges levied on monthly basis should be adjustable on yearly basis. We are not convinced with the argument of the appellant in this regard and reject the same.

11.3. We also do not find any specific submission regarding unmetered supply in the objections filed before the State Commission.

11.4. Accordingly, the appellants' contention on the above issues is rejected.

12. Summary of our findings

12.1 The first issue is regarding acceptance of the petition filed by the respondent no. 2 belatedly and without the audited accounts. Even if it is accepted that the filing of the tariff petition by the

licensees on or before 30th November of each year is not mandatory because of absence of penal consequences in the Regulations still the State Commission has powers to initiate suo motu proceedings for tariff determination in case the licensee does not file the petition in time, as per the regulations. However, delay in filing the ARR/tariff petition can not be a reason to set aside the tariff proceedings and the order. In this case the State Commission had given the extensions to the respondent licensees for filing of the petition. We have also given directions to the State Commission and the licensees in paragraph 6.7 for future. We have also held that the Regulations clearly indicate the requirement of submission of the audited accounts. The audited accounts for the previous year are not only required for the true up

but also needed for making realistic estimate of expenditure required for determination of ARR for the ensuing year. The ARR/ tariff determination for the ensuing year should also consider true up of financials for the previous financial year and Annual Performance Review for the current financial year as available in the half yearly provisional accounts for making a realistic estimate of ARR for the ensuing year. However, if the audited accounts for the previous year are not available for some reasons then at least the audited accounts for the year just prior to the previous year alongwith the provisional accounts for the previous year may be considered.

12.2. Regarding the second and third issues relating to true up of financials of the previous year and verification of the fixed assets, we have

given some directions to the State Commission and the licensees in paragraphs 6.15 and 7.6 respectively for implementation.

12.3. Regarding the fourth issue on subsidy by the State Government, in view of the submissions made by the respondents the issue does not survive.

12.4. The fifth issue is regarding System Loading Charges. We are in agreement with the contention of the respondents that the System Loading Charges are levied according to the Supply Code at the time of providing the electricity connection and is not a part of the tariff. However, we have given direction to the State Commission in paragraph 9.3 to avoid double counting of the capital expenses carried out from System Loading

Charges for the purpose of returns to the distribution licensees.

12.5. The sixth issue is regarding introduction of One Time Settlement Scheme and waiver of late payment surcharge. The relevant orders of OTS are the tariff orders for FY 2006-07 FY 2008-09 and order dated 5.2.2010 which are not part of the present Appeal. Further, the State Commission has already decided that the surcharge waiver will not be a pass through in any future tariff/ true up exercise. Accordingly, this issue would not survive.

12.6. The seventh issue is regarding the unmetered supply and levy of minimum consumption charges. We do not find any substance in the submissions of the appellant and reject the same.

13. In view of above, the appeal is allowed in part as indicated above without any cost. We have also given some directions to the State Commission and the respondent licensees for necessary action in future.

14. Pronounced in the open court on this **21st day of October, 2011.**

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

**(Rakesh Nath)
Technical Member**

REPORTABLE / NON-REPORTABLE

vs