

Court-II
In the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 188 of 2015

Dated: 28th July, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Torrent Power Limited

Incorp. Under the Companies Act, 1956

Having its Registered Office at :
Torrent House, Off Ashram Road,
Ahmedabad – 380 009, Gujarat.

... Appellant(s)

Versus

1. U.P. Electricity Regulatory Commission

II Floor, Kisan Mandi Bhawan,
Gomti Nagar, Vibhuti Khand,
Lucknow – 226 010.

2. U.P. Power Corporation Limited

Through its Chairman/Managing Director,
Shakti Bhawan, Ashok Marg,
Lucknow.

3. Dakshin Vidyut Vitran Nigam Limited

Through its Managing Director
Urja Bhawan,
NH-2 (Agra-Delhi Bypass Road)
Sikandra, Agra – 282 007.

... Respondent(s)

4. Rama Shankar Awasthi

Son of (Late) Shri G.P. Awasthi
Village Rithari, Post Kurara,
Distt. Hamirpur and
Present Residence,
301-Surabhi Deluxe,
Apartment, 6/7 Dali Bagh,
Lucknow.

... Respondent/Petitioner

Counsel for the Appellant(s) : Mr. Jayant Bhushan, Sr. Adv.
Mr. Ramji Srinivasan, Sr. Adv.
Ms. Deepa Chawan
Mr. H. S. Jaggi, Mr. Hardik Luthra,
Mr. Chantan Bandila,
Mr. Ravindra R. Chile,
Mr. V. C. Shukla, Ms. Sara Sundaram,

Mr. Chetan Bundela

Counsel for the Respondent(s) : Mr. C. K. Rai
Mr. Paramhans for R-1/UPERC

Mr. Pradeep Misra, Mr. Manoj Kumar
Sharma, Mr. Shashank Pandit for R-
2/UPPCL

Ms. Alka Agarwal for R-3/DVVNL

Mr. Rama Shankar Awasthi, R-4
Mr. Anand K. Ganesan

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

The present appeal, emanating from the Impugned Order dated 16.07.2015, has been filed under Section 111 of the Electricity Act, 2003 by Torrent Power Ltd. (the appellant) assailing the said Impugned Order dated 16.07.2015, passed in Petition No. 816 of 2012 by the Uttar Pradesh Electricity Regulatory Commission (in short '**State Commission**')/respondent No.1 in the matter of investigation and taking appropriate action against the appellant and further to cancel license of Dakshin Vidyyut Vitran Nigam Limited (in short '**DVVNL**') whereby the State Commission has concluded that the Petition is filed by Mr. Rama Shankar Awasthi, Petitioner/respondent No.4 herein, is maintainable and hence, decided to proceed with the matter. The State Commission, in the Impugned Order, has further held that since the State Commission has jurisdiction to hear and decide the Petition filed by Mr. Rama Shankar Awasthi, it becomes incumbent upon the State Commission to further assess the benefits of such franchisee given to the appellant, Torrent Power Ltd. for the DISCOMs as also for the general public. The State Commission further has held that although the Torrent Power Ltd. has made submissions but submissions are insufficient and further since the said Petition had already been prolonged for many years and five years have already lapsed since the Agreement became effective, hence formation of a Committee with a specific purpose to ascertain the answers to the following questions:

- (i) What has been the yearly reduction in loss levels since 2009-10 to till date?

- (ii) What has been improvement in the collection efficiency from 2009-10 level?
- (iii) How much arrears have been recovered from the due amount from 2009-10?
- (iv) Have the benefits of such improvements, if any, been passed on to the consumer and if yes, how?

Apart from above specific questions the Committee would also examine the year wise technical and commercial performance of TPL. The Committee would be at liberty to investigate and examine any sort of data and accounts so as to assess the performance of TPL. The work shall be completed within two months of this order.

- 2) The appellant has challenged the Impugned Order on the following main grounds:
 - (a) Lack of jurisdiction under the Electricity Act, 2003 for the State Commission to consider issues in public interest as well as contractual matters concerning the appointment of distribution franchisee, namely, Torrent Power Ltd. (TPL)
 - (b) Grievance of individual persons not maintainable before the State Commission under the provisions of the Electricity Act, 2003, particularly, when the matters are pending before the Hon'ble Allahabad High Court and also there is no remand by this Appellate Tribunal on the aspect of grant of franchisee.
- 3) The appellant herein, the Torrent Power Ltd., is a company formed under the provisions of Companies Act, 1956 and is in the business of generation and distribution of electricity.
- 3.1) The respondent No.1 is the State Commission which is empowered to discharge various functions under the provisions of the Electricity Act, 2003. Respondent No.2 is UPPCL and respondent No.3/DVVNL is a distribution licensee in the State of Uttar Pradesh. Respondent No.4/Mr. Rama Shankar Awasthi is a person who filed the Impugned Petition before the State Commission.

- 4) Mr. Rama Shankar Awasthi, respondent No.4/petitioner, preferred the Petition, being No.816 of 2012 before the State Commission, requesting the State Commission to investigate the conduct of UPPCL/DVVNL which had appointed Torrent Power Ltd. as a 'franchisee' for the distribution of electricity in the urban area of Agra. By way of filing the Impugned Petition before the State Commission, Mr. Rama Shankar Awasthi impugned the distribution Franchisee Agreement dated 18.05.2009 and Supplementary Agreement dated 17.03.2010 entered and executed between the appellant and respondent No.3 and to investigate the conduct of respondent No.2 & 3 who had appointed the appellant as the franchisee for the distribution of electricity in the urban area of Agra without purportedly seeking prior approval of the State Commission for transfer of the assets/inventory of DVVNL to the appellant. The appellant herein raised the preliminary objection before the State Commission as to the jurisdiction and maintainability of the Petition and jurisdiction of the State Commission to hear the said Petition in which the aforesaid Impugned Order has been passed. According to Mr. Rama Shankar Awasthi/Petitioner, the licensee may appoint franchisee in the rural area as per Section 13 of the Electricity Act, 2003 and provisions of National Electricity Policy.
- 5) The relevant facts of the matter are as under:
- 5.1) On or about 06.07.1999, the Uttar Pradesh Electricity Reform Act, 1999 came into force. In pursuance of reform restructuring exercise, the erstwhile U.P. State Electricity Board was unbundled on 14.01.2000 under the first reforms transfer scheme into the following three separate entities:
- (a) Uttar Pradesh Power Corporation Ltd. (UPPCL) was vested with the function of transmission and distribution within the State.
 - (b) Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited (UPRVUNL) was vested with function of thermal generation within the State and
 - (c) Uttar Pradesh Jal Vidyut Nigam Limited (UPJVNL) was vested with the function of Hydro Generation within the State.

The trifurcation of the UPSEB was accompanied by the financial restructuring of the State's Power Sector utilities. Four new distribution companies namely,

DVVNL, MVVNL, PVVNL and PVVNL were created vide Uttar Pradesh Transfer of Distribution Undertaking Scheme, 2003.

- 5.2) That on 10.06.2003, the Electricity Act, 2003 came into force.
- 5.3) On or about 12.08.2003, the State Government notified the U.P Transfer of Distribution Undertaking Scheme 2003 for the purpose of providing and giving effect for transfer of distribution undertakings of U.P. Power Corporation Ltd. to four distribution companies, one of which was the DVVNL. In pursuance to the said transfer scheme, the respondent No.3 became a distribution licensee under the provisions of the Electricity Act, 2003.
- 5.4) That on 18.05.2009, the Distribution Franchisee Agreement was entered into between the appellant and DVVNL, respondent No.3. The appellant was appointed as Distribution Franchisee under the Electricity Act, 2003 by UPPCL and DVVNL under Section 2(27), read with 7th proviso to Section 14 of the Electricity Act, 2003.
- 5.5) That on 17.03.2010, a Supplementary Agreement was executed between the appellant and respondent No.3. From the said date of execution of the said Agreements, the appellant had undertaken the work of distribution of electricity in the areas of Agra as agreed upon in the distribution franchisee agreement.
- 5.6) That Mr. Rama Shankar Awasthi, respondent No.4/petitioner preferred the Petition, being No. 816 of 2012 before the State Commission requesting it to investigate the conduct of UPPCL/GUVVNL which had appointed TPL as the franchisee for the distribution company for the urban city of Agra, impugning the distribution franchisee agreement dated 18.05.2009 and supplementary agreement dated 17.03.2010, executed between the appellant and respondent No.3, DVVNL, without seeking prior approval of the State Commission for transfer of assets/inventory of the DVVNL to the appellant. In the said Petition, the aforementioned Impugned Order dated 16.07.2015 has been passed which is being assailed before us in this appeal.
- 6) We have heard Mr. Jayant Bhushan, Sr. Adv., Mr. Ramji Srinivasan, Sr. Adv. Ms. Deepa Chawan for the appellant and Mr. C.K. Rai, Mr. Pradeep Misra,

Ms. Alka Agarwal, Mr. Anand K. Ganesan and Mr. Rama Shankar Awasthi in person for the respondents. We have also gone through the written submissions filed on behalf of the respondents, perused the impugned order, including the material available on record.

- 7) The following two issues arise for our consideration:
- (a) Whether the State Commission lacks jurisdiction under the Electricity Act, 2003 to consider issues in public interest as well as contractual matters concerning the appointment of distribution franchisee, namely Torrent Power Limited (TPL)
 - (b) Whether the grievance of individual persons is not maintainable before the State Commission under the provisions of the Electricity Act, 2003, particularly when the Writ Petition or public interest litigations are pending before the Hon'ble Allahabad High Court.
- 8) Since both these issues are interconnected, we are taking them and deciding them together.

The following arguments have been made by the appellant on the said issues:

- 8.1) That the Impugned Order is clearly erroneous, contrary to law and material on record, so far as it relates to the interpretation of provisions of Electricity Act, 2003 and has made the seventh proviso to Section 14, read with Section 2(27) of the Electricity Act, 2003 otiose and nugatory.
- 8.2) That the State Commission has failed to consider the import and meaning of the concept of franchisee and appointment of the franchisee namely, the appellant, TPL, by the distribution licensee, as ushered in the Electricity Act, 2003.
- 8.3) That the State Commission has usurped the jurisdiction of the public interest in passing the Impugned Order because the State Commission is not empowered to consider the issues of public interest as well as contractual matters concerning appointment of a distribution franchisee.
- 8.4) That Section 2(27) of the Electricity Act describes the '*franchisee*' as under:

“franchisee” means a person authorized by a Distribution Licensee to distribute electricity on its behalf in a particular area within his area of supply.”

- 8.5) That proviso 5 and 7 to Section 14 of the Electricity Act, 2003 respectively states as under:

“... the Government company or company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:”

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

- 8.6) That in view of the proviso 5 and 7 to Section 14 of the Electricity Act, 2003, the distribution licensee, including the respondent No.3, herein is entitled to appoint a distribution franchisee for a particular area of supply. In the present case, the respondent No.3 a distribution licensee namely, DVVNL has appointed the appellant, TPL as a franchisee for a part of its area of supply.

- 8.7) That legally the DVVNL continues to remain responsible and accountable in all respects for its area of supply to the State Commission under the Electricity Act, 2003. There is a contractual relationship between the appellant and the respondent No.3, distribution licensee. In this view of the matter the said Petition is liable to be dismissed, being non-maintainable, because respondent No.4/petitioner erred in invoking the jurisdiction of the State Commission under Section 86 of the Electricity Act, 2003 which does not confer the jurisdiction as claimed by the appellant.

- 8.8) That the grievance of individual person is not maintainable before the State Commission, as per the provisions of definition of a ‘consumer’ and Section 86, dealing with function of State Commission, prescribed in the Electricity Act, 2003.

8.9) That the Hon'ble Supreme Court has already settled the issue relating to individual consumers approaching the State Commission in the case of **Maharashtra Electricity Regulatory Commission Vs. Reliance** and **Maharashtra State Electricity Distribution Co. Ltd. Vs. Lloyds Steel Industries Ltd., reported in (2007) 8 SCC 381, paragraph 33 and 34** of which state as under:

“33. As per the aforesaid provision, if any grievance is made by a consumer, then they have a remedy under Section 42(5) of the Act and according to sub-section (5) every distribution licensee has to appoint a forum for redressal of grievances of the consumers. In exercise of this power the State has already framed the Maharashtra Electricity Regulatory Commission (Consumer Grievance Redressal Forum and Ombudsman) Regulations, 2003 (hereinafter referred to as “the 2003 Regulations”) and created Consumer Grievance Redressal Forum and Ombudsman. Under these 2003 Regulations a proper forum for redressal of the grievances of individual consumers has been created by the Commission. Therefore, now by virtue of sub-section (5) of Section 42 of the Act, all the individual grievances of consumers have to be raised before this forum only. In the face of this statutory provision we fail to understand how could the Commission acquire jurisdiction to decide the matter when a forum has been created under the Act for this purpose. The matter should have been left to the said forum. This question has already been considered and decided by a Division Bench of the Delhi High Court in Suresh Jindal v. BSES Rajdhani Power Ltd. and Dheeraj Singh v. BSES Yamuna Power Ltd.- and we approve of these decisions. It has been held in these decisions that the forum and ombudsman have power to grant interim orders. Thus a complete machinery has been provided in Sections 42(5) and 42(6) for redressal of grievances of individual consumers. Hence wherever a forum/ ombudsman have been created the consumers can only resort to these bodies for redressal of their grievances. Therefore, not much is required to be discussed on this issue. As the aforesaid two decisions correctly lay down the law when an individual consumer has a grievance he can approach the forum created under sub-section (5) of Section 42 of the Act.

34. In this connection, we may also refer to Section 86 of the Act which lays down the functions of the State Commission. Sub-section (1)(f) of the said section lays down the adjudicatory function of the State Commission which does not encompass within its domain complaints of individual consumers. It only provides that the Commission can adjudicate upon the disputes between the licensees and generating companies and to refer any such dispute for arbitration. This does not include in it an individual consumer. The proper forum for that is Section 42(5) and

thereafter Section 42(6) read with the Regulations of 2003 as referred to hereinabove....”

- 8.10) In view of the above, the Impugned Petition is not maintainable as the grievance of individual consumer cannot be moved before the State Commission and the State Commission has never been conferred with any extra ordinary jurisdiction beyond the ambit of Section 86 of the Electricity Act, 2003.
- 8.11) That the State Commission is not conferred with jurisdiction to decide matters akin to public interest litigation. The respondent/petitioner claims to be a consumer of the State of Uttar Pradesh. The provisions of Electricity Act, 2003 do not permit a consumer or a person to approach the State Commission for the aforesaid reliefs. In terms of adjudicatory role, Section 86(1)(f) of the Electricity Act, 2003 confers power on the State Commission to adjudicate upon disputes between licensees and / or generator.
- 8.12) That the full Bench of Calcutta High Court in ***Hriday Nath Vs Ramachara reported in AIR 1921 Cal 34*** stated that *“the jurisdiction of the court may be qualified or restricted by a variety of circumstances. Thus the jurisdiction may have to be considered with reference to place, value and nature of the subject-matter. The power of a Tribunal may be exercised within defined territorial limits. The Court or Tribunal must be careful to distinguish exercise of jurisdiction from existence of jurisdiction, for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all not the decision rendered therein is what makes up jurisdiction, and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.”*
- 8.13) As quoted in ***Ujjam bai Vs. state of U.P reported at AIR 1962 SC 1621*** *‘jurisdiction’ means authority to decide. Whenever a judicial or quasi judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on application for certiorari but are binding until reversed on appeal.*

8.14) That a Civil Misc. Writ Petition (PL) No. 49974 of 2009 (**Gharelu Vidyut Upbhokta Kalyan Samiti & Ors. Vs. State of U.P & Ors.**) is pending before the High Court at Allahabad in which respondent No.3 is also a party, seeking some reliefs in the Impugned Petition. The reliefs prayed by the *Gharelu Vidyut Upbhokta Kalyan Samiti & Ors* in the said PIL are:

- A. *Issue a writ, order or direction in the nature of certiorari calling for the record of the case and quashing the unregistered Distribution Franchisee Agreement dated 18.5.2009 executed between Respondent No.3 and respondent No.5 and declare the same as null and void.*
- B. *Issue a writ, order or direction in the nature of Mandamus directing the Respondents not to give effect to unregistered Distribution Franchisee Agreement dated 18.5.2009 and further be pleased to issue direction to Respondent Nos. 1, 2, 3, 4 and 6 to ensure 100% compliance of the ban on the use of generator in TTZ, in order to protect Taj Mahal from air pollution emanating due to the use of generator sets or from any other quarter, and*
- C. *Issue a writ of mandamus and / or any other appropriate writ, order or direction, directing the Respondents to comply with various directions, orders and / or guidelines passed by the Hon'ble Apex Court in writ petition (civil) No.12281/1984 in relation to 100% uninterrupted power supply for TTZ/Agra city and protection of Taj Mahal.*
- D. *Pass any other order/s or direction/s as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.*
- E. *Award the cost of this writ petition in favour of the petitioners throughout.*

8.15) In the PIL/Writ Petition before the Hon'ble High Court, the relief regarding quashing of the distribution franchisee agreement dated 18.05.2009 had been prayed for.

8.16) That another Civil Misc. Writ Petition (PIL) No.30385 of 2012 (**Agra Mandal Vyapar Sangathan Vs. State of U.P and Others**) had been filed impleading respondent No.3 as a party seeking the same relief of certiorari for quashing most of the office memorandum dated 08.10.2009 and letter dated 03.12.2009 and also pass appropriate order or direction to constitute independent and impartial committee for monitoring the affairs of the TPL in the city of Agra and

submit report regarding the irregularities and illegalities perpetuated in Agra City.

- 8.17) One more Writ Petition (PIL) No. 2463 of 2014 (**Anoop Gupta Vs. Union of India & Ors.**) was also filed before the High Court of Allahabad, impleading the respondent No.3 as a party. The Hon'ble Lucknow Bench dismissed the said Writ Petition No.2463 of 2014 vide order dated 27.03.2014 on the ground that similar public interest litigations are pending before the Hon'ble Allahabad High Court, giving liberty to the petitioner of the Writ Petition No.2463 of 2014, namely, *Anoop Gupta* to intervene in the Writ Petition pending in the Hon'ble Allahabad High Court besides giving liberty to the interested persons to file intervention application before the Hon'ble High Court of Allahabad in respect of the issues relating to execution of distribution franchise agreement and consequent development there to.
- 8.18) That since the same issue is pending before the Hon'ble Allahabad High Court, hence, the State Commission should have dismissed the said Petition, filed by Mr. Rama Shankar Awasthi.
- 8.19) That a Writ Petition (Civil) No. 361 of 2009 namely, **Gharelu Vidyut Upbhokta Kalyan Samiti & Ors Vs. State Of U.P.& Ors.** was also filed before the Hon'ble Supreme Court which was dismissed as withdrawn vide order dated 04.09.2009 passed by Hon'ble Supreme Court.
- 8.20) That there was no remand by this Appellate Tribunal on the aspect of grant of franchisee, as concluded in the Impugned Order, because Appeal Nos. 239, 240, 241 and 243 of 2012 and Appeal Nos. 11, 12 and 160 of 2013 were filed before this Appellate Tribunal against the State Commission's order dated 19.10.2012, in the matter of determination of Annual Revenue Requirement (ARR) and tariff for the FY 2012-13. In the said appeals, this Appellate Tribunal framed the issue that "*when a franchisee has been given by the distribution licensee in its area of operation, why should the consumers of other distribution licensees bear the tariff burden on account of supply of cheaper power by one of the distribution licensees to the franchisee?*"

- 8.21) That this Appellate Tribunal vide its judgment dated 28.11.2013, passed in the aforesaid batch of appeals being Appeal No.239 of 2012 and others explaining the details of tariff and bulk supply etc. decided the issue against the appellants of the said appeals.
- 8.22) That this Appellate Tribunal in the matter of ***Amausi Industries Association & Ors. Vs. Uttar Pradesh Electricity Regulatory Commission reported in (2014) ELR (APTEL) Page 362*** did not remand the matter, on the issue raised in the present Petition, to the State Commission and the factual matrix of the judgment has to be seen and appreciated.
- 8.23) The main prayer of the appellant in the instant appeal is to modify or quash or set aside the Impugned Order dated 16.07.2015.
- 9) **Per contra**, the following points have been argued on behalf of the respondent, State Commission:
- 9.1) That the said Petition No.816 of 2012 was filed before the State Commission by Mr.Rama Shankar Awasthi under Section 128 and 129 of the Electricity Act, 2003, read with Section 26 and 27 of the U.P. Electricity Reforms Act 1999 praying, *inter alia*, for the following reliefs :
- “29. That in view of the aforesaid facts and circumstances, it is expedient in the interest of justice that this Hon’ble Commission may graciously be pleased to investigate the conduct of the Respondent No.1 and 2 for acting in sheer disregard and gross violation of the statutory mandatory provisions of the Act, 2003 and declare that the utility of the licensee has been transferred in favour of the Respondent No.3 without prior permission of the State Commission as mandated by Section 17 of the Act, 2003 and further that the Respondent No.1 and 2 acted in breach of the License, 2000 and annul the license No.3 of 2010 dated 21.01.2010 of the Respondent No.2 in respect of Urban Area of Agra and also agreement dated 18.05.2009 and supplementary agreement dated 17.3.2010”.*
- 9.2) That on 13.06.2014, the appellant filed an objection questioning the maintainability of the Petition pleading that the State Commission do not have jurisdiction to entertain the said Petition as the PIL/Writ Petitions are pending in the Hon’ble High Court at Allahabad seeking the same relief of quashing the Agreement dated 18.05.2009 and Supplementary Agreement dated 17.03.2010

entered and executed between the appellant and respondent No.3. Further, raising the objection regarding maintainability of the Petition, the appellant raised the objection before the State Commission that the matter had already been decided by this Appellate Tribunal in Appeal No.239 of 2012 & Batch.

- 9.3) That the learned State Commission, vide order dated 12.05.2014 and also by the Impugned Order dated 16.07.2015, relying upon judgment dated 12.02.2008, passed by Bombay High Court reported in (2008) 110(2) Bombay LR has held that the Petition is maintainable and well within its jurisdiction. Further, deciding the formation of a committee to ascertain the yearly reduction in loss levels since 2009-10 till date to ascertain the improvement in the collection efficiency from 2009-10 and how such improvement, if any, have been passed on the consumers.
- 9.4) That this Appellate Tribunal admitting the instant appeal for hearing vide Impugned Order dated 15.09.2015, directed the appellant to furnish within three weeks the Distribution Franchisee Agreement entered into between the appellant and the DVVNL and to explain under what circumstances the appellant was appointed franchisee and who will bear the ultimate burden of expenses of the appellant. The said direction of this Appellate Tribunal, by the appellant, has not been complied with till date which warrants dismissal of this appeal on this point alone.
- 9.5) That the franchisee system is allowed under the provisions of the Electricity Act, 2003 with the primary objective of facilitating reduction of distribution losses and improvement in collection efficiency. Further the concept of franchisee has been promoted in the Electricity Act 2003 to ensure better quality of supply and services to the consumer. The agreements between the appellant and respondent No.3 namely DVVNL have been entered with the said motives only. But since five years have lapsed which is substantial period to show the improvements etc. the State Commission wanted to ascertain whether the objectives have been met and whether the trends of improvement are visible.

- 9.6) That with the above view the State Commission vide another order dated 12.05.2014 sought certain reply and data from respondent No.3, DVVNL and the appellant, which DVVNL did not give.
- 9.7) That the DVVNL has not met the above information as sought in the order dated 12.05.2014 of the State Commission. On this background, the State Commission has passed the Impugned Order and decided to form a Committee with the specific purpose to ascertain the answers to questions raised in the Impugned Order.
- 9.8) That the directions in the Impugned Order have been passed by State Commission in consonance with the judgment dated 28.11.2013 passed by this Appellate Tribunal in Appeal No. 239 of 2012 & Batch, Appeal No.11 of 2013 & Batch. In the judgment dated 28.11.2013 passed in Appeal No.239 of 2012 & Batch, this Appellate Tribunal held as under:

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

71. There are many models of appointing the Franchisee and one of such model is 'on the basis of Input costs'. Under this model the Franchisee is sold electricity by the licensee at certain predetermined rate and the franchisee distributes the electricity in its area and recovers the costs at price not more than retail tariff of the Licensee. The Franchisee is responsible for the reduction of losses. The areas given to it for distribution is high loss area. The franchisee would earn profit only if he is able to reduce the losses to a certain level else he would suffer loss.

72. The average revenue recovery rate of Agra was only Rs.1.27 per unit. The bulk supply rate for the licensee was Rs.2.64 per unit.

Thus, the licensee was suffering a loss of Rs.1.37 per unit to supply power in this area. Accordingly, the consumers of other areas would have been subsidizing this amount. With the appointment of a Franchisee at Bulk supply rate of Rs.1.54 per unit, the cross subsidization by the consumers of other areas gets mitigated by 27 paise per unit.

- 10) Mr. Pradeep Misra, learned counsel appearing for the respondent, UPPCL has supported the grounds or submissions raised on behalf of the appellant, making the following submissions:
 - 10.1) That Mr. Rama Shankar Awasthi has no *locus standi* to maintain the Petition before the State Commission
 - 10.2) Mr. Rama Shankar Awasthi is a resident of Village Nithari, Post Kurara, District Hamirpur and at present resident of 301, Subhi, Deluxe Apartment, 6/7, Dalibagh, Lucknow. Mr. Rama Shankar Awasthi was not a resident of Agra hence the Petition on his behalf is not maintainable.
 - 10.3) Mr. Rama Shankar Awasthi in the Impugned Petition states that the situation of electricity supply is not good and the local resident of City Agra is suffering a lot due to power cuts. Mr. Rama Shankar Awasthi has some social obligations also towards his friends and relations and, therefore, he is to visit the Agra City. Mr. Rama Shankar Awasthi visited Agra City a number of times, but now-a-days the condition of supply of electricity in the City Agra is very poor and alarming as compared to the previous period when the distribution of electricity was undertaken by the respondent No.1 and 2. The same is forcing the local residents to switch over to alternate arrangement of electricity supply to meet their day-today requirement.
 - 10.4) The functions of the State Commission are provided under Section 86 of the Electricity Act, 2003, wherein there is no provision entitling the State Commission to test the franchisee agreement entered into between the licensee and the franchisee. Hence, the Impugned Petition being in the nature of public interest litigation is not maintainable before the State Commission. Since the licensee has not contravened any condition of license, the Impugned Petition is not maintainable.

10.5) That the question of jurisdiction of the State Commission was raised before the State Commission by respondent No.2 and 3, however, the State Commission assumed the jurisdiction on the basis that this Appellate Tribunal had passed a specific direction to pass consequential orders. Various appeals, being Appeal No.239 of 2012 & Batch (supra) were filed by various consumers in respect of tariff determination by the State Commission for the DISCOMs of Uttar Pradesh for the FY 2012-13 and in most of the appeals Mr. Rama Shankar Awasthi was a party. All the appeals were filed against the distribution licensees in Uttar Pradesh. The said appeals were disposed of by this Appellate Tribunal vide judgment dated 28.11.2013. The relevant part is being reproduced as under :

“74. With regard to Rosa Power, it was contended that this is not a tariff related matter. Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar Pradesh. Any money excess paid to or recovered from Rosa power will necessarily be a pass through in tariff and therefore it becomes a tariff issue. In fact, this aspect was raised by the Appellant before the State Commission but no finding was given by the State Commission. Therefore, since the issue has not been decided by the State Commission it requires reconsideration by the State Commission and to decide the issue afresh.”

10.6) That the ‘appointment of input base franchisee agreement’ was entered into as per recommendations of the Central Electricity Authority which was accepted by Government of Uttar Pradesh.

10.7) That the issue regarding appointment of appellant ‘as input base franchisee’ is pending consideration before the Hon’ble High Court in the aforesaid Writ Petitions hence, the Impugned Petition filed by Mr. Rama Shankar Awasthi is not maintainable before the State Commission.

11) **Our consideration and conclusion:**

The Torrent Power Ltd. who is appellant herein and a franchisee of Respondent No.3, Dakshin Vidyut Vitran Nigam Ltd., has in the instant appeal challenged the Impugned Order dated 16th July, 2015, passed in Petition No.816 of 2012, passed by the State Commission on two points:

- (a) That the State Commission has no jurisdiction under the Electricity Act, 2003 to consider the issues in public interest as well as contractual matters concerning the appointment of distribution franchisee like the appellant and
- (b) That the grievance of individual persons is not maintainable before the State Commission, particularly when the Writ Petition or public interest litigation are pending before the Hon'ble Allahabad High Court.

11.1) The genesis of this litigation started as a result of judgment dated 28.11.2013, passed by this Appellate Tribunal, in Appeal Nos. 239 of 2012 and Batch. That batch of appeals was filed by various consumers challenging the order dated 19.10.2012, passed by the State Commission in the matter of determination of ARR and tariff for FY 2012-13. The various categories of consumers who filed that batch of appeals assailed the order dated 19.10.2012 of the Commission on the following grounds:

- (a) Fixation of tariff without audited accounts for the period 2008-09 onwards despite the specific directions issued by this Tribunal in the Judgment dated 21.10.2011 in Appeal No.121 of 2010.
- (b) Differences/discrepancies in Data and irregularities in the method of issuance of the tariff order
- (c) Increase in the level of cross subsidy
- (d) Non recovery of past surplus of the Transmission Licensee.
- (e) Allowing Bulk Supply Power to Torrent Power, a franchisee enterprise below the bulk power purchase price.
- (f) No separate Tariff Petition for the licensees;
- (g) Fixed Assets Register; Transparency and propriety etc.

This Appellate Tribunal in its judgment dated 28.11.2013 in that batch of appeals directed the State Commission as under:

“74. With regard to Rosa Power, it was contended that this is not a tariff related matter. Rosa Power is one of the generating companies having entered into a PPA with the Holding Company for supply of power to the consumers in the State of Uttar Pradesh. Any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore it becomes a tariff issue. In fact, this aspect was raised by the

Appellant before the State Commission but no finding was given by the State Commission. Therefore, since the issue has not been decided by the State Commission it requires reconsideration by the State Commission and to decide the issue afresh.”

- 11.2) What became clear from the above paragraph No.74 is that this Appellate Tribunal in the aforesaid judgment, in the batch of appeals, accepted the contention of the appellant who are consumers to the effect that since Rosa Power is one of the generating companies having entered into a PPA with the Holding Company to supply power to the consumers in the State of Uttar Pradesh, any money excess paid to or recovered from Rosa Power will necessarily be a pass through in tariff and therefore it becomes a tariff issue. Since the issue was raised by the consumers before the State Commission but the State Commission did not record any findings thereon. Hence, this Appellate Tribunal directed reconsideration of the issue and decide the same afresh. It is in pursuance of the aforesaid direction given in paragraph 74, cited above, that the Commission after hearing has passed the Impugned Order dated 16.07.2015 in Petition No.816 of 2012.
- 11.3) The Impugned Order has merely been assailed by the appellant who is a franchisee of the distribution licensee in the State of Uttar Pradesh, in the instant appeal. Mr. Rama Shankar Awasthi, respondent No.4 (the petitioner of Petition No.816 of 2012) filed the said Petition before the State Commission requesting it to investigate the conduct of UPPCL, DVVNL which had appointed the appellant as a franchisee for distribution licensee in the urban area of Agra. Mr. Awasthi in the Petition has impugned a distribution agreement dated 18.05.2009 and Supply Agreement dated 17.03.2010 entered between the appellant (Torrent Power Ltd.) and Respondent No.3, DVVNL and to investigate the conduct of Respondent No.2, namely UPPCL and Respondent No.3 DVVNL (Discom) who had appointed the appellant as a franchisee without seeking prior approval of the State Commission for transfer of assets/inventory of the Discom to the appellant. The appellant Torrent Power Ltd. raised a preliminary objection before the State Commission as to the jurisdiction and maintainability of the said Petition. Let us see the Impugned Oder which has been assailed in the instant appeal by the franchisee, appellant. The State Commission in the Impugned Order dated 16.07.2015 held that since the State Commission has jurisdiction to hear and decide the said Petition it becomes incumbent upon the

State Commission to further assess the benefits of such franchisee given to the appellant, Torrent Power Ltd. for the Discoms as also for the general public. According to the State Commission, since the said Petition had already prolonged for many years and five years already lapsed since the agreement became effective, the State Commission directed the formation of a Committee with the specific purpose of ascertaining the following points:

- (a) What has been the yearly reduction in loss levels since 2009-10 to till date?
- (b) What has been improvement in the collection efficiency from 2009-10 level?
- (c) How much arrears have been recovered from the due amount from 2009-10?
- (d) Have the benefits of such improvements, if any, been passed on to the consumer and if yes, how?

11.4) The State Commission further clarified that the said Committee would also examine the year-wise technical and commercial performance of Torrent Power Ltd. and the Committee would be at liberty to investigate and examine any sort of data and account so as to assess the performance of Torrent Power Ltd. further directing the Committee to complete the work within two months of the Impugned Order.

11.5) The main challenge of the appellant so far as the Impugned Order is concerned is that the State Commission has no jurisdiction under the Electricity Act, 2003 to consider the issues of public interest as well as contractual matters concerning the appointment of a distribution franchisee namely the appellant herein and further the grievances of individual persons are not maintainable before the State Commission since the same lis/dispute is pending before the Hon'ble Allahabad High Court in Writ Petitions or public interest litigations.

11.6) We have, in detail, described the rival contentions of the parties and the relevant provisions in that regard, the repetition of which we do not think proper. Section 2(27) of the Electricity Act, 2003 says that "*franchisee*" means a person authorized by a distribution licensee to distribute electricity on its behalf in a particular area within his area of supply" Further proviso 5 and 7 to Section 14 of the Electricity Act, 2003, state that a government company or any company referred to in Section 131 (2) of the Electricity Act, 2003 and the company created in pursuance to the Act specified in the schedule, shall be

deemed to be a licensee under the Electricity Act, 2003, where a distribution licensee proposes to undertake distribution of electricity for a specified area within the area of supply through another person, that person shall not be required to obtain any separate license from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in its area of supply.

- 11.7) In view of the above, we are of the clear view that the distribution licensee including respondent No.3, herein is entitled to appoint a distribution franchisee for a particular area of its supply. In the present case, the Respondent No.3, a distribution licensee, namely DVVNL, had appointed the appellant Torrent Power Ltd. as a franchisee for a part of its area of supply in Agra. There is no dispute about this legal position. What is depicted from the above legal position is that the distribution licensee legally continues to remain responsible and accountable in all respects for its area of supply to the State Commission. There is a contractual relationship between the appellant, Torrent Power Ltd., and Respondent No.3, the distribution licensee.
- 11.8) We have, in paragraph 8.9 of this judgment, cited the judgment of the Hon'ble Supreme Court pronounced in *Maharashtra Electricity Regulatory Commission Vs. Reliance reported in (2007) 8 SCC 381*. We have given our careful consideration to the law laid down by Hon'ble Supreme Court reported in Maharashtra case. This Appellate Tribunal, in its judgment dated 27.05.2014, in Appeal No. 311 of 2013, while dealing with the consumer's grievance has observed as under:

"12. SUMMARY OF OUR FINDINGS:

12.1 The State Commission has no jurisdiction to entertain the individual consumer disputes under the provisions of Electricity Act, 2003. As observed by the Hon'ble Supreme Court in Maharashtra Electricity Regulatory Commission v. Reliance Energy Ltd. (2007) 8 SCC 381 and in M/s H.P. State Electricity Board v. M/s Gujarat Ambuja Cements Ltd. and others, in Civil Appeal No. 2005 of 2011, vide judgment, dated 22.2.2011, the State Commission, being State Electricity Regulatory, is under statutory obligation to ensure that any particular category of consumers has been rightly considered under the approved tariff category to which it belongs and is charged the tariff approved by the State Commission for the said category because the State Commission is under statutory duty or obligation to ensure the complete and full compliance of its tariff order in letter and

spirit by the distribution utility and to direct the distribution licensee to comply with the tariff order by adhering to consumer categories as approved under the tariff order and recover tariff as approved for that category. Thus, the adjudication of consumer disputes arising out of classification and reclassification of consumer categories is quite different and distinct from ensuring compliance of the tariff order in letter and spirit. The State Commission, being State Electricity Regulatory, is fully competent and empowered to look into the fact that the particular class of consumers or category of consumers is not over-charged under any so called new nomenclature or by making quite new categories without the approval of the State Commission, otherwise, the provision of Electricity Act, 2003, State Commission's Regulations, Supply Code and National Tariff Policy, would be put to misuse by some errant distribution licensees."

11.9) Further, this Appellate Tribunal in judgment dated 05.02.2016 in Appeal No.34 of 2015, while dealing with the consumer grievances has observed as under :

"18. The Appellant brought our attention to this Tribunal's order dated 22.03.2011 in the matter of Uttar Gujarat Vij Company Ltd. Vs. Gujarat State Electricity Regulatory Commission and Others in Appeal No. 181 of 2010 wherein it has been observed that if a particular entity is of the opinion that it has been wrongly categorized or that there has been wrong application of the Tariff Order because of misunderstanding or misinterpretation, then it is the State Commission that has to clarify the confusion and make the position clear. As per the Appellant, even in the present case, the matter is relating to the misunderstanding or misinterpretation of the Tariff Order for FY 2012-13 which clearly could be dealt with only by the State Commission in its true letter and spirit.

....

25. The State Commission has decided to refer the above case of the Appellant to Redressal Forum and Ombudsman on the basic premise of the judgment of Hon'ble Supreme Court and the relevant portion of the same judgment has already been reproduced above. In our opinion, the present case of the Appellant is not that similar to the case which was under the consideration of the Hon'ble Supreme Court. In that case, the Consumer Grievance Redressal Forum and Ombudsman was already created by the Maharashtra Electricity Regulatory Commission and the issue was relating to Section 86(1)(f) of the Electricity Act, 2003 on the aspect of adjudication by the State Commission in respect of the individual consumer. The Hon'ble Supreme Court stated in the above judgment that the State Commission cannot adjudicate disputes relating to grievances of individual consumers if such Redressal Forum is already in existence and the issue was limited to the individual grievances of the consumers. However, in the present case it is a distinct from the above in the manner that it is relating to only clarification of some of the provisions of the Tariff Order for the FY 2012-13 issued by the State Commission read in conjunction with Agreement dated 16.11.2013 executed between the Appellant and the Respondent No.1 and the limited issue before the State Commission was to issue the requisite clarification

with respect to the implementation of the provisions contained in the Clause 13 of the Agreement executed between the parties.

27. As decided by this Tribunal vide judgment dated 30.07.2007 in Appeal No. 37 of 2007, the matter related to interpretation of the Load factor rebates in the Appeal filed by the Jharkhand Induction Furnace Association Vs. Jharkhand State Electricity Regulatory Commission could be entertained by the State Commission and further stated that so far as the plea that it was merely a billing dispute and therefore, the consumer dispute forum should have been approached does not have any merits.

Here in the present Appeal also, the issue is of similar nature and required to be interpreted or clarified which could be judicially done by the State Commission since it is arising out of their own Tariff Order.

28. Even in another case involving Chhattisgarh State Power Holding Co. Ltd Vs. Lanco Amarkantak Power Pvt. Ltd in Appeal No. 176 of 2010, this Tribunal vide its judgment dated 15.03.2011 opined that the issue relating to clarification of applicability of tariff is not merely a billing dispute and the State Commission, which has determined the tariff under Section 86(1)(a) alone has the jurisdiction to give the clarification of correct applicability of the tariff provisions and in our opinion, the case in the present Appeal is similar one.

29. In another judgment of this Tribunal dated 27.05.2014, this Tribunal upheld the view that if any distribution licensee is found violating the Tariff Order of not complying with it in letter and spirit and is trying to misinterpret it while applying to certain category of consumers, then it is a statutory duty of the State Commission to look into the matter and ensure that the consumers are charged tariff as approved by the State Commission and the case in the present Appeal again is of the similar nature wherein a right interpretation of Tariff Order for the FY 2012-13 issued by the State Commission read in conjunction with Agreement dated 16.11.2013 executed between the parties, ought to have been dealt with by the State Commission itself.

11.10) This Appellate Tribunal in judgment dated 09.09.2015, in Appeal No.73 of 2014 and 197 of 2014, while dealing with the similar issue and perusing the Maharashtra case judgment of Hon'ble Supreme Court (supra) held as under:

"7.24 The Hon'ble Supreme Court in Maharashtra Electricity Regulatory Commission Vs. Reliance Energy Ltd. reported at (2007) 8 SCC 381 clearly observed that only billing disputes are to be decided by the Consumer Forum set up under the Electricity Act 2003 but the State Commission alone has complete jurisdiction to deal with the stipulations where non-compliance of condition, Rules and Regulations by the licensee are reported. The case in hand, as we have observed

above, the condition No.29 of the Load sanction letter issued by the Electricity Board was illegally inserted and the appellant was coerced and constraint to agree to that condition in spite of the fact that there were no CEA metering and operations Regulations or State Supply Code and that too on the basis of recommendations of the Committee of Electricity Board. Thus in this case the State Commission was fully competent to decide the matter of the appellant/petitioner as the non-compliance of the provisions of Electricity Act, conditions, Rules and Regulations by the Electricity Board was reported in the petition with certain prayers.”

11.11) We take note of the fact that the afore noted writ petition or public interest litigation involving identical facts are pending before the Hon’ble Allahabad High Court but there is no interim order or any other order of the Hon’ble High Court to stall the proceedings of the present matter pending before the State Commission. Further, it is also not the case of the appellant that the interim order has been passed by the Hon’ble High Court in the said matters.

11.12) We are fully conscious of the fact that this Appellate Tribunal does not have any power to entertain any public interest litigation under the Electricity Act, 2003 because there is no provision in the said Act to empower this Appellate Tribunal to hear and decide the public interest litigation. The matter in hand before us is not really a public interest litigation. The only purpose of the present Petition before the State Commission is whether by giving franchisee to Torrent Power Ltd. by a distribution licensee, namely Respondent No.3, DVVNL, some benefit has accrued to the consumers in general or not. What is to be seen is whether as a result of franchisee given to Torrent Power Ltd. the consumers of the area would be benefited or not? If all the liability, responsibility of the franchisee still remain with the distribution licensee, then its impact is also to be considered by the State Commission.

11.13) We are unable to accept this contention of the appellant that this Appellate Tribunal in judgment dated 28th November, 2013 in Appeal No.239 of 2012 and batch did not remand the matter to the State Commission, hence, the Impugned Order is manifestly erroneous and illegal. We have already cited the relevant part of the judgment dated 28th November, 2013, in paragraph 74, thereof this Appellate Tribunal clearly held that since any money excess paid or recovered from Rosa Power will necessarily be a pass through in tariff it becomes a tariff issue. It means that the learned State Commission is bound to

decide the said issue in the light of the observations made by this Appellate Tribunal in the said judgment as the same issue becomes a tariff issue, the effect on the consumers of the State, particularly within the area of Respondent No.3, DVVNL. Thus the whole impact of the franchisee and its consequences are to be considered to determine the tariff in the light as observed by this Appellate Tribunal.

11.14) The Petition No.816 of 2012 (Impugned Petition) was filed before the State Commission under Section 128 and 129 of the Electricity Act, 2003, read with Section 26 and 27 of the UP Electricity Reforms Act, 1999, praying, *inter alia*, for the following reliefs:

“29. That in view of the aforesaid facts and circumstances, it is expedient in the interest of justice that this Hon’ble Commission may graciously be pleased to investigate the conduct of the Respondent No.1 and 2 for acting in sheer disregard and gross violation of the statutory mandatory provisions of the Act, 2003 and declare that the utility of the licensee has been transferred in favour of the Respondent No.3 without prior permission of the State Commission as mandated by Section 17 of the Act, 2003 and further that the Respondent No.1 and 2 acted in breach of the License, 2000 and annul the License No.3 of 2010 dated 21.01.2010 of the Respondent No.2 in respect of Urban Area of Agra and also agreement dated 18.05.2009 and supplementary agreement dated 17.3.2010”.

11.15) The learned State Commission while passing the Impugned Order appears to have thought, on the formation of Committee, which should ascertain the loss level since 2009-10 till date, to ascertain the improvement in the collection efficiency from 2009-10 level and to see the improvement, if any, have been passed on to consumers in its right perspective and correctness.

11.16) We find that the franchisee system is allowed under the Electricity Act, 2003 with the primary objective of facilitating reduction of distribution loss and improvement in collection efficiency. Further the concept of franchisee has been permitted in the Electricity Act, 2003 to ensure better quality of supply and services to the consumers. Apparently, the agreement between the appellant, Torrent Power Ltd., franchisee and Respondent No.3, a distribution licensee had been entered with the said motives and purposes. Since five years had already elapsed since the agreement and to enable the franchisee to show

the improvements the State Commission appear to be on the right path to ascertain whether the said objectives as provided under the Electricity Act, 2003 have been met or accomplished and further whether the trends of improvements are visible.

11.17) The learned State Commission vide order dated 12.05.2014, i.e. more than one year before passing of the Impugned Order sought reply and data from Respondent No.3, DVVNL and the appellant in that regard which they did not give. Since the said data and information as sought by the State Commission's order dated 12.05.2014 were not given, the State Commission has to pass the Impugned Order and decide to form the aforesaid Committee for the aforesaid purposes.

11.18) On careful consideration, we are unable to accept this contention of Mr. Pradeep Misra, learned counsel for the Respondent, UPPCL that the petitioner Mr. Rama Shankar Awasthi has no *locus standi* to maintain the petition because the consumers, most of the time, remain unrepresented when such kind of decisions are taken and only a few consumers come forward to actively participate in such kind of proceedings. The present matter cannot be said to be a public interest litigation by any stretch of imagination.

11.19) Section 61 dealing with Tariff Regulations and Section 62 dealing with determination of tariff, of Electricity Act, 2003 clearly specify the Terms and Conditions for determination of tariff with certain guidelines like the factors which would encourage competition, efficiency, economic use of the resources, good performance and optimum investments and further safeguarding of consumers interest and at the same time recovery of cost of electricity in a reasonable manner and the principles regarding efficiency in performance, National Electricity Policy and Tariff Policy. A proviso to Section 62 of the Electricity Act 2003 states that in case of distribution of electricity in the same area by two or more distribution licensees, the appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity. Sub-section 2 further provides that the appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff. Sub-section 6 to

Section 62 of the Act says that if any licensee or a generating company recovers a price or charge exceeding the tariff determination under this Section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the Bank rate without prejudice to any other liability incurred by the licensee. From the perusal of the provisions of the Electricity Act, 2003, it is evidently clear that the tariff for a distribution licensee for its area of supply shall be determined by the respective State Commissions as per Terms and Conditions of the Act and relevant Tariff Regulations in compliance with the National Electricity Policy and Tariff Policy.

11.20) We have been informed during the arguments in this matter that in the State of Uttar Pradesh, Respondent No.2, UPPCL, procures bulk power from various sources and then supply it to the distribution licensees namely, Purvanchal Vidyut Vitran Nigam Ltd., Paschimanchal Vidyut Vitran Nigam Ltd., Madhyanchal Vidyut Vitran Nigam Ltd. and Dakshinanchal Vidyut Vitran Nigam Ltd. which are the Government Discoms besides a private Discom namely Noida Power. All the PPAs or agreements are executed between UPPCL and the relevant utility without any active role of the distribution licensee of Uttar Pradesh. A uniform tariff for the respective category of consumers is fixed for the whole State of Uttar Pradesh viz. for each of the Government Discoms. It means that the tariff shall remain the same for the whole State for each Discom, irrespective of the performance level of that Discom and its collection efficiency. Thus the consumers category-wise are charged the tariff at the same level. In other words, we can elucidate that the performance of the Discom of a particular area is never taken into account and all are to be treated alike.

11.21) The full Bench of this Appellate Tribunal in its judgment dated 15.12.2010 in Appeal No.121 of 2007, captioned as Uttar Pradesh power Corporation Ltd. Vs. NOIDA Power Co. Ltd. & Anr. had occasion to examine the status of the Uttar Pradesh Power Corporation Ltd. (UPPCL), as under:

14. Let us now examine the status of the Appellant. The Appellant is one of the successors of UPSEB. ALL the PPAs of erstwhile UPSEB with central sector generating stations in which UP has been allocated a share and other generating stations rest with the Appellant. The Appellant is also the sole procurer of power from thermal and hydro power stations owned by the state generating companies for the

distribution licensees. The Appellant is responsible for arranging bulk power supply to all the state owned distribution companies in the state.

15. There is no provision in the Electricity Act, 2003 for constitution of an entity responsible for procurement and bulk supply of electricity to the distribution licensees. Section 131 of the Electricity Act, 2003 provides for reorganization of the State Electricity Board and formation of State Transmission Utility, generating company, transmission licensee and distribution licensee. The Tariff Policy dated 6.1.2006, on the other hand, states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The PPAs have so far not been assigned to the successor distribution companies. The Appellant is aggregating the requirement of the distribution companies and procuring power on their behalf. Thus the bulk supply tariff of the Appellant which is the power purchase price of the distribution licensees has to be regulated by the State Commission under Section 86 (1) (b) of the Electricity Act, 2003.

16. To put the matter other way, the very claim of the Appellant that the Appellant has been discharging the function of a Trader, and as such it is free to have price fixed for bulk supply being unfettered by the law is wholly unacceptable. It is not the claim of the Appellant in the memorandum of Appeal that the Appellant's creation has been as a Trader in Electricity according to the Law. Though the function of the Appellant would prima-facie appear to be partaking the character of a Trading Company engaged in the business of trading of electricity, considered from the angle of history of the Organization of the Appellant it can hardly be said that the Appellant is an Electricity Trader within the meaning of Section 2(26) of the Electricity Act, 2003. The all-pervasive character of the UPSEB which was the creation of a statute, was initially fragmented on 4.1.2000 into companies for generation of electricity and for distribution and transmission. The function of distribution and transmission was vested with the Appellant Company. On 12.2.2003 because of further fragmentation the function relating to distribution was assigned to four Government owned distribution companies and later the function of transmission which was hitherto vested with the Appellant was also taken away from it, and consequently, the Appellant was assigned with the function of bulk supply to the distribution companies. Therefore, given the history of the evolution of the Organization, the Appellant's entity does not appear to be an Electricity Trader simpliciter. Its present function is no different altogether from one of the functions of its predecessors. An entity in the name and style of Uttar Pradesh Power Corporation Ltd. which is a Government Company has been created after unbundling the UPSEB only to supply power in bulk to different distribution companies and viewed in the light, the Appellant can hardly equate itself with a trader and claim freedom from the shackles of the law. Since the distribution companies which otherwise could be said to be competent under the law to purchase power from the Central and State generating companies could not do so because of non-assignment with them of the existing PPA entered into between the erstwhile UPSEB and the

generating companies, and since it is the Appellant alone with whom such assignment has been vested, the Appellant is exercising one of the functions of its predecessor-entity which was doubtlessly not exercising the function of a trader. Furthermore, in terms of PPA, tariff is to be determined by an independent authority and it is not a case that the Respondent No.2 has been procuring power from the Appellant through any competitive bidding process. Therefore, argument that in term of the PPA of 1993, the Appellant is still entitled to charge double the rates, is not acceptable.

17. The bulk supply tariff of the Appellant for supply to the four state owned distribution licensees is also determined by the State Commission and the same has not been challenged by the Appellant. Similarly, the bulk supply tariff determined by the State Commission for FY 2003-04 in September, 2003 and for FY 2004-05 in its order dated 18.2.2005 in respect of ARR/tariff of the Respondent has also not been challenged by the Appellant. It is not a case of the Appellant that in the impugned orders the rate determined by the State Commission is less than its bulk supply rate which is applicable to other state owned distribution licensees and the Appellant is suffering any loss on this account. The Appellant has challenged the impugned orders, where the cost of power purchased by the Respondent from other sources was adjusted in its bulk supply rate and surplus in ARR of the Respondent in a year was not passed on to the Appellant and adjusted in ARR of the Respondent for subsequent years. Further, the Appellant had not raised any objection to the notice given by the State Commission while disposing of the petitions of the Respondent for determination of ARR/tariff which culminated in the impugned orders.

11.22) Since the Full Bench of this Appellate Tribunal in judgment dated 15.12.2010 had examined the status of the appellant, we do not need to re-consider the same. This Appellate Tribunal in judgment dated 28.01.2008 in Appeal No.24 of 2007 & Batch in the matter of Mula Pravara Electric Co-operative Society Ltd. Vs. Maharashtra Electricity Regulatory Commission & Ors. while dealing with determination of retail supply tariff for each distribution licensee observed as under:

53. Licensees are required to file their Annual Revenue Requirement(ARR) and tariff proposal to the Commission who determines the ARR and the Retail Supply Tariff for various categories of consumers falling in the licensee's area. We agree with the contentions advanced on behalf of the respondent Commission that due to various reasons of varying cost of supply, consumer mix etc. it is not possible to arrive at uniform Retail Supply Tariff in the state across all licensees. The cost to serve depends upon various factors such as cost of power procured, transmission and distribution losses, operational and administrative expenses etc. which is bound to be different for different licensee's areas and, therefore, there is no way in which the Retail Supply Tariff can be kept at uniform level in the state. We are not able to agree with the contention of the applicant in IA No. 80 of

2007 in appeal number 24 of 2007 wherein it is alleged that the impugned order is violative of Article 14 of the Constitution of India as tariffs for MSEB and MPECS consumers set by MERC are different. The Commission has to set tariffs for various licensees areas individually and common tariff for consumers falling in different licensees area is envisaged in the Act. Section 62(3) of the Act permits the Commission to fix even differential tariff within a licensee's area for consumers. In view of this no interference with the orders of the Commission is called for in this view of the matter.

11.23) This Appellate Tribunal in a separate batch of appeals, being Appeal No.15 of 2008 & others, vide judgment dated 09.10.2009, while dealing with the determination of tariff for each distribution licensee, also observed and noted as under:

“Analysis and decision

27. The determination of tariff for each distribution licensee is based on the cost and expenses, power availability for the particular distribution licensee, consumer base and consumer mix of the distribution licensee, their efficiency of operations, distribution losses etc. etc. In order to encourage efficient operation, it is only necessary that the different licensees have competition amongst themselves to carry out their operations in more efficient manner. In view of this, this Tribunal held that the Commission may determine differential tariff, according to the geographical location of the consumers, different distribution licensees could have differential tariffs for their respective area of operations. The Letter dated September 26, 2007 from the Government of Karnataka to Secretary, KERC relied upon by the appellant ends with the following para.

“In this connection, I am directed to reiterate that the Government is not in favour of differential tariffs at this stage. This may be brought to the notice of the Commission”

28. We are inclined to agree with the contention of the Commission that the aforesaid Letter dated September 26, 2007 relied upon by the appellant is not any policy direction in terms of Section 108 which has not even been quoted in the letter. This is only an innocuous suggestion. In this view of the matter, the appeal is not allowed and we uphold the decision of the Commission.”

11.24) Thus this Appellate Tribunal has reiterated the view that there should be separate determination of tariff for each distribution licensee in the State. Uniform or common retail tariff for the several distribution licensees is not proper and is wrong.

12) In view of the above discussion, we find and observe that the learned State Commission is fully competent and has jurisdiction to entertain the Petition,

being Petition No.816 of 2012, because the pleadings and reliefs sought therein do not fall under the category of Public Interest Litigation. Further the grievances mentioned in the said Petition can legally be raised before a State Commission. In this view of the matter, we do not find any illegality or infirmity in the Impugned Order and both these issues are decided against the appellant. The appeal is liable to be dismissed.

ORDER

The Instant Appeal, being Appeal No.188 of 2015, is hereby dismissed and the Impugned Order is hereby affirmed. In the facts and circumstances of the matter no cost is being imposed. The Interim Order or any other Order, passed by this Appellate Tribunal, in this instant Appeal are hereby discharged.

Pronounced in the open court on this **28th day of July, 2016.**

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member



REPORTABLE / ~~NON-REPORTABLE~~