

**In the Appellate Tribunal for Electricity,
New Delhi
(Appellate Jurisdiction)**

Appeal no. 97 of 2015

Dated: 6th October, 2016

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. I.J. Kapoor, Technical Member**

In the matter of

**Meghalaya Power Distribution Company Limited
Integrated Office Complex
LumJingshai, Short Round Road
Shillong- 793001
Meghalaya**

... Appellant

Versus

**Meghalaya State Electricity Regulatory Commission
New Administrative Building, 1st Floor, Left Wing
Lower Lachumiere,
Shillong- 793001,
Meghalaya**

...Respondent

**Counsel for the Appellant: Mr. S. B Upadhyay, Sr Adv.
Mr. Sanjay Sen, Sr Adv
Mr. Param Kumar
Ms. Sakie Jakharia
Mr. Kaustav P. Pathak
Mr. Pynkraw Sahkar
Mr. Ruth Elwin**

**Counsel for the Respondent: Mr. Buddy A. Ranganadhan
Mr. D V Raghu Vamsy
Mr. Raunak Jain
Ms. Pooja Nuwal**

JUDGMENT

PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by Meghalaya Power Distribution Corporation (hereinafter referred to as “**Appellant**”) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 23.01.2015 passed by the Meghalaya State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in relation to determination of Fuel and Power Purchase Price adjustment amount for Meghalaya Power Distribution Corporation Ltd. (“**MePDCL**”) for first quarter of the FY 2014-15.
2. The Appellant, Meghalaya Power Distribution Corporation Limited (hereinafter called '**Distribution Company**') is the electricity Distribution Company in the State of Meghalaya.
3. The Respondent is the Electricity Regulatory Commission for the State of Meghalaya exercising jurisdiction and discharging functions in terms of the Electricity Act 2003.
4. Aggrieved by the Order dated 23.01.2015 passed by the State Commission, the Appellant has preferred the present appeal against the Impugned Order on following grounds:
 - a) The State Commission while passing the Impugned Order failed to put in place a Fuel and Power Purchase Price Adjustment (FPPPA)

mechanism in the Impugned Order which is in violation of Regulation 6 of the Tariff Regulations 2011 issued by the State Commission.

- b) The State Commission under Section 62 (4) of the Electricity Act failed to put in place a formula for recovery Fuel and Power Purchase Price Adjustment.
- c) The State Commission has acted contrary to principle laid down by this Tribunal in Judgment dated 11.11.2011 in OP no. 1 of 2011 wherein this Tribunal inter alia directed that any State Commission which did not have such formula/mechanism for fuel and power purchase cost adjustment in place must within 6 months of the date of the order put in place such formula/ mechanism.
- d) The State Commission failed to consider the simplified FPPPA formula proposed by Distribution Company without any justification. Further the State Commission erred in holding that the proposed modified formula for computation of FPPPA was already dealt with in order dated 02.12.2013 whereas no decision on the Review Petition dated 22.08.2013 of the Appellant was taken by the State Commission in the order dated 02.12.2013.
- e) The State Commission erred in rejecting the FPPPA surcharge as sought by the Appellant on the incorrect basis of considering variation in total power purchase cost as against total approved power purchase cost instead of considering per unit change in power purchase cost.

- f) The State Commission fell into error by failing to consider supplementary bills of the past period, which were received by the Appellant in the relevant Quarter of 2014-15, while considering FPPPA surcharge and deferring the same to be considered at the time of truing up, the same being in violation of the framework laid down in the Tariff Policy dated 06.01.2006 under clause 5.3 (h) (4).

- g) The State Commission fell into error while refusing to entertain the application of Distribution Company and the FPPPA surcharge sought therein on the basis that audited accounts are not available to determine actuals of expenditure and revenue for previous years and thereby delaying the process of recovery of FPPPA surcharge.

5. Facts of the present Appeal:

- a) Govt. Of Meghalaya notified the Meghalaya Power Sector Reforms Transfer Scheme 2010 on 31.3.2010, under which the erstwhile Meghalaya State Electricity Board (MeSEB) was reorganized and unbundled into (i) Meghalaya Electricity Corporation limited (MeECL), the Holding Company and (ii) Meghalaya Power Distribution Corporation Limited (MePDCL), the Distribution Utility; (iii) Meghalaya Power Generation Corporation Limited (MePGCL), the Generation Utility; & (iv) Meghalaya Power Transmission Corporation Limited (MePTCL), as the Subsidiary Companies with effect from 01.04.2010.

- b) The State Commission notified the Meghalaya State Electricity Regulatory Commission (Terms and Conditions for Determination of

Tariff) Regulations, 2011 ("**Tariff Regulations, 2011**") w.e.f. 10.02.2011. Regulation 6 of the Tariff Regulations 2011 provided for Power Purchase and Fuel Cost Adjustment.

c) MeECL, the Holding Company, under Regulation 6 of the Tariff Regulations, 2011 filed a Petition for approval of FPPPA Formula within the State of Meghalaya on 12.10.2012. MeECL prayed approval of the FPPPA Formula as submitted and made applicable on quarterly basis. The proposed FPPA formula by MeECL was as below:

i. **The amount of Fuel & Power Purchase Price Adjustment (FPPPA) shall be computed as under:**

$$FPPPA = (PPP_0 + Z + A + I)$$

Where

- FPPPA is the Fuel & Power Purchase Price Adjustment in Rs. million
- PPP_0 is the adjustment on account of variation in the power purchase cost from other entities, including Central Sector Stations, Independent Power Producers, Captive Power Plants, Bilateral, Power Exchange etc as determined by the State Commission from time to time.
- Z is any other unpredictable and unforeseen cost, not envisaged at the time of tariff fixation. These costs could be variation in Water Charges/ Tax structure / Electricity Duty/Cess & Other Levies.
- A is the adjustment on account of unadjusted amount, if any, from the previous Control Period.
- I is the adjustment on account of interest burden on MeECL due to additional Working Capital requirement corresponding to lagged recovery.

ii. Adjustment Formula for change in costs of Power Purchases (PPP₀) on account of variation in the power purchase cost from other entities in Rs. Millions;

$$PPP_0 = \sum_{m=1}^k (FC_A - FC_B) + \sum_{m=1}^k \{(VC_A - VC_B) \times (Q_A)\}$$

Where

m 1 to k the generating stations of other entities

FC_A = Actual fixed cost paid to the generators in Rs Million

FC_B = Base fixed costs to the generators in Rs millions as per applicable/ prevailing order of the MSERC.

VC_A = actual variable cost per unit of delivered energy in Rs/KWh computed based on the principles laid down in the power purchase arrangements or tariff order of appropriate regulator

VC_B = the base variable cost per unit of delivered energy from each station in Rs./KWh as per applicable /prevailing order of the MSERC

Q_A = the actual level of power purchases from each source in million units.

iii. Adjustment Formula for unadjusted amounts (A):

The adjustment on account of unadjusted amount form previous period shall be calculated in the following manner:

$$A = FPPPA_{PPT} - FPPPA_{APT}$$

Where

A The adjustment on account of unadjusted charge in fuel and power purchase price of previous Control period in Rs. Million.

FPPPA_{PPT} Amount permitted for pass through in Rs. million

FPPPA_{APT} Amount actually passed through in Rs. Million

iv. Adjustment Formula for working capital interest(I):

$$I = \frac{UA \times r \times T}{12}$$

Where

I Interest cost (carrying cost) in Rs Million.

UA The adjustment on account of fuel and power purchase price of previous control period (PPP_0), any other unpredictable and unforeseen cost (Z) and under or over recovery carried forward from previous control period (A) (in Rs. Million) i.e. $UA = PPP_0 + Z + A$, Where, PPP_0 , Z, A is as defined earlier

r Average rate per annum of short term borrowing for MeECL for preceding Control Period (in percent per annum).

T Time difference between the date of recovery of adjustments from the consumers and the date on which the adjustments are measurable (months)

v. Allocation of FPPPA amount in each category

$$FPPPA_{pu} = \frac{(FPPPA \times ARR_{CCPT} / ARR_{AT})}{SEc}$$

$FPPPA_{pu}$ is the Fuel & Power Purchase Price Adjustment in Rs. per kWh

ARR_{CCPT} Approved revenue (as per applicable /prevailing order of the MSERC) from sale of power to the category

ARR_{AT} Total approved revenue (as per applicable /prevailing order of the MSERC) from sale of power to categories other than exempted categories.

SEc Energy sold in the previous "Control Period" in Million Units for the category (The Control Period shall mean to be the period comprising of a Quarter)

In case approved revenue is not available for computation of ARR_{CCPT} and ARR_{AT} , actual revenue for the previous Control Period shall be used.

- d) Commercial operation of MePDCL, the Distribution Company commenced from 01.04.2013.
- e) An Order in the FPPPA Petition dated 12.10.2012 was passed by the State Commission on 28.06.2013 wherein State Commission decided to allow fuel and power purchase cost adjustment mechanism for FY 2013-14 on provisional basis as an interim arrangement. The State Commission approved a modified FPPPA formula which would be allowed subject to total cost of power purchase from the sources other than State Generating Stations being more than the purchase cost allowed in the tariff order of respective year. The FPPPA formula was made applicable from prospective date i.e. for the quarter beginning 01.07.2013 for the previous quarter (April'13 to June'13). As per order, the FPPPA formula will be reviewed in the tariff order for FY 2014-15.
- f) Aggrieved by the order dated 28.06.2013, Distribution Company filed a review Petition on 22.08.2013, praying for modification of the formula approved in its Order dated 28.06.2013 and prayed that it be allowed to compute the PPP_0 on the basis of the change in the unit rate of power purchase and multiplied by actual quantum approved for FY 2013-14 in the tariff order. By such computation the additional power purchase expenditure will be about Rs 27.6 crores, recoverable from the consumers through FPPPA. It was also prayed to allow the Licensee to recover "I" component as part of FPPPA.

- g) The State Commission by communication dated 3.9.2013 stated that the FPPPA formula approved by order dated 28.06.2013 is provisional and directed Distribution Company / MePDCL to file proper petition deriving fuel surcharge for the first quarter and to suggest any improvement in the proposed formula with supporting documents to validate its claim.
- h) On 20.11.2013, Distribution Company filed petition seeking amendment of the modified Fuel and Power Purchase Price Adjustment (FPPPA) Formula approved by State Commission vide its order dated 28.06.2013 and also submitted the FPPPA computation for the period from April-September, 2013 according to the formula originally proposed by it. By this method of calculation, the Appellant sought Rs. 27.6 crores for FPPPA for the first quarter of FY 2013-14 and Rs 25.35 crores for FPPPA for the second quarter of FY 2013-14.
- i) On 02.12.2013, the State Commission passed orders on FPPPA for the period April 2013 to September 2013. The State Commission observed that there were supplementary bills related to previous year's dues and delayed payment surcharges in the first quarter of FY 2013-14 and also noted that according to Distribution Company these bills were received by it in the first quarter of FY 2013-14. The State Commission stated that the entire amount of Rs. 82 Crore per quarter allowed in the tariff order for power purchase from all sources was enough to meet the requirement of Rs. 64 Crore actually spent by the licensee provided it gets the targeted quarterly amount of Rs. 154 Crore as revenue out of sale as per tariff order. The State Commission, in the absence of

audited figures, provisionally allowed Rs 5 Crore against an amount of Rs 27.6 Crore sought by Distribution Company as FPPPA for first quarter. For the second quarter also the State Commission provisionally allowed Rs. 5.5 Crore against an amount of Rs 25.34 Crore as sought by Distribution Company.

- j) In view of the order dated 02.12.2013, the Appellant on 02.01.2014 raised the issue of pending Review Petition dated 22.08.2013 before State Commission and sought disposal of the same.
- k) On 12.04.2014, the State Commission passed Tariff Orders for period FY 2014-15.
- l) The Appellant on 10.06.2014 filed a Review Petition seeking review of the Tariff Order dated 12.04.2014 for the period FY 2014-15 submitting that a final decision on the Review Petition dated 22.08.2013 on FPPPA be decided by State Commission.
- m) The State Commission on 03.07.2014 directed the Appellant to file information relating to FPPPA for 1st quarter of 2014-15 as per the order dated 28.06.2013 and also directed the Appellant to propose a computation of FPPPA for 1st quarter of FY 2014-15 based on its previous year experience for examination and orders.
- n) Based on the experience of the previous two years, the Appellant proposed a simplified FPPPA formula for computation of FPPPA for Q-1 of 2014-15 to the State Commission on 13.08.2014, as follows:

$$\mathbf{FPPPA= (PPP_0+I)}$$

Where,

I = Adjustment on account of interest burden on MePDCL due to additional Working Capital requirement corresponding to lagged recovery

PPP₀ = Is the adjustment on account of variation in the power purchase cost from other entities, including Central Sector Stations, Independent Power Producers, Captive Power Plants, Power Exchange, etc as determined by the State Commission from time to time.

The PPP₀ will be computed by the following way:

$$PPP_0 = \sum_{m=1}^k (FC_A - FC_B) + \sum_{m=1}^k ((VC_A - VC_B) \times (Q_A))$$

Where

FC_A = Actual fixed cost of a station

FC_B = Approved fixed cost of a station

VC_A = Actual per unit variable cost of a station

VC_B = Approved per unit variable cost of a station

Q_A = Actual quantum purchase from the stations.

Thereafter, the Appellant sought to have the formula implemented in the following manner:

- The Multiplying Factors for LT & HT (MF_{LT} & MF_{HT}) will be fixed for a financial year based on the Tariff Order of State Commission for that Financial Year.
 - The FPPPA is proposed to be recovered in the form of an incremental energy charge (Rs/kWh) in proportion to the energy consumption and form a part of the energy bill to be served by MePDCL on its consumers except exempted category.
 - The formula is proposed to be applied at the end of each quarter by MePDCL with post-facto approval of the State Commission.
- o) The State Commission passed the Impugned Order on 23.01.2015 relating to determination of fuel and power purchase price adjustment amount for Distribution Company for first quarter of FY 2014-15. Aggrieved by the Impugned Order, the Appellant has preferred the present Appeal.

6. QUESTIONS OF LAW

As per Appellant, the following questions of law arise in the present Appeal:

- a) Whether the failure to put in place a FPPPA mechanism in the Impugned Order passed by State Commission is in violation of Regulation 6 of the Tariff Regulations 2011?
- b) Whether the Impugned Order passed by the State Commission is in the teeth of Section 62 (4) of the Electricity Act, 2003 having failed to put in place a formula for recovery Fuel and Power Purchase Price Adjustment?

- c) Whether by passing the Impugned Order the State Commission has acted contrary to principle laid down by this Tribunal in Judgment dated 11.11.2011 in OP no. 1 of 2011 wherein this Tribunal inter alia directed that any State Commission which did not have such formula/mechanism for fuel and power purchase cost adjustment in place must within 6 months of the date of the order put in place such formula/ mechanism?
- d) Whether the State Commission fell into error by failing to consider the simplified FPPPA formula proposed by MePDCL without any justification? Whether the Ld. MSERC erred in holding that the proposed modified formula for computation of FPPPA was already dealt with in order dated 2.12.2013 whereas no decision on the Review Petition dated 22.08.2013 of MePDCL was taken by the State Commission in the order dated 02.12.2013?
- e) Whether the State Commission erred in rejecting the FPPPA surcharge as sought by MePDCL on the incorrect basis of considering variation in total power purchase cost as against total approved power purchase cost instead of considering per unit change in power purchase cost?
- f) Whether State Commission fell into error by failing to consider supplementary bills of the past period, which were received by the Appellant in the relevant Quarter of FY 2014-15, while considering FPPPA surcharge and deferring the same to be considered at the time of truing up, the same being in violation of the framework laid down in the Tariff Policy dated 06.01.2006 wherein clause 5.3 (h) (4) provides for recovery of uncontrollable costs?
- g) Whether State Commission fell into error while refusing to entertain the

application of MePDCL and the FPPPA surcharge sought therein on the basis that audited accounts are not available to determine actuals of expenditure and revenue for previous years and thereby delaying the process of recovery of FPPPA surcharge?

7. We have heard at length Mr. S. B. Upadhyay, the learned senior counsel for the Appellant and, Mr Buddy A. Ranganadhan, the learned counsel for Respondent and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the submissions is as under.
8. **On the specific issues raised in the present Appeal, the learned senior counsel for the Appellant has made the following submissions for our consideration;**

Issue no. 1: Failure on the part of the State Commission to put in place a FPPPA Formula and a recovery mechanism thereunder.

- i. The provision for FPPPA was provided in the Tariff Regulations 2011, however, till date the State Commission has failed to put in place a FPPPA Formula and a recovery mechanism for timely recovery of fuel and power purchase cost incurred by MePDCL. The said failure to put in place an FPPPA mechanism was in violation of :
 - a) Regulation 6 of the Tariff Regulations 2011
 - b) Section 62 (4) of the Electricity Act, 2003.
 - c) Clause 5.3 (h) (4) Tariff Policy dated 6.01.2006

d) By doing so, the State Commission has also acted contrary to the principle laid down by this Tribunal in Judgment dated 11.11.2011 in OP no. 1 of 2011 which was later also followed in Judgment dated 14.1.2013 in OP no. 1 and 2 of 2012 in relation to FPPPA mechanism.

Further, the State Commission has acted in violation of its own order dated 28.06.2013 wherein it was concluded that further orders would be issued in respect of allowing FPPPA automatically subject to a maximum ceiling of charges at the time of passing of orders for first quarter of FY 2013-14. However, no such automatic recovery mechanism was ever approved by State Commission neither in the order for first quarter 2013-14 nor later.

- ii. Contrary to the provisions under the MYT Regulation effective from 25.09.2014, there is no automatic recovery of FPPPA.

Issue no. 2: Incorrect basis for disallowing refund of FPPPA for Q1 FY 2014-15 and failure to consider supplementary bills to the tune of Rs. 65.42 Crores

- i. The Appellant on the basis of the provisional FPPPA formula as approved in order dated 28.06.2013 of the State Commission claimed an amount of Rs. 47.204 Cr as FPPPA for 1st quarter of FY 2014-15 and alternatively also claimed an amount of Rs 59.849 Cr as FPPPA for the relevant quarter computed on the basis of its simplified FPPPA formula suggested by it therein. The State

Commission in the Impugned Order rejected the claim of the Appellant on either basis and recorded the following findings:

Impugned findings

"2. The information shows Rs.33.11 crores as actual fixed cost as against Rs.40.22 crores approved by the Commission for the quarter. Similarly, the actual variable charges have been shown as Rs.35.20 crores against the approved amount of Rs.46.31 crores. The Generating Stations from whom power was purchased are the OTPC, NTPC, NHPC, OPTC and NEEPCO. The quantum of electricity actually purchased from these stations is 197.79 MU while the approved quantum is 282.54 MU. On further examination it is found that the amount of power purchase includes the delayed payment surcharge as reflected in supplementary bills for the past periods. In the present application, the petitioner has proposed levy of Rs 2.28 per unit to Rs 3.90 per unit as the Fuel and Power Adjustment rate to be charged from different categories of consumers. While computing the surcharge the licensee has considered Rs 47.20 crores (PPP_o) which is the difference between the actual power purchases cost (Rs. 133.73 Cr.) and approved power purchase cost (Rs. 86.53 Cr). On examination, it is found, that PPP_o includes a supplementary bill of Rs 65.42 crores which is related to the past period bills and delayed payment surcharges. The Commission's order dated 28.06.2013 provides that previous years power purchase dues can be considered during the truing up exercise and therefore if we excludes this amount the approved power purchase cost is more than the actual by Rs 18.2 crores in the quarter of 2014-15 and there is no justification for allowing FPPPA surcharge as proposed by the licensee."

- ii. A major part of power procured by the distribution company comes from the Central Sector Generating Companies whose tariff is regulated by the Central Electricity Regulatory Commission

- ("CERC") and the charges of the generation companies are also increased as and when the fuel prices are increased.
- iii. All supplementary bills received during a particular quarter need to be considered for determining FPPPA surcharge for that period. The State Commission deferred the recovery of FPPPA surcharge on the incorrect basis that previous years power purchase dues can be considered only during the truing up exercise. Supplementary bills are payable within 30 days of receipt of bills and thus the expenditure incurred/ becomes incurred in the same specific quarter in which the bills are received. Moreover, non-payment of supplementary bills lead to imposition of late payment charges by the suppliers.
- iv. Unlike bills for Energy & Capacity charges, supplementary bills are not being raised by suppliers at fixed intervals. Such bills do not follow a set time schedule and cannot be anticipated with any degree of certainty.
- v. In this regard reference may be made to the Judgment of this Tribunal dated 11.10.2013 in Appeal no. 5 of 2013:

"39. The very purpose to provide FSA is to compensate the Distribution Licensee for the increase in power purchase costs during the year to keep its financial liquidity intact. In practice, a generator has to make payment for the fuel. Any increase in fuel

price will have to be compensated else the generator would not be in position to procure enough fuel to generate.

Therefore, the DISCOMs who procure power from the Generators, they would have to pay the generators the increased costs. If DISCOMs are not compensated during the period, their liquidity would be affected. In case the Regulatory control is enforced at every level, the very purpose of FSA would be lost."

- vi. In the context of Supplementary bills, the State Commission has stated that average power purchase cost from NEEPCO has become very high because licensee was paying fixed charges without getting energy as NEEPCO has stopped the supply of MeECL *due* to non-payment of dues. MePDCL has long term PPA with NEEPCO and it is obligated to make payments for capacity charges/Fixed cost irrespective of procurement of power from such sources. The power regulation was only during the Q-1 of FY 2014-15 and the Power Regulation by NEEPCO had been withdrawn after MePDCL made some payments against the outstanding dues. Subsequently, MePDCL has taken substantial steps so that no power regulation occurs from NEEPCO and to repay the debt of NEEPCO. As a result of such steps initiated by MePDCL on 23.02.2015 NEEPCO has already agreed to waive of 60% of the surcharge amount. In order to clear the remaining power purchase dues of NEEPCO, MePDCL has approached the Power Finance Corporation Limited (PFC) for sanction of medium term loan and PFC has also accorded the approval of the loan.

- vii. The State Commission while adopting the principle of FPPPA mechanism provisionally adopted in its earlier order dated 28.06.2013 entirely rejected the Supplementary bills of the previous years on the basis that same may be considered during the truing up exercise.

Issue no. 3: Wrongful denial of FPPPA formula proposed by MePDCL.

- i. Under the directions of the State Commission, MePDCL proposed computation of FPPPA for the 1st Quarter of 2014-15 based on its previous year's experience.

$$\mathbf{FPPPA = (PPP_0 + I)}$$

Where,

- I = Adjustment on account of interest burden on MePDCL due to additional Working Capital requirement corresponding to lagged recovery
- PPP_0 = Is the adjustment on account of variation in the power purchase cost from other entities, including Central Sector Stations, Independent Power Producers, Captive Power Plants, Power Exchange, etc. as determined by the Commission from time to time.

The PPP_0 will be computed by the following way:

$$PPP_0 = \sum_{m=1}^k (FC_A - FC_B) + \sum_{m=1}^k ((VC_A - VC_B) \times Q_A)$$

Where

- FC_A = Actual fixed cost of a station
- FC_B = Approved fixed cost of a station
- VC_A = Actual per unit variable cost of a station
- VC_B = Approved per unit variable cost of a station

- Q_A = Actual quantum purchase from the stations.

- ii. **Factor 'I' in the formula** - The factor 'I' in the suggested FPPPA formulae of MePDCL is adjustment on account of interest burden on MePDCL due to additional working capital requirement corresponding to delayed recovery. When the power purchase cost exceeds the approved power purchase cost, MePDCL borrows short term loan to make payment for such additional power purchase cost in time to avoid delayed payment surcharge or Power Regulation by Generators. The State Commission has not considered the proposal of MePDCL to include factor "I" in FPPPA formula.
- iii. The State Commission ought to have reviewed the FPPPA formula for the period FY 2014-15 on the basis of actual data, as per the State Commission own decision dated 28.06.2013. The said provisional FPPPA formula adopted in order 28.06.2013 is flawed because the State Commission has set a criteria therein that FPPPA will be computed only if the total actual power purchase cost is more than the total approved power purchase cost. In effect, the State Commission considered change in total power purchase cost whereas it is the variation in per unit power purchase cost that reflects the actual additional power purchase cost of the licensee. This can be seen in the following illustrations:

Scenario 1: Actual total Power Purchase Cost more than Approved cost but actual per unit cost same as approved.

It is assumed that other than power purchase cost, all other cost are fixed in nature i.e. these cost will not vary with the quantum of energy sale.

SN	Particulars	Unit	Approved	Actual
1.	Total Power Purchase Cost	Rs Crs	8.00	10.00
2.	Total Energy Sale	MU	80	100
3.	Per unit cost of Power Purchase	Rs/Unit	1.00	1.00
4.	Per unit fixed cost (other than power purchase cost)	Rs/Unit	2.00	2.00
5.	Per Unit Cost of Service	Rs/Unit	3.00	3.00
6.	Per Unit Tariff	Rs/Unit	3.00	3.00
7.	Net Gain/ (Loss) vis-a-vis Approved cost	Rs/Unit		0.00
8.	Net Gain/ (Loss) vis-a-vis Approved cost	Rs Crs		0.00

Therefore in the above scenario where the actual total power purchase cost for a quarter is more than the approved total power purchase cost by Rs. 2 Cr, under the provisional FPPPA formula, the additional power purchase cost of Rs. 2 Crore would be passed through to the consumers.

Scenario 2: Actual total Power Purchase cost less than Approved cost but actual per unit cost more than approved per unit cost:

SN	Particulars	Unit	Approved	Actual
1.	Total Power Purchase Cost	Rs Crs	8.00	6.00
2.	Total Energy Sale	MU	80	50
3.	Per unit cost of Power Purchase	Rs/Unit	1.00	1.20
4.	Per unit fixed cost (other than power purchase cost)	Rs/Unit	2.00	2.00
5.	Per Unit Cost of Service	Rs/Unit	3.00	3.20
6.	Per Unit Tariff	Rs/Unit	3.00	3.00
7.	Net Gain/ (Loss) vis-a-vis Approved cost	Rs/Unit		(0.20)
8.	Net Gain/ (Loss) vis-a-vis Approved cost	Rs Crs		(1.00)

In the above scenario the actual power purchase cost for a quarter is less than the approved total power purchase cost by Rs. 2 Cr, however, the actual per unit power purchase cost is more than approved power purchase cost by 20 paise. In such a scenario under the provisional FPPPA formula used by State Commission, the recovery of Rs. 1 Cr is not possible.

- iv. Comparative table indicating some of the other states in relation to treatment of Actual Power Purchase Cost with Approved Power Purchase Cost for FPPPA is as follows:

Table: A

FPPPA Component	Particulars	Assam	Tripura	Gujarat	JERC-Goa	Meghalaya
Power Purchase (PPP0)	Comparison of per unit power purchase cost	Yes	Yes	VC-Per unit FC-Total to total	Yes	No
	Applicability of FPPPA only if total quantum (in Rs) of power purchase is higher than approved quantum	No	No	No	No	Yes

- v. Power purchase cost is of uncontrollable nature and hence change in power purchase cost cannot be exactly predicted. Some of the major factors affecting power purchase cost are:
- a) change in tariff of Central Generating Stations due to CERC orders;
 - b) pass through of additional fuel cost by thermal stations;
 - c) change in hydro generation due to rainfall leading to:
 - I) change in capacity charge due to change in availability
 - II) lower/higher generation leading to change in energy charge payments
 - d) supplementary bills by Central Generating Stations;
 - e) Variation in energy consumption by consumers leading to increase/ decrease in requirement of power.
- vi. 62 % of the total power purchased by MePDCL is hydro based and rest of 38% of the power are fuel based. During non-monsoon season MePDCL has to procure more power from sources other than hydro leading to a change in power purchase mix and its cost. Power procured during a period may vary due to several uncontrollable factors like seasonal variation in Hydel Generation, demand variation and infrastructure bottlenecks etc. These uncertainties during the year lead to significant deviations in power purchase units. The principle applied by State Commission in determining FPPA completely overlooks these factors and defeats the purpose for putting in place a FPPA mechanism.

- vii. The State Commission failed to carry out any review of the FPPPA mechanism on the basis of data provided and instead held in the Impugned Order that the matter is hereby disposed of and no other matter relating to FPPPA is pending before the Commission.

Issue no. 4: Incorrect observation on proposed modified formula

- i. In the Impugned Order, the State Commission has observed that the proposed modified formula for computation FPPPA was already dealt with in its order dated 02.12.2013. On the contrary in the order dated 02.12.2013, the State Commission noted that FPPPA formula, earlier allowed by order dated 28.06.2013 stays and a final view will be taken at the time of the annual tariff exercise for FY 2014-15 when more data will be available.
- ii. There was no finding as to the date of the Review Petition in the order dated 02.12.2013 of the State Commission. The State Commission has not addressed the issue of FPPPA formula even in the tariff order dated 12.04.2014 for the period FY 2014-15.
- iii. The State Commission has time and again rejected to refund the FPPPA claim sought by MePDCL merely on the basis that audited accounts are not available thereby delaying the legitimate claim of MePDCL.
- iv. FPPPA is only an adjustment on account of variation in fuel cost and power purchase cost which is not an exercise for fixation of tariff,

therefore, the reliance on the ground of absence of audited accounts is against the very principle in relation to the concept FPPPA refund and cannot be sought to defer the exercise to the time of truing up and thereby effectively delaying the process of recovery of uncontrollable cost.

Issue no. 5: Impact of delay and uncertainty in recovery of FPPPA amount.

- i. The power purchase cost is a major expenditure in the ARR of the distribution licensee. The Electricity Act, 2003 under Section 62(4) has specific provision for amendment of the tariff more frequently than once in any financial year in terms of Fuel Surcharge Formula specified by the Regulations. A major part of power procured by the distribution company comes from the Central Sector Generating Companies whose tariff is regulated by the CERC. The CERC in its Tariff Regulations has already provided a formula for fuel price adjustment and the charges of the generation companies are increased as and when fuel prices are increased.
- ii. Due to delay in recovery of FPPPA surcharge, the additional power purchase expenditure has to be met by taking short term loans. In case such increase in costs are not passed through at regular intervals then, MePDCL has to bear additional financial burden of either interest on short term loan or delayed payment surcharge in case of delay in payment with a significant impact on working capital of the licensee and ultimately leading to higher cost of power to the consumers. Therefore,

timely and regular pass through of change in power purchase cost is important for optimum financial management of distribution licensee.

- iii. The MePDCL is under severe financial crunch to meet even its regular expenditures. Due to the flawed FPPPA principle followed by the State Commission there is still a huge unrecovered FPPPA surcharge amount for the Appellant. In view of the present precarious financial conditions of the Appellant, it is imperative that the State Commission provides for FPPPA Formula and a mechanism thereunder and in turn adopt the formula and mechanism suggested by MePDCL for refund of FPPPA amount as intended in the section 62(4) of the Electricity Act, 2003.

9. The learned counsel for the Respondent has made following submissions on the various issues raised in the Appeal for our consideration

Issue No. 1: The FPPPA mechanism in the Impugned Order is in violation of Regulation 6 of the Tariff Regulations, 2011.

- i. The State Commission in compliance with this Tribunal directive in O.P. No.1 of 2011 approved the FPPPA mechanism and formula after following the due process of consultation and public hearing by passing an order on 28.06.13. By passing the said Order the State Commission has not violated its Regulations of 2011 as reproduced below at **point no. (f) & (g)**

"13.30 Implementation of the FPPPA"

- a) *The Commission hereby allows the formula given at paragraphs 11 & 12 on provisional basis subject to revision if so required. The formula shall be applicable to all consumers except BPL/kutir category.*
- b) *If the FPPPA is positive (+), then it will be recovered in the form of an incremental energy charges on paisa per unit in proportion to the energy consumption of respective consumer category and will be forming a part of the energy bill to be served on monthly/bi monthly basis.*
- c) *The FPPPA formula shall be applicable from prospective date i.e. for the quarter beginning 1st July 2013 for the previous quarter (April'13 to June'13).*
- d) *This adjustment in fuel and power purchase cost for the quarter would be calculated by the end of the 1st month of next quarter and would be charged thereafter for the next quarter. Hence, if a quarter ends in the month of June 2013, the adjustment in the cost would be calculated by July 2013 end and would be applied thereafter for the next quarter or the Commission's order.*
- e) *Each control period shall be a quarter year i.e. 3 months. Accordingly, the licensee shall compute FPPPA on the basis of actual power purchase cost made in the previous quarter and in case it is positive then only the licensee shall calculate FPPPA surcharge in accordance with this order.*
- f) ***Since the FPPPA mechanism is being introduced in the State for the first time, it shall be prudent to examine the***

FPPPA proposal of the licensee before applying it so as to avoid any kind of uncertainty in the consumer's tariff. Accordingly the Commission in exercise of its power given to it by regulation 118 in the MSERC (Terms and condition for determination of tariff) Regulation 2011, has decided that the FPPPA for the first quarter of the FY 2013-14 ending June, 2013 shall be allowed only after the Commission's approval in the public interest.

- g) The Commission shall take a view in its order to be given for the first quarter (April'13-Jun'13) and issue for further orders in respect of allowing FPPPA automatically subject to a maximum ceiling of charges.***
- h) At this stage, the licensee shall have to take prior approval of the Commission before applying the FPPPA surcharge in the bills of the consumers. The Commission after verifying the proposed charges may allow the FPPPA surcharge if justified.*
- i) The licensee shall be obligated to provide all relevant information to the Commission required in the calculation of FPPPA and to satisfy the Commission. The Commission shall try to provide speedy recovery of dues in a simpler administrative and regulatory process subject to completeness/quality of information provided by the licensee.*
- j) The Commission shall have the power to allow the FPPPA fixed for one quarter to be applied for more than one quarter in order to avoid frequent changes in the consumer's tariff. However any surplus or deficits shall be*

considered in the normal tariff petition or at the time of truing up exercise.

- k) In case the distribution licensee is found responsible of charging unapproved FPPPA charges to the consumer, the Commission shall adjust the same along with the interest in the tariff/FPPPA.*
- l) In the tariff order of 2013-14, the provision for power purchase from sources other than state own generation is kept at an optimum level subject to merit order principle and after applying efficient norms. If however, due to any exigencies there is a slippage of expected generation or any other uncontrollable reason, the same would be made by the additional purchases from either central allocated share or sources which have prior approval of the Commission so as to avoid load shedding in the State. The corresponding differential in the power purchases may be permitted for that quarter.*
- m) In the application of FPPPA formula the licensee shall bear all cost including charges occurring on account of purchases done in contravention of the merit order principles and not adhering with the efficiency norms and have no prior approval.*
- n) In order to streamline the process, the Commission requires the licensee to file a petition for FPPPA for the first quarter April - June 2013 with the documents required for determining the fuel surcharge for approval of the Commission at the earliest. The Commission shall determine the charges of FPPPA and category wise surcharge, if applicable, as soon as*

possible. In this process if required necessary modifications/improvements may also be considered in the FPPPA formulae for determining fuel surcharge in future.

Accordingly there was no violation of Regulations and the State Commission in exercise of its power under Regulation 118 of tariff regulations decided that since the FPPPA was introduced first time in the State, in order to streamline the process and to avoid any inconvenience to consumers of the State, the FPPPA for the first quarter of the FY 2013-14 ending June, 2013 shall be allowed only after the State Commission's approval in the public interest. The State Commission is not against allowing automatic FPPPA mechanism subject to a ceiling of FPPPA amount as being used in Uttarakhand, Assam and other States.

- ii. In the MYT Regulations which are effective from 25.09.2014, after superseding the Tariff Regulations 2011, the provision of Fuel and Power Purchase Price Adjustment provides that the generating company or licensee shall send detailed calculation of such charges quarterly to the State Commission for scrutiny and approval along with the charges actually recovered or refunded. Accordingly, at present there is no such question of violation of Regulations in allowing FPPPA after scrutiny and approval.

Issue No. 2 : The Impugned Order has failed to put in place a formula for recovery of Fuel and Power Purchase Price Adjustment.

- i. The order dated 28.06.13 had provided the formula to calculate the FPPPA amount by comparing the fixed and variable cost actually paid and approved by the State Commission.
- ii. The State Commission has also passed an order on 02.12.13 on the petition filed by MePDCL to modify the present formula. The State Commission after due deliberation allowed the FPPPA charges of Rs 0.20/unit as an average FPPPA as against the MePDCL proposal of Rs 0.81/unit. This was made applicable for the period April 2013 to September 2013 (2 quarters). However, this FPPPA charge was made provisional subject to adjustment at the time of truing up of FY 2013-14. The reasons for non allowances of certain expenditure towards power purchase was supplementary bills, delayed payment surcharges because of non payment of power purchase dues in time and inclusion of interest on working capital which was not approved by the State Commission while allowing the formula.
- iii. In the first exercise of FPPPA the State Commission was not convinced with the quality of information and reasons for inclusion of previous arrears in the FPPPA. Accordingly, the State Commission has taken a view that FPPPA amount should be allowed after proper scrutiny in a time bound manner.
- iv. Further the State Commission has in the Impugned Order dated 23.01.15 not allowed any FPPPA. The State Commission has also deliberated that truing up of FY 2010-11 was done but truing up of FY 2011-12 could not take place because of non submission of audited accounts. Accordingly in the absence of

audited accounts for FY 2011-12, the State Commission could not verify the actual of power purchase amounts for previous years and therefore FPPPA charges were not allowed. The licensee was advised to file annual petition supported by bills for FY 2011-12 and FY 2012-13 without further delay.

Issue No. 3: The State Commission has acted contrary to principle laid down by the Judgment in O.P.1 of 2011:

- i. This Tribunal in OP No.1 of 2011 has emphasized to have a formula/mechanism for addressing variation in fuel and power purchase cost of a distribution company. It was directed that every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62 (4) of the Electricity Act, 2003.
- ii. The objective of Fuel and power purchase adjustment is to pass on the uncontrollable cost due to change in fuel cost or power purchase mix and should be done frequently. This is more important where the purchase of power are mostly done from thermal or gas by more than 50% (the national mix of power purchase) or where thermal or gas plants are owned by the State. Accordingly the law prescribes to set a mechanism so as to review the impact of any variation in fuel cost or change in power purchase cost due to change of power purchase mix.
- iii. In Meghalaya, all State owned plants are 100% hydro based and meet about 65% of its demand. Remaining demand is met by purchase of power from Central Generating Stations. Purchases

from central generating company like NEEPCO is mostly from hydro based projects. However some purchases are also made from NTPC and ONGC from fossil fuel and gas based power plants. This constitutes only 20% of total share of power purchase. So if there is a change of fuel prices by about 10%, the impact of such change shall not be more than 2% in the total power purchase cost.

- iv. The State Commission is passing its tariff orders by 31st March of each year. The impact of any changes due to fuel prices variation is not much.
- v. The truing up orders are also being passed as and when licensee files the petition with audited accounts. The State Commission has already adjusted power purchase amount up to 2011-12 and directed the licensee to file the truing up petition for 2012-13 within two months time.
- vi. Accordingly, as directed by this Tribunal in OP 1 order, the State Commission has introduced a mechanism and a reasonable formula so as to protect the finances of utility provided it incurred more than allowed amount and at the same time the approach also protects 90% household consumers from frequent revision of tariff.
- vii. This method is quite simple and requires filing of proper data by licensee and scrutiny of the same by the State Commission without going through public consultation. The orders are passed expeditiously and if require tariff is increased recovering all legitimate dues.

Issue No. 4: No action taken by the State Commission on the review petition dated 22.8.13 filed by MePDCL.

- i. The Order dated 02.12.2013 has referred to the contentions raised in the Review Petition and has dealt with the substance of the grievance therein. The said Order has not been challenged by the Appellant and has achieved finality. The Appellant, could not in law, be permitted to question the correctness of the Order dated 02.12.2013 by means of the present petition. If the Appellant was aggrieved by the alleged non-disposal of its Review Petition, it ought to have challenged the Order dtd 02.12.2013.
- ii. The State Commission has not accepted the licensee's proposal as it was not satisfied with the provisions of supplementary bills of previous years of power purchase dues and situations where the average power purchase cost has certain distortion. For e.g. the average power purchase cost from NEEPCO has become very high because the licensee was paying fixed charges without getting any energy as the NEEPCO has stopped the supply of MeECL due to non payment of dues.

Issue No.5: Rejection of average cost of power purchase, and supplementary bills while computing FPPPA surcharge.

- i. While determining FPPPA by the method proposed by the licensee the average power purchase cost from some stations of

NEEPCO was very high and impractical. This was happened because NEEPCO has stopped the supply of power to MeECL because of long pending arrears. However, as per the agreement the licensee has to pay fixed charges to NEEPCO without getting any power. This has resulted in very high average power purchase cost like Rs. 8.38 and Rs. 14.58 per unit which are not comparable by any means with what the State Commission has allowed. Therefore, the State Commission has compared the actual power purchase cost with the same as allowed in the tariff order. Similarly, the supplementary bills of period not related with the same quarter were rejected. This was due to past arrears which the licensee has not paid to NEEPCO and NTPC. The State Commission has already agreed that the supplementary bills of the tariff year will be considered and the supplementary bills of previous year shall be considered at the time of truing up. It was made clear in the order that FPPPA mechanism is not a substitute of passing of previous arrears and for that truing up is the appropriate exercise.

Issue No. 6: FPPPA charges are refused because audited accounts are not available

- i. The State Commission has shown its concern that without audited results it becomes difficult to the State Commission to verify the power purchase amount which constitutes the major portion of the ARR and validate certain expenditures. However the State Commission is open to consider the licensees' genuine

concern and therefore required the licensee to submit its proposal at the time of next tariff application.

10. After having a careful examination of all the issues brought before us on the aspect of Fuel and Power Purchase Price Adjustment formula and its implementation mechanism for our consideration, our observations are as follows:-

Reliance has been made by the parties on the relevant provisions of the Tariff Regulations, 2011 issued by the State Commission, provisions of the National Tariff Policy 2006 as well as directions issued by this Tribunal on the judgment dtd 11.11.2011 passed in OP No 1 of 2011 on the issue related to fuel and power purchase price adjustment and MYT Regulations 2014.

Now we shall proceed to decide on the specific issues raised in the Appeal:

a) On first issue i.e. Whether the failure to put in place a FPPPA mechanism in the Impugned Order passed by State Commission is in violation of Regulation 6 of the Tariff Regulations 2011?, our views are as follows:

- i. The Tariff Regulations 2011 notified by the State Commission on 10th February, 2011 introduced the framework of Fuel and Power purchase Cost Adjustment in the State of Meghalaya.

Clause 6 of the Tariff Regulations 2011, states as:-

"6. Power purchase and fuel cost adjustment

1. *The Commission shall allow the recovery or refund, as the case may be, of additional charge for adjustment to tariff on account of change in fuel related costs of electricity generation and purchase of electricity.*
2. *The additional charge for adjustment shall be recovered or refunded, as the case may be, on a quarterly basis; and shall be taken as per actuals of the last three months.*
3. *The generating company or licensee shall put forth a formula for such recovery or refund in their tariff petition for approval by the Commission.*
4. *After approval of the above proposed formulae with modifications, if any, the generating company or licensee is not required to file separate petition for power purchase and fuel cost adjustment.*

The generating company or licensee shall determine such charge, in accordance with the formula under sub-regulation 6.4 above, and recover or refund the same, as the case may be, from their respective beneficiaries / consumers.

5. *The generating company or licensee shall send detail calculation of such charge quarterly to the Commission for scrutiny and approval along with the charge actually recovered / refunded.*
6. *The generating company or licensee shall refund or recover, as the case may be, any difference of such charge already recovered by it and now approved by the Commission.*

7. *In case of any reduction in power purchase and fuel cost the generating company or licensee shall refund the same by adjustment in the monthly bill within 3 (three) months.*
8. *In case of any dispute, an appropriate petition in accordance with the Meghalaya State Electricity Regulatory Commission (Conduct of Business) Regulations, 2007 as amended from time to time shall be made before the Commission. "*

Hence the Tariff Regulations 2011 issued by the State Commission under Regulation 6 regarding Fuel and Power purchase Price Adjustments have very clearly defined the framework for such cost adjustment with respect to mechanism, frequency, formulation, process of approval, recovery as well as refund. As far as specific formula for FPPPA is concerned, the Regulations provide that the Licensee has to propose the FPPPA formula in their Tariff Petition for approval of the Commission. As per Regulation 6(4), after approval of the above proposed formulae with modifications, if any, the licensee is not required to file separate petition for power purchase and fuel cost adjustment.

- ii. As per Regulation 17 (1) of the Tariff Regulations 2011 each licensee has to file Tariff Petition on or before 30th November each year with the State Commission which shall include statements containing calculation of the expected aggregate revenue from charges under it, currently approved tariff and the expected cost of providing services i.e., Aggregate Revenue Requirement (ARR) during the previous year, current year and ensuring year. The

- information for the previous year should be based on audited accounts and in case audited accounts are not available, audited accounts for the year immediately preceding the previous year should be filed along with un-audited accounts for the previous year.
- iii. The Appellant for the very first time on 12th October 2012 filed a petition for approval of the FPPPA formula. The State Commission vide order dated 28.06.2013 approved the FPPPA mechanism for the Licensee. In the order dated 28.06.2013, State Commission has acknowledged the requirement of FPPPA by the licensee and observed as

“11. Commission's analysis

The Commission agrees that the fuel power purchase mechanism is needed so that the licensee is compensated in case it spends more than the approved power purchase amount. However, the Commission is unable to overlook the provisions of the tariff order for power purchase, sale and T&D losses. It would not be reasonable to allow additional amount of fuel power purchase in the tariff just because the licensee is unable to collect the revenue and provide adequate supply to the consumers of the State....”

- iv. Let us now look into the issue raised by the Appellant regarding automatic recovery of FPPPA. As per Appellant, the Tariff Regulations 2011 provides for automatic recovery of FPPPA which in the various orders of the State Commission has not been implemented and the State Commission has directed the Appellant

to take prior approval of the FPPPA charges before billing the same to the customers. As per Regulation 121 of the Tariff Regulations 2011, the State Commission is empowered to adopt a procedure which is at variance with any of the provisions of the Regulations in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing. The Regulation 121 of the Tariff Regulations 2011 is reproduced as below:

“121. Savings

(1) Nothing in these regulations shall be deemed to limit or otherwise affect the inherent power of the Commission to make such orders as may be necessary for ends of justice to meet or to prevent abuses of the process of the Commission.

(2) Nothing in these regulations shall bar the Commission from adopting, in conformity with the provisions of the Act, a procedure, which is at variance with any of the provisions of these regulations, if the Commission, in view of the special circumstances of a matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient for dealing with such a matter or class of matters.

(3) Nothing in these regulations shall, expressly or impliedly, bar the Commission dealing with any matter or exercising any power under the Act for which no regulations or codes have been framed, and the Commission may deal with such matters, powers and functions in a manner it thinks fit in the public interest.”

- v. As per order dated 28.06.2013, the FPPPA formula by the State Commission was allowed on provisional basis subject to revision if

- so required. The State Commission had further observed that since the FPPPA mechanism is being introduced in the State for the first time during FY 2013-14, it shall be prudent to examine the FPPPA proposal of the licensee before applying it so as to avoid any kind of uncertainty in the consumer's tariff. Accordingly it was decided that the FPPPA for the first quarter of the FY 2013-14 ending June, 2013 shall be allowed only after the Commission's approval in the public interest. The State Commission directed the licensee to take prior approval of the Commission before applying the FPPPA surcharge in the bills of the consumers.
- vi. The State Commission in the order dated 28.06.2013, regarding automatic pass through of the FPPPA had expressed to take a view later while deciding FPPPA for the first quarter (April'13-Jun'13) subject to a maximum ceiling of charges. Hence as per order dated 28.06.2013 there was no mechanism identified by the State Commission for automatic pass through of the FPPPA.
- vii. Subsequently the State Commission vide order dated 02.12.2013 allowed the FPPPA charges for the period April'13 to Sep'13 on provisional basis subject to the condition that the matter will be examined in the next tariff exercise for FY 2014-15, so that any levy now made for FPPPA is subsumed and adjusted in a manner as may be deemed reasonable and justify. Hence it can be seen that the FPPPA mechanism and formula as approved by State Commission in the order dated 28.06.2013 continued with a direction to review in the next tariff exercise for FY 2014-15.

- viii. The State Commission in the Impugned Order has made reference to its order issued on 28.06.2013 related to FPPPA charges on provisional basis and based on the data submitted by the Appellant has decided that there is no justification for allowing FPPPA surcharge as proposed by the licensee for the first quarter of FY 2014-15. While deciding the matter, the State Commission has analysed both the formula one which was in existence based on order dated 28.06.2013 and another as proposed by the Licensee and decided that there is no justification for allowing FPPPA surcharge as proposed by the Appellant and finally concluded that FPPPA recovery is not allowable to the Appellant for first quarter of FY 2014-15.
- ix. Hence in our view the State Commission has rightly acted as per various provisions of Tariff Regulations 2011 and we do not see any violations on part of State Commission with respect to provisions of its Tariff Regulations 2011.
- x. Now MYT Regulations 2014 have been issued by the State Commission in September 2014 and these Regulations will supersede the Tariff Regulation 2011. The Regulation 90 of the MYT Regulations 2014 describes the Fuel and Power Purchase Price Adjustment mechanism. The same is reproduced as below:

“90 Fuel and Power Purchase Price Adjustment

90.1 The Commission shall allow the recovery or refund, as the case may be, of additional charge for adjustment to tariff on account of change in fuel related costs of electricity generation and purchase of electricity.

90.2 The additional charge for adjustment shall be recovered or refunded, as the case may be, on a quarterly basis; and shall be taken as per actuals of the last three months.

90.3 The generating company or licensee shall put forth a formula for such recovery or refund in their tariff petition for approval by the Commission.

90.4 The generating company or licensee shall determine such charge, in accordance with the formula under sub-regulation 90.3 above, and after getting the approval of the recover or refund the same, as the case may be, from their respective beneficiaries / consumers.

90.5 The generating company or licensee shall send detail calculation of such charge quarterly to the Commission for scrutiny and approval along with the charge actually recovered / refunded.

90.6 The generating company or licensee shall refund or recover, as the case may be, any difference of such charge already recovered by it and now approved by the Commission.

90.7 In case of any reduction in power purchase and fuel cost the generating company or licensee shall refund the same by adjustment in the monthly bill within 3 (three) months.

90.8 In case of any dispute, an appropriate petition in accordance with the Meghalaya State Electricity Regulatory Commission (Conduct of Business) Regulations, 2007 as amended from time to time shall be made before the Commission.”

- xi. It can be seen that the provision of Regulation 6(4) of MYT Regulations 2011 have been modified in Regulation 90(4) to the extent that the generating company or licensee shall determine such FPPPA charge, in accordance with the formula proposed by them under sub-regulation 90.3 and after getting the approval recover or refund the same, as the case may be, from their respective beneficiaries / consumers. Further the provision in Regulation 6(4) that after approval of the above proposed FPPPA formulae with modifications, if any, the generating company or licensee is not required to file separate petition for power purchase and fuel cost adjustment has been removed. Hence as per the provisions of MYT Regulations 2014, the provision for automatic recovery of FPPPA is not available to the Appellant.

- xii. The MYT Regulations 2014 were issued on 15.09.2014 and made applicable for the determination of tariff effective from April 1, 2015 in all cases covered under these Regulations. It further provides that for the purpose of review or of truing up of revenues and expenses pertaining to FYs prior to 2015-16, the provisions under MSERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 shall apply.

xiii. Considering the provisions of the Tariff Regulations 2011 and subsequent directions issued under various orders by the State Commission regarding FPPPA adjustment as well as the provisions of MYT Regulations 2014, we find that the State Commission has duly identified the mechanism of FPPPA recovery and dealt with the matter in accordance with the provisions of Tariff Regulations 2011 hence we are not in agreement with the argument of the Appellant that the State Commission has not followed the process identified under Tariff Regulations 2011 for FPPPA mechanism.

xiv. **Hence this issue is decided against the Appellant.**

b) On the second issue i.e. Whether the Impugned Order passed by the State Commission is in the teeth of Section 62 (4) of the Electricity Act, 2003 having failed to put in place a formula for recovery of Fuel and Power Purchase Price Adjustment?, our observations are as follows;

i. Section 62 of the Electricity Act 2003 deals with the “determination of tariff” by Appropriate Commission. Section 62(4) state that no tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. Hence the Fuel and Power Purchase Cost Adjustment may be allowed to pass through more than once in any financial year based on the fuel surcharge formula as specified by the Appropriate Commission.

- ii. The need for FPPPA mechanism has been acknowledged by the State Commission and addressed by the State Commission in its Tariff Regulations 2011. The Appellant has approached the State Commission in 2012 for approval of FPPPA formula. The State Commission has approved a FPPPA formula vide order dated 28.06.2013. The State Commission has also given liberty to the Appellant to make suggestions for improvement in FPPPA mechanism. The Order dated 28.06.2013 specifies recovery of FPPPA on quarterly basis. However the State Commission has directed the Appellant to take prior approval of the commission for FPPPA charges before recovery of the same from the customers.
- iii. Considering our findings on the issue (a) above, we do not find any substance in the contention of the Appellant that there is no specific formula for recovery of Fuel and power purchase cost variation identified by the State Commission.
- iv. Hence this issue is also decided against the Appellant.**
- c) On third issue i.e. Whether by passing the Impugned Order the State Commission has acted contrary to principle laid down by this Tribunal in Judgment dated 11.11.2011 in OP no. 1 of 2011 wherein this Tribunal inter alia directed that any State Commission which did not have such formula/mechanism for fuel and power purchase cost adjustment in place must within 6 months of the**

date of the order put in place such formula/ mechanism?, our analysis is as follows:

- i. This Tribunal on its Suo-Motu Judgment in the O.P. 1 of 2011 issued on 11.11.2011 has directed as under :

“(vi) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission’s Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/mechanism in place must within 6 months of the date of this order must put in place such formula/ mechanism.”

- ii. The State Commission in compliance with this Tribunal directive in O.P. No.1 of 2011 approved the FPPPA mechanism and provisional FPPPA formula after following the due process of consultation and public hearing by passing an order on 28.06.13. While passing the orders regarding FPPPA mechanism and implementing the same in the State for the very first time during FY 2013-14, the State Commission has considered initial safeguards and made the FPPPA formula applicable on provisional basis with a direction to review the same in next financial year.

- iii. The FPPPA mechanism has been addressed in Tariff Regulations 2011. The implementation of the FPPPA for FY 2013-14 was also identified by the Commission in its order dated 28.06.2013. For the FY 14-15, the Appellant has filed the petition for approval of FPPPA before the State Commission for which the Impugned Order has been issued.
- iv. In the Impugned Order, the State Commission has assessed the claim of the Appellant for FPPPA amount considering the existing FPPPA formula as per previous Orders as well as considering the alternate FPPPA formula proposed by the Appellant.
- v. As per the directions issued by this Tribunal under O.P. 1 of 2011, a mechanism for Fuel and power purchase price cost adjustment needs to be identified by respective State Commissions within 6 months, if not there. The objective of Fuel and Power purchase cost adjustment is to pass on the uncontrollable cost due to change in fuel cost or power purchase mix should be done frequently. The FPPPA mechanism should define the FPPPA formula, the frequency of such cost adjustment as well as provision of pass through of such cost as per formula. We have already observed that the State Commission has identified the FPPPA mechanism in Tariff Regulations 2011, the formula and frequency of pass through and pass through mechanism has been dealt with by the State Commission in subsequent Orders issued on 28.6.2013 as well as in order dated 02.12.2013.

vi. Hence in line with our observations on issues (a) and (b) above, **this issue is also decided against the Appellant.**

d) On Fourth issue i.e. Whether the State Commission fell into error by failing to consider the simplified FPPPA formula proposed by MePDCL without any justification? Whether the State Commission erred in holding that the proposed modified formula for computation of FPPPA was already dealt with in order dated 02.12.2013 whereas no decision on the Review Petition dated 22.08.2013 of MePDCL was taken by State Commission in the order dated 02.12.2013?, we decide as follows;

- i. Regulation 6 (3) of the Tariff Regulations 2011 provides that the licensee shall put forth a Power purchase and fuel cost adjustment formula for such recovery or refund in their tariff petition for approval by the Commission. As per Regulation 6(4) after approval of the above proposed formulae with modifications, if any, the licensee is not required to file separate petition for power purchase and fuel cost adjustment. Hence it is the State Commission who has to approve the FPPPA formula proposed by the licensee considering various aspects regarding its applicability and impact on the tariff/ Licensee as well on the customers.
- ii. In the Impugned Order dated 23.01.2015, the State Commission has stated that the Commission vide its order dated 02.12.2013 allowed the FPPPA charges for FY 2014-15 on provisional basis subject to the condition that it will be validated with audited records at the time

- of truing up and any deficit or surplus shall be adjusted accordingly. Further while disposing the petition, the State Commission in the Impugned Order has observed that “No other matter relating to FPPPA is pending before the Commission”.
- iii. In its order dated 02.12.2013, the State Commission has stated that the Appellant had included interest on working capital in the computation of FPPPA while the State Commission in its order of 28.06.2013, had already ruled that the interest on working capital could not be allowed in FPPPA computation. If there is any gap the same will be considered at the time of truing up petitions.
 - iv. The FPPPA formula approved by the State Commission after adopting due process of stakeholders’ consultation has to be honoured. The State Commission in its various orders has given the opportunity to the Appellant to propose and come back to the Commission with the proposed modified FPPPA formula along with supporting bills.
 - v. In view of the above, we do not find any infirmity in decision of the State Commission in this regard.
 - vi. **Hence this issue is also decided against the Appellant.**
- e) Now we shall discuss the fifth issue i.e. **Whether the State Commission erred in rejecting the FPPPA surcharge as sought by MePDCL on the incorrect basis of considering variation in total**

power purchase cost as against total approved power purchase cost instead of considering per unit change in power purchase cost?

- i. As per the Impugned Order, the State Commission has considered the variation in total cost of power purchase with reference to approved power purchase cost for the quarter. This has been done as per the Order dated 28.06.2013 as well as Order dated 02.12.2013. The relevant Para of the Impugned order is as below:

“2. The information shows Rs 33.11 crores as actual fixed cost as against Rs 40.22 crores approved by the Commission for the quarter. Similarly, the actual variable charges have been shown as Rs.35.20 crores against the approved amount of Rs 46.31 crores. The Generating Stations from whom power was purchased are the OTPC, NTPC, NHPC, OPTC and NEEPCO. The quantum of electricity actually purchased from these stations is 197.79 MU while the approved quantum is 282.54 MU. On further examination it is found that the amount of power purchase includes the delayed payment surcharge as reflected in supplementary bills for the past periods. In the present application, the petitioner has proposed levy of Rs.2.28 per unit to Rs. 3.90 per unit as the Fuel and Power Adjustment rate to be charged from different categories of consumers. While computing the surcharge the licensee has considered Rs.47.20 crores (PPP₀) which is the difference between the actual power purchases cost (Rs. 133.73 Cr.) and approved power purchase

cost (Rs. 86.53 Cr.). On examination, it is found, that PPP₀ includes a supplementary bill of Rs.65.42 crores which is related to the past period bills and delayed payment surcharges. The Commission's order dated 28.06.2013 provides that previous years power purchase dues can be considered during the truing up exercise and therefore if we exclude this amount the approved power purchase cost is more than the actual by Rs.18.2 crores in the quarter of 2014-15 and there is no justification for allowing FPPPA surcharge as proposed by the licensee."

- ii. As per the Appellant, the State Commission while calculating the FPPPA charge must consider per unit change in power purchase cost and not the actual total power purchase cost with respect to approved total power purchase cost for the relevant quarter as per the Tariff order. A sample calculation for different scenario has also been given in this regard to justify the claim of the Appellant.
- iii. The two methodologies i.e. "change in per unit rate of power purchase" method and "change in total power purchase cost" will have different impact on the FPPPA amount to be recovered with respect to the actual quantum of energy purchased and supplied to the consumers.
- iv. Various State Electricity Regulatory Commissions have adopted different methodologies to adopt the FPPPA charge calculations. State Commissions have been given the responsibility under the Statute to balance the interest of consumers as well as the licensee.

- v. Hence in our view State Commission are in a best position to decide the FPPPA formula and charge under the same considering the impact of the same on both consumers as well as licensee. Hence we do not find any infirmity in the decision of the State Commission while adopting change in total power purchase cost method.
- vi. **Hence this issue is decided against the Appellant.**
- f) On the next issue i.e. **Whether State Commission fell into error by failing to consider supplementary bills of the past period, which were received by the Appellant in the relevant Quarter of FY 2014-15, while considering FPPPA surcharge and deferring the same to be considered at the time of truing up, the same being in violation of the framework laid down in the Tariff Policy dated 6.01.2006 wherein clause 5.3 (h) (4) provides for recovery of uncontrollable costs?, we decide as follows:**
- i. The Appellant has made reference to the provisions of the Tariff Policy regarding recovery of uncontrollable costs. The Clause 5.3 (h) (4) of the Tariff Policy issued on 06.01.2006, *provides that:-*

"4) Uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. Uncontrollable costs would include (but not limited to) fuel costs, costs on account of inflation, taxes and cess, variations in power

purchase unit costs including on account of hydro-thermal mix in case of adverse natural events."

The Tariff Policy provides clear direction that all uncontrollable costs are to be recovered speedily. The uncontrollable costs include (but not limited to) fuel costs as well as variation in Power purchase costs.

In the Impugned Order, the State Commission has acknowledged the above fact and also stated at the same time that the Tariff policy and the intent of the Electricity Act, 2003 is not to burden the consumers with the inefficiency of the licensee.

- ii. The major factors which affect the Power purchase cost of the Licensee are:
 - a) Change in tariff of central generating stations ("**CGS**") due to CERC orders;
 - b) Pass through of additional fuel cost by thermal stations
 - c) Change in hydro generation due to rainfall leading to
 - i. Change in capacity charge due to change in availability
 - ii. Lower /higher generation leading to change in energy charge payable
 - d) Supplementary bills by Central Generating Stations

- iii. In the present case the supplementary Bills were raised by the Central Generating Stations because of Revision of Tariff of CGS for

the past period. As per generation Tariff Regulations of the CERC, any change in fuel price is also allowed as pass through in the Energy Charge Rate and the same is being recovered by the CGS on month to month basis from its beneficiaries. Further as per CERC Tariff regulations fixed charges of the CGS are also determined on year to year basis. As per Two Part Tariff structure identified in CERC Tariff Regulations, Beneficiaries have to pay Fixed Charges depending upon the availability of the Power Station even if they are not scheduling any energy from that Power Station.

- iv. The basic concept of FPPPA was introduced in the Tariff Regulations 2011 of the State Commission. As per Regulation 6 (1) of the Tariff Regulations the State Commission shall allow recovery or refund of additional charge to tariff on account of change in fuel related costs of electricity generation and purchase of electricity. As per Regulation 6(2) the FPPPA adjustment shall be on quarterly basis and shall be taken as per actuals of the last three months. Hence the actual fuel related cost of electricity generation and actual cost of purchase of electricity during past three months shall be under consideration while deciding FPPPA amount.
- v. The State Commission in the Impugned Order has stated its view that past period power purchase dues should be considered at the time of True up and advised the Appellant to file annual True-up petition with proper justification, supported by power purchase bills. The State Commission has also expressed concerns over the additional cost of power purchase which the Appellant has to bear

and also stated that the interest of the consumers are also to be protected from any undue burden.

- vi. Regulation 15 of the Tariff Regulations 2011 of the State Commission specifies the provisions related to “Review” and “Truing-up”. The provisions related to True-up clearly defines the manner in which cost / expenditure of the relevant year shall be allowed by the State Commission. The Regulation 15 of the Tariff Regulations is reproduced here :

“15. Review and Truing-Up

(1) The Commission shall undertake a ‘Review’ of the expenses and revenues approved by the Commission in the Tariff Order. While doing so, the Commission shall consider variations between approvals and revised estimates/pre-actuals of sale of electricity, income and expenditure for the relevant year and permit necessary adjustments / changes in case such variations are for adequate and justifiable reasons. Such an exercise shall be called ‘Review’.

(2) After audited accounts of a year are made available, the Commission shall undertake similar exercise as above with reference to the final actual figures as per the audited accounts. This exercise with reference to audited accounts shall be called ‘truing-Up’.

(3) The generating company or the licensee, as the case may be, shall make an application before the Commission, for ‘truing up’ of ARR of the previous year by 30th September of the following year, on the basis of audited statement of accounts and the Audit Report, thereon. The generating company or the licensee shall get their accounts audited within a specified time frame, either by

the Comptroller & Auditor General of India or by a Statutory Auditor drawn from the panel of Statutory Auditors approved by the Comptroller & Auditor General of India, from time to time, to enable them to file the application for 'truing up' within the specified date, that is 30th September of the following year.

(4) In case the generating company or the licensee as the case may be, fails to make an application for truing-up of the ARR of previous year by 30th September of the following year, the Commission may, undertake suo-moto 'truing up' of the ARR of previous year and direct the generating company or the licensee as the case may be to produce such data as it may direct.

(5) The surplus of revenue of any year as a result of review and truing up exercises shall be adjusted in the manner prescribed by these regulations.

(6) While approving such expenses/revenues to be adjusted in the future years as arising out of the review and / or truing up exercises, the Commission may allow the carrying costs as determined by the Commission of such expenses/revenues. Carrying costs shall be limited to the interest rate approved for working capital borrowings.

(7) For any revision in approvals, the generating company or the licensee would be required to satisfy the Commission that the revision is necessary due to conditions beyond its control."

It can be seen from the above that for getting approval of the State Commission for any revision in costs, the Licensee has to satisfy the commission that revision is due because of conditions beyond its control. Further, the Regulations also provide for allowing carrying Costs while approving expenses/revenues to be adjusted in future years arising out of review/ annual truing-up exercise.

vii. We are of the opinion that that these charges related to past period arrears in the Supplementary Bills are uncontrollable cost and these need to be considered suitably by the State Commission as per the Tariff Regulations 2011. As put up by the Appellant that the frequency of such Supplementary bills is not fixed and they may pertain to higher time period too, while deciding the impact of Supplementary bills, the State Commission needs to take due care of impact in consumer tariff too. However, in the present case, we would not like to interfere.

viii. Hence this issue is decided against the Appellant.

g) On the last issue i.e. Whether State Commission fell into error while refusing to entertain the application of MePDCL and the FPPPA surcharge sought therein on the basis that audited accounts are not available to determine actuals of expenditure and revenue for previous years and thereby delaying the process of recovery of FPPPA surcharge?, we decide as follows:

i. In the Impugned Order, the State Commission has stated that –

“The licensee has so far submitted the accounts of FY 2010-11 with the AG report and the same has been considered and passed in the truing up order dated 22.12.2014. MePDCL on 15.01.2015 has submitted the audited accounts for FY 2011-12 and mentioned that accounts for 2012-13 are being finalized and will be submitted. However, no application for truing up of 2011-

12 has been filed so far. In the absence of audited accounts, the Commission is not in a position to verify the actuals of the expenditure and revenue of the Corporation for previous years. Therefore, at this stage, it would not be appropriate to entertain the present application of the licensee and allow the FPPPA surcharge as claimed by them.”

Hence the State Commission has linked the recovery of FPPPA adjustment of the licensee with the audited accounts of previous years.

- ii. The Tariff Regulations 2011 do not specify the requirement of audited accounts for calculation or pass through of FPPPA charges. However, the Regulation 15 of Tariff Regulations 2011, as already discussed in this order, puts the requirement of Audited accounts for deciding the True-up application of the Licensee.
- iii. The State Commission while doing the Truing-up exercise of the Appellant for the previous years has to verify the total revenue realized as per approved tariff, including FPPPA recovered/refunded along with other permissible expenses as per actual audited accounts.
- iv. In absence of the audited accounts to determine the actual of expenditure and revenue for previous year, the State Commission has not considered to entertain the FPPPA surcharge as claimed by the Appellant.

- v. We have already held while deciding the earlier issue that the State Commission has rightly acted to consider previous year's adjustment based on audited accounts during Truing-up exercise.
- vi. Hence we do not find any infirmity in the decision of State Commission on requirement of audited accounts in the issue raised by the Appellant.
- vii. This issue is according decided against the Appellant.**
- h) We have decided the issues raised by the Appellant regarding FPPPA mechanism, FPPPA formula and automatic pass through mechanism of FPPPA, against the Appellant. The State Commission has approved the FPPPA mechanism and after following the due process of consultation and public hearing approved provisional FPPPA formula. We would like to put a remark on this count. The State Commissions have the responsibility to establish regulatory certainty in their functioning. In order to ensure the same, they should avoid situations when any provisional mechanisms are being made for consideration of any issue. If situation demands for such exigencies, it should not be repeated and the final mechanism to address such issues ought to be identified at the earliest after following the due process of consultation with stakeholders.

ORDER

We are of the considered opinion that there is no merit in the present Appeal and the Appeal is hereby dismissed.

The Impugned Order dated 23.01.2015 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **6th day of October, 2016**

(I.J. Kapoor)
Technical Member

(Mrs. Justice Ranjana P. Desai)
Chairperson

✓
REPORTABLE/~~NON-REPORTABLE~~
mk