

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

Appeal no. 242 of 2012

Dated: 9th April, 2013

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member**

In the matter of:

- 1. Association of Steel Rolling Mills & FurnacesAppellant(s)
10-A, Industrial Estate, Meerut Road
Muzaffarnagar – 251003 (U.P)**
- 2. Association of Secondary Steel Manufacturers
C-232, BS Road, Industrial Area
Ghaziabad-201009 (U.P.)**
- 3. Shri Rama Shankar Awasthi
Son of (Late) Shri G.P. Awasthi
301 - Surabhi Deluxe Apartment,
6/7 Dali Bagh, Lucknow, U.P. – 226001**
- 4. RANIA Industries Association
Gata No. 202, Rania,
Kanpur Dehat – 209304**
- 5. Chamber of Industries Gorakhpur
Udyag Vaban, Govt. Industrial Estate
Gorokhnath, Gorokhpur – 273015**
- 6. Eastern UP, Chamber of Commerce and Industries
Vigyan Parishad Building
Swami Dayanand Marg
Near Indian Press Crossing
Allahabad – 211002**

7. **U.P. Chamber of Steel Industry**
122/235, Plot No. 17,
Fazalganj Kanpur – 208012
8. **Amausi Industries Association**
B-131/1, Amausi Industrial Area
Lucknow – 226 008
9. **Cold Storage Association, U.P.**
Water Works Road, Aish Bagh
Lucknow – 226 004

Versus

1. **Uttar Pradesh Electricity Regulatory Commission** ...Respondent(s)
Vibhuti Khand, Kisan Mandi Bhawan
Gomti Nagar, Lucknow – 226 010 (U.P.)
2. **Uttar Pradesh Power Transmission Corporation Limited**
Shakti Bhawan, Extension,
14, Ashok Marg, Lucknow – 226 001
Uttar Pradesh

Counsel for the Appellant (s): Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Swagatika Sahoo

Counsel for the Respondents (s): Mr. Pradeep Misra
Mr. Amit Kapur
Mr. Buddy A. Ranganadhan
Mr. Sanjay Singh
Mr. Daleep Kr. Dhayani
Ms. Richa Bhardwaj

JUDGMENT

Mr. RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Association of Steel Rolling Mills and Furnaces and others against the order dated 19.10.2012 passed by the Uttar Pradesh Electricity Regulatory Commission (“State Commission”) determining the Annual Revenue Requirement and Tariff for the FYs 2010-11, 2011-12 and 2012-13 for Uttar Pradesh Transmission Corporation Ltd.

2. The Appellants are the Associations of various industrial consumers. The State Commission is the Respondent no.1. UP Power Transmission Corporation Ltd., the transmission licensee, is the Respondent no.2.

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

3.1 Following the enactment of the State Reforms Act, 1999 and the Electricity Act, 2003, the UP State

Electricity Board was reorganized. The Transmission Licensee, the Respondent no.2 was established as a result of the reorganisation of the State Electricity Board for carrying out the transmission functions.

3.2 According to the Regulations, the Transmission Licensee (R-2) is required to file a separate petition for determination of ARR and tariff along with audited accounts before the State Commission. However, the Transmission Licensee (R-2) has been filing the petition for determination of ARR and tariff along with the distribution licensees without furnishing the audited accounts.

3.3 For FY 2007-08 and 2008-09, a common petition for ARR and tariff was filed by the Transmission Licensee (R-2) along with the distribution licensees on 04.10.2007 and 19.12.2007 respectively. The Transmission Licensee (R-2) also did not furnish the

requisite audited accounts and provisional accounts. The State Commission passed a common order dated 15.4.2008 approving the ARR and tariff for the Transmission Licensee (R-2) as well as the ARR/Tariff for distribution licensees. In this order, the State Commission directed the Transmission Licensee (R-2) to file its audited accounts.

3.4 On 30.07.2009, the Transmission Licensee (R-2) again filed a common petition for ARR/ tariff along with the distribution licensees. This time also, the Transmission Licensee (R-2) did not furnish any audited accounts. Despite this, the State Commission by common order dated 31.03.2010 determined the ARR/tariff of the Transmission Licensee (R-2) for the FY 2009-10 along with the distribution licensees.

3.5 On 14.10.2011, the Transmission Licensee (R-2) filed a petition for revision of transmission tariff for FY 2007-08

and 2008-09 without filing petition for trueing up. The State Commission by its order dated 2.11.2011 approved the tariff for FYs 2006-07 and 2007-08 provisionally with the directions to file the true up petition immediately after obtaining the audited accounts.

3.6 Thereupon, the Transmission Licensee (R-2) filed a petition on 28.03.2011 giving details of its ARR for FYs 2010-11 and 2011-12 without supported by any audited accounts. Thereafter, on 01.02.2012, Transmission Licensee (R-2) filed a revised petition for ARR and tariff for the period FY 2010-11 to FY 2012-13, without filing the supporting audited accounts.

3.7 The State Commission passed the impugned order dated 19.10.2012 disposing of the above petition filed by the Respondent no. 2.

3.8 Aggrieved by the impugned order dated 19.10.2012, the Appellants have filed the present Appeal.

4. The Appellants have raised following issues:

- I) The State Commission has allowed the transmission tariff for the period 2010-11 to 2012-13 without truing up the financials of the previous years.
- ii) The Respondent no.2 has not furnished the requisite financial accounts, statements and other data and despite that, the State Commission has determined the ARR/Tariff.
- iii) The State Commission has not given effect to the directions contained in the judgment dated 21.10.2011 in Appeal No. 121 of 2011 by this Tribunal.

5. Elaborating the above issues, Ms. Swapna Seshadri, Ld. Counsel for the Appellants has made the following submissions.

5.1 The admitted surplus found by the State Commission in the earlier order dated 02.11.2011 which provisionally trued up the financials of the Respondent no.2 for FYs 2006-07 and 2007-08 has not been considered to reduce the tariff. The State Commission allowed the ARR as claimed by the Respondent no.2 without any basis.

5.2 By common order dated 15.04.2008, the State Commission approved ARR of Rs. 1025.39 crores for 2007-08 and Rs. 1195.12 crore for 2008-09 and transmission charges of 18.7 paise/kWh and 21.8 paise/kWh for 2007-08 and 2008-09 respectively for the Respondent no.2.

5.3 Again by common order dated 31.03.2010, the State Commission approved the tariff of the Respondent no.2 and approved ARR of Rs.680.51 crores and transmission tariff of 12 paise/kWh, for FY 2009-10 which was lower than the approved ARR/tariff for the previous years. In this order again the State Commission failed to carry out truing up exercise.

5.4 The Above common order dated 31.3.2010, was challenged before the Tribunal in Appeal no. 121 of 2010. The Tribunal in its judgment dated 21.10.2011 allowed the Appeal giving specific directions to the State Commission to carry out proper truing up and also insist on audited accounts for the purpose of tariff fixation.

5.5 The State Commission without truing up the ARR for the previous years and adjusting the surplus of the previous years again approved the ARR of Rs. 1241.38

crore for the Respondent no.2 as against its claim of Rs. 1298.75 crore for FY 2012-13. The State Commission has allowed ARR in excess of the actual amounts incurred by the Respondent no. 2. The Respondent no.2 also did not furnish any accounts for the previous years and the State Commission allowed the ARR in contravention to the directions of the Tribunal in its judgment dated 21.10.2011. According to the data obtained from the accounts, the Respondent no.2 was having cumulative surplus of 1194.36 crore at the end of FY 2009-10 which should have been adjusted in the ARR in the impugned order.

6. Shri Amit Kapur, Ld. Counsel for the Respondent no. 2 made the following submissions in response to the arguments made by the Ld. Counsel for the Appellant.

6.1 There is no surplus available with the Respondent no.2. On 23.12.2010, the State Government in exercise

of its powers under Section 131(4) and 180(1) of the Electricity Act, 2003 notified UP Electricity Reforms (Transfer of Transmission and Related Activities including the Assets, Liabilities and related Proceedings) Scheme, 2010 ("Transfer Scheme") to transfer the transmission activity viz., UP Power Corporation Ltd. and to create a separate entity for transmission activity i.e. UP Power Transmission Corporation, the Respondent no.2. In the said Transfer Scheme, the provisional balance sheet as on 01.04.2007 of the Respondent no.2 was notified in which a loss of Rs. 976.27 crores was assigned to the Respondent no.2.

6.2 Even assuming that there was a surplus in FYs 2006-07 to 2008-09 as pointed out by the Appellant, there would still be a net loss of Rs. 327.02 crores upto FY 2009-10. Thus, the argument of the Appellant for adjustment of surplus is misplaced.

6.3 The above issue was raised by the Appellant at the time of Public Hearing which has been adequately dealt with by the State Commission in its order.

6.4 The Appellant has suppressed the facts relating to Transfer Scheme and provisional balance sheet notified under the Transfer Scheme necessary for adjudication of the present Appeal and therefore, the Appeal is liable to be rejected on the ground of material misrepresentation and suppression of facts.

6.5 There has been delay in filing of the audited accounts by the Respondent no.2 due to following reasons:

i) On 14.01.2000, in pursuance of the reforms and restructuring process of the power sector in the State, the first reforms transfer scheme was enacted thereby unbundling the Electricity Board into UPPCL with the

functions Transmission and Distribution, UPRVUNL with function of thermal generation and UPJVNL vested with the function of hydro generation in the State.

- ii) On 12.08.2003, the UPPCL was unbundled and four distribution companies were created and the role of UPPCL was specified as Bulk Supply Licensee and State Transmission Utility.
- iii) On 26.07.2006, UP Transmission Corporation was incorporated and entrusted with the functions of transmission of electricity.
- iv) On 23.12.2010, the State Government notified the transfer scheme and the provisional balance sheet of UP Transmission Corporation was also notified.

6.5 Thus, even though the UP Transmission Corporation started operating as a separate entity w.e.f. 26.07.2006,

the assets and liabilities of the UP Transmission Corporation was finally assigned by the State Government by Transfer Scheme only on 23.12.2010. In the absence of the Transfer Scheme along with the provisional balance sheet, it was not possible to audit the accounts of the UP Transmission Corporation.

6.6 The Tribunal in its judgment in Appeal no. 121 of 2010 had directed the Respondent no.2 to file its audited accounts. However, in light of the above facts, it was not possible for the Respondent no.2 to file audited accounts in time. The Statutory Transfer Scheme as a delegated legislation and the aforesaid facts appear to have not been brought to the notice of the Tribunal in Appeal no. 121 of 2010. As such the judgment of the Tribunal is pre-incurium.

6.7 According to the Tariff Regulations, the ARR for any year has to be trued up on the basis of the audited

financials and operational results. Evidently, truing up is permissible only once the audited accounts of Respondent no. 2 are available. The accounts up to 2009-10 have been audited and the true up petition up to 2009-10 is expected to be filed within 4 weeks. The audit for FY 2010-11 and 2011-12 is under process.

6.8 Based on the audited accounts, the true up petition for the period 2000-01 to 2007-08 was filed before the Commission on 28.05.2012 and true up petition for FY 2008-09 was filed on 19.11.2012 on 07.02.2013. The State Commission has admitted the true up petition filed on 28.05.2012 and public notice was issued on 09.02.2013 and 10.02.2013.

6.9 The impugned order only deals with determination of ARR and tariff for FY 2011-12, 2012-13 and does not deal with true up for 2007-08 and 2008-09. Even otherwise in the Tariff Order for FY 2007-08, 2008-09,

the Commission had approved Return on Equity @ 14 % to the Respondent no. 2 amounting Rs. 278.24 crores and 321.96 crores respectively. However, in order to reduce the tariff burden of the consumers, the Board of Director of UP Transmission Corporation decided to remove the component of Return on Equity from the ARR for FY 2007-08, 2008-09. Accordingly, the tariff was reduced. Thus, transmission tariff was charged much below the rate determined by the State Commission.

7. The State Commission, the 1st Respondent, in its written submissions has submitted that the true up petition for FY 2000-01 to 2007-08 has been filed and is under process. The State Commission is not in a position to conclusively confirm the surplus figure propounded by the Appellant for the previous years, the accounts which are under consideration of the State Commission in separate true up proceedings and the

figures could be ascertained only when the Commission has deliberated on the true up of the financials for the previous years.

8. The main issue raised by the Appellant is that the ARR and tariff has been allowed without proper true up of accounts for the previous years and even though there were surplus as determined by the State Commission in the provisional true up of the previous years the same has not been accounted for in deciding the ARR and tariff in the impugned order. Further, the Respondent has not complied with the directions of the Tribunal in judgment dated 21.10.2011 in Appeal no. 121 of 2010. The Appellant has, therefore, sought for re-determination of ARR and tariff for FY 2010-11, 2011-12 and 2012-13 after taking into account the surplus amounts in the hands of the Respondent no.2 and for appropriate directions for expeditious true up of the financials of the Respondent no. 2 for all previous years.

9. Thus the only question that arises for our consideration is whether the State Commission could be directed to re-determine the ARR and tariff after taking into account the revenue surplus, if any, for the previous years.

10. Let us first examine the findings of the State Commission in the impugned order.

10.1 The State Commission has noted the directions of the Tribunal in judgment dated 21.10.2011 in Appeal no. 121 of 2010 regarding submission of audited accounts by the licensees as under:

“2.1.4 The Hon’ble Appellate Tribunal For Electricity (hereinafter referred to as “APTEL”) in its judgement in Appeal No. 121 of 2010 dated 21st October, 2011 has, vide Para 12.1, upheld the Tariff Regulations in the matter of requirement of the audited accounts for the previous year in any ARR / Tariff filing. The order also stipulates

to consider the audited accounts for the previous year and provisional half yearly accounts for the current year as part of the Annual Performance Review. It further held that in case the previous year audited accounts are not available, then the audited accounts for the year prior to the previous year could be taken into consideration. The Hon'ble APTEL vide Para 6.15, gave directions to the Petitioner with regards to time lines for filing the audited accounts for FY 2007-08, FY 2008-09 and FY 2009-10. It also gave directions to State Commission to immediately initiate true-up exercise after receipt of the same. The timelines for submission of the audited accounts by the licensee / Petitioner were as follows:

<i>Financial Year</i>	<i>Last date of Submission</i>
<i>2007-08</i>	<i>21.11.2011</i>
<i>2008-09</i>	<i>31.01.2011 (may be read as 31.01.2012)</i>
<i>2009-10</i>	<i>31.03.2012</i>

2.1.5 The above - referred judgement of the Hon'ble APTEL's judgment reproduced below:

"..Therefore, we direct the respondents 3 to 8 to submit the audited accounts for the FY 2007 – 08 to the State Commission within one month of the date of this judgment. The audited accounts for

the FY 2008 – 09 and 2009 – 10 should be furnished by 31.01.2011 and 31.3.2012 respectively to the State Commission. The State Commission shall initiate the true up exercise upto FY 2006-07 immediately, followed by the true up of the FY 2007 - 08, 2008 - 09 and 2009 – 10 immediately after the receipt of the respective audited accounts...”

10.2 The State Commission further noted as under

“2.1.7 The Commission finds that non-submission of audited accounts by the Petitioner is contrary to the provisions of the UPERC Transmission Tariff Regulations. The Commission had accordingly convened a hearing on 27th March, 2012, wherein the issue of non-submission of audited accounts was discussed. During the discussions on the above matter, Sh. Nand Lal, the then Director (P&A), UPPCL, on behalf of the Petitioners, speaking to the Commission that the accounts for FY 2008 – 09 were under audit by the CAG and would be made available to the Commission. Further, he submitted that the CAG audited accounts for FY 2009-10 would be made available by December, 2012. However, till the issue of this order no submission has been made.

2.1.8 The Commission also notices that the process of determination of ARR / Tariff for the period under consideration in this order is already much delayed and so would not like to stall it further due to the non-submission of requisite information by the Petitioner as elaborated

above. Further delay in determination of tariff would adversely affect the Petitioner as well as the consumers of the State as a whole.

2.1.9 Accordingly the Commission, vide its order dated 29th March, 2012, had directed the Petitioner to file the provisional accounts along with the schedules duly certified by Chartered Accountant for FY 2009-10 and FY 2010-11 within 15 days.

2.1.10 The Petitioner had in compliance to the directives of the Commission had filed the provisional accounts for FY 2009-10 and FY 2010-11 vide letter No.605/RAU/ARR & Tariff FY 2012-13 dated 25th April, 2012.”

It is noted by the Commission that despite the submissions made by the licensee before the State Commission that the audited accounts for 2008-09 and 2009-10 would be made available to the Commission, only the provisional accounts for the FYs 2009-10 & 2010-11 were filed before the State Commission.

10.3 The State Commission has also noted that the transmission licensees have filed true up petition for

FYs 2000-01 to FY 2007-08 on 28.05.2012 and the Commission has taken up the petition separately. However, the State Commission has not taken up the true up for the past year in the impugned order as the licensee had not submitted the audited accounts in time. The State Commission has, therefore, again directed the transmission licensee to ensure finalization of the audited accounts for the past years at the earliest.

11. Ld. Counsel for the Transmission Licensee (R-2) has given following position regarding the audited accounts.
 - i) True up petition for the period 2000-01 to 2007-08 filed before the State Commission on 28.05.2012
 - ii) True up petition for 2008-09 filed on 19.11.2012.

- iii) Final accounts of FY 2009-10 was duly audited and statutory auditor's report was also received and submitted before the State Commission. The true up petition for FY 2009-10 would be filed within four weeks.
 - iv) The audit of FYs 2010-11 and 2011-12 is under progress.
12. Ld. Counsel for Transmission Licensee (R-2) further submitted that the delay in finalization of the audited accounts occurred due to the delay in notification of transfer scheme and balance sheet of the transmission licensee only on 23.12.2010 even though the UP Transmission Corporation was declared as a State Transmission Utility by the State Government on 18.07.2007.

13. Let us now examine the directions given by this Tribunal in judgment dated 21.10.2011 in Appeal no.121 of 2010

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

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

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

of the FY 2007-08, 2008-09 and 2009-10 immediately after the receipt of the respective audited accounts.”

14. The time line given by the Tribunal were based on the submissions made by the Ld. ASG, representing the distribution and transmission licensees, regarding the time schedule of audit of accounts. At that time the Transfer Scheme dated 23.12.2010 along with the balance sheet as a 01.04.2007 had already been notified. Since, the notification of the transfer scheme and balance sheet as on 01.04.2007, a period of more than two years have elapsed and even then the true up application for FY 2008-09 and 2009-10 has not been filed. Moreover, no time schedule has been submitted regarding completion of audit for FY 2010-11 and 2011-12. Therefore, we do not find any merit in the argument of the Ld. Counsel for the Respondent no.2 that the notification of Transfer Scheme had not been brought to the notice of the Tribunal in Appeal no. 121 of 2010 and

as such the said judgment of the Tribunal is per-
incurium.

15. Though the conduct of the Transmission Licensee is contemptable, we restrain ourselves from initiating contempt proceedings as against the Transmission Licensee (R-2) for not following the time schedule prescribed by the Tribunal for submitting the audited accounts upto FY 2009-10 in Appeal no.121 of 2010 considering the submissions of the Ld. Counsel for the Respondent no. 2 that the true up applications for the period FY 2000-01 to FY 2007-08 and for FY 2008-09 have been filed and true up application for FY 2009-10 also would be filed within four weeks i.e. by March, 2013. We direct the State Commission to carry out the true up of accounts of the Respondent no.2 upto FY 2009-10 as per the Regulations on priority. The State Commission is also directed to give a timeline for submission of the true up application for FY 2010-11

and 2011-12 along with the audited accounts to the Respondent no.2 and in case of default by them to take suitable action as per the provisions of the Act and its Regulations.

16. The Transmission Licensee (R-2) has submitted the position of balance sheet as on 01.04.2007 as notified under the transfer scheme which shows a loss. However, the correct position of ARR would be known after the true up of financials by the State Commission. Therefore, we do not intend to interfere with the impugned order.

17. Accordingly, we dispose of the Appeal with directions to the State Commission to carry out the true up of accounts upto FY 2009-10 on priority and adjust the surplus/deficit in the ARR in the transmission tariff for FY 2013-14. The State Commission is also directed to give a time schedule for submission of the true-up

application along with audited accounts for FY 2010-11 and 2011-12 to the Respondent no. 2 and in case of default take suitable action against them according to law.

18. The Appeal is disposed of with directions to the State Commission. The State Commission shall pass the consequential orders at the earliest. No orders as to costs.

19. Pronounced in the open court on this 9th day of April, 2013.

**(Rakesh Nath)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

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