

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 2nd January, 2013

Present: HON'BLE MR. JUSTICE PARTHA SAKHA DATTA, JUDICIAL MEMBER
HON'BLE MR. V J TALWAR, TECHNICAL MEMBER,

Appeal No. 108 of 2010

IN THE MATTER OF:

Federation of Karnataka Chamber of Commerce and Industry
Federation House, K G Road
Bangalore, Karnataka – 560 009

.... Appellant

Versus

1. Karnataka Electricity Regulatory Commission
6th & 7th Floor, Mahalaxmi Chambers,
No. 9/2, M G Road
Bangalore, Karnataka – 560 001

2. Bengalore Electricity Supply Company
K R Circle,
Bangalore, Karnataka – 560 001

.... Respondent(s)

Counsel for the Appellant(s):

Mr Rohit Rao N

Counsel for the Respondent(s):

Mr. Anand K Ganeshan along with
Ms Swagatika Sahoo for R-1
Mr. Raghvendra S Srivastava
Mr. Venkata Subramania T R for R-2

JUDGMENT

PER MR. V J TALWAR TECHNICAL MEMBER

1. The Appellant Federation of Karnataka Chamber of Commerce and Industry (FKCCI) is the association of large industrial consumers of the 2nd Respondent Bangalore Electricity Supply Company (BESCOM). Karnataka Electricity Regulatory Commission (Commission) is the 2nd Respondent.
2. Aggrieved by the Impugned Order dated 25.11.2009 passed by the 1st Respondent Commission, the Appellant has filed this Appeal.
3. The relevant facts leading to the present Appeal are as under:
 - a) The Commission notified the MYT Regulations on 1.4.2007 specifying 3 years as its first control period. BESCOM, the 2nd Respondent herein filed a petition for determination of ARR and ERC for the year 2007-08, 2008-09 and 2009-10 and tariff determination for the year 2007-08. The Commission passed MYT order on 11.1.2008 determining ARR and ERC for the years 2007-08, 2008-09 and 2009-10 along with the Retail Tariff for the year 2007-08.
 - b) The 2nd Respondent BESCOM filed a petition before the Commission on 30.6.2009 for (i) Performance Review for FY 2008 and FY 2009, (ii) Revision of ARR and ERC for FY 2009 and FY 2010 and (iii) Determination of Retail Tariff for FY 2010.
 - c) The Commission passed the Impugned Order on 25.11.2009 determining the Retail Tariff for FY 2010. Aggrieved by the Impugned Order, the Appellant has filed present Appeal.

4. Following six issues have been raised by the Appellant in this Appeal.
 - i). Maintainability of the Tariff Petition before the Commission
 - ii). Accounting Standards
 - iii). Return on Equity and depreciation.
 - iv). Consumption attributed to Irrigation pump sets
 - v). Interest on Consumer deposits.
 - vi). Capitalisation of Consumers' Security Deposits
5. We will deal with each of the above issues one by one. First issue is related to maintainability of the tariff petition before the Commission.
6. The learned Counsel for the Appellant made following submissions on this issue.
 - a) The Commission has held that the Annual Performance Review for the FY 2008 was done on the basis of the audited accounts. However, the Commission did not have the audited accounts for FY 2008. Regulation 2.8.1 of the MYT Regulations contemplates that the distribution licensee shall be subject to an annual performance review. It also provides that the licensee should provide all such information that would justify the need for variation in the performance from that of the approved forecast. The BESCO (R-2) is bound to furnish an auditor's report for the accounting statements

so prepared and furnished to the KERC, within 6 months from the end of the financial year, for which the accounting statements pertain.

- b) Condition 10.5 of the Licence conditions lays down that the accounting statements shall be as per the Companies Act. Thus, BESCOM ought to have filed the audited accounts of FY 2008 along with an auditor's report latest by 31.08.2008. However, BESCOM has apparently not filed the audited accounts of FY 2008 along with the Application for annual performance review for the year 2008.
- c) BESCOM has sought the review of its performance for FY 2009 also, i.e. for the period between 01.04.2008 to 31.03.2009. Though initially no accounts whatsoever were filed before the Commission, However, the 2nd Respondent BESCOM filed on 20.08.2009 some additional documents including provisional accounts for the FY 2009. However, even these alleged provisionally audited accounts were defective and unreliable because the said accounts do not contain the auditor's report. Thus any review on the basis of such accounts is defective. The perusal of the impugned order would reveal that the figures reckoned by the Commission to review the performance of FY 2009 are

completely different from the figures that are reflected in the provisional accounts. There is no reason or explanation whatsoever in the impugned order as to why and from where did it derive the figures to review the performance of BESCO for FY 2009.

- d) The Commission has revised the ARR and ERC for the remainder of the control period, viz. FY 10. In terms of Regulations 2.8.2 and 2.8.3 of the MYT Regulations modification of ARR and ERC for the remainder of the control period can be done only if it is a result of additional information, which was not previously known or available to the distribution licensee or the Commission at the time of approving the ARR and ERC. However, the neither BESCO has furnished any additional information nor the Commission has assessed if there is any additional information that has come up to modify the ARR and ERC approved vide order dated 11.01.2008. The Commission has justified the modification by way implementing this Tribunal's Judgment and Order in Appeal No. 15 of 2009 dated 9.10.2009.
- e) While modifying the quantum of power purchase and the power purchase cost, for the remainder of the control period,

the Commission has sought to rely upon the order dated 09.10.2009 of this Tribunal wherein the Tribunal has directed that power purchase cost should be allowed as per actuals.

- f) The Commission has completely ignored the fact that the Tribunal's Order dated 9.10.2009 has been appealed against before the Hon'ble Supreme Court and proceeded to modify the ARR and ERC for the FY 2010. Despite the Appellant herein submitting that the said order dated 09.10.2009 had been appealed against before the Supreme Court and was pending, the Commission still proceeded to modify the ARR and ERC. While doing so, the Commission has also ignored the provisions of Tariff Policy and its own MYT Regulations which provide for Regulatory and Tariff certainty.

7. The gist of the Appellant's submissions are as under:

- a) The Commission should not have carried out the Performance Review for FY 2008 in the absence of audited accounts.
- b) The Commission should not have carried out provisional Performance Review in the absence of reliable data.
- c) The Commission should not have carried out Performance Review for FY 2010 during the financial year itself just to implement the orders of this Tribunal in Appeal No. 15 of 2009 dated 9.10.2009 while an Appeal against the said judgment of the Tribunal was pending before the Hon'ble Supreme Court.

8. This Tribunal in its Judgment in Appeal No. 269 of 2006 dated 23rd May 2007 has held that the State Commissions are required to carry out truing up exercise with available data and second and subsequent truing up exercises can be carried out upon availability of audited accounts. The relevant extracts of this Tribunal's judgment dated 23.5.2007 is reproduced below:

“Normally, truing up exercise is undertaken on the basis of available data and information. Second and subsequent truing up exercises can be taken up when audited account figures are available”.

- Thus, the Commission has correctly carried out the Performance Review for the FY 2008 and FY 2009 based on the available data. With regard to Performance Review for FY 2010 carried out by the Commission during the year itself, the Commission has clarified that the same was carried out to implement the direction given by this Tribunal in its Judgment in Appeal No. 15 of 2009. The contention of the Appellant that the Commission should not have implemented the directions of this Tribunal in Appeal No. 15 of 2009 while an appeal against the said order is pending in the Supreme Court is misconceived. It is settled law that mere pendency of appeal does not operate as a stay on the order. The Hon'ble Supreme Court in *Atma Ram Properties (P) Ltd vs Federal Motors (P) Ltd.* (2005) 1 SCC 705 Hon'ble Supreme Court has held that

“ It is well settled that mere preferring of an appeal does not operate as stay on the decree or order appealed against nor on the proceedings in the court below. A prayer for the grant of stay of proceedings or on the execution of decree or order appealed against has to be specifically made to the appellate Court and the appellate Court has discretion to grant an order of stay or to refuse the same.”

9. In *Madan Kumar Singh Vs District Magistrate, Sultanpur*, (2009) 9 SCC 79 the Hon'ble Supreme Court has reiterated the same and has held that:

“ 20. It is trite to say that mere filing of a Petition, Appeal or Suit, would by itself not operate as stay until specific prayer in this regard is made and orders thereon are passed.”

10. Thus, the Commission was bound to implement the orders of this Tribunal in Appeal No. 15 of 2009 and the Commission has correctly carried out the Performance Review for the FY 2010.
11. In addition to the above points related to Performance Review for FY 2008, 2009 and 2010, the Appellant has also submitted that the Commission had erred in determining the Tariff for FY 2010 along with the ARR and ERC filings. According to the Appellant, the Commission does not have the power to entertain a combined application for Annual Performance review, modification of the ARR and ERC as well as determination of tariff. This becomes clear from Regulation 2.9.3 of the MYT Regulations that contemplates that such a joint application can be filed only in the first year of the first control period.
12. The above contention of the Appellant is misplaced. Section 64 of the Electricity Act 2003 requires the Commission to pass a tariff order within 120 days from the date of filing of tariff petition by the

licensee. In view of the specific provision of the Act, the learned Counsel for the Appellant did not press this point further.

13. In view of the above discussions the issue is decided against the Appellant.
14. Second Issue for consideration is related to **Accounting Standards**.
15. The learned Counsel for the Appellant made the following submissions:
 - a) As per licensing condition No. 10.5, BESCO is to maintain its Accounting Statements as per the provisions of Companies Act. However, the Commission has held that the Accounting Statement need not be maintained as per Companies Act but as per the Electricity Annual Supply Rules, 1985, framed under Section 69 (1) of the Electricity Supply Act, 1948. It based its decision on the reason that Section 185(2) (d) of the Electricity Act 2003 specifically saves operation of the Rule made Section 69(1) of the 1948 Act, unless the same is modified or rescinded.
 - b) The Rules framed under 69(1) have been rescinded by virtue of the licensing conditions issued by the Commission. The Commission is empowered under Section 26 of the Karnataka Electricity Reforms Act, 1999 to specify the manner of preparation and maintenance of annual accounts in the license conditions. Further, Section 58 (3) (f) of the Karnataka Electricity Reforms Act, 1999 made Section 69 inapplicable to the State of Karnataka. As such, BESCO is

bound to maintain Accounting Statements as per the Companies Act.

- c) While conducting audit of BESCO for the years 2001-2005 as well as 2009-2010, the CAG has held that the A/c Standards are not maintained correctly i.e. not as per Companies Act.
 - d) Under the 1985 Rules, the licensee can treat consumer contribution, Government grants etc. towards capitalization, thereby claiming depreciation on it from the consumers. This, however, is an incorrect method. The correct method is as prescribed under Accounting Standards 12.
16. The Learned Counsel for the 2nd Respondent BESCO made very elaborate submissions referring to Section 211 and Section 616 of the Companies Act 1956 and submitted that the Companies Act itself permits the Accounting Statement to be prepared as per the Rules made under Section 69 of the Electricity (Supply) Act 1948.
17. The Commission in its written note of arguments have made very detailed submissions as under:
- a) There is no inconsistency whatsoever in the application of Annual Accounts Rules, 1985 to the Accounting Statements to be prepared and submitted by the distribution licensees in the State under Clause 10.2 read with Clause 10.5 of the Licensing Regulations.
 - b) In terms of the clause 10.5 of the Licensing Regulations the Accounting Statement is to be read in accordance with the Companies Act, 1956.

- c) In terms of the Section 211 of the Companies Act itself, the Annual Accounts, namely, the Balance Sheet and Profit and Loss Account in the case of any Company engaged in generation or supply of electricity and also to any other class of Company for which a form of Balance Sheet has been specified in or under the Act governing such class of Company, the same need to be followed. It is, therefore, a provision of the Companies Act, 1956 itself directing the Annual Accounts of a Company engaged in the generation or supply of electricity to follow the applicable provisions in or under the other Act governing such Company.
- d) There is similar recognition under Section 616 of the Companies Act, 1956 which provides that the provisions of the Companies Act, 1956 shall apply to Companies engaged in generation or supply of electricity except to the extent there are inconsistent provisions in the Electricity Laws, namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 which were the applicable Electricity Laws when the Companies Act, 1956 was enacted.
- e) A combined reading of the provisions of Sections 211 and 616 of the Companies Act would establish that for a Company engaged in generation or sale of electricity, the provisions regarding Annual Statement provided for in or under the Electricity Laws will prevail.
- f) Section 69 of Electricity (Supply) Act 1948, is a specific provision dealing with the accounts of the State Electricity Board. The annual accounts are to be maintained in terms of

the Rules notified under the said provision. The Annual Accounts Rules, 1985 have been notified by the Central Government in pursuance of Section 69 of the Electricity (Supply) Act, 1948 and these are the Rules “under the Act” as envisaged in Section 211 of the Companies Act, 1956.

- g) Accordingly, the Annual Accounts Rules, 1985 are to be read as being provided for in pursuance of Section 211 of the Companies Act, 1956 and are being enforced by the Companies Act. The annual statement prepared as per the Annual Accounts Rules, 1985 would be in accordance with the Companies Act, 1956.
- h) Section 69 of the Electricity (Supply) Act, 1948 deals with the State Electricity Boards constituted under Section 5 of the said Act. In pursuance of the statutory mandate, firstly under the Karnataka Electricity Reforms Act, 1999 and thereafter under the Electricity Act, 2003, the Electricity Boards are to be re-organised with the licensed functions which include supply of electricity being statutorily transferred and vested in a successor company incorporated under the provisions of the Companies Act, 1956.
- i) Section 58 of the Karnataka Electricity Reforms Act, 1999 where under the erstwhile Karnataka Electricity Board was first reorganised provides for affecting the State Act on the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Sub section (3) If of Section 58, inter alia, provides that provisions of section 69 of the Electricity (Supply) Act

1948 would not apply to the extent the Karnataka Electricity Reforms Act, 1999 has made specific provisions

- j) Section 26 of the Karnataka Electricity Reforms Act, 1999 deals with the Annual Accounts of the licensees and there is no reference to the Companies Act, 1956 in the said provision. Section 26 read with Section 58 of the Act continues to apply the Annual Accounts Rules, 1985 to the licensees under the Karnataka Electricity Reforms Act, 1999.
- k) In terms of the above and in the absence of any specific provision in the Karnataka Electricity Reforms Act, 1999 dealing with the annual accounts of the licensees, the provisions of Section 69 read with the Annual Accounts Rules, 1985 would continue to apply to the erstwhile Karnataka Electricity Board and to its successor entities.
- l) The Electricity Act, 2003 came into force on 10.6.2003. Section 185 (2) (d) of the Electricity Act provides that all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified.
- m) In terms of Section 185(2)(d) of the Electricity Act, 2003 the provisions of Section 69 of the Electricity (Supply) Act, 1948 would apply notwithstanding its repeal by the Electricity Act, 2003. Accordingly, Section 69 of the Act provides for special provisions in regard to the annual accounts of the Board, which is succeeded by the licensee including supply licensees in Karnataka would be governed by the Annual Accounts Rules, 1985.

- n) The intention of Section 185 (2) is to continue to make the Annual Accounts Rules notified under Section 69 of the Act after 10.6.2003 without any restriction in regard to the period. The Electricity Act, 2003 as mentioned above mandates the re-organisation of the State Electricity Board.
- o) Section 185 (2) (d) has been enacted on the clear basis that the Electricity Board will cease to function within a period of one year unless temporarily extended with the consent of both the Central Government and the State Government. Accordingly, Section 185 (2) (d) was enacted with the full knowledge that it should have continued application even to the licensees which are successor entities of the Electricity Board.
- p) The above is further fortified by comparing sub clauses (c) and (d) of Section 185 (2) (c) and (d) of the Electricity Act. While, Section 185 (2) (c) provides for the continued application of the Rules framed under Sections 12 to 18 of the Indian Electricity Act, 1910 only till such time the Rules are framed under the corresponding provisions of the Electricity Act, 2003 (Sections 67 to 69), there is no such limitation provided for in Section 185 (2) (d). Accordingly, the Annual Accounts Rules notified under Section 69 of the Electricity (Supply) Act, 1948 will continue to apply to the licensees which are the successors of the State Electricity Board for all times to come.
- q) Thus, by virtue of the provisions of the Karnataka Electricity Reforms Act, 1999 and the Electricity Act, 2003, the Annual

Accounts Rules, 1985 would continue to apply for the licensees which are the successor of the State Electricity Board.

18. According to the Commission, a combined reading of Section 211 and Section 616 of the Companies Act would establish that in case of the 2nd Respondent BESCO, a company engaged in supply of electricity, the provisions, in regard to the Annual Statement, Electricity Laws would prevail.
19. According to the Appellant, the Electricity (Supply) Act 1948 has been repealed by the enactment of the Electricity Act 2003. Thus, after enactment of 2003 Act, the provisions of Companies Act 1956 alone would apply.
20. Thus, the Appellant has also accepted that the Companies Act 1956 does not prohibit the maintenance of Annual Accounts by the electricity companies as per the provisions provided in Electricity laws. However, the main contention of the Appellant is two fold firstly, Section 58 of Karnataka Electricity Reforms Act 1999 specifically provides that provisions of Section 69 of the 1948 Act would not apply to the State of Karnataka and Secondly, since the 1948 Act itself has been repealed, the Rules framed under this Act also stood repealed and therefore, the 2nd Respondent is bound to prepare annual accounts statement as per Companies Act alone.
21. Let us examine the provisions of the Karnataka Electricity Reforms Act 1999. Section 26 of this Act deals with Annual Accounts of the licensee is reproduced below:

26. Annual accounts of the licensee.- Every licensee shall, unless expressly exempted by the licence, prepare and

render to the Commission on or before the date in each year specified in the licence an annual statement or statements of accounts of its undertaking and of each separate business unit as specified in the licence made up to such date, in such form and containing such particulars, as may be set out in the licence and it shall be a term of the licence that such statements shall be published in the manner specified by regulations."

22. Section 58 of the Karnataka Electricity Reforms Act 1999 provides for reorganisation of the Karnataka Electricity Board and, Sub-section 3, inter alia, provides as under:

"(3) Subject to sub-sections (1) and (2), upon the establishment of the Commission, the provisions of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948 shall, in so far as the State is concerned, be read subject to the following modifications and reservations:-

.....

*(f) In respect of matters provided in sections ... **56 to 69, 72 and 75 to 83** of the Electricity (Supply) Act, 1948, to the extent this Act has made specific provisions, the provisions of the Electricity (Supply) Act, 1948 shall not apply in the State;*

23. According to the 1st Respondent Commission, Section 58 of the Karnataka Electricity Reforms Act, 1999, inter alia, provides that provisions of Section 69 of the Electricity (Supply) Act 1948 would not apply to the extent the Karnataka Electricity Reforms Act, 1999 has made specific provisions. Section 26 of the Karnataka Electricity Reforms Act, 1999 deals with the Annual Accounts of the licensees and there is no reference to the Companies Act, 1956 in the said provision. Section 26 read with Section 58 of the Act would establish that the Annual Accounts Rules, 1985 would

continue to apply to the licensees under the Karnataka Electricity Reforms Act, 1999.

24. The above contention of the Commission is not correct. Section 58(3)(f) states that provisions of Section 69 of the 1948 would not be applicable to the State of Karnataka in so far as there is a specific provision in the 1999 Act itself. Section 26 of the 1999 Act mandates the licensee to prepare the Annual Accounts Statement in such forms and containing such particulars as may be set out in the license. Clause 10.5 of the license requires the 2nd Respondent BESCO to prepare its accounts statement as per the provisions of the Companies Act. Therefore, conjoint reading of Section 58, Section 26 of Karnataka Electricity Reforms Act 1999 along with the license of the 2nd Respondent BESCO clearly establishes that the 2nd Respondent BESCO is required to prepare the Annual Accounts Statement in accordance with the provisions of Company Act.
25. The 1st Respondent Commission further submitted that The Electricity Act, 2003 came into force on 10.6.2003. Section 185 (2) (d) of the Electricity Act 2003 provides that all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 shall continue to have effect until such rules are rescinded or modified. Thus, in terms of Section 185(2)(d) of the Electricity Act, 2003 the provisions of Section 69 of the Electricity (Supply) Act, 1948 specifically would apply notwithstanding its repeal by the Electricity Act, 2003. Accordingly, Section 69 of the Act provides for special provisions in regard to the annual accounts of the Board, which is succeeded by the licensee including supply licensees in Karnataka would be governed by the Annual Accounts

Rules, 1985. The intention of Section 185 (2) is to continue to make the Annual Accounts Rules notified under Section 69 of the Act after 10.6.2003 without any restriction in regard to the period even after the re-organisation of the State Electricity Board. Section 185 (2) (d) has been enacted on the clear basis that the Electricity Board will cease to function within a period of one year unless extended with the consent of both the Central Government and the State Government. Accordingly, Section 185 (2) (d) was enacted with the full knowledge that it should have continued application even to the licensees which are successor entities of the Electricity Board. The above is further fortified by comparing sub clauses (c) and (d) of Section 185 (2) (c) and (d) of the Electricity Act. While, Section 185 (2) (c) provides for the continued application of the Rules framed under Sections 12 to 18 of the Indian Electricity Act, 1910 only till such time the Rules are framed under the corresponding provisions of the Electricity Act, 2003 (Sections 67 to 69), there is no such limitation provided for in Section 185 (2) (d). Accordingly, the Annual Accounts Rules notified under Section 69 of the Electricity (Supply) Act, 1948 will continue to apply to the licensees which are the successors of the State Electricity Board for all times to come.

26. The gist of the Commission's contention is that Rules made under Section 69 of the 1948 Act have been saved by virtue of Section 185(2)(d) of the 2003 Act and the same would continue to apply till they are rescinded or modified. The Commission has acknowledged that Annual Accounts Rules 1985 framed under Section 69 of the Act covered the accounts of the Electricity Boards established under Section 5 of the 1948 Act and these

provisions would be equally applicable to the 2nd Respondent being a successor company to the Karnataka Electricity Board.

27. The above contention of the Commission requires in depth examination as to whether the provisions of Section 69 of the 1948 Act would be applicable to the Company registered under Companies Act 1956 and is engaged in the business of supply of electricity by virtue of Section 185(2)(d) of the 2003 Act.
28. Admittedly, prior to enactment of Electricity Act 2003, the provisions of Section 69 of 1948 Act would apply to the State Electricity Boards established under section 5 of the 1948 Act and would not apply to the companies in the business of supply of electricity. Accordingly, these Electric Companies were required maintain their accounts as per the Companies Act.
29. The accounting law applicable for SEBs was Accounting Rules 1985 framed under Section 69 of 1948 Act. These Rules are applicable to the Boards till the time Boards are not restructured; thereafter upon restructuring of the Board in to Companies, the Companies Act would apply as there is no provision for accounting of licensees and generating companies in the 2003 Act. The only provision available is in the Tariff Policy in para 5.3(c) that too only for Depreciation, which is as follows:

*"c) Depreciation: The Central Commission may notify the rates of depreciation in respect of generation and transmission assets. The depreciation rates so notified would also be applicable for distribution with appropriate modification as may be evolved by the Forum of Regulators. The rates of depreciation so notified would be applicable for the purpose of tariffs **as well as accounting.**"*

30. The above position is also clarified in CEA's Annual Report 2004-05, which in Chapter 9 clearly states that:

"SEBs have been following the accounting principles as laid down in the Electricity (Supply) (Annual Accounts) Rules – 1985. With the formation of various corporations/ companies, accounting principles to be followed will be according to the Company Law accounting practices."

31. In this regard, the relevant provision for accounting for licensees was there in Section 11 of 1910 Act and that for generating companies was in section 75A of 1948 Act. It may be seen that both require accounts to be in line with any rules prescribed. Further, Section 75A of 1948 Act clarified that Companies Act provisions will prevail for accounting. Thus, unless there were any specific rules prescribed by competent Government, Companies Act was to apply to licensees and generating companies. The status does not change after enactment of 2003 Act as there is no specific provision with regard to accounts except depreciation in Tariff Policy.

32. The Boards were to prepare their accounts according to Accounting Rules 1985 issued under section 69 of the 1948 Act. A perusal of The Rules 1985 would reveal that they are applicable to the Boards only. At many places it only refers to Board and gives information regarding its generation, transmission and distribution business. It gives formats for Revenue Account and Balance Sheet, whereas Companies Act requires accounts to be prepared as Profit & Loss Account and Balance Sheet. The Revenue Account has only Income & Expenditure items and not the Profit or Loss. Similarly, the Balance Sheet format does not have Share Capital under liabilities as the Board was not having any Share

Capital. The saving provided to the Rules 1985 in section 185(2)(d) of 2003 Act is only till the time Board is in existence. The moment the Board ceases to be in existence, the Rules would not apply to successor entities as they are not the Board although the Rules continue to exist and may be applicable to other Boards.

33. It is also a fact that many of the unbundled corporations of the erstwhile Board are still following Rules 1985 for preparing their accounts. Although they are not statutorily required to be followed but the accounts would be valid to the extent they are not in conflict with the Companies Act, which is the law now applicable to such entities.
34. Further, it would not be correct to hold that the companies which were in the business of supply of electricity prior to enactment of Electricity Act 2003, are required to follow Companies Act and the Companies which are formed as a result of restructuring of the Boards would be required to follow Annual Accounts Rules 1985. The Parliament could not have approved of the discrimination between the two sets of Companies.
35. In view of the above discussions we hold that since Section 69 of the 1948 Act was not applicable to the Companies those were in the business of supply of electricity prior to enactment of the Electricity Act 2003, it cannot be held to be applicable to the companies formed after the enactments of 2003 Act and restructuring of the Board under Section 172 of 2003 Act by virtue of 185(2)(d) of the 2003 Act. The Commission is accordingly directed to direct the 2nd Respondent to submit the Annual Accounts Statement in accordance with the Companies Act

henceforth. Depreciation on Grants, consumer's contribution etc shall have to be treated in accordance with Accounting Standard 12 of Institute of Chartered Accounts.

36. Interestingly, while the Commission in written note of arguments has made a case for application of Annual Accounts Rule 1985, in para 22 of its written note of arguments has accepted that the Commission has wrongly applied the provisions of Annual Accounts Rules 1985. Para 22 of the Commission's written note of arguments is reproduced below:

"In view of the above, it is respectfully submitted that the State Commission has wrongly applied the provisions of the Annual Account Rules, 1985."

(The above paragraph No. 36 has been expunged as per orders of the Hon'ble Court in IA No. 42 of 2013, order dated 1.2.2013)

37. The issue is accordingly decided in favour of the Appellant.
38. The third issue is related to Return on Equity (RoE) and Depreciation.
39. The learned Counsel for the Appellant submitted that Regulation 3.9 of the MYT Regulations contemplates that RoE shall be 14% and shall be computed on the equity base determined in accordance with Regulation 3.6 and 3.7. Regulation 3.7 contemplates that for a Debt: equity ratio for capital cost of projects would be 70:30. However, if the equity component is more than the normative level, then the excess would be treated as loans advanced. If it is less than the actual equity invested would be reckoned for RoE. However, the Commission has allowed 14% on the whole capital. This is completely contrary to the MYT Regulations. The Commission has permitted depreciation at the rate of 15.5% i.e higher than the rate specified in MYT Regulations

relying upon the CERC Regulations. The Commission has no power to deviate from its own MYT Regulations and provide higher RoE and depreciation without amending the MYT Regulations.

40. The learned Counsels for the Respondents justifying the Commission's findings in the Impugned Order has submitted that for the purpose of Return on Equity, the Commission took into consideration the cash resources available to the licensee from its share premium and the internal resources that were used to fund the equity commitments, which are in accordance with Clause 3.9 of MYT Regulations. The 2nd respondent has claimed RoE and Depreciation as per the CERC norms and the State Commission has allowed the same, as MYT Regulations are framed considering the CERC Regulations, 2004 as per Section 61(a) of Electricity Act, 2003. The CERC has now revised these norms in its Regulations, 2009. Therefore, the Commission has followed revised CERC norms specified in 2009 Regulations.
41. The above approach of the Commission following CERC norms without amending its own Regulations is not correct. In this context it would be desirable to refer to Section 61 of the Act which read as under:

61. Tariff regulations.—The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:—

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

...

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948 (54 of 1948), the Electricity Regulatory Commissions Act, 1998 (14 of 1998) and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

42. Bare reading of section 61 would elucidate that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission for determination of tariff for generation companies and transmission licensees. Once the Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. The Karnataka Electricity Regulatory Commission has framed MYT Regulations determination of tariff in the year 2006 and accordingly the Commission is required to fix tariff as per these Regulations. These MYT Regulations have specific provisions dealing with Return on Equity and Depreciation and the Commission is required to follow these.
43. The issue is accordingly decided in favour of the Appellant.
44. Fourth issue for consideration is related to consumption attributed to Irrigation pump sets.
45. The learned Counsel for the Appellant submitted that Section 55 of the 2003 Act contemplates that metering of all classes of consumers have to be necessarily be done. The 2nd Respondent

BESCOM has not metered the IP set consumers and has always claimed power purchase on assumptions and projections. The Commission in its order has noted that the IP set consumers are not opposed to metering. The Commission has also noted that the data regarding number of IP Set consumers has not been furnished by BESCOM. Further, the Commission has also noted that the data from the meters of Distribution Transformers feeding power predominantly to IP set consumers has not been placed on record. Yet, the Commission has approved 4125.22 Million Units basing its figure on the data furnished by BESCOM. The approach of the Commission is erroneous. It should have disallowed any power purchase on account of IP sets until production of reliable data by BESCOM.

46. The Commission has justified the assumption taken by them in regard to consumption by the IP sets and have submitted that it had considered the number of IP sets as per the 2nd Respondent's audited data for FY 2008 and census data produced by the 2nd Respondent BESCOM. The Commission has considered IP sets sales on the basis of consumption recorded in the meters installed at the Distribution Transformer Level. Thus the sales to IP sets has been correctly made.
47. This Tribunal in catena of judgments has held that the Commissions ought to approve the power purchase costs subject to prudence check. This Tribunal in its judgment in Appeal No.250 of 2006 in the case of Bangalore Electricity Supply Company Limited & Ors. v/s Karnataka Electricity Regulatory Commission & Ors. 2008 ELR (APTEL) 164 had held as under:

“11. We hold that as the appellant is responsible for meeting the power demand in its area, its projections – unless perverse or grossly wrong – should not be interfered. Any variation in power procurement cost can be taken care of during truing up exercise. In the present case since tariff years 2007-08 and 2008-09 are over and we are in the midst of the tariff year 2009-10, the Commission is directed to i) allow the power purchase cost on the basis of actual available figures and ii) also allow it the carrying cost, while carrying out the truing up exercise.”

48. In view of findings of the Commission that it has considered IP sets sales on the basis of consumption recorded in the meters installed at the Distribution Transformer Level and in view of this Tribunal’s judgment quoted above, we do not find any reason to interfere with the findings of the Commission. The issue is decided against the Appellant.
49. Fifth issue for consideration is related to Interest on Consumer’s deposit.
50. The learned Counsel for the Appellant contended that the Commission has passed the order regarding interest on consumer deposits without any basis and dehors the figures filed by the BESCO. The very approach of the Commission makes it clear that the order suffers from grave infirmities. For the FY 2008, BESCO as per its original filing had claimed that it had consumer deposits amounting to Rs.1570.13 Crores which was amended to Rs.1487.78 Crores by the BESCO as per its revised filing. However, the Commission has considered that consumer deposits lying with the BESCO were at Rs.1275.87 Crores. Similarly, for the FY 2009, BESCO as per its original filing had claimed that it had consumer deposits amounting to Rs.1727.15 Crores which

was amended to Rs.1635.50 Crores by the BESCO as per its revised filing. However, the Commission has considered that consumer deposits lying with the BESCO as Rs.1485.79 Crores. From these facts it is clear that unless the audited accounts along with the auditor's report is not made the basis for the annual review performance exercise, such huge inconsistencies and errors will continue to occur, thus negating the very purpose of the MYT regime.

51. The learned Counsel for the Commission submitted that the interest on consumer deposits is calculated as per the KERC (Interest on Security Deposit) Regulations, 2005. The State Commission has considered closing balances as on 31.3.2008 based on the audited accounts. Obviously, this is the opening balance as on 1.4.2008. Similarly, interest is calculated on the closing balances as on 31.3.2007 based on audited accounts which is the opening balance as on 1.4.2007 and the interest allowed by the Commission in the revenue requirement for FY 2007-08 was based on the Bank rate prevailing as on 1st April 2007 on the opening balances of security deposit as on 1.4.2007. Further, interest on security deposit was determined for the year 2008-09 based on the Bank rate prevailing as on 1st April 2008 on the opening balance of security deposit as on 1.4.2008. Thus the interest calculated for the year 2007-08 and 2008-09 are as below :

S No	Particulars	2007-08 (Rs. In cores)	2008-09 (Rs.in crores)
1	Opening Balance of security deposit	Rs. 1275.87	Rs. 1485.79
2	Interest rate	6%	6%

3	Amount of interest allowed	Rs. 76.55	Rs. 89.15
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52. From the above it is evident that the Commission has considered the closing balance for the year FY 2007 as per the audited accounts. In view of this we are of the view that the Commission has adopted correct approach and we do not find any reason to interfere with the findings of the Commission.
53. Sixth issue for our consideration is related Capitalisation of Consumers' Security Deposits.
54. The learned Counsel for the Appellant has contended that the 2nd Respondent has capitalised Rs 85.97 crores as per the State Government's directions. The BESCO is obliged to pay interest on the security deposit to the consumer. By capitalising the same, no interest would accrue on the capitalised amount.
55. The Commission, in its written note of arguments, has clarified that all the distribution licensees including the 2nd Respondent BESCO are regularly paying interest on the consumer deposit despite capitalization of the security deposits.
56. In view of the categorical statement made by the Commission, the issue has become infructuous.
57. **Summary of our findings**
- i). **The Commission has correctly carried out the Performance Review for the FY 2008 and FY 2009 based on the available data. With regard to Performance Review for FY 2010 carried out by the Commission**

during the year itself, the Commission has clarified that the same was carried out to implement the direction given by this Tribunal in its Judgment in Appeal No. 15 of 2009. Section 64 of the Electricity Act 2003 requires a Commission to pass a tariff order within 120 days from the date of filing of tariff petition by the licensee. In view of the specific provision of the Act, the learned Counsel for the Appellant did not press this point further.

- ii). Since Section 69 of the 1948 Act was not applicable to the Companies those were in the business of supply of electricity prior to enactment of the Electricity Act 2003, it cannot be held to be applicable to the companies formed after the enactments of 2003 Act and restructuring of the Board under Section 172 of 2003 Act by virtue of 185(2)(d) of the 2003 Act. The Commission is accordingly directed to direct the 2nd Respondent to submit the Annual Accounts Statement in accordance with the Companies Act henceforth. Depreciation on Grants, consumer's contribution etc shall have to be treated in accordance with Accounting Standard 12 of Institute of Chartered Accounts.
- iii). Bare reading of section 61 would elucidate that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission for determination of tariff for generation companies and

transmission licensees. Once the Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases. The Karnataka Electricity Regulatory Commission has framed MYT Regulations determination of tariff in the year 2006 and the Commission is required to fix tariff as per these Regulations. These MYT Regulations have specific provisions dealing with Return on Equity and Depreciation and the Commission is required to follow these.

- iv). In view of findings of the Commission that it has considered IP sets sales on the basis of consumption recorded in the meters installed at the Distribution Transformer Level and in view of this Tribunal's judgment quoted above, we do not find any reason to interfere with the findings of the Commission. The issue is decided against the Appellant.
- v). The Commission has considered the closing balance for the year FY 2007 as per the audited accounts. In view of this we are of the view that the Commission has adopted correct approach and we do not find any reason to interfere with the findings of the Commission.
- vi). In view of the categorical statement made by the Commission that the interest on consumers' deposit is

being paid regularly to the , consumers the issue has become infructuous.

58. In view of the above findings, the Appeal is allowed in part to the extent indicated in the body of judgment. The Commission will now pass consequential Order in the light of this judgment. However, there is no order as to costs.

(V.J. Talwar)
Technical Member

(Justice P. S. Datta)
Judicial member

Dated: 2nd January 2013

Reportable/~~Not Reportable~~