

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

Appeal No. 121 of 2007

Dated : December 15, 2010

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

In the matter of:

**Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14-Ashok Marg, Lucknow-226001.**

.....Appellants

Vs

- 1. M/s. NOIDA Power Company Limited,
Commercial Complex, H Block, Sector Alpha-II,
Greater NOIDA-201 308.**
- 2. Uttar Pradesh Electricity Regulatory Commission,
Kishan Mandi Bhawan, 2nd Floor, Gomti Naga,
Lucknow (UP)- 226010**

.....Respondents

**Counsel for Appellant(s) : Mr.Pradeep Mishra &
Mr. Suraj Singh**

**Counsel for Respondent(s): Mr.M.G. Ramachandran
& Mr. Vishal Gupta**

Appeal No. 51 of 2009

In the matter of:

**Uttar Pradesh Power Corporation Ltd.,
Shakti Bhawan, 14-Ashok Marg, Lucknow-226001.
.....Appellants**

Vs

**1. Uttar Pradesh Electricity Regulatory Commission,
Kishan Mandi Bhawan, 2nd Floor, Gomti Naga,
Lucknow (UP)- 226010**

**2. M/s. NOIDA Power Company Limited,
Commercial Complex, H Block, Sector Alpha-II,
Greater NOIDA-201 308.**

.....Respondents

**Counsel for Appellant(s) : Mr.Pradeep Mishra &
Mr. Suraj Singh**

**Counsel for Respondent(s): Mr.M.G. Ramachandran
& Mr. Vishal Gupta**

J u d g m e n t

Per Hon'ble Shri Rakesh Nath, Technical Member:

1. These Appeals 121 of 2007 and 51 of 2009 have been filed by U.P. Power Corporation Limited, the bulk power supplier and the successor of U.P. State Electricity Board after its restructuring. U.P. Electricity Regulatory Commission is Respondent No. 2 in Appeal No. 121 of 2007 and Respondent No. 1 in Appeal No. 51 of 2009. NOIDA Power Company Limited (NPCL), a distribution licensee in the area of Greater NOIDA is the other respondent. NPCL is a joint venture company of CESC, a private sector company and Greater Noida Development Authority.
2. In Appeal No. 121 of 2007 the Appellant has challenged the order of the State Commission dated 26.6.2007 determining bulk supply tariff for supply of power by the Appellant to NPCL for the FY 2005-06 and FY 2006-07. Similarly, Appeal No. 51 of 2009 is against the order of State Commission dated 01.09.2008 determining the bulk supply

tariff for the FY 2007-08 and FY 2008-09. Though the impugned orders are different, this common judgment is rendered in both these Appeals, as the issues are the same.

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

- (a) Noida Power Company Limited (NPCL) was granted license by Government of U.P. for distribution of electricity in the area of Greater NOIDA under the Indian Electricity Act, 1910 on 30.8.1993. Subsequently, Power Purchase Agreement dated 15.11.1993 was executed between U.P. State Electricity Board (predecessor of the Appellant) and NPCL, the Respondent herein, for supply of electricity of 30 MVA to be enhanced to 45 MVA after construction of 220 kV Sub-Station at NOIDA. A tentative rate of Rs. 1.66/ kWh was fixed for bulk power supply which was to be examined and revised by a independent authority after six months. Under the PPA there was a provision that after the expiry of four years and half, in the event of NPCL failing to set up its own generation, and if

UPSEB was required and ready to supply electricity, then UPSEB would be entitled to charge double the rates applicable at that time.

- (b) After the expiry of six months of the agreement, Government of Uttar Pradesh appointed Nair Committee but the final determination of bulk supply rates could not be made due to different rates suggested by the members of the Committee. In the year 1995 Government of UP appointed M.I. Beg Committee which gave its recommendation in 1997 fixing the bulk supply rate at Rs. 1.59/kWh. The matter was referred back to the Beg Committee twice and finally in December 1999, the Committee recommended the bulk supply rate of Rs. 1.63/kWh. This was objected to by NPCL.
- (c) On 4.1.2000, UPSEB was unbundled separating thermal and hydro generation assets under two separate government companies. The assets pertaining to

distribution and transmission were transferred to the Appellant.

- (d) On 29.2.2000 a writ petition No. 1048/2000 was filed by NPCL before Hon'ble Allahabad High Court praying inter-alia, for direction to withdraw, cancel and revoke the Beg Committee Report and also refer the issues relating to power purchase price to the State Commission. Hon'ble High Court by an interim order dated 31.3.2000 directed the State Commission to fix the power purchase price for 45 MVA supply by the Appellant. Consequently, the State Commission vide its order dated 05.02.2001 fixed the power purchase price from FY 1993-94 to FY 1999-00. The rates determined by the State Commission were Rs. 1.39/kWh for FY 1993-94 with yearly escalation which culminated in a rate of Rs. 2.56/kWh in FY 1999-00.
- (e) The State Commission in its order dated 5.2.2001 applied principles of Sixth Schedule of Electricity (Supply) Act, 1948 to the business of Respondent

distribution licensee to arrive at the power purchase cost. The principle adopted was that the Respondent distribution licensee should be allowed to recover its operational expenses and return on equity/ capital base from its revenue and thereafter the balance is treated as power purchase cost. The bulk supply rate was determined by dividing the power purchase cost by the energy that should be purchased from the Appellant to supply energy actually sold by the Respondent to its consumers after accounting for actual transmission & distribution losses in its distribution system subject to a ceiling of 8%. The State Commission continued to follow the same principle in the subsequent years till the FY 2005-06. This methodology resulted in the Appellant getting tariff for bulk supply from NPCL at higher rates than its pooled power purchase cost in the past.

- (f) On 12.08.2003, the distribution system vesting with the Appellant was unbundled and transferred to the four state owned distribution companies. The Appellant

was left with functions of transmission and bulk supply. Thereafter, the transmission was also separated by formation of a transmission company and the Appellant was left with only bulk power supply function.

- (g) On 18.02.2005, the State Commission while dealing with Annual Revenue Requirement (ARR) of NPCL for FY 2004-05 approved a bulk power supply tariff of Rs. 2.9361/kWh. In this order also the bulk supply tariff was determined on the same principles as in the previous years.
- (h) On 10.11.2005, Writ Petition No. 1048/2005 concerning the PPA rate of 45 MVA supply by the Appellant to NPCL was disposed of by the Division Bench of Allahabad High Court by setting aside the report of the Beg Committee and affirming the State Commission's order dated 05.02.2001. However, on 27.02.2006 Special Leave Petition was filed by the Appellant against this judgment. The same has since been admitted by the Hon'ble Supreme Court.

- (i) On 26.6.2007, the State Commission passed an order on ARR/Tariff Petition of NPCL, the Respondent distribution licensee, for FY 2005-06 and 2006-07. In the FY 2006-07, the State Commission included the estimated cost of power purchased by the NPCL from open market aggregating to Rs. 20.37 crores at a rate much higher than the bulk supply tariff of the Appellant as an item of expenditure and reduced the power purchase cost payable to the Appellant on that account. Consequently, the bulk supply tariff of the Appellant has been reduced from 2.9141/kWh in FY 2005-06 to Rs. 2.7042/kWh in FY 2006-07. Aggrieved by this order dated 26.6.2007, the Appellant has filed Appeal No. 121 of 2007.
- (j) Subsequently on 01.09.2008, the State Commission passed an order in the ARR/Tariff of the Respondent distribution licensee for FY 2007-08 and FY 2008-09 according to its Regulations of 2006. In this order bulk supply tariff of the Appellant has been further

reduced and made equal to the bulk supply tariff as applicable to the four government owned distribution licensees in the state. Further, the State Commission has also carried out true up of financials of Respondent distribution licensee for the FY 2006-07. The surplus of Rs. 19.64 crores as a result of the true-up has been allowed to be retained by Respondents distribution licensee towards projected future expenses instead of paying to the Appellant as done in the previous orders of the State Commission. Aggrieved by the order dated 01.9.2008 of the State Commission the Appellant has filed Appeal No. 51 of 2009.

4. Learned Counsel for the Appellant has argued that the State Commission does not have the jurisdiction under the Electricity Act, 2003 to determine the rate for supply of electricity by the Appellant, a trader, to the Respondent distribution licensee. The supply of power from the Appellant to Respondent distribution licensee has to be governed by the terms of supply of the PPA entered into between them on 15.11.1993. The PPA

was only for a period of four years and half and was extended till the Writ Petition No. 1048/2005 was decided by the Hon'ble Allahabad High Court i.e. 10.11.2005. Thus the Appellant is under no legal obligation to supply power to the Respondent. Even assuming that the Appellant has an obligation to supply power it has to be at double the rate determined by the State Commission, as per the terms and conditions of the agreement dated 15.11.1993.

5. The Learned Counsel for the Appellant has also challenged the methodology used by the State Commission to determine the rate of supply of power by the Appellant to the Respondent for the following reasons:
 - (a) The Electricity Act, 1948 has been repealed by Section 185 of the Electricity Act, 2003. Hence the provision of the Sixth Schedule to the Act 1948 cannot be applied in reverse direction while determining the electricity purchase price of the Respondent.

- (b) Power purchase by the Respondent from other sources at higher rate cannot be adjusted for determining the rate of power supplied by the Appellant to the Respondent.
 - (c) The surplus of Rs. 19.64 crores as a result of the true up of the financials of FY 2006-07 of the Respondent had to be passed on to the Appellant and the Respondent cannot be allowed to retain the same for adjustment in the future years.
6. The Learned Counsel for Respondent, (Noida Power Company Limited), distribution licensee replying to the arguments has submitted as under:
- (a) The contractual obligation of the Appellant to supply power to the Respondent is the subject matter of the writ petition No. 9892 of 2008 in the Hon'ble High Court of Allahabad filed by the Respondent distribution licensee as the required allocation of power to the Respondent from the power sources for the State of UP

which is more than 45 MVA has not been made available to the Respondent. There is an interim order passed by the Hon'ble High Court protecting the supply of 45 MVA to the Respondent. Therefore, the Appellant cannot raise the same issue in the present proceedings.

- (b) The methodology adopted by the State Commission to determine the bulk supply tariff payable by the Respondent to the Appellant has been as per judgment of Hon'ble High Court of Allahabad, Lucknow Bench dated 10.11.2005 passed in Writ Petition No. 1048 (M/B) of 2008.
- (c) The State Commission has determined the power purchase cost of the Respondent by deducting the total costs and returns from the total revenue of the Respondent. To determine the per unit purchase price, the power purchase cost has been divided by the number of gross units that should have been purchased by the Respondent to supply energy actually sold, with

distribution loss restricted to actuals but not exceeding 8%. Thus the State Commission has allowed only reasonable returns to the Respondent while ensuing recovery of full cost of supply to the Appellant.

- (d) This methodology has been applied by the State Commission consistently from 1993-94. Till the FY 2005-06, the Appellant by application of this methodology recovered excess amount over and above its pooled power purchase cost to the tune of Rs. 209 crores from the Respondents. This was done essentially because uniform retail tariff was being maintained by the State Commission in the state of UP and consequently the Respondent was paying the amount in excess of its own revenue requirement to the Appellant instead of passing it over to its own consumers by way of reducing the retail supply tariff.
- (e) The cost of power purchased by the Respondent from other sources at higher rate to meet its consumer's demand over and above 45 MVA supplied by the

Appellant has to be included in its ARR as uncontrollable expenditure and this amount has been rightly adjusted by the State Commission while working out the bulk supply tariff of the Appellant.

- (f) As regards the surplus of FY 2006-07, the State Commission has duly considered the surplus of FY 2006-07 and deficit of 2007-08 while passing the true up order dated 1.9.2008 commonly for both the years. It is not a case of adjustment in future expenses as claimed by the Appellant. Once the recovery of Appellant's revenue requirement i.e. the pooled cost of power supply of 45 MVA to Respondent has been protected, the Appellant could have been given any additional amount only if there was any surplus after considering the pending deficit adjustment.
- (g) The Appellant cannot legally claim any amount in excess of its revenue requirement which is the pooled cost of its power purchases from different sources.

7. In view of the rival contentions of the parties, the following issues would arise:

- (i) Whether the Appellant has binding obligation to supply power to the Respondent distribution licensee?
- (ii) Whether the State Commission has jurisdiction to determine the rate of power supply by the Appellant, a trader or a bulk power supplier to the Respondent distribution licensee?
- (iii) Whether Sixth Schedule of Electricity Act 1948 can be applied in reverse direction for electricity purchase price of the Respondent from the Appellant when the same has been repealed by Section 185 of the Electricity Act, 2003?
- (iv) Whether power purchase cost by the Respondent distribution licensee from other sources at a higher price can be adjusted from

its revenue while determining the bulk supply tariff for the Appellant?

(v) Whether the surplus as a result of true up of financials for FY 2006-07 relating to power purchase cost of the Respondent to the tune of Rs. 19.64 crores can be allowed to be retained by the Respondent for adjustment in future?

8. Let us first take up the issue of obligation of supply by the Appellant. According to the Learned Counsel for the Appellant the obligation of the Appellant to supply power to the Respondent was for 4-1/2 years or till the agreement was extended i.e. 10.11.2005, the date of judgment of Hon'ble High Court.
9. According to the Learned Counsel for the Respondent distribution licensee, the issue of binding obligation of the Appellant is a subject matter of Writ Petition No. 9892 of 2008 pending in the Hon'ble High Court of Allahabad filed by the Respondent and there are interim orders passed by the

Hon'ble High Court protecting supply of 45 MVA power to the Respondent.

10. We have examined this issue in detail. As regards legal obligation to supply power, the Appellant has persistently been supplying upto 45 MVA power to the Respondent from the year 1993. This issue was also not a subject matter of the impugned orders of the State Commission. Further according to the Respondent the binding obligation of the Appellant to supply power to the Respondent is a subject matter of writ petition pending in Hon'ble High Court of Allahabad and there is an interim order passed by the Hon'ble High Court protecting the supply of 45 MVA. Thus the legal obligation of supply can not be challenged in these Appeals which are against the orders dated 26.6.2007 and 1.9.2008 of the State Commission determining the Respondent Distribution Company's ARR and bulk supply tariff covering the period from FY 2005-06 to 2008-09. Thus the issue of legal obligation to supply power does not survive in so far these appeals are concerned.

11. Let us now consider the second issue regarding jurisdiction of the State Commission. According to the Learned Counsel for the Appellant, the State Commission can exercise only those powers which have been conferred under Section 86 of the Act. No such power under the said Section has been conferred on the State Commission to determine the rate for power supply by the Appellant, a trading company, to the Respondent distribution licensee.
12. According to the Learned Counsel for the Respondent only the State Commission has the jurisdiction to determine the bulk supply rate in terms of Section 86 (1) (a) and (b) of the Electricity Act 2003.
13. On the issue of jurisdiction of the State Commission, it is noted that the PPA between UPSEB, the predecessor of the Appellant, and the Respondent dated 15.11.1993 provided for a tentative tariff of Rs. 1.66/kWh which was to be examined and revised by an independent authority after six months. The agreement did not provide for any methodology to determine the tariff. The State Commission

was directed to determine the tariff by an interim order dated 31.3.2000 of Hon'ble Allahabad High Court in writ petition No. 1048/2000. Accordingly the State Commission determined the tariff by its order dated 5.2.2001 from FY 1993-94 to FY 1999-00. Since then the State Commission has been determining the bulk supply tariff. The tariff determined by the State Commission by its order dated 5.2.2001 was also affirmed by the Hon'ble High Court in its judgment dated 10.11.2005.

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

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

supply being unfettered by the law is wholly unacceptable. It is not the claim of the Appellant in the memorandum of Appeal that the Appellant's creation has been as a Trader in Electricity according to the Law. Though the function of the Appellant would prima-facie appear to be partaking the character of a Trading Company engaged in the business of trading of electricity, considered from the angle of history of the Organization of the Appellant it can hardly be said that the Appellant is an Electricity Trader within the meaning of Section 2(26) of the Electricity Act, 2003. The all-pervasive character of the UPSEB which was the creation of a statute, was initially fragmented on 4.1.2000 into companies for generation of electricity and for distribution and transmission. The function of distribution and transmission was vested with the Appellant Company. On 12.2.2003 because of further fragmentation the function relating to distribution was assigned to four Government owned distribution companies and later the function of transmission which was hitherto vested with the Appellant was also taken away from it, and consequently, the Appellant was assigned with the function of bulk supply to the distribution

companies. Therefore, given the history of the evolution of the Organization, the Appellant's entity does not appear to be an Electricity Trader simpliciter. Its present function is no different altogether from one of the functions of its predecessors. An entity in the name and style of Uttar Pradesh Power Corporation Ltd. which is a Government Company has been created after unbundling the UPSEB only to supply power in bulk to different distribution companies and viewed in the light, the Appellant can hardly equate itself with a trader and claim freedom from the shackles of the law. Since the distribution companies which otherwise could be said to be competent under the law to purchase power from the Central and State generating companies could not do so because of non-assignment with them of the existing PPA entered into between the erstwhile UPSEB and the generating companies, and since it is the Appellant alone with whom such assignment has been vested, the Appellant is exercising one of the functions of its predecessor-entity which was doubtlessly not exercising the function of a trader. Furthermore, in terms of PPA, tariff is to be determined by an independent authority and it is not a case

that the Respondent No.2 has been procuring power from the Appellant through any competitive bidding process. Therefore, argument that in term of the PPA of 1993, the Appellant is still entitled to charge double the rates, is not acceptable.

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

ARR of the Respondent in a year was not passed on to the Appellant and adjusted in ARR of the Respondent for subsequent years. Further, the Appellant had not raised any objection to the notice given by the State Commission while disposing of the petitions of the Respondent for determination of ARR/tariff which culminated in the impugned orders.

18. Learned Counsel for Appellant has argued that the State Commission does not have jurisdiction to determine the tariff of a trader, which is the present status of the Appellant. It is true that Section 86 (1) (j) empowers the State Commission to fix the trading margin, if considered necessary. The Tariff Policy in Section 9.0 stipulates that the Appropriate Commission should monitor the trading transaction continuously and ensure that electricity traders do not indulge in profiteering in situation of power shortage and fixing of trading margin should be resorted to for achieving this objective. Thus, a trader is also not free to sell power at any rate as its trading margin may be fixed by the Appropriate Commission. However, this is not a case of

promotion of market development in the state or procurement of power by the Respondent Company from a trading licensee through competitive bidding. The power is being supplied by the Appellant to the Respondent as a successor of UPSEB against the Power Purchase Agreement with the Respondent distribution licensee. Admittedly, the procedure for determination of tariff has not been specified in the agreement. According to the PPA, the tariff is to be determined by an independent authority. The Hon'ble High Court had directed the State Commission to determine the tariff and since then the State Commission has been determining the tariff.

19. As stated above, the power supply by the Appellant to the Respondent distribution licensee can not be categorized as a trading transaction. The supply by the Appellant is against the PPA as successor of UPSEB having control over all the PPAs with central and state sector generating companies and others. The State Commission has not determined the purchase price of the Appellant and

has ensured that the full cost of the Appellant is recovered. As stated above, the Appellant is aggregating the requirements of the distribution companies and procuring power on their behalf against the PPAs of central and state sector power stations resting with it as a successor of UPSEB. Thus the bulk supply tariff of the supply to the Respondent distribution licensee has to be regulated and determined by the State Commission under Section 86(1) (a) & (b) of the Electricity Act, 2003.

20. In view of above, we hold that the State Commission is empowered to determine the bulk supply tariff for supply of power by the Appellant to the Respondent distribution licensee.

21. Let us now examine the third issue regarding application of the Sixth Schedule in determination of Bulk Supply Tariff. Learned Counsel for the Appellant has argued that the Electricity (Supply) Act 1948 has been repealed by Section 185 of the Electricity Act 2003 and therefore the Sixth Schedule which is a part of the Act of 1948 cannot not be

applied. According to the Learned Counsel for the Respondent, the methodology has been as per the judgment of Hon'ble High Court dated 10.11.2005. The State Commission has consistently been using the same principle since its order dated 5.2.2001.

22. We shall first discuss the provisions of the Sixth Schedule to understand the core of the issue. According to Section 57 of the Electricity (Supply) Act, 1948 dealing with licensee's charges to consumers, the licensee has to comply with provisions of the Sixth Schedule. The Sixth Schedule envisages that the licensee has to adjust his charge for the sale of electricity whether by enhancing or reducing such that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return. The Sixth Schedule also specifies the manner in which the clear profit of the licensee exceeding the reasonable return has to be adjusted. It envisages as to what part of the excess amount will be at the disposal of the undertaking, to be kept as reserve and to be distributed to consumers. The Schedule

defines the components of capital base, income, expenditure, reasonable return, etc.

23. Thus The Sixth Schedule defines various components of expenditure and reasonable return, principle of providing reasonable return to the licensee and in case the return exceeds the reasonable level how it has to be adjusted and shared with the consumers. These principles are still valid under the Electricity Act, 2003. The principles of the Sixth Schedule have rightly been applied in the absence of any regulations of the Respondent No. 1, and no exception can be taken thereto. Section 61 (b) of the Electricity Act 2003 stipulates that the terms and conditions for tariff determination for generation, transmission and distribution of electricity shall be on commercial principles. Section 61 (d) stipulates that the consumers' interest shall be safeguarded and at the same time recovery of the cost of electricity has to be ensured in a reasonable manner. The tariff policy dated 6.1.2006 under para 8.0 on 'Distribution' stipulates that the State Commission have to strike a balance between the requirement of commercial viability of

- distribution licensee and consumers' interest and gains of efficient operation with reference to normative parameters should be appropriately shared between consumers and licensees.
24. The State Commission has so far kept the same retail supply tariff in the entire state. The expenditure incurred by the Respondent distribution licensee along with reasonable return had to be allowed by the State Commission to the distribution licensees in the ARR. The sale price and expenditure and return of the Distribution Licensee being fixed, the only variable that remained was the power purchase cost. The State Commission has therefore worked out the power purchase cost of the Respondent by deducting the prudent expenditure and return from the total revenue of the Respondent. However, the State Commission has ensured that the bulk supply tariff for the Respondent distribution licensee is not less than the pooled bulk supply tariff of the Appellant.
25. Till the FY 2005-06, the State Commission has been passing on the excess returns above reasonable return of the Respondent distribution licensee to the Appellant instead of

passing on to the consumers of Greater NOIDA in terms of reducing their retail supply tariff. This is borne out by the following table submitted by the respondent distribution licensee.

Comparison of Power Purchase Cost between UPPCL & NPCL							
Financial Year	UPPCL	NPCL					
	Pooled cost (including wheeling chgs @ 12%)	MU Imported	MU Sold	Power purchase cost "Rs/kWh"	Additional price paid over and above pooled cost	% over and above pooled cost	Total additional amount (Rs. Cr)
	(1)	(2)	(3)	(4)	(4) - (1) = (5)	(5) / (1) = (6)	(5) x (2) = (7)
1993-95	1.0354	124	114	1.680	0.645	62%	7.99
1995-96	1.2090	108	102	1.730	0.521	43%	5.63
1996-97	1.0525	129	119	1.830	0.778	74%	10.04 .
1997-98	1.2817	139	129	1.920	0.638	50%	8.85
1998-99	1.3280	144	131	2.020	0.692	52%	9.96
1999-00	1.6387	162	146	2.560	0.921	56%	14.90
2000-01	1.4707	162	148	2.735	1.264	86%	20.48 .
2001-02	1.7074	180	165	2.740	1.032	60%	18.60
2002-03	1.8310	216	199	2.688	0.857	47%	18.52
2003-04	1.8454	266	245	2.877	1.032	56%	27.44 .
2004-05	1.8970	309	284	2.967	1.070	56%	33.03
2005-06	1.8970	329	302	2.927	1.030	54%	33.84,
Total/ Average		2,267	2,085				209.28 .

26. In the Impugned order dated 26.06.2007 the State Commission has noted that Regulations prescribing the long term tariff principles for determination of ARR and tariffs for distribution licensees within the State had been notified and these Regulations would apply for the ARR and tariff determination in future. The Commission also noted difficulties in application of the Regulations in order dated 26.06.2007 due to non-availability of data from all distribution licensees of the State. Accordingly, the ARR and tariff for the FY 2007-08 and FY 2008-09 in the impugned order dated 1.9.2008 has been decided on the basis of its Regulations of 2006. Thus the State Commission has used the principles of Schedule VI till ARR/tariff order dated 20.6.2007 and thereafter the State Commission's Regulations of 2006 have been applied.

27. The State Commission in its order dated 01.09.2008 has noted as under:

“ 4.4.1 The Bulk Supply Tariffs as payable by NPCL to UPPCL have so far been determined based on

reverse application of principles of Schedule VI of the Electricity (Supply) Act 1948. However, UPPCL has been disputing such application of Schedule VI for the determination of Bulk Supply Tariffs of NPCL from the very beginning. Since the Commission has now notified the UPERC (Terms and Conditions for the Determination of Distribution Tariff) Regulation-2006, the same shall henceforth be applied for the determination of Annual Revenue Requirement of NPCL and also the Bulk Supply Tariffs.

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4.5.2 In the Tariff order dated 15th April 2008 of the four government owned Discoms, the Commission has determined the Bulk Supply Tariff which is payable by these Discoms to UPPCL for the power purchases by UPPCL on their behalf. The approved Bulk Supply Tariff as payable by the Government owned Discoms is Rs. 2.36/kWh for FY 2007-08 and Rs. 2.47/kWh for FY 2008-09. The above Bulk Supply Tariffs are exclusive of the transmission charges payable by the government owned Discoms to UPPCL for usage of its

transmission network. Based on the approved ARR of UPPTCL for FY 2007-08 and FY 2008-09, the transmission charges payable by the Discoms are Rs. 0.19/kWh and Rs. 0.22/kWh respectively. Under the provisions of new regulations, the Commission makes applicable the same Bulk Supply Tariffs as well as Transmission Tariffs as are applicable on the other distribution licensees in the State on NPCL also.....”

Thus, in our opinion the State Commission has adopted reasonable and prudent financial principles in determination of the bulk supply tariff and balanced the interest of the Appellant, Respondent and the consumers in the licensed area of the Respondent.

28. The Learned Counsel for the Appellant has argued that the State Commission should have decided the tariff as per the terms and conditions of the Agreement under which they are entitled for a tariff at double the bulk supply rate determined by the State Commission. In our opinion the penal provision of the agreement to charge double the rate in case of failure of the distribution licensee setting up of its own generating

station is inconsistent with the provisions of the Electricity Act, 2003 and cannot be relied upon. Further, according to the provisions of the Act and Tariff Policy of 2006, all power purchase costs unless held unreasonable, have to be allowed as expenditure in the ARR. If the power purchase price at double the normal cost is allowed in the ARR of the Respondent distribution licensee, it will result in higher retail supply tariff. Thus the burden of power purchased at penal rate will be passed on to the consumers of Greater Noida in the licensed area of the Respondent which will not be in order.

29. In this connection, we would like to reproduce the observation of the State Commission in its order dated 01.09.2008:

“ 6.3.12 In this context the Commission would also like to highlight that in its various tariff orders, in line with the provisions of the Tariff Policy, it has been highlighting the requirement of allocation of existing PPAs with the Generating Companies to respective Discoms based on their load profiles. Non-allocation of PPAs based on the load profile of the respective

distribution companies, probably is one of the major contributors of the present impasse, which is now threatening the survival of better performing Discom in the state. It is the considered view of the Commission that electricity consumers across different parts of the State have an equitable right in the power produced by the state owned generating stations as well as in the power allocations from the Central Sector Generating Stations to the State. The Commission accordingly exhorts the State Government to take suitable necessary action in the matter at an early date and allocate the existing PPAs to respective Discoms in an equitable manner, based on the load profiles of the Discoms.”

30. It will not be correct that while the consumers of the four state owned distribution licensees get the benefit of the cheaper power from central and state sector power stations, the consumers of Greater NOIDA in the licensed area of the

Respondent bear the burden of the penal rate. Thus the contention of the Appellant for penal rate is not tenable.

31. In view of above we hold that the State Commission has determined the Bulk Supply Tariff for the supply by the Appellant to the Respondent Distribution Licensee based on sound commercial principles keeping in view the interests of the distribution licensee, the bulk power supplier and the consumers. The order dated 1.9.2008 is based on the Tariff Regulations, 2006 and the bulk supply tariff of the Appellant has been fixed same as bulk supply tariff applicable to other distribution licensees in the State. Thus, no financial loss has been caused to the Appellant by the impugned order and the Appellant has been able to recover its cost of supply. Thus, this issue is decided against the Appellant.

32. Let us now discuss the fourth question regarding the cost of power purchased by the Respondent from other sources. The Learned Counsel for the Appellant has argued that the cost of power purchased by the Respondent from other sources

at a high price has been wrongly considered in the ARR to reduce the power purchase cost of the Appellant. The Learned Counsel for the Respondent has argued that the Distribution Licensees had to procure power from other sources to meet the additional power requirements of its consumers over and above 45 MVA supplied by the Appellant against its obligation to meet the requirement of its consumers. Therefore, the entire power purchase cost has to be passed through in the ARR as expenditure.

33. Section 61 (d) of the Electricity Act 2003 provides for recovery of cost of electricity in a reasonable manner. Section 61 (i) provides that the State Commission will be guided by the National Electricity Policy and Tariff Policy in determining the tariff. Section 5.8.7 of the National Electricity Policy dated 12.2.2005 stipulates that all the generating companies, transmission licensees and distribution licensees should receive due payments for effective discharge of their operational obligations. Section 5.3(h) (4) of the Tariff Policy dated 6.1.2006 stipulates that all uncontrollable costs such as power purchase cost should

be recovered speedily. Section 8.2.1 (1) of the Tariff Policy stipulates that all power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates. The Respondent distribution licensee had to procure additional power from other sources to meet its obligation to meet the consumers' requirement. Thus the cost of additional procurement of power from other sources cannot be denied to the Respondent and has to be allowed as an expenditure in the ARR. If this amount is not adjusted in determining the bulk supply tariff, it will result in the distribution licensee not receiving reasonable return or incur loss. However, the State Commission has ensured that the Appellant recovers its cost of supply and no loss is incurred by the Appellant on this account. Thus, this point is also decided against the Appellant.

34. The fifth issue is relating to treatment of surplus of 19.64 crores from the true up of financials of FY 2006-07 of the Respondent distribution licensee. The Learned Counsel for

Appellant has argued that it has to be passed on to the Appellant and cannot be allowed to be retained by the Respondent for use in the future years. In the previous years also such surplus had been passed on to the Appellant. According to the Respondent, the State Commission had changed the methodology for determination of Bulk Supply Tariff in the impugned order dated 1.9.2008. In FY 2007-08 and 2008-09, the Distribution Licensee was having revenue gap and accordingly the surplus of 2006-07 has been adjusted to meet the expected revenue gap in FY 2007-08 and 2008-09.

35. We have examined this matter. In the ARR of 2006-07, the State Commission had projected power purchase cost of Rs. 20.37 crores from other sources against which the actual power purchase cost was only Rs. 3.35 crores. In the true up of financials of 2006-07 in the impugned order dated 01.9.2008, the State Commission determined a surplus of 19.64 crores. On the other hand a revenue gap of Rs. 16.23 crores and Rs. 100.71 crores was expected in the FY 2007-08 and 2008-09 respectively. The State Commission adjusted

the surplus of 2006-07 in the FY 2007-08 to finally arrive at a net surplus of Rs. 3.41 crores in FY 2007-08. Since large gap exceeding Rs. 100 crores was expected in the revenue requirement of FY 2008-09, the State Commission has decided to adjust this surplus in the true up of 2008-09.

36. We do not find any fault in this methodology. It is a normal and correct practice to adjust the surplus/gap as a result of true up of previous year in the succeeding years and the State Commission has rightly done so in its order dated 1.9.2008. However, as already discussed above, the State Commission has ensured that the cost of supply of power of the Appellant has been allowed and the Appellant has not suffered any loss on that account. In the past till 2005-06 the surplus in ARR of the Respondent was passed on to the Appellant but when there is deficit in the succeeding years, the surplus in the previous year can not be passed on to the Appellant. Accordingly, this point is also decided against the Appellant.

37. The summary of our findings are as under:

- i) The Appellant has raised the issue of legal obligation to supply power to the Respondents distribution licensee. According to the Appellant the obligation of the Appellant to supply power to the Respondent was for 4-1/2 year or till 10.11.2005, the date of judgment of Hon'ble High Court affirming the tariff determined by the State Commission. The Respondent distribution licensee has stated that the issue of binding obligation of the Appellant is a subject matter of writ petition pending in the Hon'ble High Court of Allahabad and there is interim order of the Hon'ble High Court protecting the supply of 45 MVA. We note that the Appellant has been persistently supplying 45 MVA power to the Respondent. This issue was also not a subject matter of the impugned orders of the State Commission. Further the binding obligation of the Appellant to supply power to the Respondent is a matter of writ petition pending in the Hon'ble High Court and there is an interim order protecting the supply of 45 MVA. Thus the legal obligation of supply

cannot be challenged in these appeals which are against the State Commission's orders dated 26.6.2007 and 1.9.2008 determining the ARR and bulk supply tariff. Thus the issue of legal obligation to supply power does not survive in so far as these appeals are concerned.

- ii) a) The second issue is the jurisdiction of the State Commission to determine the bulk supply tariff. According to the Appellant, the State Commission does not have jurisdiction of determining the tariff between the Appellant, a trader, and the Respondent distribution licensee.

- b) The Appellant as successor of UPSEB has control over the PPAs of erstwhile UPSEB with central sector generating stations and the power stations owned by state generating companies and is responsible for arranging bulk power supply for the state owned distribution licensees.

c) There is no provision in the Electricity Act, 2003 under section 131 relating to reorganization of SEBs for an entity responsible for procurement and bulk supply to the distribution licensee. The Tariff Policy provides that the existing PPAs with the generating companies need to be suitably assigned to the successor distribution companies. The PPAs have so far not been assigned to the successor distribution companies. Thus the Appellant is only procuring power on behalf of the distribution licensee by aggregating their requirements. Thus the bulk supply tariff of the Appellant which is also the power purchase price of the distribution licensees has to be regulated by the State Commission under Section 86(1)(b) of the Electricity Act, 2003.

d) The bulk supply tariff of the Appellant to state owned distribution companies is being determined by the State Commission and the same has not been challenged by the Appellant. Similarly, the bulk supply tariff for supply to the Respondent determined by the State Commission for FY 2003-04 and FY 2004-05 has

also not been challenged by the Appellant. The Appellant also did not raise any objection during the proceedings before the State Commission during ARR/tariff determination which resulted in the impugned orders.

e) It is not a case where the Respondent distribution licensee is procuring power from a trading licensee through competitive bidding. The Appellant has been supplying power to the Respondent as a successor of UPSEB which had signed the PPA dated 15.11.1993 with the Respondent. According to the PPA the tariff has to be determined by an independent authority. The Hon'ble High Court of Allahabad had directed the State Commission to determine the tariff and since then the tariff is being determined by the State Commission

f) Thus the supply of power by the Appellant to the Respondent distribution licensee cannot be categorized as trading transaction and is against the PPA as a successor of UPSEB having control over all PPAs with

central and state sector generating stations. Thus the bulk supply tariff of the Appellant for supply to Respondent distribution licensee has to be regulated and determined by the State Commission under Section 86(1)(a) & (b) of the Electricity Act, 2003.

- iii) a) The third issue is related to application of Sixth Schedule in the reverse order for determining the bulk supply tariff of the Appellant. According to the Appellant the Sixth Schedule has been repealed under section 185 of the Electricity Act, 2003. The Sixth Schedule defines various components of expenditure and reasonable return, principle of providing reasonable return to the distribution licensee and in case the return exceeds the reasonable level how it has to be adjusted and shared with consumers. These principles are still valid under the Electricity Act, 2003. The State Commission has applied the principles of the Sixth Schedule upto FY 2005-06 till the formation of its Regulations of 2006 and has been passing on the surplus of the Respondent to the Appellant after

providing for prudent expenditure and return to the Respondent distribution licensee. However, while determining the ARR and tariff for FY 2007-08 and 2008-09, the State Commission has applied its tariff Regulations of 2006. In our opinion the State Commission has adopted reasonable and prudent financial principles in determination of the bulk supply tariff and has balanced the interest of the Appellant, Respondent distribution licensee and the consumers in the licensed area of the Respondent.

b) The Learned Counsel for the Appellant has argued that the applicable rate of supply should be double the bulk supply rate of the Appellant as per the terms of PPA. In our opinion, the penal provision of the PPA in case of failure to set up generating station is inconsistent with the provisions of the Electricity Act, 2003 and cannot be relied upon. According to the tariff policy, the power purchase cost unless held unreasonable has to be allowed as an expenditure in the ARR of the distribution licensee. If the penal rate is allowed in the ARR, it will result in higher retail tariff

in the licensed area of the Respondent which will not be in order. Thus the contention of the Appellant for penal rate is not tenable.

- iv) Regarding the fourth issue on power purchase cost of the Respondent from other sources at higher rates, it is noted that that the additional power has been procured by the Respondent to meet the requirement of its consumers over and above 45 MVA supplied by the Appellant. Section 61 (d) of the Electricity Act, 2003 provides for recovery of cost of electricity in a reasonable manner. The National Electricity Policy stipulates that all the generating companies, transmission licensees and distribution licensees should receive due payments for effective discharge of their operational obligations. The Tariff Policy stipulates that all uncontrollable costs such as power purchase cost should be recovered speedily. The tariff policy also stipulates that all power purchase costs need to be considered legitimate unless it is established that the merit order principle has been violated or power has

been purchased at unreasonable rate. The Respondent had to procure additional power to meet its obligation to supply to its consumers and to meet their requirement. Thus the cost of additional procurement of power from other sources cannot be denied to the Respondent and has to be allowed in the ARR as an expenditure. If this cost is not allowed to the Respondent, it will result in the distribution licensee not recovering reasonable return or incur loss. However, the State Commission has ensured that the Appellant recovers its cost of supply and no loss is incurred by the Appellant on this account. Thus, this point is decided against the Appellant.

- v) The last issue is relating to the treatment of surplus of 19.64 crores from true up of financials of FY 2006-07 of the Respondent distribution licensee. It is noted that in the ARR for FY 2007-08 and 2008-09 a revenue gap of Rs. 16.23 crores and Rs. 100.71 crores respectively was expected. The State Commission adjusted the surplus of Rs. 19.64 crores in the FY 2007-08 to finally

arrive at a net surplus of Rs. 3.41 crores in FY 2007-08. Since large gap of more than Rs. 100 crores was expected in FY 2008-09, the State Commission decided to adjust this surplus of Rs. 3.41 crores in the true up of 2008-09. In our view, this is in order. It is correct to adjust the surplus/gap as a result of true up of financials of a financial year in the ARR of the succeeding year. In the past, the State Commission had been passing on the surplus of the Respondent distribution licensee after meeting its revenue requirement to the Appellant but it cannot not do so when deficit is expected in the succeeding years. Therefore, we have decided this issue also against the Appellant.

38. In view of above, we dismiss both the Appeals. No order as to costs.

39. Pronounced in the open court on this 15th day of
December,2010.

(Justice P,S. Datta)
Judicial Member

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

INDEX : REPORTABLE / NON-REPORTABLE.

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