

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

**Appeal No. 102 of 2015**

**Dated: 19<sup>th</sup> July, 2017**

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

**In the matter of**

**Byrnihat Industries Association,  
13<sup>th</sup> Mile, Tamulikuchi, Byrnihat,  
Ri Bhoi District, Nongpoh,  
Meghalaya – 793101**

**... Appellant**

**Versus**

**i. Meghalaya State Electricity Regulatory  
Commission (MSERC)  
New Administrative Building, 1<sup>st</sup> Floor,  
Left Wing, Lower Lachumiere,  
Shillong- 793001,  
Meghalaya**

**...Respondent No.1**

**ii. Meghalaya Power Distribution Corporation  
Limited (MePDCL)  
Integrated Office Complex, Lum Jingshai,  
Short Round Road, Shillong- 793001  
Meghalaya**

**...Respondent No.2**

**Counsel for the Appellant(s): Mr. Anand K. Ganeshan  
Ms. Swapna Seshadri  
Mr. Sandeep Rajpurohit  
Ms. Neha Garg**

**Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan  
Mr. D V Raghu Vamsy for R-1**

**Mr. Sanjay Sen, Sr Advocate  
Mr. Sakie Jakharia for R-2**

## **JUDGMENT**

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

1. The present Appeal is being filed under Section 111 of the Electricity Act, 2003 against Order dated 22.12.2014 (“**Impugned Order**”) passed by the Meghalaya Electricity Regulatory Commission (hereinafter called the ‘**State Commission**’) whereby the State Commission has trued up the financials of the Respondent No. 2 - Meghalaya Power Distribution Company Limited (hereinafter called '**Distribution Company**') for the year FY 2010-11. The additional financial impact on account of such truing up is passed on to the consumers in the State.
2. The Appellant is a society registered under the Meghalaya Societies Registration Act, 1983 having its registered Office at Byrnihat, Ri-Bhoi District, Meghalaya. The Appellant was formed by the different industrial units for the welfare, better functioning of its units and regularly participates in the proceedings related to determination of ARR and tariff by the State Commission and also takes up the other issues concerning its Members.
3. The Respondent No.1 is the Electricity Regulatory Commission for the State of Meghalaya exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.
4. The Respondent No.2, MePDCL was formed pursuant to the Government of Meghalaya Notification "The Meghalaya Power Sector Reforms Transfer Scheme 2010" dated 31.03.2010.

Therefore, with effect from 01.04.2010, MePDCL was incorporated to undertake business of Distribution Licensee in the State of Meghalaya.

5. Aggrieved by the Impugned Order dated 22.12.2014 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:
  - a. In the truing up, can all expenses be given to the Distribution Company as per the Statement of Accounts without going into controllable and uncontrollable factors;
  - b. Allowing the additional loss level incurred by the Distribution Company due to its inefficiencies and passing on the same to the consumers;
  - c. Allowing additional depreciation even though the Distribution Company in 2010 claimed the depreciation as per the CERC Regulations, 2004 despite the notification of the CERC Regulations, 2009 and now changing its stand to get additional depreciation;
  - d. Allowing Rs. 28.98 crores as a pass through on account of terminal benefit payment merely because the Distribution Company claims to have paid it even though the State Commission has decided that funding the pensioners is the responsibility of the State Government;

- e. Allowing all other expenses on actuals without going into the reasons as to deviations and who was responsible for such deviations.
6. Facts of the present Appeal:
- a) The Respondent No.2 – Distribution Company had filed a tariff petition for determination of tariff for FY 2010-11 and the State Commission after conducting the due process vide Order dated 23.08.2010 had determined the tariff for FY 2010-11. The ARR fixed in the Order dated 23.08.2010 was Rs. 419.20 crores and the tariff was determined accordingly.
- b) The Government of Meghalaya notified the 'Meghalaya Power Sector Reforms Transfer Scheme 2010' on 31.03.2010, to form different generation, transmission and distribution companies and on 31.03.2012 notified an amended scheme to transfer the assets and liabilities amongst the various companies. On 23.12.2013, the State Government once again issued a revised statement of account effective from 01.04.2010.
- c) Based on the above, the Distribution Company issued its Statement of Accounts for FY 2010-11.
- d) The Distribution Company also filed a petition for truing up of the financials for FY 2010-11 before the State Commission in September 2014. In the said petition, the Distribution Company claimed expenses on all aspects on actuals mainly on the basis of notification of revised accounts by the State Government.

- e) The Appellant filed its detailed objections to the true up petition.
- f) The State Commission has passed the Impugned Order on 22.12.2014 allowing certain claims of the Distribution Company.
- g) Aggrieved by the Impugned Order dated 22.12.2014, the Appellant has filed the present appeal.

## 7. QUESTIONS OF LAW

The following questions of law arise in the present appeal:

- a) Whether the State Commission is correct in making the true up proceedings mechanical by simply allowing the claims of the Distribution Company on all aspects based on the Statement of Accounts?
  - b) Whether, in truing up proceedings, the State Commission is not mandated to go into controllable and uncontrollable parameters and give reasons for allowing additional expenses except that such expenses have been incurred by the Distribution Company?
8. We have heard at length Mr. Anand K. Ganesan, the learned counsel for the Appellant and Mr. Buddy A. Ranganadhan, learned counsel for the State Commission and Mr. Sanjay Sen, learned senior counsel for the Respondent No. 2 and considered the arguments putforth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is discussed hereunder.

9. On the specific issues raised in the present Appeal, the learned counsel for the Appellant has made the following submissions for our consideration-
- a) The State Commission has failed to appreciate that truing up does not mean that whatever are the amounts spent by the Distribution Company under the various heads will be allowed to the Distribution Company as a matter of course without any prudence check.
  - b) The State Commission erred in allowing the loss level of 33.40% instead of 27.08% which had been fixed in the Tariff Order dated 23.08.2010. The State Commission had fixed the loss level of 27.08% in the Tariff order dated 23.08.2010 based on the proposals of the Distribution Company only. The relevant extracts are reproduced below;

***“33 B. Generation and Procurement of Power – Energy Balance***

1. *The Commission notes that in their ARR and Tariff (D) Petition dated 12.02.2010 the Petitioners indicated that they would generate 808.83 million units of energy (exclusive of auxiliary consumption), and procure 836.61 million units of energy through long term State Share of central power as well as short term power purchase, totaling 1645.44 million units of energy, during 2010-11. The net energy for sale during 2010-11, after debiting T&D losses(445.63 million units or 27.08 %) would be 1199.81 million units.*
2. *Later, on 10 June 2010, the Petitioner submitted an Affidavit dated 09.06.2010, under cover of their letter No.MeECL(RA)/42/Pt-11/33, dated 10.06.2010 stating that they would generate a reduced level of 534.00 million units of energy (exclusive of auxiliary consumption), and procure 976.01 million units of energy from long term State Share of central power, as well as short term power purchase, totaling 1510.01million units*

of energy. The net energy for sale during 2009-10, after debiting T&D losses (408.91 million units or 27.08 %) would be 1101.10 million units.

3. The gist of the proposals set out against 1 and 2 above are tabulated in Table-I below –

TABLE-I

| SN | Source of Energy                        | As projected in ARR cum Tariff petition dated 12.02.2010 | As projected in revised proposal dated 10.06.2010 | Remarks |
|----|---|--|---|---------|
| 1  | Own Generation In MU's                  | 808.83   | 534.00  |         |
| 2  | Procured from Outside State in Mus      | 836.61   | 976.01  |         |
| 3  | Total Energy In MU's                    | 1645.44  | 1510.01   |         |
| 4  | T&D Loss in MU's                        | 445.63   | 408.91  |         |
| 5  | T&D Loss as a %                         | 27.08 %  | 27.08%  |         |
| 6  | Total Energy available for sale In MU's | 1199.81  | 1101.10   |         |

As against the above, the Distribution Company has not given any reasons for higher loss level achieved and the State Commission also in the Impugned Order has simply approved 33.40% as the loss level without going into the reasons for non- achievement of the loss level of 27.08% by the Distribution Company .

- c) The State Commission has erred in approving the payment of Rs. 28.98 crores by the Distribution Company as Terminal benefits. The stand of the State Commission is contradictory in as much as the State Commission has held that the terminal payment to be made is the responsibility of the Government of Meghalaya and at the same time, allowed an amount of Rs. 28.98 crores to be passed on to the consumers which is an adhoc payment made by the Distribution Company to the retired employees.
- d) The State Commission has misconstrued the third amendment of the Meghalaya Power Sector Reforms Transfer Scheme, 2010 which

stated that the receivables from Government of Meghalaya for terminal benefits of existing and retired employees are Rs. 840 crore. The payment of terminal benefits for pensioners/family pensioners is the responsibility of the pension trust or the Government of Meghalaya. Either the Trust should have been established or the State Government should have been made responsible for discharging the liability towards terminal benefits.

- e) The State Commission on one hand has not allowed the amount of Rs. 2.92 crores and Rs. 23.22 crores which have been contributed by the Distribution Company towards pension trust and provision for such liabilities for the existing employees but gone on to allow Rs. 28.98 crores paid by the Distribution Company to the existing pensioners. If any such amounts are paid by the Distribution Company without complying with the directions to establish the pension trust or insisting on the State Government to fund this liability, it cannot be simply passed on to the consumers. The Respondent No. 2 contended that when the funds are released by the Government of Meghalaya, adjustment shall be made in ARR/Tariffs during respective years. It is submitted that the adjustment in the subsequent ARR would not permit the Respondent No. 2 to put burden on consumers of today.
- f) The State Commission has erred in changing the rates at which depreciation has been charged by the Distribution Company in the truing up proceedings as compared to the main tariff order. The tariff petition had been filed by the Distribution Company much after the notification of CERC (Terms and Conditions of Tariff) Regulations, 2009, in the year 2010. Even so, the Distribution Company had

consciously claimed depreciation as per the rates notified in the CERC (Terms and Conditions of Tariff) Regulations, 2004 which had been allowed by the State Commission in the Tariff Order dated 23.08.2010 as under -

**"34.5 REVENUE REQUIREMENT FOR DEPRECIATION COST**

*(1) The Petitioner projected a revenue requirement of Rs.45.42 crores for covering depreciation costs during 2010-11 in their OP, reflecting an increase of over 265 percent over the provisional expenditure of Rs.17.08 crores for such purpose, during the previous year 2009-10 as per their PD. On being asked, by the Commission, to justify the projected increase in depreciation cost, the Petitioner responded by stating that the depreciation cost of its capital assets of the MLHEP had been reflected in the proposal, since the said project was supposed to be commissioned during the year 2010-11. However, this projection was revised downwards to Rs.17.08 crores on 10.06.2010, due to reasons reflected in their RP, as set out above. The revised proposal was at par with the previous year's provisional expenditure level.*

*(2) On careful consideration, the Commission approves the revised level of depreciation costs of Rs.17.08 crores during the year 2010-11, as proposed by the Petitioner in their RP. "*

- g) The State Commission failed to appreciate that the Distribution Company itself had claimed the depreciation of Rs. 17.08 crores as per the rates prescribed in the CERC Tariff Regulations, 2004 which had been allowed after prudence check by the State Commission. In the Impugned Order, the State Commission has simply allowed the rates as per the CERC Tariff Regulations, 2009 on the misconceived basis that the Distribution Company has charged the same in the statement of Accounts.

- h) The State Commission has allowed the additional depreciation which was claimed not on account of adding any new capital assets but simply because of the difference in the rates of depreciation between the CERC Tariff Regulations, 2004 and CERC Tariff Regulations, 2009.
- i) The State Commission failed to appreciate that merely because the audited accounts indicate that expenses have been incurred is not a reason for allowing such expenses in the truing up proceedings. In this regard, the State Commission has failed to appreciate the ratio laid down by this Tribunal in various Judgments and culminated in the Judgment dated 13/01/2011 in Appeal No. 177 of 2009 (KSEB v KSERC) as under -

*"20. At the outset, it shall be stated that the State Commission while examining the accounts is not bound by the audited accounts. The accounts may be genuine as per the Auditor's Report but, it is the State Commission which has to examine the accounts to ascertain the performance of the licensee in relation to the desirability of the expenditure in the interest of the consumers. This point has already decided by the Judgment of this Tribunal in Appeal No. 94 of 2008 as well as the decision of Hon'ble Supreme Court in West Bengal Electricity Regulatory Commission vs. CESC Ltd. (2002) (8)SCC 715.*

*21. Let us refer to the relevant observations made by this Tribunal in Appeal No. 94 of 2008:*

*"In the truing up process the actual expenditures are examined and the expenditure with various heads are trued up. So far as the effect of audit is concerned, it establishes the genuineness of accounts and expenditure incurred. The Commission has to allow only as much expenditure as pass through as meets the targets set by it or is found to be prudent and necessary"*

22. *This decision was given by this Tribunal on the strength of the ratio decided by Hon'ble Supreme Court. We will now refer to the relevant observations made by the Hon'ble Supreme Court in the decision referred in (2002) (8) SCC 715.*

*"In this process, the Commission, in our opinion, is not bound by the Auditors' Report. There may be any number of instances where an amount may be genuine and may not be questioned, yet the same not reflect good performance of the company or may not be in interest of the consumers. Therefore, there is an obligation on the Commission to examine the accounts of the company which may be genuine and unchallenged on that count still in the light of the above requirements of Section 29(2) (g) to (h). In the said view of the matter admitting that there is no challenge to the genuineness of the accounts, we think on this score also the accounts of the company are not ipso facto binding on the Commission."*

23. *The above observations would reflect the ratio decided by Hon'ble Supreme Court. What is to be seen in this Appeal where each item of expenses allowed or disallowed by the State Commission is correct or not in the facts of the case and the materials placed before of the Commission."*

- j) The State Commission has erred in merely allowing the expenses incurred under all heads including Repair & Maintenance Expenses, Administrative & General Expenses, Interest & Finance Charges etc. only on the basis that the audited accounts reflect that such expenditure has been incurred. The incurring of expenditure does not prove its prudence and the State Commission has to separately conduct a prudence check.
- k) The State Commission failed to distinguish between controllable and uncontrollable factors in the truing up proceedings despite the State Commission notifying the Meghalaya State Electricity Regulatory Commission (Determination of Tariff) Regulations, 2011 and

Meghalaya State Electricity Regulatory Commission (Multi Year Tariff) Regulations, 2014 providing specific provisions to controllable and uncontrollable factors.

10. On the specific issues raised in the present Appeal, the learned senior counsel for the Respondent No 2 has made the following submissions for our consideration-
  - a) The true-up Petition for the period FY 2010-11 was filed by MePDCL along with statement of accounts for FY 2010-11 duly audited by statutory auditors.
  - b) It is an established principle of law that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. The MSERC (Multi Year Tariff) Regulations, 2014 clearly provided that true-up for the period prior to FY 2015-16 is required to be undertaken in terms of provisions in MSERC (Terms & Conditions for determination of Tariff) Regulations, 2011.
  - c) The Appellant has sought to rely on provisions in MSERC (Multi Year Tariff) Regulations, 2014 which have no application in matters of truing up the financial for FY 2010-11.
  - d) The Transfer Scheme was issued by the State Government under the statutory provisions of Section 131 and Section 133 of the Electricity Act, 2003 to give effect to the transfer of assets and liabilities of the Meghalaya State Electricity Board to the successor entities for distribution, generation, transmission and the holding company in the State of Meghalaya.

- e) During the time the Tariff order dated 23.08.2010 for the period FY 2010-11 was issued, the prevailing Regulation being MSERC (Determination of Tariff) Regulations, 2006 ('Tariff Regulations, 2006') did not provide for a methodology for determination of tariff. On 10.02.2011 the State Commission notified the MSERC (Terms and Conditions for Determination of Tariff) Regulations, 2011 ('Tariff Regulations, 2011') which for the first time provided for a methodology for determination of tariff and also for Review and Truing up.
- f) The State Commission on 15.09.2014 notified MSERC (Multi Year Tariff) Regulations, 2014 ("Tariff Regulations, 2014"), wherein specific provision in relation to Truing-up is prescribed in Regulation 1.4. The Petition for truing up of the financials for FY 2010-11 was filed by MePDCL on 23.09.2014 when the Tariff Regulation 2014 was notified which mandated that for the purpose of truing up of revenues and expenses pertaining to FYs prior to 2015-16, provisions of the Tariff Regulations, 2011 will apply. As per the Tariff Regulations, 2014 the true-up for the FY 2010-11 ought to have been carried out in accordance with the provisions in the Tariff Regulations, 2011.
- g) Regarding controllable and uncontrollable factors, the expenses claimed by Respondent No. 2 were duly supported by audited statement of accounts and in accordance with the Tariff Regulations, 2011. The provisions of the Tariff Regulations, 2014 have no application in matters of truing-up for FY 2010-11 as the provisions of controllable and uncontrollable factors are applicable only from 2015-16 onwards.

- h) On additional loss level incurred by the Distribution Company due to alleged inefficiencies it can be seen that the T&D loss during FY 2009-10 was 33.02 % during the period of operation of erstwhile MeSEB. There has been consistent effort to reduce overall T& D loss on the part of the successor entity, MeECL, which has been recorded to be 33.27 % for FY 2010-11 being the first year of operation of the successor entity.
- i) Approved AT&C loss during FY 2009-10 was 38.64 % during the period of operation of erstwhile MeSEB. In spite of the best efforts of the successor entity, MeECL was able to make a reduction to 38.85% during period FY 2010-11, being the first year of operation of the successor entity due to constraints such as network conditions, geographical spread, consumer mix etc. In view thereof considering the ground realities it was not possible to reduce AT & C loss beyond what has been achieved.
- j) There was a posting error in the data submitted before the State Commission regarding revenue collection from Assam State Electricity Board. The Revenue Collection for FY 2010-11 was Rs. 317.06 Cr. The same was rectified while preparing statement of accounts for 2011-12. By considering Rs 317.06 Cr as Revenue Collection, the AT & C loss for FY 2010-11 would actually be 38.85 % as opposed to 41.19% as determined in the Impugned order. It is worth mentioning here that in the Impugned order State Commission has imposed a heavy penalty of Rs. 19.99 Cr based on an AT& C loss of 41.19 % on the basis of MePDCL not achieving the targeted loss level in AT & C loss.

- k) The Tariff Petition for the period 2010-11 was filed by erstwhile MeSEB on 17.02.2010. It is pertinent to mention that during that period the prevailing Tariff Regulations, 2006 did not provide for a methodology for determination of tariff. In view thereof, while projecting ARR in the Tariff Petition for the period 2010-11, MeECL proposed a Depreciation considering the old rate adopted in the earlier Tariff Orders. Thereafter, the Tariff Regulations, 2011 were notified on 10.02.2011. Subsequently the Tariff Regulations, 2014 were also notified on 15.09.2014 which provide that in matters of Truing up for the period prior to 2015-16, provisions of the Tariff Regulation 2011 will apply. Tariff Regulation 2011 provides for Depreciation as follows:

*“106 Depreciation*

*For the purpose of tariff determination, depreciation shall be computed in the following manner:*

*(a) The asset value for the purpose of depreciation shall be equal to the cost of the assets as approved by the Commission where:*

*The opening asset's value recorded in the Balance Sheet as per the Transfer Scheme Notification shall be deemed to have been approved, subject to such modifications as may be found necessary upon audit of the accounts, if such a Balance Sheet is not audited. Consumer contribution or capital subsidy/ grant etc shall be excluded from the asset value for the purpose of depreciation.*

*(b) For new assets, the approved/accepted cost for the asset value shall include foreign currency funding converted to equivalent rupee at the exchange rate prevalent on the date of foreign currency actually availed but not later than the date of commercial operation.*

*(c) The salvage value of the asset shall be considered as 10% and depreciation shall be allowed upto a maximum of 90% of the capital cost of the asset.*

*(d) Depreciation shall be calculated annually as per straight-line method over the useful life of the asset as per the rates specified by the CERC. The Rate of Depreciation shall be the same as the Rate of Depreciation specified by CERC from time to time. Operative rates as on date are shown in Annexure-II of these Regulations.*

*(e) Land is not a depreciable asset and its cost shall be excluded from the capital cost while computing the cost of the asset.*

*(f) On repayment of entire loan, the remaining depreciable value shall be spread over the balance useful life of the asset.*

*(g) Depreciation shall be chargeable from the first year of commercial operation. In case of commercial operation of the asset for part of the year, depreciation shall be charged on pro-rata basis.”*

- l) Therefore, subsequently while finalizing Annual Accounts of MeECL which have now been duly audited, the Depreciation rates notified by CERC in Tariff Regulations for 2009-14 period were considered in view of the applicable provision of Tariff Regulations, 2011 which provide that depreciation is to be calculated as per straight-line method at the rates specified in Appendix - III in the CERC (Terms & Conditions of Tariff) Regulations, 2009.
- m) In terms of the Transfer Scheme of 2010 notified on 31.03.2010, under Clause 6 which provides for Transfer and Deputation of Personnel, Sub-clause (9) & (10) therein provides as follows:

*"(9) (i) The funds and trusts established for and existing on the date of transfer relating to pension, provident fund, gratuity,*

*leave encashment and all other terminal benefits including for the retired Personnel of the Board shall be vested under the control of MeECL in such manner as the State Government may notify for the purpose.*

*(ii) MeECL shall be responsible to ensure that the Terminal Benefit Trusts including Pension, Gratuity and Leave Encashment etc, of the Board personnel are progressively funded in regard to the unfunded part to meet the pension, gratuity and leave encashment payments pertaining to the years of service rendered by the personnel of the Board including retired personnel in the Board as determined as per actuarial valuation to be done for the purpose: or*

*(iii) In the event of any shortfall of funds with the trusts at any point of time relating to the period prior to the Date of Transfer, the State Government shall pay the shortfall of the required funds to meet the ongoing outflow on annual basis.*

*(iv) MeECL shall be responsible to ensure that the contribution to the Trusts relating to personnel related funds, for the services after the effective date of transfer of their respective personnel are made as required from time to time.*

*(10) All obligations in respect of pension, gratuity, leave-encashment and other retirement benefits including provident fund, superannuation and gratuity to the personnel who have retired from the services of the Board before the effective date of transfer shall be discharged by MeECL."*

Thereafter, in the third amendment to the Transfer Scheme dated 23.12.2013 it was provided that receivables from State Government against Terminal benefit liabilities shall be Rs. 840 Crore. However, no time line was specified by the State Government for release of the funds for such terminal benefits and in such circumstances, the obligation fell on MeECL to make such payments to the employees. As such the State Commission has rightly allowed the actual payment during the relevant year as a pass through in the tariff. The

Power Department of the State Government has now issued a letter stating that a corpus fund may be created for Terminal Liabilities of employees of MeECL. Once the funds are released by the State Government adjustments shall be made in the ARR/tariffs during the respective years.

11. On the specific issues raised in the present Appeal, the learned counsel for the State Commission has made the following submissions for our consideration-
  - a) The State Commission has allowed power purchase at Rs. 301.48 Cr. as against audited figures of Rs. 303.88 Cr. by disallowing the short term purchase of the Respondent No. 2 over and above the approved power purchase cost as allowed by the State Commission for FY 2010-11. R&M cost was allowed at Rs. 22.79 Cr. as against actual cost of Rs. 22.79 Cr. as these expenses were necessary for up keep of distribution and transmission network and nature and volume of civil work and maintenance of old generating plants so as to ensure good supply of electricity to consumers.
  - b) The State Commission has allowed Rs. 130.16 Cr. as against Rs. 156.3 crores for employees cost by disallowing Rs. 26.14 crores towards provision of contribution towards the terminal benefits to the trust which is still not functional and not funded by the State Government till date. The State Commission has allowed reasonable and justifiable expenses only.
  - c) The State Commission has allowed actual Administrative & General (A&G) expenses of Rs. 11.75 crores. The depreciation was allowed

as per Regulations only computed as per the rates prescribed in CERC Tariff Regulations, 2009. The State Commission has not allowed Rs. 27.02 crores as claimed in the Balance Sheet and allowed only Rs. 25 crores by observing the auditors' note.

- d) The State Commission has allowed interest charges at Rs. 91.9 Cr. as against Rs. 100.13 Cr. actually shown in the Balance Sheets. While allowing interest charges the State Commission has not allowed payment of penalties due to late payment of loans and interest on those loans. The State Commission has not allowed provisions of bad debts and other debits as claimed in the Statement of Accounts at Rs. 41.19 crores and allowed Rs. 3.99 crores as per the actual written off bad debts and infructuous capital expenses and compensation paid to death and injuries. This has been done after applying prudence check.
- e) The State Commission has allowed prior period charges of Rs. 3.61 crores as against the actual of Rs. 12.73 crores by analyzing the nature of expenses and controllable factors. The State Commission has analyzed the size of the assets while allowing return on equity.
- f) The State Commission has imposed a penalty of Rs. 19.99 crores because the licensee could not improve AT&C losses by 3% from its present level in accordance with the State Commission's Regulations. Therefore, it is wrong to say that State Commission has not done prudence check while doing the truing up exercise.
- g) The concept of "controllable" and "non-controllable" parameters are usually to be found in a Multi Year Tariff (MYT) regime. The Tariff

Order for FY 2010-11 had been passed on 23.08.2010, there were no MYT Tariff Regulations in place and no mechanism was in place for the sharing of gains and losses on account of controllable/uncontrollable factors. Hence, the Truing Up which has been carried out in the present Impugned Order could not have been undertaken on a basis fundamentally different from the original tariff determination.

- h) The contention of the Appellant that the State Commission could not grant a tariff number more than or different from what is claimed by the licensee is in the teeth of various judgments of the Hon'ble Supreme Court and this Tribunal. There is thus no error while making adjustments as per the requirement of Regulations.
  - i) In the MYT Regulations, 2014 it is mentioned that truing up exercise for the period prior to 2015-16 shall be done with the Regulations prevalent at that point of time. Hence for true-up of FY 2010-11, MYT Regulations, 2014 are not applicable.
12. After having a careful examination of all the arguments and submissions of the rival parties on various issues raised in the present Appeal, our observations are as follows:-
- a) On the first question of law raised in present Appeal i.e. Question No. 7 a) Whether the State Commission is correct in making the true up proceedings mechanical by simply allowing the claims of the Distribution Company on all aspects based on the Statement of Accounts?, we observe as below:

- i. Let us examine the process adopted by the State Commission in this regard. The State Commission had Notified Tariff Regulations, 2014 on 15.09.2014, where Regulation 1.4 provides specific provision in relation to Truing-up of revenues and expenses.

**"1 Short title, extent, commencement and applicability**

*1.1 These Regulations may be called the Meghalaya State Electricity Regulatory Commission Multi Year Tariff Regulations, 2014.*

*1.4 They shall be applicable for the determination of tariff effective from April 1, 2015 in all cases covered under these Regulations.*

*Provided that for the purpose of review or of truing up of revenues and expenses pertaining to FYs prior to 2015-16, the provisions under MSERC(Terms and Conditions for Determination of Tariff) Regulations, 2011 shall apply."*

Hence in the present case the True-up petition of the Respondent No. 2 has to be dealt with the provisions of Tariff Regulations, 2011.

- ii. Regulation 15 of the Tariff Regulations, 2011 specifies the provisions related to Review and Truing-up. Regulation 15 (2) states that after audited accounts of a year are made available, the Commission shall undertake similar exercise as specified in Regulation 15(1) regarding 'Review' of the expenses and revenues approved by the Commission in the Tariff Order with reference to the final actual figures as per the audited accounts.

This exercise with reference to audited accounts shall be called 'Truing-Up'. The relevant extracts are as follows:

*"15. Review and Truing-Up*

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

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

*(3) The generating company or the licensee, as the case may be, shall make an application before the Commission, for 'truing up' of ARR of the previous year by 30th September of the following year, on the basis of audited statement of accounts and the Audit Report, thereon. The generating company or the licensee shall get their accounts audited within a specified time frame, either by the Comptroller & Auditor General of India or by a Statutory Auditor drawn from the panel of Statutory Auditors approved by the Comptroller & Auditor General of India, from time to time, to enable them to file the application for 'truing up' within the specified date, that is 30th September of the following year."*

Hence the requirement of availability of audited accounts has been clearly specified in Truing-Up exercise under the Tariff Regulations, 2011.

iii. Now, we will look at the process adopted by the State Commission while doing the Truing-up exercise as per the Impugned Order. The State Commission at the Para 5.1 of the Impugned Order has clearly specified that the revenue and expenses of MeECL during 2010-11 as reflected in the audited accounts have been considered and compared with those contained in the earlier tariff order dated 23.08.2010 and a prudence check thereon has been exercised while deciding the truing up for FY 2010-11 trying to make a balance between the interest of utility, consumers and other stakeholders.

*“ 5.1 The revenue and expenses of MeECL during 2010-11 as reflected in the audited accounts have been considered and compared with those contained in the earlier tariff order dated 23.08.2010 and a prudence check thereon exercised. The Commission has tried to make a balance between the interest of utility, consumers and other stakeholders while deciding the truing up for FY 2010-11....”*

iv. While the State Commission has allowed some claims of the Respondent No 2 during Truing-up exercise as per Audited Accounts, some components were not allowed based on the State Commission's observations. While Category wise sales, T&D losses, Energy Balance, Depreciation, Administrative and General Expenses, Repair and Maintenance Expenses, Power Purchase Cost, Non-Tariff Income were allowed as claimed by Respondent No. 2 as per audited accounts, some expenses/cost related to Employee expenses, short term power purchase made above Rs 4.00 per unit as approved earlier, interest and finance charges, Other debits (Including

provision for bad debts), Return on Equity and prior period expenses were not allowed as per due-diligence done by the State Commission. Now we will see the observations of the State Commission in the Impugned Order while disallowing certain claims of the Respondent No 2. Regarding Employee Expenses, the State Commission in the Impugned Order has not allowed contribution made towards the terminal benefits to the Trust amounting Rs 26.14 Cr. in the True-up exercise. Para 5.9.2 of the Impugned Order states as below:

*“As per the third amendment of the Meghalaya Power Sector Reforms Transfer Scheme, 2010 receivables from Government of Meghalaya for terminal benefits of existing and retired employees are Rs. 840 crores. As such payment of terminal benefits for pensioners/family pensioners is the responsibility of the pension trust or the Government of Meghalaya. Accordingly the contribution towards the terminal benefits to the Trust amounting Rs.2.92 crores and Rs.23.22 crores are not allowed in the true up exercise till the time Trust becomes fully functional. However till such time, Rs. 28.98 crores already paid by the petitioner to pensioners/family pensioners is being allowed as shown in audited records.  
As such the net employee expenses are Rs. 130.16 Crores (156.30 –2.92-23.22).”*

From the above it can be seen that the State Commission based on the provisions of the Meghalaya Power Sector Reforms Transfer Scheme, 2010, after prudence check has not allowed contribution of Rs 26.14 made by the Respondent No. 2 towards the terminal benefits to the Trust. However, the amount of Rs. 28.98 Cr. which was already paid by the Respondent No. 2 to pensioners/family pensioners has been

allowed by the State Commission. In our view the State Commission has acted in a fair manner by balancing the interests of the Respondent No. 2 and the consumers in the State of Meghalaya.

- v. On the issue of Depreciation, the State Commission has allowed rates of depreciation as per CERC Tariff Regulations, 2009 mentioning thereby that the same are being allowed as the effective date of operation of the CERC Regulations, 2009 is prior to FY 2010-11 and relevant extract of the impugned findings relating to this issue are reproduced below;

*“5.12.2 Commission’s Analysis*

*The Commission in its Tariff Order dated 23.08.2010 had approved for Depreciation of Rs.17.08 crore for FY 2010-11 based on depreciation rates notified by CERC (Terms and conditions of Tariff) Regulations, 2004. CERC has revised the said regulations w.e.f 1.4.2009 in CERC (Terms and conditions of Tariff) Regulations, 2009 in which the rates of depreciation were also revised. Now the MePDCL has stated that the depreciation is calculated as per revised rates which are in order as the effective date of operation of the revised CERC Regulations is prior for FY 2010-11. As per the annual accounts of FY 2010-11 the depreciation accounted is Rs.27.02 crore. However the Commission allows Rs. 25.0 crores as the depreciation charges after considering the observations mentioned in the Audit Report.*

***Accordingly, the Commission allows Rs.25.0 crores towards depreciation based on the annual accounts in truing up for FY 2010-11.”***

From the foregoing it is very clear that the State Commission has carried out prudence check while complying with its

relevant regulations. In our opinion, there is no infirmity in the decision of the State Commission on this issue.

vi. Now let us have a look on the State Commission's findings on Interest and Finance Charges which are reproduced below:

*“ 5.13.2 Commission's Analysis*

*As verified from the annual accounts for FY 2010-11, out of the Interest and finance Charges of Rs. 100.75 Crore, Rs. 1.07 crore relating to penal interest in respect of capital liabilities and Rs. 3.60 crore relating to other charges for which details are not furnished. Payment of penal interest is due to late payment of loan amount which should not be passed on to the consumers. Further, the interest includes (i) interest on State Government Loans - Rs.0.62 crore, (ii) Interest on OECF Loans – Rs.1.56 crore and (iii) Interest on JBIC Loan – Rs.0.25 crore totaling to Rs.2.43 crore. The Petitioner has not furnished the details of payments made against the said loans during FY 2010-11. Hence, the Commission has disallowed Rs.2.43 crores being the interest on the said loans in true up for FY 2010-11. In addition to above the Commission further disallows Rs. 1.75 crores interest on account of observations reflected in the Audit Report. Thus the total amount disallowed is Rs.8.85 crores (Rs.4.67 crores + Rs.2.43 crores +1.75 crores).*

*So the net interest and finance charges are Rs. 91.9 Crores (100.75-8.85)*

*The Commission accordingly approves Interest and Finance charges at Rs. 91.9 Crores in trueing up for FY 2010-11.”*

The State Commission after taking into consideration the information available from annual accounts and due diligence, has disallowed amount of Rs 8.85 Crores. This disallowance has been on account of penal interest in respect of capital liabilities & other charges for which details were not furnished

by the Respondent No. 2 i.e. Rs. 4.67 crores, interest on said loans during FY 2010-11 i.e. Rs. 2.43 crores and interest on account of observations reflected in the Audit Report i.e. Rs. 1.75 crores. We find that the State Commission has prudently disallowed the claims/expenses which could have been avoided as they were under the control of the Respondent No. 2. Hence, we are in agreement with the findings of the State Commission on this issue.

vii. The issue of Return on Equity has been dealt by the State Commission based on the details furnished by the Respondent No. 2. The findings of the State Commission are reproduced below:

*“5.18 To a query the MePDCL in its letter no MePDCL/DD/2014-15/T444/Pt-11/35 dated 24.11.2014 has furnished opening balance sheet of the Meghalaya Power Sector Reforms Transfer Scheme, 2010 (3rd amendment) notified by government of Meghalaya in its notification no Power 79/2009 dated 23.12.2013. While deciding on the return on the equity, the Commission has taken into account the size of completed assets and assets which does not carry any liability of repayment. As considered in the Commission’s order dated 23.8.10, the Commission is allowing Rs.28.28 crores as the return on equity to be passed through in the truing up of FY 2010-11.*

***Accordingly, the Commission has considered Return on Equity at Rs. 28.28 crores in true up for FY 2010-11.”***

It is a fact that the Respondent No 2 had claimed Rs. 126.49 crores as Return on Equity at the rate of 14% on equity capital of Rs. 903.53 crore as per audited accounts. However, the State Commission has allowed only Rs. 28.28 crores as

Return of Equity in true up for FY 2010- 11. While deciding on the return on the equity, the Commission has taken into account the size of completed assets and assets which do not carry any liability of repayment. This has been done by the State Commission after due-diligence based on material placed on record before it. We do not see any infirmity in the decision of the State Commission on this issue too.

- viii. Regarding cost of power purchase, the State Commission in the Impugned Order has observed as follows:

***“5.7.3 Commission’s Analysis***

*As per annual accounts for FY 2010-11 the Power Purchase Cost is Rs. 303.88 Crores which includes short term purchases of Rs.31.25 crores.*

*The Commission has approved short term purchases @ Rs.4.00/kWh for FY 2010-11 in Tariff order dated 23rd August 2010. The Petitioner has made short term power purchases from PTCIL, SCF, RPG at a higher rate than the Commission approved rate of Rs.4.00/kWh. As per the records, no prior permission was sought for the short term purchases at a higher rate. Accordingly, the Commission has regulated the cost of the short term purchases from these sources and disallowed Rs.2.39 crores from the cost of short term purchases. In this connection, the licensee is advised to adhere with the norms stipulated in the tariff order while making expenditures.”*

The State Commission has disallowed the short term power purchases by the Respondent No. 2 over and above the approved cost of Rs. 4.0/kWh. This issue has been decided against the State Commission in our judgment dated 19<sup>th</sup> July,

2017 in Appeal No. 74 of 2015 in case of Meghalaya Power Distribution Corporation Ltd. Vs. Meghalaya Electricity Regulatory Commission and Ors. wherein we have allowed the total cost of short power purchases incurred by the Respondent No. 2 for FY 2010-11. Hence, this issue is decided accordingly.

- ix. On AT&C losses, in the Impugned Order, the State Commission has worked out AT&C loss as per audited accounts to 41.19% and fixed the penalty for failure to achieve the minimum required reduction of AT&C loss in FY 2010-11 at Rs. 19.99 crore. We observe that in functioning of the Discoms, AT&C Loss reduction and improvement in efficiency are very important. From the perusal of the Order dated 23.08.2010 it is observed that the State Commission has emphasized for reduction in AT&C losses to bring the same below to the level of 33.79% achieved during the 2008-09. The Tariff Regulations 2011 provide for penalty for non-achievement of reduction in AT&C losses by Respondent No. 2. The Tariff Regulations, 2011 were made applicable for trueing up for the period before FY 2015-16 in terms of the Tariff Regulations, 2014. The Tariff Regulations, 2014 were framed after seeking views of all the stakeholders. Hence, we do not find any infirmity in the penalty imposed by the State Commission on non-fulfillment of AT&C loss reduction target of 3% by the Appellant in FY 2010-11.
- x. Further, in the Impugned Order, the State Commission has mentioned that in the process for deciding the True-Up of FY 2010-11, the State Commission had given opportunity to the consumers, including the Appellant and other stakeholders to be

heard and their responses, verbal or written were considered during the True-up exercise.

xi. From the above observations of the State Commission on various claims which were disallowed during the True-up exercise, it is evident that the State Commission has exercised due-diligence (except on the issue at 12. ix. above) as well as considered the information available as per audited accounts while deciding on the Truing-up of expenses/revenue of the Respondent No.2. In view of the above we are of the considered opinion that the True-up proceedings followed by the State Commission was not the mechanical one by simply allowing the claims of the Distribution Company on all aspects based on the Statement of Accounts, as argued by the Appellant and the approach adopted by the State Commission was as per the applicable Tariff Regulations.

xii. Hence this issue is decided against the Appellant.

b) The Second Question of law i.e. Question No. 7 b) Whether, in truing up proceedings, the State Commission is not mandated to go into controllable and uncontrollable parameters and give reasons for allowing additional expenses except that such expenses have been incurred by the Distribution Company?, our observations are as follows;

i. The issue is about the treatment of controllable and uncontrollable factors while allowing any additional expenses during the True-up exercise by the State Commission.

- ii. It has been brought to our notice that prior to Tariff Regulations 2011; the Regulation governing tariff determination in the State of Meghalaya was MSERC (Determination of Tariff) Regulations, 2006. In the said Regulations 2006, there was no specific prescribed provision for determination of tariff or truing up or for prescribing norms. Thereafter, by a subsequent Regulation being MSERC (Furnishing of Details for Determination of Tariff) Regulations, 2009, forms for furnishing details for tariff determination were prescribed. Even this Regulation, 2009 did not prescribe any method for determination of tariff or truing up. Therefore, it was Tariff Regulations, 2011 that came into effect on 10.02.2011 put in place definite provisions for determination of tariff and truing up and for prescribing norms of operation.
- iii. Considering above facts and as per the provisions of Tariff Regulations, 2014, we have already observed that for the True-up exercise for FY 2010-11 the provisions of Tariff Regulations, 2011 shall be applicable.
- iv. As per Tariff Regulations, 2011 the process of Review and Truing-Up was identified for the very first time by the State Commission. There was no specific guiding principle describing “Controllable factors” and “Uncontrollable factors” in the Tariff Regulations, 2011 as defined in the Tariff Regulations, 2014 issued by the State Commission under General Guiding Principles specified “ Controllable factors” and “ Uncontrollable factors” and mechanism for sharing of gains/losses on account of controllable and uncontrollable factors. The Appellant has sought to rely on principles of Tariff Regulations, 2014, related to

Controllable and Uncontrollable factors in the True-up exercise of past periods also.

- v. We have already observed that the provisions of Tariff Regulations, 2011 shall be applicable in Truing-up of FY 2010-11 hence any principles defined in Tariff Regulations, 2014 shall have no applicability in the present case.
- vi. Further, Tariff Regulations, 2011 at various places deals with a situation which is beyond reasonable control of licensee like Regulation 15 (7) which states that for any revision in approvals, the licensee would be required to satisfy the Commission that the revision is necessary due to conditions beyond its control.
- vii. Further Regulation 13.2, Regulation 98(3) and Regulation 103(5) of Tariff Regulations, 2011 also deal with the condition which is beyond normal human control, and factors not within the control of Licensee respectively. The relevant extracts are reproduced below:

***“13. Sharing of Profits and Losses***

*13.2 The generating company or the licensee, as the case may be, shall bear the entire loss on account of its failure to achieve the norms laid down by the Commission or targets set by the Commission from time to time, unless it can satisfy the Commission that such losses were incurred after complying with the provisions of these regulations and such Orders as may have been passed by the Commission, for reason which are well beyond normal human control.”*

***“98. Annual Revenue Requirement***

*3) Adjustments if any, due to natural calamities or insurgency or other factors not within the control of Licensee may be*

*approved by the Commission for inclusion in Annual Revenue Requirement of the Licensee.”*

**“103. Operation and Maintenance Expenses**

*(5) Increase in O& M expenses due to natural calamities or insurgency or other factors not within its control may be approved by the Commission.”*

viii. Earlier in this Judgment also we have seen that State Commission has not allowed whatever expenses have been incurred/claimed by the Respondent No. 2 as per Audited Accounts and has done due-diligence wherever required while deciding on the True-up Application of the Respondent No. 2.

ix. Hence this issue is also decided against the Appellant.

**ORDER**

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

The Impugned Order dated 22.12.2014 passed by the State Commission has been upheld except to the extent of allowing short term power purchase cost incurred by the Respondent No. 2 as decided by this Tribunal in Appeal No. 74 of 2015 vide judgment dated 19.07.2017.

No order as to costs.

Pronounced in the Open Court on this **19<sup>th</sup> day of July, 2017.**

**(I.J. Kapoor)**  
**Technical Member**

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**(Mrs. Justice Ranjana P. Desai)**  
**Chairperson**

**REPORTABLE/NON-REPORTABLE**

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