IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI

(APPELLATE JURISDICTION)

APPEAL NOS. 62 OF 2015 AND 63 OF 2015

Dated: 2nd March, 2016

Present: Hon'ble Mr. Justice Surendra Kumar, Judicial Member
Hon'ble Mr. I. J. Kapoor, Technical Member

IN THE MATTER OF

APPEAL NO. 62 OF 2015

Tamil Nadu Electricity Consumers' Association (TECA),
Represented by its President,
1st Floor, SIEMA Building, P.B. No. 3847,
8/4, Race Course, Coimbatore-641018 ..... **Appellant**

VERSUS

1. **Tamil Nadu Electricity Regulatory Commission (TNERC),**
TIDCO Office Building,
No. 19-A, Rukmani Lakshmipathy Salai,
Marshalls Road, Egmore,
Chennai-600 008

2. **Tamil Nadu Transmission Corporation Limited (TANTRANSCO),**
Represented by its Chairman and Managing Director,
No. 144, Anna Salai,
Chennai-600 002 ..... **Respondents**

APPEAL NO. 63 OF 2015

Tamil Nadu Electricity Consumers' Association (TECA),
Represented by its President,
1st Floor, SIEMA Building, P.B. No. 3847,
8/4, Race Course, Coimbatore-641018 ..... **Appellant**

VERSUS

1. **Tamil Nadu Electricity Regulatory Commission (TNERC),**
TIDCO Office Building,
No. 19-A, Rukmani Lakshmipathy Salai,
Marshalls Road, Egmore,
Chennai-600 008

2. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO),
Represented by its Chairman and Managing Director,
No. 144, Anna Salai,
Chennai-600 002 **..... Respondents**

Counsel for the Appellant ... Mr. N.L. Rajah, Sr. Advocate
Mr. S. Santanam Swaminadhan
Mr. Arun Anbumani
Ms. Mishika Singh

Counsel for the Respondent(s)... Mr. T. Mohan for R-1

Mr. G. Umapathy
Mr. S. Vallinayagam for R-2

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. Each of these Appeals, being Appeal Nos. 62 of 2015 and 63 of 2015, have been filed by Tamil Nadu Electricity Consumers' Association (in short, the '***Appellant***'), against the impugned suo-motu tariff orders, being SMT-Order Nos. 8 of 2014 and 9 of 2014, both dated 11.12.2014 (effective from 12.12.2014) respectively in the matter of Determination of Intra-State Transmission Tariff and other related charges in the State of Tamil Nadu on suo-motu basis passed by Tamil Nadu Electricity Regulatory Commission (in short, the '***State Commission***').

2. Since, the issues involved in both these appeals are same; they have been heard together and now, decided by this common judgment.

3. Following are the grievances of the Appellant Association in these appeals:

(a) that both impugned tariff orders of the same date have been passed in violation of the important provisions of the Electricity Act, 2003 and the Regulations of the State Commission.

(b) that the State Commission conducted public hearings on 24.10.2014 at Chennai, on 28.10.2014 at Tirunelveli and on 31.10.2014 at Erode whereas, in the past, the public hearings were held at large cities like Chennai, Coimbatore, Madurai and Trichy. However, this time, the public hearings were held at smaller towns like Tirunelveli and Erode, where industrial concentration is low.

(c) that some of the crucial informations were made available to the stakeholders just 5 to 7 days before the last date of submission of comments to the State Commission. Such crucial information appears to have been deliberately kept away from the stakeholders and made available only at the last minute thereby providing very little opportunity to study the same and provide comments. Most of the crucial information was still kept away from the stakeholders. The Appellant, then, filed its objections to the proposed tariff revision by the State Commission.

(d) that the State Commission, thereafter, passed the said tariff orders, being SMT Order Nos. 8 of 2014 and 9 of 2014, on the same date i.e. 11.12.2014, purportedly after examining the comments and suggestions from the stake holders and after considering suggestions and objections received from the public during the public hearings. The tariff orders were directed to come into effect from 12.12.2014. The charges for the members of the Appellant Association were steeply hiked without any legal basis for the same and, consequently, the Appellant is aggrieved over the said tariff order.

(e) that one of the three Members of the State Commission, passed a separate and detailed dissenting order disagreeing and disapproving the impugned order passed by the other two members of the State Commission. The dissenting order sets

out the procedural lapses, procedural irregularity and the failure on the part of the State Commission to take action against the Licensees (Respondent No.2 herein) for its continued disobedience and defiance to the directives of the State Commission.

(f) that the impugned tariff order passed by the majority, i.e. two Members of the State Commission, is not in conformity with the provisions of the Electricity Act, 2003 and the Regulations framed there-under.

4. The Appellant in these appeals are Tamil Nadu Electricity Consumers' Association. Out of two respondents, one is the State Commission and another is the Distribution Licensees.

5. The relevant facts for the purpose of deciding these Appeals, are as under:

(a) that the impugned tariff orders are in complete violation of Section 64 of the Electricity Act, 2003 and regulations framed there-under. The Licensee failed to file its petition for determination of tariff before the deadline and, hence, the State Commission suo-motu initiated the process of tariff fixation but the tariff could be fixed only in suo-motu exercise after proper scrutiny and prudence check of various parameters that were required to be filed by the Respondent No.2/Transmission Licensee.

(b) that the Tariff Policy makes it clear that in the absence of timely filing of the tariff fixation petition by the licensee, the Appropriate Commissions shall initiate tariff determination and scrutiny on a suo-motu basis. This Appellate Tribunal in its order, dated 11.11.2011, passed in O.P.No.1 of 2011, has also directed only initiation of suo-motu proceedings for tariff determination in accordance with Section 64 of the Electricity

Act, 2003 read with clause 8.1. (7) of the Tariff Policy. The Tariff Policy permits the Appropriate Commission to initiate the tariff determination process so as to avoid delays in notifying the tariff order. In this case, the State Commission did not comply with the said provisions.

(c) that This Appellate Tribunal, in Appeal No 70 of 2007, held as under:

> *"Suo-Moto initiation* of *tariff determination may not be an easy process.* A *large amount* of *data is required for determination* of *tariff. Without* a *tariff petition being filed by* a *licensee the Appropriate Commission may find it quite difficult to collect and collate the necessary data and to fix a tariff."*

(d) that the determination of the Tariff has to be made on the basis of adequate and reliable data, which is made available to the consumers well in advance and sufficient time must be given to them to process the data. Public hearings must be held in such a manner that all consumers can participate in them meaningfully and be able to put forth their objections, which has not been done in the present case.

(e) that the observations in the dissenting order passed by one member of the three members of the State Commission stated that as mandated by the section 64 (2) of the Electricity Act, 2003, the data (application) should have been published by the Applicant. Since, it is a suo-motu order, the Commission should have published the data after obtaining from the licensee. There are atleast 102 discrete formats which provide data for retail tariff determination but, the Commission has not got all the details but only monthly/quarterly returns such as some generation returns, power purchase statements, sales returns, etc. As per dissenting member's order, the said abstract statements were inadequate for prudence check and determination of tariff as the TANGEDCO did not send any

information from November 2013 to September 2014 in respect of tariff determination. The Annual Reports for 2011-12, 2012-13 and Annual Financial Statement for 2014-15 were informally obtained by the State Commission. Even, the scanty information was not hosted in the website along with the public notice and the summary of the tariff proposal on 23.9.2014. But, they were hosted in the website only on 24.10.2014 after a month when there was hardly a week to respond.

(f) that the State Commission has failed to see that mere initiation of Suo-Motu proceedings does not exempt the Respondent licensee or for that matter the State Commission itself from complying with the procedures laid out under Section 64 of the Electricity Act, 2003, which consists of filing of a tariff petition, payment of fees publication of notice, etc. Para 5 (ii) of the TNERC (Terms and Conditions for Determination of Tariff) Regulations 2005 states that *"ARR shall be filed every year even when no application for determination of tariff is made"*. In the present cases, it was mandatory for the Respondent Licensee to file the ARR, even if it fails to fill the tariff petition. Again, the Respondent Licensee had failed to file the ARR for the year 2014-15 and, thereby, committed a serious violation of regulatory requirement. Thus, the impugned orders suffer from non-fulfillment of the basic regulatory requirement of filing ARR for the year 2014-15.

(g) that the impugned tariff orders suffer from the vice of transparency and principles of natural justice. Even otherwise, the Suo-Moto initiation of determination of tariff should have been taken by 31.12.2013, which would have provided adequate time for the licensee to provide all relevant tariff filings, which might have been made use of by the consumers of the state while analyzing the tariff proposals.

(h) that the State Commission has vast powers under Section 86 of the Electricity Act, 2003 to direct the licensees to submit the tariff petitions but, the said power has not been properly exercised in the present cases by the State Commission. The Hon'ble Supreme Court, in the case of MSEDC vs. Reliance Energy Ltd. (2007) 8 SCC 381 held that *"There can be no manner* of *doubt that the Commission has full powers to pull up any* of *its licensee to see that the rules and Regulations laid down by the Commission are properly complied with. After all, it is the duty* of *the Commission under Sections 45* (5), 52, 55 (2), 57, 62, 86, 128, 129, 181 *and other provisions* of *the Act to ensure that the public is not harassed".* The State Commission should have compelled the licensee asking it to file the tariff petitions.

(i) that the said exercise of the State Commission resulted in arbitrary hike in tariff which is a violation of the rights of the consumers and is an antithesis to the object of the Electricity Act, 2003.

(j) that this Appellate Tribunal, in its judgment, dated 9.4.2013, passed in Appeal No. 257 of 2012, directed the State Commission to publish all relevant information supplied by the licensees towards determination of tariff. Further, the State Commission's Tariff Regulations also require that all documents submitted by the licensees towards tariff determination shall be hosted in the website of the Commission. However, the State Commission did not make available the audited accounts for scrutiny by the stakeholders until about 5-7 days before the last date for submission of comments.

(k) that the following information was kept out of the bounds of the stakeholders and consumers:

(i) Audited/provisional accounts for FY 2013-14

(ii) Detailed split up of the capital expenditure and capitalization considered for TANTRANSCO for FY 2011-12, 2012-13, 2013-14 and 2014-15

(iii) Detailed calculation of depreciation of TANTRANSCO for FYs 2011-12, 2012-13, 2013-14 and 2014-15

(iv) Actual long term loan profile for TANTRANSCO along with their repayment for FYs 2011-12, 2012-13, 2013-14 and 2014-15

(v) Detailed computation of interest on working capital for TANTRANSCO for FY 2014-15

In any tariff petition, these informations should have been furnished. However, in the name of Suo-Motu determination, all these information have been kept out of the scrutiny by the stakeholders and consumers thereby vitiating the entire tariff determination process and in the violation of principles of natural justice.

(l) that in the matter in hand, the public hearings were held at small towns where industrial concentration is low and the accessibility to attend such public hearings by the stakeholders and the public is remote. Since, before the previous tariff orders, the public hearings were made by the State Commission in bigger towns like Chennai, Coimbatore, etc. but before passing the present tariff orders, the public hearings were held at small towns making quite impracticable for the public and the stakeholders to attend the public hearings in smaller towns.

(m) that the entire determination of tariff took place based on projected data rather than real data. This is an erroneous process which has been followed by the State Commission and is in violation of the provisions of the Electricity Act, 2003. This Appellate Tribunal, in its judgment, dated 11.11.2011, passed in O.P.No.1 of 2011, has categorically held that tariff determination must be based on real data observing as under:

"This Tribunal has repeatedly held that regular and

timely truing-up expenses must be done since. By passing such an excessive tariff, the very principles of not harming consumers and not harassing them are in fact being perpetuated.

(a) No projection can be so accurate as to equal the real situation.(b) The burden/ benefits of the past years must not be passed on to the consumers of the future. (c) Delays in timely determination of tariff and truing-up entails: (i) Imposing an underserved carrying cost burden to the consumers, as is also recognized by para 53 (h) (4) of National Tariff Policy."

As per the Tariff Regulations 2005, a number of parameters have to be taken into account and based on this data must be arrived at. Without such data, it is not known how the State Commission arrived at such abstract values, which is in clear violation of Section 86 (3) of the Electricity Act, 2003 which mandates transparency in the exercise of powers by the State Commission.

(n) that the consumers cannot or should not be burdened due to the inaction of the licensees and in the event the licensees do not file timely petitions, the tariff, in terms of equity as well as the law should not be increased. This Appellate Tribunal, in Appeal No. 70 of 2007, held as under:

"In case consumer is made to pay more than the cost of supply he can be described as hapless. Secondly the financial implication caused solely due to late submission is only the delay in recovery and not the increase in tariff."

It was further held that:

"The consumer cannot be burdened with this resulting carrying cost because the delay has not been caused on account of their default."

(o) that the same will lead to a situation where the licensee is not filing the tariff application or providing the data every year and the State Commission is issuing suo-moto tariff order every year to comply with this Appellate Tribunal's directions. The State

Commission could have ended at determination of revenue gap and setting aside its recovery in future years when there is proper filing of tariff petition along with audited accounts by the licensees. Instead they went ahead with approving tariff hikes also, which will severely prejudice the consumer and provides an escape route to take a lax and indifferent attitude to the provisions of the Act, which if strictly followed, would in fact, sub serve the avowed object of tariff determination of the State Commission. By initiating the suo-motu process of the determination of tariff, the State Commission has in effect provided a way for the licensees to continue to be in non-compliance of the statutes and directives, but to still get benefitted by a tariff hike, thereby, totally ignoring the interests of the consumers. The Respondent licensee has now been incentivized as in future they will not file any detailed petition for review/revision of its performance, true up of past expenses and determination of tariff for the ensuing year, as they now very well know that even in the absence of any action from their part, the State Commission will grant them annual increase in tariff.

(p) that the Chairman and one of the Members of the State Commission were top ranking employees of the Respondent licensee and were influential parties when the tariff petitions for the year 2013-14 were filed. They were privy to the decisions and financial affairs of the Respondent licensee that resulted in the *"final true-up and approval* of *Aggregate Revenue Requirement (ARR) for the year 2010-11, provisional true-up and approval* of *ARR for the year 2011-12, Annual Performance Review (APR) for the year 2012-13 based on estimates and its Multi Year Tariff petition for 2013-14 to 2015-16 along with tariff revision for 2013-14"* petition which resulted in the tariff order which is in effect currently.

(q) that Regulation 17(5) of the Tariff Regulations, 2005 and Regulation 3(v) of the Tariff Regulation under MYT framework specifies that the Respondent licensee shall get the capital investment plan approved by the State Commission before filing ARR and application for determination of tariff. These provisions have not been complied-with by the licensee.

(r) that this Appellate Tribunal, in its judgment, dated 18.10.2014, passed in Appeal no. 197 of 2013, held as under:

> *"39. We find that the Regulation 17(5) of the Tariff Regulations, 2005 and Regulation 3 (v) of MYT Regulations, 2009 specifies that the licensee shall get the Capital Investment Plan approved by the State Commission before filing of the ARR and application for determination of tariff. However, the State Commission has approved the capital expenditure without approval of the Capital Investment Plan contrary to the Regulations.*
>
> *40. We also find that the State Commission has approved the capital expenditure and capitalization for the Control Period 2013-14 to 2015-16 as submitted by the TANTRANSCO without any prudence check and without considering the past performance of the TANTRANSCO. The capital expenditure provisionally approved for the FY 2010-11 (5 months), 2011-12 and 2012-13 was Rs. 733.19 crores, Rs. 1435.77 crores and Rs. 1449.62 crores based on the audited accounts/provisional accounts. The capitalization approved for FY 2010-11, 2011-12 and 2012-13 was also Rs. 59.22 crores, Rs. 89.63 crores and Rs. 1841.67 crores. However, for the second Control Period i.e., FY 2013-14, FY 2014-15 and 2015-16, the State Commission has approved capital expenditure of Rs. 4526, Rs. 5627 crores and Rs. 2505 crores respectively and capitalization of Rs. 2610 crores, Rs. 7218 crores and Rs. 3026 crores. The capital expenditure and capitalization for the second Control Period appears to be very optimistic considering the past performance of TANTRANSCO. We feel that the State Commission has erred in approving the capital expenditure/capitalization without considering the details of the capital Investment Plan and the past performance of TANTRANSCO.*

> *41. We, therefore, direct the State Commission to true up/provisionally true up the capitalization for FY 2013-14 immediately and the short fall if any should be accounted for while determining the tariff for the FY 2015-16, with carrying cost on the impact of the variation on this account on the ARR. We direct TANTRANSCO to submit the actual accounts of capital expenditure and capitalization during FY 2013-14 by 30.11.2014 to the State Commission. TANTRANSCO shall also submit the application for Capital Investment Plan for FY 2014-15 and 2015-16 in the requisite formats to the State Commission for approval as per the Tariff Regulations by 30.11.2014, if not already done. The State Commission shall accordingly approve the Capital Investment Plan of TANTRANSCO for the FY 2014-15 and 2015-16 after following due process of law, if not already done, and consider the same while approving the tariff for the FY 2015-16."*

(s) that in line with the directions of this Appellate Tribunal, the State Commission was required to true up the capital expenditure and capitalization for FY 2013-14, and to approve capital expenditure and capitalization of FY 2014-15 only as per the approved investment plan. However, contrary to such directives, the State Commission continued to approve capital expenditure and capitalization. The capital expenditure and capitalization are critical in determining the appropriate level of interest on long term loans and depreciation, which are critical heads of the cost in the ARR. Proceeding to approve cost that consumers will have to bear, without providing consumers the opportunity to scrutinize the basis for such costs and provide comments on it is a gross violation of the mandates of Section 86(3) of the Electricity Act, 2003 and the principles of natural justice.

(t) that Regulation 21 of the State Commission's Tariff Regulations determines the capital structure on which Return on Equity (RoE) can be allowed. According to which, there is debt-equity ratio of 70:30 as on the date of commercial operation. As per

accounting policy, an asset shall be capitalized on the balance sheet only when it is put to use – commercial operation, in this context. Therefore, the equity addition considered has to be 30% of the capitalization for the year, as per the State Commission's own Regulations and there should be check to see that actual equity infusion has taken place.

(u) that the mere fact of the utility being a Government owned enterprise should not be a justification for approving the entire amount of DA to be loaded on to the consumers without any prudence check. Most of the end consumers in the state have their salary not linked to any DA or inflation.

(v) that the State Commission has rightly held that losses prior to transfer scheme are not to be recovered through tariffs. A substantial portion of the loan profile of the Respondent licensee is on account of generic loans taken to compensate for the losses prior to true up. Therefore, though losses themselves are not passed on to the consumers, the interest impact of such past losses is passed on to the retail tariff. Therefore, a proper study needs to be initiated to determine the prudently allowable opening loan profile and interest expenses of the Respondent Licensee for the period corresponding to start of transfer scheme. Subsequently, interest should be allowed only on debt and allowable capital expenditure when the assets are put to use – commercial operations, in line with the requirements of Regulation 21 of the State Tariff Regulations, 2005, which specifies the capital structure and treatment of variances from recommended capital structure.

6. We have heard Mr. N.L. Rajah, learned Senior Counsel and Mr. S. Santhanam Swaminadhan, the learned Counsel for the Appellants, Mr. T. Mohan, the learned counsel for the Respondent No.1 and Mr. G. Umapathy, the learned counsel for the Respondent No.2 and gone through

the material available on record including the impugned order passed by the State Commission.

7. The following issues arise for our consideration in the instant Appeals:

(A) Whether the State Commission has violated the procedure prescribed under Section 64 of the Electricity Act, 2003 and made no compliance of the directions of this Appellate Tribunal regarding voltage wise cost of supply and cross-subsidy charges and proper determination of time of the day (TOD) tariff before passing of the impugned order?

(B) Whether the change of public hearing venues and inadequacy of required information and time in submitting views has vitiated the impugned order passed by the State Commission?

(C) Whether the observations made by the Dissenting Member are binding upon the majority views by which the impugned order has been passed?

(D) Whether the impugned order suffers from non-approval of capital investment plan?

(E) Whether the approval of auxiliary consumption contrary to applicable regulations?

(F) Whether there is violation of regulations while allowing employee cost in the impugned order and interest on loans taken to compensate losses prior to true up sought to be passed on to the consumers?

OUR ISSUE-WISE CONSIDERATIONS ARE AS FOLLOWS:

8. ***Issue (A) : Violation of Section 64 of the Electricity Act, 2003 and non-compliance of the directions of this Appellate Tribunal regarding voltage wise cost of supply, cross-subsidy charges and proper determination of time of the day (TOD) tariff before passing of the impugned order*:**

8.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that though the appropriate commission has power to initiate suo-motu proceedings but the manner and procedure adopted by the State Commission is unjust and illegal. In suo-motu proceedings, the State Commission is bound to follow the

procedure prescribed under Section 64 of the Electricity Act, 2003.

(b) that merely because suo-motu revision of tariff has been undertaken by the State Commission, the necessity to comply with tariff setting regulations does not get eliminated as tariff could be fixed only after proper scrutiny and prudence check of various parameters that are required to be submitted by the Distribution Licensee. In the absence of ARR and other reliable data, the tariff fixation can only be based on assumptions.

(c) that this Appellate Tribunal, vide its judgment, dated 11.11.2011, passed in OP No. 1 of 2011, directed only initiation of suo-motu proceedings for tariff determination in accordance with Section 64 of the Electricity Act, 2003 read with clause 8.1(7) of the Tariff Policy which aspects have been grossly ignored while passing the impugned order.

(d) that as per para 5(ii) of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005, the ARR shall be filed every year even when no application for determination of tariff is made. The powers granted to the appropriate commission under Section 62 of the Electricity Act, 2003 are not unconditional.

(e) that this Appellate Tribunal has given direction to calculate voltage-wise cost of supply even without any detailed report from the distribution licensee. The methodology would have required only the voltage wise T&D losses to be submitted by the distribution licensee and verified by the State Commission.

(f) that the distribution licensee submitted a report only in November, 2014, which cannot be used as justification for the failure of the State Commission to determine voltage wise cost of supply.

(g) that the distribution licensee claims that voltage wise cost of service was not determined, as the directive of this Appellate Tribunal was given when tariff process was already underway. This submission of the licensee is totally unacceptable, as the directive of this Appellate Tribunal regarding determination of voltage wise cost of service in Appeal Nos. 196 and 199 of 2013 was issued on 27.10.2014 whereas, the impugned tariff order was passed only on 11.12.2014 i.e. just around a month later.

(h) that this Appellate Tribunal, vide its judgment, dated 9.4.2013, in Appeal No. 257 of 2012, in the case of SIMA vs. TANGEDCO and TNERC, directed to "*determine the voltage-wise cost of supply and corresponding cross subsidy for each category of consumers in the next tariff order*".

(i) that the State Commission has failed to comply with the directions of this Appellate Tribunal in Appeal No. 196 and 199 of 2013 whereby, this Appellate Tribunal directed the State Commission to notify the roadmap for reduction of cross subsidy as per the Tariff Policy after following due process of law which should be undertaken immediately. The State Commission is not serious to comply with these directions under the garb of studying the voltage wise cost of service report submitted by the distribution licensee.

(j) that in absence of notification of such road map, the subsidizing consumers in the State are being denied justice. The cross subsidy charges determined by the State Commission is not in accordance with the Regulations and the subsidizing class of consumers are unnecessarily bearing the burden. The tariff for the two categories of consumes i.e. agriculture and hut, though portrayed as being increased, is fully subsidized by the State Government.

(k) that despite the directions of this Appellate Tribunal in its judgment, dated 27.10.2014, in Appeal Nos. 196 and 199 of 2013, the State Commission erred in permitting the existing Time of the Day tariff, i.e. peak hour and non-peak hour charges which is glaring violation on the part of the State Commission as the same time of day tariff mechanism was set aside by this Appellate Tribunal, vide its judgment, dated 27.10.2014, in Appeal Nos. 196 and 199 of 2013 with a clear directive for redetermination of the same.

8.2 ***Per contra,*** the following submissions have been made on behalf of the Respondents on this issue:

(a) that the procedure adopted by the State Commission is well within the principles of natural justice and the proceedings are in line with the directions of the Full Bench of this Appellate Tribunal in OP-1 of 2011.

(b) that as per Section 64(2) of the Electricity Act, 2003, it would suffice if the publication of abridged form of tariff proposal is published in the newspaper. Accordingly, the publication was issued by the State Commission on 23.9.2014 in two English and two Tamil evening newspapers and on 24.9.2014 in two English and two Tamil daily newspapers. Further, under Section 64(3), State Commission has to issue the tariff order within 120 days after considering all suggestions and objections received from the public. The sub-section requires only consideration of all suggestions and objections received from the public and it does not mandate public hearing or the number of places in which public hearings have to be held. The public hearings were earlier conducted in Chennai, Trichy, Coimbatore and Madurai but for the present tariff revision, the Respondent conducted public hearings in Chennai, Tirunelveli and Erode to enable the people from other cities to get an opportunity to submit their views. Further, the State

Commission has hosted all the relevant data in the website of the Commission to enable the public to put forth their views.

(c) that the fact that MYT regime is in force and the particulars required for determination of tariff are collected beforehand itself, is a fair indication that the State Commission had enough data in hand before proceeding the determination of the tariff. In view of the said provisions, what has been determined for FY 2014-15 in the impugned order, is nothing but the fine tuning of ARR already approved by the Commission in MYT order, dated 20.6.2013.

(d) that the contention of the Appellant on Section 64 of the Electricity Act, 2003 to question the suo-motu proceeding is misplaced for the simple reason that the powers of the Commission under section 62 cannot be whittled down by the procedural provision under Section 64 of the Electricity Act, 2003. Further, the suo-motu proceedings are in line with the directions of the Tribunal and seek to sub-serve the cause of substantial issue of tariff determination

(e) that the powers of the Commission under Section 142 of the Electricity Act, 2003 are penal in nature and independent of Section 62 of the Act. The proceeding under Section 62 namely tariff determination cannot be stalled for the reason that the proceeding under Section 142 has not yet been taken or still pending.

(f) that the Respondents rely on the reasoning recorded in the impugned order on the points of cross-subsidy charges and proper determination of time of the day tariff.

8.3 **Our consideration and conclusion on Issue-A**:

(a) The Appellant has challenged the suo-motu exercise of determination of tariff done by the State Commission for the

FY 2014-15 alleging non-compliance of the procedure prescribed under the Electricity Act, 2003. It is true that the tariff can be determined only after scrutiny and prudence check of various parameters by the State Commission that are required to be submitted by the distribution licensee.

(b) This Appellate Tribunal, in its judgment, dated 11.11.2011, in OP No. 1 of 2011 held as under:

> *"57. This Tribunal has repeatedly held that regular and timely truing-up expenses must be done since:*
> *(a) No projection can be so accurate as to equal the real situation.*
> *(b) The burden/benefits of the past years must not be passed on to the consumers of the future.*
> *(c) Delays in timely determination of tariff and truing-up entails:*
> *(i) Imposing an underserved carrying cost burden to the consumers, as is also recognised by para 5.3 (h) (4) of National Tariff Policy.*
> *(ii) Cash flow problems for the licensees.*
>
> *58. A similar position is reflected in the tariff Regulations framed by various State 1st Respondents. These regulations would stipulate that the approved gains and losses have to be passed through the tariff following the True-up.*
>
> *59. Tariff determination ought to be treated as a time bound exercise. If there is any lack of diligence on the part of the Utilities which has led to the delay, the State 1st Respondent must play a pro-active role in ensuring the compliance of the provisions of the Act, Regulations and the Statutory Policies under the Electricity Act, 2003."*

(c) In view of above, the State Commission has taken the pro-active role of revising the tariff suo-motu in compliance of the Full Bench order, dated 11.11.2011. The State Commission initiated suo-motu proceedings with the information available with it for the determination of tariff for the FY 2014-15. As the Respondent No.2/distribution licensee, subsequent to the initiation of the suo-motu proceedings, submitted all relevant

information, which facilitated the State Commission to arrive at the ARR for FY 2014-15 based on which the tariff was determined for the FY 2014-15 by the impugned order. On perusal of the material placed on record and after going through the relevant provisions of the Electricity Act, 2003, we find that the State Commission, after considering all the details furnished by the distribution licensee for arriving at the tariff for FY 2014-15, made various changes to the proposed tariff submitted by the distribution licensee and substantially reduced the same while arriving at the final tariff.

(d) The average cost of supply for the proposed tariff for FY 2014-15 arrived at by the State Commission in its Executive Summary was Rs.6.02/unit. However, based on the suggestions/views obtained from various stakeholders and the additional information furnished by the distribution licensee, the average cost of supply considered by the State Commission in the Tariff Order No.9, dated 11.12.2014, is Rs.5.77/unit only and the return on revenue is Rs.5.74/unit leaving a revenue gap of Rs.0.03/unit. We further note that none of the consumers in the State of Tamil Nadu have been over burdened due to the tariff determined by the State Commission for the FY 2014-15 which is clearly evident from the fact that even as on date, the price of the power available in the open market in the State of Tamil Nadu is in the range of Rs.10/- and the HT consumers are even procuring the power at that rate from other sources.

(e) Section 61 of the Electricity Act, 2003, empowers the appropriate Commission to notify the regulations for terms and conditions for determination of tariff, which, inter-alia, provides that the tariff determination should be guided by the National Electricity and Tariff Policy. Accordingly, the State

Commission notified the Tariff Regulations, 2005 and instituted suo-motu tariff determination. Regulation 6 (8) empowers the State Commission to initiate suo-motu proceedings to determine tariff, if the licensee does not file a petition for tariff determination.

(f) We further note that the accounts for FY 2012-13 were completed and the audited accounts were submitted with the State Commission and the same was hosted in the website of the State Commission. The accounts for the FY 2014-15 were completed and submitted with the Accountant General for certification. Hence, the State Commission has passed the impugned order after considering the material available on record and complying with the provisions laid down under Section 61, 62 & 64 of the Electricity Act, 2003.

(g) We find from the record that the State Commission is in the process of evolving a Road Map for reduction of cross-subsidy. This Appellate Tribunal, in SIEL's case, has settled the concept of cross-subsidy, which concept is required to stay for quite some time until socio-economic disparities cease to exist. The State Commission is quite conscious of the mandate under the Electricity Act, 2003 to reduce the cross-subsidy and the State Commission is making every effort to reduce/dispense with the same. The State Commission has candidly submitted that it may require some time to eliminate altogether or reduce the cross-subsidy on a large scale for the reason that any such attempt to reduce the cross-subsidy at a larger scale would leave public at large in tariff shock leading to undesirable consequences. This Appellate Tribunal, vide its judgment, in Appeal Nos. 196 of 2013 & 199 of 2013, had directed the State Commission to determine the tariff in the year 2015-16 on Time of Day (TOD) basis. The submission of the State Commission on this point

is that the State Commission should be permitted to continue with the present peak and off peak charges and to decide the same after considering the stand of the Licensees because any interim change will only lead to more complexities and, therefore, before a final change is effected in the system, it is desirable to continue with the present system of TOD tariff. This Appellate Tribunal, in its aforementioned judgment, has further given time to the State Commission until 2015-16 to implement the cost-to-serve. The licensee had already submitted report and the consultant engaged for this purpose had already submitted his report which is under review of the State Commission for the same basis.

In view of the above discussions, we agree to the view and findings of the State Commission and do not find any perversity or illegality in the reasoning recorded by the State Commission in its impugned order on this issue because the impugned order is based upon the proper application of the legal provisions provided under the aforementioned State Tariff Regulations, 2005 and to comply with the directions of this Appellate Tribunal, the State Commission is taking progressive steps. **In view of this, the Issue No. (A) is decided against the Appellant.**

9. ***Issue (B): Change of public hearing venue and inadequacy of required information and time in submitting views has vitiated the impugned order passed by the State Commission:***

9.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that this Appellate Tribunal has consistently held that the principles of transparency and natural justice require that the State Commission should grant opportunity of making suggestions to the stakeholders and consumers before passing

any order. In the present case, the said procedure has not been followed.

(b) that the tariff fixation process stood vitiated since public hearings were not conducted in large towns like Coimbatore, Trichy and Madurai as had been done in the past where industrial concentration is higher rather, the State Commission conducted public hearings in smaller towns like Erode and Tirunelveli where industrial concentration is low.

(c) that the State Commission has treated publication/hosting of information for the stakeholders to give their views as only a formality.

(d) that the State Commission, in its counter affidavit, before this Appellate Tribunal stated that important information on power purchase and sales returns were hosted in their website only on 24.10.2014 i.e. after extending the last date for receiving comments from 23.10.2014 to 31.10.2014, which indicates that the stakeholders were given short period to file their response. The public hearing at Chennai was held on 24.10.2014 i.e. on the same day the State Commission hosting the additional information on its website. Public hearings at Tirunelveli on 28.10.2014 and Erode on 31.10.2014 were made soon thereafter.

(e) that the important MIS reports were made available in the website of the Commission on 24.10.2014 when public hearing was already underway in Chennai and when there were only 7 days left to file objections before the State Commission. The State Commission has also admitted that audited accounts for 2013-14 were made available to it post public hearing, whereas, even then, the same were not shared with the consumers.

(f) that the crucial information were made available by the State Commission only about 5-7 days before the last date for submission of comments. Some information were kept out of the bounds of the stakeholders and consumers.

(g) That one dissenting member has noted that the State Commission could not even ensure the submission of data by the licensee, as per the formats prescribed by the Tariff Regulations. As per the Member, who has given the dissenting order, the relevant information were not sent before the relevant time.

9.2 ***Per contra,*** on this issue, the Respondents have justified the reasoning recorded by the State Commission in the impugned order.

9.3 **Our consideration and conclusion on Issue-B**:

(a) The State Commission has recorded the sufficient and cogent reasons for change of public hearing venues before passing the impugned order, just to enable the stakeholders from other places of the State to express their views or send comments and to participate in the tariff determination process by the State Commission. We find that there is no hard rule to hold public hearing at particular venue. So far as the issue of inadequacy of required information and granting short time of 5-7 days in submitting the views of the stakeholders is concerned, we find from the record that sufficient time was granted by the State Commission to enable the real stakeholders and consumers to file their views and the information made available on the website and through newspapers also was quite adequate to enable the stakeholders to send their comments or suggestions. We also find no violation of principles of natural justice or violation of any kind of transparency i.e. alleged to have been committed by the State Commission in the impugned order. The State

Commission is free to hold public hearings in any town whether large or small that they thinks fit to enable the public and the stakeholders to file their comments or suggestions. It is evident from the record that the information on power purchase and sales returns were hosted in the website of the State Commission on 24.10.2014 and the last date was further extended to 31.10.2014 to enable the stakeholders to send their comments. Thus, the adequate information and other details were available to the public or the stakeholders in advance to enable them to send their comments or suggestions. Thus, there is no perversity or illegality or error in the findings recorded in the impugned order and we agree to the views expressed by the State Commission in the impugned order. The majority of the members of the State Commission is not bound to go by the dissenting order of some other member because the majority view is always bound to prevail and have legal sanction. **In view of this, the Issue No. (B) is also decided against the Appellant**.

10. ***Issue (C): Observations made by the Dissenting Member are binding upon the majority views by which the impugned order has been passed*:**

10.1 This issue, relating to dissenting order of the Members of the State Commission has simply been argued. In fact, neither the State Commission in its lengthy counter and written note of arguments nor the Respondent Licensee in its counter and written submissions have disputed the contents of the dissenting order, particularly in relation to the procedural lapses and procedural irregularities.

10.2 ***Per contra,*** on this issue also, the Respondents have justified the reasoning recorded by the State Commission in the impugned order.

10.3 **Our consideration and conclusion on Issue-C**:

(a) The majority view always prevails and has legal force. The minority view has no binding effect on the majority view. Hence, the impugned order suffers from no illegality merely because one member has given dissenting order.

(b) The impugned proceedings were held and heard before three Members of the State Commission but the views of the two Members are common and third Members gave a dissenting order. In this situation, the majority view is always bound to prevail. Hence, there is no force in the submission of the Appellant on this issue. **In view of this, the Issue No. (C) is also decided against the Appellant.**

11. ***Issue (D): Non-approval of capital investment plan*:**

11.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the capital investment and capitalization are critical in determining the appropriate level of interest on long term loans and depreciation, which are critical heads of cost in the ARR. Proceeding to approve cost that consumers will have to bear, without providing consumers the opportunity to scrutinize the basis for such costs and provide comments on it, is a gross violation of the mandates of Section 86(3) of the Electricity Act, 2003 and the principles of natural justice.

(b) that Regulation 17(5) of the Tariff Regulations, 2005 and Regulation 3(v) of the Tariff Regulation under MYT Framework specifies that the Capital Investment Plan has to be approved by the State Commission before tariff determination, which provisions have not been complied with by the State Commission.

(c) that the State Commission, in compliance of the directions of this Appellate Tribunal, had floated tender for appointment of

the consultant to review the Capital Investment Plan, which report of the consultant is under review of the State Commission. This Appellate Tribunal had already granted time up to 2015-16 for approval of the Capital Investment Plan.

11.2 ***Per-contra***, it has been submitted that the distribution licensee has submitted a report which is under review by the State Commission and since, this Appellate Tribunal has granted time upto 2015-16 for approval of the capital investment plan, the State Commission is under the expeditious process to determine the capital investment plan.

11.3 **Our consideration and conclusion on Issue-D**:

We find no force in the contentions of the Appellant on this issue because the Respondent No.2/distribution licensee had already filed capital investment plan for approval of the State Commission for the control period ending with FY 2015-16. Further, the licensee has also filed the actual capital expenses details with the State Commission on quarterly basis. The compliance report had already been filed with the State Commission in R.A. No.1 of 2014 after serving a copy of the same on the Appellant's counsel. It is an admitted fact that the State Commission, in compliance of the directions of this Appellate Tribunal, had floated tender for appointment of the consultant to review the Capital Investment Plan, which report has already been submitted and is now under review of the State Commission. The State Commission is making all efforts for approval of the capital investment plan up to 2015-16. **In view of this, the issue no. (D) is decided against the Appellant**

12. ***Issue (E): Approval of auxiliary consumption contrary to applicable regulations*:**

12.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that despite the Regulations mandating an auxiliary consumption of only 3%, the State Commission has been

approving the same for gas based stations as 6%. In line with CEA's own recommendations, quoted by the State Commission, only 2.5% additional auxiliary consumption needs to be considered for the use of gas booster compressors.

(b) that even this Appellate Tribunal, in its judgment, dated 21.11.2012, passed in Appeal No. 41 of 2012, in the matter of Puducherry Power Corporation Limited vs. JERC had upheld that only 2.5% additional auxiliary consumption be considered for the use of gas booster compressors. The State Commission should, therefore, re-determine the ARR and revenue gap based on the normative auxiliary consumption for gas based power plants of 5.5% instead of 6%.

(c) that the licensee's claim that PLF of gas based power plants in Tamil Nadu is only 60-65% , is untenable and unsupported.

12.2 ***Per-contra***, on this issue, it has been submitted by the Respondents that the Central Electricity Authority (CEA) had specified the auxiliary consumption at 5.50% to the gas based generating stations which are having Plant Load Factor (PLF) of more than 80%. The PLF to the gas based thermal generating stations in Tamil Nadu are in the range of 60 to 65% which is lower than that of norms specified by the CEA. In Tamil Nadu, the gas allocation has been made on the basis of availability which is not sufficient to operate on full load. Since, the gas supply was not sufficient to meet the requirement of generation to maintain the PLF of more than 80%, the auxiliary consumption quantum remains constant and even the PLF is lower.

12.3 **Our consideration and conclusion on Issue-E:**

We find from the record as well as the impugned order that the State Commission has adopted the auxiliary consumption of 6% for the purpose of calculating the variable cost for the gas based stations based on its approval in its 2013 order. The order issued in 2013 has been adopted

from 2010 Tariff Order No.3 of 2010, dated 31.7.2010 (effective from 1.8.2010), the reason being on account of installation of Gas Booster Compressors for drawing gas. It is absolutely clear that the State Commission has been consistently adopting the same 6% auxiliary consumption from its 2010 order. The Appellant, in these appeals, has raised the issue which has been in vogue for the past many years and that too without challenging the same before this Appellate Tribunal by filing the appeals. We are unable to accept the contention of the Appellant that the State Commission should re-determine the ARR and revenue gap based on the normative auxiliary consumption for gas based power plant of 6.5% instead of 6%. **Thus, the contentions of the Appellant on this issue are meritless and the Issue No. (E) is also decided against the Appellant**.

13. ***Issue (F): Violation of regulations while allowing employee cost and interest on loans taken to compensate losses prior to true up sought to be passed on to the consumers:***

13.1 On this issue, the following submissions have been made on behalf of the Appellant:

(a) that the State Commission, on the one hand held that losses prior to transfer scheme are not to be recovered through tariffs but on the other hand, a substantial portion of the loan profile of the licensee is on account of the generic loans taken to compensate for the losses prior to true up. Therefore, though losses themselves are not passed on to the consumers, the interest impact of such past losses is passed on to the retail tariff.

(b) that a proper study should be initiated to determine the prudently allowable opening loan profile and interest expenses of the licensee for the period corresponding to start of transfer scheme. Subsequently, interest should be allowed only on debt and allowable capital expenditure when the assets are put to use – commercial operations, in line with the

requirements of Regulation 21 of the State Tariff Regulations, 2005, which specifies the capital structure and treatment of variances from recommended capital structure.

(c) that when the licensee has not come forward to file a proper tariff petition, there is no need to approve ARR items beyond the actual cost such as return on equity and incentive for availability both during initial approval and true up.

(d) that the licensee's contention that the issue of interest on loans was raised in the earlier tariff order and decided by this Appellate Tribunal is untenable because each tariff order is a separate order by itself and the Appellant has legal right to challenge every tariff order.

13.2 ***Per contra***, the following contentions have been made on behalf of the Respondent:

(a) that with regard to the allegation of the Appellant that the DA increase has been allowed in actual as against the normal escalation of 5.72%, the Government of India had announced the DA increase at an average rate of above 15% per annum, whereas, the State Commission has allowed an increase of only 12% in the suo-motu proceedings. Moreover, even this 12% increase is only estimation and any savings in this will be passed on to the consumers during the true-up process. The Appellant challenged the pay structure of the licensees which is contrary to law.

(b) that the State Commission has deducted the interest expenses in the tariff order, dated 20.6.2013, that have been excessively allowed from the ARR whereas, in the suo-motu tariff order, dated 11.12.2014, the interest expenses itself have been allowed limiting the loan amount equivalent to capital expenditure incurred and capital investment plan submitted. The interest expenses have not been allowed to

the entire loan amount. Further, the State Commission has not allowed RoE considering that loan amount itself is higher than the capital expenditure.

13.3 **Our consideration and conclusion on Issue-F:**

As per Regulation 14(5) of the State Tariff Regulations, 2005, all uncontrollable costs shall be allowed as pass through in tariff and the uncontrollable costs will include the following:

a) Cost of fuel
b) Cost on account of inflation
c) Taxes and duties and
d) Variation in power purchase cost"

The employee expenses have been dealt in detail in the impugned order. The State Commission, in para 4.40, has stated that it has arrived at the employee expenses for FY 2013-14 during the performance review exercise considering the expenses approved in last tariff order for FY 2012-13 as base. For projecting the employee expenses for FY 2014-15 State Commission has considered the employee expenses approved for FY 2013-14 as base as under:

> *"4.41 Commission in accordance with its amended tariff regulation has escalated the approved employee expenses for FY 2013-14 at 5.72% on all components except for DA for arriving at the employee expenses for FY 2014-15.*
>
> *4.42 DA has been compiled based on the pay revisions duly declared by the Government of Tamil Nadu during the respective years. For FY 2014-15, DA rates have been escalated at 22.8% which is the CAGR of actual DA rates for the period FY 2010-11to FY 2013-14.*
>
> *4.43 The employee expense capitalization for generating stations has been arrived by taking the same percentage as considered in the last tariff order. However, for distribution business the Commission has relied on average employee capitalization of 9% based on historical data."*

In the present impugned order, the State Commission has calculated the employee cost based on the above methodology only. In addition to the above, this Appellate Tribunal, in its order in Appeal No.196 of 2013 and Appeal No.199 of 2013, has already dealt with this issue and it is a settled position before the law. **In view of the above, we do not find any force in the contentions of the Appellant on this issue and, thus, the Issue No. (F) is also decided against the Appellant.**

14. Since, all the issues have been decided against the Appellant, an Electricity Consumers' Association, the instant Appeals, being Appeal Nos. 62 of 2015 and 63 of 2015, are worthy of dismissal.

O R D E R

15. The present Appeals, being Appeal Nos. 62 of 2015 and 63 of 2015, are hereby dismissed and the impugned suo-motu tariff orders, being SMT-Order Nos. 8 of 2014 and 9 of 2014, each dated 11.12.2014, passed by the Tamil Nadu Electricity Regulatory Commission, are hereby upheld. There shall be no order as to costs.

PRONOUNCED IN THE OPEN COURT ON THIS 2ND DAY OF MARCH, 2016.

(I.J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member

√ **REPORTABLE/~~NON-REPORTABLE~~**

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