Before the Appellate Tribunal for Electricity
Appellate Jurisdiction

Appeal No. 189 of 2005

Present : Hon'ble Mr. Justice E. Padmanabhan, Judicial Member
Hon'ble Mr. H.L. Bajaj, Technical Member

Uttaranchal Jal Vidyut Nigam Ltd. .....Appellant

Versus

1. Uttaranchal Electricity Regulatory Commission
2. Government of Uttaranchal through its Secretary
Deptt. Of Energy and Irrigation
3. Uttaranchal Power Corporation Ltd. .....Respondents

For the Appellants : Mr. Hemant Sahai with Mr. Sitesh Mukherjee, Advocates
Mr. V.R.Reddy, Sr. Advocate
Mr. S.S. Choudhary
Mr. Sanjay Sen

For the Respondents : Mr. M.G. Ramachandran with Ms Taruna Singh Baghel, Advocates. Mr. Anuvrat Sharma & Mr. Sanjay Kumar Singh, Advocates
Ms. Saumya Sharma

Dated 14th September, 2006

Judgment

1. The appellant, Uttaranchal Jal Vidyut Nigam Ltd. has preferred the present appeal under Section 111 read with Section 121 of The Electricity Act, 2003 against the order dated December 16, 2004 passed by Uttaranchal Electricity Regulatory Commission in Petition No. 4 of 2004 and to direct the said Commission to re-determine the appellant's generation tariff for the year 2004-05 on the basis of evidence/material

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placed by the appellant along with tariff petition and such other evidence as may be made available during the re-determination proceedings by applying appropriate recovery and as per accounting principles.

2. Mr. Hemant Sahai Advocate made detailed submissions on behalf of the appellant and Mr. M.G. Ramachandran, learned counsel appearing for the first respondent Commission made his submissions to sustain the impugned order of the Commission.

3. The brief facts leading to the present appeal could be summarised for ready reference. The appellant is a wholly owned undertaking of Government of Uttaranchal engaged in hydel generation. The state of Uttar Pradesh was bifurcated. The state of Uttaranchal came into being w.e.f. November 19, 2000 in terms of the provisions of the U.P. Re-organisation Act, 2000. The Government of Uttar Pradesh issued a notification on January 25,2001 under the UP Electricity Reform Act, 1999 and as per the notification the assets and liabilities of erstwhile U.P. State Electricity Board stand vested with (i) U.P. Jal Vidyut Nigam Ltd. (UPJVNL), (ii) U.P. Rajya Utpadan Nigam Ltd. and (iii) U.P. Power Corporation Ltd. During the year 2001 in terms of the notification issued under Uttaranchal Adoption and Modification Orders 2001 the U.P. Electricity Reform Act, 1999 was adopted in the state of Uttaranchal.

4. On 2nd February,2001 the appellant Corporation was incorporated but it commenced its business operations from November 9,2001. By notification dated November 14,2001 the Government of India, issued orders in exercise of power under Section 63 of the UP Re-organisation Act, 2000 division and allocated the assets and liabilities from UPJVNL and UPPCL respectively to UJVNL (appellant) and UPCL in the state of Uttaranchal. The Uttaranchal Government by order dated February 22,2002 fixed the tariff of the appellant- UJVNL at 60.5 paise per unit,

which included royalty of 10% per unit. The said fixation was confirmed by the Uttaranchal state Government by its further orders dated June 14,2002 and November 11,2002.

5. On September 12,2002 the Uttaranchal Electricity Regulatory Commission (UERC)- first respondent was constituted. The Electricity Act, 2003 was notified on June 9,2003 and the provisions of the Act are enforceable w.e.f. June 10, 2003. On September 8,2003 the first respondent UERC passed tariff for the distribution licensee – UPCL by which order the first respondent Regulatory Commission reduced the existing tariff of UJVNL from 54 paise per unit to an adhoc tariff of 37 paise per unit. Numerous petition were filed to review the ad hoc tariff. On May 14, 2004 the first respondent notified the UERC (Terms and conditions for determination of hydel tariff) Regulations 2004, which Regulations apply to Hydel generating stations above 25 MW. On July 12, 2004 UERC rejected the appellant's request for restoration of original tariff of 55 paise per unit.

6. On August 31, 2004 the first respondent Commission initiated suo moto proceedings for determination of generation tariff while giving time till September 15, 2004 to the appellant to file its tariff petition. On September 15, 2004 the appellant filed tariff petition for the year 2004-05 for large and medium hydro generation stations. The first respondent held public hearings, received objections and comments of stake-holders and considered the same. On December 16, 2004 the first respondent Commission passed the tariff order.

7. The appellant challenged the tariff order by filing Writ Petition on the High Court of Uttaranchal. On March 23, 2005 the High Court passed interim order which was modified on April 29,2005. On August 25,2005 the Hon'ble High Court disposed of the Writ Petition directing transfer of the Writ Petition to this Appellate Tribunal constituted under Section 110 of the

Electricity Act, 2003. while issuing other directions, the Hon'ble High Court also extended the interim order for a further period while directing the parties to go before this Appellate Tribunal for modification or cancellation of the interim order. As per the orders of the Hon'ble High Court the present appeal was filed and taken on file. The appeal was admitted and notice was ordered to the respondent on November 22,2005 returnable on January 13,2006.

8. On behalf of the appellant UJVNL Mr. Hemant Sahai contended that the impugned tariff order passed by the first respondent Commission is vitiated by illegalities, material mis-directions and error apparent on the face of the record. It is further contended that the denial of return on equity by the Regulatory Commission is illegal, illogical and run counter to the Regulations framed by the first respondent Regulatory Commission. The learned counsel contended that the Regulatory Commission had committed fundamental/conceptual error with respect to the claim of depreciation advanced by the appellant. The reliance placed on the provisions of The Income Tax Act by the Commission, which it is contended is erroneous. It is further contended that the Commission erred in ignoring the materials placed before the Commission regarding hydro generation and corresponding the generation potential of the hydel electricity stations. The learned counsel also contended that the Commission has ignored the statutory obligations of the appellant to settle the terminal benefits of the employees and necessary allocation ought to have been made to discharge to such statutory obligations. The fixation of tariff retrospectively is illegal. The assumption of the Commission that no capital has been contributed and therefore the appellant is not entitled to return on equity is liable to be set aside as illegal. The Commission has misdirected itself in failing to note that after coming into force of The Electricity Act, 2003 the provisions regarding fixation of tariff have changed and tariff determination shall be in

terms of Section 62 of the Electricity Act, 2003 as well as the statutory Regulations framed by the Commission. The Commission proceeded to determine tariff on the basis of assumptions and conjectures which vitiate tariff order.

10. Per contra Mr. M.G. Ramachandran, learned counsel for the respondent Commission contended that no interference is called for with the findings and conclusions of the Regulatory Commission and various grounds raised by the appellant are devoid on merits. The learned counsel prayed for dismissal of the appeal in its entirety. Both sides filed written submission, while the counsel for the State of Uttranchal has no specific instructions.

11. In this appeal the following points arise for consideration:

A) Whether the conduct of the appellant in failing to seek approval of ARR and determination of tariff despite repeated notices deserves to be deprecated? To what course of action, if any?

B) Whether the disallowance of depreciation by the Uttaranchal Electricity Regulatory Commission is illegal and liable to be interfered?

C) Whether the denial of return on equity by the Regulatory Commission is justified and sustainable?

D) Whether the disallowance of employees related cost towards unfunded Provident Fund and terminal benefit liabilities claimed by the appellant is liable to be interfered?

E) Whether the implementation of reduction in tariff determined by the impugned tariff order with retrospective effect and consequential conclusion that the appellant had recovered excess charges from UPCL, the sole buyer of the power generated by the appellant is illegal and liable to be interfered?

F) Whether the proposal of the Regulatory Commission to the State Government to levy CESS is sustainable, What is the scope and purport of CESS levied under the State Act?

G) To what relief, if any?

12. We shall take up the first point at the threshold. We find that the appellant has been highly recalcitrant in moving the Regulatory Commission for approval of its Annual Revenue Requirement and tariff determination. Even after the Commission calling upon the appellant to file necessary petitions for approval of ARR and determination of tariff for over 15 months the appellant was dragging its feet. After a lapse of 15 months the appellant submitted nine separate petitions in respect of nine generating stations. We are unable to appreciate the attitude of the appellant in delaying the matter and only when the Regulatory Commission issued summons under Section 94 of The Electricity Act, 2003, the appellant furnished the details half- heartedly and not even the full details or the particulars as prescribed by the Regulations. In fact the Commission waited for about 15 months which is too long a period and thereafter initiated suo-moto action for determination of tariff. The delay caused by the appellant had not been explained at all and there is no justification for such inordinate delay. Even after summons the appellant has not furnished the full information as called for by the Commission and this reflects very badly on the appellant.

13. In our view the Commission should have taken drastic action, when it noticed total non-cooperation on the part of the appellant. The Commission is not without powers and for the deliberate attempt to delay on the part of the appellant and for its failure to file the necessary petition, ARR and determination of tariff, the Commission should have viewed the matter seriously and taken a stern action. We direct the Commission to enforce the provisions of the Electricity Act 2003 strictly and when there is

a default on the part of the generator or Discom , the Commission shall not hesitate to take action. We emphasize that the Regulatory Commission should have taken action for failure on the part of the appellant by enforcing the provisions of the Act. The appellant's recalcitrant attitude in seeking for approval of the ARR as well as determination of tariff, deserves to be deprecated and we administer a warning on the appellant. The appellant being generator and it has officers of its own who have rich experience. It is for the appellant to file the ARR and tariff determination petitions as prescribed by the provisions of The Electricity Act 2003 and in terms of the Regulations framed by the Uttaranchal Electricity Regulatory Commission.

14. In future we expect the appellant to go by the Schedule and in case if there is any lapse on the part of the appellant, the Uttaranchal Electricity Regulatory Commission shall take strict and appropriate action taking a serious view for such lapses or defaults on the part of the appellant. Point (i) is answered accordingly.

15. Nextly we shall consider Point B. The Commission while referring to Section 43 of the Income Tax Act had approached this issue from the wrong end and with a misdirection in proceeding, as if no depreciation is allowable in terms of notification vesting the generating stations, as the appellant has not paid cost/ value of the assets of generating stations. Far from denying depreciation, the Commission has directed the appellant to create a fund called 'Reformation and Modification Fund(RMF)' and to open a separate bank account for the said purpose while directing that the said fund shall be used in investments required for replacement of renovation and modification of existing assets and not to be used for any other use. We are not persuaded to accept the said approach of the Commission.

16. The Commission has obviously misdirected itself with respect to object, principle and basis behind allowing depreciation. The Commission also failed to follow the well settled principles or method of calculating depreciation by reference to Schedule VI of The Electricity (Supply) Act, 1948. The appellant like any other generator or transmitter or distributor requires machinery along with equipments, stations etc. and require a huge capital. The appellant like any other organization has to raise funds for the purposes, which means it has to obtain loans. Loans so raised have to be repaid and with interest. Provisions have to be made for replacement of machinery, equipment and buildings, plants etc. besides required to be maintained and all of which require huge staff. It has to make the capital outlay with demand charges are levied and collected, whereas the consumption charges that are levied and collected to meet the running charges.

17. It is settled law that the appellant like any other generator or distribution Company should carry on its activities viably depreciating and on sound economic principles that provide for the purpose of rendering statutory services. Being a generating utility it may not be driven by pure profit motive but at the same time it must maintain its affairs on sound economic principles. In this respect it is useful to refer to the pronouncement of the Hon'ble Supreme Court in Kerala Electricity Regulatory Commission V/s Govind Prabhu and Bros. Reported in (1986) 4 SCC 198. Where the Hon'ble Supreme Court held thus:

> *"The State Electricity Board is a public utility monopoly undertaking which may not be driven by pure profit motive- not that profit is to be shunned but that service and not profit should inform its actions. It is not the function of the Board to so manage its affairs as to earn the maximum profit; even as a private corporate body may be inspired to earn huge profits with a view to paying large dividends*

to its shareholders. But it does not follow that the Board may not and need not earn profits for the purpose of performing its duties and discharging its obligations under the statute. It stands to common sense that the Board must manage its affairs on sound economic principles. Having ventured into the field of commerce, no public service undertaking can afford to say it will ignore business principles which are as essential to public service undertakings as to commercial ventures. If the Board borrows sums either from the government or from other sources or by the issue of debentures and bonds, surely the Board must of necessity make provision year after year for the payment of interest on the loans taken by it and for the repayment of the capital amounts of the loans. If the Board is unable to pay interest in any year for want of sufficient revenue receipts, the Board must make provision for payment of such arrears of interest in succeeding years. The Board is not expected to run on a bare year-to-year survival basis. It must have its feet firmly planted on the earth. It must be able to pay the interest on the loans taken by it; it must be able to discharge its debts; it must be able to give efficient and economic service; it must be able to continue the due performance of its services by providing for depreciation etc; it must provide for the expansion of its services, for no one can pretend the country is already well supplied with electricity. Sufficient surplus has to be generated for this purpose. Either the character of Electricity Board as a public utility undertaking or the provisions of the Electricity (Supply) Act will preclude the Board from managing its affairs on sound commercial line though not with a profit-thirst. The principles of efficiency and economy are, therefore, not forsaken but resolutely emphasized. However, pure profit motive, unjustifiable according to us even in the case of a private trading concern, can never be the sole guiding factor in the case of a public enterprise."

18. In Orissa State Electricity Board V/s IPI Steel 1995, Vol. IV SCC 320 it was held that provisions have to be made for depreciation of machinery, equipment, buildings, plants and machines, stations and transmission lines. In Pilibhit Electricity Supply Co. Special Officer 1996 11 SCC page 288 the Hon'ble Supreme Court laid down the method of computing the depreciation and calculation of such depreciation on the concerned assets is to be done in accordance with Sixth Schedule of the Electricity (Supply) Act. In this respect of Hon'ble Supreme Court held thus:

> *"Only the method of calculation of depreciation has to be applied by way of reference to the Sixth Schedule. But the type of asset for which depreciation has to be computed is not to be gathered from the Sixth Schedule".*

19. In Garden Silk Weaving Factory V/s CIT 1991 SCC 684 it was held that the "expression depreciation", in respect of an outgoing, which is not an item of expert expenditure or is one which should not be treated as outgoing of a revenue nature directed by the statute is to be deducted. Therefore it follows that the refusal to allow depreciation cannot be sustained. Had the Commission allowed depreciation in terms of the Regulations framed by it and if there is no Regulations it is to follow Sixth Schedule to the Electricity (Supply) Act, 1948. The disallowance of depreciation by the Commission cannot be sustained and consequently we set aside the order of disallowance of depreciation and direct the Commission to sustain the claim of depreciation advanced by the appellant on the value of assets. As claimed by the appellant or at least at the normative value and the approach that no amount has been paid by the appellant is illegal.

20 It is common knowledge that on bifurcation of the U.P. State Electricity Board consequent to trifurcation, the State of Uttaranchal came into existence and the State Government issued notification declaring that nine generating stations to vest with the appellant and Government of Uttaranchal. No question of payment of cost or market value of generating stations for vesting on such trifurcation or divisions arises, as it was the legal owner hitherto before and it follows that no question of payment arises on such reorganization and no payment of cost nor it is a purchase. Therefore, it follows that the value of the generating stations have to be taken into consideration for allowing depreciation.

21. We direct the Regulatory Commission to allow depreciation for the entire value of machinery of the nine generating stations and its buildings etc. as was hither before evaluated by the U.P. Electricity Regulatory Commission in the earlier determination. That would be the appropriate procedure. There will be a direction to the Regulatory Commission in this respect and the Regulatory Commission shall allow depreciation on the normative value of the nine generating stations.

22. We shall now consider Point C. On point 'C', it is pointed out by the counsel for the appellant that the Regulatory Commission, declined to allow return on equity on the view that the generator / appellant has not invested its own funds and no funds have been invested in creating / acquiring the asset. On the said two reasonings among others the Commission turned down the claim of ROE. During the appeal, Mr. M. G. Ramachandran, the learned counsel appearing for the Commission, with ingenuity contended that normally in the balance sheet capital cost should appear on one side of the balance sheet and on the other side debt and equity should find a place. Such a debt is to be serviced by interest and equity by ROE. As the State Government of Uttaranchal has not allocated the amounts between the stake holder, namely funds and liabilities and till

the Uttaranchal Government takes a decision whether such amount is to be treated as equity or debt or subsidy, the appellant cannot claim either depreciation or return on equity. Mr. M. G. Ramachandran, the learned counsel for the Commission, contended that as no decision has been taken by the State Government on share capital and therefore the Commission is well founded in denying ROE. According to Mr. M. G. Ramachandran, ROE is an amount which has to reach the share holder, namely the investor, which in this case is the Government of Uttaranchal and the government having failed to take a decision; there is no justification to claim ROE. One another contention being that the Government has levied CESS and that CESS is an element in substitution of ROE and therefore, the disallowance of ROE is not liable to be interfered. In this respect Mr. M. G. Ramachandran, the learned counsel, added that the appellant is not being deprived of funds since the CESS collected is earmarked for generation projects by the State government.

23. The counsel for the appellant, while pressing the contention advanced, pointed out that the view of the Commission is contrary to law and practice and merely because there is no notification or allocation by the Government of Uttaranchal, it is not to be assumed that there is no capital or equity at all. It is pointed out that in the last tariff notified by the U.P. Electricity Regulatory Commission, in respect of seven generating stations which has since been vested with appellant, capital has been assessed and on that basis, the appellant is entitled to return on equity. It is fairly stated that the appellant is solely owned undertaking of the Uttaranchal Government, which came into existence on bifurcation and the capital for the seven generating stations was assessed in the earlier ARR. It is a bifurcation of the State and there is neither a transfer nor a sale, but it is a division consequent to bifurcation of the State. The largest State which owned the generating stations, among other stations have been bifurcated and by reorganization these seven generating stations stand allocated and

vest with Uttaranchal State. It is not a transfer but it is a State under taking which owns the generating stations. Merely because there is no notification or allocation indicating the capital or investment or such other sum, there is no reason at all to deny return on equity. The non specification by the State Government as to the allocation of equity may be for ever so many reasons of State reorganization or it may take some more time but that cannot be a ground for deprivation of return on the investment made in the generating stations, presently held by appellant, which was held by a larger State, now vested with the Government of Uttaranchal on reorganization. It is a division among the two States and it is only the State which owns the generating stations throughout. If the Commission is to await the decision of the Government, and till then the disallowance of equity would lead to anomalous situation as if on a latter date even if the Government issues a notification in this regard the tariff cannot be determined with retrospective effect and clock cannot be put back.

24. The appellant had sought return on equity on 30% of the share capital based/GFA as valued by the Commission. The Commission has assessed the GFA and that being so the Commission should have allowed ROE at least on that basis. The various reasons assigned are misdirections and not based on legal principles nor logic. The Commission has overlooked the basic principles behind allowing ROE and this illegality has resulted in miscarriage of justice. There is no reason to disallow ROE.

25. The contention of Mr. M. G. Ramachandran, the learned counsel for the respondent Commission, is that CESS collected by the Government is a substitute for ROE. With respect, to the learned counsel, such an argument cannot be sustained. CESS is being levied by the Government of Uttaranchal in exercise of its legislative powers. The CESS is collected

on the consumption of electricity. It is nothing but a duty on the consumer which the State Government levies and collects. The sum total of such collection of CESS goes to State exchequer, though it may ultimately go for implementation of projects for generations etc. That does not mean that it is an income to the generator or the appellant undertaking or a substitute for ROE. What is allocated by the State Government is from its revenue which it collected by way of CESS or it may be under any other head. CESS cannot be equated to ROE. Such a contention is not only misconception but born out of frustration. One another argument advanced by Mr. M. G. Ramachandran, the learned counsel for the Commission, also in our view cannot be sustained. If ROE is to be allowed, the appellant is to pay income tax on such return payable under the Income Tax Act. On CESS collected by the Government, no income tax is levied and therefore it is better to get CESS rather than realization of ROE. We will not at all be justified in sustaining such a contention which is not legally sustainable. CESS is different from return on equity which the appellant generator is entitled to as per statutory provisions. It may be that, the appellant may be liable to pay income tax but that does not mean that it should be denied of ROE. There is nothing to suggest that once ROE is sustained the appellant could be denied of State allocation of funds. As already pointed out, the CESS collected by virtue of state enactment and it is the levy by legislation and the same cannot be taken as a substitute for ROE. Such a contention advanced for the Respondent is a misconception and it is legally untenable.

26. The UP Electricity Regulatory Commission in its earlier proceedings, which is since being followed by Uttaranchal Electricity Commission, has fixed the capital cost / GFA for nine hydro generating plants at Rs. 503.96 crores as seen from Table 5.9, Page 48 of the tariff order. It is not only just but also appropriate to provide ROE on 30% on the said capital base, being normative equity. If such a portion of ROE on normative basis is not

allowed, on the reasoning that the government has not issued a notification or allocation or fixed it either as equity or loan or subsidy or a grant, as already pointed out on a later date, this will not be possible for the Commission to put back the clock or reopen the matter and revise the tariff retrospectively and eventually liability has to be fastened on the new generation of consumers ultimately In our view on the first principles of law, the appellant is bound to succeed and the denial, if sustained will result in miscarriage of justice. In our view there is neither reason nor logic nor basis to disallow ROE claimed by the appellant even on a normative basis. This point is answered in favour of appellant and we direct the respondent Regulatory Commission to consequently to allow ROE in terms of its Regulations.

27. Next we shall take up point D, where we have to examine the disallowance of employee related costs claimed for payment of Provident Fund (PF) and related terminal benefits of the employees to retire. The commission has chosen to negative the said claim on the reasoning that U.P. government has taken the responsibilities. The commission, in effect requires the appellant has been allowed to raise loan and service on actuals in this behalf, that apart the appellant has been directed to take up the matter with State Authority with expedition.

28. In this respect, Mr. M.G. Ramachandran, the learned counsel appearing for the Commission pointed out that (i) employees terminal benefit payments are covered by Bonds issued by U,P, Government in favour of the trust created in this behalf (ii) the current contribution towards employees terminal benefits has been allowed by the State Commission, which has not been challenged (iii) the contribution for the past period towards GPF is yet to be settled between the State Government of U.P. and Utttranchal (iv) the consumers shall not be burdened for the delay on the part of the appellant in getting the bonds transferred and credited in

the trust constituted to pay terminal benefit and (v) the commission has allowed the appellant to service the amount as seen from the order (Page 130 & 131) under appeal.

29. In respect of the claim of terminal benefits in identical circumstances on 12.9.2006 in appeal No. 24 of 2006 HVPN Vs. HERC, in respect of identical issue/occasion to consider in detail this aspect and held thus:

"*13. Learned Counsel for the appellant pleaded before us that the appellant is bound to make provisions, on accrual basis, under Accounting Standard-15, Accounting for Retirement Benefits in the Financial Statements of Employers towards terminal benefits, based on the valuation made by the actuary. It has been brought to our notice that the Accounting Standard (AS)- 15 came into effect in respect of accounting periods on and or after April 1, 1995 and it is mandatory in nature. It is pertinent to note, at this stage, that as per Black's Law Dictionary accrual accounting method means: an accounting method that records entries of debits and credits when the liability arises, rather than when income or expenses received or disbursed.*

14. The appellant in its ARR for financial year 2002-203 and 2003-04 has claimed terminal benefits expenses on accrual basis on the basis of valuation made by the actuary. However, Commission has allowed the terminal benefits expenses on the actual cash pay out basis.

15. The Commission has failed to appreciate that appellant is bound to make provision on accrual basis under Accounting Standard-15, towards terminal benefits based on the valuation made by the actuary. If this amount is not provided and invested by the appellant then it would not be able to discharge its liability towards terminal benefits to the former

employees, who retire from service on attaining the age of superannuation.

16. Appellant further contended that the Commission has failed to appreciate that it had acted with illegality in dis-allowing the expenditure of terminal benefits. Once it had come to the conclusion that the Corpus is required to be created or PF Scheme/ Bond linking it with the earning of profit is against all cannons of accountancy, financial management and prudent business practices. The Commission has failed to appreciate that it may not be possible to make contribution for all the previous years (for which no contribution was made due to adoption of method of cash pay out basis) when the appellant starts earning profits and these profits may not be sufficient for the purpose in question. If for the terminal benefits, the method of cash pay out is adopted, the present consumers will be charged less for consumption of electricity whereas the future consumers will have to pay more and bear a part of the burden that present consumer should have borne. This aspect has been lost sight by the Commission in its anxiety to reduce the allowable expenses and consequential revision of tariff, if any.

17. The Commission has failed to appreciate that the erstwhile HSEB was a statutory body constituted under The Electricity Supply Act, 1948 and was not required to maintain its accounts according to the provisions of The Companies Act, 1956. The appellant is a company constituted under Companies Act, 1956 and has to comply with the provisions of the said Act including so far as they relate to maintenance of accounts. Section 209 of the Companies Act, 1956 requires that the accounts of the Company shall be made on accrual basis. Sub Section (5) of Section 209 of the Companies Act, 1956, further provides that if any of the persons referred to in sub section (3) fail to take all reasonable steps to secure compliance by the Company of the requirement of this Section i.e. Section

209, or has by his own willful act been the cause of any default of the Company there-under, he shall, in respect of each offence be punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 10,000 or with both. If the pensionary contribution is booked at payout basis then a part of the liabilities will remain un-depicted in the books of accounts and the account of the company will not reflect a true and fair working of the company, which would be violative of Section 209 and Section 211 of Companies Act, 1956. The said provisions are mandatory.

18. Per contra the respondent Commission pleads that keeping in view the deficit position of the appellant, the Commission deferred it until the appellant is able to generate cash surplus. Allowing terminal benefits on the basis of actuarial valuation basis at this stage would lead to additional borrowings by the appellant and hence consumers will have to bear the burden of high interest expenses. Had the appellant been in an operational surplus, it would have been viable to create a corpus to discharge the future liability accruing for the current period as the appellant is not required to pay during the next year or even in near future.

19. Concedingly both appellant and respondent realize that a corpus is required to be created to pay terminal benefits payable on a future date. While we appreciate the concern of the Commission regarding interest payment, we are convinced that once the Accounting Standards-15 are mandatory in nature and accounts are required to be kept on accrual basis, there is no way in which the appellant can deviate from this basic accounting principle. In view of this position we answer this point in favour of the appellant and set aside the directions issued by the Commission in this regard."

30. The above statement of law squarely applies to the case on hand and following the same, while reversing the direction of the commission, we direct that all terminal benefits including PF shall be approved on accrual basis. We answer this point in favour of appellant.

31. Taking up point E, the learned counsel for appellant pointed out that the Regulatory Commission has given retrospective effect to the tariff order dated 8.9.2003 (w.e.f. 1.4.2003) and the commission consequently concluded that the appellant had been recovering an unauthorized tariff at 55 ps per unit, which has since been rolled back to 37 ps. per unit. In that view, the Regulatory Commission has directed the appellant that Rs. 86.78 crores be credited to RM Fund to be managed and operated by a High Power Committee that manages the P.D.F. Such a direction, it is pointed out is illegal, not called for and it proceeds on an erroneous assumption.

32. Per contra, Mr. M.G. Ramachandran the learned counsel appearing for the Commission contended that in terms of PPA dated 18.12.2000 signed between UPJVNL and UPPCL, it has been specifically stipulated that the appellant and UPPCL shall obtain approval of Regulatory Commission, which they failed to secure by approaching the regulator. As a further consequence suo motu action was taken by the commission while determining the tariff for UPPCL. By order dated 8.9.2003 the commission fixed the power purchase cost of UPPCL at 37 ps. per unit on an ad-hoc basis pending determination of tariff for power purchase from the appellant. Only thereafter the appellant moved the commission for tariff fixation, the tariff was determined for each station and pooled tariff works out to 29.68 ps. per unit. This shows that the appellant has realized excess tariff from UPPCL based on the ad-hoc tariff of 55 ps. Per unit and the appellant shall not be allowed to take advantage of its own wrong, Thus according to Mr. M.G. Ramachandran the Commission is justified in

issuing a direction with respect to excess revenue collected by the appellant. It is submitted that no interference is called for with the direction to deposit the excess collection in RMF account and further directions thereof to operate the account.

33. Though Mr. M.G. Ramachandran was forceful in his submissions in resisting the contention advanced by the counsel for appellant, yet we find there is substance and merit in the contention advanced on behalf of the appellant. The State of Uttranchal was carved out from undivided U.P. state on 9th Feb., 2000. Till then U.P. Electricity Reform Act 1999 and Regulations framed thereunder were applicable in all respects to the undivided UP JVNL. The Government of India, upon creation of State of Uttranchal in exercise of power under Clause (1) of sub-section (iv) of Section 63 of the U.P. Reorganization Act 2000 issued a Notification on 5.11.01 and in terms of which the assets, liability, rights and privileges of the undertaking UJVNL were divided between UPJVL and UPJVNL (appellant) and allocation was concluded.

34. In terms of the said notification nine hydro generating stations located in Uttranchal stand vested with the UJVNL (appellant) w.e.f. 9.11.2001. In the inter-regnum the Government of Uttranchal passed the (UP Electricity Reform Act) Adoption and modification orders 2001 and by virtue of said adoption, UP Electricity Reform Act 1999 was adopted in the State of Uttranchal. Under the said enactment, Uttranchal Electricity Regulatory Commission was constituted on 5.9.2003. The state commission is deemed to have been constituted under The Electricity Act 2003, by virtue of Section 82 (1) proviso of the 2003 Act.

35. The Uttranchal Government by order dt. 22.2.2002 fixed generation tariff of hydro generating plants operating in the said state at 60.5 paise per unit with retrospective effect from 9th November, 2001, which includes royalty

of 10% payable to the said state Government. By another notification dt. 14.6.2002, the Government of Uttranchal clarified the earlier tariff Notification dt. 22.2.2002, stating that the tariff of 60.5 paise per unit notified is applicable to large hydro projects while for micro hydro projects which existed before 9th November, 2001, different tariff, namely 1.70 paise per unit which was prevailing in the past to be continued. The said tariff was extended for a further period of two years by the State Government by its Notification dt. 11th November, 2002. All those notifications or tariff orders were issued by the State Government of Uttranchal before commencement of The Electricity Act 2003 and before the constitution of Uttranchal State Regulatory Commission, which was constituted on 5th September, 2003.

36. It is pointed out by Mr. Hemant Sahai that in terms of Section 185 (3), the provisions of the enactment specified in the schedule, which includes UP Electricity Reform Act 1999, not inconsistent with the provisions of 2003 Act shall apply to Uttranchal in which the said UP Electricity Reform Act was adopted and made applicable by adoption order referred to above. It is further pointed by the learned counsel for the appellant that the provisions of the UP Electricity Reform Act, the notification issued there under and the tariff notification issued by Uttranchal State government would govern the appellant, its generation tariff till 10th June, 2003.

37. Till 10th June 2003, the Uttranchal State adoption order which was in force would govern the situation in state of Uttranchal. Uttranchal Electricity Regulatory Commission, which has been constituted by the State Government is governed by the Adoption Order and it has to act within the four corners of the state enactment till 10.6.2003.

38. Till 10th June, 2003, the adoption order, governed and in terms of statutory provisions, UERC had authority to determine the price at which

the power shall be procured from the generating companies or generating stations or from other sources. There is nothing to indicate in the adoption order which enable UERC to fix ad-hoc tariff. The order dt. 8.9.2003 in so far as it determines an ad-hoc tariff is prima-facie not authorized by law nor it falls within the state commission's jurisdiction. The tariff order was passed by the Government of Uttanchal much prior to the constitution of the UERC. The ratification referred to or indicated by the Government of Uttranchal in the tariff order would mean UERC if it could have exercised the jurisdiction over UPCL, the distribution licensee and determined the price at which it could procure power from the appellant. The UERC has not been vested with the power to retrospectively to determine tariff nor it could meddle with the tariff fixed by the Government, purported by exercise of power under 2003 Act.

39. The very authority of UERC to fix generation tariff at the material point of time is being challenged by the appellant as one without jurisdiction. No authority is conferred on UERC either by the Government or by the statutory provisions to determine generation tariff much less retrospectively and reopen the tariff already notified by the State, which is the competent authority.

40. Without prejudice, it is to be pointed out that the tariff as determined by the Uttranchal Government and notified by it, was acceptable and agreed to by UPCL. Being bound UPPCL paid the rate at which it was notified by the Government to the appellant for the period ending 9th September, 2003, On 8th September, 2003 the UERC fixed tariff which is the sole authority. In terms of the adoption order referred to above, if at all it is the State Government of Uttranchal which could notify the tariff within the provision of Electricity Supply Act 1948 and Indian Electricity Act 1910 were in force and the competent authority being the State Government of Uttranchal. Under Section 43-A of The Electricity Supply Act 1948, if at all

it is the Government which could notify the tariff in respect of generation. Therefore, it can not be said that the tariff notification which was issued by the Government of Uttranchal is without authority or illegal.

41. Per contra, it is the Government which had the authority to notify the tariff and the same is applicable to all to purchase of power by UPCL from UJVNL. As such the tariff fixed could not be amended nor it is amenable to any modification by the UERC, much less retrospectively. The reference was also made to the Power Purchase Agreement (PPA) dt. 8.12.2000 executed between UPPCL and UPJVNL. There is no doubt that the said Power Purchase Agreement is binding on those who have authority as well as on their successor which includes the appellant as well as UPCL. The PPA has been concluded much prior to the formation of the Regulatory Commission and before coming into force of The Electricity Act 2003.

42. Factually there was no Regulatory Commission for the State of Uttranchal during the relevant period. Therefore, the question of approval of PPA or non-approval is in consequential. Contract concluded in terms of PPA is binding on the parties and the same could not be re-opened by the Regulatory Commission on any later date nor the commission is the authority to interfere with the terms of PPA entered between the parties.

43. In this respect the learned counsel for the appellant rightly relied upon the judgment of three member bench of this Appellate Tribunal rendered in Small Hydro Association and others vs, APERC and Others decided on 2nd June, 2006.

44. The PPA could not be modified or nullified by the Commission which came into being on 5.9.2003 and which exercise powers under The Electricity Act 2003. So long as the parties to the PPA have no grievance and they

do not seek to avoid, PPA is binding as it has been concluded in terms of the tariff order issued by State of Uttranchal.

46. Further there could not be a retrospective tariff fixation by the commission much less for the period before 10.6.2003 and the commission has no such powers. So long as the PPA is not sought to be revised by the parties and the parties were acting as per PPA, it is not within the purview of the UERC to retrospective reduce the tariff and order refund. The tariff as fixed by the Government alone followed by PPA will govern and the retrospective reduction of tariff by the UERC by the impugned order cannot not be sustained. Hence consequential direction to recover of alleged excess payment cannot not also be sustained.

47. In the circumstances, while answering point D, we set aside the direction issued by the first respondent commission and whatever tariff rate at which the appellant/generator collected, it is entitled to and there is no illegality in this respect.

48. One another point which was highlighted by Mr. M.G. Ramachandran learned counsel for the respondent is with respect to the recommendations of the Regulatory Commission to impose cess. The learned counsel for the appellant has not advanced any argument in this respect.

49. In our view, the recommendations of the Commission, if at all, it is for the Government to examine and act according to its decision and within its legislative powers. We need not express ourselves in this respect nor it is within our jurisdiction. Hence we decline to examine this aspect, as it is for the State to decide and take action.

50. In the result we answer the points A to F framed as hereunder:

(a) On point, we deprecate A the recalcitrant attitude of the appellant and its failure to move for approval of ARR and determination of tariff as per the schedule prescribed by the provisions of The Electricity Act 2003 and the regulations framed by the first respondent commission. We make it clear that the commission may take stern action in the event of such failure on the part of the appellant in future.

(b) On point B we set aside the disallowances of depreciation by the UERC and direct the first respondent commission to allow depreciation as prescribed.

(c) On point C we set aside disallowance of ROE and direct the first respondent commission to allow ROE as directed supra.

(d) On point D, we set aside the disallowance of terminal benefits claimed by the appellant and direct the commission to allow the claim made by the appellant in respect of terminal benefits and PF, related claims of employees.

(e) On point E we set aside direction of the commission giving retrospective effect to the tariff order under appeal and set aside the direction to create RMF fund.

51. The appeal is allowed to the extent indicated above and we direct first respondent commission to forthwith rework the entire ARR and re-fix the tariff accordingly in the light of our judgment.

52. The parties shall bear their respective costs throughout.

Pronounced in open court on this 14th day of September, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr.Justice E Padmanabhan)
Judicial Member

GB/NP
No. of corrections