Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.5 OF 2013
AND
APPEAL NO.58 OF 2013

Dated: 11th Oct, 2013

Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON
HON'BLE MRV J TALWAR, TECHNICAL MEMBER

APPEAL No.5 OF 2013

In the Matter of:

Andhra Pradesh Ferro Alloys Producers Associations
No.308, Nirmal Towers,
Dwarakapuri Colony,
Panjagutta
Hyderabad-500 082

……. Appellant

Versus

1. **Andhra Pradesh Electricity Regulatory Commission,**
   Singareni Bhavan, Red Hills,
   Lakdikapul,
   Hyderabad-500 004

2. **Central Power Distribution Company of**
   Andhra Pradesh Limited (APCPDCL),
   6-1-50 Mint Compound,
   Hyderabad-500 063

3. **Eastern Power Distribution Company of**
   Andhra Pradesh Limited., (APEPDCL)
   APEDCL, Beside Nakkavinapalem Sub Station,
   Near Gurudwara,
   Vishkhapatnam-530 504

4. Northern Power Distribution Company of Andhra Pradesh Limited., (APNPDCL), H.No.1-1-478, 503 & 504, Chaitanyapuri, Hanamkonda, Warangal-506 004

5. Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) No.19-13-65/A, Srinivasapuram, Tirupati-517 501,

….. Respondent(s)

Counsel for the Appellant: Mr. Sridhar Prabhu
Mr. Anantha Narayana M.G.
Mr. Lokesh R Yadav

Counsel for the Respondent(s): Mr. K V Mohan for R-1
Mr. G V Brahmananda Rao
Mr. P Shiva Rao for R-2 to R-5

APPEAL No.58 OF 2013

In the Matter of:

M/s. Aman-Try Sponge and Power Pvt Limited., No.46, Usman Ali Street, TVS Tollgate, Tiruchirappali-620 020

……. Appellant

Versus

1. Andhra Pradesh Electricity Regulatory Commission, Singareni Bhavan, Red Hills, Lakdikapul, Hyderabad-500 004

2. Central Power Distribution Company of

Andhra Pradesh Limited (APCPDCL),
6-1-50 Mint Compound,
Hyderabad-500 063

3. **Eastern Power Distribution Company of Andhra Pradesh Limited., (APEPDCL) APEDCL, Beside Nakkavinapalem Sub Station, Near Gurudwara, Vishkhapatnam-530 504**

4. **Northern Power Distribution Company of Andhra Pradesh Limited., (APNPDCL), H.No.1-1-478, 503 & 504, Chaitanyapuri, Hanamkonda, Warangal-506 004**

5. **Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL) No.19-13-65/A, Srinivasapuram, Tirupati-517 501,**
,

.... Respondent(s)

Counsel for the Appellant: Mr. Sridhar Prabhu
Mr. Anantha Narayana M.G.

Counsel for the Respondent(s): Mr. K V Mohan for R-1
Mr. G V Brahmananda Rao
Mr. P Shiva Rao for R-2 to R-5

J U D G M E N T

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Andhra Pradesh Ferro Alloys Producers Association in Appeal No.5 of 2013 and M/s. Aman-Try Sponge and Power Private Limited are the Appellants in Appeal No.58 of 2013.

2. Both these Appellants have filed these Appeals challenging the impugned order dated 2.11.2012 passed by Andhra Pradesh State Commission (the first Respondent herein) in the matter of determination of Fuel Surcharge Adjustment (FSA) for first quarter of the Financial Year 2012-13.

3. The short facts are as under:

(a) The Appellants are the Ferro Alloys Producers across the State of Andhra Pradesh. The Andhra Pradesh State Commission is the first Respondent herein. The Respondents 2-5 are the Distribution Licensees.

(b) Under the State Commission's Conduct of Business Regulations read with Section 62 (4) of the Electricity Act, 2003 as well as under the tariff order passed in respect of the Financial Year 2012-13, the additional cost of fuel and power purchase cost had to be passed to the consumers as Fuel Surcharge Adjustment (FSA) on quarterly basis as per the terms

of fuel surcharge formula, specified under the above Regulation.

(c) The Respondents 2-5, the Distribution Companies in pursuant to the said Regulation submitted the FSA proposals for the first quarter of Financial Year 2012-13 i.e. the period between April, 2012 and June, 2012.

(d) While submitting the claim, the Distribution Licensees requested the State Commission to permit them to collect the Fuel Surcharge Adjustment amount during the first quarter of Financial Year 2012-13 on weighted average basis of Rs.1.6221 per unit per month.

(e) The State Commission, after entertaining the Petition, issued public notice on 5.9.2012 informing the public that the public hearings would be held on 20.9.2012. Accordingly, all the stake holders including the Appellants also participated in the public hearings and put forth their views.

(f) After hearing the parties, the State Commission passed the impugned order dated 2.11.2012 fixing the Fuel Surcharge Adjustment charges for first quarter of Financial Year 2012-13.

(g) Aggrieved by the said impugned order, the Appellants have filed these separate Appeals.

4. The learned Counsel for the Appellants had raised several issues in these Appeals. Though most of the issues were of minor nature and unrelated to the main issue of wrongful calculation of Fuel Surcharge Adjustment for the first quarter of Financial Year 2012-13, the Appellant ultimately have pressed only the following issues in their arguments.

(a) The Effect of the pendency of the same issue before the High Court of Andhra Pradesh;

(b) Non-est of the FSA Formula of the State Commission.

(c) Uniform Amount of Fuel Surcharge Adjustment for all the Utilities ignoring the FSA formula specified in the State Commission's Conduct of Business Regulations;

(d) Requirement of prior regulatory approval for expanses on account of power purchased from Generating Companies;

(e) Inclusion of Expenditure incurred in the past;

(f) Exemption of agricultural resources from FSA

(g) Estimation of unmetered consumption in violation of Section 55 of the Act;

5. On these grounds, elaborate arguments were advanced by the learned Counsel for both the parties.

6. Let us now discuss each of the issues one by one.

7. The **First Issue** is relating to the **effect of the pendency of the same issue in Writ Petition before the High Court of Andhra Pradesh.**

8. According to the learned Counsel for the Respondents 2-5, this issue has been raised in the Writ Petition filed before the State Commission and therefore, this Appeal may not be heard at this stage and it could be deferred.

9. The learned Counsel for the Appellants informed that the Respondents themselves have filed Writ Petition in WP No.22086 of 2012 before the High Court of Andhra Pradesh challenging the FSA formula framed under the Regulations of the State Commission and therefore, it is not tenable on the part of the Respondents to plead estoppel as against the Appellants.

10. On going through the records and also on hearing the submissions of the parties, we are of the view that the pendency of the Writ Petition will not come in the way of the

adjudication of the present Appeal proceedings before this Tribunal. The reasons are as follows:

(a) The present proceedings are by way of a statutory Appeal under the Electricity Act, 2003. This Tribunal is the competent Appellate Forum to adjudicate upon any orders passed by the State Commission;

(b) There is no stay as against the adjudication in these proceedings pending before this Tribunal in any Court. Merely because the contesting Respondents and some others have approached some other Forums relating to the issues, there is no provision in law to stop this Tribunal to go into the validity of the State Commission's order and to decide the issue.

(c) The legality and validity of various Regulations is challenged before the proceedings before the High Court. The validity of the Regulations can be gone into only by the High Court. In these proceedings arising out of this Appeal, there is no challenge to the validity of the said Regulations.

(d) We are only concerned with the validity of the impugned order passed by the State Commission with reference to the determination of Fuel Surcharge Adjustment.

11. Therefore, the objections raised by the Respondents have no basis.

12. Accordingly, we accept the arguments of the Appellant and proceed with the other grounds raised in the Appeal.

13. The **Second Issue** is relating to the non-est of the FSA Formula of the Commission's Regulations.

14. According to the learned Counsel for the Appellants, the State Commission did not follow the requirements of the previous publication as per Section 181 (3) of the Act, 2003 read with Ninth Difficulty Removal Order, 2005 and therefore, the Regulations prescribing the FSA Formula for computation are non-est.

15. This contention of the Appellants is liable to be rejected as it is misconceived. The Ninth Difficulty Removal Order, 2005 would be applicable to the Regulations framed under Electricity Act, 2003. The Andhra Pradesh Conduct of Business Regulations, 1999 was framed under Andhra Pradesh Reforms Act, 1998 after following the due process of law.

16. Let us now quote the Ninth Difficulty Removal Order dated 9.6.2005. The same is as follows:

> ***"2. Previous publication of regulations made by the State Commissions.***—*Regulations made by the State Commissions,* ***before the commencement of this order,***

> ***without meeting the requirement of the previous publication under sub-section (3) of section 181 of the Act shall again be published*** *as draft regulations for the information of persons likely to be affected thereby for inviting the objections or suggestions following the procedure prescribed under the Electricity (Procedure for Previous Publication) Rules, 2005, and shall be finalised after considering such objections or suggestions received."*

17. Section 181(3) of the Act, 2003 reads "***All regulations made by the State Commission under this Act shall be subject to the condition of previous publication.”***

18. It is not disputed that Clause 45-B of Andhra Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 have been made sourcing the power from Section 54 of the A.P. Electricity Reforms Act prior to enforcement of Electricity Act, 2003.

19. The conjoint reading of these regulations would make it evident that only the Regulations framed under 2003 Act without prior publication alone are to be required to be published seeking comments from stake holders. Regulations framed under AP Reforms Act which is consistent with the 2003 Act do not come within the purview of the Ninth Difficulty Removal Order 2005. Further, these Regulations had been in force since 1999. Unsettling these merely on the ground that these had not been re-published after the Ninth Difficulty Removal Order, 2005 would cause great ramifications.

20. Further, the issue of validity of the FSA Regulations contained in Conduct of Business Regulations 1999 as amended by Regulation No.1 of 2003 for want of prior publication cannot be challenged before this Tribunal as laid down by the Constitution Bench of the Hon'ble Supreme Court in PTC India Ltd.,Vs CERC reported at 2010 (4) SCC page 603. So this ground, urged by the Appellant would fail.

21. The **Third Issue** is with reference to **Uniform amount of FSA for all the Utilities ignoring the FSA Formula specified in the Commission's Conduct of Business Regulations**.

22. According to the Appellant, the State Commission has completed the Fuel Surcharge Adjustment for all the four Distribution Companies as exactly same to the 4th decimal place. It is further submitted that all the Companies have made the same quantum of FSA claim irrespective of their load patterns, consumer mix and voltage regimes.

23. The Appellant had raised the very same objections before the State Commission during the public hearing. On this contention, the State Commission has given the following findings.

24. Let us now refer to the findings of the State Commission in the impugned order:

"METHODOLOGY OF FSA COMPUTATIONS

30. ***Views of Objectors***

Representatives/Learned Counsels of M/s Andhra Spinning Mills Association, M/s Andhra Sugars like Sri Gopala Chowdary, Representatives of AP Ferro Alloys Producers' Association and others, submitted the following objections. The statements of month-wise category-wise sales for the quarter do not show the corresponding power purchase quantities by appropriately closing up the same for the losses. The methodology appears to be different from that in the applications for the previous years.

There must be a nexus between the energy consumed in the quarter (in the denominator of the formula) and the variation in costs considered (in the numerator of the formula). Otherwise the entire formula becomes irrational, inconsistent, unreasonable and arbitrary. There is totally insufficient information with regard to the observance of merit order, the effects of violation of which are also to be adjusted under the formula in the Regulation.

From the statements appended to the proposal, it appears that the FSA is being computed on a state-level basis. The purchase quantities and expenditure on the basis of the entire State (combining / pooling / cartelizing all DISCOMs) taken together. Such methodology is not authorised or contemplated by the Regulation and is therefore contrary to law. The claim of an individual DISCOM for a FSA rate determined on the basis of all DISCOMs taken together is illegal and contrary to the Regulation and law. Each DISCOM must provide its own energy balance which is a sine qua non of the determination of the FSA of that DISCOM. The main tariff order itself deals with the requirement of each DISCOM separately. It is not at all clear from the statements of information furnished as to how the DISCOMs have purchased and accounted for the power from generating stations as allocated to the respective DISCOMs specifically under the statutory 3rd Transfer Scheme.

There is no clarity or information on the D-D transfers and the consequences resulting there from with respect to the provision in the tariff order for such transfers. The

methodology adopted in the FSA proposals would enable one or more DISCOMs to realise additional revenue from their consumers in excess of their actual difference in power purchase and/or fuel costs. This is impermissible.

It is amazing that all Distribution Companies have made the same quantum of FSA claims, irrespective of their load patterns, consumer mix, and voltage regimes. The provisions of the Act, as stated above, require that the FSA can be claimed by way of a formula specified. And if the Petitioners are claiming the FSA through a formula, then, it is virtually impossible that power purchase cost of all the Petitioners would be surprisingly equal Replies of Licensees*:*

Actual Power Purchase made was taken into consideration for the purpose of FSA calculation FSA is claimed as per the regulation in vogue The monthly calculation sheets enclosed with FSA filings are based on the merit order dispatch only In the Tariff Order one merit order for entire state is approved and further the monthly variable cost/kWh is approved for entire state for the purpose of calculating FSA. Licensees have therefore claimed FSA for the entire state by merging sales and power purchase of all the licensees. Source-wise purchases were already placed in website.

Commission's Views*:*

Regarding the objections on the uniform FSA charge across the entire state, Commission would like to refer to the Tariff Order for FY 2012-13, wherein the Govt of Andhra Pradesh, u/s 108 of Electricity Act 2003, issued a policy direction that the tariff is to be maintained uniform across the State and accordingly the Commission kept the tariffs uniform across all the four DISCOMs in the State. When the main tariff rates had been maintained uniform across the four DISCOMs in the State, in accordance with the policy direction given by GoAP u/s 108 of EA 2003, the question of determination of FSA rates on differential basis does not arise since the FSA component is nothing but a surcharge on main tariff and the original tariff together with FSA now being determined will be the eventual effective overall tariff, which has to be construed as the figure which is

> ***expected to be uniform across the DISCOMs. Based on this, Commission is of the view that it is not possible to have DISCOM wise/Category wise FSA rates for different DISCOMs and for different consumer categories.***
> *Regarding the objections on the merit order dispatches & D-D sales, it is found that DISCOMs had separately furnished their (i) category-wise, monthwise, voltage-wise sales quantity, (ii) month wise power purchase quantity, grossing up limiting the Agricultural sales to minimum of Tariff Order quantity (or) actual sales, with approved losses as per MYT. Tariff Order contains the month-wise single merit order for entire State. The D-to-D transaction at end of the quarter has not been done since it results category wise differential tariff across the DISCOMs which will be contrary to the policy directions issued by GoAP u/s 108 of EA 2003, as explained in the preceding paragraphs.*

25. In the above decision, the Commission has given the view that it is not possible to have DISCOMs wise/category wise FSA rates for different DISCOMs and for different consumer categories. However, it has been observed by the State Commission at the end that D-to-D transactions at the end of the quarter has not been done since it results category wise differential tariff across the DISCOMs and will be contrary to the policy directions issued by the State Government u/s 108 of the Electricity Act, 2003.

26. As correctly pointed out by the learned Counsel for the Appellant, the findings of the State Commission in the impugned order are diametrically opposite to the judgment rendered by this Tribunal in the case of **Polyplex Corporation Limited., Vs UERC and Others in Appeal No.41-43 of 2010 dated 31.1.2011.** In this judgment, this

Tribunal discussed in detail the powers of the Government in issuing such directions and ultimately held that any directions issued by the State Government u/s 108 of the Electricity Act which prevents the exercise of the powers in discharging the statutory functions of the State Commission, are not binding on the State Commission. Therefore, the observations as referred to above contained in the impugned order pursuant to the so called directions u/s 108 of the Electricity Act is opposed to the principles laid down by this Tribunal in the above case.

27. The determination of the FSA is a separate proceeding. FSA orders cannot be based on the directions issued u/s 108 of the Electricity Act since the Act says FSA only to be determined as per the Formula prescribed in the Regulations.

28. According to the Respondent, it is true that the decision of the State Commission cannot be exclusively on the basis of the directions issued by the State Government. But, the State Commission can also consider the suggestions made by the State Government through its Notification u/s 108 of the Act.

29. It is now pointed out by the Respondent in this case that the directions issued by the State Government are not about the para-meters to be considered or the quantum of tariff to be

fixed. It is only in public interest to have a common tariff across the entire State dehor's to four separate Distribution Companies engaged in the business of retail supply of power and further the State Commission has not exclusively decided the issue on the basis of the directions u/s 108 and it has considered the common tariff order and other factors prevailing, to pass a common tariff and common FSA for the entire State.

30. Thus, it is clear that the State Commission has followed the directions of the State Government and fixed the retail Uniform Tariff in all State. In that case, the Appellant ought to have challenged the main tariff order. But this has not been done. As such, the same has attained finality. It is not understood as to why the Appellants did not challenge the main Tariff order on this ground. Once Uniform Retail tariff has been accepted by not filing the Appeal, the Appellants have no reasons to challenge the uniform FSA which in fact is a part of the tariff.

31. Uniform Retail Tariff, throughout the State, is not confined to the State of Andhra Pradesh alone. It is prevalent in entire Country except small pockets like Mumbai, Ahmedabad and Surat etc.,

32. Let us now refer to table showing the state of the tariff in majority of the States in the Country:

State having multiple Distribution Licensee						
State	No of Distribution Licensee			Tariff Structure		
	Govt.	Pvt	Total	Govt	Pvt	
Haryana	2		2	Uniform		
Delhi	2	3	5	Indiv	Uniform	
Rajasthan	4		4	Uniform		
UP	4	2	6	Uniform in State		
WB	1	1	2	Uniform		
Odisha		4	4		Uniform	
Jharkhand	2	2	4	Info not available		
MP	4		4	Uniform		
Gujarat	4	2	6	Uniform	Indiv	
Maharstra	1	2	3		Indiv	
Chhatisgrh	1	3	4			
Karnatka	5		5	Uniform		
AP	4		4	Uniform		
Kerala	1	9	10	Uniform in State		
States having one Distribution Licensee						
Punjab	1		1			
HP	1		1			
Uttrkhnd	1		1			
Bihar	1		1			
TN	1		1			
7 states of N.East	1		1			
Sikkim	1		1			
Goa	1		1			
All UTs	1		1			

33. From the table above, it is clear that there are as many as 14 States which have multiple Distribution Licensees and

have Uniform Retail Tariff among Government owned Distribution Licensees.

34. The Bulk Supply rate was so computed by the State Commission that Retail Tariff for all the Distribution Licensees in the State of remains uniform. Whatever it is, the real problem lies with the Uniform Tariff throughout the State. In the present case, it is noticed that Uniform FSA has been fixed due to fixing of the Uniform Tariff in the tariff order for the Financial Year 2012-13. Admittedly, the Appellant did not challenge the said tariff order. Therefore, the impugned order relating to the FSA in absence of the challenge to the order cannot be said to be invalid.

35. The **Fourth Issue** would relate to the **Requirement of the Prior approval to claim the expenditure of power purchase from the Generating Companies and inclusion of expenditure incurred in the past**.

36. According to the Appellant, this expenditure can be claimed by the Distribution Companies in the FSA data, only after incremental cost of the fuel of the generator have been approved by the State Commission in a separate proceeding. It is further contended that the State Commission allowed a sum of Rs.1,195.34 Crores as prior period expenditure without proper explanation and without any verification with the original bills.

37. Let us now refer to the relevant portion of the impugned order on this issue:

> ***"Prior Regulatory approvals for claims of Generators:***
>
> ***Views of Objectors***
>
> *Representatives of M/s Ferro Alloys Companies Association submitted that analogous to the present exercise, wherein distribution companies are seeking approval to pass on their FSA exposure onto the consumers, the generator/s too ought to have sought specific approval from the appropriate Commission/s, to pass on their variable costs / other legitimate claims*
>
> ***Replies of Licensees***
>
> *It is incorrect to state that the incremental cost of fuel that is incurred by generator should first get the approval from the respective regulator and then pass on the claim to the DISCOMs. Based on the said approval, the DISCOMs should pay to the Generator and the DISCOMs should then claim the same as part of the FSA. The objector misconceived the FSA of tariff. The Hon'ble Commission, as part of its order held that FSA applicable shall be in addition to the tariff. The present proceedings are to achieve the object of correctness or otherwise of the FSA claims that are made by the DISCOMs. If the claims are found to be excessive / incorrect the same would be appropriate corrected to the entitled quantum by APERC. Therefore, there is no possibility of unapproved claims passed on to the consumers. Clause 45-B of CBR not only provides the incremental cost of fuel incurred by the generators / DISCOMs, also provides prior period expenses and some part of fixed costs. Therefore, the claims made by the DISCOMs, subject to the correction of quantum, are made in accordance with the law in force*
>
> ***Commission's views***
>
> *The claims of variable costs / other legitimate claims, either pertaining to the Central Generating Stations or pertaining to the power plants under APGENCO, are made in accordance with the respective regulations (Terms & Conditions of Tariff determination for Generators) issued by either CERC or*

APERC, as the case may be and as per the respective clauses of the PPAs entered into by the Distribution Licensees with the Generators. Based on these, Commission thoroughly examines the claims/bills submitted by the Generators/DISCOMs before finally admitting them."

38. The above findings rendered by the State Commission in the impugned order would show that the State Commission thoroughly examined the bills submitted by the Generators as well as the Distribution Companies before finally allowing the same.

39. The very purpose to provide FSA is to compensate the Distribution Licensee for the increase in power purchase costs during the year to keep its financial liquidity intact. In practice, a generator has to make payment for the fuel. Any increase in fuel price will have to be compensated else the generator would not be in position to procure enough fuel to generate. Therefore, the DISCOMs who procures power from the Generators, they would have to pay the generators the increased costs. If DISCOMs are not compensated during the period, their liquidity would be affected. In case the Regulatory control is enforced at every level, the very purpose of FSA would be lost.

40. In the light of the above, this issue is decided as against the Appellants.

41. The **Fifth issue** would relate **to inclusion of the Expenditure incurred in the past.**

42. According to the Appellant, the specific objections was raised that prior period expenditure of Rs.1,230.59 Crores as payments to the APGENCO alone was amounted for Rs.1165.46 Crores and the explanation provided for spending such high expenditure is not clear. On this issue, the State Commission has analysed and passed the following order:

> *Admissibility of prior period expenses:*
>
> ***Views of Objectors***
>
> *Sri Thimma Reddy, M.V. Mysoora Reddy, Ex. M.P., B. Janaki Prasad of Y.S.R Congress Party, Sri T. Harish Rao, MLA/Siddipeta, Dr. K. Narayana of CPI, Sri K Raghu and others submitted that Figures for the 1st quarter of 2012-13 show that variation in fixed cost and prior period expenditure (which is nothing but differed fixed cost recovery) together account for 62.1 percent of the FSA claim of DISCOMs for the first quarter of 2012-13. Prior period expenditure alone accounts for 56.81 percent of FSA.*
>
> *Sri. Gopal Chowdary, Representatives/Learned Counsel for M/s Andhra Sugars and others submitted that the amounts shown as prior period expenses, purportedly in respect of periods as far back as the year 2000, aggregating to over 1200 Cr for the quarter is astounding. The provision for prior period expenses in the formula is being grossly abused to mulct a section of the consumers in an arbitrary, capricious, irrational and unreasonable manner. This requires serious consideration and there has to be a different method of dealing with these so-called prior period expenses. There is no indication as to any criteria for identifying prior period expenses in relation to a particular month quarter. Properly, if at all, these should be considered in an appropriate true up proceedings where all the expenses of the licensees are*

taken into consideration and they are passed through to the cost of service in the same manner as was done in the original tariff orded the FSA claims as per the regulations in vogue.

***Commission's Views**:*

Commission has examined all the objections put forth by the concerned on the prior period expenditure claims of the DISCOMs. All the bills pertaining to the prior period expenditure would be thoroughly scrutinized before finalizing the FSA amount. The expenditure pertaining to PGCIL, STOA, MTOA, and Posoco are proposed to be disallowed by the Commission, since the same were not covered in the respective Tariff Order, under 'power purchase cost'.

The expenditure pertaining to the revision of cost, for the energy supplied in the month of March-2012, under bundled power by NVVNL, is proposed to be disallowed since this energy was not considered while determining the FSA of 4th quarter of FY 2011-12.

The expenditure pertains to Farakka station of NTPC, claimed in the month of June-2012, which is also proposed for disallowing since the details are not furnished by the DISCOMs.

43. According to the State Commission, in the impugned order, the State Commission has examined all the objections and all the bills pertaining to the prior period of expenditure and finalised the FSA amount while the expenditure pertaining to some of the other Distribution Companies were disallowed holding that the same were not covered in the respective tariff orders under the Power Purchase Cost.

44. The above findings cannot be said to be in valid as we notice no infirmity in the matter. Further, the period covered under the order is already over and the State Commission

have in fact issued fresh tariff orders for the Financial Year 2013-14.

45. Therefore, this issue raised by the Appellant cannot be said to be valid. Accordingly, the same is decided as against the Appellant.

46. In respect of the **other two issues (6th and 7th Issue)** relating to the **Exemption of Agricultural Consumers from FSA** and **Estimation of Unmetered Consumption**, it is submitted by the Appellant that specific objections were raised that agricultural consumption cannot be excluded from the denominator of the Formula for the computation of the FSA and the Licensees should not supply any electricity except through the meter in any time after June, 2005.

47. While considering these issues we feel that the State Commission has subtracted supply to the Agricultural consumption as per the Regulations.

48. It is settled law that validity of the Regulations cannot be challenged before this Tribunal. Therefore, the Appellants would raise these issues being the tariff order at the time of fixation of the new tariff.

49. In the above circumstances, we are not inclined to go into the validity of these issues at this stage.

50. Summary of Our Findings

i) **On going through the records and also on hearing the submissions of the parties, we are of the view that the pendency of the Writ Petition will not come in the way of the adjudication of the present Appeal proceedings before this Tribunal.**

ii) **The conjoint reading of these regulations would make it evident that only the Regulations framed under 2003 Act without prior publication alone are to be required to be published seeking comments from stake holders. Regulations framed under AP Reforms Act which is consistent with the 2003 Act do not come within the purview of the Ninth Difficulty Removal Order 2005. Further, these Regulations had been in force since 1999. Unsettling these merely on the ground that these had not been re-published after the Ninth Difficulty Removal Order, 2005 would cause great ramifications.**

iii) **It is clear that the State Commission has followed the directions of the State Government and fixed the retail Uniform Tariff in all State. In that case, the Appellant ought to have challenged the main**

tariff order. But this has not been done. As such, the same has attained finality. It is not understood as to why the Appellants did not challenge the order on this ground. Once Uniform Retail tariff has been accepted by not filing the Appeal, the Appellants have no reasons to challenge the uniform FSA which in fact is a part of the tariff.

iv) **The very purpose to provide FSA is to compensate the Distribution Licensee for the increase in power purchase costs during the year to keep its financial liquidity intact. In practice, a generator has to make payment for the fuel. Any increase in fuel price will have to be compensated else the generator would not be in position to procure enough fuel to generate. Therefore, the DISCOMs who procures power from the Generators, they would have to pay the generators the increased costs. If DISCOMs are not compensated during the period, their liquidity would be affected. In case the Regulatory control is enforced at every level, the very purpose of FSA would be lost.**

v) **The findings of the State Commission cannot be said to be in valid as we notice no infirmity in the matter. Further, the period covered under the order is already over and the State Commission have in**

fact issued fresh tariff orders for the Financial Year 2013-14.

51. In view of our above findings, we feel that there is no merit in the Appeals. Hence, both the Appeals are dismissed. However, there is no order as to costs**.**

(V J Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: **11th Oct. 2013**

√REPORTABLE/~~NON-REPORTABALE~~