

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

**Appeal no. 96 of 2013 and
Appeal no. 130 of 2013**

Dated : 30th June, 2014

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

Appeal no. 96 of 2013

In the matter of:

**Amman-Try Sponge and
Power Private Limited
#46 Usman Ali Street, TVS Tollgte
Tiruchirapalli – 620 020**

...Appellant(s)

Versus

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

...Respondent(s)

**2. Southern Power Distribution Company
of Andhra Pradesh Limited (APSPDCL
19-13-65/A, Srinivasapuram
Tirupati – 517 501**

Counsel for the Appellant(s) :

**Mr. Shridhar Prabhu
Mr. Anantha Narayan M.G.**

Counsel for the Respondent(s): Mr. P. Shiva Rao
Mr. K.V. Mohan
Mr. G.V. Brahamananda
Mr. P.M. Jaikesh Yadav

Appeal no. 130 of 2013

A.P. Ferro Alloys Producers AssociationAppellant(s)
No. 308, Nirmal Towers,
Dwarakapuri Colony
Panjagutta, Hyderabad – 500 082

Versus

1. **Andhra Pradesh Electricity Regulatory Commission** ...Respondent(s)
Singareni Bhavan, Red Hills
Lakdikapul, Hyderabad – 500 004
2. **Central Power Distribution Company of Andhra Pradesh Limited**
6-1-50, Mint Compound
Hyderabad – 500 063
3. **Eastern Power Distribution Company of Andhra Pradesh Limited**
APEDCL, Beside Nakkavanipalem
Sub-station, Near Gurudwara
Visakhapatnam – 530 013
4. **Northern Power Distribution Company of Andhra Pradesh Limited**
H. No. 1-1-478, 503 & 504
Chaitanyapuri, Hanamkonda
Warangal – 506 004

**5. Southern Power Distribution Company
of Andhra Pradesh Limited
19-13-65/A, Srinivasapuram
Tirupati – 517 501**

**Counsel for the Appellant(s) : Mr. Shridhar Prabhu
Mr. Anantha Narayan M.G.**

**Counsel for the Respondent(s): Mr. P. Shiva Rao
Mr. K.V. Mohan
Mr. G.V. Brahamananda
Mr. P.M. Jaikesh Yadav**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

These Appeals have been filed by M/s. Amman-Try Sponge and Power Pvt. Ltd. and Andhra Pradesh Ferro Alloys Producers Association challenging the order dated 12.3.2013 passed by Andhra Pradesh Electricity Regulatory Commission (“State Commission”) in the matter of determination of Fuel Surcharge Adjustment (FSA) for the second quarter (July, 2012 to September, 2012) of FY 2012-13.

2. The Appellants are Industrial Consumer and Consumer Association. The State Commission is the Respondent no.1. The Distribution Licensees are the other Respondents.

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

i) The Distribution Licensees filed a petition on 26.10.2012 before the State Commission regarding determination of Fuel Surcharge Adjustment for the quarter July-September, 2012. The Distribution Licensees proposed a Fuel Surcharge Adjustment ("FSA") at the rate of 82.39 paise/kWh. Subsequently, public notice was issued and public hearing was held and after considering the objections obtained from the public, the State Commission passed the impugned order dated 12.3.2013 for the quarter July-September, 2012 allowing FSA at the rate of 62.13 paise/kWh to be recovered from all the

consumers except LT agricultural consumers on a monthly basis during April, 2013 to June, 2013.

ii) Aggrieved by the above order of the State Commission, the Appellants have filed these Appeals.

4. The Appellants have raised a number of issues in these Appeals. However, it has been pointed out by them that most of the issues in the present case are covered by the judgment dated 11.10.2013 rendered by this Tribunal in Appeal nos. 51 of 2013 and 58 of 2013 and have restricted their submissions on the following issues which according to them are not covered by the above judgment.

- A) Incomplete details: Violation of principles of natural justice:

The Distribution Licensees did not provide the full details that are required for thorough scrutiny of the FSA proposals either at the time of publication or at the time of public hearing. Neither the details provided by the Distribution Licensees nor the formula contained in the Regulation is the basis for determination of the FSA. The entire FSA has been determined on ad hoc basis without any basis.

- B) Truing up Vs. FSA:

The State Commission did not conduct periodical APR and truing up exercise and to cover the resultant effect the State Commission not only passed the fuel surcharge expenses but also passed on other expenses which cannot be grouped under the category of FSA. The State

Commission issued notice on 1.12.2012 to all the Distribution Licensees to furnish certain information within a month. This information was neither the part of the Petition nor was apprised in the public domain.

C) Non-application of FSA formula:

The prior period expenses were also included in the FSA which is not permissible. Further as the true up for the previous year has not been carried out it is not proper to pass on the burden of FSA on the consumers.

D) Ceiling price breach:

The State Commission allowed short term power procurement beyond the ceiling price fixed by it in the main tariff order for FY 2013-14. The State Commission could not have revised the ceiling price

unilaterally and enhance the price of short term purchase for the second quarter of FY 2012-13.

E) High cost of power:

Reasoning and rationale for allowing high cost imported coal by APGENCO and NTPC is very vague and hence does not stand on the scrutiny of law. The State Commission ought to have made a detailed scrutiny of the claim submitted by the Distribution Licensees before allowing this expenditure.

F) Uniform tariff and challenge to the main tariff order:

In the earlier proceedings, this Tribunal had rejected the contention of the Appellants that uniform tariff has been determined by the State Commission ignoring the FSA formula contained in the Regulations. This contention was rejected by

the Tribunal on the ground that the Appellants had not challenged the main tariff order issued by the State Commission. However, the Appellants in this case have challenged the main tariff order for FY 2013-14 and the FSA as well are being challenged by the Appellants.

G) Agricultural consumption:

In the judgment rendered in the previous case, it is held that the subtraction of the supply to agricultural consumption is as per the regulations and the validity of the Regulations could not be challenged before this Tribunal. However, the point raised by the Appellants in the present Appeal is that the agricultural consumption is free as per the State Government Policy. The same is payable in full by the State Government as per the tariff order in consonance with Section 65 of the Act. However,

when it comes to levy of FSA, the State Commission passes on this burden only to the non-agricultural consumers.

5. We have heard the Learned Counsel for the Appellants and Learned Counsel for the Distribution Licensees.
6. According to the Learned Counsel for the Distribution Licensees all the issues raised in the present Appeals are covered against the Appellants in the judgment by this Tribunal dated 11.10.2013 in Appeal nos.5 of 2013 and 58 of 2013.
7. On the basis of the rival contentions of the parties, the following questions would arise for our consideration.

- i) Whether the impugned order has been passed in violation of the principles of natural justice?
- ii) Whether the State Commission has erred in passing on other expenses not under the category of FSA in the impugned order?
- iii) Whether the impugned order has been inconsistent with the FSA formula specified by the State Commission?
- iv) Whether the State Commission has erred in enhancing the ceiling price for short term power purchase?
- v) Whether the State Commission has erred in allowing high cost of imported coal used by thermal stations of APGENCO and NPTC?

- vi) Whether the State Commission has erred in applying uniform FSA to all the Distribution companies?
 - vii) Whether the State Commission has erred by not passing on the FSA on the agricultural consumers?
8. The first issue is regarding violation of principles of natural justice.
 9. According to the Appellants, the Distribution Licensees did not provide full details for scrutiny of FSA proposals at the time of publication of petitions or at the time of public hearings and the entire FSA was determined on ad hoc basis.
 10. According to the Distribution Licensees, on the basis of the objections raised by public, information

was sought by the Commission which was furnished by them. On this basis, it is contended that the subsequent information need not once again be required to be posed to public. This principle of law is settled by Division bench of High Court of Andhra Pradesh in S. Bharat Kumar and others Vs. Government of Andhra Pradesh in judgment reported as 2000(6) ALD 217. This judgment was upheld by the Hon'ble Supreme Court in case of Association of Industrial Electricity Users Vs. State of Andhra Pradesh reported as 2002 AIR SC 1361.

11. We notice that public notice of the petition filed by the Distribution Licensees was published in the newspapers on 6.11.2012 and public were requested to file their objections/suggestions. The State Commission in the impugned order has

considered all the objections/suggestions obtained from public and gave its findings on the same.

12. We find that some of the objectors submitted that the FSA proposal filed by DISCOMS did not contain some important information like GCV and quantity of both indigenous and imported coal to decide their claim. The State Commission after considering the objections of the objectors directed the Distribution Licensees to provide some more details/clarifications to verify the information furnished by them in order to determine the FSA. The relevant paragraph of the impugned order is reproduced is as under:

“The Commission has issued the notice on dated. 01.12.2012 to all the Discoms to furnish the Information within a month, the landing prices of the imported coal and domestic coal, GCVs, quantity of coals used separately for imported coal and domestic coal, the GCV of blended coal, quantity of blended coal and its price of all APGENCO Thermal

Stations and NTPC stations. On the notice issued, the Discoms have submitted the required information furnished by the APGENCO stations. Regarding the NTPC stations, the NTPC authorities have stated in their letter that the information already furnished is as per the contents in the CERC tariff orders for FY 2009-14. However the CERC has issued amended orders in the month of Dec-2012 to furnish the details such as landing prices, GCVs and quantities of imported coal and domestic coal used during the month separately for both imported and domestic coal and also GCV, quantity and price of blended coal used. The NTPC authorities have stated that the required particulars will be submitted from the month of Jan-2013. After taking into consideration of the facts furnished by the APGENCO and NTPC, the Commission is of the view to determine the FSA for this quarter based on the information furnished by the Discoms.”

13. Thus, the State Commission had sought some more details/clarifications to verify the claim of the Distribution Licensees which was furnished by the Distribution Licensees in respect of APGENCO. However, for NTPC stations it was informed that it was as per the tariff order of Central Commission. The State Commission after prudence check of the

claim made by the Distribution Licensees, decided the FSA according to the formula prescribed in the Regulations. The State Commission has given detailed calculations in the impugned order. We feel that the additional information provided by the Distribution Licensees to verify the FSA claim of distribution licensees was not required to be notified to the public again. However, we direct that the audited information regarding cost of fuel for the FY 2012-13 in respect of APGENCO stations shall be made public at the time of true up of the accounts for FY 2012-13.

14. Thus, we do not find any merit in the contention of the Appellants that the FSA has been worked out on adhoc basis.
15. The second issue is regarding truing up

16. According to the Appellants, the State Commission pass on other expenses not covered under the category of FSA to the consumers as part of the FSA.

17. We notice that the State Commission has considered the prior period expenditure claimed by the Distribution Licensees and after scrutiny allowed negative (credit) amount of Rs. 38.68 crores in the FSA. The Specified FSA formula also has a provision for adjustment of expenses for the past period. In this case the adjustment for the past period has resulted reduction in the FSA. In view of this we reject the contention of the Appellants in regard to the adjustment for the past period.

18. The third issue is regarding FSA formula.

19. According to the Appellants, the FSA has not been determined as per the formula. As already held by us, the State Commission has computed the FSA according to the specified formula. Therefore, this issue is also decided against the Appellants.
20. The fourth issue is ceiling price of short term power purchase.
21. According to the Appellants, the State Commission has erred in enhancing the ceiling price for short term power purchase from that determined in the main order.
22. According to the Respondent Distribution Licensees, depending on the availability of power, transmission constraints, etc., the market prices of

power would vary. Therefore, considering the variation in the market prices as found in transaction carried out in the power exchange, the Commission has revised the ceiling price to Rs. 5.50 per unit as against Rs. 4.17/kWh that was fixed in the tariff order for FY 2012-13. The aspect of tariff, as decided by the Hon'ble Supreme Court, is a continuous process and the same can be revised during the tariff period depending upon the prevailing circumstances. The Respondents referred to the judgment reported at 2009 ELR (SC)0013 between UP Power Corporation Ltd. Vs. NTPC.

23. Let us examine the findings of the State Commission in this regard, the relevant paragraph is as under:-

“Regarding the short term power purchases by the DISCOMs, Commission had indicated a maximum ceiling price of Rs.4.17/kWh on the average (with Rs.2.65/kWh during off peak and Rs.4.50/kWh during peak) in the Tariff Order. The Commission subsequently amended the maximum ceiling price as Rs.5.50/kWh for purchases of power from short-term sources, subject to procurement of power from such sources by Web based competitive procurement process. However, maximum ceiling price is not operative for purchases made through IEX and IPX. Commission, while scrutinizing the month-wise FSA amount for the months of June, July and Aug-2012, in the merit order dispatch, is limiting the Power Purchase rate at Rs.5.50/unit for short term power purchases made over and above the maximum ceiling provided such purchases are made through competitive bidding process. “

24. According to the Distribution Licensees, they had approached the State Commission explaining the power shortage, the prevailing market price and technical constraints in Southern Regional grid in procuring short term power. The transmission corridor had also to be booked well in advance to ensure supply of the power in short term.

25. The State Commission has authority to revise the ceiling price for procurement of short term power fixed in the main tariff order. The tariff order is issued based on the projections and the estimated prices. The price of power in the short term may vary depending on the demand and availability of power in the short term market, transmission constraints, etc. The State Commission keeping in view the power supply position in the State and the prevailing market conditions can enhance the ceiling price. We do not find any infirmity in the State Commission allowing to increase the ceiling price in view of the prevailing circumstances, provided the purchases are made through competitive bidding process. This issue is also decided against the Appellants.

26. The fifth issue is regarding high cost of imported coal.
27. We notice that the issue regarding high cost on imported coal by the power stations of APGENCO and NTPC stations were raised by some of the objectors. The relevant finding of the State Commission in this regard is as under:

“The Central Generating stations pertain to NTPC and are under the purview of central Electricity Regulatory Commission (CERC) for determination of tariff including procurement and price of coal. However the bills submitted by the CGS stations through Discoms have been prudently checked as far as quantity of coal with GCV used.

Regarding APGENCO stations the bills submitted by APGENCO authorities through Discoms have been checked prudently. They are procuring imported coal duly calling tenders from central public sector undertakings and orders have been placed on lowest bidder. The rates are also competitive. In case of shortage in supply of linkage coal, the domestic coal is procured from M/s. SCCL at premium price which is a weighted average of e-

procurement price. Due to this there is variation in average price of domestic coal.”

28. We find that the State Commission has allowed the price of coal after prudence check. Accordingly this issue is also decided against the Appellants.
29. The sixth issue is regarding uniform FSA to all distribution companies.
30. According to the Appellants in the earlier proceedings the Tribunal had rejected the contention of the Appellants on the ground that the Appellants have not challenged the main order. However in this case they have challenged the main order for FY 2013-14 as well as the FSA.
31. We find that the impugned order pertains to the second quarter of the FY 2012-13. The Appellants

have not challenged the tariff order for FY 2012-13 but have challenged the subsequent tariff order for FY 2013-14. Therefore, findings of the Tribunal in judgment dated 11.10.2013 in Appeal nos. 5 of 2013 and 58 of 2013 will squarely apply to the present case. Accordingly, this issue is also decided against the Appellants.

32. The seventh issue is regarding agricultural consumers.

33. According to the Appellants, the judgment of this Tribunal in Appeal no. 5 of 2013 and Appeal no. 58 of 2013 would not be applicable as the judgment which has not rendered justification of the action of the Distribution Licensees of passing the entire burden of FSA on account of agricultural consumption on the non-agricultural consumers.

34. This Tribunal has given a very categorical finding that the agricultural consumption has been excluded as per the Regulations and it is a settled law that validity of Regulations cannot be challenged before this Tribunal.
35. We also notice that the State Commission has considered this issue in the impugned order as some objectors had filed objections regarding treatment of agricultural consumption in determination of FSA.
36. We find that the findings of this Tribunal in Appeal nos. 5 of 2013 and 58 of 2013 would squarely apply to the present case too. Accordingly, this issue is also decided against the Appellants.

37. Summary of our findings

We notice that most of the issues raised in this Appeal have been covered in the judgment by this Tribunal dated 11.10.2013 in Appeal no. 5 of 2013 and Appeal no. 58 of 2013. Some additional points have been raised by the Appellants in which we do not find any merit.

38. In view of the above, the Appeal is dismissed as devoid of any merits. No order has to costs.

39. Pronounced in the open court on this 30th day of June, 2014.

**(Rakesh Nath)
Technical Member**

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**(Justice M. Karpaga Vinayagam
Chairperson**

REPORTABLE/NON-REPORTABLE

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