

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

**Appeal No. 13 of 2010,
Appeal No. 198 of 2010 and
Appeal No. 42 of 2011**

Dated: 26th July, 2012

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice P.S. Datta, Judicial Member**

In the matter of:

Appeal No.13 of 2010

**M/s. Ispat Industries Limited,
Registered office at Park Plaza,
71, Park Street, Kolkatta-16
Branch Office: Nirmal, 7th Floor,
Nariman Point,
Mumbai-400 021**

... Appellant(s)

Versus

**1. Maharashtra State Electricity
Distribution
Company Limited,
Prakashgad, Bandra (East),
Mumbai-51.**

... Respondent(s)

**2. Maharashtra Electricity Regulatory Commission,
World Trade Centre No. 1,
13th Floor, Cuffe Parade,
Mumbai-400 005**

Counsel for the Appellant(s): Mr. G. Umapathy
Mr. Ramasubramaniam
Ms. Sudha Umapathy
Mr. Rohit Singh
Mr. Sakesh Kumar

Counsel for the Respondent(s): Mr. Buddy A. Ranganathan
Mr. Abhishek Mitra,
Mr. Aabhish Bernard
Mr. Samir Malik
Ms. Richa Bhardwaj
Mr. Adab Singh
Mr. Vikas Singh, Sr. Adv.
Ms. Amrita Narayan

Appeal No. 198 of 2010

**M/s. Ispat Industries Limited,
Registered office at Park Plaza,
71, Park Street, Kolkatta-16
Branch Office: Nirmal, 7th Floor,
Nariman Point,
Mumbai-400 021**

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Counsel for the Appellant(s): Mr. G. Umapathy
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Mr. Abhishek Mitra,
Mr. Aabhis Bernard
Mr. Samir Malik
Ms. Richa Bhardwaj
Mr. Adab Singh
Mr. Vikas Singh, Sr. Adv.
Ms. Amrita Narayan

Appeal No. 42 of 2011

**Maharashtra State Electricity
Distribution Co. Ltd.
Plot No. G-9, Prakashgad, Bandra (E)
Prof. Anant Kanekar Marg
Mumbai 400 051** **... Appellant(s)**

Versus

- 1. Maharashtra Electricity Regulatory Commission,
Centre – 1, 13th Floor,
World Trade Centre, Cuffe Parade,
Mumbai-400 005** **... Respondent(s)**
- 2. Prayas (Energy Group)
Amrita Clinic, Athwale Corner
Lakdipool-Karve Road Junction
Deccan Gymkhana, Karve Road
Pune – 411 004**

- 3. Mumbai Grahak Panchayat
Grahak Bhavan
Sant Dynaneshwar Marg
Behind Cooper Hospital
Vile Parle (West), Mumbai 400 056**
- 4. Thane Belapur Industries Association
Plot No.P-14, MIDC
Rabale Village, PO Ghansoli
Navi Mumbai 400 701**
- 5. Vidarbha Industries Association
1st Floor, Udyog Bhawan
Civil Lines, Nagpur 440 001**
- 6. Shri N. Ponrathnam
25, Majithia Industrial Estate
Waman Tukaram Patil Marg
Deonar, Mumbai 400 088**
- 7. Shri Rakshpal Abrol
Bhartiya Udhmi Avam Upbhokta Sangh
Madhu Compound, 2nd Floor
2nd Sonawala Cross Road
Goregaon (East), Mumbai 400 063**
- 8. Shri Sandeep N. Ohri
A-74, Tirupati Tower
Thakur Complex, Kandivali (East)
Mumbai 400 101**
- 9. Prof. Dr. Barhate G.H.
Organiser, Grahak Panchayat
Shrirampur**

Chairman, Research Centre

**C.D. Jain College of Commerce
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Counsel for the Appellant(s): Mr. Vikas Singh, Sr. Adv.
Mr. Abhishek Mitra
Ms. Pooja Priyadarshini

Counsel for the Respondent(s): Mr. Buddy A. Ranganathan
Mr. Samir Malik
Ms. Richa Bhardwaj

JUDGMENT

MR. RAKESH NATH, TECHNICAL MEMBER

Three Appeals, being no.13 of 2010, 198 of 2010 and 42 of 2011 are being disposed of by this common judgment because of commonality of the issues.

Appeal Nos. 13 of 2010 and 198 of 2010 have been filed by M/s. Ispat Industries Limited, an Extra High Voltage (“EHV”) consumer of Maharashtra State Electricity Distribution Company Limited, a distribution licensee. Appeal No. 13 of 2010 has been filed challenging the order of the Maharashtra Electricity Regulatory Commission (“State

Commission”) dated 17th August, 2009 regarding truing up for the Financial Year 2007-08, Annual Performance Review for the FY 2008-09 and tariff determination for the FY 2009-10, while Appeal No. 198 of 2010 has been filed against the order passed by the State Commission on 12th September, 2010 regarding truing up for the Financial Year 2008-09, Annual Performance Review for the FY 2009-10 and Tariff determination for the FY 2010-11 for the distribution licensee. Maharashtra State Electricity Distribution Company is the Respondent no.1 and the State Commission is the Respondent no.2.

2. Appeal No. 42 of 2011 has been filed by Maharashtra State Electricity Distribution Company Ltd., against the orders dated 12.9.2010 and 02.12.2010 passed by the State Commission regarding the truing up for the FY 2008-09, Annual Performance Review for the FY 2009-10 and Aggregate Revenue Requirement and Tariff determination for the FY 2010-11. The State Commission

- is the respondent no. 1. The respondent nos. 2 to 9 are the consumer associations/NGOs.
3. On 18.2.2010 the appellant submitted a petition before the State Commission for APR for the FY 2009-10 and ARR and tariff determination for the FY 2010-11. The State Commission after following the due process, passed the impugned order dated 12.9.2010 regarding true up for the FY 2008-09, APR for the FY 2009-10 and ARR and tariff for the FY 2010-11. On 18.10.2010, the appellant filed a review petition before the State Commission seeking review of the Tariff Order dated 12.9.2010 on certain aspects.
 4. The State Commission passed an order dated 2.12.2010 disposing of the review petition partially modifying its original tariff order. However, some of the issues raised by the appellant were rejected in the review. Aggrieved by the orders dated 12.9.2010 and 2.12.2010, the appellant has filed this appeal.

5. Even though a number of issues have been raised in the appeals 13 of 2010 and 198 of 2010, the learned counsel for the appellant has argued only on the following issues making reference to the appeal paper book of Appeal No. 198 of 2010 for the Tariff Year 2010-11 for the sake of brevity.

5.1 **Power Purchase Expenses:**

The power purchase component is an important component in determination of tariff. The State Commission has failed to apply the prudence check on the power purchase cost. The increase of Rs.127 crores in Power Purchase Expenses has not been explained. Further, there is no requirement to purchase power from traders in the FY 2010-11.

5.2 **Controllable and uncontrollable expenses:**

The Tariff Regulations define controllable and uncontrollable expenses and set guidelines on how these

expenses are to be treated. The Regulations also state the mechanism for sharing of profits and losses. Despite the regulations, the State Commission has not provided clear demarcation of the over/under achievement of the controllable and uncontrollable items and a detailed analysis of pass through and sharing mechanism. The State Commission has considered all the expenses as uncontrollable thereby providing no scope for efficiency improvement. Only in respect of Administrative and General (A&G) expenses and Repair and Maintenance (R&M) expenses, the figures have been slightly reduced. All other expenses such as power purchase cost, distribution loss, employees cost, etc., have been accepted as furnished by the distribution licensee.

5.3 **T & D Losses:** The State Commission has accepted the figures of distribution loss as furnished by the distribution license without any discussion on the treatment of expenses as controllable and uncontrollable factors. For the FY 2009-10 for the purpose of provisional

truing up, the State Commission has accepted the distribution loss of 20.12% as indicated by the distribution licensee instead of 18.20% allowed in the T&D loss trajectory in earlier order. However, efficiency loss on that account has not been computed and has been deferred to the final truing up.

5.4 **Average Cross Subsidy/Cost of Supply:** The average cost of supply of the distribution licensee has been increasing every year and the appellant has been made to share a greater burden of cross subsidy. The high cross subsidy is being prescribed contrary to the scheme of the Act and the Tariff Policy which provided that the cross subsidy is required to be reduced progressively. Further, the State Commission should have determined the cost of supply vis-a-vis the voltage of supply as per the ratio laid down by the Tribunal in various judgments. In this connection, the appellant has referred to the judgments of the Tribunal dated 30.05.2011 in Appeal nos. 102, 103 and 112 of 2010 in the matter of Tata Steel Ltd. Vs.

Orissa Electricity Regulatory Commission & Anr., etc.
and dated 28.07.2011 in Appeal nos. 192 and 206 of
2010 in the matter of Tamil Nadu Electricity Consumers
Association Vs. TNEB & Anr.

5.5 **New categorization:**The appellant had contended before the State Commission with regard to creating a special category for consumers with load of more than 100 MW and getting supply at 220 kV or 132 kV. The appellant also presented statistics of voltage-wise EHV tariffs in the various states to show that the tariff for EHV consumers in Maharashtra paying at HT-I category is much higher. This aspect has not been considered by the State Commission.

5.6 **Delayed payment charges and Bulk discount:** The State Commission should have increased the refund of RLC from Rs.500 crores to Rs.1000 crores and should have directed that till the refund of RLC is made fully, no delayed payment is charged and ensuring that there is no

threat of disconnection in case of delayed payment. The delayed payment surcharge is also very high and needs to be reduced. The Bulk Discount has been discontinued and the same needs to be initiated again. The Act also permits differentiation in tariff based on load, voltage, consumption, etc.

6. In appeal no. 42 of 2011, the appellant - distribution licensee had raised the issue of capitalization and capital expenditure and O&M expenditure, but during the pendency of the appeal, the State Commission in the subsequent tariff order dated 30.12.2011 has granted the balance capitalization which was outstanding. Now the appellant has submitted that the only issue that remains in the appeal is the disallowance of increase in Administrative & General (A&G) Expenses and Repair & Maintenance (R&M) expenses which are components of Operation & Maintenance expenses.

7. According to learned Sr. counsel for the distribution licensee, the O&M expenses have increased due to number of factors such as creation of new zones, divisions and subdivisions, theft detection initiative, additional security arrangements, higher expenses as a result of computer billing due to increase in consumers, implementation of photomonitoring, aging effect of equipment requiring frequent maintenance, renovation and modernization needs, etc., the details of which were furnished to the State Commission. However, the State Commission applied a blanket formula based on WPI and CPI figures to approve the said sums, without any prudence check and without considering the appellant's submissions regarding reasons for increase in expenses thereby denying the legitimate expenses. The reasons for increase in expenses are uncontrollable and ought to have been considered by the State Commission.

8. According to the distribution licensee, the State Commission has approved A&G and R&M expenses for

the FY 2008-09 as approved earlier in the APR order for the FY 2008-09 except for allowing Rs.5 crores cess paid to Excise Department. For the FYs 2009-10 and 2010-11, the State Commission arbitrarily allowed the expenses by applying inflation factor with combination of weightage for WPI and CPI, over the expenses allowed for the previous year. The WPI and CPI indices are not reflective of the price inflation applicable to the business of the distribution licensee.

9. Further, the State Commission failed to consider the uncontrollable factors such as opening of new zones/circles/divisions, additional security on account of higher incidence of theft, higher cost due to photo-metering and billing, advertisement costs to create awareness on pilferage as well as conservation, more R&M expenses due to ageing equipment, increase in utilization of cables due to widening of roads and replacement of old equipment. The complete rejection of increase in expenses for the FY 2008-09 has led to

establishment of inaccurate and inadequate base year figures for future enhancements.

10. The major portion of increase in Operation & Maintenance expenses are on account of creation of new zones, divisions, circles etc., as a result of consumer base. The State Commission has acted arbitrarily in not evaluating the uncontrollable nature of Operation & Maintenance expenses of the appellant, as was mandatorily required under Regulation 17.6 of the Tariff Regulations.
11. The State Commission in its counter affidavit has submitted that the approach adopted by the State Commission in this regard has been consistently adopted in the previous tariff orders. According to State Commission, both A&G and R&M expenses are controllable expenses.
12. On the above pleadings we have heard Ld. Counsel for M/s. Ispat Industries Ltd., Ld. Sr. Counsel for the

distribution licensee and Ld. Counsel for the State Commission. After considering the rival contentions of the parties, the following questions would arise for our consideration:

- i) Whether the State Commission has done prudence check while allowing the Power Purchase Expenses?
- ii) Whether the State Commission has erred in allowing the expenses as claimed by distribution licensee without analysis of controllable and uncontrollable expenses?
- iii) Whether the State Commission has erred in not allowing sharing of efficiency loss on account of non-achievement of T&D loss target by the distribution licensee for the FY 2009-10.
- iv) Whether the State Commission was correct in considering A&G and R&M expenses as controllable

without taking into account the various reasons submitted by the distribution licensee for increase in these expenses?

- v) Whether the State Commission has erred in not determining the voltage-wise cost of supply and increasing the cross subsidy for the appellant contrary to the provision of the Act and Tariff Policy.
- vi) Whether the State Commission has erred in not creating a separate category for the Appellant and other EHV consumers?
- vii) Whether the State Commission has erred in providing for Delayed Payment Surcharge at a very high rate while discontinuing the Bulk Discount?

13. Let us take the first issue regarding power purchase cost.

13.1 According to Ld. Counsel for Ispat Industries Ltd., the increase in power purchase cost has been high and has not been explained. According to Ispat Industries, the distribution licensee should purchase power through Unscheduled Interchange (UI) instead of buying from traders at high cost.

13.2 According to Ld. Sr. Counsel for the distribution licensee, the basic premise of Availability Based Tariff Mechanism which stipulates UI, is based on grid discipline. Each utility is expected to adhere to the schedule for 96 blocks of 15 minutes each every day, failing which there is inherent penalty. Therefore, considering UI as a source of power is incorrect.

13.3 This issue has been dealt with in details in the impugned order. In this connection it is relevant to note the following observation of the State Commission in the

impugned order dated 12.09.2010 on the objections of the stakeholders regarding power purchase cost.

“The Commission has been regularly directing MSEDCL to enter into the necessary long-term power purchase agreements at reasonable prices, to mitigate the demand-supply gap in its licence area. For FY 2010-11, based on the projected sales and allowed distribution losses, the energy requirement and power purchase from various sources has been considered, as elaborated in Section 4 of this Order. Based on the Commission’s realistic projections of sales and power purchase, there is no requirement to purchase power from traders in FY 2010-11.”

13.4 We notice from the source-wise details of Power Purchase Cost submitted by the distribution licensee for the FY 2009-10 that the major power purchase is from MAHAGENCO, the state owned generating company, central generating station, RGPPL, etc., the tariffs of which are regulated by the State/Central Commissions. The charges of Power Grid are also regulated. The power purchase cost as given in the impugned order are as under:-

S.No.	Source	Power Purchase Cost 'Crores'	Percentage
1.	MAHA GENCO	10777	50.4%
2.	RGPPL	3741	17.5%
3.	Dodson I & II, IBSM & CPP	238	1.1%
4.	Non-conventional energy	1074	5.0%
5.	Central Generating Stations (NTPC & NPCIL)	4356	20.5%
6.	SSP and PENCH	162	0.8%
7.	UI charges	6	
8.	Trading Company	668	(3.1%)
9.	Power Grid	350	(1.6%)
10.	Other charges (reactive, banking and wheeling)	1	
TOTAL		21373	100%

13.5 Thus 90% of power purchase cost is from state and Central generating stations/POWERGRID, the tariffs of which are determined and regulated by the State or Central Commission. The tariff of non-conventional

energy sources, CPPs, etc. within the state which comprise about 6% of Power Purchase Cost is also regulated by the State Commission. About 97% of the total Power Purchase Cost is borne through long term contracts. Only about 3.1% of the total Power Purchase Cost is effected through the traders through short term purchases. The short term purchases of 3.1% of the total power purchase cost in our opinion can not be termed as excessive. The State Commission has looked in the the actual Power Purchase Cost from these sources while carrying out provisional truing up for the FY 2009-10. This is also subject to final truing up on the basis of the audited accounts.

13.6 For the FY 2010-11 the State Commission has estimated the power purchase from Central/State generating stations and other long term contracts and has not considered any power purchase from traders and has asked the distribution licensee to consider purchase of power from traders only in case of increase in energy

requirements and/or shortfall in energy availability from other sources. We do not find any infirmity in the directions of the State Commission regarding short term power procurement.

13.7 We are also in agreement with the contention of the Ld. Sr. Counsel for the distribution licensee that Unscheduled Interchange (UI) could not be treated as source of power. In fact drawal of power in excess of the schedule i.e. the UI, under low frequency conditions which is experienced under shortage conditions, may result in heavy penalty besides endangering the security of the grid.

13.8 Thus, we do not find any infirmity in determining the power purchase cost of the distribution licensee by the State Commission. This issue is, therefore, decided against the appellant, M/s Ispat Industries Ltd.

14. The second, third and fourth issues are inter-connected and hence being dealt with together.

14.1 According to Ld. Counsel for M/s. Ispat Industries Ltd, the State Commission has mechanically allowed the expenses as claimed by the distribution licensee without clearly demarcating the uncontrollable and controllable expenses.

14.2 According to Ld. Counsel for the State Commission, the Commission has undertaken final truing up for the FY 2008-09 based on the audited accounts and prudence check and has undertaken the sharing of efficiency gains and losses due to controllable factors, in accordance with the Regulations. The State Commission has also carried out the provisional true up for the FY 2009-10, based on the available data of actual expenses and estimation for the remaining period of the year and has made projections for the FY 2010-11 as per the Regulations. The appellant has not been able to point out any flaw, irregularity or illegality in the impugned order. Ld. Counsel for the State Commission also referred to the

various clauses of the impugned order where sharing of efficiency gain/loss has been decided.

14.3 According to Ld. Sr. Counsel for the distribution licensee, the State Commission should have carried out the prudence check of the Administrative and General and Repair and Maintenance expenses and looked into the specific reasons for the increase in these expenses rather than deciding that these expenses were controllable. When the base figure for the FY 2008-09 has been much lower than the actual, it would result in lower expenses for the FYs 2009-10 and 2010-11 which were derived from the indexation of the base figures. This has resulted in denial of prudent Administrative and General and Repair and Maintenance expenses to the distribution licensee.

14.4 Let us first examine the relevant tariff Regulations, which are reproduced below:-

“12.2 The multi-year tariff framework shall be based on the following elements, for calculation of aggregate revenue requirement and expected revenue from tariff and charges:

- (i) control period, at the commencement of which a forecast of the aggregate revenue requirement and expected revenue from existing tariffs and charges shall be submitted by the applicant and approved by the Commission;*
- (ii) applicant’s forecast of aggregate revenue requirement and expected revenue from tariffs and charges during the control period, based on reasonable assumptions relating to the expected behaviour of the underlying financial and operational variables;*
- (iii) trajectory for specific variables as may be stipulated by the Commission, where the performance of the applicant is sought to be improved through incentives and disincentives;*
- (iv) annual review of performance vis-à-vis the approved forecast and categorization of variations in performance into those that were caused by factors within the control of the applicant (controllable factors) and those caused by factors beyond the control of the applicant (uncontrollable factors);*
- (v) mechanism for pass-through of approved gains or losses on account of uncontrollable factors;*
- (vi) mechanism for sharing of approved gains or losses arising out of controllable factors;*

(vii) annual determination of tariff for each financial year within the control period, based on the approved forecast and results of the annual performance review.

“ 15 Forecast

*15.1 The applicant shall submit the forecast of aggregate revenue requirement and expected revenue from tariff for the control period in such manner, within such time limit and accompanied by such fee payable therefore as provided in **Part B** of these Regulations.*

15.2 Forecast of aggregate revenue requirement

15.2.1 The applicant shall develop the forecast of aggregate revenue requirement using any one of the following two methodologies:

(a) Assumptions relating to the behavior of individual variables that comprise the aggregate revenue requirement during the control period; or

(b) Assumptions relating to-

(i) percentage annual change in a suitable macro-economic or market index, or combination thereof, to which the aggregate revenue requirement of the applicant is correlated; and

(ii) percentage annual reduction in aggregate revenue requirement due to efficiency or productivity gains proposed to be achieved by the applicant during the control period:

Provided that applications under this Regulation for the control period commencing from April 1, 2006 shall be accompanied by forecasts developed using the methodology specified in clause (a) above.”

“15.5 Upon studying the application, the Commission shall either-

- (a) pass an order approving the forecast of aggregate revenue requirement and expected revenue from tariff and charges for the control period, subject to such modifications and conditions as it may specify in the said Order; or*
- (b) reject the application for reasons to be recorded in writing, if it is not in accordance with the principles contained in Section 61 of the Act or these Regulations and direct the applicant to submit a revised forecast taking into consideration such factors as the Commission may deem appropriate”.*

“15.6 The Commission shall, in its Order passed under Regulation 15.5 above, specify the variables comprised in the aggregate revenue requirement and expected revenue from tariff and charges of the applicant that shall be reviewed by the Commission as part of the annual performance review in accordance with Regulation 17 below:

“17 Annual review of performance”

“17.5 For the variables stipulated by the Commission under Regulation 15.6, the Commission shall carry out a detailed review of performance of the applicant vis-à-vis the approved forecast, as part of the annual performance review.

17.6 Upon completion of the review under Regulation 17.5 above, the Commission shall attribute any variations or expected variations in performance, for variables stipulated under Regulation 15.6 above, to factors within the control of the applicant (controllable factors) or to factors beyond the control of the applicant (uncontrollable factors):

Provided that any variations or expected variations in performance, for variables other than those stipulated under Regulation 15.6 above, shall not be reviewed by the Commission during the control period and shall be attributed entirely to controllable factors:

Provided however that where the applicant or any interested or affected party believes, for any variable not stipulated under Regulation 15.6 above, that there is a material variation or expected variation in performance, for any financial year, on account of uncontrollable factors, such applicant or interested or affected party may apply to the Commission for inclusion of such variable, at the Commission's discretion, in the review under Regulation 17.5 above for such financial year.

Explanation – for the purpose of these Regulations, the term “uncontrollable factors” shall include the following factors which were beyond the control of, and could not be mitigated by, the applicant, as determined by the Commission-

- (a) Force Majeure Events;*
- (b) changes in law, judicial pronouncements and Orders of the Central Government, State Government or Commission;*
- (c) economy-wide influences, such as unforeseen changes in inflation rate, market-interest rates, taxes and statutory levies”.*

“17.6.1 Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to uncontrollable factors include, but are not limited to, the following:

- (a) Variation in the cost of power generation and/ or power purchase due to the circumstances specified in Regulation 25;*
- (b) Variation in the number or mix of consumers or quantities of electricity supplied to consumers:*

Provided that where there is more than one Distribution Licensee within the area of supply of the applicant, then any variation in the number or mix of consumers or in the quantities of electricity supplied to consumers within the area served by two or more such Distribution Licensees shall be attributable to controllable factors:

Provided further that where any consumer or category of consumers within the area of supply of the applicant is eligible for open access under sub-section (3) of Section 42 of the Act, then any variation in the number or mix of such consumers or quantities of electricity supplied to such eligible consumers shall be attributable to controllable factors;”

“17.6.2 Some illustrative variations or expected variations in the performance of the applicant which may be attributed by the Commission to controllable factors include, but are not limited to, the following:

- (a) Variations in capital expenditure on account of time and/ or cost overruns / efficiencies in the implementation of a capital expenditure project not attributable to an approved change in scope of such*

project, change in statutory levies or force majeure events;

- (b) Variations in technical and commercial losses, including bad debts;*
- (c) Variations in the number or mix of consumers or quantities of electricity supplied to consumers as specified in the first and second proviso to clause (b) of Regulation 17.6.1;*
- (d) Variations in working capital requirements;*
- (e) Failure to meet the standards specified in the Standards of Performance Regulations, except where exempted in accordance with those Regulations;*
- (f) Variations in labour productivity;*
- (g) Variations in any variable other than those stipulated by the Commission under Regulation 15.6 above, except where reviewed by the Commission under the second proviso to this Regulation 17.6”.*

14.5 The Regulations provide guidelines for uncontrollable and controllable factors and some illustrative variations or expected variations which may be attributable to uncontrollable and controllable factors. According to learned senior counsel for the distribution licensee, from the holistic reading of the above provisions it is clear that the State Commission was bound to stipulate the

variables which would be used to measure the performance of the distribution licensee during the control period. These variables were never specified by the State Commission. These variables are the foundation on the basis of which the State Commission has to determine on yearly basis what parts of O&M expenses are to be categorized as 'controllable' or 'uncontrollable'. The O&M expenses cannot be painted in one stroke as 'controllable'. Various factors need to be taken into consideration, which may include environmental disturbances, worldwide economic conditions and significant variations therein, sharp increase in prices beyond a predetermined limit, age and condition of infrastructure, etc. For instance, the price of fuel has increased by almost 50% over 2010 prices. However, the State Commission has not undertaken the prudence check to determine whether the O&M expenses were justified. Regulation 17.6.1(b) clearly covers variation in quantities of electricity supplied to consumers as an uncontrollable factor.

14.6 Shri Vikas Singh, Ld. Sr. Counsel for the distribution licensee also referred to a number of decisions of the Hon'ble Supreme Court to impress upon the well settled principle that if a statute provides for a thing to be done in a particular manner then it has to be done in that manner or not at all.

14.7 M/s. Ispat Industries Ltd. has contended that the State Commission has allowed all the expenses as uncontrollable expenses passing them to the consumers. The contention of M/s. Ispat Industries Ltd. is incorrect. The State Commission while truing up the financials for the FY 2008-09 has computed sharing of efficiency gain and losses due to controllable factors. For non-achievement of distribution loss norm, the efficiency loss has been computed. For O&M expenses and interest on working capital also the efficiency loss has been worked out.

14.8 We do not find any substance in the contentions of M/s Ispat Industries as the State Commission in the impugned order has gone into each element of expenses and has determined sharing of efficiency loss and gain due to controllable factors.

14.9 Regarding distribution losses for the FY 2008-09, the actual distribution loss was 22.24% as against normative loss of 22.20%. The loss of revenue for efficiency loss due to higher distribution loss has been computed as Rs.11.94 crores which has been apportioned to the distribution licensee (2/3rd) and the consumers (1/3rd) as per the Regulations. Thus, there is no infirmity in working out the efficiency loss for the FY 2008-09.

14.10 Regarding distribution loss for the FY 2009-10, the State Commission in the MYT order had stipulated loss reduction of 4% in each year of the MYT control period

of FY 2007-08 to FY 2009-10. Accordingly, the distribution loss level approved for the FY 2009-10 in the MYT order was 18.2%. The State Commission has retained the same level of 18.2% for the FY 2009-10 in the provisional true up even though the distribution licensee wanted a higher loss level. The grievance of the appellant is that the efficiency loss on this account has not been passed on to the distribution licensee.

14.11 We feel that the sharing of efficiency loss on account of non-achievement of the distribution loss can only be allowed after the accounts are made available after completion of the FY 2009-10. Thus, there is no substance in the contention of M/s. Ispat Industries Ltd in this regard. It was further informed by Shri Vikas Singh, Sr. Counsel for the distribution licensee, that the sharing of loss with respect to the normative T&D loss for the FY 2009-10 has since been decided by the State Commission in the final true up of the FY 2009-10 by its order dated 30.12.2011. Thus, this issue would also

not survive in this appeal in view of the final true up carried out by the State Commission.

14.12 Let us now examine the treatment of Administration and General expenses (A&G) and Repair and Maintenance expenses (R&M) in the impugned order.

14.13 We notice from the truing up of A&G expenses for the FY 2008-09 that the State Commission in paragraph 3.4.2 of the impugned order has recorded the reasons given by the distribution licensee for increase in A&G expenses on account of Rs. 5 crores cess paid to excise department, additional security arrangements to check threat of misappropriation, theft, damage, etc., higher expenditure on computer billing due to increase in number of consumers and photo-metering, etc. The State Commission only allowed Rs. 5 crores cess paid to the excise department but did not go into the other reasons stating that the A&G expenses are controllable and cannot be allowed to increase. Accordingly, the

State Commission allowed gross A&G expenses of Rs. 255.46 crores (Rs. 250.46 crores as per APR Order plus Rs. 5 crores on account of cess paid to Excise Department) as against the actuals of Rs. 349.52 crores. After deducting capitalization, the net A&G expenses allowed were Rs. 232.09 crores, as against actuals of Rs. 317.54 crores. The difference between the actual A&G expenses and A&G expenses allowed after truing up for the FY 2008-09 was considered as controllable efficiency loss and has been shared between the appellant and the consumers in accordance with Regulation 19, i.e. 1/3rd borne by the consumers and 2/3rd by the appellant.

14.14 For the FY 2009-10 the distribution licensee estimated the revised A&G expenses of about Rs.363 crores as compared to the approved expenses of Rs.213 crores. For the FY 2010-11 the distribution licensee estimated about Rs.417 crores towards A&G expenses after accounting for increase of 10% over the previous years

expenses. The distribution licensee assigned reasons for increase in A&G expenses due to increase in volume of transmission due to opening of new zones (Nanded and Jalgaon), three circles (Nandurbar, Washin and Baramati) and new divisions and sub-divisions, frequent drives undertaken to check theft of power, increase in conveyance and travel to increase in special recovery drive, considerable increase in petrol and diesel, additional security measures, increase of rent, increased cost of computer stationery on account of photo billing, etc., which have been recorded in paragraph 4.6.2 of the impugned order. Thereafter, the State Commission without going into the reasons furnished by the appellant has allowed Rs.245 crores A&G expenses for the FY 2009-10 after allowing indexation for inflation of 5.48% computed with 60% weightage to WPI and 40% to CPI, on the A&G expenses for the FY 2008-09 allowed in the impugned order after truing up. The A&G expenses for the FY 2010-11 were determined as Rs.262 crores by applying an inflation

index of 7.02% on the A&G expenses approved for the FY 2009-10.

14.15 Regarding R&M expenses, the actual expenses for the FY 2008-09 were about Rs.599 crores as compared to R&M expenses of about Rs.458 crores approved by the State Commission in the APR order. The distribution licensee attributed to the increase in R&M of lines and underground cables, vehicle running expenses, transportation expenses, advertisement of tenders, incidental stores expenses etc, which were being charged to revenue account. However during the year expenses amounting to Rs.16.04 crores have been charged to revenue account and capital costs in ratio of usage of material used for R&M. Hence a sum of Rs.3.05 crores has been charged to R&M as part of these expenses for material used for R&M. Also the requirement of R&M had increased due to ageing effect and non-attendance of R&M works in the past owing to paucity of funds. Further, in the coastal and hilly areas

the R&M cost is high due to corrosion effect. The State Commission has examined the reasons given by the distribution licensee and has observed that there has been no extra-ordinary circumstances necessitating additional R&M expenses and all the reasons given by the distribution licensee are an occurrence of every year. Further, the change in accounting policy regarding booking of expenses to project, has resulted in reduction of R&M expenses and not increasing the same. Thus, the State Commission has retained R&M figures as approved in APR order for the FY 2008-09.

14.16 For the FY 2009-10 the distribution licensee estimated R&M expenses of Rs.658.66 crores as compared to approved expenses of Rs.482 crores. For the FY 2010-11, the licensee estimated R&M expenses of Rs.724.53 crores by escalating the estimated expenses for FY 2009-10 by 10%. The distribution licensee submitted that the projected R&M expenses for the FY 2009-10 includes works like part replacement of HT and LT

cables, distribution boxes, LT and HT poles, CT operated meters, DTC maintenance, re-earthing, providing guarding, crimping of jumpers at cut points, labour charges, etc. The State Commission directed the distribution licensee to submit detailed plan regarding R&M expenses of Rs.725 crores in the FY 2010-11. In response, the licensee submitted that it has projected as an expenditure of Rs.725 crores for the FY 2010-11, based on the actual expenditure for the FY 2008-09. The licensee considered an annual escalation of 10% over the actual expenses for the FY 2008-09 for projecting R&M expenses for the FY 2009-10 and FY 2010-11.

14.17 For the FY 2009-10 the State Commission considered 4.91% increase based on WPI on account of inflation over the revised level of R&M expenses approved for the FY 2008-09, and approved Rs.481 crores as against the revised estimate of Rs. 659 crores. For the FY 2010-11, the State Commission considered inflation rate of 6.05%

p.a. over the revised estimate for the FY 2009-10 under the provisional true up exercise in the impugned order based on the increase in WPI. Accordingly, the State Commission approved the R&M expenses of Rs.510 crores for the FY 2010-11 as against the projection of Rs.725 crores made by the distribution licensee.

14.18 Let us first examine if the Tariff Regulations allow variations in A&G expenses and R&M expenses as uncontrollable. We find that A&G and R&M expenses do not appear in the illustrative variations listed under Regulation 17.6.2 which may be attributed to controllable factors. Therefore, the uncontrollable variations in A&G and R&M expenses covered under explanation to Regulation 17.6 and illustrative variation under Regulation 17.6.1 or for reasons considered appropriate by the State Commission could be attributable to uncontrollable expenses.

14.19 The variations covered under explanation to Regulation 17.6 are (a) Force majeure events (b) Change in law, judicial pronouncements and orders of Central Government, State Government or Commission; (c) economy wide influence, such as unforeseen changes in inflation rate, market interest rates, taxes and statutory levies. The illustrative variations or expected variations permitted under 17.6.1 are variation in cost of power generation and/or power purchase due to circumstances specified in Regulation 25 and variation in the number or mix of consumers or quantities of electricity supplied to consumers. The State Commission may also consider additional appropriate variations as uncontrollable as the variables are not limited to the illustrative variations, according to the Regulations. It is also noticed that State Commission has allowed the claim of Rs. 5 Cr. cess paid to excise department in the FY 2008-09 correctly in consonance with the explanation under Regulation 17.6 under clause (c).

14.20 Now we shall examine if the reasons given by the distribution licensee for increase in A&G and R&M expenses could be covered under the uncontrollable variations.

14.21 The main reason attributable to increase in A&G expenses for the FY 2008-09 is due to higher expenditure on computer billing due to increase in number of consumers and photo-metering, etc. For the FY 2009-10 also the main reason in increase in A&G expenses is due to increase in volume of transaction and opening of new zones, circles, divisions and sub-divisions increased cost of photo billing, etc. We feel that the increase in number of consumers and electricity consumption are uncontrollable factors and if the increase in A&G expenses are attributable to these then the State Commission should consider the same.

14.22 The escalation factor applied over the approved expenses for the previous financial year may not cover the additional expenses for new zones/circles/divisions/sub-divisions created due to increase in

volumes of transaction and number of consumers, cost of photo-billing and new measures taken to check pilferage of electricity.

14.23 Ld. Counsel for the State Commission referred to the judgment of the Tribunal dated 23.3.2011 in Appeal No.139 of 2009 in the matter of Maharashtra State Electricity Transmission Co. Ltd. Vs MERC & Ors. in which the Tribunal upheld the findings of the State Commission regarding A&G and R&M expenses. The findings of the Tribunal in that case were specific to the circumstances of the case and the material placed by the applicant in support of its claim and will not be applicable to the present case.

14.24 As regards R&M expenses of the distribution licensee, the State Commission has observed that there has been no extraordinary circumstances necessitating additional R&M. Further, the change of accounting policy regarding booking of expenses to project has resulted in reduction in R&M expenses and not increasing the same as claimed by the distribution licensee. For the

FY 2010-11 also when the State Commission directed the distribution licensee to submit detailed plan regarding estimated R&M expenses, the distribution licensee could not furnish the details and submitted that the estimate was based on the projected rate of 10% increase in R&M expenses for the previous year.

14.25 The Appellant distribution licensee has pointed out that higher R&M was due to replacement of aging equipment. We do not understand why the replacement of old equipment was claimed by the distribution licensee as revenue expenses under R&M. This could be claimed as capital expenses which could be capitalized after decapitalization of the replaced asset. The appellant could not give any convincing reasons for increase in R&M expenses and failed to provide the information sought by the State Commission regarding details of R&M expenses.

14.26 Thus, we do not find any fault in the findings of the State Commission regarding R&M expenses.

14.27 The Ld. Counsel argued that the WPI/CPI adopted by the Commission may not be the appropriate indexation for their business. We find that the distribution licensee had proposed indexation at 10% in its estimates without giving any justification/basis. We do not find any basis in the proposal of ad-hoc inflation factor of 10% by the distribution licensee.

15. The fifth and sixth issue regarding voltage-wise cost of supply and increasing cross subsidy and separate category for EHV consumers are inter-connected and are being dealt with together.

15.1 According to Ld. Counsel for M/s. Ispat Industries Ltd., the cross subsidy component by HT industries having HT-I tariff category has been increasing. The degree of burden will still be higher on EHV consumers such as M/s Ispat Industries who are being charged at rates applicable to consumers of lower voltage. This is contrary

to the scheme of the Act and the National Tariff Policy which provides that the cross subsidy is required to be progressively reduced. The State Commission has calculated cross subsidy vis-à-vis the average cost of supply. The State Commission ought have calculated cost of supply vis-à-vis voltage-wise cost of supply. Further, there should be a separate category for consumers with load more than 100 MW and consumers connected at 220 kV or 132 kV.

15.2 According to Ld. Counsel for the State Commission the cross subsidies have been reduced to the extent possible. In the current tariff order the cost recovery for residential category has been increased from 82% to 84%, for LT agriculture from 43 to 45% and for LT street light category from 76% to 80%, whereas for HT-I industry cost recovery has been increased from 126% to 128%. According to the Tariff Policy, the cross subsidies should be reduced to $\pm 20\%$ of average cost of supply. In the impugned order for the FY 2010-11, the cross subsidy for

HT-I category is close to the target level. As regards voltage-wise cost of supply, the Tariff Policy mandates the reduction of cross subsidy vis-à-vis the average cost of supply, whereas the 2003 Act has not specifically mentioned that the cross subsidy should be reduced vis-a-vis the voltage-wise cost of supply. In the absence of voltage-wise cost of supply, the State Commission has been adopting the average cost of supply as a parameter for determining the cross subsidy which is in accordance with the 2003 Act and the Tariff Policy. The State Commission has also undertaken the exercise separately for specifying the Regulations for trajectory for cross subsidy reduction. Regarding a specific category for EHV consumers, the Ld. Counsel for the State Commission has contended that the State Commission has used the criteria of 'voltage' under Section 62(3) by having two groups viz High Tension and Low Tension, which is consistently being followed across all distribution licensees in the State. The reference to the voltage-wise allocation of costs for determination of wheeling charges

is inappropriate, since lot of assumptions have to be made for determination of voltage-wise wheeling charges in the absence of authentic data on assets and expenses at different voltages.

15.3 Ld. Sr. Counsel for the distribution licensee has also supported the above views of the State Commission.

15.4 The issue relating to voltage-wise cost of supply and cross subsidy has been decided in the judgment dated 30.05.2011 in Appeal nos. 102 of 2010 and batch in the matter of Tata Steel Ltd. Vs. Orissa Electricity Regulatory Commission & Another. The relevant extracts of the judgment are reproduced below:-

“22. After cogent reading of all the above provisions of the Act, the Policy and the Regulations we infer the following:

“i) The cross subsidy for a consumer category is the difference between cost to serve that category of consumers and average tariff realization of that category of consumers. While the cross-subsidies have to be reduced progressively and gradually to avoid

tariff shock to the subsidized categories, the cross-subsidies may not be eliminated.

- ii) The tariff for different categories of consumer may progressively reflect the cost of electricity to the consumer category but may not be a mirror image of cost to supply to the respective consumer categories.*
- iii) Tariff for consumers below the poverty line will be at least 50% of the average cost of supply.*
- iv) The tariffs should be within $\pm 20\%$ of the average cost of supply by the end of 2010-11 to achieve the objective that the tariff progressively reflects the cost of supply of electricity.*
- v) The cross subsidies may gradually be reduced but should not be increased for a category of subsidizing consumer.*
- vi) The tariffs can be differentiated according to the consumer's load factor, power factor, voltage, total consumption of electricity during specified period or the time or the geographical location, the nature of supply and the purpose for which electricity is required."*

"28. Of the above Judgments of this Tribunal, 2007 APTEL 931 Siel Limited vs. PSERC & Ors. has a clear finding on the cost of supply. The relevant extracts of the Judgment are reproduced below:

"109. According to Section 61(g) of the Act of 2003, the Commission is required to specify the period within which cross subsidy would be reduced and eliminated so that the tariff progressively reflects the cost of supply of electricity. Under Section 28(2) of the Act of 1998, the Commission while prescribing the

terms and conditions of tariff was required to safeguard the interests of the consumers and at the same time, it was to ensure that the consumers paid for the use of the electricity in a manner based on average cost of supply. The word "Average" preceding the words "cost of supply" is absent in Section 61(g) of the Act of 2003. The omission of the word "Average" is significant. It indicates that the cost of supply means the actual cost of supply, but it is not the intent of the legislation that the Commission should determine the Tariff based on cost of supply from the date of the enforcement of the Act of 2003. Section 61(g) of the Act of 2003 envisages a gradual transition from the Tariff loaded with cross subsidies to a Tariff reflective of cost of supply to various class and categories of consumers. Till the Commission progressively reaches that stage, in the interregnum, the roadmap for achieving the objective must be notified by the Commission within six months from January 6, 2006, when the Tariff Policy was notified by the Government of India, i.e. by July 6, 2006. In consonance with the Tariff Policy, by the end of the year 2010-11, tariffs are required to be fixed within ± 20 per cent of the average cost of supply (pooled cost of supply of energy received from different sources). But the policy has reached only up to average cost of supply. As per the Act, Tariff must be gradually fine tuned to the cost of supply of electricity and the Commission should be able to reach the target within a reasonable period of time to be specified by it. Therefore, for the present, the approach adopted by the Commission in determining the average cost of supply cannot be faulted. We, however, hasten to add that we disapprove the view of the Commission that the words "Cost of Supply" means "Average Cost of Supply."

110. *Keeping in view the provisions of Section 61 (g), which requires Tariff to ultimately reflect the cost of supply of electricity and the National Tariff Policy, which requires Tariff to be within ± 20 per cent of the average cost of supply, it seems to us that the Commission must determine the cost of supply, as that is the goal set by the Act. It should also determine the average cost of supply. Once the figures are known, they must be juxtaposed, with the actual tariff fixed by the Commission. This will transparently show the extent of cross subsidy added to the tariff, which will be the difference between the tariff per unit and the actual cost of supply”.*

“29. *The State Commission has indicated in the impugned order that the voltage-wise cost determination is the first step in determining the consumer-wise cost of supply but has expressed difficulties in determination of voltage-wise cost of supply due to non-segregation of costs incurred by the licensee related to different voltage levels and determination of technical and commercial losses at different voltage levels due to non-availability of meters. The State Commission has also noted that the data submitted by the distribution licensee does not have technical or commercial data support.”*

“31. *We appreciate that the determination of cost of supply to different categories of consumers is a difficult exercise in view of non-availability of metering data and segregation of the network costs. However, it will not be prudent to wait indefinitely for availability of the entire data and it would be advisable to initiate a simple formulation which could take into account the major cost element to a great extent reflect the cost of supply. There is no need to make*

distinction between the distribution charges of identical consumers connected at different nodes in the distribution network. It would be adequate to determine the voltage-wise cost of supply taking into account the major cost element which would be applicable to all the categories of consumers connected to the same voltage level at different locations in the distribution system. Since the State Commission has expressed difficulties in determining voltage wise cost of supply, we would like to give necessary directions in this regard.

32. *Ideally, the network costs can be split into the partial costs of the different voltage level and the cost of supply at a particular voltage level is the cost at that voltage level and upstream network. However, in the absence of segregated network costs, it would be prudent to work out the voltage-wise cost of supply taking into account the distribution losses at different voltage levels as a first major step in the right direction. As power purchase cost is a major component of the tariff, apportioning the power purchase cost at different voltage levels taking into account the distribution losses at the relevant voltage level and the upstream system will facilitate determination of voltage wise cost of supply, though not very accurate, but a simple and practical method to reflect the actual cost of supply.*

33. *The technical distribution system losses in the distribution network can be assessed by carrying out system studies based on the available load data. Some difficulty might be faced in reflecting the entire distribution system at 11 KV and 0.4 KV due to vastness of data. This could be simplified by carrying out field studies with representative feeders of the various consumer mix prevailing in the distribution*

system. However, the actual distribution losses allowed in the ARR which include the commercial losses will be more than the technical losses determined by the system studies. Therefore, the difference between the losses allowed in the ARR and that determined by the system studies may have to be apportioned to different voltage levels in proportion to the annual gross energy consumption at the respective voltage level. The annual gross energy consumption at a voltage level will be the sum of energy consumption of all consumer categories connected at that voltage plus the technical distribution losses corresponding to that voltage level as worked out by system studies. In this manner, the total losses allowed in the ARR can be apportioned to different voltage levels including the EHT consumers directly connected to the transmission system of GRIDCO. The cost of supply of the appellant's category who are connected to the 220/132 KV voltage may have zero technical losses but will have a component of apportioned distribution losses due to difference between the loss level allowed in ARR (which includes commercial losses) and the technical losses determined by the system studies, which they have to bear as consumers of the distribution licensee.

- 34. Thus Power Purchase Cost which is the major component of tariff can be segregated for different voltage levels taking into account the transmission and distribution losses, both commercial and technical, for the relevant voltage level and upstream system. As segregated network costs are not available, all the other costs such as Return on Equity, Interest on Loan, depreciation, interest on working capital and O&M costs can be pooled and apportioned equitably, on pro-rata basis, to all the voltage levels including the appellant's category to*

determine the cost of supply. Segregating Power Purchase cost taking into account voltage-wise transmission and distribution losses will be a major step in the right direction for determining the actual cost of supply to various consumer categories. All consumer categories connected to the same voltage will have the same cost of supply. Further, refinements in formulation for cost of supply can be done gradually when more data is available.”

“36. The learned counsel for the Appellants has argued that it would not be difficult to determine cost to supply for them as they draw electricity directly from the transmission system of the State Transmission Licensee. We feel that even if it is not difficult for the State Commission to determine the cost of supply for the appellants, unless the cost of supply is determined for all the consumer categories connected to different voltage levels, it will not serve any purpose. We also do not accept the argument of the learned counsel for the appellant that the distribution losses and network costs in respect of the appellant consumer category will be nil. As stated above, the commercial losses of the distribution system have to be borne by all the consumers of the distribution licensee. However, as the distribution losses reduce gradually, the cost of supply for the appellants’ category will also reduce. We also can not grant any relief to the appellants on account of fixed charges for the distribution system assets and O&M expenses, etc. due to complexities involved in determining the segregated cost of service and in light of amendment of 2007 of the Act removing the provision for elimination of subsidies.

37. We, however, direct the State Commission to determine the cross subsidy for each consumer category after

working out the voltage-wise cost of supply based on the directions given in the preceding paragraphs. The cross subsidy will be calculated as the difference between the average tariff realization for that category as per the Annual Revenue Requirement and the cost of supply for the consumer category based on voltage-based cost of supply.”

“41. Summary of our findings

41.1. After considering the provisions of the Act, the National Electricity Policy, Tariff Policy and the Regulations of the State Commission, we have come to the conclusion that if the cross subsidy calculated on the basis of cost of supply to the consumer category is not increased but reduced gradually, the tariff of consumer categories is within $\pm 20\%$ of the average cost of supply except the consumers below the poverty line, tariffs of different categories of consumers are differentiated only according to the factors given in Section 62(3) and there is no tariff shock to any category of consumer, no prejudice would have been caused to any category of consumers with regard to the issues of cross subsidy and cost of supply raised in this appeal.

41.2. We do not agree with the findings of the State Commission that cost to supply a consumer category is the same as average cost of supply for the distribution system as a whole and average cost of supply can be used in calculation of cross subsidy instead of actual cost of supply. This is contrary to Regulation 7 (c)(iii) of the State Commission and findings of

this Tribunal in the Judgment reported in 2007(APTEL) 931 SIEL Limited, New Delhi v/s PSERC & Ors.

41.3. The State Commission has expressed difficulties in determining cost of supply in view of non-availability of metering data and segregation of the network costs. In our opinion, it will not be prudent to wait indefinitely for availability of the entire data and it would be advisable to initiate a simple formulation which could take into account the major cost elements. There is no need to make distinction between the distribution charges of identical consumers connected at different nodes in the distribution network. It would be adequate to determine the voltage-wise cost of supply taking into account the major cost element which would be applicable to all the categories of consumers connected to the same voltage level at different locations in the distribution system. We have given a practical formulation to determine voltage wise cost of supply to all category of consumers connected at the same voltage level in paragraphs 31 to 35 above. Accordingly, the State Commission is directed to determine cross subsidy for different categories of consumers within next six months from FY 2010-11 onwards and ensure that in future orders for ARR and tariff of the distribution licensees, cross subsidies for different consumer categories are determined according to the directions given in this Judgment and that the cross subsidies are reduced gradually as per the provisions of the Act.”

15.5 In judgment dated 28.07.2011 in Appeal no.192 & 206 of 2010 also this Tribunal has reiterated the above findings.

15.6 The ratio in the above judgments of the Tribunal will squarely apply to the present case. Accordingly, the State Commission is directed to undertake the exercise of determination of voltage-wise cost of supply within six month of the date of this judgment and ensure that in tariff orders passed subsequent to that, cross subsidies for different categories of consumers are determined based on the voltage-wise cost of supply and tariffs are determined based on the settled principles.

15.7 In the impugned tariff order the State Commission has computed the ratio of average billing rate to average cost of supply for different categories of consumers at Page 221 of the order. For HT-I Industry (Express

factor) applicable to M/s. Ispat Industries the ratio of average billing rate to average cost of supply is 128%. The increase in the tariff for HT category has been of the order of 1.87% only. The State Commission has also recorded in the impugned order that it has separately initiated a consultative process for formulation of the road map for cross subsidy reduction. The FY 2010-11 is already over and one more year e.i FY 2011-12 has also elapsed after that. Determination of voltage-wise cost of supply will take some more time. Any change in principle of setting up the tariffs will have an impact on other categories of consumers and retrospective change in the tariffs of all the consumers which may not be desirable. In view of above, we do not want to interfere with the impugned order. Therefore our directions in this regard are for future after the voltage-wise cost of supply is determined by the State Commission.

15.8 Regarding creation of a separate category for EHV category, we find that the State Commission has created

only one HT-I industry category for all HT and EHV voltage levels. Thus, same tariff is applicable to consumers availing supply from 11 kV to 220 kV. We find some merit in the contentions of M/s. Ispat Industries as there is wide difference in cost of supply at 11 kV and 132/220 kV and keeping uniform tariff for all consumers of same category receiving supply at any voltage from 11 kV to 220 kV does not seem to be correct. Section 61(g) stipulates that the tariff progressively reflects the cost of supply of electricity and also reducing cross subsidies. Section 62(3) permits differentiation in tariff according to voltage. However, at this belated stage disturbing the categories of tariff will not be correct. In view of our directions for determination of voltage-wise cost of supply, the State Commission shall consider creation of separate category for EHV consumers in future tariff order and decide the matter after hearing all concerned keeping in view the

provisions of Sections 61(g) and 62(3) of the 2003 Act and Tariff Policy.

16. The seventh issue is regarding Delayed Payment Surcharge and Bulk Discount.

16.1 The Ld. Counsel for M/s. Ispat Industries Ltd. has argued that the Delayed Payment Surcharge at 18% is very high especially as RLC is yet to be refunded to the subsidizing consumers. Further, Bulk Discount has been discontinued and replaced by prompt payment incentive, whereas the purposes of the two are different.

16.2 According to Ld. Counsel for the State Commission, the Delayed Payment Charges (DPC) of 2% is applicable only for one time, in case the bill is not paid within the due date.

16.3 The relevant paragraph of the impugned order is reproduced below

“Delayed Payment Charges (DPC)

In case the electricity bills are not paid within the due date mentioned on the bill, the delayed payment charges of 2

percent on the total electricity bill (including taxes and duties) shall be levied on the bill amount.”

16.4 Further, according to the Ld. Counsel for the State Commission M/s. Ispat Industries Ltd. has also filed a separate Review Petition before the State Commission on the same issue in case no.51 of 2008 which has been rejected after giving a reasoned order. The relevant paragraph of the order is reproduced below:-

“The Petitioner has also not submitted any basis for the computation provided in the Petition, and the Commission is unable to understand as to how the computation of effective penalty of 60%, 63% and 66% have been arrived at. The DPC of 2% is only levied once, in case the bill is not paid by the due date, and in such a case, the principal amount due is itself increased to include the DPC. For further delay in payment of the amount due, interest at the stipulated rates is applied on the total outstanding amount (which includes the DPC). Thus, the levy of DPC and interest on delayed payment in accordance with the Commission’s Tariff Order does not result in compounding of interest and double charging, as averred by the Petitioner.

Moreover, this methodology of computing DPC and Interest on delayed payment has been in force for quite some time now, and has not been introduced through the impugned Order...”

16.5 We do not find any infirmity in the findings of the State Commission regarding DPC. There is also no logic in linking DPC to refund of RLC. The Ld. Counsel for M/s. Ispat Industries Ltd. has also not pressed the issue of RLC in the appeal.

16.6 Regarding Bulk Discount, the State Commission has submitted that the Bulk Discount last existed in the Tariff Order dated 20.10.2006 for the FY 2006-07. The Discount was, however, allowed if the bill was paid within 7 days from the date of bill or within 5 days of the receipt of the bill, whichever is later. The Bulk Discount was eventually done away with the next Tariff Order and only the Prompt Payment Incentive was retained.

16.7 We do not find any infirmity in withdrawal of Bulk Discount which was done from the FY 2007-08. M/s. Ispat Industries has also not referred to any Regulation

which entitles him to Bulk Discount.

16.8 We do not find any merit in the contention of M/s. Ispat Industries regarding the delayed payment charges and Bulk Discount and reject the same.

17. Summary of our findings:

Appeal No.13 of 2010 and 198 of 2010

- i) Power Purchase expenses: We find that the State Commission allowed the power purchase cost after prudence check and we do not find any infirmity in the same.**

- ii) Controllable and uncontrollable expenses: We do not find any substance in the issues raised by the Appellant.**

iii) T&D Loss: We do not find any infirmity in the impugned order. The issue relating to T&D loss for the FY 2009-10 does not survive in this appeal in view of final true up order dated 30.12.2011 of the State Commission.

iv) Cross subsidy/cost of supply: We are not inclined to interfere with the impugned order for the reasons explained in paragraph 15.7 of the judgment. However, we have given directions in paragraph 15.6 of the judgment for determination of voltage-wise cost of supply in pursuance of the decision of this Tribunal in judgment dated 30.05.2011 in Appeal nos. 102 of 2010 and batch in the matter of Tata Steel Ltd. Vs. OERC & Another, within six months of the date of this judgment

- and ensure that in tariff orders passed subsequent to that take into account the voltage-wise cost of supply in determining the cross subsidy and tariffs.**
- v) New categorization for EHV consumers: The State Commission shall consider creation of separate category for EHV consumers in future tariff order after determination of voltage-wise cost of supply and decide the matter after hearing all concerned keeping in view the provisions of Sections 61(g) and 62(3) of the Act and Tariff Policy.**
- vi) Delayed payment surcharge and bulk discount: We do not find any merit in the contentions of the Appellant.**

Appeal no. 42 of 2011

- i) A&G and R&M expenses: According to the Tariff Regulations, the impact of uncontrollable variations on A&G expenses and R&M expenses could be considered by the State Commission if the variations are covered under the explanation and illustrative variations given in the Regulation or are to the satisfaction of the State Commission. We find some substance in some of the reasons given for increase in A&G expenses by the distribution licensee for consideration as uncontrollable expenses. We, therefore, direct the State Commission to look into the same based on the material placed by the appellant and pass consequential orders.**

However, we do not find any fault in the order of the State Commission regarding R&M expenses.

18. Accordingly the Appeals 13 of 2010 and 198 of 2010 are disposed of with some directions to the State Commission for future as indicated above. Appeal no 42 of 2011 is allowed partly, to the extent indicated above. No order as to costs.

19. Pronounced in open court on **26th day of July of 2012.**

**(Mr. Justice P.S. Datta)
Judicial Member**

**(Mr. Rakesh Nath)
Technical Member**

REPORTABLE/NON-REPORTABLE

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