# Important Judgments of Appellate Tribunal on some current issues and Tariff related Issues

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# Layout of the presentation

- Some Current Issues
- General Issues related to tariff
  - Necessity of issuance of tariff order timely
  - Importance of Regulations
- Issues related to ARR
- Issues related to rationalization of tariff

# Current Issues

# Whether the Commission has power to modify tariff contained in a subsisting PPA.

# Appeal No. 61 of 2007

**Appellant:** **Him Urja Pvt Limited**

**Versus**

**Respondent:** **Uttarakhand Electricity Regulatory Commission**

**Bench:** **Ms. Manju Goel, Judicial Member**

**Mr. H L Bajaj, Technical Member**

**Dated: 30.10.2010**

**Issue:** The validity of the PPA was the basic question in this appeal.

**Held**: If the PPA is valid, the price of power determined by the PPA cannot be undone by a tariff order of the Commission.

# POWER TRADING CORPORATION INDIA LTD.

# VS

# CENTRAL ELECTRICITY REGULATORY COMMISSION



**BENCH:** K. G. Balakrishnan, C.J.I.,
S. H. Kapadia ,
R. V. Raveendran,
B. Sudershan Reddy and
P. Sathasivam , JJ.

**DATE:** 15.3.2010

# Whether capping of trading margins could be done by the CERC by making a Regulation in that regard under Section 178 of the 2003 Act?

- Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. **Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178** and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).

# Appeal No. 35 of 2011

**Appellant:** **Konark Power Projects Ltd**

**Versus**

**Respondent:** **Karnataka Electricity Regulatory Commission**

**Bench:** **Mr. Karpaga Vinayagam, Chairman**

**Mr. V J Talwar, Technical Member**

**Dated: 10.02.2012**

**Issue:** Whether the Commission has the power to modify the tariff contained in a subsisting PPA.

# Concerned Regulation of KERC

- **9. Determination of Tariff for electricity from Renewable sources of energy**:- (1) The Commission may determine at any time the tariff for purchase of electricity from Renewable sources of energy by Distribution Licensees either suo motu or on an application either by generator or by Distribution Licensee;

  Provided that the tariff approved by the Commission including the PPAs deemed to have been approved under sub-Section (2) of Section 27 of the Karnataka Electricity Reforms Act, 1999, prior to the coming into force of these regulations shall continue to apply for such period as mentioned in those PPAs.

# Commission's Findings

- "Under Section 86 of the Electricity Act, 2003 read with sections 62 & 64, the Commission has the power to determine the tariff of the generating companies including NCE projects who supply electricity to the Distribution Licensees. In exercise of its powers under these provisions, the Commission has passed two orders, one during 2005 and another on 11.12.2009, and has also approved the PPAs. Once this Commission has powers to fix and approve the tariff, in our considered view, the same includes the power to modify the same in case there are circumstances warranting such modification."

# Commission's Findings

- "We have gone through the material placed before us and the reasons urged in support of the revision by the petitioner. **The main reason pleaded by the petitioner in support of its prayer for increase in tariff is that the rate of fuel has gone up abnormally and the tariff paid under the PPA is too low affecting the very viability of the plant.** The petitioner in support of its contention has produced certain invoices of purchase of biomass. In our view, mere production of some invoices will not be enough to justify the increase in rates. The petitioner has not produced details of its actual costs supported by material evidence to substantiate the effect of the present tariff on the viability of the unit. Therefore, we hold that the petitioner has not made out a case for revision of the tariff contained in the PPA. Accordingly this petition is liable to be rejected and hence dismissed."

# APTEL's Observations and Ruling

- The guidelines in Section 61 of the Act would indicate that the Commission has to maintain a balance of interests so that the generators also may not suffer unnecessarily. It is not disputed that unit of the Appellant was shut down due to its becoming unviable at the existing tariff.
- The State as well as the Country has been facing power shortage and this fact has been accepted by the Government of Karnataka in its GO mentioned above. Under such circumstances it should be our endeavour to produce energy to the extent possible.
- It would not be desirable to keep any generating unit out of service for want of 'just' tariff more so when 70% of investment is funded by Public Sector Banks or Financial Institutions as loan. In the context of prevailing power scenario in the country, it is well said that "No power is expensive power". In other words power at any cost is acceptable as the Cost of unserved energy (loss due load shedding) could be very high.
- The State Commission as indicated in the impugned order has power to modify the tariff for concluded PPA in larger public interest.
- The guiding principles laid down in Section 61 of the 2003 Act would indicate that the Commission has to maintain a balance so that the generators also may not suffer unnecessarily. In the context of prevailing power situation in the country, it would not be desirable to keep any generating unit out of service for want of 'just' tariff

# Appeal No. 132 of 2012

**Appellant:** **M/s. Junagadh Power Projects Private Limited,**

**Versus**

**Respondent:** **Gujarat Electricity Regulatory Commission**

**Bench:** **Mr. Karpaga Vinayagam, Chairman**

**Mr. V J Talwar, Technical Member**

**Mr Rakesh Nath, Technical Member**

**Dated: 02.12.2013**

**Issue:** Whether the Commission has the power to modify the tariff contained in a subsisting PPA.

# APTEL's Ruling

- The State Commission has the powers to reconsider the price of biomass fuel and revise the tariff of the biomass based power plants in the State in view of the circumstances of the case as the biomass plants in the State are partially closed and are operating at suboptimal Plant Load Factor due to substantial increase in the price of biomass fuel.

# Appeal No. 198 of 2014

**Appellant:** **GUJARAT URJA VIKAS NIGAM LIMITED,**

**Versus**

**Respondent:** **Gujarat Electricity Regulatory Commission**

**Bench:** **Mrs. Rajana P Desai, Chairman**

**Mr. T. Munikrishnaiah,, Technical Member**

**Dated: 28.09.2015**

**Issue:** Whether the Commission has the power to modify the tariff contained in a subsisting PPA.

# APTEL's Ruling

- We find no fetters in law on the power of the Appropriate Commission to undertake such exercise. We have already referred to the provisions of the Electricity Act which permit the Appropriate Commission to amend the tariff order. These statutory provisions have a purpose. They are meant to give certain amount of flexibility to the Appropriate Commissions. They have been empowered to amend or revoke the tariff because exigencies of a situation may demand such an exercise.
- In the circumstances, we hold that there is no bar on the Appropriate Commission preventing it from entertaining a petition for modification of tariff after execution of a PPA. In other words, the Appropriate Commission has the power to reopen a PPA and modify the tariff by an order. We, therefore, find no substance in these appeals. The Appeals are dismissed. Needless to say that hearing of the petitions shall now proceed and the petitions shall be disposed of on merits in accordance with law.

WHETHER FOSSIL FUEL FIRED CO-GENERATION PLANTS ARE OBLIGED TO PROCURE CERTAIN PERCENTAGE OF POWER FROM RENEWABLE SOURCES

&

WHETHER THE DISTRIBUTION LICENSEES CAN BE FASTENED WITH THE OBLIGATION TO PROCURE POWER FROM SUCH CO-GENERATION PLANTS

# Appeal No. 57 of 2009



**Appellant:** **Century Rayon**

**Versus**

**Respondent:** **Maharashtra Electricity Regulatory Commission**

**Bench:** **Mr. Justice M. Karpaga Vinayagam, Chairperson**

**Mr. H.L. Bajaj, Technical Member**

**Dated:** **26th April 2010**

**Issue: Whether a Co-generator generating power from coal can be fastened with RPO by the Commission.**

# APTEL's Observations

(I) The plain reading of Section 86(1)(e) does not show that the expression 'co-generation' means cogeneration from renewable sources alone. The meaning of the term 'co- generation' has to be understood as defined in definition Section 2 (12) of the Act.

(II) **As per Section 86(1)(e), there are two categories of `generators namely (1) co-generators (2) Generators of electricity through renewable sources of energy. It is clear from this Section that both these categories must be promoted by the State Commission by directing the distribution licensees to purchase electricity from both of these categories.**

(III) The fastening of the obligation on the co-generator to procure electricity from renewable energy procures would defeat the object of Section 86 (1)(e).

# APTEL's Observations

(IV) The clear meaning of the words contained in Section 86(1)(e) is that both are different and both are required to be promoted and as such the fastening of liability on one in preference to the other is totally contrary to the legislative interest.

(V) Under the scheme of the Act, both renewable source of energy and cogeneration power plant, are equally entitled to be promoted by State Commission through the suitable methods and suitable directions, **in view of the fact that cogeneration plants, who provide many number of benefits to environment as well as to the public at large, are to be entitled to be treated at par with the other renewable energy sources.**

(VI) The intention of the legislature is to clearly promote cogeneration in this industry generally irrespective of the nature of the fuel used for such cogeneration and not cogeneration or generation from renewable energy sources alone.

# Appeal No. 53 of 2012

**Appellant:** **Lloyd Metal**

**Versus**

**Respondent:** **Maharashtra Electricity Regulatory Commission**

**Bench:** **Mr. Justice M. Karpaga Vinayagam, Chairperson**

**Mr. Rakesh Nath, Technical Member**

**Mr. V. J. Talwar, Technical Member**

**Dated: 2nd December 2013**

**Issue:** Whether the Distribution Licensees could be fastened with the obligation to purchase a percentage of its consumption from co-generation irrespective of the fuel used under Section 86(1)(e) of the Act 2003."

# APTEL's Observations

**Summary of our findings:**

Upon conjoint reading of the provisions of the Electricity Act, the National Electricity Policy, Tariff Policy and the intent of the legislature while passing the Electricity Act as reflected in the Report of the Standing Committee on Energy presented to Lok Sabha on 19.12.2002, **we have come to the conclusion that a distribution company cannot be fastened with the obligation to purchase a percentage of its consumption from fossil fuel based co-generation under Section 86(1)(e) of the Electricity Act, 2003. Such purchase obligation 86(1)(e) can be fastened only from electricity generated from renewable sources of energy**.

However, the State Commission can promote fossil fuel based co-generation by other measures such as facilitating sale of surplus electricity available at such co-generation plants in the interest of promoting energy efficiency and grid security, etc.

# CPP OBLIGATED ENTITY?

# SC Civil Appeal No. 4417 of 2015

**Appellant:** **Hindustan Zinc**

**Versus**

**Respondent:** **Rajasthan Electricity Regulatory Commission**

**Bench:** **Mr. Justice V. Gopala Gowda and**
**Mr. Justice R. Banumathi, JJ.**

**Dated:** **13th May 2015**

**Issue:** whether the impugned Regulations imposing RE Obligation upon Captive Power Plants framed by the RERC in exercise of power Under Section 86(1)(e) of the Act of 2003, which provides for promotion, co-generation of electricity from renewal source of energy are *ultra vires* the provisions of the Act or repugnant to Article 14 and 19(1)(g) of the Constitution.

# Supreme Court's Ruling

50. Article 51A(g) of the Constitution of India cast a fundamental duty on the citizen to protect and improve the natural environment. Considering the global warming, mandate of Articles 21 and 51A(g) of the Constitution, provisions for the Act of 2003, the National Electricity Policy of 2005 and the Tariff Policy of 2006 are in the larger public interest, Regulations have been framed by RERC imposing obligation upon captive power plants and open access consumers to purchase electricity from renewable sources. **The RE obligation imposed upon captive power plants and open access consumers through impugned Regulations cannot in any manner be said to be restrictive or violative of the fundamental rights conferred on the Appellants under Articles 14 and 19(1)(g) of the Constitution of India.**

# Gujarat HC Civil Appeal No. 171 of 2011 and Batch

- 14 CPPs approached the Gujarat High Court against the GERC Regulations Fastening CPPs in the State with RPO. The plea taken by the Appellants was similar to the plea taken by Appellants in Hindustan Zinc Case supra.
- Single Bench of Gujarat High Court in its judgment dated 12.3.2015 upheld the GERC Regulations on the similar ground as taken by Hon'ble Supreme Court in Hindustan Zinc Case.
- The matter was taken in Appeal before Division Bench of the High Court
- The Division Bench in its judgment dated 5.5.2015 confirmed the order of single member bench and upheld the GERC Regulations.

# Who Should be the Chairperson of a Commission

# Civil Appeal No. 4126 of 2013



- Appellants: **T.N. Generation and Distbn. Corpn. Ltd.**

  **Vs.**

  Respondent: **PPN Power Gen. Co. Pvt. Ltd.**
- **Bench:** S.S. Nijjar and A.K. Sikri, JJ.
- Decided On: 04.04.2014
- Issue: Whether it is mandatory to have a judge as Chairperson of the Commission

# COURT'S OBSERVATIONS

- Section 113 of the Act mandates that the Chairman of APTEL shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court. A person can be appointed as the Member of the Appellate Tribunal who is or has been or is qualified to be a Judge of a High Court. This would clearly show that the legislature was aware that the functions performed by the State Commission as well as the Appellate Tribunal are judicial in nature. Necessary provision has been made in Section 113 to ensure that the APTEL has the trapping of a court.
- **This essential feature has not been made mandatory under Section 84 although provision has been made in Section 84(2) for appointment of any person as the Chairperson from amongst persons who is or has been a Judge of a High Court. In our opinion, it would be advisable for the State Government to exercise the enabling power under Section 84(2) to make appointment of a person who is or has been a Judge of a High Court as Chairperson of the State Commission.**

# Writ Petition (PIL) No. 172 of 2014 in Gujarat High Court



- Appellants: UTILITY USERS' WELFARE ASSOCIATION
  Versus
  STATE OF GUJARAT & 12

- **Bench:** Jayant Patel, Acting CJ and N V Anjaria, J.
- Decided On: 08.10.2015
- Issue: Whether it is mandatory to have a judge as Chairperson of the Commission

# Gujarat High Court's Ruling

1) **The word used "may" in Section 84(2) shall be** interpreted to mean "as far as possible" and unless impossible for the appointment of any person as Chairperson from amongst the persons, who are or have been Judge of the High Court.

2) **When it is impossible to resort to Sub-section**(2) of Section 84 as per the interpretation made in the present judgement, the Government may fall back upon Section 84(1) for appointment of chairperson, but such action of appointment, if made on the basis of misconceived or non-availability of doctrine of necessity, the said action would be vulnerable and subject to challenge under Article 226 of the Constitution.

3) **Even in case of impossibility to make** appointment under Section 84(2), if the State decides to exercise power under Section 84(1) of the Act, then the person to be considered for appointment as Chairperson must possess the minimum experience of work for 5 years in the cadre of District Judge or minimum experience of practice in District Court or High Court for 10 years as an advocate.

# Whether CAG can Audit the Accounts Of a Private DISCOM

# Writ Petition No. 895 of 2011 in Delhi High Court

**Petitiners: UNITED RWAS JOINT ACTION (URJA)**

**Versus**

**Respondents: UNION OF INDIA AND ORS**

**Bench: The Chief Justice and Rajiv Sahai Endlaw (J)**

**Date: 30.10.2015**

**Issues:** (I) Whether under Section 20(1) of the Comptroller and Auditor Generals' (Duties, Powers and Conditions of Service) Act, 1971 (CAG Act) the Comptroller and Auditor General of India (CAG) can be requested to undertake the audit of the accounts of the Distribution Companies (DISCOMs),

(II) Whether the said decision to request such audit is to be of the Administrator, acting on his own, or on the aid and advice of the Council of the Ministers of GNCTD.

(III) Whether the direction so given to the CAG in the present case has been taken in accordance with the procedure prescribed under Section 20 of the CAG Act and if not, to what effect.

(IV) Whether the audit so directed can be since the date of inception of DISCOMs i.e. 1st July, 2002 and if not, for what period.

(V) If it were to be held that the CAG can conduct audit of DISCOMs but the direction impugned in these proceedings is bad for the reason of having been issued without compliance with the proper procedure, whether a mandate ought to be issued to the GNCTD or to the CAG to conduct the audit of the DISCOMs

# Delhi High Court's Rulings

- Issue 1: President or Governor or Administrator in UTs can direct CAG to Audit accounts of any company under Article 149 of the Constitution.
- Issue 2: Administrator of UT has to act on aid and advice of the government.
- Issue 3: Procedure prescribed by the Section 20(1) of the CAG Act has not been followed by the Delhi Government. DISCOMS must have been heard after decision had been taken to get their accounts audited by CAG in consultation with CAG and the Terms and Conditions for CAG Audit had been framed. In other words the DISCOMs must have been heard after finalizing the Terms and Conditions of CAG Audit. In this case opportunity was given to DISCOMS before entry conference with CAG and finalization of Terms and Conditions of Audit. **The Government's order on CAG Audit reversed on this ground.**
- Issue 5: The purpose of ordering CAG Audit was to reduce the tariff. Tariff fixation is exclusive domain of DERC. No useful purpose could have been served for the audit as the Government can not direct the DERC in any matter related to tariff. Govenrment has no role in fixation of tariff.

# Tariff Related Issues

# OP1 of 2011

- Date of Judgment; 11.11. 2011

- Bench: Karpaga Vinayagam, Chairperson
  Rakesh Nath, Technical member
  V J Talwar, Technical member
- Issue: Non-performance of SERC in issuance of timely tariff orders.

# OP1 of 2011

- Suo-Motu action on the letter received from Ministry of Power.
- Complaint that most of the State Commissions constituted all over India have failed to comply with statutory requirements by not making periodical tariff revisions resulting in the poor financial health of the State distribution utilities and requesting this Tribunal to take appropriate action and to issue necessary directions to the State Commissions under section 121 of the Electricity Act,2003 (the Act) to ensure that all the State Commissions perform their statutory functions without any default.

# Directions

- Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted year to year basis as per the time schedule specified in the Regulations.
- It should be the endeavour of every State Commission to see that the tariff for the financial year is decided before 1st April of the tariff year.
- In the event of a delay in filing of the ARR truing-up and Annual Performance Review, beyond 31st December, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy.

# Directions

- In determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of routine except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset shall be allowed to the utilities to avoid problem of cash flow.
- Truing up shall be carried out regularly and preferably every year.
- Every State Commission must have in place a mechanism for adjustment of Fuel and Power Purchase cost in terms of Section 62 (4) of the Act. … Any State Commission which does not already have such formula/mechanism in place must within 6 months of the date of this order must put in place such formula and ensure its implementation latest by 1.4.2013.

# Appeal No. 131 of 2011

- Appellant : Haryana Power Generation Company
- Respondent: Haryana Commission
- Date of judgment: Feburary 2012
- Bench : Karpaga Vinayagam, Chairperson
  V J Talwar, Technical Member

- Issue: Whether provisions of CERC Regulations are binding on State Commissions?

# Contentions of the Appellant

- The Appellant, Haryana Generation Company has stated that the Haryana Commission has not followed the guidelines laid down by the Central Electricity Regulatory Commission and principles laid down by the Tariff Policy issued by the Government of India in accordance with Section 3 of the 2003 Act.
- Referring to Section 61 of the Act, the Appellant contended that the State Commissions, while fixing tariff, are required to be guided by the principle laid down by the Central Commission and the National Electricity Policy and Tariff Policy.
- The State Commission has neither followed the principles and methodology specified by the Central Commission nor followed the provisions of Tariff Policy and National Electricity Policy.

# Observations of APTEL

- Bare reading of section 61 would elucidate that the State Commissions have been mandated to frame Regulations for fixing tariff under Section 62 of the Act and while doing so i.e. while framing such regulations, State Commissions are required to be guided by the principles laid down in by the Central Commission, National Electricity Policy, Tariff Policy etc.

- It also provide that while framing the regulations the State Commissions shall ensure that generation, transmission and distribution are conducted on commercial principles; factors which would encourage competition and safe guard consumer's interest.

- Once the State Commission has framed and notified the requisite Regulations after meeting the requirement of prior publication under Section 181(3), it is bound by such Regulations while fixing Tariff under Section 62 of the Act and the Central Commission's Regulations have no relevance in such cases.

- However, the State Commission may follow the Central Commission's Regulations on certain aspects which had not been addressed in the State Commission's own Regulations.

# Appeal No. 266 of 2006

- Appellant: North Delhi Power Limited
- Respondent: Delhi Commission
- Date of Judgment : 23.5.2007
- Bench: H L Bajaj, Technical Member
  Manju Goel, Judicial Member

- Issue: Truing Up Exercise

# Observations of APETL

- Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up.
- While considering the tariff petition of the utility the Commission has to reasonably anticipate the revenue required by a particular utility and such assessment should be based on practical considerations.
- It cannot take arbitrary figures of increase over the previous period's expenditure by an arbitrarily chosen percentage of 4% or 20% and leave the actual adjustments to be done in the truing up exercise.

# Observations of APTEL

- The truing up exercise is mentioned to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year.
- When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure.
- This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence.

# Observations of APTEL

- In any case, the method adopted by the Commission has not helped either the consumer or the utilities. It can only be expected that the Commission will properly understand its role in assessing the revenue requirement of the utility and in determination of the tariff in accordance with the policy directions and the relevant law in force.

# Appeal No. 36 of 2008



- Appellant: BSES Rajdhani Power Limited
- Respondent: Delhi Commission
- Date of Judgment : 6.10.2009
- Bench: H L Bajaj, Technical Member
  Manju Goel, Judicial Member
- Issue: Load Projections made by the licensee vis-à-vis projections made by the Commissions

# Observations of APTEL

- The projection of sale in the area of the licensee depends on the peculiar situation which obtains in the area of the licensee. We are unable to approve the methodology adopted by the Commission which projects the sale of all the DISCOMs together and divides the projection amongst the areas of the different licensees depending upon the proportion of their business. The actual figures for 2007-08 have been submitted to the Tribunal. The actual figures do not tally with the estimation of either the Commission or that of the appellant. Neither of the two estimations is too far from the actuals.

- We do feel that the Commission should determine the sale projection based on the data of a particular area of each distribution agency rather than taking into account the data of the entire city. While doing so the Commission should pay due regard to the projections made by the licensee who is responsible for supplying electricity to the consumers in its area and also has to face the consequences of failure in discharging his responsibility.

# ISSUES RELATED TO RETAIL TARIFF

- Components of Retail Tariff
  - Power Purchase Costs
  - Return on Equity
  - Interests on Loan
  - Depreciation
  - Operation and Maintenance Expenditure
  - Interest on Working Capital
  - Income Tax.
- Rationalization of Retail Tariff

# ON DEPRECIATION

# Appeal no. 265 of 2006

- Appellant: North Delhi Power Limited
- Respondent: Delhi Commission
- Date of Judgment: 23rd May 2007
- Bench: H L Bajaj, Technical Member
  Manju Goel, Judicial Member

- Issue: Whether Depreciation is permissible on APDRP Grant?

# Observation and Ratio

- "It may further be said here that there is no rationale for declining to allow depreciation for assets acquired out of the APDRP grant because depreciation is a source of funding required for **replacement of assets**. **Therefore, unless the Commission is able to say that APDRP grant will be available every year and there is no need to create funds for replacement of such assets, it cannot say that no depreciation on such asset may be given."**

- **Ratio: Depreciation is permissible on grant.**

# Appeal no. 27 of 2007

- Appellant: Haryana Vidyut Prasaran Nigam Ltd
- Respondent: Haryana Commission
- Date of Judgment: 4.10.2007
- Bench: Anil Dev Singh, Chairperson
  A A Khan, Technical Member
- Issue: Depreciation is meant for ?

# Observations and Ratio

- **Issue:- Whether depreciation is meant for replacement of asset after useful life?**
- We are persuaded to hold that in view of the fact that generation does not require any license, value of BBMB/IP stations assets appear in the Balance Sheet of HVPNL and **that replacement will be required after useful life of assets,** the depreciation on BBMB/IP station assets deserves to be allowed as claimed by the appellant. Hence this point is answered in favour of the appellant.

- Ratio: Depreciation is meant for replacement of assets after its useful life

# Appeal no. 134 of 2010

- Appellant: Power Grid Corporation of India
- Respondent: Central Commission
- Date of Judgment: 5.4.2011
- Bench: Karpaga Vinayagam, Chairperson
  V J Talwar, Technical Member
- Issue: Whether Depreciation is permissible on Grants?

# Usage of Depreciation explained

- In tariff exercise expenditure for meeting the interest payment liability of the utility on the loan raised is allowed.
- Similarly Return on Equity (RoE) for providing Equity for creating an asset is also allowed.

**However, no allowance is made for repayment of principle amount of loan.**

Depreciation is thus linked to principle repayment liability of the utility. Since the life span of asset created is higher than term of loan raised to create the asset, the depreciation allowed on straight line method would be less than principle loan repayment liability of the utility.

# Usage of Depreciation explained

- So as to allow the utility to have sufficient funds to repay its interest and principle repayment liability, the concept of Advance Against Depreciation (AAD) had been introduced by various Electricity Regulatory Commissions in the country. Under this concept in addition to allowable depreciation, the distribution licensee is allowed to claim an advance against depreciation (AAD).
- Thus in practice, depreciation is utilized to meet loan repayment liability of the utility arisen out of creation of an asset.
- When such an asset is required to be replaced after expiry of its useful life, fresh financial arrangements are made.
- In the light of above discussions it is clear that as per definition, depreciation is replacement cost of an asset but in practice it is utilized for repayment of loan.

# Treatment of Depreciation

- Accounting Standard 12 of Institute of Charted Accountants of India permits two methods of presentation of grants in accounts.
  - 1st method – Amount of grant is deducted from GFA and depreciation is allowed on net amount
  - 2nd method – Depreciation is allowed on grant and the amount of depreciation on grant is considered as non-tariff income and deducted from ARR of licensee.
- **Impact of both the methods is same i.e. Tariff Neutral**
- Ratio: In Power Sector depreciation is not used for replacement of assets. It is used for repayment of Loan. Accordingly depreciation on grants is not permissible.

# Appeal no. 102 of 2011

- Appellant: Haryana Vidhyut Prasaran Nigam
- Respondent: Haryana Commission
- Date of Judgment: 18.4.2012
- Bench: P S Datta, Judicial member
  V J Talwar, Technical Member
- Issue: Whether Depreciation is meant for replacement of asset?

# Observations

- The Appellant in this case had claimed depreciation on BBMB and IP assets for replacement after serving useful life.
- It would be pertinent to mention that if the depreciation is used for asset replacement than the Appellant must surrender the amount it has received as depreciation against IP station as this asset has been shut down permanently.
- **We are not passing any direction to recover the said amount as we are aware that in Indian Power Sector the depreciation is normally utilised for meeting the loan liabilities and not for replacement of asset.**

# Appeal no. 61 of 2012

- Appellant: BSES Rajdhani Power Limited
- Respondent: Delhi Commission
- Date of Judgment: 28.11.2014
- Bench: Karpaga Vinayagam, Chairperson
  Rakesh Nath, Technical Member
- Issue: Whether Depreciation is permissible on consumer's contribution?

# Ratio

- Issue: Whether depreciation on consumer contribution is permissible?
- Equating Consumer Contribution with grant, the Tribunal has held that the **Depreciation on Consumer Contribution is not permissible.**

# INTEREST ON LOAN/ NOTIONAL LOAN

# Appeal no. 40 of 2011

- Appellant: DVC
- Respondent: Central Commission
- Date of Judgment: 1.5.2012
- Bench: P S Datta, Judicial member
  V J Talwar, Technical Member
- Issue: Whether Equity infused in excess of 30% during construction period is to be treated as 'Notional Loan' and IDC is permissible on this?

# Appellant's claim

- The cumulative capital cost should be divided in the debt equity ratio of 70:30, the excess equity deployed should be treated as a loan. All such equity amount even during construction period has to be treated as notional loan.
- Accordingly Notional IDC should be duly allowed.
- The Central Commission has, however, allowed only the actual IDC and has disallowed IDC on notional loan.

# Observations

- Bare perusal of the Regulation 20 of CERC Tariff Regulations would reveal that debt – equity ratio of 70:30 is to be considered as on date of commercial operation and for the purpose of determination of tariff. It does not provide that the debt - equity ratio of 70:30 would be considered during construction of the project or after its commercial operation.

- Factually, debt component of the capital cost has to be repaid as per term of the loan and equity component of capital would remain constant during the life of the project.

- Therefore, debt – equity ratio would vary from time to time and after repayment of loan only equity would remain. Similarly, Capital would be injected during construction of the project depending upon the requirement and availability of funds either from loan or from equity and debt – equity ratio would vary.

# Observations and ratio

- In the present case debt – equity ratio had been varying from quarter to quarter throughout the construction period.
- In the beginning equity component was 100% and during some months it was as low as 10%.
- If the contention of the Appellant is accepted then interest on 'normative' loan would be payable when equity is more than 30% but when loan is more than 70%, interest on actual loan would have to be provided.
- This would result in unjust increase in the capital cost of the project. As brought out above, the Appellant's claim of 'notional interest' on 'notional loan' during construction period is in fact a claim on return on equity during construction which is not permissible.

# Appeal no. 160 of 2013 and Batch

- Appellant: Reliance Infrastructure Limited
- Respondent: Maharashtra Commission
- Date of Judgment: 8.4.2015
- Bench: Rakesh Nath, Technical member
  Surendra Kumar, Judicial Member
- Issue: Rate of Interest on Actual Loan taken and also rate of interest on outstanding normative loan?

# FACTS

- Appellant Rinfra is involved in the Business of Generation, Transmission and Distribution in the city of Mumbai. It is also carrying out other business not regulated by MERC.
- Rinfra submitted ARR separate petitions for generation, transmission and distribution.
- Rinfra-G has not taken any loan and had some outstanding 'Normative Loans'
- Rinfra-T has taken actual loans having terms ranging 5-7 years for the new projects in transmission.
- Rinfra-D has taken loans to replace certain 'Normative Loans'.

# Commission's Regulations related to interest on loans

- The rate of interest shall be the weighted average rate of interest calculated on the basis of the actual loan portfolio at the beginning of each year applicable to the Generating Company or the Transmission Licensee or the Distribution Licensee:
- Provided that if there is no actual loan for a particular year but normative loan is still outstanding, the last available weighted average rate of interest shall be considered.
- Provided further that if the Generating Company or the Transmission Licensee or the Distribution Licensee, as the case may be does not have actual loan, then the weighted average rate of interest of the Generating Company or the Transmission Licensee or the Distribution Licensee as a whole shall be considered

# Commission's observations

- For Generation business the MERC observed that since there is no actual loan taken by the petitioner, it shall be allowed weighted average of rate of interest for loans taken by the Company for regulated as well as unregulated businesses as per 2nd proviso to regulation 33.5. Accordingly allowed 8% instead of 11% demanded by the appellant as the last available weighted average rate of interest as per first proviso to Regulation 33.5.

- In its order for Transmission the MERC observed that the Appellant has taken short term loans for 6-7 years bearing high rate of interest. The Appellant should have taken long term loans at lower rate of interests.

- In its order for distribution the MERC observed that the Appellant has swapped 'Normative Loans' for Actual Loans at higher rate of interest. Refinancing of Loans would make sense only if fresh loans are taken at lower rate of interest. MERC allowed rate of interest lower than actual rate.

# Appellate Tribunal's findings

- i) The interest rate on the normative loan as on 01.04.2011 has to be reconsidered in view of the judgment of this Tribunal in Appeal nos. 138 and 139 of 2012 at the prevailing market rate.

- ii) There is no provision for replacement of outstanding normative loan by actual loan. However, there is no bar in replacing the outstanding normative loan as on 01.04.2011 by actual loan provided the actual loan has been taken for the assets which have been taken into service prior to 01.04.2011 and the Appellant is able to establish that no prejudice has been caused to the consumers by arranging loans at better terms then the prevailing market rates.

- iii) The perception that the State Commission is having that the loan of tenure of 5 to 6 years is short term loan and the interest on a loan for tenure of 10 years or more than 10 years will be lower than the interest rate for 5-7 years tenure is not correct as the Bank may charge higher spread on longer term loans. The Bank would perceive a loan of 10 or more than 10 years as having higher risk than loan of 5 to 6 years. Sometimes when the interest rates are showing declining trend it may be advisable to take shorter term loan. The interest rate on the actual loans taken by the Appellant for the new capital works should be decided taking in account the data on market rates of loan and actual loans availed as furnished by the Appellant after analysis.

# RETURN ON EQUITY

# Appeal no. 21 of 2010

- Appellant: Haryana Vidhyut Prasaran Nigam
- Respondent: Central Commission
- Date of Judgment: 11.11.2011
- Bench: Karpaga Vinayagam, Chairperson
  V J Talwar, Technical Member
- Issue: The only grievance of the Appellant was against the method of recovery of the charges by PGCIL. According to the Appellant the recovery of charges are computed on yearly basis but recovered on monthly basis. This methodology adopted by the PGCIL would result in over recovery by PGCIL?

# Crux of Contentions of the Parties

- The PGCIL's case was based on the fact that the issue in hand is generic and has been adopted throughout the country for tariff determination. In all tariffs, the fixed charges are computed on annual basis but recovered monthly without considering the frequency of interest payment.
- The Appellant categorically stated that issue is not generic but specific to ULD&C scheme.

# Whether the issue was generic or specific?

- In generic transmission tariff, Equity and Loan are not recoverable through transmission charges.
- The equity invested in the asset is not recovered and remain invested throughout the life of asset and is not paid through tariff.
- Similarly, repayment of principle of loan amount is not a part of tariff.
- In the present case the PGCIL proposed to recover equity as well as loan capital in 15 years through annual charges.
- Thus, there is a material difference in generic transmission charges and annual charges for ULDC Scheme. Therefore, these two are to be treated differently.

# Observations

- The equity is not recovered in generic transmission tariff.
- Accordingly, it would not matter as to whether Return on Equity is paid on annual basis or monthly basis.
- It would also not matter as to whether equity is levelised or not. As long as equity remains same, the Return on Equity would also remain same under all the circumstances.
- However, in the present case before us, the equity is also recovered in equal monthly instalments. As such Return on Equity would also diminish with the reduction in balance equity.
- Since, in this case equity is also recoverable in equal monthly instalments; the methodology adopted by the Central Commission would result in higher recovery of equity as well.

# OPERATION AND MAINTENANCE CHARGES

# Appeal no. 61 of 2012

- Appellant: BSES Rajdhani Nigam Limited
- Respondent: Delhi Commission
- Date of Judgment: 28.11.2014
- Bench: Karpaga Vinayagam, Chairperson
  Rakesh Nath, Technical Member
- Issue: Whether higher expenditure incurred for one or some of the components in O&M charges is permissible under normative regime?

# Observations and Ratio

- There are many sub-components under the head A&G expenses. Audit fee is one of such sub-component. Under normative regime, break up of each component is not considered and the expenses as a whole are approved by the Commission based on applicable Regulations.
- Under normative setup, the licensee may loose on one of the component and gain on other components. If there is gain i.e. actual expense is less than the approved expense, the licensee pockets the gain. Similarly lose, if any, is to be borne by the licensee.
- Under normative regime, the licensee cannot be permitted to claim additional expenditure it is likely to suffer on account of increased expenditure on one component and any gain on reduction in expenditure on other components is kept by the licensee.

# INCOME TAX

- **In Reliance Infrastructure Ltd Vs MERC in Appeal No.111 of 2008 (2009 ELR(APTEL 560) dated 28.5.2009 it was held that** for income tax on incentives is to be given to it as a pass through.
- **In Torrent Power Ltd Vs GERC in Appeal No.68 of 2009 23.3.2010 the tribunal** laid down the principle of grossing up of Income tax. Grossing up of the income tax would ensure that after paying the tax, the admissible post tax return is assured to the Appellant. In this way the Appellant would neither benefit nor loose on account of tax payable which is a pass through in the tariff.
- **In Gujarat Electricity Regulatory State Commission Vs Torrent Power Limited in Review Petition No.09 of 2010 in Appeal No. 68 of 2009 dated 5.01.2011** this Tribunal has observed that the Utility should neither benefit nor loose on account of tax payable which is a pass through in the tariff. Thus, there is no question of the company making profit on account of income tax.

# Appeal No.251 of 2006 – Reliance Energy Ltd Vs MERC

- The consumers in the licensee's area must be kept in a water tight compartment from the risks of other business of the licensee and the Income Tax payable thereon.
- Under no circumstance, consumers of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee.
- **Income Tax assessment has to be made on stand alone basis for the licensed business so that consumers are fully insulated and protected from the Income Tax payable from other businesses.**

- **In TPC Vs MERC in Appeal No.174 of 2009 Dated 14.02.2011 and in Appeal No.173 of 2009 Dated 15.02.2011** the Tribunal held that Profit Before Tax should be basis for assessment of income tax during truing up and restated the principles of Grossing up and income tax on incentives to be pass through.

- In Appeals No. 104, 105 & 106 of 2012, the Tribunal has carried out detailed analysis of all the above judgments and rendered its view on Income Tax at page numbers 22 to 45.

# ISSUES RELATED TO RATIONALIZATION OF TARIFF

# Appeal no. 75 of 2011

- Appellant: Sothern Railways
- Respondent: Tamil Nadu Commission
- Date of Judgment: 23.5.2012
- Bench: Karpaga Vinayagam, Chairperson
  V J Talwar, Technical Member

- Issue: Whether Railways being public utility is entitled fro preferential tariff.

# Issues framed by APTEL

- Whether the State Commission has violated the provisions of Article 287 of the Constitution of India?
- Whether directive issued by Ministry of Power, Government of India in 1991 are binding on the State Commissions constituted under Electricity Act 2003?
- Whether the Appellant is entitled for concessional tariff by virtue of it being a public utility?
- Whether the provisions of the Distribution Code and the Supply Code relating to voltage wise classification of consumers is binding in tariff determination by the State Commission?
- Whether the special category created by the State Commission for the Appellant is sufficient to offset the investments made by the Appellant in taking the supply at EHT level or further rebate in energy charges would also be necessary?

# Article 287 discussed

- Article 287 bars any State Government to impose tax on the consumption of electricity by the Railways. The Tariff determined by the State Commission is in accordance with Electricity Act 2003 which is a Central Act passed by the Parliament.
- The last portion of the Article 287 provides that where the retail tariff includes any tax imposed by the State Government, the tariff for the Railways would be lesser by an amount equal to such tax.
- The Impugned Order determining the tariff for all categories of consumers did not have any component of any tax imposed by the State Government.
- The Article 287 does not deal with tariff much less with the plea of the Appellant that it provides for lower tariff for Railways as compared to other HT consumers.

# Whether being a public utility railways is entitled for concessional tariff

- With the advent of economic reforms said to have been initiated by the Government in the early nineties the concept of what should be the attitude of the public utilities in its service to the society has definitely undergone a change and the appellant cannot any longer say that since it serves the people without any profit motive it requires special treatment from the respondents nos. 2 and 3 because to say so is to forget that the respondent no. 2 & 3 are equally Government companies and they are right when they say that they are also equally public utilities and they cannot be asked to run on non- commercial principles, for to do so is to wind up their concerns. It is for the appellant to lay down its own policy.

# On Drawal of power on own network at EHT

- The plea of the Appellant is that it is drawing power at 110 kV from the Electricity Board's grid by laying 110 kV line and 110/25 kV substation at its own cost and therefore, it is entitled for lesser demand charges.
- This is untenable for the reason that under Section 46 of the 2003 Act, the licensee is entitled to recover expenditure incurred in providing the electric line and electric plant for giving supply to any consumer under section 43 of the Act.
- The Electricity Board is charging the cost of service line even from a domestic LT consumer. Other 135 EHT consumers taking supply at 110 kV or above also provide the cost of these facilities. The Appellant Railways was required to pay such charges even in case it preferred to take supply at 33 kV or 11 kV. In such a case the Appellant Railways was also required to provide 33/25 kV or 11/25 kV substation as the traction is at 25 kV.

# On Drawal of power on own network at EHT

- So there is nothing exceptional for the Appellant Railways in providing the cost of 110 kV lines and 110/25 kV Substation at their own cost.
- Drawal of power at 110 kV or above for consumers with heavy power demand is technical requirement. Theoretically, any load can be met even at 400 volts. However, that would require large number of circuits depending upon the power requirement. Managing large number of parallel circuits would be techno-economically unviable and unpractical. Accordingly, the State Commission has fixed the voltage levels for drawal of power. Undoubtedly, drawal of power at EHT level would result in lesser distribution losses, the same would be true for other EHT consumers also.

# Appeal no. 110 of 2009

- Appellant: Association of Hospitals
- Respondent: Maharashtra Commission
- Date of Judgment: 20.10.2011
- Bench: Karpaga Vinayagam, Chairperson
  Rakesh Nath, Technical Member

- Issue: Whether motive of earning profit comes within the preview of 'Purpose for which supply is required' in Section 62(3) of the Act.

# OBSERVATIONS

- The State Commission in the present case wrongly placed all the consumers including the Appellants who were neither domestic nor industrial nor falling under any of the categories under the Commercial Category.
- The purpose for which the supply is required by the Appellants can not be equated at par with other consumers in the Commercial Category.
- The Appellants are seeking separate categorisation on the basis of purpose for which the supply is required by the Appellants i.e. rendering essential services.

# Observations

- The real meaning of expression ‘ “purpose for which the supply is required” as used in Section 62 (3) of the Act does not merely relate to the nature of the activity carried out by a consumer but has to be necessarily determined from the objects sought to be achieved through such activity.
- The Railways and Delhi Metro Rail Corporation have been differentiated as separate category as they are providing essential services. The same would apply to the Appellants as well.
- The application of mind should be on identifying the categories of the consumers who should be subjected to bear the excess tariff recoverable based on a valid reason and justification.

# Observations and ratio

- The re-categorisation of Charitable Hospitals and Charitable Organizations and grouping them with the consumers of the category such as Shopping Malls, Multiplexes, Cinema Theatres, Hotels and other like commercial entities is patently wrong.
- By the impugned order, the State Commission classified the members of the Appellants into 'Commercial' category following a mechanical approach.
- This has been done only because the Appellants cannot fall under either in the industrial or agricultural or residential category and therefore, the Appellant would automatically fall in the Commercial Category.
- This is not a proper approach. In case the State commission felt that the Appellants are not falling under any particular existing category, then the State Commission ought to have applied its mind and provided for a new category and given them a competitive tariff having regard to the purpose for which the electricity is used by them.

# Appeal no. 39 of 2012



- Appellant: Rajasthan Engineering College Association
- Respondent: Rajasthan Commission
- Date of Judgment: 28.8.2012
- Bench: P. S. Datta, Judicial member
  V J Talwar, Technical Member

- Issue: Whether motive of earning profit comes within the preview of 'Purpose for which supply is required' in Section 62(3) of the Act.

# Facts and question before the Aptel

- The Commission has fixed higher tariff for private owned educational institutions than for the Government owned educational institutions. The question was -
- Whether the State Commission can ignore the phrase '*purpose for which the supply is required*' appearing in Section 62 (3) of the Electricity Act, 2003 while classifying consumers in various categories and classifying the educational institutions in different categories merely because of the difference in ownership.

# Section 62(3) explained

- The mandate of Section 62 (3) is that no **undue** preference should be shown to any consumer. If no preference is to be shown to any consumer of electricity, it would mean that all consumers are to be supplied electricity at uniform tariff reflecting the cost of supply. This is clear from the first part of Section 62 (3) which uses the expression ***"shall not……..show undue preference to any consumer***".

- This would mean that due preference can be given. What is prohibited is a preference of undue nature.

- There should, however, be a rationale or reason for giving due preference. For example, a life line consumer below poverty level can be given preference in the tariff based on his non-affordability. Similarly, agricultural consumers can be given preference because of the important nature of activities being carried out by them.

# Categorization of consumers explained

- Thus, retail tariff for the Consumers can be differentiated, *inter alia*, on the basis of purpose for which supply is required. There can be numerous purposes for which supply is taken. Some of these are:
  - Residential, Paying Guest Accommodation, Guest House, Hotels, Motels, Gaushala, Piyao, Dharmshala, Night Shelter Cheshire homes, etc.
  - Shops, Shopping Malls, Clubs, restaurants etc.
  - Agriculture, cultivation, horticulture, floriculture, mushroom production, etc.,
  - Public water works, Lift Irrigation, Public lighting,
  - Industry, Glass industry, Liquid Air, Steel Industry, Induction Furnace, Rolling mill, Pharma Industry, Plywood Industry,
  - Transportation, Inter-city and intra-city bus service, Railway, Metro, Airport, Aerodromes, Ship yards etc.

# Categorization of consumers explained

- It would not be practical for the ERCs to fix tariff for each of the groups of consumers as listed above. Therefore, the State Commissions all over the country have created various categories clubbing some the groups where supply is taken for similar purposes and created sub-categories within the main categories on other parameters enunciated in Section 62(3). Thus, State Commissions have created following main categories:
  - Domestic
  - Agriculture
  - Industry
  - Public Lighting
  - Public Water Works
  - Railways.
- In addition to above, State Commissions have also created another category viz., Non-domestic which is residual category. Any consumer which could not fall within main categories is categorised as non-domestic category.

# Categorization of consumers explained

- Commission have created sub-categories within the main categories to fix differential tariff based on Voltage ( LT/HT Industrial tariff), Total Consumption (Slab wise tariff in domestic category), Time of day, (Introduction of ToD tariff for select categories), Load factor (Load factor based Incentive/disincentive), geographical location (lesser tariff for hilly areas) etc.
- Section 62(3) permits the State Commissions to differentiate between the tariff of various consumers. The expression “may differentiate” as found in Section 62(3) clearly indicates that there shall be a judicial discretion to be exercised with reasons. It is well settled that any discretion vested in the statutory authorities is a judicial discretion. It should be exercised supported by the reasons.
- In other words, the categorization of the consumers should be based upon the proper criteria legally valid. It cannot be arbitrary.

# Purpose of supply explained

- It could be argued that while residential premises are charged at domestic tariff, the Hotels are being charged at Commercial tariff. Both, the residential premises and the hotels, are used for purpose of residence and, therefore, cannot be charged at different tariff because purpose for the supply is same. The argument would appear to be attractive at first rush of blood, but on examination it would be clear the purpose for supply in both the cases is different.

- The 'Motive' of the categories is different. Whereas Hotels are run on commercial principles with the motive to earn profit and people live in residences for protection from vagaries of nature and also for protection of life and property. **Thus 'purpose of supply' has been differentiated on the ground of motive of earning profit.**

- The fundamental ground for fixing different tariffs for 'domestic' category and 'commercial' category is motive of profit earning. In this context it is to be noted that even charitable 'Dharamshalas' are charged at Domestic tariff in some states. The objective of Dharmshalas and Hotels is same i.e. to provide temporary accommodation to tourists/ pilgrims but motive is different; so is the tariff. Thus the 'Motive of earning profit' is also one of the accepted and recognised criterions for differentiating the retail tariff.

# Appellant's submissions

- The term 'purpose' includes many factors. However, the differentiation done by the Commission has to be tested on the anvil of 'undue preference' as per first part of Section 62(3).
- The Appellant has submitted that the Commission has given undue preference to the Government run institutes by keeping them in the mixed-load category and re-categorised the Appellant and shifted it to non-domestic category.
- According to the Appellant ownership cannot be the criteria to differentiate the tariff under section 62(3) of the Act. Both the government run institutes and institutes run by members of the Appellant society imparts education and therefore the purpose for supply is same. Article 14 of the Constitution prohibits Equals to be treated unequally.

# Observations and reasons

- The contention of the Appellant that Government run educational institutes and institutes run by private parties are equal is misconceived and is liable to be rejected:
- Government run institutes are controlled by the education departments and run on budgetary support. On the other hand private institutions are run by the Companies incorporated under Companies Act 1956 and operate on the commercial principles. The survival of Government run institutes very often depends upon the budgetary provision and not upon private resources which are available to the institutes in the private sector.

# Differentiating Government institutions from private institutions.



- Right to education is a fundamental right under Article 21 read with Articles 39, 41, 45 and 46 of the Constitution of India and the State is under obligation to provide education facilities at affordable cost to all citizens of the country. Private institutes are not under any such obligation and they are running the education institutes purely as commercial activity.
- Article 45 of the Constitution mandates the State to provide free compulsory education to all the children till they attain the age of 14 years. In furtherance to this Directive Principle enshrined in the Constitution, a Municipal School providing free education along with free mid-day meal to weaker sections of society cannot be put in the same bracket along with Public School with Air-conditioned class rooms and Air-conditioned bus for transportation for children of elite group of society. They are different classes in themselves and have to be treated differently. Where Article 14 of the Constitution prohibits equals to be treated unequally, it also prohibits un-equals to be treated equally.

# Ratio

- The same is true for hospitals. Right to health is a fundamental right under Article 21 of the Constitution and Government has constitutional obligation to provide the health facilities to all citizens of India. Therefore, Hospital run by the State giving almost free treatment to all the sections of society cannot be treated at par with a private hospital which charges hefty fees even for seeing a general physician.
- Hon'ble Supreme Court in Hindustan Paper Corpn. Ltd. vs. Govt. of Kerala, (1986) 3 SCC 398 has also held that government undertakings and companies form a class by themselves.
- Ratio: Profit earning motive is the purpose for supply under Section 62(3)

# Appeal no. 323 of 2013



- Appellant: Shasun Research Centre
- Respondent: Tamil Nadu Commission
- Date of Judgment: 28.8.2012
- Bench: Karpaga Vinayagam, Chairperson
  Rakesh Nath, Technical Member

- Issue: Whether motive of earning profit comes within the preview of 'Purpose for which supply is required' in Section 62(3) of the Act.

# Observations and Ratio

- Section 62(3) of the Act provides that the Appropriate Commission may differentiate the consumers on the basis of several factors including the purpose for which the supply is required.
- The benefit accrued out of the Government run Research Units will be driven to public welfare and the profit earning is a secondary one, whereas in private owned Research Units, the profit earning is the prime object and public cause is relegated to next level.
- Therefore, the two can be classified as separate categories for the purpose of tariff. Such classification is based on an intelligible criteria and such classification has nexus to the purpose sought to be achieved.
- The Government run Units are not profit oriented and purely service oriented. Thus, there is a clear distinction between the Research Units recognized by the Government and the Research Units which are Government owned and Government affiliated.

# CROSS SUBSIDY SURCHARGE

# Statutory Provisions



- Section 38, 39 and 40 of the Act permits open access to consumer in transmission on payment of a surcharge to be used to meet current level of cross subsidy.
- Section 42 of the Act empowers Commission to permit open access to consumers on payment of a surcharge to be used to meet current level of cross subsidy.
- Tariff Policy has suggested certain formula to determine the cross subsidy surcharge.

# Appeal no. 169 of 2006

- Appellant: RVK Energy Limited
- Respondent: Andhra PradeshCommission
- Date of Judgment: 5.7.2007
- Bench: Anil Dev Singh, Chairperson
  A A Khan, Technical Member
  H L Bajaj, Technical Member

- Issue: Whether the State Commissions can deviate from the formula given in the Tariff Policy.

# Observations and directions

- We direct the APERC to compute the cross subsidy surcharge, which consumers are required to pay for use of open access in accordance with the Surcharge Formula given in para 8.5 of the Tariff Policy, for the year 2006-07 and for subsequent years.
- In future all the Regulatory Commissions while fixing wheeling charges, cross subsidy surcharge and additional surcharge, if any, shall have regard to the spirit of the Act as manifested by its Preamble. The charges shall be reasonable as would result in promoting competition. They shall be worked out in the light of the above observations made by us. This direction shall also apply to the APERC for computing the cross subsidy surcharge for the year 2005-06 as well.
- This Judgment of the APTEL has been stayed by the Hon'ble Supreme Court.

# Appeal no. 119 of 2009

- Appellant: Chhatisgarh State Power Distribution Co.
- Respondent: Chhatisgarh Commission
- Date of Judgment: 9.2.2010
- Bench: Karpaga Vinayagam, Chairperson
  H L Bajaj, Technical Member

- Issue: Nature of the Cross Subsidy Surcharge?

# Ratio

- Under the Act and the Regulations framed under the said Act a consumer is entitled to receive the supply of electricity from the source other than the licensee thereby making **a proviso to compensate the licensee therefore, show that there are provisions for the payment of cross subsidy surcharge and by that process, it safeguards the interest of the distribution licensee in whose area the consumer is located.**

# Appeal no. 200 of 2011

- Appellant: Maruti Suzuki India Limited
- Respondent: Haryana Commission
- Date of Judgment: 4.10.2012
- Bench: P S Datta, Judicial Member
  V J Talwar, Technical Member

- Issue: Whether the State Commissions can deviate from the formula given in the Tariff Policy.

# Facts

- Haryana Commission framed Tariff Regulations 2008 having provision for computation of cross subsidy surcharge based on Average Cost of Supply instead of top 5% marginal cost as suggested by Tariff Policy.
- HERC computed CSS according to its own Regulations i.e. based on ACoS.
- Maruti Motors Challenged the order based on RVK judgment and Tariff Policy.

# Observations and decision



- In RVK AP Commission had issued order. In this Case HERC has made Regulations, Regulations framed by the ERC cannot be challenged before APTEL.
- APTEL in two its judgments has held that **the term 'shall be guided' used in Section 61, 86 and 108 of the Act cannot be termed as mandatory and any direction hampering the statutory functions of the Commission cannot be considered as binding upon the Commission.**
- **Therefore, provisions of Tariff Policy suggesting computation of CSS is not binding.**

# Appeal no. 103 of 2012



- Appellant: Maruti Suzuki India Limited
- Respondent: Haryana Commission
- Date of Judgment: 24.3.2015
- Bench: Ranjana P Desai, Chairperson
  Surendra Kumar, Judicial Member
  Rakesh Nath, Technical Member

- Issue: Whether the term "shall be guided" used in Sections 61, 79 & 86 means appropriate Commission has to mandatorily follow Tariff Policy & National Policy ignoring Regulations framed by it.

# Appellant's Contentions

- Formula prescribed by the Tariff Policy for calculating CSS is binding of the Commission.
- Full Bench Judgment in RVK case is binding on the Commission.
- Commission cannot determine CSS without calculating voltage wise cost of supply.

# Appellate Tribunal's Findings

- While referring to the Constitutional Bench in PTC judgment the Tribunal in para 42 of its judgment has observed that
- The Act has distanced the Government from all forms of regulations, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access.
- This distance cannot be bridged by this Tribunal by holding that the National Electricity Policy or the Tariff Policy is binding on the Regulatory Commission. They can be only guiding factors.
- If the Regulatory Commissions have to be independent and transparent bodies, they are expected to frame Regulations under Sections 178 & 181 independently. They can take guidance from National Electricity Policy or the Tariff Policy but are not bound by them.

# Appellate Tribunal's Findings

- 43. P.T.C. India Ltd. leads us to conclude that Regulations framed under Sections 178 and 181 of the said Act have a primacy. Being subordinate legislation they rank above orders issued by the Regulatory Commissions in discharge of their functions under Section 61 read with Sections 62, 79 and 86.
- **They will have to be followed unless struck down by a Court in judicial review proceedings.**
- Regulations made under Sections 178 and 181 have to be consistent with the said Act.
- **Tariff Policy and National Electricity Policy are mentioned in Sections 61, 79 & 86 merely as guiding factors. They do not control or limit the jurisdiction of the Appropriate Commission.**

# Appellate Tribunal's Findings

- 45. It is clear from the above observations of the Supreme Court {in Transmission Corporation of AP} that the policy framed by the State cannot hamper the functions of the Regulatory Commission.
- It is implicit in the above observations that the National Electricity Policy or the Tariff Policy are to only serve as guiding factors.
- If there are Regulations in the field framed by the Appropriate Commission, the Appropriate Commission will have to follow them. Supremacy of Regulatory Commissions in this regard is acknowledged by the Supreme Court.

# Appellate Tribunal's Findings

- 46. In our opinion, reliance placed by the Appellant on the Full Bench decision of this Tribunal in R.V.K. Energy is totally misplaced. In that case two orders of the State Commission were under challenge. …. In our opinion, this judgment is not applicable to the present case because in that case no Regulations were framed by the State Commission prescribing methodology to determine the cross-subsidy surcharge. After the judgment of the Constitution Bench in P.T.C. India Ltd. to which we have made reference in great detail, this issue should not detain us any longer.

# Appeal no. 132 of 2011

- Appellant: Tata Power Company Limited
- Respondent: Maharashtra Commission
- Date of Judgment: 21.12.2012
- Bench: Karpaga Vinayagam
  V J Talwar, Technical Member

- Issue: Whether consumers opted supply from one licensee (TPC) using the system of other licensee (Rinfra) in the same area of supply (Mumbai) are liable to pay CSS.

# Findings

- Acting upon the judgment of Hon'ble Supreme Court in Civil Appeal No. 2898 of 2006 dated 8.7.2008, the Appellant TPC had filed petition before the State Commission under MERC (Open Access in Distribution) Regulations and consequently, the State Commission permitted changing over of Consumer from RInfra to TPC to get supply by using the network of RInfra. Having availed of the same, the Appellant TPC cannot now be permitted to contend that the observations of the Hon'ble Supreme Court relating to surcharge were 'fleeting' observations and not the findings.

# Findings

- The only method to use the network of the Distribution Licensee namely RInfra, by the another Distribution Licensee namely TPC, is only through open access under Section 42 of the Act.
- Section 42(3) envisages the existence of parallel distribution licensee and it is equally applicable in this case where a consumer connected to the network of one distribution licensee i.e. RInfra, takes power from other distribution licensee i.e. TPC in the same area of supply.

# Findings

- The State Commission is required to look after not only the interest of the consumers but also the interest of licensees. Therefore, the State Commission, while deciding that the change over consumers are liable to pay cross subsidy surcharge to RInfra for using their network has in fact taken into consideration the interest of the consumers as well as the interest of the licensees. Therefore, findings and directions given in the impugned order by the State Commission which would promote healthy competition are perfectly justified.
- Ratio: CSS is payable by the Consumer who are connected to the wires of one licensee and opts for taking supply from other licensee in the same area os supply.

# Appeal no. 140 of 2011

- Appellant: Reliance Infra Limited
- Respondent: Maharashtra Commission
- Date of Judgment: 14.11.2013
- Bench: Karpaga Vinayagam
  V J Talwar, Technical Member

- Issue: Whether consumers getting supply from one licensee opted supply from other licensee (TPC) using other licensee's system in the same area of supply (Mumbai) are liable to pay CSS.

# Findings

- No doubt, the Cross Subsidy Surcharge is a compensatory charge. When a subsidizing consumer takes supply from any other source by seeking Open Access, the amount of cross subsidy it was paying to the licensee would also be lost. This would put burden on remaining consumers particularly the subsidized consumers. In order to mitigate the loss of cross subsidy, the legislature has introduced the concept of Cross Subsidy Surcharge.
- The rational provided in the findings that but for the Open Access the consumers would have taken the quantum of power from the licensee and in the result, the consumer would have paid tariff applicable for such supply which would include an element of cross subsidy of certain other categories of consumers would not be applicable to situation having more than one licensee.

# Findings

- One of the objects of the 2003 Act is to promote competition. The above doctrine, if applied to areas having more than one distribution licensee, would defeat the purpose of the competition. Presently, most parts of the country are served by one distribution licensee only. Sixth proviso to Section 14 of the Act provide for multiple distribution licensee in the same area of supply through own distribution network. Therefore, second distribution licensee in any area will have to lay down its own network and all the consumers, who would opt to take supply from new licensee, will have to pay Cross Subsidy Surcharge of the existing licensee. This would make competition in distribution impossibility.

# Appeal no. 178 of 2011

- Appellant: Reliance Infra Limited
- Respondent: Maharashtra Commission
- Date of Judgment: 2.12.2013
- Bench: Karpaga Vinayagam
  V J Talwar, Technical Member

- Issue: Whether the MERC has determined the CSS correctly by adopting the figures of tariff and cost of supply for different periods.

# Findings



- The CSS can only be determined with the figures for the current year as per the law (2nd proviso to Section 42 of the 2003 Act). Anything done outside this requirement is patently illegal.
- Hon'ble Supreme Court in its judgment dated 30.9.2013 in Selvi J Jayalalitha Vs Government of Karnataka 2013(12) SCALE 234 has held that when a statue provides that a thing is to be done in a particular way, it has to be done in that way only and no other way.
- In view of the clear provision of 2nd proviso to Section 42, there cannot be any other view on this issue.

# Findings

- The contention of the State Commission that Tariff Policy provide that the CSS should not be so enormous to suffocate the Competition is misplaced.
- The Act mandated the State Commission to determine the CSS to meet the requirement of current level of cross subsidy. We have to keep in mind that the CSS is paid by the subsidizing consumers only. This Tribunal in catena of cases has held that CSS is compensatory in nature. It is meant for to compensate the loss suffered by the remaining subsidized low-end consumers.
- Thus, in the scenario of mass change-over of consumers, the CSS has also to be such that exodus of subsidizing consumers does not load the remaining low-end consumers heavily.

# Findings

- The State Commission had used actual revenue recovered from various category of consumers during FY 2010-11 and divided it with actual sale to those category during the same period. This approach is completely wrong and dehores any logic. While passing the tariff order for FY 2011- 12 the Commission must have the figures for expected revenue from every category and sale to such category. The Commission should have used these figures approved in the tariff order to arrive at Average Billing Rate or effective Tariff during the relevant year

# THANK YOU