

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 55 & 56 OF 2011

Dated: July, 2011

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. V.J. Talwar, Technical Member,**

In The Matter Of

APPEAL NO.55 OF 2011

M/s Aditya Birla Chemicals (India) Limited

... Appellant(s)

Versus

**1) Jharkhand State Electricity Regulatory Commission
Through its Secretary, Rajendra
Jawan Bhawan, Main Road, Ranchi
Jharkhand**

**2) Jharkhand State Electricity Board through its
Chairman, Engineers Building, HEC Township
P.O. & P.S. Dhurwa, District: Ranchi, Jharkhand**

....Respondent(s)

**Counsel for Appellant(s): Mr. Ajit Kr. Sinha, Sr.
Advocate**

**Mr. Mohit Kr. Shah, Mr.
S.Pathak, Mr. Ashwarya
Singa, D. Pathak, Mr. Rohit
Tripathi**

**Counsel for Respondent(s): Mr. S. Shrivastava for R-1
Mr. R.B. Sharma for R-2**

**1) Jharkhand Small Industries Association through its
Prtesident, Arun Khemka, son of Sri Chaturbhuj
Khemka, resident of Kokar, P.O & P.S. Kokar, District
Ranchi(Jharikhand)**

**..... Intervener in
I.A. No.132 of 2011.**

**2) Singhbhum Chamber of Commerce and Industries,
through its General Secretary, Suresh Kumar
Sonthalia, son of Sri K.D. Sonthalia, resident of
Ashiyana Garden, Sonari, P.O. & P.S. Sondari, District
East Singhbhum.**

**..... Intervener in
I.A. No.133 of 2011.**

**3) Federation of Jharkhand Chamber of Commerce
and Industries, through its President Sajjan Kumar
Saraff son of late Durga Prasad Saraff, resident of
Kutchery Raod, P.O. G.P.O. P.S Kotwali, District
Ranchi**

**..... Intervener in
I.A. No.134 of 2011.**

APPEAL NO.56 OF 2010

**M/s Jharkhand Induction Furnace Association
... Appellant**

Versus

Jharkhand State Electricity Regulatory Commission

Jharkhand State Electricity Board

....Respondent(s)

**Counsel for Appellant(s): Mr. Ajit Kr. Sinha, Sr.
Advocate
Mr. Mohit Kr. Shah, Mr.
S.Pathak, Mr. Ashwarya
Singa, D. Pathak, Mr.
Rohit Tripathi**

**Counsel for Respondent(s): Mr. S. Srivastava for R-1
Mr. R.B. Sharma for R-2**

JUDEGMENT

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

1. Aditya Birla Limited is the Appellant in Appeal No.55 of 2011. Jharkhand Induction Furnace Association is the Appellant in Appeal No.56 of 2011. Jharkhand State Commission is the 1st Respondent. State

Electricity Board is the 2nd Respondent. Since both the Appeals have been preferred as against the same impugned order dated 14.3.2011 passed by the Jharkhand State Commission, this common judgement is being rendered in both these Appeals.

The short facts are as under:

2. Consequent upon the formation of the new Regulations, the Jharkhand State Commission initiated a suo-moto proceedings on 4.12.2010 in Case No.30 of 2010 and directed all the generators and the licensee of the State to file their respective Annual Revenue Requirement (ARR) and Tariff Petitions for determination of tariff for the year 2011-12 by 31.12.2010 in the format appended in the Regulations along with the audited accounts.
3. In compliance with the said direction, the Jharkhand State Electricity Board, the second Respondent filed

its ARR and Tariff Petition for the year 2011-12 along with a Petition for truing-up of the ARR from the year 2003 to 2010 without the audited Accounts. The State Commission, on noticing that audited accounts were not filed by the Respondent-2, initiated separate proceedings in case No.33/2010 and issued notice to the State Electricity Board(R-2) asking it to explain the reasons as to why the audited accounts by statutory auditors have not been filed. On receipt of the said notice, the State Electricity Board (R-2) furnished the reasons through its letter dated 26.2.2011 for non-filing of the audited accounts along with the other information sought for by the State Commission. They prayed to condone their inability to produce the audited accounts and requested for fixing the tariff even without the audited accounts. On consideration of the explanation and the prayer made by the State Electricity Board, the State Commission felt that

before passing any orders on that, it would be appropriate to issue notice to all the stake holders to seek their views on the explanation submitted by the State Electricity Board for non filing of its audited accounts and for entertaining the petition without audited accounts. Accordingly, the State Commission issued notices to Stakeholders and invited public objections, by the order dated 26.2.2011 on the point of admission of tariff petition of the State Electricity Board without audited accounts in the light of their explanation. On the basis of the said notice, the objections were filed by the public. Public hearing was held on 12.3.2011. In the public hearing 33 persons participated. In the public hearing, both the public as well as the licensee Electricity Board were heard.

4. During the course of hearing, the State Electricity Board, explained the reasons for non submission of

audited accounts and requested the State Commission to admit the Petition for tariff determination for the Financial Year 2011-12 without audited accounts by relaxing the provisions of Regulations. On the other hand, the various consumers associations objected to the admission of this Petition contending that no tariff be decided in the Petition presented by the Electricity Board without audited accounts. Finally, after hearing the parties and after considering the explanation and prayer put forth by the Electricity Board, the State Commission by the impugned order dated 14.3.2009 decided to invoke the powers under clause 13.4 of the Regulation to relax the Regulation 4.4 which provides for the requirement of the audited accounts and to admit the petition for determination of the tariff without audited accounts. Accordingly the same was ordered. Thereupon, the State Commission started the process of conducting enquiry for making tariff

determination. At that stage, the Appellants have filed these Appeals challenging the State Commission's order dated 14.3.2011 on being aggrieved over the admission the said petition after relaxing the Regulation requiring the audited accounts.

5. Assailing the impugned order, The Learned Counsel for the Appellants would make the following contentions:

(a) Even though the State Commission is vested with the powers to relax any other provisions of the Regulations under Regulation 13.4, it specifically provides that while relaxing any provisions of the Regulation, the State Commission should do it only in the public interest and also should record the reasons in writing and not otherwise. But in the present case, the State Commission has not recorded

any valid reason while relaxing the Regulation 4.4 of the Regulation requiring the submission of audited accounts.

(b) The impugned order has not followed Section 61 (a) and Section 62 of the Electricity Act, 2003 which envisages that the State Commission shall be guided by the principles and methodology specified by the Central Commission for determination of the tariff. Regulation 5 of the Central Commission Tariff Regulation, 2004 provides that the generating Company has to submit the Application along with the audited accounts. Despite that, the State Commission has not followed the said principle laid down by the Central Commission. This is in violation of the Section 61 of the Act.

(c) The State Commission did not maintain the judicial discipline and consistency by not following its

own order dated 4.10.2010 by which all the generators and licensees were asked to file their ARR and Tariff Petition along with audited accounts as well as the law laid down by this Tribunal. The State Commission ought not to have relaxed the Regulation which is against the spirit of the Section 178 and 181 of the Electricity Act, 2003.

(d) The State Commission is expected to determine the tariff on commercial principles and to ensure recovery of the cost of electricity in a reasonable manner since the actual cost form the basis for determination of various components of tariff and future projections. Hence, the availability of authenticated data of past is an essential requirement for determination of tariff which can only be obtained from the accounts audited under statutory orders. Since these principles have not

been followed, the impugned order would suffer from patent illegality.

6. The learned Counsel appearing for some of the interveners in I.A. Nos. 132,133 & 134 of 2011, has also advanced their arguments in support of the Appellants.

7. In reply to the above grounds, both the Learned Counsel appearing for the Respondents namely State Commission and the State Electricity Board have argued at length in defending the order impugned.

8. The main question that arises for consideration in these Appeals is this:

“Whether the power exercised by the State Commission under Regulation 13.4 is in consonance with the law as envisaged in Electricity Act, 2003 and is based on the proper appreciation of the appropriate

reasons to be recorded for relaxation adduced by the licensee?

9. Before considering this question, it would be proper to recall the relevant chronological events which led to the passing of the impugned order.

10. The Jharkhand State Commission issued a provisional tariff order on the claim of the Jharkhand State Electricity Board in respect of the year 2006-07 by the order dated 31.8.2007. The State Electricity Board, filed an Appeal before this Tribunal in Appeal No.129 of 2007. This Tribunal while allowing the said Appeal by the judgement dated 8.5.2008, directed the State Commission to take up the exercise on provisional truing-up even if audited accounts are not available. Accordingly, the State Commission passed the order in pursuance of the said directions in suo-moto case No.01 of 2010 fixing the provisional

tariff in respect of the Financial Year 2010-11 on the basis of the materials available even without the audited accounts. This order was passed on 23.9.2009.

11. Thereupon, the State Commission framed three Regulations defining the terms and conditions in all the three areas of generation, transmission and distribution for determination of tariff and related charges. These Regulations are:

(a) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2010 made applicable from 28th October, 2010.*

(b) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2010 made applicable from 28th October, 2010.*

(c) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination*

of Distribution Tariff) Regulations, 2010 made applicable from 4th November, 2010.

12. The State Commission consequent upon the formation of the above Regulations on 4.12.2010, initiated suo-moto proceedings in case No.30 of 2010 and directed all the generators and licensee of the State to file their ARR and Tariff Petitions for determination of tariff for the Financial year 2011-12 on or before 31.12.2010 as per the new Regulations along with the accounts audited by their statutory auditors.

13. The State Electricity Board filed its ARR and Tariff Petition for determination of Tariff for the year 2011-12 without audited accounts. Therefore, to process it separately, the State Commission instituted a new case in No.33 of 2010 and issued notice on 10.2.2011 to the State Electricity Board to explain the reasons

as to why the accounts audited by the statutory auditors have not been filed and also to furnish the additional information along with the clarifications on the discrepancies found in the Tariff Petition. In compliance with the said notice, the State Electricity Board (R-2) , through its letter dated 26.2.2011 furnished its explanation and clarification over the discrepancies and requested for admitting the Petition by accepting its explanation for non filing of the audited accounts.

14. After going through the explanation, the State Commission felt that before passing any order on the said explanation, it is necessary to hear the views of all the stake holders over this. Therefore, it issued notices on 26.2.2011 to all the stake holders and public and invited public objections on the point of admission of Tariff Petition of the State Electricity Board without audited accounts. Accordingly, they

were heard. Finally, after hearing the parties and after considering the explanation and prayer made by the State Electricity Board, the State Commission admitted the Petition by relaxing the Regulation relating to the requirements of the audited accounts by the impugned order dated 14.3.2011. Hence, these Appeals. The main grievance of the Appellants is that the State Commission ought not to have relaxed the Regulation 4.4 which requires the submission of the audited accounts for Tariff determination by invoking clause 13.4 which is ultra vires, since it nullifies the Central Commission Regulation 5 and violates Section 61, 62 and 178 of the Electricity Act, 2003. The relevant portion of the main ground urged by the Learned Counsel for the Appellant in the written submissions is as follows:

“The Learned Commission cannot go beyond the scope of power and exceed its jurisdiction as a

delegate. It strikes at the root of the authority to frame such regulation and is a nullity. Clause 13.4 is thus ultra vires and has to be read down, since it nullifies the Central Commission Regulation 5 and violates Section 61, 62 and 178 of the Electricity Act, 2003”.

15. He has also cited two judgements of Hon’ble Supreme Court reported in 2006 (3) SCC Page 620 and 2007 (5) SCC Page 77.

16. The above argument advanced by the Learned Counsel for the Appellants would virtually amount to questioning vires of the Regulation 13.4 which confers powers to the Commission to relax any other provisions of the Regulations. At the outset, it shall be stated that the challenge over the validity of the Regulation on the ground that it ultra vires, can not be made before this Tribunal as per the Constitution Bench Judgement of Hon’ble Supreme Court reported in 2010 (4) SCC Page 603. The judgements cited by the Learned Counsel for the Appellant which do not

deal with the powers of this Tribunal to go into the vires of the Regulations would not apply to the present case. Therefore, the challenge over the validity of Regulation 13.4 in these Appeals is not sustainable under law and so it deserves outright rejection.

17. Let us now deal with the other points which have been raised by the Appellant.

18. According to the Appellant, the impugned order has been passed in utter disregard of Sec 61 (a) of the Electricity Act, 2003 which envisages that the State Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of tariff. It is also contended that the Generating Company has to submit capital expenditure incurred duly audited and certified by the statutory auditors and that the Regulation-5 of

the Central Commission Tariff Regulation, 2005 which is in the teeth of Section 61 and 178 of the Electricity Act, 2003 is binding on the State Commission has not been followed. This contention is misconceived for the following reasons:

“Section 61 of the Electricity Act, 2003 provides as follows:

“61 Tariff Regulations- *The Appropriate Commission shall, subject to the provisions of this Act, specify the term and conditions for the determination of tariff, and in doing so, shall be guided by the following namely:-*

(a) The principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

.....

(i) The National Electricity Policy and tariff policy”

19. Section 61 provides that the State Commission shall frame Regulations specifying the terms and conditions for determination of tariff. It is true that while framing the Regulations, the State Commission shall be guided by the principles and methodologies specified by the Central Commission. It is to be noted that the operation of Section 61 is restricted to formation of Regulation by the State Commission. As a matter of fact, the State Commission has notified separate Regulation for determination of tariff for generation, transmission and distribution. Therefore, the State Commission has already framed the Regulations after taking into consideration, the relevant Regulations framed by the Central Commission. Once these Regulations have been notified by the State Commission after meeting the requirement of previous publication under section 181(3) of the Act, then the question of violation of Section 61 (a) 1 of 2003 Act would not arise.

Further, as indicated above on that ground, Regulation 4.4 can not be challenged in this Tribunal. Therefore, this contention is liable to be rejected.

20. It is further contended by the Appellant that since Regulation 5 of the Central Commission Regulation mandates that there must be statutory audited accounts for determination of ARR, the State Commission is bound by the said Regulation. It shall be stated that Section 61 (a) provides that the State Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of the tariff applicable to the generating Companies and transmission licensees.

21. The reading of this provision would make it evident that the Central Commission does not deal with the

principles and methodologies with reference to the distribution but it merely deals with the principles in respect of generation and transmission. There is no provision in the Act by which the Central Commission can frame any Regulation with reference to the distribution. In such a situation, the State Commission is free to frame Tariff Regulation for Distribution. As a matter of fact, as indicated above, three Regulations have been framed by the State Commission:

(a) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2010 made applicable from 28th October, 2010.*

(b) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2010 made applicable from 28th October, 2010.*

(c) *Jharkhand State Electricity Regulatory Commission (Terms and Conditions for Determination*

of Distribution Tariff) Regulations, 2010 made applicable from 4th November, 2010.

22. Thus, it is clear that the specific Regulations have been framed as 3rd item with respect to distribution tariff which have been made applicable w.e.f. 4.10.2010. Only on the basis of the said Regulations, the State Commission directed all the generators and licensees of the State to file their ARR and tariff petition for determination of tariff for the Financial year 2011-12. Admittedly, the Appeal in hand, relates to the distribution. The State Commission has framed the Tariff Regulations for Distribution. Regulation 4.4 of these Regulations is akin to Regulation 5 of the Central Commission Regulation. The same is reproduced below:

“4.4 The Application shall include statements containing Aggregate Revenue Requirement (ARR) of the Licensee for the ensuing year in addition to

the current year and the previous year. The information for the previous year should be based on audited accounts”.

23. The reading of above Regulation would make it clear that the State Commission has framed Regulation relating to distribution for tariff determination in line with the requirements laid down by the Central Commission. Therefore, the question as to whether Regulation 5 of the Central Commission would prevail over the Regulation 4.4 of the State Commission Regulation would not arise. On this reasoning, the point urged by the Learned Counsel for the Appellant is to be rejected.

24. According to the Appellant, the State Commission has relaxed mandatory requirement of statutory audited accounts arbitrarily and the Regulation 13.4 does not give unfettered power of relaxation to the State Commission and this can be exercised only in

the public interest that too on the basis of the reasons to be recorded in writing and in the impugned order, the State Commission without giving valid reasons, relaxed the Regulation provision 4.4 which depicts the lack of application of mind on the part of the State Commission.

25. According to the Appellant, even though the State Commission has powers to relax its own Regulations, the same has to be exercised only prudently as per the provisions of the Regulations and not in violation of the Act and in this case, the State Commission neither referred to the public interest nor gave relevant reasons for relaxation. We will deal with this point now.

26. Let us now refer to Regulation 13.4 of the JSERC Distribution Tariff Regulations, 2010 which deals with the relaxation and is in the following terms:

“Power of Relaxation

13.4 The Commission may in public interest and for reasons to be recorded in writing, relax any of the provisions of these Regulations”.

27. The reading of the above Regulation would reveal that the power to relax any of the provisions of the Regulations under clause 13.4 of the Distribution of the Tariff Regulations, 2010 can be exercised only in public interest and only on reasons to be recorded in writing. So, let us now see the circumstances which warranted to resort to the provisions of Regulation 13.4 for invoking the power of relaxation.

28. As narrated above, on 4.12.2010, the State Commission directed all the generators and licensee of the State to file their respective ARR and tariff petition for determination of tariff in the formats appended with relevant Regulations framed earlier by the State Commission along with the accounts

audited by the statutory auditors. Accordingly, the State Electricity Board filed the ARR and Tariff for determination of tariff for the year 2011-12, but without the audited accounts. In view of the non compliance of the orders passed by the State Commission on 4.12.2010, the State Commission instituted separate proceedings on 10.2.2011 and issued notice to the Electricity Board by its order dated 10.2.2011 to explain the reasons as to why the accounts audited by the statutory auditors have not been furnished. In compliance of the above direction, the licensee, the State Electricity Board (R-2) furnished the reasons vide its letter dated 26.2.2011 for non filing of the audited accounts and praying for the condonation of the said shortcomings. The relevant portion of the explanation and prayer is given below:

“As already submitted in the petition, it is prayed that the Board approved Annual Accounts for the year 2003-04 to 2009-10 be considered for provisional true-up. It submitted that the case of JSEB being a board constituted under the provisions of the Electricity Supply Act, 1948 is not comparable to other utilities which are companies registered under the Companies Act, 1956 wherein the companies are at liberty to appoint statutory auditors. The Section 69, Clause 2 of the Electricity Supply Act, 1948 which mandates audit by CAG/CAG appointed auditor is reproduced below for reference:

“The Accounts of the Board shall be audited by the Comptroller and Auditor General of India or by such person as he may authorize in his behalf and any expenditure incurred by him in connection with such audit shall be payable by the Board to the Comptroller and Auditor General of India”

Therefore, the CAG is the sole auditor for the JSEB. The Annual Accounts/Revised Annual Accounts have already been submitted to the CAG after due approval of the JSEB/Board. It is therefore, submitted that CAG audit is a time consuming process and waiting for the audited accounts would therefore, prevent the JSEB from being able to file its ARR/Tariff petitions by the date given by the Hon’ble Commission. The JSEB shall submit its petition for final true-up for the period 2003-04 to 2006-07 and 2007-08 to

2009-10 as and when the CAG audit for the same gets completed for the purpose of final true-up by the Hon'ble Commission.

The JSEB prays to the Hon'ble Commission condone any inadvertent omissions/error/ shortcomings and permit JSEB to add/change/modify/alter this filing and make further submissions as may be required at a future date”.

29. The reading of the reply submitted by the 2nd Respondent dated 26.2.2011 would indicate that the reason for its non availability to file the audited accounts is that under Section 69 (2) of the Electricity Act, 1948, the Comptroller and Auditor General of India (CAG) alone is the sole auditors of the State Electricity Board and as CAG audit is a time consuming process and waiting for the said accounts virtually prevent the State Electricity Board from being able to file its ARR Tariff Petition within the time frame fixed by the Commission and under those circumstances the application has been filed without audited accounts

and therefore, the said shortcoming may be condoned.

30. After going through this explanation, the State Commission felt that before passing any orders on the said explanation, it is necessary to hear all the stakeholders and the public in order to get their views with reference to the explanation of the Board and for the admissions of the Tariff Petition without the audited accounts. Accordingly, State Commission issued notice by passing a separate order on 26.2.2011. The relevant portion of the said order dated 26.2.2011 inviting the objections/comments, is reproduced below:-

“Perused the explanation and the clarification as well as the information submitted by the licensee-JSEB.

It has been stated by the licensee-JSEB that the audited Annual Accounts for the years 2001-02

and 2002-03 have been completed by the CAG and have been submitted to the Commission. The licensee-JSEB has received the Audit Report for the annual accounts for the year 2003-04 and the same is yet to be reviewed by the Board of JSEB. The JSEB shall furnish the same in due course of time during the processing of its ARR/Tariff petition for the Financial Year 2011-12. In view of this, it has been prayed that the Board's approved annual Accounts for the years 2003-04 to 2009-10 be considered for provisional true up. It has been further stated that the case of JSEB being a Board constituted under the provisions of the Electricity (Supply) Act, 1948 is not comparable with other utilities which are companies registered under the Companies Act, 1956 wherein the companies are at liberty to appoint statutory auditor. The provisions of Section 69 92) of the Electricity (Supply) Act, 1948 which mandates audit by CAG/CAG appointed auditor has been quoted by the licensee-JSEB which reads as under:-

'The Accounts of the Board shall be audited by the Comptroller and Auditor General of India or by such person as he may authorize on his behalf and any expenditure incurred by him in connection with such audit shall be payable by the Board to the Comptroller and Auditor General of India'

In view of the above, it has been stated that the CAG is the sole auditor for the JSEB. The

Annual accounts/revised Annual Accounts have already been submitted to the CAG after due approval of the JSEB Board. It has further been submitted that the CAG audit is a time consuming process and awaiting for the audited accounts would prevent the JSEB from being able to file its ARR/Tariff petitions by the date given by the Commission. The JSEB shall submit its petition for final true-up for the period 2003-04 to 2006-07 and 2007-08 to 2009-10 as and when the CAG's audit for the same gets completed for the purpose of final true up by the Commission.

The Commission feels that before passing any orders on the explanation submitted by the licensee-JSEB for non-filing its audited annual Accounts for the years from 2003-04 to 2009-10 it is necessary to hear all the stakeholders”.

31. The perusal of the above order dated 26.2.2011 shows that the State Commission gave an opportunity to all the stakeholders to seek their objections or suggestions with regard to explanation offered by the State Electricity Board by referring to various reasons adduced by the State Electricity Board for its inability to file the audited accounts.

This shows that the State Commission did not incline to take a hasty decision over the explanation but inclined to hear the consumers and other parties including the licensee for taking a just decision. This conduct on the part of the State Commission would reveal that the entire proceedings were conducted by the State Commission, keeping an open mind in a transparent manner so as to give an opportunity to all the parties concerned to enable the State Commission to come to a proper conclusion with regard to the explanation offered by the State Electricity Board and admission of its petition.

32. On receipt of the said notice, 33 stakeholders including consumers and the Appellants participated in the public hearing. They were fully heard. The licensee was also heard. There was objection on the side of the Appellants. On the other hand, the Licensee prayed for waiver in view of the unavoidable

circumstances. Thus, only after giving opportunity to all concerned and only after considering the submissions made by all the parties, the State Commission ultimately passed the impugned order accepting the explanation offered by the State Electricity Board and admitted the Petition.

33. Let us now see the relevant portion of the impugned order with reference to the opportunity given to various parties which is quoted below:

“4. In order to take a final view on whether the Commission should proceed in absence of the audited annual accounts or not, a public hearing was held on 12.3.2011. In all, 33 persons participated in the said public hearing consisting of the representatives from various consumer groups, consumer forums, industries and the licensee-JSEB. A notice to this effect was published on 2nd March, 2011 in various newspapers of Jharkhand edition. Also, letters were sent separately to various stakeholders vide No.739 dated 1st march, 2011. The licensee-JSEB presented its case requesting the

Commission to admit the petition for tariff determination for the Financial Year 2011-12 and process the case without audited accounts. The licensee-JSEB also prayed to relax the provision of clause 4.4 of the Distribution Tariff regulations, 2010 by exercising its power under clause 13.4 of the said Regulations. On the other hand, the representatives from various groups of consumers strongly advocated that no tariff be given to the licensee-JSEB without audited accounts”.

34. The above observations would clearly indicate that the State Commission adopted a careful approach and followed the transparent procedure by giving all the stakeholders an opportunity to place their point of view before the State Commission. During the course of hearing, the licensee, Electricity Board also requested the State Commission to admit the petition for determination of tariff for the year 2011-12 without audited accounts by relaxing the provisions of clause 4.4 of the of Tariff Regulation for Distribution by exercising its powers under clause 13.4 of the said Regulation by condoning its

shortcoming. Only after considering the prayer and suggestions made by the parties, the State Commission accepted the prayer of the Electricity Board and admitted the Petition by relaxing the requirement of the audited accounts through the impugned order.

35. It is strenuously contended by the Appellants that the main ingredient of clause 13.4 i.e. recording of reasons for relaxation which involves public interest is explicitly absent in the impugned order.

36. Let us now quote the relevant portion of reasons recorded by the State Commission for relaxation in the impugned order:

“13. The question arises whether the Commission, in the given situation, should exercise its power vested in it under clause 13.4 of the JSERC (Terms and Conditions for determination of Distribution Tariff)

Regulations, 2010 and relax the requirement of submission of audited annual accounts as provided in Clause 4.4 of the said Regulations. The provision of clause 13.4 of the said Regulations is reproduced below:

13.4: Power of Relaxation – The Commission may in public interest and for reasons to be recorded in writing, relax any of the provision of these Regulations”.

14. The Commission appreciates the concerns of the representative of the consumers on the necessity of the submission of audited annual Accounts by the licensee-JSEB and acknowledges the importance of such Accounts in determination of tariff. The Commission will continue to pursue the issue of submission of audited annual Accounts with the licensee-JSEB and monitor the progress quarterly. The Commission also feels that it is in public interest that the tariff is updated at regular intervals as provided in the Electricity Act, 2003 and aforesaid Distribution Tariff Regulations. If the tariff is not updated from time to time, a situation will arise when unbearable load will suddenly come on the consumers giving them a “tariff shock”. On the other hand, the licensee will also be deprived of its genuine requirements of funds leading to sub-standard service which again will adversely affect the consumers.

15. *In view of the above, the Commission feels that it is in the public interest to relax the requirement of audited annual Accounts and orders accordingly. Moreover, it will be a provisional tariff. The Commission has already done the provisional true-up upto 2006-07 in the Tariff Order for the Financial Year 2010-11. When the audited annual Accounts are made available, for which the licensee-JSEB is pursuing at the highest level in the Audit office, these will be taken into account in the final true-up.*

16. *Considering the facts and circumstances mentioned hereinabove, the ARR and the petition filed by the licensee-JSEB for determination of distribution tariff for the Financial Year 2011-12 is admitted for further scrutiny”.*

37. The perusal of the relevant paragraph in the impugned order as referred above, would indicate that the State Commission while arriving at a conclusion, has taken into account the following factors:

(a) The clause 4.4 which requires the submissions of the audited accounts can be relaxed by exercising

the power under Regulation 13.4 of the Regulation, 2010 only in public interest and reasons to be recorded in writing.

(b) The State Commission has taken into consideration all the concerns of the consumers on the necessity of the submissions of the audited accounts and also emphasis made by them with reference to importance of audited accounts in determination of tariff. Taking note of the said concerns, the State Commission decided to pursue the State Electricity Board to submit the audited accounts and monitor the progress of the same quarterly.

(c) The State Commission felt that the tariff is to be updated at regular intervals in the public interest as provided in the Electricity Act and the Distribution Tariff Regulations. If it is not updated from time to

time, a situation will arise when unbearable load come giving the consumer a “tariff shock”. By not deciding the tariff determination on the basis of the available materials, the licensee will also be deprived of its genuine requirements of funds. In that event, there will be sub standard service which would adversely affect the consumers. Therefore, it is in the public interest and in the interest of the consumer that the Regulation with reference to requirement of audited accounts is to be relaxed.

(d) The tariff to be determined is only a provisional tariff. The State Commission has already done the provisional truing-up upto 2006-07 in the tariff year for 2010-11. Further provision of truing-up will be done for the year 2007-08 and 2010-11. When the audited annual accounts are made available for which it has been pursued by the State Electricity Board at the highest level, all the aspects will be

taken into consideration in the final true-up. On these reasons, the Regulation 4.4 namely requirement of audited accounts has to be relaxed by the State Commission by invoking the powers under Clause 13.4 of the Regulation.

(e) All the annual accounts of the licensee namely the State Electricity Board have been approved by the Board of Directors and the audit of annual accounts for two years have already been completed and the rests are in process which is likely to take considerable time. Moreover, the licensee has assured of co-operation in meeting the queries of the State Commission arising in the scrutiny of their Petitioner.

38. These reasonings recorded in writing in the impugned order, in our view, are perfectly valid and justified.

39. Incidentally, the Appellant has placed its reliance on the judgement of this Tribunal in Appeal No.56 of 2010 dated 29.9.2010 (Bihar State Hydro-Electric Power Corporation Ltd. Vs Bihar State Electricity Regulatory Commission) on the question of requirement of audited accounts. The facts of the present case, as pointed out by the Learned Counsel for the Respondent are distinguishable from the facts of the said case. In Appeal No.56 of 2010, the State Commission has not relaxed the requirement of audited accounts whereas in these Appeals, the State Commission has relaxed the requirement. Further, the accounts of the Electricity Board in Jharkhand State are to be audited by the Comptroller and Auditor General of India. On the other hand, the Appellant in Appeal no. 56 of 2010 is a company registered under Company Act 1956. Accordingly, its accounts are to be audited by a statutory auditor

only and not by CAG. Therefore, Appeal No.56 of 2010 would not apply to the present case as correctly distinguished by the State Commission itself in the impugned order.

40. Lastly, we are constrained to refer to the conduct of the Appellants. Earlier in the Appeal filed by the State Electricity Board in Appeal No.129 of 2007, we directed the Commission to take-up the suo-moto exercise of provisional truing-up even without audited data. In order to comply with the said directions given in Appeal No.129 of 2007, the State Commission initiated suo-moto proceedings and issued tariff order for the Financial Year 2010-11 even without the audited accounts. During the course of the said proceedings, knowing fully well that the said proceedings were initiated at the instance of this Tribunal, both the Appellants filed application before the State Commission and objected to the jurisdiction of the State Commission to proceed suo-moto without receipt of audited

accounts. The State Commission rejected their plea in the order of the Commission dated 12.3.2011. The relevant portion of the order is as follows:

“The Commission through agree with the interveners/petitioners that Section 64 (3) of the Electricity Act, 2003 speaks about the filing of the application by the licensee and disposal thereof by the Commission within 120 days of its receipt. But this section does not say that the Appropriate Commission shall initiate proceedings only on receipt of such application. Had it been the intention of the Legislature, it would have specifically provided so. If the argument of the interveners/petitioners is accepted, it would mean that the Commission, which is a statutory regulatory body enjoined with the powers to determine the tariff and regulate the activities of the licensees, in the interest of the consumers and development of the industries, will be compelled to sit idle and the very purpose of constituting of the Commission would be defeated. This view finds support from the aforesaid Tariff Policy also formulated by the Government of India under Section 3 of the Act. The relevant para of the said Tariff Policy is reproduced below:-

“Para 8.1(7): *Appropriate Commission should initiate tariff determination and regulatory scrutiny on a suo moto basis in case the licensee does not initiate filings in time. It is desirable that requisite tariff changes come into effect from the date of commencement of each financial year and any gap on account of delay in filing should be on account of licensee”.*

In this context, the Commission also refers provisions of Clause 31.2 of the JSERC (Terms & Conditions for Distribution Tariff) Regulations 2004 according to which it is mandatory for the distribution licensees to file tariff application by 1st November every year for the ensuing financial year. Since the licensee-JSEB has failed to file such application, the Commission has initiated suo-moto proceedings.

From the above, it is abundantly clear that this Commission has jurisdiction to proceed, suo moto, for determination of tariff and regulatory scrutiny, if the licensee does not file it in time. The action of the Commission is perfectly in accordance with the provisions of the Electricity Act, 2003 and the Regulations framed there under. The Commission has also initiated this proceeding so that the order of the Hon’ble Tribunal can be complied with. Hence the argument of the petitioner/intervenors that this Commission does not have the jurisdiction to proceed, suo-moto, in

the facts and circumstances of this case, is hereby rejected”.

41. So, this order would show that while the State Commission in compliance with the direction issued by this Tribunal to take-up suo-moto proceedings while determining the provisional tariff without the audited accounts, the present Appellants intervened and objected to the jurisdiction of the same Commission without giving due regard to the orders of this Tribunal passed in Appeal No.129 of 2007.

42. On perusal of the said order, it is made clear that the sole purpose of the Appellant is to delay the tariff process year after year. This conduct, in our view, is highly deplorable.

43. It is pointed out by the Learned Counsel for the State Commission that huge public money has already

been spent in conducting the public hearing in various places of Jharkhand and public hearing have also been completed. Therefore, it is appropriate to allow the State Commission to scrutinize the accounts submitted by the State Electricity Board approved by the Board of Directors and to do prudence checks even if the accounts are not audited. Further, the State Commission need not wait till the audited accounts are submitted in view of the fact that the State Commission can not blindly accept the accounting figures on its face value merely even when the audited accounts are submitted.

44. It is pointed out by the Learned Counsel for the State Commission that though the accounts submitted by the Electricity Board were not audited but the same has been approved by its Board of Directors and for the purpose to discharge its regulatory functions, the State Commission is duty bound to decipher the

regulatory accounts and after doing necessary prudence checks it should take such decision as envisaged under the law.

45. In view of the above submissions and in view of the fact that the entire public hearing is over, we should allow the State Commission to complete its duty to pass a provisional order after prudence checks. As pointed out by the Learned Counsel for the State Commission, the function of the State Commission is to regulate and not to strangle.

46. Therefore, we vacate the interim order passed in this Appeal and direct the State Commission to pass a final provisional order on the basis of the available materials, as expeditiously as possible.

47. Summary of Our Findings: Summary of our findings in each of the grounds raised by the Appellants are:

- I. The challenge over the validity of Regulation 13.4 of State Commission's Tariff Regulations for Distribution in these Appeals is not sustainable under law and so it deserves outright rejection.**

- II. Section 61 of Electricity Act 2003 provides that the State Commission shall frame Regulations specifying the terms and conditions for determination of tariff. It is true that while framing the Regulations, the State Commission shall be guided by the principles and methodologies specified by the Central Commission. Once these Regulations have been notified by the State Commission after meeting the requirement of previous publication under Section 181(3) of the Act,**

then the question of violation of Section 61 (a) 1 of 2003 Act would not arise.

III. Central Commission does not deal with the principles and methodologies with reference to the distribution but it merely deals with the principles in respect of generation and transmission. Accordingly, the Central Commission has not framed any Regulations related to Distribution business. In such a situation, the State Commission is free to frame Tariff Regulation for Distribution.

IV. The State Commission has framed the said Tariff Regulations for distribution. Regulation 4.4 of these Regulations is akin to Regulation 5 of the Central Commission's Tariff Regulations. Therefore, the question as to whether Regulation 5 of the Central Commission would prevail over the Regulation 4.4 of the State Commission

Regulation would not arise. On this reasoning, also the point urged by the Learned Counsel for the Appellant is to be rejected.

V. The State Commission while invoking Regulation 13.4 of Distribution Tariff regulations in relaxing the requirements of audited accounts under Regulation 4.4 of these Regulations has done so in public interest and has recorded reasons thereof in the impugned order. These reasonings of the State Commission given in the impugned order are perfectly valid and justified.

48. In view of above findings, we do not find any merit in these Appeals. Appeals are dismissed. Consequently all the IAs are also dismissed.

49. Though we thought of imposing heavy cost on the Appellants due to their improper conduct, we refrain

from doing so, since we hope that the Appellants would not commit such mistakes in future. Hence, no order as to costs.

(V.J. Talwar)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 19th July, 2011

REPORTABLE/NON-REPORTABLE