Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 128 of 2014

Dated: 23rd November, 2015

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

1. **Uttar Pradesh Power Corporation Limited**
Shakti Bhawan, Extension,
14, Ashok Marg,
Lucknow – 226 001,
Uttar Pradesh

2. **Dakshinanchal Vidyut Vitran Nigam Ltd.**
Urja Bhawan, 220 KV Sub-Station
Agra-Mathura Bye Pass Road,
Agra – 282 007
Uttar Pradesh

3. **Madhyanchal Vidyut Vitran Nigam Limited**
4-A, Gokhle Marg,
Lucknow – 226 001
Uttar Pradesh

4. **Paschimanchal Vidyut Vitran Nigam Ltd.**
Urja Bhawan, Victoriya Park,
Meerut – 250 001
Uttar Pradesh

5. **Purvanchal Vidyut Vitran Nigam Limited**
Purvanchal Vidyut Bhawan,
Vidyut Nagar,
DLW, Varanasi – 221 004 **... Appellant(s)**

Versus

1. **Uttar Pradesh Electricity Regulatory Commission**
Vibhuti Khand, Kisan Mandi Bhawan,
Gomti Nagar,
Lucknow – 226 010
Uttar Pradesh **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur, Mr. Vishal Anand and Mr. Gaurav Dudeja

Counsel for the Respondent(s) : Mr. Buddy A. Ranganadhan, Mr. Raunak Jain, Mr.D.V. Raghuvamsy and Mr. Sanjay Singh

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

The instant appeal, under Section 111 of the Electricity Act, 2003, has been filed by the appellants, the distribution licensees of the State of Uttar Pradesh against the order dated 21.05.2013 passed by the learned Uttar Pradesh Electricity Regulatory Commission (in short the ***State Commission***) in Petition No. 809 of 2012 for truing up of Aggregate Revenue Requirement (ARR) for the FY 2000-01 to 2007-08, disposing of the said Petition.

2) The appellants are aggrieved by the Impugned Order in particular since they are the alleged victims of undeserved cash-flow and financial crisis caused primarily due to the error in the Impugned Order. As per the appellants, the wrongful disallowances in the Impugned Order are as under:

Sl.No.	Particulars	Impact (Rs. Crore)
1.	Direction by Ld. UP Commission to recover subsidy from the State Government instead of giving the same as a pass through in the Appellant's ARR	1679.03
2.	Disallowance of prior period items	852.33
3	Disallowance of Efficiency Gains on O&M Expenses	521.94
4	Denial of Carrying Cost	373.28
	TOTAL	**3516.58**

Thus the same has been assailed in the present appeal at the instance of the distribution licensees in the State of Uttar Pradesh.

3) The relevant facts leading to the instant appeal are stated as under:

3.1) That the appellant No.1, Uttar Pradesh Power Corporation Ltd., is a Company incorporated under the provisions of Companies Act, 1956. After the unbundling of Uttar Pradesh State Electricity Board (in short **UPSEB**) on 14.01.2000, the functions of transmission and distribution of electricity in the State of Uttar Pradesh were vested with the

appellant No.1. Pursuant to further unbundling on 12.08.2003 by Uttar Pradesh Transfer of Distribution Undertaking Scheme, the appellant No.1 is now operating as bulk supply licensee in the State of Uttar Pradesh, as per the license granted by the State Commission and as State transmission utility under sub-section 1 of Section 27(B) of Indian Electricity Act, 1910, and function of distribution of electricity in the State of Uttar Pradesh is vested with the appellant Nos. 2 to 5.

3.2) That the respondent is the Uttar Pradesh Electricity Regulatory Commission, constituted on 10.09.1998 under the Electricity Regulatory Commission Act 1998. Thus the State Commission constituted was deemed to have been appointed as the Commission constituted under Section 3 of Uttar Pradesh Electricity Reforms Act, 1999 and continues to exercise jurisdiction as the State Regulatory Commission under Section 82 of the Electricity Act, 2003.

3.3) That through another transfer scheme dated 15.1.2000, assets, liabilities and personnel of Kanpur Electricity Supply Authority (KESA) under UPSEB were transferred to Kanpur Electricity Supply Company Ltd. (KESCO), a Company registered under the Companies Act, 1956.

3.4) That on 06.10.2006, Uttar Pradesh Electricity Regulatory Commission (Terms and Conditions for determination of distribution tariff) Regulations 2006 and UPERC (Terms & Conditions for determination of Transmission Tariff) Regulations, 2006 were notified by the State Commission. These Regulations are applicable for the purpose of Aggregate Revenue Requirement (ARR) filing and tariff determination of distribution and transmission licensees within the State of Uttar Pradesh from FY 2007-08 onwards. Prior to framing of Distribution Tariff Regulations 2006, the State Commission had determined the tariff based on past trends and principles established on a case to case basis.

3.5) On 26.07.2006 the UP Power Transmission Corporation Ltd. (UP Transco) was incorporated under the Companies Act, 1956 and entrusted with the business of transmission of electrical energy to various utilities within the State. That on 18.07.2008, UP Transco was declared as State Transmission utility by the element is Uttar Pradesh.

3.6) That on 23.12.2010, the Government of Uttar Pradesh notified a transfer scheme effective from 01.04.2007 whereby the provisional balance sheet of UP Transco (as on 01.04.2007) was notified by Government of Uttar Pradesh and the bulk procurement and supply undertaking came to be vested on that date. Although the appellant No.1 started operating as a separate entity w.e.f 26.07.2006, the assets and liabilities finally came to be vested in appellant No.1 only on 23.12.2010 (when transfer scheme was finally notified by Uttar Pradesh Government). In the absence of transfer scheme and the provisional balance sheet, it was not possible to audit the accounts of the Uttar Pradesh Power Corporation Ltd. (appellant No.1) and the appellant Nos. 2 to 5 (distribution licensees). Therefore, there was considerable delay in filing the true up petition by the appellants.

3.7) That on 28.05.2012, the appellants filed a petition for true up of ARR for FY 2000-01 to FY 2007-08.

3.8) That on 20.12.2012, pursuant to preliminary scrutiny of the petitions carried out by the State Commission, a detailed deficiency notice was sent to the appellants directing to provide the required information by 10.01.2013. Thereafter, a reminder was sent to appellant on 14.01.2013 by the State Commission to submit the response to the deficiency notice.

3.9) That on 18.01.2013, the appellants requested the State Commission to grant extension of two week's time for submission of replies. Ultimately, on 30.01.2013, the appellants submitted data as directed by the State Commission.

3.10) That on 07.02.2013, the State Commission admitted the true up petitions and directed the appellants to publish, within 3 days a public notice detailing the salient features and facts of the true up petitions in at least two daily newspapers (one English and one Hindi) for two successive days for inviting views/objections from all stake holders and public at large. The State Commission also directed the appellants to upload the response to the deficiency notice on their website.

3.11) That on 09.02.2013 and 10.02.2013, the required public notice detailing the salient features of the true up petitions were published by appellant No.1 on behalf of all the appellants inviting objections from public at large and all stake holders.

3.12) That on 11.03.2013 a public hearing was held in Lucknow and it was on 21.05.2013 the Impugned Order was passed by the State Commission disposing of the said petition of the appellants.

4) We have heard Mr. Amit Kapur, Mr. Vishal Anand and Mr. Gaurav Dudeja learned counsel for the appellants and Mr. Buddy A. Ranganadhan, Mr.Raunak Jain, Mr. D.V.Raghuvamsy and Mr. Sanjay Singh learned counsels for the respondents. We have also gone through the written submissions submitted by rival parties and also gone through the material on record including the Impugned Order passed by the State Commission.

5) The following issues arise for our consideration in this appeal:

(a) Whether the State Commission is legally and correctly justified to direct the appellants to recover additional subsidy from the State Government instead of giving the same as a pass through, in the appellants' Aggregate Revenue Requirement?

(b) Whether the State Commission is legally justified in disallowing prior period expenses only on the ground of absence of details of each item booked under prior period expenses with respect to the FYs to which they pertain to, particularly when there was no requirement under law for the appellants to classify prior period expenses year-wise?

(c) Whether the State Commission is legally and correctly justified in disallowing the efficiency gains on Operation and Maintenance (O&M) expenses to the appellants for over achievement of O&M expenses determined in the tariff orders on normative basis?

(d) Whether the State Commission has rightly disallowed the carrying cost to the appellants on the alleged legitimate expenses incurred by the appellants and allowed by the State Commission in the Impugned Order?

Our issue-wise consideration:

6) **Issue No.(b): Directions to recover subsidy/additional subsidy from the State Government**. On this issue, the following contentions have been made on behalf of the appellants:

6.1) That the findings on this issue are in violation of Section 65 of the Electricity Act, 200, clause 8.2.1(3) of the Tariff Policy and Regulations 6.10 of Tariff Distribution Regulations 2006 (for true up of FY 2007-2008) which is evident from the following facts:

(a) Ld. UP Commission failed to consider that Grant of subsidy is sole prerogative of the State Government. In the present case Govt. of UP has granted fixed amount subsidy.

(b) Ld. UP Commission has wrongly directed the appellant to recover the subsidy amount, where after truing up the ARR of

the appellants the subsidy granted by Govt. of UP as per audited accounts is lower than the levels envisaged in the Tariff Order.

(c) Ld. UP Commission while truing up the ARR of the appellants for the FYs 2000-01 to 2006-07 has taken inconsistent and contradictory approach thereby artificially reducing the ARR of the appellants which is evident from the following:

(i) For the FYs in which the actual subsidy received by the appellants is more than the subsidy envisaged in the respective Tariff (FYs 2001-02, 2003-04, 2006-07) Ld. Commission has allowed the actual subsidy disbursed by the Govt. of UP.

(ii) For the FYs in which the actual subsidy received by the appellants is less than the subsidy envisaged in the respective Tariff Order (FYs 2002-03, 2004-05), Ld. UP Commission has allowed the amount of subsidy approved in the Tariff Order.

(d) For FY 2007-08 Ld. UP Commission has directed the appellants to recover the additional subsidy from the Govt. of UP which was not even envisaged in the Tariff Order. In the Tariff Order for FY 2007-08, Ld. UP Commission had considered the subsidy of Rs.1822 Cr. against which the appellants received subsidy of Rs.1854.72 Cr. Even after having received subsidy more than what was envisaged in the Tariff Order, Ld. UP Commission directed the appellants to recover additional subsidy of Rs.1086.11 Crores from the State Government for FY 2007-08.

(e) The same has resulted in artificially reducing the ARR of the appellants for FY 2000-01 to 2007-08 by Rs.1612.03 Cr.

6.2) That it is evident from the perusal of Section 65 of the Electricity Act, 2003 and clause 8.2.1(3) of the Tariff Policy that the State Commission is required to determine the tariff independent of subsidy to be approved by the Government of Uttar Pradesh and the learned

State Commission has to only take into consideration the subsidy granted by the Government of Uttar Pradesh. It is nowhere suggested that the difference in the amount of subsidy approved by the State Commission and the amount of subsidy granted by the Government can be directed to be recovered by a distribution licensee from the State Government.

6.3) That the findings of the State Commission in FY 2007-08 are also contrary to Tariff Regulations which is applicable for truing up of FY 2007-08. Regulation 6.10 of the Distribution Tariff Regulations provides that if a State Government decides to subsidize the consumer or a class of consumers, the State Government shall pay such subsidy in advance. No direction of the State Government to grant subsidy will be operative if the payment of the amount is not made in accordance with the provisions of the said Regulations and the Electricity Act.

6.4) That letters from the State Government regarding subsidy show that subsidy was being provided/promised by Government of Uttar Pradesh on a lump sum basis. The Government of Uttar Pradesh has not directed that tariff of a particular class of consumers should be fixed at a particular rate and subsidy required over and above the said tariff will be given by the Government. Therefore, the said direction of the State Commission is untenable.

6.5) That the year-wise (for FYs 2000-01 to 2006-07) detail of amount of subsidy approved by Ld. UP Commission in the Tariff Orders, actual subsidy disbursed by Govt. of UP and allowed by ld. UP Commission in the Impugned Order are, as under:

Particulars	Tariff Order	Actuals-audited accounts	True-up Petition	Impugned Order
FY 2000-01				
UPPCL	240.00	240.00	240.00	240.00
FY 2001-02				

UPPCL	850.00	862.18	862.18	862.18
FY 2002-03				
UPPCL	**850.00**	**849.33**	**849.33**	**850.00**
FY 2003-04				
UPPCL	935.00	1029.25	1029.25	1029.25
FY 2004-05				
DVVNL	373.00	157.03	157.03	373.00
MVVNL	460.00	210.36	210.36	460.00
PVVNL	415.00	350.54	350.54	415.00
PuVVNL	274.00	278.82	278.82	274.00
Total	**1522.00**	**996.75**	**996.75**	**1522.00**
FY 2006-07				
DVVNL	227.10	248.94	248.94	248.94
MVVNL	345.13	333.26	333.26	333.26
PVVNL	395.93	481.12	481.12	481.12
PuVVNL	543.84	484.06	484.06	484.06
Total	1512.00	1547.38	1547.38	1547.38

6.6) That the incorrect approach of the State Commission has resulted into under-recovery of Rs.525.92 Crores (for FYs 2000-01 to 2006-07) as under:

FY	UPPCL	DVVNL	MVVNL	PVVNL	PuVVNL	Total
2000-01	-					-
2001-02	-					-
2002-03	0.67					0.67
2003-04	-	-	-	-	-	-
2004-05	-	215.97	249.64	64.46	-4.82	525.25
2006-07	-	-	-	-	-	-
Total	**0.67**	**215.97**	**249.64**	**64.46**	**-4.82**	**525.92**

6.7) That for the FY 2007-08, the learned State Commission has directed the appellants to recover the additional subsidy from the State Government which was not even envisaged in the tariff order. In the tariff order for FY 2007-08, the State Commission had considered the subsidy of Rs.1822 Crores against which the appellants received subsidy of Rs.1854.72 Crores. Even after having received subsidy more than what was envisaged in the tariff order, the learned State Commission directed the appellants to recover additional subsidy of Rs.1086.11 Crores from the State Government for FY 2007-08.

6.8) That this Appellate Tribunal in its judgment dated 28.01.2008, in *Appeal No.24 of 2007, titled Mula Pravara Electric Co-operative Society*

Ltd. Vs. MERC reported at 2008 ELR (APTEL) 0135 held that if the State Government requires the grant of any subsidy to any consumer in the tariff determination by the Commission under Section 62 of the Electricity Act, 2003, then it is the responsibility of the State Government to pay any advance to compensate the licensee affected by the grant of subsidy. If the Commission determines tariff *de hors* promise of any subsidy, it cannot be held responsible to ensure that the subsidy as promised from the Government is received as it is a post tariff fixation subsidy. That in the reported case of *Mula Pravara* (supra) this Appellate Tribunal further held that as the State Commission had factored Rs.72 Crores subsidy element in the determination of tariff, the State Commission is duty bound as per this Appellate Tribunal's judgment dated 26.05.2006 in *Appeal No.4 of 2005 in SIEL Vs. PSERC* to require the Government to pay outstanding subsidy.

6.9) That the contention of the State Commission that in respect of the appellant Nos. 3 & 5 for FY 2006-07, the State Commission allowed the actual subsidy received from the State Government, which was lower than the subsidy considered in the tariff order, is misconceived. In the tariff order as the State Commission considered and allowed the cumulative subsidy considered in the tariff order for the four distribution licensees (appellant Nos. 2 to 5 herein) which was lower than the actual subsidy received by the distribution licensees. In the Impugned Order the State Commission did not consider the subsidy separately for each distribution licensee.

6.10) That further the contention of the State Commission in respect of appellant Nos. 3 & 5 for FY 2006-07 the State Commission allowed the actual subsidy received from the State Government, which was lower than the subsidy considered in the tariff order, amounts to mislead further.

6.11) That further the contention of the State Commission that the appellants have not placed on record the said steps taken by the

appellants to recover the subsidy from the State Government is erroneous and irrelevant because the appellants in their true up petition filed before the State Commission clearly pointed out the actual subsidy received by the appellant from the State Government.

6.12) That the contention of the State Commission that in case the State Government does not release the assured subsidy for a particular class will result in the cross subsidizing of that class, is erroneous and baseless because it is the responsibility of the State Commission to determine the tariff after allowing the actual subsidy received by the appellants in the manner that the tariff determination is in accordance with the Electricity Act, Tariff Regulations and this Appellate Tribunal's judgment. The approach of the State Commission that allowing actual subsidy will amount to cross subsidizing a class of consumer by another class amounts to abdication of the statutory responsibility of the State Commission.

6.13) That further finding of the State Commission in the Impugned Order to erroneously disallow the legitimate claim of the appellants in the ARR is contrary to the principle contended in Section 61 of the Electricity Act 2003 which requires Commissions to safe guard consumers interest and at the same time recovery of the cost of electricity in a reasonable manner.

6.14) That the learned State Commission in this appeal is trying to place new/extraneous justifications before this Appellate Tribunal which travels beyond the Impugned Order and the same cannot be allowed in view of the law laid down in the case of *Mohinder Singh Gill Vs. Chief Election Commissioner*, reported at *(1978) 1 SCC 405* and the judgment dated 27.02.2013 in Appeal No. 184 of 2011 titled *Delhi Transco Ltd. Vs. Delhi Electricity Regulatory Commission reported at 2013 ELR (APTEL) 0498* passed by this Appellate Tribunal.

6.15) That this Appellate Tribunal should direct the State Commission to allow subsidy to the extent disbursed by the State Government (Uttar Pradesh).

7) **Per contra**, following are the contentions made on behalf of the State Commission:

7.1) That the State Commission has trued up the amount of subsidy by the State Government taking into consideration the amount of subsidy approved in the tariff order of the respective FY and actual amount of subsidy received as per the audited accounts in the respective FY and as claimed in the true up petitions of respective FYs.

7.2) That the fundamental contention of the appellants in this appeal is that in some years, the State Commission has allowed the subsidy approved in the respective tariff order where the actual subsidy received from the State Government is less and in other years allowed the actual subsidy where the actual amount received from the Government is more and hence, the State Commission has been inconsistent in its approach. For FY 2006-07 for appellant Nos. 3&5, the State Commission has finally approved in its order dated 21.05.2013 an amount actually received as subsidy which is lower than the amount approved in the tariff order. Similar is the case of FY 2007-08. The chart shown in paragraph 9.4 of Memo of Appeal further shows that for FY 2004-05, the State Commission has approved the amount of subsidy as approved in the tariff order for the respective distribution licensee though the amount of subsidy received by the appellant PuVVNL as per audited accounts as well as, as claimed in the true up petition is more than the subsidy approved in the tariff order.

7.3) That the so called discrepancy/inconsistency is being argued by the appellants since the appellants are comparing the DISCOM-wise figures separately for each DISCOM. However, the State Commission has, in the Impugned Order, treated the matter uniformly across the DISCOMs in totality. When viewed, across the DISCOM in totality, the approach of the State Commission has been uniform and consistent, i.e. the true up is on the basis of the amount provided for in the tariff

order, except when actual subsidy received from State Government is more than the figure projected in the tariff order, in which case, the actual amount has been taken.

7.4) That the State Commission, after due prudence check approves the amount of subsidy in the tariff order and as such any deviation from it at the time of true up has to be to the satisfaction of the Commission, based on materials for prudence check. The appellants have not brought on record any material to show either before the State Commission or before this Appellate Tribunal as to what steps did the appellants take to pursue for the amount of subsidy which the State Government assured to be given to the respective DISCOMs on the basis of which the ARR petition was filed and the tariff was fixed by the State Commission for the particular FY.

7.5) That in case the amount of subsidy assured by the State Government for a particular class of consumer is not released, then it may lead to cross subsidizing that particular class of consumers by another class of consumers as a tariff is fixed by the State Commission for different class of consumers taking into account the amount of subsidy assured by State Government for that particular class of consumers, which in turn will be violation of principles laid down by this Appellate Tribunal.

7.6) That for FY 2007-08, the issue of additional subsidy requirements from the State Government has been dealt with by the State Commission in paragraph 9.21 of the true up order dated 21.05.2013 (Impugned Order).

7.7) That the direction of the State Commission to the DISCOMs/appellants to take necessary steps to recover the subsidy from the Government is legally justified as per judgment dated 28.01.2008 in Appeal No.24 of 2007 in the case of *Mula Pravara Electric Co-operative Society Ltd. Vs. MERC* (supra) by this Appellate Tribunal where this Appellate Tribunal having relied upon the full

bench judgment dated 26.05.2006 of this Appellate Tribunal in Appeal No. 4 of 2005 in the matter of *SIEL Vs. PSERC & Ors.* had held that in the matters of tariff, the Commission's are also empowered to issue directions to the State Governments.

8) **Our consideration and conclusion on issue No.(a)** - Whether the State Commission is legally and correctly justified to direct the appellants to recover subsidy/additional subsidy from the State Government instead of giving the same as a pass through, in the appellants' Aggregate Revenue Requirement?

8.1) We have detailed above the rival contentions on this issue which we don't think proper to reiterate here once again. We now directly proceed to decide this issue on the treatment of subsidy received/not received from the State Government.

8.2) Before we reach our own conclusion after discussing the relevant facts on this issue, we think it is necessary to reproduce and consider the relevant part of the Impugned Order on this issue, which is reproduced as under:

"9.21 ADDITIONAL SUBSIDY REQUIREMENT FROM GOUP

The Distribution Tariff Regulations are effective from FY 2007-08, Para 6.10 of the Distribution Tariff Regulations provide:

"6.10 Provision of Subsidy

1. *The Commission, while determining the tariff, shall see that the tariff progressively reflects the cost of supply of electricity and the cross subsidy is reduced or eliminated.*

2. *If the State Government decides to subsidize any consumer or class of consumers, the State Government shall pay the amount to compensate the affected licensee by grant of such subsidy in advance.*

   Provided that no such direction of the State Government to grant subsidy shall be operative if the payment is not made in accordance with the relevant provisions contained in these Regulations and the Act. In such a case, the tariff

of the applicable categories may be revised excluding the subsidy.

3. *The Government shall, by notification, declare the consumers or class of consumers to be subsidized.*

4. ***Tariff of the subsidized category shall be designed taking into account the subsidy allocated to that category.***

5. ***The Distribution Licensee shall furnish details of power consumed by the subsidized category to the State Government and the Commission.*** *The Distribution Licensee shall provide meters on all rural distribution transformers and shall also furnish the power consumption details in respect of agricultural and rural domestic consumption based on readings from such meters and normative distribution losses on a monthly basis." (**Emphasis supplied**)*

   The Commission in its Letter No. UPERC/D(T)/2013-176 dated 06th May, 2013 had directed the Petitioner to furnish the details in respect of energy sold and thru rate of subsidized categories. The Petitioner filed the response to the Deficiency Note on 15th may, 2013 vide Letter No. 1045/RAU/ARR FY 2013-14. The Petitioner has failed to provide the desired data and has stated that the sub-category wise energy sales data in respect of rural domestic and private tube wells categories were not maintained by the licensees. However, it has submitted the broad category wise details.

   In the absence of sub-category wise data, the Commission has adopted the sales figures for FY 2007-08 as provided in the Tariff Order for FY 2009-10. The Commission has computed the actual subsidy requirement considering the actual sales of the subsidised categories namely LMV-1 (a): Consumer getting supply as per "Rural Schedule" and LMV-5: Private Tube wells (PTW) in FY 2007-08. As per the table provided below, the actual subsidy requirement has been worked out to be Rs.2,940.83 crores. Out of the above, the revenue subsidy available from GoUP is only Rs.1,854.72 crores. ***Thus the balance subsidy of Rs. 1,086.11 crores has been applied as a reduction from the ARR being trued up. The distribution licensees need to realise such sums from the State Government.***

Table 0-1: COMPUTATION OF SUBSIDY REQUIREMENT FOR FY 2007-08 (RsCrores)

Particulars	***Sales (MU)***	***Cost of Service (Rs/kWh)***	***Thru Rate (Rs/kWh)***	***Loss (Rs kWh)***	***Loss (RsCrore)***
LMV-1: (a)Consumer	*6132.00*	*3.87*	*1.03*	*2.84*	*1744.07*

getting supply as per "Rural Schedule"					
LMV-5: PTW	*4317.00*	*3.87*	*1.10*	*2.77*	*1196.76*
Total Loss					***2940.83***
Subsidy Available					*1854.72*
Balance Subsidy to be made available by GoUP					***1086.11***

The additional subsidy requirement has been allocated among Discoms in the ratio of their sales in FY 2007-08 as the Discom wise sales to rural domestic and private tube wells categories has not been provided by the Disocoms.

Table 0-2: ALLOCATION OF ADDITIONAL SUBSIDY REQUIREMENT AMONG DISCOMS

(RsCrores)

Particulars	***DVVNL***	***MVVNL***	***PVVNL***	***PuVVNL***	***Total***
Total Sales in FY 2007-08 (MU)	*8087.13*	*6548.45*	*11966.01*	*8195.26*	***34796.85***
Allocation of Balance Subsidy among Discoms (RsCrores)	*252.42*	*204.40*	*373.49*	*255.80*	***1086.11***

8.3) The Full Bench of this Appellate Tribunal vide judgment dated 26.05.2006 in Appeal Nos. 4 of 2005 and Batch, in the matter of M/s.Siel Limited Vs. PSERC & Others while dealing with a similar issue observed as under:

"63. We are unable to appreciate the stand of the state government. We are anguished to note that the PSERC felt helpless after this reply and was of the view that it was not appropriate for the Commission to say anything more on the subject except to express the hope that the issue will be resolved at an early date, finally and to the satisfaction of all concerned. As already pointed out, the question of subsidy for the year 2002-03 has been raised at this stage only to illustrate that the State Government and the PSERC are under misapprehension that the PSERC is powerless to decide such matters. ***It appears that the Commission felt that it cannot issue any directions to the Government.*** *One baneful*

manifestation of this view is that in case it is accepted that the Commission cannot determine the capital cost chargeable to the power component of the RSD project or it cannot deal with the matter relating to RE ***subsidies of the earlier years, when the Commission had not been constituted, in that event balance sheet figures of the Board imposed by the State with regard to RSD cost,*** *exorbitant interest levied on Government loans etc. will have to be accepted painfully by the Commission year after year even at the cost of denying fair tariff fixation to consumers. On the same reasoning it may be argued that since no directions can be given to the State Government by the Commission, the question whether or not payments on account of subsidies are outstanding from the Government to the Board, cannot be gone into by the Commission. Consequently, in case the Government claims that the entire amount of subsidy has been paid to the Board, it will have to be taken as the gospel truth and the Commission will be reduced to the status of a mere rubber stamp of the State Government and in that event the entire exercise for formulation of tariff will be rendered farcical. This position is inconsistent with Section 61(d) of the Act of 2003, whereunder the interest of the consumers have to be safeguarded and recovery of cost of electricity is to be effected only in a reasonable manner. This position is also contrary to Section 62 of the Act of 2003, according to which the Appropriate Commission is required to determine the tariff in accordance with the provisions of the Act.*

64. For a proper determination of tariff and ARR of the utilities suitable and binding directions can be given by the Regulatory Commissions to the Government to achieve the purpose of Sections 61 and 62 of the Act of 2003, particularly clause (d) of Section 61 thereof.

65. In a nutshell, the Commission is empowered to issue orders or directions to the State Government in regard to the matters having a bearing on and nexus with tariff determination. The directions of the Commission are binding on it not only because it is the owner of the PSEB dejure and defacto but even otherwise as well. *Section 146 of the Act of 2003 provides that whoever, fails to comply with any order or direction given under the Act, within such time as may be specified or contravenes or attempts or abets the contravention of any of the provisions of the Act or any rules or Regulations made thereunder, is liable for punishment with rigorous imprisonment for a term which may extend to three months or with fine which may extend to one lakh rupees or both. The word 'whoever' is of a very wide connotation. It covers all persons and authorities. Under Section 94 the Appropriate Commission is empowered to summon and enforce the attendance of any person and requisition public record. Therefore, it can summon and enforce the attendance of even the officers of the Government. It can require the production*

of any document including any public record from the State. Under sub-section (2) of Section 94, it has power to pass interim orders in any proceedings. Power to pass interim orders is not restricted in as much as there is no embargo in passing orders against Government or its functionaries. Therefore, interim orders can even be passed against the Government or its officials. Section 95 provides that all proceedings before the Appropriate Commission shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code and the Appropriate Commission shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973.

66. There is nothing in Sections 61 & 62 of the Act of 2003 to show that orders relating to tariff will not bind the State Government. The State is not above law and it is bound to respect the mandate of the legislature. Otherwise tariff determination will not be in consonance with the various factors and parameters specified in Section 61. The Commission is an independent statutory body and its directions being in terms of the Act are definitely binding on the Board whose dejure owner is the State. The ultimate end effect shall be on dejure owner viz. the State of Punjab."

8.4) This Appellate Tribunal, consisting of 1 Judicial Member and 1 Technical Member, vide its judgment dated 28.01.2008 in Appeal No.24 of 2007 and Batch in the case of *Mula Pravara Electric Co-operative Society Ltd. Vs. MERC & Ors.* (supra) while dealing with a similar issue had observed as under:

"H. Is MERC responsible for ensuring that MPECS gets promised subsidies from the Government of Maharashtra?

58. In order to discuss the matter regarding subsidies by the state Government, it is pertinent to refer to Section 65 of the Act which states as under:

> ***"Provision of subsidy by state Government:***
>
> *If the state Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the state Commission under Section 62, the state Government shall, notwithstanding any direction which may be given under Section 108, pay, in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the state Commission may direct, as a condition for the licence or any other person concerned*

to implement the subsidy provided for by the state Government.

Provided that no such direction of the state Government shall be operative if the payment is not made in accordance with the provisions contained in this section and the tariff fixed by the state Commission shall be applicable from the date of issue of orders by the Commission in this regard.

59. The Act is very clear with regard to subsidies; that if the state Government requires the grant of any subsidy to any consumer in the tariff determined by the Commission under Section 62, then it is the responsibility of the state Government to pay in advance to compensate the licensee affected by the grant of subsidy. In this case if the Commission determines the tariff de hors the subsidy, in no way the Commission can be made responsible to ensure that the appellant gets subsidy from the Government. However, if the Government provides a subsidy, as has been the case, in case No.51 of 2005 where the Commission vide its order dated February 23, 2007 has factored Rs.72 crores for arriving at the Annual Revenue Requirement as suggested by MPECS in their petition before the Commission where they have stated as under for determination of retail tariff:

"The Annual Revenue Requirement of MPECS is the summation of all the expenses and the return on equity as computed above, less the non-tariff income. The GOM GR dated August 24, 2004 states that MPECS shall receive a revenue subsidy of Rs.72 crores every year till MPECS makes a turn around, the same has been considered by MPECS for estimating of the ARR for all the three years.

60. In view of the aforesaid discussion we decide that if the Commission determines tariff de hors promise of any subsidy, it cannot be held responsible for ensuring that MPECS gets the promised subsidy from the Government of Maharashtra as it is a post tariff fixation subsidy. But as the Commission has factored Rs.72 crores subsidy element in determination of tariff, it is duty bound as per this Tribunal's judgment dated May 26, 2006 in SIEL vs PSERC case, to require the Government to pay outstanding subsidy. We order accordingly."

8.5) The other contentions on this issue of the appellants is that the State Commission, in the Impugned Order, has adopted a unique practice namely, the State Commission had allowed less subsidy when the appellants received more amount of subsidy from the Government.

Even after having received subsidy more than what was envisaged by the State Commission in the tariff order, the State Commission directed the appellants to recover additional subsidy from the State Government. Likewise, the State Commission has allowed the actual subsidy received from the State Government which was lower than the subsidy considered in the tariff order.

8.6) The reply to the said contentions of the appellants as made on behalf of the respondent State Commission is that the State Commission has trued up the amount of subsidy given by the State Government taking into consideration the amount of subsidy approved in the tariff order of the respective FY and the actual amount of subsidy received as per the audited accounts in the respective FYs and as claimed in the true up petitions of the respective FYs.

8.7) The main grievance of the appellants on this issue is that in some years the State Commission has allowed subsidy approved in the respective tariff order where the actual subsidy received from the Government is less and in other years the State Commission has allowed the actual subsidy where the actual amount received from the Government is more and hence, the State Commission has been inconsistent in this approach. The learned counsel for the respondent on this issue has submitted that the so called discrepancy/ inconsistency is set by the appellants since the appellants are comparing the DISCOM-wise figurers separately for each DISCOM. However, the State Commission has in the Impugned Order, treated the matter uniformly across the DISCOM in totality. Hence, the approach of the State Commission has been uniform and consistent i.e. the true up is on the basis of the amount provided for in the tariff order except when actual amount received from the Government is more than the figure provided in the tariff order, in which case the actual amount has been taken. Further the State Commission submits that the State Commission after a prudence check has passed the Impugned Order on this issue and since the appellants have not brought on record any material to show before the State

Commission as to what steps did the appellants take to pursue for the amount of subsidy which the State Government assured to be given to the respective DISCOMs on the basis of which the ARR petition was filed and the tariff was fixed by the State Commission for the particular FY. In case the amount of subsidy assured by the State Government for a particular class of consumers is not released, then it may lead to cross subsidizing that particular class of consumers by another class of consumers as the tariff is fixed by the State Commission for different class of consumers taking into account the amount of subsidy assured by the State Government for that particular class of consumers which would be against the principles of law laid down by this Appellate Tribunal. We, after considering these rival contentions of the parties do not find force in the contentions of the appellants. The contentions raised by the respondent Commission appear to be reasonable, legal and correct one. It appears from the Impugned Order and other material on record that the State Commission has been consistent in its approach on the said issue because the State Commission has approved the amount of subsidy in a just and legal way. The State Commission has trued up the amount of subsidy given by the State Government on taking into consideration the amount of subsidy approved in the tariff order of the respective FY and actual amount of subsidy received as per audited accounts in the respective FY and as claimed in the true up petitions for the respective FYs. Further, the State Commission has correctly and legally allowed the subsidy approved in the respective tariff order where the actual subsidy received from the State Government was less and in some years the actual subsidy where the amount received from the Government was more. The said discrepancy/inconsistency as argued by the appellants appear just on the ground that since the appellants are comparing the DISCOM-wise figures separately for each DISCOM. The State Commission has in the Impugned Order treated the matter uniformly across DISCOMs in totality. Since the decision on this issue has been made by the State Commission after due prudence check, we do not find any fault in the findings and reasonings recorded on issue No.(A) by the State Commission. We hereby agree

to all the findings/reasoning on this issue and this issue is liable to be decided against the appellants.

8.8) Hence, we hold that the State Commission is legally justified in directing the appellants to recover the subsidy/additional subsidy from Government of Uttar Pradesh instead of giving the same as a pass through in the appellants aggregate revenue requirement. If proper datas and details in true sense were not available with the appellants, then for that lapse or failure of the appellants, the consumers cannot be allowed to suffer. Hence, this issue is decided against the appellants.

9) **Issue No. (b): Relating to disallowance of prior period expenses**. On this issue, the following contentions have been made by the appellants:

9.1 That the State Commission has wrongfully observed that there is absence of clarity of each item booked under prior period expenses with respect to the FYs to which they pertain and has wrongfully disallowed the prior period expenses to the tune of Rs.852.33 Cr.

9.2) That the learned State Commission by, its letter dated 20.12.2012, had raised the following queries regarding appellants' claim of prior period expenses :

"9. Prior Period Items: (i) The Petitioner companies are purporting to claim the prior period expenses and incomes on the grounds of omissions/errors in accounting statements. However the items booked under prior period expenses and incomes are essentially ARR items such as power purchase cost, O&M expenses, etc. Since each item of ARR has a distinct methodology of treatment in the ARR and True-up determination, hence the Petitioner companies need to provide the details of prior period items with respect to the financial year to which they pertain. The Commission would assess the admissibility of the same after the Petitioner companies provide the details of each item with respect to the financial year to which they pertain."

9.3) That the appellants duly replied to the said query of the State Commission, submitting as under:

"The prior period expenses/income are recognized in the financial statements in compliance with the Accounting Standards (AS 5) (Revised) on 'Net Profit or Loss for the Period, Prior Period Items and changes in Accounting Policies' which does not require year wise classification of prior period items as requested by the Commission. As there was no statutory requirement of classifying the prior items with respect to the each year to which they pertain, such information was not specifically depicted in the audited accounts.

Considering this expenses and incomes which are omitted to be accounted for in one or more financial years are accounted for as and when such omissions or errors are detected."

9.4) That even after specific submission of the appellants that year-wise classification cannot be given as there is neither any statutory requirement to year-wise classify prior period expenses nor the Accounting Standard 5 (Revised) requires any such classification, the learned State Commission has failed to consider the same and in ignorance of the specific submissions of the appellants it has wrongly disallowed the prior period expenses only on the ground that year-wise break up of prior period expenses was not given by the appellants.

9.5) That prior period expenses as claimed by the appellants are duly audited expenses allowed in the statutory audit of the appellants and cannot be disallowed by the State Commission only for the want of year-wise details. Electricity Act, 2003 requires that the expenses prudently incurred by the licensees ought to be allowed in the ARR of the appellants and not doing the same is contrary to the Act.

10) **Per contra**, the following are the contentions raised on behalf of the respondent Commission:

10.1) That the State Commission has rendered its finding regarding prior period expenses in Paragraph 2.17.8 to 2.17.11 of the true up order

dated 21.05.2013 (the Impugned Order) after considering the comments/suggestions of the public in pursuance to the public meeting held on 11.03.2013 and also in response to the appellants on it.

10.2) That the learned State Commission vide its order dated 20.12.2012 had required the appellants to provide the details of such "Prior Period Expenses" including the FY to which such expenses pertained. The appellants in reply expressed their inability to furnish such particulars, *inter alia*, on the ground that there was no statutory requirement of classifying the prior items with respect to each year to which they pertained and such information was not specifically depicted in the audited accounts.

10.3) That merely because the "prior period expenses" have been audited does not mean that the State Commission is bound to allow such expenses to be recovered in tariff. The term "audited" only means that the expenditure has been vouched for. Whether such expenses had been prudently incurred and/or whether the licensee or the consumer has received any benefit from such expenditure still has been considered by the State Commission. In the absence of the details provided by the licensee, the Commission could not have conducted a prudence check on such items. As per the law laid down in a judgment dated 13.01.2011 in Kerala State Electricity Board vs. Kerala Electricity Regulatory Commission in Appeal No. 177 of 2009 reported at 2011 ELR (APTEL) 149, the State Commission is not bound by the audited accounts of the licensee.

11. **Our consideration and conclusion on issue No.(b)**:

After citing rival contention on issue No.(b), we directly proceed to consider this issue on merits. According to the appellants there is no absence of clarity on each item booked under prior period expenses with respect to FYs to which they pertain. As stated above, the learned State Commission has disallowed the prior period expenses to the tune of Rs.852.33 Cr., observing that there was absence of

classification of such items booked under prior period expenses with respect to FYs to which they pertained. The record further depicts that the learned State Commission through letter dated 20.12.2012 raised the queries regarding appellants' claim of prior period expenses. The appellants/DISCOMs, without giving correct reply to the above query of the State Commission simply stated that year-wise classification could not be given as there was neither any statutory requirements to year-wise classify prior period expenses nor the Accounting Standard 5 (Revised) required any such classification. Thus the appellants failed to reply to the exact query made by the State Commission to the aforesaid letter and skipping true reply said that the year-wise classification could not be given as there was no statutory requirement nor Accounting Standard requiring such year-wise classification of prior period expenses. Thus the appellants instead of replying to the queries correctly and properly tried to take some excuse and ultimately failed to properly respond to the query of the State Commission. The learned State Commission while passing the Impugned Order has disallowed the prior period expenses on the legal and correct ground that year-wise break up of prior period expenses was not given by the appellants. It is true that prior period expenses claimed by the appellants were duly audited expenses allowed in the statutory audit of the appellants but the word "*audited*" only means that the expenditure has been vouched for and the State Commission is further required to consider or check whether such expenses have been prudently incurred on whether the consumer has received any benefit from such expenditure. We are of the opinion, that in these circumstances and in the absence of non-furnishing of the details sought by the Commission, the State Commission has rightly disallowed the prior period expenses. After all the State Commission is required to use prudent check whether the expenses have been properly incurred or whether the licensee or the consumer has actually received any benefit from such expenditure. It is clear from the facts and other material on record that in the absence of the details to be provided by the appellants herein, the State Commission could not have conducted the prudence check of such items. The law

as settled by this Appellate Tribunal on this point is that the State Commission is not bound by the audited accounts of the licensee because the State Commission being the regulator is required to apply prudence check to such expenses or expenditure to see whether such expenses or expenditure were really required to be made for the benefit of the consumers. On our careful scrutiny we do not find any illegality or perversity in the Impugned Order passed by the State Commission on this issue No.(b). Consequently, this issue is also decided against the appellants.

12) **Issue No.(c) – relating to disallowing the efficiency gains on O&M expenses**. On this issue the appellants have raised the following contentions:

12.1) That the learned State Commission has wrongfully denied incentive to the appellants on the controllable O&M expenses while truing up by taking contradictory and inconsistent approach to artificially suppress the ARR of the appellants which is evident from the following reasons:

(a) For the FY in which net O&M expenses actually incurred were higher than the O&M expenses approved in the Tariff Order, normative figure approved in the Tariff Order has been approved. Whereas, for the FY in which the actual net O&M expenses were lower than the O&M expenses approved in the Tariff Order, actual expenses have been approved.

(b) Similar approach has been adopted by the learned UP Commission while approving each of the component of the O&M expenses separately, i.e. Employee Expenses, A&G expenses and R&M expenses.

(c) While approving the O&M expenditure actually incurred by the appellants, the learned UP Commission disallowed any share of the profit on account of overachievement in performance with

respect to O&M cost i.e. Less O&M cost incurred by the appellants due to its efficient management.

12.2) That the learned State Commission has, without any justification, approved the least possible figure for each of the component of the O&M expenses with the intent to artificially suppress the ARR to the lowest and thereby disallowing the appellants of their legitimate dues.

12.3) That the State Commission was required to adopt uniform approach while approving different components as well as the net O&M expenses incurred by the appellants. The State Commission either has to consider the O&M expenses on normative basis or allow the efficiency gains, if any, or approve O&M expenses as per actuals.

12.4) That as per Impugned Order of the State Commission, the O&M expenses are controllable in nature and it has wrongly disallowed the O&M expenses incurred by the appellants over and above the normative figure approved in the tariff order. While considering the O&M expenses on normative basis, it was imperative on the Commission to allow the appellants the efficiency gain earned by the appellants due to its better and efficient management.

12.5) That when a certain component of the ARR is allowed on normative basis, then any overachievement or underachievement of the same by the licensee is to be borne by the licensee. If there is underachievement of the same then any loss has to be incurred by the licensee and at the same time if there is a profit on account of overachievement, then that profit will be accrued to the licensee, as held by this Appellate Tribunal in judgement dated 30.07.2010 in Appeal No.153 of 2009, titled as *New Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission*, reported on 2010 ELR (APTEL) 0891 (paragraph 31).

12.6) That where the O&M expenses actually incurred by the appellants are lower than the O&M expenses approved in the tariff order, the

difference between figure approved in the tariff order and actually incurred by the appellants have to be considered as the efficiency gains of the appellants and should be passed on to the appellants. However, the appellants being perceptive of consumer interest is restricting its claim to only 50% of the efficiency gains and rest 50% may be passed on to the consumers.

12.7) That where the O&M expenses actually incurred by the appellants are lower than normative then, actual has been considered. Then the uniform approach should be adopted and the O&M expenses should be approved as per actual, even where O&M expenses actually incurred are higher than the normative figure allowed in the tariff order.

12.8) That the aforesaid approach of the State Commission to artificially suppress the ARR of the appellants is in contravention of the provisions of Section 61(e) of the Electricity Act, 2003 which provides that while specifying the terms and conditions for tariff determination, the Commission should be guided by the principles rewarding efficiency in performance. Hence, the incentive to the appellants on the overachievement of O&M expenses should be allowed.

13) **Per contra**, following are the submissions raised on behalf of the respondent State Commission on this issue No.(c):

13.1) That the O&M expenses comprise of Employee Expenses, Administrative and General Expenses (A&G) and Repair and Maintenance (R&M) expenses. While determining the ARR/tariff for FY 2007-08, the distribution Tariff Regulations 2006 were made applicable w.e.f. 06.10.2006. The State Commission has expressed its views regarding O&M expenses in paragraph 2.12.8 to 2.12.10 (Employee Expenses), 2.13.7 to 2.13.9 (A&G expenses) and 2.14.9 to 2.14.11 (R&M expenses) of the true up order dated 21.05.2013 (Impugned Order) after considering the comments and suggestions of the public and also the response of the appellants.

13.2) That the Full Bench of this Appellate Tribunal vide judgment dated 23.03.2011 in Appeal No. 139 of 2009 in MSEDCL Vs. MERC held that the employee costs, A&G expenditure and R&M expenses are inherently controllable in nature. That same treatment has been undertaken by the State Commission in the Impugned Order i.e. when actual is less than the normative number, the actual has been granted and where the actual is more than the normative number, the normative number has been granted and there is no contradiction in the Impugned Order on this aspect.

13.3) That on the one hand, the appellant is pleading that it ought to be given the actual number irrespective of whether the normative is less or more than the actual number. On the other hand, the appellants are claiming the efficiency gain to be allowed to them. By this very nature, the allowance of efficiency gain would amount to the grant of something more than the actual.

13.4) That the judgment dated 13.07.2010 in Appeal No. 153 of 2009 of this Appellate Tribunal (supra), relied upon by the appellants, does not support the appellants at all. Paragraph 31 of the said judgment relied upon by the appellants appears to be a recital of the appellants' argument therein and not a finding of this Appellate Tribunal. Secondly, even the finding which is contained in paragraph 34 thereof is based on the interpretation of the regulations made therein. Since the extant regulations of the State Commission do not contain any such principle as is argued by the appellants, the said argument is bereft of any substance.

14) **Our consideration and conclusion on issue No.(c) - relating to disallowing the efficiency gains on O&M expenses.**

14.1) For our own assessment of legality of the findings recorded on this issue, we deem it necessary to reproduce the relevant part of the Impugned Order which is as under:

"2.12 EMPLOYEE EXPENSES

C) The Commission views:

2.12.8 The Commission has noted that comments/suggestions of NPCL, Mr. B. B. Jindal and Mr. Manish Garg in respect of employee expenses.

2.12.9 No efficiency gains have been allowed during the years FY 2000-01 to 2006-07 as the framework of sharing of efficiency gains and losses was approved by the Commission only for FY 2007-08 onwards after the formulation of Tariff Regulations.

*2.12.10. **The Commission has considered employee expenses as controllable expenses** and accordingly disallowed employee expenses over the extent approved in the Tariff Order for any relevant year up to FY 2006-07. In cases, where actual expenses are lower than approved expenses, actual expenses have been considered. For determining the True-up for FY 2007-08, the Commission has followed the Tariff Regulations.*

C) The Commission's views:

2.13.7 The Commission has noted the comments/suggestions of NPCL in respect of A&G expenses.

2.13.8 No efficiency gains have been allowed during the years FY 2000-091 to 2006-07 as the framework of sharing of efficiency gains and losses was approved by the Commission only for FY 2007-08 onwards after the formulation of Tariff Regulations.

2.13.9 The Commission has considered A&G expenses as controllable expenses and accordingly disallowed A&G expenses over the extent approved in the Tariff Order for any relevant year up to FY 2006-07. In cases, where actual expenses are lower than approved expenses, actual expenses have been considered. For determining the true-up for FY 2007-08, the Commission has followed the Tariff Regulations.

2.14 REPAIR & MAINTENANCE EXPENSES

C) The Commission's views:

2.14.9 The Commission has noted that comments/suggestions of NPCL in respect of R&M expenses.

2.14.10 No efficiency gains have been allowed during the years FY 2000-01 to 2006-07 as the framework of sharing of efficiency gains and losses was approved by the Commission only for FY 2007-08 onwards after the formulation of Tariff Regulations.

2.14.11 The Commission has considered R&M expenses as controllable expenses and accordingly disallowed R&M expenses over the extent approved in the Tariff Order for any relevant year up to FY 2006-07. In cases, where actual expenses are lower than approved expenses, actual expenses have been considered. For determining the true-up for FY 2007-08, the Commission has followed the Tariff Regulations."

14.2) After consideration of rival contention on this issue and perusal of the Impugned Order on this issue which we have cited above, we do not find any merit in any of the contentions of the appellants. The State Commission, in our considered view, has rightly disallowed the efficiency gain on O&M expenses in the Impugned Order because the sharing of the efficiency gain or efficiency losses is not a right which is inherent in the licensees/appellants. It is a right which, if at all, is granted to such licensees by way of statutory enactments such as the Tariff Regulations and in the absence of such Tariff Regulations providing for sharing of efficiency gain or efficiency losses, the same can be granted to the appellants on fundamental principles. The sharing of the efficiency gain or the efficiency losses is a normative treatment afforded to a licensee by the State Commission and unless such norms were in place prior to the actual incurring of the prior period expenses, there could not be a question of granting such normative adjustment retrospectively. In the Impugned Order the State Commission has undertaken the exercise that when the actual is less than the normative number, the actual has been granted and where the actual is more than normative number, the normative number has been correctly and legally granted. The ratio of the judgment dated 30.07.2010 in Appeal No. 153 of 2009 (supra) does not squarely cover the facts and circumstances of the present case.

14.3) In view of the above discussions the issue No.(c) is hereby decided against the appellants as the contentions of the appellants are bereft of merits.

15) **Issue No.(d) – disallowing the carrying cost to the appellants**. On this issue, the learned counsel for the appellants has contended as under:

15.1) That the learned State Commission has wrongly disallowed the legitimate dues of the appellants by not allowing the carrying cost for the expenses allowed in the Impugned Order. The said finding is contrary to :

a) Judgments of this Appellate Tribunal including "*Tata Power Company Limited Vs MERC* in Appeal No. 173 of 2009 reported as 2011 ELR (APTEL) 336 (Paragraph 43) wherein this Appellate Tribunal held that once expense is allowed then the appellant is not only entitled to the expense but is also entitled to the carrying cost as its legitimate claim.

b) Financial principle that if there is deferment of recovery of expenses, the appellant will be eligible for carrying cost, which is a legitimate expense.

15.2) **That the sole reasoning given by the State Commission for not granting the carrying cost incurred by the appellants is <u>an inordinate delay in filing of the true up petition by the appellants</u>. The State Commission has failed to take into account that delay in filing of true up petition was not on account of appellants. On 23.12.2010, the Government of Uttar Pradesh notified the transfer scheme effective from 01.04.2007, whereby the provisional balance sheet of UP Transco (as on 01.04.2007) was notified by the Government of Uttar Pradesh and the bulk procurement and supply undertaking came to be vested on that date. Although the UPPCL, appellant No.1, started operating as a separate entity w.e.f 26.07.2006, the assets and liabilities finally came to be vested in UPPCL on 23.12.2010 (when transfer scheme was finally notified by the Uttar Pradesh Government.)**

15.3) That while disallowing the carrying cost, the learned State Commission has failed to consider that the delay in filing of the true

up petition was not on account of the appellants. In this context, following facts are noteworthy:

a) U.P.Power Corporation Ltd. (Holding Company) is entrusted with purchase and sale of bulk power for the Discoms. The accounts of U.P.Power Corporation Ltd. (UPPCL) could not be finalized as the Statutory Transfer scheme separating UPPCL and Uttar Pradesh Power Transmission Corporation Ltd. ("U.P. Transco") along with their respective provisional balance sheet as on 01.04.2007 was notified by the Govt. of U.P. only on 23.12.2010. The audit of accounts of UPPCL and for all the subsidiary Discoms commenced immediately once the provisional balance sheet of UPPCL was notified. The audit of Accounts of Discoms could not have commenced before provisional accounts of its Holding Company was notified.

b) The above was preceded by the following elements of reforms since 2000:-

(i) On 14.01.2000, the first reforms transfer scheme was brought into effect unbundling the erstwhile Uttar Pradesh State Electricity Board ("UPSEB") into the following three separate entities:

(1) U.P.Power Corporation Ltd. vested with the function of Transmission and Distribution within the state.

(2) Uttar Pradesh Rajya Vidyut Utpadan Nigam Ltd. ("UPRVUNL"), vested with the function of Thermal Generation within the state.

(3) Uttar Pradesh Jal Vidyut Nigam Ltd. ("UPJVNL"), vested with function of Hydro Generation within the State.

(ii) On 12.08.2003, after the advent of Electricity Act, 2003, the U.P.Power Corporation Ltd. was unbundled separating bulk supply and transmission from distribution business. The Distribution business was vested in four new distribution companies created in terms of the Uttar Pradesh (Transfer of Distribution Undertaking), Scheme, 2003, i.e. (i) Dakshinanchal Vidyut Vitaran Ltd: (Agra

DISCOM); (ii) Madhyanchal Vidyut Vitaran Ltd: (Lucknow DISOCM); (iii) Pashchimanchal Vidyut Vitaran Ltd: (Meerut DISCOM); and (iv) Purvanchal Vidyut Vitaran Ltd: (Varanasi DISOCM). The role of U.P.Power Corporation Ltd. was specified as "Bulk Supply Licensee" as per the license granted by the Ld. UP Commission and as "State Transmission Utility" under sub-section(1) of Section 27-B of the Indian Electricity Act, 1910.

(iii) On 26.07.2006, the Uttar Pradesh Power Transmission Corporation Ltd ("U.P. Transco) was incorporated under the Companies Act, 1956 and entrusted with the business of transmission of electrical energy to various utilities within the State.

(iv) On 18.07.2007, UP Transco was declared as State Transmission Utility by the Government of Uttar Pradesh.

(v) On 23.12.2010, Government of Uttar Pradesh notified the Transfer Scheme effective from 01.04.2007 whereby the provisional Balance Sheet of U.P. Transco (as on 01.04.2007) was notified by Government of Uttar Pradesh and the bulk procurement and supply undertaking came to be vested on that date. Although the U.P.Power Corporation Ltd. (UPPCL) started operating as a separate entity with effect from 26.07.2006, the assets and liabilities finally came to be vested in UPPCL only on 23.12.2010 (when Transfer Scheme was finally notified by U.P. Government). In the absence of Transfer Scheme and the provisional balance sheet, it was not possible to audit the accounts of the U.P. Power Corporation Ltd. and the Discoms.

15.4) That as per the procedure followed, the Discoms/appellants get their accounts audited by Chartered Accountants and thereafter, a supplementary audit is conducted by CAG's office.

15.5) **That in the absence of Transfer Scheme and the provisional balance sheet, it was not possible to audit the accounts of Discoms/ appellants. Therefore, the true up petition had to await the segregation of accounts and balance sheets. Though the preparation of true up petition commenced soon after, the**

allocation inter-se the 8 Financial Years took time and was a complicated exercise.

15.6) That the contention of the State Commission that in tariff orders dated 31.05.2013, the State Commission has considered carrying cost while providing regulatory surcharge is wrong. In the tariff order dated 31.05.2013, at paragraph 7, while determining the ARR for the FY 2013-14, the State Commission has considered the revenue gap of Rs.2,487.93 Crores without considering the carrying cost on the same till the date of the Impugned Order dated 21.05.2013. Hence, this Appellate Tribunal should direct the State Commission to allow the carrying cost.

16) **Per contra**, following are the contentions of the respondent Commission on this issue:

16.1) That the claim of the appellants is for carrying cost on the revenue gap which has arisen after the true up for the FY. The State Commission has expressed its views regarding the "*carrying cost*" in paragraph 11 and "*treatment of gap and way forward*" in paragraph 31 of the true up order dated 21.05.2013 (Impugned Order).

16.2) That the State Commission in *suo moto* Case No.2 of 2013, 3 of 2013, 4 of 2013 and 5 of 2013 in the matter of *suo moto* determination of ARR and tariff for FYs 2013-14 for the appellant Nos. 2 to 5 made provisions for the treatment of the net recoverable gap subsequent to final truing up of FY 2000-01 to 2007-08, amounting to Rs.2,487.93 Crores vide order dated 31.05.2013. The State Commission vide paragraph 7.3 of the order dated 31.05.2013 in *suo moto* in Case No. 2 of 2013 in respect of DVVNL has directed the licensee DVVNL to depict the regulatory surcharge distinctly in the electricity bills of the consumers and to create separate accounting fields to capture the amounts corrected as regulatory surcharge in both its financial and commercial statements to enable the licensee to correctly report the amount collected towards regulatory surcharge and further to provide

the details of the regulatory surcharge so collected for FY 2013-14 duly certified by the statutory auditor by 30.09.2014. Similar orders have also been passed in respect of other DISCOMs who are appellants before us on 31.05.2013.

16.3) That the regulatory surcharge, as ordered by the State Commission vide order dated 31.05.2013, passed in *suo moto* cases 2 to 5 of 2013 was to remain in force till 31.03.2014 unless amended or extended by the Commission through an order. As the finalization of tariff order for FY 2014-15 got delayed because of the general elections code of conduct, the State Commission on a Petition filed by the appellants on 31.03.2014 (Petition No. 945 of 2014), vide order dated 06.06.2014 has extended the applicability of regulatory surcharge till the tariff order for FY 2014-15, wherein it may be revised, if required.

16.4) That this Appellate Tribunal in its judgments dated 28.11.2013 in Appeal No.239 of 2012 and judgment dated 09.04.2013 in Appeal No.242 of 2012 has observed that the non-filing of true up Petitions is entirely due to the appellants' inaction itself. If the appellants were permitted to get carrying cost on the revenue gap for the entire period, they did not file true up petitions, it would tantamount to appellants profiting on their lapses. If the appellants as per their arguments were allowed to file true up petition after 20 years, they must get carrying cost for 20 years which could never be the intendment behind the carrying cost.

16.5) That rulings cited by the appellants in support of their claims for carrying cost, namely judgement dated 29.02.2012 (paragraph 13) in Appeal No. 28 of 2013, judgement dated 28.11.2013 in Appeal No.190 of 2011 (paragraph 76) and judgment dated 15.02.2011 in Appeal No. 173 of 2009 (paragraph 43) do not enure to the benefits of the appellants. The ratio laid down by these judgments is essentially that carrying cost is a legitimate expense which has to be given on the financial principle that whenever legitimate cost is accepted to be recoverable but its recovery is deferred/deprived, carrying cost ought

to be given to compensate the loss but this principle cannot be extended to a situation where a licensee defaults in its obligations of filing true up petitions and then seek to profit on its own delay. In the present case of the appellants, there has been no deprivation at all but it is the appellants who have deprived themselves of the fruits of a true up.

17) Our consideration and conclusion on issue No.(d) - relating to disallowing the carrying cost to the appellants.

17.1) Before we proceed to our own conclusion on issue No.(d), relating to carrying cost, we think it necessary to cite the relevant part of the Impugned Order which we reproduce as under:

"11. CARRYING COST

The Commission's Analysis:
There has been an inordinate delay by the distribution companies in filing the True-up Petitions in spite of several directives by this Commission. The distribution companies were constrained to file such petitions only after a judicial pronouncement by the APTEL. It is fairly established that true-up should be regularly conducted and uncontrollable costs should be recovered speedily to ensure that future consumers are not burdened with past costs. The true-up being claimed in this Petition is for a period ranging from 5-12 years back. The onus of such unreasonable delay squarely falls on the Petitioner and is not due to any process of law.

The Commission appreciates that the claim of carrying cost is towards revenue gap as a result of legitimate expenditure in the true up. However issue of delayed filing of true up petitions is also pertinent to be considered.

The Commission would decide on the issue of carrying cost while approving the mechanism and time period for recovery of true up amounts as described in Section 13."

"13. TREATMENT OF THE GAP AND WAY FORWARD
The UPPCL is permitted to raise revision bills towards bulk supply tariff on the distribution licensees and extra state consumers / licensees based on the trued up bulk supply rates approved in this Order. The table

below summarises the trued up bulk supply rates approved in this Order.

TABLE 0-1 : YEARLY BULK SUPPLY RATES

Particulars	***2000-01***	***2001-02***	***2002-03***	***2003-04***	***2004-05***	***2005-06***	***2006-07***	***2007-08***
Bulk Supply Tariff approved in Tariff Order (Rs./kWh)	*	*1.921*	*1.92*	*1.93*	*1.897*	*##*	*2.41*	*2.36*
Trued up Bulk Supply tariff (Rs./kWh)	*	*1.824*	*1.849*	*1.664*	*2.103*	*##*	*2.315*	*2.348*

** In FY 2000-01, the Commission had treated the difference between the aggregate income and expenditure of the bulk power purchaser as the amount payable towards cost of bulk power purchased from UPPCL. Accordingly, specific BST rates have been approved by the Commission in the True up orders of the bulk power purchaser.*

No adjustment has been provided, as no Tariff Order was issued by the Commission for FY 2005-06.

The entire amount of net recoverable gap subsequent to final truing up of FY 2000-01 to 2007-08, amounting to Rs.2,487.93 crores would be adjusted with the amount of the Aggregate Revenue Requirement of the distribution companies namely DVVNL, MVVNL, PVVNL and PuVVNL for the year 2013-14 or that for any other ensuing year or through a separate order, as may be decided by the Commission.

Similarly, in case of UPPTCL, the net recoverable gap subsequent to final truing up of FY 2007-08, amounting to Rs.20.21 crores would be adjusted with the amount of the Aggregate Revenue Requirement of the UPPTCL for the year 2013-14 or that for any other ensuing year or through a separate order, as may be decided by the Commission.

The decision of the Commission in this regard will be given in the Tariff Order of the aforementioned distribution companies for the year 2013-14 or that for any other ensuing year or in a separate order."

17.2) The learned Commission has given the reasons in the Impugned Order for not granting the carrying cost, the main reason being an inordinate delay in filing of the true up petition by the appellants, distribution licensees of the State of Uttar Pradesh. The main grievance of the appellants on this issue is that the State Commission should have taken into consideration that the delay in filing of true up petition was not on account of the appellants. The said delay had occurred due to the reason that it was only on 23.12.2010 the Uttar Pradesh Government had notified the transfer scheme effective from

01.04.2007, whereby the provisional balance sheet of UP Transco as on 01.04.2007 was notified by the Uttar Pradesh Government and the bulk procurement and supply undertaking came to be vested on that date. Although the UPPCL, the appellant No.1, had started operating as a separate entity w.e.f 26.07.2006, the assets and liabilities finally came to be vested in UPPCL only on 23.12.2010, when the transfer scheme was finally notified by the Uttar Pradesh Government. The UPPCL, appellant No.1 (holding company) was entrusted with purchase and sale of bulk power for the discoms, namely, appellant Nos. 2 to 5. The accounts of UPPCL could not be finalised as the statutory transfer scheme separating UPPCL and UP Transco along with their respective provisional balance sheet as on 01.04.2007 was notified by Uttar Pradesh Government only on 23.12.2010. Further, the audit of accounts of UPPCL and for all other subsidiary Discoms namely, appellant Nos. 2 to 5 commenced immediately once the provisional balance sheet of UPPCL was notified. Hence, the audit of accounts of Discoms could not have commenced before the finalization and notification of provisional accounts of its holding company, namely, UPPCL. Further, in the absence of transfer scheme and the provisional balance sheet of the appellants, it was not possible to audit the accounts of appellants and therefore, the true up petition had to await the segregation of accounts and balance sheet of appellants and the allocation of *inter se* the past eight financial years took time and the true up petition, being Petition No. 809 of 2012, for truing up of aggregate revenue requirement for FY 2000-01 to 2007-08 had to be filed only in the year 2012.

17.3) On deep and careful scrutiny and analysis of the reasons advanced by the appellants on this issue, we do not find any merit or substance in the said contentions of the appellants because the true up petition for ARR for past eight years was filed by the appellants in the year 2012 for which the management, way of functioning and the planning made by the appellants or their officers and the Uttar Pradesh Government were responsible. All these distribution licensees belong to the Uttar Pradesh Government and it was for the State Government to act

promptly and immediately at a proper time and if the State Government machinery had taken 12 years, the Appellate Tribunal cannot grant any relief towards such attitude of the appellants and if the carrying cost as claimed by the appellants is allowed, it would cost heavy burden on the end consumers of the State of Uttar Pradesh. For the poor and improper practice and management of the officers of the distribution licensees, who are appellants herein, and also for the inactive attitude of the Government, the said situation was created. We do not find any illegality or perversity in the findings recorded in the State Commission's order on this issue and we agree to all the findings recorded in the Impugned Order on this issue. Further if the appellants are permitted to get carrying cost on the revenue gap for the entire period, particularly when they do not file true up petitions, it would amount to appellants' profiting for their own lapses and negligence and irresponsible attitude. If the appellants, as per their arguments were allowed to file true up petitions after such a long gap, namely a gap of 12 years and if they are further allowed carrying cost for such an extra ordinary delay of 12 years, then we will not be doing justice to the end consumers of the State of Uttar Pradesh. A perusal of the rulings relied upon by the appellants constrain us to conclude that the ratio laid down in those judgments is that carrying cost is the legitimate expenses which has to be given on the financial principle that whenever a legitimate cost is accepted to be recoverable but its recovery is deferred, then carrying cost ought to be allowed to compensate the loss. But that is not the situation in the present matter before us. This principle cannot be extended to the present case where the licensees/appellants have defaulted in their own obligation in filing true up petition in a timely manner and took 12 years in filing the true up petition for ARR of the FY 2000-01 to 2007-08 and then claim carrying cost of such a long period, which is never the intention and purpose of the provisions provided under the Electricity Act, 2003. The carrying cost is to be allowed to compensate the loss only in the case where a carrying cost is the legitimate expense and the legitimate cost is accepted to be recoverable but its recovery is deferred and not otherwise.

17.4) In the light of the above discussions, we do not find any merit in the contentions of the appellants on this issue. Consequently, this issue is decided against the appellants.

17.5) Since all the issues have been decided against the appellants, the instant appeal deserves dismissal.

O R D E R

The instant appeal, being Appeal No. 128 of 2014, is hereby dismissed and the Impugned Order dated 21.05.2013, passed by the Uttar Pradesh Electricity Regulatory Commission, in Petition No. 809 of 2012, for truing up of aggregate revenue requirement for FY 2000-01 to 2007-08, is hereby upheld/affirmed.

No costs.

Pronounced in the open court on this ***23rd day of November, 2015***.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔ **REPORTABLE / ~~NON-REPORTABLE~~**