BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTIION, NEW DELHI

Appeal No. 181 of 2005, 207 of 2005 & 59 of 2006

Dated this 08th day of November 2006

Present : Hon'ble Mr. Justice E. Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

Appeal No. 181 of 2005 :

Uttar Haryanan Bijli Vitran Nigam Ltd.
Through its Superintending Engineer/Regulatory Affairs(UHBVNL)
Shakti Bhawan, Sector-6, Panchkula-134 109. ... Appellant

Versus

1. Haryana Electricity Regulatory Commission
   Through its Secretary,
   SCO – 180, Sector -5,
   Panchkula – 134 109,
   Haryana.
2. S.M.S. Muchhal, IDSE, ACE,
   Principal Director of Military Engineering Service,
   Military Cantonment,
   Chandimandir, Panchkula. ... Respondents

Appeal No. 207 of 2005:

Uttar Haryana Bijli Vitran Nigam Ltd.
Through its Superintending Engineer/Regulatory Affairs,
(UHBVNL), Shakti Bhawan, Sector-6,
Panchkula-134 109 ... Appellant

Versus

1. Haryana Electricity Regulatory Commission
   Through its Secretary,
   SCO-180, Sector-5, Panchkula-134 109, Haryana
2. Shri Parmesh Bindal
   M/s Parshadamal Mukandilal ... Respondents

Appeal No. 59 of 2006:

Uttar Haryana Bijli Vitran Nigam Ltd.
Shakti Bhawan, Sector-6,
Panchkula-134 109, Haryana ... Appellant

Versus

Haryana Electricity Regulatory Commission
Through its Secretary,
SCO 180, Sector-5,
Panchkula – 134 109, Haryana ... Contesting Respondent

Counsel for the Appellant In Appeal No. 181/05	:	Mr. Neeraj Jain, Advocate, Mr. Bharat Singh, Advocate Mr. Sanjay Sinha, Advocate Mr. Deepak Chopra, SE/RA Mr. Amit Dewan, Sr. AO Mr. Anurag Nanchahal, Sr. AO Mr. H. L. Singla for UHBVNL
Counsel for the Respondents In Appeal No. 181/05	:	Mr. Ashwani K. Talwar, Advocate Mr. Ashu Mathur, Jt. Director (Finance), HERC, Mr.Rajesh Kumar Monga, Law Officer Mr. Sanjay Varma, Jt. Director,HERC
Counsel for the Appellant In Appeal No. 207/05	:	Mr. Neeraj Jain, Advocate Mr. Sandeep Sharma, Advocate Mr. Pradeep Dahiya, Advocate Mr. Deepak Chopra, SE, Mr. Amit Dewan and Mr. Anurag Nanchahal, Sr. AOs, UHBVNL
Counsel for the Respondents In Appeal No. 207/05	:	Mr. Ashwani Talwar, Advocate Mr. Rajesh Kumar Monga, Law Officer, Mr. Ashu Mathur, Jt. Dir. HERC
Counsel for the Appellant In Appeal No. 59/06	:	Mr. Neeraj Jain, Advocate Mr. Amit Dewan and Mr. Anurag Nanchahal, Sr. AOs, UHBVNL

Counsel for the Respondent : Mr. Ashwani Talwar, Advocate
In Appeal No. 59/06 Mr. Ashu Mathur, Jt. Director, HERC
Mr. Rajesh Kumar Monga, Law Officer

COMMON JUDGMENT

1. Heard Mr. Neeraj Kumar Jain, advocate, appearing for Uttar Haryana Bijli Vitran Nigam Ltd., who is the appellant in all the three appeals and Mr.A.K.Talwar, learned counsel appearing for the Haryana Electricity Regulatory Commission who is the first respondent in all the three appeals. The 2nd respondent in Appeal No. 181/05 by its letter dated 06th February, 2006 has submitted that the 2nd respondent has no role with respect to the subject matter of the dispute in this appeal and the 2nd respondent has sought for dispensing with its appearance.

2. In Appeal No. 181/05 the appellant challenged the order dated 18.04.05 made in Case no. HERC/PRO-16/2004 and the order dated 31.08.05, passed on the review application filed by the said Haryana Electricity Regulatory Commission.

3. The appellant herein moved the 1st respondent, Commission, in terms of Section 26(5) of the Haryana Electricity Reforms Act, 1997 for the financial year 2004-05 approval of its ARR and determination of tariff for its distribution business on 31.12.03. After following the procedure prescribed the respondent, Haryana Electricity Regulatory

Commission, passed the order on 18.04.05 and determined the tariff. The appellant moved a Review Petition, in Case No. HERC/PRO-16/2004, which was dismissed on 31.08.2005. Being aggrieved, the present appeal has been preferred by the appellant herein challenging the said two orders of the Commission. According to the appellant, the Commission has not allowed a reasonable return and therefore, the order of the Commission is liable to be interfered. It is also contended that the Commission has illegally disallowed repair and maintenance expenses. Nextly, it is contended that there was error apparent on the face of the Impugned Order with respect to capitalisation and payment of interest. It is contended that claim with respect to working capital and interest on borrowing has been denied illegally. Fifthly, it is pointed that the Commission has not allowed to create Regulatory Assets in ARR in question and this vitiates the tariff as determined by the respondent, Commission. Sixthly, it is contended that category wise cost of service and revenue as assessed by the Commission is illegal, misdirection and liable to be interfered. Seventhly, it is contended that the amount of subsidy has been wrongly assessed with respect to revised AIR for 2005-06. It is further contended that the Commission ought to have taken into consideration of the actual amount of loans set out in the filing and the Commission ought to have allowed it. Nextly, it is contended that the running of metered tube wells should be fixed at 5.14 Hrs of running for metered tube wells as against the sample study of running

meters of tube wells in the order of 6.48 Hrs. per day is to be allowed. Lastly, it is contended that the cost of power purchase has been erroneously arrived at and the tariff order is liable to be interfered on one or more grounds set out in the Memorandum.

4. The first respondent, Commission, raised preliminary objections besides making submission on merits of each and every one of the contentions raised and advanced by the counsel for the appellant. According to the contesting respondent, no case has been made out for interference in the present appeal and the contentions advanced by the appellant are devoid of merits and untenable.

5. In Appeal No. 59/06 the same appellant sought to challenge the order dated 20th August, 2003 passed in HERC/PRO-7/2002 and the order dated 29.01.2004 passed in HERC/RA-3/2003, of the 1st respondent, Regulatory Commission and the grounds raised in this appeal also are identical to the grounds raised in Appeal No. 181/05.

6. In Appeal No. 59/06, the very same appellant has challenged the order dated 20th August, 2003 passed in HERC/PRO-7/2002 and the order dated 29.01.2004 passed in HERC/RA-3/2003 by the respondent, Regulatory Commission, and prayed for setting aside the same. In this appeal also the learned counsel for the appellant advanced contentions which are identical to the earlier two appeals. As the contentions advanced by the learned counsel for the appellant

as well as the contesting respondent are one and the same, these three appeals were consolidated and taken up together for hearing. Only in respect of the above nine points, arguments were submitted.

7. It may not be necessary to set out in detail about the case and counter case of either side and it would be sufficient to summarise the facts while discussing the contentions advanced by the appellant in all the three appeals. On a consideration of oral and written submissions submitted by the learned counsel for the appellant and the respondent, we are framing the following points for consideration in all the three appeals :-

A. Whether the appellant is entitled to receive a reasonable return of 0.5% on the loan approved and availed and provision has to be made for payment of income tax thereof?

B. What is the quantum of working capital required for efficient functioning of the appellant UHBVNL?

C. What is the reasonable quantum of working capital borrowings, which is permissible?

D. Whether the disallowance of writing off of regulatory asset in the ARR as proposed by the appellant, is liable to be interfered?

E. Whether the assessment of cross subsidy and subsidy requirement of the Discom licensee as calculated by the

Regulatory Commission are liable to be interfered in this appeal?

F. Whether the appellant's claim towards repair and maintenance expenses incurred with respect to income earning assets such as residential colony to staff and Rest / Guest houses etc. are sustainable?

G. Whether the cost of power purchase as claimed by the appellant in Appeal No. 181 of 2005 deserves to be sustained?

H. Whether the claim of the appellant with respect to running hours of tube – well is sustainable?

I. Whether the claim relating to capitalisation schedule and interest thereon as advanced by the appellant deserves to be sustained?

J. Whether the terminal benefits are to be calculated on accrual basis or on actuals?

K. Whether the bifurcation of balance of Regulatory asset by the Commission requires to be modified?

L. Whether the Commissions assessment of subsidy payable to the appellant is in order or liable to be interfered?

M. Whether the refusal to consider the revised ARR filed for FY 2005-06 is liable to be interfered?

N. To, what relief, if any the appellant is entitled in each of the three appeals?

8. **Point A:** Whether the appellant's claim that it is entitled to a reasonable return of 0.5% on the approved loan and income tax there on is allowable in the above appeals. It is contended that the claim of the appellant has been disallowed by the Commission under the heading "reasonable return" on the view that the Commission is allowing financial charges as part of "interest costs". According to the appellant interest and reasonable return are two distinct components of ARR and the same cannot be substituted with each other. It is pointed out that the interest is allowed to meet the debt service obligation and the reasonable return is a part of earning of the appellant undertaking. Whether the Commission acted erroneously and with illegality in not allowing the terminal benefits on actuarial basis?

9. The learned counsel nextly contended that the appellant is entitled to reasonable return of 0.5% on the loans borrowed as per the guidelines prescribed by the Commission and relied upon the earlier judgment of this Appellate Tribunal in Appeal No. 33 and 74 of 2005 dated 07.07.2006 between HVPNL and HERC. Though the learned counsel appearing for the respondent sought to re-open the point and vehemently contended that the view of this Appellate Tribunal requires re-consideration. After consideration of the contentions advanced by the counsel appearing on either side, we hold that the earlier judgment of ours squarely applies to the case on hand.

10. In Appeal No. 33 and 74 of 2005 we have held thus :

"The appellant fairly argued that interest and reasonable return are two separate components of the ARR and the same cannot be substituted with each other. While the interest is allowed to meet the debt services obligation, the reasonable return is a part of earnings of the owner. Moreover, the ARR guidelines issued by the Commission provides for a return @ 0.5% on the loans, hence the view of the Commission runs counter to its own guidelines."

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"It would be relevant to point out that the ARR guidelines issued by the Commission in the year 1998 were based on Schedule VI of the Electricity (Supply) Act, 1948. As this Act has been repealed with the enactment of the Electricity Act, 2003, the Schedule VI is no more applicable as such the said guidelines on ARR are obsolete. As the Commission has not allowed reasonable return it has also not allowed Income Tax amounting to Rs. 13.17 millions. The appellant rightly contended that as its claim for reasonable return is legitimate, it should be allowed along with Income Tax element thereon."

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"Per contra on behalf of the respondent Commission it was argued that the guidelines of the Commission, with reference to Schedule VI of Electricity (Supply) Act, 1948, does provide for reasonable return on the amount of loan advanced by the State Government multiplied by ½ percent. The sub section (3) of Section 26 of Haryana Electricity Reforms Act 1997 states, "Where the Commission departs from factors specified in Schedule VI of the Electricity (Supply) Act, 1948 while determining the licensees' revenue and tariff it shall record the reasons therefore, in writing"."

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"It was argued on behalf of the respondent Commission that accordingly, it allows interest on borrowings for capital expenditure, interest on borrowings for the allowable level of working capital, and over and above this also allows other financial charges including 2% guarantee fee charged by the Government for capital expenditure related borrowings of the appellant. Having allowed all borrowings related expenditure the Commission did not find it justifiable and fair in the interest of the consumers to burden them with a return on loan as claimed by the appellant. Accordingly the Commission had disallowed the same with the observations "As the Commission is allowing financial charges as part of interest cost, the Commission disallows this amount as part of ARR for FY 2004-05.""

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"In all fairness, entity in business operation should be allowed some kind of minimum return. The Commission has so far not revised or modified provisions of Schedule VI of the Electricity (Supply) Act, 1948. We are convinced that the reasons given by the respondent Commission for not allowing a reasonable return of 0.5% as per its own guidelines are not valid in law to justify its action. We decide in favour of the appellant. The Income Tax payable on the amount of reasonable return of 0.5% on the approved loans is also allowed as the Income Tax on profits is a legitimate business expenditure for the purpose of ARR and Tariff."

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11. We answer the point in favour of appellant and set aside that the disallowance of a reasonable return of 0.5% is not valid and it is and we allow the return on 0.5%. We also allow the income tax payable there as income tax on profits is a legitimate and legal expenditure for the purposes of ARR and tariff determination. Point A is answered in favour of the appellant.

12. **Points B & C:** These two points could be considered together conveniently. The learned counsel for the appellant advanced detailed arguments. The learned counsel for the appellant while pointing out that no norms have been prescribed in this respect, relied upon the

earlier Judgment of this Appellate Tribunal and contended that the appellant should have been allowed atleast two months receivables towards working capital borrowings. The learned counsel for the appellant is not justified in relying upon the earlier judgment of this Appellate Tribunal, which pertains to Bulk supply and transmission tariff. Mr.Talwar, the learned counsel appearing for the respondent, rightly pointed out that the appellant has been collecting substantial sum towards consumption charges in advance and therefore, no interference is called for with respect to the order of the Regulatory Commission in this respect. We find there is merit in this contention advanced by Mr. Talwar. Concedingly, the appellant collects consumption charges in advance.

13. That apart, the appellant has also collected security deposit from all the consumers and the same is very much available with it. Substantial amount is collected by way of advance consumption charges and that being so we are unable to appreciate the claim of the appellant made in this respect. This shows that the appellant is not effectively managing its finances and there are either latches or want of effective finance management. Though in the earlier judgment, as was pointed out, we took the view that two months receivables should be a reasonable sum, which the appellant may be entitled to claim towards working capital borrowings. However, in our considered view, when the consumption charge is collected in advance and such advance collection being substantial, we do not find any reason to

interfere with the orders passed by Regulatory Commission in this respect. As already pointed out, the consumption charges collected in advance is very much available with the appellant apart from security deposit. The billing cycle is only normal and we do not find any justification to allow two months receivables. We should also not forget the fact that the subsidy received by the appellant shall not be lost sight of.

14. In the circumstances, while distinguishing the earlier judgment of ours, we hold that no interference is called for with the order of the Commission in respect of points B & C. We answer points B & C against the appellant while holding that no interference is called for.

15. **Point D:** Whether the disallowance of writing off of the regulatory asset in the ARR, as proposed by the appellant, is liable to be interfered ? It is the contention of Mr. Neeraj Kumar Jain that the appellant had written off the regulatory asset as per asset in terms of its accounting policy and sought to include the same in its ARR but the Commission has rejected the same on the view that out of the gap of Rs. 432 crore the apportionment to be borne by the consumers and to be treated as deferred cost will be around 60% and the balance of Rs. 172.8 crore has to be made up by the appellant.

16. According to Mr. Neeraj Kumar Jain, the learned counsel for the appellant, the differentiation between UHBVNL and DHBVNL should have been adopted in terms of the bifurcation between the two companies on the basis of the agreed bifurcation and the view taken to the contra, is illegal. It is also pointed out that the two Discoms have prepared their balance sheets in terms of the agreed bifurcation and they have filed their accounts accordingly. That being so, it is not known as to how the regulator has chosen to hold that it is not aware of any bifurcation. Per contra, Mr. Ashwani Talwar, learned counsel appearing for the respondent, pointed out that the Regulatory Commission bifurcated the outstanding balance of regulatory asset in the ratio of gross sales value for the FI 2003-04 and such calculations and allocations were made on the basis of residual regulatory asset, based on sales in terms of audited accounts for 2003-04.

17. In our considered view, when the two Discoms have already agreed among themselves as to bifurcation, in the fitness of things the Commission would have adopted the same instead of calculations based on sales volumes. Mr. Talwar, the learned counsel, pointed out that the details of such agreement is either missing or not being placed to make it clear to the Commission that there has been an agreed bifurcation. The Commission ought to have issued notice in this respect to the two licensees to state their stand as to the agreed bifurcation, if any, before taking a final decision.

18. In the circumstances, we direct the Commission to issue a notice to both the Discoms calling upon them to state the agreed ratio of bifurcation and there after pass suitable orders with respect to the balance of regulatory assets. Such an exercise shall be undertaken by the Commission in the coming truing up exercise and as a consequence there of necessary results will flow from it. The point D is answered accordingly.

19. **Point E:** Whether the assessment and calculation of cross subsidy and subsidy requirement of the distribution licensees as adopted by the Regulatory Commission is sustainable or liable to be interfered in this appeal ? On this point, it is pointed out that the Commission had calculated the category wise deficit and surplus and calculated the cross subsidy and on that basis arrived at the subsidy requirement of the two Discoms, namely UHBVNL and DHBVNL. It is contended that the regulator has worked out the cost of service for each consumer category of the two Discoms and had worked out a common cost of service for the two distribution companies which was functioning under the original licensee HBVNL. The appellant had moved the regulator to furnish the details of calculations of cost of service and revenue in its Review Petition. According to the appellant, details were not furnished but discussions were allowed to be held with the staff members of the Regulatory Commission. In the Review Petition,

the appellant drew the attention of the Commission to the breakup details of service and revenue allowed for 2004-05 and pointed out that the over all cost of service of UHBVNL is higher than DHBVNL. Yet with respect to the categories of subsidization, namely domestic and agriculture, the cost of service of DHBVNL is held to be higher and the deficit per unit, on a comparison would show that for DHBVNL the deficit is higher and this has resulted in deprivation of substantial portion of subsidization, while subsidization given to UHBVNL is on the higher side. It is further pointed out that the category wise cost of service and revenue is arrived at by the regulator is erroneous and which has serious impact on the tariff design and subsidy payable to the appellant.

20. Per contra, Mr. Ashwani Talwar, learned counsel appearing for the regulator pointed out that the appellant had failed to file the cost of service calculation with its ARR filing before the Commission and in fact, had sought for waiver from the Commission from filing its cost of service data. Though there is reason to sustain the contention advanced by the appellant with respect to the quantum of subsidization. As the appellant had failed to submit the cost of service calculations in its ARR filing as per the regulations. Yet the Commission has chosen to arrive at allocable subsidy as seen from the table of calculations, estimated costs of service for each of the two distribution licensees on the basis of data submitted in the ARR filing

and supplementary filings. Had the appellant furnished the cost of service data, service cost calculation etc, the position would have been different. For the default of the appellant it is not proper for us to find fault with the Commission. It is true that there had been differences in subsidization but it is the appellant who has failed to furnish the details and calculations and it has to blame itself. Hence, we are of the considered view that we may not be justified in interfering with the findings of the Commission at this belated stage. Atleast in the future ARR, it is needless to emphasize, the appellant shall furnish full data viz. the cost of service calculations in its ARR and after a prudent check the Commission may order allocation of subsidy to the appellant. The point is answered accordingly against the appellant.

21. **Point F:** In Appeal No. 181/2005, appellant contended that the disallowance of repair and maintenance expenses for the staff residential colonies, rest/guest house is arbitrary and without reason or rhyme. It is fairly stated that such quarters belonging to the appellant requires annual maintenance and repairs. Admittedly the quarters are being used by staff, as staff attached quarters or guest houses and certain amount of concessional rental income is derived by the appellant. The said buildings require maintenance and repairs and appellant being the owner has to necessarily incur expenses towards repair and maintenance to maintain its assets. Though the income from such building is meager, it is obligatory for the appellant

to maintain the same, as a housing facility for staff and guest house facility for the staff members who go for inspection, auditing, planning etc. These are all the adjuncts which the organization like the appellant are required to provide for, repair and maintain irrespective of whether it is deriving a reasonable income or not. In fact with respect to some staff, they are part of service condition or accommodation as their presence in the field is essential, be it generating station or substation, etc. In fact some of the buildings are office attached quarters. The appellant claims that it has furnished audited accounts with necessary information (Annexure A2) and in Schedule 18 of the audited balance sheet the income from such quarters and guest houses do find a place. Yet the Commission has not sustained the claim.

22. As owner of those buildings which are being used for the purposes of the appellant and its activities, the appellant has to maintain and undertake repairs in the interest of the appellant irrespective of the aspect or fact that the income is only at a minimum level. Further in terms of Schedule VI of The Electricity (Supply) Act 1948 other expenses admissible under law for the time being in force in the assessment of income tax and arising from ancillary or incidental to the business of electricity supply falls under the category of expenditure properly incurred. This includes repairs and maintenance as well.

23. On a consideration of the entire aspect we hold that the view of the Commission deserves to be reversed and we further hold that the cost of maintenance and repairs as claimed deserves to be allowed subject to prudent check as to details of sum spent after affording necessary opportunity. We hasten to add that there is no rationale in the view taken by the Commission in disallowing maintenance and repair expenses incurred as per actuals and it deserves to be reversed. The point E is answered in favour of the appellant and we direct the Regulatory Commission to afford sufficient opportunity to the appellant to adduce materials in support of its claim while undertaking truing up exercise for production of accounts, vouchers etc to prove the actual expenditure and allow the same as allowable expenses.

24. **Point G:** On the point whether the cost of power purchase as claimed by the appellant in Appeal No. 181 of 2005 deserves to be sustained, the learned counsel for the appellant raised this contention and advanced long winding arguments in this respect. However, we do not find any valid reason or ground to interfere with the conclusion of the Regulator. We may also add that there is no illegality nor irregularity, in the approval of the Regulator, nor violation of any of the statutory provison or regulation is being pointed out by the appellant. It is rightly pointed out by Mr. Talwar, learned counsel appearing for the

Regulator, the Regulator has allowed Power Purchase based upon the tariff and bulk supply tariff, as approved by the Regulator. We do not find any illegality to interfere in this respect. However, we make it clear for the future, tariff years, it is well open to the appellant to raise identical pleas and contention as is permissible and the view taken by the Commission will not preclude the appellant from raising the contention if foundation is laid to support its contention. Hence Point G is answered against the appellant.

25. **Point H:** On the point whether the claim of the appellant with respect to running hours of tube wells is sustainable, the learned counsel was vociferous in his argument. Here and now, we are to point out with emphasis that the failure to implement the directions to fix meters in all agricultural connections including bore wells deserves to be deprecated. The various reasons sought to be suggested by the appellant are not acceptable and more so after the coming into force of 2003 Act and Regulations framed there under. It is imperative to fix meter in each and every connection including subsidized sector of agriculture as the same alone reflects the true position of consumption by each category of consumer and to check the loss in transmission as well as distribution. For the appellants' failure to implement the directions issued from time to time by the Commission action deserves to be initiated in terms of Part XII of The 2003 Act against the appellant. We decline to examine the contention advanced

by the appellant, as it had deliberately failed to implement the directions issued by the Regulator earlier and we hope this will make the appellant to realize and take suitable steps and see that the directions of the Commission are carried out. It is needless to add in case of further persistent default, the Regulator is bound to enforce its orders and the attitude of the appellant deserves stringent action. Every attempt shall be made to enforce the provisions of The Electricity Act 2003 and the Regulations framed there under without reservation and immunity. In these days where system of recording consumption for each consumer has advanced and collecting data one need not go to consumption point, the appellant shall take every step to introduce modern electronic metering system and this will go a long way for undertaking energy audit on a regular basis.

26. **Point I:** The next point we take up for consideration relate to capitalisation schedule and interest thereon. In view of the passage of time, we need not examine this issue in thread bear, yet we are to lay the obvious position for the future guidance, less there may not be a change in the approach of the appellant as well as Commission.

27. It is rightly pointed out on behalf of the Commission, that UHBVNL, which proposed to capitalize new investments in the ratio of 70:30, had failed to adduce supporting details in its ARR filing for FY 2004-05 and therefore UHBVNL has to blame itself. Be that so, for the

subsequent year the Commission had capitalized the expenditure on the basis of capitalisation schedule of 30:60:10 as was ordered earlier.

28. However, according to the Commission, the details and information furnished since FY 2000-01 did not support capitalisation schedule of 70:30: as proposed by UHBVNL. It is also pointed out that despite deficiencies being pointed out, the appellant had not chosen to furnish datas and there was no response in that respect. It is also rightly pointed out by the Commission that the appellant had miserably failed to substantiate its requirement with respect to new capital work projects undertaken by it. In the light of the said observation, we hasten to add that the appellant should have placed full details and supporting materials to satisfy the Regulator. Having failed, it is too late to express grievance in this respect.

29. However, we find that the approach of the Regulatory Commission is not in the proper perspective and the Commissions approach requires a paradigm shift. In this respect, we point out our judgment dated 28.08.2006 made in Appeal No. 84 of 2006 KPTCL Vs KERC, Bangalore & Others, in which an identical contention was raised :

"6. The functions of the State Commission are enumerated in Section 86 (1) (a) to (k) of The Electricity Act 2003. We notice from the above provision that the role played by the Commission in slashing the investment is not one of the enumerated function Section 86 (2) provides that the Commission shall advise the

State Government on all or any of the matters enumerated in clauses (i) to (iv) of the said sub section. Section 86 (4) provides that the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy. Section 61 to 66 provides for framing Tariff regulations and determination of tariff. These provisions are also silent in this respect.

7. In contrast, Section 22 (2) of The Electricity Regulatory Commissions Act 1998, since repealed provided that the State Govt. may confer functions enumerated Clause (a) to (f) of Sub section (2) of Section 22. Section 22 (2) (a) reads thus :

"22.(2)(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating within the State;"

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There is no parallel provision in Section 86 or any other provisions in The Electricity Act 2003 which will enable the Commission to regulate the investment approval for generation, transmission, distribution and supply of electricity within the State, and it is not as if it is the repository of entire power or authority to control the whole spectrum of Transmission or Distribution including financial management of utilities or it has the power to micromanage the affairs of the utilities.

8. The learned counsel appearing for the contesting respondents is unable to point out any provison in this respect. Provisons of 2003 Act has made a deviation and that being the position we are at loss to know how the Commission could take upon itself to examine the sagacity of investment proposed by utility in development or up gradation or maintenance of its system, by engaging a team of experts to review or study the merits of the proposal or plans to invest.

9. The only provison, if at all which has a relevance is Section 86 (2), which is advisory in nature. This being the position it is obviously clear that the legislature has left it to the utilities to decide their plans of investment or improvement of system or expansion to meet the demand of power within their area including up gradation and maintenance for a better and quality generation, transmission or supply as the case may be. It is the commercial decision of the utility and its source to raise funds which falls within the domain of the utility and not liable to be interfered, except at the stage when utility claims for return on such investment, interest on capital expenditure and depreciation. It is at that stage the Commission shall undertake a prudent check and if deemed fit allow the claim. In appropriate cases the Commission may disallow such claims of utility and it is for the utility to bear the brunt of such investment and it cannot pass it on to consumers.

10. We are unable to appreciate the procedure adopted by the Commission in appointing a Committee to examine the proposal or to find out whether it is feasible or not to implement the investment proposal. It is being commented as a day dream on the part of utility. Yet they are within the domain, commercial decision and internal management of the utility and there is time enough for the Commission to undertake prudent check when the utility comes forward to claim return on such investment. in its annual revenue requirement and till then the proposal to invest is well within the domain of the utility. It is sufficient if the utility confirms its proposal to invest.

11. Further when the Technical Experts and Engineers, have applied their mind with respect to their proposal and plan it is not for the Commission to examine by appointing another expert Committee. No expert agrees with another expert as presumably either add or comment. By this it shall not be taken that we are commenting upon the expert Committee appointed by Commission. Even the Committee did not opine that the proposed capital investments are not at all required or otherwise not suitable nor an efficient proposal.

12. All that it is being pointed that it may not be possible to execute. Here again it is within the domain and control of the utility. Assuming that the utility has a dream, it is expected that it will wake up with determination and act, lest the State which owns the undertaking will not spare and accountability of the utility is unending to the State, State Legislature and audit by The Accountant General. The power demand is increasing by leaps and bounds and quality has to be maintained and this compels the utility to update its transmission system including reduction in transmission loss ordered by the Commission. It is not for the Commission to throw its spanner in the wheels of the utility when it has proposed to invest for the improvement and expansion of system after a study by its Technical Team and when its board has approved the investment proposals.

13. Section 11 of The Karnataka Electricity Reforms Act, 1999 also does not spelt out such power on the Commission, as it only enables the Commission to require licensee to formulate perspective plans and schemes for promotion of transmission, generation etc. Section 12 of The Karnataka Electricity Reform Act saves the power of State Govt. to issue policy directives concerning electricity in the State including the overall planning and coordination. Thus viewed from any angle, the power of the Commission to interfere with the proposal of investment by the transmission corporation or for that matter a distribution licensee as well cannot be assumed.

14. The approach that consequent to the slashing of the investment proposal, interest and financial charges for the financial year 2007 has been reduced or saved at an average rate of 8.5% for six months amounting to Rs. 40.1 Crores is no reason at all. Mere proposal to invest will not involve the liability either interest or finance charges eo instanti, but such charges may have to be incurred only when the amount is actually invested as planned. Till the investment is complete the utility is not entitled to claim either finance or interest or return on the investment.

15. The further approach that it is obligatory for the Commission to keep the cost of the power at the lowest possible level is not a proper approach. Being a regulator, the Commission has to approach such issues as a regulatory measure and not as if the Commission is there to protect the consumers alone. When the Commission expects the utility to upgrade its system of transmission or distribution or quality of service, it follows automatically that utility has to invest in upgradation, maintenance for providing quality service. This could be by way of balancing and not by approaching the issue as if the consumer has to pay at the lowest rate. When the consumer expects quality service, the consumer should be prepared to pay a reasonable charge and here the role of Regulator is vital and it has to balance between the two. If timely capital investment is not made to improve the system then the quality of service by the utility cannot be complained either by consumers nor it could be commented by Regulator. The appointment of an expert committee by the regulator at the stage of proposal to invest is neither warranted nor justified as the plan to invest, estimate of investment and the program of up gradation or extension or development of transmission system is exclusively within the domain of transmission utility.

16. Even if the proposal to invest is over ambitious, the utility might improve itself or act in such an improved speed to execute the work, but that does not mean that the utility or its managers or top brass should not have imagination or over ambitious which target they set up for themselves to achieve in the course of the year. It follows that as and when the project is executed and investment is made, the same will have financial implications on the sector and consumer tariff but that has to be balanced by the first respondent. The regulator is not going to approve the expenditure or approve the financial charges just for asking and the regulator has to satisfy itself by a prudent check with respect to capital investment and in case they contribute for the quality or development or providing better service, the regulator may include and pass on the consequences of such investment to the consumers. Day by day demand increases and number of consumers are also increasing. The utility has to serve a number of metropolitan cities where the need for power is ever increasing. Therefore, the transmission

utility has to estimate or at least imagine and estimate the requirements in advance for the future years to serve the consumers.

17. To decry the utility and its technical experts or engineers is also not called for as it is for them to rise up to their planning and implement it. The expert committee has not stated that the proposed investment is not required at all and none of the proposals have been commented as not called for by the expert committee appointed by the Regulator. The efficiency to implement the projects or investments, if the utility fails to achieve, then it cannot pass on the consequences of such investment to the consumers. The investment made on the earlier years cannot be a basis to restrict investment for the current year 2007 or the following years.

18. The reference made to the National Electricity Policy and in particular to the draft policy dated 16.03.2005 may not be of any consequence. The utility has proposed to undertake expansion of its network after a study. The draft tariff policy has not been understood properly and at any rate it was only a draft which will not supersede or over rule the statutory provisions of The Electricity Act 2003 or Regulations. Reliance made on Section 91(4) of The Electricity Act 2003 is a misconception. There is no quarrel with the impartiality of the regulator. It is the jurisdictional issue or the scope of regulator's power vis a vis the utilities internal management and functions and its plans. Legally there could be none who could complain about such proposals nor they could have a say.

19. A reference is made to license condition No.12, in our view such a condition referred to by the 1st respondent just provides that the licensee shall not make any investment except in economic and efficient manner. This will not in any manner could be used as a trump card to interfere with the proposals or future investment plans of the utility. The utility might have placed its investment plan before the Commission but this does not mean that the Commission has a full and complete authority to decide as to when and how the projects are to be executed or when it should not be executed. A condition might have been imposed in the license under the earlier enactment and The Electricity Act 2003 has made the difference. The claim

of the 1st respondent that it is empowered to interfere with investment proposal made by the appellant and substitute its recommendations in respect of the same in our considered view is far fetched. If such a stand is to be sustained then utility will be a depart mart of the Commission and the Commission may not be exercising its power or functions as a regulator but as a head of the utility. This is not the object of the 2003 Act. It shall not be lost sight that the regulator has no budget or funds of its own to invest nor it could interfere with the micro management of the utility.

20. The preamble of the Act shall not be lost sight of, where in it has been emphasized that the object of the Act being to take measures conducive to development of the electricity industry, promote competition there in, protecting interest of consumers and supply with electricity to all areas etc. A question may be raised as to the effectiveness of capital investment and further question that if such investment is found to be a waste or otherwise not required which may result in waste of funds of utility. This over looks the fact that the utility being a State undertaking is controlled by its Board and responsible officials of the State and it is subject to the control and approval of the State in such matters which provides funds for such investments or over see such investments. For all these reasons we are not persuaded to accept the line of reasoning assigned by the Commission.

21. The Commission overlooked the fact that the appellant being transmission utility transmitting power through out the State for the bulk supply as well as distribution as an obligation to maintain the supply as well as quality supply and when the demand increase, either at the level of distribution or at the level of bulk supply it is the transmission licensee who should provide for the supply. This obviously means that the transmission utility has to plan in advance and should be in a position to supply power as demanded from time to time. Section 42, 43 of The Electricity Act 2003 also should not be lost sight of. To meet the ever increasing demand consequent to development and improvement in the status of the consumer public, industrialization, computerization, heavy industries and requirement increases by geometric proportion, it is for the transmission utility or such

other utility to estimate the future demands as well, besides improving the quality and standard of maintenance. This is possible only if the utilities have the freedom to plan with respect to their investment, standardization, upgrading of the system. For such a course it is within the domain of those utilities to undertake to plan, invest and execute the projects or schemes of transmission etc. If the view of the Commission is to be sustained, as already pointed out, the same would mean for each and every investment an approval has to be sought by the utility in advance which is not the objective of The Act.

22. The consumers interest also do not arise at this stage for consideration nor they could be an objector in respect of proposal or plan or investment by utility as the liability of the consumers, if any, arise or there could be a passing by way of return on equity or interest etc. as such contingency arises only when the Regulatory Commission subject to its prudent check allows such expenditure, while fixing the annual revenue requirement and determining the tariff. Till then, the consumers have no say and there could be no objection from their side. When the consumers complain poor service or failure to maintain supply, to face such a situation the utility has to plan in advance, invest in advance, execute the project or scheme for better performance and maintain.

23. The Karnataka Electricity Regulatory Commission has not acted reasonably or fairly in interfering with the internal, commercial, management and domain of the transmission utility with respect to its commercial plan and proposal to invest a substantial sum. We have made ourselves clear and in the future years to come the Commission will take this into consideration and will act accordingly. The point 'A' is answered in the above terms."

30. It is expected that for the future years the approach of the Commission shall be inconsonance with the above pronouncement.

This point is answered accordingly and we hold that the appellant is not entitled to any relief on this issue.

31. **Point J :** As regards the calculation of terminal benefits, learned Counsel for the appellant pleaded before us that the appellant is bound to make provisions, on accrual basis, under Accounting Standard-15, Accounting for Retirement Benefits in the Financial Statements of Employers towards terminal benefits, based on the valuation made by the actuary. It has been brought to our notice that the Accounting Standard (AS)- 15 came into effect in respect of accounting periods on and or after April 1, 1995 and it is mandatory in nature. It is pertinent to note, at this stage, that as per Black's Law Dictionary accrual accounting method means: an accounting method that records entries of debits and credits when the liability arises, rather than when income or expenses received or disbursed.

32. The appellant in its ARR for financial year 2002-203 and 2003-04 has claimed terminal benefits expenses on accrual basis on the basis of valuation made by the actuary. However, Commission has allowed the terminal benefits expenses on the actual cash pay out basis.

33. The Commission has failed to appreciate that appellant is bound to make provision on accrual basis under Accounting Standard-15, towards terminal benefits based on the valuation made by the actuary. If this amount is not provided and invested by the appellant then it would not be able to discharge its liability towards terminal benefits to the former employees, who retire from service on attaining the age of superannuation.

34. Appellant further contended that the Commission has failed to appreciate that it had acted with illegality in dis-allowing the expenditure of terminal benefits. Once it had come to the conclusion

that the Corpus is required to be created, linking it with the earning of profit is against all cannons of accountancy, financial management and prudent business practices. The Commission has failed to appreciate that it may not be possible to make contribution for all the previous years (for which no contribution was made due to adoption of method of cash pay out basis) when the appellant starts earning profits and these profits may not be sufficient for the purpose in question. If for the terminal benefits, the method of cash pay out is adopted, the present consumers will be charged less for consumption of electricity whereas the future consumers will have to pay more and bear a part of the burden that present consumer should have borne. This aspect has been lost sight by the Commission in its anxiety to reduce the allowable expenses and consequential revision of tariff, if any.

35. The Commission has failed to appreciate that the erstwhile HSEB was a statutory body constituted under The Electricity Supply Act, 1948 and was not required to maintain its accounts according to the provisions of The Companies Act, 1956. The appellant is a company constituted under Companies Act, 1956 and has to comply with the provisions of the said Act including so far as they relate to maintenance of accounts. Section 209 of the Companies Act, 1956 requires that the accounts of the Company shall be made on accrual basis. Sub Section (5) of Section 209 of the Companies Act, 1956, further provides that if any of the persons referred to in sub section (3) fail to take all reasonable steps to secure compliance by the Company of the requirement of this Section i.e. Section 209, or has by his own willful act been the cause of any default of the Company there-under, he shall, in respect of each offence be punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 10,000 or with both. If the pensionary contribution is

booked at payout basis then a part of the liabilities will remain un-depicted in the books of accounts and the account of the company will not reflect a true and fair working of the company, which would be violative of Section 209 and Section 211 of Companies Act, 1956. The said provisions are mandatory.

36. Per contra the respondent Commission pleads that keeping in view the deficit position of the appellant, the Commission deferred it until the appellant is able to generate cash surplus. Allowing terminal benefits on the basis of actuarial valuation basis at this stage would lead to additional borrowings by the appellant and hence consumers will have to bear the burden of high interest expenses. Had the appellant been in an operational surplus, it would have been viable to create a corpus to discharge the future liability accruing for the current period as the appellant is not required to pay during the next year or even in near future.

37. Concedingly both appellant and respondent realize that a corpus is required to be created to pay terminal benefits payable on a future date. While we appreciate concern of the Commission regarding interest payment, we are convinced that once the Accounting Standards-15 are mandatory in nature and accounts are required to be kept on accrual basis , there is no way in which the appellant can deviate from this basic accounting principle. In view of this position we answer this point in favour of the appellant and set aside the directions issued by the Commission in this regard.

38. **Point K :** Nextly it is contended that the Commission acted with illegality in bifurcating the balance of Regulatory asset on the basis of gross sales effected for FY 2003-04 and such an approach is per se

illegal and it is a valid basis at all. We hold that the criteria adopted to bifurcate the balance of Regulatory asset in our considered view is not acceptable as there is no relevancy nor there is any rationale. The appellant had in its filing has set out the ratio as per agreed bifurcation between the two Discoms. The same was the approach of the DHBVNL as well as UHBVNL as reflected in their respective Balance Sheet. A statement in this respect as reflected in the respective balance just shows the agreed bifurcation i.e. at the ratio of 56.55**:**43.45% between UHBVNL and DHBVNL. Even assuming for purposes of argument no material to support such a claim is produced, the appellant and the DHBVNL should have been called upon to state as to the basis of bifurcation. The two Discoms have filed their accounts before the Commission in the past for more than two years and the same could have been verified. This failure is also fatal to the conclusion arrived at by the Commission and at any rate at the stage of review atleast there should have been checked and a proper approach should have been adopted. This failure is fatal and warrants interference.

39. It is not known as to how UHBVNL, despite having a higher overall cost per unit, would have a lower per unit cost in the subsidized categories and higher revenue per unit in cross subsidizing categories. It is pointed out that during FY 2001-2002 the cost per unit of UHBVNL was higher in all categories yet the Regulator had allowed

common cost of service at the same rate for both the Discoms. This has resulted in a mis-direction and deserves to be set right at the time of truing up. So also there is mis-direction in assessing the average assessment of domestic category and this warrants an exercise to be undertaken at the stage of truing up atleast after affording opportunity to the two Discoms.

40. **Point L:** We will consider the contention about the failure to work out subsidy requirement and calculation of cross subsidy properly. There is merit in this contention advanced by the learned counsel for appellant. The main grievance being that even at the stage of review the appellant filed a detailed calculation as hereunder.

The cost of service and Revenue allowed for FY 2004-05 are as set out in the following Table :

	UHBVNL			**DHBVNL**		
	Cost per unit	**Revenue per unit**	**Surplus/ Deficit per unit**	**Cost per unit**	**Revenue per unit**	**Surplus/ Deficit per unit**
DOMESTIC	4.42	3.40	-1.03	4.50	3.42	-1.08
NON-DOMESTIC	3.89	4.19	0.30	3.82	4.19	0.37
L.T.INDUSTRY	4.05	4.28	0.23	4.21	4.28	0.07

AGRICULTURE METERED	3.56	0.37	-3.19	3.64	0.35	-3.29
AGRICULTURE NON-METERED	3.55	0.46	-3.10	3.64	0.44	-3.20
MITC	3.50	4.00	0.50			0.00
LIFT IRRIGATION	3.48	4.00	0.53	3.75	4.00	0.25
STREET LIGHTING	3.24	4.18	0.94	3.27	4.14	0.86
PUBLIC WATER WORKS	3.41	4.00	0.59	3.47	4.00	0.53
H.T.INDUSTRY	2.70	4.09	1.39	2.70	4.09	1.39
RAILWAY TRACTION	2.63	4.26	1.63	2.14	3.99	1.85
BULK SUPPLY	2.40	4.19	1.79	2.53	4.19	1.66
TOTAL	3.64	2.48	-1.16	3.59	2.89	-0.70

As set out in Table the category wise cost of service and revenue as assessed by the Regulator are obviously not correct and requires interference. Hence the entire basis changes and it requires fresh consideration in the hands of the Commission. We direct the

Commission to work out this claim correctly and accordingly grant the consequential benefit.

41. **Point M:** It is contended that the refusal to consider revised ARR FY 2005-06 filed is liable to be interfered? One another incidental grievance expressed being failure to consider the revised ARR filed for FY 2005-06. The appellant has to blame itself for the defects and despite opportunities there has been omission which cannot be explained. For such situation the appellant has to blame itself and suffer the consequence. We do not see any justification to interfere in this respect. This contention deserves to be rejected, so that in future atleast the appellant will be careful. The appellant also should change its attitude and approach in its own interest apart by advance planning and bestowing concentration in the filing of ARR, apart from creating a special cell or group for planning and filing of ARR.

42. **Point N:** In the result :-

i) On Point A, Point A is answered in favour of the appellant and consequently appellant is entitled to 0.5% and the income tax payable there on.

ii) Points B & C are answered against the appellant and we hold that no interference is called for in this respect.

iii) On Point D, we hold that we set aside the bifurcation adopted by the Commission and direct the Commission to bifurcate writing

off of the regulatory asset as proposed by the appellant after affording necessary opportunity while undertaking truing up exercise.

iv) On Point E, we decline to interfere with the findings of the Commission while making it clear that in future ARR the appellant shall furnish full data of the cost of service calculated and the Commission may undertake prudent check for allocation of subsidy.

v) Point F is answered in favour of the appellant and we set aside the disallowance of repair and maintenance of building / staff quarters / guest houses while directing the Commission to afford sufficient opportunity to adduce material in support of its claim while undertaking truing up exercise.

vi) On Point G, point G is answered against the appellant and we hold that we do not find any illegality with the order of the Commission on this point. However, we make it clear that this will not preclude the appellant to raise identical pleas and contentions by laying foundation to support its contentions.

vii) On Point H, point H is answered against the appellant and we hold that the Commission is well founded and justified in issuing directions. We also direct the appellant to introduce modern electronic system on a time bound basis as directed by the Commission.

viii) On Point I, while answering the point against the appellant, we hold that the approach of the Commission requires a change and Commission shall follow our earlier judgment in Appeal No. 84 of 2006 – KPTCL Vs KERC, Bangalore & Others for future tariffs.

ix) On Point J, point J is answered in favour of the appellant and modify the directions issued by the Commission in this respect.

x) On Point K, point K is answered in favour of the appellant and we direct the Commission to give the benefits while under taking truing up.

xi) On Point L, we direct the Commission to work out the claim correctly and consequently grant consequential benefits.

xii) On Point M, point M is answered against the appellant and appellant shall change its attitude and approach in its own interest by way of advance planning and bettering its contentions in the filing of ARR in the future years.

In other respects we hold that no arguments were advanced and we hold that no interference is called for in all the three appeals in other respects.

Parties shall bear their respective costs.

Pronounced in open court on this 8th day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member