

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI  
(APPELLATE JURISDICTION)**

**APPEAL NOS. 11 of 2015, 12 of 2015, 13 of 2015 & 14 of 2015**

**Dated: 05<sup>th</sup> December, 2018**

**PRESENT: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER  
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

**APPEAL NO. 11 of 2015**

**IN THE MATTER OF:**

Dakshinanchal Vidyut Vitran Nigam Limited,  
Urja Bhawan, 220 KV Sub-Station,  
Agra-Mathura Bye Pass Road,  
Agra - 282 007,  
Uttar Pradesh

.....Appellant

VERSUS

Uttar Pradesh Electricity Regulatory Commission,  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow-226010.  
Uttar Pradesh

....Respondent(s)

**APPEAL NO. 12 of 2015**

**IN THE MATTER OF :**

Pascimanchal Vidyut Vitran Nigam Limited,  
Urja Bhawan, Victoriya Park,  
Meeerut- 250001,  
Uttar Pradesh

.....Appellant

VERSUS

Uttar Pradesh Electricity Regulatory Commission,  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow-226010.  
Uttar Pradesh

....Respondent(s)

**APPEAL NO. 13 of 2015**

**IN THE MATTER OF :**

Purvanchal Vidyut Vitran Nigam Limited,  
Purvanchal Vidyut Bhawan,  
Vidyut Nagar,  
DLW, Varanasi - 221004,  
Uttar Pradesh

.....Appellant

VERSUS

Uttar Pradesh Electricity Regulatory Commission,  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow-226010.  
Uttar Pradesh

....Respondent(s)

**APPEAL NO. 14 of 2015**

**IN THE MATTER OF :**

Madhyanchal Vidyut Vitran Nigam Limited,  
4-A, Gokhle Marg,  
Lucknow - 286 001,  
Uttar Pradesh

.....Appellant

VERSUS

Uttar Pradesh Electricity Regulatory Commission,  
Vibhuti Khand, Kisan Mandi Bhawan,  
Gomti Nagar, Lucknow-226010.  
Uttar Pradesh

....Respondent(s)

**Counsel for the Appellant(s)** : Mr.Amit Kapur  
Ms. Aparajita Upadhyay

**Counsel for the Respondent(s)** : Mr. Sanjay Singh for R-1

## J U D G M E N T

PER HON'BLE MR. S. D. DUBEY, TECHNICAL MEMBER

### APPEAL NO. 11 of 2015

1. The Appellant, Dakshinanchal Vidyut Vitran Nigam Limited filed the Appeal under Section 111(2) of the Electricity Act, 2003 against the impugned Order dated 01.10.2014, passed by Uttar Electricity Regulatory Commission in Petition No. 887 of 2013 and Petition No. 918 of 2013, whereby the State Commission has determined the Truing up of the Aggregate Revenue Requirement ("**ARR**") for the FY 2008-09 to FY 2011-12; and determination of ARR and Retail Tariff for FY 2014-15. The Appellant has filed the present Appeal to assail the legality, validity and enforceability of specific observations and findings in the Impugned Order dated 01.10.2014 passed by the State Commission and the Impugned Order dated 03.11.2015 passed in Review Petition No. 995 of 2014 filed by M/s. Rimjhim Ispat Limited against Impugned Order dated 01.10.2014.
  - 1.1 The Appellant is aggrieved by the Impugned Order since its legitimate claims have been disallowed by the State Commission for which the Appellant is facing undeserved cash-flow and financial crises.

**APPEAL NO. 12 of 2015**

2. The Appellant, Pascimanchal Vidyut Vitran Nigam Limited filed the Appeal under Section 111(2) of the Electricity Act, 2003 against the impugned Order dated 01.10.2014, passed by Uttar Electricity Regulatory Commission in Petition No. 886 of 2013 and Petition No. 920 of 2013, whereby the State Commission has determined the Truing up of the Aggregate Revenue Requirement (“**ARR**”) for the FY 2008-09 to FY 2011-12; and determination of ARR and Retail Tariff for FY 2014-15. The Appellant has filed the present Appeal assailing the legality, validity and enforceability of specific observations and findings in the Impugned Order dated 01.10.2014 passed by the State Commission.
- 2.1 The Appellant is aggrieved by the Impugned Order since its legitimate claims have been disallowed by the State Commission for which the Appellant is facing undeserved cash-flow and financial crises.

**APPEAL NO. 13 of 2015**

3. The Appellant, Purvanchal Vidyut Vitran Nigam Limited filed the Appeal under Section 111(2) of the Electricity Act, 2003 against the impugned Order dated 01.10.2014, passed by Uttar Electricity

Regulatory Commission in Petition Nos. 888 of 2013 and Petition No. 919 of 2013, whereby the State Commission has determined the Truing up of the Aggregate Revenue Requirement (“**ARR**”) for the FY 2008-09 to FY 2011-12; and determination of ARR and Retail Tariff for FY 2014-15. The Appellant has filed the present Appeal assailing the legality, validity and enforceability of specific observations and findings in the Order dated 01.10.2014 passed by the State Commission.

- 3.1** The Appellant is aggrieved by the Impugned Order since its legitimate claims have been disallowed by the State Commission for which the Appellant is facing undeserved cash-flow and financial crises.

#### **APPEAL NO. 14 of 2015**

- 4.** The Appellant, Madhyanchal Vidyut Vitran Nigam Limited filed the Appeal under Section 111(2) of the Electricity Act, 2003 against the impugned Order dated 01.10.2014, passed by Uttar Electricity Regulatory Commission in Petition No. 885 of 2013 and Petition No. 917 of 2013, whereby the State Commission has determined the Truing up of the Aggregate Revenue Requirement (“**ARR**”) for the FY 2008-09 to FY 2011-12; and determination of ARR and Retail Tariff for FY 2014-15. The Appellant has filed the present

Appeal assailing the legality, validity and enforceability of specific observations and findings in the Impugned Order dated 01.10.2014 passed by the State Commission.

- 4.1** The Appellant is aggrieved by the Impugned Order since its legitimate claims have been disallowed by the State Commission for which the Appellant is facing undeserved cash-flow and financial crises.

**5. Brief Facts of the Case(s) :-**

- 5.1** The Appellant(s), herein, Dakshinanchal Vidyut Vitran Nigam Ltd., Pascimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited and Madhyanchal Vidyut Vitran Nigam Limited are Distribution Licensees and the companies incorporated under the provisions of Companies Act, 1956. After the unbundling of Uttar Pradesh State Electricity Board on 14.01.2000, the functions of Transmission and Distribution of Electricity in the state of Uttar Pradesh were vested with the Uttar Pradesh Power Corporation Ltd (“**UPPCL**”). Pursuant to further unbundling on 12.08.2003 by Uttar Pradesh Transfer of Distribution Undertaking Scheme, UPPCL is now operating as Bulk Supply Licensee in the state of Uttar Pradesh and function of

distribution of electricity in the State of Uttar Pradesh is vested with the distribution companies, i.e., Dakshinanchal Vidyut Vitran Nigam Limited, Madhyanchal Vidyut Vitran Nigam Ltd., Paschimanchal Vidyut Vitran Nigam Ltd. and Purvanchal Vidyut Vitran Nigam Ltd. (cumulatively referred to as the “ **UP Discoms**”)

**5.2** The Respondent is the Ld. Uttar Pradesh Electricity Regulatory Commission, which was constituted on 10.09.1998 under the Electricity Regulatory Commission Act, 1998. The said Commission as constituted under Electricity Regulatory Commission Act, 1998 was deemed to have been appointed as the Commission constituted under Section 3 of the UP Electricity Reforms Act, 1999 and continues to exercise jurisdiction as the State Regulatory Commission under Section 82 of the Act.

**5.3** 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.

**5.4** On 6.10.2006, UPERC (Terms and Conditions for Determination of Distribution Tariff) Regulations, 2006 (“**UPERC Tariff Regulations**”) were notified by UP Commission. These Regulations are applicable for the purposes of ARR filing and Tariff

determination to all the distribution licensees within the State of Uttar Pradesh from FY 2007-08 onwards. Prior to the framing of the Distribution Tariff Regulations, UP Commission had determined the tariff based on past trends and principles established on a case to case basis.

- 5.5** On 31.03.2010, UP Commission issued the order in Petition No. 624, 625, 626, 627, 628 of 2009 filed by UP Power Transmission Corporation, Madhyanchal Vidyut Vitaran Nigam Ltd, Dakshinanchal Vidyut Vitaran Nigam Limited, Purvanchal Vidyut Vitaran Nigam Limited, Pashchimanchal Vidyut Vitaran Nigam Limited determining AAR and Tariff for FY 2009-10.
- 5.6** On 23.12.2010, GoUP notified the Transfer Scheme effective from 01.04.2007 whereby the provisional Balance Sheet of U.P. Transco (as on 01.04.2007) bulk procurement and supply undertaking came to be vested on that date. Although the UPPTCL started operating as a separate entity with effect from 26.07.2006, the assets and liabilities finally came to be vested in UPPTCL only on 23.12.2010 (when Transfer Scheme was finally notified by GoUP).
- 5.7** On 19.10.2012, UP Commission issued an Order determining the AAR and Tariff of the Appellant for the period FY 2010-11, FY



2011-12 and FY 2012-13. On 13.05.2013, the Appellant filed the Petition for True-up of the Aggregate Revenue Requirement for FY 2008-09 to FY 2010-11.

**5.8** On 14.11.2013, UPPCL filed an Appeal under Section 111 of the Act against the True-up Order for FY 2000-01 to FY 2007-08 dated 21.05.2013 challenging the applicability of the additional subsidy requirement from GoUP. On 29.11.2013, the Appellant filed the Petition for determination of ARR and Tariff for FY 2014-15 along with True Up Petition for FY 2011-12 under Section 62 and Section 64 of the Act.

**5.9** On 24.07.2014, the UP Commission conducted the public hearing for the Appellant in Petition No. 887 of 2013 and Petition No. 918 of 2013 at Agra. On 01.10.2014, the Impugned Order was passed by UP Commission. On 16.11.2014, Appellant filed the Appeal against the Order dated 01.10.2014 passed by UP Commission.

**5.10** On 16.12.2014, M/s Rimjhim Ispat Ltd filed Review Petition No. 995 of 2014 seeking review of Ld. UP Commission's findings in the Impugned Order. On 29.06.2015, UPPCL, the holding company of the Appellant, filed response to the Review Petition filed by Rimjhim Ispat Ltd.

**5.11** UP Commission passed the Final Order in Review Petition No. 995 of 2014 allowing the prayers of M/s Rimjhim Ispat Ltd and directed that:

- (a) In order to promote open access in the State of Uttar Pradesh, the provisions regarding open access surcharge in Tariff Orders in FY 2014-15 and FY 2015-16 be kept in abeyance
- (b) All open access consumers be levied cross subsidy surcharge as per the rates approved in the Tariff Orders for FY 2013-14 only.

**5.12** Accordingly, the Impugned Order was modified by the aforementioned directions. Aggrieved by the Impugned order of the Commission disallowing various legitimate claims, the Appellants have preferred the present Appeals.

**6. Questions of Law:**

The Appellants have raised following questions of law for adjudication by this Tribunal:-

- A. Whether Ld. UP Commission erred by calculating the Notional Subsidy in the Appellant's True-up for ARR and

revenue for FY 2008-09 to FY 2011-12 and ARR for FY 2014-15 without the same being granted by GoUP?

- B. Whether the Ld. UP Commission has erred in directing the Appellant to recover additional subsidy from the State Government?
- C. Whether Ld. UP Commission has ignored the fact that surcharge of 2.38% is insufficient to recover Regulatory Asset and the same is violative of UPERC Tariff Regulations and the directions of this Hon'ble Tribunal in O.P. No. 1 of 2011?
- D. Whether Ld. UP Commission has erred in linking Regulatory Surcharge fixed for recovery of Regulatory Asset for earlier years with the actual performance of the Appellant in the current year i.e., FY 2014-15?
- E. Whether Ld. UP Commission committed error by allowing carrying cost of only 2.91% against the Regulatory Asset?
- F. Whether Ld. UP Commission has incorrectly applied Merit Order Principle and excluded power to be purchased from Bajaj Energy Pvt Ltd, Co-generation Plants and Bilateral sources, PXIL, IEX/ UI?

- G. Whether the Ld. UP Commission has incorrectly approved the Power Purchase cost from URPVUNL and Rosa TPP, by ignoring the submission of the Appellant?
- H. Whether Ld. UP Commission has wrongly can calculated energy purchased by Appellant first taking into consideration the energy sales and then adding the approved T&D loss?
- I. Whether Ld. UP Commission has passed order in excess of scope available under review jurisdiction and kept cross subsidy surcharge for FY 2014-15 and FY 2015-16 in abeyance despite observing that cross-subsidy surcharge has been rightly computed in order dated 01.10.2014 as per Distribution Tariff Regulations, 2006?
- 7. Shri Amit Kapur, the learned counsel appearing for the Appellants, has filed the written submissions as under:-**
- I. Computation of Notional Subsidy and direction to recover from State Government is a colourable exercise of power without any basis in law or in facts***
- 7.1** Under the Electricity Act, the powers of the State Commission and State Government regarding subsidy are clearly demarcated. While it is the State Government's prerogative to decide who it wishes to subsidize and to what extent, the role of the State

Commission is confined to issuing directions with respect to the 'manner' in which such subsidy should be paid [Section 65 of Electricity Act].

7.2 The Hon'ble Supreme Court in its judgment dated 03.12.2014 passed in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles*** reported as **(2014) 16 SCC 212, (Para 21-24, at pg. 47-48 of the Compendium)** has clearly held that the decision of the State Government in matters of subsidy is final and the State Commission neither has any say in the matter nor can it direct the State Government in this regard. The relevant findings of the Hon'ble Supreme Court's judgment are reproduced hereunder:-

***"23. ... Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Sections 65 and 108 of the 2003 Act that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission.***

***24. ... It was not open to the Commission to issue clarification dated 14-9-2006/15-9-2006, as the matter of providing subsidy was clearly prerogative of the State Government under the provisions of Section 65 read with Section 108 of the 2003 Act and Section 12 of the Reforms Act, 1999 hence the Commission could not have accepted on its own, or directed the State***

*Government to release the subsidy to HV-2 consumers and that too unilaterally.”*

**7.3** The Impugned Order suffers from an obvious infirmity and exhibits a colourable exercise of power by a statutory authority ultra vires the scheme of the parent statute. The findings in the Impugned Order are ultra vires the provisions of the Electricity Act. UP Commission is a statutory authority, which has to act within the four corners of law. In this regard, the Hon’ble Supreme Court in the case of ***Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*** reported as ***(2003)2 SCC 111 (Para 40, at pg. 52 of the Compendium)*** has observed as follows:

***“40. The statutory interdict of use and enjoyment of the property must be strictly construed. It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof.”***

**7.4** In the present case, the UP Commission has usurped the power of the State Government and decided that the State Government must pay an additional/notional subsidy and that too of Rs. 3783.36 Crores which was never the intent of the State Government or assured by it. The additional/notional subsidy amount seems to have been arrived at by a reverse calculation which the UP Commission has directed the Appellant to recover

from the State Government. The difference between losses incurred by the Appellant due to sale of subsidized power and the actual subsidy approved and paid by the State Government has been termed as 'Notional Subsidy' under the Impugned Order. Such a direction is without any basis in law or in fact since the State Government did not choose to undertake this objective.

**7.5** The Electricity Act requires the State Commission to safeguard consumers' interest and at the same time, ensure recovery of the cost of electricity in a reasonable manner. The State Government has provided a subsidy of fixed amount which is evident from subsidy letters of the State Government which have been placed on record. Considering that during the true-up proceedings, the figures of actual subsidy assured and paid by the State Government was placed before the UP Commission, there was no occasion to differ from the submitted figures.

**7.6** As a result of the wrongful direction issued by the UP Commission, the Appellant is suffering a loss of Rs. 3783.36 Crore. The net effect of the Impugned Order is that the Net Revenue Gap of the Appellant for FY 2008-09 to FY 2011-12 and FY 2014-15 have been artificially reduced by the UP Commission. The same cannot be recovered by the Appellant from any source. The Appellant is in

no position to demand and recover such amounts towards subsidy from the State Government as no such undertaking/ commitment has been given by the State Government in this regard.

**7.7** The Appeal No. 128 of 2014 was preferred by the UP Discoms challenging-

(i) The inconsistent approach followed by the UP Commission on the issue of subsidy. In some years the UP 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 UP Commission has allowed the actual subsidy where actual amount received from the Government is more.

(ii) The incorrect directions issued by the UP Commission to recover notional subsidy from the State Government.

**7.8** By order dated 23.11.2015, [reported as 2016 ELR (APTEL) 259 this Hon'ble Tribunal has decided the Appeal No. 128 of 2014 and dismissed the above issues by way of a common finding as extracted herein below-

***“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. 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. 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.***

***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 data 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."***

- 7.9** This Tribunal's findings in the said judgment are premised on the issue of inconsistent approach being followed by the UP Commission and not on the issue of Notional Subsidy. The said judgment of this Tribunal was challenged by the UP Discoms before the Hon'ble Supreme Court in Civil Appeal No. 2615 of

2016, which was admitted by the Hon'ble Supreme by its order dated 18.03.2016 civil and pending adjudication.

**7.10** The judgment and statement of law that holds the field is the Supreme Court judgment reported as (2014) 16 SCC 212. The judgment dated 23.11.2015 has been passed by a bench of this Hon'ble Tribunal without considering the Supreme Court's judgment dated 03.12.2014 passed in the case of *Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles* (referred at para 5 above). Therefore, the judgement dated 23.11.2015 is as such *per incuriam*, and the UP Commission cannot place any reliance on the same.

## **II. Approval of insufficient Regulatory Surcharge**

**7.11** The UP Commission by way of the Impugned Order has:-

- (a) Created a Regulatory Asset of Rs. 3940.53 Crore as on 01.10.2014;
- (b) Computed a Regulatory Surcharge @ 2.38% which leads to recovery of Rs. 79.93 Crore only for FY 2014-15;
- (c) Held that that if the Appellant had filed its true-up petition on time, the Revenue Gap could have been recovered within a 3 year period

**7.12** This Hon'ble Tribunal in its Judgment dated 11.11.2011 in **OP No. 1 of 2011** reported as **2011 ELR (APTEL) 1742(Para 65 (iv))**, has

held that Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period, and carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which Regulatory Asset is created.

**7.13** By determining Regulatory Surcharge of 2.38%, the UP Commission has acted in contravention of its own Regulations i.e. UPERC Tariff Regulations, by failing to ensure that the Net Revenue Gap of the Appellant is recovered within the stipulated time period of three years. Further, the UP Commission has failed to specify any time frame within which the Regulatory Asset is to be amortized. Apart from the above, the tariff determined by UP Commission is not cost reflective and is not sufficient to meet the current expenses.

**7.14** In the case of *PTC India v CERC* reported as **2010 4 SCC 603**, a constitutional bench of the Hon'ble Supreme Court of India has held that when Regulations have been framed by a competent authority in pursuance of the powers conferred under the parent

legislation, then the decisions of the competent authority must be in conformity with those Regulations.

**7.15** UP Commission has created Regulatory Asset of Rs 3940.53 Crore. For recovery of the same, UP Commission has approved a Regulatory Surcharge @ 2.38%, which will result in recovery of Rs. 79.93 Crore in FY 2014-15. It is noteworthy that for FY 2014-15, UP Commission has approved a Carrying Cost of Rs. 114.90 Crore. As a result of this, there is actually an increase in Regulatory Asset in FY 2014-15 from Rs 3940.53 Crore to Rs 3975.51 Crore (Rs. 114.90 crores – Rs. 79.93 crores). It is submitted that the Regulatory Asset which should have reduced on a year on year basis, is actually increasing with the passage of time. Thus, Regulatory Surcharge of 2.38% would be ineffective in reducing the Net Revenue Gap.

**7.16** The UP Commission has erred in concluding that if the Appellant had filed its True-up Petition on time, the Revenue Gap could have been recovered within a 3 year period. The delay in filing the True-up Petitions for FY 2008-09 to FY 2011-12 was not on account of the failure on the part of the Appellant but due to delay in finalization of accounts till 23.12.2010 due to unbundling of erstwhile UP State Electricity Board by several transfer schemes

notified by the State Government. Until such time the segregation of the assets and liabilities are divided among the UP Discoms, it is not possible to file True-up petitions without any balance sheets or audited accounts for each UP Discom.

**7.17** The UP Commission ought to have computed a Regulatory surcharge which would enable the Appellant to recover the Net Revenue Gap within a reasonable time period. By allowing for a low Regulatory Surcharge, the UP Commission has threatened the financial viability of the Appellant.

***III. Erroneous linking of the Regulatory Surcharge with future performance of the Appellant***

**7.18** The UP Commission has arbitrarily and illegally held that :-

- (a) The Regulatory Surcharge of 2.38% fixed by the UP Commission would be reduced by 10% in the future if the Appellant in FY 2014-15 was unable to achieve:-
  - (i) Target Consumer Addition; or
  - (ii) The Target distribution loss of FY 2014-15
- (b) The Regulatory Surcharge reduced on account of under-achieved performance shall be considered as deemed recovery of Net Revenue Gap.

**7.19** The UP Commission failed to consider the fact that Regulatory

Surcharge has been imposed for recovery of Regulatory Asset approved for past years. Therefore, linking Regulatory Surcharge to future performance is illegal and arbitrary. The Regulatory Asset is the amount recognized in the books of Appellant and as an asset for past years whose recovery is deferred to in the future and therefore the same cannot be linked to future performance. The direction of UP Commission is directly contravening Section 61 of the Electricity Act.

**7.20** The Review Petition filed against Order dated 06.06.2014 challenging the linking of regulatory surcharge with the performance of the Distribution Licensees is yet to be decided by UP Commission. The UP Commission has merely opined in the Impugned Order that it is not satisfied with the reasons given in the Review Petition. This does not mean that Review Petition has been disposed of. The Appellant cannot challenge the said Order in the absence of disposal of the Review Petition. Once the Review Petition is dismissed, the Appellant may choose to challenge the same. Even going by UP Commission's logic that the Review Petition has been disposed of by the Impugned Order, once the present Appeal has been filed, it will also entail challenge

to the Order in the Review Petition. Accordingly, the hyper technical objection of the UP Commission has no basis.

**7.21** As regards the loss targets projected to the State Government as well as Union Government under the Financial Restructuring Plan, it is pertinent to note that having passed the Impugned Order, UP Commission has tried to build new/extraneous justifications in its reply which travels beyond the Impugned Order. The same cannot be sustained in view of observations of the Hon'ble Supreme Court in the judgment titled ***Mohinder Singh Gill v. Chief Election Commissioner*** reported as ***(1978) 1 SCC 405***, wherein it was held that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. The findings of aforesaid judgment of the Hon'ble Supreme Court has been followed by-

- (a) Hon'ble Supreme Court in ***T.P. Sen Kumar v. Union of India*** (2017) 6 SCC 801.

(b) Hon'ble Tribunal in its Judgment in the case of ***Delhi Transco Ltd. v. Delhi Electricity Regulatory Commission***.: 2013 ELR (APTEL) 498.

**7.22** The Regulatory Surcharge @ 2.38% is insufficient to recover the Net Regulatory Gap of the Appellant. In addition to that if the Regulatory Surcharge was further reduced, the same would impact the financial viability of the Appellant.

#### ***IV. Determination of an insufficient Carrying Cost***

**7.23** The UP Commission by the Impugned Order has arbitrarily allowed the carrying cost of the Regulatory Asset @ 2.91% without indicating or providing the basis for calculating such low rate of carrying cost. It is submitted that in doing so, UP Commission has ignored the provisions of the UPERC Tariff Regulations and the Tariff Policy.

**7.24** UP Commission has arbitrarily allowed the carrying cost of the Regulatory Asset @ 2.91 % instead of allowing the actual interest incurred by the Appellant. UP Commission, in the Impugned Order, has ignored the fact that the Appellant is procuring loans in the range of 12.25% to 15.75%. (Details submitted before UP Commission on 04.08.2013). Therefore, the UP Commission



should have at least allowed the carrying cost on the basis of the actual interest on loans availed by the Appellant.

**7.25** UP Commission has itself allowed 12.5% towards interest on working capital. Therefore, UP Commission should have allowed at least carrying costs of 12.5% on the Regulatory Asset instead of 2.91% allowed in the Impugned Order. In this context, reliance is placed on:-

- (a) This Hon'ble Tribunal's judgment dated 28.08.2009 passed in Appeal No. 117 of 2008 in the case of **Reliance Infrastructure Ltd v. MERC**
- (b) This Hon'ble Tribunal's Judgment in the case of **NDPL v DERC: 2010 ELR (APTEL) 891**

**V. Wrongful consideration of sale of power as base to compute power purchase**

**7.26** UP Commission in order to arrive at the availability of power has adopted a bottom up approach wherein the UP Commission has considered the energy sales and then added normative transmission and distribution losses to arrive at the availability of power.

**7.27** In a typical scenario, energy input is uncontrollable and is consequent to the energy available from long term sources and short term and bilateral sources to mitigate the cyclic and seasonal

fluctuations in demand. Thus, energy available from long term sources and bilateral and short term sources is summed up to arrive at the energy input for any year.

**7.28** While calculating the ARR for an ensuing year, the total power purchase by the Appellant taken into consideration out of the total power procured, the transmission and distribution loss is subtracted to arrive at availability of normative power for sale to consumers. Thus a top-down approach is generally adopted in a tariff proceeding. This is in accordance with the principles set out in Regulations 3.1.5 and Regulation 3.3 of the UPERC Tariff Regulation .

**7.29** Thus, the approach of the UP Commission to consider the actual energy sale and then adding normative loss level to derive the normative power purchase input rather than considering the actual power purchase incurred by the Appellants in the true up orders is incorrect and liable to be set aside.

**8. Shri Sanjay Singh, the learned counsel appearing for the Respondent, has filed the written submissions as under :-**

**8.1** This Tribunal vide judgment dated 21.10.2011 in Appeal No. 121 of 2010 had directed the Commission to initiate the true - up exercise up to FY 2006 – 07. Further the Commission vide order

dated 29.03.2012 in the matter of ARR and Tariff for FY 2010 – 11, FY 2011 – 12 and FY 2012 - 13 filed by the State owned distribution companies namely – DVVNL, MVVNL, PVVNL, PuVVNL and KESCO and the state owned transmission utility namely UPPTCL, had directed the distribution and transmission licensees to file the true-up petitions up to FY 2007 - 08. Thereafter on 28.05.2012 the True-up Petitions was filed by the appellants for the FY 2000 – 01 to 2007 – 08 which was finally decided vide order dated 21.05.2013, against which an appeal (Appeal No. 128 of 2014) has been filed by UPPCL before this Hon'ble Tribunal which was finally decided vide judgment dated 23.11.2015. Further, the said judgment dated 23.11.2015 has been challenged by the UPPCL before the Hon'ble Supreme Court in Civil Appeal No. 2615 of 2016 which is pending adjudication.

### **I. Wrongly directed Appellant to recover Subsidy from GoUP**

**8.2** The 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 Commission or before this Tribunal as to what steps

did the Appellants take to pursue for the amount of subsidy which the GoUP assured to give to the respective DISCOMS on the basis of which the ARR Petition was filed and the tariff was fixed by the Commission for the particular FY.

- 8.3** 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 consumer by another class of consumers as the tariff is fixed by the 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 in turn will be violation of the principle laid down by this Tribunal.
- 8.4** The observation of the Commission that DISCOMS need to realize the amount of additional subsidy from the GoUP is justified on the findings rendered by this Tribunal in judgment of Mula Pravara Electric Co-operative Society Limited versus MERC dated 28.01.2008 in Appeal No. 24 of 2007.
- 8.5** This Tribunal in the Mula Pravara case (supra) also relied upon the Full Bench Judgment dated 26.05.2006 in the case of M/s Siel Limited versus The Punjab State Electricity Regulatory Commission in Appeal No. 4 of 2005 & Batch.

- 8.6** This Tribunal again relying on the aforesaid two judgments has upheld the aforesaid contention of the Commission on the issue of Additional Subsidy Requirement from GoUP in Appeal No.128 of 2014 (UPPCL versus UPERC) dismissing the appeal filed by the UPPCL on behalf of DISCOMS. It is submitted that the plea taken to distinguish the findings given in the present case was also taken therein.
- 8.7** In reply to the submissions of the Appellant on this issue it is submitted that the cited case law of Paschimanchal Vidyut Vitran Nigam Ltd. versus Adarsh Textiles is not applicable in the present case in as much as that in the cited case the GoUP had only subsidised LMV-2 and LMV-6 category of consumers and had not subsidised the HV-2 category of consumers, as such it was held that the Commission could not have directed the State Government to release the subsidy to HV-2 consumers, where as in the present case the Commission has only observed that the Distribution Licensees need to realise Additional Subsidy Requirement from GoUP.
- 8.8** In reply to the submissions of the Appellant on this issue it is submitted that the ratio of cited case law of Bhavnagar University versus Palitana Sugar Mills (P) Limited would not be attracted in the present case in view of the judgment rendered in the cases of

Mula Pravara (supra), M/s Siel (supra) and Appeal No. 128 of 2014(supra).

## **II. Insufficient Regulatory Surcharge**

### **III. Wrongly linking Regulatory Surcharge with Future Performance**

**8.9** The Commission has elaborately dealt with the Regulatory Surcharge issue in detail in paragraph 12.3 and 12.4 in its order dated 1.10.2014. The perusal of the same shows that the Commission took into consideration the findings of this Tribunal rendered in the judgment of OP No. 1 dated 11.11.2011 and Appeal No. 10 of 2013 dated 25.10.2013. In OP No. 1(supra) it has been held that Regulatory Asset should not be created as a matter of course except where it is justifiable. In Appeal No. 10 (supra) the tariff of consumers for HT IV category was increased exorbitantly giving them tariff shock by Kerala Commission, so it was set aside by this Tribunal.

**8.10** In regard to the case of PTC India versus CERC cited by the Appellants on this point it is submitted that the ratio laid down in that case is not applicable on the point in the present Appeal.

**8.11** In regard to the case of Delhi Transco Limited versus DERC cited by the Appellants on this point it is submitted that in the said case

following cases of the Hon'ble Supreme Court has been considered:

- i) Bharat Sanchar Nigam Limited versus UOI (2006) 3 SCC 1
- ii) Radhasoami Satsang Swami Bagh, Agra versus Commissioner of Income Tax AIR (1992) 1 SCC 659

wherein it has been held that res judicata does not apply in matters pertaining to tax for different assessment years because res judicata applies to debar Courts from entertaining issues on the same cause of action whereas the cause of action for each assessment year is distinct. Nonetheless, the Supreme Court proceeds to hold that the Courts will generally adopt a earlier pronouncement of the law or a conclusion of fact unless there is a new ground urged or a material change in the factual position. It is submitted that on the point under consideration an earlier pronouncement has been made by this Tribunal vide judgment dated 23.11.2015 in Appeal No. 128 of 2014.

**8.12** In regard to the case of Mohinder Singh Gill versus Chief Election Commissioner cited by the Appellants on this point it is submitted that the Order against which Review Petition has been filed is dated 06.06.2014 whereas the order which is under challenge in the present Appeal has been passed by the Commission at a later date on 01.10.2014. Also, going by the logic of the Appellants that once the present Appeal has been filed it will also entail challenge

to the order in the Review Petition. If so, then certainly the reasons given by the Commission in order dated 06.06.2014 linking Regulatory Surcharge with the performance of the DISCOMS would be looked into by this Tribunal. It is submitted that in either of the conditions it would be appropriate to appreciate the reasons given by the Commission in the order dated 06.06.2014 for proper adjudication of the issue of Regulatory Surcharge in hand. In view of the above the case of T. P. Sen Kumar versus UOI and Delhi Transco Limited versus DERC cited by the Appellants on this point is also of no avail.

#### **IV. Insufficient Carrying Cost allowed towards Revenue Gap**

**8.13** As regards the claim of the Appellant that the Commission has allowed only 2.91% of carrying cost, it is submitted that in the computation of carrying cost for FY 2014-15 there was some inadvertent computational error which the Commission has rectified subsequently in its next Tariff Order dated June 18, 2015 considering the annual rate for carrying cost at 10% for the same period. In view of the above, the appellants are not entitled for any relief, save computational error as stated above, as prayed in the memo of appeal.

#### **V. Wrong Application of Merit Order Dispatch Principle (Not Pressed by the Appellant)**



**VI. Arbitrary Approach in approving Power Purchase Cost (Not Pressed by the Appellant)**

**VII. Wrongly Considering Sale of Power as Base to Compute Power Purchase**

**8.14** The Appellant has selectively relied in the appeal only on Regulation 3.1.5 of the Distribution Tariff Regulations, 2006 unduly to make out case in their favour. It is submitted that the complete Regulations 3.1 and 3.4 of the Distribution Tariff Regulations, 2006 clearly make out that the Commission has to adopt a “bottoms up” approach.

**8.15** In view of the above, the appellants are not entitled for any relief as prayed in sub-paragraph 9.65 of the memo of appeal.

**8.16** It will, therefore, be appropriate in the interest of justice that the Appeal preferred by the Appellants may be dismissed and suitable orders may be passed in favor of the Respondent Commission.

**9. We have heard learned counsel appearing for the Appellants and learned counsel appearing for the Respondent Commission at considerable length of time and we have considered carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeals for our consideration:-**

**Issue No.1:** Whether the State Commission was right in directing the Appellants to recover additional subsidy from the State Govt.?

**Issue No.2:** Whether the State Commission has considered correctly the regulatory surcharge and also linking such surcharge with the actual performance of the Appellants?

**Issue No.3:** Whether the State Commission has committed an error in allowing the lower carrying cost against the regulatory asset?

**Issue No.4:** Whether the State Commission has correctly approved the power purchase cost?

## **10. Our Findings and Analysis :-**

### **10.1 Issue No.1 :-**

The learned counsel for the Appellant submitted that under the Electricity Act, the powers of the State Commission and the State Govt. regarding subsidy are clearly demarketed. While it is the State Government's prerogative to decide to whom it wishes to subsidize and to what extent, the role of the State Commission as per Section 65 of the Act is confined to issue directions with respect to the manner in which such subsidy should be paid. The learned counsel further contended that the Hon'ble Supreme Court in its judgment dated 03.12.2014 passed in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd. v. Adarsh Textiles***

reported as **(2014) 16 SCC 212**, has clearly held that the decision of the State Government in matters of subsidy is final and the State Commission neither has any say in the matter nor can it direct the State Government in this regard. The relevant findings of the Hon'ble Supreme Court's judgment are reproduced hereunder:-

***“23. ... Such decision/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under Section 65 it is a prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Sections 65 and 108 of the 2003 Act that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government and such other direction issued in the public interest shall be binding upon the Commission.***

*24. ... It was not open to the Commission to issue clarification dated 14-9-2006/15-9-2006, as the matter of providing subsidy was clearly prerogative of the State Government under the provisions of Section 65 read with Section 108 of the 2003 Act and Section 12 of the Reforms Act, 1999 hence the Commission could not have accepted on its own, or directed the State Government to release the subsidy to HV-2 consumers and that too unilaterally.”*

**10.2** The learned counsel further submitted that the findings of the State Commission in the Impugned Order are ultra vires the provisions of the Electricity Act, 2003 and accordingly the order suffers from an obvious legal infirmity. He further contended that the Commission being a statutory authority, has to act within the four corners of law and to substantiate his contentions, he cited the

judgment of the Apex court in the case of ***Bhavnagar University v. Palitana Sugar Mill (P) Ltd.*** reported as ***(2003)2 SCC 111***

which held as under:

**“40. The statutory interdict of use and enjoyment of the property must be strictly construed. It is well settled that when a statutory authority is required to do a thing in a particular manner, the same must be done in that manner or not at all. The State and other authorities while acting under the said Act are only creature of statute. They must act within the four corners thereof.”**

The learned counsel contended that, the State Commission has jumped over the State Govt. and unduly decided that the Discoms should recover the additional/notional subsidy from the State Govt. which in fact was never the intent of the Government or assured by it. The learned counsel vehemently submitted that under the Act, the State Commission had to safeguard consumers interest and at the same time is has to ensure recovery of the cost of electricity in a reasonable manner. He pointed out that the State Govt. has provided a subsidy of fixed amount as may be evident from letters of the State Govt. admitting such subsidy and placed on record before the State Commission. The learned counsel highlighted that as a result of erroneous direction issued by the State Commission, the Appellants are suffering a loss of over Rs.3783 crores whereas the net revenue gap of the Appellants have been artificially reduced by the Commission for FY 2008-09

to FY 2011-12 & FY 2014-15. The learned counsel was quick to submit that the Appellants are not in a position to demand and recover such amounts towards subsidy from the State Government as no such commitment was given by the State Government in this regard. To advance his argument further, the learned counsel placed the reliance of the judgment of this Tribunal dated 23.11.2015 in Appeal No. 128 of 2014 which has held as :-

***“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. 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. 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.**

**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 data 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."**

**10.3 Per contra**, learned counsel for the Respondent Commission submitted that, the State Commission after due prudence check approves the amount of subsidy in the Tariff Order and any deviation from the same at the time of True-up has to be to the satisfaction of the Commission, based on relevant materials. He contended that the Appellants have not brought on record any material to show either before the State Commission or this Tribunal as to what steps did the Appellants take to pursue for the amount of subsidy amount which the State Govt. assured to give to the respective DISCOMS on the basis of which the ARR Petitions were filed and the tariff was fixed by the Commission for that particular FY. He further submitted that 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 consumer by another class of consumers. This, in turn, will be violation of the principles laid

down by this Tribunal from time to time. To support his contentions, the learned counsel for the Respondent Commission placed reliance on the judgment of this Tribunal in the case of of ***Mula Pravara Electric Co-operative Society Limited versus MERC dated 28.01.2008 in Appeal No. 24 of 2007.*** The learned counsel also submitted that the aforesaid judgment of this Tribunal was passed relying upon the Full Bench Judgment dated 26.05.2006 in the case of ***M/s Siel Limited versus The Punjab State Electricity Regulatory Commission in Appeal No. 4 of 2005 & Batch.*** Admittedly, this Tribunal again relying on the aforesaid two judgments has upheld the aforesaid contention of the Commission on the issue of Additional Subsidy Requirement from GoUP in Appeal No.128 of 2014 (UPPCL versus UPERC). The learned counsel further submitted that in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd. versus Adarsh Textiles*** is not applicable in the present case in as much as that in the cited case the State Govt. had only subsidised two categories of consumers and had not subsidised another category of consumers and as such it was held that the Commission could not have directed the State Government to release the subsidy to HV-2 category of consumers, whereas in the present case the Commission has only held that the Distribution Licensees need to

realise Additional Subsidy Requirement from the State Govt., as assured. He further contended that the other case cited by the Appellant **of Bhavnagar University versus Palitana Sugar Mills (P) Limited** would not be applicable in the present case in hand.

**Our Findings:-**

**10.4** We have considered the rival submissions of the learned counsel appearing for the Appellants and the learned counsel appearing for the Respondent Commission and also took note of the various judgments of the Apex court as well as this Tribunal cited by both the parties. What thus emerges is that the State Commission during true up found that the subsidy declared in the ARR has not been realised in its entirety and accordingly directed the Appellants that the additional subsidy be obtained from the State Govt.. While the learned counsel for the Appellants has contended that it is beyond jurisdiction of the State Commission to direct the DISCOMS to approach the State Govt. for realisation of the additional subsidy, on the other hand, the learned counsel for the Respondent Commission submitted that there was nothing wrong on the part of the Commission for directing the DISCOMS to recover the balance amount of the subsidy committed by the State Government which was projected in the respective ARR of the



distribution companies. It is relevant to note that the decisions of the Hon'ble Supreme Court in its judgment dated 03.12.2014 passed in the case of ***Paschimanchal Vidyut Vitran Nigam Ltd. versus Adarsh Textiles*** relied by the Appellants counsel is distinguishable from the instant case due to the fact that in the earlier case the amount of subsidy was calculated & decided by the State Commission itself for a class of consumers which was not proposed to be subsidised by the Government and hence, the directions of the State Commission to recover any such subsidy was found to be unjustified and beyond the legal jurisdiction of the State Commission, whereas in the present case, based on the assurance of the State Govt., the requisite subsidy amount was projected in the ARR of the respective DISCOM and only after prudence check, the State Commission found the entire subsidy not being actually disbursed and accordingly, directed the Appellant DISCOMS to approach the State Government for its realisation. This Tribunal has held in a number of judgments, as cited by the Respondent Commission, that the State Commission is legally justified in directing the Appellants to recover the subsidy / additional subsidy from the Government as committed instead of giving the same as a pass through in the tariff and the consumers cannot be allowed to suffer for the lapses of the Appellants. In

view of these findings and our analysis, we hold that the State Commission has answered this issue against the Appellants/DISCOMS rightly and in a judicious manner. Therefore, we do not find any error, muchless material irregularity in the impugned order passed by the State Commission, interference of this Tribunal does not call for.

**11. Issue No.2 :-**

The learned counsel for the Appellants submitted that the State Commission by way of the Impugned Order has created a Regulatory Asset of Rs. 3940.53 Crore as on 01.10.2014 and has computed a Regulatory Surcharge @ 2.38% which leads to recovery of Rs. 79.93 Crore only for FY 2014-15. The learned counsel further contended that the State Commission has wrongly held that if the Appellants had filed its true-up petition on time, the Revenue Gap could have been recovered within a period of three years. To substantiate his contentions, the learned counsel cited the Judgment of this Tribunal dated 11.11.2011 in **OP No. 1 of 2011** reported as **2011 ELR (APTEL) 1742(Para 65 (iv))** wherein it has been held that the Regulatory Asset should not be created as a matter of course except when it is conclusively justified, in accordance with the Tariff Policy. This Tribunal has also held that

the recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. The learned counsel for the Appellants vehemently submitted that the State Commission has determined the Regulatory Surcharge of 2.38%, which in fact is in contravention of its own Regulations. He further placed reliance on the judgment of the apex court in the case of ***PTC India v CERC*** reported as **2010 4 SCC 603** wherein it has been held that when Regulations are framed by a competent authority in pursuance of the powers conferred under the parent legislation, then the decisions of the competent authority must be in conformity with those Regulations.

**11.2** The learned counsel for the Appellants further submitted that even such a low Regulatory Surcharge of 2.38% has been linked with the future performance of the Appellants in form of achievement relating to target consumer addition and the target distribution loss of FY 2014-15. The learned counsel was quick to point out that linking the regulatory surcharge to future performance is illegal and arbitrary. The Appellants had filed Review Petition against the State Commission's Order dated 06.06.2014 challenging the linking of regulatory surcharge with the performance of the

Distribution Licensees is pending adjudication by the State Commission and the Commission has merely opined in the Impugned Order that it is not satisfied with the reasons given in the Review Petition. The learned counsel further contended that having passed the impugned order, the State Commission has tried to build new / extraneous justifications in its reply which travels beyond the Impugned Order as far as projection of loss targets are concerned. To contend that, the same cannot be sustained in law, the learned counsel placed reliance upon the judgment of the Hon'ble Supreme Court in ***Mohinder Singh Gill v. Chief Election Commissioner*** reported as **(1978) 1 SCC 405** .

**11.3 Per contra**, learned counsel for the State Commission submitted that, the Commission has elaborately dealt with the Regulatory Surcharge issue in detail in paragraph 12.3 and 12.4 in its order dated 1.10.2014 wherein the State Commission also took into consideration the findings of this Tribunal rendered in the judgment of OP No. 1 dated 11.11.2011 and Appeal No. 10 of 2013 dated 25.10.2013. The learned counsel further contended that in the judgment dated 25.10.2013, this Tribunal set aside the order of Kerala State Electricity Commission vide which the tariff of a particular class of consumers (HT IV category) was increased

exorbitantly which resulted into the tariff shock. The learned counsel submitted that the findings of the other judgments relied upon by the Appellants has no relevance as far as the instant Appeal is concerned.

11.4 Regarding the linking of the Regulatory surcharge with the performance of the DISCOMS, the learned Counsel for the Respondent Commission submitted that the order against which Review Petition had been filed was dated 06.06.2014 whereas the order which is under challenge in the present Appeal has been passed by the Commission on 01.10.2014. He vehemently submitted that the reasons given by the Commission in order dated 06.06.2014 linking Regulatory Surcharge with the performance of the DISCOMS would have to be looked into and it would be appropriate to appreciate the appropriate reasons given by the Commission in the order dated 06.06.2014 for proper adjudication of the issue of linking of Regulatory Surcharge with the performance of DISCOMS. Accordingly, the case of T. P. Sen Kumar versus UOI and Delhi Transco Limited versus DERC cited by the Appellants on this point is also of no avail.

**Our Findings:-**

11.5 We have analysed the submissions made by the learned counsel for the Appellants and the Respondent Commission and also took note of various judgments cited by both the parties. As held in the catena of judgments, the regulatory asset should not be created as a matter of course except otherwise conclusively justified. Besides, the recovery of the same should be made in a time bound manner within a period not exceeding three years at the most and preferably within same control period. It is relevant to note that as the regulatory surcharge is passed through the tariff, the same should be determined in such a fashion that it doesn't not result into the tariff shock to the consumers as held by this Tribunal in its judgment dated 25.10.2013 in Appeal No.10 of 2013. In the light of these facts, we are of the considered opinion that the State Commission has analysed the matter relating to the provision of regulatory surcharge and its linking to the performance of the respective distribution company in right perspective and passed the order impugned giving valid and cogent reasoning. Accordingly, we hold that there is no legal infirmity or ambiguity in the findings of the State Commission as far as this issue is

concerned and interference of this Tribunal in the same does not call for.

**12. Issue No.3 :-**

The learned counsel for the Appellants submitted that, the State Commission has arbitrarily allowed the carrying cost of the Regulatory Asset @ 2.91 % without indicating any basis for calculating such a low rate for carrying cost. He further contended that the State Commission could have allowed at least the actual interest incurred by the Appellants which are in range of 12.25% to 15.75%. He further pointed out that the Commission itself has allowed 12.5% interest on working capital. To support his contentions, the learned counsel placed reliance on the judgments of this Tribunal dated 28.08.2009 passed in Appeal No. 117 of 2008 in the case of **Reliance Infrastructure Ltd v. MERC** and in the case of **NDPL v DERC**: 2010 ELR (APTEL) **891**.

The learned counsel vehemently submitted that the State Commission has failed to consider the well settled law laid down by this Tribunal, as referred above. Therefore, he submitted that the impugned order passed by the State Commission is liable to be vitiated.

**12.1 *Per contra*,** learned counsel for the Commission submitted that while the State Commission has allowed only 2.91% of regulatory assets as carrying cost for FY 2014-15 which was due to inadvertent computational error and has since been rectified subsequently in its next Tariff Order dated 18.06.2015 considering the annual rate for carrying cost at 10%. As such, the Appellants should not have any grievance on this issue.

The learned counsel for the Respondent, inter alia contended and submitted that, the Appellant has failed to make out any case towards annual rate of carrying cost, therefore, interference of this Tribunal is not justiciable or called for.

**Our Findings:-**

**12.2** Having regard to the submissions of both the parties, we opine that in view of the rectification carried out subsequently by the Commission in its next tariff order dated 18.06.2015 wherein the annual rate of carrying cost has been fixed as 10%, this issue stands settled and no further consideration is needed. Hence, we hold that we do not find any error or legality in the impugned order, interference of this Tribunal is not justiciable having regard to the facts of the case in hand.



**13. Issue No.4 :-**

The learned counsel for the Appellants submitted that the State Commission in order to arrive at the availability of power has adopted a bottom up approach wherein it has considered the energy sales and then added normative transmission and distribution losses to arrive at the availability of power. Accordingly, while calculating the ARR for ensuing year, the total cost projected by the Appellants taking into consideration the total power procured, the transmission distribution losses are subtracted to arrive at availability of normative power for sale to consumers. The learned counsel contended that a top-down approach is generally adopted in a tariff proceedings which is in accordance with the principles set out in the Regulations of the State Commission. As such, the approach adapted by the Commission is erroneous and discriminating. Hence, the State Commission has committed grave error, not considering the case made out by the Appellant instead of providing relevant material for consideration. Therefore, he submitted that the impugned order passed by the State Commission is liable to set aside.

**13.2 *Per contra*,** learned counsel for the Commission submitted that the Appellant has selectively relied upon only a part of the

regulation i.e. clause 3.1.5 of the Distribution Tariff Regulations, 2006 unduly to make out case in their favour. He pointed out that the complete Regulations 3.1 and 3.4 of the Distribution Tariff Regulations, 2006 clearly make out that the Commission has to adopt a “bottom up” approach. He further submitted that the State Commission has acted strictly as per its Regulations and there is not any wrongful consideration as far as in approving the Power Purchase Cost is concerned. Learned counsel for the Respondent submitted that the State Commission has rightly justified assigning valid and cogent reasons as per the relevant regulations of the Distribution Tariff Regulations, 2016, the Commission has to adopt a bottom up approach and the reasoning given is well-founded and well reasoned, interference of this Tribunal does not call for.

**Our Findings:-**

**13.3** While taking note of the Tariff Regulations and submissions of the learned counsel for the Appellants and the Respondent Commission, we are of the opinion that the State Commission has decided the availability of normative power for sale to consumers strictly in accordance with its tariff regulations. There is nothing inappropriate in adopting a bottom up approach as considered by the State Commission through which it has computed the energy sales and then added normative T&D losses to arrive at the

availability of power. As such, there does not appear any unjustness or perversity in the order of the State Commission as far as this issue is concerned. Hence, we hold that interference of this Tribunal does not call for.

**ORDER**

For the foregoing reasons, we are of the considered opinion that the issues raised in the present appeals being Appeal Nos. 11 of 2015, 12 of 2015 , 13 of 2015 and 14 of 2015 are devoid of merits. Hence, these Appeals filed by the Appellants are dismissed.

The Impugned Order dated 01.10.2014 passed by the Uttar Pradesh Electricity Regulatory Commission (UPERC), is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **05<sup>th</sup> day of December, 2018.**

**(S.D. Dubey)**  
**Technical Member**

**(Justice N.K. Patil)**  
**Judicial Member**

**REPORTABLE / ~~NON-REPORTABLE~~**

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