IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 413 OF 2023
AND
IA NO. 1542 OF 2022 & IA NO. 844 OF 2024

Date: **25th September, 2024**

Present: **Hon'ble Sandesh Kumar Sharma, Technical Member**
Hon'ble Mr. Virender Bhat, Judicial Member

IN THE MATTER OF:

M/s TGV SRAAC LIMITED
(Formerly known as Sree Rayalaseema Alkalies
And Allied Chemicals Limited)
40-304, II Floor, K.J. Complex, Bhagyanagar,
Kurnool rep.by its Authorized Signatory,
Sri Anupam Srivastav S/o Dr. Ravi Shankar,
Aged about 51 years,
R/o 9-C, Pocket-V, MIG, Mayur Vihar Phase-III,
Delhi-110096

…Appellant

VERSUS

1. Andhra Pradesh Electricity Regulatory Commission
Rep. by its Secretary,
Having its Office at 11-4-660, 4th Floor,
Singareni Bhavan, Red Hills,
Lakdikapul, Hyderabad-500004

2. Southern Power Distribution Company of A.P., Ltd.,
Rep. by its Chairman & Managing Director,
Having its Office at 19-13-65/A,
Vidyut Nilayam, Srinivasapuram,
Tirupati., A.P.-517503

….Respondents

Counsel for the Appellant(s) : Mr. Hitendra Nath Rath
Mr. Alladi Ravinder
Mr. S. Vallinayagam

Ms. Venonka Shikha Johnson

Counsel for the Respondent(s) : Mr. Gaichangpou Gangmei
Mr. Arjun D Singh
Mr. Ankita Sharma
Mr. Yashvir Kumar
Mr. Vishnu Thulasi Menon
Mr. Rajat Srivastava
Mr. Lothungbeni T. Lotha
Mr. Maitreya Mahaley
Mr. Yimyanger Longkumer
Mr. Sridhar Potaraju
Mr. Mukund Rao Angara
Ms. Ankita Sharma
Ms. Shiwani Tushir
Mr. Yashvir Kumar
Mr. Aayush
Mr. Rajat Srivastava
Ms. Simran Gupta for R-1

Mr. Sidhant Kumar
Ms. Manyaa Chandok
Mr. Shivankar Rao
Mr. Gurpreet Singh Bagga for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. The Appeal has been filed by M/s. TGV SRAAC Ltd. (in short "Appellant") challenging the legality and validity of the Common Tariff Order dated 30.03.2022 (in short "Impugned Order") passed by Andhra Pradesh Electricity Regulatory Commission (in short "APERC" or "Respondent Commission" or "Commission") in OP. No. 34 of 2020 filed by the Distribution Licensees of the State of Andhra Pradesh, as it imposes True-up charges on Distribution Business for the 3rd Control Period FY 2014-15 to FY 2018-19, amongst others, on all categories of consumers.

2. The Commission passed the order based on the petition filed by the 2nd Respondent dated 11.06.2020 for the determination of the True-up charges for the Distribution Business for the 3rd control period under clause 19 of Regulation 4 of 2005.

Description of the Parties

3. The Appellant is a Caustic Soda Manufacturing Industry (Chloro-Alkali Industry) situated near Kurnool, Andhra Pradesh, and about 2800 units of electricity are required for manufacturing 1 MT of Caustic Soda as such the major component of cost is Electricity charges constituting 70% of the total cost of production.

4. Respondent No. 1 is the Electricity Regulatory Commission for the State of Andhra Pradesh, *inter-alia*, exercising powers and discharging functions under the Electricity Act, 2003.

5. Respondent No. 2 is the Southern Power Distribution Company of Andhra Pradesh Ltd., (in short APSPDCL) is one of the distribution licensees in the State of Andhra Pradesh.

Factual Matrix of the Case

6. The APERC passed the Tariff order for Wheeling Charges for the Distribution Business for the 3rd Control Period for FY 2014-15 to FY 2018-19 on 09.05.2014 (in short "Tariff Order"), where it has categorically stated that the Wheeling charges/ Tariff Schedule applies only to 33KV & 11 KV consumers but not to Appellant who is a consumer of 132KV.

7. Subsequently, the AP DISCOMs viz., APSPDCL and APEPDCL filed O.P. Nos. 34 & 41 of 2020 dated 11.06.2021 respectively seeking True-up of Distribution Business for 3rd Control Period FY2014-15 to FY 2018-19.

8. The Commission passed the True-up Order (in short "True-up Order") for the True-up Charges on 27.08.2021.

9. Further, APERC Sou Motu reviewed its order dated 27.08.2021 in OP Nos. 34 & 41 of 2020, and passed the Impugned Order dated 30.03.2022 *inter-alia* levying the True-up Charges on all categories of industries and directed the same shall be recovered from the affected consumers in 36 monthly instalments commencing from 01.08.2022.

10. As per the Impugned Tariff Order dated 30.03.2022, the Discoms-Respondent No.2-APSPDCL levied True-up charges in the HT Electricity bills dated 05.08.2022 and 05.09.2022 on the Appellant.

11. Aggrieved by the above, the Appellant has preferred the present appeal.

Submissions of the Appellant

12. The Appellant argued that Respondent No. 1, Commission failed to consider that the application for levying True-Up charges by the AP Discoms was barred by limitation and contrary to the norms fixed by the Commission itself under the Wheeling Tariff Order for the Multi-Year Tariff (MYT) period 2014-2019, as outlined in its order dated 09.05.2014, further, the Commission erred in not appreciating that the levy of True-up charges after a lapse of seven

years would cause significant prejudice and irreparable losses to the Appellant Company.

13. The Appellant, an EHT (132 kV) consumer, is not connected to the Distribution Network maintained by the Discoms, which operates up to 33 kV as the network above 132 kV is maintained by APTRANSCO, and a separate transmission tariff is determined by the APERC.

14. The inclusion of distribution charges as a cost item in the Tariff ARR filed by the Discoms further underscores the need for the Commission to exclude the Appellant from the obligation to pay True-up charges to the 2nd Respondent.

15. The Appellant also contended that the decision rendered by this Tribunal in OP No. 1 of 2011, the Annual Performance Review, True-Up of past expenses, and the determination of Annual Revenue Requirement and Tariff determination are required to be conducted on an annual basis, in strict adherence to the prescribed timelines, thereby dispensing with the Multi-Year Tariff (MYT) Framework applicable to the Retail Supply Business.

16. Further, this Tribunal has enunciated principles governing the regular review of the annual performance of DISCOMs, contrary to these established principles, the Discoms, on 11.06.2020, submitted True-up petitions for the Distribution Business after the conclusion of the MYT period, which is impermissible under the APERC (Terms and Conditions for Determination of Tariff for Wheeling and Retail Sale of Electricity) Regulations, 2005 (in short "Regulations 2005").

17. The Appellant further placed on record Clause 19 of the Regulations, 2005, which is extracted hereunder:

> *"19. Corrections for "Uncontrollable" Items and "Controllable" Items and sharing of Gains/Losses of "Controllable" Items. The Distribution Licensee shall file its proposals for pass-through as well as sharing of gains/losses on variations in "uncontrollable" Items of ARR and "controllable" items (indexed to external parameters) in accordance with clause 10 of this Regulation."*

18. Furthermore, by Invoking this above clause, the 2nd Respondent-DISCOM filed a petition before the APERC seeking to recover True-up charges from consumers for alleged losses incurred during the 3rd Control Period (FY 2014-19), Clause 10 further elaborates on the Multi-Year Tariff (MYT) Framework, including the classification of ARR items as "controllable" or "uncontrollable."

> *"10. Multi-Year Tariff Framework and Approach. –*
> *10.1……*
>
> *10.2 Base Year.- Values for the Base Year of the Control Period will be determined based on the audited accounts available, best estimate for the relevant years and other factors considered appropriate by the Commission, and after applying the tests for determining the controllable or uncontrollable nature of various items.* ***The Commission will normally not revisit the performance targets even if the targets are fixed on the basis of base values of un-audited accounts.***
>
> *10.3……*

10.4 Controllable and Uncontrollable items of ARR:- The expenditure of the Distribution Licenses considered as 'controllable' and 'uncontrollable" shall be as follows:

Distribution Business

ARR Item	*Controllable/ Uncontrollable*
Operation & Maintenance Expenses	*Controllable*
Return on Capital Employed	*Controllable*
Depreciation	*Controllable*
Taxes on Income	*Uncontrollable*
Non-tariff income	*Controllable*

In addition to the above items the retail supply business shall include the following:

Retail Supply Business:

ARR Item	*Controllable/ Uncontrollable*
Cost of Power purchase	*Uncontrollable*

10.5 Pass-through of gains and losses on variations in "uncontrollable" items of ARR:- The Distribution Licensee shall be eligible to claim variations in "uncontrollable" items in the ARR for the year succeeding the relevant year of the Control Period depending on the availability of data as per actuals with respect to effect of uncontrollable items:

Provided that the Commission shall permit the recovery of financing costs incurred due to the time gap between when the True-Up becomes

due and when it is actually approved, and such corrections shall generally not be subject to further review.

10.6 Sharing of gains and losses on variations in "controllable" items of ARR:- The Distribution Licensee in its annual filings during the Control period shall present gains and losses for each controllable item of the Aggregate Revenue Requirement. A Statement of gain and loss against each controllable item will be presented after adjusting for any variations on account of uncontrollable factors.

19. It is also submitted by the Appellant that in the Impugned Order approving the True-up for the Distribution Business for the 3rd Control Period, the Commission allowed the collection of ₹1,488.03 crores for future pension liabilities of APSEB-origin employees, based on letters from the Comptroller and Auditor General (CAG) and judgments of the Supreme Court and APTEL.

20. It is argued that these future pension liabilities should be considered in the future determination of Distribution Business Tariffs, rather than in the present True-Up.

21. The Appellant, further, asserted that in accordance with the prevailing regulations, the determination of True-up for the Distribution Business for the 3rd Control Period should be based on profit and loss as per the Wheeling Tariff Order dated 09.05.2014, however, the actual expenditure claimed and its subsequent approval was not aligned with the norms established by the Wheeling Tariff Order and applicable law, the relevant extracts are quoted as under:

"F. The Commission has computed the "Employees expenses and A&G expenses" based on the above approved norms using the actual number of substations, the length of lines, the number of DTRs, and the number of consumers furnished by the DISCOMs in their petitions, (for Kurnool and Anantapur circles in APSPDCL, norms of APCPDCL have been applied which was obtained through email) to examine and compare the actual expenses with the set norms. The comparisons, DISCOM wise are shown in the tables below.

Table 30: APSPDCL - Employees and A&G Expenses (Rs. Cr.)

S. No.	FY	Expenditure as per the Wheeling Tariff order	Actual Expenditure incurred	Computed expenditure as per the norms
1.	FY2014-15	1200.34	2030.18	1443.00
2.	FY2015-16	1396.65	1741.17	1634.00
3.	FY2016-17	1577.35	1626.15	1878.00
4.	FY2017-18	1788.52	2037.94	2143.00
5.	FY2018-19	2031.74	3617.85	2418.00

	Total	7994.60	11053.29	9516.00

As Could be seen from the above tables, the actual employees and A&G expenses have exceeded the norms by 1537.29 crores in respect of APSPDCL and by Rs.1119.59 crores in respect of APEPDCL."

22. The Appellant submitted that while examining the issue of A&G Expenses the Commission arrived at the following finding:

"J. If the pension, leave encashment liabilities, and disallowed expenditure are excluded, the excess in the actual Employees and A&G expenses over the norms is Rs.169.52 Cr. in respect of APEPDCL and there is no excess over the norms for APSPDCL.

Sl. No	*Item*	*APSPDCL*	*APEPDCL*
1.	*Employees and A&G expenses in excess of the norms (Rs. Cr.)*	*1537.29*	*1119.59*
2.	*Pensions liability provision (Cr.)*	*1488.03*	*403.61*
3.	*Leave Encashment provision*	*0.00*	*546.46*
3.	*Disallowed A&G expenses (Cr.)*	*98.09*	*0.00*

4.	*Net Excess over the norms (Cr.) [(1)-(2)-(3)-(4)]*	*-48.83*	*169.52*

K. From the above, it is clear that substantial variation in "Employees and A& G expenses is mainly on account of DISCOMs making a provision for future pension liabilities of the erstwhile APSEB employees based on actual reports. One of the objectors has stated that future liabilities shall be disallowed."

23. The Appellant further submitted that under the head of Return on Capital Employed (RoCE), the Commission permitted the collection of Rs. 2,239.73 Crores as against the amount of Rs. 1,602.62 Crores approved in the Tariff Order, however, the Commission found that T&D losses are less than the approved, further, the Commission passed the excess ROCE to the Consumers on erroneous findings, the relevant extracts as under:

Table 47: APSPDCL - RoCE Computed by the Commission (Rs. Cr.)

S. No.	*FY*	*As per Wheeling Tariff Order (A)*	*Actual Claim (B)*	*ROCE as per this Order (C)*	*Disallowed (D) = (B)-(C)*
1	*FY2014-15*	*303.12*	*360.15*	*359.97*	*0.18*
2	*FY2015-16*	*328.25*	*439.09*	*438.33*	*0.76*
3	*FY2016-17*	*325.09*	*473.88*	*473.28*	*0.60*
4	*FY2017-18*	*319.84*	*451.24*	*450.18*	*1.06*
5	*FY2018-19*	*326.32*	*519.87*	*517.97*	*1.90*
	Total	***1602.62***	***2,244.23***	***2239.73***	***4.50***

24. The Commission determined that transmission and distribution (T&D) losses were below the approved threshold, moreover, the Commission erroneously allocated excess Return on Capital Employed (ROCE) to consumers.

25. The Appellant further asserted that Clause 10.2 mandates that the Commission shall generally not revisit the performance targets, even if those targets are established based on the base values of unaudited account, section 64(6) of the Electricity Act, as extracted below:

> *(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order.*

26. Furthermore, reliance was placed on the Supreme Court's judgment rendered in the case of "***BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission (2022 SCC Online SC 1450)***," where after interpreting Section 64(6) of the Electricity Act during the True-up exercise, held as follows:

> *"a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. Apart from this, we are also of the view that at the stage of "truing up", the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.*

27. Further, the Supreme Court in para 56 of the above judgment held as under:

"Revision or redetermination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff order, which can be done only as per the provisions of Subsection 6 of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable. In our view, DERC cannot amend the Tariff order for the period 01.04.2008 to 31.03.2010 in the guise of 'trueup' after the relevant financial year is over and the same is replaced by a subsequent tariff Order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise.

28. Further, submitted that Respondent No.1, Commission, in this case, altered the methodology for computing employee expenses and incorrectly allowed the 2nd Respondent, DISCOM to recover amounts for future pension liability and Return on Capital Employed (RoCE), this is in direct contravention of the norms set by the Commission in the Wheeling Tariff Order dated 09.05.2014, however, the item-wise loss or gain, as well as the total aggregate loss for the Distribution business during the 3rd control period, as computed by the Commission, in comparison with the figures submitted by the DISCOMs, are detailed in the tables below:

Table 61: APSPDCL: The aggregate loss for the 3rd control period (Rs. Cr.)

Item of ARR	**Approved in MYT**	**Modified claim permitted**	**Approved in this order**	**Deviation**
	A	B	C	D=C-A

O & M Expenses (Net of O&M Expenses Capitalized)	**8,720.05**	11,877	11,379	2,659
Return on Capital Employed	**1,602.63**	2,244	2,239	637
Depreciation during the year	**3,708.40**	3,634	3,634	(75)
Taxes on Income	**148.08**	0	0	(148)
Special Appn. For Safety measures	**29.22**	30	30	1
Other Expenditure	**1.78**	2	2	0
Gross ARR	14.210.14	17,787	17,285	3,074
Revenue of Distribution cost factored in Retail ARR	**11,560.41**	11,560	11,560	0
Non-Tariff Income	**2,071.61**	1,778	1,778	(293)
True-up for 1st Control Period	**578.12**	578	578	0
The aggregate loss for 3rc CP	0.00	3,870	3,368	3.368

29. The table above clearly demonstrates that, according to the norms established in the MYT Tariff Order, there is no loss to the 2nd Respondent, however, the Commission, by deviating from these norms, calculated a loss of Rs. 3,368 crores, and subsequently permitted the DISCOM to recover Rs. 2,135.60 crores from all classes of consumers, after accounting for the

Government's apportioned share, this action is impermissible under law and contrary to the dicta laid down by the Supreme Court in the aforementioned case.

30. The Appellant further relied on the Supreme Court judgment in ***West Bengal Electricity Regulatory Commission v. C.E.S.C. Limited (2002 (8) SCC 715*** wherein the licensee was allowed to recover only the actual amount spent on employees, consequently, provisions for future pension liabilities, being prospective expenses, cannot lawfully be recovered from consumers.

31. However, the Respondent No. 1, Commission, in the impugned Tariff Order dated 30.03.2022, concluded that:

> *"465. Before proposing the recovery methodology, the Distribution cost determined in respect of APSPDCL has to be apportioned between APCPDCL as it became operational only from 01.04.2020 separating from APSPDCL. Hence the total true-up amount determined has been apportioned in the power sharing ratio as approved by the GoAP. Accordingly, the True-up amounts work out to Rs.2135.60 Cr for APSPDCL and Rs.1232.56 Cr for APCPDCL, out of the total true-up amount of Rs.3368 Cr.*
>
> *466. Hence, the total true-up amounts to be recovered from the consumers are Rs.2135.60 Cr, Rs.1232.56 Cr and 609 Cr. for APSPDCL, APCPDCL, and APEPDCL respectively."*

32. Further, the Appellant submitted that the DISCOM's claim for levying True-up charges by the APERC after the completion of the MYT period (2014-2019) is in violation of Section 61(b) and (d) of the Electricity Act, 2003, as held

by the Supreme Court in *BSES Rajdhani Power Ltd. v. DERC, (2023(4) SCC 788), h*owever, the State Commission erred in not recognizing that consumers of EHT (132 KV and above) should be exempt from Distribution True-up charges, as they are not connected to the Distribution network and are not liable to pay any tariff under the Wheeling Tariff for Distribution Business Order dated 09.05.2014.

33. The Appellant, drawing electricity from a 132 KV line maintained by APTRANSCO, is being incorrectly charged True-up costs based on Transmission Tariffs set by APERC for FY 2014-2019, these charges, reflected in the Retail Supply Tariff, are unjust and unauthorized, contrary to the Supreme Court held in *National Mineral Development Corp. Ltd. v. State of M.P, (2004(6) SCC 281) and Indian Mica Micanite Industries v. State of Bihar, (1971(2) SCC 236),* additionally, the State Commission erred in failing to recognize that Clause 10.6 of Regulation 4 of 2005 mandates the sharing of gains and losses between the Licensee and consumers, however, currently, only the losses are being recovered from all consumers, without appropriately sharing the gains or losses as required by the regulation.

Submissions of the Respondent No. 2, SPDCAPL

34. Respondent No. 2 argued that it is a settled law that prudently incurred employee expenses are required to be reimbursed to a licensee.

35. In West Bengal Electricity Regulatory Commission v. CESC (2002) 8 SCC 725, the Supreme Court held that a licensee is entitled to reimbursement of the actual employee costs properly incurred, the Court reversed the regulatory commission's reduction of the licensee's increased expenditure on overtime, pension contributions, and leave encashment.

36. It was determined that the settlement agreement between the licensee and its employees was lawful, thereby legitimizing the incurred costs, consequently, the Supreme Court permitted the higher actual costs to be passed through to the licensee. The relevant extract is reproduced below:

> *"87. ASCI in its report in regard to the above item held that the number of employees in New Cossipore and Mulajore is very high by any standard. It observed that the running of these institutions has become uneconomical and, hence the Company has been advised to take action to reduce the number of employees by proper deployment or Voluntary Retirement Schemes (VRS), particularly, in the context of the proposal for closing down the Mulajore plant. It also observed that the overtime payment made to the employees was a worrying feature. It also noticed that because of the settlement with the a workmen, the Company was paying the workmen overtime irrespective of the need for the same and such payment had no justification especially when the same has to be passed on to the consumers. Therefore, it recommended a drastic cut or alternatively phasing out of this system of overtime payment. The Commission in its report agreed with the views expressed by the consultant. It however did not agree with the consultant as to the closure of Mulajore and New Cossipore plants, unless it was established that the cost of generation of electricity in those plants was higher than the cost of purchase of electricity by the Company from other sources. For the said reason it deferred the finding in regard to closure of the abovementioned two plants. It however agreed with the consultants that the overtime payment that was being made by the Company was extremely high and hence for the*

year 2000-01 it imposed an ad hoc cut from the actual expenditure under this head, to the extent of Rs 447 lakhs towards overtime, Rs 600 lakhs towards pension contribution and Rs 208 towards provision for leave encashment. ***The High Court reversed this finding on the ground that the payment of wages including overtime and other welfare benefits was made by the Company under lawful agreements entered with the workmen. Therefore, during the pendency of these agreements, it was legally not possible for the Company to stop these payments. Therefore, the amounts spent towards this purpose, namely, towards the employees' cost should not be treated as amounts not properly incurred. The High Court on this basis allowed the entire expenditure incurred by the Company under this head.***

88. We are in agreement with this finding of the High Court. Since it is not disputed that the payments made to the employees are governed by the terms of the settlement from which it will not be possible for the Company to wriggle out during the currency of the settlement, therefore, for the year 2000-01 the actual amounts spent by the Company as employees' costs will have to be allowed*. However, we agree with the findings of the consultants as also the Commission that the amounts spent towards wages are highly disproportionate to the energy generated as also the amounts paid as overtime to the workmen is wholly unrealistic. We also notice that the two plants of the respondent Company namely those at Mulajore and New Cossipore are stated to be economically not viable. Therefore, the Company should take steps either to make the said plants economically viable or to close down if necessary. In this regard,*

> *we note that the Commission has for the relevant granted the request of the Company for introducing VRS by allocating required sums of money on this account, which under the circumstances seems to be a good one-time investment for reducing the cost under the head "Employees' cost". While considering the tariff revision for the year 2002-03 we direct the Commission to bear this fact in mind. However, we further direct the Company that should there be any need for entering into a fresh settlement with the workmen, then any agreement which entitles the workmen to get overtime payment even when overtime work is unnecessary should be done away with. With the above observations as a future guidance, we accept the finding of the High Court on this count."*
>
> *(Emphasis Supplied)*

37. Further, the Discom submitted that this Tribunal in *BSES Yamuna Power Limited v. Central Electricity Regulatory Commission, 2015 SCC OnLine APTEL 164 ("BSES Yamuna")* has followed this position, the relevant extract is reproduced below:

> *"18.5. Contrary to the aforementioned main contentions of the appellants, the emphasis of the respondents is on the point that the respondent Corporations like NTPC, NHPC etc. were entitled to claim the employees cost incurred as a part of the O & M expenses under a capital cost based tariff (in determination of the tariff under sections 61 and 62 of the Electricity Act, 2003). The increase in the employees cost being an event subsequent to the normalization of the O & M expenses for the year 2004-09 based on the actual O & M expenses of the said period. According to the respondent Corporations, the learned Central Commission has*

rightly and legally exercised its power under Regulations 12 & 13 of the 2004 Tariff Regulations because precisely for a situation when there is a subsequent development during the control period which makes the norms specified in the 2004 Tariff Regulations inadequate for reasons not attributable to the generating company.

18.6. We have gone through the proposition of law settled by the Hon'ble Supreme Court of India in West Bengal Electricity Regulatory Commission Vs. CESC Limited (2002) 8 SCC 715 in which the Hon'ble Apex Court had observed that the employees cost prudently incurred needs to be reimbursed to the Utility. ***The Hon'ble Supreme Court expressing agreement with the finding of the High Court held that since it is not disputed that the payments made to the employees are governed by the terms of the settlement form which it will not be possible for the Company to wriggle out during the existence of the settlement, therefore, the actual amounts spent by the Company as employees' costs will have to be allowed****. In these matters in hand, after careful and deep scrutiny of the rival submissions made by the parties, we do not find any force in the submissions/contentions made on behalf of the appellants. Rather, the submissions of the respondent power generators/corporations have legal force to which we agree."*

(Emphasis Supplied)

38. Further, submitted that this Tribunal in Tata Power Delhi Distribution Ltd. v. Delhi Electricity Regulatory Commission (2015 SCC OnLine APTEL 170), permitted the pass-through of employee cost expenditure in the True-up process, the Tribunal deemed the increase in costs as "uncontrollable",

attributing it to the implementation of the Sixth Pay Commission's recommendations, consequently, the Tribunal allowed the additional expenditure incurred on this basis, the relevant extract is reproduced below:

> *"1. The present Appeal has been filed by Tata Power Delhi Distribution Ltd. against the order dated 13.7.2012 passed by the Delhi Electricity Regulatory Commission ("State Commission") whereby the true up of expenses of the Appellant for FY 2010-11 and ARR for the Control Period FY 2012-13 to FY 2014-15 have been determined.*
>
> *3.7 We find that the food allowance has been increased four folds w.e.f. 1.4.2010 from the base year 2006-07 as a result of DTL following the recommendations of the Sixth Pay Commission. The Appellant is bound to enhance the food allowances as per the provisions of the Reforms Act, the statutory transfer scheme and the Tripartite Agreement. The expenditure incurred by the Appellant is uncontrollable in nature being part of the recommendations of Sixth Pay Commission which are bound to be paid to FRSR employees by the Appellant. The normal escalation of 4.66% p.a. over the base year expenses of FY 2006-07 will not be adequate to cover the enhancement of the food allowance for FR/SR employees from Rs. 125 to Rs. 500/- per employee per person. The Appellant paid Rs. 0.38 crores during 2006-07. Taking into account the escalation of 4.66%, the amount allowed in ARR for FY 2010-11 was Rs. 0.47 crores. Thus, the Appellant had to pay Rs. 0.91 crores over and above that allowed in the ARR. Even if the excess amount allowed during the FY 2007-08 to FY 2009-10 is taken into account due to escalation of 4.66%*

p.a. over the base year, the excess amount paid by the Appellant during FY 2010-11 would work out to be Rs. 0.8 crores. The Appellant has stated that the actual amount of Rs. 1.38 crores paid to the FR/SR employees during FY 2010-11 has only been claimed. Therefore, the impact of retirement of the employees has already been taken into account. Therefore, the Appellant is entitled to the claim of Rs. 0.8 crores on account of enhancement of food allowance for FR/SR employees. ***The enhancement of food allowance on the recommendations of the Sixth Pay Commission Report as adopted by DTL is binding on the Appellant as per the Statutory Transfer Scheme. As such, it is an uncontrollable expenditure. Accordingly, the State Commission shall allow the additional expenditure of Rs.0.8 crores on this account with carrying cost****."*

(Emphasis Supplied)

39. The actual expenditure by Respondent No. 2 during the 3rd Control Period exceeded the normative expenditure set by the Tariff Order, this increase was primarily due to:

i. Pay revisions effective from April 1, 2014, and April 1, 2018 (as recommended by the Pay Revision Committee).
ii. Additional provisions for future pension and gratuity liabilities as required by Indian Accounting Standards and valuation reports.

40. The Respondent Commission, after reviewing certified information, acknowledged these factors, it was noted that, excluding the provisions for future pension and gratuity, Respondent No. 2 did not exceed the norms outlined in the Tariff Order, in line with the Tata Power case (Tata Power Delhi

Distribution Ltd. v. Delhi Electricity Regulatory Commission (2015 SCC OnLine APTEL 170)), the Respondent Commission, recognizing the uncontrollable nature of the increased employee expenditure due to statutory obligations, allowed the costs to be passed on to consumers in the Impugned Order.

41. Further, argued that Respondent No. 2 is legally obligated under Accounting Standards 15 (AS-15) to provide for pension and gratuity liabilities based on actuarial valuation, these provisions, though for future liabilities, are considered actual costs incurred during the 3rd Control Period for past services, as such, they must be accounted for, and it is incorrect for the Appellant to argue that these provisions are for future expenses and should not be allowed, the relevant extract (paragraphs 4 and 24) of Accounting Standard (AS) 15 are reproduced below:

“4. Employee benefits include:

(a) short-term employee benefits, such as wages, salaries and social security contributions (e.g., contribution to an insurance company by an employer to pay for medical care of its employees), paid annual leave, profit-sharing and bonuses (if payable within twelve months of the end of the period) and non-monetary benefits (such as medical care, housing, cars and free or subsidised goods or services) for current employees;

(b) post-employment benefits such as gratuity, pension, other retirement benefits, post-employment life insurance and post-employment medical care;

(c) other long-term employee benefits, including long-service leave or sabbatical leave, jubilee or other long-service benefits, long-term disability benefits and, if they are not payable wholly within twelve months after the end of the period, profit-sharing, bonuses and deferred compensation; and

(d) termination benefits.
Because each category identified in (a) to (d) above has different characteristics, this Standard establishes separate requirements for each category.

Post-employment Benefits: Defined Contribution Plans and Defined Benefit Plans

24. Post-employment benefits include:

(a) retirement benefits, e.g., gratuity and pension; and

(b) other benefits, e.g., post-employment life insurance and post-employment medical care.

Arrangements whereby an enterprise provides post-employment benefits are post-employment benefit plans. An enterprise applies this Standard to all such arrangements whether or not they involve the establishment of a separate entity to receive contributions and to pay benefits."

42. The Respondent Commission, after reviewing Respondent No. 2's audited accounts and letters dated 29.10.2019 and 01.07.2019 from the

Comptroller and Auditor General (CAG), recognized that future liabilities were understated and needed to be accounted for within the 3rd Control Period, these liabilities are statutory obligations and must be included in the true-up process as per Supreme Court's ruling in *BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission (2023) 4 SCC 788,* thus, the Appellant's claim that pension liabilities are future expenses and should not be considered in a True-up petition is without merit and should be dismissed.

43. Regulation 10.3 & 10.6 of Regulation No. 4 of 2005 allows employee and administrative costs to be treated as pass-through expenses, which was initially considered in the Tariff Order, the Impugned Order, consistent with these regulations, permits the pass-through of additional liabilities, maintaining the principles and norms of tariff determination, contrary to the Appellant's claim, this approach aligns with the scope of truing up as established in the BSES judgment, the relevant extract is reproduced below:

> *"55. "Truing up" has been held by APTEL in State Load Despatch Centre v. Gujarat Electricity Regulatory Commission' to mean the adjustment of actual amounts incurred by the licensee against the estimated/projected amounts determined under the ARR. Concept of "truing up" has been dealt with in much detail by APTEL in its judgment in North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission (North Delhi Power case SCCOnLineAPTEL para 60)*
>
> > *"60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment*

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

(Emphasis Supplied)

44. Respondent No. 2, further, argued that the Supreme Court in BSES ruled that once employee expenses are accepted as pass-through costs, the State Commission cannot reject additional expenditures for these expenses during the truing-up process, the relevant extract of BSES case is reproduced below:

"65. The DERC, while projecting employee expenses for the entire control period in its MYT tariff order dated 23-2-2008, had categorically acknowledged the uncontrollable nature of the Sixth Central Pay Commission Report as well as the impact of the same on the salaries of FR&SR employees and held that since the salary of FR&SR employees was an uncontrollable item and that it would be trued up on actuals as under:

…

66. However, contrary to its own undertaking, the DERC in tariff order dated 26-8-2011 has erroneously changed its own methodology at the stage of truing up, by not allowing employee expenses of FR/SR employees as per actuals. The DERC, at the stage of truing up, has changed the methodology and disallowed the actual salary of FR&SR employees, which is

> *impermissible. The DERC in the tariff order dated 26-8-2011 has acted contrary to its own undertaking of truing up the impact of employee expenses on account of the Sixth Central Pay Commission Report."*
>
> *(Emphasis Supplied)*

45. The counsel further argued that Regulation No. 4 of 2005 does not mandate the annual filing of true-up charges, Clause 10.7 of Regulation 4 of 2005 allows the aggregate gains or losses for the Control Period to be reviewed as a whole at the end of the period, without mandating annual true-up filings, Clause 5.11(h.3) of the National Tariff Policy, 2016 supports a comprehensive review at the Control Period's end, the Respondent Commission acknowledged this in the Impugned Order and is empowered to determine true-up amounts even if not filed annually, in line with Section 61(d) of the Electricity Act, 2003, additionally, Clauses 24.1 and 24.2 grant the Commission the discretion to make orders or adopt procedures as necessary for justice, allowing true-up charges to be filed at the end of the 3rd Control Period.

46. Further, the Limitation Act, 1963 does not govern the administrative or regulatory functions of the State Commission, the Appellant's claim that Respondent No. 2's petition is time-barred is baseless, Respondent No. 2 filed the Petition after the 3rd Control Period ended and once the FY 2018-19 audited reports were available, making earlier filing impossible, the determination of true-up charges is a regulatory function and the Limitation Act, 1963, does not apply to such functions, as affirmed by the Supreme Court in *Andhra Pradesh Power Coordination Committee v. Lanco Kondapalli Power Limited (2016) 3 SCC 468*, further, Regulation No. 4 of 2005 also does not set a specific timeframe for filing gains or losses under Regulation 19, as noted in the Impugned Order.

Analysis and Conclusion

47. We have gone through the detailed arguments put forth by the Appellant and Respondent No. 2 and examined the documents/ records placed before us, after a detailed hearing the only question that needs to be answered through this Appeal is:

> *Whether the State Commission is right in passing the liabilities of the DISCOMs making a provision for future pension liabilities of the erstwhile APSEB employees based on actual reports on to the consumers connected directly to the transmission network at the stage of Truing up of the tariff of the Discoms.*

48. If the answer to the above question is affirmative, the other issues shall be examined and adjudicated, however, if the answer is negative, the Impugned Order deserves to be *set aside* as prayed by the Appellant.

49. It is a settled principle of law that the rules adopted in the determination of tariff cannot be changed or modified at the True-up stage, the Supreme Court in Civil Appeal Nos. 4323 of 2015 and 4324 of 2015 titled ***BSES Rajdhani Power Ltd vs. Delhi Electricity Regulatory Commission (2022 SCC online SC 1450)*** has settled the principles by deciding that the rules/ methodology adopted in the initial tariff determination cannot be changed or altered at the True-up stage or otherwise amended or set aside by the appellate court, the relevant extract of the judgment is quoted as under:

> ***"54. As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. Apart from this, we are also of the view that at the stage of "truing up", the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.***

55. "Truing up" has been held by Aptel in State Load Despatch Centre v. Gujarat Electricity Regulatory Commission [State Load Despatch Centre v. Gujarat Electricity Regulatory Commission, 2015 SCC OnLine APTEL 50, para 17] to mean the adjustment of actual amounts incurred by the licensee against the estimated/projected amounts determined under the ARR. Concept of "truing up" has been dealt with in much detail by Aptel in its judgment in North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission [North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission, 2007 SCC OnLine APTEL 16 : 2007 ELR (Aptel) 193] wherein it was held as under : (North Delhi Power case [North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission, 2007 SCC OnLine APTEL 16 : 2007 ELR (Aptel) 193] , SCC OnLine APTEL para 60)

> "60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. … The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence."

56. This view has been consistently followed by Aptel in its subsequent judgments and we are in complete agreement with the above view of Aptel. **In our opinion, "truing up" stage is not an opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. "Truing up" exercise cannot be done to retrospectively change the methodology/principles of tariff determination and reopening the original tariff determination order thereby**

> **setting the tariff determination process to a naught at "true-up" stage.**
>
> 57. In Gujarat Urja Vikas Nigam [Gujarat Urja Vikas Nigam Ltd. v. Tarini Infrastructure Ltd., (2016) 8 SCC 743 : (2016) 4 SCC (Civ) 284] , this Court was considering a case where tariff was incorporated in the power purchase agreement between a generating company and a distribution licensee. This Court held that it is not possible to hold that the tariff agreed by and between the parties, though finding a mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. We are of the view that this judgment is not applicable to the facts of the present case.
>
> 58. Revision or re-determination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff order, which can be done only as per the provisions of sub-section (6) of Section 64 of the 2003 Act within the period for which the tariff order was applicable. **In our view, DERC cannot amend the tariff order for the period 1-4-2008 to 31-3-2010 in the guise of "true-up" after the relevant financial year is over and the same is replaced by a subsequent tariff order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the "truing up" exercise."**

50. Therefore, it is settled law that a tariff order is quasi-judicial and becomes final and binding unless amended, revoked, or set aside by the appropriate appellate authority, and during the "truing up" process, the regulatory commission cannot alter the methodology or principles used in the initial tariff determination.

51. Further, any revision or redetermination of the tariff during the truing up process would effectively amend the original tariff order, which is only permissible under Section 64(6) of the Electricity Act, 2003, and within the

period the tariff order was applicable, amending the tariff order retrospectively after the relevant financial period has ended is not allowed.

52. In the present case as well, the Respondent Commission altered the methodology for calculating employee expenses, *inter-alia,* erroneously allowing the 2nd Respondent to recover amounts related to future pension liabilities and the Return on Capital Employed (RoCE), this is contrary to the norms established by the Commission in the Wheeling Tariff Order dated 09.05.2014, where the State Commission has decided that the Wheeling charges/ Tariff Schedule applies only to 33KV & 11 KV consumers but not to Appellant who is a consumer of 132KV.

53. Undisputedly, the State Commission while passing the Impugned Order after *suo motu* reviewing the order dated 27.08.2021 in OP Nos. 34 & 41 of 2020, has acted contrary to the settled principle of law as laid down by the Supreme Court *inter-alia* levying the True-up Charges on all categories of industries and directing the same to be recovered from all the consumers including the Appellant in 36 monthly instalments commencing from 01.08.2022.

54. Further, the Impugned Order is contrary to principle laid down in the Wheeling order by including the consumers connected at 132 kV also as against the consumers connected upto 33kV as part of the Wheeling Order.

55. Accordingly, 'Truing-up' stage is not an opportunity for the State Commission to rethink de novo on the basic principles, premises, and issues involved in the initial determination/projections of the revenue requirement of the distribution company, undisputedly, 'Truing up' exercise cannot be done to retrospectively change the methodology/principles of tariff determination and

revising the original tariff determination order thereby setting the tariff determination process to a naught at 'true up' stage.

56. We are satisfied that the Impugned Order passed by the State Commission is bad in law and deserves to be set aside.

57. The Appellant is entitled to be reimbursed for the additional charges paid in terms of the Appellant along with the interest.

58. The other issues as raised by the Appellant are not taken up for adjudication at this stage as the Impugned Order itself is set aside.

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal No. 413 of 2023 has merit and is allowed.

The Impugned Order dated 30.03.2022 in OP No. 34 of 2020 is set aside to the extent as concluded herein above and the additional True-up charges, if, paid by the Appellant shall be reimbursed to the Appellant by the Respondent No. 2 along with interest within three months from the date of this judgment.

The Captioned Appeal and IAs, if any are disposed of in above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 25th DAY OF SEPTEMBER, 2024.

(Virender Bhat) **Judicial Member**	**(Sandesh Kumar Sharma)** **Technical Member**

pr/mkj