

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

APPEAL NO. 103 OF 2013

Dated: 11th March, 2014

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

Bihar Industries Association
Sinha Library Road
Patna – 800001

.... Appellant

VERSUS

Bihar Electricity Regulatory Commission
Ground Floor, Vidyut Bhawan – II,
Jawaharlal Nehru Marg
Patna – 800001

North Bihar Power Distribution Companies Limited
Ground Floor, Vidyut Bhawan – I,
Jawaharlal Nehru Marg
Patna – 800001

South Bihar Power Distribution Companies Limited
Ground Floor, Vidyut Bhawan – I,
Jawaharlal Nehru Marg
Patna – 800001

.... Respondents

APPEAL UNDER SECTION 111(1) OF THE ELECTRICITY ACT, 2003

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent : Mr. Mohit Kumar Shah for R-3

JUDGMENT

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

1. This is an Appeal under Section 111 of the Electricity Act, 2003 filed by the appellant Bihar Industries Association against the order dated 15.03.2013 passed by the Bihar Electricity Regulatory Commission (for short, 'State Commission') in case No. T.P. 41 of 2012 approving the Truing up of FY 2011-12 & Review for FY 2012-13 of the erstwhile Bihar State Electricity Board (BSEB) and determination of Multi Year Aggregate Revenue Requirement (ARR) for FY 2013-14 to 2015-16 and tariff for FY 2013-14 for the North and South Bihar Power Distribution Companies Limited (NBPDC & SBPDCL), respondent nos. 2 and 3 herein.

2. The relevant facts giving rise to the present appeal are as follows:-

- (a) that the appellant is an association of industries and business traders and are consumers of electricity either under the Low Tension or High Tension category of consumers. The members of the appellant are taking supply of electricity from the erstwhile Bihar State Electricity Board (BSEB) and now from respondents nos. 2 and 3 (distribution licensees). The members of the appellant are taking power supply at different voltage level from the electrical system maintained by the licensees.
- (b) that the respondent no.1 is Bihar State Electricity Regulatory Commission and respondent nos. 2 and 3 are the distribution companies of North and South Bihar respectively.
- (c) that the Power/electricity (in most categories) constitutes about 20-50% of the input cost in the appellant's industry and therefore constitutes the principal cost of manufacture. The uninterrupted supply of electricity at competitive rates is essential for the sustenance of the industries in the State of Bihar.

- (d) that the appellant had earlier challenged the tariff order dated 26.08.2008 passed by the State Commission for the year 2008-09 before this Tribunal by way of an Appeal, being Appeal No. 128 of 2008. This Tribunal while dismissing the appeal gave important directions to the State Commission vide Judgment dated 12.02.2009. The main direction given by this Tribunal in Appeal No. 128 of 2008 was that the Commission to draw a road map for reduction of transmission and distribution losses and the Board should implement the same. Inadequate resources and organizational deficiencies of the Board cannot be an excuse for increase in tariff due to excessive Transmission and Distribution (T & D) losses. The Board has to set its house in order and the consumers at large cannot be made to bear the burden of inefficiency and mismanagement of the Board.
- (e) that thereafter, the appellant challenged the next tariff order dated 6.12.2010 passed by the State Commission in Tariff Petition No. 3 of 2010 for ARR 2010-11 by way of Appeal No. 14 of 2011 which was also disposed of by this Tribunal vide Judgment dated 10.5.2012 directing the State Commission to determine category wise cost of supply as also to determine the cross-subsidy based on cost of supply at different voltage levels within next six months and ensured that in future orders beginning from Financial Year 2013-14, the cross-subsidy and tariffs are determined based on principles laid down by this Tribunal in judgment dated 10.05.2012.
- (f) that this Tribunal also gave directions with respect to category wise tariff determination in the Judgment dated 19.7.2012 in Appeal No. 101 of 2011 dealing with the tariff for the year 2011-12.
- (g) that the erstwhile Bihar State Electricity Board (BSEB) was restructured on functional basis with effect from 1st November, 2012 into five successor companies under Bihar State

Electricity Reforms Transfer Scheme 2012 vide Notification No. 17 dated 30.10.2012 issued by Energy Department, Government of Bihar, namely,

- Bihar State Power Holding Company Limited (BSPHCL)
- Bihar State Power Generation Company Limited (BSPGCL)
- Bihar State Power Transmission Company Limited (BSPTCL)
- North Bihar Power Distribution Company Limited (NBPDCCL) and
- South Bihar Power Distribution Company Limited (SBPDCL)

(h) that as per directives of the State Commission, the erstwhile BSEB was finalizing the petition for true-up of expenses and revenues for FY 2011-12, review of expenses and revenues for FY 2012-13 and determination of Multi Year ARR for FY 2013-14, 2014-15 and 2015-16 and tariff with effect from 01.04.2013. However, the State Government restructured erstwhile BSEB with effect from 01.11.2012. Hence, the Bihar State Power Holding Company Ltd. (BSPHCL), filed a common petition on behalf of the successor generation, transmission and two distribution companies on 14th November, 2012.

(i) that the State Commission admitted the above petition as TP No. 41 of 2012 and issued public notice. The appellant filed its objections to the above petition and tariff proposals of the licensees. The aforesaid tariff Petition No. 41 of 2012 has been, as stated above, decided by the impugned order dated 15th March, 2013 by the State Commission which is assailed before us, in the instant appeal, on the following grounds:

(i) that the State Commission has not followed National Tariff Policy and judgements of this Tribunal while dealing with the cross-subsidies to categories such as Kutir –Jyoti and irrigation.

(ii) that the State Commission has not carried forward the surplus of Rs. 950 crores found by the State

Commission in the books of the erstwhile BSEB leading to artificial inflation of the ARR and tariff for the FY 2013-14.

- (iii) that the sudden change in the methodology of appropriating Government Grant retrospectively for the years 2011-12, 2012-13 and 2013-14, even though in the tariff order for the respective years, a different treatment had been prescribed.
- (iv) that in the truing up for the year 2011-12, out of total Government Grant of Rs. 2120 crore for FY 2011-12, the State Commission has only adjusted Rs. 1080 crore for reducing ARR without any logic or basis. Similar approach has been adopted for the FYs 2012-13 and 2013-14 by the State Commission.
- (v) that the State Commission should not have allowed premium on consumers in notified areas on assurances that the licensee would supply electricity close to 24 hours by defining continuous supply exclusive of, the grid failure, any force majeure condition, scheduled shut down, emergent breakdown beyond the control of licensees.
- (vi) that the State Commission has allowed the licensees to charge the demand charges on 100% KVA for the high tension consumers and also prescribed Rs. 700 per KVA additional charges.

3. We have heard Mr. Anand K. Ganesan, learned counsel for the appellant, Ms. Priya Ranjan, learned counsel for the respondent no.1 and Mr. Mohit Kumar Shah, learned counsel for the respondent no. 3 and have also considered their rival oral and written submissions.

4. The following issues arise for our consideration:
- A. Whether the State Commission was correct in not carrying forward the surplus of Rs. 950 crores found by the State commission in the books of the erstwhile Bihar State Electricity Board leading to artificial inflation of the ARR and tariff for the year 2013-14?
 - B. Whether the State Commission was correct in approving the change in the method of appropriating Government grant retrospectively for the years 2011-12, 2012-13 and 2013-14, even though in the Tariff Order for the respective years, a different treatment had been prescribed?
 - C. Whether in the process of truing up for the year 2011-12, out of total Government Grant of Rs. 2120 crores, the State Commission has only adjusted Rs. 1080 crores for reducing ARR which is without any logic or basis. A similar approach has been adopted for the years 2012-13 & 2013-14?
 - D. Whether the State Commission was correct in allowing the premium on consumers in notified areas on assurance that the licensee would supply electricity close to 24 hours by defining continuous supply exclusive of the grid failure, any force majeure condition, scheduled shut down and emergent break down beyond the control of licensee?
 - E. Whether the State Commission was correct in allowing the respondent licensees to charge demand charges on 100% KVA for the High Tension customers as well as having prescribed Rs. 700 per KVA additional charges?
 - F. Whether the State Commission was correct in not following the National Tariff Policy and the judgments of this Tribunal while dealing with cross subsidies to categories such as Kutir Jyoti and Irrigation?

5. **ISSUE NO. A : NOT CARRYING SURPLUS OF RS. 950 CRORES FOUND IN THE BOOKS OF THE ERSTWHILE BSEB:**

The relevant findings on this issue in the impugned order is as under:-

“Further, the State Government vide its letter no. 1223 dated 4th March, 2013 has also informed that according to the budget provision proposed by the State Government, a resource gap grant of Rs. 2160 crore has been provided for the FY 2013-14. The resource gap grant of Rs. 2160 crore for the FY 2013-14 is first adjusted towards disallowed power purchase cost amounting to Rs. 1588.02 crore due to difference in the actual T&D loss and the T&D loss approved by the Commission and the balance amount of Rs. 571.98 crore has been considered to subsidise the BPL, agricultural and rural consumers. The Commission has approved a net revenue gap of Rs. 1167.64 crore at the existing tariff for FY 2013-14. After adjusting the Government subsidy to Kutir Jyoti, rural and agricultural consumers amounting to Rs. 571.98 crore, the net gap at existing tariff is Rs. 595.66 crore. As a result, the revenue gap for FY 2013-14 is reduced to Rs.595.66 crore against Rs. 3427.72 crore projected by BSPHCL. In order to avoid Tariff shock to the consumers, a modest increase in Tariff for all consumers to realize additional revenue of Rs.241.18 crore, is considered by the Commission and the balance revenue gap of Rs.354.48 crore is approved as regulatory asset to be amortised/ adjusted along with admissible carrying cost during next three years. The surplus of Rs. 950.32 crore in review for FY 2012-13 is not proposed to be carried forward and considered for FY 2013-14, as the surplus is based on six month revenue which may materially change as experience has shown earlier. The surplus/deficit during FY 2012-13 will be considered after Truing up of FY 2012-13, based on audited accounts, is done in FY 2014-15.

5.19.1. The Commission approves the net revenue surplus of Rs. 950.32 in revised estimate subject to final truing up as and when the Audited Accounts of the BSPHCL will be submitted by the petitioner for FY 2012-13. From the above table it can be seen that a surplus of Rs. 950.32 crore is available over and above the State Government’s support for financial loss on account of non-achievement of T & D loss target as set by the Commission, the net revenue surplus approved by the Commission for FY 2012-13 is Rs. 950.32 crore against the regulatory asset created by the Commission in the Tariff Order for FY 2012-13.

The surplus estimated by the Commission is based on revised estimates submitted by BSPHCL as modified by the Commission.

Actuals for FY 2012-13 will be known only after the audited annual accounts for FY 2012-13 are made available to the Commission which may differ from the reviewed estimates approved by the Commission.

Therefore, the Commission does not consider this surplus to be carried forward in the ARR for FY 2013-14. However, considering the estimated surplus for FY 2012-13 the Commission also decides that the regulatory asset of Rs. 157.26 crores approved in the tariff order for FY 2012-13 shall not be carried forward and adjusted in the ARR of FY 2013-14.”

6. The following submissions on behalf of the appellant have been made on this Issue No. A:-

- (i) That the State Commission has erred in not carrying forward the provisional surplus of Rs. 950 crores merely because the audited accounts are not available. The surplus could have been carried forward provisionally subject to final truing up upon availability of audited accounts. The actual financials of the licensees were available which clearly showed that in addition to the Government grant, an amount of Rs. 950 crores was available. Therefore, the consumers who have funded this surplus in the previous years should get the benefit of a reduced tariff in the current tariff year.
- (ii) That this Tribunal has held that truing up need not to await the audited accounts and provisional truing up can be carried out based on provisional financials subject to final truing up after the audited accounts are available. However, the licensees cannot be allowed to profiteer in this manner by retaining a surplus and also claiming an increased tariff in the next tariff year. Thus, the State Commission erred in not following the said approach.
- (iii) That this Tribunal in judgment dated 04.12.2007 in Appeal No. 100 of 2007 KPTCL V KERC in para 28 thereof held that invariably the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for the following year. The truing up for the FY 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue has been realized during the year 2006-07, it must be adjusted as

available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. This Tribunal while considering this issue lastly held that truing up by itself cannot be faulted. The Tribunal further held that truing up stage is not an opportunity for the Commission to re-think de novo on the basic principles, premises and issues involved in the initial projections of revenue requirements of the licensee.

- (iv) Lastly that the State Commission ought to have taken Rs. 950 crores as a provisional surplus in the ARR of the licensees for the year 2013-14 instead of completely ignoring it and artificially escalating the ARR of the licensees.

7. On this issue, according to respondent no. 3, the State Commission has approved the net revenue surplus of Rs. 950.32 crore as result of review exercise for FY 2012-13. The review was based on 6 months data made available by erstwhile BSEB. The Annual Revenue Requirement (ARR) and tariff determination is based on projected operating cost of utilities. The learned commission, after detailed due diligence, allowed itemized operating cost to determine ARR for the utility. This ARR then becomes the basis of determination of applicable tariff in particular for consumers. Since ARR is based on projected figures, actual parameters are likely to vary from projected figures. It is necessary to keep a check on above parameters for ARR as any major deviation needs to be brought into the attention of Commission so that corrective measures can be undertaken. The sole objective of review exercise is to understand the difference between approved ARR and estimated ARR based on partial year figures. Since, neither these figures are audited nor represent the annual cost cannot be considered for determination of tariff. The true up exercise is undertaken by the State Commission based on audited annual accounts to determine transfer of surplus/gap in subsequent year. The learned

Commission has determined net revenue surplus of Rs 170.33 crore in true up exercise based on audited annual accounts of FY 2011-12.

8. The learned counsel for the respondent no.3 has further submitted that the appellant, especially when it is canvassing the cost of the low tension and high tension commercial consumers, cannot crib about the grant given by the State Govt., being diverted towards setting off extra T&D losses because they are not being taxed for the gap between the revenue and expenditure of the respondent and there being no other source other than the tariff income from the consumers or grant from the Govt., the respondent has to fall back on the support of the State Govt. and in doing so it has to follow the instructions of the State Govt. for utilizing the said grant. It has been pointed out during hearing on behalf of the respondent no.3 that average revenue realisation from the consumers is even less than the average cost of supply being incurred by the respondent no.3. Learned counsel for the respondent no.3, throwing light on the methodology, has stated that the true up exercise is based on audited annual accounts whereas review and ARR are based on estimated figures. Further, the net surplus/deficit determined by true up exercise becomes the part of ARR, thus benefit is passed onto consumers. The methodology for treatment of stop gap funding has not been changed. In this way the revenue gap cannot be carried forward un-bridged and has to be accounted by some means. Accordingly revenue gap funding made available by the Government is first accounted for losses on account of higher T & D losses (then normative) and then any reduction in ARR is allowed.

9. Accordingly to the learned counsel for the respondent no.3, the impugned order does not suffer from any infirmity and the appeal is fit to be dismissed.

10. The learned counsel for the State Commission /respondent no.1 has submitted that the State Commission has dealt with this issue in para no. 5.19.1 of the impugned order and held that the revenue surplus of Rs.

950.32 crores is a revised estimate figure subject to final truing up. The surplus estimated by the State Commission is based on revised estimates submitted by the BSPHCL as modified by the Commission. Actuals for FY 2012-13 can be determined only after audited annual accounts for FY 2012-13 are made available to the State Commission which may differ from the reviewed estimates approved by the Commission and therefore the State Commission did not consider this surplus to be carried forward in the ARR of FY 2013-14. Further considering the estimated surplus of FY 2012-13, the State Commission also decided that the regulatory asset of Rs. 157.26 crores approved in the tariff order for FY 2012-13 should not be carried forward and adjusted in the ARR for FY 2013-14. The surplus arrived on the basis of audited annual accounts for FY 2011-12 including interest on surplus @14.75% totalling to Rs. 170.33 crores has been adjusted in the ARR of FY 2013-14 as fully described in para 4.27, table 4.44 (page 114) and para 8.21, table 8.102 (page 274) of the impugned tariff order. The State Commission has rightly not taken the surplus as well as the regulatory asset of FY 2012-13 into the ARR of FY 2013-14.

11. According to the State Commission it has issued impugned tariff order on 15.03.2013 taking into consideration letter no. 19.09.2011 issued by the Energy Department, Government of Bihar clarifying the treatment of the financial assistance being given by the State Government to the erstwhile Bihar State Electricity Board as revenue gap grant specifying the manner in which resource gap grant has to be utilized.

12. The tariff order for FY 2012-13 was passed on 30.03.2012, much after the issue of letter no. 4208 dated 19.09.2011 by the State Government clarifying the priority of treatment of its resource gap grant to the BSEB, the resource gap grant released by the State Government to BSEB was accordingly treated in the tariff order for FY 2012-13 in which the resource gap grant was first used to compensate the Board for the financial loss incurred by it due to higher T & D loss compared to the target fixed by the State Commission and only the remaining amount of

State Government grant was treated as subsidy to targeted consumers. Out of total expected revenue gap grant of Rs. 2160 crore, an amount of Rs. 1588.02 crore has been for compensating the distribution licensees for their higher T & D loss compared to the target fixed by the Commission and the balance amount of Rs. 571.98 crore has only been used as subsidy to the consumers.

13. The counsel for the State Commission has further submitted that the respondent-State Commission has fully complied with the direction of this Tribunal regarding determining category wise/voltage wise cost of supply and tariff in chapter 9 of the impugned order. The State Commission in the impugned order has determined revised tariff rates such that they are within $\pm 20\%$ of the voltage wise cost of supply as far as possible except for Kutir Jyoti, rural and agriculture consumers for whom the Government of Bihar has provided subsidy. Out of 2160 crores resource gap grant provided by the State Government, the State Commission has considered Rs. 571.98 crore as subsidy to the agriculture and rural consumers in the impugned order.

14. Regarding adjustment of resource gap funds, according to the State Commission, it has not changed the methodology adjusting the Government grant in the truing up of ARR for FY 2011-12 and review of ARR for FY 2012-13 and determination of ARR for FY 2013-14. The State Commission has issued impugned order on 15.03.2013 after considering the aforesaid letter no. 4208 dated 19.09.2011 of the State Government.

After considering the aforesaid submissions and cautiously perusing the impugned order, comparing it with the material available on record, we find no infirmity or illegality in any of the findings recorded by the State Commission in the disposal of Issue No. A. As indicated by the State Commission in the impugned order, the Review for FY 2012-13 was based on six months data and not annual data which might change materially as has been the experience of the State Commission. Thus, the State

Commission has decided to true up the financials for FY 2012-13 after the audited accounts for the full financial year are available. All the findings recorded by the State Commission for issue no.1 are liable to be affirmed. This issue is accordingly decided against the appellant.

15. **ISSUE NOS. B & C : RETROSPECTIVE ADJUSTMENT OF RESOURCE GAP FUNDING BY THE STATE GOVERNMENT**

These two issues are inter-related, hence they are taken up and decided together. In the impugned order the State Commission has separately dealt with FYs 2011-12, 2012-13 and 2013-14. In the tariff order dated 01.06.2011 for FY 2011-12, the State Commission considered the resource gap assistance at Rs. 1080 crore. The State Commission in the tariff order dated 01.06.2011 was of the view that letter from the State Government after the issue of tariff orders cannot be used to withdraw the effect of Government Grant already passed on the consumers on a retrospective basis. The State Commission had then not considered the BSEB proposal for post-facto adjustment of the revenue resource gap during the truing up exercise for FY 2006-07 to FY 2010-11. The Commission was then also of the view that same approach would be continued while truing up the ARR for FY 2011-12, since the tariff order for FY 2011-12 had already been issued before such decision was taken by the State Government. Accordingly, the State Commission out of Rs. 2120.24 crore of resource gap assistance received for FY 2011-12, Rs. 1080 crore has been treated as resource gap grant for reducing ARR gap approved in the truing up for FY 2011-12 leaving balance resource gap assistance of Rs. 1040.24 crore. The Commission then disallowed an amount of Rs. 1144.12 crore towards power purchase cost for the year. The balance resource gap assistance of Rs. 1040.24 crore has subsequently been adjusted against the power purchase cost dis-allowance of Rs.1156.12 crore leaving unadjusted power purchase disallowance of Rs. 115.88 crore on account of financial loss caused due to higher Transmission & Distribution (T&D) loss to be absorbed by the BSPHCL.

Thus, the State Commission has allowed Rs.1180 crore as resource gap grant as per the tariff order for FY 2011-12 for reducing ARR gap.

The State Commission for the FY 2012-13 has observed that the State Government in its letter no. 21/2010-285 dated 16th January, 2013 has informed the State Commission that the resource gap funding support of Rs. 2880.00 crore for FY 2012-13 to BSPHCL. Accordingly, the resource gap funding has been adjusted in the review for 2012-13 to BSPHCL. Accordingly, the resource gap funding has been adjusted in the review for 2012-13 as follows:-

Particulars	(Rs. crore)
Resource gap funding from State Government	2880.00
Less: Disallowed power purchase cost on account of high T&D loss with reference to BERC target.	1020.17
Resource gap funding available with BSPHCL	1859.83

During FY 2013-14, as per letter dated 04.03.2013 from Bihar State Government BSPHCL would be receiving resource gap assistance of Rs. 2160 crores. The State Commission based on the letter of the State Government on utilization of resource gap grant has adjusted the cost of additional power purchase requirement on account of difference in actual T & D loss of the Discoms and T & D loss approved by the State Commission from resource gap funding by the State Government.

The approach has reduced the net power purchase cost of the Discoms. The Commission has computed the cost of additional power purchase (as approved in energy balance) at the average purchase rate of power purchase as given in the Table below:

Table 8.94 : Cost of additional power disallowed

Sl. No	Category	Unit	FY 2013-14 (RE)	FY 2014-15 (RE)	FY 2015-16 (RE)
1.	Additional power purchase by Discoms due to excess distribution losses (Table 8.56)*	MU	4179	4784	5241
2.	Average power purchase rate (Table 8.61)	Rs/ Unit	3.80	3.82	3.89
3.	Cost of additional power disallowed (1x2)	Rs. Crore	1588.02	1827.49	2038.75

16. At the time when the tariff orders for the FYs 2011-12 and 2012-13 were passed, the State Commission, as per the learned counsel for the appellant, had examined the contention of the Board and did not agree with the proposed post-facto adjustment of the revenue resource gap grant given by the State Government against the financial loss caused due to the difference between the actual T & D loss of BSEB and the T & D loss trajectory approved by the State Commission. The State Commission in para 4.23.8 of the impugned order dealt with this issue. The State Commission has been treating with resource gap funding available from the State Government for reducing the ARR of BSEB thus subsidizing the consumers of the Board across the State.

17. The State Commission, while passing impugned order, considered various State Government letters sanctioning grants as resource gap grants through the various financial orders and also considered the matter while hearing tariff filings of BSEB in FYs 2008-09 and 2010-11.

18. The revenue resource gap grant has always been proposed by the BSEB/Board for reducing the net deficit in the ARR and thus reducing the average cost of supply of electricity and subsidizing all categories of consumers in the State. The State Commission had also aligned its approach with the proposal of the BSEB and accordingly has already passed on the benefit of resource gap grant received from the State

Government to the consumers in the past tariff orders. Since the letter from the State Government received in the past in this regard did not mention the priority of the usage as outlined in the latest order dated 19.09.2011 and only mentioned that the support is being made available for payment of power purchase cost directly to NTPC. The State Commission has accordingly not agreed that the prayer of the Board to adjust the cost of disallowed power projects from the resource gap grant and then use remaining amount for subsidizing the consumers. The State Commission retained the resource gap assistance of Rs. 1080 crore received from the State Government as subsidy to consumers for FY 2010-11.

19. The revenue gap for FY 2010-11 as per the State Commission's observation would be computed considering the same.

The main thrust of the arguments of the learned counsel for the appellant on this issue is that the State Commission has erred in using the resource gap funding against the unachieved transmission and distribution losses and the additional power purchase cost conducted by the licensees. The State Commission having fixed the normative transmission and distribution losses for the previous years cannot now change indirectly and adjust the resource gap funding given by the State Government for the inefficiencies of the licensees.

According to the learned counsel for the appellant it is well settled principle that truing up is not a stage to change the methodology of tariff fixation and the State Commission cannot change the manner of adjustment of resource gap funding given by the State Government. It is also one of the submissions of learned counsel for the appellant that in the absence of any mention regarding the priority of the usage of the Government grant/subsidy, the State Commission could not have allowed the respondent/licensees to cover up the revenue gap/the transmission and distribution loss with the fund so provided by the Government as the same would give rise to inefficiency by the licensee so far as it relates to recovery of energy charges on the basis of actual consumption.

20. The State Commission in para 362 of the impugned order (proceedings of the State Advisory Committee) has considered the same since the Government of Bihar owned the two discoms, the first issue was how to treat the Government Grant and second issue was to the extent to which the discoms should be compensated for the financial loss incurred due to higher T & D loss and that the third issue was the extent of subsidy to agriculture and rural consumers. Hence, the state Government's decision was required on the matter before finalizing the tariff order.

21. Per contra, the learned counsel for the respondent no.3 has made the following submissions:-

- (i) That the treatment of the resource gap funding for the FY 2011-12, 2012-13 and 2013-14 is as follows:-

Sl. No.	Particular	FY 2011-12	FY 2012-13	FY 2013-14
		<i>Trup Up</i>	<i>Review</i>	<i>ARR</i>
A.	Resource Gap Funding from State Government	2120.24	2880.00	2160.00
B.	Loss on account of power purchase for higher than normative T&D loss.	1156.12	1020.17	1588.02
C.	Resource Gap grant towards reducing ARR gap	1080.00	1869.83	571.08
D.	Allowed loss on account of power purchase for higher than normative T&D loss (A-C)	1040.24	1040.24	1588.02
E.	Disallowed loss on account of power purchase for higher than normative T & D loss (B-D)	115.88	----	----

- (ii) The State Commission in the impugned order has rightly considered the revenue gap funding for the purpose of compensating disallowed power purchase in view of the letter of the Energy Department dated 19.09.2011 wherein the Govt. of Bihar has clarified the priority for use of revenue gap funding provided by it. As per this letter, the revenue gap funding has to be first used to meet financial losses arising out of non-approval of actual T&D losses by the State Commission. The remaining amount of resource gap funding will be used for subsidizing

agriculture and rural consumers. In view of the matter, the resource gap funding received from Govt. of Bihar has to be first used for meeting unabsorbed power cost on account of disallowed T&D losses.

- (iii) The resource gap provided by the State Government has to be treated exactly in the manner for which it is provided. Now, by defining the nature of the Grant, the State Government has not proposed to undo the benefits granted to the consumers in the past tariff orders but it has simply sought to drag erstwhile BSEB out of the reds.
- (iv) In view of Section 65 of the Electricity Act, 2003, the State Government has the right to decide the quantum of subsidy and the categories to which it would like to subsidize. The Govt. of Bihar has exercised this right in its letter dated 19.09.11 wherein it has been stipulated that the resource gap funding will be first used to meet financial losses arising out of non-approval of actual T&D losses by the State Commission and then the balance amount of revenue gap funding will be used for subsidizing agriculture and rural consumers.
- (v) That financial losses arising out of additional power purchase because of higher T&D losses will have to be borne by State of Bihar if the actual T&D losses are not approved by the State Commission. The Govt. of Bihar, in public interest, is discharging its onerous responsibility and providing funds to erstwhile BSEB to meet the gap between actual power purchase cost and approved power purchase cost. The grants under resource gap have got to be first applied to meet the expected resource gap due to higher actual T&D loss. This would be essential to avoid carrying over of loss year after year in the books of accounts which would help erstwhile BSEB to borrow from the Banks for meeting its working capital requirement and the liquidity crunch. Such gap cannot be carried over

perpetually and has got to be bridged either by a regulatory mechanism or by fiscal grant by the State Government. Once the regulatory mechanism for bridging out such accumulated revenue gaps has been disallowed by the learned Commission, the Commission cannot dispute, deny or disallow direct resource gap funding by the State Government to wipe out such accumulated and carry forwarded losses.

- (vi) It is the prerogative of the State Government/Agency which is giving grant to specify the mode and manner in which the grant is to be utilised by the beneficiary.

22. The State Commission, in its tariff order for FY 2011-12 dated 01.06.2011 while disallowing the request of the erstwhile BSEB for re-fixing higher T & D loss reduction trajectory, has observed as follows:-

“if BSEB is not able to meet loss reduction trajectory due to implementation of Government sponsored RGGVY scheme, then it should ask for subsidy to compensate for the increased T&D losses. The un-bridged expenditure gap (after considering tariff income) of erstwhile BSEB has to be met by the Government of Bihar as an owner of erstwhile BSEB, hence erstwhile BSEB has no other recourse for meeting the gap between its revenue and expenditure”.

23. The learned counsel for the appellant has cited the judgment dated 23.05.2007 passed in Appeal No. 265 of 2006 in the case of North Delhi Power Ltd. vs. Delhi Electricity Regulatory Commission on the point of truing up. After going through the judgment we find that this Tribunal remarked that the Commission has not properly understood the concept of truing up. While considering the tariff petition of the utility, the State Commission has to reasonably anticipate the revenue required by a particular utility and such assessment should be based on practical considerations. Truing up exercise is done to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. The 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. This Tribunal expected that the State Commission will properly understand its role in assessing

the revenue requirement of the utility and in determination of the tariff in accordance with the policy directions and the relevant law in force. This case law does not clearly cover the issue before us. Hence, the said case law is not applicable to the present case.

24. After going through the impugned order and rival submissions, we are unable to accept the contentions of the appellant because State Commission has passed the impugned order in compliance of the Government letters by which the revenue resource gap grant was given. For 2011-12, the State Commission has allowed Rs.1080 crores out of the resource gap assistance from the State Government as per the Tariff Order for 2011-12 for reducing the ARR. Similarly for FY 2012-13 Rs.1859.83 crores out of the Resource gap funding available from the State Government has been allowed to be passed on to reduce the ARR to benefit the consumers. For FY 2013-14, the State Government's letter indicating that the adjustment has to be made towards cost of additional power purchase requirement on account of difference between actual T&D loss and the targeted T&D losses was available at the time of passing the impugned order. The Respondent No.3 is fully owned by the State Government and the State Government has the authority to decide how the assistance given by it is to be utilized. All the findings recorded on these issues are fully supported by the material available on record. We also agree to the said findings. Therefore, issues B & C are decided against the appellant.

25. **ISSUE NO. D**

This issue is whether the State Commission was correct in allowing the premium on consumers in notified areas on assurances of 24 hours electricity supply exclusive of grid failure, force majeure, scheduled shut down and emergent break-down beyond the control of licensee?

On this issue, the main submission of the learned counsel for the appellant is two fold. Firstly, the State Commission in the impugned order has allowed a licensee to impose premium which has been allowed for the

region in and around Patna which is discriminatory and is violative of Article 14 of the Constitution of India as well as contrary to Section 62 (3) and Section 45 of the Electricity Act, 2003.

Secondly in allowing the premium on consumes in notified areas on assurance that the licensee would supply electricity close to 24 hours, the State Commission has further defined continuous supply exclusive of grid failure, any force majeure condition, scheduled shut down and emergent break down beyond the control of licensee. Therefore, there is no meaning of charging the premium from such consumers at all.

Refuting the appellant's submission on this issue, the learned counsel for the respondent no. 3 has meekly submitted that the State Commission should not have allowed premium on consumers in notified areas on assurances of 24 hours electricity supply exclusive of the aforesaid situation.

26. Section 62(3) of the Electricity Act, 2003 postulates that appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. The tariff imposed on the consumer reflects the cost of supply of electricity at an adequate and improved service level and efficiency with optimum investments of utility along with the safeguarding of consumer interest at the same time, which the State Commission has considered in an appropriate manner while determining the tariff.

27. The premium tariff provisions have been continued from tariff order for FY 2012-13 which was not challenged by the appellant. After considering the rival submissions and the provisions of Section 62 (3) of the Electricity Act, 2003 we observe that the learned State Commission has

taken the correct stand while deciding this issue and the findings of the State Commission on this issue is just proper and reasonable to which we also agree. Under the provisions of the Electricity Act, 2003 the State Commission has rightly allowed the licensee premium on the consumers in notified areas on assurances of 24 hours electricity supply exclusive of grid failure, force majeure, scheduled shut down and emergent break-down beyond licensee's control. This issue is, therefore, decided accordingly and the stand of the State Commission warrant no interference therewith.

28. **ISSUE NO. E**

Whether the State Commission was correct in allowing the respondent licensee to charge demand charges on 100% KVA for the HT consumers and also prescribed Rs. 700/- per KVA additional charges. On this issue, relevant finding in the impugned order, is to the effect that HTSS (33KV/11KV) is applicable for supply of electricity to all consumers who have contract demand of 300 kVA and more for induction furnace including Ferro Alloy loads. This tariff will not apply to casting units having induction furnace of melting capacity of 500 Kg and below. The capacity of induction furnace shall be 600 KVA per metric tonne as existing for determining the contract demand of induction furnace in the existing HTSS service connections. However, for new connection and if the furnace is replaced with a new one for the existing connections, the contract demand shall be based on total capacity of the furnace and equipment as per manufacturer technical specifications, and in case of difference of opinion, the provisions of clause nos. 6.39 and 6.40 of the Bihar Electricity Supply Code shall apply.

29. Further finding on the issue is that those consumers who are having rolling/re-rolling mill in the same premises will take additional contract demand for the rolling/re-rolling mill over and above the contract demand required for induction furnace. The consumers will have the option to segregate the rolling/re-rolling mill and take separate new connection following all prescribed formalities with a separate transformer. This new

connection, if taken by the consumer will be allowed to be billed in appropriate tariff schedule. Such rolling/re-rolling mill will be allowed to avail power at 33 KV. The billing demand shall be the maximum demand recorded during the month or the contract demand whichever is higher. If in any month the recorded maximum demand of the consumer exceeds 110% of contract demand that portion of the demand in excess of the contract demand will be charged at twice the normal charges. If the power is availed at 11 KV a surcharge of 5% will be charged extra on demand and energy charges. FPPCA charges as applicable shall be charged extra.

30. Assailing the finding of the State Commission on this issue in the impugned order, the main submission of the appellant's counsel is that fixed charges are the charges that are to be paid by all the consumers irrespective of their actual consumption during the month. Therefore, if the demand charges are billed as per the maximum recorded demand or the contract demand, whichever is higher, it would mean that in a given month, if a consumer does not have consumption of electricity, the consumer will still have to pay the demand charges on the basis of the contract demand. Also the basis for billing of the HTSS category of consumers is different as compared to the other categories namely demand charges being billed at 100% contract demand. This is violative of Section 62(3) of the Electricity Act, 2003.

31. Again refuting the aforesaid submission of the appellant's learned counsel on this issue, the learned counsel for the respondent no.3 has contended that according to Section 46 of the Electricity Act, 2003, the licensees are authorized to recover its expenses reasonably for providing electric line or plant used for giving electricity supply to the consumers. While supplying power to a consumer, any distribution licensee has to undertake fixed expenditure on following account:-

- Fixed expenses on power purchase in the form of fixed charges payable to power projects under ABT regime.

- Capital expenditure for creating infrastructure to supply power to consumer.
- Operation & maintenance expenses for above infrastructure.

32. Therefore, the distribution licensee is justified in seeking the fixed charges from consumer irrespective of energy consumption to recover the fixed costs incurred to provide supply to the consumer. After considering the rival submissions, we again find that the plea taken by the appellant on this issue is not legally sustainable and we find ourselves in agreement with the finding recorded by the learned State Commission in the impugned order on this issue. The State Commission has recorded cogent reasons for arriving at the said finding. This issue is also decided against the appellant.

33. **ISSUE NO. F**

This issue relates to implementation of Electricity Act, National Tariff Policy, National Electricity Policy and judgments of this appellate Tribunal while dealing with the cross subsidies to categories such as Kutir Jyhoti and irrigation.

The main submission of the appellant's counsel on this issue is that the State Commission has erred in not following the principle of $\pm 20\%$ of average cost of supply with respect to the tariff of agricultural consumers and Kutir Jyoti consumers. The State Commission has purported to implement the principle of tariff to be within $\pm 20\%$ of the average cost of supply and the judgments dated 10.05.2012 and 19.07.2012 passed by this Tribunal but fixed the tariff of Kutir Jyoti and agricultural consumers as per table 8.104 dealing with computation of cross-subsidy with average cost of service for FY 2012-13 & FY 2013-14.

34. Per contra, the learned counsel for the respondent has submitted that the allegation of not following the NTP while dealing with the cross-subsidies to the categories such as Kutir Jyoti and irrigation is not correct. The actual position would be apparent from the data depicted a tabular

form below, showing the Average Cost of Supply as against the average realization for various categories of consumers:-

	ACS	Average Realization	CS
Kutir Jyoti	6.46	3.03	47%
DS I	6.46	3.34	52%
DSII	6.46	5.06	78%
DS III	6.46	4.7	73%
NDS I	6.46	4.45	69%
NDS II	6.46	6.88	107%
NDS III	6.46	4.23	65%
Irrigation – I	6.46	1.15	18%
Irrigation – II	6.46	5.24	81%
LTIS - I	6.46	5.99	93%
LTIS – II	6.46	6.28	97%
PWW	6.46	7.85	122%
Str lits	6.46	6.44	100%
Strlits (Un MTRD)	6.46	7.21	112%
HTS I	6.46	6.86	106%
HTS II	6.46	6.93	107%
HTS III	6.46	6.05	94%
HTSS	6.46	5.49	85%
RTS	6.46	6.37	99%

Therefore, it is apparent that certain categories are much below the cross subsidy range ($\pm 20\%$) as provided under the National Tariff Policy. We agree with the petitioner on this issue and believe that cross subsidy should be in the range of $\pm 20\%$ for all categories of consumer.

It may also be pointed out that neither the Electricity Act, 2003 nor the National Tariff Policy prohibits cross-subsidy. On the contrary, the National Tariff Policy, 2006 empowers the State Government to decide the extent of subsidy for different categories of consumers keeping in view various relevant aspects.

35. This aspect of the matter has been dealt with by the learned Commission in para 8.22 and 8.23 of the impugned order. The State Commission has approved the tariff for various consumer categories considering gradual reduction in cross subsidy in line with the requirement of National Tariff Policy. The tariff, as per the above table, as a percentage of average cost is moving towards band of $\pm 20\%$ of average cost of supply as suggested in the National Tariff Policy. The Commission has made an attempt to determine the voltage-wise cost based on the limited data/information made available. The average tariff as a percentage of cost of supply approved in the tariff order for FY 2012-13 and the average tariff as a percentage of voltage-wise cost determined in chapter 9 for FY 2013-14 is as shown in the aforesaid table.

36. The tariff policy mandates that tariff should be within $\pm 20\%$ of the average cost of supply by FY 2010-11 and requires Commissions to lay down a road map for reduction of cross subsidy. However, the Commission while designing the retail tariffs for FY 2013-14 has taken into consideration the existing level of cross subsidies, the need to reduce cross subsidies as required under the Tariff Policy and the feasible pace at which it can be done without giving a tariff shock to subsidized consumers.

The Commission has accordingly modified tariffs for consumers categories whose existing tariffs are lower/higher than the average cost of supply so that the retail tariffs of all such consumer categories move closer to the band of $\pm 20\%$ of the average cost of supply. The Commission for this purpose has computed the average cost of supply on the basis of the revenue requirement allowed and the sale approved by the Commission for FY 2013-14.

The Commission has also determined the voltage-wise cost of supply as per the direction and guidelines provided by APTEL, for the first time and determined the revised tariff rates such that they are within $\pm 20\%$ of the voltage wise cost of supply as far as possible except for Kutir Jyoti,

rural and agricultural consumers for whom State Government tariff subsidy will be available.

We find that the average realization from the Appellant's category for FY 2013-14 is well within $\pm 20\%$ of the average cost of supply. In fact, certain categories of the industrial consumers have tariffs less than the average cost of supply. Further the State Commission has also determined voltage-wise cost of supply. The tariff in the Appellant's categories is also close to the cost of service and in some cases less than the cost of service. Thus, there is no reason for the Appellants to complain about the cross subsidy provided to Kutir Jyoti and Agriculture consumers for which the State Government has provided grant.

37. In view of the above discussion, we observe that the impugned order as regards this issue does not suffer from any illegality or perversity or infirmity and the findings recorded in the impugned order on this issue are also liable to be confirmed. There is no reason to deviate from the findings recorded by the State Commission in the impugned order while deciding this issue. This issue is also decided against the appellant.

38. **SUMMARY OF OUR FINDINGS**

1) **ISSUE NO. A**

That the State Commission has not erred in not carrying forward the surplus of Rs.950 crore found by it in the books of the erstwhile Bihar State Electricity Board and the appellant's submission that the State Commission ought to have taken Rs. 950 crore as a provisional surplus in the ARR for the licensees for the FY 2013-14, instead of completely ignoring it and artificially escalating the annual revenue requirements of the licensees is not legally sustainable. The State Commission has given reason for not carrying forward the surplus of Rs.950 crores which was based on the data for only 6 months of FY 2012-13 and not for the whole year and has

correctly decided that true-up when the audited accounts are available.

2) **ISSUE NO. B & C**

In the truing up for the year 2011-12 out of total Government Grant of Rs.2160 crores for FY 2011-12, the State Commission has rightly adjusted only Rs.1080 crores for reducing the ARR as per the earlier tariff order for FY 2011-12 after recording sufficient reasons considering its logic and basis and the same approach for the FYs 2012-13 and 2013-14 has been rightly adopted by the learned State Commission.

3) **ISSUE NO. D**

That the State Commission has rightly allowed the premium on consumers in notified areas on assurances that the licensees would supply electricity close to 24hours by defining continuous supply exclusive of a grid failure, any force majeure condition, scheduled shut down and emergent break-down beyond the control of the licensees. The Commission has rightly adopted this methodology under the provisions of Section 62(3) of the Electricity Act, 2003 considering the geographical position of the area of the State of Bihar.

4) **ISSUE NO. E**

That the State Commission has rightly allowed the licensees to charge the demand charges on 100% KVA for the high tension consumers and also prescribed Rs. 700/-per KVA additional charges.

5) **ISSUE NO. F**

That the State Commission has sincerely attempted to follow the National Tariff Policy and the judgments of this Appellate Tribunal while dealing with the cross-subsidies to the said categories as per the situation/circumstances mentioned in the impugned order. There is no reason for the Appellant Association about the tariffs to complain about the cross subsidy provided to Kutir Jyoti and Agriculture consumers for which State Government has provided grants especially as the tariffs of industrial categories is within $\pm 20\%$ of the cost of supply and also close to cost of service.

In view of the foregoing discussion, the appeal is dismissed as devoid of merits. However, there is no order as to costs.

Pronounced in open Court on this 11th day of March, 2014.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

√ REPORTABLE/NON-REPORTABLE

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