Before the Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 269 of 2014, Appeal No. 204 of 2014 & IA Nos. 320 of 2014, 309 of 2014 & 188 of 2015 and Appeal No. 216 of 2015 & IA No. 356 of 2015

Dated : 28th April, 2016

Present: HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER
HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

In the Matter of:

Appeal No. 269 of 2014

Open Access Users Association
A-49, 2nd Floor,
Dwarka Sector-8,
New Delhi – 110 077 **... Appellant(s)**

Versus

1. **Haryana Electricity Regulatory Commission**
   Through its Secretary
   Bays 33-36, Sector-4,
   Panchkula – 134 112

2. **Uttar Haryana Bijli Vitran Nigam Ltd.**
   Vidyut Sadan,
   Plot No. C16, Sector-6,
   Panchkula

3. **Dakshin Haryana Bijli Vitran Nigam Ltd.**
   Registered Office:
   Vidyut Sadan, Vidyut Nagar,
   Hisar – 125 005 **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Buddy A. Ranganadhan, Mr. Raunak Jain, Mr. D. V. Raghu Vamsy, Mr. Amit Kapur, Ms. Pallavi Mohan and Ms. Adrija Das

Counsel for the Respondent(s) : Mr. Varun Pathak, Mr. Samir Malik, Mr. G. Saikumar, Ms. Sowmya Sai Kumar and Mr. Raheel Kohli

204 of 2014 & IA Nos. 320 of 2014, 309 of 2014 and 188 of 2015

Hissar Industries Association
Through its President
3, Industrial Development Colony,

Hisar, Haryana **... Appellant(s)**

Versus

1. **Haryana Electricity Regulatory Commission**
   Bays 33-36, Sector 4,
   Panchkula,
   Haryana – 134 112

2. **Dakshin Haryana Bijli Vitran Nigam Ltd.**
   Vidyut Sadan,
   Vidyut Nagar, Hisar,
   Haryana – 125 005

3. **Uttar Haryana Bijli Vitran Nigam Ltd.**
   Vidyut Sadan,
   Plot No. C16, Sector-6,
   Panchkula, Haryana ... **Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur, Ms Pallavi Mohan, Ms. Adrija Das, Ms. Roohina Dua, Ms. Raveena Dhamija, Ms. Aachal Mullick, Advs.

Mr. R.K.Jain and Ms. Richa Sharma, Reps.

Counsel for the Respondent(s) : Mr. G. Saikumar, Ms. Sowmya Sai Kumar, Mr. Raheel Kohli, Mr. Varun Pathak, Mr. Sameer Mallik, Advs.

Mr. A.K.Rampal, Consultant, HERC

A.No. 216 of 2015 & IA No. 356 of 2015

Faridabad Industries Association
FIA House, Bata Chowk,
Faridabad,
District Faridabad – 121 001 **...Appellant(s)**

Versus

1) **Haryana Electricity Regulatory Commission**
   Bays No. 33-36, Sector-4,
   Panchkula-134 112
   Haryana – 134 112

2) **Uttar Haryana Bijli Vitran Nigam Ltd.**
   Shakti Bhawan, Sector-6,
   Panchkula – 134 109

3) **Dakshin Haryana Bijli Vitran Nigam Ltd.**

Vidyut Nagar,
Hissar – 125 005 **...Respondent(s)**

Counsel for the Appellant(s) : Mr. Raunak Jain

Counsel for the Respondent(s) : Mr. Varun Tankha, Mr. Arjun Nanda, Mr. Rahil Kohli, Mr. Samir Malik, Mr. Varun Pathak, Advs.

Mr. A.K.Rampal, Consultant, HERC

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUIDICIAL MEMBER

These three appeals, being Appeal Nos. 269 of 2014, 204 of 2014 and 216 of 2015, have emanated from a common tariff order dated 29.05.2014 (hereinafter referred to as the '***Impugned Order***') passed by the Haryana Electricity Regulatory Commission (hereinafter referred to as the '***State Commission***') in Case Nos.41 of 2013, 42 of 2013 and 43 of 2013 respectively on the Aggregate Revenue Requirement of Uttar Haryana Bijli Vitran Nigam Ltd. and Dakshin Haryana Bijli Vitran Nigam Ltd. (in short hereinafter referred to as '***UHBVNL' and 'DHBVNL'***) for their distribution and retail supply business under MYT framework in the control period FY 2014-15 to FY 2016-17 and the distribution retail supply tariff for FY 2014-15.

2) The appellant in each of these three appeals is aggrieved by the Impugned Order which has resulted in :

(a) Arbitrary increase in Cross Subsidy Surcharge of 149 paise per unit from 53 paise per unit in FY 2013-14 to 202 paise per unit in FY 2014-15.

(b) Unreasonable imposition of Additional Surcharge at 50 paise per unit on open access consumers.

(c) Ad hoc increase in Electricity tariff for Industrial Consumers by 50 paise per unit.

(d) Unjustifiable increase in Distribution Wheeling Charges by 4 paise per unit from 70 paise per unit to 74 paise.

(e) Additional burden on Open Access consumers creating trade barriers for Generators and Licensees outside the State of Haryana.

3) The appellant, Open Access Users Association, is an Association of industries situated in New Delhi having more than 35 member units, who are engaged in manufacturing of products ranging from motorcycle parts, air conditioners, special alloy steels casting, forgings, vacuum glass flasks, LPG, Textiles, Furnace, Automobile Parts, Tubes, Polymers, Pipes, Cements, Commercial entities Guar Gum manufacturers. The Member units of the Association are the consumers of the UHBVNL and DHBVNL and belong mainly to the High Tension Industrial (HT Industrial) category.

4) The other appellant, Hissar Industries Association, has 16 industrial units located in Hissar District and is an Association of Industries operating out of Hissar and these Members are HT Industrial consumers and are procuring power through open access from outside the State of Haryana. One respondent is Haryana Commission, which is empowered to exercise various functions under various provisions of the Electricity Act, 2003. The respondents UHBVNL and DHBVNL are the two State Government owned distribution licensees and are engaged in the business of distribution and retail supply of electricity in the North Zone and South Zone of Haryana.

5) One more appellant is Faridabad Industries Association comprising of member industries situated in Faridabad in the State of Haryana, having more than 500 member Units that are engaged in the manufacturing of various products and these members are High Tension Industrial (HT Industrial) consumers of the distribution licensees.

6) Assailing the Impugned Order, the following aspects in the approval of ARR and tariffs for both the distribution licensees namely, UHBVNL and DHBVNL, are sought to be set aside by the appellant in these instant appeals:

a) Approval of Depreciation on the basis of Gross Fixed Assets (GFA) without consideration of approved closing GFA of FY 2013-14.

b) Approval of higher Employee Expenses as compared to allowable Employee Expenses according to Tariff Regulations, 2012.

c) Approval of higher Repair and Maintenance Expenses as compared to allowable Repair and Maintenance Expenses according to Tariff Regulations, 2012.

d) Approval of higher A&G Expenses as compared to allowable A&G Expenses according to Tariff Regulations, 2012.

e) Approval of higher interest on working capital as compared to allowable interest on Working Capital according to Tariff Regulations, 2012.

f) Approval of truing up of selected components of ARR for FY 2012-13 without undertaking prudence check.

g) Approval of erroneously computed ARR for DHBVNL for FY 2015-16 and FY 2016-17 even based on the approved expenses by the Learned Haryana Commission itself.

h) Applicability of revised tariffs and CSS with retrospective effect from April 1, 2014.

i) Approval of erroneously computed Average Cost of Supply, Average Billing Rate and cross-subsidy.

j) Approval of tremendous increase in CSS of upto 281% as compared to CSS for FY 2013-14.

k) Approval of newly introduced Additional Surcharge of Rs.0.50/kWh.

7) According to the appellants, the Impugned Order has the following adverse impacts:

a) The Learned State Commission significantly increased the tariff of the various consumer categories. The average tariff of HT Industrial Category is increased from Rs.6.59/Unit to Rs.7.28/Unit.

b) The Learned State Commission has approved CSS of Rs.2.02/kWh for HT Industrial Open Access consumers and has introduced Additional Surcharge of Rs.0.50/kWh for all the Open Access Consumers and as a result, closed the door of open Access for the HT Industrial consumers.

c) With issuance of the Impugned Order, the Learned State Commission has severely victimised the HT Industrial Consumer. On one hand, the Learned State Commission has significantly increased the tariffs and on the other hand, the CSS and Additional surcharge has been increased to such an extent that

the procurement of power by means of Open Access has become unviable for these consumers. As a result, the Power purchase cost of the HT Industrial consumers has become extremely high and many consumers are facing a possible shut-down of their business.

8) We have heard Mr. Buddy A. Ranganadhan, Mr. Amit Kapur and Mr. Raunak Jain learned counsel for the appellant(s) and Mr. Varun Pathak, Mr. Samir Malik, Mr.G.Saikumar, Mr. Varun Tankha, Mr. Arjun Nanda and Mr. Rahil Kohli, learned counsels for the respondents. We have also gone through the written submissions submitted by rival parties and also gone through the material on record including the Impugned Order passed by the State Commission.

9) The following issues arise for our consideration in the aforesaid three appeals, relating to distribution and retail supply tariff of both the distribution licensees:

a) Erroneous approval of depreciation.
b) Erroneous computation of employee expense.
c) Erroneous computation of Repair and Maintenance expense (***R&M***).
d) Erroneous computation of Administrative and General expense (***A&G***).
e) Erroneous computation of Interest on working capital.
f) Erroneous computation of truing up for FY 2012-13.
g) Erroneous approval of ARR.
h) Erroneous computation of Average cost of supply, average billing rate and cross subsidy.
i) Retrospective applicability of distribution and retail supply tariff.
j) Cross subsidy surcharge and
k) Additional surcharge.

10) **Issue No.(a)** – relating to erroneous approval of depreciation:

10.1) That the learned Commission has approved the expenses for both the distribution licensees for three years of the control period based on the opening Gross Fixed Assets (***GFA***) at depreciation rate specified in the Haryana Electricity Regulatory Commission (MYT Regulations) 2012 (hereinafter referred to as the '***Tariff Regulations 2012***')

10.2) That the opening GFA of the utilities (DISCOMs) for the FY 2014-15 considered by the State Commission for computation of depreciation is not equal to the approved closing GFA of FY 2013-14. The closing GFA of both UHBVNL and DHBVNL, the distribution licensees, for the FY 2013-14 approved by State Commission in the order dated 30.03.2013 are Rs.6,182.092 Cr and Rs.5,439.941 Crores, respectively. However, in the Impugned Order, the State Commission has considered opening GFA for the FY 2014-15 for UHBVNL and DHBVNL as Rs.6,130.87 Cr and Rs.5,962.71 Cr respectively, which is clearly an error by the State Commission.

10.3) That the revised computation of depreciation for UHBVNL and DHBVNL by considering the opening GFA of FY 2014-15 is same as the closing GFA approved for the FY 2013-14.

10.4) That the State Commission has erroneously approved combined depreciation expense of Rs.522.43 Crores, Rs.628.64 Cr and Rs.732.37 Cr for the FY 2014-15, 2015-16 and 2016-17, respectively, as compared to the correct values of Rs.497.92 Crores, Rs.569.58 Cr and Rs.645.30 Cr for respective years. Thus the State Commission has erroneously approved higher depreciation expense to the extent of Rs.24.51 Cr, Rs.59.06 Cr and Rs.87.07 Cr for the FY 2014-15, 2015-16 and 2016-17, respectively which needs to be disallowed.

10.5) That the DISCOMs in their reply have stated that :

a) The closing balance of RY 2013-14 (in terms of the Order dated 30.03.2013) was based on simply normative assumptions; and
b) The actual closing balance (after finalizing annual accounts for FY 2013- 14) has been treated through as per Regulation 13 (Truing Up) of the 2012 Tariff Regulations.
c) Hence the closing balance of FY 2013-14 has been "computed" on the above basis.

10.6) That the reply of the DISCOMs is unsustainable for the reason that the Impugned Order makes it clear that truing up has been done for the FY 2012-13 and not for FY

2013-14 and if no truing up has been carried out in the Impugned Order for FY 2013-14, there could not have been any modifications of the figures for FY 2013-14.

10.7) That the respondent, Commission should be directed to approve the depreciation expense considering the opening GFA for FY 2014-15 same as the closing GFA of FY 2013-14

11) **Per contra**, Mr. G. Sai Kumar, learned counsel appearing for the DISCOMs, has contended as under, on the issue of depreciation:

11.1) That the contention of the appellants is that the State Commission has erroneously approved higher depreciation expense to the extent of Rs.24.51 Crore, Rs.59.06 Crore and Rs.87.07 Crore for FY 2014-15, FY 2015-16 and 2016-17, respectively. This contention is on wrong basis just as the closing GFA of the DISCOMs for the FY 2013-14 approved by the State Commission in its order dated 30.03.2013 was Rs.6,182.092 Crores, Rs.5,439.941 Crores, which was merely based on approved projection for DISCOMs capital addition and capitalization for the FY 2013-14 by the State Commission. These projections were based on actual annual accounts for the FY 2011-12 and DISCOMS estimated figures for the FY 2012-13 and were submitted for consideration to the State Commission vide letter dated 29.11.2012. The depreciation for FY 2014-15 to 2016-17 has been estimated based on the audited accounts of the DISCOMs for the FY 2012-13. The opening balance at the beginning of the year 2013-14 has been taken based on the actual audited closing balance of FY 2012-13. Further, for computation of closing balance of FY 2013-14, addition of assets during the year was worked out based on the Capital Work In Progress (***CWIP***) and capitalization of 70% of the estimated capital expenditures for the FY 2013-14. Correspondingly, retirement of GFA has been worked out based on average of retired GFA in the last two years.

11.2) That it is clarified that the closing balance approved by the State Commission for FY 2013-14, vide order dated 30.03.2013, was based on simply normative assumptions and the deviations in approved and actual closing balance (after finalizing annual accounts of FY 2013-14) has been treated through as per Regulation 13 (Truing Up) of the HERC (Terms and Conditions for Determination of Tariff for Distribution & Retail

Supply under Multi Year Tariff Framework) Regulations, 2012 ('***MYT Regulations***'). The closing balance at the end of FY 2013-14 has been computed to be Rs.5,962.71 Cr For DHBVNL and Rs.6,640.39 Cr for UHBVNL and the same have been taken as opening GFA for the FY 2014-15 by the State Commission for MYT calculations.

11.3) The appellant has considered normative closing balance approved by the State Commission for FY 2013-14, vide order dated 30.03.2013 for the calculation of depreciation for FY 2014-15 and thereafter for control period also. Such an approach is not in accordance with the MYT Tariff Principles and Tariff Methodology.

12) **Our consideration and conclusion on Issue No.(a)** – relating to depreciation:
Having cited the rival contentions of the parties, we directly proceed towards our conclusion on this issue:

12.1) We have deeply considered this contention of the appellant that the State Commission has wrongly approved higher depreciation expense to the extent of Rs.24.51 Cr, Rs.59.06 Cr and Rs.87.07 Cr for FY 2014-15, 2015-16 and 2016-17 respectively. According to the State Commission, the closing GFA of DISCOMs for the FY 2013-14 approved by the State Commission in its order dated 30.03.2013 was Rs.6,182.092 Cr And Rs.5,439.941 Cr which was merely based on the approved projection of DISCOMs capital addition and capitalization for FY 2013-14 by the State Commission. We find that these projections were based on actual annual accounts for the FY 2011-12 and the DISCOMs estimated figures for the FY 2012-13 and were submitted for consideration to the State Commission, vide letter dated 29.11.2012. Further, the depreciation of FY 2014-15 to 2016-17 as was estimated based on the audited accounts of DISCOMs for the FY 2012-13 the opening balance of the beginning of the year 2013-14 had been taken based on the actual audited closing balance for the FY 2012-13. We further find that for computation of closing balance for the FY 2013-14, addition of assets during the year was worked out based on the capital work in progress and capitalization of 70% of the estimated capital expenditure for FY 2013-14. Consequently, the retirement of GFA had been worked out based on the average of retired GFA of last two years. We further find from the record that the closing balance approved by the State Commission for FY 2013-14 in its order dated 30.03.2013, was based on simply normative assumptions and deviations in approved

and actual closing balance (after finalization of annual accounts of FY 2013-14) had been treated as per Regulation 13 (Truing UP) of the MYT Regulations 2012). We have perused the table given in the Impugned Order on this issue and find that the closing balance at the end of FY 2013-14 had been computed to be Rs.5,962.71 Cr For DHBVNL and Rs.6,640.39 Cr For UHBVNL and the same has been taken as opening GFA for the FY 2014-15 by the State Commission for MYT calculations. After careful analysis of the counter submissions as well as record, we feel that the appellant in these appeals, considered normative closing balance approved by the State Commission for the FY 2013-14 as mentioned in the order dated 30.03.2013 for the calculation of depreciation for the FY 2014-15 and thereafter for control period also. This approach of the appellant is not in accordance with MYT Tariff Principles and Tariff Methodology. We find no force in the contentions of the appellants on this issue relating to erroneous approval of depreciation. The State Commission has rightly approved the said depreciation to which we also agree. This issue is decided against the appellant of these three appeals.

13) **Issue No.(b),** relating to erroneous computation of employee expense: On this issue, following are the contentions raised by the appellant(s):

13.1) That the Commission directed the DISCOMs not to make any new recruitment including any recruitment against sanctioned posts unless specifically approved by the State Commission. The licensees have further been directed to outsource as many services as could be done without compromising on the quality of service. The Commission's clear observation is that senior technical services may not be outsourced but it is important to bring down the employee cost and improve efficiency in the working of the organization. The distribution licensees should endeavour to outsource additional services and link the rewards to efficiency parameters so that both the targets are met and try to implement franchise model in distribution management. All these directions made in the Impugned Order by the State Commission are inappropriate and unreasonable. By giving these directions in the Impugned order, the State Commission has reiterated the directions given in the FY 2012-13.

13.2) That the learned State Commission has approved employee expenses of Rs.511.03 Cr, Rs.558.06 Cr and Rs.609.43 Cr for UHBVNL and Rs.495.39 Cr, Rs.540.99 Cr And Rs.590.78 Cr for DHBVNL for FY 2014-15, FY 2015-16 and FY 2016-17, respectively.

13.3) That in the Impugned Order, the State Commission has stated that it has computed the employee expense in accordance with the Tariff Regulations 2012. However, the State Commission has deviated from the Tariff Regulations, 2012, and has not computed the employee expenses in accordance with the Tariff Regulations, 2012.

13.4) That Regulation 57.3 of the Tariff Regulations 2012 specifies the computation of O&M expenses, according to which regulation *the actual audited O&M expenses for the financial year preceding the base year, subject to prudence check, shall be escalated at the escalation factor of 4% to arrive at the O&M expenses for the base year of the control period.* However, the State Commission has merely considered the actual audited expenses of FY 2012-13 for its computations, without undertaking any prudence check and entire actual audited expenses have been considered for computations which lead to an incorrect computation of employee expenses for the control period.

13.5) That while computing the employee expenses, the State Commission has considered Indexation Factor as 9.21%. However, the State Commission has not shown the computation of the Indexation Factor. The appellant has attempted to compute the Indexation Factor according to the Tariff Regulations 2012 and according to Regulation 57.3 of the Tariff Regulations, 2012, the Inflation Factor of year 'n' is to be computed by using the CPI and WPI of the immediately preceding year by using the formula given therein. According to the Regulation 57.3 of the Tariff Regulations 2012, the correct Indexation Factor for O&M expenses is 8.24%. The employee expenses (excluding the Terminal Benefits) for the control period should be recomputed by using the correct Indexation Factor of 8.24%.

13.6) That the allowable employee expenses for the control period are lower than those approved by the State Commission. If the prudence check is carried out as required under the Tariff Regulations, 2012, the allowable employee expenses are likely to be even lower which is clearly an error apparent on the part of the State Commission. The State Commission has considered the efficiency factor (Xn) as nil and has not

given any justification in the Impugned Order for doing so. The State Commission has merely stated in the Impugned Order that *the Commission has determined the O&M expenses of UHBVNL and DHBVNL without considering the impact of efficiency factor as requested by the DISCOMs i.e. the value of Xn has been taken as nil.*

13.7) That the State Commission has not given any justification for accepting the request of the DISCOMs in this regard and it should have arrived at a reasoned decision in this regard.

13.8) That the efficiency factor as specified in the Tariff Regulations, 2012, should have been applied by the State Commission while computing the employee expenses and in not doing so it has committed illegality in the said computation of employee expenses.

13.9) That the Regulation 3.9 of the Tariff Regulations 2012 defines "'base year", *"base year" means the financial year immediately preceding the first year of the Control Period and used for the purposes of these regulations"*. Hence, for MYT Control Period of FY 2014-15 to 2016-17, the base year as per Regulations 2012, will be FY 2013-14. Hence, it was not open to the DISCOMs to rely on the figures of FY 2012-13 nor was it open to the State Commission to accept such figures.

13.10) That the Commission has wrongly calculated employee expenses without carrying out any prudence check and Impugned Order clearly shows that there was no exercise of prudence check.

14) **Per contra**, the following contentions have been made on behalf of the DISCOMs:

14.1) That the appellants' contention that the employee expenses have not been allowed by the State Commission in accordance with the MYT Regulations 2012, this contention is not correct. As per the notified MYT Regulations, the State Commission has approved the employee cost for the control period for FY 2014-15 to FY 2016-17. The State Commission has considered the actual audited expenses of FY 2012-13 after proper screening and prudence check for approving the employee cost. Hence, calculations by the State Commission are quite correct. In the MYT petition filed on behalf of the DISCOMs, the projected employee expenses for the control period (FY 2014-15 to FY 2016-17) were based on the methodology specified by the State

Commission. At the time of MYT Tariff petition submission, the latest Consumer Price Index (CPI) and Wholesale Price Index (WPI) were available for FY 2011-12 and FY 2012-13 along with a few months of FY 2013-14. Hence, to get inflation index, the inflation data of FY 2011-12 and FY 2012-13 had been utilized for computation of inflation factor, which comes out to be 9.21%.

14.2) That the actual employee cost of FY 2012-13 based on audited account was escalated 4% to arrive at the estimated cost for the base year i.e. FY 2013-14. Further, 9.21% inflation which was computed based on latest available CPI and WPI data for the projection of employee cost for the said control period of FY 2014-15 to FY 2016-17. However, as per the submission of the appellant the State Commission has considered the inflation factor based on CPI and WPI data of FY 2012-13 and 2013-14, which arrives at 8.24%.

14.3) That data for FY 2013-14 could not be put on the records for calculation proposed by distribution licensees, as MYT petition was filed in mid of FY 2013-14 i.e. on December 2013. Hence, the DISCOMs utilized data of FY 2011-12 and FY 2012-13 at the time of MYT filing and the State Commission also approved the same, while the appellant had utilized the latest data available with them at the time of filing the instant appeal The inflation factor approved by the State Commission i.e. 9.21% is as per the MYT guidelines. Further, the difference in actual and State Commission approved employee cost has been treated as per Regulation 13 of the MYT Regulations.

14.4) That the State Commission has considered the efficiency factor (Xn) as nil at the humble request of the DISCOMs.

14.5) That the DISCOMs had their request to the State Commission under Clauses 79 & 83 (Power to Relax and Power to Amend) of MYT Regulations on the following basis:

i) The concept of efficiency factor is an international concept and is a relatively new concept which is yet to be utilized to its full extent in the Indian power sector. It is a known fact that there are various issues pertaining to data availability uncertainties in sales project, issues in power purchase availability, volatility in fuel prices, irregularity in tariff filings, deferred recoveries, dynamic

statutory levies, etc. and all these are uncontrollable factors for the distribution licensee.

ii) That the DISCOMs have time and again been putting its efforts to perform better and live up to the expectations of the consumer and the Commission.

14.6) That the State Commission addressed the licensee's submission under Clauses 79 & 83 of the MYT Regulations and considered efficiency factor as nil as of now. However, further Commission added that the efficiency factor would be calculated for FY 2015-16 and 2016-17 based on the actual expenses incurred in FY 2012-13 and FY 2013-14 along with applicable and relevant facts. Hence, admittance of efficiency factor as nil is justified and is in accordance with the MYT Regulations.

15. **Our consideration and conclusion on Issue No.(b)** relating to computation of employee expenses:

15.1) After going through rival contentions detailed above, we find no substance or merit in the contentions of the appellant. It appears from perusal of the record that employee expenses have been allowed by the State Commission vide Impugned Order in accordance with the MYT Regulations 2012. As per notified MYT Regulations 2012 the State Commission has approved the employee cost for the control period of FY 2014-15to FY 2016-17. The State Commission has considered the actual audited expenses of FY 2012-13 after proper screening and prudence check for approving the employee cost hence, the calculations by the State Commission appear to be correct to us on this aspect. In the MYT petitions of the DISCOMs, the projected employee expenses for the relevant control period were based on the methodology specified by the State Commission. Since at the time of MYT Tariff Petitions the latest CPI and WPI were available for FY 2011-12 and FY 2012-13 along with a few months of FY 2013-14, hence, to get inflation index, the indexation data for FY 2011-12 and FY 2012-13 had been utilized for computation of inflation factor which comes to be 9.21%. We may further note that the Commission has in a table given a method to arrive at the said figure of 9.21%.

15.2) We further find that the actual employee expense of FY 2012-13 based on audited accounts was escalated 4% to arrive at the estimated cost for the base year i.e. 2013-14. Further, 9.21% inflation which was computed on the latest available CPI and WPI

data for the projection of employee cost for control period FY 2014-15 and FY 2016-17. The appellants have cited a table in their written submission showing computation of inflation index to arrive at 8.24%. The data for FY 2013-14 could not be put on records for calculation purpose by DISCOMs because the MYT Tariff Petitions were filed in December, 2013, namely in the mid of FY 2013-14. Hence, the DISCOMs had correctly utilized the data of FY 2011-12 and FY 2012-13 at the time of MYT filing and the State Commission correctly approved the same. The appellant has utilized the latest data available with them at the time of filing the instant appeal which is not permissible at the appellate stage. We further note that since the licensees has submitted their request to the State Commission requesting exercise of power under Clauses 79 & 83 relating to Power to Relax and Power to Amend, of the MYT Regulations, the State Commission, by applying this judicial and judicious approach, had exercised the said power in favour of the DISCOMs. We find that the Commission has rightly exercised the said powers and there is no perversity in the approach of the State Commission. The State Commission, while exercising the said power to Relax and Amend, has rightly considered the efficiency factor as nil as of now and the State Commission has further added that the efficiency factor would be calculated for the FY 2015-16 and FY 2016-17 based on the actual expenses incurred in FY 2012-13 and FY 2013-14, along with applicable and relevant facts. Hence, we find the admittance of efficiency factor as nil is justified in view of the above discussions and thus this issue relating to computation of employee expenses is decided against the appellants.

16) **Issue No.(c),** relating to erroneous computation of Repair and Maintenance (R&M) expenses. On this issue the contentions of the appellants are as under:

16.1) That the State Commission has approved R&M expenses of Rs.115.53 Cr, Rs.126.34 Cr and Rs.134.00 Cr for UHBVNL and Rs.106.73 Cr, Rs.131.85 Cr And Rs.152.99 Cr For DHBVNL for FY 2014-15, FY 2015-16 and FY 2016-17, respectively. The State Commission has not shown the computation for arriving at these approved numbers.

16.2) That the appellants have computed the revised R&M expenses allowable for the control period in accordance with the Regulation 57.3 of the Tariff Regulations 2012 considering the Indexation Factor of 8.24% by giving the computation table in the written submission.

16.3) That the approved opening GFA of the DISCOMs in the Impugned Order is not the same as the closing GFA approved by the State Commission for FY 2013-14 in the Tariff Order dated 30.03.2013 which appears to be a clear mistake on the part of the State Commission. If the opening values of GFA are considered same as for FY 2013-14, there is a reduction in the R&M expenses allowable in the control period.

16.4) That the revised allowable R&M expenses for the control period are lower than those approved in the Impugned Order. The State Commission has not given any justification in considering the efficiency factor (Xn) as nil.

17) **Per contra**, the DISCOMs have argued as under:

17.1) That the closing GFA of DISCOMs for FY 2013-14 approved by the State Commission in order dated 30.03.2013 was merely based on approved projection for DISCOMs capital addition and capitalization for FY 2013-14 and these projections were based on actual annual accounts for FY 2011-12 and DISCOMs estimated figures for FY 2012-13 were submitted for consideration before the State Commission vide letter dated 29.11.2012.

17.2) That the R&M expenses for the control period have been estimated based on the audited accounts of the DISCOMs for FY 2012-13. The opening balance at the beginning of the year 2013-14 has been taken based on the actual audited closing balance of the FY 2012-13. Further, for computation of closing balance of FY 2013-14, addition of assets during the year was worked out on the capital work in progress and capitalization of 70% of the estimated capital expenditures for FY 2013-14. Correspondingly, retirement of GFA has been worked out based on average of retired GFA in last two years.

17.3) That the closing balance approved by the State Commission for FY 2013-14 was based on simple normative assumption and deviation in method and actual closing balance (after finalizing annual accounts of FY 2013-14) would have been treated through as per Regulation 13 of Tariff Regulations 2012. The appellants are wrongly considering normative closing balance approved by the State Commission for FY 2013-14, as

mentioned in order dated 30.03.2013 for the calculation of depreciation for FY 2014-15 and thereafter for control period also. The said consideration by the appellant is nowhere in line with the MYT Tariff Principles and Tariff Methodology. At the time of MYT Tariff petition submission the latest CPI and WPI was available for FY 2011-12 and FY 2012-13 along with a few months of FY 2013-14. Hence, to get inflation index, the inflation data for FY 2011-12 and FY 2012-13 had been utilized for computation of inflation factor, which comes to 9.21%.

18) **Our consideration and conclusion on Issue No.(c)**:

Since we have cited in detail the rival contentions of the parties during our discussion of Issue No.(a), (b) and also in (c), we do not find any merit in the contentions of the appellant and we find merit in the contentions of the DISCOMs, respondents herein. We have given detailed reasons and analyzed the said reasons during our conclusion on Issue Nos.(a) and (b). Without feeling any need to repeat the same discussion and analysis here, relying upon the same discussion and analysis we do not find any perversity or illegality in the approach of the State Commission on this issue relating to computation of R&M expenses. The said computations have been properly and legally made by the State Commission and the same is in line with the MYT Regulations, 2012. Thus Issue No.(c) is also decided against the appellants.

19) **Issue No.(d),** relating to erroneous computation of A&G expenses: On this issue, following are the contentions of the appellants:

19.1) The main contention of the appellants on this issue is that no computation has been given in the Impugned Order as to how the figures have been arrived at and no prudence check has been applied by the State Commission while deciding this issue.

19.2) That the State Commission has approved the A&G expenses of Rs.72.70 Cr, Rs.79.39 Cr And Rs.86.70 Cr For UHBVNL and Rs.59.75 Cr Rs.65.25 Cr And Rs.71.26 Cr For DHBVNL for FY 2014-15, FY 2015-16 and FY 2016-17, respectively. The State Commission has not shown the computation for arriving at these approved numbers in the Impugned Order.

19.3) That in accordance with Regulation 57.3, the appellants have computed the revised A&G expenses for the control period, considering the Indexation Factor of 8.24% by giving the calculation in a tabular form in their written submissions.

19.4) That as per computation of the appellants, in a table given by them, the allowable A&G expenses for the control period would be lower than those approved by the State Commission and that too without applying any prudence check.

19.5) That the State Commission has considered efficiency factor (Xn) as nil and has not given any justification thereof in the Impugned Order.

19.6) That the State Commission has to adhere to the Tariff Regulations 2012, while computing the A&G expenses, which the State Commission has failed to do in the Impugned Order.

20) **Per contra**, the DISCOMs contended as under:

20.1) That the appellants' contention that A&G expenses have been erroneously allowed by the State Commission is wrong and incorrect because as per Paragraph 3.1.26 of MYT Tariff Order dated 29.05.2014, the State Commission has approved the A&G expenses after escalating the A&G expenses by 4% that of the base year and by applying the Indexation factor for the control year, the same as proposed by the DISCOMs. The State Commission has after proper and correct screening and computation approved the A&G expenses on the basis of the latest CPI and WPI available only for FY 2011-12 and FY 2012-13 with few months of FY 2013-14 at the time of MYT Tariff Petitions submissions. Hence, to get inflation index, the inflation data of FY 2011-12 and FY 2012-13 had been utilised for computation of inflation factor by the State Commission which comes out to be 9.21%.

20.2) That the actual A&G cost of FY 2012-13 based on the audited accounts was escalated 4% to arrive at the estimated cost for the base year i.e. FY 2013-14. Further, 9.21% inflation which was computed based on latest available CPI and WPI data for the projection of employee cost for control period 2014-15 to FY 2016-17.

20.3) That the data of FY 2013-14 could not be put on the records for calculation purpose by DISCOMs as the MYT Tariff petition was filed in December, 2013, namely in the mid of FY 2013-14. Hence, the DISCOMs utilized the data of FY 2011-12 and FY 2012-13 at the time of MYT petition and the State Commission approved the same.

21) **Our consideration and conclusion on issue No.(d)**, relating to erroneous computation of A&G expenses:

Most of the arguments of the rival parties are repeatedly the same which we have cited above, during the discussion on Issue Nos. (a), (b) and (c). Without feeling any need to repeat the same, we come to the conclusion that the State Commission has computed the A&G expenses in a proper and correct way and the same is in line with the MYT Tariff Regulations 2012. There appears to be no perversity or illegality in the approach of the State Commission while passing the Impugned Order. We further find that the State Commission has rightly exercised the Power to Relax and Power to Amend in the instant cases and we do not find any fault with the said exercises of discretion by the State Commission in favour of the DISCOMs. This issue is decided against the appellants.

22) **Issue No.(e),** relating to erroneous computation of interest on working capital: The appellants have contended as under:

22.1) That the State Commission has approved interest on working capital as Rs.179.24 Cr, Rs.173.63 Cr and Rs.184.92 Cr for UHBVNL, and Rs.137.08 Cr, Rs.146.40 Cr And Rs.147.32 Cr for DHBVNL for FY 2014-15, FY 2015-16 and FY 2016-17, respectively.

22.2) That while computing the interest on working capital, the State Commission has considered working capital requirement of Rs.1,493.70 Cr, Rs.1,446.92 Cr and Rs.1,540.99 Cr for UHBVNL, and Rs.1,142.37 Cr Rs.1,219.96 Cr and Rs.1,227.70 Cr For DHBVNL, for FY 2014-15, FY 2015-16 and FY 2016-17, respectively and has applied 12% interest rate on the same. The State Commission has stated that it has arrived at such values of working capital as per the Regulation 22 of the Tariff Regulations, 2012. However, the State Commission has not shown the computation for arriving at such numbers of working capital based on the Tariff Regulations, 2012.

22.3) The appellants have given their own calculation table regarding revised interest on working capital for FY 2013-14 and FY 2016-17 allegedly prepared in accordance with the Tariff Regulations, 2012.

22.4) That the working capital and interest on working capital, as per Tariff Regulations would be significantly lower than those approved by the State Commission for the control period.

23) **Per contra**, the DISCOMs have argued as under:

23.1) That the findings or calculations provided by the State Commission cannot be interfered with in an appeal unless the calculation provided appear to be illegal or incorrect. The State Commission following the MYT Regulations 2012 has calculated the working capital and interest on working capital as per the Tariff Regulations, 2012. The calculation table prepared by the State Commission on this issue makes it evident that the State Commission has followed the MYT Regulations for calculation of interest on working capital for both the utilities. Advance consumer deposit received from the consumers, has been deducted in order to evaluate the net working capital requirements and the interest rate of 12% over the same has been calculated to get the interest on working capital.

24) **Our consideration and conclusion on Issue No.(e),** relating to erroneous computation of interest on working capital:

Having cited and deeply considering the rival submissions on this Issue, we do not find any merit in the contentions of the appellants. The State Commission appears to have legally and properly computed the interest on working capital. The State Commission by preparing a table has given the correct calculation to which we agree. This issue is also decided against the appellants.

25) **Issue No.(f) and (g),** relating to erroneous computation of truing up for FY 2012-13 and erroneous approval of ARR. Since these two issues are interconnected, we are taking them together. The appellants have contended as under:

25.1) That there is no whisper on the application of the prudence check on this entire claim and no discussion has been made to arrive at the approved figures, while dealing with truing up expenses for the FY 2012-13.

25.2) That the State Commission has approved true up deficit amount of Rs.191.55 Cr and true up surplus of Rs. 66 Cr for UHBVNL and DHBVNL, respectively for FY 2012-13 as sought by the DISCOMs.

25.3) That the State Commission has not trued up the expenses in the true sense, since it has not undertaken any prudence check of the expenses. The State Commission has only accepted the audited expenses without any prudence check which cannot be said to be in accordance with the Tariff Regulations 2012.

25.4) That the settled law on the point is that any expenses incurred by the utility need not be allowed to be recovered through tariff merely on the ground that the same is an 'audited' expense, and the Regulatory Commissions are required to verify the 'prudence check' of the same.

25.5) That the State Commission has not trued up the power purchase interest, interest expenses, non-tariff income, as well as the revenue from sale of electricity, which has led to a situation where selective truing up of only certain expenses have been carried out while ignoring the bulk of the ARR and revenue.

25.6) That the State Commission has approved net ARR of Rs.10,955.94 Cr, Rs.11,455.90 Cr And Rs.12,456.47 Cr for UHBVNL, and Rs.11,077.84 Cr, Rs.12,481.51 Cr and Rs.13,283.58 Cr for DHBVNL for FY 2014-15, FY 2015-16 and FY 2016-17, respectively.

25.7) That the State Commission has made an apparent error on the face of the record in the computation of the ARR of DHBVNL for FY 2015-16 and FY 2016-17. The State Commission has erred while summing up all the elements of the ARR of DHBVNL for FY 2015-16 and FY 2016-17, if all the individual components of the ARR are considered as approved by the State Commission in the Impugned Order, the ARR for

DHBVNL works out to Rs.11,929.78 Cr and Rs.12,678.41 Cr for FY 2015-16 and FY 2016-17, respectively, as against Rs.12,481.51 Cr and Rs.13,283.58 Cr Approved by the State Commission in the Impugned Order. The State Commission has thus, approved an unjustified amount of Rs.551.73 Cr and Rs.605.17 Cr for FY 2015-16 and FY 2016-17, respectively.

25.8) The appellants have re-computed the ARR on their own estimates by citing a table in their written submission which tables have been cited even during other issues namely, depreciation, O&M expenses and interest on working capital.

26) **Per contra**, the DISCOMs have argued as under:

26.1) That the various calculations done by the appellants to arrive at net ARR for Control Period is merely based on their random assumptions which is not in line with the notified MYT Regulations, 2012.

26.2) That the State Commission has reproduced the summary of approved ARR for the control period on the basis of MYT Regulations 2012 in a table. The State Commission has done a complete true up of expenses and the submission of the appellant that there has been a selective true up is completely erroneous.

26.3) That the ARR has been correctly approved by the State Commission and the underlying assumption of the appellants are clearly erroneous being without any basis.

27) **Our consideration and conclusion on Issue Nos. (f) & (g)**:

Having cited and considered the aforesaid counter submissions of the parties, we do not find any force in the contentions of the appellants on these issues. The State Commission after a detailed analysis and by preparing tables has correctly trued up expenses for FY 2012-13 and has correctly approved the ARR. No calculation in the true up or in ARR can be allowed at the appellate stage just at the instance of the appellants that the appellants have given estimates in a table to arrive at their own conclusion based on their own assumptions. What is required in law from the appellate court is that it is to see and check the findings and calculations made by the appropriate Commission while analyzing and conclusion of the same. We do not find

any defect in the procedure and approach made by the State Commission regarding these issues. Consequently, both these issues relating to true up for FY 2012-13 and approval of ARR are decided against the appellants.

28) **Issue No.(h)-** relating to erroneous computation of average cost of supply, average billing rate and cross subsidy. On this issue following are the contentions of the appellants:

28.1) That the learned State Commission has considered the Average Cost of Supply (***ACOS***) for both the DISCOMs as Rs.6.64/kWh. The State Commission, in the Impugned Order, has determined category-wise tariff on the basis of ACOS. Hence, for the computation of category-wise tariffs, the State Commission has considered Rs.6.64/kWh as ACOS for the DISCOMs. However, the State Commission has not shown the computation of ACOS of the DISCOMs in the Impugned order based on the total approved ARR of Rs.22,033.78 Cr and approved energy sales of 35189 MU for the DISCOMs for FY 2014-15 by the State Commission itself, the ACOS comes out to Rs.6.26/kWh as against Rs.6.64/kWh, which is a clear error on the part of the State Commission.

28.2) That the State Commission has computed the category-wise tariffs on such erroneous value of ACOS, it follows there from that the category-wise tariffs approved by the State Commission are also erroneous, since the tariffs are designed with reference to the ACOS, to stay within the band of $\pm$ 20%.

28.3) That according to the State Commission the Average Billing Rate (***ABR***) for the HT Industrial Consumers is Rs.7.28/kWh. The State Commission has computed the cross subsidy and cross subsidy surcharge accordingly. The State Commission has maintained complete lack of transparency in computation of category-wise tariffs.

28.4) That the State Commission has applied cross subsidy of 9.64% (though stated as 8% in the Impugned Order) for the HT Industrial consumers by purportedly approving ABR of Rs.7.28/kWh on the erroneously computed ACOS of Rs.6.64/kWh. On the basis of same cross subsidy of 9.64% applied on the ACOS of Rs.6.26/kWh derived based on the approved ARR and sales in the Impugned Order, the ABR works out to

Rs.6.86/kWh, i.e. the tariff for HT Industrial category could have been lower by 42paise/kWh and the cross subsidy surcharge could have also been computed lower, even if the incorrect approach followed by the State Commission were adopted.

28.5) That as per submissions and calculations made by the appellants, the ARR of the DISCOMs for FY 2014-15 should be Rs.21,931.29 Cr instead of Rs.22,033.78 Cr approved by the State Commission. Based on such legitimate value of ARR, and sales approved by the State Commission, the ACOS for the DISCOMs for FY 2014-15 is Rs.6.23/kWh. Based on such ACOS and cross subsidy of 9.64% for the HT Industrial consumers, the ABR should be Rs.6.83/kWh as against Rs.7.28/kWh approved by the State Commission.

28.6) That by computing the category-wise tariff on the basis of the incorrect value of ACOS, the State Commission has determined more than legitimate category-wise tariffs for the consumers, and in effect, has approved more cross subsidy for the subsidizing consumers.

28.7) That the State Commission should be directed to approve correct value of ACOS based on the ARR and sales of the DISCOMs and re-determine the category-wise tariffs and cross subsidies for the consumers of the State of Haryana with clarity and transparency in computations.

29) **Per contra**, the DISCOMs have contended as under, on issue No.(h):

29.1) That the State Commission has already considered the ACOS for FY 2014-15 as Rs.6.64/Unit for the AP consumers. The State Commission has estimated the cost of supply for HT Industrial consumers category-wise in FY 2014-15 as Rs.5.26/kWh as against the ACOS of DISCOMs of Rs.6.64/kWh. The learned State Commission seems to have inadvertently mentioned the cost of supply of AP consumers rather than the average cost of supply. This is because, considering the ACOS as Rs.6.26/Unit, an increase of 8.2% above the ACOS of supply of Rs.6.26/Unit amounts to Rs.6.78/Unit of tariff existing prior to revision done for FY 2014-15. Thus an increase of 50 paise per Unit as per the Impugned Order for FY 2014-15 amounts to Rs.7.28 per unit of per unit revenue as correctly considered by the Commission. Moreover, the billing rate of Rs.7.28/Unit is the average revenue figures for the HT Industry consumers

category only and is based on the tariff for this category of consumers by citing details in Table5.2 of the Impugned Order.

29.2) That without including the Electricity Duty and Municipal Tax, the total effective tariff emerges to Rs.7.30/Unit for 11 KV power supply to HT industries. The load factor is assumed to be 45% considering 13 hours of running per day for the industries for 25 days a month. The peak load exemption charges are considered as Rs.0.23 per Unit equivalent to Rs.1.5 per kVAh of Peak Load Exemption Charges (***PLEC***) charges for 4 hours a day. Similarly, the energy charges are multiplied by 0.9 (assumed stranded power factor) in order to calculate the rate in Rs. Per kWh of power consumed. Hence, per Unit realization assumed by the State Commission for FY 2014-15 for HT Industrial consumers as per the Impugned Order is Rs.7.28/Unit including estimated approximate FSAs at the time of Impugned Order. The fact that the effective tariff includes the amount of FSA and PLEC is because all the open access consumers of Haryana are embedded open access consumers and thus they have an option to procure power from both the DISCOMs as a conventional consumer and/or procure power through open access route from some other supplier or power markets, th rough exchanges.

30) **Our consideration and conclusion on Issue No.(h):**

After going through the rival contentions of the parties on this issue, relating to erroneous ACOS and ABR and cross subsidy, we find no merit in any of the contentions of the appellants on this issue. It is true that the State Commission has considered ACOS for the DICOMs as Rs.6.64/kWh. The State Commission has observed that in all its distribution and retail supply orders it has so far been determining tariff on the basis of ACOS. The HERC Tariff Regulations 2012 require the licensee to provide the details of the embedded cost of supply of electricity, voltage/consumer category-wise. In the absence of data on the embedded cost of supply for each category of consumers, the Commission has decided to continue with the consumer category-wise ACOS as established by the State Commission on the basis of the determining tariff for FY 2014-15 as well. The main contention of the appellants on this issue is that the State Commission for computation of category-wise tariff, has considered Rs.6.64/kWh as ACOS for the DISCOMs without showing any computation of the ACOS of DISCOMs in the Impugned Order. The learned State

Commission has discussed at length the said points and correctly considered the ACOS for the DISCOMs as R.6.64/kWh. The appellants in their written submissions have given their own calculations for arriving at the said conclusion, the same cannot be considered by this Appellate Tribunal because the learned State Commission while considering the ACOS had given their own calculations and findings. We are totally unable to accept these contentions of the appellants that the State Commission has computed the category-wise tariffs on the said erroneous value of ACOS. It is true that tariffs are designed with reference to ACOS to stay within the band of ± 20%. We feel that the State Commission has been trying its best to bring the ACOS within the band of ± 20%. Such kind of contentions cannot be legally accepted just on the ground that some appellant or some generating station in their own calculations has arrived at a different figure and the Commission cannot be expected to work on individual calculation given by any company or any category of consumers. Hence, we uphold the findings recorded by the State Commission as the same suffers from no perversity or illegality and thus this issue is decided against the appellants. We observe that there is no erroneous computation of ACOS, ABR and cross subsidy by the State Commission while passing the Impugned Order.

31) **Issue No.(i)-** relating to retrospective applicability of distribution and retail supply tariff, vide Impugned Order dated 29.05.2014 which has been made applicable from 01.04.2014. On this issue, following contentions are made by the appellants:

31.1) That the Impugned Order dated 29.05.2014, issued by the State Commission, has wrongly been applied retrospectively for the distribution and retail supply tariffs for FY 2014-15 from 01.04.2014 which is a clear violation of the principles of natural justice by the State Commission.

31.2) That the retrospective applicability of tariffs would have significant adverse impact on the business of the industrial consumers of the State of Haryana. The industrial consumers include several manufacturers, whose products are highly electricity intensive. The cost of electricity is a major portion of the input costs of the products manufactured by these industrial consumers and hence, the manufacturers have to take into account the cost of electricity while determining the prices of their end products.

31.3) That by the time Impugned Order 29.05.2014 was issued two months had already lapsed since 01.04.2014 and the State Commission could not have retrospectively applied the Impugned Order from 01.04.2011 as the end products of the industrial consumers had already been sold during these two months.

31.4) That the State Commission has increased the average tariff of industrial consumers by 10.5% i.e. from Rs.6.59/kWh in FY 2013-14 to Rs.7.28/kWh in FY 2014-15. If such tariffs are made applicable retrospectively, the industrial consumers will have to pay the revised and substantially increased tariffs for the past two months of April and May 2014 which the appellants would not be able to recover as the end products have already been sold in the market. A Substantial portion of the electricity procured by the industrial consumers consists of the electricity procured by open access. Vide Impugned Order, the State Commission has increased the cross subsidy surcharge by 281% compared to the cross subsidy for FY 2013-14, apart from the increase in wheeling charges to Rs.0.74/kWh to the wheeling charges of Rs.0.70/kWh for FY 2013-14.

31.5) If the revised tariffs are made applicable retrospectively, the industrial consumers will have to bear the enormous amounts of cross subsidy charges and wheeling charges for the power procured through open access in the months of April and May, 2014 which they would not be able to recover. It is completely unjustifiable on the part of the State Commission to allow the DISCOMs to recover such increased tariff charges from the consumers retrospectively. Hence, the retrospective applicability of tariffs is a clear violation of principles of natural justice by the State Commission to the consumers of the State of Haryana.

31.6) That the main reason for the delay in the proceeding for the tariff determination is delayed filing of the capital investment plans, business plans as well as ARR/Tariff petitions by the DISCOMs. There is absolutely no role of the consumers in delayed proceeding for determination of tariff by the State Commission. In fact, after failure of the DISCOMs to file their capital investment plans and business plans even after two time extensions provided by the State Commission, as well as further failure of ARR and Tariff petitions before 30.11.2013, the Faridabad Industrial Association (***FIA***) had

to file petition before the State Commission to expedite the procedure for determination of tariffs.

31.7) That this Appellate Tribunal, vide judgment dated 31.05.2013 in Appeal No.179 of 2012 titled *Kerala HT & EHT Industrial Consumers Assn. Vs. KSEB* upheld the validity of the retrospective determination of tariff. But since in the present case there has been wanton lethargy on the part of the DISCOMs and tariffs were determined by the State Commission after the consumer association approached the State Commission to exercise *suo-motu* powers to determine tariff, there is absolutely no justification to permit retrospective determination of tariffs.

31.8) That as regard to the levy of cross subsidy in the Impugned Order, the same cannot be made retrospective as held by this Appellate Tribunal in judgment dated 02.12.2013 in Appeal No.178 of 2011 in the case of *RInfra Vs MERC*.

32) **Per contra**, the DISCOMs have argued as under:

32.1) That the appellants have challenged the retrospective levy of tariff by the Impugned Order. The levy of retrospective tariff is permissible under law as there is no infirmity in the same. The tariff order clearly says that tariff for distribution and retail supply of electricity in Haryana by the distribution licensees shall be applicable from 01.04.2014 and shall remain effective till revised/amended by the State Commission.

32.2) That it flows from the Impugned Order, the tariff to be charged by the distribution licensees is to be computed and charged from 01.04.2014. The DISCOMs have not made the levy of tariff charges on their own accord from 01.04.2014. The first control period for determination of ARR/Tariff under the MYT framework, as provided in the Regulations shall be of three years i.e. from 01.04.2014 to 31.03.2017. Regulation 4.2 of the Regulation provides as under:

> *"4.2 The Commission shall adopt Multi Year Tariff (MYT) framework for determination of ARR/tariff for each year of the Control Period from FY 2014-15. However, there shall be annual determination of ARR/tariff for the utilities for FY 2013-14 for their respective businesses as per these regulations."*

32.3) That while making the Impugned Order applicable from 01.04.2014 it has been made clear in the Impugned Order that the revised tariff for HT industrial consumers shall be effective from 01.04.2014. The State Commission has categorically stated that the additional surcharge calculated under the Impugned Order dated 29.04.2014 is to be levied from the date of the tariff order itself. Thus the State Commission has specifically excluded the applicability of the additional surcharge retrospectively and the same is completely in consonance with the Regulation 22(3) of the State Tariff Regulations 2012 which provides that the additional surcharge determined by the State Commission shall be applicable from the date of determination. The said provision is absent from cross subsidy surcharge. The relevant part of the Impugned Order is quoted hereunder:

> "*In view of the above disposition, the Commission has now decided to levy additional surcharge on the energy drawn by open access consumers through open access @ 50 paisa/kWh with effect from the date of this Tariff Order. The additional surcharge shall be levied/recovered by the distribution licensees from open access consumers as provided in regulation 22 of the Haryana Electricity Regulatory Commission (Terms and Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012.*"

33) **Our consideration and conclusion on this Issue No.(i)**, relating to retrospective applicability of distribution and retail supply tariff order:

33.1) After going through the rival contentions of the parties, which we have narrated in detail above, we find no force in the contentions of the appellants. The MYT Control Period is from FY 2014-15 to FY 2016-17. The Impugned Order determining the tariff was passed on 29.05.2014 which had been made applicable from 01.04.2014. It is true that Impugned Tariff Order was issued on 25.04.2014 after almost completion of two months from the commencement of Control Period, namely 01.04.2014. It is also true that the State Commission has directed the applicability of the said Impugned Tariff Order of the distribution and retail supply tariff for FY 2014-15 from

01.04.2014. The State Commission in the Impugned Order has clearly cited Regulation 4.2 of the MYT Regulations 2012 which provides that the Commission shall adopt Multi Year tariff framework for determination of ARR/control period from FY 2014-15. Further, saying that there shall be annual determination of ARR/tariff for the utilities for FY 2013-14 in their respective businesses as per these Regulations, The State Commission has clearly given the provision in the Impugned Order that the additional surcharge calculated under the Impugned Order dated 29.05.2014 is to be levied from the date of tariff order itself, namely from 29.05.2014. Thus the State Commission has specifically excluded the applicability of the additional surcharge retrospectively which is completely in consonance with Regulation 22(3) of the said HERC (Terms and Conditions for grant of connectivity and open access for intra-State transmission and distribution system) Regulations, 2012, which provides that additional surcharge determined by the State Commission shall be applicable from the date of determination. Thus the Impugned Order itself provides for additional surcharge as to be levied from the date of the Impugned Order and not from 01.04.2014.

33.2) This Appellant Tribunal in its judgment dated 31.05.2013 in Appeal No.179 of 2012, in the Case of *Kerala High Tension and Extra High Tension Industrial Electricity Consumers' Association Vs. KSERC & Anr.* has upheld the validity of retrospective determination of tariff. This judgment of the Appellate Tribunal dated 31.05.2013 has further been followed by this Appellate Tribunal in its judgment dated 22.08.2014 in Appeal No.111 of 2013, *Snam Alloys Pvt. Ltd. and Ors. Vs. JERC & Anr.* Thus the issue is no longer *res-integra* that the tariff order can be retrospective in nature. More over if the tariff is made applicable from the date of the order i.e. 29.05.2012, the revenue gap in the ARR due to short recovery of the approved revenue will have to be allowed in the ARR and the tariff of the subsequent year with carrying cost which will un-necessarily burden all the consumers with the carrying cost. Therefore, we find no fault in retrospective application of the Impugned Tariff Order and this issue is decided against the appellants.

34) **Issue No.(j)-** relating to cross subsidy surcharge. On this issue, the appellant have contended as under:

34.1) That the State Commission has approved Rs.2.02/kWh as Cross Subsidy Surcharge (***CSS***) for HT Industrial consumers for FY 2014-15, which was approved as Re.0.53/kWh for FY 2013-14 in the order dated 30.03.2013. Thus the CSS determined by the State Commission was extremely high. Moreover, there is enormous increase of 281% in the CSS for the HT Industrial consumers. For other subsidizing categories also there is a huge increase in the CSS. However, the increase in the CSS for HT Industrial consumers is the highest. Such a huge increase in the CSS is against the mandate of the Electricity Act 2003 as well as the Tariff Policy.

34.2) That Section 42(2) of the Electricity Act, 2003 provides that *the State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall have due regard to all relevant factors including such cross subsidies, and other operational constraints.* Proviso 3 further provides that *such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the State Commission."*

34.3) Thus proviso to Section 42 of the Electricity Act provides that surcharge and cross subsidy should be progressively reduced in the manner as specified by the State Commission.

34.4) That paragraph 8.5.1 of the National Tariff Policy lays down that the *amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition which is intended to be fostered in generation and supply of power directly to the consumers through open access.*

34.5) The consumers who are permitted open access will have to make payment to the generator, the transmission licensee whose transmission systems are used, distribution utility for the wheeling charges and in addition, the cross subsidy surcharge. The computation of cross subsidy surcharge, therefore, needs to be done in a manner that while it compensates the distribution licensee, it does not constrain introduction of competition through open access. The cross subsidy surcharge should

be brought down progressively and, as far as possible, at a linear rate to a maximum of 20% of its opening level by the year 2010-11.

34.6) The State Commission has specified the trajectory for reduction of cross subsidies through Regulations, which it was required to do. The State Commission, instead of reducing the CSS increased the same by upto 281%. Thus the State Commission in the Impugned Order has violated the provisions of the Electricity Act, Tariff Policy as well as its own regulatory precedence of reducing the CSS by 20% of the total cross subsidy every year. The appellants have in their written submissions given their own table and figures indicating proper calculation of cross subsidy surcharge.

34.7) That the Full Bench of Appellate Tribunal, vide judgment dated 05.07.2007 in Appeal Nos. 169, 170, 171, 172 of 2005 & Batch (referred to as RVK judgment) had made several important observations and rulings, *inter-alia*, that the Formula stipulated by the Tariff Policy for determination of CSS has to be adopted by all Regulatory Commissions for determination of CSS. Subsequently, the Appellate Tribunal vide judgment dated 04.10.2012 in Appeal No.200 of 2011 while distinguishing the RVK judgment had ruled that the Formula stipulated in the Tariff Policy needs to be adopted by the Regulatory Commissions only if the Regulations notified by the Regulatory Commission did not specify the formula for determination of CSS, else, the formula specified in the Regulations needs to be adopted. This judgment dated 04.10.2012 is in appeal before the Hon'ble Supreme Court.

34.8) That recently the Full Bench of this Appellate Tribunal in judgment dated 24.03.2015 in Appeal No.103 of 2012 captioned as *Maruti Suzuki Vs. HERC* has once again reiterated that in the absence of any methodology specified in the Regulations, the Commission is bound to follow the National Tariff Policy formula.

34.9) Since neither the HERC Open Access Regulations nor the Tariff Regulations 2012 specify the formula for computation of CSS, hence the ratio of the afore said Full Bench judgment are fully applicable.

35) **Per contra**, the DISCOMs have pleaded as under, on this Issue of cross subsidy surcharge:

35.1) That the issue of cross subsidy surcharge has been discussed in paragraph 4.4.3 of the Impugned Order by the State Commission.

35.2) That distribution licensee had filed an amended review petition before the State Commission for review of the State Commission's order dated 30.03.2013. The hearing on the amended review petition was duly held and all the data of additional surcharge was deliberated upon during public hearing. The State Commission had noted in the Impugned Order that it agreed with the submissions of the distribution licensee.

35.3) The State Commission in the Impugned Order has observed as under :

"*The Commission feels that there is weight in the submissions of the Discoms that a considerable lower cross – subsidy surcharge when the corresponding reduction in the cross – subsidy has not yet taken place makes it onerous for the Discoms when increasing quantum of power is drawn through Open Access.*

In the light of the above discussions the Commission decides to maintain parity between the cross – subsidy paid by the consumers of Discoms as well as the cross – subsidy surcharge paid by the Open Access consumers."

35.4) That the open access is aimed to enable the consumer to take advantage of competitively available power in comparison to the power available from distribution licensees. However, while doing so the Electricity Act itself has protected the financial interests of the DISCOMs through CSS and additional surcharge. By a reduction in CSS without a commensurate reduction in cross subsidy, the open access users have the undue advantage at the cost of public at large who are being supplied electricity by the distribution licensees. The basic aim of the open access regime is to facilitate the end users by giving them a level playing opportunity to source power through third parties and at the same time compensate the distribution companies to the extent of the cross subsidization in the tariff design prevalent in the tariff design which, will otherwise, cannot be secured in the case of such open access users sourcing power from outside. The present tariff structure approved by the State Commission has cross subsidization mechanism whereby the tariffs for some category of consumers are

lower than cost of supply to them. The State Commission by the Impugned Order has determined the CSS payable by a consumer availing open access at par with the cross subsidy element prevalent in tariff design. In order to ensure viability and sustainability in operations of the distribution licensee, it is necessary that both cross subsidy surcharge and additional surcharge are imposed on the open access consumers.

35.5) The Hon'ble Supreme Court in ***Sesa Sterlite Ltd. Vs. Orissa Electricity Regulatory Commission*** reported at 2014 SCC online SC 389 has held that the CSS is to be reflective of the current level of cross subsidy and is to compensate the distribution licensee for the loss of the cross subsidy from the cross subsidizing consumers.

35.6) This Appellate Tribunal in judgment dated 25.02.2010 in Appeal No.135 of 2010 in ***Polypex Corporation Ltd. Vs. UERC & Anr.*** (paragraph 18) held that "T*he Tariff Policy postulates that the category-wise subsidy has to be within ± 20% of average cost of supply by the end of the year 2010-2011 and not the tariff for each and every consumer that is to say, if the tariff for subsidizing category is already within 120% of the cost of supply, the cross subsidy must not be increased beyond that point, and may or may not be reduced further."*

35.7) Further this Appellate Tribunal in judgment dated 11.11.2011 in OP No. 1 of 2011 has held that Commission can do *suo-moto* determination of tariff in absence of filing of tariff petitions by licensees and can take into account the ACOS. Also financial viability of the distribution licenses is to be maintained.

35.8) This Appellate Tribunal in judgment dated 17.01.2012 in Appeal No.11 of 2011, captioned as ***Northern Railways Vs. HERC & Ors.*** (paragraph 49) held that non determination of category wise cost of supply will not make the tariff determination illegal. Further, this Appellate Tribunal in judgment dated 31.05.2013 in Appeal No.179 of 2012 (supra) held that average cost of supply is permissible. This Appellate Tribunal vide judgment dated 28.11.2013 in Appeal No.239 of 2012, ***Amausi Industries Association & Ors. Vs. UPERC & Ors.*** and in judgment dated 02.12.2013 in Appeal No.178 of 2011, ***Reliance Infrastructure Ltd. Vs. MERC &***

Ors. held that increase in cross subsidy is proper and the cross subsidy surcharge to meet current level of cross subsidy is permissible.

38) **Our consideration and conclusion on Issue No.(j)-** relating to cross subsidy surcharge:

38.1) After giving our thoughtful consideration on the rival contentions discussed above raised by the parties, we do not find any merit in the contentions of the appellants on this issue relating to cross subsidy surcharge. The State Commission with respect to cross subsidy surcharge in paragraph 4.4.3 of the Impugned Order has observed as under:

> *"4.4.3 Reduction of cross subsidies:*
>
> *The National Tariff Policy of the Central Government dated 6th January 2006, provides for progressively bringing down the cross subsidy and specifies a target of plus or minus 20% of the average cost of supply. The Commission has re-visited the issue of cross – subsidy surcharge and reduction thereto. The Commission observes that the difference between the cross – subsidy being paid by the non-open access consumers due to various reliefs granted by the Honb'le APTEL in the appeal(s) preferred y the power utilities and the open access consumers have widened, while both needs to be brought down and the difference between the two narrowed so that the Discoms are adequately compensated for their power being offset by the power brought from outside under open access mechanism. Consequently, the Commission in order to maintain parity has now decided to maintain the Cross subsidy surcharges payable by the Open Access consumers at par with the embedded consumers of the distribution licensee(s) in FY 2014-15."*

38.2) It is established by now by this Appellate Tribunal and also by Hon'ble Supreme Court that the cross subsidy should be ± 20% of the cost of supply and the appropriate Commission should try its best to bring it down within the band of ± 20%. The Hon'ble Supreme Court also observes that the appropriate Commission have slightly moved some steps further towards bringing down cross subsidy surcharge within ± 20% of the cost of supply. The State Commission has cited sufficient reasons in the Impugned Order while dealing with this issue and we find no perversity therein. The State Commission is quite conscious of the fact that the National Tariff Policy and

other provisions require the cross subsidy surcharge to be brought down within ± 20% of the cost of supply. This issues is decided against the appellants.

39) **Issue No.(k)-** relating to additional surcharge: On this issue, the appellants have contended as under:

39.1) That the State Commission has approved additional surcharge of 50 paisa/kWh for the open access consumers for FY 2014-15. Such high rate of additional surcharge is detrimental to the spirit of competition intended to be brought about by the Electricity Act 2003 and the Tariff Policy.

39.2) Paragraph 8.5.1 of the National Electricity Policy lays down that the amount of cross subsidy surcharge and the additional surcharge to be levied from consumers who are permitted open access should not be so onerous that it eliminates competition. The Tariff Policy mandates safeguarding of the interest of the open access consumers in the broader interest of creating competition in the electricity market through open access. Since the amount of additional surcharge approved in the Impugned Order is detrimental to the spirit of competition in the electricity sector by means of open access, approval of such additional surcharge is against the spirit of Tariff Policy.

39.3) That Regulation 22 of the HERC Open Access Regulations provides that additional surcharge shall become applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded or there is an unavoidable obligation and incidence to bear fixed costs consequent to such a contract. However, the fixed costs related to network assets would be recovered through wheeling charges.

39.4) That the consumers have been denied the rightful opportunity to study the method of computation or to assess the impact of the proposed additional surcharge during hearing before the State Commission. The State Commission has issued the Impugned Order just on the very next day after the detailed submission made by the licensees, which submissions were never made public. Hence, the determination of additional surcharge violates the principles of natural justice.

39.5) That while the State Commission has allowed 41,086 Mu as the net energy available for intra-State sale for FY 2013-14, the power surrendered has been shown as nearly 10,327 MU, which is more than 25% of the net available energy for sale. The total surplus quantum for FY 2014-15 has been estimated as 5452 MU by the State Commission in the Impugned Order after considering all the sources of power supply and projected demand. It is not possible to understand how the DISCOMs could have surrendered almost double the quantum at 10327 MU in FY 2013-14, when the sources of power were lesser than those considered in FY 2014-15.

39.6) That the Impugned Order does not contain the data regarding the fixed cost of power purchase from various sources of power purchase, as the power purchase expenses have been approved on the basis of the composite per unit rate, rather than considering the share of fixed charges in Rs. Cr. and the energy charges in Rs./kWh. Hence, there is no way to verify whether the rate of around Rs.1.00/kWh considered by the DISCOMs and accepted by the DISCOMs is appropriate. Since this is the most critical figure in the computation of additional surcharge, the absence of such information in the Impugned Order vitiates the determination of additional surcharge.

39.7) That open access energy has been shown as 1884 Mu i.e. around 4.6% of the total purchase allowed. Open access phenomenon was not new to the licensee and the likely trend of purchase of power through open access should have been taken into consideration. If the licensees had taken into consideration the likely trend of the open access in the State, it would have been possible for the licensee not to be bound by the long term PPAs for the excess amount of power on account of consumers opting for open access as the energy sales forgone by the licensees on account of open access is a small fraction of the total energy available for sales for the licensees. Indiscriminate signing of the agreements indicates nothing but poor planning on the part of the licensees. For the failure of the licensee, the consumers cannot be loaded for the contractual liabilities which are of no benefit to the consumers.

39.8) That in a separate order dated 14.07.2014, in the matter of review of tariff order dated 30.03.2013 (for FY 2013-14), the State Commission in paragraph 4, dealing with trading loss has noted that the DISCOMs need to appreciate that peak and base load ought to be met with power sourced from different fuels i.e. requirement of base load

power ought not to be met from peaking station as the consumer would have to bear the avoidable cost of peak load station during off peak hours. The DISCOMs have not demonstrated whether the DISCOMs explored the economies of different options to serve the peak load or whether the financial implications of the idle load were quantified and then the conscious decision was taken. Further the State Commission observed in its Review Order dated 14.07.2014 that on the one hand licensee talks of surplus power and on the other hand it resorts to load shedding and power regulatory measures. It is unable to strengthen its distribution system to release the long pending connection for new consumers who are in need of power and on the other hand it seeks compensation for under-drawing power at a fraction of the cost of which could have been sold to these consumers at a compensatory tariff. The Commission in the Review Order further notes its concern that DISCOMs have already tied up for power which is in excess of its requirement for at least 5 to 7 years without having a system of power procurement planning and load forecasting and for open access of power purchase cost. Considering all this in Review Order, the State Commission has taken a view that the relief sought by the DISCOMs for recovering its trading loss from the consumers is not admirable hence, the same is not admitted.

40) **Per contra**, the DISCOMs have argued as under:

40.1) The State Commission in the Impugned Order on one hand has held that distribution licensees have conclusively proved stranding of power whereas on the other hand has only passed on only 50% of the burden to the consumers.

40.2) The National Tariff Policy 2006 firstly is not binding on the Commission in the light of judgment dated 24.03.2015 passed by this Appellate Tribunal in Appeal No.103 of 2012, ***Maruti Suzuki India Ltd. Vs. HERC & Anr.***. Further the National Tariff Policy, dealing with cross subsidy and additional surcharge, provides under clause 8.5.1 that computation of cross subsidy surcharge and additional surcharge needs to be done in a manner that it compensates the distribution licensee. The National Electricity Policy also recognizes that to make the power sector sustainable, there is an urgent need for ensuring recovery of cost of service from consumers. The reduction of cross subsidy surcharge and cross subsidy prevalent as per tariff design go together. The tariff of subsidising consumers were envisaged to be brought down to $\pm$ 20% and in the said context the cross subsidy reduction was also envisaged to be reduced eventually to $\pm$

20%. Thus reduction in cross subsidy surcharge cannot go independent of the reduction in cross subsidy in the tariff design as a consequence of the formula for determination of cross subsidy surcharge notified under the National Tariff Policy. Both will have to go together.

40.3) The State Commission by the Impugned Order had determined the cross subsidy surcharge payable by a consumer availing open access at par with the cross subsidy element prevalent in tariff. In order to ensure viability and sustainability in operations of the distribution licensee, it is necessary that both the cross subsidy surcharge and the additional surcharge are imposed on the open access consumers.

40.4) That this Appellate Tribunal in judgment dated 11.07.2006 in Appeal No.1 of 2006, while interpreting section 42 of the Electricity Act 2003 held that additional surcharge is payable not only when the stranded capacity is proved. That Regulation 63 of the MYT Regulations 2012 provides for calculation of additional surcharge red with Regulation 22(3) of open access regulations. As per the regulations framed by the State Commission surcharge becomes applicable only if the obligation of the licensee in terms of power purchase commitments has been and continues to be stranded.

41) **Our consideration and conclusion on Issue No.(k)-** relating to additional surcharge:

41.1) We have given our thoughtful consideration to the rival contentions made by the parties on this issue of additional surcharge. The State Commission dealing with issue of additional surcharge has observed as under in the Impugned Order:

"*The Commission observes that the distribution licenses, based on the data provided by them for the period April 2013 to March 2014, have been able to conclusively prove, backed with calculations, that their long term power purchase commitments do get stranded most of the times when power is drawn by embedded open access consumers from other sources and the Discoms have to bear the fixed cost of such stranded power which ultimately get passed on to other consumers. They have worked out the cost of such stranded power and based on that has worked out the additional surcharge as 97 paise/unit for FY 2013-14. The Commission further observes that it would not be fair if the cost incurred by distribution licensees for the power purchase commitments stranded on account of power drawn by open access consumers from other sources is passed on to other consumers as that would amount to cross subsidising of the open access consumers by other consumers. It would also be fair to assume that, as the number of open access consumers and power*

drawn through open access is increasing every year, the additional surcharge worked on similar basis for FY 2014-15 would not work out less than as has been worked out by UHBVNL for FY 2013-14.

41.2) We have considered the reasoning's recorded in the Impugned Order on this issue of additional surcharge. We find ourselves in agreement with the same findings and observations. The conditions for levy of additional surcharge are provided in the relevant regulations and the repetition of the same is not needed.

41.3) We are happy to note that the State Commission in a separate review order dated 14.07.2014, seeking review of an earlier tariff order dated 30.03.2013, has expressed its concern that the DISCOMs have already tied up with power which is in excess of requirement for at least 5 to 7 years without having a system of power procurement planning and for load optimum power cost and accordingly the State Commission has rejected the relief sought by the DISCOMs for recovering its trading loss from the consumers.

41.4) Thus there is no perversity in the Impugned Order on this issue and it is decided against the appellants.

42) Since all the aforesaid issues have been decided against the appellants, all the appeals are bound to be dismissed.

O R D E R

All these appeals, being Appeal Nos. 269 of 2014, Appeal No. 204 of 2014 and Appeal No. 216 of 2015 are hereby dismissed and the Impugned Order passed therein is hereby upheld. All the IAs in the said Appeals stand disposed of.

No orders as to costs.

Pronounced in the open court on this **28th *April, 2016*.**

(I. J. Kapoor)
Technical Member

(Justice Surendra Kumar)
Judicial Member