Appellate Tribunal for Electricity, New Delhi
(Appellate Jurisdiction)

Appeal No. 308 of 2013

Dated:9th Oct, 2015

Present: HON'BLE MRS. JUSTICE RANJANA P.DESAI, CHAIRPERSON
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Chhattisgarh State Power Distribution Co. Ltd.
4th Floor, Vidyut Seva Bhavan,
Daganiya,
Raipur – 492 013.

...Appellant(s)

Versus

Chhattisgarh State Electricity Regulatory Commission
Irrigation Colony, Shanti Nagar,
Raipur – 492 001.

... Respondent

Counsel for the Appellant(s) :Mr. K Gopal Choudary

Counsel for the Respondent(s):Mr. M G Ramachandran
Ms. Swapna Seshadri
Nr, Anand K Ganesan
Ms. Mandakini Ghosh
Ms. Poorva Saigal
Ms. Anushree Bernard
Ms. Swagatika Sahoo for R-1

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

The present appeal has been filed by Chhattisgarh State Power Distribution Co. Ltd. against the impugned order dated 12.07.2013 passed in Petition No. 3 of 2013, 21 of 2013 and 22 of 2013 under the Electricity Act, 2003.

2) The appellant is a successor of the erstwhile Chhattisgarh State Electricity Board and has been constituted in terms of the transfer scheme after unbundling of the Electricity Board. The Chhattisgarh State Electricity Regulatory Commission is the respondent.

3) **Facts of the Case:**

3.1 The erstwhile Chhattisgarh State Electricity Board (herein after referred to as 'CSEB') was the distribution licensee for the whole of State of Chhattisgarh until it was unbundled w.e.f. 01.01.2009 pursuant to a statutory transfer scheme notified by the State Government in exercise of power conferred upon it by section 131of the Electricity Act 2003.

3.2 The learned State Commission determined the Annual Revenue Requirement (hereinafter ARR) and the retail supply of tariff of the CSEB for the FY 2005-06 by a tariff order (herein after referred to as TO 2005-06) dated 15.06.2005. In this impugned order, the learned

Commission purports to revise the final true up for 2005-06 to give effect to the judgment of this Hon'ble Tribunal dated 14.08.2012 in Appeal No. 89 of 2011 and the order dated 23.01.2013 in Review Petition No. 10 of 2012 in Appeal No. 89 of 2011.

3.3 On 17.02.2006, the learned Commission issued CSERC (Terms and Conditions for determination of Tariff Regulations 2006) herein after referred to as the Tariff Regulations 2006 which came into effect from 1.3.2006 and is applicable for FY 2006-2007 to FY 2009-10.

3.4 That the learned Commission determined the ARR and the retail supply tariff of the CSEB for the FY 2006-07 by the tariff order dated 13.09.2006. The Tariff Regulations 2006 was applicable to this determination of tariff. The learned Commission had carried out a final true up for the FY 2006-07 in the tariff order for the FY 2011-12.

3.5 The learned Commission determined the ARR and the retail supply tariff of CSEB for the FY 2007-08 by a tariff order dated 22.10.2007. The Tariff Regulations 2006 was applicable to this determination of tariff. The provisional true up for the FY 2007-08 was done while determining the ARR for the FY 2009-10 by order dated 30.05.2009. The second provisional true up was done while determining the tariff order for the FY 2012-13 by order dated 31.03.2011.

3.6 The tariff determined in tariff order for the FY 2007-08 continued to apply during FY 2008-09 as there was no separate filing for FY 2008-09 pending the introduction of multi year tariff principle and the issue of, and bringing into effect all the Regulations.

3.7 The learned Commission published by a Notification dated 25.06.2008 the SCERC (Terms and Conditions of determination of tariff agreeing to multi year tariff principles), 2010 which were to be brought into effect on a date to be subsequently notified by the learned Commission. As per the learned Commission, these Regulations and the MYT framework was contemplated from FY 2009-10.

3.8 By a Notification No. F1-8/2008/13/1 dated 19.12.2008, the Chhattisgarh State Government notified the Chhattisgarh State Electricity Board transfer scheme Rules, 2008 which was brought into force from 01.01.2009. The said Rules provided for the transfer of properties, undertakings, interest, rights, obligations, liabilities, personal etc. on a provisional basis.

3.9 The Chhattisgarh Electricity Board (hereinafter called CSEB) unbundled into five companies being the appellant distribution company (CSPDCL), the generating company (CSPGCL) and the transmission Co. (CSPTCL) and the

trading company (CSPTRCL) and the holding company (CSPHCL) named in the Rules and in the manner provided therein.

3.10 The State Government thereafter issued a Notification No. F1-8/2008/13/1 dated 21.01.2009 notifying 01.01.2009 as the appointed date for all the objects and purposes under CSER Transfer Scheme Rules 2008.

3.11 The learned Commission determined in the order dated 31.03.2011 the ARR for FY 2008-09 on the basis of the actual as per the provisional accounting then available. The learned Commission had considered and clubbed expenses as per the provisional accounting of CSEB for the period April to December, 2008 and the provisional accounting of the unbundled utilities for the period January to March 2009 in determining the consolidated ARR for FY 2008-09.

3.12 In the order impugned herein the learned Commission has carried out the final true up for FY 2008-09. The learned Commission also given effect to judgment of this Tribunal dated 14.08.2012 in Appeal No. 89 of 2011 and the order dated 23.01.2013 in Review Petition No. 10 of 2012 in Appeal No. 89 of 2011.

3.13 The learned Commission determined the ARR and the retail supply tariff of the CSEB for FY 2009-10 by tariff order

dated 30.05.2009. The learned Commission had carried out the provisional true-up for FY 2009-10 in the order dated 31.03.2011. In the order impugned herein the learned Commission has carried out the final true up for FY 2009-10.

3.14 The learned Commission notified the CSERC (Terms and Conditions of determination of tariff agreeing to multi year principles) Regulations 2010 (hereinafter referred as MYT Regulations 2010) which was made applicable for FY 2010-11 onwards.

3.15 The learned Commission passed the tariff order dated 31.03.2011 for FY 2011-12 wherein the learned Commission had:

(a) carried out the final true up for FY 2005-06 and 2006-07 with respect to tariff order 2005-06 and tariff order 2006-2007;
(b) decided that the final true up for FY 2007-08 with respect to tariff order 2007-08, it was provisionally trued up in tariff order 2009-10;
(c) determined the consolidated ARR for the whole of FY 2008-09 on the basis of the provisional accounting of the CSEB from April 2008 to December 2008 and the provisional accounting of the three unbundled utilities

from January to March 2009 by clubbing the accounts;

(d) carried out the provisional true up for FY 2009-10 with respect to tariff order 2009-10;

(e) carried out an aggregate of surplus arising out of the true ups aforesaid and the allocation of the same as towards generation, transmission and distribution utilities;

(f) determination of multi year ARR of the appellant after adjusting the surplus determination for the previous years in the true up exercise for the three year controlled period of FY 2010-11 to 2012-13; and

(f) Determining the distribution and retail supply tariff for FY 2011-12, leaving the uncovered deficit of Rs.343 Cr as a regulatory asset to be carried forward to FY 2012-13.

3.16 Aggrieved by the said order dated 31.03.2011, the appellant filed Appeal No. 89 of 2011 before this Hon'ble Tribunal which was partly allowed by the Hon'ble Tribunal by judgment dated 14.08.2012. The appellant also filed a Review Petition No. 10 of 2012 which was also partly allowed by this Tribunal by order dated 23.01.2013.

3.17 A clarification application filed by the learned Commission with respect to a direction in the Review Petition dated 23.01.2013 was disposed of by this Tribunal by order dated

09.07.2013 in DFR No. 1219 of 2013 in Appeal No. 89 of 2011 and Review Petition No. 10 of 2012.

3.18 The learned Commission did not reopen the original proceedings of tariff order 2011-12 on remand to give effect to judgment dated 14.08.2012 in Appeal No. 89 of 2011 and the order in Review Petition No. 10 of 2012. Instead, the learned Commission initiated a separate *suo moto* proceedings in Petition No.47 of 2013 to determine the principles and methodology for allocation of surplus/deficit of CSEB amongst the successor utilities. The learned Commission passed an order therein dated 11.07.2013 allocating the surplus of the erstwhile CSEB in the proportion CSPGCL:CSPTCL:CSPDCL and the ratio of 52.57:15.69:31.74.

3.19 The learned Commission has given effect to the same in the tariff order dated 12.07.2013 impugned herein.

3.20 The learned Commission determined the ARR and retail supply tariff for FY 2012-13 by order dated 28.04.2012.

3.21 The learned Commission passed the common impugned order dated 12.07.2013 in Petition Nos. 03 of 2013, 21 of 2013 and 22 of 2013.

3.22 In the impugned order dated 12.07.2013), the learned Commission has :

(a) revised the final true up of FY 2005-06 purporting to give effect to the judgment of this Tribunal in Appeal No. 89 of 2011 and orders in Review Petition No. 10 of 2012.

(b) revised the final true up of FY 2006-07 to give effect to the judgment of this Tribunal in Appeal No. 89 of 2011 and order in Review Petition No. 10 of 2012

(c) carried out the final true up of FY 2007-08, 2008-09, 2009-10 and 2010-11 and also to give effect to the judgment of this Tribunal in Appeal No. 89 of 2011 and order in Review Petition No. 10 of 2012

(d) carried out provisional tariff of FY 2011-12

(e) revised the treatment of cumulative surplus/gap till FY 2012-13 and

(f) Determined the ARR for distribution business and retail supply business in the control period FY 2013-14 to 2015-16 and determined the distribution (wheeling tariff and retail supply) tariff for FY 2013-14.

3.23 Aggrieved by the impugned order dated 12.7.2013 by Chhattisgarh State Electricity Regulatory Commission, the

appellant filed this appeal before this Tribunal. The following issues have been raised by the Appellant:

Issue No.1: Whether the State Commission erred in computing the Working Capital for Financial Year 2006-07 to Financial Year 2015-16 excluding the payment of Pension and Gratuity Fund?

Issue No.2: Whether the State Commission has erred in allowing rate of interest on Working Capital for Financial Year 2006-07 to Financial Year 2009-10?

Issue No.3: Whether the State Commission erred in allowing rate of interest on Working Capital for Financial Years 2010-11 to FY 2012-13 ?

Issue No.4: Whether the State Commission erred in considering the income on consumer security deposit for the FY 2006-07 to FY 2015-16 ?

Issue No.5: Whether the State Commission erred in implementing the CSERC Tariff Regulations, 2006 while computing the Rate of Return on Equity for the FY 2007-08 to FY 2009-10 ?

Issue No.6: Whether the State Commission is right in disallowance of administrative and general expenses for the FY 2008-09 (April to December) and Financial Year 2009-10 ?

Issue No.7: Whether the State Commission erred in allowing the Distribution Loss target for the FY 2008-09 and disallowing the Power Purchase Cost of excess T&D loss ?

Issue No.8: Whether the State Commission erred in considering the 130.95 MU exported from 33 kV bus to EHT bus and consequently disallowing excess Power Purchase Cost for not meeting the targeted T&D loss by the Appellant ?

Issue No.9: Whether the State Commission has erred in disallowing the contribution towards Pension and Gratuity Fund and penalizing the Appellant by deducting 65.87 Crores from the contribution for the FY 2013-14 ?

Issue No.10: Whether the State Commission has the powers to direct the Appellant on management of Pension and Gratuity Fund ?

Issue No.11: Whether the State Commission is correct in considering the inflation of surplus by adding holding cost for FY 2005-06 (April to December) and FY 2008-09 (January to March) to FY 2010-11 ?

Issue No.12: Whether the State Commission disregarded all the binding nature and effect of the

Transfer Scheme notified by the Government of Chhattisgarh ?

Issue No.13: Whether the State Commission erred in computing capital restructuring by taking the expenditure of CSEB based on the added figures of 31.8.2008 ?

Issue No.14: Whether the State Commission has erred in reduction on account of fully depreciated assets for the FY 2008-09 (January to March) FY 2009-10, FY 2010-11 and FY 2013-14 to FY 2015-16 ?

Issue No.15: Whether the State Commission has erred in presumptive revenue from the sale of power during the transitory period of Financial year 2008-09 (January to March) and FY 2009-10 assigned to CSPTrL in pursuance of the Transfer Scheme, 2010 ?

Issue No.16: Whether the State Commission has not observed the principles of Natural Justice ?

4. We have heard learned counsel for the appellant Mr. Gopal Choudary and the learned counsel for the respondent, Mr. M.G. Ramachandran and Ms. Swapna Seshadri on the above issues. We shall be dealing with the issues one by one.

4.1 **<u>Issue No.I</u>: Computation of Working Capital for FY 2006-07 to FY 2015-16 excluding the payment towards Pension and Gratuity Fund.**

4.2 The **following are the submissions** made by the appellant, CSPDCL on this issue:

(a) that it is sought to be contended that the contribution to the pension and gratuity fund was being allowed by the Commission as a separate component in the ARR. This is factually incorrect as can be seen from the following table extracted from To 2011-12. The contributions to the fund were always considered to be part of the employee expenses and the employee expenses including such contributions were considered in the ARR:

Table 14: Employee Cost (Rs.Cr) for FY 2005-06 & FY 2006-07

	Particulars	FY 2005-06			FY 2006-07		
		Approved in TO of FY 2005-06	Petition	Approved	Approved in TO of FY 2006-07	Petition	Approved
1.	Salaries & Wages (excluding terminal benefits		356.38	356.71		402.05	402.23
2.	Terminal benefits						
	Contribution to Gratuity & Pension fund		200.00	0.00		100.00	100.00
	Payment made to Retried Employees		79.62	79.62		77.95	77.95
	Sub-total (2)		279.62	79.62		177.95	177.95
3.	Total Employee Cost (1+2)	470	636.00	436.33	638	580.00	580.18

Table 39: Employee Cost (Rs. Cr) for FY 2008-09

S.No.	Particulars	Petition FY 2008-09	Approved Apr-Dec 2008	Approved Jan-Mar 2009	Approved FY 2008-09
1.	Salaries & Wages (excluding Terminal benefits)		406.26	136.48	542.75
2.	Terminal Benefits				
	Contribution to Gratuity & Pension Fund		100.00	195.59	295.59
3.	**Total Employee Cost (1+2)**	**949**	**506.26**	**332.07**	**838.33**

(b) that the contribution to the trust is required to be paid in equal monthly installments just as salaries are paid and that there is no difference in the nature, and that both are part and parcel of employee costs and required by the Regulations to be considered for the computation of working capital.

(c) that the interest on working capital on normative basis does not mean that interest on working capital will be allowed even for expenses which are not required as part of O&M expenses is incorrect and misconceived. The Regulations clearly define that employee expenses are part of O&M. The employee expenses admittedly include the contributions to be made to the Gratuity & Pension Fund as shown supra. The contributions to the Gratuity and Pension Fund must therefore be considered in computing the normative working capital according to the Regulations.

(d) that the Impugned Order does not anywhere states that the Appellant is not making deposit to the trust in a required manner or that there were repeated directions on this aspects. These allegations are not in any case true. Even if there is any violation of any directives the only course is only to institute proceedings under the Act for violation of directives

duly issuing a notice to show cause and with appropriate proceedings. The tariff determination process and determination of ARR cannot be an occasion to punish or penalize for any alleged violation of directives.

5. **Per contra**, the following are the submissions of the Chhattisgarh State Electricity Regulatory Commission, the Respondent:

(a) that the contentions of the Appellant is that in the calculation of the interest on working capital, the contribution to the pension trust has been excluded and not been allowed as an O&M expenses. It is submitted that a separate pension trust was created by the State Utility in the State of Chhattisgarh before 1.4.2005 and the State Commission is allowing the contribution to such fund as a separate component in the ARR. The current pension liability is being fully met by the interest from the amounts lying in the pension trust. Further, the contributions to the pension trust are only for funding the pension liability which will arise in future on account of further retirements. Therefore, the Appellant does not have to borrow money to make payments for the current pensions and does not require this as a working capital.

(b) that the employees expenses need to be discharged on a monthly basis, the Appellant is not making the deposit to the pension trust in a regular fashion. The State Commission has even issued repeated directions to the Appellant on this aspect. In any event, it is not that the Appellant requires working capital to make payments to the pension trust. Therefore, this cannot be part of the Interest on Working Capital.

(c) that the interest on working capital on a normative basis only means that irrespective of the rate of interest or actual borrowings, the interest on working capital will be allowed. However, it does not mean that the interest on working capital will be allowed even for expenses which are not required to be incurred by the Appellant as part of the O&M expenses.

(d) that in the State of Chhattisgarh, a pension trust has been created even before April 01, 2005 i.e. start of the Regulatory regime. To recoup the trust funds against current payments and to meet the future liabilities, the Commission has allowed a separate component in ARR computations as "contributions to Pension & Gratuity fund". Thus, it is not an expense towards operation and maintenance of the

system. Accordingly, the interest on working capital on pension towards gratuity has not been allowed.

6. **Our Consideration and Submissions on this Issue**:

6.1 Let us examine the provision of Clause 15 and 17 (1) of the Tariff Regulations, 2006 which is applicable for the FY 2006-07 to 2009-10 which reads as under:

"*15.* ***Working capital***

Working capital shall consist of :

(a) Operation and maintenance expenses for one month

(b) Maintenance spares for 2 months based on annual requirement considered at 1% of the gross-fixed assets at the beginning of the year

(c) Receivables equivalent to 60 days' average billing of consumers

(d) Receivables equivalent to 60 days' of wheeling charges from open access customers

17. ***Operation & Maintenance expenses***

(1) The operation and maintenance (O&M) expenses comprise of the employee cost, repairs and maintenance (F&M) costs, administrative and general (A&G) costs and other miscellaneous expenses including insurance. The Commission may specify normative O&M expenses for the base year as certain percentage of the capital cost of the distribution system and also may specify separate norms for difficult terrain. The base year, for the purpose of O&M expenses, shall be the tariff year immediately after the notification of these Regulations.

(2) .....

(3) To arrive at the O&M expenses for the tariff year, the normative O&M expenses allowed for the base year shall be escalated on the basis of predetermined indices such as consumer price index, wholesale price index and other cost drivers such as network growth, energy sales, growth in consumer, wage revision of the employees of the licensee etc., subject to prudence check by the Commission.

6.2 According to the 2006 Regulations, the O&M expenses consist of (i) the employees cost and (ii) administrative and (iii) general expenses and repair and maintenance cost. According to these Regulations one of the component of the working capital is employees cost. The employees cost consists of salaries, wages and contribution towards Pension and Gratuity and other expenses relating to the employees. Thus, the Pension and Gratuity fund also comes under employees cost and the same is to be considered under O&M expenses. The Commission in the various tariff orders for FY 2005-06, 2006-07, 2007-08 and 2009-10 has been considering the terminal benefit as a part of employees cost which in turn is a part of O&M expenses.

6.3 Tariff Regulations, 2010 applicable for FY 2010-11 to 2012-13 provides for interest on working capital as under:

> *"47.2 For the purpose of working out interest, working capital of distribution licensee shall cover:*
>
> *(a) Operation and maintenance expenses for one month;*
> *(b)……*
> (c) *……"*

6.4 Similar to 2006 Regulations, the O&M expenses cover the expenditure under the heads of employees' costs, repair and maintenance expenses and A&G costs. There is no separate head for employees terminal benefit expenses in the various components of tariff enumerated under Regulation 42. The expenses towards terminal benefit are covered under the employees' costs. In the tariff order for MYT period 2010-11

to 2012-13, the Commission directed the Appellant to deposit without fail in the Pension Fund the amount allowed by the Commission in ARR in 12 monthly installments.

6.5 As per Tariff Regulations, 2006 and Tariff Regulations, 2010, the terminal benefit is a part of employees expenses/O&M expenses and therefore, 1/12 of the total O&M expenses including terminal benefits has to be allowed in determining the working capital. Accordingly, for the FY 2005-06 to 2012-13, the working capital has to be determined by including $1/12^{th}$ of the terminal benefit approved by the Commission.

6.6 Tariff Regulations 2012 applicable for FY 2013-14 to FY 2015-16 provide for that the working capital shall inter alia include $1/12^{th}$ of the amount of O&M expenses for the Financial Year (Regulation 25.1 (a) & (e). Regulation 53.1 enumerates the components of tariff payable for usages of distribution wires of the distribution licensee. In the components of tariff the O&M expenses and Pension & Gratuity Fund Contributions have seen stipulated as separate heads. The ARR of distribution wheeling business is a component of ARR for Retail Supply Tariff as per Regulation 62.1. Thus, in 2012 Tariff Regulations, the terminal benefit is not a part of O&M expenses. Therefore, for FY 2013-14 to 2015-16, the amount allowed towards terminal benefit is not to be considered in determining the working capital.

6.7 Thus, there is no infirmity in the Commission's order in not including amount of terminal benefit in the working capital for the FY 2013-14 to FY 2015-16.

6.8 **This issue is allowed in part in favour of the Appellant**.

7. **Issue No.2 and 3**: **Rate of Interest on Working Capital for FYs 2006-07 to 2009-10 and 2011-12 to 2012-13.**

7.1. Since, Issue No.2 and 3 are inter related, these issues will be taken up together for consideration.

7.2 the Appellant has submitted as under:

7.3 the Commission erroneously considered the SBI Prime Lending Rate as on 1.4.2004 on the basis of the CERC (Terms and Conditions of Tariff Regulations, 2004) which has no application at all. The Commission ought to have computed the interest on working capital for FY 2006-07 to 2009-10 reasonably applying at least the SBI PLR as on 1st April of each Financial year or weighted average SBI PLR interest rate during relevant year.

7.4 that the Hon'ble Commission has erroneously and unreasonably considered the SBI Prime lending rate as on 1.4.2010 purportedly on the basis of the CERC terms and conditions of the Tariff regulations, 2004.

7.5 that the interest rate on working capital is dependent upon the statutory Regulations of Credit by the RBI and the

prevailing PLR of SBI at the relevant time is good and fair basis for determining the interest rate for working capital for the purpose of determination of tariff.

7.6 that the interest rates are varied from time to time by the commercial banks on the basis of the credit and monetary policy Regulations by the RBI in exercise of its statutory regulatory powers.

7.7 that it is entirely beyond the control of the Appellant or any borrowing commercial entity.

7.8 that the State Commission ought to have justly and reasonably allowed at least the interest rate on working capital for each of the Financial Year 2006-2007 to FY 2009-10 at least at the PLR of the SBI as on the first date of each Financial Year.

7.9 the PLR of SBI as ascertained from its Web site as on 1st April of each of the Financial year 2006-2007 to 2009-10 are as follows:

(a) As on 1.4.2006 = 10.25%
(b) As on 1.4.2007 = 12.25%
(c) As on 1.4.2008 = 12.25%
(d) As on 1.4.2009 = 12.25%

7.10 that the proper method of exercise would be to take the weighted average PLR(Product Method) during the year as the actual normative rate of interest would apply and to consider weighted average SBI PLR during the year with all consequential effects and reliefs.

7.11 As regards FYs 2010-11 and 2011-12 and 2012-13, the Commission has erroneously allowed interest rate on working capital of 11.75% for each of the FYs 2010-11 to 2012-13 on the basis of SBI PLR as on 1.4.2010. The issue now stands covered for this period by the judgment dated 18.12.2013 of this Tribunal in Appeal No.173 of 2012. The proper method in the true-up exercise would be to take the weighted average PLR during the year as the actual narrative rate of interest to be applied.

8. **Per contra**, the following are the submissions of the Respondent:

8.1 that the issue is covered by the judgment dated 18.12.2013 of this Tribunal in Appeal No.173 of 2012. The State Commission has already given effect to the same as per the directions of this Tribunal.

8.2 that the Appellant has modified its prayer and sought weighted average rate of interest on 1st of April of each year which had been sought by the Appellant and granted by this Tribunal in the judgment dated 18.12.2013 in Appeal No.173 of 2012.

8.3 that the Appellant having sought the interest rate applicable on 1st April of the respective year and having succeeded before this Tribunal cannot now make a further claim for weighted average interest rate merely because the prayer has been followed in some other judgments.

9. **Our Considerations on this Issue**.

9.1 Let us examine the relevant Regulation of CSERC Tariff Regulations, 2006:

> "***21. Interest Charges on Working Capital***
>
> *The rate of interest, on working capital computed as per Clause 15, shall be on normative basis. The interest on working capital shall be on normative basis even when the licensee has not taken working capital loan from any outside agency or his working capital loan exceeds the normative figures."*

9.2 The 2010 Tariff Regulations stipulate that rate of interest on working capital for wheeling and retail supply shall be computed in accordance with Regulation 25 as applicable to Generating Station and transmission Licensee. Regulation 25.3 provides that the rate of interest on working capital shall be on normative basis and shall be equal to the latest available short term Prime Lending Rate of SBI in which the Generating Company or a unit thereof or the transmission system as the case may be is declared under commercial operation.

9.3 Further, this Tribunal in its judgment in Appeal No.173 of 2012 pronounced on 18.12.2013 decided this issue. The relevant portion of this Tribunal's judgment is as follows:

> *"6.....*
>
> *iii) Whether the State Commission has erred in not considering the actual SBI Prime Lending rate as on the first April of the respective years from FY 2011-12 and 2012-13 for determining*

the interest on working capital in contravention of its own Tariff Regulations?

……..

25. We find from the impugned order that the Appellant had sought rate of interest of 13% for FY 2011-12 and 14.75% for FY 2012-13 on the working capital requirement, being the SBI Prime Lending Rate as on 1st April of the respective year. However, the State Commission has decided the rate of interest at 11.75% for FY 2011-12 and FY 2012-13 on the working capital requirement as had been considered by the State Commission in the MYT order. The State Commission has not given any reason for not accepting the prayer of the Appellant and retaining the rate of interest as on 1.4.2010 i.e. at the beginning of first year of the control period of FY 2010-11. However, while deciding the working capital for the State generating company in the impugned order for FY 2011-12 and 2012-13, the State Commission has stated that for determination of rate of interest, the MYT Regulations, 2010 do not allow for change in normative rate of interest on working capital on year to year basis during the control period and accordingly, the State Commission approved the normative interest rate @ 11.75% as approved in the MYT order. The same argument has now been extended by the learned counsel for the State Commission with regard to interest on working capital for distribution licensee, i.e. the Appellant.

26. Thus, the moot point that is to be decided by us is whether the Regulation provide for interest rate on working capital as on the 1st day of the first year of the control period or it has to be considered as the SBI Prime Lending Rate as on 1st day of each financial year of the control period for the respective financial years.

27. Let us examine the Regulations ……

30. According to the State Commission, the interest on working capital as allowed in the MYT order will not be reviewed in the APR or truing up as the regulations do not permit the same. We are not in agreement with the contention of the State Commission. Regulation 25.4 only provides that the interest on working capital has to be allowed on normative basis notwithstanding that the licensee has not taken loan for working capital from any outside agency. Thus, if the distribution licensee does not take any loan for maintaining its working capital requirement, and uses its own funds for the same, the interest on working capital on normative basis would still be admissible to the licensee. However, the

normative interest on working capital has to be computed based on the prevailing PLR of SBI for the respective year. Accordingly, the working capital for FY 2011-12 and 2012-13 need not be trued up but the interest rate on working capital has to be trued up as per the actual SBI PLR rate in the truing up of the accounts.

31. Accordingly, this issue is decided in favour of the Appellant."

9.4 Thus, according to the judgment of this Tribunal, the interest rate on working capital has to be considered as per the prevailing short term SBI prim lending rate as on 1st day of each financial year of the control period. Accordingly, the interest on working capital has to be considered as per SBI prime lending rate as on 1st April of the respective year.

9.5 Accordingly, the State Commission is directed to re-compute the Interest on Working Capital for the Financial Years 2006-07 to 2009-10 as per SBI Prime Lending Rate as on 1st April of the respective year. Similarly, for the Financial Years 2011-12 to Financial Years 1012-13, the Interest on Working Capital has to be considered accordingly. We are however not in agreement with Learned Counsel for the Appellant that the rate of interest has to be considered as weighted average PLR of SBI during the year. The simple interest rate has to be considered as there is no provision for compounding on monthly basis in the Regulations. Thus, this issue is decided in favour of the Appellant.

10. **<u>Issue No.4</u>**: **Income on Consumer Security Deposit for FY 2006-07 to FY 2015-2016**.

10.1 The following are the submissions made by the Petitioner/Appellant on this issue.

10.2 that the Commission has erred in considering a notional and fictious income on consumer security deposits as non tariff income for FY 2006-07 to FY2015-16.

10.3 that the Original tariff order of the Commission for FY 2006-07 to 2012-13 did not make any such provisions for the treatment of any notional income on the consumer security deposits as non tariff income. Therefore, as held by this Tribunal it is impermissible for a new methodology to be introduced in any provisional or final true-up exercise.

10.4 that the State Commission has set up the consumer deposits (FY 2013-2014 to FY 2015-16) on estimates basis against the normative working capital and consider a notional and fictious income in so much of the consumers security deposits as was estimated in the excess of normative working capital as a non tariff income thereby reducing the ARR of the Appellant.

10.5 that there is no provision at all in the tariff Regulations for the treatment of any notional or fictious income on the consumers security deposit as non tariff income. That the Commission gravely erred in considering a notional and fictious income on the security deposits as a non tariff income and thereby reducing the ARR of the Appellant to that extent.

10.6 that the interest paid on the consumer security deposits is required by the Regulations to be allowed in the ARR.

10.7 that the Hon'ble Commission gravely erred in deciding this issue to the detriment of the Appellant causing substantial adverse effect upon the Appellant without any indication to the Appellant that such an issue was under consideration and without giving the Appellant an opportunity for hearing.

10.8 The interest paid on the consumer security deposits is required by the Regulations to be allowed in the ARR. The working capital is required to be computed on a normative basis and interest thereon is to be allowed. That is the requirement of the Regulations and only that ought to have been done. There is no provision in the Regulation for any notional income. Such notional income cannot form part of the non-tariff income by stretched logic and argument.

In the 2012 Regulations, the consumer security deposits are to be deducted from the working capital computed on normative basis. That may be done because the Regulations so specifically provide. But, there is no provision for treating any part of the consumer security deposits as yielding notional income and to consider any such notional income as non-tariff income.

10.9 Further, and without prejudice to the above, it is submitted that the consumer security deposit is for the purpose of securing the payments due from the consumer. There are

several cases where the payments from the consumers remain unpaid or overdue, often exceeding the amounts of the security deposit, and steps are underway for recovery of such amounts by such means as are permissible to the Appellant under law. There are also several cases where the recoveries of amounts due to the Appellant are restrained by orders of Courts/authorities. In the meanwhile, the adjustment of the consumer security deposit against the dues in any or all such cases are kept pending. The deposits would then be funding receivables beyond the period of 2 months for which no other provisions are made. It therefore cannot be said that the entire consumer security deposits are otherwise used in the business of the Appellant; and it cannot also be said that all of it is working capital or that any of it yields any notional income.

10.10 the decision of the Commission is vitiated by the serious violation of the principles of natural justice and lack of transparency and the order of the Commission in this respect is liable to be set aside.

11. **Per Contra,** the following are the submissions of the Respondent.

11.1 that the Appellant has tried to project that the State Commission by factoring in the interest of the consumer security deposit has over reached the decision of this Tribunal dated 14.8.2012 in Appeal No.89 of 2011. In

accordance with the directions given by this Tribunal in the judgment dated 14.8.2012 passed in Appeal No.89 of 2011, the Appellant has been allowed interest on working capital on the normative basis as provided in the Regulations. In addition, the Appellant has also been allowed actual interest paid by the Appellant to the consumers on their deposits in accordance with the provisions of the Section 47 of the Electricity Act, 2003.

11.2 that as a consequence thereby, the Appellant was left with significant quantum of amount received as the consumers deposit without outstanding liability. This money has come to the Appellant in undertaking the distribution and retail supply business. The money that the Appellant is benefited into is secured by the Appellant. There is a value to such benefit to be adjusted in the revenue requirements. The value calculated is equivalent to the interest payable on working capital.

11.3 that the consumer security deposit is a fund value with the Appellant and is being used by the Appellant for its business and its operation. When this issue was specifically raised by various consumers organization, the State Commission sought a clarification from the Appellant as to how this money was being used. The Appellant by the letter dated 7.3.2013 stated that the consumer security despot is being utilized in the business and its operation. This issue was raised by the consumer representatives in the State

Advisory Committee Meeting also. Therefore, after due consideration the State Commission considered the above amounts as being available to the Appellant towards utilization for its business and income on consumer security deposit was factored while computation of ARR.

12. **Our Consideration and Submissions on this Issue.**

12.1 Section 47 of the Electricity Act, 2003 deals with the power to require security. The relevant Section is quoted below:

"47. Power to require security.-

(1) Subject to the provisions of this section, a distribution licensee may require any person, who requires a supply of electricity in pursuance of section 43, to give him reasonable security, as may be determined by regulations, for the payment to him of all monies which may become due to him--

(a) in respect of the electricity supplied to such person; or

(b) where any electric line or electrical plant or electric meter is to be provided for supplying electricity to such person, in respect of the provision of such line or plant or meter, and if that person fails to give such security, the distribution licensee may, if he thinks fit, refuse to give the supply of electricity or to provide the line or plant or meter for the period during which the failure continues.

-x x x x -

12.2 As per above Sections, the Distribution Licensee collects security deposits through the consumers of the respective Distribution Licensees and the same amount has to be

returned back to the consumers whenever the consumers leaves/terminates the agreement with the respective Distribution Licensee.

12.3 The consumer security deposit will be available with the Distribution License until the amount is returned to the consumer and the deposits will be used by the Appellant in its business and its operation at no cost. In the impugned order, it has been observed by the Commission that huge amount of consumer security deposit rested with the Appellant. On this deposit, the interest is paid to the consumers and at the same time it is recovered by way of inclusion in the interest and finance charges in the ARR. Further, it is also observed from the Impugned Order that the Appellant has provided year wise details of the consumer security deposits and the Appellant has confirmed that the consumer security deposit has been utilized in the business and its operation.

12.4 This Tribunal in the Review Petition No.10 of 2012 in Appeal No.89 of 2011 has held that the Rate of Interest for Consumer's Deposit has to be considered as per the rates determined by Reserve Bank of India. As per the Notifications of the Reserve Bank of India dated 13.2.2012, the bank rate has increased from 6% to 9.5% w.e.f 14.2.2015 and accordingly, the Appellant is bound to pay the Interest to consumers on Consumer's Security Deposits as determined by the Reserve Bank of India. Accordingly,

the state Commission ought to have allowed the interest on consumer's security deposits for the Financial years 2006-07 to 2012-13. The decision of the Tribunal has been implemented by the Commission.

12.5 We find that for FY 2006-07, 2007-08 and 2008-09 (April-December), the Commission has reduced the interest on working capital by interest on Consumer Security Deposit available with the Appellant on the same interest rate as considered for determining the interest on Working Capital. For FY 2008-09 (Jan-March, 2009), 2009-10 and 2010-11 and 2011-12, the interest on consumer Security deposit has been considered as non-tariff income which is deducted from the ARR.

12.6 In the 2012 Tariff Regulations, the Regulation for Working Capital has been modified such that the consumer security deposit is to be deducted from the components of normative expenditures allowed as Working Capital. In FY 2013-14, 2014-15 and 2015-16, the consumer security deposit is anticipated to be in excess of normative working capital and therefore, the Commission has considered the excess consumer security deposit over and above the working capital requirement as non tariff income.

12.7 Let us examine the Regulations. 2006 Tariff Regulations provides for components of working capital. The relevant Reguation 15 is reproduced below:

"*15.* ***Working capital***

Working capital shall consist of :

(a) Operation and maintenance expenses for one month

(b) Maintenance spares for 2 months based on annual requirement considered at 1% of the gross-fixed assets at the beginning of the year

(c) Receivables equivalent to 60 days' average billing of consumers

(d) Receivables equivalent to 60 days' of wheeling charges from open access customers

12.8 Regulation 22 provides for interest charges on security deposit to be considered at the rate specified in CSERC (Security Deposit) Regulations, 2005. Regulation 30(1) provides that the total annual expenses and Return on Equity of the licensee shall be worked out on the basis of expenses and return on equity allowed in terms of Clause 29. Regulation 30(2) provides that the ARR of the Distribution Licensee shall be worked out by deducting other income as laid down in Regulation 32 and any grant received from the State Govt. Other income has been specified under Regulation 32 as income from investments, other non-tariff income from the levy of charges as provided in the schedule for miscellaneous charges and general charges under the CSERC, 2004 Regulations, wheeling charges from Open Access customers, income from surcharge, additional surcharge and late payment surcharge from Open Access customers and Revenue from other business to the extent authorized under Section 51. Thus, 2006 Tariff Regulations do not provide for deduction

of notional interest on consumer security deposit from the ARR for interest on wheeling capital.

12.9 As per 2010 Tariff Regulations, applicable for the period 2010-11 to 2012-13, the ARR of the distribution licensee comprises various components as indicated under Regulation 42. Regulation 42 provides that non-tariff income as specified in Regulation 65 shall be subtracted from the sum of various expenses allowed under Regulation 42 to arrive at ARR. Regulation 64 describes the non-tariff income as any income being incidentals to the business of the licensee derived for sources including not limited to the disposal of assets, income from investment, rents, open access charges, parallel operation charges, penalties for over/under utilization of system and any other miscellaneous receipts but other than income from sale of energy, shall constitute the non tariff income.

12.10 As per 2012 Tariff Regulations in determining the Working Capital in case of retail supply of electricity, the amount held as security deposit from the consumers is to be deducted. The interest paid on security deposit to the consumers is also allowed as part of interest and financial charges under Regulation 23.10. Provision for non –tariff income what is to be subtracted from ARR is similar to 2010 Regulation

12.11 2010 Tariff Regulations provide for non tariff income to be deducted from the ARR. However, the non-tariff income does not specify notional income on the consumer security deposit.

12.12 The 2012 Tariff Regulations provide for deduction of consumer security deposit from the working capital requirements. However, there is no provision for notional interest on excess consumer security deposit to be treated as non-tariff income.

12.13 Thus, deduction of notional interest from the interest on working capital in FY 2006-07 to 2008-09 (April-December), treating notional interest on consumer security deposit as non-tariff income for FY 2008-09 (Jan-March) and 2009-10 to 2011-12 and notional interest on excess consumer security deposit over and above the working capital requirement as non tariff income is contrary to the applicable Regulations.

12.14 Therefore, this issue is decided in favour of the Appellant.

13. **Issue No.5**: **Rate of Return on Equity for the FY 2007-08 to 2009-10.**

13.1 The following are the submissions made by the Petitioner/Appellant on this issue.

13.2 the contention that the CSERC Regulations, 2006 only gave a discretion to prescribe a rate of return different from 14% is incorrect and unjustified. The CERC Regulations clearly set out the principle that the Rate of Return on Equity (RoE) for the Distribution Business is to be higher than that for the Transmission Business considering the higher risk involved. The Commission was bound to consider the issue in that light and in accordance with the principle set down. The Commission simply took the CERC Transmission rate of 14% and without any further consideration, applied the same. In the case of Financial Year 2009-10, the rate was even lower than the CERC's Rate of Return on Equity for transmission.

13.3 The Commission ought to have followed its own CSERC Tariff Regulations, 2006 and considered an appropriate modification taking into account the higher risk involved in the Distribution Business. Accordingly, the Commission ought to have allowed Return on Equity at more than 14%.

13.4 for the Financial Year 2009-10, the CERC, 2009 Regulations was applicable and the ROE for transmission as 15.5%.

13.5 that the Commission has not given any consideration to the factors and principles laid down in the CSERC Regulations for determining the rate of Return on Equity. Not only has the Commission not considered a higher rate for Return on Equity than that allowed to transmission under the CERC

Regulations as required by the CSERC Regulations, the rate of Return on Equity for the Financial Year 2009-10 was even lower than that allowed to transmission under CERC Regulations applicable for that period.

13.6 that the Tribunal, may therefore be pleased to set aside the Impugned Order so far as the Return on Equity for FY 2007-08 and Financial Year 2008-09 (April to December), FY 2008-09 (January to March) and FY 2009-10 is allowed at 14% and to allow Return on Equity at 15% for FY 2007-08 and FYT 2008-09 and that 16.5% for FY 2009-10.

14. **Per Contra**, the following submissions have been made by the Respondent State Commission.

14.1 that the issue raised by the Appellant is that a higher rate of Return on Equity than 14% should be allowed to the Appellant. Regulation 29 of the Chhattisgarh State Regulatory Commission (CSERC) Tariff Regulations, 2006 only gave a discretion to the State Commission to prescribe a rate of return different from 14% if the State Commission would so decide but it was for the Appellant to prove the additional risk which it had taken to maintain a claim for higher Rate of Equity.

14.2 that in the Tariff Petitions, the original Tariff Orders, provisional True-up Petitions, Provisional True-Up orders, Final True Up Petitions and final True Up orders for FY 2007-08 and FY 2008-09, the Appellant had claimed only

14% and the State Commission allowed the same. However, it is relevant to point out that even though the actual equity of the Appellant including the free reserves was much lower than 30% of the total capital cost, the ROE of 14% was allowed deeming than the Equity is 30% of the capital cost and on account of this, the Appellant received substantially higher quantum of Return on Equity.

14.3 that for the FY 2009-10, the State Commission had prescribed a new set of Regulations in 2008 which provided for ROE at the maximum level of 14%.

14.4 that in the Tariff Regulations, 2006, the intention of the State Commission is only to follow the CERC Tariff Regulations, 2004 and not any further CERC Regulations. Regulations 29 which is being relied on by the Appellant needs to be read with Regulation 5 which pertains to transmission and adopts CERC Regulations, 2004.

15. **Our Consideration on the Issue: Return on Equity**.

15.1 The Appellant has claimed a higher rate of interest on equity than 14% allowed by the Commission for the FYs 2007-08 to 2009-10 on the basis of the 2006 Regulations which provides that rate of return as notified by the Central Commission for the transmission may be adopted for distribution with appropriate modifications taking into account the higher risks involved as decided by the

Commission on the paid up equity capital determined as per the Regulation 12.

15.2 We find that in the main tariff order dated 22.10.2007 for the FY 2007-08 and dated 30.5.2009 for the interpreted CSEB and for 2009-10 and ARR for 2008-09, the State Commission had decided RoE @ 14%. In the tariff order dated 30.5.2009, the Commission gave detailed reasoning for not allowing RoE at the rate higher than 14% for the distribution business. This was not challenged by the Appellant. The Appellant also did not raise this issue in the Appeal No.89 of 2011 filed before this Tribunal. Therefore, raising this issue at this stage after re-organization of the CSEB and final true-up of the accounts is not permissible. The 2006 Regulations provides discretion to the Commission for deciding the RoE at the rate higher than the rate specified by the Central Commission in its Regulations for transmission. The Commission considered this issue in its tariff order dated 30.5.2009 and gave detailed reason or allowing RoE at 14%.

15.3 In view of the above, **this issue is decided as against the Appellant**.

16. **<u>Issue No.6:</u> Part Disallowance of Administrative and General Expenses for FY 2008-09 (April to December) and FY 2009-10.**

16.1 The following are the submissions made by the Appellant on this issue:

16.2 that while determining the ARR for FY 2008-09 for the first time in Tariff Order 2011-12 and the basis of actual as per provisional accounts, the Commission for the first time approved the A&G expenses of 99.65 Crores for the Financial year 2008-09.

16.3 Now in the Impugned Order the Commission has considered a limit of A&G expenses for the FY 2008-09 considering allowable escalation of 10% over and adjusted gross actual A&G for the FY 2007-08.

16.4that the Commission is not justified in setting up a target of norm retrospectively after the period of Financial Year 2008-09 is over. A target of norm has to be set-up and establishing up front before the period commenced otherwise it is unreasonable and unjustified.

16.5 in the Impugned Order for the FY 2009-10 a limit has been determined by taking the limited A&G expenses for the last quarter of FY 2008-09 (January to March) annualizing the same by a multiple of four escalating the so analyzed allowable expenses by 10% and allowing CSPDCL expenses at actual in addition.

17. **Per contra,** the Counsel for the Respondent has made the following submissions in support of its plea.

17.1 that the A&G expenses is a component of operational and maintenance expenses. The **relevant Regulations reads as under:**

> **"*17. Operation & Maintenance Expenses***
>
> **.....**
>
> *(5) The licensee shall be allowed to retain the savings against the permitted O&M expenses. Likewise, the licensee shall bear the losses if he exceeds the permitted O&M expenses, for that year."*
>
> **.....**
>
> ***35. Multi Year Tariff (MYT)***
>
> *(5) The Operation and Maintenance costs shall be controllable cost and shall be based on escalation indices or other mode determined during determination of tariff for the base year.*

17.2 that the State Commission has not deviated in any manner from the original tariff order or fixed a target retrospectively. For the FY 2008-09, the Appellant did not file any Tariff Petition and no tariff order was passed. When the tariff for the FY 2011-12 was being passed, the Appellant based on provisional accounts projected that the A&G expenses for FY 2007-08 was 78 Crores. The State Commission has allowed 10% escalation and determined the A&G expenses for FY 2008-09 at Rs.86.12 Crores. However, when the audited accounts for FY 2007-08 were placed, it was observed that the actual A&G expenses for FY 2007-08 was only Rs.66.16 Cores out of which the donation etc were excluded and some capitalization was added and net A&G

expenses were arrived at Rs.70.65 Crores. On this figure, the State Commission has allowed 10% escalation and determined the A&G expenses for FY 2008-09 at Rs.77.71 Crores (3/4th of which has been allowed from April to December, 2008). Apart from this, for the balance 03 months an amount of Rs.17 Crores has been allowed and also the share of A&G expenses holding Company to be borne by the Appellant has been fully allowed.

17.3 there is no question of setting a retrospective norm. The Appellant did not file any tariff petition for FY 2008-09 and gave only provisional accounts for FY 2007-08 and FY 2008-09 when the tariff order for FY 2011-12 was being passed. Therefore, the State Commission has given a methodology of giving a 10% hike which has been continued even in the Impugned Order.

18. **Our Consideration:**

18.1 A&G expenses are one of the components of Operation and Maintenance Expenses.

18.2 The relevant Section deals with the Operation & Maintenance Expenses in the Tariff Regulations, 2006 which is quoted below:

"***Section 17(3):*** *To arrive at the O&M Expenses for the Tariff Year a normative O&M expenses allowed for the base year shall be escalated on the basis of predetermined indexes such as consumer price index, whole sale price index and the cost drivers such as net work growth, energy sales,*

growth in consumer, major revision of the employees of the licenses etc subject to prudence check by the Commission".

Section 35(5) of the Multi Year Tariff Regulations, 2006

"The Operation & Maintenance cost shall be controllable cost and shall be the base on the escalation indexes or other mode determined during the determination of the Tariff or the Base Year".

18.3 The State Commission initially computed the A&G expenses for the Financial Year 2008-09 based on the provisional accounts submitted by the Appellant that the A&G expenses for FY 2007-08 was Rs.78 Crores. Further, the State Commission allowed 10% escalation and determined the A&G expenses for FY 2008-09 at Rs.86.12 Crores. Further, the Commission has also allowed the share of the Employees Expenses of CSPHCL allocated to the Companies i.e. Rs.13.53 Crores. Thus, the State has provisionally approved total A&G expenses of Rs.99.65 Crores for the Financial Year 2008-09.

18.4 Later on, the Petitioner in the Petition submitted to consider the actual A&G expenses based on the audited accounts and as per the audited accounts gross A&G expenses for FY 2007-08 has been decreased to Rs.66.16 Crores instead of Rs.78 Crores and based on the base figures of FY 2007-08, the Commission has approved Rs.77.71 Crores as the net A&G expenses which is an increase of 10% over base A&G expenses approved for the

FY 2007-08 i.e Rs.70.65 Crores. The total calculation is shown below:

Table 15: Computation of A&G expenses for FY 2008-09 (Rs.Crore)

Particulars	Derivation of A&G Expense
Gross A&G Expenses for FY 2007-08	66.16
Less: Donation/Contribution	5.41
Less: Actual Capitalization of A&G Expenses	21.09
Add: Actual Capitalization of DSPM	18.85
Add: Store Incidental Charges	12.13
Base A&G Expenses considered for estimating allowable A&G expenses for FY 2009	70.65
Projection for FY 2008-09 (with 10% hike)	77.71
Approved A&G Expense for FY 2008-09	77.71
Approved A&G Expense for FY 2008-09 (Apr-Dec)	58.28

18.5 Accordingly**,** the State Commission has approved A&G expenses for the Financial year 2008-09 (from April to December Rs.58.28 Crores).

18.6 We observe that the State Commission has rightly computed the A&G expenses taking into consideration the audited accounts for the FY 2007-2008.

18.7 Since the Appellant has not provided suitable justification for increase in A&G expenses for the year 2009-10, the State Commission followed the same methodology i.e. escalating the A&G expenses for FY 2008-09 by 10% and accordingly computed the allowable expenses for FY 2009-10 as Rs.58.65 Crores for CSPDCL.

18.8 We find that the approach adopted by the Commission is in accordance with the tariff Regulations, 2006 i.e. escalation of O&M expenses by escalation indices over the expenses for

the base year. We do not find any infirmity in the findings of the State Commission.

18.9 Accordingly, we affirm the decision of the State Commission in the Impugned Order and **decide this issue against the Appellant.**

19. **<u>Issue No.7</u> is relating to Distribution Loss Target for FY 2008-09.**

19.1 The Appellant has submitted that the Commission has erroneously re-determined a T&D loss target of 32.54% retrospectively for FY 2008-09 and consequently disallowed the power purchase cost. The Commission has failed to see that the Appellant ought to have been allotted incentive for better performance.

19.2 That the Appellant contested that the State Commission had accepted 34.46% loss level for FY 2007-08 as reference level and stated that the target for 2007-08 prevails for 2008-09 also since there was no tariff order for FY 2008-09. The loss level considered for FY 2007-08 will be considered for FY 2008-09 also. However, the State Commission has considered that target as 32.54% for FY 2007-08 and fixed the same as the target for FY 2008-09. Further, the Commission has also considered alternative approach on the basis of reference level of 34.46% and reduced it by 3% purportedly on the basis of the Abraham Committee Report and again fixed 32.54% on liberal approach.

19.3 That the State Commission has computed the actual T&D loss for FY 2008-09 on a revised assessment of the loss and arrived the actual T&D loss at 33.35% and stated that the actual loss of 33.35% is more than the target of 32.54% and the Commission has disallowed Power Purchase cost for the excess energy and accordingly, the Commission has arrived excess energy at 137.64 MU at the average Power Purchase Rate of Rs.1.49 per unit and it works out to Rs.20.72 Crores and the same amount has been disallowed by the State Commission in the Impugned Order.

20. Per Contra, the State Commission has submitted the following in support of its plea**.**

20.1 That for the FY 2008-09, the tariff order could not be passed since the Appellant chose not to file a tariff petition. For the FY 2007-08 in the tariff order dated 22.10.2007, the distribution loss target was fixed by the State Commission as 32.54% as against the proposal of the Appellant of 34.54%. The actual loss level achieved by the Appellant for FY 2007-08 was 34.46%.

20.2 That the State Commission accepted the actual loss achievement of 34.46% for FY 2007-08 and did not penalize the Appellant for not achieving the target. However, this does not mean that the actual achievement for FY 2007-08 will become the target for FY 2008-09 also. Despite that the State Commission has taken a liberal

approach and kept the distribution loss target of 32.54% even for the FY 2008-09.

20.3 It is not correct to contend that no target at all was fixed for FY 2008-09 when no tariff order was passed for the FY 2008-09, at the most the same target at for FY 2007-08 was taken for FY 2008-09. Accordingly, the Commission has fixed the loss target as 32.54% for the FY 2008-09.

20.4 That the State Commission has considered the loss level target as per the Utilities/Appellant's own submission which were 34.46% and considering the Abraham Committee Report on loss target at least 3% has to be reduced for the subsequent year i.e. FY 2008-09. Accordingly, the lost target will become 34.46% -3% =31.46%.

20.5 That the Abraham Committee appointed by the Ministry of Power, Government of India which recommended fixation of a T&D loss reduction target as per the prevailing loss level in the utilities such as (a) utilities having a T&D loss level above 40% and reduction by 4% per year (b) Utilities having a T&D loss between 30% to 40% reduction by 3% per year and (c) Utilities having loss as between 20 and 30% reduction by 2% per year.

20.6 The contention of the Petitioner/Appellant in the instant case is that the Abraham Committee Repot cannot be considered is not acceptable because at the time of determination of tariff for FY 2007-08, the Commission has fixed a target of 32.54% but considered the loss level

submitted by the Appellant as 34.36% and did not penalize the Distribution licensee at that time.

20.7 That now the State Commission has considered the loss level submitted by the Appellant i.e. 34.46% and considering the Abraham Committee report i.e. reduction of 3% has to be done by the Utilities if the T&D loss level target is between 30 to 40%. In the instant case, the loss level submitted by the Appellant himself is 34.46% and hence the Commission has taken the report of Abraham Committee into consideration and as per this Report, the Appellant has to achieve a loss level target of 31.46% but in a liberal view, the State Commission has considered 32.54% for FT 2007-08 and the same was considered for the FY 2008-09.

20.8 The Commission also directed the Appellant to carryout an independent study on the technical losses, non technical commercial losses with further brake-up of losses of theft/pilferage and due to commercial reasons other than theft and pilferages.

21. Our Consideration on the issue No.7:

21.1 The loss target set up by the State Commission for FY 2007-08 was 32.54%. The Appellant failed to achieve the target for 2007-08. While carrying out the provisional true-up, the Commission has considered the T&D losses for the FY 2007-08 as submitted by the Appellant CSPDCL as 34.46%. Further, the State Commission did not penalize the

Appellant for the higher T&D losses during the FY 2007-08. The Appellant did not file tariff Petition for FY 2008-09. However, the State Commission decided to retain the same losses as fixed for FY 2007-08 i.e. 32.54% for FY 2008-09 also. We find that the Commission has adopted a liberal approach while deciding the target for FY 2008-09. If the Appellant failed to achieve the target for FY 2007-08 and the Commission decided to take a liberal approach by allowing the entire power purchase cost, the Appellant cannot claim that the actual loss level for FY 2007-08 should be taken as the target for FY 2008-09.

21.2 Thus, we affirm the decision of the State Commission on this issue.

21.3 This issue is **decided against the Appellant**.

22. Issue No.8: Distribution Loss for the FY 2010-11

22.1 The Contention of the Appellant is that the State Commission has erroneously omitted to consider 130.95 MU exported out of the 33/11 kV sub station to the EHV system out of 426.47 MU injected by CPPs/IPPs directly at 33/11 kV sub stations. The Appellant has computed the actual loss level of Rs.33.56% which is less than the approved target of 34% and hence there was a saving of power purchase to the extent of 102.23 MU and consequently there was a saving of Rs.22.47 Crores.

22.2 Thus, the Commission should have allowed the Appellant to retain Rs.7.49 Crore of the said gains. Instead, the Commission disallowed the Power Purchase cost of Rs.3.55 Crores by considering loss level of 34.12% against the target of 34%. The computation of the Petitioner/Appellant is quoted as below:

Particulars	***Unit***	***Impugned Order***	***Actual***
Energy Sales at LT & HV	*MU*	*10228.28*	*10228.28*
Energy Delivered to CSPDCL at 33 kV outgoing Feeder of all EHV s/s	*Mu*	*15100.55*	*15100.55*
Energy injected by CPP/IPP at 33 kV	*MU*	*426.47*	*426.47*
Less: Energy exported from 33 kV system to EHV system	*MU*	*Erroneously omitted*	*(130.95)*
Total Energy available at 33 kV	*MU*	*15527.02*	*15396.07*
Energy Loss below 33 kV	*MU*	*5298.14*	*5167.19*
Energy Loss % below 33 kV	***%***	***34.12%***	***33.56%***

22.3 According to the State Commission, 130.95 MU has been factored in and is reflected as total input of 15100 MU in metered data (14767.56 MUs at EHV transfer over +479.69 MU of CPP/IPP Injection at EHV + 130.95 MU injection at EHV S/Stn from CPP/IPP injection at 22/11 KV S/Stn – 278.1 MU bus losses. Further, 61350 MU is already reflected as metered data in submission of the Appellant to the State Commission. Though buss losses of 278 MU are at higher levels, the State Commission has considered it in calculation of losses.

23. Our Consideration on the Issue.

23.1 We find that the submission of the learned Counsel for the State Commission that 15100.55 MU taken as delivered at 33 KV already contains 130.95 MU of energy injection at 33 KV from CPP/IPP connected to 33/11 KV sub station.

Therefore, 130.95 MU has to be deducted from the energy of 426.47 MU injected by CPP/IPP directly connected to 33/11 KV sub station.

23.2 We, therefore, **direct the State Commission to reconsider the computation of energy loss below 33 KV and pass consequential order**.

24. Issue No.9 i.e. Contribution to Pension and Gratuity Fund.

24.1 The Appellant has made the following submissions:

24.2 That the contribution towards Pension and Gratuity Fund having only been paid directly to the Fund and no part was directly to any ex-employee during the FY 2008-09 and hence the reasons and circumstances for payment over and above the tariff order approved amounts in FY 2009-10 and the pleas in respect thereof were all placed before this Tribunal in Appeal No.89 of 2011. This Tribunal did not accept the under paid contribution for FY 2005-06 to be allowed in the true-up for that year. Further, this Tribunal directed for verification of the facts with regard to the payments alleged to have been made to ex-employees and not to the fund. Further, this Tribunal directed that the additional amounts paid in the subsequent years be considered in the true-up for such subsequent years.

24.3 That the Commission has expressly pursuant to the Review Order in RP No.10 of 2013 allowed the actual contribution made to the pension and gratuity fund in FY 2009-10 as

claimed by the Appellant while carrying out the final true-up for FY 2009-10.

24.4 That the State Commission proceeded to reduce the amounts paid in FY 2009-10 in excess of what was approved in the Original tariff order for that year from the amount of contribution to be allowed for FY 2013-14 by way of punishing the Appellant for alleged willful violation of directives.

24.5 That the entire issue of contribution to the Pension and Gratuity Fund from 2005-06 up to and including FY 2009-10 was put in issue before this Tribunal in Appeal No.89 of 2010 and again in RP No.10 of 2013.

24.6 That this Tribunal did not accept the under paid contribution in FY 2005-06 to be allowed in the true-up for that year and this Tribunal directed verification of facts with regard to payments alleged to have been made to ex employees and not to the fund.

24.7 Further, this Tribunal directed that the additional amounts paid in subsequent years to be considered in the true-up for such subsequent years.

24.8 That the State Commission allowed the contribution as claimed by the Appellant for FY 2008-09 and 2009-10.

24.9 That the Commission's further action on holding the Appellant to be in willful violation of directives and adopt punitive measures of reducing the amount of contribution for FY 2013-14 is wholly unwarranted and improper.

24.10 That the State Commission ought to have allowed the entire amount of Appellant's contribution of Rs.155.58 Crores (i.e. 62.23% of Rs.250 Crore) for FY 2013-14 without any adjustment or deduction.

25. Per Contra, following are the submissions made by the Respondent on this issue:

25.1 that there is no violation of the judgment of this Tribunal's decision dated 23.1.2013 in Review Petition No.10 of 2012. Whatever the amounts contributed by the Appellant to the Pension Trust, have been allowed. But the contributions in excess of the directions issued by the State Commisison have been taken as having been contributed in the subsequent years.

25.2 that the State Commission has not disallowed a single paise contribution actually made to the fund. However, the Appellant has made excess contribution to the fund than what was allowed in the tariff order. Therefore, for working out the actual requirement for future period, State Commission has taken cognizance of the excess contribution so made. The consumers cannot be saddled with the same liability twice over.

26. Our Consideration on the issue:

26.1 Let us examine this Tribunal Order:

26.2 In the Review Petition No.10 of 2012 in Appeal No.89 of 2011 held as under:

> *"if the additional amount has been contributed to the Fund in the subsequent year, the same may be considered by the State*

Commission in the true up for the sub sequent years. The Petitioner/Appellant has submitted that for the years 2008-09 and 2009-10, they have not made any direct payment to the employees and an amount of Rs.407.22 Crores and Rs.257.09 Crores respectively was actually paid with the fund. Accordingly, we direct the State Commission to verify the actual facts from the records and consider the sub missions of the Appellant and decide the issue accordingly".

26.3 Accordingly, the State Commission has allowed the actual payment towards contribution of Pension and Gratuity Fund for the FY 2008-09 and FY 2009-10. In the present Appeal, the Appellant has contested that the State Commission disallowed Rs.65.87 Crores from the Contribution for FY 2013-14 stating that the Appellant has contributed excess amount during FY 2009-10 and hence the same amount is adjusted from the contribution for the FY 2013-14.

26.4 We feel that the State Commission as per the directions of this Tribunal has considered the actual payment for the FY 2009-10 towards Pension and Gratuity Fund and hence the payment of excess amount does not arise when the Commission allowed the actual amount during the FY 2009-10. The Commission has itself held after going through the 20 years fund flow projections, the acturial report submitted by the Appellant that P&G trust contribution for the control period 2013-16 is 250 Crores, 300 crores and 350 Crores. This requirement has been decided after considering the actual contribution for FY 2009-10 which has also been allowed in the Impugned Order. If the Commission felt that

the appellant should not have deposited excess amount of Rs.105.89 Crore during FY 2009-10, it may have not allowed carrying cost on the excess amount for the FY 2009-10 to 2013-14. However, there is no reason to disallow the excess amount allowed for FY 2009-10 and disallowing the same during FY 2013-14.

26.5 In view of the above, the State Commission should not disallow the excess payment of Rs.105.89 Crores from the contribution made by the Appellant for the FY 2013-14. Accordingly, the State Commission is directed not to disallow Rs.65.87 Crores from the contribution for the FY 2013-14 and allow the actual contribution as per this Tribunal order.

26.6 Accordingly, the State Commission is directed to allow the disallowed amount of Rs.65.87 Crores towards contribution for the FY 2013-14. **Accordingly, the issue is decided in favour of the Appellant.**

27. **Issue No.10 i.e. Direction on Management of Pension and Gratuity Fund**.

27.1 The Appellant has submitted that the Management of pension & Gratuity Fund is vested with the Trustees of the Fund who are entirely independent of the Appellant. The purpose of setting up a Trust is also to principally remove the monies required for the payment of terminal benefits to the beneficiary employees beyond and independent of the

control of, and management by, the Appellant or other entities obligated to contribute to the Fund. The powers and obligations of the Trustees are controlled by other Statutes and so also are the permissible investments of the Trust funds. The trust and its management is also beyond the jurisdiction of the Commission. The Appellant has no role per se in the same. That the Directives of the Commission to the Appellant to manage the Trust Fund is without jurisdiction and contrary to law and impossible of compliance by the Appellant and is liable to be set aside.

28. Our Consideration on the Issue:

28.1 The State Commission has directed the Utilities to manage the fund in a judicious manner to maximize the return from equity. According to the contentions of the Appellant, the Management of the Pension and Gratuity Fund is vested in the Trustees of the Fund who are entirely independent of the Appellant.

28.2 In the State of Chhattisgarh one Pension Trust has been even before April, 01, 2005 i.e. before start of Regulatory regime. Further, the purpose of setting up of a Trust is also to principally remove the monies required for payment of terminal benefits to the beneficiary employees beyond and independent of the control of, and management by, the Appellant or other entities obligated to contribute to the Fund. The powers and obligations of the Trustees are

controlled by other statutes and so also are the permissible investments of the Trust funds.

28.3 The contention of the Appellant that the Management of Pension and Gratuity Fund is vested in the Trustees and they have no control over it. We find that the State Commission has not given any observation about inadequate or less returns from the fund. Yet direction has been made by the Commission regarding management of the fund in a judicious manner without any reason. Further, the fund is managed by the Trust on which the Appellant has no control.

28.4 We **hold the direction given in the Impugned Order to the Appellant as null and void**.

29. The 11th **Issue** is **Inflation of Surplus by adding holding cost for FY 2005-06 to FY 2008-09 (April-Dec) and FY 2008-09 (Jan-Mar) to FY 2010-2011.**

29.1 The Appellant has made the following submissions:

29.2 That the Commission has added a notional holding cost for the surplus in each of the years of the Chhattisgarh State Electricity Board period from 2005-2006 and thereafter upto the Financial Year 2009-10 computed at the rate of 10.25% and for FY 2010-11 at the rate of 11.75% purportedly being the rate of interest adopted on the working capital and the average surplus between the opening and closing of the year and carrying the same policy to the opening of the

succeeding year treating the same as an additional gain during the years.

29.3 That the Commission gravely erred in deciding this issue to the detriment of the Appellant causing substantial adverse effect upon the Appellant without any indication to the Appellant that such an issue was under consideration and without giving the Appellant an opportunity for hearing.

29.4 That the Commission is vitiated by serious violations of the principles of natural justice and lack of transparency and the order of the Commission in this respect is liable to be set aside.

29.5 that in respect of the FY 2005-06, the State Commission had allowed interest on financial charges only to the extent of actual expenditures towards the interest. The surplus during the year ought to be considered to have been deployed for working capital. No interest on working capital during the year was allowed on any normative basis as erroneously suggested in the Impugned Order. Therefore, in the case of Financial Year 2005-06, the consideration of any notional holding cost/carrying cost/gains in any case without prejudice to the submissions hereafter are wholly misconceived, arbitrary and unsustainable.

29.6 that for the Financial Year 2005-06 and FY 2006-07 and further in respect of the CSEB period (s) from FY 2006-2007 and thereafter up to FY 2011-2011, the Commission grievously erred in considering a notional gain on the

surpluses of each such year thereby inflating the surpluses.

29.7 That the State Commission is indirectly reducing the working capital and the interest on working capital i.e. to be allowed in accordance with the Regulations and in terms of the judgment of this Tribunal.

29.8 The State Commission while purporting to comply with the said judgment of this Tribunal, the Commission has evolved another device by means of considering a notional gain at the rate of the interest rate on working capital on the amount of surplus by as if such surplus was a source of part of the working capital. There is no provision for such a treatment in the Tariff Regulations.

29.9 that the carrying cost is to be given where the Commission makes a conscious decision in a tariff order not to allow the recovery of entire ARR approved and to leave an uncovered revenue gap and create a regulatory asset for the purpose.

29.10 That the concept of allowing carrying cost is not applicable to cases where the tariff has been fixed to recover the approved ARR and it is thereafter found in true-up proceedings that the tariff has resulted in a deficit or surplus. In such cases, the allowable deficit/surplus is carried forward according to the Regulations without applying interest thereon.

29.11 It is therefore submitted that the inflation of the surplus of each of the year FY 2005-2006 to FY 2010-2011 by adding on a notional gain computed on the basis of the interest

rate on working capital being applied to the yearly average of surplus is liable to be set aside.

30. Per contra, the following are the submissions of the Respondent State Commission.

30.1 The State Commission has allowed carrying cost in case of Revenue gap and similarly the State Commission has also acknowledged this principle in its tariff order for FY 2012-13 wherein it was categorically stated that the State Commission will allow carrying cost and the revenue gap of the past period. The Commission opines that the corollary is also true that the concept of carrying cost is based on the financial principles that money has its own cost and where there is a revenue gap, the Utility has to bear that cost and accordingly it has a righteous claim for recovery of such cost. However, when there is a revenue surplus, it implies over recovery in the past period and the consumers have a bonafide claim to be compensated for such surplus held by the Utility. The rate at which the Utility has to be compensated in the form of carrying cost and the interest rate at which the gains from holding the surplus are to be computed will remain the same as the money has no color and its cost for the Utility and for the consumer cannot be discriminated.

30.2 The consumer representative also in a meeting in the State Advisory Committee for Tariff has requested to consider holding cost on surplus retained by the Utility. If the deficiency is passed on to the consumers along with

carrying cost, the same principle would apply if there is a surplus for the Appellant. Any surplus money also earns an interest and the same has been accounted for as a holding cost.

31. Our Consideration on this Issue:

31.1 The State Commission has determined the Revenue Gap in the ARR of a licensee after considering the submissions of the stake holders. In case, the Commission decides not to allow the entire deficit in the ARR or tariff for some reasons or creates some regulatory assets, then the carrying cost is to be allowed to the licensee as per the decision of this Tribunal in various cases. Similarly on true-up or on implementation of the decision of the Appellate Courts if Revenue Gap is found, carrying cost has to be allowed as per the decision of the Appellate in various cases. Similarly, if there is surplus as a result of true-up of accounts of the licensees, interest on the surplus is to be considered by the Commission for reducing the ARR. The principle of time value of money and carrying cost has to be applied both for the deficit as well as surplus discovered after true-up of accounts.

31.2 Learned Counsel for the Appellant has submitted that the final true-up of ARR for FY 2005-06 and FY 2006-07 was carried out by the State Commission vide order dated 31.3.2011 and in the Impugned Order only the decision of this Tribunal has been implemented in respect of FY 2005-06 and FY 2006-07. Therefore, the interest on surplus for

FY 2005-06 and FY 2006-07 should not be considered for reducing the ARR.

31.3 We find that as a result of implementation of the judgment of this Tribunal for FY 2005-06 and FY 2006-07, amount of ARR and Revenue Gap/surplus position for the Appellant for these years has changed. The Tribunal had also directed for carrying cost on revenue gap. Thus, as a result of the directions of this Tribunal the accounts of FY 2005-06 and FY 2006-07 have been further trued-up and the position of the surplus/deficit of the Appellant has also been changed. Accordingly, the carrying cost has to be allowed for final surplus/deficit which has been determined in the Impugned Order.

31.4 Learned Counsel for the Appellant has argued that the Learned Counsel for the Appellant was not heard at the time of allowing interest on surplus amount and therefore, the principle of natural justice was not followed.

31.5 We do not agree with the submissions of the learned counsel for the Appellant. The Revenue Gap/Surplus are decided by the State Commission after hearing the Appellant. The calculation of Interest on surplus/carrying cost is only a mathematical calculation based on the principle of time value of money and hence there is no violation of principle of natural justice. **Hence, this issue is decided against the Appellant.**

32. **The 12th Issue** is **Disregard of the binding nature and effect of the Transfer Scheme notified by the Chhattisgarh State Government.**

32.1 The Appellant contended that the State Commission erred in considering that the Statutory Transfer Scheme notified by the State Government was not binding upon it, and that some of the provisions therein were beyond the powers of the State Government and contrary to law and that the Commission could ignore and/or refuse to give effect to some parts of the Scheme that it considered as not in accordance with law or which interfere with principles of tariff determination adopted by the Commission for tariff determination in past years and past orders. The Commission grossly exceeded its jurisdiction and also acted in gross violation of the principles of natural justice.

32.2 That the Commission has carried out its own capital and own restructuring of the Utilities and assigned its own value on the assets disallowed/curtailed depreciation on assets, and considered deemed revenue for sales of power in a manner different than that provided in the Statutory Transfer Scheme notified by the State Government.

32.3 Further, the Appellant/Petitioner submits that the State Commission is also equally bound by the Transfer Schemes.

32.4 That the Respondent State Commission strenuously refuted the contention of the Appellant and stated that the State Commission has not violated Transfer Scheme notified by the State Government at all. Further, the State Commission

has made submissions on the applicability of the Transfer Scheme.

32.5 We find that the Tribunal has already considered the effect of Transfer Scheme Rules, 2008 and Transfer Scheme Rules, 2010 in the Judgment dated 7.8.2014 in the matter between Chhattisgarh State Power Trading Co. Ltd Vs CSERC and other in Appeal No.230 of 2013. The relevant portion is as under:

> *"11. In terms of the above Scheme, the PPAs with IPPs and CPPs stand vested with the Distribution Company. The assets of the Trading Company (appellant) exclude the agreements with IPPs and CPPs in the State. The Distribution Company also has the function to tender and finalize contracts for purchase of power from new generating plants including IPPs. However, the Trading Company has been assigned function of inviting tenders and finalize contracts for purchase of power on behalf of the State Government and act as the Trading representative w.e.f. 1.1.2009.*
>
> *12. Admittedly, the Power Purchase Agreement dated 12.1.2010 with the respondent no. 2 has been entered into directly by the Distribution Company. This agreement was also approved by the State Commission. On that day there was no understanding or agreement between the Distribution Company and the appellant for procurement of power by the appellant on behalf of and for meeting the demand of the Distribution Company. The Transfer Scheme provides that the function of the Trading Company is to purchase power on behalf of the Distribution Company for meeting any shortfall of power on short term basis and for this purpose the Trading Company has to arrange for short term power purchase and also enter into bulk power sale agreement with the Distribution Company. Admittedly no such understanding or agreement was reached between the appellant and the Distribution Company during 2009-10 and the Distribution Company procured power on its own from the respondent no. 2. There is no deeming provision under the Transfer Scheme, 2010 for all contracts for purchase entered into w.e.f. 1.1.2009 with CPPs including the*

respondent no. 2 to be deemed to be entered into by the appellant as Trading Company on behalf of the State Government. We also do not accept the contention of the appellant that clause (h) of the Part II (functions of the Trading Company) of the Transfer Scheme, 2010 regarding maintaining of a separate accounts by the Trading Company as an authorized representative of the State in respect of its functions is a specific provision which overrides the other general provisions of the Transfer Scheme and it would have an effect of deemed transfer of a PPA entered into between the respondent no. 2 and the distribution licensee from the distribution licensee to the appellant".

32.6 The Transfer Scheme as notified by the State Government is not under challenge. However, the Commission has authority to carry out prudence check of the books of accounts as notified under the Transfer scheme. The Commission has considered the entire Power Purchase Cost of CPPs/IPPs for the FY 2008-2009 and FY 2009-10 and considered the revenue from sale of surplus power on Appellant's account. The Commission has rightly held that as far as tariff fixation is concerned, the Commission is only authority which has jurisdiction for approval of various elements of tariff which have already been considered or fixed by the Commission. Power Purchase cost of the distribution licensee is to be regulated by the Commission and the revenue earned by the distribution licensee cannot be charged retrospectively since the same will have impact on consumer tariff. The commission is also having the responsibility to protect the consumer's interest under the Electricity Act, 2003.

32.7 The Commission has given a detailed and reasoned order with regard to Power Purchase cost and revenue for sale of surplus

power for FY 2008-09 and FY 2009-10 and trued-up the accounts for the period accordingly. We do not find any infirmity in the finding of the State Commission. **Hence, this issue is decided against the Appellant.**

33. **Issue No.13th: Capital Restructuring for CSPACL, CSPTCL and CSPDCL upon unbundling of erstwhile CSEB**.

33.1 The following are the contentions of the Appellant on this issue.

33.2 That the State Commission erroneously considered and apportioned amongst the Transferee Utilities by taking the closing balance of the CSEB assets in 31.12.2008 in the CSEB Account in respect of grossified Assets (GFA) Capital expenditure in progress (CEIP), grants and capital subsidy is contrary to the Transfer Scheme notified by the State Government in exercise of the powers under section 131 of the Electricity Act.

33.3 That the State Commission grievously erred in observing and considering in effect that the claims of the consumers contribution and grants as on the 1.1.2009 was zero is incomprehensible.

33.4 That the State Commission failed to see that upon notification of the statutory Transfer scheme by the state Government in exercise of powers under Section 131 all the assets, liabilities rights etc., of the CSEB are immediately vested in the State Government. The State Government is not bound to transfer and/or revest any assets to any transferee Company at the same values as at which the assets were valued in the CSEBs

account at the time of vesting in the State. The value of which the assets have been transferred upon revesting in the real original cost of the assets to the transferee so as the transferee in concerned.

33.5 Further, the Transfer Scheme (s) notified by the State Govt vests the bundling of assets specified therein at lump sum price and value. That is represented by the Opening Balance sheet issued by the State Govt in pursuance of the transfer scheme. The Opening Balance Sheet issued by the State Govt in pursuance of the Transfer Scheme specifies the Transfer value as a lump sum. The State Commission has to consider the value of assets and liabilities as given in the Opening Balance Sheet of the Appellant as issued by the State Govt.

33.6 We have observed in the Impugned Order that the State Commission while determining the Capital cost components i.e. Return on Equity, Interest and Finance Charges and Depreciation followed in accordance to the Regulatory philosophy and approach, allocation of the following as considered for CSEB upto December, 31, 2008 needs to be ascertained:

(a) The users fixed assets (UFA)
(b) The capital expenditure in progress (CEIP)
(c) The Grants, consumer contribution and capital subsidy (Grant)
(d) The debt and
(e) The Equity invested

33.7 The State Commission followed the following methodology in suo moto Petition No.47 of 2012 for allocation of surplus/deficit of CSEB between all the successor companies of the Board. The state Commission determined the equity components actually invested in the CAPEX was ascertained as per the formula: Equity= GFA + CS I P- Grant-Loan.

33.8 The State Commission observed ranging approvals by three Companies i.e. CSPGCL, CSPTCL and CSPDCL regarding the Opening Capital structure of the companies and hence the Commission has undertaken based on the facts and audited balance sheet of the companies and ascertained the factual in respect of gross fixed assets, capital expenditure in progress, grants, consumer contribution and capital study, the debt and equity invested. Let us discuss each items of the Capital restructure:

33.9 **Gross Fixed Assets**: The Commission has considered the closing GFA of CSEB as on 31.12.2008 as per the audited balance sheet was Rs.6,252.97 Crores related to the true-up for FY 2007-08 and FY 2008-09 for Regulatory purpose. Further, the Commission found some of the expenses incurred which were considered as revenue expenses in the books of accounts had to be transferred to the capital accounts and capitalization value of DSPM differs from the value of the capital assets appearing in the books. Accordingly, taking into variation of these accounts, the State Commission considered the GFA as on 1.1.2009 as Rs.6,314.91 Crore and apportioned to the three unbundled entities namely CSPGCL,

CSPTCL and CSPDCL considering the expenditure incurred on additional capitalization on account of DSPM is allocated to CSPGCL and as per Opening Balance sheet, the GFA for CSPTCL and CSPDCL has considered was Rs.892.82 Crore and Rs.1752.13 crore respectively and as per balance sheet, the additional amount of Rs.9.34 Crore belongs to CSPHCL and this has to be borne by the three successive entities. Accordingly, the revised GFA for regulatory purpose is as per the Table shown below:

Table 52 Company Wise Allocation of GFA (Rs.Crore)

Particulars	CSEB	CSPGCL	CSPTCL	CSPDCL
Gross Fixed assets	6314.9	3668.62	894.14	1752.15

33.10 **Capital Expenditure in Progress**: (CEIP):The Commission considered CSEB closing balance of CEIP as on 31st December, 2008 as Rs.2020.05 Crore as per the methodology adopted by the Commission as the suo-moto P.No.47 of 2012 (M), the CEIP have been considered to include the amount of Capital Work in progress, stock/material at construction stores and advance to Suppliers/Contractors. The Commission has followed this approach since beginning of Regulatory regime. As per details submitted by CSPHCL as on the date of transfer, the break up of the CEIP between the companies is ascertained as under:

Table 53 Company Wise Allocation of CEIP (Rs.Crore)

Particulars	CSEB	CSPGCL	CSPTCL	CSPDCL
Capital Expenditure in Progress	2020.1	544.32	373.03	1102.7

33.11 Grants, Consumer Contribution and Capital Subsidy:

The State power companies have tried to take shelter of the Opening balance sheet notified by the State Govt., wherein the grants/consumer contributions have been indicated as nil. The Commission opines that it will be travesty of justice if in the context of regulatory purpose i.e. determination of ARR/tariff, such hypothesis is adopted. Conversion of equity into grant is a fairly known concept but conversion of grant into equity is unheard of. The Commission has deliberated the issue in detail:

> *"it may be seen that the grants were issued to CSEB (or erstwhile MPEB) by the respective Governments for specific purposes from the State / Central Govt. budgetary support. It may also be appreciated that till the last day of CSEB there was no case of conversion of such grants into loans or equity because of failure to comply with the preset conditions. Thus, it can be fairly inferred that as on the date of transfer, CSEB, as far as regulatory purpose is concerned, had no right or interest in the form of claim for Depreciation or ROE or Interest on loan against property created from such funds*".

33.12 This Tribunal in the judgment dated 17.12.2014 in Appeal No.142 of 2013 has held as under:

> *"30. Thus, under the Financial Restructuring Plan finalized by the State Government, the total equity has been worked out by summation of the Government's equity in the Electricity Board, the consumer contribution treated as equity and subsidies/grants for*

capital assets also treated as equity. The State Commission on the basis of above letter allowed the revised equity of Rs. 6081.43 crores for PSPCL and determined the ROE on the same.

31. We find from the Transfer Scheme of 2010 that assets of the Electricity Board were transferred and vested with the State Government at the book value i.e. Rs. 2946.11 crores. However, while transferring the assets to the successor company, namely PSPCL and PSTCL, in the notification issued by the State Government on 24.12.2012, the equity was increased to Rs. 6687.26 crores (Rs. 6081.43 crores to PSPCL and Rs. 605.83 crores to PSTCL) by adding the consumer contribution for capital assets and subsidy /grants etc. for capital assets.

32. According to the learned counsel for the State Government and learned counsel for the PSPCL, the transfer scheme is binding on the State Commission under Section 131(3)(b). Section 131 of the Act provides for revaluation of the assets and liabilities at the time of transfer of assets from the Government of Punjab to PSPCL. According to them, the valuation of assets, property, interest in property, rights and liabilities were undertaken in terms of the proviso to Section 131(2) pursuant to a detailed expert report submitted on financial restructuring and valuation. Pursuant to above, the final Notification under Section 131(2) of the Act was notified by the Government of Punjab on 24.12.2012. Upon such valuation of the assets which belong to Government of Punjab to be transferred to PSPCL which worked out to Rs. 30912 crores, the Government of Punjab was issued equity shares to the extent of Rs. 6081.43 crores which works out to 30% of the capital assets value. PSPCL has actually issued equity share capital to the extent of Rs. 6081.43 crores to the Govt. of Punjab in terms of the Transfer Scheme Notification under Section 131.

33. We find that Section 131(1) provides that the State Government can notify Transfer Scheme for transfer of property, interest in property, rights and liabilities of the State Electricity Board to vest in the State Government on such terms as may be agreed between the State Government and the Board. Under this provision, the assets liabilities, etc., of the Punjab State Electricity Board have been vested in with the State Government at book value of the assets.

34. Sect ion 131(2) provides that the property, interest in property, rights and liabilities vested in the State Government under sub section (I) shall be re-vested by the State Government in a Government company or in a company/companies, in accordance with the Transfer Scheme on the terms and conditions as may be agreed between the State Government and such company/companies. Proviso to Section 131(2) states that transfer value of any assets transferred shall be determined as far as may be, based on the revenue potential of such assets.

35. Section 131(3) is reproduced below:

> *"(3) Notwithstanding anything contained in this section, where—*
>
> *(a) the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, the scheme shall give effect to the transfer only for fair value to be paid by the transferee to the State Government;*
>
> *(b) a transaction of any description is effected in pursuance of a transfer scheme, it shall be binding on all persons including third parties and even if such persons or third parties have not consented to it.*

36. Under Section 131(3) (a) if the transfer scheme involves the transfer of any property or rights to any person or undertaking not wholly owned by the State Government, then the transfer value will be fair value to be paid by the transferee to the State Government. Sub -section 3(b) states that transaction in pursuance of a Transfer Scheme shall be binding on all persons including third parties. In this case the transfer has taken place from the State Government to the State owned entities, namely PSPCL and PSTCL. Therefore, Section 131(3) (a) shall not be applicable to the present case. However, under proviso to Section 131(2) assets can be determined based on the revenue potential of such assets.

37. From the Consultants Report on Financial Restructuring Plan of PSPCL and PSPTCL dated 18.12.2012, we do not find any exercise of revaluation of assets of the Board vested with the State

Government to be transferred to the successor companies. The Consultants has only proposed disaggregated balance sheet.

38. Admittedly, the Transfer Scheme as notified by the State Government is not under challenge. However, the State Commission is authorized to carry out a prudence check of the balance sheet. This Tribunal in the past has held that the State Commission is not bound to accept the figures as given in the audited balance sheet in toto and can determine the return on equity and other expenses after prudence check. In this case, there was no induction of fresh funds and the equity as on the date of transfer has been increased from Rs. 2946.11 crores to Rs. 6687.26 crores. The increase as explained by PSPCL in their letter dated 26.2.2013 is on account of treating the consumer contribution and grants and subsidies towards the capital assets as standing in the audited accounts of the Electricity Board as equity. In our opinion, the State Commission should have allowed return on equity on the actual equity of Rs. 2946.11 crores to be apportioned to PSPCL and PSTCL.

39.This Tribunal had dealt with a similar matter in its judgment dated 17.09.2014 in Appeal No. 46 of 2014 and held as under:

> *"46. Admittedly, the consumer security deposit has been capitalized pursuance to the State Govt. order and the Respondent No.2 is claiming ROE on such capitalized sum. We feel that the consumer security deposit is not a capital asset on which ROE can be claimed. Even if the State Government has ordered capitalization of consumer security deposit and accordingly the balance sheet of the Distribution Companies has been drawn up with gross fixed assets including the consumer security deposit, the State Commission should have deducted the amount of consumer security deposit while allowing ROE on the equity component of the capital cost.*
>
> *47. As already held by this Tribunal, the State Commission is not bound to follow the audited accounts and the State Commission can scrutinize the same and allow the expenditure only after prudence check. By allowing ROE on consumer security deposit and also allowing interest paid by the Distribution Licensee to the consumers against consumer security deposit in the ARR of the Distribution Licensee, the consumer has been burdened unreasonably. On one hand the Distribution Company has been allowed ROE on the security deposit which is contributed by the consumer and on the*

other hand the interest paid to the consumer on such deposit is also allowed as a pass through in the tariff to be recovered from the consumers. This is wrong.

48. Hence, we find force in the arguments of the Appellant that ROE on consumer security deposit amount capitalized in the books of accounts of the Distribution Licensee should not have been allowed in the ARR of the Distribution Licensee. Accordingly, we direct the State Commission to adjust the excess amount of ROE allowed in the Impugned Order from FY 201-12 onwards in the APR/True up for these years to provide relief to the consumers".

40. The findings of this Tribunal in Appeal no. 46 of 2014 shall squarely apply in this case. Accordingly, this issue is decided in favour of the Appellants. The State Commission shall re-determine the ROE as per our directions and the excess amount allowed to the distribution licensee with carrying cost shall be adjusted in the next ARR of the respondent no.2".

33.13 The finding of the above judgment will apply to the present case.

33.14 The Commission has not restructured the Chhattisgarh State Electricity Board as alleged by the Appellant. The Commission has only decided that consumers cannot be saddled with certain costs as reflected in the accounts of the Appellant merely on account of notification of the transfer scheme and new values shown in the books of the Appellant. The Commission has only allowed the costs in the ARR and Tariff after prudence check of the books of accounts of the Appellant. Therefore, **we do not find any reason to interfere with the findings of the Commission in this regard**.

34. **Issue No.14th: Deduction on Account of fully Depreciated Assets for FY 2008-09 (Jan-March), FY 2009-10, FY 2010-11, and FY 2013-14 to FY 2015-16.**

34.1 CSPDCL submitted that it has computed depreciation on straight line method and with rates as per CSERC (Tariff) Regulations, 2006 for FY 2008-09 and 2009-10. CSPDCL submitted that the depreciation has been computed based on the opening GFA and assets added during the years under consideration. For FY 2009-10, CSPDCL submitted that, as the depreciation computed in the audited annual accounts is in line with the prevalent CSERC (Tariff) Regulations, 2006, it has claimed the same. Further, CSPDCL submitted that it has claimed depreciation after excluding depreciation on account of assets created from consumer contribution and grants. For computing the assets created out of consumer contribution, CSPDCL submitted that it has considered the amount of consumer contribution received in the ratio of capitalization of assets to the opening CWIP and capital investment during the year.

34.2 The Commission has considered the opening GFA and the asset schedule as per the submission of CSPDCL and checked the same with the closing balance of CSEB and CSPDCL's audited accounts. The asset additions during the year have been considered as per the audited accounts of

CSPDCL. The depreciation rates have been considered as per the CSERC (Tariff) Regulations, 2006.

34.3 The contention of the Appellant is that the State Commission erred in considering and deducting the value of the fully depreciated assets as in the books as on 31.12.2008.

34.4 Further, the State Commission ought to have appreciated and considered that the entire bundle of assets was vested in the Appellant at a specified value. Thereupon, the assets are to be considered as fresh acquisition of assets in the hands of the Appellant at the specified value with effect from 1.1.2009. The depreciation on the entire assets has to be allowed. The question of fully depreciated assets in the hands of the Appellant does not arise. The allowance of depreciation in the hands of the CSEB is not relevant or applicable. It is only the assets depreciated to 90% after 1.1.2009 in the hands of the Appellant that can be deducted from the assets for the purpose of depreciation.

34.5 The Commission in the Impugned Order has held as under:

> *""The Commission has considered the opening GFA and the asset schedule as per the submission of CSPDCL and checked the same with the closing balance of CSEB and CSPDCL's audited accounts. The asset additions during the year have been considered as per the audited accounts of CSPDCL. The depreciation rates have been considered as per the CSERC (Tariff) Regulations, 2006.*

As regards FY 2009-10, the Commission in its data gap queries dated March 1, 2013 had asked CSPDCL to clarify as to why has the depreciation claimed for FY 2009-10 changed to Rs. 78.91 Crore against its submission of Rs. 62.82 Crore in the previous MYT Petition (although the opening GFA and additions were same in both submissions). CSPDCL submitted that for the present Petition, it has considered depreciation as per audited annual accounts for FY 2009-10 and the same has been computed on straight line method to the extent of 90% of the cost of the asset following the rates notified by the Commission in CSERC (Tariff) Regulations, 2006. Whereas, in its provisional true-up Petition, CSPDCL had computed the same based on average of opening and addition of assets.

Further, as discussed in the earlier paragraphs of this Order, fully depreciated assets of Rs. 1176.25 Crore has been identified for erstwhile CSEB as on December 31, 2008 based on the scrutiny of the asset details available in the books of accounts. Further, the allocation of such fully depreciated assets as approved in this Order as on January 1, 2009, stands at Rs. 638.67 Crore, Rs.226.72 Crore and Rs.310.95 Crore for CSPGCL, CSPTCL and CSPDCL respectively, and accordingly have been excluded from the value of assets for the purpose of depreciation.

As regards the consumer contribution in GFA, the Commission in earlier paragraphs of this Order has identified the same for erstwhile CSEB as on December 31, 2008. Further, allocation of consumer contribution in GFA amounting to Rs. 829.14 Crore as on January 1, 2009 has been approved in this Order. Further, the Commission has identified the amount of consumer contribution in GFA (based on its past period workings and the available data) and applied the ratio of live assets (GFA minus fully depreciated assets) to total assets to identify the amount of consumer contribution in live assets. The consumer contribution and grants for the current year is considered based on the additional submission of CSPDCL dated March 7, 2013. Average depreciation rate on the estimated amount of grant & consumer contribution in live assets has been

considered to compute depreciation and accordingly such amount of depreciation on live assets has been reduced. The depreciation claimed by CSPDCL and approved by the Commission is as given in the following Table:

Table No.176 Depreciation as approved by the Commission (Rs. Crore)

Particulars	FY 2008-09 (Jan to mar)		FY 2009-10	
	Petition	Approved after final True-up	Petition	Approved after Final True-up
Opening GFA	1,L749.56	1,752.14	1,812.31	1,814.90
Additional Capitalization during the Year	62.75	62.75	217.25	217.25
Closing GFA	1,812.31	1,814.90	2,029.56	2,032.14
Average GFA for the year	1,780.94	1,783.53	1,923.52	1,923.52
Depreciation @ rates as per applicable Regulation	13.90	15.92	79.62	69.62
Average Consumer Contribution in Live Assets During the Year	-	701.61		744.72
Fully Depreciated Assets	-	310.95	-	310.95
Less: Depreciation on consumer contribution on live assets	0.02	6.18	0.71	26.96
Less: Depreciation on Fully Depreciated Assets	-	2.74	-	11.26
Net Depreciation	13.88	7.01	78.91	31.41

34.6 Similar methodology has been used by the Commission for FY 2010-11, 2011-12 and 2013-14 to 2015-16.

34.7 We feel that an assets which were fully depreciated as identified by the Commission on 31.12.2008, cannot become new assets after reverted from the State Govt to the entities under the Transfer Scheme because the depreciation amount on those particular assets were considered already in the Tariff Orders.

34.8 Further, the depreciation cannot be allowed on the assets created by consumer's contribution.

34.9 We have already held earlier that the book of accounts as finalized under the Transfer Scheme is not binding on the Commission for determination of ARR/Tariff. The Commission is fully empowered to carryout prudence check

of the regulator entity and ensure that the imprudent costs are not passed on to the consumers.

34.10 The methodology followed by the State Commission is justifiable and the Impugned Order on this issue is affirmed and the **issue is decided against the Appellant**.

35. **Issue No.15**: **Presumptive Revenue from the sale of power during the transitory period of Financial year 2008-09 (January to March) and FY 2009-10 assigned to CSPTrL in pursuance of the Transfer Scheme, 2010**.

35.1 That the Appellant submitted that the State Commission erroneously considered a total addition of Rs.708.29 Cr net revenue by considering the re-allocation/assignment of the short term PPAs with CPPs/IPPs for the transitory period from 1.1.2009 to 31.3.2010 by the revised Transfer Scheme 2010 as legally untenable and that the State Commission has the requisite authority not to accept post transaction re-allocation of PPA for short term power and revenue related thereto under Section 86 (1) (a) and (b) and that the Transfer Scheme, 2010 re-allocation/assignment of the short term PPAs with CPPs/IPPs for the transitory period from 1.1.2009 to 31.3.2010 was not legally valid.

35.2 We have already considered the above issue under issue No.12 and **hold it against the Appellant**.

36. **Issue No.16: The last and final issue is "Principle of Natural Justice**".

36.1 The Commission has erroneously made several decisions in the Impugned Order without giving the Appellant any

opportunity to be heard and taking the Appellant by surprise thereby violating the principles of natural justice.

36.2 The Commission never gave any notice or hearing to the Appellant or to any other partly likely to be adversely effected (including the other utilities, entities and also the State Government) by such decision of the Commission and the decision in the Impugned Order is, therefore, in gross violation of the principles of natural justice and lacks transparency.

36.3 The learned Counsel for the State Commission has submitted that there was no violation of principles of natural justice and if the submissions of the Appellant are accepted, the State Commission would be required to circulate a draft order to the Appellant and then seek comments on passing the Tariff Order.

36.4 We find that the Impugned Order has been passed after following the procedure under Section 64 of the Electricity Act. The Appellant was heard on all the issues. We do not agree with the Appellant that the Commission has to give notice to the Appellant on various findings and computations decided by the Commission. The Commission has passed the Impugned Order after hearing all the concerned. The remedy opened to the Appellant is to file an Appeal against the findings on which it is aggrieved and the same has been done by the Appellant by filing this Appeal.

36.5 **We do not find any violation of principles of Natural Justice in passing the Impugned Order by the Commission**.

O R D E R

37. The Appeal is allowed partly. We dispose of the Appeal with the direction in Issues No.1 (partly), Issue No.2, 3, 4, 8 and 9.

38. Accordingly, the Appeal is disposed of. No order as to costs.

39. Pronounced in the open court on this **9th day of October, 2015**.

(T Munikrishnaiah)
Technical Member
Dated, the 9th Oct, 2015.

(Justice Ranjana P. Desai)
Chairperson

✔ **REPORTABLE / ~~NON-REPORTABLE~~**