Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal no. 177 of 2012 and
Appeal no. 178 of 2012

Dated: 2nd March, 2015

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

In the matter of:

Appeal no. 177 of 2012

BSES Rajdhani Power Ltd. **... Appellant**
BSES Bhawan, Nehru Place
New Delhi – 110 019

Versus

Delhi Electricity Regulatory Commission **...Respondent**
Viniyamak Bhawan, 'C' Block
Shivalik, Malviya Nagar
New Delhi – 110 017

Counsel for the Appellant: Mr. Amit Kapur
Mr. Vishal Anand
Mr. Gaurav Dudeja

Counsel for the Respondent : Mr. Pradeep Misra
Mr. Majoj Kumar Sharma
Mr. Suraj Singh
Mr. Shashank Pandit
Mr. Daleep Kumar Dhyani
Mr. Ravi S.S. Chauhan
Mr. Prateek Dahiya
Mr. Kabir H. Khan

Ms. Swapna Seshadri, Amicus Curiae,
Mr. Anand K. Ganesan and
Ms.Mandakini Ghosh

Mr. A.K. Datta,
Mr. H.M. Sharma,
Mr. B.S. Sachdev,
Mr. G.K. Pahrlia and
Mr. B.B. Tiwari for consumers

<u>Appeal no. 178 of 2012</u>

BSES Yamuna Power Ltd. **… Appellant**
Shakti Kiran Building
Karkardooma,
Delhi – 110 092

Versus

Delhi Electricity Regulatory Commission **…Respondent**
Viniyamak Bhawan, 'C' Block
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Counsel for the Appellant: Mr. Amit Kapur
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Mr. B.S. Sachdev,
Mr. G.K. Pahrlia and
Mr. B.B. Tiwari for consumers

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

These Appeals have been filed by BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd., the Distribution Licensees, against the two orders dated 13.07.2012 passed by the Delhi Electricity Regulatory Commission ("State Commission") whereby the State Commission has trued up expenditure for FY 2010-11, determined ARR for FY 2012-13, 2013-14 and 2014-15 ("Second Control Period") and determined retail supply tariff for FY 2012-13.

2. The Appellants have raised 36 issues wherein their claims have been disallowed by the State Commission. According to the Appellants, the claims related to non-implementation of the judgments of the Tribunal, disallowance contrary to the applicable MYT Regulations and other disallowances of their claims. The following issues have been raised in these Appeals:

(A) Issues arising out of non-implementation of the judgments of the Tribunal.

i) Interest on working capital

ii) Interest on carrying cost

iii) Rebate on power purchase

iv) Terminal benefit payments to employees

v) Comparable pay vis-à-vis 6th Pay Commission for Non-FRSR employees.

vi) Disallowance due to related party purchases.

vii) Allowance of capex

viii) Repair and Maintenance (R&M) and Administrative and General (A&G) expenses

ix) Refusal to consider claim for truing up for the period 01.04.2007 to 28.02.2008.

x) Review of distribution loss for FY 2008-2011.

xi) Truing up of interest rates of loans.

xii) Higher PLF assumed for IPGCL (GT) station.

(B). Disallowance contrary to MYT Regulations.

xiii) Disallowance contrary to AT&C losses by 10% in certain zones.

xiv) Disallowance of capital expenditure.

xv) Amortization of Regulatory Assets.

xvi) Wrongful reduction of collection efficiency achieved.

(C) Other issues

xvii) Normative self-consumption.

xviii) Disallowance of sales from EBS Database (raised only by BRPL and not BYPL).

ixx) Wrongful calculation of enforcement sale.

xx) Erroneous reduction of additional UI charges:

xxi) High rate assumed for sale of surplus power for the control period.

xxii) Fixation of AT&C loss target for the MYT period.

xxiii) Lower allowance of employee costs.

xxiv) Administrative and General (A&G) expenses.

xxv) Partial implementation of Power Purchase Adjustment Formula.

xxvi) Wrongful computation of ROCE (WACC).

xxvii) Disallowance of tendering cost.

xxviii) Wrongful computation of ‘K’ factor.

xxix) Arbitrary determination of efficiency factor.

xxx) Disallowance of income tax.

xxxi) Erroneous computation of non-tariff scheme.

xxxii) Approval of capital schemes and penalizing the Appellant for non-achievement of AT&C loss target.

xxxiii) Change of methodology in computation of depreciation.

xxxiv) Disallowance of salary for FRSR structure.

xxxv) Disallowance of interest on consumer security deposit incurred by the Appellant on security deposit retained by DPCL.

xxxvi) Arbitrary imputation of efficiency factor for determination of O&M expenses for true up of FY 2010-11.

3. As the issues raised in both the Appeals are similar, a common judgment is being rendered. We shall be taking up the issues raised by the Appellants, reply of the Respondent and our findings one by one in the following paragraphs. For brevity we shall be considering the facts of the Appeal no. 177 of 2012.

4. The first issue is regarding interest on Working Capital.

4.1 According to the Appellant, State Commission has not implemented the directions of this Tribunal in the judgment reported as 2010 ELR(APTEL) 0891 in Appeal no. 153 of 2009 regarding working capital to be divided in the debt/equity ratio of 70:30 for financing of the working capital during first control period. As per the judgment of the Tribunal, on 70% debt portion, the interest has to be allowed at the prevailing market rate considering SBI PLR rate and on 30% (equity component) has to be added in the total equity infused by the Appellant on which the rate of return on equity as specified in the MYT Regulations, 2007 i.e. 16%, has to be allowed. Although, State Commission in the subsequent tariff order dated 31.07.2013 has divided the charge in Working Capital in the ratio of 70:30 however, while approving equity and debt for the Control Period, it has considered 100% working capital as debts taken during the Control Period instead of considering only 70% of the working capital in the debts taken during the Control Period and 30% of the working capital ought to have been included in the equity infused during the Control Period.

4.2 Shri Pradeep Misra, learned Counsel for State Commission submitted that in Appeal no. 36 of 2008 BSES Rajdhani Power Ltd. Vs. DERC reported as 2008 ELR APTEL 880, the Tribunal has approved rate of interest of 9.5% against the SBI PLR rate of 12.25% and the same interest rate of 9.5% has been allowed. As regards the direction of the Tribunal regarding carrying cost to be apportioned in the ratio of 70:30 in loan and equity in 2010 ELR APTEL 891, State Commission while passing the subsequent tariff order dated 31.07.2013 has implemented the said direction.

4.3 The impugned finding in paragraph 3.166 of the impugned order challenged by the Appellant is regarding true up of the Non Tariff Income for FY 2010-11 arising from Late Payment Surcharge (‘LPSC’) collected from the consumers who had paid their bills after the last date of payment. The Late Payment Surcharge is collected by the Appellant @ 18%. However, the Appellant also incurs expenses for financing the bill amount which is not paid by the consumers in time. The State Commission included the income from LPSC in the Non-tariff Income. However, the State Commission allowed the financing cost @ 9.5% as against 12.13% claimed by the Appellant. The justification given by the State Commission is that in the MYT order dated 23.02.2008, the State Commission had approved funding of working capital @ 9.5% considering SBI PLR of 12.25% prevalent at the time of issuing the MYT order. As the prevailing PLR as on 01.04.2010 was 12.25%, the State Commission has allowed the financing cost for LPSC @ 9.5%.

4.4 Shri Amit Kapur, Learned Counsel for the Appellants has submitted that the State Commission has acted contrary to the findings of the Tribunal in NDPL Vs DERC : 2010 ELR (APTEL) 0891 in Appeal no. 153 of 2009.

4.5 Let us examine the findings of the Tribunal on the issue in the above referred judgment. The Appellants have wrongly quoted the relevant paragraph of the judgment as paragraphs 49 and 50. However, the relevant paragraph on this issue is paragraph 25. Paragraphs 49 and 50 are relating to carrying cost. Paragraph 25 is relating to financing cost to be allowed for delayed payment of surcharge.

"25. According to the Appellant, the interest rate which was fixed as 9 per cent is not under the prevalent prime lending rate. On behalf of the State Commission, it was pointed out that the 9 per cent has been fixed by the State Commission only on the strength of the judgment of the Tribunal dated 21st July, 2006 reported in 2007 ELR (APTEL) 1370. It is true that the Tribunal in that case fixed the interest rate as 9 per cent. In that case, the tariff order was passed by the Commission on 9th June, 2004. At that time, the prevailing lending rate was around 9 per cent, which was much lower as compared to that prevailing rate during the year 2007-08. Therefore, the said decision would not apply to the present case. While fixing the interest rate, the State Commission should have considered the prevalent SBI prime lending rate. Even in the said judgment, the Tribunal has laid down the principle that the rate of carrying cost must be derived from prevalent prime lending rates. As such, this principle has not been followed in this case. According to the Tariff Regulations, the cost of debt has to be determined considering Licensee's proposals, present cost of debt already contracted by the Licensee and other relevant factors viz. risk free returns, risk premium, prime lending

rate, etc. Therefore, we deem it appropriate to direct the State Commission to rectify its computation of financing cost relating to the late payment surcharge and consequently reduce the amount of non-Tariff income considered by the State Commission as available for the tariff determination for the FY 2007-08 at the prevalent market lending rates. Accordingly ordered."

4.6 Thus, the Tribunal had directed computation of financing cost related to Late Payment Surcharge for deduction from the Non-Tariff Income at the prevalent market rates as per the Tariff Regulations.

4.7 This is the case in which the LPSC recovered by the Appellant from the consumer is at 18%. The LPSC amount is deducted from the Non-tariff Income. The LPSC amount is also more than the financing expenses incurred by the Appellant to finance the principle amount. The LPSC amount is considered as Non-tariff Income. Accordingly, financing expenses have to be deducted from the Non-Tariff Income.

4.8 We find that the State Commission has mechanically allowed interest rate of 9.5% as allowed while passing the MYT order on funding of working capital without verifying the prevailing cost of debt contracted by the licensee and other relevant factors. As directed in the judgment in appeal no. 153 of 2009, the financing cost for Late Payment amount has to be allowed at the prevalent market lending rates as per the Tariff Regulations. According, the State Commission is directed to redetermine the interest rate and the amount of financing cost.

5. The second issue is regarding interest rate for carrying cost on Regulatory Assets/Revenue Gap.

5.1 According to the Appellants, State Commission has acted contrary to the findings of the Tribunal in NDPL Vs. DERC: 2010 ELR (APTEL) 0891 (Appeal no. 153 of 2009) and BRPL Vs DERC : 2011 ELR (APTEL) 1196 (Appeal no. 142 of 2009).

5.2. The finding challenged by the Appellants is regarding the carrying cost on revenue gap for FY 2010-11. The State Commission has allowed the carrying cost at 11.66% based on the average interest rate on loan taken for funding of uncovered gap from the loan details submitted by the Appellants.

5.3 The submission of the Appellants is that the carrying cost should be allowed in the debt/equity ratio of 70:30 such that the carrying cost for 30% of the gap should be at the rate of 16% p.a. as per the MYT Regulations and 70% of the normative debt portion of such debt should be at the prevailing market rate considering the SBI PLR rate.

5.4 The Appellants are aggrieved by the impugned order regarding carrying cost on two counts viz. (i) average interest rates of all loans during 2010-11 was 12.13% for which an auditors certificate was submitted by the Appellants which was ignored and interest rate @ 11.66% on the basis of average interest on working capital was allowed, and ii) the carrying cost has not been computed considering 30% to be allowed at rate of Return on Equity (16%) and 70% (debt component) to be allowed at average rate of long term capex loan instead of prevalent market rate.

5.5 Learned Counsel for the State Commission has submitted that the State Commission has implemented the directions issued by the Tribunal in the subsequent tariff order dated 31.07.2013.

5.6 In Appeal no. 153 of 2009 decided on 30.07.2010, North Delhi Power Ltd., the Appellant in that case, pleaded that the interest rate of 9% allowed on carrying cost was not realistic and has been based on Tribunal's order reported in 2007 ELR (APTEL) 1370. The interest rate in 2005 was 9% and the same has been used for FY 2008-09. The interest rate has substantially increased in FY 2008-09. The working capital interest rate during 2008-09 was in the range of 11-12% p.a. Therefore, the rate fixed by the State Commission has to be reconsidered and the rate of carrying cost be allowed at the Weighted Average Cost of prevailing rate of debt for 70% of the amount and cost of equity for the balance 30% of the amount. The Tribunal accepted the contention of the Appellant and decided that the carrying cost has to allow at the prevailing market lending rate and directed the State Commission to reconsider the rate of carrying cost at the prevailing market rate and the carrying cost also has to be allowed in the debt/equity ratio of 70:30. The Tribunal reiterated the above decision in Appeal no. 142 of 2009 decided on 12.07.2011.

5.7 The Appellants' contention is that the debt should be allowed at average interest rate of all loans which was @ 12.13% for FY 201011 whereas the State commission has allowed interest rate

@ 11.66% on the basis of the average interest on working capital. We agree with the interest rate allowed by the State Commission on the basis of the average interest on working capital. In fact in Appeal no. 153 of 2009 the Appellant had sought debt component for carrying cost at the prevailing working capital interest rate. The Tribunal accepted the contention of the Appellant in that case. Therefore, there is no infirmity in the State Commission allowing the interest rate on the basis of interest on working capital.

5.8 However, the State Commission has not computed the carrying cost considering 70% as debt and 30% as equity to be allowed the prevailing Return on Equity rate as per the decision of the Tribunal.

5.9 Therefore, we direct the State Commission to recompute the carrying cost considering 70% to be allowed as debt at 11.66% and the balance 30% to be allowed at the prevailing ROE rate for the relevant year for which the carrying cost is being computed.

6. The third issue is regarding rebate claimed by the Appellant on power purchase.

6.1 According to the Appellant, the State Commission has acted contrary to the findings of this Tribunal in Appeal no. 142 of 2009 wherein the Tribunal directed to consider rebate upto 1% as non-tariff income from the total rebate of 2% on power purchase.

6.2 According to Shri Pradeep Misra, Learned Counsel for the State Commission this issue is pending consideration in Appeal no. 14 of 2012 wherein the judgment has been reserved. The State Commission has made detailed submissions in Appeal no. 14 of

2012. The Learned Counsel reiterated the detailed submissions made in Appeal no. 14 of 2012.

6.3 The Tribunal in Appeal no. 14 of 2012 on 28.11.2013 reiterated the view taken by this Tribunal in Appeal no. 153 of 2009. This Tribunal in Appeal no. 153 of 2009. Decided as under:

"The second issue relates to the deduction of rebate due to the early payment of the power purchase cost from the ARR. The Appellant, through its efficient management, has paid all the bills immediately on raising of the bills by the generating company and, therefore, it has to be allowed a rebate of 2 per cent. Therefore, there is no justifiable reason for the State Commission to reduce the power purchase cost by rebate earned by the Appellant. The normative working capital provides for power purchase cost for one month. Therefore, rebate of 1 per cent available for payment of power purchase bill within one month should be considered as non-Tariff income and to that extent benefit of 1 per cent rebate goes to reducing the ARR of the Appellant. The rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost and rebate earned only up to 1 per cent alone can be treated as par of the non-Tariff income. Therefore treating the rebate income for deduction from the power purchase cost is contrary to the MYT Regulations. As such this issue is answered in favour of the Appellant."

The Tribunal in Appeal no.142 of 2009 reiterated the above decision of the Tribunal.

6.4 Accordingly, this issue is decided in term of the findings of this Tribunal in Appeal no. 153 of 2009 and Appeal no. 14 of 2012 in favour of the Appellant.

7. The fourth issue is regarding terminal benefit payments to employees.

7.1 Shri Amit Kapur, Learned Counsel for the Appellants has submitted that the State Commission has acted contrary to the findings of this Tribunal in BRPL Vs DERC: 2009 ELR(APTEL) 880 that the State Commission shall allow the expenses incurred towards retirement of SVRS optees pending decision of the Actuarial Arbitration Tribunal and shall true up the employees expenses to the extent of increased cost by increase in consumer base.

7.2 Shri Pradeep Misra, Learned Counsel for the Appellant has submitted that the State Commission is bound to implement the directions passed by this Tribunal subject to the outcome of the Appeal filed by it before the Hon'ble Supreme Court. The State Commission in the tariff order dated 31.07.2013 has given effect to the directions issued by the Tribunal

7.3 In view of the specific assertions given by the State Commission, this issue does not survive.

8. The fifth issue is regarding comparable Pay vis-à-vis 6th Pay Commission for Non-FRSR employees.

8.1 This issue has been considered by this Tribunal in Appeal no. 61 and 62 of 2012 between the same parties and decided in judgment dated 28.11.2014 against the Appellant on the basis of the findings of this Tribunal in appeal no. 14 of 2012. The findings of the Tribunal in Appeal no. 61 & 62 applies to these Appeals too and accordingly this issue is decided against the Appellants.

9. The sixth issue is regarding disallowance due to related party purchases.

9.1 The State Commission has not allowed the capital expenditure of various nature from the sister concerns of the Appellants. According to the Appellants, the State Commission has acted contrary to the findings of this Tribunal in BRPL Vs DERC: 2009 ELR(APTEL) 880 wherein this Tribunal directed to allow the Appellant an opportunity to prove, item-wise, that the prices paid by it was not higher than the price paid by NDPL, the other distribution licensee and which was allowed by the State Commission.

9.2 According to Shri Amit Kapur, Learned Counsel for the Appellants, the Appellants had specifically sought information/data from the State Commission for making the necessary comparison but the State Commission has till date not provided the necessary information.

9.3 This Tribunal in BRPL Vs DERC: 2009 ELR(APTEL) 880 decided as under:

i) Both NDPL and Appellant have incurred capital expenditure of various nature and have purchased goods and commodities in furtherance of their business. The State Commission has to treat all the distribution companies at par. It is not disputed that NDPL has purchased products of the same description although they may be different in their quality and technical specifications. Of the long list of articles which are involved in the dispute in hand some may be comparable to the Articles purchased by the NDPL. If for these Articles, the State Commission has allowed some price then the same price can be allowed to the Appellant.

ii) The NDPL submitted its records before the State Commission simultaneously with the Appellant during the tariff hearing of the relevant year. As such the records are available with the State Commission.

iii) It would be appropriate to allow the Appellant appropriately to prove item-wise that the prices paid by it to REL (its sister concern) were not higher than the price paid by NDPL and allowed to it by the State Commission for similar products.

iv) The onus would be entirely on the Appellant to prove that the products purchased by it and the one purchased by NDPL offered for comparison are of the same technical specifications and quality and also should be similarly, priced on account of other relevant factors influencing the prices namely, the time of purchase, the quantity purchased, vendor rating, etc.

v) In case the price paid to REL is same or lower than the price allowed to NDPL for comparable commodity, the State Commission shall allow the price paid to REL. However, if the NDPL's price is lower than the price of REL's purchase plus 5% profit margin, the State Commission shall allow lesser price.

vi) Till such exercise is completed the Appellant will have to accept the decision of the Chairman, as reflected in the view of the Chairperson.

vii) The above directions should not mean that the prudence check by the State Commission should be scarified altogether and if there is sufficient material with the State Commission to hold that the price paid by NDPL was inflated it will be open for the State Commission to take an appropriate view in the matter.

9.4 According to Shri Pradeep Misra, Learned Counsel for the State Commission, the Appellant ought to have made comparison of the items purchased by it in from its sister concern with the items purchased by NDPL (now known as TPDDL). However, the same has not been done. Hence, the State Commission cannot allow such purchases.

9.5 On the other hand the claim of the Appellant is that they had sought the information related to purchase by NDPL from the State Commission but the same was not provided.

9.6 Without going into the controversy, we direct the Appellants to submit the details of the items for which data is required by an application to the State Commission. The State Commission will make available the data to the Appellants within a month of the application. The Appellant after analysis will file its claim before the State Commission and the Commission will consider the same as per the directions of the Tribunal in Appeal no. 36 of 2008 decided on 06.01.2009 and decide the matter within 60 days of submissions made by the Appellants. Accordingly directed.

10. The seventh issue is regarding allowance of CAPEX.

10.1 The Appellants have raised the issue of non-implementation of this Tribunal's judgment in BRPL Vs. DERC: 2009 ELR (APTEL) 880 wherein the Tribunal gave certain directions regarding capitalization of assets. In the present Appeal the Appellants are seeking capex for FY 2004-05 and 2005-06 in light of the decision of the Tribunal in the above Appeal.

10.2 According to the Learned Counsel for the State Commission, Commission has appointed an agency for verification of the capitalized assets and as soon as the report is available, necessary orders will be passed for true up of capex.

10.3 It is pointed out by Shri Amit Kapur, Learned Counsel for the Appellant that the physical verification of the assets is being carried out by the agency appointed by the State Commission for assets installed from FY 2006-07 to 2010-11 and not for FY 2004-05 and 2005-06.

10.4 The above assertion of the Appellants has not been denied by the Learned Counsel for the Commission. We, therefore, direct the State Commission to also carry out the physical verification of the assets capitalized during FY 2004-05 and 2005-06 through its appointed agency and expedite implementation of the decision of this Tribunal in Appeal no. 36 of 2008 decided on 06.01.2009. The whole issue shall be decided within 6 months of the date of this judgment.

11. The eighth issue is regarding repair and maintenance (R&M) and administrative and general (A&G) expenses.

11.1 According to the Appellants, the State Commission has not implemented the decision of this Tribunal in BRPL Vs DERC: 2009 ELR (APTEL) 880 wherein the Tribunal had directed the State Commission to approve the R&M and A&G expenses for FY 2004-05 and FY 2005-06 after prudence check.

11.2 Learned Counsel for the State Commission has submitted that after passing of the aforesaid tariff order, the Commission took up the exercise and approved R&M and A&G expenses and the effect will be given in the next tariff order.

11.3 This issue has been dealt with by this Tribunal in judgment dated 28.11.2014 in Appeal no. 61 and 62 of 2012. The relevant paragraph of the judgment is reproduced below:

"22. We agree with the contentions made by the Appellants that true up for the policy direction period cannot be carried out on the basis of benchmarking concept muted in MYT Regulations. The Commission is directed to implement the direction of this Tribunal in true letter and spirit and do not involve in inventing any new methodology to circumvent to such directions. The issue is decided in favour of the Appellants."

11.4 The above decision will also apply in the present Appeals. Accordingly, this issue is decided in favour of the Appellants. The State Commission is directed to give effect to the directions of this Tribunal in the next tariff order.

12. The ninth issue is regarding refusal to consider claims for truing up for the period 01.04.2007 to 28.02.2008.

12.1 According to the Appellants, the State Commission has not implemented the decision of this Tribunal's judgment dated 12.07.2011 in Appeal no. 142 of 2009 directing the State Commission to true up the controllable parameters for the period 01.04.2007 to 28.02.2008 as the targets set up for the control period cannot be made applicable retrospectively from 01.04.2007 and as the commencing of the MYT order was only from 01.03.2008.

12.2 According to Learned Counsel for the State Commission, the Commission required the audited accounts for the purpose of true-up and the same have been submitted by the Appellants only on 16.04.2013. The same will be considered and necessary true up will be made.

12.3 Shri Amit Kapur, Learned Counsel for the Appellants submitted that the Commission has not considered the said issue in its latest tariff order dated 31.07.2013.

12.4 This issue has also been dealt with by this Tribunal in its judgment dated 28.11.2014 in Appeal nos. 61 and 62 of 2012 wherein on the basis of the submissions made by Learned Counsel for the State Commission that the required truing up would be made, this Tribunal directed the State Commission to carry out the same in its next tariff exercise and allow the differential amount, if any, along with carrying cost. Accordingly, the issue is also decided with the same directions.

13. The tenth issue is regarding review of distribution loss for 2008-2011.

13.1 The same issue has been dealt with by the Tribunal in its judgment dated 28.11.2014 in Appeal no. 61 and 62 of 2012, wherein the State Commission was directed to reconsider the matter within 3 months from date of issuance of the judgment and pass a reasoned order. This issue is decided accordingly.

14. This 11th issue is regarding truing up of interest rates of loans.

14.1 This issue has been dealt with by this Tribunal in its judgment dated 28.11.2014 in Appeal no. 61 of 2012. The relevant paragraph of the judgment is reproduced below.

"37. On perusal of the data submitted by the Appellant related to SBI PLR, it is clear that SBI PLR has deviated by more than 1% during the control period and accordingly the Commission was required to revise the rate of interest on loan and carry out the required true up. Further, despite admitting that true of Return on Capital Employed (RoCE) would done at the end of control period, the Delhi Commission has failed on both the counts. The Delhi Commission is directed to revise the rate of interest on loan as well true up of the RoCE in its next tariff exercise. The issue is accordingly decided in favor of the Appellants."

14.2 This issue is decided accordingly in favour of the Appellants.

15. The 12th issue is regarding higher PLF assumed for IPGCL (GT) Station.

15.1 The State Commission has computed energy availability from the State generating stations i.e. Rajghat, Gas Turbine and PPCL based on the approved PLF and auxiliary consumption in the respective orders from IPGCL and PPCL stations for the control period. According to the Learned Counsel for the Appellants, the State Commission instead of allowing the energy availability from the generating stations to the Appellants as per the actual, has allowed the same on normative basis, refusing to implement the judgment dated 12.07.2011 of this Tribunal in Appeal no. 142 of 2009. According to the Learned Counsel, the State Commission has ignored the ground realities and has determined their energy availability from the generating stations based on a PLF of 80%.

15.2 Shri Pradeep Misra, Learned Counsel for the State Commission stated that the State Commission has implemented the power purchase cost for generating companies and any variation in cost of power purchase from the gas stations would be adjusted by the way of power purchase adjustment mechanism.

15.3 Shri Amit Kapur, Learned Counsel for the Appellants argued that the loss due to lower generation at GT station has not been addressed though the Power Purchase Cost Adjustment formula since the formula does not include the variation on account of short term sale in the power purchase. This has seriously affected the cash flow of the Appellants.

15.4 We find that instead of implementing the decision of this Tribunal in Appeal no. 142 of 2009, the State Commission is trying to justify its own method of first allowing a higher energy availability from the Gas stations in the ARR and then making the adjustment subsequently through PPCA mechanism which according to the Appellant does not compensate for the variation on account of short term sale. The State Commission has to make realistic assessment of the anticipated generation at the gas stations instead of estimating the same on the basis of normative parameters knowing fully well that the plants have been operating at less than the normative parameters. The State Commission should have made the assessment of availability of energy from GT stations as per the directions of the Tribunal in Appeal no. 142 of 2009.

15.5 This issue has also been dealt with by this Tribunal in Appeal no. 61 of 2012. The relevant finding is reproduced below

"123.We do not agree with the contention of the Commission. Preparation of tariff order is a very detailed exercise and is based on many projections. The Commission should endeavor to make such projections as accurately as possible. The Commissions must not adopt the attitude that rough projections would be corrected in true up of in the FPA exercise. While projecting the energy available from any station its past performance is most important pointer and the Commission should have taken into account the same. Since the tariff period is already over, we are not inclined to interfere with the order on this count. But we direct the Commission to consider the past performance of these generating station while estimating the availability of energy. The issue is decided in favor of the Appellant."

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

16. We find that the State Commission has again failed to give effect to the various judgments of this Tribunal. The reasoning given by the State Commission for not implementing the judgments of the Tribunal is that the State Commission has decided to go in Appeal against the Tribunal's judgments or the Appeals against these judgments have been filed before the Hon'ble Supreme Court and pending decisions on such issues, therefore, it has decided to follow the stand it has already taken. The conduct of the State Commission being a subordinate authority tentamounts to denial of justice and is against the basic principles in the administration of justice and majesty of courts as held in Delhi Transco Ltd. Vs DERC: 2013 ELR(APTEL) 498, Bhopal; Sugar Industries Ltd. Vs ITO Bhopal: AIR 1961 SC 182; Ferro Alloys Corporation Ltd. Vs

Odisha Electricity Regulatory Commission : 2013 ELR (APTEL) 1342 and BRPL Vs DERC dated 14.11.2013 in OP nos. 1 and 2 of 2012.

17. It is a settled position of law that mere filing of an Appeal does not amount to stay of a judgment as held in Madan Kumar Singh Vs District Magistrate Sultanpur (2009) 9 SCC 79 and Delhi Transco Ltd. Vs DERC 2010 ELR (APTEL) 1033.

18. Learned Counsel for the State Commission has submitted that the Commission is bound to implement the decisions/directions issued by this Tribunal and the same has been implemented by the Commission while passing the order dated 31.07.2013 for true up of 2011-12, provisional true up for 2012-13 and ARR for 2013-14. The State Commission has also submitted its unconditional apology for the language used in the impugned order.

19. In view of the above submissions by the Learned Counsel for the State Commission as also reflected in the written submissions, we do not want to take any further action in the matter, except to direct State Commission to implement the decisions of this Tribunal on the various issues expeditiously.

20. The following issues are relating to disallowances contrary to the MYT Regulations, as claimed by the Appellants.

21. The 13th issue is regarding reduction of AT&C losses by 10% in zones having losses above 40%.

21.1 According to the Appellants, the State Commission has segregated part of licensed area, in contravention of Regulations 4.7 and 4.8 of the MYT Regulations, 2011 which provide that AT&C loss targets are to be determined for the licensee taking the licensed area as a whole. Zones/districts are created by the Appellant for administrative convenience, for internal management of operations.

21.2 According to the Learned Counsel for the State Commission the Commission has exercised its powers under Regulation 12.6.

21.3 This issue has been dealt by this Tribunal in Appeal no. 171 of 2012 in the case of Tata Power Delhi Distribution Ltd. Vs. DERC, and decided in favour of the Appellant. The relevant extracts of the judgment are reproduced below:

"19.3 Thus, the AT&C loss target has been specified for the distribution system. There is no provision for zone/district-wise AT&C loss target in the Regulations. The Regulations have mechanism for incentive for achieving lower AT&C loss and disincentive for achieving higher AT&C loss than the target level. Thus, zone-wise setting up AT&C loss target for levy of penal charges is contrary to the Regulations."

21.4 This issue has also been decided in judgment of this Tribunal dated 28.11.2014 in Appeal no. 61 of 2012 in which this Tribunal set aside the finding of the State Commission regarding imposition of penalty on failure to reduce losses by 10% in high loss areas. The findings of the Tribunal in Appeal no. 61 of 2012 are as under:

"We are of the view that so far the Appellants meet the overall AT&C loss targets set by the Commission, the Commission should not indulge in micro-management of the licensee's day to day operation."

21.5 The above findings will squarely apply in the present case. Accordingly, the impugned finding for imposition of penalty for non-achievement of loss reduction of 10% in high loss area is set aside. This issue is decided in favour of the Appellants.

22. The 14th issue is regarding disallowance of capital expenditure.

22.1 According to the Appellants, the State Commission approved highly insufficient average capital expenditure of Rs. 147 crores per percentile as against Rs. 811.55 crores per percentile sought by the Appellant ignoring the submissions of the Appellant made in this Business Plan, in which Appellants provided details of CAPEX to achieve factors like load growth, distribution loss reduction and quality improvement in service in accordance with Regulation 4.14 of the MYT Regulations 2011. The State Commission has allowed an ad-hoc capital expenditure for the entire period which is not commensurate to the actual capital expenditure required by the Appellant to achieve load growth, distribution loss reduction targets and quality improvement. The Appellants have also produced a chart showing comparison of capital investment allowed to the various distribution companies of Delhi to show that they require much higher annual capital investment per percentile of loss reduction as the loss reduction target in their area is much higher than other distribution companies. The Appellant submitted 973 schemes amounting to Rs. 672.74 crores in FY 2012-13 out of which the State Commission approved only 620 schemes amounting to Rs. 185.41 crores, thereby constraining the ability of the Appellant to reduce the AT&C losses.

22.2 On the other hand, Learned Counsel for the State Commission has submitted that the Appellant submitted total 727 schemes amounting to Rs. 190 crores to be implemented in the FY 2012-13 and the State Commission has approved 606 schemes amounting to Rs. 129 crores. Thus, the projection of Rs. 300 crores per year as visualized for the FY 2012-13 to FY 2014-15 is correct.

22.3 We find that the Appellant (BRPL) sought approval for capital expenditure of Rs. 671 crores during FY 2012-13, Rs. 784 crores during FY 2013-14 and Rs. 798 crores during FY 2014-15 in the Tariff Petition. However, the State Commission approved capex of Rs. 300 crores for each year. The Commission in the impugned order has noted that the MYT Regulations, 2011 provide for true-up of capital expenditure for each year of the control period based on the actual capital expenditure carried out by the Appellant and that the capital investment approved by it was provisional and is subject to true up on the basis of actual capital expenditure. Further, the Appellant is require to take scheme wise approval for the capital investment.

22.4 The Appellant has submitted a bunch of papers giving the estimated cost of 192 schemes submitted to the State Commission for T&C loss reduction which were not approved by the State Commission. We find that the schemes are for conversion of LT overhead conductor (bare conductor) into AB cables, electrification of some areas, sanitation of LT network, replacement work of LT Distribution Box and service lines, conversion of overhead lines crossing the main road to underground cable for the Commonwealth Games, 2010, etc. The

Appellants have also not indicated when these schemes were submitted to the State Commission for execution and what justification or cost benefit analysis was made for implementation of the schemes. Furnishing of the bunch of data without proper explanation is of no help to establish the point stressed by the Appellants.

22.5 We are also not able to appreciate the argument of the Appellant regarding relative inadequacy of the capex in terms of the Annual capex per percentile of loss reduction. The capex will not only depend on the capital cost of the schemes required for loss reduction but also on requirement for system augmentation to make the growth in load including percentage of growth on HT or LT system, augmentation required to improve quality and reliability of supply, renovation and modernization of the old system which has completed its useful life, etc. Therefore, we cannot come to any conclusion on the basis of relative annual capital investment per percentile of loss reduction, as contended by the Appellant. The Appellants have not indicated whether they had submitted detailed capex schemes with justification proposed for implementation during the FY 2012-13 to FY 2013-14 for approval of the State Commission well in time. The submissions made by the State Commission also does not throw any light on the procedure adopted for approval of the capex schemes before the commencement of the financial year in which the schemes are to be implemented. From the arguments made by the parties it appears that the schemes are submitted and approved in piece-meal. We feel that the procedure for submission and approval of capex schemes needs to be streamlined.

22.6 Some time is required for processing approval of a capex scheme. There is also a gestation period for implementation of the scheme. We feel that the schemes to be implemented during the ensuing financial years should be submitted at least one year in advance to the State Commission so as to enable the State Commission to approve the same at least six months in advance to enable the Appellants to procure equipments and place work orders for execution of the projects during the ensuing financial year.

22.7 We find that the MYT Regulations provide that the Distribution Licensee has to submit business plan for the entire control period to the Commission for approval, prior to the start of the Control Period. However, the exact period prior to the start of the control period has not been specified. The MYT tariff framework is to be based *interalia* on the Business Plan of the Distribution Licensee. Therefore, the detailed proposals for capex schemes have to be processed and approved by the State Commission much before the commencement of the exercise for annual tariff fixation to enable the Distribution Company to take advance action for inviting tenders and placing of orders for procurement of equipments and placing of work orders to ensure completion of the scheme during the relevant year. Submission and approval of schemes in piece-meal has to be avoided for proper and efficient execution of the works. We, therefore, direct the State Commission take necessary action in the matter to streamline the process of approval of the capex schemes for future based on the observations of this Tribunal.

22.8 FYs 2012-13 and 2013-14 are already over and the last year of the control period i.e. 2014-15 is also going to be over soon. The State Commission had already indicated in the impugned order that the Appellant would be required to take scheme-wise approval for the capital investment and that the Commission would true up the capital investment for each year at the end of each year of the control period based on the actual capital investment carried out by the Appellant. Accordingly, the State Commission would true-up the capital expenditure incurred on the approved schemes. However, in future, we would like to Commission to approve the schemes based on the business plan for the control period and justification of the schemes as submitted by the Appellants well in advance and before the commencement of the ensuing financial year to provide sufficient time for execution of the schemes during the relevant financial year. Piece-meal approach should be avoided, as far as possible. Accordingly directed.

23. The 15th issue is regarding amortization of Regulatory Asset.

23.1 The Appellant has made the following submissions.

a) The State Commission has created a Regulatory Asset to the tune of Rs. 3225.29 crores uptill FY 2010-11 and acknowledged revenue gap of Rs. 2356.10 crores for FY 2011-12 i.e. a total uncovered gap of Rs. 5581.39 crores till FY 2011-12. This is in violation of the MYT Regulations, 2007 and, the Tariff Policy and the order dated 11.11.2011 passed by this Tribunal in OP No. 1 of 2011.

b) The State Commission has failed to specify the time frame within which the Regulatory Assets would be amortized.

c) The State Commission has ignored the fact that the Appellant has to arrange for transitional financing from the bank.

d) The State Commission did not provide for adequate carrying cost on accumulated revenue gap while computing the ARR for FY 2012-13.

e) Repeated creation of the Regulatory Assets without adequate carrying cost and amortization schedule has resulted in lowering of ROE for the Appellant and the Appellant is unable to pay its current power purchase cost to its suppliers as well as its statutory liabilities. This has also eroded the confidence of the lenders due to which the Appellant is unable to raise loans.

23.2 Learned Counsel for the State Commission has made the following submissions:

a) The State Commission has levied 8% surcharge in FY 2011-12 which has continued till date. On the basis of the said surcharge extra revenue of Rs. 376.07 crores is generated which would be sufficient to meet the carrying cost. Besides, the State Commission has also enhanced tariff from which the regulatory assets would be reduced progressively.

b) The Tribunal has already passed interim order in dated 11.03.2013 in Appeals 265 and 266 of 2013 where in the same issue was argued by the Appellant.

c) The Commission cannot allow the amortization of Regulatory Assets in a short time as it will give tariff shock to the consumers.

23.3 We find that the State Commission increased the tariff to generate additional revenue gap of Rs. 873.59 crores in the remaining period of FY 2012-13 leaving a surplus of Rs. 290.55 crores and continued the surcharge of 8% which is expected to generate additional revenue of Rs. 375.25 crores in the remaining period of the year. Thus, about Rs. 665 crores surplus has been proposed to meet the carrying cost and to amortize the accumulated revenue gap. However, the State Commission has not given any indication of the revenue gap expected at the end of the FY 2012-13 considering the carrying cost on the accumulated revenue gap at the end of the FY 2010-11 and proposal for amortization of the huge Regulatory Assets.

23.4 The MYT Regulations, 2007 provide for variation on account of uncontrollable expenses to be trued up every year and if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create the Regulatory Asset as per the guidelines provided in Clause 8.2.2 of the Tariff Policy.

23.5 This Tribunal in order dated 11.11.2011 in OP 1 of 2011 has directed the State Commission not to create Regulatory Assets as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Assets shall be time bound and within a period not exceeding three years and carrying cost of the Regulatory Assets shall be allowed to the utilities in the ARR.

23.6 This issue was also considered by this Tribunal in judgment dated 28.11.2014 in Appeals 61 and 62 of 2012 wherein the Tribunal decided as under:

"41. It is important to note the same issue came before this Tribunal in IA Nos. 264 and 265 of 2013 in Appeal Nos. 265 and 266 of 2013 and this Tribunal had disposed of the IAs in its order dated 11.03.2014 issuing certain directions to the Commission on the issue of submission of road map for amortization of Regulatory Assets as under:

"19. In view of above, we issue the following directions to the Commission:

i) The problem is to be examined in two parts viz. a) meeting the current expenses and avoiding further accumulation of the Regulatory Assets b) liquidation of the approved Regulatory Assets as at the end of FY 2011-12.

ii) The Commission has to examine why the Applicants/Appellants are not paying the current bills of the generating and transmission companies when the impugned order dated 31.7.2013 has provided for meeting the current expenses of the distribution licensees including the carrying cost and take further necessary action in the matter. The current payments have to be ensured at all cost to avoid any possibility of reduction of power availability to the NCT of Delhi.

iii) The Commission has to decide a road map for liquidation of the accepted Regulatory Assets keeping in view the interests of the consumers and the distribution licensees after satisfying itself that there are no constraints in arranging finances for making regular and timely payments of the current dues by the Applicants/Appellants to the generating companies and transmission licensees and meeting the operation and maintenance expenses and arranging finances for taking up augmentation of distribution system for meeting the load demand of the National Capital.

Needless to say that the actual liquidation of the Regulatory Assets to be decided in the Annual Tariff Orders will be subject to change depending on the actual facts and figures available before the Commission due to audited accounts, as a result of the CAG audit, etc. The road map may also need review from time to time depending on the true up of accounts and new facts which come to the notice of the Commission from time to time and also subject to the outcome of these Appeals nos. 265 and 266 of 2013.

iv) The road map will also be subject to financial restructuring of the distribution licensee as per the advice given by the Commission to the Government of NCT of Delhi. However, in the absence of any financial restructuring by the State Government, the consumers of Delhi could not be left at the mercy of the generating companies and the distribution licensees to manage the power supply in the National Capital at their own will. In the absence of the support from the Government, the Commission may follow its own road map for liquidation of the Regulatory Assets to remedy the finances of the Distribution licensees.

v) We feel that in view of large Regulatory Assets which have been accumulated over the years, financial restructuring of the distribution licensees will be very helpful in sustaining the business of the licensees with minimum burden on the consumers. The Commission shall again take up with the Government of NCT of Delhi for early decision on the financial restructuring of the Distribution Licensees to minimize the burden on the consumers on account of increase in retail supply tariff due to liquidation of the Regulatory Assets.

20. We also direct the Appellants to promptly provide any information sought by the Commission to enable it to comply with the above directions.

21. Accordingly, IAs 364 and 365 of 2013 are disposed of."

42. The Commission had issued an order giving road map for amortisation of the approved Regulatory Assets for all the *distribution licensees in eight years. In persuasion to Hon'ble Supreme Court's direction in the matter of regulation of power to Delhi by NTPC, the Delhi Commission has submitted a road map on affidavit.*

43. In view of above developments the matter stands disposed of."

23.7 This issue is disposed of as per the findings in Appeal no. 61 and 62 of 2012.

24. The 16th issue is regarding wrongful reduction of collection efficiency achieved.

24. The State Commission has considered LPSC net of financing expenses in revenue collection used for calculation of AT&C loss as the financing of LPSC is allowed as a cost to the Appellant. According to the Appellant, the Tariff Regulations provide for inclusion of revenue realization from LPSC in calculating the collection efficiency. Thus, the State Commission has acted in violation of the Tariff Regulations.

24.2 The above issue was considered in Appeal no. 61 and 62 of 2012 by this Tribunal wherein it held as under:

"55. The issue of computation of collection efficiency was discussed by this Tribunal in Appeal No. 14 of 2012 and had held that for the purpose of computing the collection efficiency the Commission is required to consider various parameters such as DVB arrears, Electricity duty and LPSC etc both in the numerator and denominator. The relevant portion of the Tribunal's judgment in Appeal No. 14 of 2012 is given below:

"97 The essence of the issue lies in the definition of the term 'Collection Efficiency'. As per the regulations, it is the ratio between total revenue realized to the total revenue billed for

the same year. Mathematically, it can be represented by the following formula:

$$\textit{Collection Efficiency} = \frac{\textit{Total Amount Realized}}{\textit{Total Amount Billed}}$$

98 Regulation also provided that the revenue realization from arrears relating to the DVB, period, electricity duty and late payment surcharge shall be included for computation of collection efficiency. This term 'Collection Efficiency' had been introduced and has been in vogue since privatization of Delhi Power Sector. Earlier, the term Collection Efficiency was the ratio between the revenue realized to the total revenue billed for the same year. It did not include the DVB arrears, electricity duty, LPSC etc. The Distribution Licensees represented to the Delhi Commission that since the monthly bill included arrears, electricity duty, Late Payment Surcharge etc., it was difficult for them to segregate the revenue billed and the revenue realized for the same year from other amounts. Since, the Collection Efficiency would be remain same if the other components of the monthly bills are also included in the revenue billed (sum of amount billed during the year) and the revenue realized (actual revenue relized during the same year).

99 A specific query was raised by the Bench during one of the hearings that as to whether the amount in question has been added to the denominator of the formula for collection efficiency or it has been added in both the numerator and denominator. The Appellant submitted that the Delhi Commission has added the amount in the denominator only i.e. the amount realized by DPCL has been added to the revenue billed and not in the revenue realized. The learned counsel for the Delhi Commission did not respond to this query.

100 In our view the amount realized by the DPCL directly is ought to be either included in both the numerator and denominator of the formula for collection efficiency or *excluded from the both. It would not be correct to add it in one component and exclude from the other component.*

In view of the above, this issue is decided accordingly. "

24.3 The above findings will be applicable to the present case. This issue is decided accordingly.

25. The 17th issue is regarding normative self consumption.

25.1 The Appellant had shown self consumption of 43.5 MU in their offices, grid sub-stations, consumer care centres, etc. However, the State Commission approved 21 MU @ 0.25% of total sales on a normative basis in the true up for FY 2010-11. According to the Appellant, the State Commission in the past has been approving self consumption on the basis of actual consumption data submitted by the Appellant wherever available and wherever the metering was not available, in that case as per LDHF formula prescribed in the Supply Code where 'L' sanctioned/connected load, 'D' is number of days, 'H' is hours in a day and 'F' is the factor. The State Commission by order dated 26.08.2011 directed the Appellant to meter electricity consumption in its offices, grid sub-stations, consumer care centre, etc., within 2 months, which has been undertaken. The Appellant supplied the requisite information to the Commission. Despite this, the State Commission reduced the self consumption lower than what was allowed in FY 2009-10. The State Commission has also not considered normal load growth since FY 2009-10 and past trend of own consumption.

25.2 We find that the State Commission in the impugned order has decided that 0.25% of total units sold during FY 2010-11 may be taken as a benchmark on normative basis for determining the self consumption and an increase @2% of the previous year's self consumption may be added each year till FY 2014-15. These norms will, however, be reviewed after the end of the current MYT period.

25.3 The Commission has made the following observations in the impugned order

"3.48 The Commission analysed the information submitted by the Petitioner and observed that there are 16 consumption points which have consumed approx 30 MU of energy. The Commission asked for explanation from the Petitioner's officials. The Petitioner's officials submitted that units drawn under 'self consumption' is being recorded on a metered basis. It was also submitted that there were cases where energy was booked on assessment basis for the past period (for a period of 2-3 years in several cases). They also submitted a few sample assessment bills through their letter dated May 8, 2012.

3.49 The Commission directed the Petitioner to submit details of own consumption based upon actual meter reading. They Commission also directed the Petitioner to segregate consumption recorded in assessment cases into assessment for FY 2010-11 and assessment for period other than FY 2010-11. The Petitioners' officials agreed to provide the required information. The Commission again reminded about the information pending on own consumption in validation session held on May 23, 2012 but no such compilation was provided by the Petitioner. Based on the observation that only 16 connection points are consuming approximately 30 MU out of 43.5 MU own consumption shown by the Petitioner, the Commission *approves own consumption for the Petitioner at 221 MU @ 0.25% of the total sales on a normative basis."*

25.4 We find that the Appellant was allowing self consumption at its own offices, consumer care centres etc., without meters and making assessment based on a formula which is used for assessment of consumers' consumption in case of faulty/tempered meter. The practice adopted by the Appellants in using electricity at their offices, etc., without meters is not in order. The Appellant is comparing the past data of self consumption which was partly based on unmetered consumption and, therefore, not authentic. The State Commission had also sought some data (refer para 3.49 of the impugned order) which was not submitted.

25.5 This issue has also been dealt by us in Appeal no. 195 of 2013 filed by a consumer and the Tribunal decided as under:

"We feel that the Appellant should have installed meters for self consumption in all its offices, call centres, sub-stations, etc. The Respondent no.2 does not need specific instructions for the same. When the Respondent no.2 is including self consumption in its energy sale figures, then it was legally bound to supply electricity for gross consumption only through correct meters. We feel that the State Commission should have allowed self consumption only to the extent of actual consumption for metered installations. The formula proposed by the Respondent no. 2 for calculating own consumption in its installations is for calculating energy consumption for consumers in case of faulty meters. Accordingly, we direct the State Commission to re-determine the self consumption based on the metered data only. We also do not feel that this would result in change in procedure in true up with respect to the MYT order dated 23.02.2008. In the MYT order the consumption is based on the projections. In the MYT order the

State Commission has not approved that the self consumption would not be metered and would only be assessed by a formula considering the load, number of days/hours, load factor, etc.”

25.6 This issue is decided in terms of the above judgment.

26. The 18th issue is disallowance of sales from EBS Database (raised only by BRPL and not BYPL).

26.1 The State Commission has disallowed energy sales in the EBS data base to the tune of 53 MU. The brief description of the issue is as under:

a) In the validation session, BRPL was directed to prepare month-wise Form 2.1(a) from the live database for FY 2010-11. BRPL had two databases which had been used for raising bills during FY 2010-11, EBS and SAP. BRPL downloaded the information from their databases and created form 2.1(a). The total sales in the Form 2.1(a) thus created was 8576.34 MU.

b) The Commission on analysis of the energy sales and revenue data observed that during some months, the average rate for sale of energy was lower than the tariff approved by the Commission.

c) It was observed that for many of the consumer categories in a few months the average energy charge was much lower than that approved by the Commission. Hence, the Commission asked the Appellant to come for a detailed data validation exercise.

d) In consumer-wise billing record for the month of march 2011 from SAP database for NDLT consumers with connected line of more than 10 KW, the Commission observed that total energy sale to their consumers was 72.16 MU which was lower by 9.6 MU vis-a-vis that shown in Form 2.1(a) submitted by the Appellant. It was observed that approximately 10% of the consumers were having no consumption and they were being billed fixed charges.

e) The same exercise conducted for SIP consumers with connected load of more than 10 KW for March 2011 showed that in the data extracted there were 4 cases (7.1MU) where energy was billed at “zero rate”. Further, total energy sold to SIP consumers was 34.84 MU which was lower by 4 MU vis-à-vis the total sale figure in Form 2.1(a) for March 2011. It was also observed that 7% of the consumers were having no consumption and they were just being billed fixed charges.

f) The Commission further directed the Appellant to repeat the exercise for February 2011 for the SIP consumers with connected load of more than 10 MW. There were no cases where energy was billed at “zero rate”. However, energy sold to SIP consumers was 35.62 MU which was lower by 4.7 MU with respect to that shown in Form 2.1 (a) submitted by the Appellant. The Appellant could not provide any explanation to the Commission. The Commission also noticed that an abnormally high number of consumers were being billed only fixed charges and no energy charge was billed as no consumption was recorded on the billing data base.

g) The explanation given by the Appellant in the next validation session on 23.04.2012 was that the billing database is dynamic, that is why number of consumers and sales have charged and for zero consumption it was submitted that either these premises were locked or these were seasonal industries. However, the

Commission did not find these explanations convincing as the variations were very high and the number of cases where no energy was billed was also significant.

h) In the next validation session on 23.04.2012 again the Appellant was asked to download the consumer-wise billing record for March 2011 for NDLT consumers where connected load was more than 10 KW. The Commission observed that the sales were 11 MU higher than that submitted in Form 2.1(a) as against lower by 9.6 MU in the earlier validation session dated 18.04.2012. The Commission also observed that there were several consumers which were present in the data downloaded on 23.04.2012 which were not there in data downloaded on 18.04.2012 and other way around. One more opportunity was given to the Appellant to give explanation.

i) The Appellant submitted that the downloaded data did not match as the downloaded data analysed was summation of KWH and KVAh of all consumers instead of KWH and the consumer with billing at zero rate pointed out by the Commission were also pointed out by their internal audit report and all these cases were amended in FY 2011-12.

j) The Appellant also submitted the list of all cases where energy was billed at zero rate showing that it had billed 28.91 MU in February 2011 and 29.41 MU in March 2011 at zero rate in SAP data base. The Appellant also submitted that these bills were reversed in February 2012.

k) In subsequent validation session held on 2nd and 3rd May 2012, the Commission directed the Appellant to download the consumer-wise billing record for March 2011 and February 2011 for NDLT and SIP consumers. The Commission now observed that the total energy sold to these consumers matched with the information provided in Form 2.1 (a). This was contrary to the explanation given by the Appellant on 23.04.2012. The Commission observed that now some consumers were billed at "zero rate" and for some consumers the billing rate was lower than the Commission approved tariff.

l) The Commission directed the Appellant to download consumer wise details for NDLT consumers with connected load less than 10 KW, Mushroom category and Agriculture category from EBS data base for February 2011. The Commission found huge variations in these cases vis-à-vis sales submitted in Form 2.1(a).

m) In the validation session on 07.05.2012, the Commission directed the appellant to download the data for SIP consumers from EBS database for September 2010. The Commission found huge variation in data vis-à-vis sales submitted in Form 2.1(a). The power unit rate of energy charges for same consumers was also lower than the tariff fixed by the Commission.

n) The Commission directed the Appellant to submit consumer wise billing details for all months in SAP and EBS database. The Appellant submitted to the Commission consumer wise billing details of all consumers of EBS and domestic consumers from SAP database.

o) The Commission analyzed the consumer wise billing details submitted by the Appellant for FY 2010-11 on sample basis and found many discrepancies in EBS database also i.e. cases where energy was billed at "zero rate", cases where energy was billed at lower rates than fixed by the Commission, cases where consumers were being refunded in bills (in monetary terms) with no mention of refund in units, etc.

p) The Commission shared a part of analysis (a sample of appropriately 10,000 cases identified), with the Appellants officers for their explanation the discrepancies. However, the Appellant could not provide satisfactory explanation.

q) It was found by the Commission that the information provided by the Appellant during the entire validation session was so inconsistent and changed many times. The Appellant also could not provide clarifications to the satisfaction of the Commission.

r) In view of above, the Commission disallowed 111.33 MU (58.33 MU for SAP and 53 MU from EBS data base), due to zero billing and other billing discrepancies like billing at lower rates, refunds given to the consumers without adjusting energy amounts, etc.

26.2 The Appellant has made the following submissions

a) The Commission has wrongly disallowed 53 MU from EBS database while truing up for FY 2010-11 by wrongly assuming that if there is mistake in SAP database there will also be mistake in EBS database while truing up for FY 2010-11.

b) By detailed analysis of EBS database, the Commission had found 10 MU of energy which were billed at "zero rate". Therefore, disallowance of 53 MU in EBS database is correct.

c) The State Commission never raised any query regarding finding of 10 MU under zero billing in EBS database.

d) During 2010-11, the Appellant started to shift the consumer database from the oracle platform (i.e. EBS) to the SAP platform. Therefore, for 2010-11, the database was maintained both in EBS and SAP database. The consumer moved to SAP database was no more in existence on EBS database and therefore, any mistake while transferring data from EBS database to SAP database will get reflected in EBS database.

e) The deviation in data for NDLT consumers of less than 10 KW load from EBS database raised form the summary of Form 2.1(a) due to non-inclusion of bill amendments made during the month.

f) The variation in data downloaded from EBS database for SIP consumer from Form 2.1 (a) in validation reason held on 07.05.2012 was due to downloading problem and the variation was also due to bill amendment made during the month.

g) During Technical Validation Session held on 03.05.2012 and 07.05.2012 it was explained that the deviation from ABR can be due to withdrawal of misuse bill, bill amendments, refund of amount due to court's order, own consumption and concessional tariff to erstwhile DVB staff.

f) The reasons for negative amount billed and no units in case of plots from EBS database for FY 2010-11 was due to conversion of plots into domestic connections. The amount might have been refunded to the consumers due to bill amendment after the category charge. As the plot connections were billed on flat rate tariff and not on unit; the bill amendment will not show units.

i) The State Commission said to have sent the information on its analysis by email on 23.05.2012 was sent at wrong email address.

j) The Commission by its letter dated 07.06.2012 (received on 11.06.2012) forwarded a sample of 13900 cases for detailed explanation. It was not possible to provide detail explanation for all the 13900 cases forwarded by State Commission within a span of one day. Therefore, the Appellant on best effort basis provided detailed explanation to 473 cases by letter dated 13.06.2012.

26.3 We find that the State Commission has analysed the issue in details. The State Commission found a number of discrepancies in the database submitted by the Appellant. The Appellant has not been able to give satisfactory reply for the deviation. The Appellant has only made general reasons for the discrepancies like there may be mistake in transferring data from EBS database to SAP database, bill amendment made during the month, withdrawal of misuse bill, refund of amount due to court's order, concessional tariff to erstwhile DVB staff, etc. The Appellant also allege that the email of their observations was sent by the Commission at wrong address and when the details were sent by letter, it was too late to give specific reply for all the cases.

26.4 We are not convinced by the explanations given by the Appellant. it is clear from the impugned order that the Appellant gave contrary explanations in different validation sessions. On many occasions during the validation sessions the Appellant could not provide any explanation or satisfactory explanation for the discrepancies. The State Commission provided adequate opportunity to give specific reply to the 10,000 cases pointed out by the State Commission where discrepancies were found but the Appellant failed to give specific replies for the discrepancies. If the Appellant wanted more time to submit the clarification, it could have made a request for more time. The Appellant has not stated that such request was made and was denied extension of time.

26.5 In view of above, we do not find any reason to interfere with the findings of the State Commission.

26.6 As regards BYPL, we have considered the issue in Appeal no. 195 of 2013 and have directed the State Commission to consider the discrepancy for the entire FY 2010-11, if not already done.

27. The 19th issue is regarding wrongful calculation of enforcement sale.

27.1 The Appellant has submitted that to derive sales against cases of enforcement, the total payment received against enforcement cases is divided by average billing rate for the years as per the past practice. However, the State Commission has wrongly reduced the declared enforcement sales to half.

27.2 The Tribunal in Appeal no. 61 and 62 of 2012 between the same parties, has considered this issue and decided as under:

"56. As regards reduction in MUs in relation to enforcement sale for the purpose of calculation of AT&C loss is concerned, the issue was also raised before this Tribunal in Appeal No. 14 of 2012 and the Tribunal in its judgment dated 28.11.2013 held as under:

107 Let us discuss the issue.

108 AT&C loss has been defined as the difference between the units input and units realized. Units realized are equal to

the product of units billed and collection efficiency. The issue is related to determination of units realized on account of enforcement. In this connection it would be necessary to understand as to how the enforcement bills are raised. When a consumer is detected to be indulged in theft of electricity, his premises is checked and 'connected load' is estimated. Connected load is defined as the sum of electrical load connected to the mains at the time of raid. Once the 'connected load' is estimated, the amount of electricity consumed by theft is estimated using the following formula defined in the Delhi Commission's Supply Code
Units consumed = L x D x H x F
Where L = Connected Load

D = No. of days in a month (taking into account weekly off)
H = No. of Hours of usage of electricity in a day.
F = Diversity Factor (100% for theft cases)
The consumer is billed at twice the applicable tariff rate as per Sections 126 and 135 of the Act.

109 The Appellant has no control over the rate, which is twice the tariff rate as per the Act and supply Code. It does not have any control over the Factors D, H and F in the formula, which are also defined in the supply Code. Thus, the Appellant can only vary the Connected Load to reach the settlement with the consumers. By reaching the settlement with the consumer, it has changed only the Connected Load as all other parameters are fixed. Therefore, the contention of the Appellant that it has to change the rate of charge for reaching the settlement is totally misleading and is ought to be rejected.

110 *Since, the consumers of different categories are booked under Section 126 and 135 of the Act during the year and bills are raised and revenue collected from them, Units billed under enforcement, for the purpose of evaluating AT&C losses, has to be back calculated from the revenue realized using average billing rate for enforcement i.e. twice the average billing rate. The methodology adopted by the Delhi Commission in working out the units billed for enforcement recovery is correct and needs no interference."*

27.3 The above finding will squarely apply to the present Appeals. Accordingly, we do not find any reason to interfere with the impugned order in this regard.

28. The 20th issue is regarding erroneous reduction of additional UI charges:

28.1 The Commission has not allowed penal UI charges of Rs. 5.50 crores in power purchase cost. These penal UI charges are for overdrawal at frequency lower than 49.2 Hz. According to the Appellant disallowance of penal UI charges is arbitrary and without any legal basis.

28.2 This issue has been decided by this Tribunal in judgment Appeal no. 171 of 2012 in the matter of Tata Power Delhi Distribution Ltd. Vs. DERC. In this matter the Tribunal decided as under:

"We do not want to give any relaxation in decision of the State Commission not allowing the penal UI charges, as we do not want to interfere in the matter relating to security of the grid in real time operation. The Appellant has to take necessary steps required to avert over-drawl under low frequency benchmark. Accordingly, this issue is decided against the Appellant."

The findings in the above case will apply squarely to the present case.

28.3 The Appellant has also submitted that only Rs. 2.66 crores would have been disallowed as the additional charges were imposed equivalent to such a mount when the frequency of the grid went between 49.2 Hz. The Appellant had paid 2.84 crores for UI overdrawal at frequency between 49.2 to 49.5 Hz and only 2.66

crores was paid for overdawl below 49.2 Hz. The Commission had sought information regarding additional UI charges without mentioning the purpose or any frequency band. Therefore, the Appellant submitted the total additional UI charges paid i.e. Rs. 5.50 crores.

28.4 In view of above submissions of the Appellant, we direct the State Commission to reconsider the amount disallowed on account of UI charges to restrict it to the amount for overdrawals below the frequency at which penal charges for UI are leviable. Accordingly, decided.

29. The 21st issue is regarding high rate assumed for sale of surplus power for the Control Period.

29.1 The Commission has considered a rate of Rs. 4.00 per unit for sale of surplus power by the Appellant during each year of the Control Period as against Rs. 3.60 per unit proposed by the Appellant. According to the Appellant there is no basis for fixing Rs. 4.00 per unit as rate for the sale of surplus power.

29.2 This issue has been decided by this Tribunal in Appeal no. 61 and 62 of 2012 as under.

"83 We are inclined to agree with the Appellant that it is difficult to estimate the surplus power that would be available with them due to load curve of Delhi. The demand of Distribution licensee depend upon many parameters. Weather temperature is one of such parameter. Any sudden change in temperature results in drastic change in demand. Accordingly, it is very difficult to estimate the demand in advance to any degree of accuracy so as to enter in to long term or medium term bilateral arrangements. The option available with Delhi Discoms is to sale the surplus power

through exchanges or on short term basis. The Commission's restriction on load shedding not exceeding 1% of consumption also plays major role in deciding sale of power by Discoms on short term basis. It is true that the rate of Rs 4.00 is only provisional rate and would be trued up based on actual rate for sale of surplus power, but higher rate fixed initially results in lesser ARR for the Appellants which may result in problems with cash flows and day to day operations. Under such a scenario, the Commission should, instead of fixing tariff at high rate of Rs 4.00 per unit, have fixed the rate based on weighted average rate for actual sale by the Appellants. The Appellants should also in their petition in future give an estimate of the sale price on the estimated surplus based on the date for the previous year to facilitate proper estimation. The Commission is directed that in future the rate for sale of surplus power shall fixed as suggested above. The issue is decided in favor of the Appellants."

29.3 This Tribunal in Appeal no. 171 of 2012 in the matter of Tata Power Delhi Distribution Ltd. Vs., DERC wherein same issue was raised, has also given guidelines for estimation of sale price more realistically. However, for the past period, the State Commission shall true up the sale price and allow the difference with carrying cost.

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

30. The 22nd issue is regarding fixation of AT&C loss target for the MYT period.

30.1 According to the Appellant the loss targets fixed by the State Commission are contrary to the MYT Regulations, are unrealistic and unachievable and have been fixed without any basis. Abraham Committee appointed by the Central Government had recommended loss reduction target of 1% for utilities where the distribution loss is 20%. Further, it would also not be possible to achieve high collection efficiency target of 99.5% fixed by the Commission. In the past, the Appellant was able to achieve high collection efficiency as the MYT Regulations, 2007 provided for inclusion of revenue realized from arrears, electricity duty, and late payment surcharge. However, as per the MYT Regulations, 2011, the revenue realization from electricity duty and late payment surcharge shall not be included for calculation of collection efficiency. Despite the aforesaid exclusion, the State Commission has now fixed targets at 99.5% without considering that the various components which led to higher collection efficiency have been excluded and it will not be possible to achieve 99.5% collection efficiency.

30.2 The Appellant further submitted that the State Commission has fixed steep target for distribution loss reduction of 4.44% for FY 2012-13 while it has fixed the reduction target of 0.84 for FY 2013-14 and 0.83% for 2014-15. Further the target for 2012-13 was fixed on 13.07.2012 when almost 3½ months of FY 2012-13 had already expired. As per the MYT Regulations, 2007, the actual achievement of the Appellant at the end of the first MYT control period (FY 2007-12) ought to have been the initial value for the second control period (2012-15). The consequences of failure or success in reaching the loss reduction target have already been borne by the licensee.

30.3 According to the Appellants, the State Commission has been conservative in approving the capital investment scheme proposed by the Appellants which has a bearing on the loss reduction plans of the Appellants. '

30.4 Learned Counsel for the State Commission argued that in case the Appellant failed to achieve the target fixed for the earlier control period, it cannot be permitted to argue that as it could not achieve the target the fixation of target by Commission is wrong. Further, another licensee has not only achieved the target, but also overachieved it. Thus, the target fixed by the Commission cannot be said to be arbitrary.

30.5 This Tribunal in judgment dated 28.11.2014 in Appeal no. 61 and 62 of 2012 has directed the State Commission to refix the AT&C loss levels for the FY 2011-12 as per its letter dated 08.03.2011 i.e. lower of i) actual AT&C loss for 2010-11 & ii) reduction of 1% over the AT&C target for FY 2010-11 and give consequential relief to the Appellants. Thus, the AT&C loss target for 2011-12 has to be revised to 16%. Accordingly, the AT&C loss level target for FY 2011-12 on the basis of which the target was fixed for 2012-13 over the second control period has also to be changed.

30.6 Let us examine the impugned order.

30.7 The Commission while fixing the AT&C loss reduction targets for the Control Period FY 2012-13 to 2014-15 has been guided by:

a) The achievement in AT&C loss reduction vis-a-vis targets fixed by the Commission since 2002, capital expenditure programs, review of the consumer mix of Delhi, metering status, etc.

b) Delhi is an urban area with very small agriculture consumers and with 100% retail consumer metering.

c) Loss levels in similar private urban distribution licensees and public utilities viz. MGVCL in Gujarat and BESCOM in Karnataka.

30.8 Further the Appellants still have areas where the AT&C loss is significantly higher than the average AT&C loss (above 40% in some areas).

30.9 The AT&C losses target approved by the Commission for BRPL is as under:

	FY 2012-13	FY 2013-14	FY 2014-15
Distribution Loss Target	13.73%	12.89%	12.06%
Collection efficiency Target	99.5%	99.50%	99.5%
AT&C loss Target	14.16%	13.33%	12.5%

30.10 Thus the State Commission fixed AT&C loss reduction target for BRPL for FY 2012-13 from 15% fixed for 2011-12 to 14.16%.

30.11 The MYT Regulations 2011 provide for AT &C loss levels to be fixed for each year of the control period based up on benchmarking, past trends, business plan submitted by the licensee and other factors considered by the Commission. The MYT Regulations, 2011 also provide that the Licensee shall propose AT&C loss reduction trajectory for each year of the control period. For any year of the control period, loss reduction should be at least 30% of the total AT&C loss reduction target for the control period. The Commission shall examine the filings made by the licensee for AT&C loss trajectory and approve the same with modifications as considered necessary.

30.12 The State Commission has proposed AT&C loss reduction 1.27% below the target fixed for 2011-12(15%). Now the AT&C loss target for FY 2011-12 has to be refixed to 16% for BRPL as per the decision of this Tribunal in Appeal no. 62 of 2012. The State Commission has fixed AT&L loss target for 2014-15 as 12.5% which would mean a loss reduction of 3.5% in the control period of 3 years which seems reasonable and can be distributed to 1.05% reduction in 2012-13, 1.2% in 2013-14 and 1.25% in 2014-15 over the target of previous year i.e. AT&C loss target of 14.99%, 13.75% and 12.5% respectively. Lower target for 2012-13 has been fixed as the impugned order was passed on 13.07.2012, about 3½ months after the commencement of FY 2012-13. In this way, the target for FY 2014-15 will remain the same as decided by the Commission in the impugned order. Considering the performance in the past and the actual AT&C loss level, the above loss reduction trajectory will be reasonable. According decided.

30.13As regards BYPL, the AT&C target for FY 2011-12 has to be refixed as per the directions given in the judgment in Appeal no. 61 of 2012. When the target level for FY 2011-12 has to be refixed, the AT&C loss targets for FY 2012-13 to 2014-15 have also to be refixed by the State Commission accordingly.

30.14 We find that the State Commission has refixed the collection efficiency as 99.5% from 98.5% earlier without any benchmarking despite making change in definition of the collection efficiency with reference to definition in 2007 MYT Regulations by excluding arrears collected for the DVB period, electricity duty and late payment surcharge. There is some force in the arguments of the Appellants that they were able to achieve more than 100% collection efficiency due to collection of arrears. We feel that the State Commission should have refixed the collection efficiency target after benchmarking and considering the actual past performance after correcting for collection of DVB arrears, electricity duty and late payment surcharge which have been excluded in the definition in 2011 MYT Regulations. Accordingly, the State Commission is directed to reconsider the fixation of collection efficiency target. We want to make it clear that we are not giving any specific number for collection efficiency and the State Commission has to decide the same after considering the above factors.

31. The 23rd issue is regarding lower allowance of employee costs.

31.1 The Commission has benchmarked the employees cost with other licensees in Delhi to arrive at the employees cost of the Base Year after considering employees cost per unit of sale and employees cost per consumer for each of the three private distribution licensees. The Appellant is aggrieved for the following reasons:

a) The State Commission has not considered the employee cost of NDMC, the fourth distribution licensee operating in Delhi.

b) If the increase in employees cost per unit of sales of a particular licensee is less than the average of three distribution companies, then the actual employee expenses for FY 2010-11 would be used to estimate the employee expenses of the Second control period. Thus, if a particular distribution company is more efficient then other distribution companies and therefore has a lower increase in employees cost per unit sales, then it is denied the benefit of the said efficiency.

c) The average increase in employees cost per unit of sale as well as employees cost per consumer served was earlier calculated by the commission in the impugned order on 2010-11 figures. At that time the audited accounts for all distribution companies were available with the Commission. Accordingly, the Commission should have made the calculations based on the actual audited figures for all the distribution companies including NDMC.

d) The Commission has failed to consider that the employee cost of FRSR employees i.e. erstwhile DVB employee is uncontrollable in nature and, therefore, has to be allowed based on the actual.

31.2 According to the State Commission, the profile of NDMC is entirely different that of the Appellants, hence, no reliance can be placed on the same.

31.3 We agree with State Commission that comparison with NDMC will not be correct as the profile of NDMC is different altogether. However, there are deficiencies in the methodology used by the Commission.

31.4 This issue has been dealt in Appeal no. 171 of 2012 and we have set aside the method used by the Commission and directed the Commission to redetermine the employees cost.

31.5 We find that the employees cost for FY 2010-11 includes the actual cost of FRSR employees which has been extended by 8% to determine the base cost for 2011-12. Therefore, the base cost is based on the actual cost of FRSR employees.

31.6 The Appellants have not challenged the methodology used by the Commission. However, the Appellants argue that the audited figures for 2010-11 which were available with the Commission should have been utilized. We find force in the argument of the Appellants. If the State Commission had the audited figures for 2010-11, the same should have been used by the State Commission. The State Commission should, therefore, redetermine the employees expenses taking into consideration the audited figures for 2010-11.

31.7 The State Commission shall redetermine the employees cost as per the findings in Appeal no. 171 of 2012 and the above observations.

32. The 24th issue is regarding Administrative and General (A&G) expenses.

32.1 While calculating A&G expenses the State Commission has adopted the same approach as in the employees costs and is being challenged on the same grounds as employee's expense.

32.2 This issue has been dealt with in Appeal no. 171 of 2012 wherein we have set aside the methodology used in the impugned order and directed redetermination of A&G expenses. Accordingly, decided.

33. The 25th issue is regarding partial implementation of Power Purchase Adjustment Formula.

33.1 The Appellant is aggrieved by the Power Purchase Adjustment formula on following grounds:

a) The PPAC formula has not included the impact of short term procurement and sale of power by Appellant on the ground that it would require prudence check and it would delay the Power Purchase Cost Adjustment.

b) The Commission has ignored the variation in transmission charges which form part of the power purchase cost.

c) The refusal to include complete variation in power purchase is contrary to the Tariff Policy and judgment of the Tribunal reported as 2011 ELR (APTEL) 1742.

d) Aravali Power Station which is the costliest power purchased by the Appellant has been excluded from the list of the power stations.

33.2 In reply to above, Learned Counsel for the State Commission has only reiterated the findings of the Commission in the impugned order.

33.3 Let us examine the findings of the State Commission in the impugned order. The findings are summarized as under:

a) The power purchase cost accounts for 80% of the ARR of the distribution licensees and includes the cost paid for procurement of power, transmission charges, UI charges and SLDC/RLDC charges. The net power purchase cost after deduction amounts realized from sale of surplus power is considered for the purpose of ARR.

b) Power Purchase Cost is uncontrollable in nature and are volatile making it difficult to accurately estimate at the time of annual tariff fixation.

c) The power purchase cost is trued up only after 2 years, putting additional burden on consumers by way of interest charges which have to be borne by the consumers additionally.

d) The State Commission has decided to implement Power Purchase Cost Adjustment (PPCA) for generating stations having long term PPAs with DISCOMS on quarterly basis.

e) The Commission does not intend to include the variation on account of short term power purchase and sale in power purchase adjustment as it would require prudence check and would delay quarterly power purchase adjustment.

f) The State Commission has decided a formula for PPCA for power procured from power stations having long term PPAs.

g) The list of power plants for which power purchase cost is to be adjusted is given. However, the list does not include Aravali power station with which the Appellant has long term PPA.

h) Power Purchase Adjustment will be charged only after it is approved by the Commission.

33.4 We find that the State Commission has not considered any power for the purpose of energy availability from Aravali power plant, Jhajjar as the distribution licensees had surrendered the power from that station upto June 2012 and had applied for surrender in subsequent months. Accordingly, the State Commission has indicated total energy and cost as nil in the station-wise power purchase cost approved by the Commission in table 68 of the impugned order. However, in the schedule for base cost for FY 2012-13 (Table 77) in the PPCA formula Aravali has not been included. We feel that Aravali should have been included showing energy purchase and cost as zero as shown in the Power Purchase Cost/procurement cost approval so that in case the Appellant had to procure power from Aravali for not being able to surrender the power after June 2012 due to its long term PPA, the Power Purchase Cost Adjustment to the extent of actual purchase cost from Aravali would have been available to the Appellants. The long term PPA between the Appellants and Aravali power has not been terminated and is still existing and therefore, it should have been included in PPCA.

33.5 As regards the cost of short term power purchase, we find that the State Commission has not approved any short term power procurement due to surplus power position from 2012-13 onwards due to upcoming power plants in future. Therefore, any short term power procurement due to unforeseen outages which may be small compared to total power purchase cost, would require prudence check for the need for such procurement and verification of price which may delay the process of PPCA. Therefore, keeping in view small amount of short term power procurement cost, we do not find any fault with the State

Commission not including cost of short term power procurement in PPCA in the circumstances of the present case.

33.6 We also find that the transmission charges (excluding losses) constitutes a small percentage of total power purchase cost. The variation in transmission charges is not volatile and also not expected to be make significant impact on total Power Purchase Cost. The PPCA formula has to be simple and should not be complicated by considering the expenses where large variation in price is not anticipated and which do not make appreciable impact on total power purchase cost.

33.7 As regards sale of surplus power, we find that the power sales constitute a major component of net power purchase cost. The price for sale of surplus power decided by the Commission has also been contested by the Appellant and we have found that the price has not been determined taking into account the ground realities. The sale price of short term power is also volatile and may vary substantially from what has been considered in determining the net power purchase cost in the ARR which may have adverse effect on the cash flows of the Appellant. Therefore, we feel that in the circumstances of the present case, the State Commission should have considered the variation in sale price of surplus power in the PPCA formula.

33.8 The Control Period is going to be completed shortly. Therefore, we direct the Commission to true up the power purchase cost in the true up exercise. The Commission shall, however, keep the above findings in view while deciding the PPCA formula for future.

33.9 This issue is decided in favour of the Appellant to the extent indicated above.

34. The 26th issue is regarding wrongful computation of ROCE (WACC).

34.1 The Appellant has stated that the computation of WACC is wrong because it has been calculated without considering the repayment of debt by the Appellant. As a consequence, the computation of weighted average of Return on Equity and Return on Debt has become flawed. As the rate of Return on Debt was much less than the rate of Return on Equity, the direct effect of Debt being taken at higher figure without deducting debt repayments is that the WACC gets depressed. As per Regulation 5.8 of MYT Regulations, the Regulatory Rate Base is to be computed after deducting the depreciation and consumer contribution from investment made during the year. As per Regulations, depreciation is to be used for loan repayment. Therefore, while calculating RRB, State Commission is reducing the investment by depreciation i.e. loan repayment. However, while calculating WACC, the commission is taking contrary stand and is considering loan repayment through depreciation.

34.2 Let us examine the MYT Regulations, 2011.

34.3 As per Regulation 5.6 of the MYT Regulations, 2011, the Return on Capital employed (ROCE) shall be used to provide a return to the distribution licensees to cover all financing costs, without providing separate allowances for interest on loans and interest on working capital.

34.4 As per the Regulation 5.7, the Regulated Rate Base (RRB) shall be used to calculate the total capital employed which shall include the original cost of assets and working capital, less the accumulated depreciation. According to Regulation 5.8, the RRB shall be determined for each year of the Control Period based on approved capital investment plan with corresponding capitalization schedule and normative working capital.

34.6 Regulated Rate Base for the year (RRBi) of the control period shall be computed as under;

RRBi = RRBi-1 + Δ ABi/2 + Δ WCi

i is ith year of the Control Period,

Δ ABi = change in Regulated Rate Base in ith year of the control period

Δ ABi = Inv i – D i – CC i

Invi = Investment projected to be capitalized during ith year and approved;

Di = Amount set aside or written off on account of depreciation of fixed assets for the ith year.

CCi = Consumer contribution, capital subsidy/grant

Regulated Rate Base for the first year of the control period shall be the Regulated Rate Base for the base year i.e. RRB which is original cost of fixed assets at the end of the base year less amount on account of depreciation of fixed assets at the end of the Base Year, less total contribution pertaining to original cost of fixed assets at the end of the Base Year made by consumer contribution and capital subsidy/grants.

Δ WCi is the change in normative working capital requirement in the ith year from the (i-1)th year.

34.7 Regulation 5.10 and 5.11 provide for Rate of Capital Employed (ROCE) and Weighted Average Cost of capital as under:

"5.10 Return on Capital Employed (RoCE) for the year "I" shall be computed in the following manner:

*RoCE=WACCi*RRBi*

Where,

WACCi is the Weighted Average Cost of Capital for each year of the Control Period;

RRBi - Regulated Rate Base is the asset base for each year of the Control Period based on the capitalization and working capital.

5.11 The WACC for each year of the Control Period shall be computed at the start of the Control Period in the following manner:

$$WACC = \left[\frac{D/E}{1+D/E}\right] * r_d + \left[\frac{1}{1+D/E}\right] * r_e$$

Where,

D/E is the Debt to Equity Ratio and for the purpose of determination of tariff, debt-equity ratio for the asset capitalized shall be 70:30. Where equity employed is in excess of 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance amount shall be *considered as notional loan. The interest rate on the amount of equity in excess of 30% treated as notional loan shall be the weighted average rate of the loans of the Licensee for the respective years and shall be further limited to the prescribed rate of return on equity in the Regulations. Where actual equity employed is less than 30%, the actual equity and debt shall be considered:*

Provided that the Working capital shall be considered 100% debt financed for the calculation of WACC;

Provided further that the Debt to Equity Ratio for the assets covered under Transfer Scheme, dated July 1, 2002 shall be considered as per the debt and equity in the transfer scheme;

Provided further that Debt to Equity Ratio for the assets capitalised till 1.04.2012 (other than assets covered under Transfer Scheme) shall be considered as per the debt and equity approved by the Commission at the time of capitalization.

rd is the Cost of Debt and shall be determined at the beginning of the Control Period after considering Licensee's proposals, present cost of debt already contracted by the Licensee, credit rating, benchmarking and other relevant factors (risk free returns, risk premium, prime lending rate etc.);

re is the Return on Equity and shall be considered at 16% post tax:

Provided further that any additional investment made by the Licensee other than in the fixed asset of the distribution business, shall not qualify for the return on equity."

34.8 Comprehensive reading of the Regulations indicates that Regulate Rate Base is determined on the original cost of fixed assets and working capital less accumulated depreciation. The Weighted Average Cost of Capital formula given in the

Regulations takes into account the Debt/Equity ratio, cost of debt and return on equity @ 16%. The Regulation gives the D/E ratio to be considered for the assets covered under the transfer scheme dated 01.07.2002 as per the transfer scheme, debt equity ratio for assets capitalized till 01.04.2012 (other than assets covered under the transfer scheme) as approved by the Commission and debt/equity ratio for new assets. The working capital is considered 100% debt financed for calculation of WACC.

34.9 The Appellant has contended that depreciation is to be used for repayment of loan and after repayment of loans, the ratio of equity has changed and the changed position of debt:equity ratio has to be considered for calculating WACC. There is a point in the contention of the Appellant. This issue has been dealt with by this Tribunal in Appeal no. 61 and 62 of 2012 wherein the Commission was directed to re-evaluate the WACC considering the repayment of loans during the period and recompute ROCE payable to the Appellants. Accordingly, this issue is decided in favour of the Appellant in terms of the above decision.

35. The 27th issue is disallowance of tendering cost.

35.1 The State Commission has disallowed tendering cost of Rs. 0.09 crores for procurement of material through open tender as the Appellant was always required to procure material through tenders. According to the Appellants, the tendering cost has been incurred by the Appellant pursuant to the competitive bidding guidelines issued by the State Commission on 11.08.2009 during the first control period.

35.2 This issue has been considered by this Tribunal in its judgment dated 28.11.2014 in Appeal no. 61 & 62 of 2012. The relevant extracts of the judgment are reproduced below:

"116.This issue had also been decided by this Tribunal in Appeal No. 14 of 2012. The findings of the judgment in Appeal No. 14 of 2012 are given below:

"85 Clause 10.5 of the License conditions provides that the licensee shall procure equipment by inviting tenders in transparent, competitive and fair way. Generally speaking tendering is done through 'Limited tender' or 'Open tender'. Under limited tender few selected vendors are asked to submit their bids. Under open tender public at large are invited to bid. This is done through advertisement in the Newspapers or other public media. The license conditions provides that tender are invited in a transparent, competitive and fair way. This can be achieved only through open tender. Thus, the condition of open tender was already there in the license conditions and the Delhi Commission did not specify any new term in the Guidelines for procurement of equipment Regulations.

86 So, this issue is decided accordingly.

117. The above ruling would apply in the facts of present case. Accordingly, the issue is decided against the Appellants."

35.3 The above findings will squarely apply to the present case. Accordingly, this issue is decided against the Appellants.

36. The 28th issue is regarding wrongful computation of 'K' factor.

36.1 The State Commission has calculated actual 'K' factor for each year from FY 2007-08 to FY 2011-12 considering R&M expenses and opening GFA for the year as approved by the Commission in its previous tariff orders. The State Commission has determined the 'K' factor for the second control period on the basis of the average 'K' factor of the Appellant for FY 2008-09 to FY 2011-12 ignoring the 'K' factor for FY 2007-08 which was found to be higher than average 'K' factor for the period FY 2008-09 to 2011-12.

36.2 According to the Appellant, the computation of 'K' factor by the Commission is wrong on account of the following

a) The Commission has not followed its own methodology specified for computing the 'K' factor in the impugned order.

b) The Commission instead of calculating the 'K' factor on the basis of the approved R&M expenses figures for the past years, has used the figures of the actual R&M expenses (audited figures) which are not the approved R&M expense figures.

36.3 In reply, the Learned Counsel for the State Commission has only reiterated the findings of the Commission in the impugned order.

36.4 As per the MYT Regulations, 2011 the value of 'K' factor for each year of the control period shall be determined by the Commission in the MYT order based on Applicant's filing, benchmarking, approved cost by the Commission in past and any other factor considered appropriate by the Commission.

36.5 We find that the State Commission had decided to fix the 'K' factor as the average K factor based on the actual R&M expenses of the last five years. We do not find any infirmity in the methodology except that the Commission has not followed the principle of computing the 'K' factor based on the actual for the last 5 years by ignoring the K factor for FY 2007-08. By this method the R&M expenses of FY 2012-13 have been determined more or less at the same level as 2011-12 which does not even cover the normal inflation factor. Therefore, the Commission should take into account the K factor for 2007-08 also and redetermine the K factor and the R&M expenses for the Control Period. Accordingly, directed.

37. The 29th issue is arbitrary determination of efficiency factor.

37.1 The State Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY 2012-13, FY 2013-14 and FY 2014-15 respectively.

37.2 According to the Appellant, the efficiency factor has been determined without any basis.

37.3 This issue has been considered by this Tribunal in Appeal no. 171 of 2012. The relevant paragraph of the judgment are reproduced below:

"12.5 We find that as per the Regulations, the efficiency factor can be determined by benchmarking and, therefore, there is no fault in the Commission's basic approach for benchmarking the O&M cost of the Appellant with other distribution companies. However, the benchmarking of O&M has to be with respect to like distribution licensees and for a larger span with analysis. In the present case, the State Commission has given figures of O&M cost per unit of sales and per consumer for a single year i.e. FY 2010-11. It is not clear whether the O&M expenses considered are the actual audited expenses or trued up expenses or the estimate of expenses approved in the tariff order. The State owned distribution licensee considered in the benchmarking should be much who maintain reliable power supply and distribution loss level comparable to the

Appellant. The Commission should have benchmarked the O&M costs of some more distribution licensees having metropolitan area of supply such as other licensees of Delhi, Mumbai, Kolkata for at last three years before coming to a conclusion. The approach adopted by the State Commission is over simplified and lacks analysis.

12.6 While we agree with the basic approach of benchmarking, the data and the analysis is required to be augmented as discussed above. Therefore, we remand the matter to the State Commission for redetermination of the Efficiency Factors."

37.4 This issue is also decided in terms of the finding in Appeal no. 171 of 2012.

37.5 The Appellant Discom in their submission has also pointed out some discrepancies in the calculation of their O&M cost per unit sales and cost per consumer. The Commission shall also consider the same while deciding the issue.

38. The 30th issue is regarding disallowance of income tax.

38.1 The State Commission has allowed the income tax after disallowing the penal interest of Rs. 2.28 crores paid by the Appellant to the income tax authorities.

38.2 According to the Appellant, they were compelled to pay penal interest only because the State Commission in its MYT order dated 23.02.2008 allowed a negligible amount of Rs. 5 crores toward income tax for the entire control period as against the claim of Rs. 25.48 crores towards income tax made by the Appellant. In FY 2010-11, the Appellant actually incurred a tax expense of Rs. 36.88 crores and penal interest thereon of Rs. 2.28 crores. As the State Commission had not provided adequate income tax in the ARR, the penal interest on income tax should be allowed.

38.3 We are not convinced by the argument of the Appellant that penal interest should be allowed as the State Commission has not kept adequate provision for income tax in the ARR. The Appellant gets carryings cost on the revenue shortfall which also includes the shortfall in income tax. The Appellant cannot claim the penal interest on income tax as also carrying cost on the revenue deficit. The Appellant is responsible to make full payment of income tax in time. In any case, the Appellant had paid the income tax alongwith penal charges despite the shortfall in revenue. Therefore, the argument for claim of penal interest on income tax is not valid and is rejected.

39. The 31st issue is regarding erroneous computation of non-tariff scheme.

39.1 The State Commission has allowed financing cost for LPSC @ 9.5% considering the SBI PLR as on 01.04.2010 as 12.25%.

39.2 According to the Appellant the interest cost of 9.5% for financing of LPSC is not reflective of market rates. It has been decided by this Tribunal that financing cost of LPSC has to be at the same rates that approved for working capital funding.

39.3 This Tribunal in Appeal no. 14 of 2012 has decided that financing of LPSC is required to meet the requirements of working capital and hence the financing cost of LPSC has to be at the same rate as approved for working capital funding.

39.4 We find that the State Commission in the impugned order has in principle accepted interest rate as applicable to the working capital for interest rate to be made applicable for funding of LPSC. The SBI PLR prevailing as on 01.04.2010 was 12.25%as per the Commission. The financing cost @ 9.5% approved in the MYT order dated 23.02.2008 had also been based on the SBI PLR rate of 12.25%. Therefore, the Commission has considered the financing cost for LPSC at 9.5%. The Appellant has not provided any information to indicate the interest rate at which it had obtained working capital funds in FY 2010-11. The Appellant is only praying for allowing financing @ 12.25% i.e. the SBI PLR without indicating the rate at which it had obtained financing for working capital. Therefore, we are not able to decide the interest rate to be allowed to the Appellant. This issue has been considered by us under item no.4. Accordingly, the State Commission is directed to determine the interest rate and amount of financing cost after verifying the cost of debt taken by the Appellant and the market rate of debt.

40. The 32nd issue is regarding approval of capital schemes and penalizing the Appellant for non-achievement of AT&C loss target.

40.1 The AT&C loss target for FY 2010-11 for BRPL was 17% against which the actual achievement was 18.82%. Accordingly, the under-recovery in the revenue realized on account of non-achievement of the minimum AT&C loss target was considered to be on Appellant's account in the impugned order. The Appellant's case is that the target AT&C loss could not achieved due to the following factors not attributable to the Appellant.

a) The Commission has failed to amend the AT&C loss targets in terms of the judgment of this Tribunal dated 06.10.2009 in Appeal no. 36 of 2008, wherein the Commission was directed to reconsider the AT&C loss target fixed for the first MYT control period (2007-08 to 2010-11) on the basis of submissions of the Appellant.

b) Nearly 50% of the number of capex schemes submitted by the Appellant during FY 2009-10 and 2010-11 were not approved by the Commission.

c) Even, 'in principle' approval granted to the capex schemes submitted by the Appellant for reduction in AT&C loss in FY 2010-11 were granted with an average delay of more than 6 months.

40.2 The Appellant submitted detailed information regarding the submission of schemes and approval by the State Commission to establish that the State Commission has not been giving necessary approvals for loss reduction schemes affecting their performance.

40.3 Learned Counsel for the State Commission submitted that approval of capex is subject to prudence check and validation of data submitted by the distribution company related to capex. There is delay in reply to queries raised by the Commission during the scrutiny of the schemes. As and when all the relevant information is received by the Commission it will be approved by the Commission subject to justification and cost benefit analysis of the scheme.

40.4 The State Commission has not given any specific information relating to delays in reply to queries raised by the Commission and has made only a very casual reply without giving any specific reason for delay in approval of the schemes and what was lacking in the proposal of the Appellants.

40.5 We find that the Appellant by letter dated 17.08.2007 had submitted capital investment plan for FY 2007-11. The plan only indicated the name of the scheme and total expenditure proposed year-wise for the first control period (2007-11). The plan indicated proposed expenditure of Rs. 141.93 crores, Rs. 157.99 crores, Rs. 99.93 crores and Rs. 55.47 crores in the first, second, third and fourth year of the control period for AT&C loss reduction. We find that the information in the plan is inadequate to accord approval of the capex by the State Commission for inclusion in the ARR.

40.6 The Appellant has also submitted a statement showing no. of schemes with the estimated amount submitted to the State Commission and that approved during the first control period. The relevant information relating to schemes for AT&C loss reduction is as under

Year	No. of schemes submitted	Estimated Amount 'Rs. Crores'	No. of scheme approved	Amount approved 'Rs. Crores'
2007-08	500	200.21	500	128.71
2008-09	443	201.87	443	90.78
2009-10	401	176.59	209*	54.42
2010-11	232	156.05	48	16.78

**161 schemes submitted in November 2009 and 31 schemes submitted in February 2010 not approved at the end of FY.*

40.7 We find that the Appellant has not raised this issue in case of BYPL where the Appellant has over-achieved the AT&C target.

40.8 Though the data submitted by the Appellant indicates delay in approval of the schemes in FY 2009-10 and 2010-11, it is extremely difficult for us to come to a definite conclusion from the information placed before us whether the non-achievement of the AT&C loss target was entirely due to non-approval/delay in approval of the schemes by the State Commission. However, we find some substance in the submissions of the Appellants as prima facie there seems to be some delay in approval of the schemes submitted in FY 2009-10 and 2010-11. If the Commission is not convinced about the commercial viability or usefulness of a scheme, it should reject the scheme by giving reasons for the same but there is no reason to keep the schemes pending awaiting approval. We would like to stress the importance of timely approve of the schemes by the Commission. As already emphasized in this judgment, the schemes proposed for the ensuring financial year have to be approved in advance before the commencement of the year to provide adequate time for their completion in order to get the benefits of the scheme in the ensuing year. Needless to say that the Appellant should give proper justification with cost benefit analysis of the scheme. All the loss reduction schemes for the ensuing FY should be furnished together, as far as possible to allow the State Commission to take a comprehensive view. The State

Commission should also clear the schemes as expeditiously as possible to allow the Appellant to execute the scheme in time to get the desired benefit in the year for which the scheme is targeted. We direct the State Commission to devise a detailed procedure for the approval of the schemes with time schedule.

40.9 We remand the matter to consider the contentions of the Appellant regarding non-achievement of AT&C loss target for FY 2010-11 due to delay/non-approval of the schemes which was beyond its control after considering whether there was delay in according approval to the loss reduction schemes submitted by the Appellant in FY 2009-10 which resulted in the non-completion of these schemes during FY 2010-11. If it is found that the proposed loss reduction schemes were not approved for no fault of the Appellant then the Appellant will be entitled to a relief. Accordingly, directed.

41. The 33rd issue is regarding change of methodology in computation of depreciation.

41.1 The Commission has revised the depreciation amount for FY 2010-11 by deducting Rs. 16.22 from the asset base while calculating depreciation. According to the Appellant, the Commission has wrongly proceeded on the footing that the consumer contribution should be deducted from the original cost of fixed asset for computing depreciation. The finding of the Commission is contrary to the MYT Regulations, 2007.

41.2 In reply the Learned Counsel for the State Commission has only referred to the impugned order.

43.3 This issue has been dealt with by this Tribunal in judgment dated 28.11.2014 in Appeal no. 61 of 2012. The relevant finding is reproduced below:

"66. It is evident from perusal of above extracted Regulation 5.8 that capital grants/subsidies has been clubbed with consumer contribution. Therefore, the Appellant's submission that Consumer's contribution and grants/subsidies cannot be treated in a same way is misplaced and is likely to be rejected. The approach taken by the Commission is as per the Regulations and, therefore, cannot be interfered with. Error committed cannot be allowed to perpetuate and the Commission has right to correct the error committed earlier. The ratio of Megalaya case would not be applicable to the present case as it is not a case of change in methodology but merely a case of correction of error. The issue is answered against the Appellants."

41.4 This issue is decided against the Appellant in terms of the above judgment.

42. The 34th issue is regarding disallowance of salary for FRSR structure.

42.1 The Appellant has claimed that the employees cost of FRSR structure employees should be trued up as per actual.

42.2 The relevant finding of the State Commission is as under:

"3.110 The Petitioner in its petition has submitted employee expenses in accordance with the employee expenses

approved by the Commission in Tariff Order dated August 26, 2011.

Table 14: Revised Employee Expenses (Rs Cr)

Particular	*Approved in MYT Order*	*Approved in TO dated Aug 26, 2011*	*Petitioner's Submission*
Employee Cost (excluding 6^{th} Pay Commission	*172.01*	*165.09*	*165.09*
Increase in Salaries in FY 2010-11		*47.5*	*47.5*
Total Employee Cost Revised		*212.59*	*212.59*
Less: Employee Expenses Capitalised	*9.33*	*9.52*	*9.52*
Total Employee Expenses	*162.68*	*203.07*	*203.07*
Add: SVRS Pension	*9.99*	*9.99*	*9.99*
Total	*172.67*	*213.07*	*213.07*

Commission's Analysis

"the Commission now allows the monthly pension provisionally subject to the outcome of the Tribunal Order with the condition that any refund/relief provided on this account to the Petitioner by the Trust will be available for adjustment in the future employee expenses"

3.112 As the final Order on the pension liability is not out yet, the Commission has approved the SVRS pension at the level approved in MYT Order. The Commission will review the expenditure under SVRS pension, while truing up for the first MYT Control Period.

3.113 The Commission approves the employee expenses for FY 2010-11 as shown in the table below.

Table 15: Employees Expenses approved by the Commission for FY 2010-11 (Rs.Cr)

<table>
<tr><th>Particular</th><th>Approved in MYT Order</th><th>Approved in TO dated Aug 26, 2011</th><th>Petitioner's Submission</th><th>Now Approved</th></tr>
<tr><td>Employee Cost (excluding 6th Pay Commission</td><td rowspan="3">172.01</td><td>165.09</td><td>165.09</td><td>165.09</td></tr>
<tr><td>Increase in Salaries in FY 2010-11</td><td>47.5</td><td>47.5</td><td>47.5</td></tr>
<tr><td>Total Employee Cost Revised</td><td>212.59</td><td>212.59</td><td>212.59</td></tr>
<tr><td>Less: Employee Expenses Capitalised</td><td>9.33</td><td>9.52</td><td>9.52</td><td>9.52</td></tr>
<tr><td>Total Employee Expenses</td><td>162.68</td><td>203.07</td><td>203.07</td><td>203.07</td></tr>
<tr><td>Add: SVRS Pension</td><td>9.99</td><td>9.99</td><td>9.99</td><td>9.99</td></tr>
<tr><td>Total</td><td>172.67</td><td>213.07</td><td>213.07</td><td>213.07</td></tr>
</table>

42.3 We find that the State Commission has allowed the employees cost as per the submissions of the Appellant. However, the Appellant has argued that the Appellant's submissions in the petition were subject to outcome of the Appeal no. 61 of 2012 wherein the Appellant had challenged the order dated 26.08.2011.

42.4 This Tribunal in Appeal no. 61 of 2012 has already rejected the contention of the Appellant. According, this issue is also decided against the Appellant.

43. The 35th issue is regarding disallowance of interest on consumer security deposit incurred by the Appellant on security deposit retained by DPCL.

43.1 At this stage of unbundling of DVB with effect from 01.07.2002, the quantum of consumer security deposit reflected in the opening balance sheet of BRPL was Rs. 79.43 crores notified in terms of the statutory transfer scheme. This amount was, however, not transferred by DPCL to the Appellant. Consequently, while the Appellant is required to and is continuing to pay interest on the said consumer security deposit in terms of Section 47(4) of the Electricity Act, 2003, the principal sum has not been passed on to the Appellant. The Appellant has argued that they cannot be penalized for non-transfer of the deposit amount by DPCL in defiance of the State Commission's order dated 23.04.2007.

43.2 We find that the Appellant has filed a writ petition in Delhi High Court against the refusal of DPCL to transfer the security amount to the Appellant and the High Court by interim order has directed the Appellant to continue to refund the consumer security deposit and pay interest to the consumers as per law.

43.3 This issue has already been considered in the Appeal no. 61 of 2012 and decided against the Appellant in terms of the findings of the Tribunal in Appeal no. 14 of 2012. Accordingly, this issue is decided against the Appellant.

44 The 36th issue is arbitrary imputation of efficiency factor for determination of O&M expenses for true up of FY 2010-11.

44.1 This issue has been considered by this Tribunal in Appeal no. 61 of 2012 and decided in favour of the Appellant. The relevant extracts of the judgment are referred below:

> *"201 Since the Appellant relied upon the principles laid down by this Tribunal in the judgment in Appeal No.28 of*

2008, let us refer to the said judgment in Appeal No.28 of 2008 which reads as under:

"25. The next issue is relating to efficiency factor. According to the Appellant, the State Commission made an ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively and this ad hoc reduction is arbitrary as the operation and maintenance expenses have already been determined by the State Commission after applying full prudent check and in accordance with the Regulations framed. In reply to the above, the Learned Counsel for the State Commission submits that the State Commission applied the efficiency factor on the operation and maintenance expenses in accordance with clause 5.7 of the MYT Regulations and the efficiency is only applied once on the operation and maintenance determined by summing up three expenses namely R&M expenses, employees cost and A&G expenses. It is not disputed that the State Commission after applying the prudent check allowed the O&M expenses for the MYT period to ensure efficiency in the system, made ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively. The only reason given by the State Commission is that the Appellant is expected to improve its performance. The very nature of operation and maintenance expenses require higher expenditure year after year on account of inflation. After providing for escalation in operation and maintenance expenses due to inflation, these are reduced again by application of ad-hoc efficiency factor. The MYT Regulations do provide for reduction of O&M expenditure by application of efficiency factor. However, the efficiency factor has to be determined by the Commission based on licensee's filing, benchmarking, approved cost by the Commission in the past and any other factor that Commission feels appropriate. In the impugned order the Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY 2009, FY 2010 and FY-2011 respectively arbitrarily without any benchmarking or any analysis and identification of area of inefficiency where the improvement is desired to be carried out. Such

efficiency factor has naturally to be determined only on the basis of material placed before the State Commission and analysis of various factors and not on ad-hoc basis as done by the State Commission. Therefore, this point is answered accordingly in favour of the Appellant".

201 So, on the strength of the judgment of this Tribunal in Appeal No. 28 of 2008, we decide this point accordingly in favour of the Appellant."

127. The above ratio of this Tribunal's judgment in Appeal No. 14 of 2012 applies squarely into the facts of the present case. The issue is decided in favour of the Appellants."

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

45. In view of above the Appeals are allowed in part. State Commission is directed to pass consequential order as per the above findings expeditiously. No order as to costs.

46. Pronounced in the open court on this **2nd day of March, 2015.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/~~NON-REPORTABLE~~
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