Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No.17 of 2011, Appeal No.18 of 2011 & Appeal No.19 of 2011

Dated, the 31st.August, 2012

Coram: Hon'ble Mr. Rakesh Nath, Technical Member

Hon'ble Mr. Justice P.S. Datta, Judicial Member

In the matter of:

The Tata Power Company Limited
A Company incorporated under the Indian Companies Act, VII of 1913
having its registered office at –
Bombay House, Homi Mody Street, Fort,
Mumbai 400 001 … Appellant
(In all the Appeals)

Versus

Maharashtra Electricity Regulatory Commission
Through its Secretary,
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade, Mumbai-400 005 … Respondent
(In all the Appeals)

Counsel for the Appellant (s): Mr. Amit Kapur
Ms. Poonam Varma (In all appeals)
Mr. Akash Sherawal

Counsel for the Respondent(s): Mr. Buddy A. Ranganadhan
& Ms. Richa Bharawaja (In all appeals)

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

1. The three appeals preferred by Tata Power Company Ltd. are being disposed of by this common Judgment and order in view of the fact that though the three appeals are directed against three separate orders passed by the Maharashtra Electricity Regulatory Commission the issues in respect of the three appeals are common and accordingly a common treatment is deserved. The Maharashtra Electricity Regulatory Commission is the sole respondent in all the appeals.

2. Appeal No. 17 of 2011 is in relation to the transmission business of Tata Power Company Ltd. which filed Case No.97 of 2009 for approval of truing up for Financial Year 2008-09, Annual Performance Review for Financial Year 2009-10 and Aggregate Revenue Requirement for Financial Year 2010-11 in respect of which the Commission passed an order dated 3.9.2010 which is the subject matter of challenge in this appeal.

3. Appeal No. 18 of 2011 is in relation to the generation business of Tata Power Company Ltd. which filed Case No.97 of 2009 for

approval of truing up for Financial Year 2008-09, Annual Performance Review for Financial Year 2009-10 and Aggregate Revenue Requirement for Financial Year 2010-11 in respect of which the Commission passed an order dated 8.9.2010 which is the subject matter of challenge in this appeal.

4. Appeal No. 19 of 2011 is in relation to the distribution business of Tata Power Company Ltd. which filed Case No.97 of 2009 for approval of truing up for Financial Year 2008-09, Annual Performance Review for Financial Year 2009-10 and Aggregate Revenue Requirement for Financial Year 2010-11 in respect of which the Commission passed an order dated 12.9.2010 which is the subject matter of challenge in this appeal.

5. In Appeal No. 17 of 2011, the issues raised are:- a) denial of actual interest rate paid by the appellant on the loan availed of from IDFC, b) denial of carrying / interest cost pursuant to judgment dated 15.7.2009 passed by this Tribunal in Appeal No.138 of 2008, c) difference between normative interest of the working capital and actual interest on working capital on account of cost of its internal funds utilized for funding working capital and alleged wrong interpretation of the judgment dated 15.7.2009 passed by this Tribunal in Appeal No.138 of 2008, d) wrongful and unlawful denial

of Rs.7 crore towards capitalization of Non-DPR Schemes for Financial Year 2008-09, Rs.17.3 crore towards projected capitalization of Non-DPR Schemes for Financial Year 2009-10 and Rs.29.42 crore towards projected capitalization on Non-DPR Schemes for Financial Year 2010-11, e) wrongful denial of capitalization of Rs.90 crore claimed towards capitalization of land, f) disallowance of contribution towards contingencies reserves & g) wrongful treatment of income tax.

6. In Appeal No.18 of 2011, that relates to generation business, the issues ventilated are:- a) denial of actual interest rate paid by the appellant on the loan availed of from IDFC, b) denial of carrying / interest cost pursuant to judgment dated 15.7.2009 passed by this Tribunal in Appeal No.137 of 2008, c) difference between normative interest of the working capital and actual interest on working capital on account of cost of its internal funds utilized for funding working capital and alleged wrong interpretation of the judgment dated 15.7.2009 passed by this Tribunal in Appeal No.137 of 2008, d) wrongful and unlawful denial of Rs.53.14 crore towards capitalization of Non-DPR Schemes for Financial Year 2008-09, Rs.165.91 crore towards capitalization of Non-DPR Schemes for Financial Year 2009-10 and Rs.158.45 crore towards capitalization

on Non-DPR Schemes for Financial Year 2010-11, e) wrongful denial of entitlement of efficiency gain on account of operation & maintenance expenditure despite significant increase in uncontrollable expenses. f) denial of carrying cost on deferred payments, g) denial of interest on Contingency Reserves Investment adjusted in previous years for bridging revenue gap of Financial Year 2009-10 & h) wrongful treatment of income tax.

7. In Appeal No.19 of 2011, the issues are :- a) denial of actual interest rate paid by the appellant on the loan availed of from IDFC, b) denial of carrying / interest cost pursuant to judgment dated 15.7.2009 passed by this Tribunal in Appeal No.139 of 2008, c) wrongful and unlawful denial of Rs.38.66 crore towards capitalisation of Non-DPR Schemes for Financial Year 2008-09, Rs.41.92 crore towards projected capitalization on Non-DPR schemes for Financial Year 2009-10 and Rs.28.13 crore towards projected capitalization of Non- Detailed Project Report Schemes for Financial Year 2010-11, d) wrongful treatment of cost of power purchased from Tata Power-G as ‘payable’ while computing interest on working capital, e) denial of Tata Power –D’s claim towards contribution to contingency reserves for Financial Year 2008-09 & f) wrongful treatment of income tax.

8. Let us look at the averments in respect of the issues raised in Appeal No.17 of 2011.

8.1 With regard to Issue No. a) – it is contended that Tata Power had availed itself of a total loan of Rs.450 crore from IDFC and entered into Rupee Loan Agreement on 28.9.2006 which is Annexure A-5 to this appeal. The interest rate was linked to the credit rating by Credit Rating Information Services of India Ltd. (CRISIL) or International Credit Rating Agency (ICRA). At the time, when the loan was availed of, its credit rating was AAA and the rate of interest was 8.9% per annum but in September, 2008, the IDFC communicated by letter dtd.29.9.2008 that it was resetting interest rate at 13 % for a period of one year from 29.9.2008. Unfortunately, the Commission by ignoring the submission of the appellant allowed interest only at a rate of 1.45 % over 5-year G-sec rate (8.64%) although the appellant paid interest rate of 13%. This increase in the rate of interest was due to bad market conditions when the liquidity had dried up and the banks were lending even at the rate up to 18% per annum. In September, 2008, the appellant took loan of Rs.500 crore from the State Bank of India for six months at the rate of interest of 13.52% per annum. Interest rates of loans availed by the appellant for other business then the Mumbai licensed area

was in the same range as applicable to the interest rates as applied to Tata Power-T under the IDFC loan. Thus, disallowance of actual interest rate was arbitrary.

8.2 According to the appellant, caring cost is a legitimate expense and has to be allowed for deferred costs. Reference has been made to the decisions of this Tribunal in Appeal No.117 of 2008 decided on 28.8.2009 (Reliance Infrastructure vs. MERC & Ors.), Appeal No.153 of 2009 decided on 30.7.2010 (NDPL Vs. DERC) and Appeal No.138 of 2008 decided on 15.7.2009 and in the last mentioned appeal, Tata Power Company Ltd. was the appellant against the Commission's Order dated 26.5.2008 and the Tribunal allowed the Appeal on the ground that once the deferred cost is restored to the utility, the utility automatically becomes entitled to the carrying cost, it being a legitimate expense.

8.3 As to the difference between normative interest on working capital and the actual interest on working capital on account of cost of its internal fund utilized for funding working capital, the Commission is alleged to have wrongly interpreted the Judgment of this Tribunal rendered in Appeal No.138 of 2008 where the Tribunal referred to its earlier Judgment in Appeal No.111 of 2008 and held that utility is entitled in full to the normative interest on working capital when the

working capital has been deployed from the internal accruals and that a licensee can never have any funds which has no costs. The appellant submitted before the Commission that cash flow statement was based on ‘regulatory accounts’ comprising normative loan, normative equity, normative interest and normative return on equity and it is difficult to prepare a separate balance sheet for generation, transmission and distribution business as such separation of working capital was not possible and it is impossible to assess the exact quantum of internal accruals utilized for funding working capital requirements as cash-inflows comprised various sources such as reserves, cash profits, accrued over the years, corporate borrowings, daily receipts from various businesses etc. The Tata Power Company Ltd. follows ‘Accounting Standard AS-3 Cash Flow Statements’ which does not provide for clear identification of the working capital requirement met through internal accruals.

8.4 With regard to wrongful and unlawful denial towards capitalization of Non-DPR schemes for Financial Year 2008-09 and projected capitalization on Non-DPR Schemes for the next two Financial Years, it is contended that there is no dispute regarding incurring expenditure towards Non-DPR Schemes and the said amount would

be capitalized but for the directives issued by the Commission in its order dated 28.5.2009 which is flawed, vague and limiting the capitalization of Non-DPR Scheme to 20% of DPR Schemes without any basis. Such limiting the capitalization of Non- DPR Schemes to 20% of the DPR Schemes amounts to interfering with the management of the utility and is in conflict with the principles enunciated by this Tribunal in its Judgment dated 29.8.2006 passed in KPTCL Vs. KERC and others (Appeal No.84 of 2006). Moreover, such directive cannot be applied retrospectively.

8.5 The Commission has wrongly denied capitalization of Rs.90 crores claimed towards capitalization of land at Bandra-Kurla Complex in Financial Year 2008-09 and it is submitted that since the construction work of 145 KV 'GIS' at Bandra-Kurla Complex was in progress. The said land was capitalized on its possession in the books of Tata Power-T and such wrongful denial has resulted in disentitlement to interest on loan portion of the capitalized amount and return on equity on such capitalised amount. According to the appellant, capitalization suggests that any asset gets capitalized when it is put to use and in the case of land, it is put to use when it is purchased. The appellant has referred to Corporate practices of

different public limited companies which we shall discuss when we come to the merit of the appeal.

8.6 With regard to disallowance of contribution towards contingency reserves, it has been submitted that as per the Sixth Schedule of the Electricity (Supply) Act, 1948 and the Regulations'63.7 of the MERC Tariff Regulations', contingency reserves that are appropriated have to be invested in certain approved securities and the income accrued to such investments have to be passed on to the consumers as 'other income' in the Aggregate Revenue Requirement of the distribution business and secondly, the amounts in contingency reserves may be drawn or utilised in the manner laid down in the Act, 1948 and the Regulations', 2006.

8.7 On the issue of wrongful treatment of the Income Tax it is submitted that the said issue was an issue before this Tribunal in Appeal no.174 of 2009 (Tata Power Company Ltd. Vs. MERC). It is also submitted that this Tribunal in its judgment dated 10.09.2010 passed in Appeal no.49 of 2009 has held that Income Tax is to be determined on gross up basis.

9. The contentions raised in Appeal no.18 of 2011 which we have indicated in brief as above are detailed hereunder:-

9.1 With regard to alleged denial of actual interest rate paid by the appellant on the loan availed of from IDFC the contentions are exactly the same as we have noticed in Appeal no.17 of 2011 and it is of no use in reproducing the same all over again. It is the essence of the appellant's case that the increase in the rate of interest was not due to any fault on the part of the appellant but due to the global financial scenario.

9.2 With regard to the disallowance of difference between normative interest on working capital and actual interest on working capital on account of cost of its internal funds utilized for funding the working capital the contentions raised in Appeal no. 17 of 2011 have been reproduced again by the appellant and we refrain from reproducing the same once again.

9.3 With regard to denial of carrying cost the same contentions ventilated in Appeal no.17 of 2011 have been ventilated herein in this Appeal no.18 of 2011 in the same identical language.

9.4 With regard to wrongful and unlawful denial of Rs.53.14 Crores towards capitalisation of Non-Detail Project Report ("DPR") Schemes for Financial Year 2008-09, Rs.165.91 crores towards capitalisation of non-DPR schemes in Financial Year 2009-10 and Rs.158.45 crores towards capitalisation of non-DPR schemes in

Financial Year 2010-11 the contentions canvassed in paragraph no.8.4 have been repeated in this Appeal also.

9.5 With regard to denial of entitlement of efficiency gain on account of operation and maintenance expenditure despite significant increase in uncontrollable expense it is contented that the commission wrongly treated it as an issue of double accounting. According to the appellant, while calculating the efficiency gains, the uncontrollable factors have to be accounted for differently, i.e. pass through effect ought to be given. The commission failed to appreciate the submissions made by the appellant before it and also the true import of the judgment of this Tribunal dated 15.07.2009 passed in Appeal no.137 of 2008.

9.6 With regard to denial of carrying cost on deferred payments it is contended that the Commission while truing of for Financial Year 2008-09 has computed a gap of Rs.74.64 crores for the said year but it has not conducted any provisional truing of Financial Year 2009-10. It is contended that the Commission overlooked the observation of this Tribunal made in the judgment dated 28.08.2009 passed in Appeal no.117 of 2008 (Reliance Infrastructure Vs. MERC) and the judgment dated 30.07.2010 passed in Appeal no. 153 of 2009 (NDPL Vs. DERC).

9.7 With regard to denial of Tata Power - G's claim to interest on Contingency Reserves Investments adjusted in previous years for bridging revenue gap of Financial Year 2009-10 it is contended that the Tata Power Company Ltd. had been working as an integrated utility till the Financial Year 2005-06 and the Aggregate Revenue Requirement for the three business were presented to the Commission jointly. It is contended that as per the Sixth Schedule of the Electricity (Supply) Act 1948 as well as Regulation 50.7 and 76.9 of MERC Tariff Regulations, such contingency reserves that are appropriated have to be invested in certain approved Securities and the income earned on such investments has to be passed on to the consumers as "Other Income" in the Annual Revenue Requirement of the Generation business. It is the grievance of the appellant that the Commission in case no.111 of 2008 decided on 28.05.2009 implemented the judgment dated 12.05.2008 passed by this Tribunal and utilized some of the contingency reserves to bridge the revenue gap but did not consider in the impugned order the case of the Tata Power Company Ltd. No carrying cost was given to Tata Power for reimbursement towards implementing the judgment dated 12.05.2008 read with the clarification dated 25.02.2009 passed by this Tribunal but the Commission used the contingency reserves for meeting the revenue requirements for the Financial

Year 2004-05 and Financial Year 2005-06. The Commission did not allow any interest on the amount that was required to be reimbursed for the Financial Year 2004-05 and Financial Year 2005-06 in its tariff order dated 28.05.2009. The income earned on this investment during the years subsequent to the Financial Year 2004-05 onwards cannot be offered to the consumers as non tariff income. Income earned on investment cannot be offered to the consumers.

9.8 On wrongful treatment of Income Tax the appellant refers to the Appeal no. 173 of 2009 and craves leave to rely upon the submissions made in the said Appeal and also refers to the decision in Appeal no. 49 of 2010 decided on 10.09.2010 wherein this Tribunal held that Income Tax is to be determined on gross up basis.

10. In Appeal No.19 of 2011, the contentions of the appellants are four-fold and they are as follows:-

10.1 On denial of actual interest paid by the appellant on the loan availed of from the IDFC, the contentions are the same and in identical words as in Appeal No.17 of 2011 and Appeal No.18 of 2011. The sum and substance of the contentions are that the increase in the rate of interest and the decrease of credit rating from AAA to AA was not due to any fault of the appellant but was on account of the

gloomy picture in the global financial scenario. The Commission failed to appreciate that the rise and fall of interest rates are a part of loan agreement with IDFC. It has been contended that at the time of reset in September, 2008, Tata Power had availed a loan of Rs.500 crore from State Bank of India for six months at the rate of 13.52% per annum which demonstrates that the interest rates on loans availed by Tata Power for other business was in the same range as applicable to the interest rates as applied to Tata Power-D under the IDFC loan. It is contended that the credit rating was in respect of the inter-company i.e. Tata Power Company Ltd. and not for any particular business.

10.2 With respect to denial of carrying / interest cost, it is alleged that the Commission failed to implement this Tribunal's order dtd. 15.7.2009 passed in Appeal No.139 of 2008 which was directed against the order dated 4.6.2008 passed by the Commission on various issues and the Tribunal allowed the Appeal on all the counts. The appellant has in this connection referred to the decisions of this Tribunal dated 28.8.2009 passed in Appeal No. 117 of 2008 (Reliance Infrastructure vs. MERC and Ors.) and the decisions dated 30.7.2010 passed in Appeal N0.153 of 2009 (NDPCL vs. DERC).

10.3 On wrongful and unlawful denial of Rs.38.66 crore towards capitalization of Non-DPR Schemes for Financial Year 2008-09, Rs.41.92 crore towards projected capitalization of Non-DPR Schemes for Financial Year 2009-10 and Rs.28.13 crore towards projected capitalization of Non-DPR Schemes for Financial Year 2010-11. It is contended that while there was no dispute regarding incurring expenditure towards Non-DPR Schemes, the amount so incurred should be capitalized but could not be capitalized due to the directives issued by the Commission in its order dtd.28.5.2009 which are arbitrary and there cannot be any directive for capitalization of Non-DPR Schemes to 20% of the DPR Schemes and that too retrospectively. The Commission does not have any power to frame any such rule for utility once guidelines and regulations qua the DPR Schemes were framed and this would amount to interference with the management of the utility and was in conflict with the principles enunciated by this Tribunal in its Judgment dated 29.8.2006 passed in Appeal No.84 of 2006 (KPTCL Vs. KERC). The appellant has also referred to this Tribunal's Judgment in Appeal No.60 of 2007 decided on 12.5.2008 which referred to Judgment in Appeal No.84 of 2006. It has been contended that there may be schemes that cannot be clapped together and it is not practical to club the scheme which would lead

to a situation where the utility may not be in a position to frame the scheme.

10.4 In respect of wrongful treatment of cost of power purchased from Tata Power-G as 'payable' while computing interest on working capital, the appellant contended that this Tribunal's judgement in Appeal No.117 of 2008 was not considered. It is contended that Regulation 34.5 (D) of the MERC Tariff Regulations' does not entitle the Tata Power-G to any 'receivables' to the extent of supply of power to Tata Power-D for computation of working capital, while Regulation 76.8 provides that for computing interest on working capital for Tata Power-D, Tata Power-D shall include one month's cost of power purchase as a 'payable' thereby implying that Tata Power-D shall not be allowed interest on one month's cost of power purchased based on the Annual Power Procurement Plan and this is primarily because of the fact that Tata Power-D is considered to have received a credit for one month's cost of power purchased through Annual Power Procurement Plan. Tata Power-D did not include the cost of power purchased from Tata Power-G as payable in its computation of interest on working capital.

10.5 With respect to denial of Tata Power-D's claim towards contribution to contingency reserves for Financial Year 2008-09, the contentions

are the same as were made in Appeal No.17 of 2011 and Appeal No.18 of 2011. It is contended that an amount of Rs.121 Crore was utilized for bridging the revenue gap in the tariff order dated 28.05.2009 the investments corresponding to contingency reserve were not liquidated and were lying in excess of the levels already. Tata Power had excess investment in the approved securities than what was required to be maintained in lying with the MERC Tariff Regulations. Since, in terms of Regulations 63.7, the additional investment in contingency reserve required for Tata Power was Rs.2.18 Crores (0.5% of the Gross Fixed Assets), the additional investment of Rs.121 Crores was lying in approved securities under the Indian Trusts Act and for the year in question, the investments were made in Government of India bonds and NABARD bonds. Therefore the said investments were allocated to the additional contingency reserve and hence claimed by Tata Power-D. The Commission erred in holding that since no new investment in contingency reserve was made, hence the claim of contingency reserve was disallowed since the said investment of Rs.121 Crores was not liquidated and was lying so invested in approved securities. The balance of Rs.118.82 Crores is still available as surplus disbursable funds of Tata Power. Thus, Tata Power-D is claiming contribution of Rs.2.18 Crores to build the reserve from Rs.13.84

Crores in stages up to the maximum permissible level of Rs.21.82 Crores based on the Gross Fixed Assets in Financial Year 2008-09.

10.6 On wrongful treatment of Income Tax the contention is exactly the same as was made in the other two appeals.

11. The Commission which is the sole respondent in its Counter Affidavit in Appeal no. 17 of 2011 has contended as follows:

11.1 With respect to denial of actual interest paid by the appellant on the loan availed from IDFC the Commission has extensively quoted their observations made in the impugned order and contends that the opinion of the Credit Rating Agency regarding change in the rating of TPC from AAA to AA that the same was only on account of the increase in the business risks on account of the proposed investment in areas other than the Mumbai Licensed areas. Thus, higher Credit Rating of AAA was attributable to the stable regulated business, while the downgrading was based on other riskier business ventures undertaken by the TPC. The consumers of the appellant in the licensed area are contributing to the stable regulated business of the appellant and are responsible for the higher Credit Rating. It is difficult to accept that all risks undertaken by the appellant on account of investment in other businesses would be passed on to the consumers but all returns would be retained by

the unregulated business and will not be passed on to the regulated business. Secondly, interest rate applicable for short term loan cannot be compared to the interest rate applicable for long term loan taken from IDFC. Thirdly, mare incurring expenditure of costs cannot be a ground for pass through of the expenses to the consumer.

11.2 On the question of denial of carrying/Interest Cost it is contended that the Commission is of the view that to assume that the Tribunal in judgment in Appeal no. 138 of 2008 also give the award of carrying cost on the amount awarded in the said order would amount to misinterpretation of the Tribunal's judgment particularly when there was no clear order on the same.

11.3 On the question on the difference between the normative interest on working capital and actual interest on working capital on account of cost of internal funds utilized for funding working capital the Commission relied on the judgment of this Tribunal dated 15.07.2009 passed in Appeal no. 138 of 2008 as the Tribunal held in that Appeal that the Commission could have looked into the source of such internal accruals and the cost of generating such accruals and this is exactly what the Commission tried to determine by asking specific questions to which no satisfactory reply was given

by the appellant. Secondly, the Tribunal held that the Commission shall not treat the entire interest on working capital for the year in question as efficiency gain. Thirdly, lack of a proper reply from the appellant implies that either internal cash accruals from the overall business has been used and there is no method of allocating the cash accruals and the carrying cost on the same to the transmission business, or the operational efficiency of the appellant has resulted in reducing the requirement of working capital itself. Fourthly, the entire working capital interest has been allowed in accordance with the MERC Tariff Regulations, and at the same time the efficiency gains have also been computed in accordance with the said regulations. Fifthly, it is contended that regulation 2.1 (c) of the MERC Tariff Regulations, regulation 16.2 of the MERC (Transmission Licence Conditions) Regulations, 2004 and MERC (Uniform Recording, Maintenance and Reporting of Information) Regulations, 2009 require the appellant to maintain separate accounting statement and allocation statements for the different businesses on the basis of which the Aggregate Revenue Requirement petitions have to be filed.

11.4 On the question of wrongful denial of amounts towards capitalization of non-DPR Schemes for Financial Year 2008-09, Financial Year

2009-10 and Financial Year 2010-11 the Commission has referred to extensively its own order dated 28.05.2009 passed in case no.112 of 2008 in justification of such denial, and in addition to what was said by the Commission in its order dated 28.05.2009 it is contended further that an utility cannot escape Regulatory scrutiny of the Capital expenditure by packaging more and more schemes under non-DPR Scheme because Capital Expenditure has impact on tariff. The Tariff Regulations also require only approved capital expenditure to be considered in tariff. Hence, the Commission introduced a 20% ceiling for non-DPR projects, and suggested that non-DPR schemes be packaged and submitted as DPR schemes to the Commission for its approval, which in the Commission's view is appropriate and very reasonable. The appellant's reference to the requirement of the Guidelines that only schemes over Rs.10 crore needs to be approved in-principle cannot be understood to mean that the quantum of non-DPR schemes will be more than 50% or 100% of DPR schemes. Else, this will defeat the whole purpose of according in-principle approval for capital expenditure schemes. The reference to the Tribunal's Judgment in the KERC vs. KPTCL matter is misplaced and irrelevant. The Tribunal's Judgment was against the background that there were no Regulations in this regard in Karnataka. Further, the Tribunal ruled that the Commission could

take a view on the capital expenditure and its impact at the time of tariff determination. There is no merit in the Appellant's contentions that the 20% ceiling has not been applied uniformly. In case No.102 of 2009 for MSPGCL, there were no DPR schemes, and the entire projected capitalisation was against non-DPR schemes, hence, the Commission ruled that "in the absence of documentary evidence that the stated purpose and objective of the capital expenditure schemes have been achieved, the Commission has restricted the capitalisation for non-DPR schemes equivalent to 50% of the capitalisation proposed by MSPGCL towards non-DPR schemes. Thus, the two Orders and decisions taken by the Commission are not comparable.

11.5 On the question of denial of capitalisation of Rs 90crore towards capitalisation of land it is the view of the Commission that land or any other asset for that matter has to be 'put to use' in order to be considered as 'capitalised', otherwise it would amount to 'capital expenditure' yet to be capitalised. The appellant has only procured the land , but the asset intended to be erected on the land has neither been installed nor put to use , and that does not benefit the consumers. It is akin to capital works in progress, and cannot be considered as capitalised. The appellant cannot seek to earn

returns on an investment that is yet to be put to use which is what the appellant is trying to achieve.

11.6 With respect to disallowance of contribution towards contingency reserve the Commission contends that the Commission has sought clarity from the appellant in this regard, and the appellant had clarified that no investment had been made, since the investments were already higher than the statutory ceiling of 5% of opening GFA. Accordingly, the Commission did not consider any investments in contingency reserve. The appellant has explained that the actual statutory investments were higher because they were not actually liquidated though the Commission has done so in its regulatory accounts. In case, it is confirmed that the appellant is entitled to the same, the Commission is willing to consider the contribution to contingency reserves in the subsequent Aggregate Revenue Requirement and tariff determination process. For the Financial Year 2008-09 the appellant had itself claimed only 0.25% of the opening GROSS FIXED ASSETS towards contribution to contingency reserves, while it is now claiming 0.5% of the opening GROSS FIXED ASSETS towards contribution to contingency reserves which is incorrect. Further, by the order dated 28.05.2009 in case no.112 of 2008 the Commission had originally allowed

0.25% of the incremental assets addition towards contribution to contingency reserves in Financial Year 2008-09.

11.7 With respect to wrongful treatment of Income Tax the Commission contends that the matter is pending for consideration by this Tribunal in Appeal no.174 of 2009.

12. In Appeal no.18 of 2011 the Commission has filed a separate Counter Affidavit and traverses the grounds canvassed in the memo of Appeal as follows:

12.1 With regard to the denial of actual interest paid by the appellant on the loan availed of from IDFC the contentions of the Commission are the same as in the Counter Affidavit in Appeal no.17 of 2011 and we need not repeat the same here.

12.2 As regards difference between normative interest on working capital and actual interest on working capital on account of cost of internal funds utilized for funding working capital the Commission reproduces the same view as it held in Appeal no.17 of 2011.

12.3 On the question of denial of carrying/interest cost pursuant to the judgment dated 15.07.2009 passed in Appeal no.137 of 2008 the Commission's contentions is the same as in Appeal no.17 of 2011.

12.4 In respect of wrongful denial of amounts towards capitalization of non-DPR schemes for the three financial years the contentions of the Commission is exactly the same in that too in identical words as in Appeal no.17 of 2011.

12.5 On the question of denial of entitlement of efficiency gain on account of operation and maintenance expenditure the Commission contends that the MERC Tariff Regulations provides for computation of efficiency gains and losses, if the actual expenses are lower or higher, respectively, vis-a vis the approved expenses. In the present case, since the actual expenses were higher than the approved expenses, efficiency losses would have had to be calculated. However, the Commission accepted the Appellant's submissions that certain components of the O&M expenses were uncontrollable in nature, and hence, the actual expenses were higher than the approved expenses. Hence, the Commission allowed the actual expenses, without computing any efficiency losses. However, the Appellant is contending that not only should efficiency losses not be considered, rather, the Appellant is entitled to efficiency gains, since the 'uncontrollable' expenses should be added to the approved expenses and the comparison be done thereafter. This contention presumes that such 'uncontrollable' expenses were not already

included in the approved expenses. The Tribunal's Judgment referred by the Appellant only rules that the 'uncontrollable' expenses should be allowed as 'pass through', which has already been done by the Commission.

12.6 On the question of denial of carrying cost on deferred payments, the Commission has gone through the submissions of the Appellant in this regard, and admits that the carrying cost on the deferred revenue gap of Financial Year 2008-09 has inadvertently not been considered by the Commission in the impugned Order, and will be allowed in the subsequent Order.

12.7 With respect to denial of appellants claim to interest in Contingency reserve investments adjusted in previous years for bridging the revenue gap of Financial Year 2009-10 the Commission contends that it has only adjusted the principal amount invested in Contingency reserve and any interest accrued on the same has not been adjusted, as such there is no question of adding such interest in the favour of the appellant. Moreover, the main prayer of the appellant is that the carrying cost should be allowed on the amount of deferred recovery allowed based on the judgment of the Tribunal.

12.8 On the question of wrongful treatment of Income Tax the appellant the Commission does not make any contentions in view of the matter being under consideration in Appeal no.173 of 2009.

13. In Appeal no.19 of 2011 the Commission in its Counter Affidavit contends as follows:

13.1 With respect to denial of actual interest paid by the appellant on the loan availed of from the IDFC the Commission repeats its contentions in same language as were made in Appeal no.17 of 2011.

13.2 The same is the position with respect to the point on denial of carrying /interest cost pursuant to the judgment dated 15.07.2009 passed by this Tribunal in Appeal no.139 of 2008.

13.3 The replies canvassed in Appeal no.17 of 2011 and Appeal no.18 of 2011 are the same replies as in Appeal no.19 of 2011 on the question of wrongful denial of amounts towards capitalization of non-DPR schemes for the Financial Year 2008-09, Financial Year 2009-10 and Financial Year 2010-11.

13.4 On the question of wrongful consideration of the cost of power purchased from TPC-G as payable while computing interest on working capital the Commission contends that Regulation 34.5(d) of

the MERC Tariff Regulations, 2005, specifically excludes the receivables on account of sale to own distribution company, however, Regulation 76.8.1 of the MERC Tariff Regulations, 2005, does not specifically exclude the credit received from own Generation Company. Secondly, the Commission has reduced the cost of power purchase from TPC-G and other sources, while computing the working capital requirement, in accordance with the formula specified in the MERC Tariff Regulations. Incidentally, this aspect has been considered while formulating the MERC (Multi-year tariff) Regulations, 2011 and the one-month equivalent of cost of power purchase from own generation sources has not been considered as a deductible, while computing the working capital requirement.

13.5 As regards disallowance of contribution towards Contingency reserves the same contentions have been raised as in Appeal no.17 of 2011 and Appeal no. 18 of 2011.

13.6 On the question of wrongful treatment of Income Tax the Commission does not make any issue as the matter is under consideration in Appeal no. 175 of 2009.

14. In each of the appeals the appellant has filed a rejoinder to each of the Counter Affidavits of the Commission but since all the rejoinders

are in the same identical words we reproduce the rejoinders in their totality in brief as follows:

14.1 On the question of denial of actual interest rate paid by the appellant on the loan availed of from IDFC it is contended that financial institutions provide loan on the basis of balance sheet of a corporate entity and do not sanction the same based on the robustness or vulnerability of any one of its business. The higher AAA credit rating is not attributable to the regulated business alone and such AAA credit rating includes existing as well as future businesses. Tata Power had other businesses apart from its Mumbai regulated business, such as plants in Jojobera near Jamshedpur and Belgaun in Karnataka, which were earning higher return as compared to its Mumbai regulated business. The Mumbai regulated business also has some inherent business risks related to various litigations and liabilities which could affect the credit rating of Tata Power. The commission has selectively cited the extracts of the rating review by the ICRA but overlooked the other part of the statement namely **"and financial flexibility derived being a part of Tata Group"**. This shows that the agency has taken into consideration the financial flexibility of all the businesses. In the Financial Year 2008-09 Indian markets suffered a Global melt down that resulted in grant

of loan at higher rate of interest by the financial institutions. AS-16 provides for borrowing costs of the enterprise and not of a specific carved out business component.

14.2 On the question of denial of carrying/interest cost pursuant to the judgment dated 15.07.2009 passed by this Tribunal in Appeal no.138 of 2008 it is contended that the Commission has not taken cognizance of the judgment dated 15.02.2011 passed by this Tribunal in Appeal no.173 of 2009 where the Tribunal held that carrying cost is a legitimate expense and is based on the financial principal that whenever the recovery of cost is deferred the financing of the gap in cash flow arranged by the distribution company from lenders is to be paid by way of carrying cost. The same finding had been arrived at in Appeal no.137, 138 and 139 of 2008. The judgment dated 14.02.2011 passed in Appeal no.174 of 2009 is also to the same effect.

14.3 On the question of difference between normative interest on working capital and actual interest on working capital on account of its internal funds utilized for funding working capital the decisions of this Tribunal in Appeal no.111 of 2008, 138 of 2008, 173 of 2009 are clear on this point. Furthermore, the MERC (Uniform Recording, Maintenance and Recording of Information) Regulation 2009 were

notified in April 2009 which was after elapse of the Financial Year 2006-07, Financial Year 2007-08 and Financial Year 2008-09.

14.4 As regards denial towards Capitalization of non-DPR scheme it is contended that limiting non-DPR capitalization to 20% of DPR capitalization the utility were not taken into account and the appellant has never suggested or intended to escape regulatory scrutiny for the Capital expenditure incurred by it. Regulatory prudence demands that any approach be implemented after having taken the view/concerns of utilities so as to ensure fair treatment to all stakeholders. This would also allow time to the utilities to align their internal processes for achieving the intended objectives of controlling the capex incurred by utilities and approving the same after appropriate regulatory scrutiny.

14.5 On the issue of denial of capitalization of Rs.90 Crores claimed towards capitalization of land it is contended that land as an asset is different from other type of assets and the moment the land is acquired it is ready to be used. The accounting treatment of the Tata Power-T to capitalize land is in line with treatment of capitalization of land by corporate such as MTNL, Power Grid Corporation of India Ltd., Coal India Ltd., Neville Lignite Ltd. etc.

14.6 As regards disallowance of contribution towards contingency reserves the contentions as made in memorandum of Appeal have been repeated.

14.7 On the issue of wrongful treatment to income tax, the Appeal No.174 of 2009 has meanwhile been decided on 15.2.2011 in favour of the appellant and accordingly the Commission may be directed to implement the said Judgment.

14.8 On the issue of denial of entitlement of efficiency gains on account of operation & maintenance expenditure despite significant increase in uncontrollable expenses, it is contended that the term ‘efficiency’ in the efficiency gain computation mechanism denotes the capability of utility to manage its expenditure within the normative limits set by the Commission and if a utility succeeds in doing so, it is regarded as efficient, thus, earning the entitlement of efficiency gain but when the expenditure is due to uncontrollable circumstances, the same has to be passed through.

14.9 On the issue of denial of carrying / interest cost on deferred payments, the Commission has not given effect to the same in subsequent order

14.10 With respect to denial of Tata Power-G's claim to interest on contingency reserves investments adjusted in the previous year for bridging the revenue gap of Financial Year 2009-10, it is contended that the appellant has passed on the interest income on such investments to the consumers. The income earned on this investment during the years subsequent to Financial Year 2004-05 onwards cannot be offered to the consumers as non-tariff income.

15. On the pleadings as aforesaid, the following points covering all the three appeals arise for consideration:-

i) Whether the Commission was justified in refusing actual interest rate paid by the appellant on the loan availed of from IDFC?

ii) Whether the Commission was justified in refusing grant of carrying / interest cost in accordance with the Judgment dated 15.7.2009 passed by this Tribunal in Appeal No.138 of 2008?

iii) Whether the Commission was justified in refusing to allow the difference between normative interest on working capital and actual interest on working capital on account of cost of its internal funds utilized for funding working capital?

iv) Whether the Commission was justified in refusing capitalization of Non-DPR Schemes for Financial Year 2008-09 and projected capitalization of Non-DPR Schemes for the Financial Year 2009-10 and 2010-11.

v) Whether the Commission was justified in refusing capitalization of Rs.90 crores towards capitalization of land?

vi) Whether the Commission was justified in disallowing contribution towards contingency reserve investments for the Financial Year 2008-09?

vii) Whether the Commission was justified in not giving treatment of income tax according to the directives of the Tribunal.

viii) Whether the Commission was justified in refusing entitlement of efficiency gain on account of operation & maintenance expenditure despite alleged significant increase in uncontrollable expenses?

ix) Whether the Commission was justified in refusing carrying cost on deferred payments?

x) Whether the Commission was justified in refusing Tata Power-G's claim to interest on contingency reserves investments adjusted in

the previous years for bridging revenue gap of Financial Year 2009-10?

xi) Whether the Commission was justified in its treatment of cost of power purchased from Tata Power-G as 'payable' while computing interest on working capital?

16 Mr. Amit Kapoor, Ld. Advocate appearing for the appellant makes the following submissions with reference to the pleadings as follows:-

16.1 The Commission was not justified in disallowing interest rate at 10.95% on the ground of certain selective observations of the Credit Rating Agency but overlooked the fact that the interest rate was the best possible interest rate that could be made available at that point of time by Tata Power Company Ltd. because on 18.10.2008 Tata Power had availed a loan of Rs.500 Crores from State Bank of India for six months at the rate of 13% per annum and secondly, it was the global financial scenario that was responsible for rating the Tata Power Company Ltd. at AA instead of AAA. The matter of the fact is that the Tata Power Company Ltd. is an integrated corporate entity and segregation of business for the purpose of obtaining loan from financial institutions was neither practicable nor justifiable. The interest rate levied by the financial institutions was primarily on

account of liquidity crunch existing during the said period and regulation 17 and 18 of the Tariff Regulations, 2005 clearly take care of uncontrollable factors which include market interest rate. The interest rate is based on the creditability of the corporate entity as a whole and not on the profitability of a particular business segment. Reference has been made to the decision of this Tribunal in NDPL vs. DERC reported in 2011 ELR (APTEL) 944, and the decision of the Supreme Court in PTC vs. Central Electricity Regulatory Commission reported in (2010) ELR (State Commission) 0269.

16.2 On the question of denial of difference between normative interest on working capital and actual interest on working capital as efficiency gain it is submitted that law on this point has been made clear in this Tribunal's judgment dated 15.07.2009 reported in (2009 ELR APTEL 0622) and certain other decisions including the one dated 28.05.2008 in Appeal No.111 of 2008 where it was held that internal funds also deserve interest in as much as the internal fund when employed on working capital losses the interest it could have earned by investment elsewhere and simply because internal accruals were used and there was not outflow of funds by way of interest on working capital and utility would be denied the differential

amount in between the normative interest on working capital and the actual interest on working capital. It is submitted that an intensive search for location of internal funds was not the ratio of the decision in Appeal no.111 of 2008.

16.3 With respect to disallowance of carrying/interest cost it is submitted that the Commission has wrongly interpreted the decision of this Tribunal in Appeal no.137 of 2008 and the advancement of the plea of constructive *res judicata* was improper on the ground that prayer was made in Appeal no.60 of 2007 and though the prayer was made in Appeal no.173 of 2009 it was not granted and it was also not granted in Appeal no.137 of 2008. Mr. Kapoor refers to the decision of this Tribunal in Tata Power Company Ltd. vs. MERC reported in 2011 ELR (APTEL) 0336, Appeal no.153 of 2009 reported in 2010 ELR (APTEL) 891, Ispat Industries Ltd. vs. AERC & Ors. reported in 2010 ELR (APTEL) 931, Kerala State Electricity Board Vs. M.R.F. Ltd. reported in (1996) 1 SCC 597, Ghaziabad Development Authority Vs. Union of India and Anr. reported in (2006) 6 SCC 113.

16.4 On denial of capitalization of non-DPR schemes it is submitted that the directive dated 28.05.2009 in case no.111 of 2008 cannot be retrospectively made applicable apart from the fact that such a

directive does not confirm to any legal mandate and that there cannot be any integrated package of diverse schemes put together. It is submitted that such directive is in violation of regulation 30.1 of the MERC Tariff Regulations, 2005 and the said regulations do not speak of curtailment of capital expenditure schemes which commenced prior to 28.05.2009. Reference has been made to the decisions in Binani Zinc vs. Kerala State Electricity Board and Ors. reported in (2009) 11 SCC 244, Meghalaya State Electricity Board vs. Meghalaya State Electricity Regulatory Commission and Byrnihat Industries Association reported in 2010 ELR APTEL 0940, Maharashtra SPGCL vs. MERC & Ors. reported in 2011 ELR (APTEL) 1404, and other decisions which we shall note when we come to the critical appreciation of the merit of the appeals.

16.5 With respect to denial of entitlement of efficiency gain on account of operation and maintenance expenditure despite significant increase in uncontrollable expenses it is submitted that the question of double accounting is misnomer. He has referred to the decision of this Tribunal in Appeal no.137 of 2008 which according to Mr. Kapoor had decided the point for all time to come.

16.6 As regards denial of carrying/interest cost on deferred payments Mr. Kapoor refers to the decisions of this Tribunal in Appeal no.173 of

2009 (Tata Power Company Ltd. vs. MERC, reported in 2011 ELR (APTEL) 336), New Delhi Power Ltd. vs. DERC reported in 2010 ELR (APTEL) (891), Appeal no.16 of 2008 reported in 2009 ELR APTEL 880, and certain other decisions.

16.7 With respect to denial of Tata Power – G's claim to interest on contingency reserves investments adjusted in previous years for bridging Aggregate Revenue Requirement gap of the Financial Year 2009-10. It is submitted that this Tribunal has settled the issue of carrying cost entitlements on deferred recoveries in its judgment dated 15.02.2011 in Appeal no.173 of 2009 reported in 2011 ELR (APTEL) 0336. It is submitted that the Commission has failed to appreciate that out of the total contingency reserves available to Tata Power – G from Financial Year 2004-05 to Financial Year 2007-08 the benefit of Rs.24 Crores has been passed on to the consumers and the Commission has neither allowed carrying cost on the deferred recovery or Rs.439 Crores in its order dated 28.05.2009 nor did it allow the claim to Rs.24 Crores in the impugned order and the said Rs.24 Crores has been passed on to the consumers.

16.8 On the question of wrongful treatment of Income Tax in respect of which the Commission did not make any submission in its Counter

affidavit Mr. Kapoor refers to the decision of this Tribunal in Appeal no. 173 of 2009 (Tata Power Company Ltd. Vs. MERC reported in 2011 ELR (APTEL) 336).

16.9 With regard to disallowance of Tata Power's claim to contribution to Contingency reserves investments for Financial Year 2008-09 it is submitted that on 31.03.2009 the closing balance of Contingency reserves investments held by the appellant was Rs.171 Crores which was in excess of the amount as required under the Tariff Regulations, 2005 to be available for Tata Power – T and Tata Power – D together. Subsequently, by the order dated 28.05.2009 the Commission decided to draw down Rs.121 Crores from this contingency reserves of TPC. Tata Power also disinvested these Contingency reserves investments to the same extent, as such on 30.09.2009 TPC had contingency reserves investments of Rs.73.83 Crores which also was in excess of the level of Contingency reserves investments required for Tata Power-T and Tata Power – D, the amount being Rs.58 Crores. Resultantly, no fresh investment in notified securities was made by Tata Power for Financial Year 2008-09. Mr. Kapoor refers to the decisions in Shaikh Salim Vs. Kumar & Ors. reported in (2006) 1 SCC 46 and New India Assurance Co. Ltd. Vs. S. Srinivasan reported in (2000) 3 SCC 242.

Accordingly, it is submitted that appropriation of Rs.2.18 Crores made towards contingency reserves as claimed by Tata Power – D may be allowed.

16.10 As regards alleged wrongful treatment of cost of power purchased from Tata Power – G as 'payable' while computing interest on working capital. Mr. Kapoor has referred to the decision of this Tribunal in Appeal no.117 of 2008 decided on 28.08.2009 and regulation 35.4 (v) proviso of the MERC Multi-year tariff Regulations, 2011.

16.11 With respect to denial of capitalization of Rs.90 Crores claimed towards capitalization of land (TPC-T) it is submitted that neither the Tariff Regulations, 2005 nor the Accounting Standards define the term Capitalization and as such the accounting treatment of capitalization of land should be as per the regulated industries of the country like MTNL, Power Grid Corporation of India Ltd., Coal India, Neyveli Lignite etc. it is further submitted that the decision in (1975) 3 SCC 572 as relied upon by the Commission is not applicable because the issue raised in that decision was whether interest paid on capital borrowed before commercial production can be included as a part of actual cost for the purpose of depreciation allowance and development rebate.

17 Mr. Buddy A. Ranganadhan, Ld. Counsel appearing for the State Commission submits as follows:

17.1 Interest rate of 9.5% instead of weighted average of 10.95% was justified on the ground that IDFC under the terms of the loan agreement sought to revise the interest rate spread due to decreased credit rating on account of the increased risks associated with the non-regulated component of the business of the appellant and the Commission was anxious to ensure that the consumers of the Mumbai regulated businesses of the licensee are insulated from the risks associated with the other business of the appellant like Mundra Project. Mr. Ranganadhan refers to the decision of this Tribunal in Appeal no. 251 of 2006. It is submitted further that the 'risk factor' cannot be confused with 'uncontrollable' expenses because the two are distinct things. The appellant's reliance on the actual interest rate for short term loan from SBI cannot be compared to the interest rate applicable for long terms loan taken from IDFC.

17.2 In Appeal no.137 of 2008 and Appeal no.138 of 2008 there was no specific order on the carrying cost and the appellant has misinterpreted the judgment of this Tribunal in the aforesaid appeals.

17.3 On the question of disallowance of difference between normative interest on working capital and actual interest on working capital for the purpose of treatment of efficiency gain it is submitted that this Tribunal in Appeal no.111 of 2008 decided on 28.05.2009 has clearly held that the Commission must enquire into and consider the actual costs of the funds used by the utility as working capital in the regulated business.

17.4 Dispensation of non-DPR scheme to the extent of 20% only of the total capitalization was upheld by the Full Bench of this Tribunal in Appeal no.139 of 2011 decided on 23.03.2011 (MSETC vs. MERC). Even though in Appeal no. 199 of 2010 this Tribunal held that since the dispensation came in the middle of the year the same could not apply in that year in question but the appellant had not challenged the order dated 28.05.2009 whereby dispensation was limited to 20% of total capitalization. In Appeal no.46 of 2007 the Tribunal upheld the power of the Commission to require a detailed project report in accordance with the guidelines framed by the Commission for in-principle approval of the capital expenditure.

17.5 According to the Commission allowing O&M expenditure in computation of the efficiency gain or loss would amount to double accounting because the actual amount of O&M expenditure directed

to be recovered by the Tribunal has already been recovered in the tariff order and if the said figures were added back to Original approved O&M figure it would be artificially increasing the approved figure retrospectively and this would be without any legislative sanction.

17.6 On the question of denial of carrying cost of deferred payment it is submitted that any inadvertent error on this count can be rectified by passing through in the next tariff order.

17.7 On the question of interest of contingency reserves investment utilized to bridge the revenue gap for the Financial Year 2009-10 it appeared that the appellant was earning interest on the investments made out of the contingency reserves till such reserves were utilized to bridge the revenue gap for the Financial Year 2009-10, as such the question of allowing any interest on such amount for the past period after the capital reserves were utilized to bridge the revenue gap cannot arise because it would mean that the appellant was being allowed to retain the interest income out of the contingency reserves funds contributed by the consumers.

17.8 On the issue of treatment of Income Tax no specific submissions have been made but it is pointed out that the issue has been raised in Appeal no.173 of 2009.

17.9 With respect of disallowance of contribution towards contingency reserve investment for the Financial Year 2008-09 it has been submitted that no fresh investment have been made only on the ground that the investments which were made were already higher than the statutory ceiling of 5% of the opening GROSS FIXED ASSETS. The appellant claimed only 0.25% of the opening GROSS FIXED ASSETS towards contribution to contingency reserves but now is claiming 0.5% and the Commission has already allowed 0.25% in the order dated 28.05.2009 in case no.112 of 2008.

17.10. On the issue of Capitalization of land to the extent of Rs.90 Crores it is submitted that Capitalization is possible only when land is put to use for its intended purpose.

18 Issue no.1 Three impugned orders pertain to the truing up for the Financial Year 2008-09, Annual Performance Review for the Financial Year 2009-10 and Tariff Determination for the Financial Year 2010-11 in respect of Tata Power Company's Transmission business (Appeal no.17 of 2011), the Company's generation business (Appeal no.18 of 2011) and the Company's distribution business (Appeal no.19 of 2011). Barring a few, most of the issues are common to each of the three appeals and this issue no.1 covers all the appeals. The Commission made a special reference to the

review of rating by ICRA according to which huge capacity expansions and the risks attached to the implementation of the projects significantly alters the Tata Power's business risk profile from that of the earlier licensee model. The CRISIL observes:-"This will result in gradual but inevitable shift in Tata Power's Business risk profile from the existing stable licensee business, to bid out generation projects supplying powers to new areas; the shift exposes the company likely higher counterparty risk, and to constraints in passing on cost increase to its buyers". It may be that the rating was for the entire Company and not on account of a particular business of the Company, but the Commission was not totally unjustified in holding that the credit rating at AAA was definitely on account of secured licensed business and not on account of other businesses which is supported by the details of the operative income earned by the Company during Financial Year 2008-09 between the Mumbai licensed area and the other business. The table at page 74 of the order of the Commission reveals that around 82% of the total revenue earned by the TPC during the Financial Year 2008-09 was so earned from the Mumbai licensed area. The Commission thus considered weighted average interest of 9.50% for truing up the interest expenses on IDFC loan of TPC for Financial Year 2008-09. But then the ICRA was not oblivious of the

financial flexibility of all the businesses of the Company, although the increase in the interest rate was mainly linked to the risk associated with other projects of the Company. The appellant points out bad market conditions due to which interest rates were higher. True it is, the review of the ICRA and that of CRISIL singularly point out that there has been a shift in the business risk profile of the appellant. When the loan came up for reset in September, 2008 the IDFC revised the rate of interest due to the rating trigger clause. The rate of interest in respect of the short term loan does not appear to have any nexus in the present situation. Therefore, the anxiety of the Commission to insulate the consumers of the Mumbai regulated business from the risks associated with the non-regulated businesses of the appellant is well understood, but the fact remains that the corporative entity is one and the same and even though credit rating fell down from AAA to AA it cannot be denied that the rate of interest increased not solely due to decrease in the credit rating of the Company. In this connection reference to the decision dated 04.04.2007 in Appeal no.251 of 2006 may not be relevant because that case related to the payment of income tax. Though the IDFC communicated that it was resetting interest rate to 13% for two years due to fall of credit rating it reset the interest rate on 06.10.2009 to 10.40% per annum from 29.09.2009 to 28.09.2012.

Tata Power Company claimed weighted average of 10.95% although for one year it paid interest rate of 13% per annum and this interest rate cannot be solely related to the non-regulated business. The interest rate is based on the credibility of the corporate entity as a whole and not on the profitability of a particular business segment. It is submitted not unjustifiably that the benefit of lower interest rate on account of Tata Power's credibility as a 'Corporate entity' in the earlier years has been enjoyed by Mumbai Consumers. Hence, consumers are liable to bear the burden of higher interest rate due to a temporary change in the credit rating which also included the regulated business. We cannot fail to notice regulation 34.3.3 of the MERC Tariff Regulations mandates that AS 16 (Accounting Standards) shall apply for the determination of the interest on loan capital. This regulation stipulates that provisions of statements of Accounting Standard (AS16):Borrowing Costs of the Institute of Chartered Accountants of India shall apply to the extent not inconsistent with the provisions of the regulations, in determination of interest on loan capital   Relevant AS-16 provides for borrowing costs of the enterprise and not of a specific carved out business component. Further, regulation 17 of the MERC Tariff Regulations, 2005 takes cognizance of market interest rate as one of the uncontrollable factors. According to the explanation under the Tariff

Regulation 17.6, the uncontrollable factors include economy-wide influences such as market interest rates. The interest rate is not covered by controllable factors indicated in the illustration under the regulation 17.6.2. However, it is accepted that the approval of the interest rate is subject to prudence check by the State Commission. Tariff Regulation 18 stipulates that the approved loss or gain due to uncontrollable factors shall be passed through as adjustment in tariff. So far as income tax is concerned the appellant has been showing separately its tax liabilities in respect of each of its business so that decision of this Tribunal in Appeal 251 of 2006 may not be relevant. There is a flaw on the logic of the Commission to the effect that if benefits accrue to the Company on account of new business than the consumers must not get that benefit. The fact is that the Commission approved the interest rate for the Mumbai regulated area after the reset for the second time i.e. from September 2009 onwards when the interest rate came down to 10.4% per annum. So long as the case of the utility is covered by the Regulations it cannot be denied interest as it claimed in Aggregate Revenue Requirement Petition. Whatever merit there might be in the Commission's approach made from the pragmatic stand point the issue has to looked at purely from the legal point of view and when the regulation in particular supports the case of the

appellant the issue rests there and it is of no avail to say that had the appellant not launched new projects the credit rating might have remained at AAA and consequently there would have not arisen increase in the rate of interest. If this practical consideration is taken to its logical extreme than there will be ample scope of counter argument and the fact is that the appellant is a corporate entity and when there is no legal inhibition of launching new power project having implication definitely of risk factor the rate of interest that a financial institution charges and which cannot be questioned because of being an uncontrollable factor has to be accepted. Tata Power is an enterprise and is seen as a corporate entity based on corporate accounts. The financial institutions provide loans based on the balance sheet of a corporate entity. The credit rating reflects the confidence of the credit rating agencies with respect to all the businesses of a corporate entity. The interest rate was subsequently negotiated by Tata Power with IDFC and IDFC agreed to remove the rating trigger. Accordingly, IDFC reset the loan at 10.4% on 6.10.2009 on the basis of IDFC's PLR. As per information submitted by Tata Power in respect of IDBI loan of Rs.400 crores the interest rate for disbursement made at the end of March 2008 was 10.5% which was increased to 11.5% for disbursement made in August, 2008 and to 14% for disbursement made in October, 2008.

The IDBI loan was based on BPLR. This indicates rising trend of interest rate around the time when the reset of interest rate was effected by IDFC. . The State Commission has not considered the fact from the review of ICRA (reproduced in the impugned order) that the cash infusion through the preferential offer of Rs.12 billion to Tata Sons Ltd. is positive from the credit perspective and that the rating continues to be supported by financial flexibility derived from being a part of the Tata group besides stable cash flows from its license business. It is difficult to imagine that the entire increase in interest rate from 8.9% to 13% was governed by the credit rating of the appellant and not market conditions. As submitted by the learned counsel for the appellant the interest rates in domestic market were affected by the global melt down post-Lehman collapse in September, 2008.

19 Issue No.2 It is the case of the Commission that there is no specific direction of this Tribunal on this issue in Appeal no.137 of 2008, that the principle of constructive *res-judicata* would apply, that there was no prayer for carrying cost in Appeal no.60 of 2007, that carrying cost was not granted in Appeal no.173 of 2009 and accordingly, the Commission was justified in rejecting the claim. In our opinion the issue is well settled in Appeal no.117 of 2008, Appeal no. 173 of

2009 and Appeal no.153 of 2009. We reproduce the decision of this Tribunal in Appeal no.173 of 2009 as follows:-

"38. The next issue is entitlement of interest on carrying cost for the deferred recoveries. According to the Appellant, this Tribunal upheld the principle that any deferred recovery of dues/entitlement involve time value of money and hence such recoveries have to be made along with the carrying cost, irrespective whether the dues have to be made along with the carrying cost irrespective of whether the dues are to be paid or to be recovered. This Tribunal in its judgment in Appeal No. 117/08 dated 28.08.2009 had directed the State Commission to allow Short Term Prime Lending Rate of State Bank of India for deferred payment and incorporate the same while carrying out the truing up exercise. This finding on the basis of which direction has been issued would apply to the present fact as well. That apart, in one more judgment the same observation has been made by this Tribunal. The relevant judgment and the observations are as follows.

39. In the judgment dated 28.08.2009 passed in Appeal No. 117 of 2008, the relevant observation is as follows:

"Regulations 63.6.2 and 76.8.2 of the MERC (Terms and Conditions of Tariff) Regulations 2995 read as under:

63.6 Interest on Working Capital
63.6.2 Interest shall be allowed at a rate equaloa to the Short Term Prime Lending Rate of the State Bank of India as at date on which the application for determination of tariff is made.
76.8
76.8.2 Interest shall be allowed at a rate equal to the Short Term Prime Lending Rate of the State Bank of India as at the rate on which the application for determination of tariff is made."

47 As the MERC Regulations deploy the Short Term Prime Lending Rate of State Bank of India for working and interest on Working Capital there is no reason why the same is not used when it comes to applying interest rate on deferred payments. The licensee shall have to arrange the amount of

deferred payment in the same way as the Working Capital. We therefore, direct the Commission to allow Short Term Prime Lending Rate of SBI for deferred payments and incorporate the same while carrying out the truing up exercise for the year 2008-09."

40. The next judgment is dated 06.10.2009 passed in Appeal No. 36 of 2008 reported in 2009 ELR (APTEL) 880). Relevant extracts are quoted hereinbelow:

"116 Before parting with the judgment we have to remind the Commission of the observation in our judgment in Appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Limited Vs. Delhi Electricity Regulatory Commission in which we said the following:

"60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the revenue requested by a particular utility and such assessment should be based on practical considerations. …. The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and the anticipated expenses at the beginning of the year. When the utility gives its own statement of anticipated expenditure , the Commission has to accept the same except where the Commission has reason to differ with the statement of the utility and records reasons thereof of where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of "restructuring the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence
117. All projection and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because the truing up exercise will be mae on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not ultimately reduced by under estimating the cost today and truing it up in

future as such method also burdens the consumer with carrying cost."

41. The next judgment is dated 30.07.2010 passed in Appeal No. 153 of 2009 reported as 2010 ELR (APTEL) 0891. The relevant observation is as follows:

"45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognized in the regulatory practices as laid down by this Tribunal as well as the Hon'ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that "along with the expenses, carrying cost is also to be given as legitimate expense". Hon'ble Supreme Court in 2007 (3) SCC 33 has also held "the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure."

"58. (iv): The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company"

42. The above judgments of the Tribunal lay down the dictum regarding entitlement of carrying cost for deferred recoveries. However, in the present appeal the Appellant has raised carrying cost as a general issue without reference to any finding of the State Commission in the impugned order or specific claim of interest on deferred recovery. Therefore, while holding the principle of carrying cost on deferred recovery, we are not in a position to give any specific direction to the State Commission in this regard except to take decision on the claim of the Appellant on carrying cost keeping in view the above judgments of the Tribunal. However, we would like to add that the Appellant is entitled to carrying cost on his claim of legitimate expenditure if the expenditure is:
(a) accepted but recovery is deferred, e.g. interest on regulatory assets;
(b) claim not approved within a reasonable time; and
(c) disallowed by the State Commission but subsequently allowed by the superior authority.

> *43. Summary of Our Findings*
> *(1) Carrying cost is a legitimate expense. Therefore, recovery of such carrying cost is legitimate expenditure of the distribution companies. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the Distribution Company from lenders/promoters/accruals is to be paid by way of carrying cost. In this case, the Appellant, in fact, had prayed for allowing the legitimate expenditure including carrying cost. Therefore, the Appellant is entitled to carrying cost."*

Accordingly, we decide the issue no. 2 in favour of the appellant.

20 Issue no.3 On this issue the only point raised by the Commission is that the ratio of the decision in Appeal no.111 of 2008 is that the Commission must enquire into and consider the actual costs of the funds used by the utility as working capital in the regulated business. In that case the Commission had treated the entire difference between the normative interest on working capital and actual interest as efficiency gain on the ground that the entire working capital of the appellant had been made from the internal funds of the appellant. It must not be missed that in Appeal no.111 of 2008 it has not been held that unless internal fund is located and sourced out interest on working capital cannot be given so far as normative portion is concerned. Merely because internal funds were spent as working capital it cannot follow that no cost was associated with it. This point has been made clear in number of decisions

namely Appeal no.137 of 2008 decided on 15.07.2009 which refers to the judgment in Appeal no.111 of 2008 and Appeal no.173 of 2009. In Appeal no.137 of 2008 following observation was made:-

"20. In Appeal No.111/08, in the matter of Reliance Infrastructure v/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital when the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008.

"7) The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed as Working Capital loses the interest it could have earned by investment elsewhere. Further the licensee can never have any funds which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there was a gain or loss the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds by way of interest on Working Capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on Working Capital as per Regulation 19 has merit.

15. b): The interest on Working Capital, for the year in question, shall not be treated as efficiency gain.

21. In view of our earlier decision on the same issue we allow the appeal in this regard also."

In Appeal no.173 of 2009 this Tribunal held as follows:

"23. The next issue is wrongful consideration of the difference between normative interest on working capital and the actual interest of working capital. In respect of this issue, according to the Learned Counsel for the Appellant, the judgment rendered by this Tribunal in Appeal NO. 137/08, this point has been referred in favour of the Appellant. The relevant observation in the said judgment is as follows:

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Analysis and decision

"20. in Appeal No. 111/08, in the matter of Reliance Infrastructure V/s MERC and Ors., this Tribunal has dealt the same issue of full admissibility of the normative interest on Working Capital where the Working Capital has been deployed from the internal accruals. Our decision is set out in the following paras of our judgment dated May 28, 2008 in Appeal No. 111 of 2008

" 7. The Commission observed that in actual fact no amount has been paid towards interest. Therefore, the entire interest on Working Capital granted as pass through in tariff has been treated as efficiency gain. It is true that internal funds also deserve interest in as much as the internal fund when employed on Working Capital loses the interest it could have earned by investment elsewhere. Further, the licensee can never have any fund which has no cost. The internal accruals are not like some reserve which does not carry any cost. Internal accruals could have been inter corporate deposits, as suggested on behalf of the appellant. In that case the same would also carry the cost of interest. When the Commission observed that the REL, had actually not incurred any expenditure towards interest on Working Capital it should have also considered if the internal accruals had to bear some costs themselves. The Commission could have looked into the source of such internal accruals or funds could be less or more than the normative interest. In arriving at whether there

was a gain or loss, the Commission was required to take the total picture into consideration which the Commission has not done. It cannot be said that simply because internal accruals were used and there was no outflow of funds byway of interest on Working Capital and hence the entire interest on working capital was gain which could be shared as per Regulation No. 19. Accordingly, the claim of the appellant that it has wrongly been made to share the interest on Working Capital as per Regulation 19 has merit.

15 b): The interest on Working Capital for the year in question, shall not be treated as efficiency gain."

21. In view of our earlier decision on the same issue we allow the appeal in this regard also."

24. In view of the law laid down by his Tribunal in the aforesaid judgment which covers the issue in hand, the State Commission is directed to restore the actual amounts considered as part of the gains on account of saving in interest expenditure in working capital".

This issue is decided in favour of the Appellant accordingly. However, the State Commission may frame regulations for evaluation of cost of internal accruals used as working capital for working out the actual interest on working capital and efficiency gain.

21 Issue No.4 It is the case of Commission that by order dated 28.05.2009 the Commission limited the Capital Expenditure of non-DPR schemes to the extent of 20% of the DPR Schemes and this finding has not been challenged in Appeal no.173 of 2009. Reference is made to the decision dated 18.05.2011 in Appeal

no.172 of 2011 (Bihar Steel Manufactures Association vs. BERC). It is further submitted that the dispensation of non-DPR schemes to the extent of not more than 20% was upheld by the Full Bench of this Tribunal in *Appeal No.139 of 2009 decided on 23.03.2011*. It is the submission of the appellant that the directive dated 28.05.2009 which does not follow from any specific provision of the Regulations of the MERC cannot be applied retrospectively particularly when the capital expenditure schemes commenced prior to 28.05.2009. Regulation 30.1 of the MERC Tariff Regulations affords power to the Commission to make a prudence check on the actual capital expenditure incurred in connection with the project. In this connection we may refer to the decision of this Tribunal in *Appeal No. 199 of 2010 (MSPGCL vs. MERC & ors.)* decided on 04.08.2011. It was observed:

> *"5.3. Capital expenses for FY 2008-09 and for FY 2010-11:*
> *The State Commission has restricted capitalization for non-DPR schemes equivalent to 50% of the capitalization proposed by the appellant. The State Commission by its APR order for 2008-09 dated 17/18.8.2009 had directed the appellant to bundle the non-DPR schemes into DPR schemes and submit before the State Commission for approval. By the time of the APR order for FY 2008-09, not only the period 2008-09 but almost first half of 2009-10 had already elapsed. Therefore, the State Commission instead of reducing the non-DPR schemes to 50% on ad-hoc basis should have prudently examined the expenditure.*

7. After considering the contentions of the parties, the following questions would arise for consideration:
(iii) Was the State Commission correct in restricting the capitalization of Non-DPR schemes instead of prudently examining the expenditure?
10. The third issue is regarding disapproval of capital expenses.
10.1. Learned counsel for the Appellant has submitted that the State Commission allowed the capitalization to the extent of 50% of the proposed capitalization on ad-hoc basis. The principle of restricting the non-DPR scheme related Capex was first introduced by the State Commission in APR order for FY 2008-09 dated 17/18.8.2009. Accordingly, the State Commission decided that the total expenditure and capitalization on non-DPR schemes in any year should not exceed 20% of that for DPR schemes during that year and that the purported non-DPR schemes should be packaged into larger schemes by combining similar non-DPR schemes together and converted into DPR schemes for obtaining in principle approval of the State Commission. By the time of the notification of order dated 17/18.8.2009, the period of 2008-09 and also almost first half of 2009-10 had already elapsed. The order of the State Commission can not be applied retrospectively.
10.2. According to learned counsel for the State Commission, the State Commission has exercised its powers of implementing guidelines for in principle approval of Capex scheme and such powers have been upheld in this Tribunal's Judgments dated 21.5.2007 in appeal no. 46 of 2007 titled Maharashtra State Electricity Distribution Co. Ltd. Vs. MERC and dated 23.3.2011 in appeal no. 139 of 2009 in the matter of Maharashtra State Electricity Transmission Co. Ltd. Vs. MERC.

10.3. Let us first examine the findings of the State Commission in this regard. The relevant extracts for FY 2008-09 true up are as under:
"The Commission observes that MSPGCL has incurred capitalisation only towards the Non-DPR schemes. The Commission, for approving capital expenditure and capitalization for Renovation and Modernisation schemes of Generating Companies, has instituted a process of giving in-principle approval for the capital expenditure schemes costing

above Rs. 10 Crore (together known as DPR Schemes), wherein the Utility has to submit Detailed Project Report (DPR) as well as the expected cost-benefit analysis, payback period, etc., as per well laid out guidelines. Schemes costing less than Rs. 10 Crore are considered as non- DPR schemes and the Utilities are not required to submit any DPR for the approval of the same. It is often observed that at the time of obtaining in- principle approval of the Commission for the DPR schemes, the Utilities indicate several quantifiable benefits and a short payback period. However, the Utilities are not able to substantiate the benefits once the capital investment is actually undertaken and the assets are added to the Gross Fixed Assets (GFA). As a result, the costs and hence, the tariffs are increased, but the expected benefits to the system do not accrue.

In view of the above, the Commission has decided that the total capital expenditure and capitalisation on non-DPR schemes in any year should be restricted. To achieve the purpose, the non-DPR schemes should be packaged into larger schemes by combining similar or related non-DPR schemes together and converted to DPR schemes, so that the in-principle approval of the Commission can be sought in accordance with the guidelines specified by the Commission.
Further, in the absence of documentary evidence that the stated purpose and objective of the capex schemes have been achieved, the Commission has restricted the capitalization for Non-DPR schemes equivalent to 50% of the capitalisation proposed by MSPGCL towards Non DPR schemes"

Thus, the State Commission due to absence of documentary evidence regarding achievement of objective of Capex scheme, has restricted the capitalization of Non-DPR schemes to 50% of the capitalization proposed by the appellant, on ad-hoc basis.
10.4. The relevant extracts for FY 2010-11 are as under:
"The Commission has dealt with the issue of Capital Expenditure and Capitalisation in detail in its Order dated August 17, 2009 in Case No. 115 of 2008. As per Regulation 30.1 of the MERC Tariff Regulations, subject to prudence check by the Commission, actual capital expenditure incurred on completion of the project shall form the basis for determination of original cost of the project. For the purpose of

APR exercise for FY 2009-10 and revised projection for FY 2010-11, the Commission has considered capitalisation as projected by MSPGCL for DPR schemes already approved by the Commission. However, the Commission has not considered any capitalisation of such DPR schemes where in-principle approval of the Commission is yet to be accorded.

For Non-DPR schemes, the Commission has considered 50% of the proposed capitalisation by MSPGCL on ad-hoc basis, as very few DPR schemes have been submitted by MSPGCL and approved by the Commission, and any linkage of non-DPR schemes as a percentage of approved DPR schemes may not be appropriate at this stage. Further, the Commission is of the view that until it is ascertained that the projected benefits have actually accrued for the benefit of the consumers, it would not be appropriate to allow the entire expenses.

Thus, the State Commission has considered the DPR Schemes already approved and restricted the non-DPR schemes on ad-hoc basis to 50% of proposed capitalization.

10.5. The State Commission has to carry out prudence check of expenditure before approving the capitalization. The State Commission vide its order dated 17/18.8.2009 has directed the appellant to club the similar Non-DPR schemes and convert into large DPR schemes for approval of the State Commission. However, there is a substance in the argument of Ms. Deepa Chavan that the directions were given when part of FY 2009-10 was already over. We are of the opinion that these directions cannot be applied retrospectively. Therefore, instead of restricting the expenditure on non-DPR schemes for FY 2008-09 and 2009-10 to 50% on ad-hoc basis, the State Commission should allow expenditure on non-DPR schemes for the FY 2008-09 and 2009-10 after prudence check. We accordingly direct the Appellant to submit the requisite information for the non-DPR schemes proposed for capitalization for FY 2008-09 and 2009-10 to the State Commission and the State Commission shall consider the same for capitalization after prudence check. As far as the capitalization for FY 2010-11 is concerned, the Appellant was bound by the directions of the State Commission to club similar non-DPR schemes for approval of the State Commission and restricting non-DPR schemes to 20% of the proposed expenditure for DPR schemes. The State Commission has already agreed to consider the DPR

schemes for improvement of performance of the power station as per CPRI recommendations as and when submitted by the Appellant. As implementation of recommendations of CPRI are required to be implemented expeditiously to bring about improvement in performance of the power stations of the appellant the appellant is directed to submit the DPRs for the same to the State Commission expeditiously and the State Commission shall consider to give approval of the same on priority. This issue is decided accordingly."

Ld. Counsel for the appellant furnished two orders of the Commission dated 08.09.2010 wherein in the case of R-Infra the Commission restricted the non-DPR Schemes on ad-hoc basis to 50% of the proposed Capitalization of the DPR schemes and the order dated 12.09.2009 the Commission though observed that the capital expenditure and capitalization of non-DPR schemes in any year should be restricted it did not prescribe any limit. The decision in Appeal no.139 of 2009 is fact oriented and in that case the Tribunal did not make any specific ruling to the effect that Capitalization of non-DPR schemes to the extent of 20% cannot be invariably deviated from, on the contrary the Commission was directed to consider the schemes for capitalization. The Tribunal held as follows:

"9. The next issue is regarding disallowance of capitalization of expenditure.
9.1. We have noticed that the State Commission has given detailed reasonings for disallowance of capital expenditure incurred on Non-DPR scheme. The State Commission in the APR Order for FY 2007-08 had approved DPR Schemes for Rs. 697.92 crores and Non-DPR scheme for Rs. 65.89 crores.

Against this, the capitalization claimed by the Appellant is Rs. 197.21 crores for DPR scheme and Rs. 669.93 crores for Non-DPR Scheme. Thus, while there was under achievement in capitalization of DPR scheme, the capitalization in Non-DPR scheme exceeded the provision by over tenfold. The relevant extracts from the State Commission's impugned order are reproduced below:

"3.3. Capital expenditure and capitalization for FY 2007-08"
"However, MSETCL in its present submission is claiming Non-DPR related capital expenditure of Rs.618.75 Crore and capitalization of Rs.669.93 Crore on such schemes during FY 2007-08, for projects that have been approved by the erstwhile MSEB Board. It follows that if a scheme has been approved around three years ago, then the same would have been started at least two years ago, but MSETCL has not made any such submission in its earlier submissions. MSETCL appears to have stated these "non"- DPR schemes in FY 2007-08, i.e. over three years after obtaining the approval of the MSEB Board. The Commissions is of the view that since these schemes have been started at a time, when the Commission's Guidelines for approval of capital investment are in force, MSETCL will have to obtain the Commission's approval for the schemes".

"In view of the above, as a general rule, the Commission has decided that the total capital expenditure and capitalization on non-DFR schemes in any year should not exceed 20 % of that for DPR schemes during that year. To achieve the purpose, the purported non-DPR schemes should be packaged into larger schemes by combining similar or related non-DPR schemes together and converted to DPR schemes, so that the in-principle approval of the Commission can be sought in accordance with the guidelines specified by the Commission. <u>Further, in the absence of documentary evidence that the stated purpose and objective of the capex schemes have been achieved, the Commission is</u> restricting the capitalization considered for the purpose of determination of ARR and tariff. <u>Once MSETCL submits the necessary justification to prove that the scope and objective of the capex scheme has been achieved as projected in the DPR, the same may be considered in future Orders.</u> The Commission may also undertake, if required, a detailed independent technical/

financial audit of the "Non"- DPR schemes of the erstwhile MSEB period".

9.2. Thus, the State Commission after fully justifying its action to disallow capitalization of Non-DPR Schemes has indicated its willingness to consider the justification of the schemes in future orders once the Appellant submits the necessary justification regarding the scope and objective of the scheme. The learned counsel for the Appellant also submitted that the Appellant has already regrouped its investment schemes and resubmitted to the State Commission for consideration. We, therefore, direct the State Commission to consider the schemes submitted by the Appellant for capitalization."

According to the Tariff Regulation investment plan for any capital expenditure project exceeding Rs.10 crores has to get approval from the State Commission. It was observed by the State Commission that the licensees in their ARRs were submitting for approval of expenditure incurred on a large number of schemes each with capital expenditure of upto 10 crores (Non-DPR schemes). Compared to this, the schemes with capital expenditure exceeding Rs.10 crores (DPR Schemes) for which prior approval was necessary were very few. Therefore, the State Commission in the year 2009 directed the licensees to bundle Non-DPR schemes and submit for approval of the State Commission as DPR schemes and limit the Non-DPR scheme to 20% of the cost of the DPR schemes. The purpose of limiting the Non-DPR schemes to 20% of DPR schemes by the State Commission was to curb the practice being followed by the distribution licensee to implement large number of non-DPR schemes with a view to avert regulatory scrutiny. In the above

referred judgment, the State Commission had agreed to consider the Non-DPR scheme in excess of the 20% limit subject to submission of the requisite data by the distribution licensee and its prudence check by the State Commission. The appellant has submitted that instead of denying capitalization of Non-DPR schemes implemented by them, the State Commission could examine these schemes and after prudence check decide capitalisation. In view of the above judgment (Appeal No.199 of 2010) the appellants shall submit justification of non-DPR schemes to the State Commission and the State Commission shall consider the same for capitalization subject to prudence check.

22 Issue No.5 This issue is related to the Appeal no.17 of 2011. The Commission's stand point is that mare acquisition of land without it being put to use would be prejudicial to the interest of the consumers because unless the land is put to use for its intended purpose it cannot be said to have been capitalized. The Ld. Advocate for the Commission seeks support from regulation 46 and 43.3.1 of the Tariff Regulations and the decision of the Hon'ble Supreme Court in the case of Chellappalli Sugar Ltd. Vs. CIT Hyderabad reported in 1995 (3) SCC 572. It appears that on 14.03.2007 Tata Power-T submitted its DPR schemes including the scheme for 145 KV Gas Insulated Sub-station at Bandra-Kurla Complex and according to the appellant the cost of land considered in the said

report was of Rs.50 Crores and the total cost of the project was estimated at Rs.129.67 Crores the cost of project was revised at Rs.230.50 Crores because of increase in the cost of land by Rs.90 Crores as the cost of land had increased to Rs.140 Crores. The matter of the fact is that the Commission granted in-principle clearance to the scheme approving thereby the total project cost of Rs.230.50 Crores that includes Rs.90 Crores. The Commission's impugned order overlooks these aspects of the matter because the denial of this amount would have the effect on interest on loan portion of the Capitalized amount and the return on equity thereon. Ld. Advocate for the appellant submitted that the accounting treatment followed by Tata Power –T is in line with treatment of capitalization of land by the other regulated utilities like MTNL, Powergrid Corporation of India Ltd., Nevyeli Lignite etc. The DPR as revised by the appellant was approved by the Commission itself on 09.05.2008 and pursuant to such approval land was purchased for capitalization. When the project is doubtlessly in progress and when total capitalization cannot be achieved by a certain particular time it is difficult to accept the proposition that so far as the land is concerned it cannot be allowed to be capitalized unless it is put to use. Secondly, the tariff regulations do not have any concise definition of capitalization. It is submitted by the advocate of the appellant that the decision in Chellapalli Sugar Ltd. Vs. CIT Hyderabad is not applicable because in that case the question was

whether interest paid on capital borrowed before commercial production can be included as a part of actual cost for the purpose of depreciation allowance and development rebate. Regulation 46.2 stipulates that for each capital expenditure projects the sum of total annual allowance capital cost from the date of commencement such project till the date of commissioning shall be original cost of such project. The land admittedly, in question at Bandra-Kurla complex procured by the appellant was being used for 145 kV gas insulated sub-station which was under construction. The land is a part of the sub-station and its cost has been included in the sub-station cost. The land would be put to use only after the commissioning of the sub-station. Therefore, we do not find any infirmity in the order and the State Commission in disallowing the capitalization of the land procured for construction of the 145 kV sub-station at Bandra-Kurla complex pending commissioning of the sub-station.

23 Issue No.6 This issue is relevant in Appeal no. 17 of 2011 and Appeal no.19 of 2011. The Commission maintains that no additional investment was made out of the statutory appropriation in contingency reserves for Financial Year 2008-09 and accordingly the Commission did not approve of the same. The appellant clarified that no investment had been made on the ground that the investments were already higher than the statutory ceiling of 5% of opening GROSS FIXED ASSETS. According

to the Commission, the confusion was created by the appellant because the appellant further clarified that the statutory investments were higher because they were not actually liquidated and now the appellant is claiming 0.5% of opening GROSS FIXED ASSETS towards contribution to contingency reserves though initially it claimed at 0.25%. It is further submitted by the Commission that in case it is confirmed that the appellant is entitled to the same than the Commission is willing to consider the contribution to contingency reserves in a subsequent Aggregate Revenue Requirement and tariff determination process. It is not disputed that the quantum of funds required to be maintained under the contingency reserves was limited to Rs.54 Crores for transmission and distribution business together but the actual funds invested in the approved securities were about Rs.171 Crores and the Tariff Regulations were more substantially complied with. Regulation 50.7 of the MERC Tariff Regulations, provides as follows:-

> *"50.7 Contribution to contingency reserves*
>
> *50.7.1 Where the Transmission Licensee has made an appropriation to the Contingencies Reserve, a sum not less than 0.25 per cent and not more than 0.5 per cent of the original cost of fixed assets shall be allowed towards such appropriation in the calculation of aggregate revenue requirement:*
>
> *Provided that where the amount of such Contingencies Reserves exceeds five (5) per cent of the original cost of fixed assets, no such appropriation shall be allowed which would*

have the effect of increasing the reserve beyond the said maximum:

Provided further that the amount so appropriated shall be invested in securities authorized under the Indian T rusts Act, 1882 within a period of six months of the close of the financial year.

50.7.2 The Contingency Reserve shall not be drawn upon during the term of the licence
except to meet such charges as may be approved by the Commission as being:

(a) Expenses or loss of profits arising out of accidents, strikes or circumstances which the management could not have prevented;
(b) Expenses on replacement or removal of plant or works other than expenses requisite for normal maintenance or renewal;
(c) Compensation payable under any law for the time being in force and for which no other provision is made:

Provided that such drawl from Contingency Reserve shall be computed after making due adjustments for any other compensation that may have been received by the Licensee as part of an insurance cover."

Regulation 63.7 relating to distribution licensee is in the same language. The ground raised by the Commission appears to be more technical than logical because though no fresh investment was made in the year in question either in respect of transmission or distribution business the investments made in approved securities covering both the businesses were much higher than what is required by the Regulations. Reduction in Contingency Reserves level as required had come down to Rs.58 Crores including Rs. 5.44 Crores for Tata Power –T and Rs.2.18 Crores for Tata

Power – D. Reference in this connection has been made to the decisions in Shaikh Salim Vs. Kumar & Ors., reported in (2006) 1 SCC 46 and New India Assurance Co. Ltd. Vs. S. Srinivasan, reported in (2000) 3 SCC 242 where it has been observed that “the rules of procedure, as has been laid down by this Court a number of times, are intended to serve the ends of justice and not to defeat the dispensation of justice”. It was pointed out by the learned counsel for the appellant that the contingency reserve as on 1st April,,,,2008 after devaluation were Rs.171 crores. Subsequently, by the order dated 28.05.2009 the State Commission decided to draw out Rs.121 crores from the contingency reserves of Tata Power in accordance with the order dated 28.5.2009. Tata Power disinvested the contingency reserves to some extent. As such, on 30.9.2009 Tata Power hads a contingency reserves investment of Rs.73.83 crores. However, this amount was in excess of the requisite level of contingency reserves investment required for Tata Power’s transmission and distribution business being Rs.58 crores. As such, no fresh investment in notified securities towards contingency reserves was made by Tata Power in Financial Year 2008-09 since its investment in notified securities exceeded the requisite level. Accordingly, appropriation of Rs.5.44 Crores in respect of Tata Power – T and Rs.2.18 Crores for Tata Power – D cannot be disallowed. We answer this issue in favour of Appellant.

24 Issue No.7 This point was decided by this Tribunal in Appeal no.173 of 2009 in Tata Power Company Ltd. vs. Maharashtra Electricity Regulatory Commission and we reproduce relevant paragraph therefrom:-

"33. The grievance of the Appellant is that in making the adjustment to arrive at the Income Tax that should be allowed as pass through, the State Commission has committed the following mistakes:

(a) Instead of computing Profit Before Tax as comprising of total revenue minus allowable expenditure, the State Commission has taken the Return on Equity (RoE) as the start point, thereby wrongly reducing the taxable income and hence the tax that has to be allowed. In doing so, it went against the principle of this Tribunal's judgment 2009 ELR (APTEL) 560. Relevant extracts of the said judgment are quoted hereinbelow:

"Income tax liabilities on incentives" :

11)The appellant claimed an amount of Rs. 22.79 Crores as PLF incentive for the FY 2006-07. The Commission permitted an amount of Rs. 21.83 Crores as PLF incentive and considered the said amount as part of the revenue for FY 2007. However, coming to the income tax liability on the amount of incentive allowed the Commission had the following to say:
"As regards tax on income arising out of sharing of gains due to better performance and PLF incentive, the Commission is of the view that the expenses incurred for achieving better performance (such as A&G, R&M etc.) including higher PLF has already been allowed as pass through by the Commission and allowing tax on income arising out of better performance will put additional burden to consumers. Hence, the Commission has not considered the tax on income arising out of sharing of gains due to better performance and PLF incentive income.
Based on above principles, the Commission has estimated the income tax of REL-G on standalone basis by considering the

income and expenses as per approved ARR after truing up for FY 2006-07, as Rs. 7.69 Crore."

12) As can be seen from the portion of the impugned order, quoted above, the Commission has disallowed the tax arising out of the better performance on the ground that the same would be an additional burden on the consumers. The Commission itself has not quoted any Regulation under which income tax on the incentive allowed can be denied to a generating company. The Regulation 34.2.1, of the MERC Tariff Regulations, which deals with income tax does not make any exception for the income arising out of incentive. Therefore, as per the Regulation the appellant is entitled to recover the income tax payable on the change in income on account of PLF incentive. Therefore, we find merit in the appellant's prayer for income tax on incentive to be given to it as a pass through.

13) The other two prayers related to employees expense and R&M of fuel gas de-sulphurization plant have not been pressed.

15) We allow the appeal in part with the following directions:
(c) The income tax payable on the PLF incentive will be treated as pass through."
(b) Departing from its past practice which was based on the method as mentioned above, the State Commission started the computation with Return on Equity (RoE) and adjusted for items of consequentially further depressing the income tax allowable.
(c) Further, the State Commission has ignored the fact that while it has claimed to reimburse the tax payable by the Appellant as computed by its erroneous approach, the Appellant was liable to pay tax on the total amount of Return on Equity and tax, thereby paying a higher quantum as compared to that computed by the State Commission which was only on the amount of Return on Equity. Thus, it has ignored the requirement of grossing up for tax so that the Appellant can earn the rightful entitlement of Return on Equity.
34. Regulation 34.1 and 34.2 of the Regulations 2005 provide for 14% return on equity and Income Tax on the income of the generating business in the Annual Fixed Charges. As interpreted by this Tribunal reported in 2009 ELR (APTEL) 560

income must include income from incentives and efficiency gains. But despite this the State Commission has considered the Profit Before Tax as being the same as Return on Equity.

35. The State Commission considered the Return on Equity as being equal to the regulatory profit before tax. This error has reduced the taxable income by Rs. 240 crores and consequently the tax entitlement of the Appellant.

36. The State Commission has also ignored the fact that the allowed Income Tax would also be considered a revenue gains and the Appellant would have to pay Income Tax on the same. The State Commission ought to have grossed up the tax computed by it and pass the same to the Appellant.

37. In view of the above, the State Commission's conclusion, in our view, may not be correct and therefore, the State Commission is directed to compute the income tax entitlement of the Appellant by replacing Return on Equity by Regulatory Profit Before Tax i.e. income less permissible expenses. This point is answered accordingly."

Accordingly, we decide this issue in favour of the appellant.

25 Issue No.8 The Commission's view point is that if the contention of the appellant is accepted than it would result in double accounting of O&M Expenditure because the actual amount of O&M Expenditure directed to be recovered by this Tribunal has been recovered in the impugned Tariff order and if the said figures were added back to the original O&M figure then it would be artificially increasing the approved figures retrospectively. According to the appellant the issue of double accounting does not arise since at the time of passing of the impugned order the Commission for the first time had the opportunity to give effect to the judgment of this Tribunal

in Appeal no.137 of 2008. It is further submitted that higher expenditure incurred due to uncontrollable factors must be allowed as passed through, that efficiency gain have to be limited to the controllable factors and the Commission's order has actually penalized the appellant for its efforts in controlling its actual expenditure in spite of increase on account of uncontrollable factors. In this connection it is pertinent to see the observation of this Tribunal in Appeal no.137 of 2008.

> *"Issue No. 3: Disallowance of entitlement on gains on account of O&M expenditure despite significant increase in uncontrollable expenses.*
>
> *22. Mr. Kapoor contended that various uncontrollable factors that have led to the increased O&M expenditure, are statutory or mandatory in nature, such as, increase in Insurance, environment impact studies and ambient air quality monitoring charges etc. Furthermore, inflation and setback of expenses have resulted in additional expenditure, which could not be envisaged at the time of the previous filing*
> *.*
> *23. He contended that MERC has erred in not allowing the sharing of loss/gains in view of the following:-*
>
> *(i) Regulation 18 inter alia provides that the approved aggregate gain or loss to the Generating Company or licensee on account of uncontrollable factors shall be passed through as an adjustment in the tariff of Generating Company or Licensee.*
>
> *(ii) Regulation 19 of the Tariff Regulations deals with the mechanism for sharing of gains or losses on account of controllable factors.*
>
> *(iii) The very concept of the uncontrollable factors means that these factors cannot be controlled and as such are required to be given a treatment as a pass-through in the tariff in terms of Regulation 18 of the Tariff Regulations.*

(iv) TPC by adopting prudent and best practices, could control the expenditure to Rs. 260 crores, instead of Rs. 274 crores and has to be rewarded for its efficiency. He submitted that only Rs. 260 crores were spent against Rs. 274 crores that would have been spent had Tata Power through its prudent practices not controlled the expenditure on account of controllable factors and as such Regulation 19 will apply as a mechanism for sharing of gains on account controllable factors.

Analyses and decision

24. MERC Regulation 18, set out below, provides that approved gain or loss to the licensee on account of uncontrollable factors shall be passed through tariff.
Regulation 18: Mechanism for pass through of gains or losses on account of uncontrollable factors.

18.1 The approved aggregate gain or loss to the Generating Company or Licensee on account of uncontrollable factors shall be passed through as an adjustment in the tariff of the Generating Company or Licensee over such period as may be specified in the order of the Commission passed under Regulation 17.10;
18.2 Nothing contained in this Regulation 18 shall apply in respect of any gain or loss arising out of variations in the price of fuel, which shall be dealt with as specified in Regulation 82.

25. We find force in the arguments of the appellant that the uncontrollable factors do mean the factor which cannot be controlled and, therefore, any additional expenditure due to uncontrollable factors needs to be deemed as pass through. We therefore, allow the appeal in this view of the matter."

The Commission's view as we find from Page 94 of the impugned order is in the following lines:-

"The Commission is of the view that the approach adopted by TPC for working out efficiency gains due to controllable factors is not appropriate. As per the provisions of Regulations, the

increase in expenses due to uncontrollable expenses is to be allowed as pass through in tariffs, however, the base value of expenditure approved in the Order cannot be increased by adding increase in expenditure due to uncontrollable elements for determining gains/losses. The Commission is of the view that the overall actual O&M expenditure has to be compared with the O&M expenditure approved in the Order to determine the amount to be shared as a result of efficiency gains. The total amount of O&M expenditure allowed by the Commission for FY 2006-07 based on actual expenses including increase in expenses subject to prudence check works out to Rs.253.14 Crore as against O&M expenses of Rs.255 Crore approved in the Order. Thus, the efficiency gain in O&M expenditure with respect to amount approved in the Tariff Order for FY 2006-07 works out to Rs.1.86 Crore, out of which 1/3rd has been considered to be passed on to Distribution Licensees and 2/3rd has been allowed to be retained by the Generating Company, I.e., TPC-G"

This was the order of the Commission dated 02.04.2008, this order was challenged in Appeal no.137 of 2008 and the relevant observation of the Tribunal has been reproduced as above on this issue. The plea of double accounting is difficult to appreciate because in its APR for Financial Year 2007-08 and tariff order for Financial Year 2008-09 dated 02.04.2008 admittedly the Commission considered Rs.255 Crores for computing O&M expenditure for Financial Year 2006-07 but the actual O&M expenditure which was not allowed was Rs.260 Crores that included Rs.19 Crores on account of uncontrollable factors. This Rs.19 Crores has been particularized as Rs.2 Crores on account of insurance charges, Rs.3 Crores on account of non-agriculture charges, Rs.1 Crore on account of cost for environment impact study, Rs.1 Crore for Air Quality Monitoring,

Rs.12 Crores for cost on account of setback of expenses and Rs.2 Crores on account of inflation. The Commission allowed Rs.253.14 Crores to the exclusion of Rs.19 crores which was spent as uncontrollable factors. In view of the judgment of this Tribunal in Appeal no.137 of 2008 this issue has to be decided in favour of the appellant.

26 Issue No.9 According to the Commission due to inadvertence this issue was not properly appreciated and submitted that the effect of the same would be passed through in the next tariff order. According to the appellant, even after the agreed position as evident from the Counter Affidavit, the MERC has failed to give effect to the carrying cost on deferred payment in the next tariff order also, i.e. the tariff order passed by the MERC on 15.02.2012 (Tata Power-G and Tata Power-D and 14.02.2012 (Tata Power-T). Such denial is on the premise that carrying cost on disallowed amounts is to only to be provided when the recovery of the amounts is deferred by the MERC or the claim is not approved within reasonable time. This is in contravention of the principles laid down by this Tribunal which provides that the appellant is entitled to carrying cost on its deferred legitimate recoveries. The Appellant in its Appeal (Appeals 173/174/175 of 2009 had submitted that the Appellant is entitled to the carrying costs on deferred payments (Gap/surplus of previous year carried forward to the next tariff periods). The MERC ought to have implemented the same as it has been implemented in the past. It cannot

apply a new philosophy for interpreting the meaning of the term 'deferred' to deny legitimate entitlements to the Appellant. It is submitted that carrying cost for the deferred legitimate payments (Gap/Surplus of previous year carried forward to the next tariff periods) would accrue from the end of the respective financial year up till the amount is actually recovered through tariff payments in the subsequent years. This point was decided by this Tribunal in Appeal no.173 of 2009 as follows:-

> *"9. The first issue is denial of carrying cost. According to the Appellant disallowance of recovery of carrying cost of Rs. 137 crores on the ground that the carrying cost was not prayed in Appeal No. 60/07 and in the judgment dated 12.05.2008 in the said Appeal, the Tribunal has not given any specific finding about the carrying cost is quite incorrect. It is pointed out that the State Commission has misinterpreted the said judgment and did not appreciate the submissions made by the Appellant before the Tribunal. Similarly, it is wrong on the part of the State Commission to state that the Appellant would be entitled to the carrying cost only on cash component and not on book adjustment.*
>
> *10. In the petition filed by the Appellant for ARR for FY 2008-09 and for tariff determination for the FY 2009-10, the Appellant mentioned that the cost allowed by the Tribunal by the order dated 12.05.2008 can only be recovered in FY 2009-10 and since cost pertain to FY 2004-05 and 2005-06, the interest for 3 to 4 years would accrue and the Appellant would be entitled to the said interest. It is also noticed from the Appeal filed before the Tribunal in Appeal No. 60/07, it is specifically mentioned that denial of legitimate expenses and assured reasonable return is unjust and the aforesaid unjust denial of legitimate expenses and assured reasonable return and its delayed payment will have a cascading effect and, therefore, the Appellant in such situation is entitled to carrying cost. The Appellant also prayed for allowing the entire legitimate expenditure which includes the carrying cost as well. This Tribunal in the judgment dated 23.05.2007 reported*

in 2007 ELR (APTEL) 193 has held that once expense is allowed then the Appellant is not only entitled to the expense but is also entitled to the carrying cost as its legitimate claim. The relevant observation of the judgment is as follows:
"The appellant is not only entitled to depreciation at this rate but also entitled to a carrying cost as its legitimate claim was denied at the appropriate time"

11. Although the Appellant may have accrued income, the cost had already been incurred by the Appellant and here has been cash outflow in respect of the same. On accrual income is allowed because corresponding expenses to earn that income had already been incurred. Hence it may not be appropriate to indicate that these accruals are mere book adjustment and do not involve the cash flow. In other words, it would not be appropriate to segregate the disallowance of expense into cash and non-cash expenditure. In this context, the following observation made by this Tribunal in the judgment dated 30.07.2010 in the case of New Delhi Power Limited V/s DERC [passed in 153/09 2009(reported in 2010 ELR (APTEL) (891) is relevant:

"45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accruals, has to be paid for by way of carrying cost. This principle has been well recognized in the regulatory practices as laid down by this Tribunal as well as the Hon'ble Supreme Court. In 2007 APTEL 193, this Tribunal has held that along with the expenses, carrying cost is also to be given as legitimate expense". Hon'ble Supreme Court in 2007 (3) SCC 33 has also held "the reduction in the rate of depreciation is violative of the legitimate expectation of the distribution company to get lawful and reasonable recovery of expenditure."
"58. (iv): The carrying cost is a legitimate expense and therefore recovery of such carrying cost is legitimate expenditure of the distribution company."
Judgment dated 28.08.2009 in Appeal No. 117/08. Relevant extracts are quoted herein below:

"46. Regulations 64.6.2 and 76.8.2 of MERC (Terms and conditions of Tariff) Regulations 2005 read as under: …..

63.6.2 Interest shall be allowed at a rate equal to the Short Term Prime Lending Rate of the State Bank of India as at the date on which the application for determination of tariff is made.

76.8 …..76.8.2 Interest shall be allowed at a rate equal to the Short Term Prime Lending Rate of the State Bank of India as at the date on which the application for determination of tariff is made."

47. As the MERC Regulations deploy the Short Term Prime Lending Rate of State Bank of India for working out interest on Working Capital there is no reason why the same yardstick is not used when it comes to applying interest rate on deferred payments. The licensee shall have to arrange the amount of deferred payment in the same way as the Working Capital. We, therefore, direct the Commission to allow Short Term Prime Lending Rate of SBI for deferred payments and incorporate the same while carrying out the truing up exercise for the year 2008-09"

12. In the judgment dated 06.10.2009 in Appeal No. 16/08 (reported in 2009 ELR (APTGEL) 0880), the relevant extracts are quoted herein below:

"116 Before parting with the judgment we have to remind the Commission of the observation in our judgment in Appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Limited Vs. Delhi Electricity Regulatory Commission in which we said the following:

60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the revenue requested by a particular utility and such assessment should be based on practical considerations. …. The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and the anticipated expenses at the beginning of the year. When the utility gives its own statement of anticipated expenditure , the Commission has to accept the same except where the Commission has reason to

differ with the statement of the utility and records reasons thereof of where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of "restructuring the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudent.

13. Accordingly, the issue of carrying cost is decided in favour of the Appellant."

The Commission therefore shall implement this judgment and we accordingly decide this issue in favour of the appellant.

27 Issue No.10 In the decision dated 15.02.2011 in Appeal no.173 of 2009 the point regarding carrying cost entitlement on deferred recoveries was settled by this Tribunal. According to the Commission since the appellant was earning interest on the investments made out of the contingency reserves till such reserve was utilized to bridge revenue gap for the Financial Year 2009-10 the question of allowing an interest on such amount for the past period after the capital reserve was utilized to bridge the revenue gap cannot arise. Now, the Commission while allowing Tata Power's claim for Financial Year 2004-05 and Financial Year 2005-06 disallowed the interest/carrying cost of Rs.137 Crores and drew down the contingency reserves of Rs.121 Crores to meet revenue gap. This would be evident from Page 87 and 98 of the Commission's order. The revenue gap of Rs.439 crores was partly

met by drawing down the contingency reserves to the extent of Rs.121 crores. The appellant's claim in the present appeal is that the benefit of interest for the period from 2004-05 to 2007-08 to the tune of Rs. 24 crores on the contingency reserves of Rs.121 crores adjusted to bridge the past revenue gap, passed on to the consumers as non-tariff income, should be paid back to them in the Aggregate Revenue Requirement. According to the State Commission, since the appellant was earning interest on the investment made out of contingency reserve till such reserve was utilized to bridge revenue gap for the Financial Year 2009-10, the question of allowing interest on such amount for the past period cannot arise. As we have pointed out at the beginning, the appellant's claim for carrying cost against the order of the State Commission dated 28.5.2009 has already been decided in its favour by this Tribunal in its judgement dated 15.02.2009 in Appeal 173 of 2009. In view of thereof, the claim of the appellant for adjustment of interest on contingency reserve would not arise. Accordingly, this issue is decided against the appellants as far as adjustment of interest on contingency reserve is concerned.

28 Issue No.11: The Commission observed as follows:

> *"3.7.2 Interest on Working capital and Consumers' Security Depot*

The Commission observed that TPC-D, while calculating One Month Equivalent of cost of power component in the computation of Interest on Working Capital (IoWC), has considered power purchase cost from Renewable sources and Transmission Charges only. TPC-D has not considered power purchase cost of TPC-G and other sources. Hence, the Commission recomputed normative IoWC, based on MERC Tariff Regulations."

This issue was dealt with by this Tribunal in Appeal no.117 of 2008 decided on 28.08.2009 (Reliance Infrastructure Limited vs. Maharashtra Electricity Regulatory Commission & Ors.) and we reproduce the relevant observations as follows:

"23. The Commission it its order dated April 21, 2008 in the matter of Reliance Energy Ltd. (Generating Business) has stated that it has not considered the receivables from the sale of electricity while computing the interest on Working Capital. This implies that the distribution licensee will not have any credit facility and it will have to pay the bill for power purchase as soon as it is raised by the generating company. However, Regulation 76.8.1(e) assumes that the distribution licensee has availed credit facility of one month equivalent to cost of power purchased. It has also been contended by the appellant that the Commission has considered that the generation company will not extend credit facility to the distribution licensee. This has been inferred by the appellant because, in computation of Working Capital requirement for the generator, two months receivables have not been considered. If it be so, it is only logical that the computation of Working Capital requirement for the distribution licensee should not assume one month credit facility from the generating company. In view of this we allow the appeal in respect of issue (b) and direct the Commission to compute the Working Capital by adding cost of one month's power purchase as per our decision if this same approach has not been already followed by it".

Tata Power-D did not consider the payables for power purchase from Tata Power-G. When the principle of non-deduction of one month

equivalent cost of power purchase in computation of interest on working capital for its own licensee has been settled the Commission is required to act accordingly. Receivables and payables cannot be confused with one another. Receivables are payments due from the consumers, while payables are payments meant for power purchase. Regulations 34.5 and 76.8 of the Tariff Regulations do not conflict with the claim of the appellant. This issue is answered in favour of the appellant.

29. Accordingly, the Appeal succeeds to the extent as indicated in the body of the judgement and thus is allowed in part against the issues concerned but without costs. The Commission will pass appropriate consequential orders in the light of this decision.

(Justice P.S. Datta)	**(Rakesh Nath)**
Judicial Member	**Technical Member**

Reportable/Non-reportable

rkt