IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No. 301 OF 2015

Dated: 28th January, 2025

Present : Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

TATA POWER DELHI DISTRIBUTION LIMITED
(Through its CEO)
NDPL House, Hudson Lines
Kingsway Camp
New Delhi – 110009 … Appellant(s)

Versus

DELHI ELECTRICITY REGULATORY COMMISSION
(*Through its Secretary*)
Viniyamak Bhavan, 'C' Block,
Shivalik, Malviya Nagar
New Delhi – 110017 … Respondent(s)

Counsel on record for the Appellant(s) : Amit Kapur
Anupam Varma
Rahul Kinra
Aditya Gupta
Aditya Ajay
Girdhar Gopal Khattar
Isnain Muzamil

Counsel on record for the Respondent(s) : Dhananjay Baijal

<u>J U D G M E N T</u>

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The order dated 29.09.2015 passed by the respondent *Delhi Electricity Regulatory Commission* (DERC) on the tariff petition filed by the appellant seeking truing up of Annual Revenue Requirement (ARR) for Financial Year (FY) 2013-2014, the second year of the Multi Year Tariff (MYT) control period 2013-2015 as well as for approval of revised ARR for the FY 2014-2015 along with approval of ARR for FY 2015-2016 is under challenge in this appeal.

2. The appellant company, *Tata Power Delhi Distribution Limited* (TPDDL), is a joint venture between the *Tata Power Company Limited* (TPCL) and the *Government of National Capital Territory of Delhi* with majority stake i.e. 51% shareholding held by TPCL. Upon unbundling of the erstwhile *Delhi Vidyut Board* (DVB) under the Delhi Electricity Reform Act, 2000, into separate distribution, transmission and generation companies, appellant company was incorporated under the provisions of the Companies Act, 1956. It is a distribution licensee in terms of Section 14 of the Electricity Act, 2003, read with Delhi Electricity Reforms Act, 2000, and took over the distribution of electricity in North and Northwest Delhi with effect from 01.07.2002. Since then, the appellant has been carrying out the distribution and retail supply of electricity in the said area of Delhi.

3. The respondent Commission was established under the provisions of Electricity Regulation Commissions Act, 1998, and continues to exercise

jurisdiction as the State Regulatory Commission for Delhi under Section 82 of the Electricity Act, 2003, read with Delhi Electricity Reforms Act, 2000.

4. The impugned order has been passed by the Commission with regard to truing up for the FY 2013-2014 and regarding distribution tariff for the FY 2014-2015.

5. According to the appellant, the Commission has erred in disallowing the requirements of the appellant under various heads and in reopening the concluded tariff order of the Commission for the previous financial year, which is contrary to the prevailing laws as well as the decisions of this Tribunal.

6. Following 75 issues have been formulated by the appellant for consideration of this Tribunal in this appeal which have also been categorized under different heads:

> *"a) Acted contrary to the principles of APTEL/MYT Order/Statutes/Regulations.*
>
> ***Issue No.1-*** *Non Truing-UP of the capitalization for the current year Trued Up (i.e. FY 2013-14) and From FY 2005-06 onwards till FY 2012-13.*
>
> ***Issue No.2-*** *Erroneous consideration of reversal of doubtful debt for FY 2007-08, FY 2008-09 & FY 2010-11 as non-tariff income.*

Issue No.3- *Non Compliance by the Learned Commission of its own directive regarding year end provision for power purchase cost.*

Issue No.4- *Disallowance of rebate provided by the Appellant while selling surplus power.*

Issue No.5- *Erroneous computation of normative rebate on power purchase cost.*

Issue No.12- *Wrongful deduction of interest/ short-term capital gain from the ARR for the year 2013-14.*

Issue No.14- *8% Deficit Recovery Surcharge (DRS) excluded from the collection for the year 2013-14.*

Issue No.15- *Own consumption of the Distribution Licensee.*

Issue No.16- *Disallowance of Other Expenses.*

Issue No.17- *Wrongful consideration of income from generation business of the Appellant as Income from Other Business for FY 2013-14.*

Issue No.18- *Non-Allowance of expenses incurrent on other business income whilst considering the income from other business as non-tariff income for reduction in ARR for FY 2013-14.*

Issue No.19- *Erroneous allowance of depreciation rate for FY 2013-14.*

Issue No.20- *Non-Allowance of Income Tax.*

Issue No.21- *Wrongful reopening and reconsideration of interest / short term capital gain for year 2007-08 t 2011-12 as Non-Tariff Income for the purpose of ARR which was earlier allowed to the Appellant based on APTEL Judgment.*

Issue No.22- *Wrongful disallowance of trading margin paid to TPTCL.*

Issue No.23- *Erroneous adjustment of 8% Deficit Revenue Surcharge (DRS) from the revenue gap/surplus for the year instead of reducing the same from carrying cost.*

Issue No.26- *Erroneous adoption of consumer contribution values for computation of means of financing of the assets capitalized.*

Issue No.36- *Erroneous double deduction of year end negative Power Purchase Provisions from the trued up Power Purchase Cost for FY 2013-14 contrary to Learned Commission's own directive under MYT Order.*

Issue No.37- *Erroneous directive of the Learned Commission in relation of putting contingency limit of 3% on sale under UI.*

Issue No.39- *Lower allowance of working capital for FY 2013-14 & FY 2014-15.*

Issue No.43- *Wrongly reversal of material cost of Rs.3.36 Cr & Rs.4.12 Cr incurred towards maintenance of street light for the year 2010-11 and 2011-12 respectively.*

Issue No.44- *Adoption of erroneous methodology for computation of WACC.*

Issue No.46- *Erroneous implementation of judgment of this Hon'ble Tribunal in relation to the employee expenses and A&G expenses.*

Issue No.47- *Non-implementation of this Hon'ble tribunal's Judgment with respect to the imposition of efficiency factor on O&M expenses for the year 2011-12.*

Issue No.50- *Adoption of erroneous methodology for decapitalization of retired/replaced assets.*

Issue No.51- *Non-revision of 'K' factor due to revision in GFA.*

Issue No.54- *Wrongful re-opening of previous year's tariff order which have attained finality.*

Issue No.57- *Erroneous consideration of 4% efficiency factor for FY 2015-16.*

Issue No.58- *Erroneous consideration of cost of debt for the purpose of computation of WACC for financial year 2015-16.*

Issue No.59- *Erroneous consideration of lower cost of debt for computation of rate of carrying cost for FY 2013-14.*

Issue No.60- *Lower consideration of cost of debt for the purpose of computation of rate of carrying cost for FY 2015-16.*

Issue No.61- *Re-determination of AT&C loss trajectory for second control period (FY 2012-13 to 2014-15).*

Issue No.62- *Non-consideration of short term Open Access charges.*

Issue No.63- *Penalty on cash collection about Rs.4000.*

Issue No.67- *Non consideration of projected capitalization for FY 2015-16 in accordance with Tariff Regulations, 2011.*

b) *Clerical / Computation/ Oversight by the Learned Commission.*

Issue No.6- *Non-consideration of repayment of APDRP loan by the Appellant during the year 2005-06 and 2006-07.*

Issue No.7- *Clerical error in applying 'K' factor leading to lower allowance of R&M expenses for the period FY 2007-08 to FY 2010-11.*

Issue No.9- *Erroneous increase in revenue available while revising financing cost of LPSC from FY 2007-08 to FY 2011-12.*

Issue No.10- *Lower consideration of Power Purchase Cost for the year 2007-08.*

Issue No.25- *Erroneous adoption of equity addition towards working capital during FY 2008-09 and 2009-10.*

Issue No.28- *Non consideration of CISF expenses allowed by the Tariff Order dated 23.07.2014.*

Issue No.30- *Erroneous computation of ARR due to reduction of interest capitalized for the FY 2007-08 contrary to its own findings under the Tariff Order of 2011.*

Issue No.45- *Erroneous consideration of employee expenses for the year 2007-08.*

Issue No.53- *Erroneous consideration of inflated revenue billed.*

Issue No.65- *Erroneous consideration of 8% inflation factor instead of 8.04% inflation factor.*

Issue No.69- *Erroneous adoption of bille revenue for the year 2010-11 while computing the working capital requirement.*

Issue No.70- *Clerical error for non-allowance of direct expenses under other business income.*

c) Non-Implementation of the Previous Judgments / Orders.

Issue No.8- *Erroneous allowance of cost of debt for computation of WACC for the FY 2007-08 to FY 2011-12.*

Issue No.11- *Erroneous allowance of LPSC financing cost for FY 2007-08 to FY 2011-12.*

Issue No.13- *Non-Allowance of incentive earned towards maintenance of street light for the year 2013-14.*

Issue No.27- *Wrongful deduction of UI penal charges.*

Issue No.41- *Carrying costs for FY 2007-08 to FY 2012-13 allowed at rates lower than the prevailing market rate for the revenue gap loans.*

Issue No.42- *Lower allowance of financing cost on Late Payment Surcharge (LPSC) for FY 2013-14.*

Issue No.52- *Non-Implementation of Judgment of this Hon'ble Tribunal in Appeal 171/2012 with respect to computation of 'K' factor for the second control period (FY 2012-13 to 2014-15).*

Issue No.55- *Non-Implementation of this Hon'ble Tribunal's Judgment with respect to allowance of food and children allowance.*

d) <u>Pending adjudication before the APTEL/DERC.</u>

Issue No.24- *Wrongful deduction of equity capital related to working capital in relation to FY 2007-08 to FY 2011-12.*

Issue No.26- *Erroneous adoption of consumer contribution values for computation of means of financing of the assets capitalized.*

Issue No.27- *Wrongful deduction of UI penal charges.*

e) <u>Others.</u>

Issue No.29- *Erroneous inclusion of interest on account of late payment of UI Charges.*

Issue No.31- *Wrongful dis-allowance of Power Purchase Cost on the erroneous pretext of non-adherence of merit order dispatch principle.*

Issue No.32- *Disallowance of Power Purchase Cost from Anta, Auriya and Dadri Gas plants in FY 2012-13.*

Issue No.33- *Swaping of costly power from DYPL to TPDDL and cheaper power from TPDDL to BYPL for FY 2015-16.*

Issue No.34- *Wrongful disallowance of expenditure to be incurred under the head 'Corporate Social Responsibility in the FY 2015-16'.*

Issue No.35- *Disallowance of claim of year wise tariff from the three solar power plants of TPDDL-G.*

Issue No.38- *Disallowance of Power Purchase Cost – Single Day bilateral transaction.*

Issue No.40- *Erroneous computation of cost of debt for Capex and working capital.*

Issue No.48- *Disallowance of Power Purchase Cost on account of overlapping baking transaction.*

Issue No.49- *Disallowance of Power Purchase Cost from Rithala Power plant.*

Issue No.56- *Non-Consideration of accumulated depreciation allowed on the assets decapitalization while computing the regulated rate base (RBR).*

Issue No.64- *Wrongful insistence on submission of internal audit reports.*

Issue No.66- *Erroneous disallowance of Power Purchase Cost of Power produced from Anta, Auriya and Dadri Power Plant in FY 2012-13 (Arrears).*

Issue No.68- *Erroneous consideration of projected weightage average cost for computation of PPAC in the FY 2015-16.*

Issue No.71- *Erroneous computation of APPC for the purpose of allowance of solar tariff for the Keshvpura, DSIDC Grid and CENNET Solar Power Plant for the FY 2013-14.*

Issue No.72- *Erroneous direction for incorporating category wise billing and collection of information in the audited annual statements of the Appellant.*

Issue No.73- *Erroneous direction for maintaining segment wise audited report for such identifiable business segment.*

Issue No.74- *Erroneous direction to provide funding for liability of the retired employee/ to be retired FRSR employees in the ARR filing.*

Issue No.75- *Public Hearing of Tariff Determination proceeding for the Appellant held in derogation to the provisions of Electricity Act, 2003 and Regulations thereunder."*

7. We have heard Shri Amit Kapur and Shri Rahul Kinra, advocates on behalf of the appellant company, as well as Shri Dhananjay Baijal, advocate for the respondent Commission extensively on several dates. We have also perused the impugned order of the Commission and the entire record. The judgments cited by the learned counsels at Bar have also been perused as well as considered. We have also considered the written submissions filed by learned counsels.

8. At the very commencement of the hearing of the appeal, a brief note was submitted on behalf of appellant company wherein it has been stated that:-

(A) Twenty issues i.e. issue Nos.16(c), 35, 71, 61, 16(a), 57, 52, 24, 31, 49, 54, 41, 59, 60, 14, 17, 23, 27, 15, and 16(g) are covered by previous judicial proceedings. It is further stated that out of these 20 issues, three issues namely issue Nos.16(c), 35 and 71 have already been implemented, 11 issues namely issue Nos.61 & 16(a), 57, 52, 24, 31, 49, 54, 41, 59 and 60, are pending implementation by the Commission, and remaining six issues namely issue Nos. 14, 17, 23, 27, 15 and 16(g) have been already decided against the appellant.

(B) Seventeen issues namely issue Nos. 1, 20, 32, 72, 3, 20(a), 20(b), 20(c), 33, 34, 39, 62, 64, 67, 68, 73 and 75 are not being pressed by the appellant.

(C) Fourteen issues namely issue Nos.5, 12, 13, 16(b), 21, 28, 30, 42, 45, 66, 4, 10, 47, and 55, have been implemented in the subsequent tariff orders dated 31.08.2017, 28.03.2018 and 30.09.2021.

(D) Five issues namely issue Nos.6, 7, 26, 51 and 69, suffer from admitted errors.

(E) Only 27 issues namely issue Nos. 2, 8, 9, 11, 16(d), 16(e), 16(f), 18, 19, 22, 25, 29, 36, 37, 38, 40 & 58, 43, 44, 46, 48, 50, 53, 56, 63, 65, 70, and 74, remain for consideration / adjudication of this Tribunal.

9. In the affidavit dated 10.02.2024 filed on behalf of the respondent Commission by its Secretary, it has been stated that the Commission will give effect to issue Nos.61, 16(a), 31 and 49, in terms of the settled judgments of this Tribunal in the next true-up/tariff order of the appellant company and the implementation of the same shall be subject to final outcome of pending appeals in the Hon'ble Supreme Court. It has further been stated that the Commission will also address the clerical / typographical errors with regards to issue Nos.6, 7, 26 and 69, and would implement the same to the extent assailed in the present appeal, in the next true-up / tariff order of the appellant company. It is also stated in the affidavit that the issue Nos.57, 52, and 24, have been implemented by the Commission in the tariff order dated 30.09.2021 and the appellant has even preferred an appeal bearing no.334/2022 against the said tariff order and the grievances of the appellant, if any, would be addressed by this Tribunal in the said appeal.

With regards to issue Nos.41, 59, and 60, it is stated in the affidavit that these issues have come up for the first time in the appellant's note dated 12.12.2023 under the hearing "covered by previous precedents" i.e. order dated 15.12.2022 passed by Hon'ble Supreme Court in Civil Appeal No.9003-9004 of 2021, but, it is to be clarified that the said order was passed by the Hon'ble Supreme Court vis-à-vis another party's dispute i.e. between BSES and Respondent Commission which does not enure to the appellant's case herein and accordingly, submissions on the issues are required to be made on behalf of the Commission during the hearing.

10. During the course of arguments issue Nos.18, 40, 58, 50, 70 and 74 were withdrawn on behalf of the Appellant. However, the Commission has raised dispute on four issues namely Issue Nos.51, 41, 59 and 60.

11. Hence, in view of these rival contentions of the parties, only following 26 issues are to be adjudicated upon by us in the appeal. These are issue Nos.2, 8, 9, 11, 16(d), 16(e), 16(f), 19, 22, 25, 29, 36, 37, 38, 41, 43, 44, 46, 48, 51, 53, 56, 59, 60, 63 and 65.

12. We shall now take all these issues for consideration and adjudication one by one.

Issue No.2- Erroneous consideration of reversal of doubtful debt for FY 2007-08, FY 2008-09 & FY 2010-11 as non-tariff income.

13. The findings of the Commission on this issue are as under:

"Income from write back of excess provisions for doubtful debts

Commission Analysis

*3.71 As per Regulation 5.23 of MYT Regulation 2007, the **miscellaneous receipts from the consumers shall constitute non-tariff income of the licensee**. Write back of provision for doubtful debts related to recovery of debts form part of the miscellaneous receipts of the Petitioner. **The Commission is of the view that the target of AT&C loss has been fixed by considering the collection efficiency at 99.50% with a scope of 0.50% provisions for bad/doubtful debts. Therefore, any recovery on account of bad and doubtful debts shall constitute non-tariff income of the licensee to the extent of 0.50% provision on debtors.** Accordingly, the income on account of any such write back of provision for doubtful/bad debts is considered as Non-tariff income.*

Table 3.10: Income from write back of provisions for doubtful debts for 1st MYT Control period

(Rs. Crore)

S. No.	***Financial Year***	***Excess provisions for doubtful debt***
1	*FY 2007-08*	*0.17*
2	*FY 2008-09*	*1.1*
3	*FY 2009-10*	*-*
4	*FY 2010-11*	*16.18*
5	*FY 2011-12*	*-*
6	***Total***	***17.45***

*[**Emphasis Supplied**]* ”

14. It was submitted by the learned counsel for the appellant that the approach of the Commission in reopening the previous tariff orders and considering write back of doubtful / bad debt for the previous financial years is wrongful and runs in the teeth of the judgment of Hon’ble Supreme Court dated 18.10.2022 in BRPL v. DERC, 2023 4 SCC 788 wherein it has been held that the truing-up exercise cannot be done retrospectively to change the methodology / principles of tariff determination and to reopen the original tariff determination order thereby setting at naught the tariff determination process at the stage of truing-up. In this regard, reliance has been placed on a judgment of this tribunal also in TPDDL v. DERC 2019 SCC OnLine APTEL 106. It is submitted that the Commission has mechanically considered an accounting entry in the financial accounting of the appellant to treat write back provision for doubtful/ bad debt as an additional income over and above the amount that has been recovered and orally declared by appellants towards collection from sale of energy.

15. Referring to Regulation 5.23 of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulation, 2007, it is argued that Non Tariff Income (NTI) relates to any income incidental to electricity business. According to the learned counsel, the amounts that are recovered from liquidation of doubtful / bad dent represent arrears towards sale of energy by appellant that had not been recovered in the earlier years and such amounts recovered subsequently are already included in the actual collection from the distribution business of the appellant. These, amounts can no way be included as income incidental to electricity business. He also

referred to order dated 11.05.2010 passed by the Commission in review petition no.6 of 2009 wherein the Commission, after considering all the aspects of treatment of provision for doubtful debts had deducted Rs.0.17 crores that had been inadvertently included as part of Non Tariff Income in the FY 2007-08. He argued that vide the impugned order, the Commission has added the said amount of Rs.0.17 crores towards ARR of the appellant without any reason whatsoever and in disregard to its own order dated 11.05.2010. He would further argue that the such erroneous approach of the Commission in considering the reversal / write back of provision for doubtful / bad debts as part of Non Tariff Income is violative of "matching principle", which requires that in order to ascertain the profit made by the business during a period, "revenue" of the period should be matched with the costs (expenses) of that period. It is submitted that this principle has been applied by this Tribunal in judgment dated 10.04.2008 in Appeal Nos.86 and 87 of 2007 titled Maharashtra State Power Generation Company Limited v. MERC and Ors., 2010, ELR (APTEL) 0189.

16. According to the learned counsel, the Commission has allowed similar claims of the other distribution licensees in their respective tariff orders dated 31.08.2017, and therefore, similar treatment ought to have been given to the appellant as well.

17. Per contra, learned counsel for the respondent Commission argued that as per regulation 5.23 of MYT Regulations, 2007, the miscellaneous receipt from the consumer shall constitute Non Tariff Income of the licensee, as the write back of provision of doubtful debts related to recovery of debts forms part of miscellaneous receipts of the appellant. It is submitted that any

reversal of provision for doubtful debts in the books of accounts indicates that revenue received against such debts earlier provisioned and the appellant takes benefit of such bad debts recovered by way of higher revenue collection and consequently, AT&C incentives. The learned counsel argued that by allowing reduction of such amount recovered on account of bad debts from Non Tariff Income, appellant would unjustifiably get double benefit of impugned AT&C incentives as well as reduction in the amount of Non Tariff Income. He would further submit that target of AT&C losses has been fixed by considering the collection efficiency at 99.5% with the scope of 0.5% provision for bad / doubtful debts and thus, any recovery on account of bad / doubtful debt shall constitute Non Tariff Income of the licensee to the extent of 0.5% provisioned on debtors.

Our View:

18. It is important to take a note of Regulation 5.23 pertaining to incomes which are incidental to the electricity business. The Appellant argued that the issue relates to an accounting entry in its books of accounts and has nothing to do with actual income in that financial year, accordingly, there is no question of Regulation 5.23 applying to the issue at hand or these entries being treated as NTI.

19. It is further argued on behalf of the appellant that the State Commission has erred in fixing the target for AT&C loss based on considering the collection efficiency at 99.50% with a scope of 0.50% provisions for bad/doubtful debts and as such, any recovery on account of bad and doubtful debts shall constitute non-tariff income of the licensee to the extent of 0.50%.

20. Looked at differently, the Appellant is also right in contending that if the State Commission's rationale of collection efficiency allowed to the Appellant as 99.50% for true up was to be accepted, then the collection over and above 99.50% of the total collection should entirely be passed on to the Appellant, which clearly has not been done. Therefore, there is no force in the argument of the State Commission that while fixing targets for collection efficiency, it had left a scope of bad debts at 0.50%.

21. We, also, are unable to countenance the view of the Commission firstly, for the reason that in view of the judgment of Hon'ble Supreme Court in BRPL case (supra) and judgment of this Tribunal in TPDDL v. DERC (supra), the Commission could not have reopened / reexamined the previous years' tariff orders to change the methodology / principles of tariff determination. Consequently, any amount recovered as bad debt from the consumers of electricity is the energy income which needs to be included in the amount collected during the year as the same is received against the amount billed in the previous years. We may note that every distribution licensee is required to maintain separate accounting books as mandated under the Companies Act as well as the Electricity Act, 2003. They also create, from time to time, provision for doubtful debts where recovery of amounts against sale of energy appears to be doubtful in the relevant financial year. This is done to ensure compliance of the financial principle of conservative and more realistic reflection of income in the financial books of the company for information of shareholders. Therefore, the amount so recovered as doubtful / bad debt cannot be termed as "miscellaneous receipts" which constitute Non Tariff Income of the licensee. It is clear that the Commission has failed to appreciate the actual nature of such amount

recovered by the appellant during the financial year in question, and therefore, such income shall have to be reduced from Non Tariff Income of the relevant year. Such an approach would be in consonance with the matching principle of accounting explained by the Hon'ble Supreme Court in JK Industries Limited v. UoI 2007 13 SCC 673 in the following words:

> ***"Matching principle***
>
> ***150.*** *Matching concept is based on the accounting period concept. The paramount object of running a business is to earn profit.* ***In order to ascertain the profit made by the business during a period, it is necessary that "revenues" of the period should be matched with the costs (expenses) of that period.*** *In other words, income made by the business during a period can be measured only with the revenue earned during a period as compared with the expenditure incurred for earning that revenue. However, in cases of mergers and acquisitions, companies sometimes undertake to defer revenue expenditure over future years which brings in the concept of deferred tax accounting. Therefore, today it cannot be said that the concept of accrual is limited to one year.*
>
> ***151.*** *It is a principle of recognising costs (expenses) against revenues or against the relevant time period in order to determine the periodic income. This principle is an important component of accrual basis of accounting. As stated above,* ***the object of AS 22 is to reconcile the matching principle with the fair valuation principles.*** *It*

may be noted that recognition, measurement and disclosure of various items of income, expenses, assets and liabilities is done only by accounting standards and not by provisions of the Companies Act."

22. The approach of the Commission in considering the doubtful / bad debt as part of Non Tariff Income and reducing it from the ARR is in clear violation of the matching principle as well as the accounting norms / standards.

23. Accordingly, we set aside the findings of the Commission on this issue and direct that the miscellaneous receipts from the consumers shall not constitute non-tariff income of the licensee.

Issue No.8- *<u>Erroneous allowance of cost of debt for computation of WACC for the FY 2007-08 to FY 2011-12.</u>*

24. This issue relates to consideration of rate of interest for the debt of the appellant for computation of WACC (Weighted Average Cost of Capital) for the FY 2007-08 to 2011-12.

25. The Commission had provisionally considered the actual rate of debt as submitted by the appellant for the purposes of WACC during the FY 2011-12 at Rs.10.17%. it has been observed by the Commission that SBI PLR had deviated by more than 1% during the FY 2011-12 due to which the normative growth in the rate of debt could not be applied. It is stated that SBI PLR had deviated by 2.13% over the previous year in FY 2011-12 and

thus, the Commission decided to restrict the rate of debt for FY 2011-12 to the rate of debt as approved for the FY 2010-11 plus 2.13% subject to actual rate of debt as incurred by the DISCOM. The Commission observed that the appellants actual rate of debt being 10.17% which was lesser than the growth as projected, and therefore, retained rate of interest for debt in case of appellant for FY 2011-12 at 10.17%.

26. It is argued on behalf of the appellant that the rate of 10.17% for FY 2011-12 considered by the Commission is arbitrary and even not equal to the actual rate suffered by the appellant for the notional loans. It is submitted that the actual rate of interest for the appellant for the FY 2011-12 is 10.86% based on weighted average of the actual and notional loans including working capital. It is further pointed out that the approach of the Commission in this regard is contrary to its own tariff order dated 29.09.2015 in case of BSES Discoms namely BSES Rajdhani Power Limited (BRPL) and BSES Yamuna Power Limited (BYPL) wherein the Commission has revised the rate of interest applicable for FY 2011-12 based on actual variation in the average rate of SBIPLR from FY 2010-11 to FY 2011-12 of 2.13%.

27. It is further argued that undisputably, the SBIPLR has deviated by more than 1% from FY 2007-08 till FY 2011-12, as upheld by this Tribunal also in Appeal Nos. 61 & 62 of 2012 BRPL v. DERC 2014 SCC OnLine APTEL 196, and therefore, appellant also deserves the same treatment as given to the BSES Discoms by allowing the following rate of interest as cost of debt for its CapEx loan / working capital loan.

"

Year	Base Rate Allowed	Average PLR during the year**	Average PLR of Base Year*	Movement	Effective rate for New Loans
	A	B	C	D = B-C	E = A+D
FY 07-08	9.50%	12.69%	11.08%	1.61%	11.11%
FY 08-09	9.50%	12.79%	11.08%	1.71%	11.21%
FY 09-10	9.50%	11.87%	11.08%	0.79%	9.50%***
FY 10-11	9.50%	12.26%	11.08%	1.18%	10.68%
FY 11-12	9.50%	14.40%	11.08%	3.32%	12.82%

*	*Table 3.8.1.25 - Base Year value as of FY 06-07*

**	*Table 3.8.1.25- During the year value as of FY 07-08 to FY 11-12*

**	*'I' as the moment for the FY 09-10 is less than (+1%, hence 9.50% interest rate has been considered "*

28. On behalf of the respondent Commission, it is argued that the appellant only wants unjust enrichment in the form of additional interest on loan on normative basis over and above the actual interest paid by the Appellant during FY 2011-12.

Our View:

29. The issue pertains to the true-up of the cost of debt for the computation of WACC for the first MYT control period, i.e. FY 2007-08 to FY 2011-12 by the State Commission. It is the case of the Appellant that the State Commission has failed to true-up the cost of debt in terms of the judgments of this Tribunal.

30. It has been the stand of the State Commission that in case there is a deviation in SBI PLR rates by 1% (on either side) it would true up the interest rates for loans taken for capital investments and for working capital requirement. Therefore, the sole question which arises for our consideration is whether there was a deviation in the SBI PLR rates by 1% (on either side) during this control period to warrant a true up.

31. Upon consideration of the rival submissions made on behalf of the parties and taking note of the judgment of this Tribunal in Appeal No.36/2008 BSES Rajdhani Power Limited v. DERC decided on 06.10.2009, we do not find the approach of the Commission justified. We find it apposite to quote Para No.115 of the said judgment hereunder: -

> *"115. Further, the Commission has at the very outset said that it shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement if there is a deviation in the PLR of the scheduled commercial banks by more than 1 per cent on either side. Thus, there is sufficient safeguard for the Appellant and sufficient room to procure loans at the given market rate of interest. We are not inclined to interfere with the Commission's decision on the approval of interest rate."*

32. Thus, it was the statement of the Commission itself given to this Tribunal, that if there is a deviation in the PLR of the scheduled commercial

banks by more than 1% on either side, they shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement accordingly. In this case it is not disputed by the Commission that there has been variation of more than 1% in SBIPLR for the FY 2011-12. In similar circumstances, the Commission has, vide its tariff order dated 29.09.2015 for BRPL and BYPL, revised the rate of interest to 11.29%. The relevant portion of the order is reproduced hereunder:

> *"3.32 The Commission had provisionally allowed the actual rate of interest for FY 2011-12.* ***It is observed that the SBI PLR varied by 2.13% in FY 2011-12 over the previous year****, while the DISCOM was provisionally allowed the interest rate at 4.91% above the normative interest rate for FY 2010-11 in the Tariff Order dated July 2013.* ***The Commission has decided to revise the rate of interest applicable to FY 2011-12 based on actual variation in average rate for SBI PLR from FY 2010- 11 to FY 2011-12 of 2.13% and revised rate of Interest is 11.29% (9.16% 2.13%)****. Further, in view of the Hon'ble APTEL's direction in Appeal No 36 of 2008 and Appeal No. 61 & 62 of 2012, the Commission has filed a Clarificatory Application before the Hon'ble APTEL, therefore a view in the matter will be taken, as deemed fit and appropriate, after receipt of the direction of the Hon'ble APTEL In the said application."*

33. As, it is clear that SBI PLR varied by more than 1% during the period under consideration, thus requiring, true up of the interest rates for the Control Period. Hence, the State Commission, in accordance with its own submissions as recorded in the above judgment, was bound to true up the interest rate for the Control Period inasmuch as it was obligated to allow the actual rates qua the projections.

34. In this view of the matter, we find force in the contentions of the appellant and set aside the findings of the Commission on this issue. We direct the Commission to re-evaluate the WACC of the appellant for the FY 2007-08 to FY 2011-12 in terms of the statement given before this Tribunal in Appeal No.36/2008 considering the actual rate of interest for debt.

Issue No.9- *Erroneous increase in Revenue available while revising Financing Cost of LPSC from FY 2007-08 to FY 2011-12.*

35. The relevant portion of the impugned order of the Commission on this aspect is as under:-

> ***"LPSC Financing Cost***
> ***Petitioner's Submission***
>
> *3.56 The Petitioner, based on Judgment of Hon'ble APTEL in Appeal No.61 and 62 of 2012, has now sought the true up of working capital interest rate in 70:30 Debt:Equity ratio where cost of debt is considered equal to the rate now sought for true up and for 30%*

equity portion rate of return on equity is considered which is further grossed up for tax.

Commission's Analysis

3.57 The approach followed by the Commission is that financing cost of outstanding dues on principal amount on which LPSC is levied at the same rate as that approved for working capital requirement. This matter has been upheld in the judgment in Appeal No. 14 of 2012 in favor of the Commission. Relevant extracts of the judgment are as below:

> *"135. Delhi Commission has submitted that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. The view taken by the Delhi Commission is correct and need not be interfered with."*

3.58 Thus, in accordance with the above judgment, the rate of interest for funding of working capital is allowed towards the financing cost of LPSC of the Petitioner.

3.59 The issue relates to 1st control period of FY 2007-08 to FY 2011-12 pertaining to allowance of lower interest rate which was originally covered under Appeal No. 36 of 2008. Relevant extracts of the judgment are as below:

> *"The Appellant (BRPL) asked for approval of interest rate at 11.50% on its borrowings for repayment tenure of 10 years. The Commission observed that the appellant has managed to procure funds at a lower rate than the SBI PLR. Based on the observations the Commission has allowed interest at 9.50%.*

....

115 Further the Commission has at the very outset said that it shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement, if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side. Thus there is sufficient safeguard for the appellant and sufficient room to procure loans at the given market rate of interest. We are not inclined to interfere with the Commission's decision on the approval of interest rate".

3.60 It was observed by Hon'ble APTEL that interest rate for new loans to be taken for Capex and working

capital shall be trued up if there is a deviation in the PLR by more than 1% on either side and there is safeguard for the appellant. As the SBI PLR has not deviated from FY 2007-08 to FY 2010-11 by more than 1% on either side, therefore the Commission has not revised the interest rate from FY 2007-08 to FY 2010-11.

3.61 Further, in view of the Hon'ble APTEL's direction in Appeal No. 36 of 2008 and Appeal No. 61 & 62 of 2012, the Commission has filed a Clarificatory Application before Hon'ble APTEL therefore a view in the matter will be taken, as deemed fit and appropriate, after receipt of the direction of the Hon'ble APTEL in the said application.

3.62 The Commission provisionally allows the rate of interest as considered for the purpose of working capital. The revised impact of financing cost of LPSC is as follows:

Table 3.7: Revision in financing cost of LPSC

Sl. No.	Particulars	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12	Remarks
A	LPSC Collected	15.28	14.12	16.09	17.44	21.14	
B	Principal Amount	84.89	78.44	89.39	96.89	117.44	A/18%
C	Rate of Interest as applied	9.50%	9.50%	9.50%	9.50%	11.43%	As earlier

							applied
D	Financing Cost of LPSC - in Non-Tariff Income	8.06	7.45	8.49	9.20	13.42	B*C
E	Net LPSC	7.22	6.67	7.60	8,24	7.72	A-D
F	Revision in LPSC						
G	Revised rate for funding of Working Capital	11.23%	11.28%	11.30%	11.30%	11.92%	WACC Rates
H	Financing Cost of LPSC	9.54	8.84	10.10	10.95	14.00	B*G
I	Net LPSC	5.74	5.28	5.99	6.49	7.14	A-H
J	Net LPSC now adjusted to revenue available - increase in revenue collected	1.47	1.39	1.61	1.75	0.57	E-1

…

Revenue Available Towards ARR

*3.196 **In view of judgment of Hon'ble APTEL on financing cost of LPSC, the net LPSC to be reduced from revenue available towards ARR is now revised**. The revised Revenue available towards ARR is as follows:*

Table 3.59: Revised Revenue Available towards ARR for FY 2007-08 to FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12	FY 2012-13	Remarks
A	Revenue Available towards ARR as earlier trued up	2,170.07	2,344.58	2,567.42	2,802.60	3,310.10	4,436.00	Resp. Tariff Orders
B	Increase in Revenue Available due to change in	1.47	1.39	1.61	1.75	0.57		Table 3.7

	financing cost of LPSC							
C	*Revised Revenue available towards ARR*	*2,171.54*	*2,345.97*	*2,569.03*	*2,804.35*	*3,310.67*	*4,436.00*	*A + B*
D	*Annual Revenue Requirement*	*2,257.00*	*2,278.81*	*3,089.89*	*3,619.02*	*4,498.74*	*4,630.92*	*Table 3.55*
E	*Revenue Surplus/(Gap) During the year*	*(85.45)*	*67.16*	*(520.87)*	*(814.68]*	*(1,188.07)*	*(194.92)*	*C-D*

"

36. As per the submission made on behalf of the appellant, it is a classic case of "what is given by one hand is taken away by the other". It is argued that on the one hand, the Commission has allowed additional Financing Cost of LPSC to show compliance with the judgment of this of this Tribunal in Appeal No.14/2012 NDPL v. DERC (2013) SCC OnLine (APTEL) 140 but on the other hand, the Commission has taken it back by increasing the revenue available with the same amount, and in this way, despite agreeing to provide additional LPSC Financing Cost, the Commission has denied the appellant its legitimate expenses. It is further argued that the Commission has failed to appreciate that full amount of LPSC has already been deducted in arriving at the revenue available with the appellant towards ARR in earlier year's tariff orders and present expense is only a differential amount of Financing Cost of LPSC revised by the Commission purportedly in compliance of the judgment of this Tribunal in above mentioned appeal No.14/2012. It is stated that Financing Cost of LPSC should only be added to the expenses to be allowed in ARR. The learned counsel further pointed out that the findings of

the Commission in this regard in the impugned order are in contradiction to the earlier approach adopted by the Commission itself in tariff orders for 2009-2011 where additional LPSC Financing Cost was added to the amount of ARR and not to revenue available. Reliance is placed upon the judgment of the Supreme Court in BRPL v. DERC (2023) 4 SCC 788 in support of the submissions.

37. On behalf of the Commission, it is argued that the appellant's claim is factually incorrect. Learned counsel for the Commission submitted that the Commission has not deviated from settled principles. It is pointed out that the total LPSC collected by the appellant during FY 2010-11 in the amount of Rs.17.44 crore has been divided into two parts. The first part is LPSC Financing Cost of Rs.19.95 crore which has been allowed to be retained by the appellant and balance amount of LPSC Rs.6.49 crore has been considered as revenue available with the appellant, which is in consonance with the methodology adopted by the Commission for computation of revenue available in the tariff order dated 29.09.2015 and 13.07.2012.

Our View:

38. We note that the full amount of LPSC has already been deducted in arriving at the revenue available with the appellant towards ARR in the tariff orders related to the previous years. The amount in dispute is the differential amount of Financing Cost of LPSC which has been revised by the Commission in compliance to the judgment of this Tribunal in appeal No.14/2012. We are in agreement with the submissions made on behalf of the appellant that any change in the Financing Cost of LPSC will not affect the revenue available towards ARR and deducting the Financing Cost of

LPSC from the ARR is neither justified nor in consonance with the principle laid down by this Tribunal in above noted judgment in appeal No.14/2012. On this aspect, following observations of the Hon'ble Supreme Court in BRPL v. DERC (supra) are also pertinent: -

> *"**61.** However, while truing up for the year in question, the DERC has retrospectively sought to take away part of the LPSC revenue by deducting the financing cost on LPSC in comparing the actual collection efficiency with the projected collection efficiency. Hence, **allowing the financing costs on LPSC revenue and then deducting it from the LPSC revenue would tantamount to giving by one hand and taking it away by the other. This order of the DERC is contrary to the original MYT determination.**"*

39. These observations of the Hon'ble Supreme Court clearly fortify our views on this issue. The Commission while allowing the additional Financing Cost of LPSC and then considering it as revenue available with the appellant has "given by one hand and taken away by the other". Such approach of the Commission in allowing the financing cost on LPSC and then showing it as an increase in revenue, is impermissible.

40. Hence, we set aside the findings of the Commission contained in the impugned order on the issue under consideration and direct that the additional LPSC Financing Cost shall be added to the ARR and not to the revenue available with the appellant.

***Issue No.11-** Erroneous allowance of LPSC Financing Cost for FY 2007-08 to FY 2011-12.*

41. The Commission, vide impugned order, has while implementing the previous judgments of this Tribunal in Appeal No.14 of 2012 and appeal No.61 of 2012, allowed Financing Cost for LPSC @ interest on capital expenditure (CapEx). It may be noted that in the tariff petition, the appellant had sought revision of rate of LPSC Financing based on the movement of SBI PLR wherein the cost of debt is based on the prevailing market rates for working capital in accordance with the judgment of this Tribunal in appeal No.61 of 2012.

42. It is argued on behalf of the appellant that although the Commission observes in Para 3.62 of the impugned order that for the purpose of financing of LPSC, the rate of interest will be same as considered for working capital yet, while revising the Financing Cost of LPSC, has wrongly considered the rate of interest on debt used for financing of regulated rate base, thereby arbitrarily reducing the cost of Financing LPSC. It is submitted that the impugned order of the Commission on the aspect under consideration runs in the teeth of the findings given by this Tribunal in appeal No.14 of 2012 wherein it has been held that "Financing Cost of LPSC has to be at the same rate as that approved for working capital funding". It is pointed out that LPSC is levied on consumers who do not make payment of electricity bills within stipulated period and it compensates the licensee (such as the appellant herein) for the interest cost that is incurred on the additional working capital requirement due to the consumers not paying their dues in time.

Accordingly, the rate of LPSC has to be considered same as the rate of interest incurred to arrange funds to meet the shortfall in the working capital due to the such delay in collection.

43. On behalf of the Commission, it is argued that rate of LPSC has no direct co-relation with the appellant's Financing Cost and it has been held by this Tribunal in the judgment in appeal No.14 of 2012 that LPSC cost is nothing but the financing of additional working capital to make up for any shortfall. It is submitted that methodology sought to be used by the appellant in using weighted average of SBI PLR instead of SBI PLR on 1st April of each year of the control period is in contravention to the methodology laid down in 2008 tariff order which has been upheld by this Tribunal in BRPL v. DERC (2009) ELR (APTEL) 880. It is, further submitted that there was no difference in the rates of working capital and CapEx and this methodology once adopted in tariff order cannot be changed at the stage of truing up in view of the findings of the Hon'ble Supreme Court in BRPL v. DERC 2023 4 SCC 788. Thus, it is argued that the appellant has not made out a case for interference by this Tribunal into the findings of the Commission on this issue.

Our View:

44. We note that LPSC i.e. Late Payment Surcharge is levied by a distribution licensee on the consumers who do not pay the electricity bills within stipulated period. This compensates the licensee for the interest cost that is incurred on the additional working capital requirement due to such consumers not paying their bills in time. Therefore, we feel in agreement with the submissions made on behalf of the appellant that financing of LPSC cost

is nothing but the financing of additional working capital to make up for any shortfall. Interestingly, the Commission has also reiterated this legal position in Para No.5 of its written submissions on this issue.

45. Therefore, the issue under consideration, in essence, relates to the nature of appellant's financing of its working capital requirement due to any shortfall in receivables from what the appellant billed in a particular month.

46. While making submissions on this issue, both the parties have placed reliance on previous judgment of this Tribunal in Appeal No.14 of 2012 NDPL v. DERC (2013) SCC OnLine (APTEL) 140. We find it profitable to quote Para 135 of the said judgment hereunder:-

> *"135. The Appellant has submitted that the financing of LPSC is required to meet the requirements of working capital. Delhi Commission has submitted that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. The view taken by the Delhi Commission is correct and need not be interfered with."*

47. In view of the above noted findings of this Tribunal, it is manifest that Financing Cost of LPSC should be worked out at the same rate as approved for working capital funding. Therefore, it is evident that the Commission has erred in not applying the ratio of the above noted judgment of this Tribunal

in Para No.14 of 2012 to the instant case and in allowing the Financing Cost for LPSC @ interest on CapEx.

48. Accordingly, we set aside the findings of the Commission on this issue and direct the Commission to redetermine the Financing Cost of LPSC in terms of the above noted judgment of this Tribunal in appeal No.14 of 2012.

Issue No.16(d): *Increase in LC (Letter of Credit) Charges.*
Issue No.16(e): *Cost of Auditor's Certificate.*
Issue No.16(f): *Credit Rating Fee.*

49. All the three issues are taken together for disposal as they appear to be inter-related and have been disallowed by the Commission on the identical reasoning. The impugned findings of the Commission in the tariff order are necessary to be quoted hereunder:-

> *"**Other expenses***
> *3.346 The Petitioner has claimed Rs. 5.66 Crore towards other uncontrollable cost/expenses in the Truing up for FY 2013-14 as detailed in the Table below:*
>
> ***Table 3.95: Other uncontrollable Costs/Expenses claimed in Truing up for FY 2013-14 (Rs. Crore)***

SI. No.	*Particulars*	*Petitioner's Submission*
...	...	...

7	Cost of Auditor Certificate	0.09
...	...	...

Commission Analysis

3.347 The Petitioner has claimed additional expenses over and above the approved normative O&M expenses as other expenses in the truing up for FY 2013-14.

3.348 The Commission has reviewed the additional expenses claimed by the Petitioner for FY 2013-14. The A&G expenses for FY 2013-14 in MYT order dated 13.07.2012 has been determined based on the actual A&G expenses incurred by the Petitioner as per the audited financial statements adjusted by certain expenses. The Commission elaborately discussed the methodology followed for arriving at the A&G expenses for the MYT period of FY 2012-13 to FY 2014-15 in the MYT order dated July 13, 2012.

3.349 The Commission has considered the actual A&G expenses of the Petitioner while determining the normative A&G expenses for MYT period FY 2012-13 to FY 2014-15. ***The Commission, accordingly, disallows the claims of the Petitioner for the***

following miscellaneous expenses as these expenses have already been considered as part of the A&G expenses during the base year i.e. FY 2010-11.

a. Cost of auditor certificate

b. Credit Rating fees."

…

"…

d. Increase in LC charges

Petitioner's Submission

The Petitioner has claimed Rs. 0.59 Crore towards increase in LC charges.

Commission's Analysis

The APTEL in Appeal No.14 of 2012 has adjudged "under MYT Regulations controllable expenses are allowed on normative basis. There are many sub-parameters under the head A&G expenses. It cannot be the case that one of the parameters, where the appellant has suffered loss, ***is taken on actual basis and other parameters are taken on normative basis. Accordingly, the Commission has not considered the increase in LC charges as it is part of normative A&G expenditure****."*

<u>Our View:</u>

50. It is, thus, evident that the Commission has disallowed the increase in LC charges on the finding that these are not part of normative A&G

(Administrative and General) expenditure, whereas it has disallowed the claims of the appellant towards cost of Auditor's Certificate and Credit Rating Fee on the reasoning that these expenses have already been considered as part of A&G expenses during the base year i.e. FY 2010-11.

51. Learned counsel for the appellant submitted that the Commission had rendered identical findings in the tariff order dated 23.07.2014 also while truing up expenses of the appellant for the FY 2012-13 thereby disallowing the expenses towards LC Charges, cost of Auditor's Certificate and Credit Rating Fees. It is pointed out that the appellant had challenged these findings of the Commission before this Tribunal by way of appeal No.246 of 2014 and in the judgment reported as <u>TPDDL v. DERC (2019) SCC OnLine (APTEL) 106</u>, this Tribunal observed that several uncontrollable expenses have been incurred by the appellant for the reasons beyond its control as well as in the interest of the consumers and accordingly decided the issues in favor of the appellant thereby directing the Commission to consider the claims of the appellant afresh. We find it pertinent to quote the relevant extract of the judgment of this Tribunal in the said appeal hereunder: -

> *"16.4.1 We have carefully gone through the rival submissions of learned counsel for the Appellant and learned counsel for the Respondent Commission and also taken note of the findings of this Tribunal in its judgment dated 10.02.2015 in Appeal No. 171 of 2012. It is not in dispute that the Appellant has actually incurred various expenses as claimed by it in the petition which the State Commission has disallowed*

while truing up for FY 2012-13 giving reasoning that these expenses are controllable. It is, however, seen that many of the expenses so claimed by the Appellant are in the category of uncontrollable in nature and need to be looked into by the Commission by adopting a judicious approach instead of disallowing all of them in totality. ***This Tribunal in its judgment dated 10.2.2015 in Appeal no. 171 of 2012 has held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and, therefore, ought to be allowed.***

16.4.2 We also take note of the provisions under Tariff Regulation 5.6 which specifies that the RoCE should cover all financing cost but financing cost incurred for obtaining the loans has not at all been factored in the cost of debt.

16.4.3 It is relevant to note that change in law relating to statutory levies cannot be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order and, thus, cannot be considered as part of the normative increase in expenses by the Respondent Commission. ***It is also noticed that apart from expenses incurred due to change in law, there are certain other expenses which have been incurred for the reasons not attributable to the Appellant but in the interest of consumers (such as credit rating***

fee) and if such expenses were not incurred by the Appellant, it would have burdened the consumers with higher interest, consequential higher tariff, carrying cost etc*. As the judgment of this Tribunal dated 10.02.2015 has been challenged by the Respondent Commission before the Hon'ble Apex Court and no stay has been granted against the operation of the said judgment, we are of the considered view that pending decision of the Hon'ble Apex Court* ***the various claims of the Appellant regarding statutory fee/charges should be looked into by the Respondent Commission afresh duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity. Accordingly, we decide this issue in favour of the Appellant."***

52. It is the submission of the learned counsel for the appellant that the Commission has failed to implement the above noted judgment of this Tribunal in appeal No.246 of 2014 in letter and spirit and therefore, the erroneous findings given in the impugned order on the issues under consideration cannot be sustained.

53. So far as the LC Charges are concerned, it is argued by the learned counsel that these are fixed at the instance of concerned bank and therefore, not within the control of the appellant. It is further pointed out that LCs are required to be maintained by the appellant under the various Power

Purchase Agreements approved by the Commission for making payments to the power generator and in case LC is not opened by the appellant, it will not be able to avail rebate on timely payments. It is argued that the Commission on the one hand grants normative rebate on power purchase and non-tariff income and on the other hand has disallowed the cost of opening the LC through which such normative rebate can be availed.

54. With regard to Auditor's Certificate, it is argued by the learned counsel that expenses on procuring it have not been incurred by the appellant for own purpose but for the purpose of complying with the directions of the Commission to submit Auditor's Certificate on various issues, and therefore, appellant had no control on these expenses.

55. In so far as Credit Rating Fee is concerned, it is submitted by the learned counsel that this expense is also uncontrollable. It is pointed out that these expenses are incurred so that the appellant is able to arrange loans at competitive rates and the Commission has itself recognized the fact that the interest rate of the appellant is lowest amongst all distribution companies. It is submitted that in the absence of credit rating, appellant would face difficulty in getting loan on competitive interest rates which would cause additional burden on consumers who would have to bear the increased interest cost as against meagre additional expenses incurred for credit rating resulting in net saving to consumers. It is argued that the Commission has disallowed claim of the appellant under this head without any reasons whatsoever.

56. On behalf of the Commission, it is argued that the contentions of the appellant under these heads are based on misreading of the governing

regulations i.e. Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations 2011 (hereinafter referred to as DERC 2011 MYT Regulations), as well as misunderstanding of the principles upon which normative Operating and Maintenance (O&M) expenses are granted. It is pointed out that Regulation 4 of these regulations lays down the principles to be followed by the Commission in determining the MYT tariff and for approval of ARR and in terms of this regulation the appellant was required to provide forecast for each year of control period in its business plan. It is argued that in terms of these regulations, not only are O&M expenses deemed to be controllable but the regulation also provides for an express bar on truing up of these expenses. It is also argued that the appellant cannot claim ignorance about these regulations for the reason that it had assailed the validity of these regulations before the Hon'ble High Court of Delhi by way of Writ Petition (Civil) 2203 of 2012 which was dismissed vide judgment dated 29.07.2016, thereby finding no fault in these regulations which provided for these costs to be granted on a normative basis and placing bar on their truing up on actual basis.

57. It is further argued by the learned counsel for the Commission that the Commission is bound by its regulations as well as the interpretation given to the regulation by the Hon'ble High Court, and therefore, it cannot make any departure from these regulations. It is submitted that in these circumstances, there is no occasion for the appellant to claim the expenses under these three heads on actuals and that too in a petition for truing up.

58. It is further submitted that the reliance placed by the appellant on the judgment of this Tribunal in appeal No.246 of 2014 is wholly misplaced for the reason that the Tribunal in that case was considering issues relating to Financing Cost and not O&M cost. It is argued that the determination as to whether any expense is controllable or uncontrollable cannot be done *dehors* the 2011 MYT Regulations and the MYT tariff order dated 13.07.2012. It is submitted that once the appellant has admittedly taken benefit of these costs on normative basis and did not assail the said classification in the MYT tariff order dated 13.07.2012, the same cannot be assailed now in truing up petition. Referring to the judgment of Hon'ble Supreme Court in BRPL v. DERC (2023) 4 SCC 788, it is argued that true-up proceedings are not an occasion to *de novo* revisit the fundamental principles that went into the formulation of MYT tariff order. Thus, it is argued that once these expenses namely LC Charges, Auditor's Certificate Fee and Credit Rating Fee have been deemed as uncontrollable O&M expenses and granted to the appellant on normative basis in original MYT tariff order, the same cannot be trued up as per the actuals in view of the express provisions of 2011 MYT Regulations.

59. We note that in the year 2011, the Commission framed DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011, which came into force on 01.04.2012. Regulations 4.7, 4.21(b)(i) and 5.3 are relevant and the same are extracted hereinbelow: -

> *"4.7 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which include;*
>
> *…*

(d) Operation and Maintenance Expenditure which includes employee expenses, repairs and maintenance expenses, administration and general expenses and other miscellaneous expenses viz. audit fees, rents, legal fees etc;

…

4.21 The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:

…

(b) For controllable parameters,

(i) Any surplus or deficit on account of Operation and Maintenance (O&M) expenses shall be to the account of the Licensee and shall not be trued up in ARR; and

…

5.3 Operation and Maintenance (O&M) expenses shall include:

(a) Salaries, wages, pension contribution and other employee costs;

(b) Administrative and General expenses which shall also include expense related to raising of loans;

(c) Repairs and Maintenance; and

(d) Other miscellaneous expenses, statutory levies and taxes (except corporate income tax).”

60. It is manifest from the perusal of these regulations that O&M expenses are deemed to be controllable and not subject to truing up. These regulations

were challenged by the appellant by way of Writ Petition (Civil) 2203 of 2012 in the Hon'ble Delhi High Court and one of the challenges to the regulations in the writ petition was that since the O&M expenses are required to be computed by complying a normative formula and there being no provision for truing up such expenses on account of uncontrollable elements affecting such expenses, these regulations are violative of Sections 61(b), 61(c) and 61(d) of the Electricity Act. The appellant's challenge to the regulations on this count has been rejected by the High Court while dismissing writ petition. It has been held as under:-

> *"21. The term 'true-up' is commonly understood to mean align/ balance/ make level. The term as used in the impugned Regulations must be read in the context of NTP, 2006, which inter alia requires that uncontrollable costs be recovered speedily. In the present context, the expression 'true-up' would be to balance and align costs. Providing for an increase in costs on normative basis is also one of the ways to balance and correct the recoveries.*
>
> *22. Paragraph 5.3(h)(4) of NTP, 2006 specifically requires the uncontrollable cost to be recovered and not accumulated so as to burden future consumers. A plain reading of the impugned Regulations also indicate that they do not permit carry forward of O&M expenses or recovery of the same in the future years; all O&M expenses which may remain unrecovered are to the*

account of the licensee. Although O&M cost are deemed to be controllable, nonetheless, the impugned Regulations do provide for a normative increase in such costs based on a specified formula.

Clearly, the intention of the Commission is to ensure that such costs are passed through but instead of bisecting the expenses' head into various cost elements and providing for truing up of the actual variation in each year, the Commission in its wisdom has framed a formula for absorbing the increased costs in the tariff on a normative basis. This is clearly to insulate the consumers from wide variation and provide for an overall uniform increase based on an inflation factor. Indisputably, the O&M expenses include both elements which are controllable as well as uncontrollable, thus admittedly, it would also not be apposite to treat all O&M expenses as uncontrollable. The Commission has adopted a broad approach and whilst all O&M expenses are treated as controllable under the impugned Regulations, it also provides for an increase in such expenses based on inflation factor. This is merely an alternate method for the pass through of increase in expenses and absorbing the effect of inflation in the tariff.

23. We are unable to accept the contention that such approach militates against the principles specified in Section 61 of the Act or falls foul of paragraph 5.3(h)(4) of NTP, 2006. It is necessary to bear in mind that Section 61 of the Act specifies certain principles/factors for guidance of the Commission in framing the Regulations. These are in nature of broad principles to be considered while framing Regulations; and not rigid formulae as is sought to be canvassed on behalf of the petitioner. Section 61(b) of the Act, inter alia, requires the supply of electricity to be conducted on commercial principles; merely because some elements of variation in actual costs are not directly incorporated in the tariff does not necessarily mean that commercial principles have been disregarded.

24. The petitioner has been unable to establish that the tariff fixed according to the impugned Regulations would render the activity of distribution unviable and that no person could possibly recover his costs in carrying out the said business. Thus, we are also unable to accept that the impugned Regulations violate Article 19(1)(g) of the Constitution of India.

25. The impugned Regulations have been framed in exercise of powers conferred under Section 181 of the Act and are in the nature of subordinate legislation. It is

well settled that scope of judicial review of subordinate legislation is very limited. And, any interference by this Court would not be warranted unless it is established that the impugned Regulations are inconsistent with the Act; are ultra vires the Constitution of India; or the due procedure for making such legislation has not been followed. In the present case, we are not persuaded that either of the said grounds have been made out."

61. Having considered the arguments of the learned counsels and taking note of the relevant regulations, extracted hereinabove, the legality / validity of which has been upheld by the Hon'ble Delhi High Court in the above noted writ petition, we do not find that the Commission has committed any error in disallowing the increase in LC Charges, Cost of Auditor's Certificate and Credit Rating Fee to the appellant. Evidently, the Commission has in doing so, followed its own Regulations of 2011.

62. We may also note that admittedly, LC Charges, Cost of Auditor's Certificate and Credit Rating Fee were considered as part of Administrative and General expenses in the MYT tariff order and were granted to the appellant on normative basis. The appellant has not challenged that order, which has become final. Therefore, the appellant is now precluded from claiming expenses under these heads on actuals in the true up proceedings. On this aspect, reliance may be placed upon judgment of the Supreme Court in BRPL v. DERC (2023) 4 SCC 788.

63. We also find that the reliance placed by the appellant on the judgment of this Tribunal in appeal No.246/2014 TPDDL v. DERC (2019) SCC

OnLine(APTEL) 106 is totally misplaced. In that case, this Tribunal had merely directed the Commission to look into the claims of the appellant TPDDL regarding statutory fee / charges afresh duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity. We are in agreement with the submissions made by the Commission's counsel that classification of any expense as controllable or uncontrollable cannot be done dehors the 2011 MYT Regulations and the MYT tariff order dated 13.07.2012.

64. Hence, we do not find any ground to interfere in the findings of the Commission and accordingly, the issues are decided against the appellant and in favor of the respondent Commission.

Issue No.19- *Erroneous allowance of depreciation rate for FY 2013-14.*

65. It was argued by learned counsel for the appellant that while computing rate of depreciation, the Commission has considered depreciation and capitalization from the books of accounts of the appellant in spite of data submitted along with the tariff petition and therefore, has disregarded its own MYT Regulations of 2011.

66. On behalf of the Commission, it is submitted that in the impugned order, the depreciation has been given on a provisional basis pending completion of physical verification of the assets of the appellant. It is further submitted that the physical verification qua the appellant has been finalized vide order dated 02.02.2024 and the appellant is therefore required to submit

its claim as per Regulation 5.17 read with Appendix – I of MYT Regulations, 2011 after reconciling the same with the said order dated 02.02.2024.

Our View:

67. In view of the above noted submission made on behalf of the respondent Commission, let the appellant submit its list of assets along with fresh claim as per Regulation 5.17 read with Appendix-I of MYT Regulations, 2011 which shall be duly considered by the Commission in terms of these regulations and allow depreciation to the appellant in terms thereof.

68. The issue stands disposed off accordingly.

Issue No.22- *Wrongful disallowance of trading margin paid to TPTCL.*

69. On this issue, the impugned findings of the Commission are reproduced hereinbelow: -

> *"Avoidable Power Purchase Cost- Single Day Bilateral Transactions*
>
> *…*
>
> *3.317 The Commission observed that during FY 2013-14, the Petitioner has procured power through its related party i.e., M/s. TPTCL and paid trading margin amounting to Rs. 0.57 Crore for short term purchases/sales. The Commission has decided to disallow the trading margin paid to related party in line with earlier Tariff Orders.*

…

3.322 With the above observations and considering the principle of avoidable Power Purchase Cost upheld by the Hon'ble APTEL in Appeal No. 160 of 2012 dated 08.04.2015, the Commission approves the Total Power Purchase Cost for FY 2013-14 as summarized in the table as follows:

Table 3.83: Trued-up Power Purchase cost for FY 2013-14 (Rs. Crore)

S.No.	***Particulars***	***Approved in T.O. dated July 31, 2013***	***Petitioner's Submission***	***Now Approved for FY 2013-14***	***Remarks***
A	*Gross Power Purchase Cost*	*4,417.83*	*4,901.23*	*4,901.23*	
…	*…*	*…*	*…*	*…*	*…*
N	***Less: Trading margin paid to related party***	***-***	***-***	***(0.57)***	
…	*…*	*…*	*…*	*…*	*…*
S	***Trued up Power Purchase Cost***	***-***	***-***	***4,253.05***	

3.323 The Commission approves the Power Purchase Cost at Rs. 4,253.05 Crore (including Transmission charges) for FY 2013-14 in truing up of FY 2013-14."

70. The appellant appears to be aggrieved by disallowance of Rs.0.57 crores paid by it as trading margin to TPTCL (Tata Power Trading Company Limited) for the FY 2013-14 for short term purchase / sale on the sole ground that TPTCL is a related party to the appellant.

71. We may note that trading margin is the amount paid by distribution licensee to trader for procurement / sale of power and towards bilateral transactions including banking of power.

72. Learned counsel for the appellant submitted that in doing so, the Commission has sought to apply retrospectively its directives contained in tariff orders dated 31.07.2013 and 23.07.2014 for the Financial Years 2013-14 and 2014-15 respectively whereby the discoms were asked not to make purchase on exchange through related parties / traders. It is argued that these directions were to be implemented prospectively from the date of these tariff orders and could not have been applied to the transactions / agreements which the appellant had undertaken / executed prior to date of issue of these orders. It is further pointed out that in the tariff order dated 31.07.2013, the Commission had provisionally disallowed trading margin paid by appellant to TPTCL for the year 2011-12 which was assailed by the appellant before this Tribunal in appeal No.271/2013 which was disposed off vide judgment dated 20.07.2016 observing that since the Commission has given clear liberty and has clearly provided that the trading margin is provisionally disallowed but the same will be considered in final true up, it is hoped that the Commission would consider the same at the final true up stage. The appellant had challenged the disallowance of trading margin for the FY 2012-13 in terms of tariff order dated 23.07.2014 also by way of appeal No.246/2014 before this Tribunal, which was later on withdrawn on the basis of assurance given by the Commission that the same would be considered in the ensuing tariff order.

73. It is further submitted that during the FY 2013-14 the appellant while undertaking the transactions with TPTCL has acted in a prudent manner and has procured power on an arm's length basis while complying with the license conditions as well as the Tariff Regulations, 2011. It is submitted that disallowance of trading margin with regards to the transactions with TPTCL is in violation of Regulation 5.24 of these Tariff Regulations of 2011. It is argued that the Commission has disallowed trading margin to the appellant solely on the basis of TPTCL being a related party, without conducting a prudence check. It is also argued that the Commission would micromanage and compel the appellant to undertake electricity trading through power exchange when there exists no such requirement under the Electricity Act, 2003.

74. On behalf of Commission, it is pointed out that the appellant, like other distribution licensees, is a deemed trader as per the last proviso to Section 14 of Electricity Act, 2003 and therefore, use by the appellant of an intermediary and that too related party / sister concern to conduct the trading of electricity on the exchange would necessarily require an examination by the Commission as mandated by Sections 60 and 61 of the Electricity Act, 2003 to ensure that these transactions are not in any manner adverse to the competition in the electricity industry as well as to the interest of the consumers. It is argued by learned counsel for the Commission that the appellant had done trading of electricity through TPTCL in the power exchange market and not "over the counter" and therefore there is no relevance between trading margin paid by it and the trading margin paid by other distribution companies. According to the learned counsel, it was incumbent upon the Commission to examine the issue threadbare to ensure

that the actions of the appellant are, in no way, in derogation of Sections 60 and 61 of the Act and it was wholly prudent on the part of the Commission to defer passing through of these costs to the retail supply consumers of Delhi before detailed examination of the issue was undertaken. He further submitted that the previous judgment of this Tribunal in Appeal No.271 of 2013 TPDDC v. DERC 2016 SCC OnLine (APTEL) 156 is of no help to the appellant for the reason that this Tribunal, after noting that there was no perversity in the impugned order of the Commission, only directed the Commission to consider provisional disallowance of trading margin to the appellant at the final truing up stage.

Our View:

75. We have already noted the relevant portion of the impugned order hereinabove. The Commission has disallowed Rs.0.57 crores to the appellant as trading margin (paid by appellant to TPTCL for the FY 2013-14 for short-term purchase/ sale of electricity) on the sole ground that TPTCL is a related party to the appellant, while applying the principle of avoidable power purchase cost upheld by this Tribunal in Appeal No.160 of 2012. We find it apposite to reproduce Sections 60, 61 and 66 of the Electricity Act, 2003 hereunder: -

> *"Section 60. The Appropriate Commission may such issue directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is*

likely to cause or causes an adverse effect on competition in electricity industry.

Section 61. (Tariff regulations): The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

(f) multi year tariff principles;

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;

(h) the promotion of co-generation and generation of electricity from renewable sources of energy;

(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

Section 62. (Determination of tariff): --- (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee: Provided that the Appropriate Commission may, in case of shortage of supply of

electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may

differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

…

Section 66. (Development of market):

The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard."

76. It is true that Sections 60 and 61 mandate the Commission to conduct a thorough scrutiny of the transactions entered into by a distribution licensee (the appellant herein) or a generating company with regards to trading of electricity on the exchange to ensure that these transactions do not, in any way, affect or impede the competition in electricity market as well as interest of the consumers.

77. On one hand, the Commission itself submits that before allowing passthrough of the trading margin to the retail consumers of electricity, as claimed by the appellant, a detailed examination of the issue was to be undertaken but on the other hand it does not appear that any such examination was actually undertaken by the Commission. Nothing has been brought to our notice on behalf of the Commission to show that any prudence check with regards to these expenses towards trading margin was done by the Commission. The Commission appears to have simply disallowed the trading margin to the appellant upon noting that trading in electricity was conducted by the appellant through its related party and in doing so, followed its earlier tariff order.

78. We are conscious of the principle enunciated by the Hon'ble Supreme Court in Kerala State Electricity Board v. Sir Syed Institute for Technical Studies (2021) 14 SCC 118 that tariff fixation is a quasi-legislative act and a tariff order need not be accompanied by reasons. However, it has been held in this very judgment that if such a tariff order, which is unaccompanied by reasons, is challenged before the appellate forum, the Commission would have to defend its decision and justify the fixing of tariff in the tariff order. In the instant case, the Commission has miserably failed to defend its action of disallowing the trading margin to the appellant. Manifestly, the Commission has not proceeded to examine the claim of the appellant with regards to the trading margin on its merits by doing prudence check, as required under Sections 61 and 61 of the Electricity Act. This is despite the judgment dated 20.07.2016 of this Tribunal in Appeal No.271 of 2013 TPDDL v. DERC (2016) SCC OnLine (APTEL) 166 in which this Tribunal had observed that since the Commission has given clear liberty and has clearly provided that the trading margin is provisionally disallowed but the same will be considered in final true-up, it is hoped that the Commission would consider the same at the final true up stage.

79. We are of the view that the State Commission cannot have a carte blanche prohibition on trading, which is a statutorily recognized activity under the Electricity Act, 2003 and especially given the fact that DISCOMs are deemed holders of a trading licence. In fact, there is nothing under the Electricity Act, 2003 which prohibits trading by a DISCOM with a related party. However, the State Commission would be well within its rights to check whether such transactions are in fact taken at arm's length if done with a sister concern. The purchase of electricity by a utility through a related party

must be left to the commercial wisdom of the utility, provided, such purchases are done in a prudent manner and do not unnecessarily burden the consumer.

80. Hence, we are unable to sustain the impugned order of the Commission on this issue. The same is hereby set aside. This issue is remanded back to the Commission with directions to do through prudence check and consider the same afresh on its merits.

Issue No.25- *Erroneous adoption of equity addition towards working capital during FY 2008-09 and 2009-10.*

81. It is submitted on behalf of the appellant that the issue relates to manifest error on the part of the Commission that has crept in table 3.41 of the impugned order. It is pointed out that while computing equity approval during FYs 2007-08 to 2012-13, the Commission in table 3.52 has approved working capital requirement from FYs 2007-08 to 2012-13 correctly while computing the equity for these FYs, but while computing equity approval for FYs 2007-08 to 2012-13 in table 3.41, the Commission has referred to table 3.50 which relates to O&M expenses instead of table 3.52 and therefore has considered incorrect amounts under the said head for the FYs 2007-08 to 2009-10.

82. The Commission has very candidly admitted the said error in the impugned order. Learned counsel for the Commission submitted that the error in this regard pointed out on behalf of the appellant has been noted by the Commission and the addition to the equity towards working capital

requirement during FYs 2008-09 and 2009-10 will be adjusted in the subsequent tariff orders.

Our View:

83. In view of the same, the Commission is hereby directed to pass consequential orders adjusting addition of equity to working capital during FYs 2008-09 and 2009-10 along with carrying cost.

84. Issue stands resolved accordingly.

Issue No.29- *Erroneous inclusion of interest on account of late payment of UI (Unscheduled Interchange) Charges.*

85. The Commission's finding on this issue in the impugned order are as under:-

> *"Interest received due to late payment on account of UI*
>
> *Petitioner's Submission*
>
> *3.373 The Petitioner has claimed Rs. 18.86 Crore on account of late payment of UI charges by the defaulting constituents on the premise that the Commission does not allow the LPSC paid to generators for delay in payment.*
>
> *Commission's Analysis*

3.374 The Commission observes that power purchases form part of working capital requirement and accordingly, interest on working capital is allowed to the Petitioner. Further, the RRB also includes working capital and accordingly, the petitioner is allowed return on working capital in the form of RoCE. In addition, the Petitioner is allowed financing cost of LPSC, which is considered for non-realisation of the revenue from sale of power from the consumers. Thus, the petitioner is allowed interest on working capital, return on working capital and also the financing cost of LPSC to meet the cost of financing of working capital. The electricity tariff includes all cost elements of the ARR including interest on working capital, RoE/RoCE and financing cost of LPSC. As such, the interest received from the defaulting UI constituents shall be treated as non tariff income and accordingly, the Commission considers the same as non tariff income."

86. Thus, the Commission has treated the interest received by the appellant from defaulting UI constituent as non tariff income for the reason that the appellant is allowed interest on working capital, return on working capital and financing cost of LPSC to meet the cost of financing of working capital.

87. Learned counsel for the appellant submitted that during normal course of business, the appellant sold some power under UI and payment from 33rd week of FY 2011-12 i.e. the week starting from 07.11.2011 of very small

amount towards UI Charges was received by appellant. Accordingly, as on 31.03.2013, accumulated dues to the tune of Rs.100 crores approximately were receivable by the appellant. It is submitted that in this regard State Load Despatch Centre (SLDC), Delhi informed appellant that said issue has arisen due to non-payment by Uttar Pradesh, Jammu & Kashmir and Punjab. Learned counsel, further argued that the Central Electricity Regulatory Commission (Unscheduled and Interchange Charges and Related Matters) Regulations, 2009 (CERC UI Regulations), *inter alia,* provided that all payments for UI charges shall be made to the "Unscheduled Interchange Pool Account Fund" within 10 days of issuance of UI accounts statement by the Regional Power Committee and delay of more than ten days would attract simple interest @0.04% for each day of delay.

88. The learned counsel further submitted that on account of failure of SLDC to disburse the UI Charges due to appellant despite repeated follow-ups, appellant was constrained to file petition No.143/MP/2013 before the CERC seeking directions to all the constituents of the Northern Regional Grid to clear outstanding dues towards "Unscheduled Interchange Pool Account Fund". By order dated 02.07.2014 the CERC observed as under: -

> *"12. In our view, the prayers of the petitioners for directions to NRLDC no more survives as the entire UI dues payable to DTL have been settled by NRLDC. The dispute regarding non-payment of UI dues by some of the intra-State entities to DTL and consequently, non-settlement of the dues of other distribution licensees of Delhi does not fall within the jurisdiction of this*

Commission. The petitioners are at liberty to approach DERC for appropriate relief in accordance with law if so advised.

13. Petition No. 143/MP/2013 along with IA Nos. 38/2013 and 3/2014 and Petition No. 282/MP/2013 disposed of in terms of above.”

89. It is further submitted by the learned counsel that payment for all surplus power sold under UI mechanism was realized by the appellant in the FY 2013-14 along with Late Payment Surcharge (LPSC) / Interest on UI Charges to the tune of Rs.18.86 crores. He argued that the Commission has wrongly considered such LPSC / Interest on UI Charges as non-tariff income, *inter alia,* on the ground that the electricity tariff includes all cost elements of the Aggregate Revenue Requirement (ARR) including interest on working capital, Return on Equity (RoE) / Return on Capital Employed (RoCE) and financing cost of LPSC. It is submitted that the Commission has failed to appreciate and consider that: -

“(a) In the year in which the Appellant had underdrawn from the Grid and was entitled to receive payment from the pool, Ld. DERC allowed power purchase cost net of the UI amount receivable. The UI amount receivable was reduced from the total power purchase cost incurred while passing through the same in the True-up.

(b) Since the power was scheduled but not drawn by Appellant due to normal variation in demand, etc., Appellant still had to make payment for the same in the billing cycle which would be set-off at a later stage per the UI mechanism. To make timely payment to the suppliers, Appellant would incur interest at market rates, while UI receivables are realized very much later.

(c) Ld. DERC in its Tariff Orders including the Impugned Order has considered both the Power Purchase Cost and sales figures on accrual basis - taking into account expected recovery of UI (though not actually received) and the expected power purchase payments (though actually not paid). Thus, UI interest receivables are adjusted annually to set-off power purchase costs incurred by Appellant while making payments to the suppliers.

(d) In the present case, interest on UI received by Appellant during FY 2013-14 relates to surplus power sold in the previous financial years, i.e., FY 2010-11 and FY 2011-12 for which Ld. DERC had trued up the power purchase cost in the True Up Orders passed for the relevant Financial Years. While doing the True Up, Ld. DERC had considered the net power purchase cost (on accrual basis) after reducing amount receivable for the surplus power disposed of by the Appellant for the UI.

(e) Regulation 5.37 of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 ("Tariff Regulations, 2007") (i.e., applicable for FY 2011-12) and Regulations 5.14 and 5.15 of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 ("Tariff Regulations, 2011") (i.e., applicable for FYs 2012-13 and 2013-14) inter alia provide for normative working capital with two (2) months receivables less one month power purchase cost.

(f) When Appellant is unable to pay generators due to delay in payment for UI purchase or otherwise, Ld. DERC does not allow LPSC imposed by the generators, for any delay in payment, in ARR. Thus, when power purchase expenses were actually paid in the respective years (with LPSC), the LPSC actually paid was denied to the Appellant. In such a case when Ld. DERC has negated the claim for LPSC on delayed Power Purchase Payments, interest received for delayed receipt of revenues could not have been considered in the ARR."

90. It is further argued by the learned counsel that such treatment given by the Commission to LPSC / Interest on UI Charges violates the "Matching

Principle" under which it is necessary that "revenues" of the period should be matched with the costs (expenses) of that period, which has been recognised by the Hon'ble Supreme Court in *J.K. Industries Ltd. v. Union of India, (2007) 13 SCC 673.* It is further argued that the impugned findings of the Commission on this issue also violate all accounting and regulatory norms / standards which are binding statutory requirements imposed by law particularly Section 211 of the Companies Act which stipulates that profit and loss account as well as balance sheet of a company shall comply with the accounting standards. Reference is also made by the learned counsel to Sections 128(1) and 129(1) of the Companies Act, 2013. Reliance is also placed by the learned counsel on the judgment of this Tribunal dated 10.04.2008 in appeal Nos. 86 and 87 of 2007 titled *Maharashtra State Power Generation Co. Ltd. v. MERC & Ors., 2010 ELR (APTEL) 0189.*

91. On behalf of the Commission, it is argued that selling of surplus power under UI mechanism is a commercial decision of the appellant linked to the appellant's core distribution business i.e. supply of electricity, whether it be under-drawl or over-drawl. It is submitted that the UI Charges received by the appellant as well as the interest on these charges are wholly incidental to the electricity business that is being carried out by the appellant and therefore fully covered by Regulations 5.35 and 5.36 of MYT Regulations, 2011. It is argued that the claim of the appellant that the impugned findings of the Commission violate the "Matching Principle", is wholly incorrect for the reason that all costs of electricity business are to be passthrough, and therefore, whether it be the core act of drawing electricity from the grid, supplying the same or forecasting the low demands are all costs that are

factored into the ARR by the appellant and hence there is no violation of "Matching Principle".

92. It is further argued that the contention of the appellant that principal amount of UI receivable (when it was yet to be received) had already been reduced from the cost of power in the ARR to respective FY, is an incorrect statement. It is submitted that the UI Charges were not considered as part of Power Purchase Cost for the FYs 2011-12, 2012-13, and 2013-14 as well as in the ARR orders for the FYs 2011-12, 2012-13, and 2013-14. It is further submitted by the learned counsel that the very term "Unscheduled Interchange" implies that the same cannot be projected and therefore, cannot be included in the Power Purchase Cost at the time of ARR projections. He pointed out that even a cursory glance at the tariff order for year 2013-14 will show that UI sales were not factored into while determining the appellants costs of power purchase in its ARR for the year 2013-14.

93. It is further submitted by the learned counsel that cost of UI Charges or sale is only accounted for at the stage of true up and not at the stage of ARR and therefore same has no consequence to change the present date status / position regarding cash flow on the actual cash in hand available to the appellant or to its working capital, since that is based upon the cost of power purchase projected into the ARR and wholly independent from any actual UI received by it. It is pointed out that the extracts of tariff orders placed by the appellant on record would show that the same are only true up orders and not the projected power purchase costs for those years. It is further submitted that the UI income earned by the appellant is wholly due to business of electricity supply undertaken by the appellant for which the entire cost is a passthrough. Therefore, the excess income earned is on account

of the money paid by the ultimate beneficiaries i.e. consumers of the electricity. Hence, this excess UI income as set off against the appellant's Power Purchase Costs only at the stage of true up and thus, it would be wholly incongruent with while main amount would be set off, interest on the same would not go to the ultimate beneficiary. Thus, according to the learned counsel, the UI interest on being received at the time of ARR computation, being wholly incidental to the business of appellant is fully within the corners of Regulations 5.35 and 5.36 of MYT Regulations, 2011 and has been rightly reduced at the stage of true up.

Our View:

94. Before discussing the rival contentions of the parties, it is necessary to understand UI mechanism. A distribution licensee, like the appellant, provides its requirement to SLDC for procurement of power according to its expected demand. Upon matching such projected requirement with the declared availability of generators, SLDC issues the schedule for the next day. On a particular day, it may so happen, in real time operations, that the distribution licensee is unable to offtake the scheduled power due to reasons beyond the control of distribution licensee (may be due to change in demand on account of extraneous conditions such as sudden change in temperature, tripping of transmission system etc.). In these circumstances, the distribution licensee may under draw from its schedule. Therefore, there is surplus power which is disposed off and / or absorbed in the UI pool and drawn by other entities to meet their respective demands. The entities drawing such power from UI pool are liable to pay UI Charges and the entities who have under drawn and whose surplus power is disposed off, are entitled to receive

payment for the same from UI pool. As and when the accounts are settled by SLDC in the UI pool, the payment is supposed to be made to the entity whose power was sold. In case, any entity fails to make timely payment to the pool, UI interest has to be paid by it and similarly if an entity does not receive timely payment from the pool, it is entitled to receive interest as per CERC Tariff Regulations.

95. Having explained the concept of UI, we may note Regulation 2.1(l) of MYT Regulations, 2011 which defines "Non-Tariff Income" as the income related to licensed business other than from tariff (Wheeling and Retails Supply) and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge.

96. We may also note Regulation 5.1 which states as follows: -

> *"5.1 The Aggregate Revenue Requirement for the Wheeling Business of the Distribution Licensees for each year of the Control Period, shall contain the following items;*
>
> *…*
>
> *(f) Less: Non-Tariff Income;*
>
> *(g) Less: Income from Other Business; and …"*

97. Similarly, Regulations 5.35, 5.36 and 5.37 are also relevant and are quoted hereinbelow: -

> *"Non-Tariff Income*

5.35 <u>All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to profit derived from disposal of assets, rents, net late payment surcharge (late payment surcharge less financing cost of late payment surcharge), meter rent (if any), income from investments, income on investment of consumer security deposit and miscellaneous receipts from the consumers shall constitute Non-Tariff Income of the Licensee</u>:

Provided that income arising from investment of shareholder's funds, if any, shall not be included in Non Tariff Income subject to prudence check of requisite detailed information submitted by the Licensee to the Commission.

5.36 <u>The amount received by the Licensee on account of Non-Tariff Income shall be deducted from the aggregate revenue requirement in calculating the net revenue requirement of such Licensee</u>.

Other Income of Licensee

5.37 Where the Licensee is engaged in any other business, the income from such business shall be calculated as per "DERC Treatment of Income from Other Business of Transmission Licensee and

Distribution Licensee Regulation, 2005"and shall be deducted from the Aggregate Revenue Requirement in calculating the revenue requirement of the Licensee;

Provided that the Licensee shall follow a reasonable basis for allocation of all joint and common costs between the Distribution Business and the Other Business and shall submit the Allocation Statement as approved by the Board of Directors to the Commission along with his application for determination of tariff;

Provided further that where the sum total of the direct and indirect costs of such Other Business exceed the revenues from such Other Business or for any other reason, no amount shall be allowed to be added to the aggregate revenue requirement of the Licensee on account of such Other Business."

(Emphasis supplied)

98. Section 51 of the Electricity Act, 2003, defines Other Business of a distribution licensee and is extracted hereinbelow: -

"Section 51. (Other businesses of distribution licensees): - A distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other business for optimum utilisation of its assets:

Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilised for reducing its charges for wheeling:

Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business:

Provided also that nothing contained in this section shall apply to a local authority engaged, before the commencement of this Act, in the business of distribution of electricity."

99. It is seen that Regulation 5.35 provides a list of sources, income from which derived by a distribution licensee shall constitute non-tariff income of the licensee. These sources are profit derived from disposal of assets, rents, net late payment surcharge, metered rent, income from investments, income on investment of consumer security deposit and miscellaneous receipts from the consumers. We note that the list is inclusive and not exhaustive and the income, if any, derived by a distribution licensee from any other such source which is incidental to electricity business, shall also be treated as non-tariff income of the licensee. The emphasis is on the term "income incidental to electricity business" used in the said regulation. Therefore, it is only that

income which is derived by a distribution licensee from the sources mentioned in Regulation 5.35 or such related sources and is incidental to electricity business, which shall constitute non-tariff income.

100. We have already explained the concept of UI mechanism and the process for claiming / payment of UI Charges. A distribution licensee is entitled to UI Charges when it sells its surplus power in the UI pool which is drawn by other entities to meet their respective demands. In case, any such entity drawing power from UI pool, fails to make timely payment to the pool, UI interest is levied from it and paid to the entity which had sold surplus power in the pool. In such a scenario, we are unable to understand how such interest received by a distribution licensee on delayed payment of UI Charges, shall constitute non-tariff income. Sale of surplus power into UI pool by a distribution licensee can by no stretch of imagination be said to be a business incidental to electricity business envisaged under Regulation 5.35 or "other business" envisaged under Regulation 5.37 or Section 51 of the electricity Act, 2003. Such sale of power forms part and parcel of the electricity business in which a distribution licensee is dealing. It is not something which can be avoided by a distribution licensee and without which it can carry on its electricity business uninterruptedly. Surplus power is not the creation of the distribution licensee itself but becomes available with it on account of circumstances beyond its control such as sudden change in temperature, tripping of transmission system etc.

101. It cannot be disputed that by the time the UI amount is received by the Appellant alongwith interest, the consumer interest is already taken care of by the State Commission and a further reduction of the Appellant's ARR is

not warranted by treating the interest as a part of Non-Tariff Income. Once the UI receivable is reduced from the power purchase cost during truing up of earlier financial years, even when the amount is not actually received by the Appellant, the benefit has already accrued to the consumers.

102. Hence, the Commission has grossly erred in treating the interest received by the appellant on UI Charges as non-tariff income. We also feel in agreement to the submissions made on behalf of the appellant that holding the interest on UI Charges as non-tariff income would certainly violate the matching principle as explained / recognized by Hon'ble Supreme Court in JK Industries Limited case (supra) as well as the accounting and regulatory norms / standards which are a binding statutory requirement imposed by law on the incorporations below Section 211 of the Companies Act.

103. In view thereof, we set aside the findings of the Commission on this issue and direct that the interest received by the appellant on UI Charges from the defaulting UI constituents shall not constitute non-tariff income.

Issue No.36- *Erroneous double deduction of year end negative Power Purchase Provisions from the trued up Power Purchase Cost for FY 2013-14 contrary to Learned Commission's own directive under MYT Order.*

104. The impugned findings of the Commission on this issue are extracted hereinbelow:-

"*Table 3.83: Trued-up Power Purchase cost for FY 2013-14 (Rs. Crore)*

Sl No.	Particulars	Approved in T.O. dated July, 31, 2013	Petitioner's Submission	Now Approved for FY 2013-14	Remarks
A	Gross Power Purchase Cost	4,417.83	4,901.23	4,901.23	
B	Less: Cost of Surplus Power Sold	912.00	782.99	782.99	
C	Net Power Purchase Cost	3,505.82	4,118.24	4,118.24	A-B
D	Total Transmission Charges	474.20	437.50	437.50	
E	Total Power Purchase Cost	3,980.03	4,555.74	4,555.74	C+D
F	**Less:** Normative Rebate	(96.56)	(96.21)	(100.18)	
G	Net Power purchase cost including transmission charges	**3,883.47**	**4,459.53**	**4,455.56**	E-F
H	**Less:** Disallowance of LTPP from Anta, Auriya and Dadri Station			(39.66)	

Sl No.	Particulars	Approved in T.O. dated July, 31, 2013	Petitioner's Submission	Now Approved for FY 2013-14	Remarks
I	***Less:*** *Impact of sale under UI above Transactions*			*(1.43)*	
J	***Less****: Single Day Bilateral Transactions*			*(0.41)*	
K	***Less:*** *Scheduling of Power without considering Merit Order*			*(49.11)*	
L	***Less:*** *Overlapping of Banking Transactions*			*(7.58)*	
M	***Less:*** *Additional UI Charges disallowed*	-	-	*(0.78)*	
N	***Less:*** *Trading margin paid to related party*	-	-	*(0.57)*	
O	***Less****: Reduction of Power Purchase cost on*	-	-	*(93.52)*	

Sl No.	Particulars	Approved in T.O. dated July, 31, 2013	Petitioner's Submission	Now Approved for FY 2013-14	Remarks
	account of Rithala				
P	***Less:*** *Reduction of Power Purchase cost on account of Solar Plant*	-	-	*(2.36)*	
Q	***Add:*** *Power purchase cost allowed against FY 2012-13*			*27.40*	
R	***Less: Negative Power Purchase Cost provisions***			***(34.52)***	
S	***Trued up Power Purchase Cost***	**-**	**-**	***4,253.05***	

…"

105. Learned counsel for the appellant argued that while submitting its audited total power purchase cost ofRs.4555.74 crores, the appellant had already deducted the year end negative provisions of Rs.34.52 crores but the Commission has not considered the same and has again deducted the

said amount in the impugned order to arrive at the trued up power purchase cost of Rs.4253.05 crores. He further pointed out that the Commission, in the tariff order dated 31.08.2017, while truing up the net power purchase cost of the appellant for FY 2014-15 has rectified its mistake by adding the year end negative provisions for the FY 2013-14 in the amount of Rs.34.52 crores in the net power purchase cost for the FY 2014-15. It is the submission of the learned counsel that the consideration of the negative power purchase cost in the tariff order dated 31.08.2017 has led to delay of two years in allowing of the amount resulting into carrying cost of Rs.4.36 crores as the same ought to have been considered in the FY 2013-14 itself. The calculation of the carrying cost in the amount of Rs.4.36 crores has been given in a table in the written submissions filed on behalf of the appellant which is reproduced hereinbelow: -

"

Particulars	***FY 13-14***	***FY 14-15***	***Total***
Principal amount	*34.52*	*(34.52)*	*-*
Opening Balance	*-*	*36.57*	
Carrying cost rate Books	*11.88%*	*11.98%*	
Carrying cost amount	*2.05*	*2.31*	*4.36*

"

Our View:

106. Thus, the grievance of the appellant is only with regards to the component of carrying cost.

107. Learned counsel for the Commission very candidly submitted that the issue may be remanded back to the Commission for a fresh examination as

to whether the said adjustment of Rs.34.52 crores was for the FY 2013-14 or 2014-15 and the issue would be resolved finally.

108. Accordingly, the issue is remanded back to the Commission for fresh adjudication in the light of the submissions made on behalf of the parties before us which have been noted hereinabove.

Issue No.37- *Erroneous directive of the Learned Commission in relation of putting contingency limit of 3% on sale under UI.*

109. The impugned findings of the commission on this issue are reproduced hereinbelow:-

> *"Disallowance due to excessive Sale under UI mode*
>
> *3.300* ***It has been observed that the Petitioner has sold huge quantum of surplus power under UI mode at low rate which may have been avoided by through better management. The UI mode of disposal of power has been benchmarked for BRPL, BYPL and TPDDL.***
>
> *3.301* ***UI charges under ABT mechanism were incorporated to maintain Grid Discipline and benefit those entities which support Grid and penalize those which hamper Grid so as to maintain Grid frequency near to 50 Hz****. CERC vide its Order dtd. 4/01/2000 has dealt up the reason for implementation of UI Charges under ABT mechanism as follows:*

*"…Apart from the two charges, a third charge contemplated in the ABT scheme is for the unscheduled interchange of power (UI charges). The **UI charges are payable/receivable depending upon who has deviated from the schedule and also subject to the grid conditions at that point of time.** This is the element, which is expected to bring about discipline in the system."*

*3.302 Therefore, the Commission is of the view that **UI Charges cannot be treated as mode of transaction to dispose of major share of Surplus power at low rate.***

*3.303 It is observed that the Petitioner has sold Surplus Power of 1027 MU in the months of Apr '13 to Sept '13 out of which 178 MU were sold in UI, 112 MU was sold through Bilateral, 189 MU through Banking and 546 MU through Exchanges. **The month wise details of power sold and rate observed as indicated in the audited accounts for FY 2013-14 is summarized in the table as follows**:*

Particulars		Apr-13	May-13	Jun-13	Jul-13	Aug-13	Sep-13	Total
Bilateral	MU	55.28	6.48	18.21	19.67	12.00	1.03	**112.66**
	% of Total ST	22%	**4%**	**12%**	10%	14%	1%	**10.97%**
	Rate	3.72	3.50	3.68	3.41	3.79	3.32	
	Total MU	74.08	108.84	65.21	112.34	37.40	147.97	**545.84**

Exchange	*% of Total ST*	*30%*	*62%*	*42%*	*57%*	*43%*	*89%*	***53.17%***
	Total Rate	*2.31*	*2.18*	*1.79*	*1.76*	*1.39*	*2.77*	
Banking	*MU*	*78.36*	*12.40*	*41.25*	*44.95*	*12.40*	*0.00*	***189.36***
	% of Total ST	*32%*	*7%*	*27%*	*23%*	*14%*	*0%*	***18.45%***
UI	*MU*	*37.98*	*46.75*	*29.84*	*20.88*	*25.39*	*17.06*	***177.90***
	% of Total ST	*15%*	***27%***	***19%***	*11%*	*29%*	*10%*	***17.33%***
	Rate	*2.11*	*1.43*	*1.08*	*0.95*	*1.11*	*1.57*	
Total MU including IDT		***246.29***	***174.62***	***154.80***	***197.99***	***87.26***	***166.08***	***1027.03***

3.304The month wise analysis of ratio of power sold under UI to Gross Power Purchase for various DISCOMs is indicated in the table as follows:

Table 3.80: Percentage of UI Sale v/s. Gross Power Purchase in FY 2013-14

DISCOMs	***Apr'13***	***May'13***	***Jun'13***	***Jul'13***	***Aug'13***	***Sep'13***	***Oct'13***	***Nov'13***	***Dec'13***	***Jan'14***	***Feb'14***	***Mar'14***
BRPL	*1.08*	*0.07*	*2.21*	*1.78*	*1.43*	*0.32*	*0.76*	*2.02*	*0.14*	*1.81*	*0.66*	*0.00*
BYPL	*6.52*	*11.88*	*10.40*	*7.75*	*7.05*	*6.64*	*3.06*	*2.25*	*0.63*	*0.95*	*0.00*	*1.91*
TPDDL	*4.18*	*4.59*	*2.99*	*1.91*	*2.80*	*1.72*	*1.27*	*2.05*	*1.20*	*0.47*	*0.78*	*1.60*

*3.305**This ratio is maximum for BYPL during various months on an average basis. Further, sale of power under UI is linked to real time frequency mechanism which cannot be 100% avoided due to dynamic power system**. However, **there***

has to be certain contingency limit to dispose of surplus power in UI, which has been fixed at 3% on Gross Power Purchase for every month. Thus, percentage sale over and above the contingency limit is set off with the differential rate of Exchange v/s. UI Rate for the Petitioner also. *The disallowed cost arrived at is indicated in the Table as follows*

Table 3.81: Disallowed Cost due to excessive surplus sale under UI (Rs. Crore)

Particulars	***Apr'13***	***May'13***	***Jun' 13***	***Jul'13***	***Aug' 13***	***Sep' 13***	***Oct' 13***	***Nov' 13***	***Dec' 13***	***Jan' 13***	***Feb'13***	***Mar' 13***
Gross Power Purchase (MU)	*908.69*	*1017.83*	*996.85*	*1092.92*	*906.27*	*992.14*	*910.04*	*797.76*	*937.01*	*1020.54*	*851.83*	*810.16*
UI Sale (MU)	*37.98*	*46.75*	*29.84*	*20.88*	*25.39*	*17.06*	*11.57*	*16.37*	*11.27*	*4.84*	*6.64*	*12.99*
% Sale in UI	*4.18*	*4.59*	*2.99*	*1.91*	*2.80*	*1.72*	*1.27*	*2.05*	*1.20*	*0.47*	*0.78*	*1.60*
UI Rate (Rs/kWh)	*2.11*	*1.43*	*1.08*	*0.95*	*1.11*	*1.57*	*1.52*	*2.20*	*2.02*	*2.32*	*1.62*	*0.89*
Exchange Rate (Rs./kWh)	*2.31*	*2.18*	*1.79*	*1.76*	*1.39*	*2.77*	*2.17*	*2.41*	*3.08*	*2.41*	*2.75*	*2.00*
Disallowed Amount (Rs. Cr.)	***0.21***	***1.22***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***	***0.00***

*3.305**Accordingly, as shown in the above table, the Commission has decided to disallow Rs. 7.11 Crore during FY 2013-14.***

…

*4.104During the prudence check for Short Power Purchase and Sale for FY 2013-14, it has been observed that DISCOMs **do not follow the best method for optimisation of Power Purchase Cost on account of reasons indicated as follows:***

……

b) ***DISCOMs were disposing off their Surplus power in UI at very low rate rather than selling the same in Banking/Bilateral/Exchanges as prescribed in the Commission's Short Term Power Purchase & Sale guidelines issued to the DISCOMs on 20.01.2010**. It is observed that UI charges under ABT mechanism were **incorporated to maintain Grid Discipline and they cannot be treated as a mode of transaction to dispose off huge quantum of Surplus Power. For few of the months of FY 2013-14 UI sale was around 10%-12% of the Gross Power Purchase during that month for few DISCOMs.***

*4.105**In view of the above, the Commission has decided to impose a Contingency Limit of 3% per month on Gross Power Purchase to dispose off Surplus Power in UI.** Percentage sale of surplus power over and above the*

Contingency Limit will be set off with differential rate of Exchange/Bilateral as decided by the Commission. The Commission may review the contingency limit in next Tariff Orders depending upon the Short Term Market dynamics and other parameters."

110. According to the appellant, the Commission has disallowed Rs.7.11 crores of its claim for sale of power under UI as being in excess of the contingency limit of 3% per month fixed by the Commission.

111. Learned counsel for the appellant submitted that while truing up power purchase cost for the FY 2013-14, the Commission has penalized the appellant for no fault by disallowing power purchase cost sold under UI (unscheduled interchange) mode by applying the arbitrary contingency limit of 3% per month retrospectively and without any justification. He would submit that the said benchmark was not applied during the ARR process for FY 2013-14 and therefore, applying the same at truing up stage tantamount to reopening of ARR at the stage of true up. He argued that the Commission could have specified such mechanism in prospective applications only and it was not open for it to frame the mechanism at true up stage to penalize the appellant. He cited the judgment of Supreme Court in BRPL v. DERC (2023) 4 SCC 788 and judgment of this Tribunal in TPDDL v. DERC (2019) SCC OnLine (Aptel) 106 to canvass that truing up exercise cannot be done to retrospectively change the methodology / principles of tariff determination and to reopen the original tariff determination order.

112. It was further argued by the learned counsel that neither the Central Electricity Regulatory Commission (Unscheduled Interchange Charges and related matters) Regulations, 2009 nor CERC Deviation Settlement Mechanism Regulations, 2014 provide for any contingency limit of 3% to restrict the surplus sale by UI mode. According to the learned counsel, the impugned order of the Commission suggests that UI charges are in the nature of the penalty which is absolutely erroneous and contrary to the judgment of the Supreme Court in Central Power Distribution Company v. CERC (2007) 8 SCC 197 in which the Hon'ble Court, while interpreting the UI charges, has rejected the contention that the additional UI charges should be considered as a penalty. The relevant portion of the judgment is as under:-

> "*It is thus clear from the above that UI charges are a commercial mechanism to maintain grid discipline. The UI charges penalises whosoever caused grid indiscipline, whether generator (NTPC) or distributor, is subject to payment of UI charges who are not following the schedule. The UI charges are not payable if the appellants maintain their drawl of electricity consistent with the schedule given by themselves. Therefore, there is no merit in the contention of the appellants that the UI charges are by way of penalty.*"

113. The learned counsel further submitted as under: -

" (a) UI is where actual energy drawn is either higher or lower that the schedule. Accordingly, UI mechanism obliges a

Discom to pay for excess energy drawn by it over the schedule or entitles Discom to receive payment for energy under drawn against its schedule. In terms of Sections 28 and 32 of the Electricity Act, 2003, SLDC and RLDC, monitor grid discipline and direct various stakeholders to act as per their directions, including on whether they should schedule power or not. Appellant acts as per the directions of the SLDC.

(b) Schedule provided by the Appellant is revised by the SLDC, considering grid security, technical minimum, islanding schemes, transmission constraints, etc., i.e., factors over and above the mere demand of the Appellant. These factors may result in the SLDC giving directions, irrespective of the schedule and give rise to UI for the Appellant. Accordingly, the consequential UI charges is incidental and uncontrollable and cannot, in manner be attributable to the Appellant.

(c) Appellant has sold surplus power of 2719 MU in FY-2013-2014, out of which only 9.3% being 253 MUs were sold through UI and remaining 90.7% being 2466 MUs through other modes i.e., 611 MUs through Bilateral, 759 MUs through Banking and 1096 MUs through exchanges.

(d) Ld. DERC has arbitrarily fixed contingency limit of 3% on Gross Power Purchase for every month and erroneously observed that percentage sale for UI in the months of April and May, 2013 is over and above the arbitrary fixed

contingency limit of 3% for the first time in the Impugned Order."

114. Learned counsel for the Commission argued that the deductions in the UI charges to the appellant in excess of contingency limit of 3% of the gross power purchase per month has been made on the basis of prudence check conducted by the Commission on the power purchase procurement carried out by the appellant. Referring to regulation 5.25 of 2011 MYT Regulations, the learned counsel submitted that power purchased by any discom in violation of these guidelines has to be considered illegitimate. He further argued that as per regulation 5.40, the Commission is bound to carry out the true up on the basis of actual / audited information as well as prudence check. He would argue that prudence check cannot be prospective for the reason that the same is required to be done only at the stage of true up and therefore, the argument raised on behalf of the appellant that the disallowance of UI charges has been made by applying the contingency limit of 3% retrospectively, does not hold any water.

115. He further submitted that as per the contention of the appellant itself under Issue No.38, UI sales are not a normal mechanism for either power procurement or power sale and therefore, UI sale cannot be used as a usual mechanism to sell excess power. It is also submitted by the learned counsel that the disallowance of UI charges is not in the nature of a penalty, as contended by the appellant but a prudence check which identifies the imprudence of resources by the appellant in selling of excess power at rates less than what was available in the market and the Commission has been wholly prudent in prescribing the 3% contingency limit and in disallowing the

differential between what would have been earned if the power has been sold in the exchange instead of through the UI mechanism. He pointed out that in case of the appellant, such differential amount has been found to be to the tune of Rs.1.43 crores and the same has been rightly disallowed.

Our View:

116. We have already discussed the concept of UI under Issue 29 above.

117. The UI is where actual energy drawn is either higher or lower than the schedule. Accordingly, UI mechanism obliges a discom to pay for excess energy drawn by it over the schedule or entitles the discom to receive payment for energy underdrawn by it against its schedule. State Load Despatch Centre (SLDC) and Regional Load Despatch Centre (RLDC) monitor the grid discipline as mandated under Sections 28 and 32 of the Electricity Act, 2003 by issuing appropriate directions in this regard to the stakeholders and the discoms are bound by those directions.

118. We are in agreement with the submissions of the learned counsel for the Commission that the power distribution business, being a government granted monopoly, requires intense prudence check of all costs incurred by a discom. It also cannot be gainsaid that UI is not a usual mode / market for sale / purchase of power and such a mechanism can be resorted to only in case of acute exigency. Therefore, we are unable to find fault in the order of the Commission so far as it imposes contingency limit of 3% per month on the gross power purchase of the discoms to dispose off surplus power in UI. However, at the same time, we are of the firm opinion that such a limit cannot be imposed and applied at the true up stage when the sale / purchase has

already been done through UI mechanism. A new limit / principle / methodology cannot be imposed or applied by the Commission retrospectively at the stage of true up without drawing the attention of the stakeholders like the discoms to the same at the stage of approval of ARR for the concerned financial year. What the Commission has done by setting up such contingency limit at the stage of true up is to change the rules of the game or to prescribe a new rule of the game after the game has been played which cannot be permitted under law.

119. The State Commission candidly accepted that the contingency limit of 3% was imposed at the stage of the true up and not at the stage of determination of the ARR. While the State Commission justifies the same by submitting that this was done in the course of prudency check, however, the imposition of conditions at the time of truing up, which conditions were not present at the stage of the original ARR determination, cannot be sustained. The Appellant is right in contending that the methodology for tariff determination cannot be changed at the stage of truing up and its reliance on the decision of the Hon'ble Supreme Court in BRPL v. DERC, (2023) 4 SCC 788, is well placed.

120. Hence, we are unable to sustain the impugned order of the Commission on the issue under consideration and the same is hereby set aside. We direct that the contingency limit of 3% per month of gross power purchase to dispose off surplus power in UI cannot be applied while truing up for purchase cost of the appellant in the FY 2013-14.

Issue No.38- *<u>Disallowance of Power Purchase Cost – Single Day bilateral transaction.</u>*

121. The findings of the Commission on this issue are extracted hereunder:-

*"**Avoidable Power Purchase Cost- Single Day Bilateral Transactions***

3.307 As per CERC Open Access Regulations 2008, that there is a provision for revision of Short Term Open Access Schedule. The relevant extract of the said Regulation is as follows:

14........ Revision of Schedule
*Provided that such cancellation or downward revision of the short term open access schedules **shall not be effective before expiry of a minimum period of two (2) days:***

*Provided further that the day on which notice for cancellation or downward revision of schedule is served on the nodal **agency and the day from which such cancellation or downward revision is to be implemented, shall be excluded for computing the period of two (2) days."***

3.308 Further, as per the terms and conditions of the Bilateral Contracts there are certain permissible generation/ transmission constraints in the bilateral purchase/sale contracts itself with minimum off-take/supply to the level of 80% to 90%. Such level of minimum off take/supply does not levy any penalty to either party.

3.309 It has been observed during prudence check that the ***Petitioner has entered into various Single day Bilateral Purchase Contracts and at the same time there were Bilateral Sale Contracts in existence for full month for same time period which could have been avoided by revising Open Access Schedule for reduction in Sale of Surplus Power as indicated above.***

3.310 The Petitioner vide its replies dtd. 16/04/2015 submitted that such single day purchases were contingency in nature which cannot be met by revision in Open Access Schedule as it was sudden requirement due to unit tripping of a Generator.

3.311 However, it is pertinent to mention that ***such Bilateral Purchase is of very less quantum of around 1.36 MU for 4 such contracts which could have been easily met through IDT/Exchange/UI.***

3.312 Further, it is observed that 20% of proposed quantum for sale of surplus power could have been reduced without any penalty and for the short term requirement for single day. Total short term purchase of single day was 6.2% of total short term sale on same day which could have been avoided by TPDDL as per the provisions of bilateral contract for short term sales mentioned above. ***Hence, the Commission has decided to disallow Rs. 0.41 Crore from the Power Purchase Cost for TPDDL in FY 2013-14 which is total purchase from such single day purchases***

without revising Open Access Schedule/limiting minimum off take supply of surplus power."

122. This issue relates to disallowance of Rs.0.41 crores to the appellant towards power purchase cost relating to single day bilateral transactions. As per the order of the Commission, the appellant has entered into various single day bilateral purchase contracts and at the same time there were bilateral sale contracts also in existence for full month for the same time period, which could have been avoided by revising open access schedule in terms of Regulation 3.307 of CERC Open Access Regulations, 2008, for reduction in sale of surplus power.

123. Learned counsel for the appellant submitted that the Commission has passed the impugned order on the issue at hand while ignoring the contents of the letter dated 16.04.2015 of the appellant in which the appellant had highlighted as to how these bilateral purchases were due to contingencies beyond the control of the appellant and that the bilateral export already booked in advance could not have been curtailed as the refusing of the needs two clear days in order to bring the same in effect in terms of Regulation 14 of CERC Open Access Regulations, 2008. With regards to the four bilateral purchases pointed out by the Commission in the impugned order, being of less quantum of around 1.36MU and which could have been easily met through intra day transactions/ exchange / UI, the learned counsel argued that all the four purchases are for less than Rs.5/unit in compliance with Commission's directive No.7.6 of tariff order dated 26.08.2011 and thus the appellant has been prudent in making such purchases. It is further submitted by the learned counsel that the demand of power cannot be

predicted to the extent of 100% accuracy and hence demand planning undertaken by the appellant may lead to surplus power or shortage in power but the appellant is bound to arrange / supply uninterrupted electricity to its consumers. According to the learned counsel, such bilateral purchases could not have been easily made through intraday transactions / exchange / UI for the reasons that:-

"

(a) UI is not a market for sale/purchase of power. Purchase through UI is not prudent as it may lead to grid indiscipline.

(b) purchases through exchange could not have been made due to contingencies beyond the control of the Appellant and due to plant outages/ breakdowns. For undertaking purchases in exchange, bid has to be placed on a day ahead basis which could not be done as information pertaining to plant outage was received on the same day on which bilateral purchase was done. It is pertinent to mention that no RTM (Real Time Market) existed for selling or buying surplus power hence there was no other way in which the power requirement could be met considering universal supply obligation and limit of 1% imposed by Ld. DERC on the total shortfall allowed.

(c) Intraday exchange does not guarantee availability of power and hence the last option left was bilateral purchase which was executed at a rate lower than the mandated short term rate of Rs.5/- per unit.

(d) Revision of existing bilateral export schedule is not possible as it required at least two (2) clear days for

implementation in terms of binding CERC Open Access Regulations.”

124. On behalf of the Commission, it is merely submitted that the disallowance of these bilateral purchases is a consequence of prudence check and there is no penalty that has been imposed on the appellant.

Our View:

125. From the material on record as well as the submission on behalf of the Commission, it does not appear that any prudence check has actually been done by the Commission before disallowing the power purchase cost of single day bilateral purchases made by the appellant. It is specific contention of the appellant that these short term purchases were made by it for less than Rs.5/unit in compliance of the commission’s directive No.7.6 of the tariff order dated 26.08.2011. There is no finding of the Commission in the impugned order that cheaper power was available to the appellant through other modes on the dates on which these bilateral transactions were entered into by it. It is also not disputed by the Commission that these bilateral purchases were made by the appellant on contingency basis due to sudden generation outages. Therefore, manifestly the appellant could not have envisaged in advance such shortage of power in order to procure the same through intraday transaction/exchange/UI. We also find that the Commission has penalized the appellant by disallowing Rs.0.41 crores to it from the power purchase cost without providing cogent reasons which would contradict the contentions of the appellant as conveyed to the Commission by letter dated 16.04.2015 which highlighted the reasons for the appellant to enter into such bilateral power purchase. It was for the Commission to

scrutinize minutely each and every averment of the appellant contained in the said letter dated 16.04.2015 and to explain why the same does not appear satisfactory to it and deserve to be rejected.

126. Undoubtedly, the procurement of power is the responsibility of the Utility and the State Commission cannot micromanage the same. The utility should act prudently. However, the State Commission can do a slot wise analysis to ascertain if entering into single day contracts was financially imprudent and avoidable. If however, a slot wise analysis reveals that the act of entering into single day contracts was in fact financially detrimental and avoidable, then only the said power purchase cost should not be allowed.

127. Hence, the impugned findings of the Commission on this issue cannot be sustained and the same are hereby set aside. The Commission is directed to reverse the penalty of Rs.0.41 crores imposed upon the appellant and to allow the same to the appellant along with carrying cost.

Issue No.41- *Carrying costs for FY 2007-08 to FY 2012-13 allowed at rates lower than the prevailing market rate for the revenue gap loans.*

Issue No.59- *Erroneous consideration of lower cost of debt for computation of rate of carrying cost for FY 2013-14.*

Issue No.60- *Lower consideration of cost of debt for the purpose of computation of rate of carrying cost for FY 2015-16.*

128. All above three issues relate to computation of rate of carrying cost and therefore are taken up together for disposal.

129. The impugned findings of the Commission on these three issues respectively is extracted hereinbelow:-

Re: Issue No.41- Carrying costs for FY 2007-08 to FY 2012-13 allowed at rates lower than the prevailing market rate for the revenue gap loans.

"Revenue gap and Carrying cost from FY 2007-08 to FY 2012-13

*3.197 The Carrying cost for FY 2007-08 to FY 2012-13 has also been revised based on actual equity available for funding of revenue gap as per Hon'ble APTEL's judgment in Appeal No. 153 of 2009 subject to a maximum 30% of the equity and **outcome of Civil Appeal No. 884 of 2010 before Hon'ble Supreme Court**.*

3.198 The opening balance of the revenue gap for FY 2007-08 has been considered at Rs.156.34 Crore. Various adjustments as discussed in above paragraphs have been considered and the revised ARR and the Revenue Gap for FY 2007-08 to FY 2012-13 along with carrying cost is as follows:

Table 3.60: Revenue Gap and carrying cost for FY 2007-08 to FY 2012-13 (Rs. Crore)

Sl. No.	*Particulars*	*FY 2007-08*	*FY 2008-09*	*FY 2009-10*	*FY 2010-11*	*FY 2011-12*	*FY 2012-13*	*Remarks*
…	…	…	…	…	…	…	…	…

I	Average balance of Revenue Gap	(150.11)	(175.18)	(421.86)	(1,083.84)	(2,198.03)	(3,039.05)	(D+H)/2
J	Actual equity Available towards RG (above Capitalisation and WC)	473.75	511.09	820.67	1,024.27	1,287.46	2,016.56	
K	**Equity as 30% of total funds required**	**45.03**	**52.55**	**126.56**	**325.15**	**659.41**	**911.72**	**Min (J, (I*30%))**
L	Balancing figure - Debt	105.08	122.63	295.30	758.69	1,538.62	2,127.34	-I-K
M	**Rate of return on equity**	**14.00%**	**14.00%**	**14.00%**	**14.00%**	**14.00%**	**16.00%**	
N	**Rate of interest on debt**	**9.15%**	**10.17%**	**8.53%**	**8.87%**	**11.43%**	**9.97%**	
O	**Rate of carrying cost**	**10.61%**	**11.32%**	**10.17%**	**10.41%**	**12.20%**	**11.78%**	**((M*K)+(N*L))/ (K+L)**
P	**Carrying cost**	**(15.92)**	**(19.83)**	**(42.91)**	**(112.82)**	**(268.18)**	**(357.97)**	**O*I**
Q	Closing balance	(208.76)	(161.43)	(725.20)	(1,604.00)	(3,060.25)	(3,375.83)	H+P

"

Re. ISSUE NO. 59: Erroneous consideration of lower Cost of Debt for computation of rate of carrying cost for FY 13-14

"3.420 As shown above, the approved trued up net revenue surplus is at Rs.10.96 Crore for FY 2013-14 is

considered in determination of Aggregate Revenue Requirement for FY 2015-16. The revenue gap up to closing of FY 2013-14 is as follows:

Table 3.131: Revenue (Gap)/Surplus upto FY 2013-14 (Rs. Crore)

Sl.	Particulars	FY 2013-	Remarks
A	Opening balance	(3375.83)	Table
B	Revenue surplus/(Gap) during the year	10.96	Table
C	8% surcharge	390.70	
D	Net Revenue Surplus/(gap) during the year	401.66	B+C
E	Closing Revenue Gap (without carrying cost)	(2,974.16)	A+D
F	Average balance of Revenue Gap	(3,174.99)	(A+E)/2
G	Actual equity Available towards RG (above Capitalisation and WC)	2185.56	
H	Equity as 30% of total funds required	952.50	30% of
I	Balancing figure – Debt	2222.50	70% of
J	Rate of return on Equity (re)	16.00%	
K	Rate of interest on debt (rd)	10.12%	
L	Rate of carrying cost	11.88%	
M	Carrying cost	(377.32)	L*F
N	Closing balance	(3351.48)	E+M

"

Re. ISSUE NO. 60: Lower consideration of cost of debt for the purpose of computation of Rate of Carrying Cost for FY 2015-16

"…

Table 4.36: Employee Expenses approved for FY 2015-16 (Rs. Crore)

Particulars	Now approved	Reference
Gross Employee Expenses (as per FY 2014- 15) (A)	333.39	
Inflationary index (B)	8%	

Inflationary increase (C)	*26.67*	*A x B*
Sub-total (D)	*360.06*	*A + C*
Less: Capitalisation @10% (E)	*36.01*	*D x 10%*
Net employee expenses (F)	*324.05*	*D – E*

…

Table 4.66: Carrying Cost on Revenue Gap for FY 2015-16 (Rs. Crore)

Sl. No	*Particulars*	*Now Approved*	*Reference*
A	*Closing balance of (Gap) / Surplus at the end of the year FY 2013-14*	*(3351.48)*	
B	*Estimated amortization of revenue in FY 2014-15*	*630.76*	*Rs. 453.08 Crore as 8% Surcharge + Rs. 177.68 Crore as expected reduction in gap*
C	*Revenue requirement for FY 2015-16*	*5575.92*	
D	***Rate of carrying cost for FY 2015-16***	***12.08%***	
E	*Total Revenue Requirement including 8% Surcharge and carrying cost for FY 2015-16*	*5876.22*	*(B+(A*C))/(1+(8%/2)*C)*
F	*Carrying cost*	*300.30*	*E-C*

"

130. On behalf of the appellant, it is vehemently submitted that while allowing carrying cost on the equity component of 14% only, the Commission has ignored the directions of this Tribunal in judgment dated 30.07.2010 in appeal No.153/2009 titled NDPL v. DERC (2010) SCC OnLine (Aptel) 74 according to which the rate of carrying cost on regulatory gap for FY 2007-08 to FY 2012-13 was to be computed at the prevailing SBI Prime Lending Rate (SBIPLS) keeping in view the debt / equity ratio of 70:30. It is submitted that return on equity (RoE) on the remaining 30% equity has to be 16% grossed up for tax. The learned counsel further pointed out that the said judgment of this Tribunal was assailed before the Hon'ble Supreme Court by

way of Civil Appeal No.6006 of 2012 which was dismissed vide order dated 21.08.2012. He further submitted that the said judgment has been relied upon by this Tribunal in subsequent judgment dated 12.07.2011 in the appeal titled BRPL v. DERC (2011) SCC OnLine (Aptel) 106 (appeal Nos.142 and 147 of 2009). It is further submitted that the said judgment dated 12.07.2011 of this Tribunal was also challenged before the Hon'ble Supreme Court by way of Civil Appeal Nos.9003-9004 of 2011 which were tagged with Civil Appeal Nos.884 and 980 of 2010 and all these appeals were dismissed on 01.12.2021 as being bereft of any substantial question of law.

131. It is further argued by the learned counsel that the impugned findings of the Commission are contrary to regulation 5.10 read with regulation 5.39 of the DERC tariff regulations, 2007 and therefore liable to be set aside. It is submitted that while allowing the carrying cost on equity component @ 14%, the Commission has ignored the fact that appellant is not only undertaking wheeling business but is also undertaking business of supply of electricity and hence, it is entitled to assured 16% post tax return on equity component.

132. According to the appellant, the rate of carrying cost needs to be recomputed considering the cost for the debt as per SBIPLR for each respective year in the debt/equity ratio of 70:30 and rate of return on equity equivalent to assured return of 16% grossed up for tax.

133. Learned counsel for the Commission argued that the judgment of this Tribunal dated 30.07.2010 in appeal No.153 of 2009 is not applicable to the case of appellant for the reason that the said judgment had been rendered

regarding the period for which 2007 MYT regulations were in operation whereas the instant appeal relates to the period for which subsequent MYT regulations of 2011 are applicable. He pointed out that 2007 MYT regulations hold the field till FY 2011-12 only whereas 2011 MYT regulations govern the filed from FY 2012-13 onwards. He further submitted that the judgment of this Tribunal dated 12.07.2011 in appeal Nos. 142 and 147 of 2009 also was against the tariff order dated 28.05.2009 when the MYT regulations of 2007 were in force. According to the learned counsel, neither this Tribunal nor the Supreme Court had any occasion to examine 2011 MYT regulations.

134. Learned counsel further argued that the appellant is seeking to reagitate the issues which have already been conclusively held against it in the earlier judgment of this Tribunal in appeal No.271 of 2013 dated 28.08.2016 reported as TPDDL v. DERC (2016) SCC OnLine (Aptel) 156 wherein this Tribunal had approved the consideration of return on equity at 14% instead of 16% for the period of computation of carrying cost. He would argue that the said judgment of this Tribunal is final as on date on the issue under consideration, and therefore, the appellant is precluded from asserting the issue again in view of the doctrine of *res judicata*.

135. Learned counsel further argued the 2011 MYT Regulations specifically exclude the return on equity from funding of carrying cost and therefore the prayer of the appellant does not survive at all. He pointed out that the appellant had challenged the legality of 2011 MYT Regulations before the Hon’ble Delhi High Court on these very grounds but the challenge was rejected by the High Court by way of judgment reported as TPDDL v DERC (2016) SCC OnLine 4165. Thus, according to the learned counsel, the issue

of carrying cost funding has been decided against the appellant itself by the High Court in the above noted judgment and carrying cost is to be considered as finalized by restricting it to the rate of return on debt and the prayer to consider cost of the debt as per SBIPRL in the debt/equity ratio of 70:30 for the control period of 2011 MYT Regulations is in contravention of these regulations.

Our View:

136. We have gone through the impugned findings of the Commission on these issues and considered the rival submissions made by the learned counsels.

137. It is not in dispute that the judgment dated 30.07.2010 of this Tribunal in appeal No.153 of 2009 and judgment dated 12.07.2011 in appeal Nos.142/147 of 2009 related to the period prior to the FY 2011-12 when the 2007 MYT Regulations held the field and therefore the same cannot be applied to the instant appeal which relates to the period 2013-14 onwards governed by 2011 MYT Regulations. There is a significant change regarding computation of carrying cost in 2011 MYT Regulations as these specifically exclude the return on equity from funding the carrying cost. It is noteworthy that the issue at hand as raised in the instant appeal was raised by the appellant before the Hon'ble Delhi High Court while assailing the 2011 MYT Regulations but the challenge was rejected by the High Court by way of judgment reported as TPDDL v. DERC (2016) SCC OnLine 4165. The relevant portion of the judgment is quoted hereinbelow: -

> *"6 5.1 Mr. Vaidyanathan further submitted that the impugned Regulations were also arbitrary and*

unreasonable inasmuch as they restrict the return on equity to investment in fixed assets and completely ignore the equity deployed as working capital. ***He submitted that the revenue gap, which was funded by the petitioner, was also erroneously considered as financed entirely by debt.*** *He submitted that the debt-equity ratio under the impugned Regulations was assumed as 70:30 and the impugned Regulations did not take into account repayment of debt during the control period which would inevitably reduce the debt component.*

…

26. One of the grievances urged by the petitioner is that the impugned Regulations do not provide for any return on equity capital used as working capital. It is asserted that in terms of the impugned Regulations, the Return on Capital Employed (RoCE) is computed on the basis of the asset base for each year and the Weighted Average Cost of Capital (WACC). WACC is a combination of interest on the debt component of the total funds employed and 16% post-tax return on the equity component. Although asset base includes working capital but for purposes of computing WACC, the working capital is considered to be financed entirely by debt. This is postulated by the first proviso to Regulation 5.11. Regulation 5.11 reads as under:-

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

…

Where,

…

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

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

Provided further that the Debt to Equity Ratio for the assets covered under Transfer Scheme, dated July

1, 2002 shall be considered as per the debt and equity in the transfer scheme;

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

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

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

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

27. In addition, the petitioner is also aggrieved by the third proviso to Regulation 5.11 in terms of which revenue gap is also considered as entirely financed by the debt component.

The petitioner submits that revenue gap of approximately Rupees three thousand crores has been created in the earlier years and the petitioner has been constrained to infuse equity to finance such revenue gap. According to the petitioner, it is also entitled to return on equity infused to finance such revenue gap and since the impugned Regulations do not provide for return on such equity, the same are violative of the tariff policy which requires a reasonable return on equity employed.

…

30. Paragraph 8.2.2 of NTP, 2006 also permits the Commission to provide for a facility of a regulatory asset in order to limit the impact of tariff in a particular year. Thus, provision of a revenue gap also cannot be considered as violative of NTP, 2006. The petitioner would be justified to make a grievance if as a result of the revenue gap, the return on equity becomes unreasonably low. ***However, in the present case, there is no material which would indicate that as a result of the regulatory asset - funding of the revenue gap - the return on equity has become unreasonably low. On the contrary, it is the petitioner's case that the revenue gap is assumed to be financed entirely by debt and, thus, return equivalent to the interest rate on such regulatory asset would be available to the petitioner.***

31. In our view, no interference would be warranted by this Court on this count. ***Similarly, considering the revenue gap to be***

financed entirely by debt and thereby restricting the rate of return to the rate of return on debt also cannot be per se arbitrary or unreasonable or violative of Section 61 of the Act*.”*

138. Therefore, once the issue of carrying cost finding has already been decided against the appellant by a constitutional court, which findings are binding on this Tribunal, the appellant is precluded from agitating the issue before this Tribunal in this appeal.

139. Moreover, we also find that this Tribunal in a subsequent judgment dated 20.07.2016 in appeal No.271 of 2013 reported as TPDDL v. DERC (2016) SCC OnLine (Aptel) has dealt with the identical issue and has upheld the order of the Commission considering the rate of return on equity at 14% instead of 16% for the purposes of computation of carrying cost. The relevant portion of the judgment is quoted herein below: -

> *“ 15.7)* ***Issue No.17, relating to incorrect consideration of return on equity at 14% instead of 16% for the purpose of carrying cost.*** *On this issue, following contentions are raised on behalf of the appellant:*
>
> *…*
>
> *17) Our consideration and conclusion on Issue No.17, relating to incorrect consideration on Return on Equity at 14% instead of 16% for the purpose of carrying cost.*
>
> *17.1) Having cited the rival contentions of the parties and having gone through the MYT Regulations, 2007, we*

proceed towards our own discussion and conclusion on this issue.

17.2) It appears from paragraph 3.187 of the Impugned Order, that rate of return on equity has been considered at 14%, for the purpose of carrying cost in the Impugned Tariff Order dated 31.07.2013, in accordance with Regulation 5.10 of MYT Regulations 2007 by learned Delhi Commission. It appears from record and earlier tariff orders that Learned Delhi Commission had revised carrying cost for FY 2007-08 to FY 2011-12 in the debt equity ratio of 70:30 in compliance with directives of this Appellate Tribunal in Appeal No.153 of 2009 in NDPL Vs. DERC. The learned Delhi Commission after going through Regulations 5.9, 5.10, 5.38 and 5.39 of the MYT Regulations 2007 has considered the return on equity at 14% holding on the basis that from the perusal of MYT Regulations 2007, the return on equity cannot be more than 16%, however, it has to be prescribed by the Delhi Commission.

17.3) Regulation 5.9 deals with computation of Return on Capital Employed, prescribing a formula for such kind of computation. Regulation 5.10 provides for computation of Weighted Average Cost of Capital (WACC) for each year of the control period, clearly providing that "cost of equity for wheeling business shall be considered at 14% post tax." Regulation 5.39 clearly states that the return from the wheeling business and retail supply business shall not

exceed 16% of equity. Thus, there is a rider restricting that the return from the wheeling business and retail supply business shall not exceed 16% of the equity. Thus, the maximum limit is 16% which cannot be allowed to exceed under any circumstances. Appellant is claiming 16% of equity on the basis of 14% RoE + 2% supply margin. ***In view of the above discussion, we do not find any illegality or perversity in the finding recorded in the Impugned Order on this issue and we approve the approach adopted by the Delhi Commission in deciding this issue. We find and observe that the learned Delhi Commission has correctly, in the impugned tariff order, considered the rate of return on equity at 14% to which we also agree. Hence, this issue is decided against the appellant."***

[Emphasis supplied)

140. In view of these clear cut findings of this Tribunal in the above noted judgment, the instant issue raised in this appeal is manifestly hit by the doctrine of *res judicata* and the appellant is precluded from reagitating the same.

141. Hence, we do not find any infirmity in the impugned order of the commission on these three issues. The prayer of the appellant for re-computation of rate of carrying cost considering the cost for the debt as per SBIPLR in the debt / equity ratio of 70:30 and considering the rate of return on equity equivalent to 16% grossed up for tax is clearly unsustainable. The

three issues are decided against the appellant and in favour of the respondent.

Issue No.43- *Wrongly reversal of material cost of Rs.3.36 Cr & Rs.4.12 Cr incurred towards maintenance of street light for the year 2010-11 and 2011-12 respectively.*

142. The impugned findings of the Commission on this issue are extracted hereinbelow:-

> "***Recovery of Material cost towards street lights***
>
> ***Commission's Analysis***
>
> *3.76 The Petitioner is allowed normative O&M costs without excluding the material cost utilised towards maintenance of the street lights.* ***Therefore, the Commission has decided to include the recovery on material cost under maintenance charges of street light under non-tariff income. Accordingly, the amount of Rs. 3.36 Crore and Rs. 4.12 Crore recovered towards material cost under maintenance charges has been included in non tariff income for FY 2010-11 and FY 2011-12 respectively.***"

143. It is submission of the learned counsel for the appellant that by way of the above quoted portion of the impugned order, the Commission has reopened the tariff orders dated 13.07.2012 and 31.01.2013 vide which the ARRs of the FY 2010-11 and 2011-12 respectively had been trued up and

which orders had attained finality. It is argued that these findings of the Commission run in the teeth of the judgment of this Tribunal in appeal No.246 of 2014 reported as TPDDL v. DERC (2019) SCC OnLine (Aptel) 106 wherein it has been held that when final true up for previous years has been completed and final orders passed by the Commission, which have attained finality, same cannot be reopened for re-examination.

144. It is further submitted by the learned counsel that material cost of streetlight mainte4nance was never part of the O&M expenses in the base year i.e. 2006-07, as stated by the Commission in the impugned order. He argued that streetlight maintenance is caried out in terms of the directions of the Commission in order dated 16.03.2004 in petition No.8, 9 and 10 of 2003, which were reiterated by the Commission in subsequent tariff order dated 23.02.2008. It is argued that the maintenance of streetlights is not an obligation upon the appellant under the distribution and retail supply license or the Electricity Act and the said activity has no relation to the licensed business of the appellant. It is submitted that upon privatization, the private discoms inherited the legacy of streetlight maintenance and no operational cost of such activity or the revenue accrued therefrom can form part of the ARR. In this regard, reliance is placed upon the judgment of this Tribunal dated 04.04.2007 in appeal No. 251 of 2006 titled 'Reliance Energy Limited v. MERC & Ors.', 2007 SCC OnLine APTEL 7 wherein it was held that licensed business must be treated as a watertight compartment and only expenses / revenue of that business can be taken into account. It is further argued that the Commission has erroneously considered the income towards streetlight material cost as nontariff income (NTI) and the same is violative of "matching principle" according to which, in order to ascertain the profit

made by a business during a particular period it is necessary that "revenues" of that period should be matched with the costs (expenses) of that period as expounded by the Hon'ble Supreme Court in J K Industries Limited v. Union of India (2007) 13 SCC 673. It is further argued that the impugned findings of the Commission also are in violation of accounting norms and standards which are binding statutory requirements imposed upon the appellant by way of Section 211 of the Companies Act, 1956.

145. On behalf of the Commission, it is argued that the employee expenses of the appellant are considered as a whole and the appellant has not provided any data to suggest that the salaries as well as other costs related to the maintenance of the streetlights are not included in the figures submitted to the Commission for the calculation of the normative O&M targets for the control period in the MYT tariff order of 2008. It is further pointed out that the submission made on behalf of the appellant that maintaining streetlights is not a part of its licensed business is not correct for the reason that in terms of license condition Nos. 20.1 and 20.3, the appellant is required to provide supply of public lamps as well as the mains / other equipments for the same. He further submitted that this is not a case where the Commission has changed the rules/ methodology at the stage of true up and actually this is more a case of the Commission correcting an error that had escaped its notice in the previous years and therefore the ratio of judgment of Supreme Court in BSES Rajdhani Power Limited & Anr. v. DERC (2023) 4 SCC 788 does not apply.

<u>Our View:</u>

146. We note that in terms of the order dated 16.03.2004 of the Commission in petition Nos.8,9 and 10 of 2003, the appellant is required to carry out

maintenance of the streetlights in its area of operation. These directions have been reiterated by the Commission in its subsequent tariff order dated 23.02.2008, the relevant portion of which is extracted hereinbelow:-

> *"5.81* ***As regard to the maintenance charges for street lighting, the Commission had issued a separate Order on March 16, 2004.*** *The Commission would like to clarify that the maintenance charges and other conditions of maintenance of street lights as approved in the Commission's Order dated March 16, 2004 will continue till such time it is amended".*

147. By way of the impugned order, the Commission has included the amount of Rss.3.36 crores and Rs.4.12 crores recovered towards material cost under maintenance charges for the FYs 2010-11 and 2011-12 respectively in non-tariff income for these two FYs. It is important to note here that while passing the impugned order, the Commission was dealing with a tariff petition filed by the appellant seeking truing up of ARR for the FY 2013-14 as well as for approval of revised ARR for the FY 2014-15. It is not in dispute that the true up for FYs 2010-11 and 2011-12 had already been completed and final orders in that regard had already been passed by the Commission, which had attained finality. In these facts and circumstances, we wonder as to how the Commission proceeded to include any amount recovered towards material cost under maintenance charges in the non-tariff income for FYs 2010-11 and 2011-12, the true up for which had already been completed and achieved finality.

148. In terms of judgment of this Tribunal in appeal No.246 reported as TPDDL v. DERC (2019) SCC OnLine (Aptel) 106, when final true up for previous year has been completed and final orders passed by the Commission, which have attained finality the same cannot be reopened for re-examination. Therefore, the Commission could not have reopened the tariff / trued up orders for FYs 2010-11 and 2011-12 while determining the truing up of the ARR for FY 2013-14. The impugned order of the Commission manifestly runs in the teeth of the judgment of this Tribunal in appeal No.246 of 2014 and thus is patently erroneous.

149. Further, the supply of electricity to streetlights cannot bring the activity of maintenance of streetlights, an activity to be undertaken by the public authorities (MCD), within the ambit of the licensed business. Historically, DVB was involved in this activity. The obligation has been passed on to the Appellant, but, not as part of the licenced business. The activity of supplying electricity and the activity of maintaining streetlights, are two completely different activities and are in no way connected. Thus, the activity of maintaining streetlights, therefore, has no correlation with the licenced business of the Appellant and as such, cannot be included as a part of NTI.

150. Hence, the impugned findings of the Commission on this issue cannot be sustained and are hereby set aside. The Commission is directed to allow the material cost towards streetlight maintenance activity in terms of the tariff orders dated 13.07.2012 and 31.07.2013 and also to allow any consequential impact to the appellant along with carrying cost.

Issue No.44- *Adoption of erroneous methodology for computation of WACC.*

151. The Commission's analysis and decision on this issue is extracted hereinbelow:-

*"**Return on Equity***

3.136 GoNCTD had notified Policy Directions vide its notification dated 22.11.2001 to enable restructuring of the Delhi Vidyut Board (DVB) and privatization of the distribution business in exercise of the powers conferred by section 12 and other applicable provisions of Delhi Electricity Reform Act, 2000. The relevant clause related to Return on Equity to be allowed for the distribution licensees is as follows: -

> *"16 (c) Distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserve."*

3.137The Commission had not considered the actual equity available with the Petitioner in its financial statements for computation of Return on Equity from FY 2002-03 to FY 2006-07 (Policy Direction Period) and computation of Return on Capital Employed (RoCE) from FY 2007-08 to FY 2012-13 (MYT Period).

3.138The Commission had proposed to consider the actual equity deployed as net shareholders fund to be used for determination of the ratio of actual equity deployed to total funds required in computation of Weighted Average Cost of Capital (WACC) in Para 3.190 and 3.191 of Tariff Order dated 31.07.2013 as follows:

Net Worth = Original Cost of Fixed Assets

Add : Closing Work in Progress

Add : Net Current Assets
Less : Cumulative Depreciation
Less : Outstanding Loans
Less :Consumer Contribution / security deposits/grants etc.

….

3.141 Accordingly, the Commission has reviewed the available equity and free reserves of the Petitioner during the Policy Direction period and has revised Return on Equity based on the issued, paid up capital and free reserve of the Petitioner from FY 2002-03 to FY 2006-07 as follows:

Table 3.38: Revised Return on Equity approved from FY 2002-03 to FY 2006-07 (Rs. Crore)

Sl. No	***Particulars***	***As on 01.07.2003***	***FY 2002-03***	***FY 2003-04***	***FY 2004-05***	***FY 2005-06***	***FY 2006-07***	***Remarks***
A	*Net Worth as per Audited statements*	*368*	*390.20*	*419.5*	*476.26*	*546.82*	*665.48*	*Table 3.37*
B	*Average Net Worth for the period*		*379.10*	*404.85*	*447.88*	*511.54*	*606.15*	
C	*Opening Equity*	*368.00*	*368.00*	*368.00*	*416.53*	*463.73*	*547.62*	
D	*Internal Accruals - based on capex*		*(0.00)*	*48.53*	*47.20*	*83.89*	*62.53*	*Table 3.34*
E	*Closing balance of Equity eligible for RoE*	*368.00*	*368.00*	*416.53*	*463.73*	*547.62*	*610.15*	*C+D*
F	*Average Equity*		*368*	*392.26*	*440.13*	*505.67*	*578.89*	*(C+E)/2*

	(Equity Capital + Average Free Reserve)							
G	RoE Offered @ 16%		44.16	62.77	70.42	80.91	92.62	F*16%
H	Limiting Average normative Equity to actual equity		**368**	**392.26**	**440.13**	**505.67**	**578.89**	**Min(F,B)**
I	Revised RoE		44.16	62.76	70.42	80.91	92.62	H*16%

...

3.146In view of the Regulation 5.10 of MYT Regulations, 2007 and 5.11 of MYT Regulations, 2011, it is clarified that return on equity shall be restricted to actual available equity including free reserves in case where the actual available equity including free reserves is less than 30% of the asset capitalized. Further, as per MYT Regulations 2011, Working capital shall be considered 100% debt financed for the calculation of WACC.

3.147Total capital requirement in the distribution business for the relevant year is indicated in the form of RRB which includes actual equity and actual debt after repayment. The Commission has considered actual available equity including free reserves up to maximum of 30% of RRB for the purpose of computation of WACC. RRB includes original cost of fixed asset excluding accumulated depreciation. By considering the actual equity available the balance of RRB has been considered to be funded from debt which is net of repayment of loans.

3.148Accordingly, the revised equity of the Petitioner is as follows:

Table 3.41: Equity approved during FY 2007-08 to FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Remarks
A	Opening Equity	610.15	618.15	694.54	729.61	824.03	888.22	Table 3.38
B	Addition during the year – Capitalisation	-51.69	70.57	36.86	95.92	56.94	33.4	Table 3.40
C	Addition during the year - Working Capital	59.69	5.83	-1.79	-1.5	7.25		Table 3.50
D	Adjustment in Working Capital (due to 2nd MYT Regulations)						-70.37	July 2014 Order
E	Closing Balance	618.15	694.54	729.61	824.03	888.22	851.25	A+B+C+D
F	Average Equity	614.15	656.35	712.08	776.82	856.12	869.73	(A+E)/2

…

3.192 Due to revision in RRB and consideration of actual equity available including free reserves, the revised WACC and RoCE from FY 2007-08 to FY 2012-13 is as follows:

Table 3.55: Revised WACC and RoCE from FY 2007-08 to FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	Remarks
A	RRB (i)	1,315.94	1,461.68	1,598.82	1,780.74	2,032.29	2,231.48	Table 3.54

B	Normative Equity @ 30% of RRBi	394.78	438.50	479.65	534.22	609.69	669.44	A*30%
C	Average Actual Equity including free reserve	767.00	909.06	1,124.96	1,429.41	1,727.82	2,291.58	Table 3.37
D	Equity considered for WACC (min of normative equity and actual equity)	394.78	438.50	479.65	534.22	609.69	669.44	Min (B,C)
E	Debt - balancing figure	921.16	1,023.17	1,119.18	1,246.51	1,422.61	1,562.04	A-D
F	Equity available for revenue gap, if any.	372.22	470.56	645.31	895.18	1,118.13	1,622.13	C-D
G	Rate of return on equity incl. Supply Margin (re)	16.00%	16.00%	16.00%	16.00%	16.00%	16.00%	
H	Additional re on account of AT&C incentive						0.63%	
I	Rate of interest on debt	9.19%	9.25%	9.28%	9.29%	10.17%	9.97%	
J	WACC	11.23%	11.28%	11.30%	11.30%	11.92%	11.97%	
K	ROCE	147.82	164.80	180.60	201.28	242.23	267.03	A*I
L	RoCE allowed in T.O.	166.23	184.97	203.53	226.90	268.77	298.74	
M	Difference to be allowed/ (recovered)	(18.41)	(20.17)	(22.93)	(25.62)	(26.54)	(31.71)	K-L

...

Debt and Equity

Petitioner's Submission

3.396 The Petitioner has submitted the value of equity and debt for FY 2013-14 as given below:

Table 3.118: Debt and Equity submitted by Petitioner for FY 2013-14 (Rs. Crore)

Sl. No	Particulars	Equity
A	Opening equity	1156.34
B	Additions of capex	89.17
C	Closing equity	1245.50
D	Average equity	1200.92

Sl. No	Particulars	Debt	Working capital	Total
A	Opening	1210.42	328.79	1539.21
B	Additions of capex	208.06	56.69	264.75
C	Repayment	203.33		203.33
D	Closing	1215.15	385.48	1600.63
E	Average	1212.79	357.13	1569.92

Commission's Analysis

3.397 The Commission has considered the equity funding for capitalisation in terms of MYT Regulations 2011 as given below:

Table 3.119: Equity for FY 2013-14 (Rs. Crore)

S.No.	Particulars	FY 2013-14	Reference
Equity during the Control period			
A	Opening Equity	851.25	Table 3.41
B	Addition during the year - Capitalisation	24.79	Table 3.108
C	Closing Balance	876.04	A+B
D	Average Equity	863.64	(A+C)/2

…

Commission's Analysis

3.404 Regulation 5.11 of the MYT Regulations, 2011 specifies,

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

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

Where,

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

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

3.405 Regulation 5.11 of the MYT Regulations, 2011 specifies

"for the purpose of determination of tariff, debt-equity ratio for the asset capitalisation shall be 70: 30. where equity employed is in excess of 30% of the amount of equity for the

purpose of tariff shall be limited to 30% and the balance amount shall be considered as notional loan. Where actual equity employed is less than 30%, the actual equity and debt shall be considered.

The working capital shall be considered 100% debt financed for the calculation of Weighted Average Cost of Capital (WACC)".

3.406 The Regulation 4.21(b)(ii) specifies that "the Commission shall not true up the interest rate, if variation in SBI Base Rate as on 1st April 2012 is within +/- 1% during the control period."

3.407 The SBI Base Rate as on 1st April 2012 and 31st March 2014 is at 10.00% and there is no change/variation in base rate. Therefore, interest rate is not required to be trued up for FY 2013-14.

3.408 The Commission has accordingly, considered the cost of debt at 10.12% and Return on Equity @16% for FY 2013-14 in terms of Regulation 5.11 of the MYT Regulations, 2011.

3.409 The Regulation 4.8 of the MYT Regulations 2011 specify that "the Distribution licensee will be eligible for incentive by way of higher rate of Return on Equity (to be considered while calculating RoCE) for achieving lower AT&C loss level than specified in the loss reduction trajectory".

3.410 The Commission has approved additional return on equity of 2.89% towards AT&C loss reduction as incentive.

For the purpose of RoCE, the revised WACC considering the impact of AT&C incentive is as follows:

3.411 The Commission has computed the weighted average cost of capital (WACC) and return on capital employed (RoCE) as shown in the Table below:

Table 3.125 Approved WACC and RoCE for FY 2013-14

Sl. No.	***Particulars***	***FY 2013-14***
A	*RRB (i)*	*2282.00*
B	*Normative Equity @ 30% of RRBi*	*684.60*
C	*Average Actual Equity including free reserve*	*2778.08*
D	*Equity considered for WACC (min of normative equity and actual equity)*	*684.60*
E	*Debt - balancing figure*	*1597.40*
F	*Equity available for revenue gap, if any.*	*2093.48*
G	*Rate of return on equity incl. Supply Margin (re)*	*16.00%*
H	*Additional re on account of AT&C incentive*	*2.89%*
I	*Rate of interest on debt*	*10.12%*
J	*WACC*	*12.75%*
K	*ROCE*	*290.98*

…"

152. The Commission has thus trued up the Weighted Average Cost of Capital (WACC) and Return on Capital Employed (RoCE) of the appellant by factoring in the actual equity invested by the appellant into the distribution business, which is assailed by the appellant in this appeal.

153. The learned counsel for the appellant argued that this is a classic case of reopening the previous years tariff orders by the Commission, which is not permissible in view of the judgment of the Supreme Court dated 18.10.2022 in BRPL v. DERC (2023) 4 SCC 788 and the judgment of this Tribunal in TPDDL v. DERC (2019) SCC OnLine (Aptel) 106 (appeal No.246 of 2014). It is further submitted that the Commission has deviated from its past practice of computing the WACC for the FYs 2007-08 to 2013-14. It is pointed out that till 23.07.2014, the Commission considered equity component as on 01.07.2002 in the debt-equity ration of 60:40 (original investment) in accordance with the transfer of assets to the three discoms under Delhi Electricity Reforms (Transfer Scheme) Rules, 2001. Thereafter all fresh investments have been considered in the debt-equity ratio of 70:30 (fresh investments). It is submitted that this methodology was followed constantly by the Commission in all tariff determinations / projections as well as true up orders and accordingly for the purpose of calculation of WACC respective debt-equity was considered in the said ratio. It is submitted that after pending investment in the fixed asset on 06.07.2002 where debt-equity ratio of 60:40 was allowed, the investment in fixed assets onwards has been allowed in the debt-equity ratio of 70:30 but with the paucity of time and implementation of 2007 MYT Regulations, repayment of the debt has been allowed by the Commission in the form of depreciation without any repayment of equity invested by the appellant in the fixed assets resulting into reduction in debt-equity ratio of assets lower than 70:30 on account of such repayment of debt. It is pointed out that though the quantum of debt included in the capital reduces constantly and would be lower than that at a time of capitalization, the amount of equity invested in the capital would remain constant and therefore assumption of debt-equity ratio of 70:30 while computing WACC

during the subsequent years is artificial as it results in giving lesser weightage to the equity investment by the appellant.

154. It is argued by the learned counsel that in considering Regulated Rate Base (RRB) for calculation of debt-equity ratio and WACC, the Commission has ignored the fact that original investment was allowed in the debt-equity ratio of 60:40 and fresh investments were to be considered in the debt-equity ratio of 70:30. It is argued that the Commission has arbitrarily determined WACC based on debt-equity ratio of 70:30 without giving any due consideration to the equity amount invested by the appellant which was duly approved by the Commission and also while ignoring the fact that the repayment is being made with respect to debt component only and no repayment of the equity component is allowed under the tariff regulations.

155. The learned counsel pointed out that in the tariff order dated 13.07.2012, while projecting the ARR of the appellant for the second control period i.e. FYs 2012-13 to 2014-15 in terms of regulation 5.11 of 2011 MYT Regulations, the Commission had approved WACC considering the average (gross) of the debt and average value of equity. It is submitted that same methodology was again followed by the Commission in the subsequent tariff orders dated 31.07.2013 and 23.07.2014 while determining the ARR of the appellant for the FYs 2013-14 and 2014-15 respectively.

156. According to the learned counsel, the said approach of the Commission in not following the methodology for computation of WACC / RoCE adopted by it in the previous tariff orders and deviating from the same by considering the RRB for calculation of debt/equity ratio as well as WACC, is absolutely unfair and arbitrary in as much as it arbitrarily reduces the return

on investment of the appellant than what is guaranteed under the extant statutory and regulatory framework, and thus, cannot be sustained.

157. On behalf of the Commission, it is argued that the underlying capitalization of discoms in Delhi has remained provisional from the very beginning and privatization on account of pendency of physical verification and the difficulty in formulating the initial Register of Assets inherited by the discoms, and therefore, WACC and RoE has till date remained provisional. Thus, it is sought to be argued that since the capitalization as well as computation of WACC/RoE were never final there arises no question of the Commission reopening or unsettling the same. It is submitted that if the Commission is barred from reopening these figures in subsequent true ups, it would be detrimental for the appellant as well as the entire sector in Delhi.

158. The learned counsel further submitted that it is the bounden and statutory duty of the commission to verify the equity invested by appellant and to ensure that appellant earns a return only on the actual equity invested. It is pointed out that the Commission has in its tariff order dated 31.07.2013 stated the principles on which actual equity has to be computed and the same are quoted hereinbelow: -

> *"3.168 The Commission in its MYT Regulation has provided that the debt : equity ratio of 70: 30 would be adopted by the Commission subject to the condition that in case the actual equity deployed in the business is less than 30%, the weighted average cost of capital (WACC) would be computed considering the actual percentage of equity deployed.*

3.169 For this purpose, the Commission propose to consider the equity deployed as net shareholders fund to be worked out as follows:

Net Worth = Original cost of Fixed Assets
Add: Closing Work in progress
Add: Net current assets
Less: Cumulative Depreciation
Less: Outstanding loans
Less: Consumer contributions/ security deposits/ grants etc.

3.170 For this purpose, the Commission has sought additional details regarding equity infusion from the distribution utilities. Pending receipt of the above information and finalization of the figures of net worth, the Commission has adopted a normative debt: equity ratio of 70:30 which will be subject to true-up after the details of equity infusion and net worth are finalization by the Commission."

159. It is submitted by the learned counsel that this methodology was never assailed by the appellant and therefore it is not open for the appellant to dispute the same in these proceedings. It is further argued that the MYT Regulations of 2007 as well as of 2011 allow for a debt-equity ratio of 70:30 contingent on the actual equity being 30% or above and in the event of actual equity being below 30%, the same is to be treated on actuals. Therefore, the same is required to be trued up.

160. It is further submitted that the Commission has approved all fresh capitalization in the ratio of 70:30 only which is in consonance with the tariff policy of 2006, the relevant portion of which is as under: -

> *"b) Equity Norms*
>
> ***For financing of future capital cost of projects, a Debt : Equity ratio of 70:30 should be adopted**. Promoters would be free to have higher quantum of equity investments. The equity in excess of this norm should be treated as loans advanced at the weighted average rate of interest and for a weighted average tenor of the long term debt component of the project after ascertaining the reasonableness of the interest rates and taking into account the effect of debt restructuring done, if any. In case of equity below the normative level, the actual equity would be used for determination of Return on Equity in tariff computations."*

161. According to the learned counsel, the Commission cannot change the 70:30 mandate of law and hence the contentions of the appellant in this regard deserve to be rejected. He further argued that RoCE has been calculated on the RRB as per the 2007 MYT Regulations. In this regard he referred to regulation 5.5 to 5.19 of 2007 MYT Regulations. Thus, the submission of the learned counsel is that the depreciation as well as RoCE is required to be calculated only on the RRB by virtue of these regulations and actually the appellant, by arguing to the contrary, is seeking amendment of these regulations which is not permissible.

Our view:

162. Examining the records and considering the arguments of the parties and the Impugned Order, it is noted that the State Commission, by way of the Impugned Order, has suo-motu re-opened all previous tariff and true-up orders and changed the methodology of computing WACC and hence deviated from the principles which were laid down by it in the Multi-Year Tariff determination, which is contrary to the settled principle of law.

163. We also examined the MYT Regulations in terms of which, the State Commission is required to review the actual capital investment at the end of each year of the Control Period and adjustment to depreciation and return on capital employed for the actual capital investment vis-à-vis approved capital investment shall be done at the end of Control Period. In fact, the State Commission has not denied that in all previous Tariff Orders, it has while computing WACC considered normative debt: equity ratio of 70:30 on the asset capitalized each year as per the methodology specified in MYT Regulations. In other words, the State Commission has not denied that till the issuance of the Impugned Order, it has considered funding of Capex / capitalization in debt: equity ratio of 60:40 as of 01.07.2002 and normative 70:30 for each year thereafter.

164. In this connection, the two Provisos to Regulation 5.11 of the MYT Regulations, 2011 are important. The two Provisos read as under:

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

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

165. The second of the two Provisos extracted above makes it clear that even for assets capitalized during the First Control Period, i.e., up to 31.03.2012, whatever was the debt: equity ratio approved by the Respondent Commission at the time when those assets were actually capitalized will be continued. It is the undisputed case that with respect to the assets capitalized till 01.04.2012, the Commission had been approving the debt: equity ratio at 70:30 on a normative basis. Even though those approvals may have been on a provisional basis, the State Commission has now by the aforesaid Regulation (i.e., the third proviso to Regulation 5.11) mandated that whatever the debt: equity ratio approved at the time of capitalization would have to be continued. It is hardly necessary to hold that if there is an inconsistency between an Order of the State Commission and the Regulations framed by it, the Regulations would override. Therefore, the statutory mandate is for the debt: equity ratio: (i) covered by the Transfer Scheme, to be continued as per the Transfer Scheme (i.e., 60:40); and (ii) for assets capitalized up to 01.04.2012, to be continued on the same debt: equity ratio approved at the time of capitalization (i.e., 70:30).

166. The State Commission in its submissions has relied on the fact that truing up of the capitalization from the date of privatization could not be done by it because the approvals were provisional, and therefore it is entitled to reopen the issue.

167. We find such a submission unacceptable. As a fundamental principle, no man can suffer due to the fault of the Court. If the State Commission has not undertaken the true up of capitalization ever since privatization, the Appellant cannot be made to bear the brunt of the State Commission's own failure.

168. Further, the State Commission was fully aware of its provisional approvals during the first MYT Period as on the date when it framed its second MYT Regulations, 2011. The State Commission is deemed to have known about its own provisional approvals when it framed the aforesaid third Proviso to Regulation 5.11 and mandated that whatever the debt: equity ratio on the capitalization till 01.04.2012, provisional or otherwise, would be continued unchanged.

169. Even otherwise, in terms of the settled position of law, a truing-up exercise cannot be done retrospectively to change the methodology/principles of tariff determination and reopen the original tariff determination order thereby setting the tariff determination process to naught at the stage of truing-up, reliance is placed on the judgment dated 18.10.2022 in *BRPL v. DERC, (2023) 4 SCC 788*.

170. We accordingly set aside the Impugned Order wherein the State Commission has considered the debt: equity ratio based on RRB. There is

nothing in the Regulations which provides that the debt and equity have to be derived from the RRB. Hence, we direct the State Commission to re-determine the debt and equity for each year by considering the ratio of 60:40 for assets capitalized under the Transfer Scheme and the ratio of 70:30 for assets capitalized thereafter up to 01.04.2012. It must also ensure that the closing balance of debt and equity of a year is to be continued forth as the opening balance of debt and equity for the next year.

171. Hence, this issue is decided in favour of the appellant.

Issue No.46- *Erroneous implementation of judgment of this Hon'ble Tribunal in relation to the employee expenses and A&G expenses.*

172. The Commission has considered the figure of 264.66 crores as employee expenses of the appellant for the base FY 2011-12 as against the audited expenses of the appellant under this head of Rs.307.91 crores. The impugned findings of the Commission are extracted hereinbelow: -

> *"3.160 The Employee Expenses is majorly impacted by Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in AT&C Loss levels. Therefore, the Commission has compared the Actual Employee Expenses of FY 2011-12 as per audited Financial statement of FY 2011-12 with the Actual Employee Expenses of FY 2007-08 escalated by proportionate increase in five years Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in*

AT&C Loss levels. It has been observed that the Actual Employee Expenses of FY 2011-12 is less than the escalated Employee Expenses by considering Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in AT&C Loss levels.

3.161 ***Therefore, the Commission has approved the base year employee expenses of the Appellant at Rs. 264.66 Crore which is minimum of revised employee expenses for FY 2011-12 (Rs. 264.66 Crore) and audited employee expenses (Rs. 307.91 Crore). Hon'ble APTEL has upheld the escalation factor of 8% to be applied for projection of Employee expenses during second MYT control period in Appeal No. 171, 177 and 178 of 2012****.*

3.162 Accordingly, the Commission has approved the employee expenses for second MYT control period as follows:

Table 3.45: Revised Employee Expenses for 2nd MYT Period {Rs. Crore)

Particulars	***Audited FY 12***	***Revised employee expenses (FY 12)***	***Base Year expenses (FY 12)***	***FY 13***	***FY 14***	***FY 15***
Gross Employee Expenses	*307.91*	*264.66*	*264.66*	*285.83*	*308.69*	*333.39*
Less: capitalisation (@10%)				*28.58*	*30.87*	*33.34*
Net Employee Expenses				*257.24*	*277.82*	*300.05*

...

3.336 The Commission has re-determined the O&M Expenses in light of judgment of Hon'ble APTEL in Appeal no. 171,177 & 178 of 2012. The basis of such determination is as discussed in earlier paragraphs.

3.337 The Commission, subject to outcome of the Tribunal order, has provisionally considered SVRS pension as per the audited accounts for FY 2013-14 in true up. The Employee Expenses as approved for FY 2013-14 is as follows:

Table 3.86: Employee Expenses approved by the Commission for FY 2013-14 (Rs. Crore)

Sl. No.	Particulars	Tariff Order FY 2012-13 dated 13.07.2012	Petitioner's Submission	Now Approved	Reference
1	Gross Employee Expenses	302.62	409.22	308.69	Table 3.45
2	Less: Employee expenses capitalized	30.26	40.92	30.87	
3	Net Employee expenses	272.36	368.30	277.82	
4	SVRS Pension	4.01	3.53	3.53	

…"

173. The submission made on behalf of the appellant is that the approach of the Commission in computing the employee expenses for the base year 2011-12 is in violation of tariff regulations 2011 as well as judgment dated 10.02.2015 of this Tribunal in TPDDL v. DERC (2015) SCC OnLine (Aptel)

170 (appeal No.171/2012) and the Commission ought to have considered the latest available audited account, business plan filed by the appellant and actuals of the base year. The learned counsel for the appellant argued that this tribunal in the said judgment in appeal No.171/2012 has held that methodology adopted for benchmarking the employee expenses as well as A&G expenses of the appellant against the employee expenses as well as A&G expenses of other distribution companies in the NCT of Delhi on the basis of cost of per unit sales etc. is erroneous and accordingly directed redetermination of these expenses as per the 2011 tariff regulations. The learned counsel also cited another judgment dated 28.11.2013 of this Tribunal in NDPL v. DERC (2013) SCC OnLine (Aptel) 140 (appeal No.14/2012) in which this Tribunal had specified the methodology to be followed for fixing the O&M expenses for the base year period.

174. It is further argued by the learned counsel that while purportedly implementing the judgment of this Tribunal in appeal No.171/2012, the Commission has wrongfully considered the arbitrary figure of Rs.264.66 crores as employee expenses for the base year 2011-12 as against the audited expense of Rs.307.91 crores as submitted by the appellant.

175. Learned counsel for the Commission argued that as per the directions of this Tribunal in subsequent judgments dated 28.11.2013 and 30.09.2019 in appeal Nos.14/2012 and 246/2014 reported as NDPL v. DERC (2013) SCC OnLine (Aptel) 140 and TPDDL v. DERC (2019) SCC OnLine (Aptel) 106 respectively, the Commission has redetermined the employee, A&G and R&M expenses of the appellant upon considering 2011 MYT Regulations, audited financial statements of the appellant for FY 2011-12, different modes of work carried out by the distribution licensees and purpose of distribution

licensees. It is submitted that as a consequence of implementation of the judgments of this Tribunal, the methodology and trajectory computed in the impugned order are no longer in existence and in effect, the instant issue has become infructuous. It is submitted that the tariff order dated 30.09.2021, in which the said redetermination of these expenses has been made, has been assailed by the appellant by way of appeal No.334 of 2021 and all the grievances of the appellant with regards to the same can be adjudicated in that appeal.

176. In rebuttal, the learned counsel for the appellant submitted that in the tariff order dated 30.09.2021, the Commission has under the guise of implementing the judgments of this Tribunal, adopted a different methodology which is contrary to these judgments. It is admitted that the said tariff order has been assailed by the appellant by way of appeal No.334 of 2021 and it is pointed out that by way of orders dated 24.05.2022 and 22.07.2022 passed in that appeal, the Commission has been directed to scrupulously implement the judgments of this Tribunal. It is further submitted by the learned counsel that in furtherance of Order dated 24.05.2022, Ld. DERC had passed Order dated 21.07.2022 purportedly in compliance of this Hon'ble Tribunal Judgment dated 24.05.2022 in Appeal No. 213 of 2018, Appeal No. 332 of 2021, IA No. 1971 of 2021 in Appeal No. 334 of 2021 and DFR No. 38 of 2022. Thereafter, TPDDL had filed Review Petition No. 38 of 2022 before Ld. DERC seeking review of Ld. DERC's Order dated 21.07.2022. Ld. DERC by Order dated 11.11.2022 had dismissed the Review Petition No. 38 of 2022. TPDDL has filed Appeal No. 363 of 2023 challenging Ld. DERC's Order dated 21.07.2022.

<u>Our View:</u>

177. Regulation 5.4 of 2011 MYT Regulations is relevant and is reproduced hereinbelow:-

> *"5.4 The Licensee shall submit the O&M Expenses for the Control Period as prescribed in Multi Year Tariff filing procedure. The O&M expenses for the Base Year shall be approved by the Commission taking into account the latest available audited accounts, business plan filed by the Licensees, estimates of the actual for the Base Year, prudence check and any other factor considered appropriate by the Commission."*

178. In judgment dated 28.11.2013, in appeal No.14 of 2012, this Tribunal has held as under:-

> *"187. **While fixing the target for AT&C losses, Delhi Commission has considered actual AT&C losses achieved during the previous year. However, while fixing the O&M expenses, Delhi Commission has ignored actual expenses and indexed the normative expenses as per MYT 2007 Regulation**.*
>
> *188. The approach taken by Delhi Commission is not correct. **It should have adopted either the normative AT&C trajectory or normative expenses as per MYT 2007 Regulation or actual. The Delhi Commission can't***

adopt a method under which appellant is at loss under all the circumstances*.*

189. This issue is decided accordingly in favour of appellant."

179. In judgment dated 30.09.2019 in appeal No.246 of 2014, this Tribunal again held as under:-

"12.4.1 Having regard to the submissions of learned counsel for the Appellant and learned counsel for the Respondent Commission, we note that the various aspects relating to the fixation of AT & C loss trajectory and O & M charges on actual/normative basis have been duly deliberated by this Tribunal in its judgment dated 28.11.2013 in Appeal No. 14 of 2012. Subsequently, in compliance to the said judgment, the State Commission has determined AT & C loss as well as OM expenditure on normative basis for the FY 2011-12. However, as alleged by the Appellant, the same principle has not been followed for the subsequent period i.e. FY 2012-13 to FY 2014-15. We find force in the submissions of learned counsel for the Appellant that once a principle or methodology for determining the AT & C loss trajectory or O & M charges are decided, the same should be enforced for subsequent periods also taking the previous base year for which these matters stand settled. In the instant case, the base year was FY 2011-12 for which AT & C loss trajectory as well as O & M charges have been

reworked out based on normative basis. It is not in dispute that the Appellant has been able to reduce AT & C loss for F& 2012-13 and also earned incentive towards the same. However, we are of the opinion that a methodology once finalized should not be altered in such a way that it renders ultimate disadvantage to the Distribution Licensee as in the present case."

180. There appears to be consensus between the parties on the aspect that A&G expenses as well as the R&M expenses have to be determined as per the above noted judgments of this Tribunal in appeal Nos.14/2012 and 246/2014. The contention of the Commission is that the employee expenses, A&M expenses and R&M expenses of the appellant have been redetermined in tariff order dated 30.09.2021 in terms of these two judgments of this Tribunal upon considering 2011 MYT Regulations as well as the audited financial statements of the appellant for the FY 2011-12. However, it is submitted on behalf of the appellant that in the said tariff order dated 30.09.2021, the Commission has in the guise of implementing the judgments of this Tribunal, adopted a different methodology which is contrary to these judgments. The appellant has already assailed the said tariff order dated 30.09.2021 by way of appeal No.334/2021 before this Tribunal. By way of order dated 24.05.2022 passed in the said appeal, this Tribunal has directed the Commission to scrupulously implement the above noted judgments of this Tribunal. It appears that in furtherance of the said order dated 24.05.2022 of this Tribunal, the Commission has passed order dated 21.07.2022 purportedly in compliance of the said order. The appellant appears to have not been satisfied with the correctness of the methodology

adopted by the Commission in the order dated 21.07.2022 and accordingly, filed review petition No.38/2022 before the Commission seeking review of the said order but the review petition has been dismissed by the Commission vide order dated 11.11.2022. The appellant has, thereafter, assailed the said order dated 21.07.2022 before this Tribunal by way of appeal No.363/2023 which is still pending disposal.

181. The order dated 30.09.2021 is not before this Tribunal in these proceedings, and therefore, we are unable to examine the correctness or otherwise of the said order. The same would be done in appeal Nos.334/2021 and 363/2023. Therefore, we defer passing of any order on the issue under consideration at this stage. The issue can be effectively resolved in terms of the judgments to be passed by this Tribunal in these two appeal Nos.334/2021 and 363/2023.

Issue No.48- *Disallowance of Power Purchase Cost on account of overlapping banking transaction.*

182. The issue relates to disallowance of Rs.7.58 crores to the appellant by the Commission during the FY 2013-14 (particularly in the months of June 2013 to September 2013 and December 2013 to February 2014) on account of overlapping of forward and return banking transactions. The detailed findings of the Commission on this issue are extracted hereinbelow: -

> "***Avoidable Power Purchase Cost- Due to Overlapping in Banking Transactions***

3.285 The Commission has analysed Power Banking transactions during FY 2013-14 and observed that ***there are parallel Forward and Return banking transactions during the months of June'13, July'13, August'13, September'13, December'13, January'14 and February'14 i.e., overlapping of Forward and Return banking transactions.***

3.286 ***During the Technical Validation Session, the Commission directed the Petitioner to furnish the reasons for such overlapping during the said periods.*** *The replies submitted by the Petitioner were not satisfactory. Therefore, the Commission vide its letter dated 24.04.2015 authorised its staff to visit the office of the Petitioner as a part of Prudence Check process for True up of FY 2013-14.* ***Based on the documents provided by the Petitioner during such prudence check process, it is observed that the total quantum of import and export in the same time slot as per Letter of Intent (LoI) in FY 2013-14 was 67.42 MU.***

3.287 ***Due to such overlapping in Banking Transactions, the Petitioner has incurred additional expenses on account of Trading Margin and Transmission Charges. Accordingly, the additional expenses incurred on account of Trading Margin and Transmission Charges on such quantum of overlapping***

in Banking Transaction of Rs. 7.58 Crore has not been considered in Power Purchase Cost for FY 2013-14 which could have been avoided by the Petitioner.

3.288 Therefore, the Commission directs the ***Petitioner to take necessary precautionary measures before entering into power Banking transactions and to avoid such Forward and Return overlapping transactions and resultant losses.***

3.289 The Commission observed that the Petitioner has sold 2719.43 MU of surplus energy under short term arrangements as follows:

…

3.290 It is observed from the above table that short term sales under Bilateral has been reduced from 30.32% in FY 2012-13 to 22.46% in FY 2013-14 whereas sales under Banking transactions has increased from 2.83% for FY 2012-13 to 27.91% in FY 2013-14.

3.291 The Petitioner has received Rs. 782.99 Crore (@ Rs. 2.88 per unit) on short term power sale of 2719.43 MU out of which Rs. 203.31 Crore (25.97% @ Rs. 3.33 per unit) was through sale of energy under bilateral, Rs. 36.49 Crore (4.66% @ Rs. 1.51 per unit) was through UI, Rs. 282.14 Crore (36.03% @ Rs. 3.72 per unit) under banking

arrangement, Rs. 256.30 Crore (32.73% @ Rs. 2.34 per unit) was through exchange and Rs. 4.74 Crore (0.60% @ Rs. 4.19 per unit) was for sale of energy under intra- state arrangement.

3.292 It is observed that the rate of sale of surplus power is highest under intra-state arrangements (Rs.4.19 per unit) followed by banking transaction (Rs.3.72 per unit) and bilateral transactions (Rs.3.33 per unit) during FY 2013-14. The Commission is of the view that the Petitioner should endeavour to maximise the revenue from sale of surplus power and enter into increased banking, intrastate and bilateral transactions.

3.293 The Commission had directed the Petitioner in Tariff Order dated 31 July, 2013 for short term transactions during FY 2013-14 as follows:
"6.9 All effort shall be made for prudence in short term sale and purchase so as optimize power purchase cost."

3.294 Further, the Commission vide its letter dated 20 January, 2010 had already issued directions for procurement and sale of power by Distribution Licensee as follows:
"7…….. the Distribution Licensee, for any reason whatsoever, the licensee may enter into a short-term arrangement or agreement for procurement of power/sale of

power through a transparent process of open tendering and competitive bidding in accordance with these guidelines.

8. Distribution Licensee shall adopt a bid evaluation or scoring system that is sufficiently comprehensive and transparent to permit a competitive result which identifies the least cost proposal for procurement and highest in case of sale of power.

.....

15. The Distribution Licensees endeavor should be first to dispose off surplus power through banking transaction. Such banking transactions should be tried at first on direct basis."

3.295 In view of the above, the Commission directs the Petitioner should enter into increased Banking Transactions against available surplus power to avoid the short term power purchase requirement.

3.296 On a query from the Commission, the Petitioner has submitted that they had floated/participated in tenders floated by the other utilities and also sold some of the surplus power to other states through traders.

3.297 The Commission observed that Petitioner has also sold/purchased power by entering into contracts for which offers were received after telephonic discussions/e-mails. It is observed that the Petitioner has not followed the tendering process in these cases. ***The Petitioner has also purchased/sold substantial quantum in banking but no***

tendering process was followed to enter into contracts for this purpose.

3.298 The Commission directed the Petitioner to submit the details of process followed by the Petitioner for load forecast, projection of surplus/deficit power, procurement/ sale of deficit/surplus power. The Petitioner explained the methodology followed by them for short-term purchase/sales. ***The Petitioner submitted that slot wise estimations for shortages/surplus are made on an on-going basis based on demand projected by SLDC as well as internal projections and availability as per the most recent outages.***

3.299 ***The Commission has taken serious view of not following the guidelines issued by the Commission to purchase or sell short-term power. The Commission therefore, directs the Petitioner to strictly adhere to the guidelines for procurement/sale of power through short term as issued by the Commission.****"*

*[**Emphasis Supplied**]*

183. The main argument raised on behalf of the appellant is that the findings of the Commission are devoid of any reasoning, non-speaking and thus, violate the principles of natural justice. Learned counsel for the appellant, further argued that the Commission has, for unknown reasons, ignored the appellant's letter dated 16.04.2015 in which the appellant had provided detailed reasons for requirement of parallel forward and return banking transactions. The learned counsel pointed out that the Commission has

merely stated in the impugned order that the total quantum of import and export in the same time slot as per letter of intent for the FY 2013-14 was found to be 67.42MU without giving reasons upon which the response of the appellant in this regard was found unsatisfactory. It is submitted that the disallowance of Rs.7.58 crores is totally arbitrary as the Commission ought to have noted the response of the appellant and given reasons for discarding the same. The learned counsel has cited various judgments of the Hon'ble Supreme Court in support of the arguments that a quasi-judicial authority is bound to consider the submissions made by the parties before it and to pass a speaking order to ensure fair play.

184. Learned counsel for the Commission sternly refuted the arguments of the appellant's counsel. He argued that perusal of the impugned order clearly reveals that the Commission has examined the issue in depth and provided its reasoned determination on the issue. He submitted that the Commission only analyses the data submitted to it and does a prudence check on the said data, and therefore, is not required to provide or create data on the demand of the appellant. He also argued that the Commission, while undertaking prudence check and issuing a tariff order is essentially performing a legislative exercise and is not required to give reasons in the order.

Our View:

185. Having gone through the impugned order on the issue under consideration, as extracted hereinabove, we feel in agreement with the submission of the appellant's counsel that the same is bereft of any reasoning and thus a non-speaking order. Perusal of the Para No.3.286 of

the impugned order makes it manifest that in pursuance to the directions of the Commission, the appellant had furnished reasons for overlapping of banking transactions during the period in question and had also provided documents during the prudence check process. The nature and import of the documents provided by the appellant during prudence process has nowhere been stated in the order. We also do not find anything in the entire order to show as to why the reasons provided by the appellant for overlapping banking transactions were not found satisfactory by the Commission. Further, there is no reference at all in the entire order to the letter dated 16.04.2015 stated to have been sent by the appellant to the Commission providing detailed reasons for requirement of parallel forward and return banking transactions during the period in question.

186. We are of the considered view that there cannot be a disallowance merely because there is an overlapping of forward and return banking at the same time. The State Commission, based on facts, has to justify that such forward and return banking at the same time was not justified. In fact, if the State Commission is inclined to make any disallowances on this basis, it would have to conclude that the forward and return banking transaction at the same time was either unjustified or imprudent or otherwise avoidable and that some prejudice has been caused by virtue of such transactions.

187. This Tribunal had the occasion of discussing the necessity of reasons in a quasi-judicial order in appeal No.243/2016 *(Telangana Offset Printers Association v. Telangana State Electricity Regulatory Commission & Ors.)* which has been decided vide judgment dated 01.10.2024, we find it apposite to quote the relevant portion of the judgment hereunder: -

"12. We may note that while passing tariff orders, the Commission exercises quasi judicial functions. Therefore, the Commission is bound to take note of every suggestions/objections raised before it by any stake-holder and to give reasons for accepting or rejecting such suggestions/objections. Reasoned order is the hallmark of judicial system. A reasoned order provides a clear understanding of the decision making process and ensures fairness, accountability and credibility. It reinforces fairness as well as rule of law and enables effective review/appeal process. It is the fundamental consideration in decision making process that the party or the parties must know why and on what grounds the order has been passed again him/them. A speaking order introduces fairness in the decision making and helps in minimizing arbitrariness. The purpose of recording reasons is also to serve wider aspect of principle of justice that justice must not only be done, it must also seem to be done. Reasons act as a bridge between the material facts on which conclusion is drawn and the actual order passed. Reasoning in a judicial order is necessary not only for the satisfaction of the parties but also for the appellate court/forum which must know the reasons for arriving at the decision assailed before it.

13. The Hon'ble Supreme Court has also emphasized in several cases, the importance of reasoned orders. The requirement of indicating reasons has been judicially

recognized as imperative. In Raj Kishore Jha Vs. State of Bihar (2003) 11 SCC 519, the Apex Court held:-

> *"8. …. Right to reason is an indispensable part of a sound judicial system; reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made;…."*

14. Similarly in Asstt. Commissioner, Commercial Tax Deptt. Vs. Shukla & Brother (2010) 4 SCC 785, it has been observed as under :-

> *"23. We are not venturing to comment upon the correctness or otherwise of the contentions of law raised before the High Court in the present petition, but it was certainly expected of the High Court to record some kind of reasons for rejecting the revision petition filed by the Department at the very threshold. A litigant has a legitimate expectation of knowing reasons for rejection of his claim/prayer. It is then alone, that a party would be in a position to challenge the order on appropriate grounds. Besides, this would be for the benefit of the higher or the appellate court. As arguments bring things hidden and obscure to the light of reasons, reasoned judgment where the law and factual matrix of the case is discussed, provides lucidity*

and foundation for conclusions or exercise of judicial discretion by the courts.

24. Reason is the very life of law. When the reason of a law once ceases, the law itself generally ceases (Wharton's Law Lexicon). Such is the significance of reasoning in any rule of law. Giving reasons furthers the cause of justice as well as avoids uncertainty. As a matter of fact it helps in the observance of law of precedent. Absence of reasons on the contrary essentially introduces an element of uncertainty, dissatisfaction and give entirely different dimensions to the questions of law raised before the higher/appellate courts. In our view, the court should provide its own grounds and reasons for rejecting claim/prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be.

25. We would reiterate the principle that when reasons are announced and can be weighed, the public can have assurance that process of correction is in place and working. It is the requirement of law that correction process of judgments should not only appear to be implemented but also seem to have been properly implemented. Reasons for an order would ensure and enhance public confidence and would provide due satisfaction to the consumer of justice under our justice

dispensation system. It may not be very correct in law to say, that there is a qualified duty imposed upon the Courts to record reasons.

26. Our procedural law and the established practice, in fact, imposes unqualified obligation upon the courts to record reasons. There is hardly any statutory provision under the Income Tax Act or under the Constitution itself requiring recording of reasons in the judgments but it is no more res integra and stands unequivocally settled by different judgments of this Court holding that the courts and tribunals are required to pass reasoned judgments/orders. In fact, Order 14 Rule 2 read with Order 20 Rule 1 of the Code of Civil Procedure requires that, the Court should record findings on each issue and such findings which obviously should be reasoned would form part of the judgment, which in turn would be the basis for writing a decree of the Court.

27. By practice adopted in all Courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of basic rule of law and, in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and proper reasoning is the foundation of a just and fair decision. In Alexander Machinery (Dudley) Ltd. there are apt observations in this regard to say "failure to give

reasons amounts to denial of justice". Reasons are the real live links to the administration of justice. With respect we will contribute to this view. There is a rationale, logic and purpose behind a reasoned judgment. A reasoned judgment is primarily written to clarify own thoughts; communicate the reasons for the decision to the concerned and to provide and ensure that such reasons can be appropriately considered by the appellate/higher court. Absence of reasons thus would lead to frustrate the very object stated hereinabove."

15. Thus, reason is the heartbeat of every conclusion and without the same, it becomes lifeless. Giving reason furthers the cause of justice and avoids arbitrariness as well as uncertainty. A litigant has a legitimate expectations of knowing the reasons for rejection of his claim/prayer."

188. Hence, we are unable to sustain the impugned order of the Commission on this issue as the same is a non-speaking one, devoid of reasons or justification. The same is hereby set aside and the issue is remanded back to the Commission for a fresh reasoned decision after hearing the parties again. We hasten to add that this exercise shall be done by the Commission within two months from the date of this judgment.

Issue No.51- *Non-revision of 'K' factor due to revision in GFA*

189. The appellant has sought truing up of the “K” factor on the basis of the truing up of GFA. The Commission, in its reply affidavit has agreed to the same and has stated as follows:-

> *“That the Commission will consider the issue and revise accordingly in subsequent tariff orders.”*

190. It is further stated on behalf of the Commission that identical issue has been heard by this Tribunal in appeal No.265-266 of 2013 in which the judgment has been reserved and therefore the Commission will await for the said judgment in these two appeals before passing any further orders.

191. In view of the above noted stand taken by the Commission, we direct that the Commission shall consider the issue again in terms of the findings to be given by this Tribunal in appeal Nos.265-266 of 2013.

Issue No.53- *Erroneous consideration of inflated revenue billed.*

192. The impugned findings of the Commission on this issue are quoted hereinbelow:-

> ***“Energy Sales***
>
> ***Petitioner’s Submissions***
>
> *3.199 The Petitioner has submitted total sales of 7187.40 MU for FY 2013-14 in its True up Petition as against 7439 MU approved by the Commission in its Tariff Order dated 31.07.2013.*
>
> ***Commission’s Analysis***

…

3.213 ***It was observed in the Audited Form 2.1(a) submitted by the Petitioner that net sales for DJB (> 100 kW) was (-) 5.66 MU for FY 2013-14****. During prudence check process, the Petitioner was directed to explain as to how the Net Sales can be negative even after considering all adjustments.*

3.214 ***The Petitioner in reply submitted that sales adjustment is shown (-) 5.66 MU in >100 kW sub-category of DJB because the adjustment through journal entries is inadvertently shown in > 100 kW sub-category in place of Supply at 11 kV of DJB****. Further,* ***the Petitioner also submitted rectified Form 2.1(a).***

3.215 ***The Commission directs the Petitioner that no deviation is accepted from the audited Form 2.1 (a) submitted and the Petitioner should ensure that proper mechanism is in place so that Form 2.1 (a) is prepared through software without manual intervention****.*

3.216 Therefore, the ***Commission has considered the amount Billed on account of such negative sale of 5.66 MU with the ABR of Rs. 12.76/kWh as submitted by the Petitioner in its revised Form 2.1 (a) of >100 kW DJB category****.* ***The amount Billed is thus computed as Rs. 7.22 Crore. The Commission has considered the Sales against 11 kV supply of DJB at same levels as indicated in the Audited Form 2.1(a) submitted by the Petitioner.***

3.217 The Commission, therefore, for Truing up sales for FY 2013-14 has considered the sales figures submitted by the Petitioner for FY 2013-14 along with the reductions mentioned above. The Trued up Energy sales for FY 2013-14 as approved by the Commission is indicated in the table as follows:

Table 3.63: Trued up energy Sales for FY 2013-14(MU)

Sl. No.	Category	Approved in Tariff Order dated 31.07.2013	Actual as per Petitioner's submission	Trued Up Sales for FY 2013-14	Reference
A	Domestic	3202	3108.50	3108.50	
B	Non-Domestic	1389	1329.39	1329.39	
C	Industrial	2231	2193.18	2193.18	
D	Irrigation and Agricultural	13	13.34	13.34	
E	Public Lighting	120	124.07	124.07	
F	Railway Traction	57	45.51	45.51	
G	DMRC	173	133.71	133.71	
H	**Delhi Jal Board**	**203**	**204.15**	**204.15**	
I.	Others*	51	35.54	35.54	
J	Total	7439	7187.40	7187.40	Sum (A to I)
K	Less: Own consumption		-	6.76	
L	Less: Other Adjustments			1.57	
M	Total Approved Sales	7439	7187.40	7,179.08	J-K-L

**includes Own consumption, theft etc."*

193. The Commission has proceeded to consider sale of electricity by the appellant to Delhi Jal Board against 11 kV supply as per the contents of form 2.1(a) submitted by the appellant itself.

194. It is argued on behalf of the appellant that the said form suffered from certain clerical error which was revised during prudence check vide communication dated 07.04.2015 wherein it was clarified that negative sales of 5.66MU has been inadvertently shown in 100kV sub-category of Delhi Jal Board. It is submitted that a revised form 2.1(a) was submitted by the appellant rectifying error of showing negative sales to Delhi Jal Board in the form previously submitted. It is argued that despite the fact that the appellant had cleared the defect by submitting the revised form 2.1(a) during the prudence check exercise before the issuance of impugned tariff order, the Commission has irrationally adjusted the revised amount of sale by adding 7.22 crores thereby inflating the revenue bill of the appellant without any justification.

195. The submission of rectified form 2.1(a) by the appellant during prudence check exercise is not denied on behalf of the Commission. It is contended on behalf of the Commission that the Commission has considered the sales against 11 kV supply of Delhi Jal Board at the same levels as indicated in the audited form 2.1(a) submitted previously by the appellant along with the tariff petition.

<u>Our View:</u>

196. We are of the opinion that manifestly the form 2.1(a) submitted by the appellant along with the claim petition suffer from certain typing errors and

therefore it ought not to have been penalized for inflated revenue billed on the basis of these errors. The Commission ought to have taken into consideration the revised form 2.1(a) submitted by the appellant during the prudence check exercise.

197. Hence, we set aside the findings of the Commission on this issue and direct the Commission to re-compute the revenue bill of the appellant for the FY 2013-14 in terms of the revised form 2.1(a) submitted by the appellant.

Issue No.56- *Non-Consideration of accumulated depreciation allowed on the assets decapitalization while computing the regulated rate base (RBR).*

198. It is argued on behalf of the appellant that:-

(a) while computing the amount of RRB, Commission has erroneously not considered the accumulated depreciation allowed on the assets de-capitalized due to retirement/replacement on the pretext that Appellant had not submitted accumulated depreciation allowed on the assets de-capitalized.

(b) while reducing decapitalized assets from RRB, Commission has reduced gross amount of assets in case of Appellant. Notably, contrary to this approach taken for Appellant, Ld. DERC reduced written down value ("WDV") (net of depreciation) in case of other two Discoms in National Capital Territory ("NCT") of Delhi without any rationale for discrimination in treatment of retired assets. As such, Ld. DERC has discriminated against the Appellant which is also a similarly placed Discoms in the NCT of Delhi.

Notably, Appellant has made detailed submissions on the issue in the Submissions tendered by Appellant on 20.02.2024 and same may be considered as part and parcel of the present Written Submissions. The same have not been repeated for the sake of brevity and to avoid prolixity.

199. In the reply affidavit filed on behalf of the Commission, it is stated that the information as desired by the Commission with respect to the corresponding depreciation as charged for the assets required was not provided by the appellant and therefore, not considered in the current tariff order. It is stated that as and when the appellant will provide the information, the same shall be considered by the Commission in the subsequent tariff order.

200. Learned counsel for the Commission also submitted that the Commission would consider this issue as and when appropriate information is supplied by the appellant and this issue does not require determination by this Tribunal at this stage.

201. In rebuttal, it was argued by the learned counsel for the appellant that the impugned tariff order nowhere indicates when such information was sought by the Commission while finalising the determination of this issue, and therefore, it is not correct to say that requisite information was not supplied by the appellant.

Our View:

202. Be that as it may, we find it appropriate to direct the Commission to call for requisite information from the appellant within two weeks from the date of

the judgment, which would be supplied by the appellant within two weeks thereafter. The Commission shall determine the issue afresh upon receipt of the information to be supplied by the appellant and upon hearing the parties again. The Commission shall complete the exercise within two months from the date of this judgment.

Issue No.63- *Penalty on cash collection about Rs.4000/-.*

203. The issue relates to the penalty of Rs.9.09 crores imposed by the appellant vide the impugned order on account of cash payments collected by appellant from the consumers over and above the sum of Rs.4,000/- in terms of the Commission's directive 5.96 contained in tariff order dated 31.07.2013. The impugned findings of the Commission on this issue are reproduced hereinbelow: -

> *"3.239 The Commission has issued directive in the Tariff Order dated 31.07.2013 regarding cash payment collection as follows:*
>
> > *"5.96 The Commission directs the Petitioner, that in case the bill for consumption of electricity is more than Rs. 4000, payment for the bill shall only be accepted by the Petitioner by means of an Account Payee cheque/DD. However, the Commission has considered that the blind consumers shall be allowed to make payment of electricity bills, for any amount, through cash."*

3.240 In view of the above, the Petitioner was directed to provide the data for cash collection of more than Rs. 4000/-. The Petitioner provided the said information vide their letter dated 05.03.2015.

3.241 On analysis on the said information it was observed that there were 75947 numbers of cash collection transactions of more than Rs. 4000/- amounting to total of Rs. 90.89 Crore. Further the Commission vide its letter dated 08.04.2015 directed the Petitioner to explain the reason for violation of the said directive. The Petitioner in its reply submitted that:

a) Majority of transactions i.e., 60453 out of 66052 pertain to those consumers who had pending arrears on their connections along with LPSC and the same was paid as total outstanding by way of cash.

b) Remaining transactions, 3701 were transacted by way of special consumer friendly measure limited consumers who were regular defaulters and who insisted on making payment through cash in order to avoid the hassle of disconnection proceedings.

c) There was one transaction of blind consumer, which is exempt from the said ceiling.

d) Remaining cash transactions were attributed solely to the inability expressed by the consumers to pay by method other than cash.

3.242 The Commission observes that there is violation of its directive by accepting the cash payment of more than Rs. 4000/-. Further, the Petitioner has not provided separately the amount collected from blind consumer who is allowed to make payment of electricity bills, for any amount, through cash.

3.243 In view of above said violation of the Commission's directive, the Commission has decided to impose penalty of 10% of the total amount collected through cash payment of above Rs. 4000/. Accordingly, the penalty payment works out to Rs. 9.09 Crore which is reduced from the ARR of FY 2013-14.

…

6.7. The Commission directs the Petitioner that there will be a cash limit of Rs.4000/- while accepting billing dues from consumers. Any bill above Rs.4000/- must be paid by any mode other than cash. This limit is also applicable in case of recovery of all types of dues including LPSC, Misuse charges, theft charges etc. No authority in the DISCOM is permitted to waive this condition pertaining to cash collection. Violation of this directive shall attract penalty to the level of 10% of total Cash collection exceeding Rs. 4000/-."

204. It is argued on behalf of the appellant that neither sections 61, 62 and 64 of the Electricity Act, 2003 nor the tariff regulations empowered the

Commission to impose penalty upon the appellant during tariff determination proceedings. The learned counsel cited judgment of this Tribunal in MSEDCL v. MERC (2009) SCC OnLine (Aptel) 73 to canvass that the Commission cannot convert its power of tariff fixation under sections 61 and 62 of the Electricity Act into the proceedings for imposing penalty. He also relied upon another judgment of this Tribunal dated 19.04.2011 in BRPL v. DERC (2011) SCC OnLine (Aptel) 56 wherein procedure has been laid down to be followed by the Commission before penalizing a utility. The learned counsel submitted that the Commission has not followed the procedure laid down by this Tribunal in the said judgment while penalising the appellant, and therefore, the imposition of penalty upon the appellant is in violation of principles of natural justice.

205. It is, further submitted by the learned counsel that the amount of Rs.9.09 crores has been arrived at by the Commission in an arbitrary manner @10% of Rs.90.89 crores being the total amount collected. He would submit that there is no rationale or justification for arriving at the such rate of 10%, there being no such direction in the tariff order dated 31.07.2013. It is further argued that:

> *(a) Appellant had listed out various instances where Hon’ble Special Courts have directed Appellant to accept cash payments in view of the difficulties faced by the consumers. For instance in an Order dated 31.03.2015 issued by Hon'ble Special Electricity Court, Rohini, Appellant was directed as under: -*

"Sh. Ranveer Singh Tyagi is directed to deposit the settled amount of Rs. 44,200/- against the bill in question. Sh. Tyagi states that he has brought the aforesaid settled amount in cash and is ready to hand over the same to with the authorized representative of the complainant company. ***Sh. KB Choudhary the LD AR of the complainant company states that they cannot take the settled amount in cash in view of the guidelines issued by DERC to the complainant company.***

I have noticed that the accused who are appearing before the court are poor persons and most of them do not have any bank account neither they are familiar with the processes of the bank and are facing lots of inconvenience in making the payments though demand drafts. <u>***This fact needs to be brought to the notice of the CEO of the complainant company so that the difficulty in depositing the payment through demand draft may be resolved by accepting of cash by the AR of the complainant company.***</u> *A copy of the said order is attached for the kind perusal of the Hon'ble Commission."*

(b) Apart from these directions to the Appellant, considerable resistance was faced by the district offices of the Appellant from low-income group consumers who

are mostly daily earners with negligible exposure to banking transactions. Most of such consumers did not even have bank accounts to pay their dues by cheques or demand drafts.

(c) *Even if cheques are accepted, then there is a high risk of the same being dishonoured which further affects the collection efficiency of the Appellant and leads to incurring of additional legal expenses by the Appellant to initiate proceedings under the Negotiable Instruments Act, 1881.*

(d) *For the cases relating to theft of electricity and Court Orders, there is no mandate of making the payment by cheque. Most of the theft cases are presently detected in JJ clusters and villages, where consumers do not have bank accounts to issue cheques.*

(e) *Private banks did not issue demand drafts unless the Applicant had an account with the bank and the Public Sector Banks required PAN no. for transactions above Rs. 50,000/-. Many consumers were unable to meet such requirements.*

(f) *There were various defaults by the consumers in JJ clusters and it became an issue as regards the recovery of dues from them. If payment in cash is not accepted, such consumers would further not be in a position to pay their bills. This leaves the Discom with no option but to disconnect their supply which in turn makes these*

consumers vulnerable to adopt other illegal means to avail electricity supply.

(g) Various RWAs have made representations regarding the problems faced by the consumers to make the payment (i.e., Energy bills, Instalments bills, Enforcement bills) of Rs. 4000/- and more through the cheque or demand draft only.

206. On behalf of the Commission, it is argued that the appellant has not complied with the directives issued by the Commission in various tariff orders regarding acceptance of cash payment above Rs.4,000/- against electricity bills and it wants to continue the same practice in future also. It is pointed out that in fact the appellant indirectly wants that the Commission should not regulate it and the Commission should give it liberty for not complying with the directives.

Our View:

207. We have given our thoughtful consideration to the rival submissions of the learned counsels on this issue. Admittedly, the Commission had issued a directive in the tariff order dated 31.07.2013 which is quoted hereinbelow:-

"5.96 The Commission directs the Petitioner, that in case the bill for consumption of electricity is more than Rs. 4000, payment for the bill shall only be accepted by the Petitioner by means of an Account Payee cheque/DD. However, the Commission has considered that the blind consumers shall

be allowed to make payment of electricity bills, for any amount, through cash."

208. It is important to note here that the directive was issued on 31.07.2013 whereas the truing up is for the entire period of 2013-14, clearly four months had passed by the time the directive was issued, and therefore, its retrospective implementation is bad in law and has to be rejected.

209. Additionally, there are also various instances where special Courts / forums have directed the Appellant to accept cash payments given the difficulties faced by consumers. Therefore, not accepting them would amount to potential contempt of Court as well.

210. Further, a penalty of 10% (or any other percentage) is unfair and beyond the express wordings of the State Commission's own directives. Moreover, it is settled law that tariff determination exercise cannot be used to penalize the Utility and the imposition of a 10% penalty in tariff exercise, was beyond the purview of such exercise [See MSEDCL v. MERC, 2009 SCC OnLine APTEL 73]. On this score also, we find fault with the State Commission's actions.

211. However, in view of the said directive of the Commission, it was not permissible for the appellant to receive payments in cash for any electricity bill for more than Rs.4,000/- after date of issue i.e. 31.07.2013. At the same time, we cannot undermine the difficulties faced by the appellant in collection of payments regarding electricity bills, which have been noted by the

Commission in Para No.3.241of the impugned order also. We also note that these bill payments in cash have been collected by the appellant in the year 2013-14 when there was no facility for Jan-Dhan Saving Bank Accounts for the public residing in rural areas and the Unified Payment Interface (UPI) system had not been introduced. In those days majority of population was not having bank accounts and used to deal in cash only. We feel that the appellant had bonafide constraints in insistence on payments of the bills in the amount more than Rs.4,000/- by account payee cheques / demand drafts etc. Having said so, we cannot lose sight of the fact that there has admittedly been violation of the directive of the Commission contained in tariff order dated 31.07.2013 in this regard.

212. Taking note of the said directive as well as the explanation furnished by the appellant regarding the circumstances in which it was constrained to accept cash payments for the electricity bills of more than Rs.4000/-, and the fact that no quantum of penalty has been prescribed in the directive passed in this regard by the Commission, we are of the opinion that the Commission was not justified in imposing penalty.

213. Thus, the penalty levied upon the Appellant is struck down.

214. The issue stands decided accordingly.

Issue No.65- *Erroneous consideration of 8% inflation factor instead of 8.04% inflation factor.*

215. The issue relates to the consideration of 8% inflation factor by the Commission for computation of employee and administrative & general expenses in the second control period i.e. FY 2013-14 to 2015-16.

216. The impugned findings of the Commission are reproduced hereinbelow: -

*"**Employee Expenses***

3.160 The Employee Expenses is majorly impacted by Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in AT&C Loss levels. Therefore, the Commission has compared the Actual Employee Expenses of FY 2011-12 as per audited Financial statement of FY 2011-12 with the Actual Employee Expenses of FY 2007-08 escalated by proportionate increase in five years Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in AT&C Loss levels. It has been observed that the Actual Employee Expenses of FY 2011-12 is less than the escalated Employee Expenses by considering Sales Growth, Increase in CPI and WPI indices and performance on account of reduction in AT&C Loss levels.

*3.161 Therefore, the Commission has approved the base year employee expenses of the Petitioner at Rs. 264.66 Crore which is minimum of revised employee expenses for FY 2011-12 (Rs. 264.66 Crore) and audited employee expenses (Rs. 307.91 Crore). **Hon'ble APTEL has upheld the escalation factor of 8% to be applied for projection of Employee expenses during second MYT control period in Appeal No. 171, 177 and 178 of 2012**.*

3.162 Accordingly, the Commission has approved the employee expenses for second MYT control period as follows:

Table 3.45: Revised Employee Expenses for 2nd MYT Period (Rs. Crore)

Particulars	***Audited FY 12***	***Revised employee expenses (FY 12)***	***Base Year expenses (FY 12)***	***FY 13***	***FY 14***	***FY 15***
Gross Employee Expenses	*307.91*	*264.66*	*264.66*	*285.83*	*308.69*	*333.39*
Less: capitalisation (@10%)				*28.58*	*30.87*	*33.34*
Net Employee Expenses				*257.24*	*277.82*	*300.05*

A&G Expenses

3.163 The A&G Expenses is majorly impacted by increase in CPI and WPI indices and Consumer growth. It has been observed that bill printing, distribution, collection, handling and postage expenses in A&G expenses have direct relationship consumer base growth. Therefore, the Commission has compared the Actual A&G Expenses of FY 2011-12 as per audited Financial statement of FY 2011-12 with the Actual A&G Expenses of FY 2007-08 escalated by proportionate increase in five years CPI and WPI indices and increase on account of Bill Printing, Distribution, Collection, Handling and Postage Expenses based on Consumer Growth.

3.164 It has been observed that the Actual A&G Expenses (Rs. 48.81 Crore) of FY 2011-12 is less than the of revised A&G Expenses (Rs. 49.80 Crore) as per the approach discussed above. Therefore, the Commission has approved the base year A&G Expenses of the Petitioner at Rs. 48.81 Crore. Hon'ble APTEL has upheld the escalation factor of 8% to be applied for projection of A&G expenses during second MYT control period in appeal no 171, 177 and 178 of 2012.

3.165 Accordingly, the Commission has approved the A&G expenses for second MYT control period as follows:

Table 3.46: Revised A&G Expenses for 2nd MYT Period (Rs. Crore)

Particulars	***Audited FY 12***	***Revised A&G Expenses (FY 12)***	***Base Year (FY 12)***	***FY 13***	***FY 14***	***FY 15***
A&G Expenses	*48.81*	*49.80*	*48.81*	*52.71*	*56.93*	*61.49*

"

217. Learned counsel for the appellant pointed out that in the tariff order dated 13.07.2012 the Commission had determined the inflation factor for the second control period i.e. FY 2012-13 to 2014-15 on the basis of weighted average Consumer Price Index (CPI) and Wholesale Price Index (WPI) as

specified in the 2011 MYT Regulations and such inflation factor was further used to compute the allowable inflation of Operation & Maintenance expenses for the control period. He argued that contrary to the said methodology adopted in the 2012 tariff order as well as to the 2011 MYT Regulations, the Commission has considered the inflation factor as 8% in the impugned order without any justification. He submitted that this Tribunal in judgment dated 10.02.2015 TPDDL v. DERC (2015) SCC OnLine (Aptel) 170 (appeal No.171/2012) has upheld the inflation factor determined by the Commission which, without any decimals comes to 8% and with two decimals comes to 8.04 - 8.05% as detailed in the following table: -

"

2012 Tarif Order					
Particulars	*Base year FY 2011-12*	*FY 2012-13*	*FY 2013-14*	*FY 2014-15*	*Remark*
Employee Expenses	*259.28*				
Approved Employee expenses- "A"		*280.1*	*302.62*	*326.99*	*Table 87 of 2012 Tariff Order*
Inflation considered		*8.03%*	*8.04%*	*8.05%*	
A&G Expenses	*42.02*				
Approved A&G expenses- "B"		*45.40*	*49.05*	*53.00*	
Inflation considered		*8.03%*	*8.04%*	*8.05%*	*Table 101 of 2012 Tariff Order*

"

218. It is argued that once this Tribunal has upheld the inflation rate determined by the Commission, it is not open to the Commission to deviate

from the same and the same methodology ought to have been followed by the Commission in the impugned tariff order dated 31.08.2017.

219. On behalf of the Commission, it is argued that the appellant is only knit-picking a calculation till the second decimal place and that too after a categorical judgment of this Tribunal in which inflation factor as 8% was upheld. It submitted that inflation factor is calculated for the entire control period by using the data for the immediately preceding five years. It is submitted that the inflation factor was admittedly fixed at 1.08 in the 2012 tariff order but it is only a mathematical term to calculate the increase of 8%. It is submitted that the appellant had assailed this inflation factor of 1.08 in its appeal No.171/2012 stating that the inflation factor ought to have been 8.6% but this Tribunal vide judgment dated 10.02.2015 has negated the contentions of the appellant and upheld the inflation factor of 1.08 or 8% in the following words: -

> *"10.11 We are, however,* ***not convinced by the contention of the Appellant that indexation factor should have been 8.6% instead of 8% as determined by the State Commission.*** *As per the Regulations, the indexation has to be combination of CPI and WPI for immediately preceding five years before the base year. The Commission has correctly considered the CPI & WPI increase from 2006-07 to 2010-11 to determine the indexation factor as per the Regulations."*

220. Thus, it is argued on behalf of the Commission that the issue raised in this appeal by the appellant is barred by the doctrine of *res judicata* as

envisaged under section 11 of the Code of Civil Procedure in view of the above noted judgment of this Tribunal and the appellant is precluded from agitating the same issue again.

<u>Our View:</u>

221. We do not feel impressed by the arguments raised on behalf of the appellant on the issue under consideration. Perusal of the impugned order, already quoted hereinabove, would reveal that the Commission has proceeded to consider the inflation factor of 8% on the basis of judgments of this Tribunal in appeal Nos.171, 177 and 178 of 2012. In fact, both the learned counsels have cited judgment of this Tribunal dated 10.02.2015 in appeal No.171/2012 during their submissions. The relevant portion of the said judgment of this Tribunal has already been extracted hereinabove.

222. The submission of the appellant's counsel that this Tribunal in appeal No.171/2012, was concerned only with the methodology adopted by the Commission to determine the escalation factor and not with the computation of the escalation factor itself, is devoid of any force. Perusal of the relevant portion of the judgment of this Tribunal, which has been reproduced hereinabove, would reveal that this Tribunal has rejected the contention of the appellant to the effect that indexation factor should have been 8.6% instead of 8% as determined by the Commission. Therefore, it is not correct to say that this Tribunal, in that case, was only dealing with the issue with regard to methodology for determining the escalation factor.

223. Once this Tribunal has in the above noted appeal No.171/2012 affirmed the fixation of indexation factor at 8%, the Commission could not have arrived at a different figure. Similarly, once the contentions of the appellant in this regard have been rejected by this Tribunal in the said judgment, it is not open for the appellant to agitate the same again in this appeal. It does not appear that the appellant has assailed the judgment dated 10.02.2015 of this Tribunal in appeal No.171/2012 in the Supreme Court as we were not informed about the same during the course of arguments, it has become final and can not be re-opened by this Tribunal.

224. Hence, we do not see any ground for interfering in the findings of the Commission on the issue at hand. The issue is, thus, decided against the appellant and in favour of the respondent Commission.

Conclusion:

225. We summarize our decision on all the contested issues (mentioned in Paragraph No.11) in the following table:-

Sl. No.	Issue No. / Issue	Our decision	In favour of
1.	**Issue No.2-** Erroneous consideration of reversal of doubtful debt for FY 2007-08,	We set aside the findings of the Commission on this issue and direct that the miscellaneous receipts from the consumers shall	Appellant

	FY 2008-09 & FY 2010-11 as non-tariff income.	not constitute non-tariff income of the licensee.	
2.	***Issue No.8-*** *Erroneous allowance of cost of debt for computation of WACC for the FY 2007-08 to FY 2011-12.*	We set aside the findings of the Commission and direct the Commission to re-evaluate the WACC of the appellant for the FY 2007-08 to FY 2011-12 in terms of the statement given before this Tribunal in Appeal No.36/2008 considering the actual rate of interest for debt.	Appellant
3.	***Issue No.9-*** *Erroneous increase in Revenue available while revising Financing Cost of LPSC from FY 2007-08 to FY 2011-12.*	we set aside the findings of the Commission and direct that the additional LPSC Financing Cost shall be added to the ARR and not to the revenue available with the appellant.	Appellant
4.	***Issue No.11-***	we set aside the findings and direct the Commission to	Appellant

	Erroneous allowance of LPSC Financing Cost for FY 2007-08 to FY 2011-12.	redetermine the Financing Cost of LPSC in terms of the above noted judgment of this Tribunal in appeal No.14 of 2012.	
5.	***Issue No.16(d):*** *Increase in LC (Letter of Credit) Charges.* ***Issue No.16(e):*** *Cost of Auditor's Certificate.* ***Issue No.16(f):*** *Credit Rating Fee.*	We do not find any ground to interfere in the findings of the Commission and accordingly, these issues are decided against the appellant and in favour of the respondent Commission.	Respondent-Commission
6.	***Issue No.19-*** *Erroneous allowance of depreciation rate for FY 2013-14.*	Let the appellant submit its list of assets along with fresh claim as per Regulation 5.17 read with Appendix-I of MYT Regulations, 2011 which shall be duly considered by the Commission in terms of these regulations and allow depreciation to	Appellant/ Remanded

		the appellant in terms thereof.	
7.	***Issue No.22-*** *<u>Wrongful disallowance of trading margin paid to TPTCL.</u>*	The impugned order is set aside and issue is remanded back to the Commission with directions to do through prudence check and consider the same afresh on its merits.	Remanded
8.	***Issue No.25-*** *<u>Erroneous adoption of equity addition towards working capital during FY 2008-09 and 2009-10.</u>*	The Commission is hereby directed to pass consequential orders adjusting addition of equity to working capital during FYs 2008-09 and 2009-10 along with carrying cost.	Appellant
9.	***Issue No.29-*** *<u>Erroneous inclusion of interest on account of late payment of UI (Unscheduled</u>*	we set aside the findings of the Commission and direct that the interest received by the appellant on UI Charges from the defaulting UI constituents	Appellant

	Interchange) Charges.	shall not constitute non-tariff income.	
10.	***Issue No.36-*** *Erroneous double deduction of year end negative Power Purchase Provisions from the trued up Power Purchase Cost for FY 2013-14 contrary to Learned Commission's own directive under MYT Order.*	The issue is remanded back to the Commission for fresh adjudication in the light of the submissions made on behalf of the parties before us.	Remanded
11.	***Issue No.37-*** *Erroneous directive of the Learned Commission in relation of putting contingency limit of 3% on sale under UI.*	The impugned order is set aside. We direct that the contingency limit of 3% per month of gross power purchase to dispose off surplus power in UI cannot be applied while truing up for purchase cost of the appellant in the FY 2013-14.	Appellant

12.	***Issue No.38-*** *Disallowance of Power Purchase Cost – Single Day bilateral transaction.*	The impugned order is set aside and the Commission is directed to reverse the penalty of Rs.0.41 crores imposed upon the appellant and to allow the same to the appellant along with carrying cost.	Appellant
13.	***Issue No.41-*** *Carrying costs for FY 2007-08 to FY 2012-13 allowed at rates lower than the prevailing market rate for the revenue gap loans.* ***Issue No.59-*** *Erroneous consideration of lower cost of debt for computation of rate of*	We do not find any infirmity in the impugned order of the commission on these three issues. The prayer of the appellant for re-computation of rate of carrying cost considering the cost for the debt as per SBIPLR in the debt / equity ratio of 70:30 and considering the rate of return on equity equivalent to 16% grossed up for tax is clearly unsustainable. The three issues are	Respondent-Commission

	carrying cost for FY 2013-14. ***Issue No.60-*** *Lower consideration of cost of debt for the purpose of computation of rate of carrying cost for FY 2015-16.*	decided against the appellant and in favour of the respondent.	
14.	***Issue No.43-*** *Wrongly reversal of material cost of Rs.3.36 Cr & Rs.4.12 Cr incurred towards maintenance of street light for the year 2010-11 and 2011-12 respectively.*	The impugned findings are set aside and the Commission is directed to allow the material cost towards streetlight maintenance activity in terms of the tariff orders dated 13.07.2012 and 31.07.2013 and also to allow any consequential impact to the appellant along with carrying cost.	Appellant
15.	***Issue No.44-***	The impugned findings are set aside and the Commission is directed to	Appellant

	Adoption of erroneous methodology for computation of WACC.	re-determine the debt & equity for each year by considering the ratio of 60:40 for assets capitalized under the transfer scheme and the ratio of 70:30 for assets capitalized thereafter upto 01.04.2012.	
16.	***Issue No.46-*** *Erroneous implementation of judgment of this Hon'ble Tribunal in relation to the employee expenses and A&G expenses.*	The issue can be effectively resolved in terms of the judgments to be passed by this Tribunal in the two appeal Nos.334/2021 and 363/2023.	To be decided in appeal Nos.334/2021 and 363/2023
17.	***Issue No.48-*** *Disallowance of Power Purchase Cost on account of overlapping baking transaction.*	The impugned order is set aside and the issue is remanded back to the Commission for a fresh reasoned decision after hearing the parties again. We hasten to add that this	Remanded

		exercise shall be done by the Commission within two months from the date of this judgment.	
18.	***Issue No.51-*** *Non-revision of 'K' factor due to revision in GFA*	We direct that the Commission shall consider the issue again in terms of the findings to be given by this Tribunal in appeal Nos.265-266 of 2013.	Remanded
19.	***Issue No.53-*** *Erroneous consideration of inflated revenue billed.*	We set aside the findings of the Commission on the issue and direct the Commission to re-compute the revenue bill of the appellant for the FY 2013-14 in terms of the revised form 2.1(a) submitted by the appellant.	Appellant / remanded
20.	***Issue No.56-*** *Non-Consideration of accumulated depreciation allowed on the assets*	We direct the Commission to call for requisite information from the appellant within two weeks from the date of the judgment, which would be	Appellant/ Remanded

	decapitalization while computing the regulated rate base (RBR).	supplied by the appellant within two weeks thereafter. The Commission shall determine the issue afresh within two months from the date of this judgment.	
21.	***Issue No.63-*** *Penalty on cash collection about Rs.4000/-.*	Penalty levied upon the Appellant is struck down.	Appellant
22.	***Issue No.65-*** *Erroneous consideration of 8% inflation factor instead of 8.04% inflation factor.*	The issue is decided against the appellant and in favour of the respondent Commission.	Respondent-Commission

226. The appeal stands disposed off accordingly.

Pronounced in the open court on this 28th day of January, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / ~~NON-REPORTABLE~~
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