IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.69 OF 2018
APPEAL No.70 OF 2018
APPEAL No.71 OF 2018
APPEAL No.72 OF 2018

Dated: 21.07.2025

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

In the matter of:

APPEAL No. 69 OF 2018

BSES RAJDHANI POWER LIMITED
A public limited company
incorporated under the
provisions of the Companies Act,
1956 having its registered office
at BSES Bhavan, Nehru Place,
New Delhi – 110 019 … Appellant

Versus

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, C-Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017 … Respondent

Counsel for the Appellant(s) : Buddy A. Ranganadhan, Sr. Adv.
Vijayendra Pratap Singh
Aditya Vikram Jalan

Ankitesh Ojha
Dhriti Batra
Anant Narayan Misra
Shreya Choudhary

Counsel for the Respondent(s) : Tushar Jain

APPEAL No. 70 OF 2018

BSES YAMUNA POWER LIMITED
A public limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at Shakti Kiran Building, Karkardooma, New Delhi – 110 032
through its Assistant Vice President Regulatory Department … Appellant

Versus

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, C-Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017
Through its Secretary …Respondent

Counsel for the Appellant(s) : Buddy A. Ranganadhan, Sr. Adv.
Amit Kapur
Anupam Varma
Rahul Kinra
Aditya Ajay
Girdhar Gopal Khattar
Isnain Muzamil

Counsel for the Respondent(s) : Tushar Jain

APPEAL No. 71 OF 2018

BSES YAMUNA POWER LIMITED
A public limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at Shakti Kiran Building, Karkardooma, New Delhi – 110 032
through its Assistant Vice President Regulatory Department … Appellant

Versus

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, C-Block, Shivalik, Malviya Nagar, New Delhi – 110 017
Through its Secretary … Respondent

Counsel for the Appellant(s)	:	Buddy A. Ranganadhan, Sr. Adv. Amit Kapur Anupam Varma Rahul Kinra Aditya Ajay Girdhar Gopal Khattar Isnain Muzamil
Counsel for the Respondent(s)	:	Tushar Jain

APPEAL No. 72 OF 2018

BSES RAJDHANI POWER LIMITED
A public limited company incorporated under the provisions of the Companies Act, 1956 having its registered office at BSES Bhavan, Nehru Place,

New Delhi – 110 019 … Appellant

Versus

DELHI ELECTRICITY REGULATORY COMMISSION
Viniyamak Bhawan, C-Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017 … Respondent

Counsel for the Appellant(s)	:	Buddy A. Ranganadhan, Sr. Adv. Vijayendra Pratap Singh Aditya Vikram Jalan Ankitesh Ojha Dhriti Batra Anant Narayan Misra Shreya Choudhary
Counsel for the Respondent(s)	:	Tushar Jain

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. M/s BSES Rajdhani Power Limited (in short "BRPL") which is appellant in appeal Nos.60 & 70 of 2018 and BSES Yamuna Power Limited (in short "BYPL") which is appellant in appeal Nos.70 & 71 of 2018, have filed this batch of four appeals against the separate tariff orders dated 31.08.2017 passed by the 1st respondent Delhi Electricity Regulatory Commission (hereinafter referred to as "the Commission") in the tariff petitions filed by them, the details of which are given hereinbelow: -

S. No.	Details of Appeal	Details of Tariff Order	Details of Petition
1.	Appeal No. 69 of 2018 BRPL v. DERC **Filed on 23.11.2017**	Tariff Order dated 31.08.2017 passed by Ld. DERC with respect to BRPL, in Petition No. 20 of 2017.	Petition No. 20 of 2017 filed by BRPL for:- (a) Approval of Annual Revenue Requirement **(“ARR”)** for FY 2015-16 and FY 2016-17. (b) True-up of expenses for FY 2014-15. (c) Final True-up for Control Period up to FY 2013-14.
2.	Appeal No. 70 of 2018 BYPL v. DERC **Filed on 28.11.2017**	Tariff Order dated 31.08.2017 passed by Ld. DERC with respect to BYPL, in Petition No. 23 of 2017.	Petition No. 23 of 2017 filed by BYPL for True-up of expenses for FY 2015-16.
3.	Appeal No. 71 of 2018 BYPL v. DERC **Filed on 27.11.2017**	Tariff Order dated 31.08.2017 passed by Ld. DERC with respect to BYPL, in Petition No. 21 of 2017.	Petition No. 21 of 2017 filed by BYPL for:- (a) True-up expenses up to FY 2014-15. (b) Review of FY 2015-16.

			(c) Multi Year ARR from FY 2016-17 to FY 2020-21. (d) Tariff for FY 2016-17.
4.	Appeal No. 72 of 2018 BRPL v. DERC **Filed on 23.11.2017**	Tariff Order dated 31.08.2017 passed by Ld. DERC with respect to BRPL, in Petition No. 22 of 2017.	Petition No. 22 of 2017 filed by BRPL for:- (a) ARR for FY 2017-18. (b) Revised ARR for FY 2016-17. (c) True-up of expenses for FY 2015-16. (d) Final True-up for Control Period up to FY 2014-15.

2. For the sake of convenience, the appellants BRPL and BYPL shall hereinafter be referred to as "discoms" or "appellants".

3. Following 62 issues in total, which are common to all the four appeals, have been raised by the appellants for our consideration and adjudication: -

Issue No.1: Disallowance of capitalisation on account of nonavailability of Electrical Inspector Certificate.

Issue No.2: Disallowance of capitalisation pertaining to Reliance Energy Limited (REL) on ad-hoc basis.

Issue No.3A:	Erroneous computation of depreciation for the first 11 months of FY 2007-08.
Issue No. 3B:	Non-revision of O&M Expenses from FY 2008-09 to FY 2010-11 not revised in line with FY 2007- 08.
Issue No. 4:	Revision in distribution loss from FY 2007- 08 up to FY 2009- 10.
Issue No. 5:	Directives in relation to regulated power.
Issue No. 6:	Effect of 6th Pay Commission for non-DVB Employees.
Issue No. 7:	Non-revision of AT&C Loss for FY 2012-13 to FY 2014-15.
Issue No. 8:	Increase in Employee Expenses corresponding to increase in Consumer Base.
Issue No. 9:	Lower cost of debt for FY 2012-13 to FY 2015-16.
Issue No. 10:	Payment to VRS Optees.
Issue No. 11:	R&M and A&G Expenses from FY 05 to FY 07.
Issue No. 12:	Re-fixation of AT&C Loss for FY 2011-12.
Issue No. 13:	Lower rates of carrying cost.
Issue No. 14:	Interest on loans for FY 2007-08 to FY 2011-12
Issue No. 15:	Repayment of loans not considered while computing WACC.
Issue No.16A:	Efficiency factor for FY 2011-12.
Issue No. 16B:	Efficiency factor from FY 2012-13 to FY 2015-16.
Issue No. 17:	Efficiency factor for FY 2010-11.
Issue No. 18:	Computation of AT&C Losses for FY 2009-10 using actual kWh figures.

Issue No. 19:	Own Consumption.
Issue No. 20:	Financing cost of LPSC based on SBI PLR (FY 2007-08 to FY 2012-13).
Issue No. 21:	Income recovered from DTL treated as NTI.
Issue No. 22:	Impact of DVB Arrears while computing AT&C Loss for FY 2008-09
Issue No. 23:	Incorrect revision of R&M Expenses by revising *'K'* factor.
Issue No. 24A:	Additional UI Charges above 49.5 Hz and below 50.1 Hz
Issue No. 24B:	Disallowance of Power Purchase cost on account of contingency reserve to dispose-off surplus power in UI fixed at 3% on gross power purchase.
Issue No. 24C:	Disallowance of Power Purchase Cost for FY 2013-14, FY 2014-15 and FY 2015-16 on Account of Overlapping in Banking Transactions.
Issue No. 25:	Consequential impact of truing-up of AT&C Loss for FY 2008-09.
Issue No. 26:	Cash limit of Rs. 4000 for payment of electricity bills
Issue No. 27A:	Write-back of miscellaneous provisions
Issue No. 27B:	Consideration of revenue from Sale of scrap as Non-Tariff Income.
Issue No. 28:	Commission earned on collection of electricity duty as Non-Tariff Income.
Issue No. 29:	Interest on funding of carrying cost.
Issue No. 30:	Erroneous computation of Net-worth.

Issue No. 31A:	De-capitalisation of assets.
Issue No. 31B:	Physical verification of assets pending since FY 2004-05.
Issue No. 32:	Disallowance of Power Purchase cost of Anta, Auraiya and Dadri Gas based stations.
Issue No. 33:	Consideration of Normative rebate in true up.
Issue No. 34:	Disallowance of R&M Expenses from FY 2007-08 to FY 2013-14.
Issue No. 35:	Benchmarking of O&M Expenses.
Issue No. 36:	Fixed Charges against Regulated Power; Rate of Short-Term power procured during period of regulation from FY 2011-12 - FY 2015-16.
Issue No. 37:	Income-tax from FY 2007-08 to FY 2015- 16.
Issue No. 38:	Lower rate of depreciation considered for FY 2017-18.
Issue No. 39:	Computation of working capital requirement on the basis of net power purchase cost vis-àvis gross power purchase cost.
Issue No. 40:	Disallowance of Bank Charges / Syndication Fees.
Issue No. 41A:	Amount of carrying cost in tariff considered for purpose of revenue gap.
Issue No. 41B:	Wrong methodology for computation of Carrying Cost.
Issue No. 42:	Approach for truing-up of FY 2016-17.
Issue No. 43:	Treatment of funding of working capital requirement.

Issue No. 44:	Financing cost of LPSC from FY 2013-14 to FY 2015-16.
Issue No. 45:	Disallowance of monthly billing rebate in ARR.
Issue No. 46:	Loans not approved from FY 2009-10.
Issue No. 47:	Directive on adjustment billing to be capped at 1%.
Issue No. 48:	Pension Trust Fund [Directive].
Issue No. 49:	Directive on Short Term Guidelines and disallowance of power procurement exceeding Rs. 5 per unit.
Issue No. 50:	AT&C Loss Target for FY 2015-16.
Issue No. 51:	Carrying cost not allowed as a separate surcharge.
Issue No. 52:	Capping of Equity at 30% and re-opening the Statutory Transfer Scheme.
Issue No. 53:	Correction in Opening Balance of Consumer Contribution.
Issue No. 54:	O&M Expenses from FY 2017-18 onwards to be trued-up based on physical verification of assets.
Issue No. 55:	Penalty on account of RPO Compliance from FY 13 – FY 16.

4. At the very beginning of the hearing of these appeals, learned counsels appearing for appellants submitted that 19 issues i.e. issue No.1, 2, 13, 43, 8, 11, 23, 24A, 9, 14, 15, 17, 18, 19, 20, 22, 40, 41B and 27A are covered by judicial proceedings and therefore, no arguments were advanced on these issues. The appellants only sought directions to the Commission for implementation of previous decisions given on these issues by either Hon'ble

Supreme Court or this Tribunal or by the Commission itself in its subsequent orders, which we hereby do. It is expected that the Commission shall implement the decision on these issues without any further delay and in any circumstances within a period of three months from the date of this judgment.

5. It was further pointed out by learned counsels for the appellants that nine issues i.e. issue Nos.6,10,12,16A,16B,21,25,32 & 38 have already been implemented by the Commission in the subsequent tariff orders passed by it with regards to the appellants.

5A. During the course of arguments, issue nos.29 and 54 were not pressed by the learned senior counsel appearing for the appellants.

6. Hence, only 32 issues i.e. issue Nos. 3A, 3B, 4, 5, 7, 24B, 24C, 26, 27B, 28, 30, 31A, 31B, 33, 34, 35, 36, 37, 39, 41A, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53 and 55 were argued before us and need to be adjudicated by us.

7. We have heard learned counsels for the parties in detail on various dates and have perused the impugned order as well as the written submissions filed by the learned counsels.

8. We shall now proceed to take up these contested issues one by once for adjudication.

<u>Issue No.3A: Erroneous computation of depreciation for the first 11 months of FY 2007-08.</u>

9. This issue pertains to the alleged failure of the Commission in implementing directions of this Tribunal in judgment dated 12.07.2011 in appeal Nos.142 and 147 of 2009, <u>2011 SCC OnLine APTEL 106</u> (hereinafter referred to as "Appeal 142 judgment") whereby the Commission was directed to true up the financials of the appellants including depreciation for the period 01.04.2007 to 28.02.2008 i.e. the first 11 months of the Financial Year (FY) 2007-08 as per Regulation 12.1 of Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 (hereinafter referred to as the "MYT Regulations, 2007").

10. We may note here that the Commission notified MYT Regulations, 2007 on 30.05.2007 applicable for the control period FY 2007-08 to FY 2010-11. Ordinarily, these regulations ought to have been applicable for a period from 01.04.2007 to 31.03.2011. However, regulation 2.1 (g) of these regulations specifies the control period as "a multi-year period fixed by the Commission from the date of issuing Multi Year Tariff (MYT) order till 31.03.2011". The

MYT order was issued on 23.02.2008, and therefore, the control period for MYT regulations 2007 commenced on 23.02.2008 instead of 01.04.2007, thereby leaving a vacuum for first 11 months of FY 2007-08 i.e. from 01.04.2007 to 22.02.2008.

11. It appears that the Commission had realized that such a vacuum may be created and thus provided in Regulation 12.1 of these MYT Regulations, 2007 as under:-

> **"***A12: TRUING UP FOR THE PERIOD UPTO THE COMMENCEMENT OF MYT ORDER*
>
> *12.1 Performance review and adjustment of variations of the Distribution Licensees for year FY 2006-07 and* ***period between 1st April 2007 and commencement of MYT tariff order*** *shall be done* ***<u>based on the actual/audited information</u>*** *and prudence checks by the Commission and shall be considered during the Control Period."*

12. In Appeal 142 judgment, this Tribunal had held as follows: -

> *"13.8.* ***We do not agree with the findings of the State Commission as these are in contravention of the Regulations****. According to Regulations, the Control Period commences from the date of the MYT order and all the targets set for the controllable parameters shall*

be applicable for the control period according to Regulation 4.7. ***The targets set for the control period cannot be made applicable retrospectively from 1.4.2007 as the commencement of MYT order was only from 1.3.2008. The Regulations 5.41 and 5.42 referred to by the learned senior counsel for the State Commission pertain to the control period only and not the period prior to that. <u>Further Regulation 12.1 clearly provides for true up of the period between 1.4.2007, date of commencement of the MYT order during the control period. Thus the controllable parameters for the period 1.4.2007 to 28.2.2008 were required to the trued up during the control period as per the Regulations.</u> This issue is, therefore, decided in favour of the Appellant and the State Commission is directed to true up the financials for the period 1.4.2007 to 28.2.2008 at the earliest and allow the costs with carrying cost."***

[Emphasis supplied]

13. The Commission did assail the judgment of this Tribunal in appeal No.142 in the Supreme Court by way of Civil appeals no.9003-04 of 2011 but concededly, did not impugne the above noted findings of this Tribunal. The only two issues raised by the Commission in the said appeal before the Supreme Court related to rebate on power purchase and carrying cost on revenue gap. Even the said civil appeal also was dismissed by the Supreme Court on 01.12.2021 and thus, judgment of this Tribunal attained finality.

14. We may also note that this Tribunal reaffirmed the Appeal 142 judgment in subsequent judgment dated 28.11.2014 in appeal nos.61 and 62 of 2012, 2014 SCC Online APTEL 196 (hereinafter referred to as "Appeal 61 judgment") and judgment dated 02.03.2015 in appeal nos.177 and 178 of 2012, 2015 SCC Online APTEL 122 (hereinafter referred to as "Appeal 177 judgment").

15. It is pointed out on behalf of the appellants that in the tariff order dated 29.09.2015, the Commission, instead of implementing the directions of this Tribunal in letter and spirit, erroneously derived actual rate of depreciation from the audited accounts of the appellant for FY 2007-08 and applied the said rate of depreciation to the Gross Fixed Assets (GFA) of FY 2007-08 which itself was not based on actual audited accounts but computed on the basis of the methodology in the MYT Regulations 2007 i.e. rate of depreciation derived from the actual audited numbers for 11 months and applied on the average GFA net of consumer contribution and grants. It is argued that in view of Regulation 12.1 of MYT Regulations, 2007, the rate of depreciation and the asset base have to be taken as per the audited books.

16. The findings of the Commission on this issue in the impugned tariff orders are extracted hereinbelow: -

(a) **For BRPL:**

"3.62 The Petitioner has submitted that the Commission has applied the ***depreciation rate on the opening GFA, which itself was not based on the actual audited accounts, but computed on the basis of the methodology in the MYT Regulations, 2007****. If the Commission* ***were to apply Regulation 12.1 in its entirety, it ought to have applied the rate of depreciation on the opening GFA as per the audited books of accounts.***

3.63 The Petitioner has submitted that the Commission has actually done a mix and match. It has ***derived the rate on the basis of audited accounts, but has derived the opening GFA on the basis of the MYT Regulations, 2007 which admittedly, did not apply during that period. If Regulation 12.1 is to be applied in its entirety, both the rate and the asset base have to be taken as per the audited books.***

3.64 The Petitioner has submitted that the Commission, while determining the opening GFA for that period, has reduced from the GFA, the average consumer contribution. Meaning thereby, that the Hon'ble

Commission has, from the GFA, reduced that portion of the GFA, which was ascribable to the consumer contributions received. This principle of disallowance is only to be found in the MYT Regulations, 2007, which admittedly, do not apply for the aforesaid 11 month period. The Commission cannot, in law, pick and choose those parts of the Regulations which they would like to apply for a period which is not covered in the Regulation at all.

3.65 Since Regulation 12.1 of the MYT Regulations, 2007 mandates that the financials for the 11 month period have to be trued-up on actuals, subject to prudence check, there cannot be any normative disallowance. It is respectfully submitted that the Hon'ble Commission ought to be consistent in its approach. If it is looking at the actual rate, it must equally look at the actual asset base. It cannot look at the actual rate on a normative asset base.

3.66 Accordingly the Petitioner has requested the Commission to consider the depreciation during first 11 months of FY 2007-08 as under:

…

COMMISSION'S ANALYSIS

3.67 It is observed that the Petitioner has claimed depreciation on total GFA of Rs. 3001 Cr. which

includes the consumer contribution, de-capitalisation and dis-allowances due to related party transactions.

3.68 The Commission has not revised depreciation for the 11 months period of FY 2007-08 as the same is sub-judice before Hon'ble APTEL in Appeal No. 297/2015."

(b) **For BYPL:**

"…

COMMISSION'S ANALYSIS

3.69 It is observed that the Petitioner has claimed depreciation on total GFA which includes the dis-allowances due to related party transactions. ***Therefore, the Commission has not revised depreciation for the 11 months period of FY 2007-08 at this point of <u>time as the dis-allowances due to related party transactions is sub-judice before Hon'ble APTEL in Appeal No. 290/2015.</u> Further, the Commission will examine this issue at the time of true up of capitalisation based on report of physical verification of asset submitted by the Consultant.***"

17. The grievance of the appellants is that the Commission has failed to implement the directions of this Tribunal in Appeal 142 judgment by erroneously computing depreciation for the first 11 months of FY 2007-08 (from 01.04.2007 to 28.02.2008) contrary to Regulation 12.1 of the MYT Regulations, 2007.

18. It is argued on behalf of the Commission that in the tariff order dated 29.09.2015, the Commission has, in terms of the Appeal 142 judgment read with MYT Regulations, 2007, considered the actual rate of depreciation based on the audited financial statements for the FY 2007-08, and therefore, there is no violation of Regulation 12.1. In support of his submissions, the learned counsel has drawn our attention to the following extract of the tariff order dated 29.09.2015 which is stated to explain the calculation referred to by the Commission in the tariff order: -

> "
> ***Commission's Analysis***
>
> *3.60 The Hon'ble APTEL in Appeal No. 142 of 2009 has adjudged that:*
>
> *"4.9. Failure to True up the expenses for the FY 2007-08 for the period 1.4.2007 till the commencement of the MYT Tariff Order dated 23.2.2008:*

The State Commission acted in contravention of the Regulation 12.1 of the MYT Regulations by not truing up the expenditure for the period between 01.04.2007 and commencement of MYT tariff order i.e. 23.02.2008 on the basis of the actual/audited information. 13.8….and the State Commission is directed to true up the financials for the period 1.4.2007 to 28.2.2008 at the earliest and allow the costs with carrying cost."

3.61 As per MYT Regulations 2007, Regulation 12.1

"Performance review and adjustment of variations of the Distribution Licensees for year FY 2006-07 and period between 1st April 2007 and commencement of MYT Tariff Order shall be done based on actual/audited information and prudence checks by the Commission and shall be considered during the Control Period."

3.62 In accordance with the judgment and in view of the MYT Regulations 2007, the Commission has *analyzed the submissions made by the Petitioner for True-up of expenses based on Audited information. Actual expenses on account of O&M and Depreciation as per Audited financial statement has been revised as follows:*

Table 3.14: Incremental O&M Expenses due to 11 months impact on actual basis (Rs. Crore)

Particulars	*Petitioner's Submission*	*Approved in MYT Order dated 23.02.2008 (prorated to 11 months)*	*Additional expenses to be allowed*
Reference	*A*	*B*	*A-B*
Employee Expenses	*151.06*	*138.15*	*12.91*
A&G Expenses	*61.42*	*59.87*	*1.55*
R&M Expenses	*61.78*	*65.48*	*(3.70)*
Total	*274.26*	*263.50*	*10.76*

3.63 The Petitioner has claimed the depreciation at the rate of 6.69% instead of 3.60% as provisionally approved by the Commission for 11 months. However, the Commission has considered the actual rate of Depreciation based on the Audited financial statements for FY 2007-08 in accordance with Regulation 12.1 of MYT Regulations 2007. The additional allowance on account of revision in the rate of depreciation is as follows:

Table 3.15: Provisionally approved Depreciation for FY 2007-08 (11 Months)

Sl. No.	*Particulars*	*Amount*	*Remarks*
A	*Depreciation as per audited financial statements for FY 2007-08*	*155.58*	*Audited financial statements*
B	*Opening GFA for FY 2007-08*	*2962.63*	*Audited financial statements*
C	*Rate of depreciation (%)*	*5.25*	*A/B*

D	*Rate of depreciation (%) as per MYT Regulations,2007*	*3.60*	
E	*Average Rate of depreciation (%) for FY 2007-08 considering 11 months as per audited statements and 1 month as per MYT Regulations, 2007*	*5.11*	*(C*11/12)+(D/12)*

3.64 The impact of change in rate of depreciation has been considered in subsequent paragraphs."

19. It is, thus, argued that the claim of the appellants in this issue are liable to be rejected.

Our Analysis:

20. As per Regulation 12.1 of the MYT Regulation 2007 already noted hereinabove, the Commission was required to true up the financials of the appellants for the 11 months period from 01.04.2007 to 28.02.2008 based on the actual / audited information. Manifestly, the MYT Regulations, 2007 were not applicable for the said period. Therefore, the opening GFA ought to have been calculated based on the actuals / audited numbers. However, as contended by the appellants, the Commission has considered the GFA by reducing from it the consumer contribution amounts and also the amounts disallowed in MYT order on account of related party purchases, which was not permissible.

21. During the course of hearing of appeal nos.61 and 62 of 2012, the Commission had given an assurance to this Tribunal that it would conduct the required true up as per the audited accounts submitted by the appellants, which was noted by this Tribunal in the Appeal 61 judgment as under: -

> *"23. The eighth issue is related to Truing up the financial for the period 1.4.2007 to 28.2.2008. The Appellants have submitted that the Delhi Commission has not implemented the directions of the Tribunal in judgment reported as 2011 ELR (APTEL) 1196 in Appeal No. 142 & 147 of 2009, wherein this Tribunal directed the Delhi Commission to true up the financials from 01.04.2007 to 28.02.2008.*
>
> *24. **The Commission in its reply has submitted that the Commission required audited accounts and the Appellant only on 25.06.2013 has submitted those***

accounts, hence the same will be considered and necessary true-up will be made.

25. ***In the light of categorical submission that required true up would be made, the Commission is directed to carry out the same in its next tariff exercise and allow the differential amount, if any, along with carrying costs.****"*

*[**Emphasis Supplied**]*

22. This issue had come up before this Tribunal in appeal nos.177 and 178 of 2012 and in the judgment passed in these appeals (hereinafter referred to as "Appeal 177 judgment") it has been recorded as under: -

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

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

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

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

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

*[**Emphasis Supplied**]*

23. It is intriguing that despite these assurances given on behalf of the Commission to this Tribunal, the Commission has repeatedly avoided to implement the directions issued by this Tribunal even after submission of the requisite audited data by the appellants. We find the conduct of the Commission in this regard absolutely contemptuous as well as contrary to the rule of law and judicial discipline. The Commission is dutybound to implement all the decisions of this Tribunal in letter and spirit unless set aside / varied by the Supreme Court. The contention of the Commission that the depreciation for the 11 months period of FY 2007-08 has not been revised as the same is subjudice before this Tribunal in other appeals bearing no.290/2015 and 297/2015, is not acceptable for the reason that admittedly no interim order has been passed by this Tribunal in these two appeals staying such revision of depreciation in the said period. It has been repeatedly held by the Supreme Court that mere filing of appeal does not tantamount to stay of the orders / judgments appealed against and the subordinate court/ authority cannot on its own postpone the implementation of such orders / judgments in the absence of a stay order from the appellate court / authority. Therefore, refusal on the part of the Commission to revise depreciation for the said period of 11 months of the FY 2007-08 merely on the ground of pendency of appeal Nos.290 and 297 of 2015 before this Tribunal is erroneous and not sustainable.

24. Hence, we set aside the findings of the Commission on this issue and remand the issue back to the Commission for fresh consideration in accordance with the directions issued by this Tribunal in Appeal 142 judgment, Appeal 61 judgment and Appeal 177 judgment and further strictly in accordance with the Regulation 12.1 of the MYT Regulations, 2007.

<u>Issue No. 3B: Non-revision of O&M Expenses from FY 2008-09 to FY 2010-11 not revised in line with FY 2007- 08.</u>

25. The grievance of the appellants is that the Commission while implementing Appeal 142 judgment has revised Operation and Maintenance (O&M) expenses for the FY 2007-08 in tariff order dated 29.09.2015 but has refused to rework the O&M expenses for the rest of the control period comprising FYs 2008-09 to 2010-11 by applying inflation factor of 4.66%.

26. The findings of the Commission on this issue in the impugned tariff orders are extracted hereinbelow: -

> (a) **For BRPL:**
>
> *"3.31 The Petitioner has submitted that the Commission in Tariff Order dated September 29, 2015 did not fully implement the directions of Hon'ble ATE, details of which are as under:*
>
> ***a) Only actual O&M Expenses pertaining to first 11 months of FY 2007-08 have been allowed. No***

treatment of revision in O&M expenses for subsequent years.

…

COMMISSION'S ANALYSIS

3.32 ***The Commission has already clarified this issue in Tariff Order dtd. 29/09/2015 in para nos. 3.60 to 3.64 and needs no further deliberation in this Tariff Order as the matter is sub-judice before Hon'ble APTEL in Appeal No. 297/2015.***

REVISION IN O&M EXPENSES FOR SUBSEQUENT YEARS PETITIONER'S SUBMISSION

3.33 The Petitioner has submitted that the Commission despite revising the Employee and A&G Expenses during FY 2007-08 has still considered the employee and A&G Expenses from FY2008-09 to FY 2010-11 on older base employee expenses of FY 2007-08 which is no longer inexistence. Regulation-5.4 of MYT Regulations, 2007 provides the formula for computation of Employee and A&G Expenses during the control period which clearly specifies that for the purpose of computation of Employee and A&G Expenses of subsequent year, inflation factor based on CPI and WPI ought to be applied on Employee and A&G Expenses determined for the previous year. The Petitioner has further submitted that as per the methodology adopted by the Commission, the employee expenses approved for FY 2008-09 are lesser by Rs.

*25Crore as compared to the employee expenses approved for FY 2007-08 which means are duction of 15% instead of inflation factor of **4.66%.** Such a treatment is contrary to the above Regulations.*

3.34 Accordingly, the Commission ought to have applied the inflation factor of 4.66% as determined for the control period on the revised employee and A&G Expenses of FY 2007-08on y-o-y basis.

3.35 The Petitioner has further submitted that the definition of "Base Year" and "Control Period" is clearly specified in MYT Regulations, 2007 which states as under:

> *'2.1 In these Regulations, unless the context otherwise requires-*
>
> *…*
>
> *(d) 'Base Year' means the Financial Year immediately preceding first year of the Control Period and used for purposes of these Regulations;*
>
> *…*
>
> *9.. 'Control Period' means a multi-year period fixed by the Commission, from the date of issuing Multi Year Tariff order till 31st March 2011;*
>
> *…' (Emphasis added)*

3.36 A plain reading of the aforesaid definitions

clearly states that the Control Period starts from the date of issuance of Multi Year Order, i.e., February 23, 2008 and base year is the financial year immediately preceding first year of the control period, i.e., FY 2007-
08. Since the Hon'ble Commission has revised the employee expenses of FY 2007-08, i.e., base year, the employee expenses ought to be revised for the period FY 2008-09 to FY 2011-12.

3.37 Accordingly the Petitioner has submitted that the Commission may allow the additional Employee and A&G Expenses from FY 2008-09 to FY 2011-12 by applying inflation of 4.6%over the increase in O&M Expenses approved for FY 2007-08 as tabulated below:

Table 12: Increase in O&M Expenses from FY 2007-08 to FY 2011- 12 (Rs. Cr.)

S. No	***Particulars***	***FY 08***	***FY 09***	***FY 10***	***FY 11***	***FY 12***
1	*Employee*	*13*	*14*	*14*	*15*	*15*
2	*A&G Expenses*	*2*	*2*	*2*	*2*	*2*
3	***Total Expenses***	***14***	***15***	***16***	***17***	***17***

…

COMMISSION'S ANALYSIS

3.55 The Hon'ble APTEL in Appeal No. 142/2009 directed the State Commission to true up the financials for the *period 1.4.2007 to 28.2.2008 and allow the costs with carrying cost. Accordingly, the Commission has already implemented the said directive in its Tariff Order dtd. 29/09/2015 in para nos. 3.60 to 3.63.*

3.56 ***However, the Petitioner has also requested for true up O&M expenses for FY 2008-09 to FY 2011-12 which is not based on the direction of Hon'ble APTEL in Appeal No. 142/2009. Therefore, the Commission has not considered this issue in this Tariff Order as O&M expenses is controllable in nature.***

…

3.60 ***Further, the Commission has analysed O&M Expenses approved vis-à-vis audited O&M Expenses and O&M Expenses claimed by the Petitioner for the period from FY 2007-08 to FY 2011-12 in totality and it is observed that the Petitioner has claimed O&M expenses more than the audited O&M expenses to tune to around Rs. 268 cr. under un-controllable expenses.*** *The comparative analysis of the O&M Expenses is as follows:*

Table 23: Comparative Analysis of the O&M Expenses

S. No	***Particulars***	***FY 08***	***FY 09***	***FY 10***	***FY 11***	***FY 12***	***Remarks***

1	*Employee Expenses*	*136.54*	*141.08*	*148.33*	*203.07*	*211.38*	*FY 2015-16 Table No.3.46*
2	*R&M Expenses*	*71.44*	*78.42*	*102.28*	*112.93*	*122.97*	
3	*A&G Expenses*	*65.31*	*68.35*	*71.54*	*74.88*	*78.37*	
4	*Total O&M Expenses*	*273.29*	*287.85*	*322.15*	*390.88*	*412.72*	
5	*Efficiency factor*		*2%*	*3%*	*4%*	*4%*	
6	*6th pay commission arrears*		*8.35*	*136.88*			
7	*SVRS Pension*	*14.17*	*10.88*	*18.28*	*9.97*	*7.39*	
8	*Net O&M Expenses*	*287.46*	*301.32*	*467.65*	*385.22*	*403.6*	
9	*O&M Expenses earlier allowed in T.O.*	*289.54*	*305.25*	*458.88*	*386.69*	*407.94*	
10	*Difference to be (allowed)/ recovered*	*2.08*	*3.93*	*- 8.77*	*1.47*	*4.34*	
			ACTUAL				
12	*Employee Expenses*	*164.39*	*182.06*	*318.76*	*250.62*	*285.43*	*Audited Accounts*
13	*R&M Expenses*	*79.23*	*72.95*	*63.77*	*98.49*	*114.75*	

14	A&G Expenses	67.02	70.86	53.94	74.19	85.15	
			CLAIMED NOW BY BRPL				
15	Additional Employee Expenses based on 11 months impact	13	14	14	15	15	Petition table 3.17e
16	Increase in Employee due to consumer addition	14	40	25	25	17	Petition table 3.17ab
17	Increase in employee due to 6th pay on Non-FRSR	17	23	27	29	30	Petition table 3.17w
18	**Total sought by BRPL**	**195**	**234**	**365**	**274**	**281**	**Computation**
19	Difference in claimed v/s audited accounts	30	52	46	23	-4	Computation
21	Additional R&M Expenses	1	12	8	17	23	Petition table 3.17bu
22	Difference in Claimed vs Audited Accounts	-7	16	43	27	31	Computation
20	Additional A&G Expenses	2	2	2	2	2	Petition table 3.17e
21	Difference in Claimed vs Audited Accounts	0	-2	17	-1	-5	Computation
22	Total O&M claimed	334	391	543	473	507	
23	Total O&M as per Audited Accounts	311	326	436	423	485	

24	*Difference in claimed vs audited accounts*	*23*	*66*	*107*	*49*	*22*	*Computation*
25	*Difference in approved vs audited accounts*	*-23*	*-25*	*31*	*-38*	*-82*	

3.61 ***In view of the above, the Commission has not considered the additional claim of the Petitioner under O&M Expenses for the period from FY 2007-08 to FY 2011-12 as the claim is more than the Audited Accounts and highly inflated. Further, the matter is sub- judice in Appeal No. 297/2015 and Clarificatory application filed before Hon'ble APTEL, therefore, does not merit consideration at this point of time.****"*

(b) **For BYPL:**

"3.59 However, the Petitioner has requested to true up O&M expenses for FY 2008-09 to FY 2011-12 which is not based on the direction of Hon'ble APTEL in Appeal No. 142/2009. Therefore, the Commission has not considered this issue in this Tariff Order as O&M expenses is controllable in nature.

… 3.61 In view of the above, it is pertinent to mention that total O&M expenses as approved by the Commission in its MYT Order dtd. 23/02/2008 as per DERC MYT Regulations, 2007 were covered under Controllable parameters except the impact of

recommendations of the 6th Pay Commission. However, the Petitioner is interpreting the methodology for True up for its advantage under R&M Expenses and claiming additional Employee Expenses over and above impact of recommendations of the 6th Pay Commission under the head of increase in consumer base, impact of Non-FRSR employees cost and impact of revised base year.

3.62 The Petitioner in this Tariff Petition has sought upward revision in Employee Expenses, A&G Expenses and R&M expenses for 1st MYT Period against the methodology as indicated above of the 1st MYT Order. However, Hon'ble APTEL in Appeal No. 271 of 2013 has already upheld the methodology for revision of R&M expenses during 1st MYT Control Period as follows:

s'23.3 ………… In this view of the matter, we find no merit in the contentions of the appellant and this issue relating to revised R&M based on revised GFA is decided against the appellant.'

3.63 Further, the matter is sub-judice in Appeal No. 290/2015 and Clarificatory Application filed before Hon'ble APTEL, therefore, this issue does not merit consideration at this point of time."

27. It is, thus, evident that while implementing the Appeal 142 judgment of this Tribunal, the Commission has, in the tariff order dated 29.09.2015, undertaken truing up of the first 11 months of the FY 2007-08 and has revised the Employee and Administrative & General (A&G) expenses which form part of O&M expenses for the FY 2007-08 by allowing the actual O&M expenses. However, the Commission did not revise the O&M expenses for the FY 2008-09 to FY 2011-12 as it found the claim of the appellants more than the audited accounts as well as highly inflated and further on the ground that the matter is subjudice in appeal No.290 and 297 of 2015 before this Tribunal.

28. Learned senior counsel for the appellants argued that the aforesaid methodology adopted by the Commission has led to a situation where the employee expenses approved for FY 2008-09 are lesser by Rs.25.00 crores as compared to the employee expenses approved for FY 2007-08 which indicates reduction of 15% in such expenses instead of an increase by applying the inflation factor of 4.66%. It is his submission that once the Commission has revised the employee expenses for FY 2007-08 i.e. the base year, the employee expenses for the period FY 2008-09 to FY 2011-12 also ought to have been revised.

29. According to the learned senior counsel, it is a settled law that O&M expenses allowed on normative basis cannot be trued up on actuals and in a normative tariff determination, the only consideration is whether the norm has been correctly set or not. The actual expenditure, whether more or less than the norm is immaterial. He referred to Regulation 4.16(b)(i) of the MYT Regulations, 2007 to argue that these regulations also clearly contemplated that the difference between the norm and the actual, when the actual is less, is to the account of licensee i.e. appellants, and therefore, by refusing to rework the norm as mandated by the judgment of this Tribunal, the Commission has negated the benefits which the appellants were entitled to under the said Regulation 4.16(b)(i).

30. On behalf of the Commission, it is merely argued that seeking one financial parameter like O&M targets with base year as 2007-08 and continue with base year as FY 2006-07 for rate of interest, is not justified and tenable, and therefore, same year shall be considered as base year for all the financial parameters.

Our Analysis: -

31. "Base year" is defined in Regulation 2.1(d) on MYT Regulations, 2007 as under: -

"…

(d) 'Base Year' means the Financial Year immediately preceding first year of the Control Period and used for purposes of these Regulations;"

[Emphasis Supplied]

32. Regulation 2.1(g) defines "control period" as under:-

"…

(g) 'Control Period' means a multi-year period fixed by the Commission, from the date of issuing Multi Year Tariff order till 31st March 2011;"

[Emphasis Supplied]

33. Regulation 5.4 provides the methodology for determination of O&M expenses as under:-

"5.4 ***O&M expenses permissible towards ARR for each year of the Control Period shall be determined using the formula detailed below.*** *The R&M expenses are linked to the Gross Fixed Assets,* ***while the employee expenses and A&G expenses are linked to an Inflation Index****, as shown below:*

(a) $\boldsymbol{O\&M_n = (R\&M_n + EMP_n + A\&G_n)^* (1 - X_n)}$

(i) ***Where,*** $R\&M_n = K*GFA_{n-1}$***;***

(ii) $EMP_n + A\&G_n = (EMP_{n-1} + A\&G_{n-1})*(INDX_n / INDX_{n-1})$***; and***

(iii) $INDX_n = 0.55*CPI_n + 0.45*WPI_n$

Where

(b) *'K' is a constant (could be expressed in %) governing the relationship between O&M costs and gross fixed assets (GFA) for the nth year. Value of K shall be determined by the Commission in the MYT Tariff order based on Licensee's filing, benchmarking, approved cost by the Commission in past and any other factor the Commission feels appropriate;*

(c) ***$INDX_n$- Inflation Factor to be used for indexing can be taken as a combination of the Consumer Price Index (CPI) and the Wholesale Price Index (WPI) for immediately preceding five years;***

(d) *EMP_n – Employee Costs of the Licensee for the nth year;*

(e) *$A\&G_n$ – Administrative and General Costs of the Licensee for the nth year;*

(f) *$R\&M_n$ – Repair and Maintenance Costs of the Licensee for the nth year;*

(g) *X_n is an efficiency factor for nth year. Value of X_n shall be determined by the Commission in the MYT Tariff order based on Licensee's filing, benchmarking, approved cost by the Commission in past and any other factor the Commission feels appropriate."*

[Emphasis Supplied]

34. Regulation 12.1 of these regulations provides as under:-

"A12: TRUING UP FOR THE PERIOD UPTO THE COMMENCEMENT OF MYT ORDER

12.1 Performance review and adjustment of variations of the Distribution Licensees for year FY 2006-07 and ***period between 1st April 2007 and commencement of MYT tariff order*** *shall be done* ***based on the actual/audited information*** *and prudence checks by the Commission and shall be considered during the Control Period."*

[Emphasis Supplied]

35. On a conjoint reading of these regulations, it becomes evident that once the O&M expenses for the base year i.e. FY 2007-08 are revised by the Commission in its tariff order dated 29.09.2015, these expenses for the FYs

2008-09 to 2010-11 shall also, as a necessary consequence, be revised accordingly by applying the inflation factor on the revised base figure. We concur with the submissions made on behalf of the appellants that the Commission ought not to have continued to base the O&M expenses for FYs 2008-09 to 2010-11 on the older figures for FY 2007-08 which no longer reflected the revised figures. In doing so, the Commission has patently violated its own regulations, in particular the Regulation 12.1 of MYT Regulations, 2007.

36. It was pointed out by learned senior counsel for the appellants that in its MYT order dated 23.02.2008 for the first control period, the Commission has explained that O&M expenses for FY 2008-09 were to be computed based on the numbers of FY 2007-08 and correspondingly escalated for the rest of the control period. The relevant portion of the said order is extracted hereunder: -

> *"Commission's Analysis*
>
> *4.106 The Commission has determined the employee expenses of the Petitioner for the Control Period using the methodology detailed in the MYT Regulations, 2007.* ***Hence, the employee expenses for the nth year of the Control Period (EMPn) shall be***

determined using the employee expenses for the (n-1)th year (EMPn-1) and the escalation factor as determined above (Table 67)*.*

4.107 ***For the Purpose of calculation of employee expenses for the Control Period the Commission has <u>considered the trued-up employee expenses of FY07</u> (net of SVRS amortization) <u>as the base employee expenses for the</u> <u>Control Period</u> i.e. Rs 137.60 Cr (Rs 184.05 Cr – Rs 46.45 Cr).****"*

[Emphasis Supplied]

37. Hence, the Commission has itself accepted in the said order that the numbers pertaining to FY 2007-08 are to form the basis for computing the O&M expenses for rest of the control period also. This is clearly in tune with the Regulation 12.1. Having held so and as directed by this Tribunal in Appeal 142 judgment, Appeal 61 judgment and Appeal 177 judgment to revise the numbers of FY 2007-08, the Commission is not justified in refusing the automatic and consequential effect on the O&M expenses for the FY 2008-09 also as well as for the rest of the control period.

38. We may further note that the refusal of the Commission to accept the claim of the appellant on this issue on the ground of pendency of appeal Nos.290 and 297 of 2015 before this Tribunal is not acceptable for the reasons as noted in our discussion on issue no.3A hereinabove (Paragraph 23) which are not repeated here for the sake of brevity.

39. Hence, we set aside the findings of the Commission on this issue and remand the issue back to the Commission with the directions to revise the O&M expenses of the appellants for the FYs 2008-09 to 2010-11 as per MYT Regulations, 2007 by applying the inflation factor on the revised base figures for FY 2007-08 determined by the Commission in its tariff order dated 29.09.2015. We also direct that the consequential financial impact would be granted to the appellants along with carrying cost.

Issue No. 4: Revision in distribution loss from FY 2007- 08 up to FY 2009-2010.

40. The contention of the appellant is that the Commission has failed / refused to consider the issue of resetting distribution and Aggregate Technical and Commercial (AT&C) loss targets pursuant to the directions of this Tribunal in the judgment dated 06.10.2009 passed in appeal No.36/2008 (hereinafter referred to as “Appeal 36 judgment”).

41. The findings of the Commission on this issue in the impugned order are extracted hereinbelow: -

(a) **For BRPL**:

"3.86 ***The Commission in its Tariff Order dtd. 29/09/2015 has already dealt this issue in para nos. 3.68 and 3.69 wherein it is specifically indicated that the Commission has reviewed the distribution loss for 1st MYT Control period (FY 2007-08 to FY 2010-11) as per the direction of Hon'ble APTEL in Appeal No. 61 of 2012, in its Order dated 20.04.2015.*** *Further, the Petitioner has preferred an appeal on this issue in Appeal No. 155 of 2015 against the Commission's order dated 20.04.2015.*

3.8 In view of the above Order dated 20.04.2015 passed by the Commission in compliance of the Hon'ble APTEL direction and appeal filed by the Petitioner ***the Commission will consider the issue after the final judgement of Hon'ble APTEL as the matter is still sub-judice****."*

*[**Emphasis Supplied**]*

(b) **For BYPL**:

*"**COMMISSION'S ANALYSIS***

3.86. ***The Commission In its Tariff Order dtd. 29/09/2015 has already dealt this issue in para no. 3.66 and 3.6.7 wherein it is specifically indicated***

> ***that the Commission has reviewed the distribution loss for 1st MYT Control period (FY 2007-08 to FY 2010-11) as per the direction of Hon'ble APTEL in Appeal No. 62 of 2012, in its Order dated 20.04.2015****. Further, the Petitioner has preferred an appeal on this issue in Appeal No. 156 of 2015 against the Commission's order dated 20.04.2015.*
>
> *3.87 In view of the above Order dated 20.04.2015 passed by the Commission in compliance of the Hon'ble APTEL direction and appeal filed by the Petitioner,* ***the Commission will consider the issue based on the final judgement of Hon'ble APTEL as the matter is still sub-judice.****"*

42. Regulation 4.8 (ii) & (iii) of MYT Regulations, 2007 specifies AT&C loss targets to be achieved at the end of control period i.e. 17% in case of BRPL and 22% in case of BYPL by the end of FY 2010-11. Year wise loss reduction trajectory for the control period was to be fixed for the discoms in the tariff year for FY 2007-08.

43. We have already noted hereinabove that MYT order for the FY 2007-08 was issued on 23.02.2008 and therefore in terms of Regulation 2.1(g) of MYT Regulations, 2007, the control period commenced on 23.02.2008 instead of 01.04.2007.

44. It is argued on behalf of the appellant that since the AT&C loss reduction target for FY 2007-08 was determined on 23.02.2008 when MYT order was issued, there were only 37 days remaining in that FY 2007-08 and the distribution loss was to be reduced by the discoms effectively during the said period of 37 days (23.02.2008 to 31.03.2008) from 35.63% to 25.95% i.e. by 9.68% in case of BRPL and from 42.3% to 34.11% i.e. by 8.19% in case of BYPL. It is argued that AT&C loss target could not have been introduced by the Commission retrospectively.

45. Learned senior counsel appearing for the appellants further submitted that the said loss reduction target was challenged by the appellants before this Tribunal by way of appeal No.36/2008 and by way of judgment dated 06.10.2009 passed in that appeal, this Tribunal held as under: -

> *"31. … The appellant does not dispute that the targets set are possible within the MYT Regulations and are as per the MYT Regulations. The order of the Commission is legal and valid when compared with the Regulations.*
>
> *32.* ***There is however, no bar on the Commission reconsidering the target that has been set and amend the relevant Regulation, if necessary. The***

> ***target for MYT period needs to be set on the basis of losses at the beginning of the MYT period and not on the basis of loss level on the date of privatization when the policy target period began.*** *The consequences of failure or success in reaching the loss reduction target have already been borne by the licensee. Hence reference to the initial level of loss at the time of privatization is not necessary.* ***The Commission may itself consider the plea of any amendment in the target set in this regard in case the appellant makes out a case. Therefore, we direct that the appellant may make an appropriate representation to the Commission in this regard within one month hereof and that if a representation is so made the Commission shall dispose it of in two months.****"*

46. It is further pointed out by the learned senior counsel that even though the Commission assailed the Appeal 36 judgment in the Supreme Court by way of Civil appeal Nos.884 and 980 of 2010, yet the above noted observations of this Tribunal had not been assailed therein. Further, even the said appeals were dismissed by the Supreme Court on 01.12.2021 holding that these do not raise any substantial question of law.

47. It is further pointed out that since the Commission did not implement the Appeal 36 judgment, even after the dismissal of above appeals by Supreme Court, the appellants were constrained to approach the Supreme Court again by way of miscellaneous application which were disposed off in the following words:-

> *"**Issue No. 1 - Distribution Losses and AT and C Losses***
>
> *17. **As regards the findings related to Distribution losses and AT and C losses, challenged by the DERC in the appeals, vide impugned judgment dated 6th October, 2009 and 30.10.2009, passed by APTEL, it had directed BRPL and BYPL[hereinafter referred to as 'the non-applicants'] to submit an appropriate representation to the DERC within one month from the date of passing of the order and if the said representation was made, the DERC was directed to dispose of the same within a period of two months.***
>
> *18. It is not in dispute that the non-applicants did submit a representation in compliance with the above directions and the DERC passed an order on 20.04.2015, though belatedly. The said order is subject matter of Appeals No.155 and156 of 2015, pending before APTEL. In view of the pendency of the above appeals in relation to*

Distribution losses and AT and C losses, it will not be appropriate for this Court to go into the said issue. The non-applicants having assailed the subsequent order before the appropriate forum, parties ought to await the decision of the said appeals.

19. ***We expect APTEL to dispose of the above appeals filed by the non- applicants as expeditiously as possible, having regard to their long pendency."***

48. The grievance of the appellant is that the Commission has still not implemented the Appeal 36 judgment by providing the necessary impact to the appellant and has malafidely taken refuge under the appeal Nos.155 and 156 of 2014 filed by the appellants which are pending disposal before this Tribunal.

49. It is further argued that continued non-compliance of Appeal 36 judgment by the Commission was noted by this Tribunal in judgment dated 28.11.2014 passed in appeal Nos.61 and 62 of 2012, (2014 SCC OnLine APTEL 196) wherein it was held and ordered as under:-

"26. ***The Ninth issue is related to review of distribution loss for the first control period. The Appellant has claimed that the Delhi Commission***

has not implemented the directions of the Tribunal in judgment reported as 2009 ELR (APTEL) 880 in Appeal No. 36 of 2008, wherein this Tribunal has directed the Delhi Commission to amend distribution loss target for first control period.

27. In reply to the above allegation the Commission has submitted that other licensees have not only achieved but overachieved the target, hence the same should not be reviewed. Otherwise also without amending the regulations the Commission cannot review the target fixed for AT&C Losses.

28. The Appellants have Submitted that the Delhi Commission has acted contrary to the findings of this Tribunal in BRPL v. DERC, 2009 ELR (APTEL) 880 wherein this Tribunal directed, as under: - …

29. The Appellants have submitted that in pursuance to above directions of this Tribunal they had submitted a petition with full details to the Commission. The Commission did not admit the petition for 54 months and after more than 56 from filing of the Petition, Ld. Delhi Commission by Order dated 17.07.2014 dismissed the Petition and ignored to give effect to judgment of this Tribunal.

30. The ***Appellants' have contended that they had not asked for amendment to the MYT Regulations but had only asked for relaxation in the Regulation***

> ***in as much as modification in the loss reduction trajectory so as to achieve the targeted loss of 17% by 2010-11*** *as indicated in a Table in the written submission reproduced below: …*
>
> *31.* ***In view of submission of the Appellants, the Commission is directed to reconsider the matter with in three months from date of issuance of the judgment and pass a reasoned order. The issue is decided accordingly.****"*

50. Thereafter, this Tribunal again vide judgment dated 02.03.2015 in appeal Nos.177 and 178 of 2012 (2015 SCC OnLine APTEL 122) (hereinafter referred to as "Appeal 177 judgment") directed the Commission to implement the Appeal 61 judgment in the following words:-

> *"13.* ***The tenth issue is regarding review of distribution loss for 2008-2011.***
>
> *13.1 The same* ***issue has been dealt with by the Tribunal in its judgment dated 28.11.2014 in Appeal no. 61 and 62 of 2012, wherein the State Commission was directed to reconsider the matter within 3 months from date of issuance of the judgment and pass a reasoned order. This issue is decided accordingly****."*

51. The learned senior counsel further pointed out that in pursuance to the said Appeal 177 judgment of this Tribunal, the commission passed order dated 20.04.2015 in already disposed off petition Nos.13 and 14 of 2014 observing, inter alia, as under:-

> *"6. The Commission has observed that:*
>
> *a). the target for reduction of AT&C losses were fixed in the MYT Regulations 2007.*
>
> *… b). The Appellant has not challenged the Statutory Regulations and therefore, they have attained legislative finality. Thus the target figures given above for the end of the control period have attained finality.*
>
> *c). Fixation of year-wise AT&C loss targets was done in the MYT Order after following the due process of law and through consultation and public hearing of all the stakeholders. The basic principle followed was that there would be equal reduction year wise in targets from the beginning of the control period to the last year of the control period. Targets for the beginning and end years have already been fixed in MYT Regulations.*
>
> *… 7.* ***In the case of BYPL, it was able to achieve the prescribed targets in three out of four years of the control period while in FY 2008-09, they claimed a***

better achievement, but this was not accepted because it could not be substantiated. (Presently true-up of FY 2008-09 is in progress as directed by APTEL).

8. ***In the case of BRPL, there was only marginal increase over the set targets in FY 2007-08, FY 2009-10 and FY 2010-11 for which they have been penalized as per the Regulations in force. Failure to achieve pre-set targets cannot be an excuse for refixing subsequent targets since regulatory certainty has already been assured through advance notification of targets in the MYT order. It is expected that the DISCOM will make all possible efforts to achieve the set targets and the very fact that two out of three DISCOMs, could achieve the set targets fixed on the same basic principle clearly indicates that these targets cannot be considered as unreasonable.***

… 10. In conclusion, the Commission while reviewing the issue of Distribution loss and AT&C loss targets during the first MYT period as directed by APTEL hereby ***decides that keeping in view the above observations, a revision of the Distribution loss and AT&C loss targets given in the MYT Order is not warranted.****"*

52. It is against the said order of the Commission dated 20.04.2015 that the appellants have filed appeal Nos.155 and 156 of 2015 before this Tribunal which are still under disposal and have been referred to by the Commission in the impugned order.

53. The stand of the Commission is that the Appeal 61 judgment has been implemented by revisiting the AT&C trajectory and AT&C targets vide order dated 20.04.2015 passed in appeal Nos.13 and 14 of 2014.

Our Analysis: -

54. We have already noted the relevant portion of order dated 20.04.2015 passed by the Commission in petition Nos.13 and 14 of 2014 in pursuance to the judgment passed by this Tribunal in appeal No.177. It is manifest from the perusal of the same that there has been no revision of AT&C loss and distribution loss targets and in fact the Commission observed that such revision is not warranted at all. The Commission has neither noted the contentions of the appellant upon which the revision of AT&C loss targets was sought nor has made any attempt to address the grievance of the appellants. Therefore, we wonder as to how the Commission contends that Appeal 36 judgment has been duly implemented.

55. Accordingly, we are again constrained to painfully note the recalcitrant approach of the Commission in avoiding/failing/neglecting/refusing to implement the directions of this Tribunal in Appeal 36 judgment, Appeal 61 judgment, and Appeal 177 Judgment. Such conduct of the commission is not only deplorable but may tantamount to insubordination also in so far as it is the bounden duty of the Commission to follow and implement each and every decision of this Tribunal.

56. Refusal on the part of the Commission to revise the AT&C loss targets for the appellants in pursuance to the directions of this Tribunal in the above noted previous judgments, merely on the ground of pendency of appeal Nos.155 & 156 of 2015 is neither tenable nor acceptable. It is for the reason that admittedly no interim order has been passed by this Tribunal in these two appeals staying such revision of depreciation in the said period. It has been repeatedly held by the Supreme Court that mere filing of appeal does not tantamount to stay of the orders / judgments appealed against and the subordinate court/ authority cannot on its own postpone the implementation of such orders / judgments in the absence of a stay order from the appellate court / authority. Therefore, the approach of the Commission in postponing the consideration of this issue till the decision of this Tribunal in appeal Nos.155&156 of 2015 is erroneous and unjustified.

57. Hence, we direct the Commission to hear the parties again on this issue and pass a fresh order in the light of the directions passed by this Tribunal in Appeal 36 judgment, Appeal 61 Judgment and Appeal 177 Judgment. The issue stands decided accordingly.

Issue No. 5: Directives in relation to regulated power.

58. The appellants are aggrieved by the following directive 6.2 issued by the Commission with regards to the regulated power:-

> (a) **For BRPL:**
>
> *"6.4. If the Petitioner purchases any expensive power to meet the demand during any time zone for which cheaper power has been regulated due to non-payment of dues, in such an eventuality,* ***the cost of such expensive power purchases shall be restricted to the variable cost of regulated cheaper power to that extent at the time of true up.****"*
>
> *[**Emphasis Supplied**]*
>
> (b) **For BYPL:**
>
> *"6.4. If the Petitioner purchases any expensive power to meet the demand during any time zone for which cheaper*

> *power has been regulated due to non-payment of dues, in such an eventuality,* ***the cost of such expensive power purchases shall be restricted to the variable cost of regulated cheaper power to that extent at the time of true up.****”*
>
> *[****Emphasis Supplied****]*

59. We may note here that "regulated power" refers to curtailment of power supply by those generating stations who have not been paid their dues by the appellants for the power procured from them.

60. The impugned directive mandates that if the appellants purchase expensive short-term power in lieu of cheaper long-term power which has been regulated by the generating stations due to non-payment of their dues, the cost of such expensive power to be allowed in true up shall be restricted to the variable cost alone of the regulated cheaper power.

61. The contentions of the appellants is that any power purchased to meet the demand during the period of regulation is due to inability of the appellants to make payments to generating stations because of non-cost reflective tariff determined by the Commission year-on-year and unlawful creation of regulatory assets by the Commission. It is contended that such failure on the part of the Commission impairs the ability of the appellants to make payments to the generating companies with which appellants have long-term power purchase agreement and compels the appellants to buy power from short-term sources to maintain uninterrupted supply of electricity in compliance with directive 6.6 of the Commission as well as Sections 42 and 43 of the Electricity Act, 2003. We find it pertinent to extract hereunder the directive 6.6 issued by the Commission: -

> *"…Commission directs the Petitioner to ensure availability of power supply for meeting the demand. The Petitioner shall ensure that the electricity which could not be served due to any reason what-so-ever, shall not exceed 1% of the total energy supplied in units (kWh) in any particular month except in the case of force-majeure events which are beyond the control of the Petitioner"*.

62. Learned senior counsel appearing for the appellants would argue that directive 6.4 is inconsistent with directive 6.6 which enjoins upon the appellants i.e. discoms to ensure continuous power supply as per the demand but at the same time the appellants are prevented from claiming complete cost of power purchased from short-term sources to maintain uninterrupted supply of electricity during the period of regulation.

63. It is submitted that as a point of fact, power purchase cost determined as part of ARR year-on-year has rarely been sufficient to meet the full power purchase cost actually incurred by the appellants and every true up will show that the projected power purchase cost had always been insufficient to meet the actual power purchase cost incurred. It is pointed out that normally in most discoms across the country, the power purchase cost ought to be about 80% of the ARR but in case of appellants, the power purchase cost for the years has never been 80% of the ARR and in fact, has sometimes been even as high as over 100% of ARR.

64. Learned senior counsel, further pointed out that the Commission has itself admitted that non-cost reflective tariff determined by it over the years which is not attributable to the appellants, in its:-

> *"(a) Statutory Advice dated 15.12.2010 issued under Section 86(2)(iv) of the Electricity Act to the Government of NCT of Delhi (**"GoNCTD"**) inter alia stating that tariff during previous years has not been cost reflective.*
>
> *(b) Statutory Advice 01.02.2013, wherein it has inter alia acknowledged that:-*
>
> > *(i) Revenue gap in case of BRPL is Rs. 9237 Crores, which has built up in spite of BRPL bringing down*

AT&C Losses in its area of supply from 48.1% to 16.36%.

(ii) Growing gap between ARR and revenue available through tariff places an additional burden on electricity consumers.

*(iii) M/s. SBI Capital Markets Ltd. (**"SBI Caps"**) in their presentation have assessed that liquidation of pending Revenue Gap will require surcharge of 20% for BRPL and 25% for BYPL on applicable tariff from 2012-13 to 2018-19."*

65. It has been submitted that disallowance towards additional Power Purchase Cost during the period of regulation, has been made without considering the fact that creation of revenue gap and regulatory assets by the Commission are primarily responsible for inability of appellants to make timely payments to the generating stations in spite of their best efforts.

66. On behalf of the Commission, it is argued that both the directives 6.4 and 6.6 are consistent with each other and valid as directive 6.4 provides for mechanism of cheaper regulated power whereas directive 6.6 ensures uninterrupted availability of power, and thus, both the directives are independent and complement each other. It is further submitted that these directives have been issued by the Commission to ensure that there is proper balance being maintained in the scheduling of power and that the power cost for the consumers in Delhi is optimum. It is submitted that the directives are essential to maintain proper check and balances in the delivery and procurement of power by the appellants from the market and for the consumers.

Our Analysis:

67. We have perused the statutory advice dated 15.12.2010 and 01.02.2013 issued by the Commission itself to the Government of NCT of Delhi. In Paragraph No.18.1 of the advice dated 15.12.2010, the Commission has clearly noted that the tariff for the year 2008-09, 2009-10 and current year i.e. 2010-11 are not cost reflective. Paragraph Nos.6,7,10&11 of the statutory advice dated 01.02.2013 reflect that there has been significant gap between the Annual Revenue Requirements of the discom and the revenue available through tariff which places additional interest burden on the consumers by way of carrying cost on the additional market borrowings which is to be resorted by the discoms to meet this gap. We quote these paragraphs hereunder:-

> *"6. The buildup of revenue gap since FY 2009-10 is given in the table below:-*
>
> *(Amount Rs. In crores)*

Revenue Gap (*)	*BRPL*	*BYPL*	*TPDDL*	*Total*
Upto FY 2008-09	*(611.50)*	*25.93*	*(351.10)*	*(936.67)*
FY 2009-10	*(1068.07)*	*(532.58)*	*(751.46)*	*(2352.11)*
FY 2010-11 (as approved by the Commission)	*(1545.72)*	*(1120.93)*	*(963.61)*	*(3630.26)*
FY 2011-12 (Projected by DISCOMs)	*(4233)*	*(2216)*	*(1783)*	*(8232)*
FY 2012-13 (Projected by DISCOMs)	*(1779)*	*(1690)*	*(885)*	*(4354)*
Total revenue gap (**)	*(9237.29)*	*(5533.58)*	*(4734.17)*	*(19505.04)*

(*) amount of the revenue gap upto FY 2010-11 includes carrying cost as approved by the Commission; and from FY 2011-12 onwards, the revenue gap includes carrying cost as per the tariff petitions filed by the licensees for FY 2013-14.

(**) This gap does not include the revenue gap arising on account of the impact of all the appeals filed before the ATE/SC etc., which shall be additional.

7. The above build-up is in spite of the fact that the Delhi distribution utilities have been able to significantly bring down AT&C losses in the city to levels well below those in most other States. The AT&C losses during 2011-12 as against the losses at the time of unbundling, based on which bids for privatization were invited are given below:-

	TPDDL	*BRPL*	*BYPL*
Opening Loss Levels in 2002	*48.1*	*48.1*	*57.2*
Current Loss Levels in FY 2011-12	*11.27**	*16.36**	*17.84**

**Note:- As claimed by DISCOM, but yet to be true-up by the Commission.*

It goes without saying that without the above mentioned reductions in AT&C Loss levels, the venue gaps would have been much higher, making the operations / tariff levels completely unviable.

…

10 The growing gap between the annual revenue requirements and the revenue available through tariff places additional interest burden on the electricity consumers by way of carrying cost on the additional market borrowings which have to be resorted to meet this gap. It also puts strain on the resources available to purchase power, even though there are adequate long term power purchase arrangements to meet the electricity demand of the NCT of Delhi.

11. The SBI Capital Markets Ltd. in a presentation made to the Commission in December, 2012 have assessed that liquidation of the pending revenue gap in the case of BRPL will require a surcharge of 20% every year on the applicable tariff from FY 2013-14 to FY 2018-19 while in the case of BYPL, a surcharge of 25% every year will be required to enable recovery of revenue gap in 6-7 years. The majority of consumers in Delhi are in the domestic category, out of which the consumers falling in the consumption slab upto 400 units constitutes approx. 70-80%. Thus, it is mainly the middle class consumers who would be impacted on account of an increase in tariff."

68. Hence, the Commission itself admits the non-cost reflective tariff determined over the years for the appellants which impairs the ability of the appellants to make payments to the generating companies for the power procured from them, thereby leading to regulation of power. Therefore, such a situation is the creation of the improper and imprudent tariff determination by the Commission. On the one hand, the power purchase cost determined as part of ARR of the appellants by the Commission has not been sufficient to meet the sufficient / actual power purchase cost incurred by the appellants as a result of which the appellants are unable to make payments to the generating companies and the generating companies resort to curtailment of power supply and at the same time, the appellants are required to purchase power from short-term sources to maintain uninterrupted supply of electricity in compliance of the directive 6.6 as well as Sections 42 and 43 of Electricity Act, 2003. Therefore, in such a situation, restricting the purchase price of such expensive power to the variable cost of regulated cheaper power only violates the doctrine of reasonableness and proportionality. It is a classic case where instead of remedying the situation, the Commission is penalizing the appellants for failure to make payments to the generating companies when the Commission itself has failed to perform its role as a regulator to determine the cost reflective tariffs.

69. We may note that as per Section 62(d) and (g), the Commission while determining the tariff shall have due regard to not only the interests of the consumers but also to the rights of the distribution companies to recover the cost of supply of electricity. The Commission, while determining the tariff, needs to balance the rights / interests of both, the consumers as well as the discoms in order to avoid precarious financial situation for the discoms like the one which is evident in the instant case.

70. We do not see any apparent conflict between directives 6.4 and 6.6. However, what needs to be ascertained is whether the non-payment of dues to the generating companies by the discoms has been on account of any situation created by the discoms themselves or due to a situation which has arisen for no fault of discoms. In the latter case, directive 6.4 needs to be relaxed in order to safeguard the interests of the discoms and avoid double whammy to them.

71. Hence, we direct the Commission to allow necessary impact of the present issue to the appellants in the light of observations made hereinabove. The issue stands disposed off accordingly.

Issue No. 7 & 50: Non-revision of AT&C Loss for FY 2012-13 to FY 2014-15 & AT&C Loss Target for FY 2015-16.

72. Since both these issues relate to the determination of AT&C loss for the appellants, though for different financial years, we think it appropriate to take together both the issues for disposal.

73. According to the appellants, the Commission has failed to implement correctly the directions of this Tribunal in Appeal 177 judgment wherein the Commission was directed to redetermine the AT&C loss trajectory on the basis of revised targets of collection efficiency.

74. The findings of the Commission in the impugned order on these two issues are extracted hereinbelow: -

> **<u>For BRPL</u>**:
>
> "…
>
> …
>
> *3.419 The Commission has indicated its difficulty in its in Tariff Order dtd. 29/09/2015 as suggested by Hon'ble APTEL in its judgment of OP 1 of 2012 dtd. 14/11/2013 whose relevant extract is as follows:*
>
> *"36. …If there are any difficulties in implementation of the orders and directions issued by this Tribunal, it is open to the Delhi Commission either to file an Application seeking for clarification or praying for*

Review on those aspects. Instead of doing so, the State Commission ought not to have adopted the approach of confrontation with this Tribunal observing that they would not follow the Tribunal's directions."

3.420 Accordingly, the Commission has filed a Clarificatory Application before Hon'ble APTEL, requesting to reconsider the AT&C loss targets of the Petitioner for maintaining parity amongst all the Distribution Utilities. The view on impact of AT&C Loss Targets will be considered, as deemed fit and appropriate, after receipt of the judgment of Hon'ble APTEL in the said Clarificatory application."

For BYPL"

"…

…

3.382 The Hon'ble APTEL has directed the Commission in Appeal No 14 of 2012, Appeal No 61 & 62 of 2012 and Appeal No. 177 & 178 of 2012, to reconsider the AT&C Loss target from FY 2011-12 to FY 2014-15. The Commission has filed a Clarificatory application before Hon'ble APTEL on various issues including AT&C Loss Target, decided in above mentioned appeals due to variance in judgement on similar issues 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."*

75. We may note here that in Appeal 177 judgment, this Tribunal had directed the Commission to:-

(a) redetermine the AT&C loss trajectory of the appellants in terms of Appeal 61 judgment dated 28.11.2014; and

(b) revise collection efficiency after benchmarking and considering the actual past performance after correcting for collection for DVB arrears electricity duty and late payment surcharge.

76. The relevant portion of the said judgment is extracted hereinbelow: -

> *"30.12 The* ***State Commission has proposed AT & C loss reduction 1.27% below the target fixed for 2011-12(15%). Now the AT & C loss target for FY 2011-12 has to be refixed to 16% for BRPL as per the decision of this Tribunal in Appeal no. 62 of 2012****. The State Commission has fixed AT&L loss target for 2014-15 as 12.5% which would mean a loss reduction of 3.5% in the control period of 3 years which seems reasonable and can be distributed to 1.05% reduction in 2012-13, 1.2% in 2013-14 and 1.25% in 2014-15 over the target of previous year i.e.*

AT & C loss target of 14.99%, 13.75% and 12.5% respectively. Lower target for 2012-13 has been fixed as the impugned order was passed on 13.07.2012, about 3½ months after the commencement of FY 2012-13. ***In this way, the target for FY 2014-15 will remain the same as decided by the Commission in the impugned order. Considering the performance in the past and the actual AT & C loss level, the above loss reduction trajectory will be reasonable. According decided****.*

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

30.14 We find that the State Commission has refixed the collection efficiency as 99.5% from 98.5% earlier without any benchmarking despite making change in definition of the collection efficiency with reference to definition in 2007 MYT Regulations by excluding arrears collected for the DVB period, electricity duty and late payment surcharge. ***There is some force in the arguments of the Appellants that they were***

able to achieve more than 100% collection efficiency due to collection of arrears. We feel that the State Commission should have refixed the collection efficiency target after benchmarking and considering the actual past performance after correcting for collection of DVB arrears, electricity duty and late payment surcharge which have been excluded in the definition in 2011 MYT Regulations. *Accordingly, the* ***State Commission is directed to reconsider the fixation of collection efficiency target. We want to make it clear that we are not giving any specific number for collection efficiency and the State Commission has to decide the same after considering the above factors."***

77. We have also been informed that the Commission has assailed the said Appeal 177 judgment before the Hon'ble Supreme Court by way of Civil Appeal No.6959-60 of 2015 but no stay has been granted by the Supreme Court.

78. We may further note that above directions issued by this Tribunal in Appeal 177 judgment regarding refixing of AT&C loss targets for the appellants was based on the previous decision of this Tribunal in Appeal 61 judgment wherein this Tribunal had, inter alia, directed the Commission to refix the targets for FY 2011-12. Relevant portion of the said Appeal 61 judgment is extracted hereinbelow:-

> *"67. The 16 issue before us for our consideration is related to fixation of AT&C loss reduction targets. …*
>
> *69. In the light of the submissions made by the parties, let us discuss the issue.*
>
> *70. Before discussing the issues we will refer to the findings on this issue in the impugned order as quoted below: …*
>
> *71. Perusal of above findings of the Delhi Commission in the Impugned Order would indicate that the Commission has not given any reason for not adhering to its approach for fixing the loss targets for FY 2011-12 communicated vide its letter dated 8.3.2011 that the AT&C loss target for FY 2011-12 will be the lower of the Actual AT&C loss for 2010-11or the reduction at 1% over the AT&C target for FY 2010-11. In accordance with the said approach, the AT&C loss targets works out to be either 21% (target for 2010-11 at 22% minus 1%) or 20.64% as claimed by the Appellant.*

- *It is important to note that AT&C loss levels and CAPEX are inexplicably interlinked with each other. Adequate & timely Capex is essential for reduction in AT&C loss levels. Therefore, inadequate and/or delay in approval of Capex schemes inevitably affects the Distribution licensee's ability to reduce losses to desired levels. The Appellants have submitted that inadequacy of CAPEX as well as delay in approvals by the Commission have strained the ability of the Appellant to reduce the AT&C loss levels to desired levels. In FY 2009-10, the Delhi Commission approved only 209 schemes amounting to Rs. 5442.18 lacs as against 401 schemes amounting to Rs. 12884.40 lacs for reduction of AT & C loss. Of the 209 schemes, Appellant implemented 205 schemes as the remaining 4 schemes got stuck up due to Right of Way (RoW). No reasons were specified for not approving the remaining 192 schemes by the Commission and also no analysis of adequacy or otherwise the approved schemes vis-à-vis the loss reductions targets were given. Due to inadequate approval of capex and respective schemes, AT&C loss level targets could not be achieved instead it had adversely impacted on performance of subsequent years also.*

72. In the light of above discussions we direct the Delhi Commission to refix the AT&C loss levels for the FY 2011-12 as per its letter dated 8.3.2011 and give consequential relief to the Appellants. The issue is decided in favour of the Appellants.

…"

79. It is argued on behalf of the appellants that once the target for FY 2011-12 was fixed by the Commission in terms of the Appeal 61 judgment, the same would have to be considered for the next control period (i.e. second MYT period) in terms of Regulation 8.11 of the MYT Regulations, 2007 which provides that *"Commission shall analyse the performance of the Licensee with respect to the targets set out at the beginning of the first Control Period and based on the actual performance, expected efficiency improvements and other factors prevalent, determine the initial values for the next Control Period."*

80. It is submitted that the Commission has failed to implement these directions of this Tribunal and on account of such failure, appellant has filed IA No.860/2021 in appeal No.236 of 2014 filed against Tariff Order dated 23.07.2014) seeking a direction to the Commission to implement the issues decided in favour of the Appellant in Appeal 177 judgment, including the issue related to revision of AT&C loss trajectory for FY 2012-13 to FY 2016-17. It is pointed out that this Tribunal vide order dated 07.06.2021 in said I.A. No. 860 of 2021 has directed the Commission to implement the judgments of this Tribunal wherein no stay has been granted by the Supreme Court. Accordingly, the appellant vide letter dated 27.08.2021 submitted its claim vis-à-vis the issue of revision of AT&C loss targets for FY 2012-13 to FY 2016-17 in terms of the Appeal 177 judgment of the Tribunal. However, the Commission in disregard to the directions of this Tribunal and the data submitted by the appellants, vide order dated 30.09.2021: -

> *"(a) Arbitrarily revised the AT&C Loss Levels for FYs 2012-13 and 2013-14 as 14.95% and 13.75% as against 16.63% and 15.80% respectively; and*
>
> *(b) Failed to revise the AT&C Loss Level for FYs 2014-15, 2015-16 and 2016-17 which are part of the Second MYT Period."*

81. It is further submitted that:-

> *(a) the Commission conduct of not implementing the judgment(s), order(s) and direction(s) of this Hon'ble Tribunal establish the wilful disobedience*

to perform its statutory functions apart from being mala fide, patently illegal and in abject defiance and violation of the directions of this Hon'ble Tribunal.

(b) it is trite law that where there is no stay on a judgment of the court of first instance or appellate court by the superior court, the directions of court of first instance or appellate court are still in operation and binding.

(c) mere filing of an appeal against a judgment does not tantamount to stay of the operation of the judgment. As stated hereinabove, judgements, orders, and directions of appellate courts are binding on subordinate authority / courts, which should be implemented effectively and scrupulously unless the same has been stayed or struck down by a superior court.

(d) any unlawful and improper refusal to implement binding directions of the superior courts compromises the efficacy of the hierarchy of decision-making machinery under Sections 62, 111 and 121 of the Electricity Act, 2003 in context of the principles of tariff determination enunciated by this Tribunal by judgment dated 11.11.2011, 2011 ELR (APTEL) 1742 in O.P. No. 1 of 2011.

(e) conduct of the Commission, being a subordinate

authority, in refusing to implement the judgments of this Hon'ble Tribunal, is tantamount to denial of justice and has been commented on in the past by this Hon'ble Tribunal in case of DTL v. DERC, 2013 ELR (APTEL) 498.

(f) scant regard given by the Commission to the directions of this Hon'ble Tribunal is evidenced from the fact that the Commission, in utter disregard to the judgments and orders passed by this Tribunal, has ignored the unequivocal directions of this Tribunal and has refused to give effect to the issue of AT&C loss trajectory for the Second MYT Period, that has already been allowed in favour of the Appellants."

82. On these contentions, the appellants have sought directions to the Commission to implement Appeal 177 judgment in letter and spirit; redetermine the AT&C loss trajectory for second MYT period; and grant consequential impact to the appellants in tariff along with carrying cost.

Our Analysis:

83. We have already noted that the Commission, in the impugned order, has expressed difficulty in implementing the Appeal 61 judgment and Appeal

177 judgment of this Tribunal regarding the issues under consideration and has postponed its decision on these issues till decision of this Tribunal in clarificatory application filed by it requesting reconsideration of AT&C loss targets for the appellants for maintaining parity amongst all distribution utilities.

84. In the reply submitted on behalf of the Commission to the Memorandum of Appeal, the Commission contended as under: -

> *"a) Issue of AT&C loss target of FY 2011-12 is sub judice before the Hon'ble Supreme Court and the direction of this Hon'ble Tribunal to revise the AT&C Loss target is linked with AT&C Loss target of FY 2011-12.*
>
> *b) View on this issue will be considered after receipt of the judgment of the Hon'ble Supreme Court of India is passed on this issue."*

85. In the written submissions filed by the Commission's counsel in these appeals, it has been prayed that the decision on these two issues may be kept pending for being heard together in appeal No.158/2023 which is pending adjudications.

86. We are unable to comprehend the conduct and approach of the Commission on these two issues under consideration. The Commission has put forth three different excuses for keeping these issues pending before it, as noted hereinabove, which is indicative of the fact that the Commission is only devising alibi to avoid decision on these two issues and thereby created ground for non-compliance of Appeal 61 judgment and Appeal 177 judgment of this Tribunal with regards thereto.

87. In the written submissions, the fate of the clarificatory application filed before this Tribunal has nowhere been stated. In so far as the appeal pending disposal with Hon'ble Supreme Court is concerned, concededly, no stay has been granted therein by the Supreme Court, and therefore, we do not find any obstacle in the way of Commission in implementing the Appeal 177 judgment. With regards to the appeal No.158/2023, which is stated to be pending disposal before this Tribunal, it has nowhere been explained as to how the same will have any bearing upon the decision on these two issues.

88. We find that the conduct of the Commission in not implementing the directions passed in Appeal 177 is in direct contravention of the directions of the Tribunal. While the Commission ought to have revised AT&C, it failed to revise the collection efficiency numbers based on directions in Appeal No. 177. We, at this stage, are not examining the impact of such implementation.

89. In view of above, we direct the Commission to implement the directions given in the Appeal 177 judgment in letter and spirit and re-determine the AT&C Loss Trajectory for the Second MYT Period by appropriately revising the figures for collection efficiency, and allow consequential impact to the Appellants in tariff along with carrying cost, within two months from the date of this judgment.

90. The two issues stand disposed off accordingly.

Issue No. 24B: Disallowance of Power Purchase cost on account of contingency reserve to dispose-off surplus power in UI fixed at 3% on gross power purchase.

91. The issue relates to the disallowance of appellants power purchase cost by the Commission at true up stage by retrospective application of directions issued vide tariff order dated 29.09.2015 with regards to disposal of surplus power in Unscheduled Interchange (UI) for FY 2014-15 (in case of BYPL) and FY 2015-16 (in case of BRPL) and fixation of contingency limit for disposal of surplus power in UI at 3% of gross power purchase for every month.

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

(a) **For BRPL:**

"3.494 The Commission recognises the efforts of Petitioner in selling majority of its Surplus power in banking. The ***purchase through exchange has increased significantly from 2.08% to 55.97% from FY 2013-14 to FY 2015-16****.* ***However, the sale under exchange has decreased significantly from 46.46% to 2.70% from FY 2013-14 to FY 2015-16.***

3.495 The Commission ***has observed that in spite of their direction in previous tariff order*** *the* ***Petitioner has not made its efforts to control its sale of surplus power through under UI****. Its sale through* ***UI has increased from 6.53% in FY 2013-14 to 20.38% in FY 2015-16.***

3.496 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:*

… 3.497 The month wise analysis of power sold under UI to Gross Power Purchase for the Petitioner is indicated in the table as follows:

… 3.498 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 was fixed at 3% on Gross Power Purchase for every month in the Tariff Order dtd. 29/09/2015. The Commission has decided to keep same percentage for contingency limit and percentage sale over and above the contingency limit is set off with the differential rate of Exchange Rate at N2 Region v/s. UI Rate for BRPL. The disallowed cost arrived at is indicated in the Table as follows:

… 3.499 In view of above, ***the Commission has decided to dis-allow Rs. 4.04 Cr. on account of sale of power through UI mode which cannot be treated as mode to dispose off surplus power rather UI mode is a real time frequency settlement mechanism for ensuring Grid Discipline.***

3.500 Further, ***the Commission observes that the sale under UI in FY 2014-15 is within the contingency limit of 3%.****"*

(b) **For BYPL:**

"3.456 The Commission recognises the efforts of Petitioner in selling majority of its Surplus power in

Banking. However, the Commission observed that the Petitioner has not made its efforts to control its transactions under UI. The purchase under UI has increased significantly from 2.52% in FY 2013-14 to 17.14% in FY 2014-15. However, the sale under UI has decreased significantly from 40.04% to 2.60% from FY 2013-14 to FY 2014-16.

3.457 UI charges under ABT mechanism were incorporated to maintain Grid Discipline and benefit those entities who maintained grid discipline and penalize those who 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:

… 3.458 The month wise analysis of power sold under UI to Gross Power Purchase for the Petitioner is indicated in the table as follows:

… 3.460 Further, the Commission observes that the Petitioner is grid disciplined and the sale under UI in FY 2015-16 is within the contingency limit of 3%.

3.461 ***In view of above the Commission has decided to disallow Rs. 11.54 Cr. on account of sale of power through UI mode which cannot be treated as mode to dispose off surplus power rather UI mode is a real time frequency settlement mechanism for ensuring Grid Discipline.****"*

93. We may note that vide tariff order dated 29.09.2015 issued by the Commission, it introduced a monthly contingency limit of 3% on gross power purchase for disposing surplus power in UI. This limit has been made applicable retrospectively from FY 2013-14. Disallowance in case of BYPL relates to FY 2014-15 and in case of BRPL relates to FY 2015-16.

94. Learned senior counsel for the appellants vehemently argued that the Commission could not have passed the directions in its tariff order dated 29.09.2015 and applied them retrospectively when a part of the financial year was already over. He submitted that at the stage of truing up, the Commission cannot change the rules / methodology used in initial tariff determination by changing the basic principles/premise applied initially. He would argue that no such contingency limit on disposal of surplus power was imposed by the Commission at the stage of ARR determination for the appellants, and therefore, such a limit could not have been applied at the stage of truing up. It is further argued that imposition of such contingency limit on disposal of surplus power by the appellants in UI encroaches upon the domain of inter-state power supply which is beyond the scope of the Commission and is also in violation of the matching principle in terms of which "revenue" of the period should match with the "cost/expenses" of that period.

95. On behalf of the Commission, it is submitted that the contingency limit of 3% was imposed by the Commission on prudence check of power purchase and sale done by the appellants. It is pointed out that the power purchase is governed by the MYT Regulations, 2011, and the guidelines issued by the Commission. Regulations provided that the power procured in violation of guidelines issued by the Commission shall be considered as illegitimate. Reference is made to Regulation 5.25 which reads as under:-

> *"5.25 While approving the cost of power purchase, the Commission shall determine the quantum of power to be purchased from various sources in accordance with the principles of merit order schedule and despatch based on a ranking of all approved sources of supply in the order of their variable cost of power purchase. All power purchase costs shall be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates or the power procurement guidelines as laid down by the Commission from time to time has not been followed."*

96. It is further argued by the learned counsel for the Commission that prudence check can only be done at the stage of true up, and therefore, the contention of retrospective application of the contingency limit is out of place. Relying upon the judgments of this Tribunal in appeal No.271/2013 TPDDL v. DERC decided on 20.07.2016 and in appeal No.246/2014 TPDDL v. DERC decided on 30.09.2019, it is argued that the penal / additional UI charges are made applicable due to severe indiscipline caused by the power over drawl or under drawl, by the discoms for the reason that UI deviation settlement mechanism cannot be permitted to be used as a medium for sale or purchase of electricity and any such sale made by the appellants cannot be permitted to be allowed as a passthrough to the consumers.

<u>Our Analysis</u>: -

97. We note that same issue had come up for consideration before this Tribunal in appeal No.301/2015 TPDDL v. DERC decided on 28.01.2025 in which it has been held as under: -

> *"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."

98. The arguments advanced by the parties on this issue in appeal No.301/2015 were identical to the submissions made on this issue in the instant appeals, and therefore, we do not find any good ground to deviate from our decision on this issue in appeal No.301/2015.

99. Hence, the impugned order of the Commission on this issue is hereby set aside. We direct that the contingency limit of 3% per month of gross power purchase through disposed off surplus power in UI cannot be applied while truing up power purchase cost of the appellants for the previous financial years i.e. FY 2014-15 and 2015-16.

Issue No. 24C: Disallowance of Power Purchase Cost for FY 2013-14, FY 2014-15 and FY 2015-16 on Account of Overlapping in Banking Transactions.

100. The issue pertains to disallowance of power purchase cost of the appellants due to overlapping in banking transactions.

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

(a) **For BRPL:**

*“**OVERLAPPING IN BANKING TRANSACTIONS***

3.501 During prudence check, the Commission directed the petitioner to provide statement of banking transactions indicating opening and closing balance of banking transactions as per that indicated in the audited financial statement.

3.502 Further, the Commission observed that import units of LOI no. 2000 and 2026 overlapping with export units of LOI 1962 for the month of January for FY 2014-15 and import units of LOI no. 1962 and 2085 are overlapping with export units of LOI no. 2031, 2000, 2026 for the month of September in FY 2015-16. The Commission has sought clarification on these transaction vide e-mail dated 30/06/2017.

3.503 The petitioner submitted detailed reply to the Commission’s e-mail vide their letter ref.: RA/2017-189/01A/177 dated 13/07/2017. In their reply they have submitted that tender for LOI no. 1932 was floated on 10/09/2014 but LOI was finally signed on 14/11/2014. And contrary to LOI no. 1932 tender for LOI no. 2000/2026 was floated on 18/12/2014 just after 33 days of signing of LOI no. 1962. The Commission is of the view that the petitioner was well aware if they sign LOI no. 2000/2026 then banking transaction will overlapped in the month of January 2015. Therefore, such transactions could have been avoided if the petitioner *could have planned in a better manner to optimise power purchase cost. During January 2015 short term power purchase is generally available at cheaper rate as compared with summer period. Therefore, there is no point that shortfall in power due to sudden re-allocation of power could not be arranged through other short term means.*

3.504 Further, signing date of LOI no. 1962, 2000, 2026, 2031 and 2085 were within a range of 3 months. Therefore, the Commission is of the view that planning for said banking LOIs is a failure at petitioner's end. Banking LOIs should not be entered by the petitioner against the philosophy of banking of power. Banking of surplus power was evolved and supported by the Commission in past to optimise power purchase cost by exporting surplus power in winter and to meet shortage of power by importing in summer period. On the contrary, it has been observed that the petitioner is involved in banking of power in which power is being imported in the winter period and is being exported in summer peak. Signing of LOI no. 2000/2062 is a perfect example of this.

3.505 In view of the above it has been observed that 19 MU and 42 MU were overlapped in banking transactions due to non-consideration of opportunity losses by petitioner in the FY 2014-15 and FY 2015-16 *respectively while planning for power banking. Therefore, the Commission has decided to disallow transmission charges and trading margin related to overlapped units from total power purchase cost.*

Table 141: Overlapping in banking transactions submitted by Petitioner (MU)

Financial Year	***Period of Overlapping***	***Import Units***	***Export Units***	***Overlapped Units***
2014-15	***January, 2015***	***19 MU***	***22 MU***	***19 MU***
2015-16	***September, 2015***	***46 MU***	***42 MU***	***42 MU***

3.506 ***In view of the above, the Commission has decided to dis-allow total additional cost due to overlapping in banking transaction of Rs. 1.97 Cr. and Rs. 4.89 Cr. from total power purchase cost in FY 2014-15 and FY 2015-16 respectively.****"*

(b) **For BYPL:**

*"**OVERLAPPING IN BANKING TRANSACTIONS***

3.462 During prudence check, the Commission directed the Petitioner to provide statement of banking transactions indicating opening and closing balance of *banking transactions as per that indicated in the audited financial statement.*

3.463 Further, the Commission sought list of months in which there were overlapping in banking transactions in RTC and non RTC basis both. The Petitioner submitted such information vide its e-mail dated 24/03/2017 and 03/05/2017 as follows:

…3.464 During prudence check with regard to overlapping in banking transactions, the Petitioner explained that in order to procure power to meet Short Term demand, Petitioner is engaged in practice to indulge in power banking transactions without considering relevant financial impact in terms of opportunity losses. ***In view of the above it has been observed that 63.52 MU and 38.39 MU (including RTC and non RTC basis) were overlapped in banking transactions due to non-consideration of opportunity losses by Petitioner in the FY 2014-15 and FY 2015-16 respectively while planning for power banking. Therefore, the Commission has decided to disallow the excess amount as submitted by the Petitioner of Rs. 2.32 Cr. and Rs. 1.46 for FY 2014-15 and FY 2015-16 respectively.****"*

102. Thus, the Commission has disallowed an amount of Rs.6.86 crores (in case of BRPL) and Rs.3.78 crores (in case of BYPL) towards transmission charges and trading margin in respect of banking transactions during FY 2014-15 and 2015-16 along with carrying cost.

103. It is argued on behalf of the appellants that while truing up, the Commission has erroneously disallowed the power purchase cost due to overlapping in banking transactions by retrospectively applying the directions in this regard contained in tariff order dated 29.09.2015 to the FYs 2013-14 and 2014-15. It is pointed out that ARR of the appellants for the financial years 2013-14 and 2014-15 was determined by the Commission vide tariff orders dated 31.07.2013 and 23.07.2014 but no such overlapping of banking transactions was imposed or provided at that stage. It is submitted that no such norm was provided by the Commission in the guidelines at the beginning of second control period (FY 2012-13 to 2014-15 subsequently extended to FY 2015-16). It is argued that while truing up, the Commission could not have changed the rules / methodology used in the initial tariff determination.

104. It is further argued that overlapping in banking transactions was beyond control of appellants and in any case, it is the Commission which permitted the banking transactions as preferred means of disposing off surplus power which is evident from the communication dated 21.10.2009 directing that all agreements for banking arrangements must have penal clause so that these can be legally enforced and can act as a deterrent before the court. It is pointed out that in the Procurement Directions 2011 also, the Commission directed that priority should be given to banking transactions while disposing off surplus power. It is submitted that on the one hand the Commission has been promoting the banking transactions and on the other hand it has penalized the appellants by disallowing legitimate costs incurred by them on statutory transmission charges under Section 39 of Electricity Act, 2003, and trading margin paid as per the CERC Trading Margin Regulations, 2010 for such banking transactions.

105. The Commission argued that it has analyzed and done a prudence check on the data submitted by the appellants themselves including the details of disallowed transactions, and therefore, the impugned findings on this issue are absolutely correct and justified. It is contended that if the appellants had any difficult, they would have brought it to the notice of the Commission and the fact that the appellants had no defense before the Commission would show that the appellants are now trying to agitate technicalities to justify billing transactions charges and trading margin for electricity not even supplied to consumers in Delhi. It is argued that the appellants are obligated to follow Paragraphs 7 and 15 of the Practice Directions issued by the Commission which are extracted hereinbelow:-

> *"7. Distribution Licensee shall undertake power procurement/sale during the financial year in accordance with the power procurement plan for year. Where the Distribution Licensee is to procure power in short term as per procurement plan or there has been a shortfall due to any reason whatsoever, or failure in the supply of electricity from any approved source of supply during the year OR there is surplus power available with 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."*
>
> *…*
>
> *…*
>
> *"15. The Distribution Licensees endeavour should be first to dispose off surplus power through banking transaction. Such banking transactions should be tried at first on direct basis.*
>
> *In case Distribution Licensee is required to do banking arrangements through trading company/ or any other*

agency due to inability of any banking arrangements with other Utilities, Distribution Licensee shall follow the guidelines stipulated in Para 7 above with insertion of a suitable penalty clause in case the party fails to deliver the agreed power as per the schedule."

Our Analysis: -

106. "Banking" of power is a mechanism in the power sector that allows generators or distribution companies to store excess energy generated during off-peak hours and retrieve it during peak hours. As noted by the Commission itself in the impugned order, the banking of surplus power was evolved and is being encouraged to optimize power purchase cost by exporting surplus power in winter and to meet the shortage of power by importing in the summer period. In doing so, the distribution licensees are obligated to scrupulously follow Para Nos 7 and 15 of the Practice Directions issued by the Commission, which have been noted hereinabove. As per Para 7 of these directions, the short-term arrangement or agreement for procurement of power / sale of power in case of shortfall due to any reason whatsoever or surplus power available with the distribution licensee, should be through a transparent process of open tendering and competitive bidding in accordance with these gui9delines. Para 15 of these guidelines envisages that the distribution licensee shall follow the guidelines stipulated in Para 7 in case they require to do banking arrangements through a trading company or any other agency due to inability of any banking arrangements with any other utility.

107. In the instant case, the Commission has found that import of energy units by the appellants by way of LOI nos. 2000 and 2026 overlap with the export of energy units by way of LOI no.1962 for the month of January 2015 (FY 2014-15) and import of energy units by way of LOI nos. 1962 and 2085 are overlapping with export units of LOI nos. 2031, 2000, 2026 for the month of September in the year 2015 (FY 2015-16). Upon considering the explanation submitted in this regard by the appellants, the Commission has found that LOI nos. 2000/2026 were floated on 18 December 2014 i.e. just after 33 days of singing of LoI no.1962 on 14 November 2014. We are unable to find any error in the observation of the Commission that at the time of signing of LoI nos. 2000 and 2026 the appellants were aware that the banking transactions will be overlapped in the month of January 2015 and therefore, they could have avoided the same by resorting to a better planning in order to optimise power purchase.

108. It is also evident that all the five LOI nos. 1962, 2000, 2026, 2031 and 2085 were signed within the duration of just 3 months which clearly reflects failure on the part of the appellants in proper planning of the banking transactions. We also concur with the observations of the Commission that issuing of LOI nos.2000 and 2026 by the appellants is a perfect illustration of involvement of appellants in improper banking transactions wherein power was being imported in the winter period when generally no shortfall experienced by the discoms and was being exported in the summer peak period when generally shortfall in power is experienced by the discoms. We are not impressed by the arguments on behalf of the appellants that such overlapping in banking transactions was beyond their control. These banking transactions patently appear to be doubtful and intended to cash in on the cheaper power available in winter season particularly in the month of January on short term basis.

109. Hence, we do not find any infirmity in the findings of the Commission on the issue under consideration. Same is decided against the appellants and in favour of the respondent Commission.

Issue No. 26: Cash limit of Rs. 4000 for payment of electricity bills.

110. This issue relates to imposition of penalty of Rs.1.62 crores and Rs.4914/- on BYPL and BRPL respectively by the Commission for collecting tariff by way of cash in excess of Rs.4,000/- during the FYs 2014-15 and 2015-16. The impugned findings of the Commission on this issue are extracted hereinbelow:-

(a) **For BRPL:**

"3.405 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.

3.406 During the prudence check exercise it has been observed that in the month of June- 2014 there were 12,763 instances where amount collected in cash was higher than Rs. 4,000.00. ***Total amount of collection from such cases was approximately Rs. 10.95 Crore.***

3.407 In view of the above, the Petitioner was directed via e-mail dated 11/07/2017 to provide the data for cash collection of more than Rs. 4000/-. The Petitioner provided the said information in soft copy during prudence check.

3.408 On analysis of the said information, it was observed that during FY 2014-15 there were 32,212 numbers of cash collection transactions of more than Rs. 4000/- amounting to total of Rs. 29.14 Crore. Further the Commission vide e-mail dated 11/07/2017 directed the Petitioner to explain the reason for violation of the said directive. ***The Petitioner has not submitted proper justification for such violation of the Commission's directive. Accordingly, the Commission has decided to impose penalty of 10% of the total amount collected through cash payment over and above Rs. 4000/-. Amount collected over and above Rs 4,000/- was Rs.16.26 Crore. Accordingly, the penalty payment works out to Rs.1.62 Crore which is reduced from the ARR of FY 2014-15.***

3.409 ***Similarly, on analysis on the said information it was observed that during FY 2015-16 there were 32 numbers of cash collection transactions of more than Rs. 4000/- amounting to total of Rs. 1.77 Crore. Further the Commission vide***

***e-mail dated 11/07/2017 directed the Petitioner to explain the reason for violation of the said directive. However, the Petitioner has not specifically replied in this regard. Accordingly, the Commission has decided to impose penalty of 10% of the total amount collected through cash payment over and above Rs. 4000/-. Amount collected over and above Rs. 4,000 was Rs. 49,140 accordingly, the penalty works out to Rs. 4,914/-**" [**Emphasis Supplied**]*

(b) **For BYPL:**

"3.369 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**.'*

*3.370 During the prudence check exercise **it has been observed that in the month of September 2014, there were 721 instances where amount collected in cash was higher than Rs. 4,000.00.***

***Total amount of collection from such cases was approximately Rs. 0.39 Crore**.*

*3.371 **In view of the above, the Petitioner was directed via e-mail dated 03/07/2017 to provide the data for cash collection of more than Rs. 4000/-.** The Petitioner provided the said information in soft copy.*

*3.372 **On analysis of the said information it was observed that during FY 2014-15 there were 2,35,914 numbers of cash collection transactions of more than Rs. 4000/- amounting to total of Rs.177.36 Crore. Further the Commission vide e-mail dated 03/07/2017 directed the Petitioner to explain the reason for violation of the said directive. The Petitioner has not submitted proper justification** for such violation of the Commission's directive. Accordingly, the **Commission has decided to impose penalty of 10% of the total amount collected through cash payment over and above Rs. 4000/-. Amount collected over and above Rs 4,000/- was Rs. 82.99 Cr. Therefore, the penalty payment works out to Rs. 8.30 Crore which is reduced from the ARR of FY 2014-15.***

*3.373 Similarly, **on analysis of the said information for FY 2015-16, 84 numbers of cash collection transactions of more than Rs. 4000/- amounting to total of Rs. 0.04 Crore were observed***

> ***and the penalty works out to Rs. 9,801.00 which is reduced from the ARR of FY 2015-16**.”*

111. Learned senior counsel for the appellants argued that the restrictions imposed by the Commission on cash collection to under Rs.4,000/- is an excessive fatter on the business of the appellants as it does not meet with the existing sectoral realities. It is argued that the Commission fixed the upper limit of accepting the cash payments towards electricity bills at Rs.4,000/- per bill for the first time in the tariff year dated 02.11.2005 for FY 2005-06 even though there was no restriction provided under the Electricity Act, 2003. It is argued that the penalty so imposed by the impugned order i.e. 10% of the total amount collected in cash, has been arrived at arbitrarily without any application of mind, and is devoid of any rationale or justification.

112. It is pointed out that in the tariff order dated 02.11.2005 passed for another distribution licensee of Delhi Tata Power Delhi Distribution Limited for the FY 2005-06, the Commission has stated that the said limit was introduced on the basis of the Finance Bill 2005 which amended the terms of Section 139 of the Income Tax Act, 1961 to include payment of annual electricity bill of Rs.50,000/- and above, as a criteria for filing income tax returns. It is argued that provisions of Income Tax Act, 1961 did not cast any obligation on the appellant not to accept cash payment beyond Rs.4000/-. It is submitted that limiting the cash deposit to Rs.4,000/- per bill disincentivizes certain consumers who have constraint in making payments in modes other than cash. It is argued that such unreasonable restrictions on cash collection are detrimental to the business of appellants and make it impossible for them to improve their collection efficiency and to reduce AT&C losses.

113. On behalf of the Commission, it is argued that during public hearing of stakeholders on this issue, it was noticed by the Commission that the higher cash transactions lead to generation of black money particularly when there is resistance on this aspect by Comptroller and Auditor General. It is argued that therefore the transactions made in cash are required to be avoided which is essential to insulate the appellants from allegation of dealing in black money. It is contended that in such situation, the Commission in its prudent exercise was completely justified in deducting 10% of the total amount collected in cash by the appellant in lieu of electricity bills and the same does not warrant any interference from this Tribunal.

Our Analysis:

114. We may note that we were confronted with the same issue in appeal no.301/2015 TPDDL v. DERC which was decided vide judgment dated 28.01.2025. In the said judgment, we have held / observed as under:-

> *"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."

115. Having considered the rival submissions of the learned counsels on this issue, we find no reason to deviate from the findings given by us on this issue in the said appeal no.301/2015.

116. Thus, we hold that the Commission was not justified in imposing penalty upon the appellants for accepting cash payments in lieu of the electricity bills of more than Rs.4,000/-. Thus, the penalty so levied upon the appellants is hereby struck down.

117. The issue stands decided accordingly.

<u>Issue No. 27B: Consideration of revenue from Sale of scrap as Non-Tariff Income.</u>

118. This issue relates to treatment of the income earned by the appellants from sale of scrap by considering it as Non-Tariff Income (NTI) by the Commission and subsequently reducing it from the ARR of the appellants. The impugned findings of the Commission on this issue in the impugned order are extracted hereinbelow:-

(a) **For BRPL:**

"SALE OF SCRAP

PETITIONER'S SUBMISSION

3.602 The Petitioner has submitted that Commission did not allow the recoveries from sale of scrap to be retained by the Petitioner as under:

> *'3.344 In view of the MYT Regulation 2011 as quoted above, all incomes* incidental to electricity business and derived by the Licensee from sources including but not limited to profit derived from disposal of assets is to be included in the NTI. Further, the receipts from sale of scrap have not been adjusted while determining O&M expenses of the base year. Therefore, the amount on account of sale of scrap is considered in Non tariff Income.'

3.603 ***The Petitioner has further submitted that the Commission has ignored the fact that MYT Regulations, 2011 also provides for all legitimate expenses. The Petitioner understands that the MYT Regulations, 2011 cannot be read in isolation such that all costs incidental to electricity business are not recovered but all incomes incidental to electricity business are considered for the purpose of ARR. It is a settled principle that any investment on assets by the Petitioner is required to be recovered from the consumers. Any investment by the Petitioner cannot be left unrecovered as same***

tantamount to violation of ensured return on equity in electricity business.

3.604 The Petitioner has requested that as per above Regulation, the depreciation is required to be allowed only on the assets funded through equity and debt subject to maximum value of 90% of the total cost of assets and rest 10% of the value is required to be recovered through income from scrap.

3.602 ***The Petitioner has submitted that in case income from sale of scrap is passed to the consumers, then the same will effectively reduce the rate of return on equity. For example: An asset of Rs. 100 is funded through debt-equity in ratio of 70:30 respectively. The Petitioner shall be able to recover only 90% of the total asset value, i.e., Rs. 90 and rest Rs. 10 will be residual value. Now the residual asset is sold at Rs. 5 which becomes income from scrap. This Rs. 5 ought to be utilized in the recovery of unrecovered residual value otherwise same will reduce return on equity of the Petitioner.***

COMMISSION'S ANALYSIS

3.603 As per DERC MYT Regulations 2011, clause 5.35,

'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 License.'

3.604 ***It is observed that Petitioner submission is contrary to the accounting principle specified by the Institute of Chartered Accountants of India in Accounting Standard (AS) 10 for treatment of disposal of fixed asset. As per AS***
10 only gains or losses arising on disposal of fixed assets are generally recognised in the profit and loss statement and not the whole sale proceeds as follows:
'14.3 In historical cost financial statements, gains or losses arising on disposal are generally recognised in the profit and loss statement.'

3.605 ***The Petitioner has submitted the audited financial statement indicating sale of scrap under the head other income and it is also pertinent to state that the audited financial statement has been prepared by the auditors in accordance with the applicable accounting standards prescribed in the Companies (Accounting Standards) Rules 2014***

issued by the Central Government. Therefore, the amount on account of sale of scrap of Rs. 9.61 Cr. and Rs. 7.00 Cr. indicated in audited financial statement for FY 2014-15 and FY 2015-16 respectively has not been reduced from Non tariff Income."

(b) **For BYPL:**

"…

3.558 It is observed that Petitioner submission is contrary to the accounting principle specified by the Institute of Chartered Accountants of India in Accounting Standard (AS) 10 for treatment of disposal of fixed asset. As per AS 10 only gains or losses arising on disposal of fixed assets are generally recognised in the profit and loss statement and not the whole sale proceeds as follows:

…

3.559 ***The Petitioner has submitted the audited financial statement indicating sale of scrap under the head other income and it is also pertinent to state that the audited financial statement has been prepared by the auditors in accordance with the applicable accounting standards prescribed in the Companies (Accounting Standards) Rules 2014 issued by the Central Government. Therefore, the***

amount on account of sale of scrap of Rs. 7.04 Cr. and Rs. 8.39 Cr. indicated in audited financial statement for FY 2014-15 and FY 2015-16 respectively has not been reduced from Non tariff Income.*"*

119. The appellant is aggrieved by the treatment of the revenue from the sale of scraped assets which, according to the appellant, has been erroneously considered by the Commission as NTI and has reduced it from the ARR of the appellants.

120. Learned senior counsel for the appellants argued that the Commission, by misplaced reliance on Accounting Standard(AS) 10 has erroneously assumed that the figure of "Income – Sale of Scrap" in the books of accounts of the appellants represents only the profits on the sale of scrap. It is submitted that the Commission has failed to consider the figure of "Income – Sale of Scrap" actually represents the total revenue realized on the sale of scrap and not only the profit (i.e. revenue minus cost) on sale of scrap. It is argued that by considering only the revenue from the sale of scrap without taking into account the cost of such scrap, the Commission has violated the matching principle in terms of which "revenues" of the period should be matched with "costs (expenses)" of that period as recognized by the Hon'ble

Supreme Court in JK Industries Limited v. Union of India 2007 13 SCC 673, besides also being in violation of Section 211 of Companies Act, 1956.

121. It is argued on behalf of the Commission that the appellants have been allowed to recover the expenses as well as finance costs associated in the purchase of items that are ultimately scrapped by them. It is argued that in case of purchase of fixed assets, the Commission allows ROCE on the purchase value of the asset without including the salvage value of 10% therefrom, and by doing so, the financing of said asset to the extent of salvage value is also provided to the appellants in the ARR. It is submitted that since the principal cost of purchase of asset is allowed in full, any realization from the sale of scrap ought to have been considered to reduce the ARR by considering it as part of NTI.

Our Analysis:-

122. We note that Regulation 5.19 of MYT Regulations 2011 provides for the depreciations allowable on an asset, and it reads as under:-

> *"Depreciation*
>
> *… 5.19* ***The residual value of assets shall be considered as 10% and depreciation shall be allowed to a maximum of 90% of the original cost of***

> ***the asset. Land is not a depreciable asset and its cost shall be excluded while computing 90% of the original cost of the asset:***
> *Provided that if the Licensee is recovering less than residual value on disposing* any retired assets, it shall take prior approval of the Commission before disposing such asset."

123. As an illustration, where an asset of the value of Rs.100 is funded through debt-equity in the ratio of 70:30 respectively, the asset holder will be able to recover only 90% of the total value of the asset i.e. Rs.90/- through depreciation. The remaining value of Rs.10 would be residual value. In case, the residual asset, upon scrap, is sold at Rs.5/-, said amount ought to be utilized in recovery of unrecovered residual value. In case, the said scrap value of Rs.5/- is directed to be passed on to the consumers in the form of NTI, it will effectively reduce the return on equity of the asset holder i.e. appellants in the instant case.

124. Thus, depreciation is allowed up to the maximum value of 90% of the original cost of the asset and the remaining 10% of the residual value of the asset has to be recovered through income from scrap.

125. Regulation 5.35 of these MYT Regulations, 2011 define Non-Tariff Income (NTI) as under: -

> *"Non-Tariff Income*
>
> *5.35 All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to <u>profit derived from disposal of assets</u>, 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:*
>
> *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."*

126. The said regulation uses the term "profit derived from the disposal of assets" as underlined hereinabove. Therefore, clearly it has not brought the total income derived from the disposal / scrapping of an asset within the ambit of Non Tariff Income but only the profit derived from the disposal of such an asset. In our opinion, the impugned findings of the Commissoin on the issue under consideration stems out of erroneous interpretation of Regulation 5.35 in so far as the Commission has considered the entire income got by the appellants from the sale of scrap as NTI.

127. Therefore, where it is possible to ascertain the profit derived by an asset holder (appellants in this case) from the sale of scrap, only the said amount of profit would qualify as Non-Tariff Income and not the entire revenue generated from the sale of scrap. Their may be cases where the scrap or discarded material from different assets is sold collectively and not separately, and therefore, it would become impossible to ascertain the profit derived by the asset holder from the sale of scrap of a particular asset. In such case, in our view, no part of the revenue derived by the asset holder from the sale of such scrap can be termed as Non-Tariff Income to be included in the ARR of the asset holder.

128. Such treatment to be given to the scrapped assets would not only be in tune with the Section 61(b) of the Electricity Act, 2003, which requires the Commission to ensure that the generation / transmission / distribution and supply of electricity is conducted on commercial principles as well as Section 61(d) which enjoins upon the Commission to ensure that the generators or discoms recover the cost of electricity in a reasonable manner but also with the ”matching principle” in terms of which revenue need to match with “costs (expenses)” as well as Section 211 of the Companies Act, 1956, which stipulates that the profit and loss account and balance sheet of a company shall comply with the Accounting Standards.

129. It was also brought to our notice by the learned senior counsel appearing on behalf of the appellants that the Commission could not have determined the amount of profit or loss from the sale of scrap of fixed assets unless the Commission finally implements its order dated 28.05.2018 passed in petition No.46/2012 on the issue of recovery of loss on Retirement of Assets. We may note that the said petition no.46/2012 has been decided by the Commission during the pendency of this appeal.

130. In view of the above discussion, we set aside the findings of the Commission on the issue under consideration and remand the same back to the Commission for fresh consideration in terms of what we have observed hereinabove.

Issue No. 28: Commission earned on collection of electricity duty as Non-Tariff Income.

131. The grievance of the appellants is that the Commission has erroneously treated the collection charges earned by them on collection of Electricity Duty as Non-Tariff Income (NTI).

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

(a) **For BRPL: -**

"COMMISSION'S ANALYSIS

3.611 The Commission is of the view that collection of electricity duty is not a separate function/job and electricity duty is collected with electricity bills as normal collection of electricity dues billed by the Petitioner. Therefore, the Petitioner's Submission that there is extra cost on account of collection of electricity duty is neither indicated in the audited financial statement nor justified. Accordingly, amount on account of Commission on Electricity Duty of Rs. 11.27 Cr. and Rs. 11.00 Cr. indicated in audited financial statement for FY 2014-15 and FY 2015-16 respectively has not been reduced from Non Tariff Income."

(b) **For BYPL: -**

"COMMISSION'S ANALYSIS

*3.562 The **Commission is of the view that collection of electricity duty is not a separate function/job and electricity duty is collected with electricity bills as normal collection of electricity dues billed by the Petitioner**. Therefore, the Petitioner's submission that there is extra cost on account of collection of electricity duty is neither indicated in the audited financial statement nor justified. **Accordingly, amount on account of Commission on Electricity Duty of Rs. 5.73 Cr. and Rs. 5.93 Cr. indicated in audited financial statement for FY 2014-15 and FY 2015-16 respectively has not been reduced from Non Tariff Income.**"*

133. Learned senior counsel for the appellants submitted that collection of Electricity Duty from consumers, on behalf of the Municipal Corporation of Delhi (MCD), also requires utilization of assets viz. employees, infrastructure etc. and the Commission could not simply add the income from such collection to NTI without considering the costs borne by the appellants in preforming the said function. He pointed out that apart from collection of Electricity Duty from consumers, the appellants have to perform in-house operations also, for which they incur additional O&M expenses, which involve:-

"

(i) *Maintening records regarding Electricity Duty (Amount of Electricity Billed, Collected, Outstanding, paid to MCD, etc.) and responding to audit issues.*

(ii) *Cash-handling activities, etc. which involves cost.*

(iii) *Security and conveyance expenses towards transfer of money to MCD."*

134. According to the learned senior counsel, the impugned findings of the Commission on this issue are contrary to the Regulations 2.1(1) and 5.35 of MYT Regulations, 2011 which provide as under: -

> *"2.1 In these Regulations, unless the context otherwise requires-*
>
> *…(l) "**Non-Tariff Income**" means income **relating to the Licensed business other than from tariff** (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;*
>
> *… **Non-Tariff Income***
>
> *5.35 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:*
>
> *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."*

135. He further argued that collection of tax is a statutory obligation upon the appellants under clause 3 of Delhi Municipal Corporation (Assessment and Collection of Tax on the Consumption, Sale or Supply of Electricity) byelaws, 1962 (in short DMC Bye-Laws) on behalf of the MCD and is not incidental to distribution or retail supply of electricity by the appellants and therefore, in view of Regulation 5.35, income derived by them from collection of Electricity Duty can not be treated as NTI.

136. Lastly, the learned senior counsel would submit that appellants are entitled to retain 20% of the revenue arising on account of other business (collection of Electricity Duty herein) in view of the Delhi Electricity Regulatory

Commission (Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee) Regulations, 2005 (in short “2005 Regulations”) which were notified under section 51 of the Electricity Act, 2003 and pass on only 80% of such revenue to the regulated business.

137. On behalf of the Commission, it is argued by the Commission’s counsel that collection of Electricity Duty is not a separate function and is collected alongwith the electricity bills. Therefore, all costs of any nature whatsoever, which the appellants may incur in collection of Electricity Duty would fall under the Operation and Maintenance Expenses in view of Regulation 5.3 of MYT Regulations, 2011 which provides as under: -

> ***“Operation and Maintenance Expenses***
>
> *5.3 <u>Operation and Maintenance (O&M) expenses shall include</u>:*
>
> *(a) <u>Salaries, wages, pension contribution and other employee costs</u>;*
> *(b) <u>Administrative and General expenses w</u>hich shall also include expense related to raising of loans;*
> *(c) Repairs and Maintenance; and*
> *(d) <u>Other miscellaneous expenses</u>, <u>statutory levies and taxes</u> (except corporate income tax).*

6.4 ***The Licensee shall submit the O&M expenses for the Control Period as prescribed in Multi Tear 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 actuals for the Base Year, prudence check and any other factor considered appropriate by the Commission."*

Our Analysis: -

138. We may note that Section 113 of the DMC Act provides for levy of Electricity Tax, to be assessed and collected in accordance with the provisions of the DMC Act and the Bye-Laws made thereunder. Clause 3 of DMC Bye-Laws proves for "Collection of Electricity Tax" on consumption, sale or supply of electricity by a licensee (appellants herein) within its area of supply on behalf of DMC. The time and manner of collection of the Electricity Tax is provided under clause 7 of these DMC Bye-Laws. The rate of said Electricity Tax is specified as 5% of the charges of supply of electricity, and the appellants are entitled under clause 17 of these Bye-to retain 3% of such tax amount collected from the consumers as collection charges.

139. The issue before us is whether these collection charges earned by the appellants from collection of Electricity Duty / Tax from their consumers on behalf of MCD would constitute NTI for them to be included in their ARR?

140. Concededly, the obligation to collect Electricity Duty from the consumers is not cast upon the appellants either under any provisions of the Electricity Act, 2003 or the terms/conditions of the license granted to them by the Commission. The appellants inherited such obligation from the erstwhile Delhi Vidyut Board (DVB) which also was not carrying out said function as part of its function of distribution of electricity but under clause 3 of the DMC Bye-Laws.

141. It is also not disputed that main business of the appellants is to wheel electricity and its retail supply within their licensed areas to the consumers. Collection of Electricity Tax is clearly not incidental to the distribution or retail supply of electricity by the appellants but a statutory obligation cast upon them under clause 3 of DMC Bye-Laws. Such collection of Electricity Tax/ Duty is not a part of licensed activity of the appellants and obligation to do so does not stem out of either the Electricity Act or the License granted to them by the Commission. Therefore, the revenue derived by the appellants from collection of Electricity Duty cannot be categorized as NTI. It has no connection with the licensed business of the appellants or their ARR.

142. Collection of Electricity Duty by appellants even cannot be treated as "other business" envisaged under Section 51 of the Electricity Act, 2003 which is quoted 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."*

143. A bare perusal of this provision would reveal that a portion of revenue derived by a distribution licensee from any other business undertaken by it voluntarily but with prior permission of the State Commission for optimum usage of its assets, shall have to be passed on to the regulated business to reduce charges of wheeling. That is not the case herein. The appellants herein are neither engaging in the collection of Electricity Duty from consumers voluntarily (it being a statutory obligation upon them as stated hereinabove) nor have they sought permission for it from the Commission. Hence, provisions of Section 51 do not apply at all.

144. Thus, we set aside the impugned findings of the Commission on this issue and hold that income derived by appellants from collection of Electricity Duty/Tax does not constitute NTI and accordingly, the Commission is directed to allow consequent impact to the appellants along with carrying cost.

Issue No. 30 & 52 : Erroneous computation of Net-worth & Capping of Equity at 30% and re-opening the Statutory Transfer Scheme.

145. We take these two issues together for disposal as they involve common question of law. The findings of the Commission on these issues in the impugned tariff order are reproduced hereinbelow: -

<u>Issue No. 30:</u>

For BRPL:

"ERRONEOUS NET-WORTH COMPUTATIONS

PETITIONER'S SUBMISSION

*3.355 As discussed in Para-3.13.21, **the net-worth will be revised based on implementation of Hon'ble ATE Judgments**. As a result, RoCE also ought to be revised based on the same.*

3.356 The impact on account of the same is already included in Table-3.17b of the Petition.

3.357 Without pre-judice, the Petitioner has requested the Commission to allow the same in the ARR.

COMMISSION'S ANALYSIS

*3.358 **The Petitioner has not submitted the specific justification and reasons where net worth computation is erroneous and the Petitioner has already preferred an appeal on this issue in its***

appeal against tariff order for FY 2014-15 and FY 2015-16. Therefore, the appropriate decision can be taken after the judgement of Hon'ble APTEL on this issue."

Issue No. 52:

(a) ***For BRPL***

"3.651 The Petitioner has submitted RoCE and WACC considering the Rate of interest@ 14.25% and 14.00% for FY 2014-15 and FY 2015-16 respectively. Accordingly, WACC has been computed by the Petitioner detailed in the table as follows:

Table 181: Weighted Average Cost of Capital (WACC) submitted for FY 2014-15 and FY 2015-16

Sr. No.	Particulars	UoM	FY 2014-15	FY 2015-16
A	Average Debt	(Rs. Crore)	1,910	1,983
B	Average Equity	(Rs. Crore)	1,568	1,644
C	Total	(Rs. Crore)	3,513	3,549
D	Cost of Debt	%	14.25%	14.00%
E	Return on Equity	%	16.00%	16.00%
F	WACC	%	15.04%	14.91%
G	RRBi	(Rs. Crore)	3,513	3,549
H	RoCE	(Rs. Crore)	528	529

Commission's Analysis

3.652 *It is observed from the* ***Audited Financial Statements*** *that networth available for FY 2014-15* *and FY 2015-16 is Rs. 1,357.42 Cr. and Rs. 1,424.88 Cr. against the requirement of Equity for net Capitalization (Average GFA – Average Accumulated Depreciation) funding of Rs. 2,601.04 Cr. and Rs. 2,781.74 Cr. Further, as per the directions of Hon'ble APTEL in its judgment in Appeal No. 153 of 2009, revenue gap should be funded in the ratio of debt: equity of 70:30*

3.653 *It is observed that the State Bank of India base rate did not vary more than +/- 1%, as the same was 10% on 01.04.2012, 01.04.2014 and 01.04.2015. Therefore, the Commission has not trued up the rate of Interest on Loan for FY 2014-15 and FY 2015-*

16. Accordingly, WACC & ROCE has been computed for FY 2014-15 and FY 2015- 16as follows:

Table 182: Approved WACC and RoCE for FY 2014-15 and FY 2015-16

Sr. No.	***Particulars***	***Petitioner's Submission***		***Trued up***		***Reference***
		FY 2014-15	***FY 2015-16***	***FY 2014-15***	***FY 2015-16***	
A	*RRB (i)*	*3,513*	*3,549*	*2,880.97*	*3,139.76*	*Table 159*
B	*Equity (limiting to 30% net capitalization)*			*650.78*	*688.99*	
C	***Average Equity balance as per net worth***			*1,326.21*	*1,391.15*	
D	*Equity now considered for WACC*	*1,568*	*1,644*	*650.78*	*688.99*	*Minimum (B,C)*

E	*Debt*	*1,910*	*1,983*	*2,230.19*	*2,450.77*	*A-D*
F	*Rate of return on equity (re)*	*16.00%*	*16.00%*	*16.00%*	*16.00%*	
G	***Rate of interest on debt (rd)***	*14.25%*	*14.00%*	***10.44%***	***10.47%***	***As per 2nd MYT Order***
H	*WACC*	*15.04%*	*14.91%*	*11.70%*	*11.68%*	
I	*RoCE*	*528*	*529*	*336.96*	*366.83*	

(b) For BYPL

"3.592 The Petitioner has submitted RoCE and WACC considering the Rate of interest @ 14.39% and 14.14% for FY 2014-15 and FY 2015-16 respectively. Accordingly, WACC has been computed by the Petitioner detailed in the table as follows:

Table 170: Weighted Average Cost of Capital (WACC) submitted for FY 2014-15 and FY 2015-16

Particulars	***FY 2014-15***	***FY 2015-16***
Average Debt (Rs. Crore)	*1079*	*1176*
Average Equity (Rs. Crore)	*881*	*951*
Total (Rs. Crore)	*1960*	*2126*
Cost of Debt %	*14.39%*	*14.14%*
Return on Equity %	*16.00%*	*16.00%*
WACC	*15.11%*	*14.97%*
RRBi	*1895*	*2126*
RoCE	*287*	*318*

Commission's Analysis

3.593 *It is observed from the Audited Financial Statements that equity available for FY 2014-15 and FY 2015-16 is Rs. 811.72 Cr. and Rs. 829.21 Cr. against the requirement of Equity for net Capitalization (Average GFA – Average Accumulated Depreciation) funding of Rs. 408.58 Cr. and Rs. 449.75 Cr. Further, as per the directions of Hon'ble APTEL in its judgment in Appeal No. 153 of 2009, revenue gap should be funded in the ratio of debt:equity of 70:30. Therefore the balance equity available has been considered for funding of revenue gap for FY 2014-15 and FY 2015-16 respectively.*

3.594 *It is observed that the State Bank of India base rate did not vary more than +/-1%, as the same was 10% on 01.04.2012, 01.04.2014 and 01.04.2015. Therefore, the Commission has not trued up the rate of Interest on Loan for FY 2014-15 and FY 2015-16. Accordingly, WACC & ROCE has been computed for FY 2014-15 and FY 2015- 16 as follows:*

Table 171: Approved WACC and RoCE for FY 2014-15 and FY 2015-16

Sr. No.	Particulars	FY 2014-15	FY 2015-16	Reference
A	RRB (i)	1,767.61	2,003.62	Table 3.98
B	Equity considered for WACC	408.58	449.75	30% of net capitalisation
C	Debt - balancing figure	1,359.03	1,553.86	A-B
D	Rate of return on equity (re)	16.00%	16.00%	Business Plan regulations
E	Rate of interest on debt (rd)	10.17%	10.25%	
F	WACC	11.52%	11.54%	
G	RoCE	203.59	231.23	A*F

146. The grievance of the appellants is that the Commission, during the exercise of true up, has calculated Debt : Equity ratio (D/E) and Weighted Average Cost of Capital (WACC) based on the net worth of the appellants as per audited financial statements while ignoring the regulatory framework in terms of the MYT Regulations 2007 and 2011. On issue No.52, it is also stated on behalf of the appellants that the Commission has erroneously relied on their financial statements to cap the equity of appellants at 30%.

147. It is argued on behalf of the appellants that the Commission has re-opened the previous tariff orders thereby re-opening the transfer scheme and D/E ratio in the true up order which is not permissible in terms of the law laid down by the Supreme Court in BRPL v. DERC (2023) 4 SCC 788. Referring to various previous tariff orders where Commission treated and considered the D/E ratio as 70:30, it is submitted that the Commission has now considered the lower equity percentage based on the net worth derived from audited books.

148. Learned counsel for the Commission submitted that the arguments and contentions raised on behalf of the appellants on these two issues are based on completely wrong premise and sans any merit.

149. Relief sought by the appellants is:-

> ***"…………..*** *set aside the Impugned findings and direct Ld. DERC to allow the funding of the assets covered under the Transfer Scheme in the debt equity ratio provided in the Transfer Scheme as also considered by it on the basis of the ratio allowed at the time of capitalisation."*

<u>Our Analysis: -</u>

150. These issues have already been settled in the previous judgments of the Hon'ble Supreme Court and this Tribunal.

151. The Commission, in the impugned order, has:

(i) re-computed the net-worth (assets – liabilities) by picking and choosing some of the numbers from the audited accounts and not on the basis of the regulatory accounts, which are utilized for the determination of tariff; and

(ii) re-opened the net-worth computation, not only for the years which were the subject matter of truing up, but also for the Policy Direction period, the First MYT Period, as well as the entire Second MYT Period.

152. As far as the aspect of re-computation of the net worth of the appellant is concerned, the same is squarely covered by the decision of the Tribunal in Appeal No. 301 of 2015, wherein at Para. 170, the Tribunal held as under:

> *"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 capitalized 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 redetermine 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."

153. With regards to the reopening of the net worth computation of the appellant for the previous years, we find the following observations of the Supreme Court in its judgment dated 18.10.2022, reported as <u>BRPL v. DERC (2023) 4 SCC 788</u> apposite:

"*55. Revision or redetermination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff* *order, which can be done only as per the provisions of sub Section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable. In our view, DERC cannot amend the tariff order for the period 01.04.2008 to 31.03.2010 in the guise of 'trueup' after the relevant financial year is over and the same is replaced by a subsequent tariff Order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise."*

154. Hence, the findings of the Commission on these two issues are erroneous and cannot be sustained. The same are hereby set aside. We direct the Commission to scrupulously apply the above noted dispensation in case of appellant also.

155. As such, the two issues are decided in favour of the appellant.

<u>Issue No. 31A : De-capitalisation of assets.</u>

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

(a) **For BRPL:**

"3.274 The Commission has already indicated in its true up for FY 2014-15 and FY 2015-16 that sale of scrap has no direct relationship with de-capitalisation of assets as per the accounting principles on which audited financial statements are prepared. Therefore, the Commission has not considered the Petitioner's request for reconsideration of its claim on account of amount due to de-capitalisation of assets based on income from sale of scrap has been considered Non-tariff income."

(b) **For BYPL:**

"3.248 The Commission has already indicated in its true up for FY 2014-15 and FY 2015- 16 that sale of scrap has no direct relationship with de-capitalisation of assets as per the accounting principles on which audited financial statements are prepared. Therefore, the Commission has· not considered the Petitioner's request for reconsideration of its claim on account of amount due to de-capitalisation of assets based on income from sale of scrap has been considered Non-tariff income."

157. The grievance of the appellants is that the Commission has erroneously held that there is no relationship between decapitalization of assets and the sale of scrap without considering the fact that sale of scrap is undertaken by a utility only after the asset is decapitalized (retired). It is submitted that the Commission, vide the impugned findings, has reduced the value of decapitalized assets from the Gross Fixed Asset (GFA) but at the same time has omitted to allow the appellants to recover the residual value of the assets as a cost in the ARR.

158. It is further pointed out on behalf of the appellants that the Commission, in the affidavit dated 19.01.2024 filed in appeal Nos.265 and 266 of 2013 before this Tribunal, has stated that the present issue is likely to be resolved in three months after data reconciliation exercise is completed by the Commission but the issue has still not been resolved.

159. We note that in the written submissions filed on behalf of the Commission in the instant appeal on this issue, it has been stated that the prayer of the appellants in the context of this issue meets with the approval of the Commission and necessary impact of the same shall be provided to the appellants in the true up exercise as per applicable law. It is further stated that in fact, the relief sought by the appellants has already been factored by the Commission in order dated 19.07.2024.

160. In view of the same, no further directions are called for from this Tribunal on the said issue. In case, the appellants feel that their grievance has not been addressed or taken care of in the order dated 19.07.2024 passed by the Commission, they shall be at liberty to raise the issue afresh as per law.

Issue No. 31B: Physical verification of assets pending since FY 2004-05.

161. The issue relates to the alleged denial on the part of the Commission of actual capitalization to the appellants since FY 2004-05 on account of pendency of physical verification of assets. We note hereinbelow the impugned findings of the Commission on this issue: -

(a) **For BRPL**: -

"3.641 ***In view of the pending physical verification of the fixed assets of the Petitioner, Capitalization for the purpose of true up has been considered provisionally based on audited financial statements for FY 2014-15 and FY 2015-16 as follows:***

Table 172: GFA approved as per audited financial statements for FY 2014-15 & FY 2015-16 (Rs. Crore)

Sr.	***Particulars***	***Petitioner's***	***Trued up***	

No.		Submission				Reference
		FY 2014-15	FY 2015-16	FY 2014-15	FY 2015-16	
A	Opening GFA	4,999.00	5,307.00	4,171.04	4479.34	
B	Additions during the year	337.62	383.26	337.62	383.26	
C	Decapitalisation	29.32	37.08	29.32	37.08	
D	Closing GFA	5,307.00	5,654.00	4,479.34	4825.52	(A+B-C)

…"

(b) **For BYPL: -**

"3.582 ***In view of the pending physical verification of the fixed assets of the Petitioner, Capitalization for the purpose of true up has been considered provisionally based on audited financial statements for FY 2014-15 and FY 2015-16 as follows:***

Table 161: GFA approved as per audited financial statements for FY 2014-15 and FY 2015-16 (Rs. Crore)

Sr. No.	Particulars	PETITIONER'S SUBMISSION		Trued up	
		FY 2014-15	FY 2015-16	FY 2014-15	FY 2015-16
A	Opening GFA	2451	2676	2,124.51	2,349.50
B	Additions during the year	245	262	244.99	261.92
		PETITIONER'S		Trued up	

Sr. No.	Particulars	SUBMISSION			
		FY 2014-15	FY 2015-16	FY 2014-15	FY 2015-16
C	Retirements	20	46	20.00	45.94
D	Closing GFA	2676	2892	2,349.50	2,565.48

…"

162. It has been fairly pointed out by learned senior counsel for the appellants that during the pendency of this appeal, the Commission passed an order dated 03.05.2024 in the matter of review of capitalization and physical verification of assets of appellants for FY 2004-05 to FY 2015-16 whereby it has allowed total capitalization of Rs.3872.94 crores to BRPL and Rs.2434.13 crores to BYPL and has further held that impact of differential amount considered for additional capitalization based on physical verification will be provided in the ensuing true up order.

163. It is further pointed out that on 19.07.2024, the Commission has passed true up orders for FY 2020-21 wherein it has held as under:-

> *3.3 On 19.07.2024, Ld. DERC passed the True-up Order(s) for FY 2020-21, wherein Ld. DERC has inter alia held that: -*

"3.30 The Commission further finalised the Capitalisation based on physical verification of assets of the Petitioner for the Financial Year 2004-2005 to 2015-16 on 03/05/2024, wherein the Commission verified the assets capitalised by the Petitioner upto FY 2015-16.

3.31 For the period FY 2016-17, FY 2018-19 and FY 2019-20, the Commission has considered the Capitalisation as per the Audited Accounts on a provisional basis. The physical verification of the assets for the period FY 2016-17, FY 2018-19 & FY 2019- 20 shall be continued and completed expeditiously by the Commission.

3.32 Thus, considering the impact of the orders of Hon'ble Supreme Court, the Commission has revised the Capitalisation on account of Related Party Transaction, Electrical Inspector Clearance and Physical verification for earlier periods as follows and the financial impact on account of such revision in Capitalisation has been appropriately dealt with in the current True Up Order. …"

164. On behalf of the Commission also, it is contended that the grievances of the appellants have been redressed by way of these orders dated

03.05.2024 and 19.07.2024 and therefore, nothing remains pending for the consideration of this Tribunal on this issue.

165. In view thereof, the issue is hereby disposed off with liberty to the appellants to seek redress against the orders dated 03.05.2024 and 19.07.2024 as per law, if they so wish.

Issue No. 33: Consideration of Normative rebate in true up.

166. This issue relates to the true up of FY 2014-15 and FY 2015-16 for the appellants wherein the Commission, while truing up the power purchase cost for the said period, has considered maximum normative rebate at 2% and deducted the full amount from the power purchase cost irrespective of the fact that the appellants were not granted rebate @ 2% by the generators. We note hereunder the findings of the Commission on this issue in the impugned order:-

(a) For BRPL"

*"**COMMISSION'S ANALYSIS***

*3.510 The **Regulation 5.24 of DERC (Terms and conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011, specifies that:***

> *“**Distribution licensee shall be allowed to recover the net cost of power it procures from sources approved by the Commission**, viz. Intra-State and Inter- State Trading Licences, Bilateral Purchases, Bulk Suppliers, State generators, Independent Power Producers, Central generating stations, non-conventional energy generators, generation business of the Distribution Licensee and others, **assuming maximum normative rebate available from each source for payment of bills through letter credit on presentation of bills for supply to consumers of Retail Supply Business**”.*

*3.511 **Further, it is pertinent to state that TPDDL has already made an Appeal before Hon’ble High Court of Delhi against the Delhi Electricity Regulatory Commission (Terms and Conditions of Wheeling Tariff & Retail Supply Tariff) Regulations, 2011. It is submitted that Hon’ble High Court of Delhi in its judgement dtd. 29/07/2016 in W.P.(C) 2203/2012 & C.M. No.4756/2012 has rejected the submissions of TPDDL regarding maximum normative rebate and has ruled as follows**:*

> *“39. The Commission is an expert body which is constituted to perform the functions as specified under the Act including determination of the tariff*

and specifying the terms and conditions for such determination. Such functions which by nature require expert knowledge would ordinarily be outside the scope of judicial review and no interference would be warranted unless it is established that the actions of the Commission are contrary to the provisions of the Act and/or ultra vires the Constitution.

... 40. ***In view of the above, we are unable to accept that the impugned Regulations are violative of any provision of the Act or are ultra vires the Constitution of India.****"*

3.512 ***In view of the above, the Commission has considered the maximum normative rebate on rebatable amount,*** *without considering the rebate on Anta, Auraiya and Dadri Gas Power Plants whose differential cost has already been disallowed, as follows:*

Table 142: Rebate on Power purchase and Transmission Cost for FY 2014-15 (Rs. Crore) …"

(b) For BYPL*: -*

*"**COMMISSION'S ANALYSIS***

3.468 ***The Regulation 5.24 of DERC (Terms and conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011, specifies that****:*

> *"**Distribution licensee shall be allowed to recover the net cost of power it procures from sources approved by the Commission**, viz. Intra-State and Inter- State Trading Licences, Bilateral Purchases, Bulk Suppliers, State generators, Independent Power Producers, Central generating stations, non-conventional energy generators, generation business of the Distribution Licensee and others, **assuming maximum normative rebate available from each source for payment of bills through letter credit on presentation of bills for supply to consumers of Retail Supply Business**".*

3.469 *Further,* ***it is pertinent to state that TPDDL has already made an Appeal before Hon'ble High Court of Delhi against the Delhi Electricity Regulatory Commission (Terms and Conditions of Wheeling Tariff & Retail Supply Tariff) Regulations, 2011. It is submitted that Hon'ble High Court of Delhi in its judgement dtd. 29/07/2016 in W.P.(C) 2203/2012 & C.M. No.4756/2012 has rejected the submissions of TPDDL regarding maximum normative rebate*** *and has ruled as follows: …*

…3.470 ***In view of the above, the Commission has considered the maximum normative rebate on rebate-able amount,*** *without considering rebate on the disallowed cost of Anta, Auraiya and Dadri Gas Power Plants, as follows:*

Table 137: Rebate on Power purchase and Transmission Cost for FY 2014-15 (Rs. Crore) …"

167. The grievance of the appellants is that the Commission has erroneously considered the normative rebate at the stage of true up and such approach of taking into account normative figures at true up stage is impermissible.

168. The learned senior counsel for the appellant argued that the Commission has on the one hand failed to determine a cost reflective tariff for the appellants to enable them to make timely payments to the generating / transmission companies and on the other hand has deducted the maximum permissible rebate, being a normative rebate determined during the tariff determination exercise, while truing up power purchase cost for the FYs 2014-15 and 2015-16. It is submitted that Regulation 5.24 of MYT Regulations, 2011, upon which reliance is placed by the Commission, can be applied only in a business-as-usual condition i.e. if the tariff was so determined as to recover all legitimate power purchase costs enabling the appellants to make payments to generators on time in order to avail rebates. However, if tariff is admittedly insufficient to meet the power purchase costs, considering normative rebate, which is the maximum possible rebate, at the time of true up when the actual rebate is considerably lesser than the normative has the effect of further depressing the cash at the hands of the appellants.

169. Prayer is made for a direction to the Commission to consider the actual rebate earned by the appellants instead of normative / maximum rebate of 2% and to allow the necessary impact to the appellants along with carrying cost.

170. On behalf of the Commission, it is argued that the Commission has acted in regulatory framework as specified in the MYT Regulations, 2011, particularly Regulation 5.24 and therefore, the issue raised by the appellants is devoid of any merits. It is submitted that one of the distribution companies operating in Delhi, TPDDL had challenged the MYT Regulations,2011 before the Delhi High Court by way of WP(C) No.2203 of 2012, which was dismissed while holding that the Regulations are neither violative of any provisions of Electricity Act, 2003, nor *ultra virus* the Constitution of India.

Our Analysis: -

171. Regulation 5.24 of MYT Regulations, 2011 has been noted by the Commission in the impugned findings on this issue, which have been extracted hereinabove. The expression used in this Regulation is "assuming maximum normative rebate available from each source for payment of bills through letter credit on presentation of bills for supply to consumers of Retail Supply Business".

172. We may note that the rebate of 2% is allowed to the distribution companies if the bill is paid through letter of credit on presentation and rebate of 1% is allowed if the distribution company pays the bills of the generating company by a mode other than the letter of credit within one month of the presentation of bill. We may also note that granting rebate on the power bills is a mutual commercial arrangement between the generating companies and the distribution companies. The basic purpose of granting rebate to the distribution companies is to incentivize them and to ensure that they pay the bills for the power purchase promptly before the due date. Therefore, evidently the distribution companies would get rebate on power bills only if, through their efficient management, pay the power bills to the generating companies immediately either through letter of credit or by any other mode.

173. We are of the opinion that the rebate earned by a distribution company on early payment of power bills cannot be deducted from the power purchase cost for the reason that when any additional cost arising due to inefficient management of working capital requirement is to the account of the distribution company and not to be passed on in the ARR, any gain achieved by the distribution company due to its efficiency above the normative levels must go to the benefit of the distribution company. As noted hereinabove that the purpose of granting rebate to the discoms is to incentivize them for payment of power purchase bills before due date. Said purpose or object of granting rebate would vanish in case the discoms are asked to pass on the entire rebate amount in the ARR. They must get some benefit of rebate granted to them by the generating companies on timely payment of power purchase bills. However, at the same time, we cannot ignore the fact that by making payment of power bills on time, a distribution company cannot be said to be efficient for the reason that it is the duty of the distribution company to pay the power bills in time. Therefore, the rebate of 1% earned by a distribution company on payment of power purchase bills within 30 days of the due date or the actual rebate, if it is less than 1%, ought to be considered and reduced from the power purchase cost of a distribution company. The assumption of maximum normative rebate available to the distribution company from a generating company, as specified in Regulation 5.24, is applicable only at the stage of ARR and cannot be considered at true up stage where only the actual figures are to be taken into account.

174. In judgment dated 30.07.2010 in appeal No.153/2009, 2010 SCC OnLine APTEL 74, this Tribunal held that even if a distribution company earns a rebate of 2% of power purchase bills, rebate of only 1% is to be treated as Non-Tariff Income and the rebate earned over and above 1% should not be treated as Non-Tariff Income. The relevant portion of the judgment is quoted hereinbelow: -

> *"28. It is not disputed that the rebate is a commercial arrangement between the generation companies and the distribution companies. The purpose of granting rebate to the distribution companies is in order to incentivize the distribution companies to make their payment of the bills for the power purchase to the generation company promptly before due date of the bill. The rebate of 2% is allowed to the distribution companies if the bill is paid through letter of credit on presentation. The rebate of 1% is allowed if the distribution company pays to the generating company by a mode other than the letter of credit within one month of presentation of bill. This rebate of 1% correlates to the working capital as provided for in*

Regulation 5.37 of the MYT Regulations.

29. It has been claimed by the Appellant that through its efficient management, the Appellant has paid all the bills immediately on raising of the bills by the generating company and therefore, it has been allowed a rebate of 2%. The distribution company is entitled to have 1% rebate if the payment is made within 30 days of presentation of bill and such rebate up to 1% can be treated as a non-tariff income. Admittedly, the State Commission has considered the rebate of 2% which has been earned by the Appellant as a part of the non-tariff income and deducted from Power Purchase Cost. The 2% rebate earned by the Appellant is only due to the efficiency of the Appellant which is not provided in the working capital as per the MYT Regulations. Therefore, there is no justifiable reason for the State Commission to hold that the rate earned above 1% is a part of the non-tariff income. The rebate of 2% being not a part of the non-tariff income cannot be deducted from the power purchase cost. The rebate allowed is a cash discount available on early payment of power purchase bills. The rate of rebate is linked to the number of days for which the payment is made in advance. Therefore, the rebate earned by the Appellant over and above 1% should not be treated as non-tariff income and as such there cannot be any reduction from the power purchase cost."

175. The said judgment was quoted with approval by the Tribunal in the subsequent judgment dated 02.03.2015 in appeal No.177-178 of 2012, <u>2010 SCC OnLine APTEL 122</u>.

176. In another judgment in the case of <u>North Delhi Power Limited v. Delhi Electricity Regulatory Commission, 2010 SCC OnLine APTEL 74</u> also, this Tribunal has taken note of the difficulties faced by the distribution companies in payment of power bills immediately and has held that the rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost and the rebate earned only up to 1% alone can be treated as Non-Tariff Income. The relevant portion of the judgment is quoted hereinbelow: -

> *"29. It has been claimed by the Appellant that through its efficient management, the Appellant has paid all the bills immediately on raising of the bills by the generating company and therefore, it has been allowed a rebate of 2%.* ***The distribution company is entitled to have 1% rebate if the payment is made within 30 days of presentation of bill and such rebate up to 1% can be treated as a non-tariff income.*** *Admittedly, the State Commission has considered the rebate of 2% which has been earned by the Appellant as a part of the*

non-tariff income and deducted from Power Purchase Cost. The 2% rebate earned by the Appellant is only due to the efficiency of the Appellant which is not provided in the working capital as per the MYT Regulations. Therefore, there is no justifiable reason for the State Commission to hold that the rate earned above 1% is a part of the non-tariff income. The rebate of 2% being not a part of the non-tariff income cannot be deducted from the power purchase cost. The rebate allowed is a cash discount available on early payment of power purchase bills. The rate of rebate is linked to the number of days for which the payment is made in advance. Therefore, the rebate earned by the Appellant over and above 1% should not be treated as non-tariff income and as such there cannot be any reduction from the power purchase cost.

… 31. ***Similarly, Regulation 5.37 provides for a cost of working capital on normative basis.*** *The underlying principle is that any additional cost arising due to the inefficient management of working capital requirement is to the account of the distribution company and is not to be passed on in the ARR. Similarly any gain achieved by the distribution company due to its efficiency above the normative levels must go to the benefit of the distribution company. However, contrary to these regulations, the State Commission*

has ruled that such efficiency gained by the distribution company be passed on in the ARR in the form of reduction in power purchase cost.

… 34. According to the State Commission, the rebate is a part of non-tariff income as per the MYT Regulations which is an essential part of the power purchase cost and the effect of MYT order as well as the impugned order is the same, in so far as treatment of rebate on power purchase cost is concerned and the distribution company would earn a rebate of 1% even if it pays the power purchase bills within 30 days of the due date and that by making the payment on time it cannot be construed that the distribution company are being efficient and on the contrary it has the duty to pay the bills in time. The State Commission relied upon the judgment of the Hon'ble Supreme Court reported in 1986 (1) SCC 264 - LIC of India v. Escorts Limited. We have gone through the said judgment. The perusal of the said judgment would make it evident that this is not applicable to the present facts of the case. In the present case the State Commission itself provided a format for ARR petition to be submitted by the distribution companies. The format referred to in the ARR petition do not cover rebate income and do not provide for the subtraction of the rebate earned from the power purchase cost. By referring to the said formats,

Form-1 and Form-11 and Form-1a, the Appellant is only providing additional documents to substantiate their claim that under MYT Regulations the rebate from the power purchase cost is not to be deducted from Power Purchase Cost and not to be included as a non-tariff income for determination of tariff. ***The Working Capital includes Power Purchase Cost for only one month. The generation company offers rebate of 2% on payment of presentation which takes place immediately after completion of the month. On the other hand the billing cycle of domestic consumers is bi-monthly and for Industrial and Commercial consumers taking supply at 11 KV and above it is monthly. The consumer also gets 15 days time for payment of bill after issue of bill. Thus there is mismatch between the receipt of payment from consumers and the payment to be made by distribution licensee for power purchase for getting 2% rebate.*** *Applying the principle that all gains and losses on account of overachievement or underachievement in performance with respect to norms, have to be retained/borne by the distribution licensee, we hold that rebate over and above 1% can not be considered non-tariff income for reducing the ARR. In view of the same, it has to be concluded that the rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost*

> *and rebate earned only up to 1% alone can be treated as part of non-tariff income. Therefore, the finding on this issue by the State Commission is contrary to the law and spirit of the MYT Regulations as it defeats the very purpose of allowing cost on normative basis. It is also contrary to the principle of allowing cost on normative basis of working capital.* ***On the one hand, the State Commission has reduced one month power purchase payment from the working capital requirement and on the other hand it has been observed that if the Appellant is making the payment earlier, the benefit of entire rebate is used for reducing the power purchase cost****."*

177. In view of the above discussion and considering the above noted previous judgments of this Tribunal, we are unable to sustain the impugned findings of the Commission on this issue. The same are hereby set aside. We reiterate that the rebate earned by the appellants only up to 1% of the power purchase bills can be deducted from the power purchase cost. The issue stands disposed off accordingly.

Issue No. 34: Disallowance of R&M Expenses from FY 2007-08 to FY 2013-14.

178. This issue relates to the reduction of Repair and Maintenance (R&M) expenses allowed by the Commission in the MYT Order dated 23.02.2008 which, according to the appellants, is erroneous for the reason that the actual Gross Fixed Assets (GFA) are less than what were initially projected. It is contended that despite observing that the R&M expenses are controllable, the Commission has in the tariff orders including the impugned tariff order revised the R&M expenses as per the provisional GFA.

179. The findings of the Commission on the issue under consideration as contained in the impugned order are reproduced hereinbelow:-

(a) For BRPL*:* -

*"**COMMISSION'S ANALYSIS***

3.294 The Hon'ble APTEL has already upheld the methodology adopted by the Commission in this matter in Appeal No. 271 of 2013 as follows:

"23.3

*…**In this view of the matter, we find no merit in the contentions of the appellant and this issue relating to revised R&M based on revised GFA is decided against the appellant."***

*3.295 **In view of the above, it is observed that this***

matter does not merit consideration.

(b) For BYPL :-

*"**COMMISSION'S ANALYSIS***

3.266 The Hon'ble APTEL has already upheld the methodology adopted by the Commission in this matter in Appeal No. 271 of 2013 as follows:

"23.3

*… **In this view of the matter, we find no merit in the contentions of the appellant and this issue relating to revised R&M based on revised GFA is decided against the appellant."***

In view of the above, it is observed that this matter does not merit consideration at this point of time."

180. It is manifest that the Commission has rejected the contentions of the appellants on this issue in view of the methodology adopted by the Commission earlier which has been upheld by this Tribunal in appeal No.271/2013.

181. Learned senior counsel appearing for the appellants argued that the appeal no.271/2013 (filed against tariff order dated 31.07.2013 regarding TPDDL) is clearly distinguishable on facts as the said judgment, *inter alia,* dealt with the issue of R&M vis-à-vis GFA together with the issue of correcting Efficiency Factor having been applied to SVRS pension. It is pointed out that in Paragraph no.23.3 of the said judgment, this Tribunal has relied upon the correction of Efficiency Factor being applied to SVRS pension to support the true up of R&M expenses with the change in GFA. The relevant portion of the said judgment is extracted hereinbelow:-

> *"**Since the efficiency factor has erroneously been applied during the true up of employee expenses on SVRS pension** for 2008-09 and 2009-10, the same has now been rectified by the Delhi Commission in compliance of this Appellate Tribunal's directions in Appeal No. 36 of 2008. **This is the whole situation which has led the Delhi Commission to provisionally allow capitalization based on the appellant's submissions and the audited accounts of the appellant. All these factors have led to revision of GFA under MYT control period and the R&M expenses have also been revised provisionally, subject to final true up of capitalization**. The learned Delhi Commission in paragraph 3.130 of the Impugned Order clarifies that employee expenses include expenses towards SVRS Pension. **However, while calculating the net employee expenses, no efficiency factor has been***

> ***applied on SVRS Pension. In this view of the matter, we find no merit in the contentions of the appellant and this issue relating to revised R&M based on revised GFA is decided against the appellant.***”

182. It is argued that in the said case, there appear to have been certain unique and individual reasons for the change in GFA being caused by Efficiency Factor having been applied to SVRS pension but there is no such connection at all in the present case where the change in GFA has admittedly not been on account of any SVRS pension or correction thereof. Therefore, the said Judgment of the Tribunal is not applicable to the facts of the present case.

183. Learned senior counsel further argued that the Commission has revised R&M expenses contrary to the Regulation 4.16(b)(i) of the MYT Regulations, 2007 which is quoted hereinbelow:-

> *“4.16 The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:.*
>
> *(a) Variation in revenue / expenditure on account of uncontrollable sales and power purchase shall be*

trued up every year;

(b) For controllable parameters,

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

(ii) Depreciation and RoCE shall be trued up at the end of Control Period."

184. It is pointed out that the Commission has in the MYT order dated 23.02.2008 and tariff order dated 26.08.2011 directed that there would be no true up of R&M expenses even if GFA were to change during the control period of these tariff orders and any surplus or deficit on account of R&M would be to the account of the licensee i.e. the appellants. However, despite these orders, the Commission has revised R&M expenses in the impugned tariff order based on the actuals of the GFA in violation of Regulation 4.16(b)(i) of MYT Regulations, 2007 and principles of normative tariff determination laid down by this Tribunal in various judgments. It is further pointed out by the learned senior counsel that the Commission in its affidavit dated 19.01.2024 filed in Appeal Nos. 265-266 of 2013 had, *inter alia*, stated: -

"

(a) Appellant has assailed Ld. DERC's decision of providing the accurate R&M trajectory basis the

Appellant's revised GFA.

(b) As per Regulation 5.4 of MYT Regulations, 2007, R&M Expenses are linked to GFA. Ld. DERC has not changed the constant 'K' but only acknowledged the change in the GFA and that too on a provisional basis.

(c) Ld. DERC does not dispute that as per Regulation 4.16(b), O&M Expenses are not to be trued-up and any additional expenses related to R&M Expenses have to be borne by the Appellant.

(d) Statutory Framework does not provide for 'specific determination of all uncontrollable elements of costs and provide for directly loading of those costs on the tariff for each year'.

(e) Ld. DERC, while finalizing provisional adjustment of R&M Expenses, has to apply regulations in true spirit as per mandate of Hon'ble High Court of Delhi."

185. It is further submitted by the learned senior counsel that in the subsequent orders dated 03.05.2024 (passed in the matter of review of capitalization and physical verification of assets of the appellants for the FY 2004-05 to 2015-16) and 19.07.2024 (passed with regards to the true up for FY 2020-21) the Commission has revised the R&M expenses as per the actual GFA.

186. Thus, prayer has been made to direct the Commission to revise the R&M expenses for the period in question also as per the actual GFA in terms of the Regulation 4.16(b)(i) of MYT Regulations, 2007.

187. The Commission, while conceding that as per said Regulation 4.16(b) O&M expenses are not to be trued up and as per MYT Regulations 2007 O&M expenses are to be provided on normative basis through a formula, has submitted that it would implement the regulations in their true spirit as per the mandate of the High Court of Delhi.

188. Hence, we set aside the findings of the Commission on this issue and remand the same back to the Commission for fresh consideration in terms of the Regulation 4.16(b)(i) of MYT Regulations, 2007 and in line with the subsequent orders dated 03.05.2024 and 19.07.2024 passed by the Commission itself whereby it revised the R&M expenses as per the actual GFA.

189. The issue stands disposed off accordingly.

Issue No. 35: Benchmarking of O&M Expenses.

190. This issue pertains to the methodology adopted by the Commission while redetermining O&M expenses for the FY 2012-13 to 2014-15 in pursuance to the directions of this Tribunal in judgments dated 10.02.2015 in appeal No.171/2012 and dated 02.03.2015 in appeal Nos.177-178/2012.

191. It is submitted on behalf of the appellants that the Commission has adopted a methodology which is contrary to the Regulation 4.21(b)(i) of MYT Regulations, 2007 and has failed to implement the above noted two judgments of this Tribunal by continuing with the same figures for FY 2014-15 and 2015-16 erroneously.

192. On behalf of the Commission, it is fairly submitted that the issue may be remanded back and the Commission is prepared to reconsider it in the light of applicable regulations and the previous judgments of this Tribunal.

193. Accordingly, the findings of the Commission on this issue are set aside and the issue is remanded back to the Commission for fresh consideration in terms of the Regulation 4.21(b)(i) of MYT Regulations, 2011 and in the light of the noted two judgments of this Tribunal in appeal No.171/2012 and appeal Nos.177-178/2012.

Issue No. 36: Fixed Charges against Regulated Power; Rate of Short-Term power procured during period of regulation from FY 2011-12 - FY 2015-16.

194. It is important to note, at first, the impugned findings of the Commission on this issue and the same are as under:-

(a) **For BRPL**: -

*"**COMMISSION'S ANALYSIS***

*3.314 The **Commission has analyzed the submission of the Petitioner and it is observed that the Petitioner has not factored the merit order principle while computing the opportunity cost and benefit due to regulation of power vis-a-vis sale of surplus power. It is clarified that in case the power would not have been regulated from these cheaper station of NHPC then the Petitioner had the opportunity to back down its costly station and avail the cheaper power from NHPC, which could have reduced the loss on sale of surplus power as considered by the Petitioner. Therefore, the claim of the Petitioner is not tenable.***

…

COMMISSION'S ANALYSIS

*3.462 **During FY 2014-15 & FY 2015-16, the Petitioner's power was regulated from NHPC, SJVNL and DVC due to non-payment of outstanding dues to the generators. As a result petitioner had to procure power on short term basis from Bilateral***

Contracts, Power Exchanges and Inter DISCOM Transfer at high rates compared to rate of regulated Stations.

3.463 This Petitioner's Submission that part of surplus power has been reduced due to regulation of power and the petitioner could still meet the demand by procuring lower quantum of power through short term market on need basis is not justified. The Commission is of the view that if power would not have been regulated then the Petitioner would have the option for backing down costlier plants in-order to procure power at comparative economical rate in order to optimize their power purchase cost. Further, ***Regulation of Power cannot be treated as mechanism to optimize surplus power and meet demand by procuring power from short term market.***

3.464 CERC vide its Regulations had introduced Central Electricity Regulatory Commission(Regulation of Power Supply) Regulations, 2010 on 28/09/2010 which are applicable to the Generating Station and the Transmission System where there is a specific provision in the Agreement between the Beneficiaries and Generating Company or the Transmission Licensee as the case may be, for Regulation of Power supply in case of non- payment of outstanding dues or non-maintenance of Letter of Creditor any other agreed Payment Security Mechanism. In its Statement of

Reasons (SOR), CERC has specifically indicated that responsibility of bearing the capacity charges has to remain with the Regulated Entity. The relevant extract of the said SOR is as follows:

…

3.465 The Commission vide its letter dated 28/12/2012 and dated11/04/2013 communicated its decision to the distribution licensee as follows:

…

3.466 In view of the above, the ***Commission has decided to continue with its existing practice for treatment of Regulated Power and disallow the prorated Fixed Cost as also indicated in para 3.265 of the Tariff Order dtd. 29/09/2015.***

3.467 The Commission vide its letter dtd. 01/05/2017 directed SLDC to submit the Regulated Quantum of power station wise, power available if there would not had been Regulation and also source-wise short term purchases done during such Regulated period. SLDC has submitted the said information indicating that for FY2014-15 there was 91.85 MU and 400.01 MU of regulated power for FY 2014-15 and FY 2015-16 from various stations of NHPC, SJVNL and DVC.

3.468 The Petitioner has submitted the Credit received for such Regulated Power in its Petition. The Commission had sought information from NHPC, *SJVNL and DVC regarding Credit given to the Petitioner and found that the information submitted by the Petitioner is same with that provided by various Generator Companies.*

3.469 The ***Commission observed that the power was regulated from NHPC, SJVNL and DVC stations for some period during FY 2014-15 and FY 2015-16. Short term procurement, except Banking and UI done by the Petitioner was 70.72 MU and 366.01 MU during FY 2014-15 and FY 2015-***

16 respectively whose weighted average rate is Rs.3.33/kWh and Rs.

3.57/kWh during FY 2014-15 and FY 2015-16 respectively.

3.470 The weighted average per unit rate pertaining to the period of Regulation was Rs. 2.96/kWh for FY 2014-15 and Rs. 2.51/kWh for FY 2015- 16 which have been arrived at considering current bill details of TPDDL wherein these stations were not Regulated.

3.471 The ***Commission has analyzed that petitioner incurred additional expenditure for procurement of 70.72 MU in FY 2014-15 and 366.01 MU in FY 2015-16. Average short term power purchase cost for the period FY 2014-15 was Rs. 3.33/kWh therefore the Commission has decided to dis- allow normative loss of Rs. 2.60 Cr. [(70.72*(3.33-2.96))/10] on***

account of purchase of power from short term sources instead of cheaper power availability from regulated power.

3.472 Similarly, average short term power purchase cost for the period FY 2015-16 was Rs. 3.57/ kWh therefore the Commission has decided to dis-allow normative loss of Rs. 38.88 Cr. [366.01(3.57-2.51)) /10] on account of purchase of power from short term sources instead of cheaper power availability from regulated power.*

3.473 ***In view of the above the Commission has decided not to allow following costs for FY 2014-15 and FY 2015-16 due to additional high cost short term purchase and prorated fixed cost (Fixed Cost for period of Regulation on difference of Energy Regulated and Short Term purchases) on account of Regulated Power:***

Table 126: Calculation of Normative Loss on account of Regulat	***Regulated Quantum (MU)***	***Energy Purchased during the period of regulation (MU)***	***Weighted Average Per Unit Cost of regulated Quantum (Rs./kW***	***Avg. per unit cost of power purchased during the period of regulation (Rs/kWh)***	***Additional Power Purchase Cost (Rs. Cr.)***	***Net Fixed Cost borne on account of Regulate d Power***

ed Power Financial Year			h)			
	1	***2***	***3***	***4***	***5 = [(4-3*2]/10***	
2014-15	*91.85*	*70.72*	*2.96*	*3.33*	*2.60*	*4.74*
2015-16	*400.01*	*366.01*	*2.51*	*3.57*	*38.88*	*4.26*

…"

(b) **For BYPL** *: -*

"COMMISSION'S ANALYSIS

3.280 The Commission has analyzed the submission of the Petitioner and it is observed that the Petitioner has not factored the merit order principle while computing the opportunity cost and benefit due to regulation of power vis-a-vis sale of surplus power. It is clarified that in case the power would not have been regulated from these cheaper station of NHPC then the Petitioner would had the opportunity to back down its costly station and avail the cheaper power from NHPC, which could have reduced the loss on sale of surplus power as considered by the Petitioner.

…

COMMISSION'S ANALYSIS

3.419 During FY 2014-15, the Petitioner's power was regulated from NHPC, SJVNL, DVC and other cheaper stations due to non-payment of outstanding dues to the generators. As a result Petitioner had to procure power on Short Term basis from Bilateral Contracts, Power Exchanges and Inter DISCOM Transfer.

3.420 This Petitioner's submission that part of surplus power has been reduced due to regulation of power and the Petitioner could still meet the demand by procuring lower quantum of power through Short Term market on need basis is not justified. The Commission is of the view that if power would not have been regulated then the Petitioner would have the option for backing down costlier plants in-order to procure power at comparative economical rate in order to optimize their power purchase cost. ***Further, Regulation of Power cannot be treated as mechanism to optimise surplus power and meet demand by procuring power from Short Term market.***

3.421 CERC vide its Regulations had introduced Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 on 28/09/2010 which are applicable to the Generating Station and the Transmission System where there is a specific provision in the Agreement between the Beneficiaries and Generating Company or the Transmission Licensee as the case *may be, for Regulation of Power supply in case of non-payment of outstanding dues or non-maintenance of Letter of Credit or any other agreed Payment Security Mechanism. In its Statement of Reasons (SOR), CERC has specifically indicated that responsibility of bearing the capacity charges has to remain with the Regulated Entity. The relevant extract of the said SOR is as follows:*

> *"9.3 We have considered the comments and are of the view that a balance has to be maintained between the benefit and risk of the Regulating Entity as well as Regulated Entity. As a result of regulation of power supply, the generator is already ensured of getting all its expenses, including the capacity charge, energy charge and incidental charges like trading margin, if sold through a trader. So, there would not be loss to the generator due to regulation of power. As per the provisions of these regulations, the Regulated Entity has to pay capacity charge even if the power is not scheduled to him due to regulation.*
>
> *…*
>
> *13.7 We are of view that during the regulation of power, the allocation of generating capacity remains with the Regulated Entity and only the power generated from it is being diverted for the specific reason of non-payment of outstanding dues by the*

Regulated Entity. Therefore, the responsibility of bearing the capacity charges has to remain with the Regulated Entity."

3.422 The Commission vide its letter dated 28/12/2012 and dated 11/04/2013 communicated its decision to the distribution licensee as follows:

"…in such cases where cheaper power is regulated due to nonpayment of dues and eventually distribution licensee purchases expensive power to meet the demand, at the time of true-up cost of such expensive power will be restricted to the cost of cheaper power"

3.423 ***In view of the above, the Commission has decided to continue with its existing practice for treatment of Regulated Power and disallow the prorated Fixed Cost as also indicated in para 3.260 of the Tariff Order dtd. 29/09/2015.***

3.424 The Commission vide its letter dtd. 01/05/2017 directed SLDC to submit the power station wise, Regulated Quantum of power available if there would not had been Regulation and also source-wise Short Term purchases done during such Regulated period. SLDC vide its letter dtd. 25/05/2017 has submitted the said information indicating that for FY 2014-15 there was 1493.87 MU and 698.82 MU of regulated power for FY 2014-15 and FY 2015-16 from various stations of

NHPC, SJVNL and DVC.

3.425 The Petitioner vide its email dtd. 24/03/2017 has submitted the Fixed Cost borne on account of Regulated Power and Credit received for such Regulated Power.

3.426 The Commission had sought information from NHPC, SJVNL and DVC regarding Credit given to the Petitioner and found that the information submitted by the Petitioner is same as provided by various Generating Companies.

3.427 The ***Commission observed that that they have factored in credit amount of Rs. 31.71 Cr. and Rs. 1.26 Cr. for SJVNL and NHPC respectively in its Gross Power Purchase Cost which is also indicated in its Petition in table no. 3.12.***

3.428 Further, the ***Commission in its prudence check session has observed that Petitioner received credit invoice dated 06/02/2017 from Damodar Valley Corporation (DVC) for FY 2015-16 indicated in the table as follows. These amounts have not been factored in the True Up Order of FY 2013-14 by the Commission and true up Petition for FY 2014-15 filed by the Petitioner as the same has been received from DVC on 06/02/2017 by the Petitioner:***

Table 115: Regulation Credit received by Petitioner from DVC in FY 2014-15…

3.429 The total Credit received by the Petitioner from the

Generators on account of regulation of power supply which is considered in True up of FY 2014-15 is as follows:

Table 116: Total Credit received from Regulated stations (Rs. Cr.) …

3.430 Fixed cost borne by the Petitioner and Credit received by them against the Regulated Power during FY 2014-15 and FY 2015-16 is as follows:

Table 117: Additional burden on Consumers due to regulated power…

*3.431 The **Commission observed that the power was regulated from NHPC, SJVNL and DVC stations throughout FY 2014-15. Short Term procurement done by the Petitioner as 380.14 MU and 135.45 MU except Banking and UI whose weighted average rate is Rs. 4.28/kWh and Rs. 3.74/kWh during FY 2014-15 and FY 2015-16 respectively.***

3.432 The weighted average per unit rate pertaining to the period of Regulation for power from Regulated stations of NHPC, SJVNL and DVC stations is Rs. 3.98/ kWh for FY 2014-15 and Rs. 3.02/kWh for FY 2015-16 have been arrived at considering current bill details of TPDDL (DISCOM for which there was no Regulation).

*3.433 The **Commission has analyzed that Petitioner incurred additional expenditure for procurement of***

380.14 MU in FY 2014-15 and 135.45 MU in FY 2015-16. *Average Short Term power purchase cost for the period FY 2014-15 was Rs. 4.28/kWh* ***therefore the Commission has decided to disallow opportunity loss of Rs. 11.54 Cr.*** *[(380.14*(4.28-3.98))/10]* ***on account of purchase of power from Short Term sources instead of cheaper power availability from regulated power station.***

3.434 Similarly, average Short Term power purchase cost for the period FY 2015-16 was Rs. 3.74/ kWh therefore the Commission has decided to disallow normative loss of Rs. 9.74 Cr. [135.45(3.74-3.02))/10] on account of purchase of power from Short Term sources instead of cheaper power availability from regulated power station.*

3.435 The additional fixed cost net of credit amounting to Rs. 87.20 Crore and Rs. 35.00 Crore for FY 2014-15 and FY 2015-16 was borne by the Petitioner as indicated in Table 117: Additional burden on Consumers due to regulated power. The Commission, therefore has decided to disallow the prorated fixed cost against 1113.73 MU (1493.87 MU - 380.14 MU) which works out to Rs. 65.01 Crore (87.20(1113.73 /1493.87)).*

3.436 Similarly for FY2015-16, the prorated fixed cost works out to Rs. 6.78 Crore.

3.437 ***In view of the above the Commission has decided not to allow following costs for FY 2014-15 and FY 2015-16 on account on Regulated Power resulted due to nonpayment of bills to the Generators:***

Table 118: Calculation of normative loss on account of regulated power

Financial Year	*Regulated Quantum (MU)*	*Energy Purchased during the period of Regulation (MU)*	*Weighted Average Per Unit Cost of regulated Quantum (Rs./kWh)*	*Avg. per unit cost of power purchased during the period of regulation (Rs/kWh)*	*Additional Power Purchase Cost (Rs. Cr.)*	*Net Fixed Cost borne on account of regulated power (Rs. Cr.)*	*Total Impact (Rs. Cr.)*
	1	*2*	*3*	*4*	*5=[(4-3)*2]/10*	*6*	*7=(5+6)*
2014-15	*1,493.87*	*380.14*	*3.98*	*4.28*	*11.54*	*65.01*	*76.55*
2015-16	*698.82*	*135.45*	*3.02*	*3.74*	*9.74*	*6.01*	*16.53*

…"

195. The grievance of the appellants is that they have been made to suffer on multiple counts. Firstly, due to non-cost reflective tariff determined by the Commission, secondly, due to regulation of power by the generating companies due to inability of the appellants in making timely payments of power purchase bills which is direct consequence of Commission's action / inaction in determining non-cost reflective tariff and thirdly, by disallowance of fixed charges paid for regulated power, in terms of CERC Regulations, 2010, as also by disallowance to recover costs / expenses incurred for procuring short-term power without considering avoidance of loss of sale of surplus power by the appellants in order to ensure continuous supply of electricity to the consumers during the period of regulation.

196. Learned senior counsel for the appellants would argue that instead of remedying the situation, the Commission is penalizing the appellants for failure to make payments to the generating stations and has thus, failed to perform its role as a regulator to determine cost reflective tariffs. Reference is made to the statutory advices dated 15.12.2010 and 01.02.2013 issued by the Commission to Government of NCT of Delhi in which the Commission itself has admitted that tariffs fixed by it are not cost reflective and have created a huge gap between ARR of the discoms and the revenue available to them through tariff. He would further submit that actually the appellants, due to regulation of power, were able to avoid 99 MUs during off-peak hours while purchasing only additional 14 MUs through short-term power in the FY 2013-14 resulting in net savings to the consumers. Similarly, it is pointed out that in the FY 2014-15 also, the appellants were able to avoid purchase of 93MUs during off-peak hours due to regulation of power and were required to purchase only additional 14 MUs through short-term power during peak hours. In the FY 2015-16 also, the appellants are stated to have avoided purchase of 400 MUs during off-peak hours while purchasing only additional 253 MUs through short-term power during peak hours, thereby contributing to net savings to the consumers.

197. It is, further argued that the Commission has considered the credit amount received by appellants for sale of regulated power by the generating companies in their ARR but has erroneously disallowed net / additional fixed / capacity charges to them in violation of Regulation 13 of CERC Regulations, 2010. It is submitted that such approach of the Commission is in violation of the “matching principle” which requires the profit made by a business during a period to match with the costs (expenses) of the business for that period.

198. On behalf of the Commission its counsel has justified these disallowances while arguing that impugned findings of the Commission would ensure that the appellants shall refrain from procuring the power at their whims and fancies. It is argued that the appellants are under an obligation to run the distribution business efficiently and any cost, which is not justified on the part of the appellants, cannot be allowed to pass on to consumers to create an additional undesired burden upon them.

<u>Our Analysis</u>: -

199. We have perused the statutory advices dated 15.12.2010 and 01.02.2013 issued by the Commission itself to the Government of NCT of Delhi. In Paragraph No.18.1 of the advice dated 15.12.2010, the Commission has clearly noted that the tariff for the year 2008-09, 2009-10 and current year i.e. 2010-11 are not cost reflective. Paragraph Nos.6,7,10&11 of the statutory advice dated 01.02.2013 reflect that there has been significant gap between the Annual Revenue Requirements of the discom and the revenue available through tariff which places additional interest burden on the consumers by way of carrying cost on the additional market borrowings which is to be resorted by the discoms to meet this gap. We quote these paragraphs hereunder:-

"6. The buildup of revenue gap since FY 2009-10 is given in the table below:-

(Amount Rs. In crores)

Revenue Gap (*)	*BRPL*	*BYPL*	*TPDDL*	*Total*
Upto FY 2008-09	*(611.50)*	*25.93*	*(351.10)*	*(936.67)*
FY 2009-10	*(1068.07)*	*(532.58)*	*(751.46)*	*(2352.11)*
FY 2010-11 (as approved by the Commission)	*(1545.72)*	*(1120.93)*	*(963.61)*	*(3630.26)*
FY 2011-12 (Projected by DISCOMs)	*(4233)*	*(2216)*	*(1783)*	*(8232)*
FY 2012-13 (Projected by DISCOMs)	*(1779)*	*(1690)*	*(885)*	*(4354)*
Total revenue gap (**)	*(9237.29)*	*(5533.58)*	*(4734.17)*	*(19505.04)*

(*) amount of the revenue gap upto FY 2010-11 includes carrying cost as approved by the Commission; and from FY 2011-12 onwards, the revenue gap includes carrying cost as per the tariff petitions filed by the licensees for FY 2013-14.

(**) This gap does not include the revenue gap arising on account of the impact of all the appeals filed before the ATE/SC etc., which shall be additional.

7. The above build-up is in spite of the fact that the Delhi distribution utilities have been able to significantly bring down AT&C losses in the city to levels well below those in most other States. The AT&C losses during 2011-12 as against the losses at the time of unbundling, based on which bids for privatization were invited are given below:-

	TPDDL	BRPL	BYPL
Opening Loss Levels in 2002	48.1	48.1	57.2
Current Loss Levels in FY 2011-12	11.27*	16.36*	17.84*

**Note:- As claimed by DISCOM, but yet to be true-up by the Commission.*

It goes without saying that without the above mentioned reductions in AT&C Loss levels, the venue gaps would have been much higher, making the operations / tariff levels completely unviable.

…

10 The growing gap between the annual revenue requirements and the revenue available through tariff places additional interest burden on the electricity consumers by way of carrying cost on the additional market borrowings which have to be resorted to meet this gap. It also puts strain on the resources available to purchase power, even though there are adequate long term power purchase arrangements to meet the electricity demand of the NCT of Delhi.

11. The SBI Capital Markets Ltd. in a presentation made to the Commission in December, 2012 have assessed that liquidation of the pending revenue gap in the case of BRPL will require a surcharge of 20% every year on the applicable tariff from FY 2013-14 to FY 2018-19 while in the case of BYPL, a surcharge of 25% every year will be required to enable recovery of revenue gap in 6-7 years. The majority of consumers in Delhi are in the domestic category, out of which the consumers falling in the consumption slab upto 400 units constitutes approx. 70-80%. Thus, it is mainly the middle class consumers who would be impacted on account of an increase in tariff."

200. Hence, the Commission itself admits the non-cost reflective tariff determined over the years for the appellants which impairs the ability of the appellants to make payments to the generating companies for the power procured from them, thereby leading to regulation of power. Therefore, such a situation is the creation of the improper and imprudent tariff determination by the Commission. On the one hand, the power purchase cost determined as part of ARR of the appellants by the Commission has not been sufficient to meet the sufficient / actual power purchase cost incurred by the appellants as a result of which the appellants are unable to make payments to the generating companies and the generating companies resort to curtailment of power supply and at the same time, the appellants are required to purchase power from short-term sources to maintain uninterrupted supply of electricity in compliance of the directive 6.6 as well as Sections 42 and 43 of Electricity Act, 2003. Therefore, disallowance of fixed charges against the regulated power and cost incurred towards purchase of short-term power procured by the appellants during periods of regulation certainly violates the doctrine of reasonableness and proportionality. It is a classic case where instead of taking remedial measures, the Commission is penalizing the appellants for failure to make payments to the generating companies when the Commission itself failed to perform its role as a regulator to determine cost reflective tariffs.

201. We may note that as per Section 62(d) and (g), the Commission while determining the tariff shall have due regard to not only the interests of the consumers but also to the rights of the distribution companies to recover the cost of supply of electricity. The Commission, while determining the tariff, needs to balance the rights / interests of both, the consumers as well as the discoms in order to avoid precarious financial situation for the discoms like the one which is evident in the instant case.

202. Further, we also find that the Commission has completely ignored the fact that due to regulation of power, the appellants have actually been able to avoid purchase of unwanted power during peak hours, thereby contributing to the net savings to the consumers which fact is reflected from following tables given by the appellants in the written submissions filed on this issue:-

"

Particulars	***Quantum***	***Avg. per unit rate***	***Amount***	***Remarks***
	MU	***Rs. / kWh***	***Rs. Cr.***	
*Actual Power Purchase cost during FY 14 (**A**)*	*11509*	*5.36*	*6174*	*Figures as per ARR Petition*
Regulated Power during FY 2013-14	*99*	*2.39*	*24*	*99 MU @ Rs. 2.39 per kWh as per DERC Tariff Order*
Short term power purchase to make up for Regulated power when demand exceeds schedule (FY 2013-	*14*	*2.23*	*3*	*165 MU as per short term schedule and Rs. 3.24 per kWh as per IEX Rate (Slot-wise)*

14)				
*Power Purchase Cost assuming no regulation of power in FY 2013-14 (**B**)*	*11594*	*5.34*	*6194*	
Avoided cost consumer due to reduction in power purchase cost			***21***	***(B-A)***

"

"

Particulars	***Quantum (MU)***	***Avg. per unit***	***Amt. (Rs. Cr.)***	***Remarks***
Actual Power Purchase (FY 15) (A)	*11938*	*5.83*	*6955*	*As per Actuals*
Regulated Power (FY 15)	*92*	*3.85*	*36*	*92MU as per SLDC @ Rs. 3.85/ unit (As per prev. Tariff Order of DERC)*
Short term power purchase to make up for Regulated power when demand exceeds schedule (FY 15)	*14*	*1.94*	*3*	*14 MU as per slot-wise analysis and Rs. 1.94/ unit as per IEX rate*
Power purchase cost assuming no regulation of power in FY 15 (B)	*12017*	*5.82*	*6988*	
Avoided cost consumer due to reduction in power purchase cost (Savings to the consumers)			*33*	*B-A*

"

“

Particulars	***Quantum (MU)***	***Avg. per unit***	***Amt. (Rs. Cr.)***	***Remarks***
Actual Power Purchase (FY 16) (A)	*12017*	*5.32*	*6389*	*As per Actuals*
Regulated Power (FY 16)	*400*	*3.33*	*133*	*400MU as per SLDC @ Rs. 3.33/ unit (As per prev. Tariff Order of DERC)*
Short term power purchase to make up for Regulated power when demand exceeds schedule (FY 16)	*253*	*2.70*	*68*	*253 MU as per slot-wise analysis and Rs. 2.70/ unit as per IEX rate*
Power purchase cost assuming no regulation of power in FY 16 (B)	*12164*	*5.31*	*6454*	
Avoided cost consumer due to reduction in power purchase cost (Savings to the consumers)			*65*	*B-A*

”

203. Notably, the figures mentioned in these tables have not been disputed on behalf of the Commission.

204. We may also note that as per Regulation 13 of CERC Regulation, 2010, the amount received from sale of surplus power by generating company due to regulation of power supply shall have to be adjusted against the outstanding dues of the regulated entities, after deduction of energy purchase trading margin and other incidental expenses borne by the generating company, if any, and the remaining amount, if any, shall have to be passed on to the regulated entity. It is manifest that the Commission, while recording the impugned findings, has totally ignored the provisions of this regulation and has fallen into error.

205. Hence, we set aside the impugned findings on this issue and direct the Commission to allow necessary impact of the present issue to the appellants in the light of observations made hereinabove. The issue stands disposed off accordingly.

Issue No. 37: Income-tax from FY 2007-08 to FY 2015- 16.

206. The grievance of the appellants is that the Commission has erroneously adopted a pick and choose approach in allowing the lower amongst the (a) income tax computed on 16% Return on Equity (RoE) or (b) income tax actually assessed, during the first MYT control period i.e. FY 2007-08 to FY 2011-12 and second MYT control period i.e. FY 2012-13 to FY 2015-16 while truing up. We find it pertinent to extract the findings of the Commission on this issue as contained in the impugned order: -

"(a) For BRPL*:*

*"**COMMISSION'S ANALYSIS***

3.655 Regulation 5.32 of MYT Regulation 2011 specify that the income tax, if any liable to be paid on the licensed business of the distribution licensee shall be limited to tax on return on equity component of capital employed. Any additional tax other than this shall not be a pass through and it shall be payable by the Distribution licensee itself.

3.656 Regulation 5.33 specify that the actual assessment of income tax should take into account benefits of tax holiday and the credit for carry forward losses applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the consumers.

3.657 Regulation 5.40 specify that truing up shall be carried out in accordance with Regulation 4.21, for each year based on the audited information and prudence check by the Commission.

3.658 Conjoint reading of the above regulations explicitly specify that tax shall be considered in true up based on actual payment, subject to prudence check, duly taking into consideration the benefits of tax holiday and shall be limited tax on RoE.

3.659 ***It is observed from the audited financial statements that the Petitioner has made actual payment of Income Tax (MAT) of Rs. 31.08 Crore for***

***FY 2014-15 and Rs. 14.46 Crore for FY 2015-16 which is lower than the Income Tax on return on Equity of Rs. 52.24 Crore and Rs. 55.41 Crore for FY 2014-15 and FY 2015-16 respectively. Therefore, the Commission approves Income Tax of Rs. 31.08 Crore for FY 2014-15 and Rs. 14.46 Crore for FY 2015-16**."*

(b) For BYPL*: -*

"COMMISSION'S ANALYSIS

3.596 Regulation 5.32 of MYT Regulation 2011 specify that the income tax, if any liable to be paid on the licensed business of the distribution licensee shall be limited to tax on return on equity component of capital employed. Any additional tax other than this shall not be a pass through and it shall be payable by the Distribution licensee itself.

3.597 Regulation 5.33 specify that the actual assessment of income tax should take into account benefits of tax holiday and the credit for carry forward losses applicable as per the provisions of the Income Tax Act, 1961 shall be passed on to the consumers.

3.598 Regulation 5.40 specify that truing up shall be carried out in accordance with Regulation 4.21, for each year based on the actual/audited information and prudence check by the Commission.

3.599 Conjoint reading of the above regulations explicitly specify that tax shall be considered in true up based on actual payment, subject to prudence check, duly taking into consideration the benefits of tax holiday and shall be limited tax on RoE.

3.600 ***It is observed from the audited financial statements that the Petitioner has made actual payment of Income Tax (MAT) of Rs. 17.68 Crore for FY 2014-15 and Rs. 5.64 Crore for FY 2015-16 which is lower than the Income Tax on return on Equity. Therefore, the Commission approves Income Tax of Rs. 17.68 Crore for FY 2014-15 and Rs. 5.64 Crore for FY 2015-16****. "*

207. The claim of the appellants is that income tax, as payable on RoE and not the actual, ought to be allowed as a pass through recoverable from the consumers through tariff for the reason that RoE is the only allowable income of the distribution licensee business. It is stated that the Commission has, in effect, exploited the gap between Income Tax attributable to the licensed business and income tax implications for the corporate entity as a whole to deny the claim of the appellants.

208. Learned senior counsel for the appellants vehemently argued that the words "limited to" in Regulation 5.22 of MYT Regulations, 2007 and

Regulation 5.32 of MYT Regulations, 2011 deal with the ambit of the allowance and not quantum of such allowance, which interpretation is clearly borne out of conjoint reading of Regulations 5.20 & 5.22 of MYT Regulations, 2007 as well as Regulation 5.32 of MYT Regulations, 2011. Reliance in this regard, is placed upon the judgment of Kerala High Court in CIT, Kerala v. Commonwealth Trust Ltd., 1978 SCC OnLine Kerela 306.

209. It is further submitted by the learned senior counsel that as a regulated entity, the appellants are entitled to a fixed rate of RoE in their regulated accounts and tariff and accordingly they had claimed income tax payable and computed based on such RoE on standalone basis for licensed business, so that consumers of regulated business are not exposed to the risk of non-regulated business by insulating them from income tax payable to them from other non-regulated businesses. It is pointed out that actual income tax assessed as per appellant's books of accounts (for both the regulated and non-regulated business) may be higher or lesser than the income calculated on RoE in regulated business in a particular year. Hence, the claim of the appellants is only for the tax payable on RoE basis, irrespective of whether the income tax paid actually is higher or lower than the tax payable on RoE. In support of his submission the learned senior counsel cited judgment of this Tribunal in appeal No.104/2012 in the matter of Tata Power Company wherein this Tribunal has held that the income tax attributable for the licensed business is only on RoE and has nothing to do with the actuals.

210. Learned counsel for the Commission argued that the appellant's prayer in the tariff petition was to consider the actual income tax paid while truing up, which has been accepted by the Commission in the impugned order, and therefore, there was no reason or occasion for them to assail the impugned order. He would further submit that the judgment of this Tribunal in Tata case is not applicable to the instant case for the reason that the regulations interpreted in the case by this Tribunal concerned the income tax for generating companies under the MERC tariff regulations and not with regards to the income tax for distribution licensees.

211. The learned counsel further argued that the issue raised in this appeal has been considered in detail by this Tribunal in appeal No.271/2013 decided on 20.07.2016 wherein this Tribunal has affirmed the order of Delhi Commission itself in which the Commission had approved income tax actually assessed or computed based on the RoE component, whichever is lower, in accordance with the MYT Regulations, 2007, and therefore, the same is squarely applicable to the instant case also. Thus, according to the learned counsel, no infirmity can be found in the findings of the Commission on this issue.

Our Analysis:-

212. The issue that arises for our consideration is whether the dispensation in the impugned order of allowing lower amongst income tax computed on RoE or income tax actually assessed violates MYT Regulations, 2007 and 2011, as well as the provision of the Electricity Act.

213. The answer to this issue would lie in the correct interpretation of Regulations 5.20 to 5.22 of MYT Regulations, 2007 and Regulations 5.32 and 5.33 of MYT Regulations, 2011.

214. Regulations 5.20 to 5.22 of MYT Regulations, 2007 are quoted hereinbelow:-

> *"Corporate Income Tax*
>
> *5.20 Income Tax, if any, on the Licenced business of the Distribution Licensee shall be treated as expense and shall be recoverable from consumers through tariff. However, tax on any income other than that through its*

Licenced business shall not be a pass through, and it shall be payable by the Distribution Licensee itself.

5.21 The income tax actually payable or paid shall be included in the ARR. The actual assessment of income tax should take into account benefits of tax holiday, and the credit for carry forward losses applicable as per the provisions of the Income Tax Act 1961 shall be passed on to the consumers.

5.22 ***Tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed.*** *However any tax liability on incentives due to improved performance shall not be considered."*

215. Regulation 5.20 of MYT Regulations, 2007 envisages that the income tax paid by a distribution licensee on income from its licensed business shall be treated as expense and shall be recoverable from consumers through tariff. As per Regulation 5.21, the actual income tax payable or paid by a distribution licensee shall be included in its ARR. It further specifies that actual assessment of income tax should take into account benefits of tax holiday and credit for carry forward losses applicable as per the provisions of the Income

Tax Act, 1961 shall be passed on to the consumers. Regulation 5.22 limits the tax on income, if any, payable by the distribution licensee to tax on RoE component of the capital employed.

216. Regulation 5.32 of MYT Regulations, 2011 is in *pari materia* with the above noted Regulation 5.22 of MYT Regulations, 2007 and is quoted hereinbelow:-

> *"Corporate Income Tax*
>
> *5.32* ***Tax on income, if any, liable to be paid on the Licensed business of the Distribution Licensee shall be limited to tax on return on the equity component of capital employed.*** *Any additional tax other than this shall not be a pass through, and it shall be payable by the Distribution Licensee itself."*

217. The issue under consideration has already been settled by this Tribunal in a catena of judgments including Judgment dated 04.04.2007 in Appeal No.251/2006 titled *REL v. MERC & Ors.* in which it has been held that Income Tax on the regulated business will have to be computed as if it were a watertight compartment i.e. to compute the Income Tax of the Regulated

Business without its numbers being mixed up with any other numbers, whether of the entity as a whole, much less, with the numbers of its non-electricity businesses.

218. The above principle of treating the Income Tax computation limited to the Regulated/licensed business of an entity, i.e., to treat it as a "watertight compartment" computation, has been reiterated in various Judgments including: -

a. *Judgment dated 28.11.2013 in Appeal Nos 104, 105 and 106 of 2012 in the case of Tata Power Company Limited v. MERC;*
b. *Judgment dated 02.12.2013 in Appeal No. 138 of 2012 in the case of Reliance Infrastructure Limited v. MERC;*

219. It is pertinent to note that the Appeal Nos.104, 105, and 106 of 2012 pertained to the Appellant's Distribution Business, Transmission Business, as well as the Appellant's Generation Business, however, the principles laid down by this Tribunal remains same. This Tribunal has held in these appeals as under:

> *"48. …Still, there cannot be two opinions that the consumers of regulated business must be insulated from*

the risks of the other business and income tax assessment of the utility should be done on standalone basis. This direction of the Tribunal is in line with the State Commission's Regulations 34.2.2 (for Generation business) and similar Regulations for Transmission and Distribution business…"

"52. The Judgment in Appeal No. 251 of 2006 is based on the principle that regulated business in question that is within the jurisdiction of the Regulatory State Commission, should neither subsidise nor get subsidy from other businesses whether unregulated or regulated by the same or different regulator. In other words, the Judgment mandates that the taxable income of the regulated business within the jurisdiction of the Regulatory State Commission should be computed on stand alone basis, irrespective of what is the impact of this business or other businesses on the overall tax liability…

…

58. The Tribunal in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis…"

220. This Tribunal also held, applying the watertight compartment principle, that the Income Tax on the regulated business has to be computed on the basis of what is “PAYABLE” by the regulated business and NOT what is PAID by the entity as a whole. This would ensure that the tax computed for the regulated business would not be interfered with by the financial numbers of either the entity as a whole or even the non-regulated businesses.

221. Regulation 5.22, as quoted above, also mandates the same. It is also important to note that in the above batch of appeals, this Tribunal was considering the relevant Regulations framed by Maharashtra Electricity Regulatory Commission which are identical to the MYT Regulations, 2007 and 2011 framed by the Delhi Commission and applicable to the instant case.

222. Further, this Tribunal vide judgment dated 22.03.2024 in Appeal No. 283 of 2017 has considered the aforesaid appeals as under:

> *“68. The Respondents have contended that Regulation 22.3 provides that the RoE has to be grossed up with actual tax paid whereas the Appellant has contended that RoE is to be grossed up with the applicable tax payable.*
>
> *69. Undisputedly, the accounts of the Appellant’s generating station have to be considered independent of the accounts of the parent company, this Tribunal in **Tata Power Company Limited vs MERC, Appeal No. 104,***

***105 and 105 of 2012 h**as held that each regulatory business is to be treated independently, exclusive of other businesses of the company, further, in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis, the relevant extract of the judgment is reproduced below:*

> *"53. For example, when on standalone basis the regulated business has taxable income to be taxed at normal rates, there may be losses/tax exemptions in other businesses which may result in overall taxable income being less than the regulated taxable income and, hence, actual tax liability for all businesses being less than that of regulated business on standalone basis.* ***In case, actual tax liability is allowed by the regulator whether in full or in proportion of profit of regulated business, it obviously amounts to less than due tax allowance for regulated business due to exemptions/losses of other business being utilised for subsiding the regulated business, which is not permissible as per the above Judgment. The impact is more pronounced when the overall taxable income becomes so small or even negative that the tax rate applicable is MAT, which not only artificially reduces the tax liability for regulated business***

due to lower rate, but also creates an incorrect impression that this tax allowed at MAT rate is to be reversed in future as MAT credit allocating MAT credit. This is obviously not permissible and for giving effect to the said Judgment in Appeal No. 251 of 2006 tax computation for regulated business has to be done on standalone basis at normal rates even though it may result into tax allowance higher than actual tax payment for overall business.

…….

57. ***In the present case, the State Commission has worked out the book profit of each segment separately. It observed that the Appellant has paid MAT. It did not worked why and how the tax liability of the company, under normal income tax rates, got reduced to such a level that it came under MAT****. Was it due to regulated business or unregulated business? Was the regulated business enjoying any tax holiday or accelerated depreciation or other tax deductions? Book Profit calculations in the Impugned order do not reflect any such deductions in the regulated businesses of G, T & D. Obviously, it was due to other business (unregulated by MERC) of the Appellant which caused massive permissible deductions. The benefit of such* *deduction must be shared by the beneficiaries of such business only and not by the consumers of regulated business. Presently, those businesses may be getting tax rebates due to tax holidays or accelerated depreciation.* ***But in the future at the end of tax holidays and reduced depreciation, these deductions would not be available to those companies and their tax liability would increase. Under those circumstances, the tax burden of the unregulated business would not be allowed to be shared by regulated business of MERC."***

58. ***The Tribunal in Appeal No. 251 of 2006 has laid down the ratio that the income tax assessment of the licensee must be done on standalone basis.*** *In Appeal No. 173 of 2011 the Tribunal has provided the methodology for assessing the income tax liability of the licensee.* ***The State Commission did not follow these directions and got carried away with the observations that the utility must not gain or loose on account of income tax made in the context of grossing up of income tax. It simply allocated the actual tax paid by the Appellant, for the company as a whole, in proportion to their respective book profit.***

59. The issue is decided accordingly. The

Commission is directed to reassess the Income tax liability of the Appellant as per our findings above and issue consequential orders.

70. From the afore-quoted judgment, it is clear that the tax assessment of the regulated business must be done on standalone basis and if, tax as per the regulations is to be considered on applicable basis, it cannot be considered on actual basis."

[Emphasis supplied]

223. It is evident that the Commission has not followed these directions and got carried away with the observations that the utility must not gain or lose on account of income tax made in the context of grossing up of income tax. It simply allocated the actual tax paid by the Appellant, for the company as a whole, in proportion to their respective book profit; therefore, there is no consideration of choosing different methodologies and deciding the lower of those.

224. In any event, whether the tax to be allowed on RoE or the actual Tax paid has to be consistent. Either it is on RoE or actual. The 'lesser of the two' as adopted by the Commission is not only contrary to the above noted

Judgments of this Tribunal but also contrary to the regulations framed by the Commission itself.

225. Hence the Commission is directed to compute and allow the Tax based on ROE. The issue, thus, is decided in favour of the Appellant.

<u>Issue No. 39: Computation of working capital requirement on the basis of net power purchase cost vis-à-vis gross power purchase cost.</u>

226. The issue pertains to the consideration of "receivables" in the computation of working capital requirement for the appellants. To be specific, the controversy is as to whether the "receivables" should be considered based on "revenue billed" or the "trued up ARR".

227. According to the appellants, the receivables for computation of working capital consist of the annual revenues from the tariffs and charges (which is the ARR), as held by the Commission itself in MYT order dated 23.02.2008. It is argued that the said approach of taking two months of approved ARR for computation of working capital was not followed by the Commission in the subsequent tariff order dated 29.09.2015 as well as in the impugned tariff order wherein the Commission has taken a different view by calculating the receivables based on two months of actual average billing on the approved tariff, which is not only contrary to Regulation 5.37 of MYT Regulations, 2007 but also has led to inaccuracies in the working capital computation which has impacted the final assessment as well as overall fairness of tariff determination.

228. Learned counsel for the Commission submitted that the perusal of Regulation 5.37 of MYT Regulations 2007 leaves no iota of doubt with regards to the fact that the working capital is to be deduced on the basis of receivables for two months of revenue obtained from the sale of electricity and thus, the Commission is completely justified in considering the actual billed revenue for computation of working capital instead of cost as provided in the ARR.

229. Relying on the judgments of Supreme Court in <u>BRPL v. DERC 2023 4 SCC 788</u>, the learned senior counsel for the appellants argued that the practice of the Commission in using ARR for computing working capital in the MYT determination order must be applied at the time of truing up also and at the stage of truing up, the Commission cannot change the rules / methodology used in the initial tariff determination. To counter the same, the Commission's counsel submitted that since ARR is trued up at a later stage, linking working capital requirement to ARR may lead to constant revision in the ARR for respective years as the ARR for past periods may get affected due to judgments of the higher courts.

230. We note that the issue has already been settled by the Hon'ble Supreme Court in its judgment dated 18.10.2022 titled *BRPL v. DERC 2023 4 SCC 788*, in which it has been held as under:

> *"66. We have already taken a view that DERC cannot reopen the basis of determination of tariff at the stage of 'truing up'. Revision or redetermination of the tariff already determined by the DERC on the pretext of prudence check and truing up would amount to amendment of tariff order, which is not permissible in law.* ***Truing up stage is not an opportunity for DERC to rethink de novo the basic principles, premises and issues involved in the initial projection of the revenue requirements of the licensee****."*

231. In the instant case, at the time of determination of ARR, the Commission had considered projected monetary value of ARR (i.e., 2 months' of ARR as "receivables") to determine the Working Capital. However, at the time of truing up, the Commission, instead of following the same principle, has considered 2 months' revenue billed. In other words, while determining ARR, the formula used by the Commission is: Receivables = 2 months of ARR.

However, while truing up, the formula used by the Commission is: Receivables = 2 months of revenue billed.

232. This approach is contrary to the principle of law laid down by the Hon'ble Supreme Court and followed by this Tribunal in several cases.

233. In the light of the above, we direct the Commission to compute the working capital for the relevant years by considering the actual approved ARR/ trued-up ARR figures rather than the billing figures and to implement the same with carrying cost.

234. The issue stands disposed off in favour of the appellant.

Issue No. 41A: Amount of carrying cost in tariff considered for purpose of revenue gap. &

Issue No. 51: Carrying Cost not allowed as a separate surcharge.

235. Both these issues relate to the computation of the carrying cost and therefore, are taken together for disposal.

236. Grievance of the appellant under issue no.41A is that the Commission has artificially reduced the revenue gap for two Financial Years i.e. FY 2014-15 and 2015-16 by including the carrying cost on the coal regulatory assets as part of the revenue for these periods. It is submitted that this misallocation reduced the actual revenue gap as well as the carrying cost that should have been based on it. It is also submitted that the Commission has acted contrary to its own affidavit submitted before the Hon'ble Supreme Court in Writ Petition No.104 of 2014 wherein it proposed the recovery of carrying cost through tariff and recovery of principal amount through 8% surcharge.

237. On this issue, it is the submission of the Commission that the contentions of the appellant lack merit for the reason that there is no financial impact of the methodology employed by the Commission and accordingly, there is no adverse effect of the same on the appellants.

238. In so far as issue no.51 is concerned, the grievance of the appellant is that its prayer before the Commission to allow recovery of carrying cost on regulatory assets as a separate surcharge instead of being allowed as part of ARR for FY 2017-18 has not been considered by the Commission. It is submitted that the Commission has not given any finding on these contentions of the appellant and to which extent, the impugned order is a non-speaking order liable to be set aside on this very score.

239. On behalf of the Commission it is argued that while considering the carrying cost to determine the revised ARR for the discoms including the appellants, the Commission hikes the expected revenue for the relevant year to the extent that the carrying cost for that year is realized through such tariff hike. It is submitted that the Commission has devised such mechanism for recovery of carrying cost in two parts in order to try to recover the individual years' carrying cost by way of tariff hike and regulatory asset surcharge as levied at 8% used for amortization of regulatory asset balance. It is further submitted that introduction of additional surcharge to recover the carrying cost, as prayed by the appellants, would lead to practical difficulty in implementation and would create multiple surcharges which is not advisable.

<u>Our Analysis: -</u>

240. The appellant assails the order of the Commission to the extent it excludes carrying cost on the approved regulatory assets at truing-up stage. The Commission, while determining the ARR of the appellant for the years

FY 2014-15 and FY 2015-16, has included “carrying cost” as a component of the ARR but has, at the time of truing-up, excluded the same.

241. Such an approach is contrary to the settled principle of law, as laid down by the Supreme Court in its Judgment dated 18.10.2022 in *BRPL v. DERC, (2023) 4 SCC 788*, the relevant portion of which has already been extracted hereinabove.

242. We, therefore, direct the Commission to:

(a) adjust the amount allowed for carrying cost against the carrying cost incurred on the opening balance of Regulatory Assets during the Financial Year;

(b) retain the ARR principles in Truing Up exercise; and

(c) give consequential relief on other components of ARR after the above adjustments.

243. Considering that the prayer to adjust the amount allowed for carrying cost against the carrying cost incurred on the opening balance of Regulatory Assets during the Financial Year has been allowed, an additional surcharge cannot be allowed in addition to the same.

244. Both the issues stand disposed off accordingly.

Issue No. 42: Approach for truing-up of FY 2016-17.

245. The grievance of the appellants is that the Commission has directed truing up for FY 2016-17 on the basis of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 (in short "MYT Regulations, 2011") when no tariff order had been issued in respect of the FY 2016-17. It is contended that since no tariff order had been issued for FY 2016-17, the appellants had, by default, continued billing for said FY 2016-17 based on the tariff determined for FY 2015-16.

246. The Commission appears to have done so as per Regulation 139 of MYT Regulations, 2017 which is quoted hereinbelow: -

> *"**139.** Performance review and adjustment of variations in the ARR and Revenue for the Utilities for FY 2016-17 shall be considered in accordance with the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff} Regulations, 2011, Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2011 and Delhi*

> *Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail SupplyTariff) Regulations, 2011."*

247. Learned senior counsel appearing for the appellants argued that the Regulation 139 purports to do what is especially prohibited by the Electricity Act, 2003 i.e. to apply MYT Regulations, 2011 retrospectively for FY 2016-17, which is forbidden by this Tribunal as well as Supreme Court in a catena of judgments. It is argued that in the absence of the norms set up by the Commission for tariff determination for FY 2016-17, there arose no occasion for the Commission to true up under the MYT Regulations, 2011 which expired on 31.03.2016, and therefore, truing up for the FY 2016-17 must be based on the actual numbers, subject to prudence check.

<u>Our Analysis:-</u>

248. We note that the 2011 Tariff Regulations, which were applicable up to FY 2014-15, were notified on 19.01.2012. The Commission further extended the 2011 Tariff Regulations for FY 2015-16 also. However, these Regulations were not extended further for FY 2016-17. As such, no Tariff Regulations were in force during the FY 2016-17.

249. It is only on 01.02.2017 that the Tariff Regulations, 2017 came into force. Regulation 139 of Tariff Regulations, 2017 provided that ARR of the distribution utilities for the FY 2016-17 would be determined in accordance with the Tariff Regulations, 2011.

250. It is evident that there was a regulatory gap till 01.02.2017 as neither had the Tariff Regulations 2011 been extended for the FY 2016-17 nor had any fresh regulations been issued by the Commission for the said financial year. Therefore, it was not open and permissible for the Commission to provide by way of Regulation 139 of Tariff Regulations, 2017 (notified on 01.02.2017) that Tariff Regulations, 2011 would be applicable for the FY 2016-17 also i.e. with effect from 01.04.2016. In an attempt to remove the said regulatory gap, the Commission has made applicable the Tariff Regulations, 2017 retrospectively with effect from 01.04.2016 by virtue of Regulation 139 which is not only contrary to regulatory framework but also to the settled principle of law that a subordinate legislation cannot be made applicable retrospectively.

251. Thus, we feel in agreement with the submissions of the learned senior counsel for the appellants that in the absence of any norms set-up by the

Commission for tariff determination for the FY 2016-17, the Commission has erred in truing-up the financials of the appellants for the said FY under MYT Regulations, 2011 which expired on 31.03.2016. The Commission ought to have trued-up the financials of the appellants for the said FY on the basis of actual numbers provided by the appellant, subject to prudence check.

252. Hence, we set aside the findings of the Commission on this issue and direct the Commission to true-up the ARR components for the appellant for FY 2016-17 on the basis of actual figures in the audited statements submitted by the appellant and to consider their impact along with carrying cost.

253. The issue stands decided in favour of the appellant.

Issue No. 44: Financing cost of LPSC from FY 2013-14 to FY 2015-16.

254. The issue relates to treatment given by the Commission to the financing cost of LPSC for FY 2013-14 to 2015-16.

255. Relying upon the judgment of this Tribunal in appeal No.14/2012 BRPL v. DERC 2013 SCC OnLine APTEL 140, the Commission has allowed the appellants the financing cost of LPSC on normative basis i.e. by considering the difference between the LPSC amount and the normative interest (at working capital rate) on the derived principal amount (LPSC divided by rate of LPSC of 18%) as part of Non-Tariff Income (NTI).

256. The grievance of the appellants is that prior to the Commission's letter dated 13.12.2012 and tariff order dated 31.07.2013, LPSC was being levied on consumers for a block period of 30 days and not on the actual days of delay. Said letter dated 13.12.2013 and tariff order dated 31.07.2013 introduced a change in the methodology for levy of LPSC to the effect that the LPSC has to be levied now on the consumer in proportion to the number of days of delay in payment instead of being levied for 30 days en-bloc. It is submitted that the new methodology for levy of LPSC in proportion to the number of days of delay, in essence, was levy of LPSC on an actual basis instead of normative, as done previously, and therefore, the Commission ought to have allowed the appellants to retain the whole amount of LPSC received and not to treat it as NTI.

257. It is argued that since the LPSC is now permitted to be recovered from consumers in proportion to the actual days of delayed payment, financing cost of such LPSC also ought to be computed on the same basis and not for the month as a whole, as was being done previously.

258. The Commission has defended its findings on the ground that the same are in terms of Regulation 5.35 of MYT Regulations, 2011, and the judgment of this Tribunal in appeal No.14/2012.

<u>Our Analysis: -</u>

259. We find that the same issue had come up before us for adjudication in <u>appeal no.301/2015 TPDDL v. DERC</u> decided on 28.01.2025 wherein we held as under:-

> *"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."

260. We find no reason to take a view contrary to that taken by us in the said appeal no.301/2015.

261. Hence, we set aside the findings of the Commission on this issue and direct that the LPSC financing cost shall be added to the ARR and not to the revenue available with the appellants i.e. it shall not be treated as Non-Tariff Income (NTI).

Issue No. 45: Disallowance of monthly billing rebate in ARR.

262. The issue relates to the Commission's disallowance of the amount on rebate granted by the appellants to their consumers based on the number of bills issued during a year.

263. It is submitted on behalf of the appellants that the issue has arisen after the appellants shifted from bimonthly billing to monthly billing after the Commission in tariff order dated 31.07.2013 directed them to provide a rebate to single phase domestic consumers up to 10kW load depending upon the number of bills raised in a year.

264. Learned senior counsel for the appellants argued that in order to secure efficiency and manage the cashflow better than the normative working capital allowed in MYT Regulations, 2011, the appellants had changed their billing cycle from bimonthly to monthly billing for domestic consumers in FY 2013-14. He pointed out that the Commission by tariff order dated 31.07.2013 had introduced a sliding scale rebate system for FY 2014 based on number of bills issued in a particular FY which is not only violative of Article 14 of the Constitution of India but also extraneous to the relevant factors set out in Section 62(4) of the electricity Act as well as an attempt by the Commission to micro manage the affairs of the appellants which is impermissible. Notably as is pointed out by learned senior counsel, the tariff order dated 31.07.2013 is the subject matter of appeal Nos.265-266/2013 pending disposal before this Tribunal.

265. It is argued that instead of rectifying the errors in the tariff order dated 31.07.2013, as pointed out in the above noted appeals, the Commission vide impugned order has, while truing up the working capital requirement of the appellants for FY 2014-15 and FY 2015-16, not allowed recovery of the rebate granted by them to the consumers based on the number of bills. It is submitted that the approach of the Commission is against the spirit of Regulation 4.21 of MYT Regulations, 2011 which provides that any surplus or deficit of working capital shall be to the benefit of the appellants and shall not be trued up in the ARR. It is argued that the appellants attempted to align their working capital requirement, as allowed by the Commission in MYT Regulations, 2011, with the actuals by shifting from bimonthly to monthly billing system and instead of allowing the appellants to retain the benefit of this shift, the Commission has by way of this impugned order taken away the benefits available to the appellants.

266. On behalf of the respondent Commission, it is argued that similar issue was raised before this Tribunal in appeal no.271/2013 also which was decided against the distribution company (TPDDL in that case) and those findings of the Tribunal squarely apply to the instant case also.

Our Analysis: -

267. We have perused the judgment of this Tribunal dated 20.07.2016 in Appeal no.271/2013 Tata Power Delhi Distribution Limited v. DERC. We find that similar contentions were raised by the distribution company TPDDL (appellants in that case) in that appeal on the similar issue being Issue No.33 in that appeal which were repelled by this Tribunal in the following words: -

> *"39.1) The main contention of the appellant in support of this issue is that the appellant has the option to change the monthly billing cycle and the appellant during FY 2013-14 is billing single phase domestic consumers in 45 days cycle rather than earlier billing cycle of 60- days followed by the appellant. The appellant claims to have changed the billing cycle of the consumers for the benefit of consumers and the ground is that the consumers would not be burdened by higher amount at once. Further contention of the appellant is that neither the MYT Regulations 2011 for the second control period nor MYT order 13.07.2012 stipulates any rebate to single phase domestic consumers up to 10 kV, hence, the said finding of the Delhi Commission is against law. We are unable to accept the contentions of the appellant on this issue of change of billing cycle because the learned Delhi Commission has rightly and legally directed the distribution utilities like the appellant to allow rebates depending on number of bills raised during the financial year and the interest cost at SBI PLR at 14.45% for the average number of days*

> *for which the billing has been advanced in respect of single phase domestic consumers (up to 10 kV) at the end of the each financial year. If one option is exercised by the appellant then its consequences are to be suffered by the appellant and not by the consumers. We are not inclined to accept the point that if the billing cycle is reduced, the meter reading, bill printing and bill distribution and other expenses are also increased for the appellant because the same are directly linked with number of billing cycles, for this purpose in terms of MYT Regulations, the O&M cost is allowed to the appellant on normative basis. In view of the above discussion, we fully agree and approve the reasons given by the Delhi Commission and the findings recorded on this issue and consequently this issue relating to rebate is decided against the appellant."*

268. We have been informed by the learned counsel for the Commission that the said judgment of this Tribunal was assailed by TPDDL in the Supreme Court by way of Civil Appeal No.11251 of 2016 which has been dismissed vide order dated 10.02.2017. Therefore, the judgment of this Tribunal dated 20.07.2016 has become final on this issue.

269. Accordingly, we hereby affirm the findings of the Commission on the issue under consideration. The issue is hereby decided against the appellants.

<u>Issue No. 46: Loans not approved from FY 2009-10.</u>

270. According to the appellants, the Commission had failed to approve the loans obtained by them since FY 2008-09 even after the submission of all the requisite data as desired by the Commission from time to time.

271. On behalf of the Commission, it was submitted that the Commission has already finalized the capitalization up to FY 2017-18 vide tariff order dated 19.07.2024 and accordingly the loans availed by the appellants for finalizing of capitalization, working capital and revenue cap have already been considered to be approved in the said tariff order.

272. Accordingly, we direct the Commission to pass a final order approving the loan taken by the appellants expeditiously, preferably within two months from the date of this order. The issue stands disposed off accordingly.

<u>Issue No. 47: Directive on adjustment billing to be capped at 1%.</u>

273. The appellants are aggrieved by imposition of a cap on adjustment billing at 1% of the energy sales by the Commission by way of the impugned order dated 31.08.2017. According to the appellants, this directive is not only arbitrary but also in the teeth of applicable laws including the regulations framed by the Commission.

274. We may clarify that "adjustment billing" refers to the corrections, changes or modifications to bills issued to consumers, inter alia, to reflect a change of position or a state of affairs which did not exist as on the date when the bill was issued or to correct a genuine error.

275. Learned senior counsel for the appellant argued that the Commission, while specifying the cap on 1 % on adjustment in billing, has failed to acknowledge the fact that appellants are obligated to make adjustments based on consumer's request in accordance with the Supply Code 2017. It is pointed out that in Sl.No.6 of Schedule-II of Supply Code, 2017, the Commission has allowed billing mistake up to a limit of 0.2% of the total numbers of bills issued. Hence, it is argued, the impugned directive is contrary to and runs in the teeth of the Supply Code, 2017.

276. Learned counsel for the Commission argued that during prudence check, it came out that the appellants were involved in provisional billing on a higher side and therefore, in order to streamline the process and for efficiency, the Commission imposed cap of 1% for adjustment. It is submitted that the directives of the Commission in this regard are in the public interest and for the benefit of the consumers.

277. Learned senior counsel for the appellants argued that the Commission itself in subsequent tariff order dated 28.08.2020 for the FY 2020-21 has watered-down the 1% cap by observing that:-

> "*6.8 The Commission directs the Petitioner to restrict the adjustment in units billed on account of delay in meter reading, raising of long duration provisional bills etc. to a maximum of 1% of total units billed. The adjustment in units billed shall be considered on a yearly basis. Further, the adjustment of Contra Entry, adjustment for Open Access consumers and adjustment on account of Provisional Billing related to period till two (2) months shall not be form the part of adjustment in units billed. Further, also the real adjustments/other adjustments shall be considered without sign change i.e. such adjustments either resulting into increase in revenue billed or decreased into revenue billed shall be considered on gross basis rather than net basis.*"

278. It is evident from the above quoted portion of the tariff order dated 28.08.2020 that the Commission has diluted the directive regarding 1% cap on the adjustment billing with regards to the adjustment of contra entry, adjustment for open access consumers and adjustment on account of provisional billing related to period till two months. The Commission has further clarified that the real adjustment / other adjustment shall be considered without sign change i.e. such adjustment either resulting into increase in revenue billed or decrease in the revenue billed shall be considered on gross basis rather than net basis.

279. The learned senior counsel for the appellants submitted that the watering down of the impugned directive issued vide impugned order dated 31.08.2017 by way of the subsequent tariff order dated 28.08.2020 clearly indicates that the impugned directive was arbitrary and lack in sound reasoning and therefore the same ought to be set aside.

280. We regret that the Commission has not put forth any reasons or explanations for diluting the impugned directive regarding 1% cap on adjustment billing issued vide impugned tariff order dated 31.08.2017 by the subsequent tariff order dated 28.08.2020. In the absence of any reasoning /

explanations at all on behalf of the Commission, we are constrained to accept the submissions of the learned senior counsel for the appellant that the same has been done as the Commission itself found the impugned directive arbitrary and without any sound basis.

281. Hence, we have no hesitation in setting aside the impugned directive regarding 1% cap on adjustment billing issued vide impugned tariff order dated 31.08.2017. We direct that the relaxation provided by the Commission in this regard in the tariff order dated 28.08.2020 shall be read into the impugned tariff order dated 31.08.2017 also and shall be applicable from the FY 2017-18 onwards.

Issue No. 48: Pension Trust Fund [Directive].

282. The appellants are aggrieved by the observation of the Commission in the impugned tariff order to the effect that the disputes related to the terminal benefits including pension between the appellants, and their employees are not under the jurisdiction of the Commission.

283. During the course of arguments, the learned senior counsel for the appellants fairly submitted that the issue may be disposed off without giving any finding and leaving open all the contentions of the appellants on facts as well as on law to be agitated at an appropriate stage.

284. The learned counsel for the Commission stated that he is not averse to the said submission on behalf of the appellants.

285. Accordingly, we refrain from giving any findings on the instant issue and leave open all the contentions of the appellants on facts as well as on law to be agitated by them at appropriate stage as and when they find it necessary to do so.

286. The issue stands disposed off accordingly.

Issue No. 49: Directive on Short Term Guidelines and disallowance of power procurement exceeding Rs. 5 per unit.

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

(a) For BRPL:

"IMPACT DUE TO SHORT TERM POWER PROCUREMENT AT MORE THAN RS. 5.00/KWH

3.513 The Commission in its Tariff Order dtd. 23/07/2014 and 29/09/2015 for ARR of FY 2014-15 *and FY 2015-16 has directed the Petitioner as follows:*

> *6.12. The Distribution licensee is directed to take necessary steps to restrict the cost of power procured through short term contracts at Rs.5 per kWh. Further in case of short term power purchase at a rate higher than the above ceiling rate (of Rs.5 per kWh), the impact of such purchase on total short term power purchase shall not exceed 10 Paise/kWh during the financial year. In case the cost of power proposed to be procured exceeds the above limits, this may be brought to the notice of the Commission within 24 hours detailing the reasons or exceptional circumstances under which this has been done. The Commission reserves the right to restrict allowance to the permissible limit if proper justification is not provided.*

3.514 In view of above direction, during prudence check session, the Commission directed the Petitioner to provide information related to short term power purchase at a rate higher than the ceiling rate of Rs. 5.00/kWh.

3.515 As per Petitioner's Submission vide letter

ref.: RA/2017-18/01/A165 dated 10/07/2017, the Commission observed that petitioner procured total 153.27 MU at a costof Rs. 94.85 Cr *on various occasions at the rate of more than Rs. 5.00/kWh for FY 2014- 15 and the impact of such purchases on total short term power purchase exceeded 10 paise/kWh at its periphery which leads to violation to the above mentioned directive in FY 2014-15. The detailed calculation is as follows:*

Table 144: Impact of Short term power procured at above Rs 5/kWh during FY 2014-15

Sr. No.	***Particulars***	***Units (MU)***	***Slot wise landed cost at DISCOM periphery (Rs.)***
A	*Total Short Term Power Purchase (STPP)*	*1506*	*636*
B	*Rate for Total STPP at Sr. No. A*		*4.22*
C	*STPP @ more than Rs. 5.00/kWh*	*153.27*	*94.85*
D	*Short Term Power Purchase cost excluding power purchase Cost where it crossed Rs. 5 per kWh*	*1352.73*	*541.15*
E	*Rate for STPP at Sr. No. 4*		*4.00*
F	*Impact for STPP @ more than Rs. 5.00/kWh*	*153.27*	*0.22*
G	*Short Term Power Purchase Cost dis-allowance on account of violation of Commission's directive*	*153.27*	*1.88*

3.516 Therefore, the Commission has decided to ***disallow Rs 1.88 Cr. on account of violating the Commission's directive regarding short term power purchase at a rate higher than the ceiling rate of Rs. 5.00/kWh*** *whose impact exceeded 10 paise/kWh at Petitioner's periphery.*

3.517 No violation of short term power purchase at a rate higher than the ceiling rate of Rs. 5.00/kWh whose impact exceeded 10 paise/kWh at Petitioner's periphery was observedin FY 2015-16."

*"**6.10.** The Commission further directs the distribution licensee:*

[..]k. To strictly adhere to the guidelines on short-term power purchase/sale of power issued by the Commission from time to time and to take necessary steps to restrict the costof power procured through short term contracts at Rs.5 per kWh. In case the cost of power proposed to be procured exceeds the above ceiling limit, this may be brought to the notice of the Commission within 24 hours detailing the reasons or exceptional circumstances under which this has been done. In the absence of proper justification towards short term power purchase at a rate higher than the above ceiling rate (ofRs.5 per kWh), theCommission reserves the right to restrict allowance of impact of such purchase on total short term power purchase not exceeding 10 Paisa /kWh during the financial year;"

(b) **For BYPL**

*“**3.471** The Commission in its Tariff Order dtd. 23/07/2014 and 29/09/2015 for ARR of FY2014-15 and FY 2015-16 has directed the Petitioner as follows:*

> *“6.12. The Distribution licensee is directed to take necessary steps to restrict the cost of power procured through Short Term contracts at Rs.5 per kWh. Further in case of Short Term power purchase at a rate higher than the above ceiling rate (of Rs.5 per kWh), the impact of such purchase on total Short Term power purchase shall not exceed 10 Paise /kWh during the financial year. In case the cost of power proposed to be procured exceeds the above limits, this may be brought to the notice of the Commissionwithin 24 hours detailing the reasons or exceptional circumstances under which this has been done. The Commission reserves the right to restrict allowance to the permissible limit if proper justification is not provided.”*

***3.472** In view of above direction, during prudence check session, the Commission directed the Petitioner to provide information related to Short Term power purchase at a rate higher than the ceiling rate of Rs. 5.00/kWh.*

3.473 *As per Petitioner's submission vide e-mail dated 27/03/2017, the Commission observed that Petitioner procured total 56.40 MU at a cost of Rs. 35.66 Cr on various occasions at the rate of more than Rs. 5.00/kWh for FY 2014-15 and the impact of such purchases on total Short Term power purchase exceeded 10 paise/kWh at its periphery which leads to violation to the above mentioned directive in FY 2014-15. The detailed calculation is as follows:*

Table 139: Calculation of disallowance-Impact for STPP @ more than Rs.5.00/kWh

Sr. No.	Particulars	Units (MU)	Slot wise landedcost at DISCOMpoint	Remarks
A	Inter DISCOM Transfer (IDT)	6.07	1.52	Table
B	Bilateral	100.03	40.90	Table
C	Exchange	274.05	120.28	Table
D	Total Short Term Power Purchase	380.15	162.70	(A+B+C)
E	Rate for STPP at Sr. No. 4		4.28	
F	STPP @ more than Rs. 5.00/kWh	56.40	35.66	Petitioner's Email
G	Short Term Power Purchase (STPP) cost excluding power purchase Cost where itcrossed Rs. 5 per KWH	323.75	127.04	(D-F)
H	Rate for STPP at Sr. No. 7		3.92	
I	Impact for STPP @ more than Rs.5.00/kWh	56.40	0.36	(E-H)
J	Short Term Power Purchase Cost disallowance on account of violationof Commission's directive	56.40	1.44	[(0.36-0.10)*56.40]/10

3.474 *Therefore, the Commission has decided to* ***disallow Rs. 1.44 Cr. on account of violation the***

<u>Commission's directive regarding Short Term power purchase at a rate</u> <u>higher than the ceiling rate of Rs. 5.00/kWh</u> *whose impact exceeded 10 paise/kWh at Petitioner's periphery.*

3.475 *No violation of Short Term power purchase at a rate higher than the ceiling rate ofRs. 5.00/kWh whose impact exceeded 10 paise/kWh at Petitioner's periphery was observedin FY 2015-16."*

*"**6.10.** The Commission further directs the distribution licensee:*

[..]k. To strictly adhere to the guidelines on short-term power purchase/sale of power issued by the Commission from time to time and to take necessary steps to restrict the costof power procured through short term contracts at Rs.5 per kWh. In case the cost of power proposed to be procured exceeds the above ceiling limit, this may be brought to the notice of the Commission within 24 hours detailing the reasons or exceptional circumstances under which this has been done. In the absence of proper justification towards short term power purchase at a rate higher than the above ceiling rate (ofRs.5 per kWh), the Commission reserves the right to restrict allowance of impact of such

purchase on total short term power purchase not exceeding 10 Paisa /kWh during the financial year;"

288. Thus, the Commission has disallowed Rs.1.88 crores in case of BRPL and Rs.1.44 crores in case of BYPL on account of violation of the Commission's directive issued in the tariff order dated 23.07.2014 and 29.09.2015 regarding short-term power purchase at a rate higher than the ceiling rate ofRs.5/kWh.

289. The grievance of the appellants is two-fold. Firstly, the said directive restricting the cost of power procured through short-term contracts to Rs.5/kWh is unreasonable as well as impracticable and secondly, the Commission has failed to consider the justifications furnished by the appellants for resorting to short-term power purchase at a rate higher than the ceiling rate of Rs.5/kWh.

290. The Commission argues that it is empowered to issue guidelines for power procurement by the distribution companies from time to time and any power purchased in violation of those guidelines shall have to be considered illegal in view of Regulation 5.25 of MYT Regulations, 2011. It is further submitted that the object and rationale for restricting the cost of power procured through short-term contracts to Rs.5/kWh was that the Average

Power Purchase Cost (APPC) assessed during the FY 2011-12 was Rs.4.36/kWh and keeping in mind the fluctuation in APPC rates which may go downwards or upwards, ceiling of Rs.5/kWh was found reasonable.

291. Learned senior counsel for the appellants has drawn our attention to letter dated 10.07.2017 sent by the appellants to the Commission explaining therein the justification for resort to short-term power purchase and submitted that the Commission has ignored the justification furnished by the appellants while disallowing the short-term power purchase at the rate higher than the ceiling rate of Rs.5/kWh.

Our Analysis:-

292. There is no gainsaying that the Commission is within its powers and authority to issue guidelines for power procurement by the distribution companies. Regulation 5.25 of MYT Regulations, 2011 provides as under:-

> *"5.25 While approving the cost of power purchase, the Commission shall determine the quantum of power to be purchased from various sources in accordance with the principles of merit order schedule and despatch based on a ranking of all*

*approved sources of supply in the order of their variable cost of power purchase. All power purchase costs shall be considered legitimate unless it is established that the merit order principle has been violated or power has been purchased at unreasonable rates or **<u>the power procurement guidelines as laid down by the Commission from time to time has not been followed.”</u>***

293. Thus, the Commission is authorized to determine the quantum of power to be purchased by distribution company from various sources.

294. The basis for fixing the ceiling of Rs.5/kWh for short-term power purchase given by the Commission appears to be reasonable and justified. Since, the Commission found APPC during the FY 2011-12 as Rs.4.36 per unit, it fixed the ceiling rate of Rs.5/kWh for short-term power purchase in the tariff order dated 23.07.2014 and 29.09.2015 which is much higher than the APPC for the FY 2011-12. The Commission appears to have taken into account the fluctuations in APPC rates while fixing the said ceiling rate for short-term power purchase.

295. At the same time, the Commission also provided a window to the distribution companies to bring to the notice of the Commission any power purchase at a rate exceeding the ceiling rate of Rs.5/kWh to its notice within 24 hours along with a reason or exceptional circumstances under which the said purchase has been done. It is therefore, manifest that the ceiling rate of Rs.5/kWh for short-term power purchase was not absolute. There is scope of relaxation in this regard to the distribution companies upon providing reasons for purchase of power through short-term at a rate higher than the ceiling rate.

296. Hence, we are unable to countenance the submissions of the learned senior counsel for the appellants that the said restriction is unreasonable or impracticable.

297. Having said so, we find that the Commission has totally ignored the justification given by the appellants vide letter dated 10.07.2017 for indulging in short-term power purchase at a rate higher than the ceiling rate of Rs.5/kWh. Once, the appellants had furnished the reasons or the circumstances under which they resorted to short-term power purchase at a rate higher than the ceiling rate, it was obligatory for the Commission to consider the same before disallowing the cost of said short-term power purchase. It goes without saying that the Electricity Regulatory Commission, while issuing a tariff order, discharges adjudicatory functions and therefore, has to be fair, objective, non-arbitrary and transparent. In the words of the Supreme Court in India Oil Corporation Ltd. v. Shashi Prabha Shukla (2018) 12 SCC 85, any decision or action of an adjudicatory authority or any public authority contrary to these fundamental precepts would be at the pain of invalidation thereof.

298. In the instant case, we find that the Commission has miserably failed to discharge its adjudicatory function in a fair, objective and transparent manner. It has completely overlooked the justification given by the appellants for resorting to short-term power purchase at a rate higher than the ceiling rate. Therefore, the impugned findings of the Commission on this issue cannot be sustained. The same are hereby set aside.

299. The Appellant had placed detailed justifications in support of its short-term purchases, and the Impugned Order is completely silent as to why the Appellant's justifications have not been considered. The disallowances over Rs.5/unit are to be made only in the event the Commission concludes that the Appellant's justifications are insufficient. In the present case, the impugned Order is completely silent as no such finding has been recorded by the

Commission. The Commission has disallowed the short-term power purchase made by the appellant merely on the ground that those were over the prescribed ceiling. Similar issue had arisen before this Tribunal in appeal No.301 of 2015, in which it has been observed as under:

> *"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.”*

300. In this case, the appellants vide letter dated 10.07.2017 had provided reasons and justifications for indulging in short-term power purchase at a rate higher than the ceiling rate of Rs.5/kWh. These have been totally ignored by the Commission. Once the appellants had furnished reasons for engaging in short-term power purchase at a rate higher than the ceiling rate, it was obligatory upon the Commission to consider the same before disallowing the cost of such short-term power purchase. It goes without saying that the Electricity Regulatory Commission, while issuing a tariff order, discharges adjudicatory functions and therefore, has to act in a fair, objective, non-arbitrary and transparent manner. In the words of Hon’ble Supreme Court in Indian Oil Corporation Limited v. Shashi Prabha Shukla (2018) 12 SCC 85, any decision or action of an adjudicatory authority or any public authority contrary to these fundamental precepts would be at the pain of invalidation of thereof.

301. We have considered the reasons/justifications given by the appellants vide letter dated 10.07.2017 for indulging in short-term power purchase at a rate higher than the ceiling rate of Rs.5/kWh and find the same satisfactory.

302. Therefore, the Impugned Order cannot be sustained on this count. The Commission is directed to reverse the penalty imposed upon the Appellant and to allow the short term power purchases made by the appellant above the prescribed ceiling along with carrying cost.

303. The issue stands decided in favour of the appellant.

Issue No. 53: Correction in Opening Balance of Consumer Contribution.

304. This issue relates to the treatment given by the Commission to consumer contributions received by the appellants in the ARR of the appellants. The issue has following three limbs:-

(a) Consideration of an incorrect number of opening balance of consumer contribution;

(b) refund of unutilized consumer contribution; and

(c) re-casting of ARR on account of refund of unutilized consumer contribution.

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

(a) **For BRPL**: -

"CORRECTION IN OPENING BALANCE OF CONSUMERCONTRIBUTION IN OPENING RRB

PETITIONER'S SUBMISSION

3.359 The Hon'ble Commission vide mail dated March 24, 2015 directed the Petitioner to submit the consumer contribution data duly audited in a specified format. The Petitioner vide letter dated May 7, 2015 submitted the data duly certified by Auditor with respect to consumer contribution. However the Hon'ble Commission did not assigned any reason for not considering the same in Tariff Order dated September 29, 2015. Since the Hon'ble Commission allowed the funding of capital expenditure instead of capitalisation during Policy Direction Period, i.e., FY 2002-03 to FY 2006- 07, the Petitioner has considered the actual consumer contribution and grants received till FY 2006-07.

3.360 Further the Hon'ble Commission has shifted from RoCE approach to ROE approach during MYT Regime, i.e., from March 1, 2008 onwards. The actual consumer contribution and grants capitalised till FY 2006-07 is Rs. 39.53 Crore and Rs. 18.63 Crore respectively. The Petitioner has accordingly considered the

same for the purpose of computation of depreciation and RoCE.

COMMISSION'S ANALYSIS

3.361 The ***Commission vide its order dated 23/12/2015 has already directed the Petitioner to refund the balance of consumer contribution collected by the Petitioner during FY 2002-03 to FY 2006-07 which has been offered by the Petitioner as means of finance during FY 2002-03 to FY 2006-07 and submit its claim on account of total amount refunded to the respective consumers during each year for recasting of ARR by the Commission****. Though, the Petitioner has submitted the total amount to be refunded in each year, however he is yet to indicate the status of refund to these consumers as well as the continuity of those consumers so as to determine the impact in ARR."*

(b) **For BYPL**: -

"CORRECTION IN OPENING BALANCE OF CONSUMERCONTRIBUTION IN OPENING RRB

PETITIONER'S SUBMISSION

3.318 The Petitioner has mentioned that the

Commission vide mail dated March 24,2015 directed the Petitioner to submit the consumer contribution data duly audited in a specified format. The Petitioner vide letter dated March 20, 2015 submitted the _data duly certified by Auditor with respect to consumer contribution. However the Hon'ble Commission did not assigned any reason for not considering the same in Tariff Order dated September 29, 2015. Since the Hon’ble Commission allowed the funding of capital expenditure instead of capitalisation during Policy Direction Period, i.e., FY 2002-03 to FY 2006-07, the Petitioner has considered the actual consumer contribution and grants received till FY 2006-07.

3.319 The Petitioner has stated that Commission has shifted from RoE approach to RoCE approach during MYT Regime, i.e. from· March 1, 2008 onwards. The actual consumer contribution and grants capitalised till FY 2006-07 is Rs. 8. 71 Crore and Rs. 16.22 Crore respectively. The Petitioner has accordingly considered the same for the purpose of computation of depreciation and RoCE.

3.320 The Petitioner requested the Hon'ble

Commission to allow the same in the ARR.

COMMISSION'S ANALYSIS

3.321 ***The Commission vide its order dated 23/12/2015 has already directed the Petitioner to refund the balance of consumer contribution collected by the Petitioner during FY 2002-03 to FY 2006-07 which has been offered by the Petitioner as means of finance during FY 2002:03 to FY 2006-07 and submit its claim on account of total amount refunded to the respective consumers during each year for recasting of ARR by the Commission****. Though, the Petitioner has submitted the total amount to be refunded in each year, however he is yet to indicate the status of refund to these consumers as well as the continuity of those consumers so as to determine the impact in ARR."*

In re. (a) Consideration of an incorrect number of opening balance of consumer contribution:-

306. Perusal of the impugned findings of the Commission, as noted hereinabove, would reveal that the Commission has not rendered any finding on this limb of the issue despite submissions made in this regard by the appellants. Therefore, we direct the Commission to give its findings on the same in accordance with the applicable regulations and accounting standards upon considering the contentions of the appellants.

In re. (b) Refund of unutilized consumer contribution:-

307. Concededly, this aspect of the issue has been considered and adjudicated upon by this Tribunal in judgment dated 31.08.2021 in Appeal nos. 5 & 6 of 2019 and Appeal no.34/2020 wherein this Tribunal held that the unutilized consumer contribution to be refunded to the concerned consumers will be allowed to be recovered first and thereafter be refunded to consumers as a cost in the ARR and then to be refunded to the respective consumers. The operating part of the said judgment in appeal no.24/2020 is quoted hereinbelow:-

> *"135. As per this procedure, the Commission will call upon the DISCOMs to furnish data in a specified format within one week of the passing of the order by this Tribunal. The data, inter alia, would consist of an Auditor Certificate clearly stating the Consumer wise Consumer Contribution received every year, spent during every year on Capital Investment activities (showing the break-up of assets capitalised and amount lying in WIP),*

balance at the end of every year and total for all consumers matching with Balance Sheet, Relevant Schedules and Tariff Orders. ***The DISCOMs shall submit this data within a period of two weeks thereafter. The Commission, thereafter, in compliance with the judgment dated 23.02.2015 will consider the information submitted by the DISCOMs and will provide the unspent Consumer Contribution to be refunded by the DISCOMs as an expenditure in the subsequent Tariff Order as directed by the Tribunal, which will be recovered through Tariff and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.****"*

308. The submission of the appellants is that they had provided all the requisite details to the Commission by way of letters dated 21.09.2021 and 15.03.2022 but the Commission is yet to implement the directions given by this Tribunal in the said judgment.

309. In view of the same, we direct the Commission to strictly implement the directions of this Tribunal contained in the above noted judgment in appeal no.34/2020 and to provide impact of the same to the appellants within one month from the date of this judgment.

In re. (c) re-casting of ARR on account of refund of unutilized consumer contribution:-

310. This limb of the issue under consideration had also come up before this Tribunal in Appeal no.34/2020 decided on 31.08.2021 wherein this Tribunal had upheld the stand of the Commission in the following words:-

> *"137. As regards to the* ***contention of the Appellants regarding the recasting of the ARR of previous years, we have gone through the submissions made by all the counsel representing the Appellants and the Respondent Commission and we are convinced by the submission of the Commission wherein it has been submitted that this could result into undue windfall gain to the DISCOM wherein DISCOMs will earn Return on Equity on a component of equity which actually has not been invested by the DISCOMs.***
>
> *138. The fact is that* ***the unspent consumer's contribution has been used as a 'means of***

finance' in the previous years starting from FY 2002-03 and the same has not been refunded till date. Even if, suppose the ARRs of the previous years are recasted then also the amounts of debt and equity invested by the Appellants in the respective years would remain unchanged as per actual investment done in the respective years, the exercise of recasting cannot change into something which has not happened at all. *It is wrong even to conceive that the amount of debt and equity will be enhanced to the extent of 70% and 30% of the unspent consumer contribution respectively. The fact is the unspent consumer contribution was used as a 'means of finance' in the earlier ARRs from FY 2002-03 and the same would now be considered, subject to verification by the DERC, as an expenditure in future ARRs. By doing this the Commission will be correcting the error, happened in the past, by considering this as an expenditure in the future ARRs. The unspent consumer contribution which should have been refunded after the certification by Electrical Inspector and should not have been used as a 'means of finance' in the previous ARRs. The Commission is correcting that error by refunding this amount to whom it belongs by recovering it as an expenditure in the future*

ARRs. The party effected in this whole process is the consumer from whom the contribution was collected and the unspent consumer contribution was not refunded in time. The Appellants cannot be allowed for any undue gains on account of this error. By correcting the error, by way of refunding the unspent consumer contribution to the identified consumer to whom it belongs, to whom it should have been paid in the past after the certification by the Electrical Inspector, the DISCOMs will not be at any loss. ***The DISCOMs have already been allowed the Return on Equity in the ARRs of the respective years on the actually equity invested by them.***

139. ***In view of the above, we are convinced with the submission of the DERC that allowing such kind of gain as sought by the Appellants by recasting the ARRs of the previous years, Return on Equity on a component of equity which has not actually been invested by DISCOMs is illogical, unfair, not in the interest of consumers, not as per the law and need not be considered. Accordingly, this contention of the Appellants is rejected.****"*

311. Learned senior counsel for the appellants submitted that these findings of this Tribunal have been assailed before the Supreme Court in Civil Appeal nos.41-43/2022 which is still pending adjudication.

312. Therefore, we refrain from giving any findings on this aspect of the issue as the same would be covered by the outcome of the above noted Civil Appeal pending disposal before the Hon'ble Supreme Court.

313. The issue stands disposed off accordingly.

Issue No. 55: Penalty on account of RPO Compliance from FY 13 – FY 16.

314. The issue relates to the penalty imposed by the Commission upon the appellants by way of the impugned order for non-fulfilment of the Renewable Purchase Obligation (RPO) during the period from FY 2012-13 to FY 2015-16. The penalty amount, so levied, is Rs.28.43 crores in case of BRPL and 15.79 crores in case of BYPL.

315. Learned senior counsel for the appellants would argue that such imposition of penalty by the Commission for non-fulfilment of RPO is contrary to the judgment of this Tribunal dated 04.05.2009 in Appeal No.71/2007 titled MSEDCL v. MERC & Ors. wherein this Tribunal has clearly held that the tariff determination process cannot be utilized to introduce a penal mechanism. It is further submitted that while imposing such penalty the Commission has acted contrary to the mandate and procedure prescribed under Section 142 of the Electricity Act as also specified in Regulation 11 of RPO Regulations, 2012.

316. On behalf of the Commission, it is argued that the Commission has clarified in its subsequent order dated 18.09.2019 passed in petition no.19/2014 that disallowance of cost of REC for not achieving RPO targets by the Discoms while truing up the ARRS for them, is only a fiscal measure and should not be misunderstood as penalty of any sort. It is stated that despite relaxation in the disallowances given in the said order dated 18.09.2019, the appellants have failed till date to meet the RPO of the FY 2012-13, and therefore, they are not entitled to any relief at all.

<u>Our analysis:-</u>

317. With regards to the issue under consideration, we find the following observations of this Tribunal in <u>Appeal no.71/2007 MSEDCL v. MERC & Ors.</u> Decided on 04.05.2009 very pertinent:-

“13) We have carefully considered the views expressed by the two sides and examined the facts placed before us. The alleged difficulties in implementing the load shedding protocol, as reproduced in paragraph 4 above, can certainly not be valid excuses for violating the protocol. Yet we are unable to approve of the action taken by the Commission to deal with the violation. The striking feature of this case is that the disallowance of Rs.96 Crores is in the nature of penalty, not on account of inefficiency but on account of an act perceived as disobedience. ***The purpose of determining the ARR and designing the tariff is to regulate power purchase, supply and distribution in an equitable manner*** so that the consumer is able to get the power at the price reflecting the cost while the distributor is able to recover the cost of supply along with the normal profit. The sole attention of the Commission while doing this exercise is to balance the cost of procurement and the revenue.

The Commission has to be alert all the time that no distribution licensee is able to pass on to the consumers any cost unwisely or inefficiently incurred. At the same time the Commission has to see that the distribution licensee can survive in the *business by getting the due returns and the cost.* ***The Commission has to be entirely objective, dispassionate and professional in its approach in doing this tedious exercise. The Electricity Act has sufficient provision for handling the situation of disobedience. As already mentioned above, section 142, gives the Commission, power for punishment in such a situation. The Commission is a creation of the statute. Even if such power given is considered by the Commission to be insufficient the Commission cannot convert its power of tariff fixation given by section 61 and 62 of the Electricity Act 2003 into a proceeding for imposing penalty. …*** *"*

318. We find ourselves in complete agreement with these observations of this Tribunal in the said judgment. There can be no gainsaying that the process of tariff fixation under Sections 61 & 62 of Electricity Act, 2003 cannot be utilized by the State Electricity Commissions to impose penalty upon the distribution licensees for non-fulfilment of renewable purchase obligations. It seems that the Commission itself realized the said error and accordingly clarified in order dated 18.09.2019 passed in petition no.19/2014 as under:-

> *"22. The Commission vide Tariff order dated 31.08.2017 has disallowed 10% of the cost of REC for under achieving of RPO targets by the Respondent Discoms.*
>
> *…*
>
> ***23.** In the ARRs of the Discoms, the cost of RECs to meet the RPO for respective financial years had been provided, nonetheless the Respondent Discoms failed to meet their RPO targets and therefore 10% of cost of REC has been temporarily disallowed while truing up the ARRs of the Discoms. The 10% cost of RECs, disallowed in true up, shall be allowed to the Discoms once they meet the RPO. Such disallowance is a fiscal measure and should not be misunderstood as penalty of any sort."*

319. It is true that the appellants have admittedly failed to achieve RPO targets since FY 2012-13. It was argued on behalf of the appellants that during the period between FY 2012-13 and FY 2015-16, the ARR approved by the Commission for the appellants was insufficient to meet the power purchase cost as well as the RPO targets. Learned senior counsel for the appellants further submitted that the appellants have been able to overachieve the RPO targets from the FY 2023-24 onwards and there is surplus available with them which can be utilized towards meeting the RPO targets for the previous years starting from the oldest year in terms of the order dated 18.09.2019 of the Commission passed in petition no.19/2014.

320. In view of these facts and circumstances, as coming out from the submissions of the learned counsels and taking note of the observations of the Commission in the order dated 18.09.2019 in petition no.19/2014, we direct the Commission to implement the said order dated 18.09.2019 from the FY 2012-13 and provide the necessary impact to the appellants accordingly.

321. The issue stands disposed off.

<u>Conclusion:</u>

322. We summarize our decision on all the contested issues (mentioned in Paragraph No.6 in the following table: -

Sl. No.	**Issue No. / Issue**	**Our decision**	**In favour of**
1.	**Issue No.3A:** **Erroneous computation of depreciation for the**	We set aside the findings of the Commission on this issue and remand the issue back to the Commission for fresh	Appellants

	first 11 months of FY 2007-08.	consideration in accordance with the directions issued by this Tribunal in Appeal 142 judgment, Appeal 61 judgment and Appeal 177 judgment and further strictly in accordance with the Regulation 12.1 of the MYT Regulations, 2007.	
2.	**Issue No.3B:** **Non-revision of O&M Expenses from FY 2008-09 to FY 2010-11 not revised in line with FY 2007-08.**	We set aside the findings of the Commission on this issue and remand the issue back to the Commission with the directions to revise the O&M expenses of the appellants for the FYs 2008-09 to 2010-11 as per MYT Regulations, 2007 by applying the inflation factor on the revised base figures for FY 2007-08 determined by the Commission in its tariff order dated 29.09.2015. We also	Appellant

		direct that the consequential financial impact would be granted to the appellants along with carrying cost.	
3.	**Issue No. 4:** **Revision in distribution loss from FY 2007- 08 up to FY 2009- 10.**	We direct the Commission to hear the parties again on this issue and pass a fresh order in the light of the directions passed by this Tribunal in Appeal 36 judgment, Appeal 61 Judgment and Appeal 177 Judgment.	Remanded
4.	**Issue No. 5:** **Directives in relation to regulated power.**	We direct the Commission to allow necessary impact of the present issue to the appellants in the light of observations made hereinabove.	Appellants
5.	**Issue No. 7:**	We direct the Commission to implement the directions given	Remanded

	Non-revision of AT&C Loss for FY 2012-13 to FY 2014-15 **----------------------------** **Issue No. 50:** **AT&C Loss Target for FY 2015-16.**	in the Appeal 177 judgment in letter and spirit and re-determine the AT&C Loss Trajectory for the Second MYT Period by appropriately revising the figures for collection efficiency, and allow consequential impact to the Appellants in tariff along with carrying cost, within two months from the date of this judgment.	
6.	**Issue No. 24B:** **Disallowance of Power Purchase cost on account of contingency reserve to dispose-off surplus power in UI fixed at 3% on gross power purchase.**	The impugned order of the Commission on this issue is hereby set aside. We direct that the contingency limit of 3% per month of gross power purchase through disposed off surplus power in UI cannot be applied while truing up power purchase cost of the	Appellants

		appellants for the previous financial years i.e. FY 2014-15 and 2015-16.	
7.	**Issue No. 24C:** **Disallowance of Power Purchase Cost for FY 2013-14, FY 2014-15 and FY 2015-16 on Account of Overlapping in Banking Transactions.**	We do not find any infirmity in the findings of the Commission on the issue under consideration. Same is decided against the appellants and in favour of the respondent Commission.	Commission
8.	**Issue No. 26:** **Cash limit of Rs. 4000 for payment of electricity bills**	We hold that the Commission was not justified in imposing penalty upon the appellants for accepting cash payments in lieu of the electricity bills of more than Rs.4,000/-. Thus, the penalty so levied upon the appellants is hereby struck down.	Appellants

9.	**Issue No. 27B:** **Consideration of revenue from Sale of scrap as Non-Tariff Income.**	We set aside the findings of the Commission on the issue under consideration and remand the same back to the Commission for fresh consideration in terms of what we have observed hereinabove.	Remanded
10.	**Issue No. 28:** **Commission earned on collection of electricity duty as Non-Tariff Income.**	We set aside the impugned findings of the Commission on this issue and hold that income derived by appellants from collection of Electricity Duty/Tax does not constitute NTI and accordingly, the Commission is directed to allow consequent impact to the appellants along with carrying cost.	Appellants

11.	**Issue No. 30:** **Erroneous computation of Net-worth.** **---------------------------** **Issue No. 52:** **Capping of Equity at 30% and re-opening the Statutory Transfer Scheme.**	The findings of the Commission on these two issues are erroneous and cannot be sustained. The same are hereby set aside. We direct the Commission to scrupulously apply the dispensation referred to by us in case of appellant also.	Appellants
12.	**Issue No. 31A:** **De-capitalisation of assets.**	We note that in the written submissions filed on behalf of the Commission in the instant appeal on this issue, it has been stated that the prayer of the appellants in the context of this issue meets with the approval of the Commission and necessary impact of the same shall be provided to the appellants in the true up	Appellant / Commission

		exercise as per applicable law. It is further stated that in fact, the relief sought by the appellants has already been factored by the Commission in order dated 19.07.2024. In view of the same, no further directions are called for from this Tribunal on the said issue. In case, the appellants feel that their grievance has not been addressed or taken care of in the order dated 19.07.2024 passed by the Commission, they shall be at liberty to raise the issue afresh as per law.	
13.	**Issue No. 31B:**	On behalf of the Commission also, it is contended that the grievances of the appellants	Appellant / Commission

	Physical verification of assets pending since FY 2004-05.	have been redressed by way of these orders dated 03.05.2024 and 19.07.2024 and therefore, nothing remains pending for the consideration of this Tribunal on this issue. In view thereof, the issue is hereby disposed off with liberty to the appellants to seek redress against the orders dated 03.05.2024 and 19.07.2024 as per law, if they so wish.	
14.	**Issue No. 33:** **Consideration of Normative rebate in true up.**	We are unable to sustain the impugned findings of the Commission on this issue. The same are hereby set aside. We reiterate that the rebate earned by the	Appellants

		appellants only up to 1% of the power purchase bills can be deducted from the power purchase cost.	
15.	**Issue No. 34:** **Disallowance of R&M Expenses from FY 2007-08 to FY 2013-14.**	We set aside the findings of the Commission on this issue and remand the same back to the Commission for fresh consideration in terms of the Regulation 4.16(b)(i) of MYT Regulations, 2007 and in line with the subsequent orders dated 03.05.2024 and 19.07.2024 passed by the Commission itself whereby it revised the R&M expenses as per the actual GFA.	Remanded
16.	**Issue No. 35:** **Benchmarking of O&M Expenses.**	The findings of the Commission on this issue are set aside and the issue is remanded back to the Commission for fresh consideration in terms of the	Remanded

		Regulation 4.21(b)(i) of MYT Regulations, 2011 and in the light of the noted two judgments of this Tribunal in appeal No.171/2012 and appeal Nos.177-178/2012.	
17.	**Issue No. 36:** **Fixed Charges against Regulated Power; Rate of Short-Term power procured during period of regulation from FY 2011-12 - FY 2015-16.**	We set aside the impugned findings on this issue and direct the Commission to allow necessary impact of the present issue to the appellants in the light of observations made hereinabove.	Appellants
18.	**Issue No. 37:** **Income-tax from FY 2007-08 to FY 2015-16.**	The Commission is directed to compute and allow the Tax based on ROE. The issue, thus, is decided in favour of the Appellant.	Appellant
19.	**Issue No. 39:**	We direct the Commission to compute the working capital	Appellant

	Computation of working capital requirement on the basis of net power purchase cost vis-àvis gross power purchase cost.	for the relevant years by considering the actual approved ARR/ trued-up ARR figures rather than the billing figures and to implement the same with carrying cost.	
20.	**Issue No. 41A:** **Amount of carrying cost in tariff considered for purpose of revenue gap.** **-----------------------------** **Issue No. 51:** **Carrying cost not allowed as a separate surcharge.**	Considering that the prayer to adjust the amount allowed for carrying cost against the carrying cost incurred on the opening balance of Regulatory Assets during the Financial Year has been allowed, an additional surcharge cannot be allowed in addition to the same.	Commission
21.	**Issue No. 42:** **Approach for truing-up of FY 2016-17.**	We set aside the findings of the Commission on this issue and direct the Commission to true-up the ARR components	Appellant

		for the appellant for FY 2016-17 on the basis of actual figures in the audited statements submitted by the appellant and to consider their impact along with carrying cost.	
22.	**Issue No. 44:** **Financing cost of LPSC from FY 2013-14 to FY 2015-16.**	We set aside the findings of the Commission on this issue and direct that the LPSC financing cost shall be added to the ARR and not to the revenue available with the appellants i.e. it shall not be treated as Non-Tariff Income (NTI).	Appellants
23.	**Issue No. 45:** **Disallowance of monthly billing rebate in ARR.**	We hereby affirm the findings of the Commission on the issue under consideration. The issue is hereby decided against the appellants.	Commission
24.	**Issue No. 46:**	We direct the Commission to pass a final order approving	Remanded

	Loans not approved from FY 2009-10.	the loan taken by the appellants expeditiously, preferably within two months from the date of this order.	
25.	**Issue No. 47:** **Directive on adjustment billing to be capped at 1%.**	We have no hesitation in setting aside the impugned directive regarding 1% cap on adjustment billing issued vide impugned tariff order dated 31.08.2017. We direct that the relaxation provided by the Commission in this regard in the tariff order dated 28.08.2020 shall be read into the impugned tariff order dated 31.08.2017 also and shall be applicable from the FY 2017-18 onwards.	Appellants
26.	**Issue No. 48:** **Pension Trust Fund [Directive].**	We refrain from giving any findings on the instant issue and leave open all the contentions of the appellants on facts as well as on law to be agitated by them at	Appellants / Commission

		appropriate stage as and when they find it necessary to do so.	
27.	**Issue No. 49:** **Directive on Short Term Guidelines and disallowance of power procurement exceeding Rs. 5 per unit.**	The Commission is directed to reverse the penalty imposed upon the Appellant and to allow the short term power purchases made by the appellant above the prescribed ceiling along with carrying cost.	Appellant
28.	**Issue No. 53:** **Correction in Opening Balance of Consumer Contribution.**	Since the findings of this Tribunal are stated to have been assailed before the Supreme Court in Civil Appeal nos.41-43/2022 which is still pending adjudication, we refrain from giving any findings on this aspect of the issue as the same would be covered by the outcome of the above noted Civil Appeal pending disposal before the Hon'ble Supreme Court.	Appellants/ Commission

29.	**Issue No. 55:** **Penalty on account of RPO Compliance from FY 13 – FY 16.**	In view of these facts and circumstances, as coming out from the submissions of the learned counsels and taking note of the observations of the Commission in the said order dated 18.09.2019 in petition no.19/2014, we direct the Commission to implement the said order dated 18.09.2019 from the FY 2012-13 and provide the necessary impact to the appellants accordingly.	Appellants

Pronounced in open court on this the 21st day of July, 2025

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

√
REPORTABLE / ~~NON-REPORTABLE~~

tp