APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 265 OF 2013 & IA NO. 357 OF 2013 & IA NO. 110 OF 2014 & IA NO. 159 OF 2015
and
APPEAL NO. 266 OF 2013 & IA NO. 358 OF 2013 & IA NO. 160 OF 2015

Dated: 11th September, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member (Electricity)

APPEAL NO. 265 OF 2013 & IA NO. 357 OF 2013 & IA NO. 110 OF 2014 & IA NO. 159 OF 2015

In the matter of:

BSES YAMUNA POWER LIMITED
Having its Registered Office at
Shakti Kiran building, Karkardooma … Appellant
Delhi – 110032.
Address for service:
BSES Yamuna Power Limited
C/o Mulla and Mulla and Craigie Blunt and Caroe
502, Nilgiri Apartments, 9, Barakhamba Road,
New Delhi – 110001.

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION
Represented by its Secretary
Viniyamak Bhavan, C-Block,
Shivalik, Malviya Nagar
New Delhi – 110017. … Respondent

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

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

APPEAL NO. 266 OF 2013 & IA NO. 358 OF 2013 & IA NO. 160 OF 2015

In the matter of:

BSES RAJDHANI POWER LIMITED
BSES Bhawan,
Nehru Place, … Appellant
New Delhi – 110019.
Address for service:
BSES Yamuna Power Limited
C/o Mulla and Mulla and Craigie Blunt and Caroe
502, Nilgiri Apartments, 9, Barakhamba Road,
New Delhi – 110001.

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION
Represented by its Secretary
Viniyamak Bhavan, C-Block,
Shivalik, Malviya Nagar
New Delhi – 110017. … Respondent

Counsel on record for the Appellant(s): Buddy A. Ranganadhan
Hasan Murtaza
Aditya Panda

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

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

Appeal No. 265 of 2013 is filed by M/s BSES Yamuna Power Limited aggrieved by the order passed by the Delhi Electricity Regulatory Commission ("DERC" for short) in Petition No.2 of 2013 dated 31.07.2013. The said petition was filed by the Appellant-Distribution licensee seeking approval of true-up for FY 2011-12, review and provisional true up of FY 2012-13, and Annual Revenue Requirement for Distribution (Wheeling and Retail Supply) Business for FY 2013-14. The reliefs, sought in Appeal 265 of 2013, are (i) to set aside the impugned tariff order dated 31.07.2013 passed by the DERC on true-up for FY 2011-12, and the Aggregate Revenue Requirement of the Appellant for FY 2013-14 to the extent challenged in the Appeal; and (ii) to grant the reliefs claimed for each of the issues listed at Paragraph 9 of the Appeal.

Appeal No. 266 of 2013 is filed by M/s BSES Rajdhani Power Limited challenging the order passed by the DERC in Petition No. 1 of 2013 dated 31.07.2013. The said Petition was filed by the Appellant seeking approval of the Commission for true-up for FY 2011-12, Review and provisional true up of FY 2012-13 and Annual Revenue Requirement for Distribution (Wheeling and Retail Supply) Business for FY 2013-14. The reliefs, sought in Appeal No. 266 of 2013, are (i) to set aside the impugned tariff order dated 31.07.2013 passed by the DERC on true-up for FY 2011-12, and the Aggregate Revenue Requirement of the Appellant for FY 2013-14 to the extent challenged in the Appeal; and (ii) to grant the reliefs claimed for each of the issues listed at Paragraph 9 of the said Appeal.

Elaborate submissions were made in challenge to the impugned tariff order in both the Appeals. Appeal No. 301 of 2015 was filed by another distribution licensee in Delhi, i.e. Tata Power Delhi Distribution Limited, aggrieved by the order passed by the DERC on 29.02.2015 in a petition filed by them seeking true-up of the Annual Revenue Requirement for FY 2013-14, the 2nd Year of the Multi-Year Tariff (MYT) Control Period 2013-15 as well as for approval of the revised ARR for FY 2014-15 along with approval of ARR for FY 2015-16. Appeal No. 301 of 2015 was disposed of by the other bench of this Tribunal by its order dated 28.01.2025.

We had, in the daily proceeding dated 10.02.2025, noted that, consequent upon the judgment delivered by Court-II in Appeal No. 301 of 2015 dated 28.01.2025 with respect to an overlapping period, some of the issues which arise for consideration in the appeals before us may be covered by the said judgment. We, therefore, requested both the Learned Counsel for the Appellant and the Learned Counsel for the DERC to examine, and submit a joint note on such of the issues which arose for consideration in the present case, and which were covered by the said judgment, without prejudice to their respective rights to question the said judgment in appropriate legal proceedings. Pursuant thereto, a note was placed for our consideration by Mr. Buddy A. Ranganadhan, Learned Senior Counsel appearing on behalf of the Appellants, during the hearing held on 17.02.2025. We had, after going through the said note, opined that it would be appropriate that an affidavit be filed by the Appellant in this regard; and the matter was directed to listed after a week on 24.02.2025. On 24.02.2025, we were informed that a copy of the affidavit had been made available to the Learned Counsel for the DERC, and the same would be filed in the Registry during the course of the day. As the contents of the affidavit was not disputed by Mr.

Dhananjay Baijal, Learned Counsel for the Respondent-Commission, we reserved judgment again, in both the appeals, on 24.02.2025.

In the affidavit, filed on behalf of the Appellants dated 24.02.2025, it is stated that a total of 53 issues/ heads of claims were raised by the Appellants at the time of filing of the Appeals; subsequently, there were two developments (a) the judgment passed by this Tribunal in Appeal No. 301 of 2015 dated 28.01.2025, and (b) the true-up order passed by the DERC in Petition No. 3 of 2022 dated 19.07.2024 for true-up of expenses of the Appellant for FY 2020-21.

Para 4, of the said affidavit dated 24.02.2025, records the submission of the Appellants that, in the light of the judgment of this Tribunal in Appeal No. 301 of 2015 and the true-up order dated 19.07.2024, the current status of the claims were as under:- (a) Category A.1 and D comprised 9 (nine) issues which had either been implemented by the DERC or had become infructuous, and no further adjudication was required; (b) Categories A.2, B and C comprised of 14 (fourteen) claims that were covered by the judgement of this Tribunal and/ or that of the Supreme Court, as regards which(i) 1 (one) claim, i.e. Issue No. 35 in Category C had already been allowed by the DERC in Tariff Order dated 29.09.2015 for 2015-16, and no further adjudication was required; (ii) 3 (three) claims i.e. Issue Nos. 10, 11 and 41 in Category B had been partially implemented by the DERC in the true-up order dated 19.07.2024; the said claims were also pending before the Supreme Court in Contempt Petitions and/ or Miscellaneous Application(s); issue of partial implementation had been raised in Appeal (DFR) No. 530 of 2024 filed by the Appellant against the True-Up order dated 19.07.2024; the Appellant was not pressing for their adjudication in the present appeal, and liberty may be granted to raise these issues in appropriate

proceedings;(iii) 3 (three) claims i.e. Issue Nos. 5, 20 and 26 in Category C had been implemented by the DERC in the True-up order dated 19.07.2024; the Appellant was not pressing for their adjudication in the present appeal, and liberty may be granted to raise those issues in appropriate proceedings, if any, inter alia regarding the manner of implementation by the DERC; and (iv) for the remaining 7 (seven) claims, being issue Nos. 4, 13, 28 and 46 in Category A.2 and Issue Nos. 30, 31 and 43 in Category B which remained unimplemented, this Tribunal may direct the DERC to implement the directions of this Tribunal and/ or Supreme Court, and to grant necessary impact along with carrying cost to the Appellant as was sought by the Appellant by way of oral submissions, claim-wise submissions tendered on 06.07.2023 as well as in the written submissions dated 03.05.2024; and these had not been disputed by the DERC at any stage of the proceedings.

In Para 4(c), of the Affidavit dated 24.02.2025, the Appellant stated that Category E comprised 4 (four) claims which were not being pressed, and no further adjudication was required. In Para 4(d), they stated that Category F comprised of 1 (one) claim i.e. Issue No. 24(g) (consideration of provisions written back for bad debts); this issue had been implemented by the DERC in the true-up order dated 19.07.2024; no further adjudication was required; and liberty may be granted to raise the said issue in appropriate proceedings if any, inter alia, regarding the manner of implementation by the DERC. In Para 4(e), the Appellant states that Category G comprised of 3 (three) claims which the Appellant had stated could be argued in Appeal Nos. 290-97 of 2015; no adjudication was required in the present appeal; and liberty may be granted to raise the issues in Appeal Nos. 290-97 of 2015. In Para 4(f), the Appellant stated that Category H comprised of 2 (two) claims which were pending before the Supreme Court; no adjudication was required by

this Tribunal; and the claims may be disposed of with directions to abide by the Supreme Court's directions that would be passed on the said issues.

In Para 4(g), of the affidavit dated 24.02.2025, the Appellant stated that Category-I comprised of 20 (twenty) claims which were argued in detail before this Tribunal; and the status of the said claims was as under: - (i) 1 (one) claim i.e. Issue No. 17 had been implemented by the DERC in True-up order dated 19.07.2024; however, there were certain grievances for which the Appellant had filed Review Petition before the DERC which was pending adjudication; the Appellant was not pressing for their adjudication in the present appeal; and liberty may be granted to raise this issue in appropriate proceedings; (ii) 3 (three) claims i.e. Issue Nos. 24(b), 24(f) and 33 were covered by the judgment of this Tribunal in Appeal No. 301 of 2015 dated 28.01.2025 wherein a similar relief was to be allowed to the Appellants which were as under: - (a) Issue No. 24(b): Unscheduled Interchange Interest (arises only in Appeal No. 265 of 2013) – similar Issue No. 29 (Erroneous inclusion of interest on account of late payment of UI charges) was decided in favour of TPDDL while relying on the Matching Principle; (b) Issue No. 24(f) – Consideration of Income earned on Maintenance of Assets of MCD – similar Issue No. 43 (Wrong Reversal of Material Cost of Rs.3.36 Crores and Rs.4.12 Crores incurred towards maintenance of streetlight for the Year 2010-11 and 2011-12 respectively) decided in favour of TPDDL; and (c) Issue No. 33 – Disallowance of Trading Margin – similar Issue No. 22 (Wrongful disallowance of trading margin paid to TPTCL) was decided in favour of TPDDL.

The Appellant further states that the DERC, by its email dated 14.02.2025, had agreed that the aforesaid issues were covered by

Appeal No. 301 of 2015 dated 28.01.2025, and had not raised any objections in this regard; and this Tribunal may therefore, allow the said claims following the judgment of this Tribunal in Appeal No. 301 of 2015 dated 28.01.2025 and grant similar relief to the Appellant with respect to Issue Nos. 24(b), 24(f) and 33.The Appellant further states that 16 (sixteen) i.e. Issue Nos. 1, 8, 14, 15, 19, 23, 24(d), 24(e), 29, 32, 34, 37, 38, 39, 44 and 45 still remain for consideration and adjudication by Tribunal.

In Para 5 of the said affidavit, the Appellant states that, in view of the above, under Category-I, the following 16 claims still remain for consideration and adjudication by this Tribunal: (a) Issue 1: no roadmap for recovery of Regulatory Asset and Surcharge insufficient to recover the accumulated shortfall; (b) Issue 8: Non-consideration of Bank Charges (for 1st MYT Period); (c) Issue 14: Truing-Up of Income Tax from FY 2002-03 to 2006-07; (d) Issue 15: Truing-Up of Income Tax for FY 2007-08 to FY 2011-12; (e) Issue 19: Disallowance of R&M Expenses during MYT Control Period; (f) Issue 23: Erroneous consideration of Opening Consumer Contribution for the MYT Period; (g) Issue 24(d): Collection of Electricity Duty; (h) Issue 24(e): Connection/ Reconnection Charges; (i) Issue 29: Revision of Distribution Loss from FY 2007-08 to FY 2010-11; (j) Issue 32: Consideration of Normative Rebate; (k) Issue 34: Disallowance of Fixed charges for regulated power; (l) Issue 37: Disallowance of License Fee paid for Assets; (m) Issue 38: Erroneous bifurcation of capitalisation while determining RoCE for MYT PERIOD; (n) Issue 39: Arbitrary Imposition of rebate based on number of Bills issued; (o) Issue 44: issuance of Tariff Order before 1st April in next Financial year; and, (p) Issue 45: Disallowance of Ombudsman Expenses. A table detailing updated status of issues was attached to the affidavit as Annexure-D.

In Para 6, of the affidavit dated 24.02.2025, the Appellants prays that this Tribunal may consider and adjudicate the 16 (sixteen) claims in para 5 and dispose of the issues detailed in (i) Para Nos. 4(b)(ii), 4(b)(iii), 4(d) and 4(g)(i), while granting liberty to the Appellant to raise those issues in appropriate proceedings; (ii) Para 4(e) while granting liberty to the Appellant to raise the issues in Appeal Nos. 290-97 of 2015; and (iii) Para 4(f) with directions to abide by the directions of the Supreme Court that would be issued on the said issues.

In Para 6(c), the Appellant seeks directions to the DERC to (i) allow the claims in para 4(g)(ii) with respect to Issue Nos. 24(b), 24(f) and 33 (in Category-I), following the judgment in Appeal No. 301 of 2015 and grant necessary impact to the Appellant along with carrying cost; and (ii) implement the judgments of this Tribunal and the Supreme Court in letter and spirit, as regards the claims detailed in Para 4(b)(iv) above i.e. Issue Nos. 4, 13, 28, 46 in Category A.2 and Issue Nos. 30, 31 and 43 in Category B; and to allow entitlements to the Appellant along with carrying cost in the next tariff proceedings.

So far as issue Nos. 10, 11 and 41 in Category B, Issue Nos. 5, 20 and 26 in Category C [as referred to in Para 4(b)(ii), and Para 4(b)(iii)], Issue No. 24(g) in Category F, and Issue No. 17 in Category-I are concerned, these issues are closed granting the Appellant liberty to agitate these issues in appropriate proceedings.

In so far as the three issues in Category-G are concerned (as detailed in Para 4(e) of the Affidavit), these issues are also closed granting the Appellant liberty to raise these issues in Appeal No. 290 and 297 of 2015.

In so far as the two claims in Category-H are concerned, these issues are also closed in the light of the fact that these issues are pending consideration before the Supreme Court.

In so far as Issue Nos. 24(b), 24(f) and 33 in Category-I are concerned (as detailed in Para 4(g) of the Affidavit), it is not in dispute that these claims are covered by the judgment of this Tribunal in Appeal No. 301 of 2015 dated 28.01.2025. Following the judgment in Appeal No. 301 of 2015 dated 28.01.2025, these claims are also allowed in terms thereof.

In so far as Issue Nos. 4, 13, 28 and 46 in Category A.2 and Issue Nos. 30, 31, 43 in Category B are concerned, the Appellants' grievance is that these seven claims have not been implemented by the DERC despite the directions of this Tribunal and the Supreme Court. While making it clear that orders of this Tribunal which have attained finality, and the orders of the Supreme Court, necessitate strict adherence and must be implemented by the Commission, we leave it open to the Appellant if they are so aggrieved by its non-implementation, to agitate their grievances in appropriate proceedings.

What remains for adjudication are the 16 issues which, as noted hereinabove, relate to:-

(1) Issue 1: No roadmap for recovery of Regulatory Asset and Surcharge insufficient to recover the accumulated shortfall.
(2) Issue 8: Non-consideration of Bank Charges (for 1st MYT Period).
(3) Issue 14: Truing-Up of Income Tax from FY 2002-03 to 2006-07.
(4) Issue 15: Truing-Up of Income Tax for FY 2007-08 to FY 2011-12.
(5) Issue 19: Disallowance of R&M Expenses during MYT Control Period.
(6) Issue 23: Erroneous consideration of Opening Consumer Contribution for the MYT Period.

(7) Issue 24(d): Collection of Electricity Duty.

(8) Issue 24(e): Connection/ Reconnection Charges.

(9) Issue 29: Revision of Distribution Loss from FY 2007-08 to FY 2010-11.

(10) Issue 32: Consideration of Normative Rebate.

(11) Issue 34: Disallowance of Fixed charges for regulated power.

(12) Issue 37: Disallowance of License Fee paid for Assets.

(13) Issue 38: Erroneous bifurcation of capitalisation while determining RoCE for MYT Period.

(14) Issue 39: Arbitrary Imposition of rebate based on number of Bills issued.

(15) Issue 44: issuance of Tariff Order before 1st April in next Financial year.

(16) Issue 45: Disallowance of Ombudsman Expenses.

The Draft Judgment was circulated to the Technical Member for his approval on 01.07.2025 at the stage when Supreme Court had reserved judgement in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS.** As judgment was pronounced by the Supreme Court in the said case on 06.08.2025, Issue Nos. 1 and 34 required correction in the light of the aforesaid judgment of the Supreme Court. Except for the corrections made with respect to Issue Nos. 1 and 34, and the conclusion on these two issues, the draft judgment sent to the Technical Member on 01.07.2025 remained the same. The corrections which had been effected were only from Page 258 of the Draft Judgment sent to the Technical Member earlier on 01.07.2025. Consequently, the corrected draft judgment was again circulated to the Technical Member for his approval on 11.08.2025.

II. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were put forth by Sri Amit Kapur, Learned Counsel for the Appellant and Mr. Dhanjay Baijal, Learned Counsel for the Respondent-DERC. Mr. Buddy Ranganadhan, Learned Senior Counsel, put forth his submissions on behalf of the Appellants on certain issues. It is convenient to examine the rival contentions issue wise. Since both Issue Nos.1 and 34 relate to regulatory assets, and are inter-connected, they shall be examined after all the other 14 issues, as afore-mentioned, have been considered.

III. ISSUE NO. 8: NON CONSIDERATION OF BANK CHARGES (FOR 1st MYT PERIOD):

A. FINDINGS RECORDED IN THE IMPUGNED ORDER (PARA 3.127)

"3.127 The additional expenses claimed by the Petitioner are discussed below:

Commission's Analysis

3.237 As discussed earlier under the head of Other Miscellaneous expenses on Petitioner's claim on borrowing costs, the Commission's view is already provided on the funding and associated costs. The expenses relating to equity, debt and working capital requirement are allowed in the form of ROCE in accordance with DERC MYT Regulations 2007. The Commission is allowing the carrying cost on the approved revenue gap. The Commission therefore disallows the borrowing costs claimed by Petitioner over and above the ROCE and Carrying cost on the approved revenue gap separately here."

B. CONTENTIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this claim is related to disallowance of actual banking charges including syndication fees paid by the Appellant for the 1st Multi Year Tariff period, governed by the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 from FY 2007-08 to FY 2010-11 with respect to (a) financing the Regulatory Asset created by the DERC, (b) financing the Capital Expenditure, and (c) working Capital requirements; in the impugned order, the DERC (a) disallowed the claim of the Appellant without any justification with a view to artificially keep the tariff at uneconomic/ below cost levels; and (b) limited the amount to the expenses purportedly allowed by the DERC for equity, debt and working capital requirement, and Return on Capital Employed (RoCE) as per Regulation 5.5 of the MYT Regulations, 2007; a similar issue arose for the consideration of this Tribunal in the second MYT Period governed by the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 for FY 2011-12 to FY 2016-17 for Tata Power Delhi Distribution Limited (a similarly placed licensee in the NCT of Delhi) in Appeal No. 246 of 2014; this Tribunal, by its judgment in Appeal No. 246 of 2014 dated 30.09.2019 [**TPDDL vs. DERC, (2019) SCC OnLine APTEL 106, Para 16.4, 16.4.1, 16.4.2, 16.4.3]** while allowing the claim, interpreted Regulation 5.6 of the MYT Regulations, 2011 which is in pari-materia with Regulation 5.5 of the 2007MYT Regulations; the findings of this Tribunal in Appeal No. 246 of 2014 squarely covers the present case; and the DERC failed to determine a cost-reflective tariff over the years, leading to incremental creation and increase in the Revenue Gap, which is treated as

Regulatory Asset attracting carrying cost; the Regulatory Asset, along with carrying cost. is required to be funded by way of loans; to avail loans from Financial Institutions, for funding of the Regulatory Asset created by the DERC and to fund the Capital Expenditure due to a non-cost reflective tariff determined by the DERC, the Appellant had incurred Syndication Fees during FY 2010-11 and FY 2011-12; Syndication Fees is a fee charged by the Financial Institutions/ Banks (IDBI in the present case) as Service Charges for completion of documentation, legal formalities, processing, etc; the Appellant is required to pay the said charges in addition to the interest cost; payment of these fees is a pre-condition for disbursement of loans; IDBI disbursed the loan to the Appellant after consultation with, and the assurances provided by the DERC; this cost is beyond the Appellant's control; the arbitrary disallowance of such cost by the DERC has unjustifiably reduced the Appellant's Return on Equity (RoE) violating Clause 8.2.2 of the Tariff Policy read with Section 61 principles; and when loan was disbursed in consultation with the DERC, to finance the gap caused by inaction/ erroneous decisions of the DERC, disallowance of costs paid by the Appellant to avail the said loan is arbitrary.

On the incorrect basis for disallowance of costs which related to borrowing/ availing loans, Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC has acted contrary to Regulation 5.5 of the MYT Regulations, 2007 (similar to Regulation 5.6 of the MYT Regulations, 2011 which arose for consideration in Appeal No. 246 of 2014); the DERC only approved the interest incurred on Debt and RoE as part of RoCE, but disallowed the banking charges; the DERC held that the Return on Capital Employed and Carrying Cost on the approved revenue gap had already been allowed, when such borrowing cost could neither be anticipated nor allowed at that stage; during the Technical

Validation session, the DERC sought details regarding computation along with relevant documents towards banking charges for FY 2011-12; these were submitted by the Appellant by their letter dated 10.01.2013 informing that the banking charges had been separately incurred by the Appellant, and were required to be allowed in addition to Interest on Debt and Return on Equity already included in RoCE; in the impugned order, the DERC acknowledged that the borrowing cost actually incurred by the Appellant had been verified and was also reflected in the audited accounts of the Appellant for FY 2010-11 and FY 2011-12; however the DERC failed to appreciate that the borrowing cost, actually incurred during FY 2010-11 and FY 2011-12, was uncontrollable in nature and was required to be trued up in accordance with the 2007 MYT Regulations.

With respect to their contention that borrowing cost was beyond the Appellant's Control, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, the borrowing cost was incurred on account of loans raised to fund the Regulatory Asset, apart from funding of Capital Expenditure; in the impugned order, the DERC has itself recognised Regulatory Assets of Rs.5,206 Crores up to FY 2011-12; the DERC transferred the Revenue Gap of Rs.1,306 Crores and Rs.1,536 Crores during FY 2010-11 and FY 2011-12 respectively to the Regulatory Asset; the Appellant availed loans during FY 2010-11 and FY 2011-12 to meet this funding gap caused by the DERC; while taking note of its statutory advice dated 01.02.2013, the DERC itself recognized that the growing gap between the annual revenue requirement, and the revenue available through tariff, placed an additional interest burden on the electricity consumers by way of carrying cost on the additional market borrowings which had to be resorted to meet the gap.

With respect to the finding that borrowing cost/ Syndication fees are a routine expense, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the borrowing costs incurred on account of Syndication fees was a routine expense that all the Distribution Utilities incur; such expenses, which include processing fees, documentation charges, guarantee fees, etc. were mandatory and unavoidable for sanctioning of loans; borrowing charges incurred are neither included in the administrative and general expenses nor allowed as part of interest charges in the Annual Revenue Requirement; and various State Electricity Regulatory Commissions, in addition to the interest charges, have contemporaneously allowed such borrowing costs/ syndication fees separately. Reference is made to the tariff orders passed by the Chhattisgarh State Electricity Regulatory Commission, the Maharashtra Electricity Regulatory Commission, the Tamil Nadu Electricity Regulatory Commission and the Rajasthan Electricity Regulatory Commission, to submit that these tariff orders make it clear that finance charges are not covered under 'Interest on Loan', and are required to be allowed separately; and the adverse financial impact on the Appellant. on account of non-implementation of the judgment of this Tribunal in Appeal No. 246 of 2014, amounts to Rs.5.62 Crores, excluding Carrying Cost.

In response to the submissions urged on behalf of the DERC, Shri Amit Kapur, Learned Counsel for the Appellant, would contend that disallowance of the borrowing costs by the DERC is contrary to Regulation 5.5 of the 2007 MYT Regulations since the said Regulation mandates that RoCE should cover all the financing costs; Regulation 5.9 of the 2007 MYT Regulations has been incorrectly applied by the DERC which provides the formulae for calculation of RoCE; cost of debt includes financing costs like Processing fee, syndication fee, rate of interest, documentation fee, etc; Regulation 5.5, 5.9, 5.10 and 5.11 of

the 2007 Regulations specifically provided for inclusion of the financing costs as 'cost of debt' for computation of RoCE; the DERC has only approved the 'Interest on Debt' and 'Return on Equity" as part of RoCE, but has not considered the banking charges/ syndication charges as part of RoCE while approving the same'; this is contrary to Section 61 of the Electricity Act and Para 8.2.2 of the applicable Tariff Policy; the disallowance of the aforesaid costs unduly reduced the RoE; the DERC has failed to perform its statutory functions contrary to the judgment of the Supreme Court in **PTC India Limited vs. CERC: (2010) 4 SCC 603**; the Appellants claim is squarely covered by this Tribunal's judgment in Appeal No. 246 of 2014 dated 30.09.2019; and, pursuant to the aforesaid judgment, this Tribunal in its order in Appeal Nos. 235 and 236 of 2014 dated 07.06.2021 had directed the DERC to follow the directions in the judgment in Appeal No. 246 of 2014. The Appellant seeks a direction to the DERC to allow borrowing costs/ banking charges incurred during FY 2010-11 and FY 2011-12 along with Carrying Cost separately in the ARR.

C. CONTENTIONS URGED ON BEHALF OF THE DERC:

Shri Dhananjay Baijal, Learned Counsel for the DERC, would submit that the Appellants' have put-forth inconsistent submissions before the DERC, thereafter in the Appeal Petition, and during the course of arguments when the main appeal was finally heard; in the true-up and ARR Petition filed before the Commission, the Appellants had classified the issue under two separate heads i.e. Para 3.24 - Other Miscellaneous Expenses, Para 3.24.12 - Borrowing Cost and 3.33 Borrowing Cost incurred during FY 2010-11 for funding Revenue Gap; in Para 9.8.6 of their Appeal, the Appellant have sought the relief that the bank charges incurred by the Appellant were required to be allowed separately from the Interest on Debt and Return on Equity already included in the RoCE; in

their submissions, handed over on 06.07.2023, the Appellants have raised a claim regarding disallowance of actual banking charges including syndication fees paid by the Appellant (Para 2.1 and 4.2 of the written submissions); while the claim before the Commission was restricted firstly on account of bank charges on additional loans raised to recover the deficit in the carrying cost which, in the submission of the Appellant, totalled to Rs.21.27 Crores during FY 2011-12; secondly the Appellants had claimed Rs.16.47 Crores on account of bank charges on additional loans raised to recover the cash deficit during FY 2010-11; neither before the Commission nor even in the Appeal did the Appellants bring their claim within the contours of Regulation 5.5 of the 2007 MYT Regulations; all financing costs of the Appellants are required to be covered under the RoCE; and there can be no allowances that does not fall within the heading of RoCE.

Shri Dhananjay Baijal, Learned Counsel, would further submit that the issue, in so far as it relates to deficit carrying cost, is no longer res integra considering the order of the Supreme Court in MA No. 633-634 of 2022 in C.A. Nos. 9003-9004 of 2011 dated 15.12.2022 (Paras 9, 13 and 14); carrying cost is required to be given to the Appellants on a normative 70:30 basis without reference to the actual interest rate or the actual debt of the Appellants; since the actual debt and actual interest incurred by the Appellant is itself to be ignored, there is no occasion to look into the actual financing costs, since the amount is to be calculated on a normative basis; the Appellants submission would lead to an anomaly wherein debt financing, if considered on actuals, would not match the normative Debt – Equity ratio as approved by the Supreme Court; and when the law deems an imaginary state of affairs to be real, one must not allow the mind to be boggled by the logical consequence of the said imaginary state of affairs, and the same must be taken to their logical

conclusion [**BSES Rajdhani Power Ltd. vs. DERC, (2022 SCC OnLine SC 1450**).

Learned Counsel for DERC would further submit that the Appellant, having classified their claim as other Miscellaneous Expenses, cannot, in Appellate Proceedings, seek a further true-up of RoCE; the Appellants claimed the said borrowing costs under the head 'Miscellaneous Expenses' and 'Borrowing Costs'; at no point of time did they claim the said expenses under Regulation 5.9 & 5.10 of the 2007 Regulations nor did they ask for a true-up of the 'cost of debt'; the true-up for Return on Capital Employed and Weighted Average Cost of Capital (WaCC) was done for the control period by the DERC as per the submissions of the Appellants; once the parameters have been trued up, they cannot be trued up on actuals under another head; the 'Rd' i.e. 'Cost of Debt' as provided in Regulation 5.10 was to be determined at the beginning of the control period; the same was calculated on the projections of the Appellants and have been trued up as per the submissions of the Appellant; it is, therefore, unclear as to how the Appellant can seek a further true up of the figure when the same was never even pleaded in its petition before the Commission; once the Appellants have submitted their figures for true up of WaCC as per the formula, which includes the cost of debt, and the same was trued up, the Commission was justified in holding that the claimed borrowing costs could not be granted twice over on actuals; the Appellants have not challenged the 2007 Regulations, and therefore cannot circumvent the same by bracketing the claims under heads which are wholly impermissible under the said Regulations; it must be presumed that the Appellants, being well aware of the 2007 Regulations, have prudently factored in such borrowing costs in their projections, and subsequently in their true up petition; and the same cannot again be granted to the Appellants under the head of

'Miscellaneous Expenses' or 'Other Borrowing Costs' contrary to the 2007 Regulations, which provide that the Return on Capital Employed would cover such financing costs, and provides a formula for determination of Return on Capital Employed.

Shri Dhananjay Baijal, Learned Counsel for DERC, would submit that reliance placed by the Appellants on Regulation 5.11 of the 2007 Regulations is misplaced; the said Regulation is applicable only to cases where a Distribution Licensee re-finances a loan for the benefit of the consumers, and then only can any claim be made; the Appellants have neither in their Petition filed before the Commission, nor in the Appeal filed before this Tribunal, made even a suggestion that the said borrowing costs related to refinancing costs, or that they benefitted the end consumers; on the other hand, the costs being claimed by the Appellants are wholly vague and indecipherable, and cannot therefore be granted under Regulation 5.11 of the 2007 Regulations..

Learned Counsel for the DERC would further submit that the Appellants' description of the borrowing costs are wholly vague; they have described the claims under the head in an inconsistent manner at different stages, firstly in the petition before the Commission, thereafter in the Appeal and later in the written submissions; in the petition filed before the Commission they sought payment of these amounts under the heads of borrowing costs for funding deficit carrying cost, and secondly as loans to cover deficits in FY 2011-12; in their final written submissions, the Appellants have put forth this claim under the head (a) financing regulatory asset, (b) financing capital expenditure, and (c) working capital requirements; the Appellants have not demonstrated what these expenditure were actually for, and how much of the expenditure was under which head; the Commission had not only called upon the

Appellants to furnish computations but also the supporting documents for their claim of 21.27 Crores as borrowing cost, that the Appellants had claimed towards deficit carrying cost; in their letter dated 10.01.2013 the Appellant submitted data in a tabular form which is vague and indecipherable; the table contains several entries which relate to 'Letter of Credit' charges that were claimed distinctly and, therefore, seem to have been claimed twice over; other entries relate to 'cheque charges', 'account renewal fees' etc, which do not seem to have any relationship with the loans taken or any other financing charges of loans; and these claims are liable to be rejected as vague, indecipherable and indeterminable; reliance placed by the Appellants, on Tariff Orders passed by various other SERCs, is misplaced; and the applicable regulatory framework is distinct from the regulations of the above referred Regulatory Commissions.

After referring to Regulation 27.1 of the Maharashtra State Electricity Regulatory Commission's Regulation, it is submitted by the Learned Counsel for the DERC that the said Regulations required the financing charges to be built into the capital cost, and not the Return on Capital Employed, and there is no formula in the case of 2007 MYT Regulations; while the regulatory framework of the other Commissions permit the grant of such costs on actuals, in the 2007 Regulations the same is restricted to the Return on Capital Employed formula, and the orders sought to be relied upon by the Appellants are distinguishable and not applicable to the facts of the present case; and, in the absence of a challenge to the 2007 Regulations, the Appellant cannot seek to import a wholly different regulatory framework for adjudication of the present appeal.

On the Appellants' reliance on **TPDDL vs. DERC: (2019) SCC OnLine Aptel 106**, Learned Counsel for the DERC would submit that the extracts relied upon by the Appellants show that the present case is wholly distinct from the case pleaded by TPDDL; in **TPDDL**, the claims had been denied in truing up on account of their being held to be controllable; this Tribunal had further noted that certain charges had been incurred on account of the fact that they were in the interests of the consumers; in the present case, the Appellants had sought and had been granted their true up for the Return on Capital Employed as well as the WACC and Rd (Cost of Debt); the Appellants have made claims under inadmissible heads, such as 'other miscellaneous expenses' and 'borrowing costs' which would result in their gaining double benefit, having already had the Return on Capital Employed component trued up; the Appellants have neither in their petition, nor in the appeal, claimed that the expenses were incurred to benefit consumers; and, in these circumstances, the case of the Appellants stands on a different footing to that of TPDDL; and the ratio of the said judgment is not applicable to the present case.

Learned Counsel for the DERC would submit that, in so far as the claim relates to deficit carrying cost, the same is liable to be rejected in the light of the binding judgment of the Supreme Court; it is also liable to be rejected since the same had been originally claimed as 'Other Miscellaneous Expenses', and as true up of RoCE and WaCC has already been carried out; the said claims do not form part of the Appellants' petition for true up of the said components, which include the Cost of Debt; the Appellants have not pleaded or provided any information, which bring the claim of the Appellants within Regulation 5.11, which permits re-financing costs so long as they benefit the consumers; a perusal of the claims as per the Appellant's letter dated

10.11.29013, would show that they are vague; reliance on Tariff Orders of other Commissions is incorrect in as much as the regulatory framework in Delhi is distinct; and reliance on TPDDL judgment is misplaced since, in the said case, denial by the Commission was on the ground that the said expenditure was deemed controllable, and a specific finding was returned on certain costs which were beneficial to the consumers, which is not the case of the present appeal.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In its rejoinder submissions, Shri Amit Kapur, Learned Counsel for the appellant, would submit that the Appellants have not linked the present issue to the issue of deficit in carrying cost; the Appellant has only sought bank charges incurred on loans availed due to inaction of DERC in including accumulation of regulatory asset without providing for its time bound recovery; by the Impugned Order, the DERC has erroneously sought to link the issue of bank charges to RoCE and Carrying Cost; the Carrying Cost given on the funding of regulatory assets does not include the total Financing Costs such as Bank Charges; and introduction of a new ground is impermissible in light of the Supreme Court's Judgment in **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405.**

On the alleged inconsistency between the original claim and the present, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, in their submissions dated 14.07.2023, the Appellant had stated that the DERC's impugned finding has limited the amount to expenses purportedly allowed by the DERC for equity, debt and working Capital requirement; DERC's action of erroneously linking Bank Charges to RoCE was challenged by the Appellant; in the Appeal, the Appellant had

submitted that bank charges are required to be levied, and to be allowed separately; in its petition the Appellant had claimed Rs. 16.47 Crores towards Bank Charges for availing additional loans; the Appellant's claim at all stages relates to disallowance of Bank Charges; and there is clearly no inconsistency in the Appellant's stand.

On the expenses originally claimed as Other Miscellaneous expenses, Shri Amit Kapur, Learned Counsel for the Appellant, would refer to para 3.200 of the impugned order to submit that bank charges were incurred separately, in addition to interest on debt (which is part of RoCE); bank charges were not included in the rate of Interest incurred on debt; the Appellant claimed actual Bank Charges as per the Audited Accounts; despite all details having been made available by the Appellant and verified by the DERC, Bank Charges have been arbitrarily disallowed; the Appellant has not claimed the said expenses twice;Bank Charges were claimed under Borrowing Cost and Other Miscellaneous Expenses since RoCE does not include Bank Charges; and there is no case of double benefit when the Appellant has not been allowed recovery of its legitimate dues, considering that the said expenses have not been allowed under any category by DERC, let alone being allowed twice.

After referring to Regulation 5.11 of the 2007 Regulations, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the said regulation is not applicable in the present case, since re-financing of loans is not involved; the issue merely relates to disallowance of Bank Charges incurred by the Appellant for availing loans; the Appellant by its letter dated 10.01.2013 had provided all details, and documents regarding computation of bank charges for FY 2011-12, sought by the DERC during the Technical Validation Session, despite which the DERC has belatedly contended that the information, submitted by the Appellant,

does not fall within the purview of Regulation 5.11 of the 2007 Regulations; despite acknowledging, in the impugned order, that bank charges actually incurred have been verified, and are reflected in the Appellant's Audited Accounts, DERC has still disallowed Bank Charges; and DERC cannot be permitted to change its own stand or approbate and reprobate. Reliance is placed in this regard on **Suzuki Parasrampuria Suitings (P) Ltd. v. Official Liquidator, (2018) 10SCC 707.**

With respect to the Appellant's claim, in terms of its letter dated 10.01.2013, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC, in its submissions dated 25.08.2023, has sought to give a fresh reasoning to justify its arbitrary disallowance which originally did not form part of the Impugned Order, and is legally impermissible; this is contrary to the law declared in, **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405;** by its letter dated 10.01.2013, the Appellant had provided all details that had been sought by the DERC; no objection was raised by the DERC regarding the said letter; even the impugned findings do not record any such discrepancy, as is now being claimed by the DERC in its submissions dated 25.08.2023; and the Appellant had placed reliance on Tariff Orders of other Regulatory Commissions in support of their contention that the bank charges are not covered as interest of loan, and these expenses are required to be allowed separately.

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that bank charges are beyond the Appellant's control; in its judgment in Appeal 246, this Tribunal interpreted Regulation 5.6 of the 2011 Regulations which is in pari-materia with Regulation 5.5 of the 2007 Regulations, stating that Regulation 5.6 specifies that RoCE should cover

all financing costs, but financing costs incurred to obtain loans has not been factored in the Cost of Debt; thisTribunal set aside the DERC's findings, and allowed financing costs in terms of Regulation 5.6 of the 2011 Regulations; and the present claim is also the same that RoCE is not inclusive of Bank Charges incurred for availing loans and the said expenses may be allowed; and reliance on the judgment of this Tribunal in Appeal No. 246 is justified.

E. ANALYSIS:

The submission, urged on behalf of the DERC, is that the Appellants had in the petition filed by them before the Commission, thereafter in the Appeal, and later in their submissions during the course of arguments before this Tribunal, made submissions that were inconsistent with each other.

In their True up and ARR Petition filed before the Respondent-Commission, the Appellants had classified the afore-said issue under two separate heads. In Para 3.24, under the head *"Other Miscellaneous Expenses"*, the Appellants had discussed the head-wise 'other miscellaneous expenses' incurred during FY 2011·12. In Para3.24.12, under the head *"Borrowing Cost",* the Appellants stated that the Commission, in its Tariff Order dated July 13, 2012, had created huge Regulatory Assets of Rs. 3225 Crores; the Commission had also allowed a surcharge of 8% on fixed and energy charges to recover the Regulatory Assets; however, the surcharge of 8% was not enough to recover the carrying cost; the Petitioner (Appellant herein) had to raise additional loans in order to meet the deficit; they had incurred bank charges of Rs. 21.27 Crore for raising additional loans; and, therefore, the Petitioner was claiming the same as part of miscellaneous charges.

Thereafter, in Para 3.33 of the Petition filed by them before the Commission, the Appellant raised the issue of Borrowing Cost incurred during FY 2010-11 for funding Revenue Gap, and contended that the Commission had created Regulatory Assets of Rs. 3225 Crore on account of the Revenue Gap calculated till FY 2010-11 in the Tariff Order dated July 13, 2012, i.e. almost after 15 months of the said period; the Petitioner had struggled due to cash deficit during the period; during FY 2010-11, the Petitioner had to raise additional loans; the Petitioner had incurred bank charges of Rs. 16.47 Crore during FY 2010-11; and the Commission should allow the same while determination of Truing-up Requirement for FY 2011-12.

In Paragraph 9.8. of their Appeal, the Appellant submitted that the Bank Charges had been separately incurred by the Appellant, and was required to be allowed apart from the Interest on Debt and Return on Equity already included in RoCE; and, despite all the details being made available to and having been verified by the Commission, the same had been disallowed.

In their Submissions, handed over during the hearing of this Appeal on 06.07.2023, the Appellants had submitted that the claim related to disallowance of actual banking charges, including syndication fees paid by the Appellant for the 1st Multi Year Tariff ("MYT") Period, governed by the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 ("MYT Regulations, 2007") from FY 2007-08 to FY 2010-11, with respect to: (a) Financing the Regulatory Asset created by the DERC; (b) Financing the Capital Expenditure ("Capex"); and (c) Working Capital requirements.

From the petition, filed by them before the DERC, it does appear that the Appellant had claimed certain amounts under the head: *Other Miscellaneous Expenses*". With respect to "*borrowing cost*", the Appellant had claimed bank charges of Rs. 21.27 Crores for raising additional loans, as part of miscellaneous charges. With respect to borrowing cost, incurred in FY 2010-11 for funding the revenue gap, the Appellant claimed bank charges on additional loans for Rs. 16.47 Crores. In Para 9.8.6 of the present appeal, the Appellant contended that Bank Charges had been separately incurred, and was required to be allowed apart from Interest on Debt and Return on Equity already included in the RoCE.

It is in the written note, handed over on 06.07.2023, that the Appellant, for the first time, stated that their claim, relating to disallowance of actual banking charges included syndication fees paid by them for the 1st Multi Year Tariff Period governed by the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 from FY 2007-08 to FY 2010-11, with respect to (a) financing the Regulatory Asset, (b) financing the Capital Expenditure and (c) Working Capital requirements.

The Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 came into force on the date of its publication in the Delhi Gazette on 30.05.2007. These Regulations, made in exercise of the powers conferred by Section 181 of the Electricity Act, have statutory sanction and the force of law. They are binding not only on the parties to these proceedings, but also on this Tribunal.

Since the Appellant's complaint is that the DERC has wrongly applied Regulation 5.9 of the 2007 Regulations, and that Regulation 5.5,

5.9, 5.10 and 5.11 of the 2007 Regulations specifically provided for calculation of the financing cost as the cost of debt for computation of ROCE, it is necessary to take note of what Regulation 5.5, 5.9, 5.10 and 5.11 of the 2007 Regulations stipulate. Regulation 5.5 provides that Return on Capital Employed (RoCE) shall be used to provide a return to the Distribution Licensee, and shall cover all financing costs, without providing separate allowances for interest on loans and interest on working capital. Regulation 5.9 provides that Return on Capital Employed (RoCE) for the year 'i' shall be computed in the following manner: RoCE = WACCi * RRBi, where, WACCi is the Weighted Average Cost of Capital for each year of the Control Period; and RRB - Regulated Rate Base is the asset base for each year of the Control Period based on the capital investment plan and working capital.

Regulation 5.10 stipulates that WACC for each year of the Control Period shall be computed at the start of the Control Period in the following manner: $\mathrm{WAAC} = \left[\frac{\mathrm{D/E}}{1+\mathrm{D/E}}\right] * \mathrm{rd} + \left[\frac{1}{1+\frac{\mathrm{D}}{\mathrm{E}}}\right] * \mathrm{re}$, where, among others, r_d is the Cost of Debt and shall be determined at the beginning of the Control Period after considering Licensee's proposals, present cost of debt already contracted by the Licensee, and other relevant factors (risk free returns, risk premium, prime lending rate etc), and r_e is the Return on Equity and shall be determined at the beginning of the Control Period after considering CERC norms, Licensee's proposals, previous years' D/E mix and other relevant factors; and the cost of equity for the Wheeling Business shall be considered at 14% post tax.

Regulation 5.11 provides that the Distribution Licensee shall make every effort to refinance the loan as long as it results in net benefit to the consumers; the cost associated with such refinancing shall be borne by

the consumers and any benefit on account of refinancing of loan and interest on loan shall be passed on to the consumers; and re-financing may also include restructuring of debt.

Clause 8.2.2 of the Tariff Policy, 2006 states that the facility of a regulatory asset had been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year; this should be done only as an exception, and subject to the following guidelines: (a) the circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions, and under business as usual conditions; the opening balances of uncovered gap must be covered through transition financing arrangement or capital restructuring; (b) carrying cost of Regulatory Asset should be allowed to the utilities; (c) Recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most and preferably within the control period; (d) the use of the facility of Regulatory Asset should not be repetitive; and (e) in cases where regulatory asset is proposed to be adopted, it should be ensured that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected.

Since the Appellant contends that Regulation 5.5 of the 2007 Regulations, which arises for consideration in the present case, is in *parimateria* with Regulation 5.6 of the 2011 Regulations which fell for consideration in **TPDDL Vs DERC 2019 SCC OnLine APTEL 106**, it is useful to read these regulations in *juxta-position* with each other.

Regulation 5.5 of MYT Regulations, 2007	**Regulation 5.6 of MYT Regulations, 2011**

"Return on Capital Employed *5.5 Return on Capital Employed (RoCE) shall be used to provide a return to the Distribution Licensee, and shall cover all financing costs, without providing separate allowances for interest on loans and interest on working capital."*	*"Return on Capital Employed* *5.6 Return on Capital Employed (RoCE) shall be used to provide a return to the Distribution Licensee, and shall cover all financing costs, without providing separate allowances for interest on loans and interest on working capital."*

From the table referred to hereinabove, it does appear that Regulation 5.6 of the 2011 Regulations is in *pari-materia* with Regulation 5.5 of the 2007 Regulations and, consequently, the law declared by this Tribunal in **TPDDL Vs DERC 2019 SCC OnLine APTEL 106,** in relation to Regulation 5.6 of the 2011 Regulations, may have a bearing on the present case in case Regulation 5.5 of the 2007 Regulations is held applicable.

As noted hereinabove, Regulation 5.5 of the 2007 Regulations requires the Return on Capital Employed to cover all financing costs without providing separate allowance for interest on loans and interest on working capital. The words "all Financing Costs" would not only include interest on loans and interest on working capital, but also other financing costs such as cost of debt etc. Regulation 5.9, which prescribes the formula for computing Return on Capital employed, requires equity to be taken as 30% and the debt component as 70%; r_d, ie the Cost of Debt, is required to be determined at the beginning of the Control Period, among others, after taking into account the Licensee's proposals, the present

cost of debt already contracted by the Licensee, and other relevant factors such as risk free returns, risk premium, prime lending rate etc.

If bank charges, as is claimed by the Appellant, had formed part of the cost of debt determined at the beginning of the control period, then their claim for payment of bank charges under the head "*Other Miscellaneous Expenses"* may well result in their claiming the said amount twice, once on a normative basis as part of the Return on Capital Employed, and the other on the basis of actuals under the head "*other miscellaneous expenditure*". If, on the other hand, the bank charges, which the Appellant had claimed in the petition filed by them before the DERC, did not form part of the cost of debt determined at the beginning of the control period, they would then be entitled for payment of the said amount under the head "*other miscellaneous expenses*" since it had not been granted to them on a normative basis as part of the Return on capital employed.

Reliance placed by the Appellant on Regulation 5.11 of the 2007 Regulations is misplaced. Regulation 5.11 relates to re-financing of the loan, and must result in a net benefit to the consumer. It is only then would the cost, associated with such re-financing, be required to be borne by the consumer and, likewise, the benefit on account of re-financing of loan and interest on loan must be passed on to the consumer.

In its judgment in**TPDDL Vs DERC: 2019 SCC OnLine APTEL 106** (Judgement in Appeal No. 246 of 2014 dated 30.09.2019), the Appeal before this Tribunal was preferred against the order passed by the DERC truing up the expenses of the Appellant for the period 2012-13, and in determining the distribution tariff for FY 2014-15 as being contrary to the 2011 Tariff Regulations.

While considering the issue of disallowance of other expenses, this Tribunal noted the submissions, urged on behalf of the Appellant, that the Commission had disallowed various uncontrollable expenses while truing up for FY 2012-13; the expenses sought by the Appellant under the head other expenses were uncontrollable on the part of the Appellant in as much as they related to, among others, change in charges levied by the bank/financial institutions; and the list of uncontrollable expenses claimed by the Appellant was given below:

Sl. No.	Particulars	Petitioner's Submission
1	Change in Service Tax Rate	1.96
2	Service Tax under Reverse charge mechanism	0.31
3	Financing charges	0.40
4	Increase in LC charges	0.73
5	Cost of Auditor Certificate	0.07
6	Credit rating fees	0.13
	Total (in Crores)	**3.6**

This Tribunal, thereafter, noted the appellant's contention that the aforementioned expenses, by the very nature, could not be envisaged by the Licensee or the Commission at the time of the MYT Order; the Commission had erred in not allowing these expenses as uncontrollable; this Tribunal, in its judgment in Appeal No. 171 of 2012 dated 10.2.2015, had held that enhancement in expenses, due to reasons beyond the control of the utility, such as statutory obligations were uncontrollable in nature and therefore ought to be allowed; in its Tariff Petition, the Appellant had submitted that it had incurred an additional expenditure of

Rs. 2.27 crores towards service tax liability due to change in service tax rate from 10.30% to 12.36% and due to introduction of reverse charge mechanism, which resulted in an increased landed cost of service in the financial year 2012-13; such expenses incurred due to change in law brought in by the Act of Parliament cannot be considered as controllable in the hands of the Appellant; and these changes of a statutory nature needed to be allowed as they were not factored in at the time of fixation of normative expenses.

This Tribunal then observed that the Appellant had actually incurred various expenses as claimed by it in the petition which the Commission had disallowed while truing up for FY 2012-13 giving a reasoning that these expenses are controllable; many of the expenses claimed by the Appellant were uncontrollable in nature and needed to be looked into by the Commission by adopting a judicious approach instead of disallowing all of them in totality; in its judgment in Appeal No. 171 of 2012 dated 10.2.2015, this Tribunal had held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations were uncontrollable in nature and, therefore, ought to be allowed; Regulation 5.6 specified that RoCE should cover all financing cost, but financing cost incurred for obtaining loans had not been factored in the cost of debt; there were certain other expenses which had been incurred for reasons not attributable to the Appellant, but in the interest of consumers (such as credit rating fee); if such expenses were not incurred by the Appellant, it would have burdened the consumers with higher interest, consequential higher tariff, carrying cost etc.; the judgment of this Tribunal dated 10.02.2015 had been challenged by the Commission before the Apex Court, and no stay had been granted against the operation of the said judgment, pending decision of the Apex Court; and as such the various claims of the Appellant, regarding statutory

fee/charges, should be looked into by the Commission afresh duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity. Subsequently, in its order in Appeal Nos. 235-236 of 2014 dated 07.06.2021, this Tribunal directed the DERC to follow the directions in its earlier judgment in Appeal No. 246 of 2014 dated 30.09.2019.

In its order in MA Nos. 633-634 of 2022 in CA No. 9003-9004 of 2011 dated 15.12.2022, the Supreme Court opined that, it was evident from the compliance affidavit/report dated 13.03.2022, that the DERC had not applied the Debt-Equity Ratio of 70:30; the DERC ought to have allowed funding of regulatory asset/revenue gap on normative Debt-Equity Ratio of 70:30; and there was no question of re-computing the carrying cost rate based on purported equity on the basis of net worth from the audited books and balancing figure as debt. The DERC was directed to allow funding of regulatory asset/revenue gap on a normative Debt: Equity ratio of 70:30.

In so far as interest on carrying cost was concerned, the Supreme Court held that DERC had substituted the words prevailing market rate keeping in view the prevailing Prime Lending Rate' with the words actual interest rate paid by BRPL and BYPL on their loans' which was not permissible in view of the judgment of APTEL. The DERC was directed to allow SBI PLR on 70% debt component for funding regulatory asset/revenue gap in the ratio of 70:30.

As noted hereinabove, in its judgment in **BSES Rajdhani Power Ltd. Vs. DERC 2022 SCC Online SC 1450,** the Supreme Court has held that the distribution licensee is entitled to carrying cost on a normative 70:30 basis ie 30% equity and 70% debt. Consequently, the question of computation of carrying cost on actuals, or on the basis of the audited

books of accounts, does not arise, as such a claim would fall foul of the law laid down by the Supreme Court.

The expression "*all financing costs",* under Regulation 5.5, may well include bank charges as forming part of the cost of debt for which the Appellant has been granted the benefit on Return on Capital Employed on a normative basis. In case bank charges had been taken into consideration, at the beginning of the control period, as forming part of the financing costs, the Appellant may then not be entitled to claim the said amount again under the head *"Other Miscellaneous Expenses"*, as that would amount to giving them the said benefit twice, the first on a normative basis as part of the Return on Capital Employed, and the second on the basis of actuals under the head *"other miscellaneous expenses".* The Appellant's claim for syndication fees does not appear to have been raised by them in the tariff petition filed before the DERC, and seems to have been urged for the first time during the hearing of the present appeal.

The DERC had, during the course of hearing of the tariff petition, sought certain clarifications from the Appellant vide their letter dated 03.01.2013, informing them that, on a preliminary scrutiny of the petition, certain deficiencies had been observed (enclosed as Annexure-1) which required additional Information/clarification/filing of missing formats etc. from the Distribution licensees. The Appellant was requested to furnish the requisite information (in hard and soft copy) within 7 days i.e. by 10.01.2012 positively.

In reply thereto the Appellant, vide letter dated 10.01.2013, submitted the data in a tabular form. They informed the Commission that the additional information/clarification/filing of the missing formats etc had been replied accordingly; the requisite information in 6 hard copies was

attached; and a soft copy of the same was also enclosed in CD. Annexure - I to the letter dated 10.01.2013 contained details of bank charges for FY 2011-12. In the table referred to therein, the Appellant furnished details of expenses such as allocation charges taken by the bank, other bank charges, 905 CHGS, consolidated charges for A/c, Inspection charges taken by the bank, document charges taken by Axis, DOC charges taken by Axis, bank charges on hand, renew charges, commitment charges, cheque charges, due diligence charges, account renewal charges, annual fee taken by SIB, cash dep charges, cash charges, cheque charges, cash deposit charges, processing fee taken by bank. annual charges, WC renewal charges, processing fees on STL, annual review charges taken by bank, annual document and process charges taken by bank, payment of appraisal fee to IDBI, fee for syndication of term loan. upfront fee taken by IDBI, LC charges, LC charges TRF from pre-paid expenses. LC amendment charges etc.

What was claimed by the Appellant, in the petition filed by them before the DERC, was bank charges. It is for the first time, in the written submissions filed before this Tribunal during the final hearing of the main appeal, that they had sought compensation for payment of syndication fees. In terms of Section 64(3) of the Electricity Act, the pre-requisite, for an order to be passed on the tariff/ true-up application filed by the appellant, is a public notice and for objections/ suggestions to be invited thereto. A claim which did not form part of the original petition, ordinarily, ought not to be considered by the DERC after the last date for submission of suggestions/objections has expired.

Section 21 of the General Clauses Act, amongst others, specifically deals with the power to add to, amend, vary or rescind notifications/orders. (**Shree Sidhbali Steels Ltd. v. State of U.P., (2011)**

3 SCC 193; Green Infra Wind Solutions Ltd vs APERC: 2024 SCC OnLine APTEL 135). In terms of the said provision, the Appropriate Commission which has been conferred the power under Section 62 (1) read with Section 64(3)(a) to issue a tariff order, would have the power, even in the absence of an express provision in this regard in the Electricity Act, to amend or revoke the tariff order issued earlier. By virtue of Section 21 of the General Clauses Act, when a power is conferred on an authority to do a particular act, it includes in such power, the power to withdraw, modify, amend or cancel the notifications/orders earlier issued, which can be exercised in the like manner and subject to like conditions, if any, attached with the exercise of the power. (**Shree Sidhbali Steels Ltd. v. State of U.P., (2011) 3 SCC 193; Green Infra Wind Solutions Ltd vs APERC: 2024 SCC OnLine APTEL 135**). In view of Section 21 of the General Clauses Act, the amending or modifying order has to be made in the same manner as the original order and is subject to the same conditions that govern the making of the original order. (**Rajeev Suri v. DDA, (2022) 11 SCC 1; Kamla Prasad Khetan v. Union of India, 1957 SCC OnLine SC 27; Green Infra Wind Solutions Ltd vs APERC: 2024 SCC OnLine APTEL 135**).While it is true that Section 64(5) provides for review or amendment of the order, any such exercise of review or amendment must also comply with the requirement of Section 64(3) of the Act read with Section 21 of the General Clauses Act.

Since no such exercise has been undertaken, any claim, beyond what was sought in the tariff petition filed before the DERC, could not have been considered subsequent to expiry of the last date for submission of objections/suggestions, or in an appeal preferred against the tariff/true-up order passed by the Commission.

The onus is on the Appellant to establish which of the aforesaid items, referred to in the table in the annexure to the letter dated 10.01.2013, constitutes bank charges which was claimed in the petition filed by the appellant. In case the appellant has not been extended the benefit of bank charges on a normative basis as a part of the Return on Capital Employed, the DERC shall re-determine the Appellant's claim in the light of the facts mentioned hereinabove, and in terms of the tariff petition filed by them before the DERC.

In the present appeal, where the challenge is to the tariff order passed by the DERC, what we are required to examine is whether or not disallowance of the Appellant's claim for bank charges, under the head "*Other Miscellaneous Expenses"*, is in terms of the 2007 statutory regulations made by the DERC. Comparison with orders passed by other Regulatory Commissions may not be justified for more than one reason. Firstly the order passed by other Regulatory Commissions, based on the Regulations framed by each of them, may not be identical to the 2007 Regulations framed by the DERC based on which the impugned order was passed. Secondly, it would require us to proceed on the premise that the orders passed by the other Regulatory Commissions are in accordance with law. Since the validity or otherwise of the orders passed by other regulatory commissions cannot be examined in an appeal filed against the tariff order passed by the DERC, we may not be justified in examining the validity of the impugned order on a comparison with the orders passed by other Regulatory Commissions.

In **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405,** the Supreme Court, relying on its earlier decision in **Commissioner of Police vs Gordhandas Bhanji: AIR 1952 SC 16**, held that, when a statutory functionary makes an order based on certain

grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise; otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out.

In **Commissioner of Police vs Gordhandas Bhanji: AIR 1952 SC 16,** the challenge was to a cancellation of a cinema theatre license by the Commissioner of Police. The Commissioner had sent the respondent the following communication: *"I am directed by the Government to inform you that the permission to erect a cinema at the above site granted to you under this office letter … dated 16-7-1947, is hereby cancelled.".*

In examining the question whether this was a cancellation by the Commissioner on his own authority acting in the exercise of some power which was either vested in him or of which he bona fide believed himself to be possessed, or whether he merely acted as a post office in forwarding orders issued by some other authority, the Supreme Court concluded that this was not an order of cancellation by the Commissioner but merely intimation by him of an order passed and made by another authority, namely, the Government of Bombay.

As an attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him, and that the order was his order and not that of the Government, the Supreme Court held that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do; Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they were addressed and

must be construed objectively with reference to the language used in the order itself.

In **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405)** what was under challenge was the elections to Parliament from 13-Ferozepore parliamentary constituency. The Appellant's complaint was that, while the poll proceeded as ordained almost to the very last stages, the completion of the counting at the constituency headquarters in Ferozepore was aborted at the final hour as the postal ballots were being counted — thanks to mob violence allegedly mobilised at the instance of the third respondent. The appellant's version was that he had all but won on the total count by a margin of nearly 2000 votes when the panicked opposite party havocked and halted the consummation by muscle tactics. The postal ballot papers were destroyed. The ballot boxes from the Fazilka segment were also done away with en route, and the Returning Officer was terrified into postponing the declaration of the result.

Disturbed by the disruption of the declaratory part of the election, the appellant met the Chief Election Commissioner requesting him to direct the Returning Officer to declare the result of the election. Later in the day, the Commission issued an order of cancellation of the whole poll. The Chief Election Commissioner stated in his affidavit *"that after taking all these circumstances and information including the oral representation of the first petitioner into account on March 22, 1977 itself I passed the order cancelling the poll in the said parliamentary constituency. In my view this was the only proper course to adopt in the circumstances of the case and with a view to ensuring fair and free elections, particularly when even a recount had been rendered impossible by reason of the destruction of ballot papers".* The earlier

order of the Election Commission, resulting in the demolition of the poll already held, stated that he was satisfied that, taking all circumstances into account, the poll in the constituency had been vitiated to such an extent as to affect the result of the election; and, in exercise of the powers vested under Article 324 of the Constitution, Section 153 of the Representation of the People Act, 1951, he was cancelling the poll already taken in the constituency, and was extending the time for the completion of the election.

It is in this context that the Supreme Court, relying on its earlier judgement in **Commr. of Police, Bombay v. Gordhandas Bhanji: AIR 1952 SC 16,** observed that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise; otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out; and Orders are not like old wine becoming better as they grow older.

Unlike in **Commissioner of Police vs Gordhandas Bhanji: AIR 1952 SC 16,** and **Mohinder Singh Gill v. Chief Election Commr., (1978) 1 SCC 405,** the order impugned in this Appeal is a Tariff Order.From Sections 61, 62 and 64 of the Electricity Act, it is clear that tariff fixation like price fixation is legislative in character; the dual nature of functions performed by the Regulatory Commissions are decision-making and specifying terms and conditions for tariff determination **(PTC India Ltd. v. CERC; (2010) 4 SCC 603);** the source of power to determine tariff, under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned

in Section 61), is the general regulatory power of the Commission under Section 79(1)/86(1); this source of power to regulate includes the power to determine or adopt tariff; and Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff.**(Energy Watchdog v. CERC, (2017) 14 SCC 80).**

In **State of Gujarat & Ors. Vs. Utility Users Welfare Association & Ors. (2018) 6 SCC 21,** the writ petitioners' case, on breach of principles of natural justice, rested on two planks. First was that adequate opportunity for raising objections to the tariff petition was not given to self-financing educational institutions. The second was that the tariff notification (issued pursuant to the order) did not contain any reasons. The writ petitioners contended that determination of tariff was a quasi-judicial exercise, and disclosure of reasons was imperative to support any decision coming out of such an exercise.

It is in this context that the Supreme Court observed that, once the Division Bench of the High Court observed that publication in the website was sufficient, the writ petitioners may not have had forfeited their right to challenge the tariff notification in the writ court or the appellate forum; but having failed to generate any lis on the tariff proposal, by not raising any kind of objection, it would not be open to them to demand disclosure of reasons along with publication of the tariff rates; the Commission's role as a quasi-judicial body, or it having trappings of a court, would emerge only if it was called upon to adjudicate a dispute; a no dispute had been generated by the writ petitioners on the basis of the Commission's proposal, which would have required it to undertake some form of adjudicatory exercise, the exercise of fixing tariff had to be undertaken as a quasi-legislative act only which, ordinarily, a tariff-fixing exercise is; issue of the subject tariff notification, unaccompanied by reasons, thus

could not be faulted for having breached principles of natural justice; while the forum of appeal was open to them, but mere existence of an appellate forum in the statute would not require a tariff-fixing body to disclose reasons for stipulating a tariff rate in each individual case; if any appeal is preferred, in relation to any specific case, the Commission would then have to justify fixing a tariff rate in such a case; the duty to disclose reason would crystallise then only, and not in a situation where a particular tariff fixing proposal goes without any objection after its draft publication; not having gone to the appellate forum, the writ petitioners approached the writ court; before the writ court, such tariff fixation was open to challenge in the same way tariffs fixed in exercise of quasi-legislative or administrative power are subjected to judicial review; in the absence of any statutory provision to the contrary, once tariff proposal is published and goes unobjected to before the State Commission, the question of disclosure of reason for such fixation would not arise at the stage of finalisation of tariff; and if such tariff orders are later challenged before the appellate forum or the writ court, the Commission would have to defend its decision the same way an administrative or quasi-legislative decision on fixing of tariff is defended.

It is true that, unlike in, the Appellants herein are the distribution licensees which had filed the tariff applications before the DERC seeking determination of tariff and true-up thereof. While we have no quarrel with the submission that even tariff orders must contain reasons however brief they may be, for effective exercise of the appellate jurisdiction, we may have difficulty in holding that this Tribunal must confine its examination only to the reasons assigned by the Commission, and not consider any other material on record including the applicable statutory regulations. We must bear in mind the fact that an appeal to this Tribunal under Section 111 is akin to a first appeal, and is a continuation of the original

hearing. As an appeal to this Tribunal is both on facts and law, this Tribunal is not disabled from considering the other material which formed part of the original proceedings before the Commission. As long as a completely new case is not set up by the Commission at the appellate stage, the validity of the impugned order can be examined on the material on record, even if it has not been explicitly referred to in the impugned order.

In the Impugned order, the DERC noted the Appellants contention that the DERC had itself admitted that true up of RoCE was provisional; it had observed that RoCE had been approved for the control period (FY 2007-08 to FY 2010-11) based on the projected capitalization in the MYT Tariff order of 23rd February 2008; and the Appellant had now submitted the actual capitalization for the revised base for the control period (FY 2007-08 to FY 2011-12).

The Commission then observed that it had taken into consideration the capitalization provisionally based on the Appellant's submission which was subject to final approval of the Commission; and the RRB, for the control period, had also been revised based on provisionally approved capitalization for the entire control period.

As noted hereinabove *"rd"*, ie cost of debt, is a factor in determining the weighted average cost of capital which again is a factor in determining the Return on Capital Employed. *"rd"*, ie cost of debt, is required to be determined at the beginning of the control period on the basis of the proposal submitted by the Licensee and other criteria. In case bank charges have also been taken into consideration at the beginning of the control period in determining *"rd"*, ie the cost of debt, the Appellant would not be entitled to claim bank charges under the head

“Other Miscellaneous Expenses” since such expenses, which formed part of the cost of debt, have already been considered in computing, on a normative basis, the Return on Capital Employed, and is thus a benefit which the Appellant has already received. It is only if bank charges were not taken into consideration in determining the cost of debt, at the beginning of the control period, can the Appellant then possibly contend that such bank charges have been assumed by the Commission itself to be uncontrollable, and they are entitled to claim the said expenditure on the basis of actuals at the true-up stage.

In **Suzuki Parasrampuria Suitings (P) Ltd. v. Official Liquidator, (2018) 10 SCC 707**, on which reliance is placed on behalf of the appellant, the Supreme Court opined that a litigant can take different stands at different times but cannot take contradictory stands in the same case; a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands; the untenability of an inconsistent stand in the same case was considered in **Amar Singh v. Union of India,** wherein it was observed that an action at law is not a game of chess; a litigant who comes to court and invokes its writ jurisdiction must come with clean hands; and he cannot prevaricate and take inconsistent positions."

The principle behind the concept of approbate and reprobate is in-built in the doctrine of election. It is a principle of equity coming under the contours of common law. It is also a species of estoppel dealing with the conduct of a party. (**Kanchan Udyog Ltd. v. United Spirits Ltd.”, (2017) 8 SCC 237; Southern Power Distribution Co. of A.P. Ltd. v. Vaayu (India) Power Corpn. (P) Ltd., 2024 SCC OnLine APTEL 137**). The doctrine of election is based on the rule of estoppel ---- the principle that one cannot approbate and reprobate inheres in it. The doctrine of

estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. **(Joint Action Committee of Airline Pilots' Association of India v. Director General Association of India, (2011) 5 SCC 435; State of Punjab v. Dhanjit Singh Sandhu, (2014) 15 SCC 144; Basaragi KM Solar Power Project LLP v. Hubli Electricity Supply Co. Ltd., 2021 SCC OnLine APTEL 62; Wardha Solar (Maharashtra) (P) Ltd. v. CERC, 2024 SCC OnLine APTEL 80; Vidarbha Industries Power Limited v. Maharashtra Electricity Regulatory Commission, 2020 SCC OnLine APTEL 73; Maharashtra State Electricity Distribution Co. Ltd. v. Maharashtra Electricity Regulatory Commission, 2020 SCC OnLine APTEL 81).**

The doctrine of approbate and reprobate is a species of estoppel (**Devasahayam (D) BY LRS. *v.* P. Savithramma *(2005) 7 SCC 653*; Ultratech Cement Limited v. Secretary, Gujarat Electricity Regulatory Commission, 2019 SCC OnLine APTEL 16),** and there cannot be any estoppel against a Statute(**MD, Army Welfare Housing Organisation *v.* Sumangal Services (P) Ltd. *v.* Sumangal Services (P) Ltd., (2004) 9 SCC 619; Devasahayam (D) BY LRS. *v.* P. Savithramma *(2005) 7 SCC 653*; Ultratech Cement Limited v. Secretary, Gujarat Electricity Regulatory Commission, 2019 SCC OnLine APTEL 16)** or a statutory rule or regulation. A statutory rule or regulation constitutes subordinate legislation, and like plenary legislation, has statutory sanction and the force of law.

As the doctrine of Approbate and Reprobate constitutes a part of the doctrine of Estoppel, and since there can be no estoppel against the law, the doctrine of Approbate and Reprobate would also not apply in the facts of the present case, as no order could have been passed by the

DERC in contravention of the 2007 Regulations which have statutory sanction and the force of law.

We consider it appropriate, in such circumstances, to remand the matter to the DERC which shall, in the first instance, ascertain whether bank charges were included in the cost of debt at the beginning of the control period; and only if it had not been so included, would the DERC, after conducting a prudence check, then be required to extend to the Appellant the benefit of bank charges under the head “Other Miscellaneous Expenses”, on the basis of actuals confining the Appellants’ claim to that sought by them in the Original Petition filed by them before the DERC.

IV. ISSUE 14: TRUING-UP OF INCOME TAX FROM FY 2002-03 TO 2006-07:

A. FINDINGS RECORDED IN THE IMPUGNED ORDER:

The findings of the Commission in the impugned order, with respect to Issue No.14, reads thus:

> *"3.5 The provisions of MYT Regulations, 2007 are not applicable to be policy direction period from FY 2002-03 to FY 2006-07. The Truing up for policy direction period has been considered by the Commission in the MYT Tariff order 23rd February, 2008. Therefore, the Commission is not reviewing the claim of the Petitioner in respect of Income Tax for FY 2002-03 to FY 2006-07."*

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

The Appellant is aggrieved by the failure of DERC to implement the judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009 (2009 ELR (APTEL) 0880) with respect to changes in income tax payable on various changes in capitalization to be allowed to the Appellant for the policy direction period comprising FY 2002-03 to FY 2006-07. Reference is made by the Appellant to the notified policy direction of the Delhi Government dated 22.11.2001 for re-structuring of the Delhi Vidyut Board and privatization of the distribution business. These policy directions were later amended by the notification dated 31.05.2002 issued by the Government of Delhi.

Sri Amit Kapur, Learned Counsel for the Appellant, would submit that the Judgment of this Tribunal in Appeal No. 36 of 2008 was upheld by the Supreme Court on 01.12.2021 with respect to various claims including capitalization; the consequential impact of capitalization, allowable in terms of the judgment of this Tribunal in Appeal No. 36 of 2008, is that Income Tax on the Return on Equity/income receivable during FY 2013-14, although originally relatable to capital expenditure actually incurred during 01.07.2002 to 31.03.2007; the claim before the DERC was for income tax on the basis of Return On Equity for the policy direction period from FY 2002-03 to FY 2006-07; and the reasons for reduction of this claim, as stated in the impugned order, are (a) 2007 MYT Regulations do not apply for the period prior to 01.04.2007, and (b) true up for FY 2003 to FY 2007 had already been completed in the MYT tariff order dated 23.02.2008, wherein income tax has been allowed on actual basis.

Sri Amit Kapur, Learned Counsel, would submit that the DERC has, in effect, refused to implement the judgment of Superior Courts by hiding behind the tariff period governed by the 2007 Regulations; income/ RoE

receivable due to wrongful disallowance of capitalization will be claimed, receivable and exigible to tax in the year of the claim and grant ie FY 2013-14, governed by the 2011 Regulations (Regulation 5.32 and 5.33); income may be due to an assessee in Year-1, when the applicable tax rate is 33%, however if the same was not actually received in Year-1 and is actually received in Year5 when the applicable tax rate is 44%, assessment of such income, for the purpose of income tax, will be the applicable tax rate in the year in which such income is exigible to tax, and not the applicable tax rate when the income may have accrued; the MYT order, which undertook the true up of the policy direction period, had undoubtedly undertaken the true up of income tax, then paid and payable in the Policy Directions period; it did not and could not have provided for what was directed by the Judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, and the directions of the Supreme Court dated 01.12.2021 directing rectification of wrongful disallowance including capital expenditure and capitalization on non-availability of Electrical Inspector Clearance Certificates etc; it is only after the judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009 that the Appellant was able to claim some amount of capitalization in FY 2013-14; and such claim therefore entails income receivable in FY 2013-14 and exigible to tax in FY 2013-14.

With regard to treatment of income receivable in FY 2013-14, reliance is placed by the learned Counsel for the Appellant on Accounting Standards(1) relating to disclosure of accounting policies and fundamental accounting assumptions, to Clause 10(c) which relates to “Accrual” and Clause 17 (a) which relates to “Prudence”. Reliance is also placed on AS (9), particularly on Explanation 5 and the effect of uncertainties on Revenue Recognition, particularly Para 9.4 and 9.5, and to Accounting Standards (AS) 29 regarding contingent assets in terms of

Para 10.5, 30, 31 and 34 thereof. Learned Counsel would submit that income tax ought to be allowed on grossing up of RoE.

Sri Amit Kapur, Learned Counsel, would further submit that income tax for FY 2003 to FY 2007 had been approved as per the statutory guidelines issued by the Delhi Government on 22.11.2001; in its judgment in Appeal No. 14 of 2012 dated 28.11.2013 (2013 SCC OnLIne APTEL 140 Para 251), this Tribunal held that only income tax, paid on Return on Equity Component of the capital employed, shall be allowed as pass through in the tariff; reliance by the DERC on the judgment of this Tribunal in Appeal NO. 14 of 2012 is misplaced as it is related to Fringe Benefit Tax which is not part of the Appellant's claim; the issue of Fringe Benefit Tax has been decided by the Supreme Court in favour of the Appellant in its judgment in (2022 SCC OnLine SC 1450 (Para 65-68); the policy directions which laid down the principle for the 5-year period ie FY 2002-03 up to FY 2006-07 mandates an assured return of 16% to the Appellant, such that all expenses are recovered by the Appellant in full; and grossing up of the return would ensure that, after paying the tax, the admissible post tax return of 16% is assured to the Appellant.

C. SUBMISSIONS URGED ON BEHALF OF DERC:

It is submitted on behalf of the DERC that the Regulations framed by the Respondent-Commission could not be applied retrospectively for a period where the Regulations were not in force; the period 2002-03 to 2006-07 were governed by the policy directions issued by the Government of Delhi; in these circumstances, there was no question of applying the subsequently framed Regulations to the true-up for that period, especially when the said true-up had already been agitated in the tariff order dated 23.02.2008; the Appellant's claim is for True-up of Income Tax for FY 2002- 03 to FY 2006-07 by retrospectively applying

the 2011 Regulations; it is only in the written submissions filed before this Tribunal that the Appellant has stated regarding the judgment of this Tribunal; the claim as formulated by the Appellant is implausible, since the judgment of APTEL in Appeal No. 36 of 2008 dated 06.10.2009 related to disallowance relating to capital expenditure on account of EiC Certificates and related party transactions which was now being allowed in terms of the judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, and the order of the Supreme Court in MA Nos. 1261 and 1262 of 2022 in Civil Appeal Nos. 884 and 980 of 2010 dated 15.12.2022; the compliance order on these items were passed by the Commission on 14.05.2023, holding that the financial impact would be appropriately provided for in the ensuing Tariff Order; the issue being agitated by the Appellant is wholly inchoate since the financial impact is yet to be even provided for; the Appellant could not have claimed tax impact on the same in 2013, which could not have been claimed in 2002-03 to 2006-07 by applying the regulations retrospectively; the tax impact, if any arising as a result of subsequent orders, would be considered by the Commission in accordance with the Income Tax laws in the Financial years under which the assessment of Tax· will be covered; and do not necessitate pre-determination by this Tribunal.

D. ANALYSIS:

Para 13 of the Policy directives of the Delhi Government, dated 22.11.2001, on which the appellant places reliance upon, stipulated that, from the date of issuance of these direction still the end of 2006-07 and subject to the provisions of paras 11 and 12 and all expenses that shall be permitted by the Commission, tariffs shall be so determined that the distribution licensees earn, at least 16% return on the issued and paid up capital and free reserves (excluding consumer contribution and revaluation

reserves but including share premium and retained profits outstanding at the end of any particular year), provided that such share capital and free reserve have been invested into fixed or any other assets, which have been put to beneficial use for the purpose of electricity distribution and retail supply, and provided further that investment of such share capital and free reserves has the approval of the Commission.

It is evident from these Policy guidelines that the tariff to be determined must provide for the distribution licensee earning at least 16% return on the issued and paid up capital and free reserves. The said Policy directives do not specifically refer to income tax payable by the distribution licensee. The Appellants do not even contend that the income tax actually paid by them should be permitted to be passed through. What the Appellants, in effect, claim is that the 16% return on equity which they are entitled to, in terms of the Policy Directives, should be 16% post tax, and consequently income tax on this 16% must be notionally computed and permitted as a pass through. Since the afore-mentioned Policy Directives do not specifically provide that the 16% return on equity, which a distribution licensee should be granted, must be 16% post income tax and be computed on a notional basis, reliance placed by the Appellants on the said Policy Directives is of no avail.

The period for which the Appellant claims this benefit is for the period from 22.11.2001 till 2006-07 which is prior to 30.05.2007 when the 2007 MYT Regulations came into force. It is settled law that Regulations, made under plenary legislation, has only prospective operation and cannot be applied respectively unless the parent statute confers power to make Regulations with retrospective effect. **(State of Bihar v. K.K. Kabra, (1997) 9 SCC 763; Paramount Bio-Tech Industries Ltd. v. Union of India, 2003 SCC OnLine All 1804; M/S. Christian Medical**

College Vellore vs Tamil Nadu Electricity Regulatory Commission and Ors.(Judgement in Appeal No. 408 of 2024 dated 22.01.2025). Regulations framed by the authority, which is a creature of the Statute, is ordinarily not retrospective. **(Uttar Haryana Bijli Vitran Nigam Ltd. v. CERC, 2024 SCC OnLine APTEL 4).** It is settled proposition that amendments to laws or regulations, unless expressly retrospective, are always prospective. **(Gujrat Urja Vikas Nigam Limited v. Renew Wind Energy (Rajkot) Private Limited, 2023 SCC OnLine SC 411; Green Infra Wind Solutions Ltd. v. A.P. ERC, 2024 SCC OnLine APTEL 135)**. Consequently, the Commission was justified in holding that the 2007 Regulations cannot be applied retrospectively to the Policy Directives period from 22.11.2001 till 2006-07.

The Appellant herein had filed Appeal No. 36 of 2008 questioning the order passed by the DERC on 23.02.2008 determining their Aggregate Revenue Requirement (ARR) for FY 2008-2011, and the distribution tariff for the period 01.03.2008 to 31.03.2009. In its judgement in Appeal No. 36 of 2008 dated 06.10.2009, with respect to the impact of lower approval of capex and capitalization, this Tribunal observed that the pleading on this aspect was divided into two parts: (i) for the periodofthepolicydirectionnamely2002-03to2006-07and(ii)for MYT period 2007-08 – 2010-11; so far as the policy direction period was concerned, disallowance of capital expenditure and capitalization had allegedly resulted in lower approval of depreciation and interest; and, after the Commission gives effect to this judgment on the aspects of capital expenditure and capitalization, the consequences on depreciation in interest would naturally follow.

In so far as the MYT period was concerned, this Tribunal

observed that the appellant had asked for an analysis of the calculation contending that the return on equity given to it was less than16%, instead of claiming a specific amount on this score; the Commission had replied that it had followed the MYT Regulations in which the Return was calculated on Capital Employed (RoCE); the total of capital employed was required to be calculated on the basis of the Regulated Rate Basis (RRB); along formula had been provided in Regulation 5.5 to 5.12; the Commission had stated that the MYT Regulations provided a return on net fixed assets, and not on gross fixed assets; the Commission had clarified that the calculation of WACC had been made after considering the approved equity and debt as per the MYT Regulations; and the appellant had not said that, despite using the Regulations mentioned above, the return on capital employed had not been sufficient.

In its order, in M.A. No. 1261 and 1262 of 2002 in Civil Appeal No. 884 & 980 of 2010 dated 15.12.2022, the Supreme Court observed that, in Civil Appeal Nos. 9003-9004 of 2011, the DERC had questioned the findings of the Tribunal that the revenue gap should be funded in the debt equity ratio of 70:30; they did not accept this contention; the DERC ought to have allowed funding of regulatory asset/ revenue gap on a normative Debt-Equity ratio of 70:30; and carrying cost rate could not be recomputed both based on purported equity on the basis of net worth from the audited books and balancing figure as debt.

The judgement of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009 has no application to the present issue which relates to whether the 2007 Regulations which came into force only on 30.05.2007 could be applied retrospective for the Policy direction period from

22.11.2001 till 2006.07 (ie till 31.03.2007).

We are in agreement with the conclusion of the DERC that the provisions of MYT Regulations, 2007 are not applicable to the earlier policy direction period from FY 2002-03 to FY 2006-07; and, as the Truing up for policy direction period was considered by the Commission in the MYT Tariff order dated 23rd February, 2008, the Commission would not review their claim in respect of Income Tax for FY 2002-03 to FY 2006-07. As the regulations cannot be applied retrospectively, and as truing up for the truing up period was already considered earlier, the claim of the appellant under this head necessitates rejection.

V. ISSUE NO. 15: TRUING-UP OF INCOME TAX FOR FY 2007-08 TO FY 2011-12:

A. IMPUGNED FINDINGS ON ISSUE NO.15:

The findings of the Commission in the impugned order with respect to Issue No.15 reads thus:

> *"3.219 The Commission has obtained the copies of Income Tax Return acknowledgements for all the years of the control period from FY 2007-08 to FY 2011-12 from DISCOM and noted the actual tax assessed for the respective Financial Year. The Commission approves the income tax actually assessed or computed based on the Return on Equity component whichever is lower in accordance with the MYT Regulations, 2007. However, if the tax assessed/paid in any financial year is higher than the tax allowed due to the reason that the higher tax is on account of any arrears of income tax pertaining to the past years, the utility may claim this in the ARR for the following year*

producing documentary evidence establishing the claim towards arrears.

3.220 The Commission has computed the return on equity at 16% post tax in accordance with MYT Regulations as detailed in the Table below:"

Table 71: Approved income tax for the control period for FY 2007-08 to FY 2011-12 (Rs. Crore)

Sl. No.	***Particulars***	***Reference***	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***	***FY 2011-12***
1	*RRB (Average)*	*A*	*1282.62*	*1634.34*	*1998.59*	*2103.62*	*2207.44*
2	*Equity*	*B*	*755.31*	*789.24*	*827.54*	*843.31*	*858.32*
3	*Debt*	*C*	*1493.85*	*1680.47*	*1785.81*	*1808.41*	*1825.21*
4	*% of Equity*	*D*	*33.58%*	*31.96%*	*31.67%*	*31.80%*	*31.98%*
5	*Equity Considered for Income Tax*	*F=A*D*	*430.71*	*522.34*	*632.95*	*668.95*	*705.94*
6	*Rate of Return*	*G*	*16%*	*16%*	*16%*	*16%*	*16%*
7	*Return on Equity*	*H=E*F*	*68.91*	*83.57*	*101.27*	*107.03*	*112.95*
8	*MAT/ Income Tax Rate*	*I*	*33.99%*	*33.99%*	*33.22%*	*19.95%*	*20.01%*
9	*Income Tax*	*J=(H/(I-I))-H*	*35.48*	*43.03*	*50.38*	*26.67*	*28.26*
10	*Tax Assessed/ Paid*	*K*	*0.00*	*0.00*	*0.00*	*36.87*	*29.92*
11	*Income Tax Approved*	*L=Min(J,K)*	*0.00*	*0.00*	*0.00*	*26.67*	*28.26*

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

On Issue No. 15, which relates to disallowance of pass through of Income Tax for FY 2007-08 to FY 2011-12, Mr. Amit Kapur, learned Counsel for the Appellant, would submit that the Appellant's claim is for income tax to be allowed as payable on Return on Equity which is the only allowable income of the distribution licensed business; the DERC had given inconsistent treatment of income tax paid by the Appellant during the 1st MYT Control Period (FY 2007-08 to FY 2011-12) in truing up by adopting a 'pick and choose' approach to allow lower amongst (a) Income Tax computed on 16% RoE (b) Income Tax actually assessed; this violates Regulations 5.20 to 5.22 of the MYT Regulations, 2007 read with Sections 61 and 86(3) of the Electricity Act, 2003, and the law laid down by this Tribunal; the Appellant ought to be allowed pass through of Income Tax computed on RoE; and, in effect, the DERC has exploited the gap between the income tax attributable to the licensed business, and the income tax implications for the corporate entity to inflict this denial.

Sri Amit Kapur, Learned Counsel, would further submit that, as a regulated entity, the Appellant is entitled to a fixed rate of RoE in its regulatory accounts and tariff; it claimed Income Tax payable and computed based on such RoE on a standalone basis for the licensed business so that consumers of the regulated business are not exposed to the risks of the non-regulated business by insulating them from the Income Tax payable on other businesses; the actual Income Tax assessed as per the Appellant's books of accounts (for both regulated and non-regulated business) may be greater or lesser than the Income Tax computed on the RoE for the related business in a particular year; this is evident from Rows 9 and 10 of Table 71 of the impugned order, wherein Income Tax paid by the Appellant during the period from FY 2007-08 to 2009-10 is zero(0), since there were no book profits computed as per the provisions of Section 115JB of the Income Tax Act in

those particular years; on the contrary, in respect of FY 2010-11 and 2011-12, the Income tax paid is higher than the tax payable on RoE; and, in both cases, the Appellant's claim is only for the tax payable on RoE basis.

On the question whether the dispensation in the impugned order, of allowing lower amongst Income Tax computed on RoE and Income tax actually assessed, violated Regulations 5.20 to 5.22 of the 2007 Regulations, Sri Amit Kapur, learned Counsel, after extracting Regulation 5.20, would submit that this Tribunal has declared the law in a catena of judgments culminating in ***Tata Power Company Limited v. MERC, (2013 SCC OnLine APTEL 139) (Para 30-31, 52-59);*** the DERC has misconstrued the 2007 Regulations in its treatment of Income Tax in the impugned order to evolve a dispensation which violates Regulations 5.20 to 5.22 of MYT Regulations, 2007, in terms of which the Appellant is entitled to Income Tax computed on the RoE component of the capital employed as a pass through.

Sri Amit Kapur, Learned Counsel, would rely on the following judgments:**(i) Reliance Energy Limited v. MERC & Ors., 2007 SCC OnLine APTEL 7 [Paras. 29-32]; (ii) Reliance Infrastructure Ltd. v. MERC & Ors., 2009 SCC OnLine APTEL 85 [Paras. 11-12]; (iii) Reliance Infrastructure Ltd. v. MERC & Ors., 2009 SCC OnLine APTEL 84 [Paras. 7-9]; (iv) Torrent Power Ltd. v. GERC, 2010 SCC OnLine APTEL 21 [Paras. 50-55]; (v) TNEB v. NTPC & Ors., 2010 SCC OnLine APTEL 104 [Paras. 16-21]; (vi) GERC v. Torrent Power Ltd., 2011 SCC OnLine APTEL 1 [Paras. 9-13]; (vii) Tata Power Company Ltd. v. MERC, 2011 SCC OnLine APTEL 19 [Paras. 13-18]; (viii) Tata Power Company Ltd. (Transmission) v. MERC, 2013 SCC**

OnLine APTEL 139 [Paras. 30-31, 46-59); and **(ix) R-Infra Ltd. (Generation) v. MERC, 2013 SCC OnLine APTEL 148, [Para. No. 14].**

Sri Amit Kapur, Learned Counsel, would also submit that the judgment of this Tribunal in ***Tata Power Company Ltd. (Transmission) v. MERC, 2013 SCC OnLine APTEL 139 [Paras. 30-31, 46-59]*** makes it clear that (a) each regulatory business is to be treated as if in a watertight compartment; Income Tax assessment has to be made on standalone basis for the licensed business so that consumers of the regulated business are not exposed to the risks of the non-regulated business, and are fully insulated and protected from the Income Tax payable from other businesses; (b) Income Tax of the corporate entity must be grossed up for the regulated business to ensure that the tax implication, which is regarded as an inflow in the ARR and attracts tax, must also be passed through in the tariff.

After extracting paras 34.2 to 34.2.2 of the Maharashtra ERC (Terms and Conditions of Tariff) Regulations, 2005, Sri Amit Kapur, learned Counsel, would submit that the aforesaid Regulations which were considered in the **Tata Power** Judgment of this Tribunal had the same effect as Regulation 5.20 to 5.22 of the 2007 Regulations which are the subject matter of the present appeal.

On the Judgment of this Tribunal, in ***Torrent Power Ltd v. GERC (SCC OnLine APTEL 21),*** Sri Amit Kapur, learned Counsel, would submit that, in the said judgment, the Appellant had challenged the computation of Income Tax allowed by the Gujarat Electricity Regulatory Commission having claimed that RoE should be allowed at 14% post tax; this Tribunal set aside the Impugned Order of the GERC to allow the prayer of the Appellant therein, observing that RoE is to be allowed by grossing up of the Income Tax; this Tribunal had, *inter alia,* held that,

even where there is grossing up of tax based on the rate of tax applicable, the actual tax paid on the equity capital only ought to be allowed, and there cannot be any gain or loss on account of payable income tax.

Sri Amit Kapur, Learned Counsel, would state that Income Tax attributable for the licensed business as per the 2007 Regulations is only on RoE; It has nothing to do with actuals; this chasm between the income tax attributable to the licensed business based on its RoE versus the income tax implications for the corporate entity has been reconciled by this Tribunal in its Judgment titled ***R-Infra Ltd. (Generation) V. MERC, 2013 SCC OnLine APTEL 148, [Para. No. 14];*** and the DERC should be directed to allow Income Tax for the licensed business computed on RoE by the Appellant along with Carrying Cost, as pass through in the hands of the Appellant for the assessment years in question, without being influenced by the actual income tax paid by the corporate entity in that period.

C. SUBMISSIONS URGED ON BEHALF OF DERC:

On Issue No. 15, relating to disallowance of pass through of Income Tax for FY 2007-08 to FY 2011-12, it is submitted on behalf of DERC that this issue of Income Tax arose during the course of arguments on Issue 9 in Appeal Nos. 235 and 236 of 2014; while those two appeals were argued on the basis of the 2011 MYT Regulations, it is 2007 Regulations which applies in the present case; the Regulations relating to Corporate Tax (ie clause 5.20 to 5.22 of the 2007 Regulations) are in *parimateria* with Regulations 5.32 and 5.33 of the 2011 Regulations; Regulation 5.21 of the 2007 Regulations is even more explicit than the 2011 Regulations, and makes it clear that the income tax actually payable or paid on the Return of Equity part shall be included in

the ARR; Income Tax was only required to be considered on actuals, and cannot be normative due to the express language of the 2007 Regulations; and the submissions filed earlier on Issue No.9 in Appeal Nos. 235 and 236 of 2014 be treated as the submissions on this issue.

In the written submissions, filed with respect to Issue No. 9 in Appeal Nos. 235 and 236 of 2014, it is contended, on behalf of the DERC, that the applicable regulations should be interpreted in consonance with the principles enunciated in Section 61 of the Electricity Act, more particularly Section 61 (d) thereof; while interpreting the said Regulation, this Tribunal should have regard to the fact that consumer ought not to be saddled with a notional income tax and that, necessarily, only actual costs/expenses (i.e., actual income tax paid) can be allowed as a pass-through, subject to a ceiling as specified in the Regulations; the applicable Regulations referred to tax “liable to be paid on the licensed business”, and limits such tax to tax on ROE; on a plain language of the Regulation, it refers to actual tax liable to be paid on the licensed business: reference to ROE is clearly only to denote a maximum limit/ ceiling on the amount of income tax allowed as a pass-through; tax on ROE basis is an outer limit; the licensee is entitled to claim a pass-through in the ARR of the actual tax paid on the licensed business, subject to a ceiling limit of the tax computed on ROE; the intention of the Regulation is to allow the licensee to recover the actual income tax paid by it on the licensed business, and not to profiteer in the name of claiming reimbursement on taxes; any other reading of the Regulations, that ignores the actual tax paid by the licensee, will have the effect of rendering portions of Regulation 5.32 and Regulation 5.33 entirely otiose; Regulation 5.32 refers to “tax on income, if any, liable to be paid”; this evidently referred to the actual income tax liable to be paid by a licensee; the said Regulations clearly provides that actual assessment of income

tax shall take into account benefits of tax holiday and the credit for carry forward of losses, and pass on the said benefits to the consumers; this Regulation also refers to the actual income tax paid; a similar interpretation has been accepted by this Tribunal in **Punjab State Transmission Corporation Ltd v. Punjab State Electricity Regulatory Commission (PSERC) & Anr, 2016 SCC Online APTEL 12** wherein this Tribunal disallowed the Appellant's claim of a higher amount of income tax, and limited the amount to income tax on ROE, thereby construing the word 'limited' as a maximum limit/ ceiling; the word limit/limited has also been used by the Commission to denote a maximum cap/ ceiling in Regulation 5.11 of the 2011 MYT Regulations; the above Regulation, which also uses the word 'limited', clearly specifies a maximum/ cap ceiling of 30% for the equity component (even if the said equity component exceeds 30%), while determining the debt: equity ratio of a licensee, for the purpose of computing the Weighted Average Cost of Capital; the Regulations used the word 'limited' to denote a ceiling/cap, and not in the sense of limiting the consideration to one of the many parameters. Reliance is placed on **BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2022 SCC Online SC 1450, paras 46, 49, 52-56,** to submit that a tariff order is quasi-judicial in nature and is binding on parties, unless amended or revoked under law; during true-up, the principles/ methodology adopted in the initial tariff methodology cannot be altered; the principle laid down in the said judgment applies not only to the Commission, but also to the Appellants, in as much as the finding is based on the premise that a tariff order, being quasi- judicial in nature, is binding on both parties equally; and this Tribunal, in **Maharashtra State Electricity Transmission Corporation Ltd v. Maharashtra Electricity Regulatory Commission & Ors, (Judgement in Appeal No. 242 of 2015, paras 1, 3, and 11)**, has also

held that principles/issues determined in an earlier MYT order cannot be re-opened at the stage of true-up.

With respect to the contentions urged on behalf of the Appellant that income tax must be computed on normative as limited to ROE, since the regulations refers only to the ROE component and no other component / factor / income, it is contended, on behalf of the DERC, that this submission is contrary to the plain language of the Regulations as also the judgment of this Tribunal in **Punjab State Transmission Corporation Ltd v. Punjab State Electricity Regulatory Commission (PSERC) & Anr, 2016 SCC Online APTEL 12;** the word Limit / limited has been consistently used by the Commission to denote a maximum cap/ ceiling in the Regulations; the Appellants argument would render portions of the said Regulations otiose, which would also fall foul of the guiding principles enshrined in Section 61 of the Electricity Act and would allow the Appellants to profiteer at the cost of consumers.

On the Appellants contention, that the Commission has ignored the Appellants other business which required income tax to be computed by treating the distribution business in a separate compartment, it is submitted on behalf of the DERC that this is not the case which had been set up by the Appellants before the Commission; there are no pleadings to this effect in the tariff petition; no separate accounts have been maintained by the Appellants for any other business, in terms of Section 51 of the Electricity Act, and the DERC (Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee) Regulations, 2005; there was no basis for the Commission to apportion the income tax paid by the licensee between the distribution business and any other business of the Appellants; and all costs incurred by the Appellants were claimed in the ARR.

On the contention that a long line of judgments, including in **Tata Power Company Ltd. (Transmission) v. MSERC, 2013 SCC Online APTEL 139 (Appeals 104-106/ 2012),** require that a regulated business be treated as water-tight compartment, and therefore tax should be granted on a normative ROE basis, it is submitted on behalf of DERC that the said judgements are not applicable on the facts of the present case, and the Regulations interpreted therein are not in *parimateria* with the applicable Regulations; the licensees in question had distinct and separate regulated and unregulated businesses and, therefore, the judgments held that the consumers of the regulated business ought to be insulated from the taxes associated with other businesses; no such question arises in the present case; and the said decisions do not deal with any argument relating to the interpretation of the word 'limit / limited' as used in the 2011 MYT Regulations.

D. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

1. In **Reliance Energy Ltd. Reliance Energy Center vs. Maharashtra Electricity Regulatory Commission: (2007) SCC OnLine APTEL 7,** the Appellant had asserted that it had made special appropriation sufficient to cover income tax; this had been accepted by the MERC; however, in the Impugned Order, MERC held that the Appellant was leveraging the Balance sheet of its licensed business for investment in other businesses; and this finding of the MERC was without any basis, and was therefore challenged in this appeal. The appellant alleged that the benefit of tax shelter available to the appellant's other business had been considered while truing up the tax payable on the revenue earned by the appellant from its licensed (distribution) business; on an incorrect presumption, MERC had allocated expenses and revenue

between the appellant's licensed business and other businesses as if the other businesses contributed 70% of the gross profit and the distribution business contributed 30% of the gross profit, and therefore 30% of the actual income tax paid by the appellant had been apportioned on a notional basis to the appellant's licensed business in Mumbai area; such a treatment on a notional basis was contrary to the provisions of the Sixth Schedule which provided for "specific appropriations"; there was no question of the appellant providing documentary evidence that actual income tax paid by them for its distribution business was higher than the income tax considered by the MERC, and that MERC would be considering such amount for truing up in the following year; and reliance on the MERC (Terms & conditions of Tariff)Regulation, 2005 by MERC was misplaced since the said Regulations were not applicable as the present issue related to truing up for the years 2004-05 and 2005-06 for which years the provisions of the Sixth Schedule were applicable.

It is in this context that it was held that truing up for the years 2004-05 and 2005-06 had to be carried out only as per the Sixth Schedule; the consumers in the licensee's area must be kept in a water tight compartment from the risks of other business of the licensee and the Income Tax payable thereon; under no circumstance, consumers of the licensee should be made to bear the Income Tax accrued in other businesses of the licensee; and income Tax assessment had to be made on stand alone basis for the licensed business so that consumers were fully insulated and protected from the Income Tax payable from other businesses.

2. In **Reliance Infrastructure Ltd. vs. Maharashtra Electricity Regulatory Commission: (2009) SCC OnLine APTEL 85,** the Commission had held that the expenses incurred for achieving better

performance (such as A&G, R&M, etc.) including higher PLF had already been allowed as pass through by the Commission; allowing tax on income arising out of better performance would put an additional burden on the consumers; and, hence, tax on income, arising out of sharing of gains due to better performance and PLF incentive income, was not being considered. Based on above principles, the Commission estimated the income tax of the appellant on a stand alone basis by considering the income and expenses as per approved ARR after truing up.

It is in this context that this Tribunal held that the Commission itself had not quoted any Regulation under which income tax on the incentive allowed could be denied to a generating company; Regulation 34.2.1, of the MERC Tariff Regulations, which dealt with income tax, did not make any exception for the income arising out of incentive; as per the Regulation the appellant was entitled to recover income tax payable on the change in income on account of PLF incentive; and they found merit in the appellant's prayer for income tax on incentive to be given to it as a pass through.

3. In **Tamil Nadu Electricity Board vs. National Thermal power Corporation: (2010) SCC OnLine APTEL 104,** the Central Commission had rejected the contention of the Appellant that Generating Companies like NTPC Limited (R-1) and Power Grid Corporation (R-2) were not entitled to grossing-up of Income Tax under the provisions of the CERC (Terms &Condition for Determination of Tariff), 2001, and the CERC (Terms & Condition for Determination of Tariff), 2004. In appeal, this Tribunal observed that this issue was primarily based on the interpretation of Regulation 2.12 of the Tariff Regulation, 2001 and Regulation 7 of the Tariff Regulation, 2004; cash outflow on account of Income Tax was one of the elements of tariff to be recovered by NTPC

from the purchasers of electricity, including the Appellant; the provisions of the Tariff Regulations, 2001 and the Tariff Regulations, 2004 made it clear that the Income Tax payable on the income from the core business of the Generating Companies/ Transmission Licensees was to be treated as an expense and to be recovered through tariff payable by the beneficiaries; in other words, the quantum of tax liability upon the Generating Companies/ Transmission Licensee should be recovered from the beneficiaries, and Generating Companies/ Transmission Licensees cannot be put to any loss on account of actual amount of Income Tax payable on the income stream from its core business; in the present case, the issue was whether the tax paid by NTPC on actual basis should be allowed as one of the tariff elements; the tax paid by NTPC was, admittedly, on the grossed-up amount; there was no dispute that the Income Tax Department recovered tax from NTPC on not only the amount of income of NTPC from core business but also the tax amount to be grossed on account of Income Tax by virtue of the said amount being treated as income in the hands of NTPC; in so far as the Income Tax Department was concerned, the actual tax paid by NTPC was on the grossed-up amount; tax is recovered as a tariff element in terms of the provisions of the applicable Tariff Regulations; the consistent practice adopted in the Tariff determination process, first by the Government of India under Section 43A of the Electricity (Supply) Act, 1948, and thereafter by the Central Commission, was to allow such grossing up of tax; and grossing up was the only eligible way of applying the tariff principles as recognized by the various Tariff Regulations notified by the Central Commission.

4. In **Gujarat Electricity Regulatory Commission vs. Torrent Power Limited: (2011) SCC OnLine APTEL 1,** the Review Petition was filed against the judgment of this Tribunal in an Appeal filed against the

order passed by the State Commission determining the Annual Revenue Requirement for the control period FY 2008-09 to FY 2010-11 and truing up for FY 2007-08.Regarding income tax, the State Commission had opined that the Tribunal had not considered Regulation 66 (20) along with Regulation 7. Regulation 7 related to tax on income. Regulation 7(1) provided that the tax on income streams of the generating company or the transmission licensee or the distribution licensee, as the case may be, from its core business, shall be computed as an expense and shall be recovered from the beneficiaries. Regulation 7(2) stipulated that under-recovery or over-recovery of any amount from the beneficiaries or the consumers on account of such tax having been passed on to them shall be adjusted every year on the basis of income-tax assessment under the Income-Tax Act, 1961, as certified by the statutory auditors; and the generating company, or the transmission or distribution licensee, as the case may be, may make such adjustments directly and without making any application to the Commission in this regard. Under the proviso thereto, any income stream, other than the core business, shall not constitute a pass through component in tariff, and tax on such other income shall be borne by the generating company or transmission licensee or the distribution licensee, as the case may be. Regulation 66 prescribed the principles, terms and conditions for determination of tariff with their application for distribution licensee, and Regulation 66(20) provided that the expenses arising from and ancillary or incidental to other business of licensee for which income have been included, but limited to amount of income so included, the Commission may also allow reasonable expenditure to be incurred actually and properly on the following:(i) All taxes on income and profit calculated on permissible return as allowed by the Commission relating to business of electricity

and also subject to the condition that the amount of taxes is actually paid as tax after taking into account refunds into consideration.

It is in this context that this Tribunal held that Regulation 7 clearly stipulated that the tax on income stream of the generating company from its core business shall be computed as expense and shall be recovered from the beneficiaries; the adjustment for under or over recovery of any amount from beneficiary has to be made by the generating company directly on the basis of income tax assessment under the Income Tax Act as certified by the statutory auditors; Regulation 66(20) only restricted the income tax to be allowed on the permissible return subject to actual payment; a conjoint reading of the Regulations of the State Commission implied that income tax had to be taken as expense subject to adjustment as per actuals as per audited accounts by the statutory auditors and to the extent of permissible return; however, tax on income on permissible return had to be 'pass through'; the intent of the Regulations was that income on permissible return on core business in the hands of the generating company had to be net of tax; thus the entire tax inclusive of grossed up tax was relatable to the core activity of the generating company; however, if there was any over-recovery of tax, the generating company had to reimburse the same as the same was adjustable as per actuals as per audited accounts by the statutory auditors; there was no question of the generating company making profit on account of income tax; the excess recovery of income tax if any had to be reimbursed by the generating company to the distribution company as per the Regulations of the State Commission; and, in this case, the excess recovery of income tax if any had to be adjusted in the true up of the financials.

5. In **Tata Power Company Limited vs. Maharashtra Electricity Regulatory Commission [(2011) SCC OnLine APTEL 19,**

Regulation 50.1 required Return on Equity to be calculated @ 14% on the approved equity capital; and income tax on the income of the transmission business of the transmission licensee shall be allowed for inclusion in the annual fixed charges, i.e. given pass through effect as per Regulation 50.2.1.

This Tribunal held that the regulations provided that transmission licensees like the Appellant shall include the estimate of income tax liability of its transmission business along with the application for determination of tariff based on the provisions of Income Tax Act, 1961; Regulation 50.2.3 provided that benefits of any income tax holding credit for unabsorbed losses or unabsorbed depreciation, etc shall be taken into account in calculation of the income tax liability; the intent of the Regulations was that the actual income tax paid by the transmission licensee, in the business of transmission, was included in the ARR and the licensee did not gain or lose on account of income tax which was a pass through in tariff; the grievance of the Appellant was that, in making this adjustment to arrive at the income tax, they had not been allowed as a pass through; in the present case, instead of computing the Profit before Tax as comprising of total revenue minus allowable expenditure, the State Commission had taken the Return on Equity as the start point, thereby wrongly reducing the taxable income by Rs. 38crores; and, consequently, the tax entitlement worked out had dropped by Rs. 13 crores.

This Tribunal held that, without following the principles laid down by this Tribunal in 2009 ELR (APTEL) 560, and departing from its past practice which was based on profit before tax, the State Commission had started the computation with Return on Equity and adjusted for items, thereby further depressing the income tax allowable; as provided in

Regulations 50.1 and 50.2, 14% Return on Equity was provided after giving pass through of income tax effect on the income of the transmission business in the annual fixed charges; the State Commission had considered Return on Equity as Profit Before Tax for the purpose of income tax; such computation was based on working out tax which disregarded annual income arising from incentives and efficiency gains; and the Regulations of the State Commission envisaged reimbursement of actual income tax.

This Tribunal further held that, while the State Commission had computed the tax by considering the Return on Equity equal to profit before tax, it had ignored the fact that such allowed income tax would also be considered as revenue gains, and the Appellant would have to paytax on the same; in order to rectify the same, the State Commission ought to have grossed up the tax computed by it, and passed on the same to the Appellant; the claim of the State Commission that it had reimbursed the actual tax, and hence there was no case for allowing post tax Return on Equity was not correct; and it would be appropriate to direct the State Commission to compute income tax entitlement of the Appellant by replacing Return on Equity by regulatory profit before tax on the basis of income less permissible expenses.

6. Relying on **Reliance Energy Ltd v. MERC: 2007 APTEL 164 (Judgement in Appeal No. 251 of 2006 dated 4.4.2007), Reliance Infrastructure Ltd v. MERC: 2009 ELR APTEL 560 (Judgement in Appeal No. 111 of 2008 dated 28.5.2009), Reliance Infrastructure Ltd v. MERC: (Judgement in Appeal No. 115 of 2008 dated 28.5.2009), Torrent Power Ltd v. GERC: (Judgement in Appeal No. 68 of 2009 dated 23.3.2010), Tamil Nadu Electricity Board v. National Thermal Power Corporation: 2010 ELR APTEL 1280 (Judgement in Appeal**

No. 134 of 2010), Gujarat Electricity Regulatory State Commission v. Torrent Power Limited (Judgement in Review Petition No. 09 of 2010 in Appeal No. 68 of 2009 dated 5.01.2011), **Tata Power Company Limited v. Maharashtra Electricity Regulatory State Commission: (Judgement in Appeal No. 174 of 2009 Dated 14.02.2011),** and **Tata Power Company Limited v. Maharashtra Electricity Regulatory State Commission** (Judgement in Appeal No. 173 of2009 dated 15.02.2011), this Tribunal, in **Tata Power Co. Ltd (Transmission) vs MERC: (2013) SCC OnLine APTEL 139,** summarised the broad principles as under:(i). Each regulatory business is to be treated as if in a water tight compartment and Income Tax assessment has to be made on stand alone basis for the licensed business so that consumers of the regulated business must not be exposed to the risks of the non-regulated business and are fully insulated and protected from the Income Tax payable from other businesses; (ii). Return on Equity is not the only income of the utility; there are other incomes such as interest, incentives, etc and non-tariff income etc; hence, the State Commission ought not to proceed on the basis that RoE is the only income of the utility; and the State Commission must consider income minus allowable expenses of the regulated business. (iii). Income Tax must be grossed up to ensure that the tax implication which itself is regarded as an inflow in the ARR and attracts tax; and, hence, such impact must also be passed through in the tariff; and (iv). The utility cannot profit on tax i.e. whatever tax is actually paid by the utility, must be reimbursed to it.

This Tribunal further held that 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; the converse of the Tribunal's direction that, under no circumstances, consumers of the licensee should be made to bear the Income Tax

accrued in other businesses of the licensee is also true i.e. under no circumstances the consumers of the licensee should be benefitted from the permissible deductions in the form of accelerated depreciation and from Tax holidays given to other businesses (unregulated by MERC) of the utility; and that was the only way to treat the regulated and other business unregulated in water tight compartments.

7. This Tribunal, in **Reliance Infrastructure limited (Generation) vs. Maharashtra Electricity Regulatory Commission [(2013) SCC OnLine APTEL 148,** followed its earlier judgements including the judgement in **Tata Power Company:** (judgment in Appeal No. 104 of 2012 and batch dated 28.11.2013),

8. In **Torrent Power Limited v. Gujarat Electricity Regulatory Commission, 2010 SCC OnLine APTEL 21,** the contention of the Appellant was that, while it had claimed Income Tax rate so as to provide it a post tax regulatory return of 14%, the Commission, in the impugned order, had calculated Income Tax on the approved rate of return on equity which had resulted in a post tax return of 11.55% instead of the stipulated 14% return.

After extracting Regulation 66 and Regulation 7 of the GERC (Terms and Conditions of Tariff) Regulations, 2005, and Section 195 of the Income Tax Act, 1961 this Tribunal observed that a conjoint reading of Regulation 7, Regulation 66 of the State Commission and Section 195(A) of the Income Tax Act, 1961, left no doubt that recovery of income tax paid as an expense from the beneficiaries was required to be grossed up in such a manner as to ensure that the actual tax paid was fully recovered through tariff; Grossing up of the return would ensure that, after paying the tax, the admissible post tax return was assured to the Appellant; in this way the Appellant would neither benefit nor lose on

account of tax payable which was a pass through in the tariff; this would ensure that the Appellant earns permissible return of 14% stipulated in Regulation 66 of the Regulations, and the mandate of Section 195A of the Income Tax Act was also complied with; the National Tariff Policy stipulated that the Regulatory Commission may adopt a rate of return as notified by the Central Commission with appropriate modifications taking into view the higher risk involved in distribution, and that a uniform approach was desired in respect of return on investment; Regulation 7 of the CERC Tariff Regulations, 2004, made it clear that income tax payable on the income from the core business of the company was to be treated as an expense and recovered from the tariff payable by the beneficiaries; the income earned by the licensee was net of tax and the tax payable was treated as a separate expenditure recoverable from the beneficiaries; and the Commission should allow income tax by grossing up to ensure the stipulated post tax return by the State Commission to the Appellant.

E. ANALYSIS:

Regulation 5.20 to 5.22 of the 2007 Regulations, which relate to Corporate Income Tax, read as under:

> *"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."

Regulation 5.21 makes it clear that the income tax actually payable or paid shall be included in the ARR, and shall be passed on to the consumers. Regulation 5.22 stipulates that the tax on income, if any, liable to be paid, shall be limited to tax on return on the equity component of capital employed. As noted hereinabove, under the head Corporate Income Tax, fall Regulations 5.20 to 5.22. All the three sub-Regulations must be read as a whole, and in such a manner as to ensure that none of these sub-Regulations are rendered otiose or redundant. The submission that income tax should be computed on a normative basis, i.e. the tax rate normatively applicable on the 16% return on equity to which a distribution licensee is entitled to, and should be permitted to be passed on to the consumers, would render Regulation 5.21, which only requires income tax actually payable or paid to be included in the ARR and be passed on to the consumers, redundant.

On a conjoint reading of Regulations 5.20 to 5.22 of the 2007 Regulations, it is clear that the income tax payable or paid in terms of Regulation 5.21 shall be limited to the tax on the return on equity component of the capital employed. Consequently, the tax actually payable or paid must first be computed in terms of Regulation 5.21, and such income tax would then be restricted only to the income tax payable or paid on the return on the equity component of the capital employed.

The Concise Oxford Dictionary (Eleventh Edition) defines *'limited'* as restricted in size, amount, or extent. P. Ramanatha Aiyar, Advanced Law Lexicon, (3rd Edition) defines *'limited'* as (1) narrow, restricted; circumscribed; construed; controlled and governed; not absolute, (2) restricted in extent, duration, scope or character, (3) the word "limited" is synonymous with the word "circumscribe". The word *'limited',* in Regulation 5.22, must therefore be understood as the income tax, if any liable to be paid, to be restricted to the extent of the income tax on return on the equity component of the capital employed.

Use of the word 'limited' in Regulation 5.22, read in conjunction with Regulation 5.21, would thus make it amply clear that what the distribution licensee is entitled to claim as a pass through to the consumers is only the income tax actually payable or paid, subject to a limit (ceiling) of the income tax payable or paid on return on equity which is to be computed at 16%.

In **North Delhi Power Limited v. Delhi Electricity Regulatory Commission, 2013 SCC OnLine APTEL 140,** this Tribunal held that a conjoint reading of the Regulations would reveal that only the income tax paid on return on equity component of the capital employed (Regulation 5.22) shall be allowed to pass through the tariff (Regulation 5.20), and not the Fringe Benefit Tax. The said judgement is squarely applicable to the facts of the present case.

The Commission was, therefore, justified in approving income tax actually assessed or computed based on the Return on Equity component whichever was lower in accordance with the MYT Regulations, 2007. The interests of the Appellant was adequately safeguarded by the Commission by holding that, if the tax assessed/paid in any financial year is higher than the tax allowed due to the reason that

the higher tax is on account of any arrears of income tax pertaining to the past years, the utility may claim this in the ARR for the following year producing documentary evidence establishing the claim towards arrears. The Appellants' claim under this head, therefore, necessitates rejection.

VI. ISSUE NO.19: DISALLOWANCE OF R&M EXPENSES DURING MYT CONTROL PERIOD:

A. FINDINGS OF THE COMMISSION

The findings of the Commission on Issue No. 19 are as under:

"3.119 The R&M Expenses for FY 2011-12 were determined by applying the 'k' factor of 3.55% on the estimated opening GFA considered in the Tariff Order dated 26th August 2011. However, the GFA has been revised based on the actual capitalization indicated by Petitioner. The opening GFA approved for FY 2011-12 in the true up for FY 2007-08 to FY 2011-12 is Rs. 3514.97 and applying the 'k' factor of 3.55 % on the opening GFA the R&M expenses worked out to Rs. 124.78 crore. The Commission provisionally approves the R&M expenses at Rs. 119.79 crore net of efficiency factor for FY 2011-12.

Table 25: R&M Expenses approved by Commission for FY 2011-12

(Rs. Crore)

Particulars	*Approved in Tariff Order of 26th August 2011*	*Petitioner's Submission*	*Now Approved*
Opening GFA	*-*		*3514.97*
'k' factor			*3.55%*
Gross R&M Expenses	*145.55*	*145.55*	*124.78*
Efficiency Factor	*4%*	*4%*	*4.00%*
Net R&M Expenses	*139.73*	*139.73*	*119.79*

…

3.149

Pending the true up of the capitalization for the MYT period FY 2007 08 to FY 2011- 12, the Commission has provisionally allowed the Capitalization based on Petitioner submission and the audited accounts of the Petitioner. Accordingly, the GFA has been revised for the MYT Control period FY 07-08 to FY 11-12. R&M expenses are based on 'K' factor as defined in the MYT regulation, 2007 as detailed in para 3.119. Due to revision in the GFA under the MYT Control Period FY 07-08 to FY 11-12, the R&M expenses have also been revised provisionally subject to final true up of capitalization.

Table 37: Revised R&M expenses based on Capitalization approved by the Commission.

Particulars	*FY 2007-08*	*FY 2008-09*	*FY 2009-10*	*FY 2010-11*	*FY 2011-12*
GFA (n-1) (Trued Up for MYT Control period FY 07-08 to FY 11-12)	*2,030.14*	*2,235.13*	*2,917.67*	*3,223.99*	*3,514.97*
Capitalization (provisional)	*204.99*	*682.54*	*306.32*	*290.98*	*213.37*
GFA	*2,235.13*	*2,917.67*	*3,223.99*	*3,514.97*	*3,728.34*
First True Up for FY 07-08 to FY 10-11/ Projected for FY 11-12 under Tariff Order FY	*72.08*	*90.84*	*110.04*	*129.57*	*145.55*
Revised True Up for FY 07-08 to FY 10-11/ First true up for FY 11 12 based on provisional Capitalization	*72.08*	*79.35*	*103.58*	*114.45*	*124.78*
Difference (B-A)	*0*	*(11.49)*	*(6.46)*	*(15.12)*	*(20.77)*

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

It is submitted, on behalf of the Appellant, that the DERC had revised R&M expenses contrary to Regulation 4.16(b)(1) of the MYT Regulations 2007; the DERC held that there would be no true up of R&M expenses even if GFA were to change during the control period; again in its Tariff Order dated 26.08.2011, while determining the ARR for 2011-12 and the true up for 2007-08 and 2008-09, the DERC, in Para 3.33, held that any surplus or deficit on account of R&M would be to the account of the licensee; yet the DERC, in the impugned order, revised R&M expenses based on actual of the GFA; this is in violation of Regulation 4.16(b)(i) of the 2007 Regulations and the judgment of the Supreme Court in **PTC vs. CERC: (2010) 4 SCC 603**; the principles of normative tariff determination have been laid down by this Tribunal i.e. O&M expenses allowed on normative basis cannot be true up on actuals: **(i) NTPC Ltd. vs. UPPCL (2016 SCC OnLine APTEL 66, Paras 13.10, 13.11 and 13.17); (ii) Torrent Power Ltd. vs. Gujarat ERC (2014 ELR (Aptel) 0238, Para 40); and (iii) GUVNL vs. GERC & Ors. (2014 SCC OnLine APTEL 168, Paras 110, 11 & 177)**; the DERC has acted contrary to the MYT order to change the methodology in true up proceedings, which violated the law laid down by the Supreme Court in its judgment in **2022 SCC OnLine SC 1450, Para 51**; the DERC induced the Appellant to spend monies on R&M by the promise held out in the MYT Order dated 23.02.2008; yet, part of the assets have remained un-capitalized due to non-approval of Capital Expenditure Schemes by the DERC; the Supreme Court on 01.12.2021 approved the judgment of this Tribunal in **2009 ELR APTEL 0880** which directed the DERC to allow capital expenditure and capitalisation to the Appellant, after benchmarking with NDPL in terms of 56 and 57 of the said judgment.

It is further submitted by the Appellant that the impugned findings has been challenged based on Regulation 4.16(b) of the 2007 Regulations which stipulates that O&M expenses are controllable expenses, and not subject to true-up; the DERC has acted contrary to the 2007 Regulations as also to its finding in Tariff Order dated 23.02.2008; the DERC has not revised Employee and A&G Expenses based on actual inflation but on normative inflation factor; yet, the DERC has reduced the R&M Expenses based on actual Gross Fixed Assets; this Tribunal in its judgment dated 06.10.2009 **[(2009) ELR APTEL 0880]** had directed to allow capital expenditure and capitalization to the Appellant, after benchmarking with NDPL; the said judgment has been upheld by the Supreme Court in its judgment dated 01.12.2021; this Tribunal in its judgment dated 28.11.2013 in Appeal No. 14 of 2012 **[(2013) SCC OnLine APTEL 140, Para 187]** held that the DERC cannot adopt a method under which the distribution licensee is at loss under all circumstances.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

On Issue No. 19, it is submitted on behalf of the DERC that as per Regulation 5.4 of the 2007 Regulations, R&M expenses are linked to the GFA; the Commission has not changed the constant 'K', but only acknowledged the change in the GFA and that too on a provisional basis; it is not disputed that as per Regulation 4.16(b), O&M Expenses are provided through a formula, which is meant to absorb the increased costs based on the inflation index; further, the statutory framework does not provide that the Appellants are entitled to the specific determination of all uncontrolled elements of costs and provide for directly loading of those costs on the tariff of each; and, the DERC would implement the

regulations in the true spirit as per the mandate of the Delhi High Court when finalizing the provisional adjustment of R&M expenses.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In its rejoinder on Issue Nos. 19 ie R&M Expenses during MYT Control Period i.e. FY 2007-08 to FY 2011-12, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this issue relates to reopening of MYT Order dated 23.02.2008 by reducing R&M Expenses allowed by the DERC on the ground that actual GFA is less than the projection; DERC re-categorised R&M Expenses to be trued up contrary to MYT Order and Tariff Order dated 26.08.2011, wherein DERC held that (i) there would be no true up of R&M Expenses even if GFA were to change during Control Period and (ii) any surplus or deficit on account of R&M Expenses would be to Licensee's account; DERC has sought to inter-link the issue of R&M Expenses (which was to be allowed on a normative basis) with disallowance of License Fee and Ombudsman Expenses (which are uncontrollable statutory expenses) by stating the latter to be controllable in nature, when such statutory amounts are to be allowed as actuals as held by this Tribunal its Judgement in Appeal No. 171 of 2012 2015 SCC OnLine APTEL 170 [Para. 3.7], Appeal No. 246 of 2014, 2019 SCC OnLine APTEL 106 [Para. 16.4.1 & 16.4.3] and, 2022 SCC OnLine APTEL 51 in Appeal No. 213 of 2018 [Para. 17]; DERC admits that it should apply regulation in true spirit and that O&M Expenses are not to be trued-up as terms of Regulation 4.16(b) of the 2007 MYT Regulation; yet DERC has attempted to true up R&M expenses linking it to the other changes in value of GFA at the end of the Control Period; this treatment is contrary to Regulation 4.16(b); sinceR&M Expenses ,being normative, cannot be trued up.

With regards to submission of DERC that it has not changed constant 'K' but only acknowledged the change in the GFA, , Shri Amit Kapur, Learned Counsel for the Appellant would submit that this treatment is contrary to para 4.151 of the MYT Order; 'K' is the constant which is linked to GFA; DERC erred in linking R&M expenses with GFA; the practice of provisional disallowance of expenses to later allow the same negates Section 61 of the Electricity Act and casts of unnecessary burden of carrying cost on the end consumers thereby failing to safeguard consumer interest; the explanatory note of the MYT Regulation 2007 clearly states that the R&M expenses is a part of O&M expenses and is not subject to true-up, (Para 1.19 and Para 1.21 of the said order); the submission on the statutory framework does not provide specific determination of all uncontrollable elements of cost is misleading

E. ANALYSIS:

We find considerable force in the submission of the Appellant that the DERC was wholly unjustified in revising the R&M expenses, since the R&M expenses also forms part of the O&M expenses which is required to be computed on a normative basis in terms of Regulation 5.4 of the 2007 Regulations read with Regulation 4.16(b)(i) thereof. In terms of Regulation 4.16(b)(i), R&M expenses are not subjected to true up.

In **TPDDL vs. DERC (2015) SCC OnLine APTEL 170,** this Tribunal found that the food allowance had been increased four fold w.e.f. 1.4.2010 from the base year 2006-07 as a result of DTL following the recommendations of the Sixth Pay Commission. In this context, this Tribunal observed that the Appellant was bound to enhance the food allowances as per the provisions of the Reforms Act, the statutory transfer scheme and the Tripartite Agreement; the expenditure incurred by the Appellant was uncontrollable in nature being part of the

recommendations of the Sixth Pay Commission which were bound to be paid to FRSR employees by the Appellant; the normal escalation of 4.66% p.a, over the base year expenses of FY 2006-07, would not be adequate to cover the enhancement of the food allowance for FR/SR employees from Rs. 125 to Rs. 500/- per employee per person; the Appellant paid Rs. 0.38 crores during 2006-07; taking into account the escalation of 4.66%, the amount allowed in ARR for FY 2010-11 was Rs. 0.47 crores; thus, the Appellant had to pay Rs. 0.91 crores over and above that allowed in the ARR; even if the excess amount allowed during FY 2007-08 to FY 2009-10 is taken into account due to escalation of 4.66% p.a. over the base year, the excess amount paid by the Appellant during FY 2010-11 would work out to be Rs. 0.8 crores; the Appellant has stated that the actual amount of Rs. 1.38 crores paid to the FR/SR employees during FY 2010-11 had only been claimed; therefore, the impact of retirement of employees had already been taken into account; the Appellant was entitled to the claim of Rs. 0.8 crores on account of enhancement of food allowance for FR/SR employees; the enhancement of food allowance on the recommendations of the Sixth Pay Commission Report, as adopted by DTL, was binding on the Appellant as per the Statutory Transfer Scheme, and it was an uncontrollable expenditure; and the State Commission should allow the additional expenditure of Rs. 0.8 crores on this account with carrying cost.

Again in **TPDDL vs. DERC: (2019) SCC OnLine APTEL 105,** this Tribunal observed that it was not in dispute that the Appellant had actually incurred various expenses as claimed by it in the petition which the State Commission had disallowed while truing up for FY 2012-13, giving reasoning that these expenses were controllable; it was, however, seen that many of the expenses so claimed by the Appellant were uncontrollable in nature and need to be looked into by the Commission

by adopting a judicious approach instead of disallowing all of them in totality; this Tribunal, in its judgment dated 10.2.2015 in Appeal No. 171 of 2012, had held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations, were uncontrollable in nature and, therefore, ought to be allowed; change in law, relating to statutory levies, could not be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order and, thus, could not be considered as part of the normative increase in expenses by the Respondent Commission; apart from expenses incurred due to change in law, there were certain other expenses which had been incurred for reasons not attributable to the Appellant but in the interest of consumers (such as credit rating fee) and, if such expenses were not incurred by the Appellant, it would have burdened the consumers with higher interest, consequential higher tariff, carrying cost etc; as the judgment of this Tribunal dated 10.02.2015 had been challenged by the Respondent Commission before the Apex Court and no stay had been granted against operation of the said judgment, they were of the view that, pending decision of the Apex Court, the various claims of the Appellant regarding statutory fee/charges should be looked into by the Respondent Commission afresh duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity.

As held in **NTPC Ltd. vs. UPPCL (2016) SCC OnLine APTEL 66, Torrent Power Ltd. vs. Gujarat ERC (2014) ELR (Aptel) 0238, and GUVNL vs. GERC & Ors. (2014) SCC OnLine APTEL 168,** O&M expenses, allowed on normative basis, cannot be true up on actuals. Further, in the light of the law laid down by the Supreme Court in its judgment in **BSES Rajdhani Power Ltd. vs. DERC: (2022) SCC OnLine SC 1450,** the DERC could not have acted contrary to the MYT order to change the methodology in true up proceedings.

The impugned order, to the extent R&M expenses were trued up on actual basis, is contrary to the 2007 Regulations and necessitate being set aside. The DERC shall, in terms of the 2007 Regulations, compute the R&M expenditure on a normative basis, and extend the said benefit to the Appellants herein.

VII. ISSUENO. 23: ERRONEOUS CONSIDERATION OF OPENING CONSUMER CONTRIBUTION FOR THE MYT PERIOD

A. FINDINGS OF THE COMMISSION:

The findings of the Commission on Issue No. 23 are as under:

"3.166 …

The provisionally approved Consumer Contribution for the control period is given in the table below:

Table 47: Approved consumer contribution capitalized during the control period FY 2007-08 to FY 2011-12 (Rs. Crore)

Particulars	**FY 2007-08**	**FY 2008-09**	**FY 2009-10**	**FY 2010-11**	**FY 2011-12**
Opening Consumer Contribution already capitalized	149.25	172.56	221.85	264.25	320.96
Consumer Contribution Capitalized During the year for Pre MYT Period up to FY 2006-07	20.67	10.67	2.79	0	0
Consumer Contribution Capitalized out of Consumer Contribution received during MYT Period	2.64	38.62	39.61	56.71	13.33
Closing Consumer Contribution and Grants	172.56	221.85	264.25	320.96	334.29
Average Consumer Contribution and Grants	160.91	197.21	243.05	292.61	327.63

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC had erroneously considered the notional value of opening Consumer Contribution (Rs. 149.25 Crores) for the MYT Control Period ignoring the fact that a portion of the amount related to work in progress or were not due for capitalization; in its Tariff Petition, the Appellant had claimed that the total value of Consumer Contribution Assets, as per the available records at that point of time,wasRs.112.48 Crores; actual capital expenditure and capitalization is required to be considered while truing-up, of Return on Capital Employed and depreciation, at the end of the Control Period, in terms of Regulation 4.16(b)(ii) of the MYT Regulations, 2007; the impact of considering a higher number of Consumer Contribution assets would result in reduction in value of Regulated Rate Base which is eligible for Return on Equity, Depreciation and Interest Cost; the submission of DERC, that it had erroneously allowed depreciation on consumer contribution and grants for the MYT Control Period fromFY2007-08toFY2010-11 in its tariff order 26.08.2011, could not be accepted; in terms of the judgment of the Supreme Court, in **BRPL v. DERC, 2022 SCC OnLine SC 1450 (Para 60, 61, 67, 68),** DERC ought to allow depreciation on Consumer Contribution Assets and Grants for the MYT Control Period from FY 2007-08 to FY 2010-11; there are subsequent developments like furnishing of data for refundable amounts of unspent consumer contribution, physical verification exercise conducted by REC Power Development and Consultancy Limited for FY 2004-05 till date, etc. which have been placed before the DERC, but has not been considered.

C. SUBMISSIONS URGED ON BEHALF OF DERC:

It is submitted, on behalf of DERC, that the Discoms have to undertake various projects/ schemes which involve capital outlay with or without Consumer Contribution; there are mainly three types of projects/ schemes undertaken by the DISCOMS which are: (i) Projects/ Schemes with Government Grants (Normally not refundable/repayable); (ii) Projects/ Schemes with 100 % share by Consumers without any contribution by DISCOMS; (iii) Projects/ Schemes with certain share i.e. up to 50% of Cost by Consumer Contribution/ Government Grants, and the balance is to be arranged by the DISCOM to the extent of its share; the methodology adopted by DISCOMS in these cases is that the DISCOM finalizes the projects, estimates the costs and intimates the amount of consumer contribution to the respective consumers in case of (ii) and (iii) above; the consumer deposits its intimated share in advance based on express/ implied contract; the DISCOM undertakes the projects/ schemes, which can be completed in one or more accounting periods; the Electrical Inspector is expected to issue the certificate of completion for these projects; and, while there are no issues involved in the cases at (i) above, the projects/ schemes at (ii) and (iii) above require a separate treatment.

Shri Dhananjay Baijal, Learned Counsel for the DERC, would further submit that, during the policy direction period, the Appellants were allowed return on equity after excluding amounts received towards consumer contribution; the 2007 MYT Regulations switched to the concept of RoCE; here also the bar on consumer contribution was continued; utilization of collected consumer contribution for capital works as part of means of finance, for meeting the ARR for respective DISCOMS for various financial years, had only been allowed by the DERC on the condition that it be utilized specifically for that particular purpose in that financial year; this was under the assumption that it is at

best a resource item to meet expenses related to that year; any additional amount, which has been left over, is required to be returned since the terms of the license only allows the consumer contribution to be collected for a specific purpose; the Appellant-Distribution Companies have, in wanton disregard of their contractual obligations, refused to refund the excess consumer contribution collected from the consumers, and have submitted that they have utilized the excess consumer contribution towards capital works on a global basis; being made aware of the said practice, DERC had directed that the amounts be immediately refunded in 2009; the Appellants have repeatedly contended that the accounting practice of diverting the excess consumer contribution was a correct practice; the entire consumer contribution received was utilised towards capital works on a global basis, resulting in a lower tariff to the consumers at large; there is no money to refund, and no reason to refund; and any refund would require the means of finance of the Appellants to be recast, since the excess consumer contribution, utilised to fund assets on a global basis, should be considered to be equity invested by the Appellants, with all consequential benefits.

Shri Dhananjay Baijal, Learned Counsel, would further submit that this issue has, thereafter, been agitated thrice over, with three judgments of this Tribunal being passed; the first judgment of this Tribunal dated 23.02.2015 has been reiterated on all occasions; in the said judgment this Tribunal negated each and every one of the contentions of the Appellant; this Tribunal held that the Appellants were following a wrong accounting practice, and the excess consumer contribution was required to be refunded to the original consumers; this Tribunal also noted that, in the event that the assertion of the Appellants was verified to be correct that the excess amounts had actually been used for capital works on a global basis and had resulted in the lowering of tariffs for consumers at

large, the said amounts could be recovered in future ARRs in the tariff as a consequential relief; the DERC had, thereafter, held the position that the Appellants were required to make the refunds first, and thereafter any consequential relief would follow; however this position was negated by this Tribunal on 15.05.2017; the Appellants, however, kept pressing for the issue of recasting of past ARRs before the Commission and the same was rejected by the DERC; this resulted in the third proceedings before this Tribunal, wherein the Tribunal on 31.08.2021 firmly and finally rejected the plea for recasting of past ARRs and reworking of the means of finance as illogical, unfair, and not in the interest of consumers; any recasting of means of finance on account of the so called unspent consumer contribution is wholly impermissible; the DERC had already re-fixed the consumer contribution, for the policy direction period, vide its order dated 26.08.2011, wherein the figure was taken to be Rs.130.62 Crores as per the figures submitted by the Appellant in its letter dated12.03.2010; the said figure was not challenged in the appeal against the order dated 23.08.2011; as this issue concerns consumer contribution received till 2006-07, there is no explanation as to why the numbers provided by the Appellant would change from their letter dated 12.03.2011 to their Tariff Petition in 2013; a perusal of the reliefs, sought by the Appellant in the present appeal, would make it clear that what the Appellant is actually seeking are-casting of the means of finance on account of refundable consumer contribution, which is expressly prohibited by the judgment of the Tribunal dated 31.08.2021; the amounts in question, in the present appeal, are actually amounts relating to consumer contribution, which are required to be refunded, but have not been refunded, and have been used globally; and, therefore, the same cannot be recast.

Placing reliance on the judgment of this Tribunal dated 13.08.2021, it is contended by Shri Dhananjay Baijal, Learned Counsel, that the said appeals were agitated by all three Delhi DISCOMS including TPDDL; only the Appellants herein have carried the said appeal to the Supreme Court, where the same is pending adjudication on the issue of maintainability; and, as the consumer contribution that the Appellants are claiming are the same consumer contribution that was directed to be refunded, there is no occasion for the same to be corrected in the manner as sought for by the Appellants.

Shri Dhananjay Baijal, Learned Counsel for the DERC, would further submit the Appellants were asked for and have submitted the figure of 130.62 Crores vide their own letter dated 12.03.2010; these figures were included by the Commission in the Tariff order dated 23.08.2011, and were not assailed by them; the Appellant has neither offered any explanation on why changed numbers were submitted in their tariff petition nor could they have submitted the changed numbers after having provided the figure of Rs. 130.62 Crores; in the guise of truing up the RoCE, the Appellants cannot seek for recasting of the means of finance of the pre-MYT period; the figure of consumer contribution actually capitalized would have been known to the Appellants in 2006-07, and therefore the supplying of changed figures in 2013 is wholly malafide; the Appellants' claim, in so far as it relates to deficit carrying cost, must be rejected in the light of the judgment of this Tribunal in ***BSES Yamuna Power Ltd.*** **v** ***DERC*****, 2021 SCC OnLine APTEL 50,** (judgment dated 31.08.2021), which prohibits the re-casting of means of finance on account of unspent/ unrefunded consumer contribution; the claim of the Appellants is liable to be rejected since the figure of Rs.130.62 Crores was provided by them vide letter dated 12.03.2010, and the same was recorded in the Tariff Order, dated 23.08.2011; and the Appellant has

neither assailed the order dated 23.08.2011 on this point nor has it offered any cogent reason for the discrepancy in the figures submitted.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In the rejoinder submissions, with respect to Issue No. 23, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC, while referring to the Appellant's letter dated 12.03.2010, failed to consider that the DERC had, by its letter dated 09.10.2009, only sought reconciliation of the deposit scheme executed from 01.07.2002 to 31.02.2009; by its letter dated 12.03.2010, the Appellant had submitted the total deposited amount against such schemes, capitalized up to FY 2006-07; the Appellant was referring to the total amount deposited in the capitalized schemes; however, the entire amount deposited by the consumers was not capitalized; the data, contained in the letter dated 12.03.2010, pertains to the total deposited amount, and not the actual amount of the consumer contribution capitalized till FY 2006-07; and the amount of consumer contribution capitalized was first captured in the 2007 Regulations only, which was applicable from FY 2007-08 to FY 2011-12.

Shri Amit Kapur, Learned Counsel, would submit that the DERC has, in the impugned order, admitted that the RRB has been revised based on provisionally approved capitalization for the entire Control Period (refer Para 3.200); till date, the capitalization amount has not been trued-up on the basis of actuals; in the impugned order, the DERC has approved Consumer Contribution, for the Policy Direction Period, of Rs.130.63 Crores, which is not the actual figure for that period; the DERC is bound to consider the actual consumer contribution amount for the opening balance of FY 2007-08 as and when the actual capitalization is

trued up for the entire Control Period; the DERC has erroneously considered the total deposited amount of Rs.130.62 Crores, submitted in the letter dated 12.03.2010, as Consumer Contribution capitalized till FY 2006-07; the DERC has disturbed its own finding rendered in the Tariff order dated 13.07.2012 that, instead of the Capital Expenditure incurred, actual capitalization figures are more important, and year-wise capitalization has to be compared to capitalization approved in the MYT Order for impact on Fixed Cost in the tariff (refer Paras 3.124 and 3.125); in terms of Regulation 14.16(b)(ii) of the 2007 Regulation, the actual data pertaining to Capital Expenditure and capitalization is required to be considered while truing up RoCE and depreciation at the end of the Control Period; and the DERC should revise the actual Consumer Contribution till FY 2006-07.

Shri Amit Kapur, Learned Counsel, would also submit that the issue of recasting of means of finance is not related to the present issue, which simply relates to erroneous consideration of a notional value of opening Consumer Contribution for the MYT Period; the judgments relied on by the DERC, including the judgment dated 31.08.2021, relate to unutilized Consumer Contribution, refund of unspent Consumer Contribution, and re-casting of the ARR of previous years; contrary to the same, the present issue relates to consideration of a higher value of opening Consumer Contribution by erroneously including amounts related to Works in Progress which were not due for capitalization; the DERC has erroneously linked the present issue to refunding the unspent Consumer Contribution; even otherwise, the judgment dated 31.08.2021 has been challenged by the Appellant before the Supreme Court in Civil Appeal Nos. 41-43 of 2022 which are currently pending adjudication; and the contentions reflect its attempt to deviate from the actual issue by making submissions regarding unutilized Consumer Contribution amounts, its

refund and recasting of ARR, when evidently no such issue is involved; and the DERC should be directed to consider the correct value of opening Consumer Contribution assets capitalized for the Financial year in question, consistent with the applicable Regulations, Accounting Standards, read with the principles laid down in the judgment of the Supreme Court in **BRPL vs. DERC: (2023) 4 SCC 788.**

E. ANALYSIS:

The Appellant's complaint, under this head, is that the amount, which related either to work in progress or were not due for capitalization, were considered in the notional value of opening consumer contribution for the MYT control period which has, in turn, resulted in reduction in the value of the Regulated Rate Base, thereby adversely affecting the Appellants' Return on Equity, Depreciation and Interest on Cost.

Regulation 4.16 of the 2007 Regulations relates to true-up and, thereunder, Regulation 4.16(b)(ii) stipulates that, for controllable parameters, depreciation and RoCE shall be trued-up at the end of the control period. Regulation 5.5 of the 2007 Regulations stipulates that the Return on Capital Employed (RoCE) shall be used to provide return to the Distribution Licensee, and shall cover the financing cost without providing separate allowance for interest on loans, and interest on working capital. Regulation 5.6 stipulates that the Regulated Rate Base (RRB) shall be used to calculate the total capital employed which shall include the original cost of assets and working capital less the accumulated depreciation; capital work in progress shall not form part of the RRB; and consumer contribution, capital subsidies/grants shall be deducted in arriving at the RRB.

Reduction of consumer contribution from the RRB would have a bearing on the Return on Capital Employed since Regulation 5.9 stipulates that Return on Capital Employed for the year "i" shall be computed in the following manner ie RoCE = WACCi * RRBi; where WACCi is the Weighted Average Cost of Capital for each year of the Control Period; and RRB, ie Regulated Rate Base, is the asset base for each year of the Control Period based on the capital investment plan and working capital. A reduction in the total quantum of RRB would automatically result in a reduction in the Return on Capital Employed.

As noted hereinabove, Regulation 5.6 requires consumer contribution to be deducted from the RRB. The Appellant-Discoms undertake project/schemes which involve capital expenditure. Among such projects include projects where the entire capital expenditure, ie 100% share, is contributed by consumers without any corresponding contribution by the Discoms. With respect to certain projects/schemes, certain share of up to 50% of its capital cost is borne by consumer contribution/ Government Grants, and the balance is required to be arranged by the Discoms.

In such projects, the Discoms estimate the cost of the project and intimate the respective consumers of the amount required to be contributed by them towards such capital outlays; the consumer deposits the said amount in advance; and the Discoms undertake the projects which are completed either in one accounting period or are spread over more than one accounting period. It is the stated case of the DERC that, after certificates of completion of these projects are issued by the Electrical Inspector, the excess amount, remaining with respect to consumer contribution, is required to be refunded to the concerned

consumers, and cannot be retained by the Discoms or utilized by them for other projects.

The stand of the Appellants-Discoms, on the other hand, is that utilization of these excess amounts, towards capital expenditure for other projects, has resulted in the Appellant not having to either invest its funds or borrow loans towards the capital expenditure required to be incurred for the other projects; if they had invested such amounts or borrowed loans, they would be entitled to RoCE which would include Return on Equity and Cost of Debt; and thereby not only is the DERC saved the trouble of recasting the means of finance of the Appellants, but it would also result in a lower tariff to the consumers who, in case of other projects (to the extent of utilization of the remaining consumer contribution), would have otherwise been required to pay a higher tariff, since the Appellant would be entitled for a higher Return on the Capital Employed.

The contention, urged on behalf of the Appellant, is that, in any event, consumer contribution, with respect to projects which were yet to be completed and with respect to which the work was still in progress, could not be removed from the RRB. As noted hereinabove, Regulation 5.6 of the 2007 Regulations stipulates that consumer contribution and capital subsidies/grants should be deducted in arriving at the RRB.

Not only consumer contribution, but also Capital subsidies/grants from the Government, are required to be deducted from the RRB, evidently because they do not form part of the capital employed by the Distribution licensee; and it is only with respect to capital employed by them (be it in the form of equity or debt) that they are entitled to RoCE. In other words, funds employed in capital projects, which the Distribution

Licensee has received as consumer contributions/subsidies/grants from the Government, are required to be excluded in computing the RRB.

The 2007 Regulations, made by the DERC in the exercise of its powers under Clauses (zb), (ze) and (zf) of Section 181(2) read with Section 61, 62 and 66 of the Electricity Act, 2003, constitutes subordinate legislation, are statutory in character and have the force of law. These Regulations, which came into force on its notification in the Delhi Gazette dated 30.05.2007, are binding not only on the Appellant and the Commission itself, but also on this Tribunal. In the light of Regulation 5.6 of the 2007 Regulations which are statutory in character, and the law declared by this Tribunal in **BSES Yamuna Power Ltd. & Ors Vs. DERC 2021 SCC Online APTEL 50,** reliance placed by the appellant on the accounting standards is of no avail.

By its letter dated 03.12.2009, the DERC informed the Appellants that the information furnished by them, regarding reconciliation of deposit schemes executed by them during 01.07.2002 to 31.03.2009, had been examined by the Commission. The Commission then noted the information given by the Appellants and its observations, and thereafter directed the Discoms to finalize the accounts of the deposit works already executed by them and approved by the Electrical Inspector (wherever applicable), and refund the amounts due to the agencies on whose behalf the work had been carried out by the Discoms. The Discoms were directed to send the reconciled accounts to all such consumers, and refund them the due amount along with penal interest of 12 % per annum. The interest was to be to the account of Discoms only, and could not be booked to ARR because this had become payable because of their fault. The Discoms were also informed that, in all future cases, the accounts be finalized immediately after completion of works, and refunds

be made to the consumers within three months of energization. The Discoms were asked to submit a quarterly report to the Commission in this regard in the enclosed format, and to send a compliance report forthwith.

In reply thereto, the Appellants, by their letter dated 12.03.2010, informed the DERC that they had paid a sum of Rs. 9.32 Crores and Rs. 14.76 Crores during FY 2007-08 and FY 2008-09 respectively as interest on consumers security deposit; they had submitted scheme-wise amounts of deposit and capitalized cost vide its letter dated 06.11.2009; and the total deposit amount against such schemes, capitalized up to FY 2006-07, was Rs. 130.62 Crores.

The Appellant may be justified in its submission that till date the capitalization amount has not been trued-up on the basis of actuals. We are, however, informed that the exercise of physical verification is already over and, since the DERC would now have the actual figures available with them, they ought to true-up the consumer contribution on actuals and not on a tentative basis.

JUDGEMENTS OF THIS TRIBUNAL ON THIS ISSUE:

1. Aggrieved by the order dated 11.03.2014 passed by DERC, the distribution companies filed appeals before this Tribunal being Appeal Nos. 109 of 2014, 110 of 2014 and 111 of 2014. On 23.02.2015, the Tribunal passed Judgment in these appeals. On the issue regarding utilisation of unspent consumers' contribution as means of finance for execution of capital works in the licensed area, and thereby interest on debt and return on equity having the effect on tariff, this Tribunal held that the Commission had the jurisdiction to adjudicate this matter to safe

guard the interest of the consumers at large and it was a tariff related issue.

On the issue whether the distribution company had the right to keep the consumers contribution for development of network/infrastructure in the licensed area, this Tribunal observed that it was the general practice that the distribution companies collect the estimated cost of the capital work required for release of supply from a specified consumer; it was the duty of the distribution licensee that, as soon as the work is completed and certified by the Electrical Inspector, the work order of the said work has to be closed and amount, if any left over, should be returned to the specified consumer; utilizing unspent amount of the consumers contribution of a deposit work, for execution of the capital works of the distribution licensee in their licensed area, was not a correct practice; hence, they rejected the plea of the Appellants towards utilization of unspent amount of the consumers' contribution for their other capital works in their respective licensed areas; and this issue was being decided against the appellants.

This Tribunal found that the Commission had been considering the consumers contribution as means of financing the capital cost; the appellants/DISCOMs had submitted that the unutilized portion of the consumer's contribution was also used as means of financing for the capital works and, accordingly, the regulated rate base from FY 2002-2003 onwards was reduced; and the consumers got the benefit of lower tariff, if the unutilized consumer contribution had been utilized as means of financing in the tariff orders from FY 2002-2003 onwards and corresponding relief had been given to the consumer in terms of retail supply tariff.

This Tribunal held that, If the said contention of the appellants was true and correct, then the unspent consumer contribution with interest, to be refunded by the appellants, may be considered as an expenditure in the future annual revenue requirement (ARR) of the appellants; the appellants should be given liberty to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-2003 onwards in reducing the retail supply tariffs; it appeared just and proper, and also in the interest of justice, that the impugned order passed by the Commission should be set aside with the aforesaid direction because, if utilization of unspent consumer contribution as a means of finance has reduced the tariff and thereby benefitted the consumers, then liberty should be given to the appellants to furnish the respective accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-2003 onwards in reducing the retail supply tariff.

This Tribunal noted that the DERC has been considering consumer contribution as means of financing the capital cost; the appellant's contention, that the unutilized portion of the consumer contribution was also used as means of finance for the capital works and accordingly regulated rate base from FY 2002-2003 onwards was reduced and consumers got the benefit of lower tariff, had legal force which they accepted; if the unutilized consumers contribution had been utilized as means of financing for the tariff orders from FY 2002-2003 onwards, and corresponding relief had been given to the consumers in terms of retail supply tariffs, then the appellants were entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's order; the unspent consumers contribution amount may be considered as an expenditure in the future ARR of each of the appellants/ DISCOMs; and these matters were fit to be remanded

giving liberty to appellants to furnish the accounts showing that the excess amount of consumers contribution had been duly considered in the annual revenue requirements from FY 2002-2003 onwards in reducing the retail supply tariffs.

2. In **BSES Yamuna Power Ltd. & Ors Vs. DERC 2021 SCC Online APTEL 50,** this Tribunal observed that Distribution Licensees (DISCOMs) in Delhi had to undertake various projects/schemes which involved capital outlay with or without Consumer Contribution; there were mainly three types of projects/ schemes undertaken by the DISCOMS, which were: (i) Projects/Schemes with the Government Grants (Normally not refundable/ repayable); (ii) Projects/Schemes with 100 % share by Consumers without any contribution by DISCOMS; (iii) Projects/ Schemes with certain share i.e. up to 50% of cost by Consumer Contribution/Government Grants, and the balance is to be arranged by the DISCOM to the extent of its share; the methodology adopted by DISCOMS, in these cases, was that the DISCOM finalizes the projects, estimates the costs and intimates the amount of consumer contribution to the respective consumers, in case of (ii) and (iii) above; the Consumer deposits its intimated share in advance based on express/implied contract; the DISCOM undertakes the projects/schemes, which could be completed in one or more accounting periods; the Electrical Inspector is expected to issue the certificate of completion for these projects; and, while there are no issues involved in the cases at (i) above, the projects/schemes at (ii) and (iii) above require a separate treatment.

This Tribunal noted that the issue regarding refund of unspent consumer's contribution by DISCOMs had been dealt extensively by this Tribunal in its earlier judgment dated 23.02.2015; there was no dispute that the unspent consumer's contribution with interest had to be refunded

back by the Appellants, and the said amount would be considered as an expenditure in the future Annual Revenue Requirement (ARR) of the Appellants; the Appellants should be given liberty to furnish the accounts showing that the excess amount of consumers contribution had been duly considered in the ARR from FY 2002-2003 onwards in reducing the retail supply tariffs; DERC in its all orders, including the order dated 05.12.2019, had been directing the DISCOMs to refund the unspent consumer's contribution and, in the event of unspent consumers contribution having been utilized as ‘means of financing’ for the Tariff Orders from FY 2002-2003, the said amount would be considered as an expenditure in the future ARR.

This Tribunal then noted the submissions of the DISCOMs that, since the unspent consumers contribution had already been utilized as a ‘means of finance’ from the Financial Year 2002-2003, there was no money left with DISCOMs to refund the unspent consumers contribution; to facilitate refund, the ARRs in respect of previous years from 2002-2003 must be recast; in case the unspent consumer contribution is being refunded, then the ARRs of the previous years, from FY 2002-2003, should be recast and Debt : Equity is to be allowed in the ratio of 70 : 30 from the date of using the unspent consumer contribution.

This Tribunal also noted the submission of the DERC that no utility can reinvest an amount retrospectively; since the utility did not actually have any outgoing cash flow from their own coffers in that period, therefore utilities cannot change its financing pattern retrospectively at this distance of time; if ARRs are recast then the Appellant DISCOMs would be the beneficiaries of windfall gains ranging back to 2002-2003 onwards, even though they had no such cash flow or actual investment for the amount that were in contemplation today.

This Tribunal then took into consideration the note submitted by the DERC, and observed that the DERC had considered the submissions of the Appellants that the unspent consumers contribution had been utilized as 'means of finance' in the previous year, and as such they were left with no money to refund the unspent consumers contribution; as per the procedure, in the '**Note on procedure for refund of consumer contribution**' submitted by it, the Commission would 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 the Balance Sheet, the relevant Schedules and Tariff Orders; the DISCOMs shall submit this data within a period of two weeks thereafter; the Commission shall thereafter, in compliance with the judgment dated 23.02.2015, 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 this Tribunal, which will be recovered through Tariff and will thereafter be refunded to the identified consumers by DISCOMs within the same Financial Year.

This Tribunal noted the procedure submitted by DERC for refund of unspent consumers contribution amending its earlier direction to refund the unspent consumers contribution, and to file claims before the Commission for consideration as expenditure in the future ARRs; the grievance of the Appellants that the funds were not available with them for making refund had been mitigated; the procedure submitted by the Commission/DERC resolved the issue regarding refund of the unspent

consumers contribution and was a balanced decision, and could be accepted. Accordingly, the Commission/DERC was directed to implement this procedure forthwith.

As regards the contention of the Appellants regarding the recasting of the ARR of previous years, this Tribunal was convinced by the submission of the Commission that this could result in undue windfall gain to the DISCOM wherein DISCOMs would earn Return on Equity on a component of equity which actually had not been invested by the DISCOMs; the fact was that the unspent consumers contribution had been used as a 'means of finance' in the previous years starting from FY 2002-2003, and the same had not been refunded till date; even if, suppose the ARRs of the previous years were recast, 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 could not change into something which had not happened at all; it was wrong even to conceive that the amount of debt and equity would be enhanced to the extent of 70% and 30% of the unspent consumer contribution respectively; the fact was that the unspent consumer contribution was used as a 'means of finance' in the earlier ARRs from FY 2002-2003, and the same would now be considered, subject to verification by the DERC, as an expenditure in future ARRs; by doing this, the Commission would be correcting the error, which had happened in the past, by considering this as an expenditure in the future ARRs; the unspent consumer contribution, which should have been refunded after certification by the Electrical Inspector, should not have been used as a 'means of finance' in the previous ARRs; the Commission was correcting that error by refunding this amount to whom it belonged by recovering it as an expenditure in the future ARRs; the party affected in this whole process was the consumer from whom the

contribution was collected, and the unspent consumer contribution was not refunded in time; the Appellants could not be allowed 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 and to whom it should have been paid in the past after the certification by the Electrical Inspector, the DISCOMs would not be at any loss; and the DISCOMs had already been allowed the Return on Equity in the ARRs of the respective years on the actual equity invested by them.

This Tribunal further observed that it was 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 had not actually been invested by DISCOMs was illogical, unfair, not in the interest of consumers, not as per the law and need not be considered; and, accordingly, this contention of the Appellants is rejected.

In terms of the judgement of this Tribunal, in **BSES Yamuna Power Ltd. & Ors Vs. DERC 2021 SCC Online APTEL 50,** the unspent consumer contribution, which should have been refunded after certification by the Electrical Inspector, should not have been used as a 'means of finance' by the Distribution Licensees in the previous ARRs; this error should be corrected by the Commission by ensuring that the Appellants refund this amount to whom it belonged by recovering it as an expenditure in the future ARRs; and the unspent consumer contribution, used as a 'means of finance' in the earlier ARRs, shall be considered, subject to verification by the DERC, as an expenditure in the future ARRs.

In terms of the afore-said observations in **BSES Yamuna Power Ltd. & Ors Vs. DERC 2021 SCC Online APTEL 50**, the Appellants' claim under this head is rejected, leaving it open to the Commission to correct the error in terms of the afore-said order of this Tribunal.

VIII. ISSUE NO. 24(d): COLLECTION OF ELECTRICITY DUTY

A. FINDINGS OF THE COMMISSION:

The findings of the Commission on Issue No. 24(d) are as under:

"Collection Charges on Electricity Duty

3.141 The Petitioner has submitted income on collection charges on electricity duty of Rs.5.84 crore to be reduced from non-tariff income. The Commission has considered that collection of electricity duty is not a separate function, electricity duty is collected with electricity bills. Therefore, income on collection charges on electricity duty is part of non-tariff income.

…

Table 35: Trued-up Non-Tariff Income approved by Commission (Rs. Crore)

Sl. No.	***Particulars***	***Now Approved***
1	*Non-Tariff Income as per audited accounts*	*235.00*
2	*Less:*	
i)	*Excess Provisions written back (pertaining to O&M expenses and bad debts written off)*	*8.03*
ii)	*Transfer from Consumer contribution for capital works*	*7.20*
iii)	*Financing Cost of LPSC*	*25.78*
Iv)	*Rebate*	*2.83*
v)	*Interest on Con. Reserve*	*3.23*

3	*Add:*	
	Interest on consumer security deposit	*30.39*
4	*Total Non-Tariff Income*	*218.13*

…

Commission's Analysis

3.222 The Commission has reviewed the submission on the Non-Tariff Income claimed from FY 2007-08 to FY 2010-11 and the Commission analysis is given below:

3.223 The Commission has not considered the interest on Contingency Reserve as it is not a part of non-tariff income as per MYT Regulations.

3.224 In compliance of Hon'ble APTEL directions, the Commission has considered rebate on power purchase upto 1% in Non-Tariff Income. Amounting to Rs. 21.43 crore.

3.225 The summarized table on Non-tariff Income approved by the Commission is as below:

Table 73: Non Tariff Income approved in truing up for FY 2007-08 to FY 2010-11 (Rs. Crore)

Sl. No.	***Particulars***	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***
1	*Non-Tariff Income*	*66.36*	*202.19*	*165.92*	*154.59*
2	*Add: Delayed projected charges*	*31.77*			
3	*Add: Interest as Investments*	*15.68*			
4	*Add: prior period interest*		*0.06*		
5	*Add: Prior period income free sale of energy*		*10.24*		

6	***Total***	***113.81***	***212.49***	***165.92***	***154.59***
7	*Add: Income from normative interest as consumer security deposit*	*10.56*	*14.52*	*18.03*	*20.92*
8	***Total NTI***	***124.37***	***227.01***	***183.95***	***175.51***
9	*Less: Interest on Contingency Reserve*	*1.96*	*1.40*	*1.43*	*2.91*
10	*Less: Financing Cost of LSPC*	*16.77*	*14.68*	*14.86*	*15.41*
11	*Less. Interest/ Short term capital gain*	*2.10*	*6.28*	*1.53*	*1.21*
12	*Less: Rebate <1%*	*21.29*	*21.63*	*24.08*	*25.51*
13	*Less: Excess/ provision back*	*1.89*	*1.56*	*22.58*	*3.49*
14	*Less: Transfer from consumer contribution for capital works*		*9.09*	*3.68*	*10.63*
15	***Net Non-Tariff Income***	***80.36***	***172.37***	***115.78***	***116.36***

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that Section 113 of the Delhi Municipal Corporation Act provides for levy of electricity tax to be assessed and collected in accordance with the provisions of the said Act and the bye laws made there-under; Section 481 empowers the Corporation to make bye laws; Clause 3 of the Delhi Municipal Corporation (Assessment and collection of Tax on the Consumption, Sale or Supply of Electricity) Bye Laws, 1962 provides for collection of electricity tax on consumption, sale or supply of electricity by the licensee within its area of supply on behalf of the DMC; the Appellant is obligated to collect electricity tax on behalf of DMC under Clause 3(1)(b) of the Bye Laws; such collection is a statutory obligation and not a licensed activity, since the obligation arises neither under the Electricity

Act nor in terms of the license granted to the Appellant; Clause 7 of the Bye Laws provides for the time and manner of collection of electricity tax, Clause 17 provides that the licensee shall be entitled to certain percentage of collection of tax which is three percent as specified by the Municipal Corporation of Delhi in its communication dated 30.01.2012; the quantum of tax, on consumption of electricity payable by the consumer, has been specified in the resolution of the Municipal Corporation dated 30.06.1992 to be 5% of the charges for supply of electricity; the Appellant is entitled to collect 5% as electricity tax from the consumers on behalf of the MCD, and to retain 3% of the said amount as collection charges; the commission earned by the Appellant, from the Municipal Corporation of Delhi, is not a non-tariff income; it can be considered only as other business income; and is covered by the judgment of this Tribunal in **MSPGCL vs. MERC (Judgment in Appeal No. 86 and 87 of 2007).**

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that all activities pertaining to electricity duty are undertaken in terms of the DERC's directions, and the Commission is well aware regarding the assets, and manpower resources utilized for undertaking any task by the Appellant; collection of tax is a statutory obligation and is not incidental to distribution or retail supply; at best, only a portion of such income can be considered in terms of Section 51 of the Electricity Act; the DERC cannot include income from collection of electricity duty as part of non-tariff income without considering the cost borne by the Appellant to perform the said function; apart from collection of electricity duty from consumers, the Appellant has also to incur additional O&M expenses; this Tribunal, in Appeal Nos. 86 & 87 of 2007, has held that, if the income cannot be reasonably linked to any cost item allowed by the Commission as part of the ARR, the same should not be adjusted against the ARR of

the Appellant in the absence of specific Regulations; the DERC should be directed to deduct the income/ commission earned by the Appellant on electricity duty from the NTI for the period from FY 2007-08 onwards, and allow consequential impact with carrying cost.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is submitted, on behalf of DERC, that electricity duty/ tax is imposed on the electricity bill, and occupies one square cell in the bill being printed by the Appellant; as on date, electricity duty is being charged at 5% on the energy charges, surcharge on energy charge, PPAC amount and ToD Surcharge/ Rebate amount; apart from calculation of 5% amount, every aspect of the creation of the said bill, including meter reading, computation of energy charge, surcharge, PPAC and ToD surcharge are included in the Appellant's O&M costs; the cost of calculation of the entire billed amount is also part of the O&M expenses of the Appellant that are provided on a normative basis with inflation and escalation factors for the control period; from the tariff petition, it is clear that the Appellant intends to over-reach the Regulations on O&M expenses; O&M expenses had been provided on a normative basis with an inflation and escalation factor and has been upheld by the Delhi High Court in **TPDDL vs. DERC: (2016) SCC OnLine Del 4165**; the Appellant's O&M expenses was taken on a company wide basis at the time of determination of the Multi-Year Tariff targets in the first MYT Tariff Order dated 23.02.2008, and the base year would have included the figures for collection of the said duty; the Appellant has not provided anything to the contrary; the Appellant has not contended, in its tariff petition, that collection of electricity duty should be considered as other business income under Section 51 of the Electricity Act; 'other business' can only be carried out with the prior approval of the Commission, and

requires the Appellant to maintain accounts in the manner prescribed to identify the expenditure associated which allows for clear segregation of the costs, expenses and profits of the Other Business, and the costs, expenses and profits of the Licensed Business; neither has the Appellant informed the Commission of its running the said 'Other Business' nor has it presented any books of accounts as required under the said Regulations as well as their license; apart from the fact that the activity is so intrinsically connected to the electricity business, the Appellant has till date not provided any evidence for the same; reliance placed by the Appellant on the judgment of this Tribunal in **MSPGCL vs. MERC (Appeal No. 86 & 87 of 2007)** is of no avail, since non-tariff income is defined in the Act, and O&M expenses are provided on a normative basis without their being a true-up of the same; and, this claim is liable to be rejected.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT ON ISSUE NO. 24(d):

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that reliance placed by the DERC on the 2011 Regulations is misplaced, since the impugned orders are governed by the 2007 Regulations; DERC's approach is contrary to Regulation 5.23, 5.24 and 5.25 of the 2007 Regulations; the Commission earned on collection of Electricity Duty does not fall within the purview of Regulations 5.23 to 5.25 of the 2007 Regulations; collecting Electricity Duty, on behalf of MCD, is undertaken as part of the legacy inherited from the erstwhile DVB; it is an additional task which required substantial work, expenses and efforts by the Appellant; merely because Electricity Duty is collected along with Electricity Bills does not mean that the activity of collecting, managing and accounting for Electricity Duty does not involve any expenditure; the

finding of the DERC that such cost is included in the O&M Expenses of the licensed Business is incorrect; expenses incurred on account of Electricity Duty is not an obligation of the Distribution License under the Electricity Act, and the Appellant is not required to incur such expenses as normal O&M; since the DERC directed the Appellant to undertake such task for the MCD, the commission for the same is a compensation for the Appellant's time, effort and cost; this cannot be included as part of Non-Tariff Income to be passed on to consumers; and the base year did not include figures pertaining to collection of Electricity Duty.

Sri Amit Kapur, Learned Counsel, would further submit that all activities pertaining to collection of Electricity Duty are undertaken in terms of DERC's directions; the DERC is well aware regarding the assets, manpower, resources utilized for undertaking any task by the Appellant; collection of tax is a statutory obligation, and is not incidental to distribution or retail supply of electricity by a licensee; DERC can, at best, consider only a portion of such income in terms of Section 51 of the Electricity Act read with the DERC (Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee) Regulations, 2005; the DERC cannot simply include income from collection of Electricity Duty as part of NTI without considering the costs borne by the Appellant to perform the said function; apart from the collection of electricity duty from consumers, the Appellant has also to incur additional O&M Expenses; the judgment of this Tribunal in **MSPGCL vs. MERC (Appeal Nos. 86 and 87 of 2007)** establishes the point that, unless a regulation specifically provides so, income cannot be considered without costs; and the DERC may be directed to deduct the income/ commission earned by the Appellant on collection of Electricity duty from NTI for the period from FY 2007-08 onwards, and allow consequent impact along with carrying cost to the Appellant.

E. ANALYSIS:

Section 113 of the Delhi Municipal Corporation Act, 1957 relates to taxes to be imposed by the Corporation under the 1957 Act. Section 113(2)(d) stipulates that, in addition to the taxes specified in sub-section (1), the Corporation may, for the purposes of this Act, levy a tax on the consumption, sale or supply of electricity. Section 113(3) provides that the taxes, specified in sub-section (1) and sub-section (2), shall be levied, assessed and collected in accordance with the provisions of this Act and the bye-laws made thereunder.

Chapter XXIII of the Delhi Municipal Corporation Act, 1957 relates to Rules, Regulations and Bye-laws. Section 481(1) of the 1957 Act stipulates that, subject to the provisions of the 1957 Act, the Corporation may, in addition to any bye-laws which it is empowered to make by any other provision of the 1957 Act, make bye-laws to provide for any of the matters referred to thereunder. Clause (3) of the Delhi Municipal Corporation (Assessment and Collection of Tax on the Consumption, Sale or Supply of Electricity) By-Laws, 1962 relates to collection of electricity duty. Clause 3(1)(b) stipulates that where, within the limits of the Corporation, electricity is supplied by any licensee other than the Delhi Electric Supply Undertaking, electricity tax shall be collected by that licensee on behalf of the Corporation. Clause 3(2) stipulates that the licensee, who collects any tax under sub-clause (b) of Clause 3(1), shall pay the tax so collected to the General Manager (Electricity) within such time and in such manner as is prescribed in these bye-laws. The tax so payable shall be a first-charge on the amount recoverable by the licensee for the electricity supplied by him and shall be a debt due by him to the Corporation. Clause 4(a) of the said bye- laws requires every licensee other than the DESU, and every person liable to pay electricity tax under

Clause (3)(3) of the bye-laws, to keep books of accounts in the form prescribed in these bye-laws, and to submit to the General Manager (Electricity) returns, in such forms and within such time as are prescribed in these bye-laws, showing the units of energy supplied, generated or consumed by him, as the case may be, and the amount of tax payable thereon and recovered or paid by him under Bye-law 3.

Clause 8 of the bye laws stipulates that the books of accounts, to be kept under Bye-law 4, shall include the following particulars (i) Name of the consumer (ii) Address of the consumers premises with a brief description thereof, (iii) Number of units of electricity supplied, (iv) period of supply; and (v) Amount of electricity tax chargeable. Under the proviso, the Commissioner may, for reasons to be recorded in writing, exempt any person from maintaining separate account books and allow him to add necessary columns in his existing books of accounts for purposes of making necessary entries about demand and collection of electricity tax. Clause 9 relates to submission of returns and, thereunder, a licensee is required to submit the monthly returns to the Commissioner or any other officer authorised by him in this behalf, in such forms as may be prescribed by the Commissioner by notification in the Official Gazette, by the 25th of the month next after that following the month to which the return relates.

It is evident, from the afore-said bye laws, that the Distribution Licensee is required to maintain books of accounts, and submit periodical returns as detailed in Clause 8 and 9 of the said bye laws.

Clause 17 of the bye laws relates to the cost of collection, and stipulates that the licensee shall be entitled, for his cost of collection or the tax, to a rebate of such percentage as may be determined by the Corporation on the amount of tax collected and paid by him. By

proceeding dated 30.01.2012, the Municipal Corporation of Delhi fixed 3 per cent, of the gross electricity tax collected by the licensee, to be paid as collection charges to them. By proceedings dated 19.02.2013, the Appellant was informed by the New Delhi Municipal Corporation that 3 per cent collection charges were paid to them in addition to the grace period of 40 days as the amounts have already been collected from the consumer.

The obligation cast on the Appellants to collect electricity tax, from consumers within its area of supply, is in terms of the provisions of the Delhi Municipal Corporation Act, 1957 read with the bye laws framed thereunder.

We have no quarrel with the submission urged on behalf of the appellant, relying on the judgment of this Tribunal in **MSPGCL vs. MERC (Appeal Nos. 86 and 87 of 2007 dated 10.04.2008)**, that, unless a regulation specifically provides to the contrary, income cannot be considered without costs. We have difficulty, however, in concurring with the opinion expressed in**Maharashtra State Power Generation Co. Ltd. Vs. MERC & Ors. (Judgment in Appeal No. 86 and 87 of 2007 dated 10.04.2008),** that. since the Tariff Regulations give powers to the Commission to amend any provisions of the Tariff Regulations (Regulation 84) and to remove difficulties in implementation of the Tariff Regulations (Regulation 85), they felt that such powers could be used by the Commission to take corrective measures so that the norms set are achievable under the operating environment; and hence, they were directing the Commission to take into consideration the independent study which they had directed to be undertaken, and re-set the above operating parameters.

Our inability to agree is primarily because of our view that this

Tribunal, in an appeal under Section 111 of the Electricity Act, does not exercise the power of judicial review (**PTC India vs. CERC: 2010 (4) SCC 603)**; the power to make regulations (and consequently the power to amend such regulations) has been conferred by Parliament only on the Regulatory Commissions; such a quasi-legislative power to make regulations (which are in the nature of subordinate legislation) can only be exercised by the concerned Commissions, and it is impermissible for this Tribunal, in an appeal under Section 111 of the Electricity Act, to dictate how such a power should be exercised, more so since even a Court exercising the power of judicial review cannot dictate to the regulation making authority as to how it should make regulations. (**State of U.P. vs. Mahindra and Mahindra: 2011 (13) SCC 77).**

The O&M expenses, which is required to be computed on a normative basis in terms of the 2007 Regulations, relates to the distribution business carried on by the Appellant in terms of the provisions of the Electricity Act, and the Regulations made by the DERC. It is such O&M expenses, which has been provided on a normative basis with an inflation and escalation factor, that has been upheld by the Delhi High Court in **TPDDL vs. DERC: (2016) SCC OnLine Del 4165.**

The obligation to collect electricity duty, and remit the collected amount to the Delhi Municipal Corporation, is placed on the distribution licensee under the Delhi Municipal Corporation Act, 1957, and not under the Electricity Act, 2003. The expenses incurred by them in this regard is in the discharge of its statutory obligations under Clauses 4, 8 and 9 of the bye-laws made under Section 481 of the Delhi Municipal Corporation Act, 1957, and is distinct from its obligations as a distribution licensee under the Electricity Act. Consequently, while treating the charges received by the distribution licensee (ie 3 per cent towards cost of

collection of electricity duty) as non-tariff income, the Appellant is entitled for deduction of the expenditure incurred by them in this regard, more particularly the expenditure which they may have incurred in maintaining separate books of accounts, in filing returns and in collecting electricity duty from its consumers. The actual expenditure, which the Appellant may have incurred on this score, may necessitate verification by the DERC.

Suffice it to observe that the Appellant cannot be denied deduction of the expenditure incurred by them in the discharge of its statutory obligations under Clauses 4, 8, 9 of the bye laws made under Section 481 of the Delhi Municipal Corporation Act, on the ground that these expenses are also governed by the normative O&M expenses fixed by the DERC in terms of the 2007 Regulations, unless it is established that the expenditure incurred in collecting electricity duty was taken into consideration while fixing the O&M expenses, in the base year of the control period, as stipulated in Regulation 5.3 of the 2007 Regulations. While the appellants deny that it was so taken, the DERC has also not stated that it was included in fixing the O&M expenses, in the base year of the control period, in terms of Regulation 5.3 of the 2007 Regulations. In any event, this is also a matter for examination by the DERC. Suffice it to make it clear that, in case the expenses incurred in collection of electricity duty was not included in fixing the O&M expenses in the base year of the control period, the appellants would be entitled to have such expenses deducted from its non-tariff income ie commission received from NDMC for collection of electricity duty on its behalf.

Section 51 of Electricity Act relates to the other business of distribution licensee and, thereunder, a distribution licensee may, with prior intimation to the Appropriate Commission, engage in any other

business for optimum utilisation of its assets. Under the first proviso thereto, 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. Under the second proviso 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.

The contention that the Appellant did not inform the DERC of its carrying on the other business of collection of electricity duty is only to be noted to be rejected. The DERC cannot be said to be unaware of the Appellant's statutory obligations, to collect electricity duty, in terms of the provisions of the 1957 Act and the bye laws made thereunder.

The DERC may cause a prudence check of the expenditure incurred by the Appellant towards collection of electricity duty, more particularly those which are referable to Clauses 4, 8 and 9 of the bye laws. It may also ascertain whether such expenditure was taken into consideration while fixing the O&M expenses for the base year of the Control period. In case it was not, then the appellant is entitled to claim deduction of the actual expenditure incurred from the income received by the Appellant from the Delhi Municipal Corporation towards cost of collection of the electricity duty which has been treated, in the impugned order, as non-tariff income.

The impugned order is set aside to the extent indicated hereinabove, and the matter is remanded to the DERC for its consideration in terms of the afore-said directions.

IX. ISSUE NO. 24(e): INCOME FROM CONNECTION/ RE-CONNECTION CHARGES:

A. FINDINGS OF THE COMMISSION:

The findings of the Commission on Issue No. 24(e) are as under:

"Table 73: Non Tariff Income approved in truing up for FY 2007-08 to FY 2010-11 (Rs. Crore)

Sl. No.	***Particulars***	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***
1	*Non-Tariff Income*	*66.36*	*202.19*	*165.92*	*154.59*
2	*Add: De layed projected charges*	*31.77*			
3	*Add: Interest as Investments*	*15.68*			
4	*Add: prior period interest*		*0.06*		
5	*Add: Prior period income free sale of energy*		*10.24*		
6	***Total***	***113.81***	***212.49***	***165.92***	***154.59***
7	*Add: Income from normative interest as consumer security deposit*	*10.56*	*14.52*	*18.03*	*20.92*
8	***Total NTI***	***124.37***	***227.01***	***183.95***	***175.51***
9	*Less: Interest on Contingency Reserve*	*1.96*	*1.40*	*1.43*	*2.91*
10	*Less: Financing Cost of LSPC*	*16.77*	*14.68*	*14.86*	*15.41*
11	*Less. Interest/ Short term capital gain*	*2.10*	*6.28*	*1.53*	*1.21*
12	*Less: Rebate <1%*	*21.29*	*21.63*	*24.08*	*25.51*
13	*Less: Excess/ provision back*	*1.89*	*1.56*	*22.58*	*3.49*
14	*Less: Transfer from consumer contribution for capital works*		*9.09*	*3.68*	*10.63*
15	***Net Non-Tariff Income***	***80.36***	***172.37***	***115.78***	***116.36***

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC has arbitrarily considered income from connection/ reconnection charges as part of the Non-Tariff Income for FY 2007-08 to FY 2011-12; as part of its additional submissions in the True-Up Petition filed on 26.06.2013, the Appellant had requested the DERC not to consider the Income from Connection/ Reconnection Charges as part of NTI for the First Control Period; however, the DERC included the aforesaid income as part of NTI; the Appellant incurred additional employee expenses for providing services related to connection/ reconnection; once a consumer applies for connection or reconnection of electricity, the Authorized Representatives of the Appellant, with prior intimation, visits the consumers' premises to confirm the eligibility, to examine the technical requirements for providing electricity supply to the consumer, and to sanction load for the premises in consultation with the consumer and the Electrical Contractor; in this effort, the Appellant incurs additional employee expenses which are not included in the normative Operation and Maintenance Expenses allowed by the DERC; income received from new consumers qua connection/ reconnection charges are used to defray the expenses which are not allowed in the Appellant's ARR; in its Tariff Order dated 26.08.2011, the DERC considered escalation factor of 4.66% on year-on-year basis to project employee expenses for the First Control Period, basic actual Employee Expenses for consumer base of FY 2006-07; the DERC erred in considering income received from new connection/ reconnection as NTI to further reduce the Appellant's ARR, while not granting additional costs to be incurred by the Appellant; Section 43 of the Electricity Act casts an obligation on the Distribution Licensee to provide supply of electricity to

the premises of an owner or occupier; the Appellant suffered a loss of Rs.0.34 Crores excluding the Carrying Cost for the period from FY 2007-08 to FY 2011-12; the DERC erred in disallowing the said expenses which the Appellant could not have avoided in terms of its obligations under Section 43 of the Electricity Act, while including the income received from new consumers in NTI and deducting it from the ARR; income earned from providing connections/ reconnection to consumers cannot be included as part of NTI since, for providing these facilities, the Appellant incurs additional employee expenses which are not included in normative O&M Expenses, and thus not in the ARR; hence, when expenses do not form part of ARR, revenue also cannot be included in the ARR as part of NTI; in **K.C. Ninan vs. Kerala State Electricity Board [(2023) SCC OnLine SC 663, Para 42 & 43]**, the Supreme Court has held that the duty to provide supply of electricity under Section 43 is not absolute and is subject to the charges stipulated by the distribution licensees as part of the application; and the DERC has erred in treating income from new consumers as part of NTI while disallowing the expenses incurred by the Appellant (claimed by way of letter dated 26.06.2013) towards servicing new connections.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that the DERC erred in considering the income received from new consumers as part of NTI and reducing it from the ARR, while not granting the expenses/ costs incurred by the Appellant to service these new connections/ reconnections; this treatment violates the 'Matching Principle' that it is necessary that the profit made by the business during a period, 'revenues' of the period should be matched with the costs (expenses) of that period as recognized by the Supreme Court in its judgement dated 19.11.20007 in **J.K. Industries Ltd. vs. Union of India:(2007) 13 SCC 673**; this principle has been applied by this

Tribunal in **Maharashtra State Power Generation Co. Ltd. vs. MERC (judgment in Appeal Nos. 86 and 87 of 2007 dated 10.04.2008)**; such accounting treatment also violates all accounting norms and standards which are binding statutory requirements imposed by law including Section 211 of the Companies Act, 1956, Sections 128(1) and 129(1) and 133 of the Companies Act, 2013, Ind AS 28 and 88 of the Indian Accounting Standard-1, and Para 94 of the Framework for the Preparation and Presentation of Financial Statements issued by the Accounting Standards Board of the Institute of Chartered Accountants of India; the DERC has in its reply reproduced Regulations 5.23 to 5.25 of the 2007 Regulations to state that income from other businesses incidental to licensed business shall constitute part of NTI; the DERC cannot unilaterally disallow the legitimate entitlements of the Appellant without any rationale; and the court should provide its own grounds and reasons for rejecting the claims/ prayer of a party, howsoever concise they may be as held by the Supreme Court in **CCT vs. Shukla & Bros. [(2010) 4 SCC 785, Para 24 to 27]**.

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the Appellant's letter dated 26.06.2013 is a part of the Tariff Petition, since the DERC by its email dated 10.07.2013 had requested the Appellant to send the list of correspondence regarding tariff determination for FY 2013-14; the Appellant, by its letter dated 15.07.2013, submitted the list of all correspondence related to tariff determination for FY 2013-14 which included the Appellant's communication dated 26.06.2013; at Para 1.13 of the impugned order, the Commission has noted that it conducted multiple validation sessions with the Petitioner during which discrepancies in the petition and additional information required by the Commission were sought; and, subsequently, the Appellant submitted replies to the issues raised in these sessions and provided documentary

evidence to substantiate its claims regarding various submissions; in view of Section 64 read with the 2007 Regulations and the Conduct of Business Regulations, the DERC is required to consider data submitted in the Tariff Petition and during the tariff determination process; and in **2003 SCC OnLine Aptel 138**, this Tribunal rejected the contention of the Commission that it cannot consider information submitted during the process of tariff determination.

Shri Amit Kapur, Learned Counsel for the Appellant, would state that the O&M expenses allowed by the DERC do not cover expenses related to connection/ reconnection services; by considering income from connection/ reconnection charges as part of NTI, the DERC, while not allowing recovery of the expenses incurred on account of the aforesaid activities, has violated the matching principle; the relevant data relating to additional costs incurred on account of connection/ reconnection charges has already been provided by the Appellant in its letter dated 26.06.2013; reliance placed on the judgment of the Delhi High Court in **TPDDL vs. DERC: (2016) SCC OnLine Del 4165** is misplaced, since the Delhi High Court had observed that, even though Regulations must necessarily provide for speedy recovery of uncontrollable costs, Regulations cannot provide for determination of all uncontrolled elements (Para 20); the said judgment nowhere rejected uncontrollable expenses, rather observed that regulations are not the only way of recovering uncontrollable costs; and therefore, this Tribunal should direct DERC to deduct the income earned by the Appellant as connection/ reconnection charges from NTI for the 1st Control Period i.e. FY 2007-08 to FY 2011-12.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is submitted on behalf of the DERC that the Appellant has sought exclusion of Connection/ Reconnection charges on the ground that they

incur additional costs for the same on account of the increased consumer base, which is not provided as per the O&M expenses; the said costs are required by the Appellant to be covered as part of its licensed business, and denial of the same would violate the matching principle; the said claim did not even form part of the Appellant's Tariff Petition; the Appellant has sought to raise these additional claims by its letter dated 26.06.2013; after the Tariff Petition was admitted on 16.01.2013, advertisements to the general public were issued by the Appellant on 02.02.2013; the advertisement records that their responses to the Tariff Petition can be submitted till 25.05.2013; the Petition was available for review at the office of the Appellant from 02.02.2013 till 25.02.2013; public hearing was held on 03.06.2013 and 04.06.2013; the Appellant's attempt to amend the tariff petition, without even filing the application for amendment or a request that the other stakeholders be permitted to examine the same and provide comments, is illegal and cannot be countenanced; the Appellant is blowing hot and cold; under some head of the claims, it has stated that the same are not part of the Licensed business, and therefore ought to be excluded as Non-Tariff Income such as Electricity Duty; in the present case, they contend that this activity is a core area of its business, and the same cannot be considered as Non-Tariff Income; O&M expenses provided in the MYT Order and calculated on the basis of the base year of the Appellant would fully cover such expenses, and cannot be faulted on account of the matching principle, since the MYT Regulations, 2007 and 2011 provide for such expenses to be on a normative basis, and the escalation and inflation factors would cover all increases available to the Appellant; these Regulations were considered by the Delhi High Court, and one of the grounds was that the consumer base increase, which was rejected by the Delhi High Court in

Para 20 of its judgment and the claim of the Appellant on this count is without merit.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the Appellant's letter dated 26.06.2013 is a part of the Tariff Petition since (i) the DERC, by its email dated 10.07.2013, had requested them to send a list of correspondence with BRPL regarding tariff determination for FY 2013-14; and (ii) the Appellant, by its letter dated 15.07.2013, submitted the list of all correspondences related to tariff determination for FY 2013-14 which included the Appellant's communication dated 26.06.2013.

After referring to Para 1.13 of the impugned order passed by the DERC to contend that the DERC, having conducted multiple validation sessions and the Appellant had submitted replies to the issues raised in the sessions, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, in view of Section 64 read with the 2007 Regulations and the Conduct of Business Regulations, the DERC should consider data submitted in the Tariff Petition, and during the course of tariff determination process. Reliance is placed by the Learned Counsel on the judgment of this Tribunal in **Amausi Industries Association & others vs UPERC and others:2013 SCC OnLine APTEL 138** to contend that, in the said judgment, this Tribunal had specifically rejected the DERC's contentions that it cannot consider information submitted during the process of tariff determination.

Sri Amit Kapur, Learned Counsel, would further submit that the O&M expenses allowed by the DERC do not cover expenses related to

connection/ re-connection services; the DERC, by considering income from connection/ re-connection charges as part of NTI while not allowing recovery of expenses incurred on account of the aforesaid activity, has violated the 'Matching Principle'; the relevant data related to additional costs incurred on account of connection/ re-connection charges, as has already been provided by the Appellant in its letter dated 26.06.2013; reliance placed by the DERC on the judgment of the Delhi High Court in **TPDDL vs. DERC: (2016) SCC OnLine Del 4165** is misplaced; the said judgment of the Delhi High Court had observed that, even though regulations must necessarily provide for speedy recovery of uncontrollable costs, however it does not mean that regulations must provide for specific determination of all uncontrolled elements; the judgment of the Delhi High Court nowhere rejected uncontrollable expenses, rather it observed that regulations are not the only way of recovering uncontrollable costs; the DERC may be directed to deduct the income earned by the Appellant as connection/ re-connection charges from NTI for the first Control Period i.e. FY 2007-08 to FY 2011-12; and allow impact along with carrying cost to the Appellant.

E. ANALYSIS:

Section 64 of the Electricity Act prescribes the procedure for tariff orders. Section 64(1) requires an application, for determination of tariff under Section 62, to be made by a licensee in such manner, and accompanied by such fee, as may be determined by Regulations. Section 64(2) requires every applicant to publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission. Section 64(3)(a) requires the Appropriate Commission, within one hundred and twenty days from the date of receipt of an application under sub-section (1), and after considering all suggestions

and objections received from the public, to issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order. Section 64(4) requires the Appropriate Commission, within seven days of making the order, to send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the persons concerned. Section 64(6) stipulates that a tariff order, unless amended or revoked, shall continue to be in force for such period as may be specified in the tariff order.

It is not in dispute that this claim of the Appellant, relating to income from connection/ re-connection charges, was made, by way of the letter dated 26.06.2013, as part of the additional submissions in the true-up petition filed by them earlier. After the tariff petition was admitted on 16.01.2013, advertisements were issued to the general public by the Appellant on 02.02.2013 inviting objections latest till 25.02.2013. A public hearing was held on 03.06.2013 and 04.06.2013, and it is only thereafter that this claim was raised by way of the letter dated 26.06.2013.

By their letter dated 26.06.2013, the Appellant informed the Secretary, DERC that they had submitted the Petition for True-up for FY 2011-12, Review & Provisional Truing-up for FY 2012-13, Annual Revenue Requirement (ARR) for Distribution (Wheeling & Retail Supply) Business for FY 2013-14 vide their letter dated 10.12.2012; the Commission was undertaking the true-up of Non-Tariff income for MYT Control Period for FY 2007-08 till FY 2011-12; in its Tariff Order dated 23.02.2008, the Commission had approved the O&M expenses purely for Retail and Wheeling Business on a normative basis; while approving the O&M expenses from FY 2007-08 to FY 2011-12, the Commission had not accounted for any contingency in O&M expenses in terms of increase in consumer sales, assets, number of consumers etc; the Appellant was

serving consumers in case of any contingency or any other requirement; they were also serving the new consumers added every year in its billing fold; the additional O&M expenses incurred by them, while serving new consumers or any other requirement of the consumers, were not covered in the O&M expenses for the first Control Period allowed by the Commission in its order dated 23.02.2008; however, the Non-Tariff Income received by them on account of such activities was considered while calculating the revenue gap.

As noted hereinabove, an application for determination of tariff is required to be published in an abridged form to make the general public aware of the contents of such an application, and objections/ suggestions from the general public is required to be obtained and then considered by the Commission before passing a tariff order. Any claim made, after the last date for inviting objections/ suggestions had expired, would undoubtedly result in denying the public at large an opportunity of putting forth their suggestion/ objections to any such claim. The tariff determined by the Commission, for each distribution licensee, would be borne by the consumers in the distribution licensee's area of supply. Consequently, the statutory requirement of making them aware of the claims made by a distribution licensee in its tariff petition, and giving them an opportunity of putting forth their objections/ suggestions thereto, cannot, ordinarily, be dispensed with. It is debatable whether this statutory requirement can be held to be directory, since failure to make the consumer of the distribution licensee aware of such a claim and denying them an opportunity of putting forth their objections/ suggestions, more so when they are called upon to bear the burden of the tariff determined in terms of the additional claim, would undoubtedly indicate that this statutory requirement cannot be dispensed with. In the light of the timeframe of 120 days stipulated for a tariff order to be passed by the Commission under Section 64(3),on an

application filed by the distribution licensee seeking adoption of tariff, ordinarily a letter raising additional claims would not be entertained after the last date for submission of objections/suggestions by the public. In any event, such an application could only have been considered by the DERC after the contents of the letter were published and objections/ suggestions from the general public was invited thereto. In the present case, this statutorily stipulated procedure has not been adhered to.

In **TPDDL vs. DERC: (2016) SCC OnLine DEL 4165**, the Delhi High Court observed that Regulations made under Section 181(2)(zd) of the Act must necessarily provide for speedy recovery of uncontrollable costs; this did not necessarily mean that the impugned Regulations must provide for a specific determination of all uncontrolled elements of costs, and provide for directly loading of those costs on the tariff for each year; the National Tariff Policy, 2006 only stated the principles which would guide determination of tariff; there would be several ways to give effect to those principles; providing an increase in costs on a normative basis, taking into account the inflation factor, would-if such normative basis has been arrived at after exercising due skill and after taking into account the relevant factors-also provide for a method of recovering uncontrollable costs.

Regulation 2.1(l) of the 2007 Regulations defines “Non-Tariff Income” to mean income relating to the Licenced business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge. Regulation 2.1(d) defines “Base Year” to mean the Financial Year immediately preceding the first year of the Control Period, and used for purposes of these Regulations. Regulation 5.23 relates to Non-Tariff Income, and provides that 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, delayed payment surcharge, meter rent (if any), income from investments other than contingency reserves, miscellaneous receipts from the consumers and income to Licenced business from the Other Business of the Distribution Licensee shall constitute Non-Tariff Income of the Licensee.

Regulation 5.25 of the 2007 Regulations stipulates that the amount received by the Licensee on account of Non-Tariff Income shall be deducted from the aggregate revenue requirement in calculating the net revenue requirement of such Licensee. Non-Tariff income under Regulation 5.23 is distinct from other income of a licensee under Regulation 5.26 in terms of which, where the Licensee is engaged in any other business, the income from such business will be calculated as per "DERC Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee Regulation, 2005", and shall be deducted from the Aggregate Revenue Requirement in calculating the revenue requirement of the Licensee. Under the first proviso thereto, the Licensee shall follow a reasonable basis for allocation of all joint and common costs between the Distribution Business and the Other Business, and shall submit the Allocation Statement as approved by the Board of Directors to the Commission along with his application for determination of tariff.

Regulation 4.5 of the 2007 Regulations requires the baseline values (operating and cost parameters) for the Control Period to be determined by the Commission, and to be based on the approved values by the Commission, latest audited accounts, estimate of the actuals for the relevant year, prudency check and other factors considered appropriate by the Commission. Regulation 5.3 requires the Licensee to

submit the O&M expenses for the Control Period as prescribed in the multi-year tariff filing procedure. The O&M expenses for the Base Year shall be approved by the Commission taking into account the latest available audited accounts, business plan filed by the Licensees, estimates of the actuals for the Base Year, prudency check and any other factor considered appropriate by the Commission. It is the O&M expenses for the Base Year, as determined under Regulation 5.3, which forms the basis for computation of O&M expenses towards the ARR for each year of the Control Period under Regulation 5.4.

It is not clear whether the connection/ re-connection charges for the base year was included in the baseline figures, for it is only if it had not, would the Appellant then be justified in its submission that the matching principle would apply and, when the income received towards connection/ re-connection charges is treated as Non-Tariff Income, then the expenditure incurred towards earning such income must be deducted from the non-tariff income so received; and it is only the net figure which can be treated as the Non-Tariff income. If, on the other hand, the baseline figures had included these connection/re-connection charges, then the appellant would only be entitled to the normative O&M expenses in terms of the 2007 Regulations, and not beyond.

While these aspects may have necessitated examination, and the DERC could have been called upon to undertake such an exercise, the fact remains that this claim did not form part of the tariff petition filed by the Appellant on 10.12.2012, but was a subsequent claim made by it for the first time in its letter dated 26.06.2013 after culmination of the entire process of publication of the abridged version of the tariff petition, and inviting suggestions/ objections from the public had been completed.

Section 43(1) of the Electricity Act obligates the licensee, on an application by the owner or occupier of any premises, to give supply of electricity to such premises, within one month after receipt of the application. This obligation to supply electricity is subject to the condition that the consumer pays the prescribed charges.

In **K. C. Ninan Vs. KSEB: (2023) SCC OnLine SC 663**, the Supreme Court held that the proviso to Section 43(2) refers to the "price" payable by an applicant to demand or to continue to receive the supply of electricity from a distribution licensee; the "price" is to be determined by the appropriate Commission; this "price" is the consideration, as determined by the State Commission, that an applicant pays for receiving supply of electricity; the term "price" has to be given a broad meaning to include all the "tariffs" and "charges" that may be determined by the appropriate Commission; this includes the "charges" fixed under Section 45 by the appropriate Commission from time to time, and the "charges" that a distribution licensee may impose under Section 46 to recover any reasonable expenditure; and the ambit of the term "price" is wide enough to also include the statutory dues that the State Commission decides to enact by way of Regulations under Section 50.

On the matching principle, the Supreme Court, in **J.K. Industries Limited vs. Union of India**: **(2007) 13 SCC Page 673,** held that accounting standards are based on a number of accounting principles, for example, the matching principle and fair valuation principle; the matching concept is based on the accounting period concept; the paramount object of running a business is to earn profit; in order to ascertain the profit made by the business during a period, it is necessary that "revenues" of the period should be matched with the costs (expenses) of that period; in other words, income made by the business

during a period can be measured only with the revenue earned during a period as compared with the expenditure incurred for earning that revenue; it is a principle of recognising costs (expenses) against revenues or against the relevant time period in order to determine the periodic income; this principle is an important component of accrual basis of accounting; the object of AS 22 is to reconcile the matching principle with the fair valuation principles; and it may be noted that recognition, measurement and disclosure of various items of income, expenses, assets and liabilities is done only by accounting standards, and not by the provisions of the Companies Act.

The matching principle, in terms of AS 22, could possibly have been applied if the Statutory Regulations did not provide a procedure to the contrary. As the 2007 Regulations specifically provide for O&M expenses to be computed on a normative basis, and these Regulations are binding on the Appellant, the Commission and this Tribunal, it is impermissible for us to adopt any procedure contrary thereto. Reliance placed by the Appellant, on the matching principle, is therefore of no avail. In **Maharashtra State Power Generating Company vs. MERC (Judgment in Appeal No. 86 & 87 of 2007 dated 19.04.2008)** the Appellant had contended that truing up of revenue was a marked deviation in approach by the Commission which was neither provided in the Tariff Regulations of 2004 nor in the Tariff Regulations of 2005; non-tariff income earned by it could be considered as extra profits and could not be adjusted to determine its ARR. The Commission had submitted that 'while non-tariff income earned by Generation Companies had not been mentioned specifically in the Tariff Regulations, the issue had to be seen in the context of the coverage of the Tariff Regulations, which could not be expected to cover all eventualities and situations, and Regulation 17 of the Tariff Regulations 2005, under the heading 'Annual review of

performance', provided for truing up of revenue.

It is in this context that this Tribunal, after extracting Regulation 17.1, observed that the other clauses of the Regulations lay emphasis on a comparison of the performance of the generating company with the approved forecast of aggregate revenue requirement and expected revenue from tariff and charges; on a combined reading of Regulation 17, the comparison would be on two counts, firstly on the aggregate revenue requirement and secondly on the revenue mobilized through the tariff and charges; aggregate revenue requirement consisted of expenses allowed by the Commission, either normatively or after prudence check, as the case may be, and permissible surplus being return on capital employed by the generating company; revenue mobilized would depend upon the sale mix of the generating company (in the present case it was not of much relevance as the case before them was of a single buyer model) and the tariff and other charges permitted by the Commission; in their view, the other incomes of the Appellant do not fall under 'revenue mobilized through tariff and charges', as: (a) such incomes have not come from the buyer; and (b) such incomes were no way linked to the quantum of electricity sold by the Appellant.

In **Amausi Industries Association & others vs UPERC and others:2013 SCC OnLine APTEL 138**, this Tribunal observed that a conjoint reading of Section 64(2) and 64(3) of the Electricity Act, 2003 would reveal that the stakeholders were required to comment on the ARR petition admitted by the State Commission; after admission, the State Commission may require many more documents from the licensee to examine and validate the claims of the licensee; for example, the State Commission may require copies of the power purchase bills paid to generating companies or bills of the equipment purchased by the

distribution licensee; all these documents are not necessary to be furnished to the consumers since those documents cannot be the subject matter of scrutiny of the consumers; the Distribution Licensees are expected to file the ARR by 30th November; it is only then that the State Commission would be in a position to issue the Tariff Order by 31st March of the next year; the Petition would include actual data for six months i.e. up to September, and projected data for the next six months of the current year; based on this data, the projections are made for the next year; during this process, since 120 days are available to the Commission to finalize the tariff order, the State Commission may, for the purpose of verifying the projected data for six months, ask the licensees to submit details of the actual power purchase and category-wise sale up to the month of December; the licensee will collect those details and submit it in the month of January; if all these data furnished by the licensees are required to be submitted to the consumers for their comments, then the tariff process would not be able to be completed to enable the State Commission to issue tariff order by 31st March; and, in such a situation, the tariff process would become unending and the tariff order could never be issued within the statutory limit of 120 days.

This Tribunal further held that the provision of seeking comments or suggestions from the consumers has been introduced in the Electricity Act to facilitate the Commission to complete the process in a transparent manner; and the State Commission, which is an expert body, would be competent to look into the available materials and decide the issue by adding the valid reason.

The e-mail sent by the DERC to the Appellant on 10.07.2013 is subsequent to the Appellant's letter dated 26.06.2013. The additional information which the Commission is entitled to call for can only be in

relation to the claims raised by the Appellant-Distribution Licensee in its tariff petition. As long as there is a claim raised in the tariff petition, any evidence in support thereof can be sought by the Commission or furnished by the licensee later. That does not, however, mean that a fresh claim, which did not form part of the original petition filed on 10.12.2012, can be raised by way of a letter after the original petition was published for the information of the general public and the last date for submission of objections/ suggestions by the general public had expired. As the question which arose for consideration, in **Amausi Industries Association & others vs UPERC and others: 2013 SCC OnLine APTEL 138**, related to whether consumers were entitled to copies of documents, filed by the licensees in support of their claim, and not whether a claim could be raised afresh after the last date for receipt of objections/suggestions from the general public had expired, reliance placed on behalf of the Appellant on the said judgment of this Tribunal is of no avail.

In **Assistant Commissioner, Commercial Tax Department, Kota vs. Shukla and Brothers; (2010) 4 SCC 785,** the Supreme Court observed that giving reasons furthers the cause of justice as well as avoids uncertainty; it helps in the observance of law of precedents; absence of reasons essentially introduces an element of uncertainty, dissatisfaction and gives an entirely different dimension to the questions of law raised before the higher/ appellate courts; the court should provide its own grounds and reasons for rejecting claim/ prayer of a party whether at the very threshold i.e. at admission stage or after regular hearing, howsoever concise they may be; by practice adopted in all courts and by virtue of judge-made law, the concept of reasoned judgment has become an indispensable part of the basic rule of law and, in fact, is a mandatory requirement of the procedural law; and reasons

are the real live link to the administration of justice.

While the Commission must, undoubtedly, disclose the reasons which weighed with it in modifying or rejecting a claim, since an appeal lies to this Tribunal against a tariff order passed by it, we may not be justified in requiring the tariff orders passed by the Commission to withstand the scrutiny or to fulfill the test of reasons being assigned in a judicial/quasi-judicial order for it is well settled that tariff fixation like price fixation is legislative in character; the dual nature of functions performed by the Regulatory Commissions are decision-making and specifying terms and conditions for tariff determination **(PTC India Ltd. v. CERC; (2010) 4 SCC 603);** the source of power to determine tariff under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Electricity Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61), is the general regulatory power of the Commission under Section 79(1)/86(1); this source of power to regulate includes the power to determine tariff; and Section 62 deals with "determination" of tariff, which is part of "regulating" tariff. **(Energy Watchdog v. CERC, (2017) 14 SCC 80).**

Suffice it to conclude that since this claim was raised by the Appellants by their letter dated 26.06.2013, after the last date for receipt of objections/suggestions from the general public had expired, the DERC cannot be faulted for not considering this claim. For reasons afore-mentioned, the appellants claim, under this head, necessitates rejection.

X. ISSUE NO. 29 - REVISIONOFDISTRIBUTIONLOSSFROM FY 2007-08 TO FY 2010-11

This issue relates to the Appellants' claim regarding failure and refusal of DERC to consider the issue of re-setting the Distribution and Aggregate Technical and Commercial Loss trends, pursuant to the directions of this Tribunal in its Judgment dated 06.10.2009 in **BRPL v. DERC, 2009 ELR APTEL 880,** which directions were affirmed by the Supreme Court in its Judgment in Civil Appeal Nos.884 and 980 of 2010 dated 01.12.2021 and 15.12.2022 read with the order passed in M.A. Nos.918-919 of 2022 and M.A. Nos.1261-1262 of 2022 in Civil Appeal Nos.884 and 980 of 2010 dated 15.12.2022.

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the question which arises for consideration is whether the DERC could have fixed the target for AT&C Loss reduction for the period from 01.04.2007 to 31.03.2008 as part of the losses for the period 2007 to 2011, by the order dated23.02.2008 by which time eleven(11) months of the said period had already elapsed; the order left the Appellant only 37 days to achieve the annual loss reduction target which was otherwise required to be achieved over a period of 12 months; the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 were notified on 30.05.2007; and these Regulations were applicable for the control period FY 2007-08 to FY 2010-11 ie for the period 01.04.2007 to 31.03.2011.

After referring to Regulation 2.1(g) and 4.8(ii) and (iii), Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the AT&C loss targets ought to have been fixed before 01.04.2007 from the period commencing from 01.04.2007; since the MYT order was issued only on

23.02.2008, the control period must be held to commence on 23.02.2008, and not on 01.04.2007; the year-wise loss reduction trajectory for the control period was to be fixed for BSES Discoms in the Tariff Order for FY 2007-08; the MYT Regulations, 2007 were issued on 30.05.2007 two months after FY 2007-08 had already begun; as a result of the tariff order passed on 23.02.2008, the Appellant was required to reduce the distribution losses within a span of 37 days (ie from 23.02.2008 to 31.03.2008) from 35.63 % to 25.95% ie by 9.68% for BRPL and from 42.03% to 34.11% ie 8.19% for BYPL ; the AT&C loss targets cannot be introduced retrospectively (refer: **Maharashtra State Power Generation Co Ltd. v. MERC, 2011 ELR (APTEL) 1404;** and **DPSC Limited v. WBERC, 2014 SCC OnLine APTEL 77;** the loss reduction target was challenged by the Appellants before this Tribunal in Appeal Nos. 36 and 37 of 2008 which resulted in this Tribunal passing an order permitting the Appellants to make a representation to the DERC within one month for revision of AT&C loss targets for FY 2007-08 to FY 2010-11, and directing DERC to re-consider the AT&C Loss targets within two months; the Appellants, vide letter dated 20.11.2009, sought re-adjustment of the distribution loss trajectory prospectively over 3 years 37 days of the control period commencing 23.02.2008; by its order dated 17.07.2014, the DERC dismissed the petitions filed by the Appellants, ie Petition Nos. 13 and 14 of 2014, holding that the issues raised have already been addressed in the previous tariff orders, and this order is under challenge in Appeal Nos. 230-231 of 2014 which is pending before this Tribunal; non-compliance of the judgment in Appeal No. 36 of 2008 was noticed by this Tribunal in **BRPL Vs DERC 2014SCCOnLineAPTEL196;** and **BRPLv.DERC,2015SCCOnLineAPTEL122.**

Sri Amit Kapur, Learned Counsel, would further submit that, while this Tribunal had pronounced its judgment in **BRPL v. DERC**: **2015 SCC**

OnLine APTEL122 directing DERC to implement the judgment within three months, the DERC passed the Order only on 20.04.2015in the already disposed of Petition Nos.13 and 14 of 2014, against which the Appellants have filed Appeal No. 155 and 156 of 2015 which are pending; the Supreme Court dismissed the DERC's Civil Appeals, preferred against the judgment of this Tribunal, by its judgment dated 01.12.2015; MA Nos. 1261-1262 of 2022 were filed by the Appellants seeking effective implementation; and the Supreme Court observed that APTEL should dispose of Appeal Nos. 155 and 156 of 2015 as expeditiously as possible.

While referring to the note on the concept of AT&C loses (Annexure-I), it is submitted on behalf of the Appellants that this Tribunal, in its judgment in Appeal Nos. 61 and 62 of 2012 dated 28.11.2015, while directing DERC to re-consider the matter, had noted the submission of the DISCOMs regarding the trajectory to achieve the targeted loss; the Appellants have not sought amendment of the regulation, but for modification of the intervening annual loss reduction trajectory to achieve targeted loss of 17% / 22% by 2010-11 as fixed by the Regulations; the DERC failed to consider that the 2007 Regulations set out that the AT&C losses would be achieved by the end of the control period ie 17% for BRYPL and 22% for BYPL by 2010-11; annual loss reduction trajectory for the control period was to be fixed for BSES DISCOMS in the tariff order for FY 2007-08 ; DERC passed its MYT order only on 23.02.2008, with a little above one month remaining in the financial year to achieve loss reduction targets of 9.68% for BYPL and 8.19% for BYPL for that year; the 2007 Regulations were notified only on 30.05.2007 wherein the control period is specified as multi-year period fixed by the Commission from the date of issuing the MYT Order till 31.03.2011 ie with effect from 23.02.2008; such a huge reduction in distribution loss could not have been stipulated to be achieved within a period of 37 days in the remaining part of FY 2007-08; and the Appellants'

request was for the loss reduction trajectory to be spread over the control period without seeking any change in the respective final target of 17% / 22% to be achieved by 31.03.2011.

Sri Amit Kapur, Learned Counsel for the Appellant, would further submit that the DERC has not pointed out any specific regulation which the Appellants had sought amendment of; the Appellants had merely sought re-working of the AT&C Loss targets for each Financial Year of the Control Period which were set by the MYT Order dated 23.02.2008 within the limits set by the Regulations itself, and without disturbing the end target of 17%/ 22% to be achieved at the end of FY 2010-11; reliance placed by the DERC on "Regulations" and/ or the "power to amend the said Regulations" is misleading since the Appellants did not seek any change in the end target of 17% and 22% mandated by the Regulations; the stand of the DERC is contrary to several judgments of this Tribunal holding that Distribution Losses must be fixed by taking a practical view of the ground realities rather than on assumption and surmises. Reliance is placed in this regard on **North Eastern Electricity Supply Co. of Orissa Ltd. v. Orissa ERC: 2006 SCC OnLine APTEL 143; and Southern Electricity Supply Company of Orissa Ltd. v. Orissa ERC: 2013 SCC OnLine APTEL 103.**

Sri Amit Kapur, Learned Counsel, would also submit that, during the hearing before the Supreme Court in MA No. 1261 and 1262 of 2022 on 15.12.2022, the Appellants had tendered to court a slightly revised trajectory taking into account the following (a) DERC proposed a reduction of AT&C Losses from 29.92%to17%in4years equated annually over 48 months; (b) since the Tariff Order was issued 11 months into the first year of 4-year Control Period, the Appellants were left with 3 years and 1 month (i.e., 37 months) to achieve the reduction; (c) the Appellants

requested that the loss reduction targets of 12.92% / 17.03% be staggered over 37 months and not 48 months; and this Tribunal may therefore direct the DERC to implement this issue and allow impact of Rs. 154 Crores along with carrying cost.

B. SUBMISSIONS URGED ON BEHALF OF DERC:

It is submitted, on behalf of DERC, that the Government of Delhi, at the time of privatization and unbundling, had issued certain policy directions, and had specified certain AT&C loss levels; vide letter dated 29.01.2002, they clarified that the said loss levels were indicative, and that it would be the prerogative of the Commission to determine the AT&C loss levels for the Distribution Companies; the opening level of AT&C losses were determined by the Commission in its 'Bulk Supply Order' of 2002; the AT&C loss reduction was set as a bidding parameter for privatization of the system, and finally the same was agreed at 17 percent over 5 years for each of the three licensees; the loss levels of the distribution licensees, at the end of the policy directive period, were 29.92% for BRPL, 39.03% for BYPL and 23.73% for TDDPL ; while framing the 2007 Regulations, the DERC considered the past achievements, capital expenditure programs etc. along with the findings of the Abraham Committee report and loss levels of similar private urban distribution licensees; Regulation. 4.8 of the 2007 Regulations sets target AT&C loss levels to be achieved by the Appellants; the said Regulation mandates yearly proposed target, for the ARR submitted by the Appellants, equal to at least 20% of the total loss target for the entire control period; and Regulation 5.31 of the 2007 Regulations relates to AT&C losses.

It is further contended, on behalf of the DERC, that the Appellants, while submitting the loss trajectory at the beginning of the Control Period, submitted a trajectory which was admittedly not in accordance with either

Regulation 4.8 or 5.31 of the MYT Regulations; in their submission to the Commission, the Appellants projected a reduction of far less than what was mandated in the 2007 Regulations; consequently, the said trajectory was inconsistent with the requirement that each year reduction should be equal to at least 20% of the total loss reduction target; the mandate of Regulations 4.8 and 5.31 required that, for any year of the control period, the Appellants should achieve a minimum of 2.581% reduction over the previous year and also achieve 17% in the last year; as the Appellants had, in their Tariff Petition, flouted the mandate of the Regulations, the Commission prescribed a uniform loss trajectory of 25% per year in its Tariff Order dated 23.02.2008, which would enable the Appellant to achieve its target.

It is also submitted, on behalf of the DERC. that this Tribunal, in its judgment in Appeal No. 36 of 2008 dated 06.10.2009, had, after examining the issue, upheld the order of the Commission; the observations in the said judgment can at best be considered obiter dicta, and as not binding; a reading of para 30 and 31 of the said judgment would indicate that the Appellants had sought amendment to the regulations since a plain reading of Regulations 4.8 and 5.31 would show that the Appellants contentions were not maintainable; this Tribunal had returned a finding that the order of the Commission was in full consonance of the Regulations; the discussion in para 32 is non-binding obiter dicta, as this Tribunal does not exercise judicial review over subordinate legislation framed by the Commission in the light of the judgment of the Supreme Court in **PTC India v. CERC, (2010) 4 SCC 603;** as held in **State of U.P. v Mahindra & Mahindra Ltd., (2011) 13 SCC 77]**, even a court, exercising writ jurisdiction would not issue a mandamus to frame legislation in a particular manner; disposing of the appeal of the Commission, vide its judgment dated 01.12.2021, would

not change the fundamental nature of the judgment and, therefore, any direction to re-consider cannot be considered a direction to amend the Regulations, and provide a relief which is beyond the 2007 Regulations itself; the Commission has, in any event, considered the representations and rejected the same vide order dated 20.04.2015; the targets set by the Commission were wholly appropriate and have actually even been met by all three Distribution Companies at different points of time; and targets that reward efficiency cannot be tweaked after the fact in the manner sought by the Appellants, since that would render the entire Regulations meaningless.

It is further submitted, on behalf of the DERC, that the Appellant chose to submit a figure that was not in consonance with both Regulations 4.8 and 5.31; as opposed to a minimum of 20%, the Appellant's submission was 15.48% for each year of the control period, and a final achievement of only 61.92% of the target; the Appellant was fully aware of what it had to achieve but chose to flout the binding regulations and submit illegal projections; and the mandate of the 2007 Regulations are flouted only to attempt at gaming the AT&C framework to boost their incentives in a manner contrary to law.

After referring to the ARR petition filed by the Appellants, their True-up petition, and their Appeal before this Tribunal, it is contended on behalf of the DERC that, contrary to the submissions made by them in their ARR and True-up Petition, the Appellants, in their appeal, have referred to the letter dated 21.10.2009 wherein a new AT&C loss trajectory was proposed; the Appellants cannot canvas their targets, which they did not submit before the Commission in their petition; even otherwise, the Appellants new proposal is contrary to Regulation 5.31 since the 20% minimum reduction in each year of the Control Period

norm was again flouted; what the Appellants are canvassing is a relaxation of the Regulations, in exercise of the regulatory powers, by the Commission under Regulation 13.4; the Appellants are, in fact, seeking revision of AT&C distribution loss targets retrospectively to achieve the targets which they had not achieved; and reliance placed on the judgment of this Tribunal in **Maharashtra State Power Generation Co. Ltd. v MERC & Ors, 2011 ELR (APTEL) 1404,** is of no assistance to them.

It is further submitted, on behalf of the DERC, that the figures projected by the Appellants are in violation of Regulation 4.8 and 5.31 of the 2007 Regulations; once the figures, in the MYT Tariff Order dated 29.10.2009, were found to be valid by this Tribunal, the same cannot be changed since the Regulations prohibit any relaxation on this account.

After referring to Regulation 1.7, 4.9, 5.32 and 5.41 it is submitted, on behalf of the DERC, that, without the said Regulations being amended or relaxed and the Appellants appeal with respect to the MYT Tariff Order dated 23.02.2008 being dismissed, there can be no true up of the AT&C and Distribution losses; in the light of the judgment of the Delhi High Court, in **TPDDL v DERC,** the factors deemed to be controllable cannot be trued up; the said issue has already been agitated, and decided in favour of the DERC by the judgment dated 29.10.2009; the Appellant had ample time to file its Tariff Petition, and achieve the AT&C loss target as per Regulation 4.8 and 5.31 of the 2007 Regulations; the average reduction, required over the control period, was far less than what had been achieved by the Appellants themselves in the four years preceding the control period; the Appellants have, at no point of time, submitted a proposal in compliance with Regulation 5.31; they had, at every stage, sought for either amendment or relaxation of

the 2007 Regulations; and the AT&C as well as Distribution losses are controllable, and cannot be trued up or revised without an amendment in the underlying Regulations

C. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT IN REJOINDER:

It is submitted in Rejoinder, by Sri Amit Kapur, Learned Counsel for the Appellant, that they had never sought any change in the end target mandated by the Regulations; they only sought to flatten out the Distribution Loss trajectory over the Control Period within the limits of the Regulations itself as the same would be realistic and achievable, and not require any amendment or alteration of the Regulations which mandated a closing target at the end of the Control Period as 17%; the 2007 Regulations were notified on 30.05.2008 two months after the commencement of the first year tariff period 2007-08, ie from 01.04.2007 to 31.03.2007; the DERC cannot claim the final/absolute targets were made known to the Appellant since the MYT Regulations provided the overall target, while year-wise loss reduction is fixed in the MYT Order only; the delay in issuing the MYT Order is a legitimate reason, and not an excuse to justify a 95% drop in efficiency; the subject issue is finally settled by this Tribunal in its judgment in Appeal No. 36 of 2008, and constitutes res-judicata; the DERC itself has passed orders dated 17.07.2014 and 20.04.2015, in Petition No. 13 and 14 of 2014, in compliance with this Tribunal's judgement in Appeal No. 36 of 2008 dated 28.11.2014 and in Appeal No. 61 and 62 of 2012; the DERC cannot reprobate and approbate; Para 32 of the of the judgment in Appeal No. 36 of 2008 contain the directions; the findings of this Tribunal must be considered as per Regulation 8.11 of 2007 Regulations, in terms of which the DERC is required to set the targets of a control period after

analyzing the performance of the licensee with respect to the target set out in the previous control period, and based on actual performance, expected efficiency improvements etc; the Appeal filed by the DERC, challenging the judgment in Appeal No. 36 of 2008, was rejected by the Supreme Court by its judgment dated 01.12.2021; and the continuing non-compliance of Appeal No. 36 of 2008 was taken note of by this Tribunal in its judgment in **BRPL vs DERC 2014 SCC OnLine APTEL 196;** and **BRPL v. DERC, 2015 SCC OnLine APTEL 122.**

D. ANALYSIS:

Regulation 4.1 of the 2007 Regulations stipulates that the Control Period shall commence from the date of issue of the Multi Year Tariff Order, and shall extend till 31 March, 2011. Regulation 4.2 stipulates that the Multi Year Tariff framework shall be based, among others, on (c) trajectory for specific parameters to be stipulated by the Commission, where the performance of the applicant is sought to be improved through incentives and disincentives. Under the head 'Targets for Controllable Parameters', Regulation 4.7 requires the Commission to set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable", and which include (a) AT&C loss, which shall be measured as the difference between the units input into the distribution system and the units realised (units billed and collected), wherein the units realised shall be equal to the product of units billed and collection efficiency; (b) Distribution losses which shall be measured as the difference between total energy input for sale to all its consumers, and sum of the total energy billed in its Licence area in the same year; and (c) Collection efficiency, which shall be measured as a ratio of total revenue realised to the total revenue billed for the same year; the revenue realisation from arrears relating to the DVB period, electricity

duty and late payment surcharge shall be included for computation of collection efficiency.

Regulation 4.8 stipulates that the target AT&C loss levels to be achieved by the Distribution Licensees, at the end of the Control Period, shall be as follows: (ii) BRPL− AT&C Loss level shall be at 17 percent. Under the first proviso there to, the year wise loss reduction trajectory for the Control Period shall be fixed for the Distribution Licensee in the Multi Year Tariff Order for 2007-08. Under the second proviso, the profits arising from achieving loss levels better than that specified in the loss reduction trajectory shall be equally shared between the Licensee and Contingency Reserve. Under the third proviso, profits arising from achieving loss level better than 15% in any year shall be completely to the account of the Licensee. Under the fourth proviso, the loss targets and year wise loss reduction trajectory for the subsequent Control Periods shall be specified by the Commission before the start of each Control Period. Regulation 4.8(iii) stipulates that the target AT&C loss to be achieved by BYPL to be 22 percent. Regulation 4.9 stipulates that any financial loss on account of under performance with respect to AT&C targets shall be to the licensee's account.

As noted hereinabove, the 2007 Regulations came into force on its publication in the Delhi Gazette on 30.05.2007. These Regulations are in the nature of subordinate legislation. As the Electricity Act does not enable Regulations to be made with retrospective effect, the 2007 Regulations would apply only on or after 30.05.2007, and not for the period prior thereto. As noted hereinabove, Clause 2.1(g) of the 2007 Regulations defines "Control Period" to mean a multi-year period fixed by the Commission, from the date of issuing the Multi Year Tariff order till 31st March 2011. The Multi Year Tariff order for FY 2007-08 was issued by

the Commission only on 23.02.2008 wherein the Distribution Loss target was fixed at 25.95% as against the target of 35.63 in FY 2006-07 i.e. a reduction of 9.68%.

The Appellant filed Appeal No. 36 of 2008 before this Tribunal against the said tariff order dated 23.02.2008 passed by the DERC. In the said appeal, the Appellant contended that the AT&C target stipulated in the MYT Regulations required BRPL to achieve a reduction of 12.92% in the Control Period i.e. from 29.92% to 17% during the MYT period, and BYPL to achieve a reduction of 17.03% i.e. from 39.03% to 22% during the MYT period.

This Tribunal, in **BRPL vs. DERC: (2009) ELR APTEL 880,** (order in Appeal No. 36 of 2008 dated 06.10.2009), observed that the Commission was doing nothing other than enforcing the Regulations; this Tribunal was not empowered to find flaw with the regulations nor was any such challenge within the scope of the present appeal; the appellant's grievance in this appeal was that the Commission, instead of following the Regulations, should have exercised its discretion to amend the Regulations, the Commission's reasoning that T&D loss trajectory can be derived from AT&C loss levels given in the MYT Regulations was incorrect, and the targets suggested by the appellant of 4.5% should have been accepted by the Commission; the MYT Regulations are binding on the Commission as well as on the appellant; what the Commission had done was within the scope of the MYT Regulations; the appellant can have a grievance only if the target set by the Commission were not within the parameters of the MYT Regulations; 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 was legal and valid when compared with the Regulations; there was, however, no bar on the Commission re-considering the target that had been set and amend the relevant Regulations, if necessary; the target for MYT period needed 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 had already been borne by the licensee; hence, reference to the initial level of loss, at the time of privatization, was not necessary; and 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. This Tribunal directed that the appellant may make an appropriate representation to the Commission in this regard within one month hereof and, if a representation is so made, the Commission shall dispose it of in two months.

In Para 4.24 of the MYT Order (For FY 2008 to FY 2011), the DERC records that, in the MYT Petition, the Appellant had submitted that the AT&C Loss reduction targets, as specified in MYT Regulations, were not achievable; the Appellant had proposed a AT&C loss reduction trajectory keeping in view various parameters such as existing loss levels, consumer & sales mix, comparative loss etc. The Appellant had proposed AT&C loss reduction targets in its MYT petition as 27.92% for FY 2008, 25.92% for FY 2009, 23.92% for FY 2010, and 21.92% for FY 2011. Likewise, it had proposed distribution loss target for FY 2008 as 31.13%, for FY 2009 as 26.63%, for FY 2010 as 23.63% and for FY 2011 as 21.63%.

The Commission observed that the AT&C loss reduction targets for the Appellant, as specified in the 2007 MYT Regulations, had been fixed considering the past achievements on loss reduction, capital expenditure programs, review of the consumer mix of Delhi, metering status etc; the Abraham Committee Report, for release of the APDRP funds, had provided insights into the existing levels of losses across several urban centres of India; it mentioned that “212 towns in the country have brought down the AT&C losses below 20% which also consisted of 169 such towns that had brought down the AT&C losses below 15%; the Commission had considered the AT&C losses reduction targets as per the provisions of the MYT Regulations, 2007; it had considered 12.92% reduction in AT&C losses (29.92% in FY 2007 to 17.00% in FY 2012) during the Control Period; the Commission had also considered reduction of 25% of the total AT&C loss reduction target in each year of the Control Period; as specified in the 2007 MYT Regulations, the Appellant had to reduce a minimum of 20% of the total AT&C loss reduction target for the Control Period in any year of the Control Period.

Under the head AT&C Losses, Regulation 5.31 stipulates that the Licensee shall propose loss reduction trajectory for each year of the Control Period based on targets specified in clause 4.8 of these Regulations; for any year of the Control Period, loss reduction should be at least 20% of the total loss reduction target for the Control Period; the Commission shall examine the filings made by the Licensee for the AT&C loss trajectory for each year of the Control Period, and approve the same with modification as considered necessary. Regulation 5.32 stipulates that, in case the actual AT&C loss is worse than the loss level approved by the Commission, the Licensee has to absorb the financial loss arising from such performance.

As stipulated in Regulation 4.8 of the 2007 Regulations, the AT&C loss target for BRPL was 17% at the end of the Control Period, and 22% for BYPL at the end of the Control Period. As against the AT&C loss figures of 29.92% in 2006-07, BRPL was required to achieve AT&C loss target of 17% by 2010-11 i.e. a reduction of 12.92% during the Control Period. In terms of Regulation 5.3, they were required to achieve each year at least 20% of the loss reduction target of 12.92% in the Control Period, which works out to 3.23% each year This would have required them to achieve a target of 29.92–3.23 = 26.69% in 2007-08. The fact, however, remains that the Commission had fixed the target of 25.95% for FY 2007-08 by its tariff order dated 23.02.2008, leaving them just 37 days to achieve the lower AT&C target of 25.95% as against 26.69%% which they were required to achieve in terms of Regulation 5.3 of the 2007 Regulations.

The DERC had fixed the AT&C loss targets for BRPL as 25.95% during FY 2007-08, 23.46% for FY 2008-09, 20.23% for FY 2009-10 and 17.00% by FY 2010-11. The targets for BYPL for FY 2007-08 was 34.77%, 30.52% for FY 2008-09, 26.26% for FY 2009-10 and by FY 2010-11 it was 22.00%.

In **Maharashtra State Power Generation Company Limited vs. MERC : 2011 ELR APTEL 1404,** this Tribunal observed that the State Commission had to carry out prudence check of expenditure before approving the capitalization; the State Commission, vide its order dated 17/18.08.2009, had directed the appellant to club similar Non-DPR schemes and convert into large DPR schemes for approval of the State Commission; however, there was substance in the argument of the appellant that the directions were given when part of FY 2009-10 was already over; these directions could not be applied retrospectively; and

instead of restricting the expenditure on non-DPR schemes for FY 2008-09 and 2009-10 to 50% on ad-hoc basis, the State Commission should allow expenditure on non-DPR schemes for the FY 2008-09 and 2009-10 after prudence check. The Appellant was directed to submit the requisite information, for the non-DPR schemes proposed for capitalization for FY 2008-09 and 2009-10, to the State Commission, and the State Commission was directed to consider the same for capitalization after prudence check.

Regarding disapproval of capital expenses, this Tribunal observed that the order of the State Commission dated 17/18.08.2009 could not be applied retrospectively to FY 2008-09 and 2009-10. The State Commission was directed to reconsider the expenditure incurred on the non-DPR schemes for FY 2008-09 and 2009-10, and allow the capital expenditure after prudence check. The appellant was directed to submit the requisite information, regarding proposed capitalization of the non-DPR schemes for FY 2008-09 and FY 2009-10, before the State Commission for consideration.

In **DPSC Limited v. West Bengal Electricity Regulatory Commission: 2014 SCC OnLine APTEL 77,** this Tribunal noted the submission of the State Commission that it had directed the Appellant to furnish details of sub-head wise expenses under Operation and Maintenance, but those details were not given in respect of legal expenses; therefore the State Commission had directed the Appellant to furnish details of legal expenses during each year along with application for APR for respective year; and the State Commission had relied on clause 5.7.3 of Tariff Regulations 2011 by applying prudence check in the absence of details being given by the Appellant.

After noting that the MYT order, for FY 2011–12, 2012–13 and 2013–14, had been passed after one and half years after the year 2011–12, this Tribunal observed that whatever the expenses had to be incurred by the Appellant were already incurred by the time the said order had been passed; the 2011 Tariff Regulations did not contain any norms for Operation and Maintenance expenses for distribution licensees; in fact, Regulation 5.7.3 provided that the State Commission shall accept operation and maintenance expenditure subject to the prudence check, and other specific provision in this respect in these Regulations; Schedule 9-A of the Regulations, which contain the operating norms, did not contain any norms of Operation and Maintenance for distribution licensees; despite this, Operation and Maintenance expenses for the Appellant had been effectively decreased by the order when taken on per unit basis; even in the Review order the State Commission observed that the issues relating to the Operation and Maintenance expenses were already discussed in the Tariff order; and as such the same need not be reviewed since Operation and Maintenance expenses were admitted as per the provisions of the Tariff Regulations, 2011.

After noting the submission of the Appellant that all the particulars, relating to the expenses actually incurred by the Appellant, were available, and they were prepared to furnish those details before the State Commission, and the State Commission may be directed to fix the Operation and Maintenance expenses after prudence check, this Tribunal observed that the MYT order for 2011–12, 2013–14 had been passed one and half years later to the year 2011; it was clear that the expenses which had to be incurred by the Appellant were already incurred before the order was passed; under these circumstances, it was appropriate to direct the Appellant to give those particulars to the State Commission regarding the legal

expenses actually incurred, and the State Commission should consider the same and decide the issue after prudence check.

With respect to review of distribution loss for the first control period, this Tribunal, in **BRPL vs. DERC: 2014 SCC OnLine Aptel 196,** noted the Appellant's contention that the Delhi Commission had not implemented the directions of this Tribunal in 2009 ELR (APTEL) 880 (Judgement in Appeal No. 36 of 2008) wherein this Tribunal had directed the Delhi Commission to amend distribution loss target for the first control period; pursuant to the directions of this Tribunal, the Appellant 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 months, from filing of the Petition, the Delhi Commission, by Order dated 17.07.2014, had dismissed the Petition and ignored to give effect to the judgment of this Tribunal; 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; and, in view of submission of the Appellants, the Commission should re-consider the matter within three months from the date of issuance of the judgment, and pass a reasoned order.

On the issue of Distribution Losses and AT and C Losses, the Supreme Court, in its order in Miscellaneous Application No.918 of 2022 in Civil Appeal No.884 of 2010, and Miscellaneous Application No. 919 of 3033 in Civil Appeal No. 980 of 2010 dated 15.12.2022, observed that Aptel, in its judgment dated 6th October, 2009 and 30.10.2009, had directed BRPL and BYPL 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; such a representation was submitted in compliance with the above directions and the DERC passed an order on 20.04.2015, though belatedly; the said order was subject matter of Appeal Nos.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 would not be appropriate for them to go into the said issue; BRPL and BYPL, having assailed the subsequent order before the appropriate forum, parties ought to await the decision of the said appeals; and they expected APTEL to dispose of the above appeals as expeditiously as possible, having regard to their long pendency.

In **BRPL vs. DERC: 2015 SCC OnLine Aptel 122,** this Tribunal observed that the issue, regarding review of distribution loss for 2008-2011, had been dealt with by this 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 the date of issuance of the judgment and pass a reasoned order; and this issue was decided accordingly.

In **North Eastern Electricity Supply Co. of Orissa Ltd. vs. OERC: 2006 SCC OnLine Aptel 143,** this Tribunal noted the contention of the Appellant that the distribution loss, as fixed by the Regulator, was not realistic and it should have taken into account actual T&D losses and results there of as reflected during FY 2006; the ground realities were reflected in actual sales of FY 2006, and they should have been taken into consideration.

This Tribunal held that it was for the Regulatory Commission to take a re-look of the entire matter, while undertaking truing up exercise; the Commission need not stick to its earlier view, but it shall have a re-look in this respect by taking a practical view of the ground realities

instead of proceeding on assumption and surmises; and they were sure that the Commission would take a re-look of the matter and grant the benefits to the Discoms.

In **Southern Electricity Supply Co. of Orissa Ltd. vs. OERC: 2013 SCC OnLine APTEL 103,** this Tribunal noted that the loss levels, for 2006–07 and 2007–08, had to be re-set by the State Commission as per the findings of the Tribunal in Appeal No. 77 of 2006 and batch and Appeal No. 52 of 2007 and batch; the loss levels, earlier set for 2006–07 and 2007–08, formed the base for the loss level trajectory approved by the State Commission for the period 2008–09 to 2012–13; accordingly, the loss levels, for the period 2008–09 to 2012–13, had also to be reset by the State Commission due to change in loss levels for 2006–07 and 2007–08, and keeping in view that the finances as envisaged in the business plan could not be made available to the Appellants; however, there was no case for retaining the loss levels as per actuals or accepting increase in loss levels.

This Tribunal, summed up the judgement, holding that the loss level trajectory had to be reset by the State Commission from 2008–09 to 2012–13 in the light of the judgment of this Tribunal in Appeal Nos. 77 of 2006 and batch and 52 of 2007 and batch, and also the findings in these Appeals; the distribution loss trajectory had to be re-determined keeping in view ground realities that the requisite funds for augmentation of the distribution system had not been made available to the Appellants; however, the loss level trajectory had to be reduced gradually from 2006–07 to 2012–13 and, in no case, it should increase; and the State Commission shall then true up the accounts of the Appellants for the above period with the revised loss levels.

In **PTC India vs. CERC: 2010 (4) SCC 603,** the Supreme Court observed that a regulation under Section 178 of the Electricity Act is made under the authority of delegated legislation, and consequently its validity can be tested only in judicial review proceedings before courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act; Section 121 of the Electricity Act does not confer power of judicial review on the Appellate Tribunal; and the power of judicial review of the validity of the regulations made under Section 178 of the Electricity Act is not conferred on the Appellate Tribunal for Electricity.

In **State of U.P. vs. Mahindra and Mahindra: 2011 (13) SCC 77**, the Supreme Court observed that, in so far as legislation is concerned, the exclusive domain is with the legislature; subordinate legislations are framed by the executive by exercising the delegated power conferred by the statute, which is the rule-making power; the judiciary has been vested with the power to interpret the aforesaid legislations and to give effect to them; and it is inappropriate for Courts to issue a mandate to legislate an Act and also to make a subordinate legislation in a particular manner.

Regulation 13.4 of the 2007 Regulations relates to the Power of Relaxation and enables the Commission, in public interest and for reasons to be recorded in writing, to relax any of the provision of these Regulations. The Appellant's contention that it is only the overall targets which are stipulated in the MYT Regulations, and the year-wise loss reduction targets is fixed in the MYT Order, may not be wholly justified, since Regulation 5.31 expressly provides that, for any year of the Control Period, loss reduction should be at least 20% of the total loss reduction target for the Control Period. The Appellant must be held to be aware of the 2007 Regulations on 30.05.2007 itself (when the Regulation came

into force) and, consequently, they would also have been aware of the minimum loss reduction of 20% they were required to achieve in the year 2007-08.

It is the stated case of the DERC that the loss levels of BRPL at the end of the Policy directive period was 29.92%, and for BYPL it was 39.03%. As against the 20% yearly reduction stipulated in the Regulations, it does appear that the DERC has prescribed a uniform loss trajectory of 25% per year in its tariff order dated 23.02.2008. While it is true that the MYT Order prescribed a higher percentage of 25%, as against the 20% stipulated as the minimum in the MYT Regulations, the Appellant's grievance of the delayed MYT order being issued on 23.02.2008 can only relate to this difference of 5 %, and not beyond, and that too only for the first year of the MYT period.

We are of the view that the DERC should consider exercising its power of relaxation under Regulation 13.14 of the 2007 Regulations, for FY 2007-08, bearing in mind the fact that the MYT Regulations were issued only on 30.05.2007 nearly two months after the commencement of FY 2007-08; and the MYT order for FY 2007-08 was issued only on 23.02.2008 just 37 days before FY 2007-08 came to an end on 31.03.2008. Since the Regulations do not have retrospective application, the minimum target of 20% stipulated therein must be suitably adjusted over a period of ten months for FY 2007-08, as against the minimum 20% prescribed for one year (ie 12 months) in the Regulations. The excess prescribed, over and above 20%, in the MYT order dated 23.02.2008, must also be suitably adjusted for FY 2007-08 bearing in mind the fact that the MYT order for FY 2007-08 was issued just 37 days before FY 2007-08 came to an end on 31.03.2008. The impugned order, in so far as it set targets for 2008-09, 2009-10 and 2010-11, does not necessitate

interference in this appeal. The matter is remanded to the Commission which shall pass appropriate orders in terms of the afore-said observations.

XI. ISSUE NO. 32: CONSIDERATION OF NORMATIVE REBATE

A. FINDINGS OF THE DERC

"Rebate on Power Purchase and Transmission Charges

4.110 With regard to rebate on power purchase and transmission charges the Regulation 5.24 of the MYT Regulations, 2011 states 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 Licensees, 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 of credit on presentation of bills for supply to consumers of Retail Supply Business."'

4.111 Accordingly, the Commission has considered power purchase rebate @ 2% of the gross power purchase cost and transmission rebate @ 2% of the total transmission and SLDC charges for projection of the normative rebate on the power purchase cost.

Table 107: Rebate on Power purchase and Transmission charges approved for FY 2013-14(Rs. Cr.)

Particulars	FY 2013-14
Power Purchase Rebate @ 2%	109.63
Rebate on Transmission Charged @ 25%	9.70

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this issue relates to the arbitrary projection of normative rebate on Power Purchase Cost; PPC is paid to generating companies @ 2% of gross PPC of the Appellant ie @ 2% of the total Transmission Charges and Charges paid to State Load Despatch Centre; on the one hand, the DERC has not allowed a cost-reflective tariff to the Appellant to enable it to make timely payments to generating and transmission companies; this is evident from the fact that the DERC has created Regulatory Assets year-on-year, but fails to even provide sufficient surcharge (presently 8%) to allow the Appellant to recover the Regulatory Asset in a timely manner; on the other hand, DERC has provided for deduction of maximum permissible rebate from the Aggregate Revenue Requirement of the Appellant without allowing necessary funds to pay Power Purchase Cost within the credit period that is required to earn the maximum rebate; the afore-said Regulations can be applied only in a business as usual condition ie if the tariff were so determined as to recover all legitimate Power Purchase Cost, the Appellant can then be reasonably expected to make payments to generators on time to avail rebate; if the tariff is admittedly insufficient to meet Power Purchase Cost, the projection of rebate in the approved cost actually has the effect of further depressing the available cash in the hands of the Appellant; even assuming that the

normative rebate is to be deducted from Power Purchase Cost, the fact remains that the Appellant's financial condition did not permit it to use Letters of Credit for payment; in terms of the relevant CERC Regulations, since the Appellant was making payment to Generators from sources other than Letters of Credit, the maximum rebate that the DERC could consider was 1%; as a Distribution Licensee, the ARR of the Appellant, and consequently the tariff to be recovered from the consumers, is regulated by the DERC, and determined under Section 62 read with Section 61 of the Electricity Act, 2003; since both the tariff and the ARR are regulated, the Appellant cannot recover a penny more from its consumers than what is allowed by the DERC; PPC is a major component, and constitutes 80% of the total ARR of the Appellant; any payment to be made by the Appellant to generating and transmission companies is directly dependant on such cost being allowed by the DERC by way of a cost-reflective tariff in a timely manner; in such a case, the Appellant can also claim rebate on PPC by timely payment of bills; ever since privatization, the ARR determined by the DERC was not even sufficient to meet the actual Power Purchase Cost of the Appellant which has led to creation of a substantial revenue gap; this has been admitted by the DERC, and its statutory advice dated 15.12.2010 and 01.02.2013; in some years, ARR, approved by DERC for the Appellant, has been lower than the Power Purchase Cost; in FY 2013-14, PPC constituted 100.70% for BRPL / 108.93% for BYPL; besides the PPC, the Appellant is also required to meet O&M Expenses, Financing Cost, Depreciation, etc. from the approved ARR; the tariff allowed to be recovered could not even cover the costs, let alone provide an assured return; despite acknowledging the precarious financial condition of the Appellant in its statutory advice, the DERC has erroneously directed deduction of maximum permissible rebate from the ARR ie (a) allowing sufficient tariff

to the Appellant to enable payment of PPC within a shorter credit period that is required to earn the maximum normative rebate; and (b)considering that, in the absence of sufficient funds, the Appellant has to bear the cost of arranging funds to make prompt payments.

After extracting Regulation 5.15 of the 2011 Regulations, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the impugned findings are contrary to the DERC's own methodology used for calculation of working capital requirement of the Appellant which is allowed as equivalent to receivables from consumers for two months less the PPC for one month; while calculating the working capital requirement, the DERC has proceeded on the basis that Power Purchase Bills are to be paid by the Appellant on the 30th day from the date of the bill i.e., after a month for availing rebate; however, as per the CERC's Tariff Regulations, if payment of the bill is made to generating and transmission companies on the 30th day from the date of the bill, then a rebate of only 1% is available to the Appellant; this is evident from Regulation 34 of the 2009 CERC Regulations as applicable in FY 2013, which provides that where payments are made other than through letters of credit within a month, rebate of 1% shall be allowed to the Discom; for the purpose of computing PPC, DERC has assumed payment of PPC by the Appellant on the date of presentation of the bill through Letters of Credit, or within a shorter period of time; Central Generating Stations such as NTPC had not even allow a 30-day period for payment of bills as per Clause 6.1.1 of the Power Purchase Agreement dated 05.06.2008; NTPC, in terms of the aforesaid clause, raises invoices on the 5th/6th of each calendar month, and the same has to be paid by the last bank working day of the calendar month in which the bills are raised, and not within thirty days from the presentation of the bill; the Appellant is required to make payment effectively within 23-24 days from the presentation of the bill so

as to avoid any late payment surcharge; DERC has failed to consider that, in terms of the Impugned Order, it is not possible for the Appellant to meet the payment terms required for earning maximum rebate given the disparity in the ARR / tariff allowed by DERC and the PPC of the Appellant; the Appellant will be required to arrange funds at its own cost to clear the dues within the shorter credit period to avail maximum rebate; the Appellant is eligible for rebate of only 1% in the event the bill is paid on the 30th day from the date of the bill; and the amount equivalent to rebate over 1% will be reduced from the PPC allowed to be recovered from the consumers.

Shri Amit Kapur, Learned Counsel, would further submit that, as per the working capital norms set forth by the DERC, the Appellant cannot make payment to the generation and transmission companies immediately on presentation of the bills; this has also been held by this Tribunal in its Judgment in **North Delhi Power Ltd. v. DERC, 2010 SCC OnLine APTEL 74;** under business as usual conditions, the Appellant would have paid the PPC within the period of seven days to avail higher rebate; however, in view of the substantial Regulatory Asset, the non-cost reflective tariff, and the fact that the working capital allowed to the Appellant is for a period of one month only, it is unreasonable to require the Appellant to pay PPC immediately on presentation of the bill since (a) billing cycle of all consumers is on monthly basis; (b) consumers are allowed a period of 15 days after issuance of the bill for making payments; (c)appellant is dependent on recovery of tariff from the consumers for making any payments including PPC; and (d) there is a mismatch between the time period within which payment has to be made for availing maximum normative rebate, and the time period within which the electricity dues are recovered by the Appellant from its consumers; DERC has failed to consider that the Appellant procures around 89% of

its total power from Central Generating Stations, and avails Inter-State Transmission through lines available at the rate determined by the CERC; and the DERC has failed to consider all these aspects in the impugned order, and has arbitrarily considered normative rebate of 2% on the PPC; and the financial impact of the present issue is Rs. 119.33 Crores.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that the Appellant has been burdened with deduction of an artificial rebate on PPC @ 2%; the DERC cannot in law assume that the maximum normative rebate was availed by the Appellant; this is not actually the factual position, since the Appellant is not left with sufficient funds, owing to the non-cost reflective tariff and accumulation of Regulatory Asset, to be able to avail the maximum rebate; DERC has failed to consider that working capital is actually available only for one month, as PPC for one month is deducted from the two months receivables from consumers; working capital is further reduced when there is delay in payments by consumers; the reasoning put forth by DERC would only hold good in a utopian setup where DERC allows a cost-reflective tariff to the Appellant, and payments are made by the Appellant's consumers on the date of presentation of bills; this is not true for the Appellant; unless the ARR allows the Appellant the necessary funds to pay the power purchase dues within a shorter credit period, there is no question of earning maximum normative rebate; even otherwise, the DERC ought to consider the actual rebate; even while truing-up the PPC, the DERC has taken into account the normative rebate of 2%, irrespective of whether such rebate was actually availed or not; and, in **North Delhi Power Ltd. v. DERC, 2010 SCC OnLine APTEL 74**,this Tribunal has acknowledged the fact that a Discom cannot

make payment to the generation and transmission companies immediately on presentation of bills.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is submitted, on behalf of the DERC, that the Appellant is assailing the application of Regulation 5.24 of the Multi-Year Tariff Regulations, 2011 by the DERC; the said regulation is unambiguous, and provides that the Appellant can recover the net cost of power it procures by presenting bills for supply to its consumers after assuming the maximum normative rebate available from each source on payment of the bills through letters of credit; the 2011 Regulations assume that the maximum normative rebate for payment of bills through letters of credit is received by the Appellant; the explanatory memorandum/ concept note to the 2011 Regulations emphasised on this interpretation of the regulations; the concept note to the 2011 Regulations captures Regulation 34 of the 2009 CERC Regulations; on a conjoint reading of Regulation 5.24 of the 2011 Regulations and Regulation 34 of the 2009 CERC Regulations, it is clear the consumers of retail supply in Delhi were entitled to the maximum reduction of 2% on all power purchase cost; in terms of the Constitution Bench judgment of the Supreme Court, in**PTC India Ltd. v CERC, (2010) 4 SCC 603**, once the mandate of the Regulations, having the character of subordinate legislation are present, the Commission is required to follow the same, and the impugned order cannot be faulted on this score; the Appellants are assailing the validity of the 2011 Regulations which is impermissible; in their tariff petition, the Appellants have contended that the 2011 Regulations are arbitrary and unreasonable; since the Appellants tariff petition assailed the 2011 MYT Regulation which the Appellant has reproduced in its appeal, the Appellant's contention that Regulation 5.24 is applicable only if payment

is made by Letters of Credit is an afterthought; they have sought to change the nature of their arguments at the appellate stage; neither before the Commission nor before this Tribunal in the appeal filed by them, has the Appellant asserted that Regulation 5.24 is applicable only if payment is made by a Letter of Credit; such a contention is contrary to a plain reading of the Regulation; the Appellants have stated that they are financially unable to meet the requirements of Regulation 5.24, and have sought an amendment of said provision; and failure of the Appellant to open a Letter of Credit is irrelevant to the issue at hand.

It is submitted, on behalf of the DERC, that the constitutional validity of Regulation 5.24 has been upheld by the Delhi High Court in**TPDDL v DERC, 2016 SCC OnLine Del 4165;**Regulation 5.24 of the 2011 Regulations is valid and suffers from no constitutional infirmity, and its application cannot be assailed in the present appeal; reliance placed by the Appellant on the judgment of this Tribunal in **NDPL v DERC, 2010 SCC OnLine Aptel 74** is misplaced; the extracts, as placed on record, pertain to a case and time frame where the 2011 Regulations were yet to be formulated; Appeal No. 153 of 2009 was decided on 30.07.2010,it concerned a true up of the year 2007-08, and discussed Regulations pertaining to the 2007 MYT Regulations; this Tribunal in the said case had no occasion to, and could not have examined Regulation 5.24 of the 2011 Regulations; and the said case and its ratio are wholly distinguishable as belonging to a wholly different regulatory period and regime, and cannot be applied to the facts of the present case.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In their rejoinder submissions, it is submitted on behalf of the Appellant that the DERC has erroneously contended that the Impugned

Order is as per the mandate of Regulation 5.24 of the MYT Regulations, 2011; Regulation 5.24 requires the DERC, while determining the ARR of the Appellant, to determine assuming maximum normative rebate available from each source for payment of bills through letters of credit on presentation of the bill; during FY 2013-14, power purchase payments were not made by the Appellant through Letters of Credit on presentation of bill to all the generating and transmission companies because of non-cost reflective tariff and creation of regulatory assets by the DERC; as such the maximum normative Rebate of 2% could not have been applied on the entire power purchase cost determined by the DERC in the Impugned Order; the Appellant was only making payments through Letters of Credit to a few generators which is evident from the fact that out of Rs. 40.55 Crores (Rs. 18.74 Crores for BYPL) earned as rebate during FY 2013-14, the Appellant had earned Rs. 18.09 Crores (Rs. 13.44 Crores for BYPL) as rebate through payment of bills through LC and Rs. 22.46 Crores (Rs. 5.29 Crores for BYPL) as rebate through payments of bill through RTGS/ NEFT/ Fund Transfer; even if Regulation 5.24 was to be made applicable, the DERC could have considered payments made through LC, towards rebate as against the total payment; Regulation 5.24 is applicable only at the time of determination of ARR; the DERC has to true up power purchase cost as per Regulation 4.21 of the 2011 Regulations, and consider the rebate earned on actual basis and not on normative basis; Regulation 5.24 can be applied only in a business-as-usual condition, ie if the tariff were so determined as to recover all legitimate PPC; then the Appellant can be reasonably expected to make payments to the generators on time, and avail rebates; however, if the tariff admittedly is insufficient to meet PPC, the projection of rebate in the approved cost has the effect of further depressing the available cash in the hands of the Appellant; under business-as-usual

conditions, the Appellant would have paid PPC within seven days to avail higher rebate; however, due to substantive regulatory assets, non-cost reflective tariff, and the fact that the working capital allowed to the Appellant was for one month only, it was unreasonable to require the Appellant to pay Power Purchase Cost immediately on presentation of the bills,since the billing cycle of all consumers was on monthly basis, and consumers are allowed 15 days to make payments, after issuance of the bill; the Appellant is dependent on recovery of tariff from consumers for making any payments including PPC; there is a mismatch between the time period within which payment has to be made for availing maximum normative rebate, and the time period within which electricity dues are recovered from consumers; the Appellant has not sought to challenge the Regulations or seek a relief contrary to what is provided under the Regulations; their contention is that Regulation 5.24 of the 2011 Regulations is only applicable in a business-as-usual condition, ie in case of a cost-reflective tariff being determined by the DERC, wherein the Appellant would have been in a position to ensure timely payments which, in the present case, it has not; the Appellant cannot be penalized by arbitrarily considering 2% normative rebate; since privatization, the ARR determined by the DERC was not even sufficient to meet the actual PPC of the Appellant, leading to creation of a substantial revenue gap as admitted by the DERC in its Statutory Advice dated 15.12.2010; the Appellant is made to suffer double prejudice firstly due to the non-cost reflective tariff determination, leading to financial constraints and creation of regulatory assets, and secondly by considering arbitrary normative rebate of 2%; as per Regulation 34 of the CERC's Tariff Regulations, 2009, if payment of bill is made on the 30th day from the date of the bill, then only 1% Rebate is available to the Appellant; where payments are made other than through LC, within a month, 1% Rebate shall be allowed

to Discoms; and the DERC has assumed payment of PPC by the Appellant on the date of presentation of the bill through LC or within a shorter period of time.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that the Appellant has not sought to challenge the Regulations or sought relief contrary to what is provided under the Regulations; the 2011 Regulations were applicable only at the time of determination of ARR, that too under business-as-usual conditions; reliance placed on the Delhi High Court judgment in **TPDDL v. DERC, 2016 SCC OnLine Del 416** is of no avail, as the Appellant has not challenged the validity of the Regulations; reliance placed by the Appellant on the judgment of this Tribunal in, **NDPL v. DERC, 2010 SCC OnLine APTEL 74** is in support of their submission that, as per the working capital norms set forth by the DERC, the Appellant cannot make payment immediately on presentation of the bills; in the said judgment, this Tribunal has held that rebate, over and above 1%, cannot be considered as non-tariff income for reducing ARR, rebated earned on early payment of PPC cannot be deducted from PPC, and rebate earned only up to 1% can be treated as part of NTI; there is no difference between the Impugned finding under the 2011 Regulations; the Appellant has not relied on the said Judgment in the context of the 2007 or the 2011 regulations, but has only relied on the findings of this Tribunal regarding the purpose of allowing cost on normative basis of working capital; reliance is simply with respect to this Tribunal's findings regarding the purpose of allowing cost on normative basis of working capital; and the DERC should be directed to consider (a) either maximum rebate on PPC @ 1% or allow requisite Working Capital required to earn 2% Rebate or (b) Actual rebate earned/ availed off by Appellant, in the true-up of Power Purchase Cost.

E.

The Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff), Regulations 2011, made by the Commission in the exercise of its powers under Section 181 of the Electricity Act, came into force on the 1st ofApril, 2012. These Regulations are statutory in character and have the force of law. As they are in the nature of subordinate legislation, its validity can only be subjected to challenge in judicial review proceedings before the High Court under Article 226 of the Constitution of India, and not before this Tribunal, as this Tribunal has been held not to have the power of judicial review (**PTC India Ltd. Vs. CERC:(2010) 4 SCC 603)**.

Regulation 5.24 of the 2011 MYT Regulations stipulates that the 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 Licensees, 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 letters of credit on presentation of bills for supply to consumers of Retail Supply Business.

On a plain and literal reading of Regulation 5.24, it is clear that what the distribution licensee is entitled to recover is the net cost of power it procures from sources approved by the Commission (ie from Intra-State and Inter-State trading licensees, bilateral purchases, bulk suppliers, state generators, independent power producers, central generating stations, non-conventional energy generators, generation business of the Distribution Licensee and others). The net cost of power, which the distribution licensee procures, is allowed to be recovered

assuming a maximum quantum rebate, available from each source for payment of bills through Letters of Credit, on presentation of bills for supply to consumers of the retail supply business. The distribution licensee is entitled, in view of Regulation 5.24, to recover the net cost of power after assuming the maximum quantum rebate which is 2 per cent.

What is required to be assumed, in terms of Regulation 5.24, is a normative rebate, and not the actual rebate which the distribution licensee may have received on the payment of dues to the source from which it procures electricity. The said Regulation provides for a legal fiction, and requires it to be assumed that the distribution licensee has received the maximum normative rebate available from each source for payment of bills through letters of credit which is 2%, irrespective of whether or not they have actually made payment by way of letters of credit or had actually received such rebate.

The explanatory memorandum/concept note for the2011 MYT Regulations, under the head (Rebate of Power Purchase/ Transmission Charges), records:-

> *"6 It is respectfully submitted that the said interpretation of the Regulations has been absolutely unambiguous and the explanatory memorandum/concept note to the MYT Regulations, 2011 further emphasized the same. Thus, the said concept note stated as follows:*
>
> "*Rebate on Power Purchase / Transmission Charges*
>
> *During the second MYT Control Period, it is proposed to allow all Distribution Licensees normative working capital of two months receivable less one month power purchase cost less one month transmission cost. In doing so, it is assumed that average*

receivable cycle is 2 months for the licensees as majority of the consumers (approximately 70% of revenue) are being billed monthly and some consumers are being billed bi-monthly (approximately 30% of revenue). Accordingly, whatever cost the licensee would incur in 2 months would be funded through the 2 months receivables allowed by Commission as working capital. The 2 months receivables shall inter-alia include power purchase expense and transmission cost for 2 months as well. Further, the Commission has subtracted one month of power purchase cost and transmission cost as the bills are raised by the generators and transmission utilities only at the end of the month; .for instance, if a distribution licensee receives some quantum of supply in the month of January, it would receive a bill against that supply only on 1st February (One month credit period). If the distribution licensee pays the bill through letter of credit on presentation of bill, it would be entitled to get a rebate @ 2% of the power purchase and transmission bills (as per CERC Regulations).

The Rebate offered by some of the Central Sector Generating Stations is even better than the rebate as per CERC Regulations. The working capital norms allowed by the Commission shall enable the distribution licensees to pay the bills on presentation of the same and the licensees shall avail maximum rebate at all times. ***It is thus proposed that the maximum applicable rebate on power purchase and transmission shall be reduced from the gross power purchase and transmission costs of the licensee irrespective of the actual rebate availed by the licensee from the generators****.*" [Emphasis Supplied]

It is clear from the explanatory note that the maximum rebate of 2 per cent, of the power purchase and purchase bills, is required to be

assumed for the purpose of Regulation 5.24 which is in terms of the CERC Regulations.

Regulation 34 of the CERC Terms and Conditions of Tariff Regulations, 2009 reads thus:-

"*34. Rebate.*

***1. For payment of bills of the generating company and the transmission licensee through letter of credit on presentation, a rebate of 2% shall be allowed**.*

Where payments are made other than through letter of credit within a period of one month of presentation of bills by the generating company or the transmission licensee, a rebate of 1% shall be allowed." [Emphasis Supplied]

As held by the Supreme Court, in **PTC India Ltd. Vs. CERC**: **2010 4 SCC 603**,if there are statutory regulations made under Section 178/181 of the Electricity Act, any order passed by the Commission must be in terms of the statutory regulations. Consequently, the DERC was obligated in law to pass the impugned order strictly in terms of the 2011 Regulations, and not contrary thereto. In the petition, filed by them before the Commission, the Appellant had specifically contended that Regulation 5.24 of the 2011 Regulations was arbitrary and unreasonable; in terms of Regulation 12.8 of the 2011 Regulations, the DERC has the power to amend the regulations; and the DERC should amend the regulations and not consider any normative rebate during FY 2012-13 and FY 2013-14.

Regulation 12.8 of the 2011 Regulations enables the Commission, for reasons to be recorded in writing, at any time to vary, alter or modify any of the provision of these Regulations by amendment. The power to

frame regulations, or to amend it, vests exclusively in the Commission and it is impermissible for this Tribunal, that too in an appeal preferred against tariff/ true-up order passed by the Commission, to direct the Commission to suitably amend its regulations with a view to grant the appellant the relief sought for by them. We find considerable force in the submission, urged on behalf of the DERC, that, ordinarily, even High Courts, in the exercise of their extra-ordinary jurisdiction under Article 226 of the Constitution of India, would refrain from issuing a mandamus for a rule or regulation to be made or amended in a particular manner. In any event such a power is not available to be exercised by this Tribunal either under Section 111 or under Section 121 of the Electricity Act.

A legal fiction is created for some definite purpose, and pre-supposes the existence of the state of facts which may not exist, and then works out the consequences which flow from that state of facts. Such consequences should be worked out to their logical extent having due regard to the purpose for which the legal fiction has been created. **(Bengal Immunity Company Limited v. State of Bihar [1955] 6 STC 446 (SC) ; AIR 1955 SC 661, K. Prabhakaran v. P. Jayarajan (2005) 1 SCC 754; State of A. P. v. Seven Hills Constructions: 2011 SCC OnLine AP 106).**

A deeming provision is enacted for the purpose of assuming the existence of a fact which does not really exist. When the legislature creates a legal fiction, the court has to ascertain for what purpose the fiction is created and, after ascertaining this, to assume all those facts and consequences which are incidental or inevitable corollaries for giving effect to the fiction. **(Manish Trivedi v. State of Rajasthan, (2014) 14 SCC 420).** The effect of a legal fiction by a deeming clause is well known. Legislature can introduce a statutory fiction and courts have to proceed

on the assumption that such state of affairs exists on the relevant date, because when one is bidden to treat an imaginary state of affairs as real he has to also imagine as real the consequences which shall flow from it unless prohibited by some other statutory provision. **(Mohd. Iqbal Madar Sheikh v. State of Maharashtra: (1996) 1 SCC 722).**

In interpreting a provision creating a legal fiction, the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. **(Mancheri Puthusseri Ahmed v. Kuthiravattam Estate Receiver MANU/SC/1238/1996 : (1996) 6 SCC 185; CIT v. Shakuntala MANU/SC/0175/1961 : AIR 1966 SC 719; CIT v. Moon Mills Ltd. MANU/SC/0179/1965 : AIR 1966 SC 870; State of West Bengal v. Sadan K. Bormal 2004 (5) Supreme 29).**

Full effect must be given to the statutory fiction and it should be carried to its logical conclusion and to that end it would be proper and even necessary to assume all those facts on which alone the fiction can operate. Once a fiction is created, upon imagining a certain state of affairs, the imagination cannot be permitted to be boggled when it comes to the inevitable corollaries thereof. (**Dipak Chandra Ruhidas v. Chandan Kumar Sarkar: (2003) 7 SCC 66; ITW Signoda India Ltd. v. CCE: (2004) 3 SCC 48; Ashok Leyland Ltd. v. State of T.N: (2004) 3 SCC 1; Crane Betel Nut Powder Works v. Commissioner of Customs & Central Excise, 2005 SCC OnLine AP 756).** When the law requires that an imaginary state of affairs should be treated as real, then unless prohibited from doing so, one must also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or

accompanied it. As Lord Asquith in **East End Wellings Co. Ltd. v. Finsbury Borough Council [1951 (2) All E.R. 587 at p. 589.]** observed that having done so, you must not cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs **(CCT v. Swarn Rekha Cokes and Coals (P) Ltd:.(2004) 6 SCC 689; Crane Betel Nut Powder Works v. Commissioner of Customs & Central Excise, 2005 SCC OnLine AP 756**).

The Appellants' contention that Regulation 5.24 of the 2011 Regulations would apply only if the Appellant had made payment by way of Letters of Credit, and not otherwise, does not also merit acceptance. Firstly, since that was not its case in the Petition filed before the Commission. Secondly, on a plain and literal reading of Regulation 5.24, it is clear that, in determining the distribution licensee's entitlement to recover the net cost of power (which it procures from generators and others), it must be assumed that they have availed the maximum normative rebate, on payment of bills through Letter of Credit, from each source. In computing the net cost of power to be recovered, Regulation 5.24 requires it to be assumed that the distribution licensee has availed the maximum normative rebate available for payment of bills through Letters of Credit. As the legal fiction in Regulation 5.24 requires it to be assumed that the distribution licensee has availed the maximum rebate, and that too on a normative basis, it was impermissible for the Commission to examine whether or not the distribution licensee had actually availed rebate by way of Letters of Credit, and whether they had in fact received the maximum 2% rebate.

The contention of the Appellant, that Regulation 5.24 would apply only in business as usual conditions, is again a matter which cannot be examined by this Tribunal in proceedings under Section 111 of the

Electricity Act. Such a contention can, possibly, be urged when a challenge is mounted to the vires of Regulation 5.24 of the 2011 Regulations before Courts exercising the power of judicial review. As the 2011 Regulations are binding not only on the Appellant and the DERC, but also on this Tribunal, it is impermissible for us to give a go-by to the statutory regulations, on the ground that the huge quantum of regulatory assets disabled the Appellant from making payment to the generators from whom it procures electricity.

It is useful in this context to note that the constitutional validity of Regulation 5.24of the 2011 Regulations has been upheld by the Delhi High Court in **TPDDL Vs DERC 2016 SCC Online Del 1465.** In the said judgement, the Delhi High Court noted the submission, urged on behalf of the distribution licensee, that the impugned Regulations assumed that the distribution companies would avail the maximum rebate (of 2%) in the purchase cost of power, which was available only on payment of bills through letter of credit on presentation; the aforesaid provisions of the impugned Regulations were contrary to Section 61(b) of the Act which required distribution of electricity to be conducted on commercial business principles; in terms of Regulation 5.24, it was assumed that the distribution licensee would avail the 2% rebate on power purchase costs allowed to a distribution licensee on immediate payment of purchase bills; even though the working capital had been determined on the basis that bills for purchase of electricity would be paid within a period of one month, nonetheless, the impugned Regulations assumed availing of rebate of 2% which is only possible if the bills are paid by a letter of credit; and, to the aforesaid extent, the impugned Regulations were contrary to Section 61(c) and 61(e) of the Act which required the Commission to be guided by the principle of rewarding efficiency in performance while determining the tariff.

It is this context that the Division Bench of the Delhi High Court observed that it was not necessary for them to examine the merits of this dispute because the principles referred to in Section 61(c) and 61(e) of the Electricity Act were broad principles for guidance of the Commission; it was not necessary for the Commission to ensure that each and every component of ARR be so determined so as to incorporate an incentive for rewarding efficiency; as long as the Regulations as a whole promoted efficiency in performance, no grievance in this regard can be made by any distribution licensee; and they were unable to accept that the impugned Regulations were violative of any provision of the Electricity Act or were ultra vires the Constitution of India.

In **NDPL Vs. DERC 2010 SCC Online Aptel 74,** this Tribunal noted the Appellants' claim that, through its efficient management, the Appellant had paid all the bills immediately on raising of the bills by the generating company and, therefore, it had been allowed a rebate of 2%; and the distribution company was entitled to have 1% rebate if the payment was made within 30 days of presentation of bills, and such rebate up to 1% can be treated as a non-tariff income.

This Tribunal observed that the State Commission had considered the rebate of 2%, which had 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, was only due to the efficiency of the Appellant which was not provided in the working capital as per the MYT Regulations; there was no justifiable reason for the State Commission to hold that the rate, earned above 1%, was a part of the non-tariff income; the rebate of 2%, being not a part of the non-tariff income, could not be deducted from the power purchase cost; the rebate allowed was a cash

discount available on early payment of power purchase bills; the rate of rebate was linked to the number of days for which the payment was 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.

This Tribunal further observed that Regulation 5.37 provided for the cost of working capital on a normative basis; the underlying principle was that any additional cost, arising due to the inefficient management of working capital requirement, was to the account of the distribution company, and was 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 had ruled that such efficiency gained by the distribution company be passed on in the ARR in the form of reduction in power purchase cost; according to the State Commission, the rebate was a part of non-tariff income as per the MYT Regulations which was an essential part of the power purchase cost; the effect of MYT order, as well as the impugned order, was the same, in so far as treatment of rebate on power purchase cost was concerned; the distribution company would earn a rebate of 1% even if it paid the power purchase bills within 30 days of the due date; by making payment on time, it could not be construed that the distribution company was being efficient; on the contrary it had the duty to pay the bills in time; in the present case. the State Commission itself had provided a format for the ARR petition to be submitted by the distribution companies; the format referred to in the ARR petition did not cover rebate income and did 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 was only providing additional documents to substantiate their claim that, under the MYT Regulations, the rebate from the power purchase cost was not to be deducted from the Power Purchase Cost, and not to be included as a non-tariff income for determination of tariff; Working Capital included Power Purchase Cost for only one month; the generation company offered 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 was bi-monthly and for Industrial and Commercial consumers taking supply at 11 KV and above it was monthly; consumer also gets 15 days' time for payment of bill after issue of bill; thus there was a mismatch between 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, they were holding that rebate, over and above 1%, could not be considered non-tariff income for reducing the ARR; it had to be concluded that the rebate earned on early payment of power purchase cost could not be deducted from the power purchase cost, and the rebate earned only up to 1% alone could be treated as part of non-tariff income; the finding on this issue by the State Commission was contrary to the law and spirit of the MYT Regulations as it defeated the very purpose of allowing cost on normative basis; it was also contrary to the principle of allowing cost on normative basis of working capital; on the one hand, the State Commission had reduced one month power purchase payment from the working capital requirement, and on the other hand it had been observed that, if the Appellant s making the payment earlier, the benefit of the entire rebate was used for reducing

the power purchase cost; treating rebate income for reduction from power purchase cost, as per the impugned tariff order, was contrary to the MYT Regulations; and rebate, only to the extent of 1%,was to be considered as non-tariff income.

Reliance placed by the Appellant, on the judgment of this Tribunal in **NDPL Vs. DERC 2011 SCC Online Aptel 74,** is also of no avail. Firstly, the said judgment was passed in Appeal No. 153 of 2009 on 30.07.2010 relating to the true-up of FY 2007-08. This judgment was delivered by this Tribunal prior to the 2011 Regulations being made. The observations in the said judgement, that a distribution licensee cannot make payment to the generating companies immediately on presentation of the bills, would not justify interdicting statutory regulations made by the DERC, since this Tribunal lacks the jurisdiction to examine the vires of the 2011 Regulations.

While we have no reason to doubt the submissions, urged on behalf of the Appellant, regarding the financial distress caused to it on account of the burgeoning regulatory assets, that would not justify this Tribunal giving a go-by to the 2011 Regulations which are in the nature of subordinate legislation, and have the force of law. This Tribunal is bound to ensure that the appellate order passed by it is not in contravention of the governing statutory regulations.

Regulation 5.15 of the 2011 Regulations relates to working capital and stipulates its components. Thereunder, the working capital for retail supply of electricity shall consist of (a) Receivables for two months of revenue from sale of electricity; (b) Less: Power purchase costs for one month; (c) Less: Transmission charges for one month; and (d) Less: Wheeling charges for two months.

The appellants' contention that, in view of Regulation 5.15 whereunder the Appellant is entitled for a lesser quantum towards working capital, the stipulation in Regulation 5.24 is unjustified, is again a matter which would relate to the vires of Regulation 5.24 which, as noted hereinabove, cannot be examined in appellate proceedings under Section 111 of the Electricity Act.

Regulation 4.21(a) of the 2011 Regulations relates to true-up, and requires variation and revenue/expenditure, on account of uncontrollable sales/power purchase respectively, to be trued-up every year. That does not mean that either this Tribunal or the Commission can ignore Regulation 5.24 of the 2011 Regulations.

In view of Regulation 5.24 of the 2011 Regulations, which are binding on the parties to this appeal and on this Tribunal, we are satisfied that the DERC was justified in denying the Appellant the relief they have claimed under this head. The Appellants claim under this head necessitates rejection.

XII. ISSUE 37: DISALLOWANCE OF LICENSE FEE PAID FOR ASSETS.

Issue No. 37 relates to disallowance of additional Land License Fee paid by the Appellant to the Government of NCT of Delhi ("GoNCTD" for short) on Fixed Assets, comprising: - (a) partial disallowance of Rs.0.33 Crores for FY 2011-12; and (b) incremental impact of Rs.9.09 Crores paid during the period from FY 2007-08 to 2010-11 not covered in the normative Operation and Maintenance ("O&M") expense.

A. FINDINGS RECORDED BY THE COMMISSION

On Issue No. 37, the findings of the DERC are as under:

"Commission's Analysis …

(ii) The Commission had directed the Petitioner to submit the details for the amount of Rs. 3.76 crore claimed towards license fees on sub stations etc., and Petitioner submitted the details vide letter no. RA/2013-14/01/A/264 dated 11th July, 2013. The Commission has analysed the details furnished by the Petitioner and observes that Rs. 0.33 crore was part of A&G Expense of base year (FY 2006-07) towards License fees. The escalated value of base year License fees in FY 2011-12 is Rs. 0.40 crore after applying annual escalation and efficiency factor. The License fee has been computed at Rs. 3.43 crore for FY 2011-12. Therefore, the Commission now allows additional Licensee Fees of Rs. 3.03 crore (3.43 – 0.40) for FY 2011-12."

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, the land license fee is an uncontrollable expense for the Appellant which is to be trued up over and above the normative O&M expense; the Appellant had claimed the incremental amount incurred on additional Land License Fee from FY 2007-08 to FY 2011-12 while submitting detailed calculation by its letter dated 11.07.2013 sent to the DERC subsequent to filing of the Tariff Petition; this information was furnished pursuant to the clarification sought by the DERC in its letter dated 10.07.2013; the actual amount of the Land License Fee for a particular year depends on the land and area used towards distribution business; this amount is also dependent on various factors including the area where the land is taken on lease by the Appellant through the GoNCTD for the purpose of expansion of the network, land required for shifting of

electrical installations etc; the Appellant cannot accurately forecast or control the amount of Land License Fee payable in the next Control Period at the time of determination of normative O&M expenses before the start of the control period; the mechanism for allotment of land was decided in a meeting held with GoNCTD dated 01.10.2004 which included signing of the lease license agreement between GoNCTD and Discoms, and that GoNCTD would charge an annual license fee/rent equivalent to 20% of the value of the land; such annual rent/ license fee is charged for using the land on 'Right to Use' basis only for the purpose of expansion of the Distribution network and erection of related infrastructure network; Regulation 4.7 read with Regulation 5.2 of the 2007 Regulations prescribes "Targets for Controllable Parameters" and "Operation and Maintenance Expenses"; expenses included in the base O&M Expenses at the stage of tariff determination are controllable in the light of the aforesaid Regulations; any change (addition/deletion) or new statutory levies, duties, etc. would be uncontrollable if not included in the base O&M expenses; Land License Fee was not included in the base O&M expenses as admitted by the DERC in its Reply; this Tribunal in Appeal No. 171 of 2012, ie in **TPDDL vs. DERC (2015) SCC OnLine APTEL 170,** held that enhancement in expenses for reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and ought to have been allowed as pass through in tariff; the findings in the aforesaid judgment has been reiterated in **TPDDL vs. DERC: (2019) SCC OnLine APTEL 106, Para 16.41 & 16.4.3;** In **TPDDL vs. DERC: (2016) SCC OnLine Del 4165**, the Delhi High Court recorded the stand of the DERC that, in an event of any serious difficulty, the DERC has sufficient powers to relax the provisions of the Regulations; the Appellant had claimed Rs.3.77 Crores towards License Fees on fixed Assets paid to GoNCTD for FY 2011-12 in its Tariff Petition for true up of

FY 2011-12; after the Tariff Petition was filed, the DERC, by its letter dated 10.07.2013, sought certain information which was furnished by the Appellant on 11.07.2013; yet the DERC, by the impugned order, only considered License Fees for FY 2011-12 of Rs.3.03 Crores instead of Rs.3.36 Crores; the DERC held that Rs.0.33 Crores was part of A&G Expenses of the base year (FY 2006-07) towards License Fees; escalated value of Base Year's License Fees in FY 2011-12 is Rs.0.40 Crores; License Fee had been computed at Rs.3.43 Crores instead of Rs.3.77 Crores; and, therefore, the DERC allowed additional Licensee Fee of Rs.3.03 Crores deducting the base license fee of Rs.0.33 Crores.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that, for FY 2007-08 to FY 2010-11, the Appellant had claimed the incremental amount of License Fees paid to GoNCTD for Rs.9.09 Crores; no justification has been given in the Impugned Order for disallowance of this additional License Fee paid by the Appellant for this period when actual/ additional License Fee was allowed for FY 2011-12; the DERC in its reply, while referring to Regulation 4.7(d) of the 2007 Regulations, had stated that legal fees were part of O&M Expenses which could not be compared to the levy of License Fee by the Government; Regulation 4.7 of the 2007 Regulations covers Legal Fees but does not include License Fees which is a Statutory Levy, and thus uncontrollable; the DERC, in its Tariff Order dated 29.09.2015, has acknowledged that the Licence Fee applicable as per the rates decided by the GoNCTD for Land Rights for the respective years was uncontrollable; the Appellant has not only augmented the inherited network system but has also expanded the same to meet the increasing demand of its consumers; the total financial impact of the present issue, for the period from FY 2007-08 to FY 2011-12, is Rs.12.45 Crores; and the Appellant was claiming an amount of

Rs.9.42 Crores, as the DERC had partially allowed License Fees for FY 2011-12 i.e. Rs.3.03 Crores.

Shri Amit Kapur, Learned Counsel for the Appellant, would also submit that, when the DERC intended to define a specific aspect of tariff for the Control Period, it did so by specifying the same in the 2007 Regulations; Regulation 4.8 specifies the targets for AT&C loss level to be achieved by the Discoms at the end of the Control Period as 17% (BRPL)/ 22% (BYPL); similarly, when it so decided, it established the governing principles to be determined specifically in the Tariff Order; Regulation 4.2 stipulated that the MYT framework shall be based on the factors enumerated thereunder which included several clauses i.e. (a), (d) and (f); the DERC has to conduct an annual review of performance based on the approved forecast and categorize variations in performance as either controllable or uncontrollable each year; uncontrollable factors are to be trued up annually; in terms of Regulations 4.7, 5.2, 5.3 and 5.4 of the 2007 Regulations, the DERC has to set targets for each year of the Control Period for the items or parameters that are deemed to be controllable including Operation and maintenance expenses; in terms of the said methodology, the DERC is required to issue a Tariff Order each year providing for normative O&M expenses for the year, after applying Efficiency Factor to be determined by the DERC; in terms of the relevant Tariff Orders, O&M expenses (which includes employee expenses, repairs and maintenance expenses, A&G expenses, and other miscellaneous expenses like audit fees, rents, legal fees etc.) are deemed to be controllable; two consequences arise: - (a) such a “deeming” in law is a rebuttable presumption; (b) only sovereign legislative bodies can create legal fiction but not a subordinate law-making bodies like the DERC, as held in **Bhuwalka Steel Industries Ltd. & Anr. vs. Union of India & Ors. (2017) 5 SCC 598, Para 36 to 38**;

the scheme of the 2007 Regulations contemplates that the targets, even of O&M expenses set at the beginning of the Control Period, are not cast in stone; this is evident from Regulation 8.1 to 8.3 which contemplate the filings at the beginning of the Control Period; Regulation 4.2(d) contemplates an "annual review of performance" vis-à-vis the approved forecast as also "categorisation of variations in performance into controllable and uncontrollable factors; Regulations 8.4 to 8.7 contemplate details of the annual filings to be made during the Control period; Regulation 8.8 contemplates a "review" on the basis of information as part of the annual review of actual performance vis-à-vis the performance targets set at the beginning of the Control Period; Regulation 11.1 and Regulation 11.2 clearly provide that, to ensure smooth implementation of the MYT framework, the Commission may undertake periodic review of the licensee's performance during the Control Period to address any practical issues, concerns of unexpected outcomes that may arise; these considerations may result in a change in Tariff under Regulation 11.2; Regulation 11.4 enables the DERC to specify any modification to the forecast of Discom for the remainder of the Control Period with detailed reasons for the same; after taking all these changes into account, the DERC modified the tariff midway during the control period to account for practical issues and unexpected outcomes, and it may review the implementation of the principles laid down in these Regulations; while doing so, it may take into account, the industry structure, sector requirements, consumer and other stakeholder expectations and licensee's requirement at that point of time, and thereby revise the principles for the second control period; none of the other Regulations has been considered in the impugned finding; and, if the impugned finding were allowed to stand, all the said Regulations would be rendered otiose.

Shri Amit Kapur, Learned Counsel for the Appellant, would state that O&M expenses, considered by the DERC in Regulation 4.7 of 2007 Regulations, being deemed to be a controllable parameter is a rebuttable presumption; it does not bar true up of uncontrollable elements of such O&M expenses, such as statutory expenses; this submission is substantiated by Para 37.3 of the reply by the DERC wherein they have stated that additional License Fee was not part of the base Year's A&G expenses and had been allowed under new initiatives as claimed by the Appellant; the License Fee paid by the Appellant to the DERC was allowed as pass-through in the impugned order as an uncontrollable expense; in the Tariff Order dated 29.09.2015, the DERC acknowledged that the Licence Fee, applicable as per the rates decided by the GoNCTD for Land Rights for the respective years, was uncontrollable; this Tribunal is empowered to correct any errors made in a Tariff Order; and, therefore, findings of the DERC may be set aside and the claim allowed.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is contended, on behalf of the DERC, that Issue Nos. 37, 45 and 19 pertain to the broad category of Operating & Maintenance Expenses; the Appellant have made mutually destructive and contradictory pleas on these three issues; while they seeking actual cost on Issues 37 and 45 to be allowed, they contend that the decision of the Commission on Issue No. 19 where it adjusted the R&M Expenses on the basis of the Gross Fixed Assets as available to be erroneous.

On Issue No. 37 relating to Disallowance of License Fee paid for Assets, it is submitted on behalf of the DERC that this claim is beyond the scope of the original tariff petitions filed before the DERC; BRPL, in its tariff petition, had sought Rs.3.76 Crores towards license fee paid during FY 2012-13 and the same was sought to be adjusted while truing

up FY 2011-12; on observing the anomaly in the petition, the DERC had sought a clarification vide email dated 10.07.2013, and had enquired whether the expenditure was booked as A&G Expenses in the years 2006-07 to 2010-11, since the Appellant had not claimed any addition in those years; in response the Appellant had submitted details of the License Fees paid in 2011-12; they admitted that the said amounts were classified as A&G Expenses, and had been factored in the MYT order dated 23.02.2008; the Appellants thereafter, in a procedure unknown to law, amended the entire tariff petition and enhanced its claim to Rs.18.79 Crores from Rs.3.77 Crores, and claimed License Fees from 2007-08 to 2011-12; the said claim neither formed part of the Tariff Petition and neither did the Appellant amend its claim in a manner known to law; therefore the non-consideration of the same suffers from no infirmity; in the impugned order dated 31.07.2013, the DERC had erroneously allowed the Appellant Rs.3.03 Crores as additional license fee; the said allowance was mistaken and impermissible under the 2007 Regulations; as per the 2007 Regulations, A&G Expenses are provided on a normative basis on the basis of an inflation factor, and therefore cannot be trued up; and the additional amount which has been allowed was erroneous as the correct Regulations had been applied; Para 37.3 of the Reply filed by the DERC was a typographical error, and was based on an incorrect understanding of the Appellant's submissions in its letter dated 11.07.2023; Regulation 4.7 of the 2007 MYT Regulations deem O&M Expenses to be controllable; Regulation 4.16(b)(i) of the 2007 MYT Regulations expressly states that '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; Regulation 5.4 states that A&G expenses are linked to an Inflation Index, and that it was taken as a combination of the Consumer Price Index and Wholesale Price Index for the immediately

preceding five years; it is clear from Regulation 5.41 that the 2007 Regulations do not provide for any truing up for controllable items; the annual review, during the control period, was only for uncontrollable parameters, and no review of controllable parameters was possible under the framework of the 2007 MYT Regulations; deeming of certain expenses as controllable has been done as per the 2007 Regulations and cannot be assailed in an appeal against a tariff order; in any event the challenge to the 2011 Regulations, which are *parimateria* with the 2007 Regulations has been repelled by the High Court of Delhi in **TPDDL vs. DERC: (2016 SCC OnLine Del 4165;** the Delhi High Court examined the deeming of O&M expenses like (i) change in taxes, statutory levies; (ii) minimum wages; (iii) inflation; (iv0 service terms and conditions of employees transferred from erstwhile DVB; (v) increase in consumer base; (vi) costs relating to career growth and replacement of employees and inflation in repairs and maintenance expenses as being controllable and found no constitutional infirmity with the Regulations (refer Paragraphs 20 to 25 of the Judgment of the Delhi high Court); since the License Fees are part of the A&G expenses, they are fully covered by the 2007 MYT Regulations which provide for a formula to absorb the increased costs based upon the inflation index; the statutory framework does not entitle the Appellants to the specific determination of all uncontrolled elements of costs and provide for directly loading of those costs on the tariff for each year; once the License Fees are factored into the A&G expenses and an escalation factor for the same was provided in the MYT order of 23.02.2008, the said principle cannot be changed at the stage of true-up in the light of the principles laid down by the Supreme Court in **BSES Rajdhani Power Ltd. vs. DERC [(2022) SCC OnLine SC 1450];** and, the Appellants' claim for additional License Fee is firstly not even pleaded in the tariff petition and cannot be allowed in principle,

since it would be in violation of the 2007 Regulations, which do not permit true-up of O&M expenses, which include A&G expenses.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the Appellant did not seek true-up of controllable parameters; land license fee is claimed by the Appellant as uncontrollable expenses which ought to have been trued-up by the DERC since (i) the Appellant's claim is for the incremental amount incurred on Land License Fee from FY 2007-08 to FY 2011-12; (ii) actual amount of the Land License Fee for a particular year depends on land / area used towards Distribution business as well as various other factors; (iii) the Appellant cannot accurately forecast the amount of Land License Fee payable in the next Control Period at the time of determination of normative O&M expenses before the start of the Control Period; the Definition of O&M Expenses, provided under Regulation 5.2 of MYT Regulations,2007, includes Statutory Levies and Taxes; yet Regulation 4.7, which provides for Targets for Controllable Parameters, excluded statutory levies and Taxes, as the same are uncontrollable costs; having itself considered Land License Fee as uncontrollable in various Tariff Orders, DERC cannot now change its stand in its previous tariff orders by way of an affidavit; before the Delhi High Court in WP (c) No. 2203 of 2012, which stand is recorded in the Judgment dated 29.07.2016, (2016 SCC OnLine Del 4165) the DERC has stated that it has the power to relax the regulations to provide relief, if they are deserved; this stand taken by the DERC before the Delhi High Court has also been recorded in this Tribunal judgment: 2022 SCC OnLine APTEL 51 [Para. 55]; the DERC's approach violates the

legitimate expectation of the Appellant since the DERC itself allowed such relief in various Tariff Orders earlier.

E. ANALYSIS:

The Appellants' claim, under this head, is that the Land License Fee paid by them to GoNCTD was an uncontrollable expense, and is required to be trued up over and above the normative O&M expenses which the Appellant was extended in terms of the Regulations. It is necessary for us, therefore, to take note of the 2007 Regulations. Regulation 4.1 thereof stipulates that the Commission shall adopt the Multi Year Tariff frame work for approval of ARR and expected revenue from tariffs and charges; and the Control Period shall commence from the date of issue of the Multi Year Tariff Order and shall extend till 31 March, 2011. Regulation 4.5 stipulates that the baseline values (operating and cost parameters) for the Control Period shall be determined by the Commission, and shall be based on the values approved by the Commission, latest audited accounts, estimate of the actuals for the relevant year, prudence check and other factors considered appropriate by the Commission. Under the head 'Targets for Controllable Parameters', Regulation 4.7 stipulates that the Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable", and which include (a) AT&C Loss; (b) Distribution losses; (c) Collection efficiency; (d) Operation and maintenance Expenditure; (e) Return on Capital employed; (f) Depreciation; and (g) Quality of Supply. Regulation 4.7 (d) states that Operation and Maintenance Expenditure shall include employee expenses, repairs and maintenance expenses, administration and general expenses and other miscellaneous expenses viz. audit fees, rents, legal fees etc. Under the head 'True Up', Regulation 4.16

stipulates that the true up across various controllable and uncontrollable parameters shall be conducted as per the principles stated thereunder: - (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 the Control Period.

Under the head 'Principles for determination of ARR' is included Operation and Maintenance Expenses. Regulation 5.2 stipulates that Operation and Maintenance (O&M) expenses shall include: (a) Salaries, wages, pension contribution and other employee costs; (b) Administrative and General expenses; (c) Repairs and Maintenance; and (d) Other miscellaneous expenses, statutory levies and taxes (except corporate income tax). Regulation 5.3 requires the licensee to submit the O&M expenses for the Control Period as prescribed in the multi-year tariff filing procedure; the O&M expenses for the Base Year shall be approved by the Commission taking into account the latest available audited accounts, business plan filed by the Licensees, estimates of the actuals for the Base Year, prudency check and any other factor considered appropriate by the Commission. Regulation 5.4 stipulates that the O&M expenses, permissible towards ARR for each year of the Control Period, shall be determined using the formula detailed thereunder; the R&M (Repairs & Maintenance) expenses are linked to the Gross Fixed Assets, while the employee expenses and A&G (Administrative & General) expenses are linked to an Inflation Index, as shown thereunder. The formula given in Regulation 5.4(a) to determine O&M is $O\&M_n = (R\&M_n + EMP_n + A\&G_n)* (1 – X_n)$.

Under the head 'Multi-Year Tariff Process', Regulation 8.1 stipulates that the Multi Year Tariff filing shall be in such form and in such manner as may be decided by the Commission, and as per the provisions of the Conduct of Business Regulations. Regulation 8.2 stipulates that the licensee shall also submit the Multi-Year Tariff filing in electronic format to the Commission. Under the head 'Multi-Year Filings for the Control Period', Regulation 8.3, which relates to the beginning of the Control Period – Business Plan Filings, requires that the Distribution Licensee shall file for the Commission's approval, on 1st April of the year preceding the first year of the Control Period or any other date as may be directed by the Commission, a Business Plan approved by the Board of Directors; The Business Plan shall be for the entire Control Period and shall, inter alia, contain, among others, (f) the Operation and Maintenance (O&M) costs estimated for the Base Year and two years prior to the Base Year with complete details, together with the forecast for each year of the Business Plan Period based on the proposed efficiency in operating costs, norms for O&M cost allowance including indexation and other appropriate mechanism.

Under the head 'Annual Filings during the Control Period – ARR and Tariff Filings', Regulation 8.4 requires that the Distribution Licensee shall file an application for approval of Wheeling Tariff and Retail Supply Tariff for each year of the Control Period, not less than 120 days before the commencement of the first year of the Control Period or such other date as may be directed by the Commission. Regulation 8.7 stipulates what the filing for Retail Supply Tariff shall contain.

Regulation 11 relates to Periodic Review. Regulation 11.1 stipulates that to ensure smooth implementation of the Multi Year Tariff (MYT) Framework, the Commission may undertake periodic review of the

Licensees' performance during the Control Period, to address any practical issues, concerns or unexpected outcomes that may arise. Regulation 11.2 requires the Distribution Licensee to submit information as part of the annual review on actual performance to assess the performance vis-à-vis the targets approved by the Commission at the beginning of the Control Period; this shall include annual statement of its performance and accounts including latest available audited/actual accounts and the tariff worked out in accordance with these Regulations. Regulation 11.3 requires the licensee to submit the revised ARR and corresponding tariff adjustments 120 days before the commencement of the Financial Year, and Regulation 11.4 enables the Commission to also specify any modifications to the forecast of the Distribution Licensee for the remainder of the Control Period, with detailed reasons for the same.

As noted hereinabove, the 2007 Regulations are statutory in character and have the force of law. These Regulations are applicable from 30.05.2007 when the 2007 Regulations were notified in the Delhi Gazette dated 30.05.2007. These Regulations are binding not only on the Appellants but also on the DERC and this Tribunal.

By its email dated 10.07.2013, the DERC sought details from the Appellant of the Annual License Fees paid for FY 2012 towards various items. The Appellant was also asked to clarify this expenditure whether it had been charged in the A&G expenses of FYs 2006-07, 2007-08, 2008-09, 2009-10 and 2010 and 2011 because it was not claimed in those relevant years under the head 'License Fees'. In reply thereto, by its letter dated 11.07.2013, the Appellant, while furnishing details of the Annual License Fees paid by them, informed the DERC that the License Fees paid to the GoNCTD, pertaining to FY 2006-07 to FY 2010-11, had been booked under A&G expenses from FY 2005-07 to FY2010-11 which

was tabulated. For FY 2006-07, a sum of Rs.0.33 Crores had been booked under A&G Expenses; for FY 2007-08, a sum of Rs.0.92 Crores had been booked; for FY 2008-09, a sum of Rs.2.91 Crores had been booked; for FY 2009-10, a sum of Rs.3.30 Crores had been booked; and for FY 2010-11, a sum of Rs.3.44 Crores had been booked. It is further stated in the said letter that the DERC had, in its letter dated 23.02.2008, considered the License Fees of Rs.0.33 Crores incurred during FY 2006-07 as base, and had allowed an escalation factor of only 4.15% on year-on-year basis from FY 2007-08 to FY 2010-11; however, there was a considerable difference between the amount of license fees allowed by the Commission, and the actual License fees paid by the Appellant to GoNCTD; and, therefore, they were entitled for the enhanced license fee for different years along with carrying cost.

The minutes of the meeting, held in the Office of the Chief Secretary, Government of NCT of Delhi on 01.10.2004, records that the issue of allotment of land to the distribution companies for creation of new infrastructure including Grid Stations, Installation of Transformer etc. were discussed. The decision, among others, was that GNCTD may allow the Power Distribution Companies to set up electric sub-stations on “right to use” basis, and on such terms and conditions as GNCTD may enter into with the Power Distribution Companies; the land should be put to use only for the specific purpose of setting up of electric sub-stations etc. and not for any other use or commercial exploitation; this should be specified in the letter by the DDA; and the DDA may only allot the minimum required land as per norms.

The minutes further records, among others, that the GNCTD would sign a licence/ lease agreement with the Distribution Companies, and would charge appropriate rent/ licence fee from the Distribution

companies; the Distribution Companies could be charged around 20% of the value of the land to be paid by the GNCTD as annual licence fee/ rent; the licence deed would, inter alia, involve allowing the Distribution Companies to use the land on 'right to use' basis, and on the basic condition that the land would be used only for the purpose of expansion of the distribution network and erection of related infrastructure and not for any other work; and the draft licence/ lease agreement to be entered into between GNCTD and Discoms would be prepared in consultation with DDA and the Law Department.

In **Tata Power Delhi Distribution Ltd. vs. DERC: (2016) SCC OnLine Del 4165**, the Division Bench of the Delhi High Court, while examining a challenge to the constitutional validity of the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 issued by the DERC, observed that Regulations made under Section 181(2)(zd) of the Electricity Act must, necessarily, provide for speedy recovery of uncontrollable costs; this did not, necessarily, mean that the impugned Regulations must provide for a specific determination of all uncontrolled elements of costs, and provide for directly loading of those costs on the tariff for each year; the National Tariff Policy, 2006 only states the principles which would guide determination of tariffs; there would be several ways to give effect to those principles; providing an increase in costs on a normative basis, taking into account the inflation factor, would,-if such normative basis has been arrived at after exercising due skill and after taking into account the relevant factors, also provide for a method of recovering uncontrollable costs; the term 'true-up' is commonly understood to mean align/ balance/ make level; the term as used in the impugned Regulations must be read in the context of the National Tariff Policy, 2006, which inter alia requires that uncontrollable costs be recovered speedily; in the present context,

the expression ‘true-up’ would be to balance and align costs; and providing for an increase in costs on normative basis is also one of the ways to balance and correct the recoveries.

The Division Bench further observed that paragraph 5.3(h)(4) of the National Tariff Policy, 2006 specifically requires the uncontrollable cost to be recovered, and not accumulated, so as to burden future consumers; a plain reading of the impugned Regulations also indicated that they did not permit carry forward of O&M expenses or recovery of the same in the future years; all O&M expenses, which may remain unrecovered, are to the account of the licensee; although O&M cost are deemed to be controllable, nonetheless, the impugned Regulations do provide for a normative increase in such costs based on a specified formula; the intention of the Commission was to ensure that such costs are passed through, but instead of bisecting the expenses' head into various cost elements, and providing for truing up of the actual variation in each year, the Commission, in its wisdom, had framed a formula for absorbing the increased costs in the tariff on a normative basis; this was clearly to insulate the consumers from wide variation and provide for an overall uniform increase based on an inflation factor; the O&M expenses included both elements which were controllable as well as uncontrollable; it would also not be apposite to treat all O&M expenses as uncontrollable; the Commission has adopted a broad approach and, whilst all O&M expenses were treated as controllable under the impugned Regulations, it also provided for an increase in such expenses based on inflation factor; and this was merely an alternate method for the pass through of increase in expenses, and absorbing the effect of inflation in the tariff.

While expressing its inability to accept the contention that such approach militated against the principles specified in Section 61 of the Electricity Act or fell foul of paragraph 5.3(h)(4) of the National Tariff Policy, 2006, the Division Bench observed that it was necessary to bear in mind that Section 61 of the Electricity Act specified certain principles/factors for guidance of the Commission in framing the Regulations; these were in the nature of broad principles to be considered while framing Regulations, and not rigid formulae as was sought to be canvassed on behalf of the petitioner; Section 61(b) of the Act, inter alia, required the supply of electricity to be conducted on commercial principles; merely because some elements of variation in actual costs were not directly incorporated in the tariff, did not necessarily mean that commercial principles had been disregarded; the petitioner had been unable to establish that the tariff fixed according to the impugned Regulations would render the activity of distribution unviable, and that no person could possibly recover his costs in carrying out the said business; they were, thus, unable to accept that the impugned Regulations violated Article 19(1)(g) of the Constitution of India; the impugned Regulations had been framed in exercise of powers conferred under Section 181 of the Electricity Act, and were in the nature of subordinate legislation; the scope of judicial review of subordinate legislation was very limited; interference by the Court would not be warranted unless it was established that the impugned Regulations were inconsistent with the Electricity Act, were ultra vires the Constitution of India; or the due procedure for making such legislation had not been followed; and, in the present case, they were not persuaded that either of the said grounds had been made out.

As long as the tariff has been fixed in accordance with the 2007 Regulations, it is impermissible for this Tribunal to grant the Appellant any

relief on the ground that there has been an increase in the land Licence Fees payable by them, since that would amount to granting them a relief contrary to the statutory Regulations in force. As noted hereinabove, the Appellant had, in its letter dated 11.07.2013, acknowledged that the DERC had, in its letter dated 23.02.2008, considered the license fee of Rs.0.33 Crores incurred during FY 2006-07 as the base, and had allowed an escalation factor of 4.15% on year-on-year basis from FY 2007-08 to FY 2010-11 which, according to the Appellant, was insufficient. Since the license fee has been included in the base A&G expenses, which also formed part of computation of the normative O&M expenses under Regulation 5.4, and as Regulation 4.16(b)(i) expressly stipulates that, for controllable parameters, 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 the ARR, grant of the relief sought for by the Appellant is impermissible, since grant of any such relief would fall foul of the 2007 Regulations which have statutory sanction and the force of law.

In **TPDDL vs. DERC(Appeal No. 171 of 2012 dated 10.02.2015) (2015 SCC OnLine APTEL 170)**, this Tribunal held that enhancement in expenses for reasons beyond the control of the utility, such as statutory obligations were uncontrollable in nature and ought to have been allowed as a passthrough in tariff. This finding has been reiterated in **TPDDL vs. DERC [(2019) SCC OnLine APTEL 106.**

While it may be impermissible for the DERC, that too in an appeal filed by the Appellant herein, to seek adjustment of the amounts which they claim to have been extended earlier to the appellant by mistake, that does not also mean that the Appellant is entitled for the relief sought for in this Appeal under this head merely on the ground that they were paid the said amounts earlier, as land license fees has been treated to form

part of the O&M expenses for which the Appellant is entitled for a normative sum in terms of the formula stipulated in Regulation 5.4(a) of the 2007 Regulations.

It is true that Regulation 4.7(d) deems Operation and Maintenance expenditure to be controllable. Regulation 4.7(d) is an inclusive definition, and brings within its ambit R&M expenses, Administrative & General expenses, and other miscellaneous expenses. In the light of the legal fiction created by Regulation 4.7(d), we are required to deem Operation and Maintenance expenditure to be controllable whether, in fact, it is controllable or not. Any grievance which the Appellant may have, regarding Regulation 4.7 deeming Operation and Maintenance expenses to be controllable, can only be agitated in judicial review proceeding questioning the validity of the said Regulations. and cannot be urged in an appeal, filed against the order of the DERC, under Section 111(1) of the Electricity Act.

While it is true that the land License Fees paid by the Appellant to GoNCTD is not a statutory levy, that does not mean that such fees paid by the Appellant would automatically be uncontrollable. In any event, the Regulations required both the DERC and this Tribunal to deem that O&M expenses are controllable, and to be, therefore, paid on a normative basis. The legal fiction created by the 2007 Regulations must be given full effect, and it is impermissible for this Tribunal to ignore the deeming provision. and compute the Land License Fee on the basis of actuals. It is also true that Regulation 4.7 prescribes targets for certain controllable expenses such as AT&C loss, distribution loss, collection efficiency, O&M expenses etc. The mere fact that no targets have been stipulated for Land License Fee does not automatically mean that such expenses must be held to be uncontrollable, notwithstanding the legal fiction created by

the 2007 Regulations which require us to deem such expenses to be controllable. It is impermissible for this Tribunal to read a legal fiction as a rebuttable presumption for the statutory fiction must be given its full effect. Such a legal fiction would require us to proceed on the premise that such expenses are controllable, and the Appellant is entitled for compensation towards such expenditure only on a normative basis and not on actuals.

Reliance is placed by the Appellant on **Bhuwalka Steel Industries Ltd. vs. Union of India & Ors: (2017) 5 SCC 598,** to contend that it is only sovereign legislative bodies which can create legal fictions but not a subordinate law-making body. In the light of the law declared by the Constitution Bench of the Supreme Court, in **PTC India Ltd vs CERC: (2010) 4 SCC 603,** the question whether the DERC could have framed Regulations creating a legal fiction is a matter which touches upon the validity of such Regulations, and can only be agitated in judicial review proceedings before the High Court, that too on a challenge being mounted to the constitutional validity of the said Regulations. In any event, as has been held by the Delhi High Court in **Tata Power Delhi Distribution Ltd. vs. DERC: (2016) SCC OnLine Del 4165**, the constitutional validity of the 2011 DERC Regulations (which are largely in *parimateria* which the 2007 Regulations) have been upheld including the Regulation providing for enhancement during the control period on a normative basis. We also find it difficult to agree with the submission that the impugned findings of the DERC renders the other part of the 2007 Regulations otiose, for a literal interpretation of the 2007 Regulations do not permit any such construction. Reliance placed by the Appellant on the subsequent tariff order of the DERC dated 29.09.2015 is also of no avail, since what we are required to consider is the validity of the impugned

order on the touchstone of the 2007 Regulations which then governed the field.

The DERC claims that it had, by mistake and on a misunderstanding of the Regulations, stated in its reply that the Land License Fee was not included in the base O&M expenses. Reliance placed by the Appellant on the said reply is, therefore, of no avail, more so as the Appellants have themselves admitted that the land License Fees were included in the base O&M expenses in the tariff order dated 23.02.2008. Consequently, since the annual escalation in O&M expenses is being extended on a normative basis, the Appellant is also entitled for enhancement in the land License Fees, during the control period, only on a normative basis in terms of the 2007 Regulations. The Appellants' reliance on the judgment of this Tribunal in **TPDDL vs. DERC [(2015) SCC OnLine APTEL 170** is misplaced, as the issue of land License Fee did not arise for consideration in the said judgment. Even otherwise, since the Land License Fee forms part of the base O&M expenses, the Appellants were entitled, in terms of the 2007 Regulations, only for enhancement on a normative basis and not on actuals. Since the Appellants entitlement for incremental amount of Land license Fee is only on a normative basis and not on actuals, their claim for the period 2007-08 to 2010-11, for the incremental increase on actuals, is not justified.

As rightly held by the DERC, the 2007 Regulations do not provide for truing up of controllable items, and it is only for uncontrollable items is annual review permissible during the control period. The MYT Order dated 23.02.2008 makes it clear that the License Fees was factored into the A&G expenses. Since these principles were applied at the ARR stage, it is impermissible for us to change the said rules which were

applicable at the ARR stage during the truing-up exercise, in the light of the law declared by the Supreme Court in **BSES Rajdhani Power Limited vs. DERC: (2022) SCC OnLine SC 1450**. The Appellants' claim of legitimate expectation would not justify an order being passed contrary to the statutory Regulations in force, since such Regulations have statutory sanction and the force of law.

Viewed from any angle, we are satisfied that the Appellants' claim under this head necessitates rejection, and the impugned order of the DERC, in so far as it relates to the present issue of disallowance of additional Land License Fee, must be, and is accordingly, upheld.

XIII. ISSUE NO. 38: ERRONEOUS BIFURCATION OF CAPITALISATION WHILE DETERMINING RETURN ON CAPITAL EMPLOYED FOR MYT PERIOD.

A. FINDINGS OF THE COMMISSION IN THE IMPUGNED ORDER:

The findings of the Commission on Issue No. 38 are as under:

"Table 42: Approved CWIP for the Control Period (Rs. Cr.) under MYT Order dated 23 February 2008

Scheme	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***
Opening CWIP	*1157.30*	*757.30*	*607.30*	*532.30*
Net Additions to CWIP	*128.24*	*390.85*	*475.00*	*350.00*
Capitalisation of Investment	*528.24*	*540.85*	*550.00*	*450.00*
Investment capitalised out of opening CWIP till FY 07	*464.12*	*345.43*	*312.50*	*35.25*
Investment capitalised out of opening CWIP for investments from FY 08 onwards	*72.08*	*0.00*	*0.00*	*239.75*

Investment capitalised out of fresh investment	*64.12*	*195.43*	*237.50*	*175.00*
Closing CWIP	*757.30*	*607.30*	*532.30*	*432.30*

3.156 The opening CWIP FY 07-08 was projected to be capitalized as per the above table 42 and Petitioner has not completed the capitalization in the MYT period. The Commission is of the view that the opening CWIP in FY 2007-08 should have been capitalized on priority basis in the MYT Control Period as the distribution schemes generally completed in 1-2 years of time. Therefore, it has been decided that such opening CWIP FY 2007-08 will be considered as capitalized within the MYT Control period (FY 2007-08 to FY 2011-12).

3.157 The Commission had allowed capitalization of Capital Expenditure to the extent of Rs. 2483 crore for the Control Period from FY 2007-08 to FY 2011-12. Petitioner has submitted the actual capitalization of Rs. 1698.20 crore against Rs. 2483 crore allowed by the Commission. Pending finalization of true up the Commission now takes into consideration the actual capitalization as submitted by Petitioner in the truing up for the control period FY 2007-08 to FY 2011-12.

3.158 The Commission has analysed the available details to consider provisional capitalization for the Control Period FY 2007-08 to FY 2001-12. The Petitioner has submitted total capitalization during the control period as Rs. 1698.20 crore including opening CWIP FY 2007-08 capitalization. Accordingly, the capitalization for the opening CWIP FY 2007-08 has been taken for as given by the Petitioner. For the years FY 2009-10 to FY 2011-12, the opening WIP FY 2007-08 has been capitalized on pro-rata basis vis-à-vis

the actual capitalization as indicated by the Petitioner during the years.

3.159 The Commission is also in the process of undertaking a true-up of the capitalization during the first MYT period from FY 2007-08 to FY 11-12 which also involves physical verification of assets with the procurement and accounting records of the utilities. While the final true-up on this basis will be possible only after the exercise of physical verification is completed, the Commission has observed that the audited accounts of the utilities indicate a significantly lower level of capitalization than the anticipated capitalization considered in the tariff orders passed by the Commission for the first MYT for FY 2007-08 to FY 2011-12.

3.160 Pending completion of the physical verification of assets and final true-up of capitalization on that basis, the Commission proposes to adopt the details of year wise capitalization as per audited accounts for undertaking a provisional true-up in respect of the distribution companies. This will result in reduction in the provision for depreciation and return on capital employed on account of the lower level of the capitalization actually undertaken by these utilities during the above MYT period as reflected in their audited accounts. This would, however, be subject to the final figures of capitalization based on the final outcome of the ongoing physical verification of assets

Table 43: Provisionally Approved Capitalization for the Control period for FY 2007-08 to FY 2011-12 (Rs. Crore)

Particulars	***FY 2007-08***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***	***FY 2011-12***
Opening CWIP	*1157.30*	*1077.51*	*662.34*	*660.83*	*671.69*

Net Additions to CWIP	*125.20*	*267.37*	*304.81*	*301.84*	*206.51*
Capitalisation of Investment	*204.99*	*682.54*	*306.32*	*290.98*	*213.37*
Investment capitalised out of opening CWIP till FY 07	*167.73*	*452.33*	*203.00*	*192.84*	*141.4*
Investment capitalised out of fresh investments	*37.26*	*230.21*	*103.32*	*98.14*	*71.97*
Closing CWIP	*1077.51*	*662.34*	*660.83*	*671.69*	*664.83*

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this issue relates to wrongful denial of actual capitalization by the Appellants during the control period by considering an inflated amount of the Capital Works in Progress ("CWIP" for short) by Rs.1157.30 Crores as compared to the actual Rs.294.29 Crores from the actual capitalisation of Rs.1698.20 Crores; consequently, the actual capitalization was reduced by Rs.863.01 Crores denying the Return on Capital Employed (Return and Interest) on this amount; this treatment violated clauses (b), (c) and (d) of Section 61 read with Regulations 4.14 and 4.16(b)(ii) of the 2007 Regulations, besides the concept of 'truing up"; the impugned order was passed to true up the projected capitalization and CWIP for the MYT Period FY 2007-08 to FY 2011-12 based on actuals under Regulations 4.14 and 4.16(b)(ii) of the 2007 MYT Regulations; the DERC was required to review the actual capital investment at the end of each year of the control period, and adjust depreciation and RoCE allowed for the actual capital investment vis-à-vis

approved capital investment at the end of the Control Period; in Para 3.160 of the impugned order, the DERC held that it would consider capitalization as per audited accounts; however, the DERC considered the provisional opening CWIP of Rs.1157.30 Crores (at the beginning of the MYT Period i.e. FY 2007-08) as projected in the MYT Order dated 23.02.2008, instead of actual CWIP of Rs.323.32 Crores, and assumed the entire Rs.1157.30 Crores to be capitalized over the MYT Period as against Rs.294.52 Crores actually capitalised out of actual CWIP of Rs.323.32 Crores; consequently, the DERC artificially reduced the actual capitalization by Rs.862.78 Crores (Rs.1157.30 Crores – Rs.294.52 Crores) during the MYT Control Period, contrary to Section 61 and the Regulations which require the DERC to ensure that distribution and supply of electricity are conducted on commercial principles, to consider factors which encourage competition, efficiency, economical use of the resources, good performance and optimum investments; to safeguard consumer's interest and at the same time, recovery of the cost of electricity in a reasonable manner, and to true up actual capitalization; and the DERC's decision, in considering the projected CWIP of Rs.1157.30 Crores, is premised on the assumption that the opening CWIP in FY 2007-08 ought to have been capitalized on priority basis in the MYT Control Period; and there is no basis found in the 2007 MYT Regulations or in the Tariff Order dated 23.02.2008 for such an assumption

After making a comparative table showing the numbers approved by the DERC in the impugned order, the numbers proposed in the true-up petition, and the numbers as per audited accounts, it is submitted on behalf of the Appellant that the DERC observed that there was lower capitalization (Rs.1698.20 Crores) by the Appellant during the MYT Period vis-à-vis the approved capitalization of Rs.2483 Crores projected

in the MYT Tariff Order dated 23.02.2008; in the said MYT Order, the DERC directed the Appellant to seek in-principal approval before undertaking any capital expenditure, and to submit a Progress Report on the actual investment on a quarterly basis in the prescribed format, and within one month of every quarter; the Appellant had duly complied with the afore-said directions of submitting Progress Reports, and incurring capital expenses on fresh schemes only after approval by the DERC; the DERC delayed approval of the capital expenditure under various schemes due to which the Appellant was unable to undertake capital expenditure within time; in its Statutory Advice dated 01.02.2013, issued to the GoNCTD, the DERC admitted that, due to cash flow issues, capital expenditure of Discoms is being approved on a conservative basis; the DERC merely relies on Regulation 5.9 of the 2007 Regulations, specifying the methodology for computation of RoCE; the DERC has not considered the issue of arbitrary imposition of priority of capitalization; in para 3.160 of the impugned order, the DERC itself recognised that capitalisation ought to be considered on actual audited numbers, and yet, while approving the numbers in the table, it merely takes the opening projected CWIP, spreads it out over the control period and considers the balance capital expenditure as capitalised; and there is a clear contradiction between the text of the Order, and the approvals in the Order. The Appellant seeks a direction to the DERC to allow actual capitalization after considering the actual opening Capital works in progress for FY 2007-08 and re-compute the RoCE for the MYT period.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is submitted, on behalf of the DERC, that the Appellants had, in their Tariff Petition, sought for an amendment of the 2007 Regulations, and had submitted that its capitalization for the first MYT Period be not

trued up at all, since it had not been able to capitalize assets to the extent projected in the MYT Order; the Appellant further stated, in the tariff petition, that they had Rs. 1157 crores of Capital Works in Progress before the start of the first MYT period, and only about Rs. 511 Crores of the same was capitalized during the course of the year, and nil amounts of the opening Capital Works in Progress was capitalized in the final two years of the first MYT period; the DERC did not accede to the request of the Appellant to amend the Regulations and the same, in any event, could not have been done in a tariff fixation exercise; the Commission further found that there were no reasons provided for not capitalizing the opening CWIP, and therefore considered the Rs. 1157 Crores of CWIP pro-rata capitalized during the first MYT period; the said treatment was provisional, pending completion of physical verification which would establish exactly when a particular asset was capitalized in terms of the 2007 Regulations; given that the Appellants had not even asked for a true-up when filing their tariff petition, and they had not sought for implementation of the earlier judgments of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, they cannot have any grievance with the methodology followed by the Commission; while it is no doubt true that it is the statutory duty of the Commission to true up capitalization as per the Regulations, the provisional capitalization computed in the impugned order dated 31.07.2013 will be trued-up by the DERC in terms of the MYT Regulations, read with the judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, and in consonance with the orders of the Supreme Court dated 15.12.2022 in MA Nos. 1261 and 1262 of 2022 in Civil Appeal Nos. 884 and 980 of 2010, after taking into account the physical verification of capitalization of the Appellants; and the provisional capitalization, computed in the impugned order dated 31.07.2013, will be

trued up in the Appellants' next true-up order which is likely to be passed within four months.

While these submissions were made on 29.02.2024, the four months' period elapsed by the end of June 2024; and it is not known whether any such true-up exercise has been undertaken since then.

D. REJOINDER SUBMISSIONS OF THE APPELLANT:

It is submitted by Sri Amit Kapur, Learned Counsel, in rejoinder, that, in Para 5 of their Affidavit dated 01.03.2024, the DERC has acknowledged its statutory obligation to true-up the capitalization of the Appellant; however, the DERC seeks to link implementation of the order of the Supreme Court dated 15.12.2022 with the physical verification of capitalization; such a linkage was never raised hitherto by the DERC including in the compliance order dated 12.04.2022, 14.05.2023 and 10.07.2023 which are the subject matter of Contempt Petition No. 788 of 2023 and connected Contempt Petitions pending before the Supreme Court; the latter part of Para 5 is merely an attempt of DERC to delay and/or deny implementation of the Supreme Court's order; during the hearing of Review Petition Nos. 16 and 17 of 2015 before this Tribunal, the DERC had given an undertaking that the physical verification exercise had been completed, which is recorded in the order of this Tribunal dated 09.02.2023; the DERC thereafter filed an affidavit on 23.02.2023 on the issue of physical verification of the Appellant's assets for FY 2004-05 to 2005-06 stating that the physical verification exercise stands concluded; the DERC seems to be going back on its own undertaking; the affidavit dated 01.03.2024 is to defer grant of entitlements to the Appellants; the DERC has also not provided a definite time frame for the same, and has merely stated that they would true-up in the Appellants' next true-up order, which is likely to be passed within four

months; this indicates the DERC's casual attitude in carrying out its statutory duties; and the DERC may be directed to true-up capitalization and entitlements of the Appellants expeditiously without deferring the same by wrongly linking it to issuance of the next true-up order or implementation of the direction of the Supreme Court.

E. ANALYSIS:

Section 61 of the Electricity Act relates to Tariff Regulations and requires the Appropriate Commission, subject to the provisions of the Electricity Act, to specify the terms and conditions for the determination of tariff and, in doing so, to be guided by the following, among others, namely (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles; (c) factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments; and (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner.

Under the head Capital Investment, Regulation 4.14 of the 2007 Regulations requires the Commission to review the actual capital investment at the end of each year of the Control Period. Under the head 'True Up', Regulation 4.16(b)(ii) stipulates that the true up for controllable parameters, such as depreciation and RoCE, shall be trued up at the end of Control Period. While truing up under Regulation 4.16(b)(ii), for the purpose of determination of the Return on Capital Employed, the Commission was required, at the end of the Control Period, to take into consideration the actual capital investment and not to determine ROCE on a normative basis. The actual capital work in progress, and the actual capital investment, can be effectively determined only on a physical verification of the capital assets of the distribution licensee or, in cases

where the physical verification exercise could not be completed for just and valid reasons, then on the basis of its audited books of accounts.

When these Appeals were being heard, this Tribunal, in its order in R.P. Nos. 16 and 17 of 2015 dated 09.02.2023, recorded the submission of the Learned Counsel for the DERC, on instructions, that the physical verification exercise, undertaken pursuant to the earlier order of this Tribunal (review of which was sought), had been completed; and the report had already been filed before the Commission; and was pending consideration.

In the affidavit filed before this Tribunal, on behalf of the DERC on 23.02.2023, it was submitted that the Supreme Court, in its order in CA No. 884 of 2010 dated 01.12.2021 and M.A. Nos. 633-634 & 1261-1262 of 2022 dated 15.12.2022, had no occasion to comment or opine on the issue of physical verification; the Appellant's contention, that the judgment of this Tribunal in Appeal No. 172 of 2012 dated 02.03.2015 is eclipsed, is incorrect; by its order dated 10.12.2009, the Commission had directed physical verification of the assets of the distribution companies for the period 2002-09 to be undertaken by the Administrative Staff College of India; the same was, however, not concluded; subsequently, on 28.03.2012, the Commission proceeded to appoint M/s Feed Back Infrastructure as the Consultant to verify the year-wise capitalization of the distribution companies for the period FY 2006-07 to FY 2010-11; the Consultant was required to verify 100% of the documents in case of LV & HV schemes and physical verification of assets on sample basis (25% of HV schemes and 10% of LV schemes); and they were also required to examine procurement/ term contracts for at least 80% of the amount capitalized and comment on compliance, with Competitive Bidding Guidelines; further, in its Order in Appeal No. 177 of 2012, this Tribunal

had directed the State Commission to also carry out physical verification of the assets capitalized during FY 2004-05 and FY 2005-06 through its appointed agency and expedite implementation of the decision of this Tribunal in Appeal No. 36 of 2008 dated 06.01.2009; the Commission decided to conduct a complete physical verification instead of verification on a sample basis; they issued a Notice Inviting Tender in June 2016, but did not receive adequate response; subsequently, another Notice of Invitation of Tender was issued in March 2017; the work was awarded to M/s REC-PDCL on 29.08.2017 for completion of works within a one year timeline; a draft report was submitted by the Consultant on 06.04.2018, and a second draft report on 13.08.2019; the Consultant sought extension on account of delay in receiving documents in possession of the Appellant, delays in manpower being mobilized by the Appellant, and the fact that the assets to be verified were old; the Appellant's comments were invited by the Commission on 22.01.2021, as the working of the Commission was hampered during 2020-21 because of the Covid Pandemic; the Appellant submitted documents totaling around 35,000 pages on 02.04.2021 which was forwarded to the Consultant; the Consultant submitted their final comments on 10.09.2021; and, consequently, the exercise undertaken by the Consultant stands completed.

It is further stated that the Commission's in-house Staff-Consultant had evaluated the information submitted by the Consultant and the Appellant, and had provided their comments to the Commission; review of the Commission was on-going; and final approval, of the physical verification for the financial years 2004-05 and 2005-06, was likely to be completed within four weeks.

The DERC filed an affidavit on 01.03.2024 with respect to Issue No. 38 wherein they stated that, in their tariff petition, the Appellant had sought an amendment of the 2007 MYT Regulations, and had submitted that its capitalization for the first MYT period be not trued up at all, since it had not been able to capitalize assets to the extent projected in the MYT order; the Appellant had further stated that they had Rs.1157 Crores of Capital Works In Progress (CWIP) before the start of the first MYT period, and only around Rs.511 Crores of the same was capitalized during the course of the year; and no amount of the opening CWIP was capitalized in the final two years of the first MYT period.

While stating that the Appellant's request for amendment of the Regulations was not acceded to, it is further stated on behalf of the DERC that the Commission found no reason not to capitalize the opening CWIP and, therefore, considered the said Rs.1157 Crores of CWIP pro-rata capitalized during the first MYT period; the said treatment was provisional, pending completion of physical verification which would establish when a particular asset was capitalized in terms of the 2007 Regulations; since the Appellant had not even sought a true-up on filing the tariff petition, and they had not sought for implementation of the earlier judgments of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, they could not have any grievance with the methodology followed by the Commission; and the Appeal was required to be dismissed on this score.

In Para 5 of the said affidavit, the Commission submitted that it recognized its bounden statutory duty to true-up capitalization of the Appellants as per the Regulations; the provisional capitalization, computed in the impugned order dated 31.07.2013, would be trued-up by the Commission in terms of the 2007 MYT Regulations, read with the

judgment of this Tribunal in Appeal No. 36 of 2008 dated 06.10.2009, and in terms of the order of the Supreme Court in MA Nos. 1261 and 1262 of 2022 in Civil Appeal Nos. 884 and 980 of 2010 dated 15.12.2022, after taking into account the physical verification of the capitalization of the Appellants; and provisional capitalization, computed in the impugned order dated 31.07.2013, would be trued up in the Appellants' next true-up order which is likely to be passed within four months.

The affidavit dated 01.03.2024 was filed after the proceedings of this Tribunal dated 09.02.2023 wherein the aforesaid submissions urged on behalf of the DERC was recorded. More than a year has elapsed since the DERC had filed its affidavit dated 01.03.2024, and it is not known whether, in the true up order passed after the affidavit was filed on 01.03.2024, the DERC has completed the true up exercise based on actual capitalization.

It is indeed disconcerting that the physical verification of assets of the Appellants should have taken such an unduly long period, and even after the exercise of physical verification has been completed, the exercise of truing up based on actual capitalization has not yet been completed.

The impugned order, passed by the DERC on this issue, is set aside and the Commission is directed, in case it has not already passed such an order, to pass a true up order forthwith based on actual capitalization of the assets, re-compute the depreciation and Return on Capital Employed for the subject Control Period and given the Appellants the benefit thereof.

XIV.ISSUE NO. 39: ARBITRARY IMPOSITION OF REBATE BASED ON NUMBER OF BILLS ISSUED.

A. FINDINGS IN THE TARIFF ORDER

The Impugned Findings: [Vol. 9 @ Pg. 2493-2494; Appeal 266] read thus:-

"4.134 The distribution utilities have historically been adopting a bi-monthly billing cycle for single phase domestic consumers and a monthly billing cycle for all other categories. Single phase domestic consumers account for nearly 50% of the energy sales of the distribution utilities. Accordingly, the average billing cycle works out to 45 days for the distribution utilities as a whole. Taking into account a period of 15 days for raising the bills and receipt of payment, the Commission has allowed 60 days outstanding while computing working capital requirements of the distribution utilities.

4.135 The Commission's attention has been drawn to recent changes in the billing cycle for single phase domestic consumers implemented by the distribution utilities during FY 2013-14. In some cases, the billing cycle has been reduced to 45 days, while in some others this has been reduced to 30 days.

4.136 In order to deal with such changes, one approach could be to revise the working capital provision in the ARR based on the practice being followed by the distribution utility in respect of single phase domestic consumers. This would lead to different principles being adopted for different distribution utilities on account of different practices being followed by them.

4.137 The other approach would be to retain the existing provision for working capital in the tariff on a uniform basis, but mandate a correction by way of rebate to single phase domestic

consumers whose billing cycle is changed from the earlier 60 days billing period.

4.138 The Commission proposed to follow the second approach as this would allow continuation of a uniform provision in the tariff while requiring that the distribution utilities allow varying rebates depending on the billing cycle adopted by them in respect of single phase domestic consumers. This rebate would be allowed by the distribution utility at the end of each financial year based on the number of bills raised by them during the financial year and interest cost at the SBI PLR at 14.45% for the average number of days for which the billing has been advanced. Accordingly, the level of rebate on the total amount billed in any financial year shall be allowed in the first bill of the next financial year. This rebate shall be computed as per the following table:

Number of bills raised during the financial year	*Rebate (%)*
6	*Nil*
7	*0.2*
8	*0.4*
9	*0.6*
10	*0.8*
11	*1.0*
12	*1.2*

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, to secure efficiency and manage its cash flow better within the normative working capital allowed in MYT Regulations, 2011, the Appellant changed its billing system from bi-monthly to monthly billing for domestic consumers *(single phase - having load up to 10 kW); the* Impugned Order introduced a sliding scale rebate system for FY 2014 based on the number of bills issued in a particular financial year; this is extraneous to the relevant factors set out in Section 62(4) of the Electricity Act, such as load, time of day, prompt payment, voltage level, etc; this allows a rebate irrespective of whether consumers make timely payments or not; it discourages efficiency in performance, violating Section 61(e) of Electricity Act read with Regulation 41 of the Delhi Electricity Supply Code & Performance Standards Regulations, 2007; the DERC failed to consider that, since working capital is computed on a normative basis, any imposition with respect to payment of rebate to the consumers, would be to the Appellant's account; the findings of the DERC that it has allowed working capital to the Appellant for sixty days is misplaced, since, in the tariff order dated 13.07.2012*,* working capital allowed was limited to only 1.2 times of the monthly billing (36 days); this was done by deducting one month of Power Purchase Cost and one month of Transmission Cost from the receivables for two months in terms of Regulation 5.15 of MYT Regulations, 2011; in case of bi-monthly billing system, there is an average lag of almost 50 days as the Appellant raises the bill after 7 days and a grace period of 14 days is given to the consumers for payment of the bill; the entire consumption from Day 1 to Day 60, in case of bi-monthly billing, is collected on Day 80; in such an event, the working capital for 14 days is to be funded by the Appellant on

its own; this is added to the regulatory lag in recovery of Regulatory Asset, and non-implementation of judgements of Superior Courts by the DERC, which was already crippling the Discom; working capital has been computed by taking two months receivables less one month's payables; effectively the working capital is for one month only; the first proviso to Regulation 4.21(b)(ii) of the MYT Regulations, 2011 provides that *"…any surplus or deficit in Working Capital shall be to the account of the Licensee and shall not be trued up in ARR"*; contrary to the said proviso, the DERC seeks to introduce the rebate scheme to take away the Appellant's efficiency improvement in its working capital management - negating Section 61(e) of the Electricity Act; in Civil Appeal No. 6959-6960 of 2015 filed by DERC against the judgment of this Tribunal in Appeal No. 177-178 of 2012 dated 02.03.2015 ***[2015 SCC OnLine APTEL 122]***, on the issue of Normative Rebate, the DERC did a volte face to contend that b*y optimizing and efficiently managing its working capital requirement, the Appellant can adjust its billing/revenue cycles in such a manner that it keeps getting revenue throughout the month which would reduce the requirement of working capital loan;* such provision of rebate based on number of bills issued to consumers is not premised on any provisions of the Act, and is violative of Regulation 41 of the Delhi Electricity Supply Code and Performance Standards Regulations, 2007, which empowers the Distribution Licensee to notify its billing and payment schedule; monthly billing by the Appellant does not have any adverse impact on the consumers since (a) it is easier for consumers to make payment of monthly bills (30 days) instead of bi-monthly bills (60 days); (b) monthly billing system helps consumers to streamline monthly household plans and budget; (c) Section 61(d) of Electricity Act, 2003 mandates that tariff should safeguard consumer interest while ensuring recovery of cost of supply with reasonable return; in the Impugned Order

the DERC has completely ignored the benefits of monthly billing to (a) disallow Capital Expenditure and Additional Cost incurred by the Appellant for implementing monthly billing; detailed estimate of such Additional Costs were submitted by letter dated 13.02.2013; (b) to direct even the normative savings of interest costs to be passed on to consumers as rebate when such savings ought to have been allowed to be retained by the Appellant for its efficiency in management of billing cycle; the findings of the DERC are contrary to its own observations in the Tariff Order dated 26.06.2003 for FY 2002-03 and FY 2003-04 wherein it was held, in ***Para. 4.9.2.20,*** that allowing any discount on bill will be tantamount to reduction of tariff, and make calculation of bills more complex; the DERC allowed the pass through of various other forms of rebates such as Time of Day rebate, voltage rebate, CGHS rebate, prepaid consumers rebate, etc in the ARR of the Appellant; however it has selectively disallowed pass through of the rebate for monthly billing.

It is also submitted, on behalf of the Appellant, that the DERC has not given any decision on the Appellant's proposal for additional expenditure on account of implementation of monthly billing system in spite of (a) recognizing 30 days billing cycle in place of 60 days in the Impugned Order; (b) directing the Appellant to submit a fresh petition containing costs involved in monthly billing by letter dated 01.02.2013; (c) indicating that change from bi-monthly to monthly cycle is under consideration by way of its letter dated 26.06.2013; and (d) having convened a meeting with the Appellant on 17.12.2012 to discuss the costs incurred to change to monthly billing.

Mr. Amit Kapur, Learned Counsel for the Appellant, would state that the DERC has completely ignored the fact that rebate was provided so that consumers make timely payment; linking rebate to extraneous

elements, like number of bills issued, discourages efficiency in performance and is against the prescription of Section 61 of Electricity Act; and the DERC failed to consider/deal with its own findings in Tariff Order for FY 2002-03 and 2003-04.

C. SUBMISSIONS URGED ON BEHALF OF DERC:

It is stated, on behalf of the DERC, that the Appellant has misconstrued the rebate to be allowed to consumers for change in billing cycle, with rebate received by it on power purchase and transmission bills; the aforesaid rebate differ in nature and cannot be read in conjunction with rebate on Power Purchase and Transmission Bills which is provided under the MYT Regulations, since Appellant avails rebate under the PPA; rebate to consumers has been introduced after the Appellant's decision to change its billing cycle from bi-monthly to monthly basis, which would reduce the debtor's turnover ratio, and lead to savings in interest on working capital; change in billing cycle will come into effect within the MYT Control Period; working capital, for the said period, has been approved in the Tariff Order dated 13.07.2012, wherein receivables have been considered for two months based on bi-monthly cycle; the DERC has proposed rebate to be passed on to consumers for change in billing cycle; the DERC has not directed the Appellant to change its billing regime for Single Phase Domestic Consumers; and, hence, option is open to the Appellant for changing the billing cycle as per cost benefit analysis.

D. ANALYSIS:

Section 62(3) of the Electricity Act enables the Appropriate Commission to differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified

period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required. In exercise of the power conferred under Section 50 of the Electricity Act read with Sections 57, 86 and 181 thereof, the DERC made the *"DERC Supply Code and Performance Standards Regulations, 2007".* Regulation 41 of the Supply Code relates to Billing. Regulation 41(i) requires the Licensee to notify Billing and Payment Schedule area wise, district wise or circle wise as may be decided by the Licensee. Regulation 41(ii) requires the Licensee to raise the bill for every billing cycle based on actual meter reading; the bills sent to consumers by the Licensee should reflect details e.g. present and last meter readings, sanctioned load, fixed charges, quantity of electricity consumed during the cycle, rate, total amount to be paid for consumption, Current Security Deposit with the Licensee, details of past arrears if any, last date for payment, surcharge for delayed payment, Government subsidy if any, etc. Regulation 41(iii) requires delivery of each bill, to the consumer, to be effected at least fifteen days before the due date for payment of the bill. Regulation 41(iv) stipulates that provisional billing (based on average consumption) shall not be for more than two billing cycles; and, in case meter is rendered inaccessible for two consecutive billing cycles, action as per Para 37(iv) should be followed. Regulation 41(v) stipulates that the licensee shall provide complete details in the bill of all arrears except for those arising due to non-payment of the last bill; and such arrears shall be recoverable in instalments along with LPSC as given in the table thereunder.

In **Tata Power Delhi Distribution Limited vs. DERC [(2016) SCC OnLine APTEL 156 (Judgment in Appeal No. 271 of 2013 dated 20.07.2016)**, this Tribunal noted the appellant's contention that they had

the option of changing the monthly billing cycle; during FY 2013-14, they had been billing single phase domestic consumer in 45 day cycle rather than earlier billing cycle followed by them of 60 days; in the light of change in billing cycle, the Delhi Commission had directed the appellant to allow rebates depending on the number of bills raised during the financial year and interest cost at the SBI PLR rate 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 each financial year; the Delhi Commission had failed to consider that they had changed the billing cycle for the benefit of consumers so that they were not burdened by the high billed amount at once; neither the MYT Regulations 2011 nor MYT order dated 13.07.2012 (which laid down parameters for the second control period) stipulated any rebate to be provided to the single phase domestic consumers (up to 10 kV); as such the Delhi Commission, in the Impugned Order, had modified MYT Regulations, 2011 without following the process of law; the Commission had failed to consider that the rebate was allowed on the full billed amount and not the bill which pertained to the reduced billing cycle; if the billing cycle is reduced then to that extent meter reading, bill printing, bill distribution and other associated expenses are also increased for the appellant which were directly linked to increase in number of billing cycles; these increased expenses incurred by the appellant should have been considered; in terms of MYT Regulations, the Operation and Maintenance cost (O & M) is allowed to the appellant on normative basis and the expenditure thus borne by the appellant in case when the billing cycle is reduced, is not considered by the Delhi Commission while allowing rebate to the consumers; and there was no justification for calculating the rate used, for rebate at 14.45% which was at a much higher rate than allowed to the appellant for working capital etc.

This Tribunal then noted the submissions urged on behalf of the Delhi Commission that it had not directed the appellant to shift/change two monthly billing regime for single phase domestic consumers; and option was open to the appellant whether to shift or change any billing cycle as per their cost analysis basis.

This Tribunal then noted the findings in the impugned order that the distribution utilities have historically been adopting a bi-monthly billing cycle for single phase domestic consumers, and a monthly billing cycle for all other categories; single phase domestic consumers account for nearly 50% of the energy sales of the distribution utilities; accordingly, the average billing cycle worked out to 45 days for the distribution utilities as a whole; taking into account a period of 15 days for raising the bills and receipt of payment, the Commission had allowed 60 days outstanding while computing working capital requirement of the distribution utilities; in order to deal with the changes in the billing cycle, one approach could be to revise the working capital provision in the ARR based on the practice being followed by the distribution utility in respect of single phase domestic consumers; this would lead to different principles being adopted for different distribution utilities on account of different practices being followed by them; the other approach would be to retain the existing provision for working capital in the tariff on a uniform basis, but mandate a correction by way of rebate to single phase domestic consumers whose billing cycle was changed from the earlier 60 days billing period; the Commission proposed to follow the second approach; rebate would be allowed by the distribution utility at the end of each financial year based on the number of bills raised by them during the financial year and interest cost at the SBI PLR at 14.45% for the average number of days for which the billing had been advanced; accordingly, the level of rebate on the total amount billed in any financial year shall be allowed in the first

bill of the next financial year; and this rebate shall be computed as per the table.

It is in this context that this Tribunal observed that the main contention of the appellant, in support of this issue, was that the appellant had the option to change the monthly billing cycle, and during FY 2013-14 it has been billing single phase domestic consumers in 45 days cycle rather than earlier billing cycle of 60 days; the appellant claimed to have changed the billing cycle of the consumers for the benefit of consumers, and the ground was that consumers would not be burdened by the higher amount at once; the further contention of the appellant was that neither the MYT Regulations, 2011 for the second control period nor MYT order dated 13.07.2012 stipulated any rebate to single phase domestic consumers up to 10 kV, and hence the said finding of the Delhi Commission was against law; they were unable to accept the contentions of the appellant on this issue of change of billing cycle because the Delhi Commission had 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 had been advanced in respect of single phase domestic consumers (up to 10 kV) at the end of 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; they were 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 the MYT Regulations, the O & M cost is allowed to the appellant on normative basis; in view of the above discussion, they fully agreed and approved the reasons given by the Delhi Commission and the findings

recorded on this issue; and consequently this issue relating to rebate was decided against the appellant.

As noted hereinabove, the Licensee is required, in terms of Regulation 41(i) of the Supply Code, to notify the Billing and Payment Schedule area-wise, district-wise or circle-wise as may be decided by the Licensee. Regulation 41(ii) requires the Licensee to raise a bill for every billing cycle based on actual meter reading. The Appellant changed the billing cycle, for domestic consumers with single phase load up to 10 kW, from bi-monthly to monthly billing. By the impugned order, the DERC has introduced a sliding scale rebate system for FY 2014 based on the number of bills raised in a Financial Year. In cases where the number of bills raised in a financial year is six, no rebate is required to be given. Where the number of bills raised ranges from 7 to 12 bills, there is a sliding rebate system between 0.2% and 1.2%.

The consequence of the billing cycle being changed, from bi-monthly to monthly, would be that the number of bills raised during the financial year would be 12, as compared to the earlier 6, requiring the Appellant to give consumers a rebate of 1.2%. Imposition of this rebate is not referable to any particular Regulation of the 2011 Regulations.

Regulation 4.21(b)(ii) of the 2011 Regulations stipulates that depreciation and Return on Capital Employed shall be trued up every year based on the actual capital expenditure and actual capitalization vis-à-vis the capital investment plan (capital expenditure and capitalization) approved by the Commission. Under the first proviso thereto, any surplus or deficit in Working Capital shall also be to the account of the Licensee and shall not be trued up in the ARR.

The stand of the DERC is that a change, in the billing cycle from bi-monthly to monthly, would reduce the debtor's turnover ratio, and lead to savings in interest on working capital, and the Appellant would be benefitted thereby. The DERC also admits that it has not asked the Appellant to change the billing regime nor has it contended that the licensee is disentitled from changing the billing system from bi-monthly to monthly. The Appellant's case, on the other hand, is that there is an average lag of around 50 days in payment of bills by the consumers, since the Appellant raises the bill after seven days and a grace period of 14 days is given to the consumers for payment of the bill; and collection of the entire bill, with respect to consumption for two months, is on day 80 for which the Appellant is required to fund its working capital requirements on its own.

Under Regulation 5.15 of the 2011 Regulations, working capital for retail supply of electricity shall consist of Receivables for two months of revenue from sale of electricity less power purchase costs for one month; (c) less: transmission charges for one month, and less wheeling charges for one month. In effect, the distribution licensee is given working capital of two months receivables less power purchase costs and transmission charges for one month each. The submission of the DERC, in effect, is that, since the Appellant was provided two months receivables on the premise that the billing cycle is for two months, a change in the billing cycle from two months to one month would result in a reduction in the debtor's turnover ratio, and result in savings to the Appellant on interest on working capital.

While it is no doubt true that recovery of the bills on monthly basis may result in reduction of receivables from the two months provided in Regulation 5.15, the Appellant would undoubtedly be required to incur

additional expenditure since, among others, Regulation 41(2) requires the bills to be raised on actual meter reading. A change in the billing cycle from bi-monthly to monthly would require the meter of each consumer to be read and recorded at least once each month, instead of the earlier reading of once in two months. The Appellant would also be incurring additional expenditure towards preparation and issuing of a bill which hitherto was bi-monthly, and is thereafter on a monthly basis. While denying the Appellant the benefit of savings in interest as a result of the billing cycle being reduced from two months to one month, the Commission ought also to have considered the additional expenditure which the licensee would be required to incur as a result of the change in the billing cycle, and should have suitably adjusted the rebate. The normative O& M expenses, determined at the beginning of the control period, could not have taken the additional expenditure to be incurred by the distribution licensees, as a result of a change in the billing cycle from bi-monthly to monthly, into consideration as the change in the billing cycle was effected long thereafter.

None of the afore-said aspects, including the applicable Regulations, were brought to the notice of this Tribunal in **Tata Power Delhi Distribution Limited vs. DERC: (2016) SCC OnLine APTEL 156 (Judgment in Appeal No. 271 of 2013 dated 20.07.2016)**.A judgment is an authority only in regard to its ratio which is required to be discerned. A decision cannot be regarded as an authority in regard to its conclusion alone or even in relation to what could be deduced therefrom. **(Suneja Towers(P) Ltd. v. Anita Merchant, (2023) 9 SCC 194).** Broadly speaking, every judgment has three segments, namely, (*i*) the facts and the point at issue; (*ii*) the reasons for the decision; and (*iii*)the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision. In fact, in a

judgment, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment. It is the ratio decidendi of a judgment, and not the final order in the judgment, which forms a precedent. **(Sanjay Singh v. U.P. Public Service Commission, (2007) 3 SCC 720; Suneja Towers (P) Ltd. v. Anita Merchant, (2023) 9 SCC194).** The final decision, rendered in the facts and circumstances of a given case, does not necessarily constitute a binding precedent.

The mere similarity of facts in one case cannot be used to determine the conclusion of facts in yet another case. The usual expressions in an order do not necessarily always reflect the reasons or application of mind. **(R. Basaveswarudu v. Secretary, 2005 SCC OnLine AP 163; Rudrappa Ramappa Jainpur v. State of Karnataka: 2004 (6) Supreme 85).** A decision is available as a precedent only if it decides a question of law. No reliance can be placed on an order of the Court which contains directions without assigning reasons. (**Surinder Kumar, AIR 1992 SC 1593; R. Basaveswarudu v. Secretary, 2005 SCC OnLine AP 163; Ideal Detonators Private Limited v. Government of Telangana, 2014 SCC OnLine Hyd 690**).

Quotability as ‘law’ applies to the principle of a case, its ratio decidendi. The only thing in a Judge's decision binding as an authority upon a subsequent Judge is the principle upon which the case was decided. Statements which are not part of the ratio decidendi are not authoritative. Without an investigation into the facts, it cannot be assumed whether a similar direction must or ought to be made. (**Gurnam Kaur, 1989 AIR 38; Mandava Rama Krishna v. State of A.P., 2014 SCC OnLine AP 294**). It is not everything said by a Judge, while giving judgment, that constitutes a precedent. The only thing in a Judges

decision binding a party is the principle upon which the case is decided. A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio, and not every observation found therein nor what logically follows from the various observations made in the judgment. The enunciation of the reason or principle, on which a question before a court has been decided, is alone binding as a precedent. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case, or is put in issue, would constitute a precedent. It is the rule deductible from the application of the law to the facts and circumstances of the case which constitutes its ratio decidendi. (**Union of India v. Dhanwanti Devi, (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas, (2006) 1 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra (1967) Online SC 17; Quinn v. Leathem (1904) AC 495; Mandava Rama Krishna v. State of A.P., 2014 SCC OnLine AP 294**). A judgment delivered without argument and without reference to the relevant statutory provisions is not binding. (**Gurnam Kaur 1989 AIR 38)**. Where by obvious inadvertence or oversight, a judgment fails to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reached, it may not have the sway of a binding precedent. (**Mamleshwar v. Kanahaiya Lal, AIR 1975 S.C. 907; Morelle v. Wakeling, (1955) 2 QB 379; Mandava Rama Krishna v. State of A.P., 2014 SCC OnLine AP 294**).

A decision rendered without any argument, without reference to the crucial words of the rule and without any citation of the authority is not a binding precedent. (**Lancaster Motor Company (London) Ltd. v. Bremith Ltd., (1941)1 KB 675**). A decision, which is neither founded on reasons nor it proceeds on a consideration of an issue, cannot be deemed to be a law declared to have a binding effect. A

decision is binding not because of its conclusions but in regard to its ratio, and the principles laid down therein. Any declaration or conclusion, preceded without any reason, cannot be deemed to be the declaration of law or authority of a general nature binding as a precedent. (**Jaisri Sahu v. Rajdewan Dubey, (1961) SCC online SC 114; Municipal Corporation of Delhi v. Gurnam Kaur, 1989 AIR 38; B. Shama Rao v. Union Territory of Pondicherry, 1967 SCC Online SC 29; Synthetics and Chemicals Ltd.34; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411)**. Uniformity and consistency are undoubtedly the core of judicial discipline. But that which escapes in the judgment, without any occasion, is not the ratio decidendi. (**Synthetics and Chemicals Ltd.34; Gurnam Kaur, 1989 AIR 38; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411).**

Any declaration or conclusion arrived at without being preceded by any reason, cannot be deemed to be the declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law. (**Synthetics and Chemicals Ltd. (1990) 1 SCC 109; B. Shama Rao, 1967 SCC Online SC 29; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411**). A mere direction of the Court without considering the legal position is not a precedent. (**Vishnu Dutt Sharma v. Manju Sharma (2009) 6 SCC 379; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411**). The view, if any, expressed without analysing the statutory provision/Rule cannot be treated as a binding precedent. (**N. Bhargavan Pillai v. State of Kerala, (2004)13 SCC 217; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411**). The enunciation of the reason or principle on which a question, before a court, has been decided is alone binding as a precedent. A

deliberate judicial decision arrived at after hearing an argument on a question which arises in the case, or is put in issue, would constitute a precedent. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi. (**Union of India v. Dhanwanti Devi, (1996) 6 SCC 44; State of Orissa v. Mohd. Illiyas, (2006) 1 275; ICICI Bank v. Municipal Corpn. of Greater Bombay (2005) 6 SCC 404; State of Orissa v. Sudhansu Sekhar Misra (1967) Online SC 17; Quinn v. Leathem (1904) AC 495; Noble Import Private Limited v. Union of India, 2015 SCC OnLine Hyd 411**).

Consequently, reliance placed by the DERC on the judgement of this Tribunal, in **Tata Power Delhi Distribution Limited vs. DERC: (2016) SCC OnLine APTEL 156,** is of no avail.

We are, therefore, of the view that the matter, with respect to this issue, should be remanded to the DERC directing them to cause a prudence check of the additional expenditure which the Appellant may be required to incur as a result of a change in the billing cycle from bi-monthly to monthly, and factor in such expenditure in computing the rebate to be extended to the consumers as a result of a change in the billing cycle.

As noted hereinabove, the DERC has prescribed this rebate not in exercise of any particular provision of the 2011 Regulations but in exercise of its regulatory power. Since regulatory orders of the Commission are not immune from interference in appellate proceedings under Section 111 of the Electricity Act, we direct the DERC to cause a prudence check factoring the expenditure which the Appellant would be required to incur as detailed hereinabove and re-compute the rebate which they should extend to the consumers as a result of the change in

the billing cycle from bi-monthly to monthly, after giving the appellant a reasonable opportunity of being heard.

XV. ISSUENO.44: ISSUANCE OF TARIFF ORDER BEFORE 1st OF APRIL IN THE NEXT FINANCIAL YEAR

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this issue relates to impact of delay of five months in issuance of the impugned Tariff Order; the Impugned Order was issued on 31.07.2013, and the revised tariff was made effective from 01.08.2013; delay in issuance of the Impugned Order is destructive of the time-bound design under the Electricity Act, 2003. particularly Section64(3), Section111(2), Section111(5), and Section 125 of the Electricity Act; the Appellant filed Petition No. 1 of 2013 before the DERC for truing-up of expenses for FY 2011-12, review and provisional truing-up for FY 2012-13 and determination of Aggregate Revenue Requirement for FY 2013-14; the Petition was admitted by the DERC on 16.01.2013; as such, the DERC ought to have issued the Impugned Order within 120 days from 16.01.2023 i.e., by 16.05.2013; and, by the Impugned Order, the DERC continued to apply the old tariff or the expected revenue during FY 2013-14 for four months.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that electricity cannot be supplied at a sustained basis for free, or at a lower cost, and expected revenue during FY2013-14 for four months cannot be met by non-cost reflective tariffs; the need for timely revision of tariff is mandated under Clause 8.1(7) of the Tariff Policy, 2006 and *Clause 8.1(7) of the Tariff Policy, 2016;* this Tribunal, in OP No.1 of 2011,

[*2011 SCC OnLineAPTEL188 Para.65], held that it should be the endeavour of every State Commission to ensure that the tariff or the financial year is decided before 1stApril of the tariff year; the ARR & tariff for FY 2011-12 should be decidedbefore1stApril of the tariff year;* on 01.04.2021 and 03.05.2021, the Ministry of Power informed all the State Electricity Regulatory Commissions that the tariff orders of licensees should be issued before the 1st of April of the tariff year; besides having a financially crippling impact on a Discom, delays in tariff determination will eventually impose an additional burden of carrying cost on the consumers, in addition to the deficit in cash-flow suffered by the utility.

B. SUBMISSIONS URGED ON BEHALF OF THE DERC:

In their reply, the DERC stated that it is committed to adherence with the provisions of the Electricity Act in finalizing Tariff Orders within the prescribed timeframe; however on certain occasions, in light of interest of the stakeholders and consumers, delay might occur while providing a reasonable opportunity for submission of comments or for public hearing.

C. ANALYSIS:

Ordinarily, the tariff order is required to be issued before the commencement of the ensuing financial year ie before the 1st of April. For instance, a tariff order for say 2025-26 (ie 01.04.2025 till 31.03.2026) ought to be issued on or before 31st March, 2025. Section 64(1) requires an application for determination of tariff under Section 62 to be made by the distribution licensee, and Section 64(3)(a) obligates the Commission, within one hundred and twenty days from the date of receipt of an application, to issue a tariff order. It is necessary, therefore, for the distribution licensee to file their tariff petition, for the next financial year,

on or before 30th of November of the previous year, to enable the Commission to pass a tariff order within 120 days thereafter.

Delays by the Commission in passing tariff orders not only result in uncertainty, but also fall foul of its statutory obligations under Section 64(3)(a) of the Electricity Act. We cannot, however, ignore the multi-fold causes for the delays in passing tariff orders, which also include delays by distribution licensee in filing their applications under Section 64(1), the delay caused in considering voluminous suggestions/objections from the public, vacancies in the posts of Chairman and Members of the Commissions etc.

It does appear, in the present case, that the Appellant filed its application under Section 64(1) nearly three weeks after 30th November. From the facts as narrated hereinabove, it does appear that there was a significant delay on the part of the DERC in passing the impugned tariff order. While the need for Regulatory Commissions to adhere to the time frame stipulated under Section 64(3) cannot be over-emphasised, this issue, which pertains not just to the DERC but to all Regulatory Commissions in the country, may possibly require exercise of jurisdiction by this Tribunal under Section 121 of the Electricity Act in as much as delayed passing of tariff orders may well amount to failure of the Appropriate Commissions to discharge their statutory functions under Section 64(3) of the Electricity Act.

What Section 111(5) of the Electricity Act provides is for a time frame for this Tribunal to dispose of appeals pending before it. It is no doubt true that this Tribunal has not been able to adhere to the time frame stipulated therein. The reasons for such non-adherence are many and varied, and are not germane to the present lis. Reference by the Appellant to Section 125 of the Electricity Act is misplaced, since what

Section 125 stipulates is the period within which an appeal can be preferred, against the order of this Tribunal, to the Supreme Court.

It is also true that, despite the directions of this Tribunal in OP No.1 of 2011 (2011 SCC Online Aptel 188), the directives of Ministry of Power as also Clause 3.1 (7) of the Tariff Policy 2016, tariff orders are still not being passed within the time frame stipulated in Section 64(3)(a) of the Electricity Act in several cases. We may not be understood to have held that all Regulatory Commissions are guilty of such delays, for we are aware that several Regulatory Commissions have passed tariff orders well within time. Suffice it to observe that this is, undoubtedly, an area of concern which may need focussed attention and periodic monitoring by this Tribunal, in proceedings under Section 121 of the Electricity Act, since belated issuance of tariff orders by the Commissions has a deleterious effect on the power sector as a whole.

XVI. ISSUE NO. 45: DISALLOWANCE OF OMBUDSMAN EXPENSES:

A. FINDINGS OF THE COMMISSION

On Issue No. 45, the Commission's findings are as under:

"Commission's Analysis

The expenses relating to Ombudsman Expenses were a part of the A&G expenses considered in the base year for the control period. The Commission observes that the Petitioner has incurred Rs.1 lakh less in each of FY 2008-09 and FY 2009-10 but has incurred Rs.1 lakh more in the years FY 2010-11 and FY 2011-12. It is felt that the amounts almost net off and therefore

Commission has not considered any additional expenses on this account."

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that, while netting off the expenses relating to the Ombudsman for FY 2008-09 to FY 2011-12, the DERC ignored its letter dated 21.07.2010 which had increased the amounts to be paid to the Office of the Ombudsman for FY 2011-12 to Rs.12,98,804/- vis-à-vis the earlier expenses of Rs.9,00,883/-; the DERC failed to consider that there was an additional expense of Rs.2.00 Lakhs towards expenses relating to Ombudsman; the DERC failed to consider that (a) by the Tariff Order dated 23.02.2008, it had fixed Rs.9,00,883/- as the base figure for Ombudsman Expenses for the Control Period; (b) in FY 2009-10, an additional amount of Rs.1.00 Lakh was incurred against Rs.1.00 Lakh saved in FY 2008-09 over and above the normative expenses provided by the DERC; (c) similarly, for FY 2010-11, there were no additional expenses incurred by the Appellant; (d) in FY 2011-12, the Appellant had incurred additional expenses of Rs.2.00 Lakhs owing to the letter dated 21.07.2010 issued by the DERC increasing the amount paid towards the Ombudsman Office for FY 2011-12 to Rs.12,98,804/-; and (e) the net impact to be allowed by the DERC is Rs.2.00 Lakhs.

Sri Amit Kapur, Learned Counsel for the Appellant, would further submit that the DERC ought to have considered that each year directions were issued by it to the Distribution Licensees to pay a particular amount towards Ombudsman Expenses (in proportion to the energy drawn from Delhi Transco Limited by the Licensee during FY 2003-04); when additional expenses incurred were on account of the DERC's directions,

such expenses cannot be categorised as 'controllable'; in **TPDDL vs. DERC: 2015 SCC OnLine APTEL 170,**this Tribunal held that the enhancement in expenses due to reasons beyond the control of the utility are uncontrollable in nature and ought to be allowed; this aspect has been considered in **TPDDL vs. DERC: 2019 SCC OnLine APTEL 106**; in the light of the law declared therein and as additional expenses towards Ombudsman Office were paid in terms of the DERC's directions, such additional expenses have to be treated as uncontrollable expenses, which out to be allowed to the Appellant.

Sri Amit Kapur, Learned Counsel for the Appellant, would also submit that reliance placed by the DERC on the judgment in Appeal No. 14 of 2012 : (2013 SCC OnLine APTEL 140, Para 195] is incorrect as the issue therein related to the claim for excessive R&M expenses, whereas in the present case, the issue solely pertains to a computational error made by the DERC; in the impugned order itself, the DERC has held that the actual expenses incurred during FY 2010-11 and 2011-12 had been adjusted against the actual expenses incurred during FY 2008-09 and 2009-10; contrary to its own order, the DERC now seeks to justify stating that the Ombudsman Expenses, being part of A&G expenses, are controllable in nature, and are to be allowed on normative basis; a party cannot blow hot cold at the same time or be permitted to approbate and reprobate as held in **Suzuki Parasrampuria Suitings (P) Ltd. Vs. Official liquidator: (2018) 10 SCC 707, Para 12]**; such a stand amounts to giving a fresh reasoning to justify the DERC's disallowance of Ombudsman Expenses which originally did not form part of the impugned order; and, reliance is placed on the judgment of the Supreme Court in **Mohinder Singh Gill vs. Chief Election Commissioner: (1978) 1 SCC 405.**

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

On Issue No.45, i.e. Disallowance of Ombudsman expenses, it is contended, on behalf of the DERC, that the Commission's subsequent comments, in the impugned order on the amounts that were sought to be claimed by the Appellant were net-off, only highlighted a practical reality which, if the 2007 Regulations did not exist, would disentitle the Appellants from making such a claim; Reliance placed by the Appellant on **2015 SCC OnLine Aptel 170** is misplaced since, in the first instance, the claim on the specific ground related to RoCE components; RoCE, while being deemed to be controllable, are to be trued up at the end of the control period, and cannot be equated to the components of O&M expenses which are deemed to be controllable and not subject to true-up; while O&M expenses can contain controllable and uncontrollable elements, they are deemed to be controllable as per the 2007 Regulations, and the same has been upheld by the Delhi High Court; the decision of this Tribunal in **2015 SCC OnLine Apel 170** has no application to O&M expenses; as per the 2007 Regulation as also the judgment of the Delhi High Court in **TPDDL vs. DERC: (2016) SCC OnLine Del 4165,** the Appellants are not entitled to the specific determination of all uncontrolled elements of costs, and to be provided for directly loading of those costs on the tariff for each year.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this claim relates to erroneous netting off of actual expenses relating to ombudsman expenses for FY 2008-09 to FY 2011-12; the DERC has ignored its letter dated21.07.2010, whereby it had itself increased the amount to be paid towards the Ombudsman Office for FY 2011-12 to Rs.

12,98,804/- as against the earlier amount of Rs. 9,00,883/-; its enhancement was not factored in the beginning of the Control Period; being enhanced expenses directed to be paid by the DERC itself such expenses cannot be categorized as controllable; the DERC's contention that the Appellant has sought true-up of controllable parameters has no relevance; in the impugned order the DERC had itself held that the actual expenses incurred during FY 2010-11 and FY 2011-12 have been adjusted against actual expenses incurred during FY 2008-09 and FY 2009-10; contrary to its own order, DERC now seeks to justify the same by stating that ombudsman expenses is a part of A&G expenses, and are controllable in nature to be allowed on normative basis; and such treatment violates transparency and predictability

E. ANALYSIS:

From the impugned order, it is evident that Ombudsman expenses formed part of the A&G expenses considered in base year of the control period. The Appellant acknowledges that, in the tariff order dated 23.02.2008, the base figure for Ombudsman expenses for the control period was fixed at Rs.9,00,883/- for FY 2007-08. In terms of Regulation 5.4 of the 2007 Regulations, the O&M expenses permissible towards ARR for each year of the control Period shall be determined using the formula detailed there-under. The formula also provides for an inflation factor, to be used for indexing, as a combination of Consumer Price Index and Wholesale Price Index for the immediately preceding five years. It is this normative figure determined in terms of the formula under Regulation 5.4 which is applicable for the Control Period. It is not in dispute that the Ombudsman expenses was treated as part of the Administrative and General cost of the Licencee in the base year which is factored in determining O&M Expenses on normative basis under Regulation 5.4.

As noted hereinabove, in terms of Regulation 4.16(b)(i), the true up for controllable parameters is that any surplus or deficit on account of O&M expenses shall be to the account of the Licensee and shall not be trued up. Consequently, any surplus, which the Distribution Licensee may receive as a result of a fall in the O&M expenses, may be retained by them, and likewise any deficit which they may suffer on account of a rise in the O&M expenses must also be borne by them in terms of Regulation 4.16(b)(i). These Regulations, which are statutory in character, are binding on the Appellant, the Commission and on this Tribunal, and it is impermissible for this Tribunal to grant any relief to the Appellant which would fall foul of the 2007 Regulations.

It does appear that the increase in Ombudsman expenses was at the direction of the DERC, and it does seem harsh that the DERC, having directed the Appellants to pay a higher quantum towards Ombudsman Expenses, should deny them the increase in such expenses. The fact, however, remains that, as long as disallowance of this additional Ombudsman expenses is in terms of Regulation 5.4 read with Regulation 4.16 of the 2007 Regulations, interference by this Tribunal may not be justified. The remedy, if any available to the Appellant on this score, is to challenge the vires of the 2007 Regulations before the High Court under Article 226 of the Constitution as this Tribunal has not been conferred the power of judicial review to examine the validity or otherwise of the statutory Regulations framed by the Commission **[PTC INDIA LTD VS CERC: (2010) SCC OnLine SC 364).**

The doctrine of 'approbate and reprobate' is a facet of the doctrine of estoppel, and there can be no estoppel against the law. The fact that the DERC had permitted the actually incurred ombudsman expenses to be treated as a passthrough in the earlier year, would not justify their

being asked to do likewise when the statutory Regulations required ombudsman expenses, as part of the A&G expenditure, to be computed only on a normative basis and not on actuals. The judgements, relied on behalf of the Appellants' under this head, have been dealt with elsewhere in this order and do not bear repetition. Suffice it to observe that, since the statutory Regulations require the expenses under this head to be allowed only on a normative basis and not on actuals, the appellant is not entitled to claim the actual expenses incurred in this regard as a pass through.

We are satisfied, therefore, that disallowance of the increase in ombudsman expenses by the DERC, on the basis of actuals, is in terms of the 2007 Regulations, and does not necessitate interference in Appeal. The Appellants' claim, under this head, necessitates rejection.

XVII. ISSUE 1: NO ROADMAP FOR RECOVERY OF REGULATORY ASSET AND SURCHARGE INSUFFICIENT TO RECOVER THE ACCUMULATED SHORTFALL.

A. FINDINGS OF THE DERC IN THE IMPUGNED ORDER:

Paras 5.26 to Paras 5.28 of the impugned order passed by the DERC read thus:-

"5.26 After the completion of the provisional true-up for FY 2011-12 and provisional capitalization for the MYT period FY 2007-08 to FY 2010-11, the Commission has observed that the Net Revenue Gap/Revenue gap after adjusting outstanding dues for all the 3 DISCOMs has increased from the earlier figure of Rs.6919.04 Cr. at end of FY 2010-11(now revised to Rs.7012.54 Crore due to revised carrying cost) to Rs. 11431.12 Crore at end of FY 2011-12.

5.27 Considering all the factors listed above, the Commission has decided to take a conservative view and limit the quantum of tariff Increase to 5% for FY 2013-14.

5.28. For meeting carrying cost of the revenue gap till FY 2013-14, the Commission has decided to continue the existing surcharge at 8% over the revised tariff "

B. APPELLANTS' CONTENTION:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that this Tribunal had, in its order in IA Nos. 365 and 366 of 2013 dated 11.03.2014, observed that it was for the Respondent-Commission to devise a roadmap for amortization of regulatory assets; this order was subjected to challenge by the Appellant by way of Appeal No. 4010 and 4012 of 2014 filed before the Supreme Court; the said Appeals are still pending; on 26.03.2014, the DERC furnished an undertaking to the Supreme Court to put forth the roadmap for recovery of regulatory assets; on 01.05.2014, the DERC proposed a roadmap before the Supreme Court for amortization of regulatory assets which was objected as inadequate by the Appellant; the amortization roadmap is both inadequate and not efficacious; pursuant to the undertaking given by them before the Supreme Court, the DERC has allowed 8% surcharge on the Aggregate Revenue Requirement towards recovery of regulatory assets, with carrying cost; and the inadequacy of such amortization is evident from the table in Annexure-A.

Learned Counsel would rely on**(a) GMRWEL v. CERC & Ors., 2023 SCC OnLine SC 464 [Para. 126 & 127]; (b) Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. v. Adani Power (Mundra) Ltd. & Anr., 2022 SCC OnLine SC 1068 [Para. 16 to 19] (c) Uttar Haryana Bijli Vitran**

Nigam Ltd. (UHBVNL) & Anr. v. Adani Power Ltd. & Ors., (2019) 5 SCC 325 [Para. 13]; (d) Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. Adani Power Rajasthan Ltd. & Anr., (2022) 4 SCC 657 [Para. 61 & 62]; (e) Adani Power Limited v. CERC & Ors., 2018 SCC Online APTEL 5 [Para. 24 (d) to 29 (d)], to submit that carrying cost must be allowed in terms of the judgments of the Supreme Court to ensure that 1/3rd of the outstanding principal regulatory asset is recovered along with carrying cost; whenever recovery of dues / tariff is deferred, carrying cost must be paid for the period of deferment as time value for money; the action of the DERC is contrary to the mandatory requirement of amortization within the 1st MYT Control Period, i.e., by the end of FY 2011-12, as specified under the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007; a meagre surcharge of 8% is wholly inadequate to ensure expeditious recovery of the regulatory asset, and strikes at the root of the Appellant's ability to clear its outstanding dues owed to the generating companies and transmission licensees which consistently threaten disconnection of supply, and to raise funds to undertake AT&C Loss reduction schemes; the decision of the DERC to continue the existing surcharge of 8% results in DERC continuing creation of regulatory assets without adequate carrying cost affecting the time-bound amortization schedule leading to erosion of the assured Return on Equity for the Appellants; regulatory assets have grown from Rs. 562.97 Crores in FY 2007-08 to Rs. 7300.38 Crores in FY 2021-22; in the road-map, DERC did not account for the claims of regulatory asset and carrying cost in terms of the judgment of this Tribunal in, **2009 ELR (APTEL) 880** which has not been stayed; and, in its letter to the Ministry of Power dated 20.12.2021, DERC admitted not having implemented the said judgment for 7 to 8 years though there was no stay by the Supreme Court.

After referring to Section 61(b) of the Electricity Act which requires distribution of electricity to be conducted on commercial principles, to Section 61(c) which details the factors required to encourage competition, efficiency, economical use of the resources, etc, to Section 61(d) which requires interest of consumers to be safeguarded, to Section 61 (e) which requires principles to be laid rewarding efficiency in performance, and to Section 61 (g) which requires the tariff to progressively reflect the cost of supply of electricity, Sri Amit Kapur, Learned Counsel for the Appellant, would refer to Clause 8.2. of the Tariff Policy, 2006 which requires the regulatory asset to be created *"only as exception"* including only for *"natural causes or force majeure conditions"*, and for recovery of regulatory assets to be made in time bout manner, within a period not exceeding three years at the most, and preferably within the control period, to submit that the Tariff Policy has been held to be a statutory document having the force of law in **Energy Watchdog v. CERC, (2017) 14 SCC 80 [Para. 57] and Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615 Para. 124.**

Learned Counsel would rely on Regulation 5.42 of MYT Regulations, 2007 which enables the DERC to take a view to create a regulatory assets as per the guidelines stipulated in clause 8.2.2 of the National Tariff Policy and to the statutory advises issued by the DERC itself on 15.12.2010 and 01.02.2013, as also the observations made by Price Waterhouse Coopers and their advisory to the Government of National Capital Territory of Delhi in its report that the level of regulatory asset surcharge needed to be adjusted so that the Discoms are able to recover existing unrecovered revenue gap.

Learned Counsel would also refer to the judgment of the Full Bench of this Tribunal in **2011 SCC OnLine APTEL 188] [Paras. 65 &66]** whereby all State Commissions were directed to ensure that revenue gaps ought not to be left, and Regulatory Assets should not be created except in exceptional and justifiable circumstances in accordance with the Tariff Policy and the Regulations, and to the judgment of the Full Bench of this Tribunal in, **2013 SCC Online APTEL 137 [Paras. 38 & 40]**, to contend that the DERC's inaction/ refusal to discharge its statutory mandate has led the Delhi Power Sector to the verge of failure in spite of the Appellant's efficient performance including reduction of AT&C Losses from 48% to 7%.

After referring to the contents of the reply of the DERC, and in rebuttal thereto, Sri Amit Kapur, Learned Counsel, would submit that recovery of prudently incurred costs has been continuously deferred to future years by the DERC, on which a miniscule surcharge of 8% is being allowed; the cost of financing to the Appellants is in excess of 12%; the surcharge of 8% is contrary to DERC's acknowledgement of the presentation of M/s. SBI Caps (referred to in the Statutory Advice dated 01.02.2013) that surcharge of 20% is required to liquidate the pending revenue gap for BRPL and 25% for BYPL on the applicable tariff from 2012-13 up to 2018-19.

Learned Counsel would refer to the judgments of the Supreme Court, in **DERC v. BYPL, (2007) 3 SCC 33 [Para. 22, 24, 26 & 42]** and of this Tribunal in **[2007 ELR (APTEL) 1370]**, to submit that 8% surcharge is wholly inadequate to cover/ recover the Regulatory Asset; this surcharge is allowed only for recovery towards carrying cost of the Regulatory Asset, and the principal Regulatory Asset still remains unrecovered; after the order passed by it on 23.07.2014 (which is the

subject matter of Appeal No. 235 and 236 of 2014), DERC has started allowing carrying cost, and the carrying cost on regulatory assets would be recovered as costs in the Annual Revenue Requirement, and 8% surcharge would be towards recovery of the accumulated principal amount of Regulatory Asset; and DERC must allow a surcharge which recovers the entire regulatory asset in terms of the Tariff Policy, rather than pegging it down to a fixed percentage of the ARR; and reliance placed on the CAG audit of the Appellant is misplaced since the directions were quashed by the Delhi High Court in its judgment in W.P. (C) Nos. 895 of 2011 and batch dated 30.10.2015, which judgment is the subject matter of an appeal which is pending before the Supreme Court in SLP No. 35164 of 2015and Civil Appeal No. 12013 of 2016, though no interim order of stay was passed therein.

The Appellant prays that this Tribunal provide adequate surcharge and carrying cost to recover the accumulated regulatory asset in a time bound manner, and ensure that the Appellants are provided appropriate/assured return on equity.

C. SUBMISSIONS URGED ON BEHALF OF DERC:

Mr. Dhananjay Baijal, Learned Counsel appearing on behalf of the Respondent-DERC, would submit that the concept of regulatory asset was proposed by the Appellants herein to amortise the existing revenue gap, and this mechanism was proposed to ensure tariff neutrality. After referring to the submissions made by the Appellant to the Commission in 2004 (as extracted in the tariff order for BSES Rajdhani Power Ltd. dated 11.03.2004), Learned Counsel would submit that the Commission, after noting that the restructuring plan of the distribution companies envisaged an average tariff increase of 10%, observed that the increase in tariff, to bridge the revenue gap, should be around 30%; it is in such

circumstances that the Commission was constrained to accept the creation of regulatory asset as proposed by the Appellant; as creation of regulatory assets was a proposal from the Appellants themselves, they are estopped from now contending to the contrary; the Commission has, in every tariff order, dealt with the issue of revenue gap and regulatory assets, which had been contained and was almost wiped out by the beginning of the first control period in 2007; post FY 2010-11 there has been a marked increase in the Regulatory Assets because of various/unforeseen, unpredictable and uncontrolled factors such as (i) undue unprecedent rise in power purchase cost from thermal/gas power plants due to increase in price of coal and or gas, and (b) sudden reduction in the sale rate of surplus power due to the CERC (Unscheduled Interchange charges and related matters) (Amendment) Regulations 2010 which came into effect from 03.05.2010; by the said Regulations, strict limits were introduced by the CERC on both under drawal and over injection, and by imposing charges for over drawal and under injection. States such as Delhi, which were earlier under-drawing heavily and making use of the UI mechanism for sale of surplus power at profitable rates would no longer do so as a result of the amended regulations; power purchase cost from Central Power Generating Stations increased more than 80% from Rs. 2.86/kWh in 2007-08 to Rs. 5.16/kWh in 2011-12; the Commission was constrained to increase tariffs across the board in three successive years; while 2011 saw an increase in tariff by 22%, in 2012 there was a further hike of 23% along with additional 8% surcharge for recovery of regulatory assets; and the Commission, in its statutory advise dated 01.02.2013, had recommended financial restructuring by way of Central Government bail out packages to be extended to the Appellant's distribution companies in line with the

provisions of the Delhi Electricity Reforms Act, 2000 read with the Electricity Act, 2003.

Sri Dhananjay Baijal, Learned Counsel, would further submit that 8% surcharge has been retained in the impugned order, besides increase in tariff by 5% for FY 2013-14; the Commission is aware of the revenue gap and regulatory assets, and has endeavoured to strike a balance between consumer interest and liquidation of the regulatory assets; and their actions are in accordance with the statutory provisions and under the judicial framework.

With respect to the order of this Tribunal in IA No. 365 of 2013 in Appeal No. 266 of 2013 dated 11.03.2014, Mr. Dhananjay Baijal, Learned Counsel for the Respondent-DERC would rely on **Satyadhan Ghosal v Deorajin Debi (1960) 3 SCR 590, Hope Plantations Ltd. v Taluk Land Board, Peermade, (1999) 5 SCC 590,** and **C.V. Rajendran & Anr. v. N.M. Muhammed Kunhi, (2002) 7 SCC 447,** to submit that the order of this Tribunal dated 11.03.2014 has been carried in appeal to the Supreme Court, before whom several proceedings have taken place; in the said order, this Tribunal, while recording the Appellant's request for a direction to the Commission to liquidate the regulatory asset in the next three years, had expressed its disinclination to issue such directions as they did not wish to usurp the power of the Commission; this Tribunal held that it is only the Commission which would be in a position to decide a proper road map after examining the present financial position of the Appellants after balancing the interests of the consumers and the distribution licensees; and recovery of a huge amount of the accumulated regulatory assets, in a short period, may result in a huge tariff shock; and principles of res judicata would bar this issue, which was considered and

examined by this Tribunal in its order dated 11.03.2014, from being re-agitated again.

Mr. Dhananjay Baijal, Learned Counsel, would also submit that the Appellant has approached the Supreme Court by way of a Writ Petition wherein they have sought a direction to declare that they were entitled to the prudently incurred costs and allowances in accordance with the mandate of Section 61 and 62 of the Electricity Act, 2003, and in terms of the methodologies as specified under the Multi Year Tariff Regulations; in the said Writ Petition, the appellants had sought a direction to the Commission to give effect to the deferred cost created as Regulatory Asset in accordance with Para 8.2.2 of the Tariff Policy; since the highest Constitutional Court has been approached for a similar relief, and is seized of the matter, this Tribunal ought not to proceed with this issue with a view to obviate any conflict; and reliance is placed in this regard on **State of Andhra Pradesh v. Raghu Ramakrishna Raju Kanumuru, (2022) 8 SCC 156**.

Mr. Dhananjay Baijal, Learned Counsel for the DERC, would state that, since the Appellants have approached the Supreme Court for the same relief as is being sought with respect to this issue, and as interim orders have been passed by the Supreme Court on multiple occasions including on 07.02.2014, 26.03.2014 and 06.05.2014, the present issue. for an identical cause of action, is not maintainable; repeated representations by the Commission, to the Ministry seeking financial assistance for the private Discoms, has not yielded result; apart from the provision of financial support from the Central Government/State Government to the Discoms in Delhi, certain crucial factors have also contributed to the ballooning of Regulatory Assets over the past years; in the Petition before the Supreme Court all the parties to this issue, are

parties, besides the Generating Companies and the State Government; and in the absence of these parties, more so as these issues have been agitated in proceedings before the Supreme Court, adjudication by this Tribunal would be incomplete.

Sri Dhananjay Baijal, Learned Counsel, would further state that, besides implementing the PPAC formula and the 8% surcharge, the Commission has ensured an increase in tariff by 22% in FY 2011-12, and by a further increase of 23% in FY 2012-13; tariff has been consistently increased from 2003 to 2013 steadily; the 8% surcharge is applicable on the fixed energy charges which is levied by Discoms to their consumers in the electricity bills since FY 2012-13, and the same is liquidating the regulatory assets roughly to the tune of Rs. 1600Croresannually; from FY 2012-13, Delhi Distribution Licensees have recovered Rs. 11,073 Crores through levy of 8% Surcharge from Delhi consumers, till the latest True - up of FY 2019-20; and recovery of Rs. 11,073 Crores is over and above the Base Electricity Tariff (Fixed and Energy Charges).

Learned Counsel would also state that the Commission has submitted to the Supreme Court that, as per the road map, the regulatory asset were to be liquidated by FY 2020-21; the roadmap considered a revenue growth at 15%; this is conservative and lower as compared to the other rates; and implementation of various judgments of APTEL, Review Orders of the Commission and the impact of various Orders of CERC have resulted in an increase in the regulatory assets.

After giving a summary of the effective implementation of various judgments of APTEL and Review Orders etc., it is submitted on behalf of DERC that, while the opening balance of Regulatory Assets for all Discoms in FY 2012-13 was Rs. 10,313 Crores (i.e., in the year of introduction of 8% Regulatory Assets Surcharge), from FY 2012-13 till the

last True-up of FY 2019-20 conducted in the Tariff Order dated. 30.09.2021, Delhi DISCOMs have been provided Rs. 8692 Crores as carrying cost in their Regulatory Assets; the impact of APTEL judgments/ Review Orders etc, of Rs. 5054 Crores, have been mostly recovered by DISCOMs through the 8%Surcharge; the closing balance of Regulatory Assets, till the last issued Tariff Order of 30.09.2021, was Rs. 9,063 Crores; after considering the impact of carrying cost, and the High Court judgments, Delhi Discoms have recovered Rs.11,073Croresthrough the 8% Surcharge; during True-ups for the Years, the DISCOMs have also had a Surplus (after True-up) of Rs. 3923 Crores equalling approximately Rs. 15,000 Crores, which can actually be said to be the quantum of liquidation of Regulatory Assets; the Commission is entitled to a play in the joints to make projections into the future on issues such as liquidation of regulatory assets; the Respondent Commission cannot be faulted for its projections not being wholly accurate, when a multitude of factors, beyond the control of either party have come into play; the assumption of 15% growth was fully justified considering the past parameters, and the inability to achieve the same was on account of several factors which were beyond the control of the Respondent Commission, and could not be predicted with precision; a regulator is entitled to some play in the joints; and decisions in economic matters cannot be expedited.

After referring to several judgments in this regard, it is submitted on behalf of the Commission that the Appellants and Tata Power Distribution Limited have liquidated a total sum of Rs. 11,073 Crores through the 8% surcharge from FY 2012-13 to 2019-20, with BRPL having liquidated Rs. 4791 Crores and BYPL having liquidated Rs.2645 Crores; the Appellants are not only declaring operating profits but have positive cash flows; the other distribution company in Delhi have also declared dividend; and the

Appellants have overblown and have exaggerated their grievance which ought not to be countenanced.

In so far as the tariff policy is concerned Shri Dhananjay Baijal, Learned Counsel for the DERC, would rely on **Tata Power Co. Ltd. Transmission v. MERC, 2022 SCC OnLine SC 1615** to submit that the National Tariff Police is one of the criteria that the Commissions are required to be guided by; the other are the provisions of Section 61 of the Electricity Act which cannot be ignored; and the Commission framed Regulation 5.42 to ensure that the issue of liquidation and creation of a regulatory asset was balanced with consumer interest; the National Tariff Policy was amended in 2016, to provide that the Regulatory assets, in existence on that date, be liquidated within a further seven years; recently, the Central Government has proposed an amendment to the Electricity Rules, 2005 to provide a gap between approved ARR and estimated annual revenue from approved tariff; and the proviso to the proposed Rule 24 requires such gap, created if any, shall not be more than three percent (3%) of the approved ARR; it also provides that the gap along with the carrying cost shall be liquidated in a maximum three numbers of equal yearly instalments from the next financial year; and that the gap between the approved ARR and estimated annual revenue along with the carrying costs shall be liquidated in a maximum seven numbers of equal years; the wisdom of the delegate of Parliament was to propose a further seven years for the liquidation of the built up regulatory asset; and the Appellants' claim of the Tariff policy, prescribing liquidation of regulatory assets within three years, is not carved in stone.

Learned Counsel would seek to distinguish the judgment of the Supreme Court in **2023 SCC OnLine SC 464** to submit that the said judgment is concerned with the grant of carrying cost and related

disputes in payments made to generators, with whom PPAs were entered into; there is no PPA provisions to be considered in the present case; the disputes with generators are all pending before the Supreme Court; the issue of carrying cost and quantification of the same on the Appellant's regulatory assets are also the subject matters of proceedings before the Supreme Court; both prior and subsequent to passing of the impugned order, the Commission has implemented a number of measures to hasten the liquidation of Regulatory Assets of the Appellant such as introduction of FPA charges and PPAC by the Commission from 2011-12 onwards; FPA charges was quantified at 5%and 6 % for the quarter of October-December 2011 and the quarter ending March, 2012, respectively; consumers in Delhi also pay surcharges towards Power Purchase Adjustment Cost which is currently in the range of between 27% and 31%, Regulatory Asset Surcharge @ 8%, Pension Trust Surcharge @7%, Electricity Duty @5%, thereby amounting to a surcharge of 50%, over and above the tariff; this has aided in the effort to liquidate Regulatory Assets or to increase cash flow efficiency, while also taking care of consumer interests; in order to liquidate the regulatory assets at a faster pace, the tariff order for FY 2014-15 dated 23.07.2014 introduced the measure of granting carrying cost on the regulatory assets at two stages (i) in the projected ARR for the up-coming year to be recovered through tariff and (ii) at the stage of true-up for the past financial year, on the recognised regulatory assets as well; the said measure of granting carrying cost on the regulatory assets in the projected ARR for the upcoming year was not present in the earlier tariff orders; the Appellants claim on this issue necessitates rejection being barred by res judicata, and the same cause of action being prosecuted by the Appellants by invoking the writ jurisdiction of the Supreme Court; and the Commission has provided for effective mechanisms to liquidate

regulatory assets whose creation was admittedly mooted by the Appellants' themselves.

D. REJOINDER SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

In the rejoinder submissions, Shri Amit Kapur, Learned Counsel for the Appellant, would rely on **Air India v. Nergesh Meerza, (1981) 4 SCC 335,** and **Jayaswal Neco Ltd. v. CCE, (2015) 10 SCC 651, CIT v. Maruti Suzuki (India) Ltd., (2020) 18 SCC 331** to contend that there can be no estoppel against the law; DERC cannot plead estoppel, since the Appellant had challenged the Tariff Order dated 09.06.2004 in Appeal Nos. 155-156 of 2005 before this Tribunal; by its Judgment in**2006 SCC OnLine APTEL 69 [Para 41, 42 and 49],** this Tribunal set aside the DERC's findings as also the direction to create regulatory assets; and the Tariff Order dated 09.06.2004 was passed by the DERC for FY 2004-05, which cannot estop the Appellant from challenging unlawful creation of regulatory asset by the DERC in subsequent orders. Reliance is placed on behalf of the Appellant on the judgment of this Tribunal in, **2009 ELR (APTEL) 0086 (judgment in Appeal No. 133 of 2007 dated 13.01.2009, Para 15 to 17)**

Shri Amit Kapur, Learned Counsel for the Appellant would refer to the interim order passed by this Tribunal in the present appeal on 11.03.2019, more particularly to para 19 thereof, to submit that the said order was passed subject to the outcome of the present appeal; the issues were not finally decided, and the said order cannot be held to be a bar on application of the principles of res judicata; further, this Tribunal had directed the DERC to look into the issues of (a) Appellant meeting current expenses to avoid build-up of regulatory assets; (b) liquidation of accumulated RA as at end of FY 2011-12; (c) non-payment of bills by the

Appellant; and (d) deciding and periodically reviewing the roadmap for liquidation of the Regulatory Asset, while ensuring that the Appellant does not face any constraints in making current payments.

Sri Amit Kapur, Learned Counsel, would further submit that, unlike a final judgment which resolves the entire case and determines the rights and obligations of the parties, an Interlocutory Order is provisional and does not end the litigation; such interim decisions, that govern the proceedings until a final resolution is reached ie through the issues finally decided, does not constitute res judicata. Reliance is placed in this regard on **(a) Manjit Singh Sodhi v. Custodian & Ors.; 2022 SCC OnLine SC 990; (b) Central Bank of India Ltd. v. Gokal Chand, AIR 1967 SC 799; (c) Pandurang Ramchandra Mandlik v. Shantibai Ramchandra Ghatge, 1989 Supp (2) SCC 627; and (d) Mammu v. Hari Mohan, (2000) 2 SCC 32; Ferro Alloys Corpn. Ltd. v. Union of India, (1999) 4 SCC 149 (Para 21].** Learned Counsel would submit that the present issue is still pending in the very same appeal, and the order of this Tribunal dated 11.03.2014, being an interim order, does not have precedential value, as held in **State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha, (2009) 5 SCC 694 [Para. 21]; Empire Industries Ltd. v. Union of India, (1985) 3 SCC 314 [Para. 59] and Abhishek Banerjee v. Directorate of Enforcement, 2022 SCC OnLine Del 747 [Para. 41].**

On the issue of the present matter, overlapping with the Writ Petitions filed by the Appellant before Supreme Court, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the Appellant had filed W.P. (C) Nos. 104 and 105 of 2014 before the Supreme Court seeking protection from regulation of power supply which is evident from the prayers (1) to (4) sought therein; the prayer for direction to DERC to

give effect to the deferred cost, created as a regulatory asset in accordance with para 8.2.2. of the tariff policy, was to facilitate payment to Generating and Transmission Companies that had threatened regulation of power supply which would have led to a black out in Delhi; in contrast, the present issue relates to recovery of regulatory asset with carrying cost and insufficiency of 8% Surcharge in recovery of the accumulated shortfall; the said decision is amenable to appellate scrutiny by this Tribunal, which, as an expert appellate body, is vested with the power to review the DERC's Tariff Orders; and the DERC had, on 26.03.2014, undertaken before the Supreme Court to put forth the roadmap for the regulatory assets; and, on 01.05.2014, the DERC had tendered its proposed roadmap for amortization of regulatory assets which was pointed out by the Appellant, as being inadequate.

On Tariff Policy 2006, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that creation of regulatory assets by the DERC is unlawful in light of the Tariff Policy, 2006 which requires (a) regulatory asset to be created only as exception and only in natural causes or force majeure conditions; (b) recovery of regulatory assets should be time-bound and within a period not exceeding three years at the most, and preferably within the control period (clause 8.2.2 of Tariff Policy, 2006); DERC cannot challenge or question the binding nature of the Tariff Policy in the present proceedings, after itself incorporating the said conditions for creation of regulatory assets in the 2007 and 2011 MYT Regulations; Regulation 5.42 of MYT Regulations, 2007 stipulates that the DERC may take a view to create regulatory assets, as per the guidelines provided in Clause 8.2.2 of the National Tariff Policy; the proviso to Regulation 5.40 of the 2011 Regulations stipulates that the variations are large, and it is not feasible to recover in one year alone, and the Commission may take a view to create a regulatory asset, as per the guidelines provided in

clause 8.2.2 of the National Tariff Policy; in the light of the law declared by the Supreme Court in**(a) PTC India Ltd. v. CERC & Ors., (2010) 4 SCC 603 [Para. 54 - 56, 58, 66 & 92]; (b) Energy Watchdog v. CERC, (2017) 14 SCC 80 [Para. 57]: (c) Reliance Infrastructure Limited v. State of Maharashtra, (2019) 3 SCC 352 [Para. 29 & 32]; and (d) Tata Power Co. Ltd. Transmission v. MERC, 2022 SCC OnLine SC 1615 [Para. 123, 124, 129 and 131],** the DERC is bound by its own Regulations; and reliance by the DERC on the Tariff Policy 2016 is misplaced since the Policy applicable at the time of passing the impugned order was the 2006 Tariff Policy; and the DERC cannot seek retrospective effect of the 2016 Tariff Policy.

Shri Amit Kapur, Learned Counsel for the Appellant, would also contend that this Tribunal, in its judgment in OP No. 1 of 2011 dated 11.11.2011, had issued certain directions (Para 64 and 65); the DERC is statutorily obligated to implement the PPAC formula; allowing PPAC has no relation to recovery of regulatory asset, but is meant to provide timely compensation to Discoms for increase in contemporaneous cost of power procurement during the relevant financial year, for a particular period in a financial year, and to keep its financial liquidity intact; PPAC merely avoids any further increase in the Revenue Gap; in its judgment in O.P. No. 1 and 2 of 2012= 2013 SCC OnLine APTEL 137, DERC was directed to take immediate action pursuant to the directions in the Judgment in O.P. No. 1 of 2011 dated 11.11.2011 (2011 SC OnLine APTEL 188), as regards recovery of admitted regulatory assets, and effective implementation of Fuel and PPAC Mechanism.

Shri Amit Kapur, Learned Counsel for the Appellant, would state that, in **GMRWEL v. CERC, 2023 SCC OnLine SC 464,** the Supreme Court held that, whenever recovery of dues / tariff is deferred, carrying

cost must be paid for the period of deferment as time value for money; carrying cost arising out of deferred payments, whether to Generating Stations or to a Discom, is the cost of delayed clearance of payments due and payable; it cannot be that Discoms are made to pay carrying cost while they are denied the same when payable to them; and the law has to be applied uniformly and cannot be picked and chosen as per convenience.

With regards financial support by the Central/State Government, Shri Amit Kapur, Learned Counsel for the Appellant, would submit that the DERC cannot shy away from its responsibility or avoid accountability for its failure to rectify its incorrect projections of revenue, by blaming the government; DERC's representations to the Ministry of Power are not binding on the Government; DERC, being the Statutory Regulator, ought to have acknowledged its incorrect projections and ensured rectification by providing adequate surcharge.

On the contention of DERC, regarding the Appellants refusal to pay generating companies, Shri Amit Kapur, Learned Counsel for the Appellant. would submit that the ARR approved by the DERC from FY 2009-10 was not cost reflective, resulting in building up of regulatory assets, and preventing the Appellant from paying power purchase dues on time; this fact has been recognized by the Supreme Court in **BRPL v. DERC, (2023) 4 SCC 788 at Paras. 3 and 19;** DERC failed to implement various judgments of the Supreme Court and this Tribunal which culminated in overdues of State Generating and Transmission Companies of approximately Rs. 23,000 Crores; DERC cannot compare the Appellant's case with that of TPDDL; TPDDL has the best consumer mix amongst all Delhi Discoms; the Appellant has the highest percentage of domestic consumers with the lowest percentage of Industrial and

Commercial Consumers; Price Water House Coopers, in its Report dated 27.06.2013, had observed that, due to a combination certain factors, under recoveries for each unit of energy sold are the lowest in case of TPDDL as compared to the Appellants; during FY 2012-13, the loss incurred by the Discoms for each unit of power sold was Rs 0.56/kWh for TPDDL, Rs 1.20/kWh for BRPL and Rs 2.54/kWh for BYPL etc.

On Pension Trust Surcharge @ 7% and Electricity Duty @ 5%, it is submitted on behalf of the Appellant that these surcharge has no bearing on recovery of regulatory assets; it is created for funding of Pension Trust of employees of the erstwhile Delhi Vidyut Board, and not against recovery of regulatory asset; Electricity Duty is a statutory charge collected by the Appellant as a collecting agent and deposited with the Municipal Corporation of Delhi; DERC's contentions are merely an attempt to bury the real issue; and DERC has failed to own its statutory obligations to implement the judgments of the Supreme Court and has made a mincemeat of its fiduciary duties.

E. ANALYSIS:

The Appellants' claim under this head is that the surcharge provided at 8% is wholly insufficient to liquidate the Regulatory Assets; the DERC's failure to provide a roadmap to liquidate the Regulatory Assets, in terms of Clause 8.2.2 of the 2006 Tariff Policy, is wholly unjustified and, in fact, is a needless burden placed on the consumers, since it is they who would be required to pay a higher tariff consequent on carrying cost being imposed on the un-liquidated Regulatory Assets.

Clause 8.2.2 of the National Tariff Policy, 2006 stipulated that the facility of a regulatory asset had been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year; this should

be done only as an exception, and subject to the following guidelines: (a) the circumstances should be clearly defined through regulations, and should only include natural causes or force majeure conditions; and, under business as usual conditions, the opening balances of uncovered gap must be covered through transition financing arrangement or capital restructuring; (b) carrying cost of Regulatory Asset should be allowed to the utilities; (c) recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most, and preferably within the control period; (d) the use of the facility of Regulatory Asset should not be repetitive; and (e) in cases where regulatory asset is proposed to be adopted, it should be ensured that the return on equity should not become unreasonably low in any year so that the capability of the licensee to borrow is not adversely affected.

Section 86 of the Electricity Act, 2003 relates to the functions of the Commission, and Section 86(4) stipulates that, in the discharge of its functions, the State Commission shall be guided by the National Tariff Policy, published under Section 3(2) of the Electricity Act. As held by the Supreme Court, in **Energy Watchdog v. CERC, (2017) 14 SCC 80,** the Tariff Policy issued under Section 3 of the Electricity Act is a statutory document, and has the force of law. As Section 86(4) requires the Commission to be guided by the National Tariff Policy, the said National Tariff Policy serves as a guidance to the Regulatory Commission. In the present case, the DERC has framed regulations in the light of the National Tariff Policy, 2006.

Regulation 5.42 of the 2007 Regulation stipulated that the variations, on account of uncontrollable items like energy sales and power purchase cost, shall be trued up; and truing up shall be carried out for each year based on the actual/ audited information and prudence check by the Commission. Under the proviso thereto, if such variations

are large, and it is not feasible to recover it in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in Clause 8.2.2 of the National Tariff Policy.

Similarly, Regulation 5.40 of the 2011 Regulation stipulated 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. Under the proviso thereto, if such variations are large and it is not feasible to recover it in one year alone, the Commission may take a view to create a regulatory asset as per the guidelines provided in clause 8.2.2 of the National Tariff Policy.

Clause 8.2.2 of the National Tariff Policy, 2016 (Amendment to the National Tariff Policy), in so far as it related to Regulatory Asset, provided that the facility of a regulatory asset had been adopted by some Regulatory Commissions in the past to limit tariff impact in a particular year; and this should be done only as a very rare exception in case of natural calamity or force majeure conditions and subject to the following: (a) under business as usual conditions, no creation of Regulatory Assets shall be allowed; (b) Recovery of outstanding Regulatory Assets along with carrying cost of Regulatory Assets should be time bound and within a period not exceeding seven years; and the State Commission may specify the trajectory for the same.

In its judgment, in O.P. No. 1 of 2011 dated 11.11.2011, this Tribunal issued the following, among other, directions to the State Commissions ie(iv) in determination of ARR/tariff, the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations; the recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably

within the Control Period; and carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee.

In **BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission, 2013 SCC OnLine APTEL 137 : [2013] APTEL 157,** this Tribunal directed the State Commission to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of this Tribunal to avert the problems of cash flow experienced by the Petitioners which may come in the way of smooth operation of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time.

While holding the Petitions filed by the Petitioners under Section 121 of the Electricity Act, 2003 as maintainable, this Tribunal observed that refusal by the Delhi Commission to implement the judgments of this Tribunal would amount to judicial indiscipline; mere filing of the Appeal before the Supreme Court or proposal to file the Appeal would not amount to automatic stay of the Tribunal's judgment; however, in view of the affidavit filed by Delhi Commission in Appeal No. 14 of 2012 and submissions made in these petitions, they did not propose to take any penal action against the Delhi Commission except to advise it to correct its mistakes committed earlier and follow the directions issued by this Tribunal in future. As regards recovery/amortization schedule of the admitted regulatory assets, the Delhi Commission was directed to take immediate action in pursuance to the directions given in OP No. 1 of 2011 dated 11.11.2011.

Section 86(2) of the Electricity Act requires the State Commission to advise the State Government on all or any of the following matters, namely (i) promotion of competition, efficiency and economy in activities of the electricity industry; (ii) promotion of investment in electricity industry; (iii) re-organization and restructuring of electricity industry in the State; (iv) matters concerning generation, transmission, distribution and trading of electricity or any other matter referred to the State Commission by that Government.

The DERC issued two statutory advises dated 15.12.2010 and 01.02.2013 both of which are relied upon by the Appellants. The statutory advise dated 15.12.2010 was given by the DERC to the Government of NCTD in response to their letter dated 04.05.2010 seeking advise from the DERC on the representation given by the distribution licensees to the Delhi State Government.

After giving a background of the issues involved, and after referring to certain orders passed by this Tribunal, the DERC opined that the tariff in the previous orders had not been cost effective; and the distribution licensees had to resort to extensive borrowing to sustain their operations. On the precarious financial position, the DERC opined that the distribution utilities were barely able to sustain operations. While opining that the delay in recovery of charges should be minimised, the DERC advised that an appropriate mechanism needed to be put in place so that shortfall, if any, did not accumulate in future but gets adjusted periodically; and it would be prudent to have a mechanism of timely recovery of these costs.

In the statutory advise dated 01.02.2013, the DERC recommended that the Government of Delhi take urgent steps so that the benefits of various Central Government sponsored schemes are extended to the

Delhi Distribution utilities and, in turn, to the electricity consumers in Delhi; the Government of NCT of Delhi should take up with the Ministry of Power that these schemes are availed of by the Delhi Distribution utilities for the benefit of the consumers of Delhi; the financial bailout package introduced by the Central Govt, for financial restructuring of State distribution entities with certain conditions including support from the State Government, was also being denied to the distribution entities in Delhi; the Government of Delhi may take up with the Ministry of Power to sanction the bail-out package for the DISCOMs of Delhi; the Government of Delhi may take up with the Government of India to ensure adequate allocation of coal from the coal mines to the power stations from where the transportation distance was the shortest; the Government of Delhi should seek the help of the Government of India in sourcing cheaper financing through green funds; and the Government of Delhi should also approach the Government of India to arrange a special financial package for modernization and development through loans from multilateral financing agencies at rates which are more favourable than financing through domestic commercial financial institutions.

The DERC concluded stating that it had already commenced the process of tariff determination for FY 2013-14; there had already been two significant increases in the past less than 2 years which had collectively resulted in enhancement of electricity bills by over 50% since August, 2011; even though the present tariff levels were more or less at par with those prevailing in the NCR region, this had already resulted in a high level of public resentment; without the measures recommended above, the increase in tariff can be quite significant; in fact, Delhi is a prime contender for the bailout package proposed by the Ministry of Power because, for the last many years, the utilities had drastically reduced the AT&C losses and moved towards cost reflective tariffs; there

was a gross misconception that the bailout package would benefit the managements of the private DISCOMs; this was not the case as they were eligible only to a limited return on their equity, and in fact the benefits of the bailout package as well as access to other schemes such as R-ARDP and soft financing will ultimately benefit the average consumer through reduced tariffs.

The DERC further opined that a huge uncovered revenue gap had built up since 2008-09 primarily due to an unprecedented rise in power purchase costs which accounted for over 85% of the total revenue requirement of the DISCOMs; this was the price that had to be borne for uninterrupted delivery of quality power; nevertheless, support through various Central and State Govt schemes was essential to cushion the impact till economic growth and prosperity rise to levels which give more purchasing power to the consumers of electricity in the country; in any case tariffs, which rise at more than thrice the inflation rate, will not be sustainable; the above recommendations are designed essentially to ensure that electricity consumers in the NCT of Delhi are not placed at a disadvantage vis-à-vis consumers in other parts of the country merely on account of the fact that the management of the electricity utilities has been handed over to private operators through 51% disinvestment as a part of power sector reforms.

It is relevant to note that it is only after the aforesaid statutory advises were sent by the DERC to the Govt of NCT of Delhi, that the Appellants herein approached the Supreme Court by filing WP(C) Nos. 104 and 105 of 2014. BSES Rajdhani Power Ltd filed WP(C) No. 104 of 2014 and BSES Yamuna Power Ltd filed WP(C) No. 105 of 2014 before the Supreme Court.

In its interim order in Civil Appeal No. 884 of 2010 along with WP(C) Nos. 104 and 105 of 2014 dated 26.03.2014, the Supreme Court recorded that it had perused the directions issued by this Tribunal in IA Nos. 365 and 366 of 2014 in Appeal Nos. 265 and 266 of 2013 dated 11.03.2014, and had noted that, in the said order, this Tribunal had observed that the Appellants had sought a direction to the Commission to liquidate the regulatory assets in the next 3 years; they were not inclined to pass such directions as they did not want to usurp the powers of the Commission; only the Commission would be in a position to decide a proper road map after examining the present financial position of the Appellants, after balancing the interests of the consumers and the distribution licensees; as the Regulatory Assets had accumulated to a huge amount, the recovery of the accumulated regulatory assets in a short period may result in a huge tariff shock to the consumers which had to be avoided; the Commission had to examine why the Applicants/Appellants were not able to pay the current bills of the generating companies and transmission licensees even though the Commission had provided for recovery of more than the current expenditure of the Appellants including the power purchase cost and carrying cost on the Regulatory Assets by way of increase in tariff and surcharge of 8% over and above the tariff; and they found that the Appellants were not making even the current payments to the generating and transmission companies.

The Supreme Court then noted the submissions urged on behalf of the DERC that the aforesaid road map could be worked out provided the exact facts and figures, and the required information, was supplied to the DERC by the distribution companies. The Supreme Court also noted the submissions, urged on behalf of the Appellants, that all necessary information had already been submitted to the DERC; however, since the

generating companies were also anxious to finalize the road map, the necessary information would be supplied again to the DERC provided a questionnaire was framed and supplied to the distribution companies indicating the exact information required.

The Supreme Court then observed that the suggestions made on behalf of the distribution companies was reasonable; this would avoid unnecessary delay on the ground that necessary information has not been given. The Supreme Court directed that the necessary questionnaire/ proforma be given to the distribution companies within 10 days; the information would be furnished/ supplied by the distribution companies within 10 days thereafter to the DERC; and, within two weeks thereafter, the road map will be prepared by the DERC. In the meantime, the distribution companies were directed to continue to pay the current payments to the generating and transmission companies with effect from 1st March, 2014 which would relate to the billing period from 1st January, 2014.

Thereafter in its interim order dated 07.05.2014, the Supreme Court noted that the figures had been made available and were accepted. The distribution companies were directed to make the payments as indicated in the documents, which had been placed on record, in accordance with the earlier order dated 26th March, 2014. The Supreme Court further observed that, if the aforesaid amounts were not paid by 31st May, 2014, the stay shall stand vacated. While directing that the documents be made part of the order, the Appeals were directed to be listed for further orders on 03.07.2014.

In its order dated 03.07.2014, the Supreme Court observed that BSES Yamuna Power Limited must make payment of the due amount as on 30.06.2014, as shown in the statement, to the transmission and

generating companies immediately and, in no case, later than 15.07.2014; and BSES Yamuna Power Limited shall continue to pay recurring monthly payments to the generating/ transmission companies having the same basis as indicated in the order dated 06.05.2014.

In its interim order dated 23.10.2024, the Supreme Court noted that the issue arising for consideration related to incessant creation and continuation of "Regulatory Assets" during tariff determination by the Electricity Regulatory Commission; this was a recurring problem having serious implications on the Electricity Sector; before interpreting the law and issuing consequential directions, they considered it appropriate that States and the State Regulatory Commissions should be heard; and therefore they had impleaded all the States and the State Regulatory Commissions and were issuing notices to them. Both the Writ Petitions were directed to be listed on 06.11.2024. Pursuant to the said order, all the State Governments and the State Regulatory Commissions were arrayed as Respondents in these two Writ Petitions.

In its interim order dated 20.11.2024, the Supreme Court noted that the Government of NCT of Delhi was to inform them about the decision with respect to the subsidies that were provided, and the consequent creation of the "Regulatory Asset"; it was submitted on behalf of the Government of NCT of Delhi that they were having certain difficulties; these should be put in the form of an affidavit indicating the circumstances in which the necessary information about the policy decision could not be taken; they had, in their previous order, impleaded all the States and the State Regulatory Commissions, as their presence were felt necessary for determining the principles that should govern the problem of creation and continuation of "Regulatory Assets" for long periods; and the State Governments as well as the Regulatory

Commissions may express their views on the matter in the form of affidavit/ statements within four weeks.

Final judgement was passed by the Supreme Court on 06.08.2025. In **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** the Supreme Court observed that they were entertaining these Writ Petitions and Civil Appeals only for examining a limited question as to the law that governs the creation of a "regulatory asset" during the process of tariff determination by the Electricity Regulatory Commissions, its impact on the rights and liabilities of the stakeholders, the limits within which it can be operated, and finally the regulatory duties that it invokes for the Regulatory Commissions. The Supreme Court also clarified that, through these proceedings, they were not determining the rights and liabilities of the parties, which would be considered in the pending Civil Appeals against the orders of the Appellate Tribunal of Electricity.

The Supreme Court thereafter noted the contents of the National Tariff Policy, 2006 notified by the Central Government under Section 3 of the Electricity Act on 06.01.2006, extracted Clause 8.2.2 of the said Policy which provided for the creation of a regulatory asset, as well as certain restrictions on time-period and circumstances, and observed that, it had in **Tata Power Co. Ltd vs MERC: (2023) 11 SCC 1,** held that, while the Policy does not bind the State Commission, it is a material consideration that must guide tariff determination; and the real issue was to examine the circumstances and the compelling reasons for creation and undue extension of the regulatory asset over a period of time.

The Supreme Court then observed that Regulation 5.42 of the DERC Tariff Determination Regulations, 2007 incorporated the National Tariff Policy and made it a part of the enforceable regime. It then noted the order of

this Tribunal in O.P. No. 1 of 2011 dated 11.11.2011 wherein various directions were issued to the Regulatory Commissions regarding timely tariff determination, truing up, and creation, continuation, and recovery of the regulatory asset, and the directions issued by APTEL to the State Commissions were as follows: (i) Every State Commission has to ensure that Annual Performance Review, true-up of past expenses and Annual Revenue Requirement and tariff determination is conducted on a year to year basis as per the time schedule specified in the Regulations; (ii) it should be the endeavour of every State Commission to ensure that the tariff for the financial year is decided before 1st April of the tariff year. For example, the ARR & tariff for the financial year 2011- 12 should be decided before 1st April, 2011. The State Commission could consider making the tariff applicable only till the end of the financial year so that the licensees remain vigilant to follow the time schedule for filing of the application for determination of ARR/tariff. In the event of delay in filing the ARR, truing up and Annual Performance Review, one month beyond the scheduled date of submission of the petition, the State Commission must initiate suo-moto proceedings for tariff determination in accordance with Section 64 of the Act read with clause 8.1 (7) of the Tariff Policy. (iii) in determination of ARR/tariff, the revenue gaps ought not to be left, and Regulatory Asset should not be created as a matter of course, except where it is justifiable, in accordance with the Tariff Policy and the Regulations. The recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within the Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created to avoid problem of cash flow to the distribution licensee; (iv) Truing up should be carried out regularly and preferably every year. For example, truing up for the financial year 2009-10 should

be carried out along with the ARR and tariff determination for the financial year 2011-12. (v) Fuel and Power Purchase cost is a major expense of the distribution Company which is uncontrollable. Every State Commission must have in place a mechanism for Fuel and Power Purchase cost in terms of Section 62(4) of the Act. The Fuel and Power Purchase cost adjustment should preferably be on monthly basis on the lines of the Central Commission's Regulations for the generating companies but in no case exceeding a quarter. Any State Commission which does not already have such formula/ mechanism in place must, within 6 months of the date of this order, put in place such formula/ mechanism; and this Tribunal concluded by directing all the State Commissions to follow these directions scrupulously, and send periodical reports by 1st June of the relevant financial year about compliance of these directions to the Secretary, Forum of Regulators, who in turn should send the status report to this Tribunal and also place it on its website.

After referring to Regulation 5.40 of the DERC Tariff Determination Regulations, 2011, the DERC's Tariff Order dated 26.08.2011 (FY 2011-12), and clause 8.2.2 of the National Tariff Policy, 2016, the Supreme Court referred to Rule 23 of the Electricity (Amendment) Rules, 2024 in terms of which four conditions were formulated for the creation, management, and liquidation of a regulatory asset; first, the regulatory asset shall not be more than 3% of the ARR, the second, the revenue gap should be liquidated within 3 years, the third, the existing regulatory assets shall be liquidated within 7 years, and fourth, the regulatory asset will have carrying cost as prescribed under the Rules.

The Supreme Court then observed that a regulatory asset is adopted as a measure by the Regulatory Commissions when the gap between the

revenue required by the distribution company to meet its costs and expenditure, and the actual revenue realised through immediate tariff, is so high that it would not only prejudice the consumer but lead to what is called a tariff shock; by adopting such a measure, the Commission liquidates the revenue required by the utility through future tariff determinations; 'Revenue assets' are costs incurred by power distribution companies that are recognized as recoverable from consumers in future tariffs, but are not immediately recovered in the current bills; the measure adopted by the Commissions, in creating a 'regulatory asset', can also be seen as an accounting treatment; Regulatory assets are treated as assets in the balance sheet and are liquidated over a defined period of time through tariff adjustments or government subsidies; the regulatory asset is a cost incurred by the utility that the Regulatory Commission allows to be deferred on the balance sheet instead of being immediately expensed; and it enables the distribution company to utilize the 'recognition' of a regulatory asset to obtain bridge funds from bankers and financial institutions as they have the confirmation that the said amount will be recovered in the ensuing financial years.

On the factors leading to an unmanageable regulatory asset, and consequent 'regulatory failure', the Supreme Court held that, while determining tariff, Regulatory Commissions have to deal with situations where there could be a sudden increase in the fuel cost, infrastructure investments, or some extraordinary expenditure; further, lack of discipline followed by delays in filing the ARR leads to uncertainties; equally, not conducting quick and effective truing up multiplies the problem of ascertaining the actual cost incurred; failure to file ARR in time and the Regulatory Commissions not invoking their suo motu powers to rectify the same are not addressed; there is a lack of accountability here; even though Section 65 provides that State Governments shall pay in advance the subsidy to subserve

social justice obligations, it is alleged that such payments are not made in time; the decisions taken by the Regulatory Commissions, which were considered in appeal by APTEL and the Supreme Court, give a clear impression that the Regulatory Commission is not able to take firm decisions; instead of taking strong decisions on the basis of the statutory mandate, there were instances where Regulatory Commissions managed and manoeuvred to arrive at a tariff by creating regulatory assets over and above all permissible limits; though the Electricity Act envisages functional autonomy for Regulatory Commissions, and the statutory scheme is complete in all respects, the decisions taken by the Commissions, many a time, have not inspired confidence of independence and autonomy; the assertion of independence comes through individual volition, and that is where the mandate of transparency leads to accountability; the decisions taken by the Regulatory Commissioners are subject to scrutiny in the appellate and the review jurisdiction of APTEL, and thereafter by the Supreme Court; and all these factors give rise to a situation where the tariff for the subsequent years has to be substantially increased to meet the ARR of the previous years.

The Supreme Court further stated that the Regulatory Commission's power to create a regulatory asset is part of the tariff fixation process, as long as it is in reasonable measure; however, in an egregious situation where the regulatory asset has grown beyond proportion and is also extended from time-to-time inefficiently, there is a compelling need to deal with it; in this context, the Regulatory Commissions have twin obligations: *first*, the Commission must enable an efficient and effective recovery of the regulatory asset by the utility, and *second*, more importantly, it must manage the regulatory asset in a manner that does not transgress the principles that inform and govern tariff determination; the regulatory asset cannot be permitted to balloon into such proportions or continued for such periods, year after year, that the governance of the sector is set in peril, affecting the rights of the utilities and at the same

time jeopardizing the consumer interest, who eventually end up bearing the burden; creation, management and dissolution of regulatory assets are subject to law and regulation; in performance of these duties, the orders of the Regulatory Commissions are subject to the orders, instructions, and directions of APTEL issued in exercise of its statutory powers; and when they fail to comply with these statutory and other requirements, one can infer regulatory failure.

On the law that governs creation, continuation and liquidation of regulatory asset, the Supreme Court observed that the Regulatory Commissions are bound by the mandate of the Electricity Act, the National Electricity Policy, the National Tariff Policy, the Electricity Rules, the Tariff Determination Regulations applicable at the relevant period, and the precedents of APTEL; the reason for introduction of Rule 23 of the Electricity (Amendment) Rules, 2024 was evident from the circulation of the Draft Rules for stakeholder comments, wherein the Central Government had expressed the need for a statutory rule on the conditions for creation and management of a regulatory asset; Rule 23 provided for the gap between approved Annual Revenue Requirement and estimated annual revenue from approved tariff; this rule subserves a salutary purpose and sets a normative principle in motion; the Rules made by the Central Government under Section 176 are binding on the Regulatory Commissions when they make regulations in view of Sections 178 and 181 of the Electricity Act; the adverse effect of an overbearing regulatory asset extended beyond proportion is an anathema to good governance of the Electricity Act; it affects every stakeholder, the worst of all being the consumer who is burdened, rather over-burdened, from time to time because of the lapses of the regulators or the manipulation of the utilities or the indifference of the government; therefore, the principle formulated in Rule 23, consistent with Clause 8.2.2 of the National Tariff Policy, 2016 and the scheme of the Act,

must be the normative principle which must invariably be followed; and wherever Rule 23 is incorporated into the Tariff Determination Regulations of the State Commission, it shall be complied with.

The Supreme Court then observed that a combined effect of the legal regime, and the relevant provisions, rules, regulations, policies, instructions and precedents, can be restated as follows: (i) As a first principle, tariff shall be cost-reflective; (ii) The revenue gap between the approved ARR and the estimated annual revenue from approved tariff must be only in exceptional circumstances; (iii) The regulatory asset should not exceed a reasonable percentage, which can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle; (iv) If a regulatory asset is created, it must be liquidated within a period of 3 years from 01.04.2024, taking Rule 23 as the guiding principle; (v) The existing regulatory asset must be liquidated in a maximum of 7 years starting from 01.04.2024, taking Rule 23 as the guiding principle; and (vi) Regulatory Commissions must provide the trajectory and roadmap for liquidation of the regulatory asset, which will include a provision for dealing with carrying costs; and Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset.

The Supreme Court then held that this position is already recognized by the APTEL, as is evident from its order in O.P. No. 1 of 2011; it was necessary to restate the directions issued by the Appellate Tribunal in its orders dated 11.11.2011 and 14.11.2013 ie (i) APTEL has the power and the duty to issue directions to Regulatory Commissions when they fail to comply with the Act, rules or regulations, fail to perform their statutory functions and duties, or perform the same negligently,

improperly or poorly; such directions were intended to secure compliance with the letter and spirit of the Electricity Act, and APTEL can monitor the same through periodical status reports and by setting timelines for the Regulatory Commissions; (ii)Tariff determination is a statutory function entrusted to the Regulatory Commissions, and it must be undertaken on a regular, timely, and annual basis; (iii) Regulatory Commissions must undertake truing up on a regular basis, immediately at the end of the financial year so that any discrepancies between the ARR and the revenue realised through tariffs is brought to notice and can be rectified in a timely manner; this is necessary so that the burden or benefit of present years is not carried forward to future consumers, and delay in truing up could lead to imposition of carrying costs and cash-flow problems for the utility (iv) the tariff determined by the Regulatory Commissions must be cost-reflective as per Section 61 of the Electricity Act; (v) Regulatory Commissions must not ordinarily leave revenue gaps or create regulatory assets, and when it does so in exceptional circumstances, it must comply with the provisions of the Act, rules and regulations on the issue; and (vi) in case a Regulatory Commission creates a regulatory asset, it must allow carrying costs to the distribution utility, time-bound recovery and a liquidation schedule, and ensure that neither the financial position and liquidity of the distribution company nor consumer interests are jeopardised.

The Supreme Court held that, in the following ten *sutras*, they had examined the issue relating to regulatory asset, its position in the regulatory regime for determination of tariff, the duties and accountability of the regulators - the Regulatory Commissions and the powers of the Appellate Tribunal for Electricity to avert a regulatory failure: (i) Electricity is a public good. Its generation, transmission, and distribution are statutorily regulated to ensure access to supply, on a non-rival and non-exclusive basis; (ii) being a material resource within Article 39 of the Constitution of

India, Part-IV of the Constitution must inform the generation, transmission, and distribution of electricity; (iii) the statutory regulators, i.e. the Central and State Regulatory Commissions, along with Union and State Governments and other stakeholders, were equally bound by the mandate under Part-IV of the Constitution for its equitable distribution; this duty is predicated on the independent, efficient, objective functioning of the electricity commissions; they must guard themselves against 'regulatory failure', and in particular 'regulatory capture'; (iv) the interpretation of the powers and functions of the Regulatory Commissions have to be such that there is no regulatory vacuum, in that there is no unallocated residue of power of regulation; (v) Tariff determination is a regulatory function and it is the exclusive province of the Regulatory Commissions. Tariff determination involves multiple variables requiring the regulators to act with expertise and also with certain amount of flexibility; creation of regulatory asset is a 'measure' that the Commission adopts for good governance of tariff. It is also a recognition of revenue recoverable by distribution companies, and as such, it is an enforceable right, though only through tariff determination for later years. This 'measure' gives rise to correlative obligations of the Regulatory Commissions to manage it efficiently and allow easy liquidation. (vi) Disproportionate increase and long pending regulatory asset depict a 'regulatory failure'. It has serious consequences on all stakeholders and the ultimate burden is only on the consumer. Laws encompassing the creation, continuation, and liquidation of a 'regulatory asset' are located in the Act, National Tariff Plan and Policy, Rules, and Regulations made under the Act, as interpreted by the APTEL. The combined effect of this legal regime is the statutory obligation on the regulator(s). (vii) Ineffective and inefficient functioning of the Regulatory Commissions, coupled with acting under dictation, can lead to regulatory failure. The commissions are accountable for their decisions, and they

are subject to judicial review. (viii) apart from examining the legality and propriety of the orders of the Commissions in appeal, the APTEL has extra-ordinary powers under Section 121 to issue orders, instructions or directions for effective enforcement of the regulatory regime. This is one of the most important powers allocated to APTEL by Parliament. (ix) they had affirmed the limits of creation, continuation and liquidation of the regulatory asset, recognised the obligations of the Regulatory Commissions, and directed that they will be accountable and subject to such orders, instructions or directions as the APTEL may issue in this regard under Section 121; and (x) The regulatory regime under the Act is a complete code enunciating rights, prescribing obligations, and laying down the mechanism for course correction; and the effectiveness of these laws will be reflected in the will to enforce them.

The Supreme Court concluded by issuing the following directions: (i) as a first principle, tariff shall be cost-reflective; (ii) the revenue gap between the approved ARR and the estimated annual revenue from approved tariff may be in exceptional circumstances; (iii) the regulatory asset should not exceed a reasonable percentage, which percentage can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle; (iv) if a regulatory asset is created, it must be liquidated within a period of 3 years, taking Rule 23 as the guiding principle; (v) the existing regulatory asset must be liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 as the guiding principle; Regulatory Commissions must provide the trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset; (vi) Regulatory Commissions shall, in general, follow the principles

governing creation, continuation and liquidation of the regulatory asset, as laid down in paragraph 70, and also abide by the directions of APTEL summarised in paragraph 69.8; (vii) APTEL shall invoke its powers under Section 121 and issue such orders, instructions or directions as it may deem fit to the Regulatory Commissions for performance of their duties with respect to regulatory asset as enunciated in this judgment and as per the orders of the APTEL in O.P. No. 1/2011 dated 11.11.2011 and O.P. Nos. 1 and 2/2012 dated 14.11.2013; (viii) APTEL shall register a suo moto petition under Section 121 of the Act to monitor implementation of above directions (v) and (vi) till the conclusion of the period mentioned therein.

The judgement of the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** is not only binding inter-parties on the Appellants and the DERC (as they were parties to the proceedings before the Supreme Court which culminated in the afore-said judgement), the law declared therein by the Supreme Court would bind all Courts and Tribunals throughout the country in view of Article 141 of the Constitution of India. Further, as the Supreme Court exercises appellate powers over orders passed by this Tribunal under Section 125 of the Electricity Act, the law declared by the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** would bind this Tribunal also on this score.

Following the judgement of the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** and in terms thereof, this issue is disposed of making it clear that, in terms of the directions issued by the Supreme Court in the

afore-said judgement, this Tribunal would, in exercise of its jurisdiction under Section 121 of the Electricity Act, monitor implementation of the directions issued by the Supreme Court ie (a) that the existing regulatory assets are liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 of the Electricity (Amendment) Rules, 2024 as the guiding principle; (b) that Regulatory Commissions provide the trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs; (c) that Regulatory Commissions also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset; (d) that Regulatory Commissions, in general, follow the principles governing creation, continuation and liquidation of the regulatory asset, as laid down in paragraph 70 of the judgement of the Supreme Court, and also abide by the directions of APTEL summarised in paragraph 69.8 of the judgement of the Supreme Court. Further, as directed by the Supreme Court, this Tribunal shall issue such orders, instructions or directions, as may be necessary to ensure that the Regulatory Commissions perform their duties with respect to regulatory asset, as enunciated in the afore-said judgment of the Supreme Court, and the orders of this Tribunal in O.P. No. 1of 2011 dated 11.11.2011 and O.P. Nos. 1 and 2 of 2012 dated 14.11.2013.

XVIII. ISSUE34: DISALLOWANCE OF FIXED CHARGES FOR REGULATED POWER.

A. FINDINGS RECORDED IN THE IMPUGNED ORDER:

"3.94 The Commission observed that Petitioner's power was regulated from SJVNL and NHPC stations during some months in FY 2011-12. The Petitioner vide letter dated June 24, 2013 has intimated that the fixed cost borne by them against the

regulated power during FY 2011-12 was Rs.21.17 Crore. The Commission feels that the said cost borne by the licensee is an additional burden on consumers of Petitioner's area due to non-payment of dues by the Petitioner. Therefore, the Commission has decided to disallow the same in true up of FY 2011-12. The Commission may consider this fixed cost in subsequent true ups, while considering the credit, received from these generating stations to the Petitioner against sale of this regulated power to some other utility."

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT:

Shri Amit Kapur, Learned Counsel for the Appellant, would submit that Fixed/ Capacity Charges borne by the Appellant towards Regulated Power supply during the FY 2011-12 was disallowed by the Commission; Regulated Power refers to curtailment of power supply by those Generating Stations who had not been paid by the Appellant for the power procured from them; the DERC failed to consider that regulation of power by Generating Companies was due to non-payment of Power Purchase bills by the Appellant, which is a direct consequence of the DERC's consistent unlawful disallowance of legitimate dues with carrying cost; the DERC has admitted to non-cost reflective tariff determined over the years, which is not attributable to the Appellant, in its Statutory Advice dated 15.12.2020 and 01.02.2013; the Appellant had claimed Rs.7050.02 Crores as ARR for FY 2011-12, of which 82.7% was the Power Purchase Cost of Rs.5829.51 Crores; in its Tariff order dated 26.08.2011, the DERC had allowed an ARR of only Rs.5397.22 Crores for FY 2011-12 with PPC of Rs.4527.2 Crores reducing the Appellant's Power Purchase projections by Rs.1302.31 Crores to keep the tariff artificially low; in the

impugned order, while truing-up for FY 2011-12, the DERC approved ARR of Rs.6109.01 Crores, including Power Purchase Cost of Rs.5614.95 Crores; the Appellant's projected costs were correct estimates, given the fact that the total Power Purchase Cost trued up was Rs.5614.95 Crores, as against the allowed cost of Rs.4527.2 Crores in the Tariff Order dated 26.08.2011; the Appellant was given a cash shortfall of Rs.1087.75 Crores by the DERC; the Appellant could not have borne the entire Power Cost; the Power Purchase Cost approved in true up is 104% of the ARR determined by the DERC in the Tariff Order dated 26.08.2011; the DERC has created Regulatory Assets of Rs.1536.43 Crores, and Rs.1017.41 Crores in FY 2011-12 for which the DERC has provided a meagre 8% surcharge amounting to Rs.298.50 Crores for BRPL and Rs.158.90 Crores for FY 2012-13; this was wholly insufficient to recover the Regulatory Asset, leading to build-up of Regulatory Assets contrary to the assurances held out to the Supreme Court, and this Tribunal; creation of Revenue Gap and Regulatory Assets are primarily responsible for the Appellant's inability to make timely payments in spite of its best efforts; and this has eventually led to regulation of power supply.

Shri Amit Kapur, Learned Counsel for the Appellant, would further submit that the principle of 'actus curaie nemimem gravabit' is attracted; the doctrine of reasonableness and proportionality are also violated; and, having been denied substantial sums of money continuously, leading to regulation of power supply on account of the DERC's erroneous tariff determination, the Appellant cannot be penalized by this disallowance for failure of the DERC to perform its role as a regulator in determining cost reflective tariffs. Reliance is placed on (i) **HUDA Vs. Dr. Babeswar Kanhar: (2005) 1 SCC 191**, (ii) **Amerjeet Singh & Ors. Vs. Devi Ratan & Ors: (2010) 1 SCC 417,** (iii) **Haryana State Electricity Board vs.**

Gulshan Lal: (2009) 12 SCC 231, (iv) **Cantonment Board, Meerut vs. K. P. Singh: (2010) 2 SCC 518,** and (v) **SIEL Limited vs. Punjab State Electricity Regulatory Commission [(2007) APTEL 931.**

Sri Amit Kapur, Learned Counsel, would also submit that the DERC, in spite of acknowledging the prevailing issue on numerous occasions while recognizing the Revenue Gap, has still failed to remedy the situation; they admitted to the GoNCTD that a surcharge of around 20% is required on the applicable tariff, and yet allowed a surcharge of only 8% leading to accumulation of Regulatory Assets; having acknowledged the precarious financial condition of the Appellant, the Commission directed deduction of the maximum permissible rebate from the ARR without (a) allowing sufficient tariff to the Appellant, to enable payment of Power Purchase Cost within a shorter credit period, that was required to earn the maximum rebate, and (b) considering that, in the absence of sufficient funds, the Appellant had to bear the cost of arranging funds to make prompt payment; Fixed/ Capacity Charges, borne on account of Regulated Power supply pertaining to FY 2011-12, must be allowed during the truing up exercise of FY 2011-12 itself, and not in future/ subsequent true-ups; and every such deferment puts an additional burden of Carrying Cost on the consumers.

Sri Amit Kapur, Learned Counsel, would state that, even if costs were to be adjusted against credit received from the Generating Companies, the DERC ought to have allowed the net costs after adjustment; Regulation 13 of the CERC (Regulation of power Supply) Regulations 2010 provides for such treatment; the Appellant received a sum of Rs.3.33 Crores during FY 2012-13 as credit amount against sale of Regulated Power during FY 2011-12; the DERC, in its subsequent Tariff Order dated 23.07.2014, adjusted the said credit amount of Rs.3.33

Crores against Rs.21.17 Crores on Fixed/ Capacity Charges borne by the Appellant in FY 2011-12, while disallowing the net additional burden of Rs.17.84 Crores against power regulated in FY 2011-12 (Refer: Paras 3.88 and 3.89 of the impugned order); the DERC has allowed the credit amount while disallowing the net/ additional fixed/ Capacity Charges; such treatment by the DERC further exacerbated the Appellant's financial situation, instead of ensuring recovery of costs; payment of Fixed/ Capacity Charges by the Appellant against Regulated Power Supply is mandatory in terms of the 2010 CERC Regulations, failing which the generator can curtail supply to such Discom, and divert the available power to other procurers (Refer: Regulation 12(1) of the 2010 CERC Regulations); owing to its precarious financial situation, due to non-cost reflective tariff determined by the DERC, the Appellant was unable to make timely payments to the Generation and Transmission Utilities due to which SJVN Ltd. issued regulation notices dated 12.07.2011 and 21.07.2011, and NHPC Limited issued regulation notices dated 18.07.2011 and 03.08.2011; in terms of the said notices, power was regulated for the period from 27.11.2011 to 31.03.2012, and 22.02.2012 to 31.03.2012, of FY 2011-12; the Appellant, by its letter dated 18.08.2011, sought guidance from the DERC on these notices; as they were obliged to make payment of Fixed/ Capacity Charges during the period of power regulation, in terms of the 2010 CERC Regulations, the Appellant claimed the Capacity Charges, paid by them to the Generators, which was disallowed by the DERC; the Appellant's precarious financial situation was caused by acts and omissions of the DERC such as marginal allowances, non-cost reflective tariff and absence of timely amortization schedule for liquidation of regulatory assets; this has created a sense of regulatory uncertainty with the Banks and financial institutions, leading to difficulty in availing loans; the DERC cannot

penalize the Appellant for their failure to make payment, when the DERC had itself failed to perform its role to determine cost reflective tariffs, and had kept the tariff low; in such an event, when power regulation has evidently occurred due to action/ inaction of the DERC, the Appellant cannot be made to suffer and bear the costs by not being allowed to recover the Fixed/ Capacity Charges; and this amount is required to be allowed during the true up exercise for FY 2011-12 itself, and not in future/ subsequent true-ups, since deferment in recovery of legitimate costs puts an additional burden of Carrying Cost on the consumers.

C. SUBMISSIONS URGED ON BEHALF OF THE DERC:

It is submitted, on behalf of the DERC, that the Appellants, in essence, are claiming a vested right to costs incurred during the periods of no-supply; the Appellants have, admittedly, defaulted in payments that were to be contractually made to the Generators; in these circumstances, the power supply to the Appellants was regulated by SJVNL and NHPC power Stations; it is in such circumstances that the Appellants did not receive supply of electricity as contracted on account of default in payment, and was still required to pay the fixed costs for the contracted supply; the scheme of the Electricity Act only permits the cost of electricity supplied to be recovered from consumers, and not costs when electricity is not supplied (Sections 1(17), 1(23)(a) and (b), 1(70), 42(1), 44, 45 and 61); the Distribution Licensee and its tariff under Section 61 is restricted to the cost of supply of electricity, which, as per the Electricity Act in the case of the Appellants, would be the cost of sale of electrical energy to a consumer; in the event that the Appellants are not supplying electrical energy, on account of its being regulated, the costs associated with the same, including any fixed charge, cannot be passed on to the consumers; the tariff is required to be based on commercial principles,

and it would be unfair that the retail supply consumers in Delhi are saddled with fixed costs for electricity that was never procured on their behalf; and the Appellants were required to honour their contracts with the generating companies, and they cannot wish away their default and saddle it on to the consumers who are paying their bills for electricity as contracted.

It is further submitted, on behalf of the DERC, that each of these submissions have already been raised by the Appellant, and is a mere attempt to deflect from their defaults, by raising the spectre of Regulatory Assets; this Tribunal has held that consumers cannot be penalised when they are paying their bills, and the Appellants cannot refrain from payment of their current bills to the Generators (Order of Aptel in IA No. 365 of 2013 in Appeal No. 266 of 2013 dated 11.03.2014); the Appellants are mandated to make their current payments, and retail supply consumers cannot be asked to pay for the defaults being made by the Appellant; mere financial hardship is not a ground for frustration of contract; and the Appellants were obligated to make payments.

It is also submitted, on behalf of the DERC, that the Appellants have moved the Writ jurisdiction of the Supreme Court, and have sought reliefs against the DERC as well as the generators on account of payments; the Supreme Court has passed interim orders in these matters; certain generators are also seeking reliefs in the Supreme Court on account of defaults by the Appellants; adjudication which this Tribunal had directed the Commission to go into, vide its order dated 11.03.2014, are on issues relating to why the Appellants had not been making payments to the generators; this is an issue which is now pending before the Supreme Court, and several interim orders have been passed therein; the final adjudication on why the Appellants had defaulted in

payments is sub-judice before the Supreme Court, and the said issue cannot be adjudicated by this Tribunal as per the ratio of the Supreme Court's decision in **State of Andhra Pradesh vs. Raghu Ramakrishna Raju Kanumuru: (2002) 8 SCC 156**;the Commission had initiated suo motu proceedings, vide Petition No. 67 & 68 of 2011 relating to Regulation/ Diversion of Power Supply to the Appellants for non-payment and non-maintenance of Letters of Credit and Show Cause Notices under Section 24 of the Electricity Act, 2003; the Appellants submitted before the Commission that judicial propriety required that the issues relating to non-payment to Gencos and Transcos be kept pending till adjudication by the Supreme Court; this request was acceded to by the Commission, and the order dated 22.07.2015 was passed to hold that the specific issue of non-payment to Gencos and Transcos, which is the subject matter of adjudication pending before the Supreme Court, would not be adjudicated upon pending disposal of the case in the Supreme Court; the Appellants are not entitled to the reliefs claimed, since the entire basis of their claim is that, but for the actions of the Commission, they would not have suffered power regulation which is yet to be adjudicated upon.

D. REJOINDER SUBMISSIONS OF THE APPELLANT:

In the Rejoinder Submissions, Shri Amit Kapur, Learned Counsel for the Appellant, would refer to the judgment of the Delhi High Court, in W.P. (C) No.12260 of 2018 dated 17.09.2019 to submit that Regulation 5.30 of the 2007 Regulations allows the Appellant to recover the cost of power incurred by the Appellant including the Fixed Charges; the judgment of the Supreme Court, in **BRPL VS. DERC [(2023) 4 SCC 788, Para 18],** is applicable; Section 61 of the Electricity Act does not restrict tariff to the cost of supply; while safeguarding the interest of consumers,

the DERC is required to ensure recovery of the cost of electricity in a reasonable manner; fixed costs are payable to Generating Companies even if power is not scheduled; the DERC has, year-on-year, continued to determine non-cost reflective tariffs, leading to non-recovery of costs and creation of Regulatory Assets; DERC's failure to determine cost-reflective tariff is a clear violation of Section 61(g), which has culminated in a situation wherein the Appellant is unable to ensure timely payments to the Generating Companies, ultimately leading to regulation of power supply; the present situation is solely attributable to the DERC's actions/ inaction; Section 61(i) requires the DERC to act in accordance with the Tariff Policy; Clause 8.2.2 of the 2006 Tariff Policy, notified under Section 3 of the Electricity Act, provides that the Regulatory Asset can be created only as exception, including for natural causes or force majeure conditions; and recovery of Regulatory Asset should be time-bound and within a period not exceeding three years at the most, and preferably within the control period; creation of the Regulatory Asset by DERC is unlawful and in violation of Section 61(i); for the actions/ inaction of the DERC, the Appellant cannot be made to suffer losses; there was no power cut due to Regulation of Power during the relevant period; on the other hand, during the years of Regulation of Power, the Appellant had saved cost which would otherwise have burdened the consumers; the Appellant cannot be made to suffer twice, the first by insufficient tariff determination and the second by not being allowed to recover the costs of such insufficient tariff determination; the interim order of this Tribunal dated 11.03.2014 was issued subject to final outcome of the present appeal; the issues were not finally decided, and reliance placed on the said order is misplaced; an Interlocutory Order is provisional as held in **Manjit Singh Sodhi vs. Custodian & Ors [(2022) SCC OnLine SC 990 Para 13]**; **Central Bank of India Ltd. vs. Gokul Chand [AIR (1967) SC**

799, para 3]; **Pandurang Ramchandra Mandlik vs, Shantibai Ramchandra Ghatge [(1989) Supp (2) SCC 627, Para 20]**; **Mammu vs. Hari Mohan [(2000) 2 SCC 32, Para 10]**; **Ferro Alloys Corpn. Ltd. vs. Union of India [(1999) 4 SCC 149, Para 21]**; the order dated 11.03.2014, being an interim order in nature, does not have precedential value as held in **State of Assam vs. Barak Upatyaka D.U. Karmachari Sanstha [(2009) 5 SCC 694, Para 21]**; **Empire Industries Ltd. vs. Union of India [(1985) 3 SCC 314, Para 59]**; and **Abhishek Banerjee vs. Directorate of Enforcement [(2022) SCC OnLine Del 747, Para 41]**; by the said interim order, this Tribunal has directed DERC to look into the issues of (i) the Appellant meeting current expenses to avoid build up of RA, (ii) Liquidation of accumulated Regulatory Asset at the end of FY 2011-2012, (iii) non-payment of bills by the Appellant, and (iv) deciding and periodically reviewing the roadmap for liquidation of the Regulatory Asset while ensuring that the Appellant is not facing any constraints in making current payments; with regard to the matters pending before the Supreme Court, the pendency of cases before the Supreme Court is of no relevance; the DERC is taking shelter of issues being sub-judice to evade adjudication of the present issue, despite having admitted to determining non-cost reflective tariff in its Statutory Advise dated 15.12.2010 and 01.02.2013; the Appellant has made payment of Fixed Costs towards Regulated Power in terms of the 2010 CERC Regulations, and the same cannot be disallowed on the ground that the related issues were pending; and the DERC has failed to consider the delay in granting relief to the Appellant by deferring recovery of legitimate costs that would put an additional burden of carrying cost on consumers, thus defeating the principle of safeguarding consumer interest under the Electricity Act

E. ANALYSIS:

The case of the Appellant on this issue, in short, is that the Generating Companies had curtailed power supply to them, since they had failed to make payment for the power supplied to them earlier; and, since the Appellants' failure to do so is primarily because of the Revenue Gap and Regulatory Assets which are of the DERC's making, the fixed charges paid by them to such generators must be allowed as a pass-through. The submission of the DERC, on the other hand, is that consumers, in the area of supply of the appellants, are only required to make payment for the electricity supplied to them, and not for electricity not supplied; and it is impermissible for the Commission, therefore, to mulct the consumers with the obligation to pay fixed charges which the appellants had paid to the generators even in a situation where electricity was not supplied to them by the Appellant herein. In short, the submission of the DERC is that consumers cannot be saddled with fixed cost for electricity that was not procured on their behalf.

It is useful, in this context, to refer to certain statutory provisions. Section 2(17) of the Electricity Act defines "distribution licensee" to mean a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply. Section 2(23)(a) defines "electricity" to mean electrical energy generated, transmitted, supplied or traded for any purpose. Section 2(23)(b) defines 'electricity' to mean electrical energy used for any purpose except the transmission of messages. Section 2(70) defines 'supply', in relation to electricity, to mean the sale of electricity to a licensee or consumer.

Section 42(1) of the Electricity Act stipulates that it shall be the duty of a distribution licensee to develop and maintain an efficient, co-ordinated and economical distribution system in his area of supply, and to supply electricity in accordance with the provisions contained in the

Electricity Act. Section 44 stipulates that nothing contained in Section 43 shall be taken as requiring a distribution licensee to give supply of electricity to any premises if he is prevented from so doing by cyclone, floods, storms or other occurrences beyond his control. Section 45(1) stipulates that, subject to the provisions of Section 45, the prices to be charged by a distribution licensee for the supply of electricity by him pursuant to Section 43 shall be in accordance with such tariffs fixed from time to time, and the conditions of his licence. Section 45(2) (a) stipulates that the charges, for electricity supplied by a distribution licensee, shall be fixed in accordance with the methods and principles as may be specified by the concerned State Commission. Section 45(3) stipulates that the charges for electricity supplied by a distribution licensee may include - (a) a fixed charge in addition to the charge for the actual electricity supplied, (b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee. Section 45(4) stipulates that, subject to the provisions of Section 62, in fixing charges under this Section, a distribution licensee shall not show undue preference to any person or class of persons or discriminate against any person or class of persons. Section 45(5) stipulates that the charges fixed by the Distribution licensee shall be in accordance with the provisions of the Electricity Act, and the regulations made in this behalf by the concerned State Commission. Section 61(d) requires the Commission to specify the terms and conditions for determination of tariff and, in doing so, to be guided by clauses (a) to (i) there-under. Section 61(d) requires the Commission to safeguard consumers' interest and, at the same time, provide for recovery of the cost of electricity in a reasonable manner.

The afore-said provisions do show that it is only for electricity supplied to them are the consumers required to make payment. The

fixed charges which the Appellant-distribution licensees were required to pay the generators, for their inability to make payment towards the outstanding dues, does not relate to the electricity supplied by the Appellants to the consumers. On the other hand, it is for non-payment of the outstanding dues that the generators had stopped supplying power to the Appellants while, at the same time, calling upon them to pay fixed charges in terms of the agreements/applicable regulations.

The contention of the Appellants is that they did not have the financial wherewithal to make payment, and this financial distress which they were facing was solely on account of the burgeoning regulatory assets, and creation of a huge revenue gap in the tariff determination exercise. The doctrine of restitution is made the basis of the claim under this head. The Appellants contend that it is because of the tariff orders passed by the DERC, keeping the tariff at an artificially low level, that they have suffered acute financial distress resulting in their inability to make payment to the generators. Reliance is placed by the Appellant on (1) **HUDA Vs. Dr. Babeswar Kanhar [(2005) 1 SCC 191, Para 5]**; (2) **Amerjeet Singh & Ors. Vs. Devi Ratan & Ors. [(2010) 1 SCC 417, Paras 17, 25 & 34];** (3) **Haryana State Electricity Board vs. Gulshan Lal [(2009) 12 SCC 231, Para 47]**; (4) **Cantonment Board, Meerut vs. K. P. Singh [(2010) 2 SCC 518, Paras 13 & 16]**; and (5) **SIEL Limited vs. Punjab State Electricity Regulatory Commission [(2007) APTEL 931, Paras 44 to 49]**.

a. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT:

1. In **HUDA Vs. Dr. BabeswarKanhar [(2005) 1 SCC 191, Para 5],** the Supreme Court observed that what is stipulated, in clause 4 of the letter dated 30-10-2001, is a communication regarding refusal to accept

the allotment; this was done on 28-11-2001; Respondent No.1 cannot be put to loss for the closure of the office of HUDA on 1-12-2001 and 2-12-2001, and the postal holiday on 30-11-2001; in fact he had no control over these matters; even the logic of Section 10 of the General Clauses Act, 1897 can be pressed into service; apart from the said Section, and various provisions in various other Acts, there is the general principle that a party prevented from doing an act by some circumstances beyond his control, can do so at the first subsequent opportunity (**Sambasiva Chari v. Ramasami Reddi [(1898) 8 MLJ 265 : ILR 22 Mad 179]**); the underlying object of the principle is to enable a person to do what he could have done on a holiday, on the next working day; where, therefore, when a period is prescribed for the performance of an act in a court or office, and that period expires on a holiday, then the act should be considered to have been done within that period if it is done on the next day on which the court or office is open; the reason is that law does not compel the performance of an impossibility. (**HosseinAlly v. Donzelle: ILR (1880) 5 Cal 906 : 6 CLR 239**); every consideration of justice and expediency would require that the accepted principle, which underlies Section 10 of the General Clauses Act, should be applied in cases where it does not otherwise in terms apply; the principles underlying are lex non cogit ad impossibilia (the law does not compel a man to do the impossible), and actus curiae neminem gravabit (the act of court shall prejudice no man); there is nothing infirm in the orders passed by the forums below; however, the rate of interest fixed appears to be slightly on the higher side and is reduced to 9% to be paid with effect from 3-12-2001 i.e. the date on which the letter was received by HUDA.

2. In **Amerjeet Singh &Ors. Vs. Devi Ratan &Ors: (2010) 1 SCC 417, Paras 17, 25 & 34],** the Supreme Court held that no litigant can derive any benefit from mere pendency of case in a court of law; a party

cannot be allowed to take any benefit of its own wrongs by getting an interim order, and thereafter blame the court; the fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed; the maxim actus curiae neminem gravabit, which means that the act of the court shall prejudice no one, becomes applicable in such a case; in such a fact situation, the court is under an obligation to undo the wrong done to a party by the act of the court; thus, any undeserved or unfair advantage gained by a party, invoking the jurisdiction of the court, must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the court. (**Shiv Shankar v. U.P. SRTC: 1995 Supp (2) SCC 726; GTC Industries Ltd. v. Union of India: (1998) 3 SCC 376;** and **Jaipur Municipal Corpn. v. C.L. Mishra: (2005) 8 SCC 423);** and the appellants were entitled to the relief purely on equitable grounds without going into any other legal issue.

3. In **Haryana State Electricity Board vs. Gulshan Lal [(2009) 12 SCC 231, Para 47]**, the Supreme Court observed that nobody should suffer owing to the mistake on the part of the court in view of the maxim actus curiae neminem gravabit.

4. In **Cantonment Board, Meerut vs. K. P. Singh [(2010) 2 SCC 518, Paras 13 & 16]**, the Supreme Court held that, for applying the maxim actus curiae neminem gravabit, it has to be shown that any party has been prejudiced on account of any order passed by the Court; they did not find any prejudice having been caused to the respondents; in **Karnataka Rare Earth v. Deptt. of Mines & Geology: (2004) 2 SCC 783,** it was held that the doctrine of actus curiae neminem gravabit is not confined in its application only to such acts of the court which are erroneous; the doctrine is applicable to all such acts as to which it can be

held that the court would not have so acted had it been correctly apprised of the facts and the law; it is the principle of restitution which is attracted; when on account of an act of the party persuading the court to pass an order, which at the end is held as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered, but for the order of the court and the act of such party, then the successful party finally held entitled to a relief, assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the court would not have been passed; the successful party can demand: (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost.

5. In **Siel Limited v. Punjab State Electricity Regulatory Commission, 2006 SCC OnLine APTEL 49,** this Tribunal observed that allocation of the cost was a tariff issue; consumers who were being continuously affected by the allocation did not have a say in the matter; the mistake could not be allowed to continue ad infinitum; relief must be given to the consumers on the analogy of the maxim Actus Curiae Neminem Gravabit, which meant that no one should suffer for the mistake of the court; there was no reason why the analogy of this principle, which applied to the act of the court, should not be applied and extended to the mistake of an authority like the Commission and the State, discharging quasi-judicial or/and even administrative functions, which adversely affected the people at large, and caused grave injustice and harm to them; and the wrong must be rectified and they need to be relegated to a situation in which they would have been placed had that mistake not taken place.

Relying on **Jang Singh v. Brij Lal, AIR 1966 SC 1631, Indian Export House Pvt. Ltd, New Delhi v. J.R. Vohra, AIR 1983 Delhi 167,** and **Johri Singh v. Sach Pal Singh AIR 1989 SC 2073,** this Tribunal, in **Siel Limited**, further observed that, in **A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602,** the Supreme Court had observed that the principle, that an act of the court shall prejudice no one, is founded upon justice and good sense and affords a safe and certain guide for the administration of the law; and to own up the mistake, when judicial satisfaction is reached, does not militate against its status or authority, and perhaps it would enhance both.

b. JUDGEMENT RELIED ON BEHALF OF THE DERC:

In support of their submission that, since the larger issues are pending before the Supreme Court, this Tribunal should not adjudicate on this issue, reliance is placed on behalf of the DERC on **State of Andhra Pradesh vs. Raghu Ramakrishna Raju Kanumuru: (2022) 8 SCC 156.**

In **State of A.P. v. Raghu Ramakrishna Raju Kanumuru, (2022) 8 SCC 156,** the Supreme Court held that it was not appropriate on the part of the National Green Tribunal to have continued with the proceedings before it, specifically when it was pointed that the High Court was also in seizing of the matter, and had passed an interim order permitting the construction; conflicting orders passed by the National Green Tribunal and the High Court would lead to an anomalous situation, where the authorities would be faced with a difficulty as to which order they are required to follow; there can be no manner of doubt that, in such a situation, it is the orders passed by the constitutional courts, which would prevail over the orders passed by the statutory tribunals; and continuation of proceedings before the National Green Tribunal for the

same cause of action, which is seized with the High Court, would not be in the interest of justice.

c. INTERIM ORDER PASSED BY THIS TRIBUNAL:

In its order, in **IA No. 365 of 2013 in Appeal No. 266 of 2013 [Order of this Tribunal dated 11.03.2014, Paras 11, 12, 18 and 19];** this Tribunal observed that Regulatory Assets have been created by the Commission to avoid tariff shock to the consumers; however, it was affecting the finances of the Applicants; the carrying cost on the accumulated Regulatory Asset was compounding the problem; the Applicants were not making payment to the generating companies and transmission licensees affecting the liquidity of the generating and transmission companies; load shedding in the National Capital due to regulation of power supply by the generating companies due to default in payment was unacceptable, particularly when consumers were paying their bills at the tariff determined by the Commission; consumers cannot be made to suffer for no fault of theirs; while they appreciated the anxiety of the Applicants for recovery of the Regulatory Assets, they failed to understand why the Applicants/Appellants were not making current payments when the impugned order dated 31.7.2013 provided for recovery of their full costs for FY 2013-14 and over and above which the State Commission had decided to continue a surcharge of 8% to cover the carrying cost.

This Tribunal issued interim directions to the Commission, among others, to examine why the Applicants/Appellants were not paying the current bills of the generating and transmission companies when the impugned order dated 31.7.2013 had provided for meeting the current expenses of the distribution licensees including the carrying cost and take further necessary action in the matter; the current payments had to

be ensured at all cost to avoid any possibility of reduction of power availability to the NCT of Delhi; the Commission had to decide a road map for liquidation of the accepted Regulatory Assets keeping in view the interests of the consumers and the distribution licensees after satisfying itself that there were no constraints in arranging finances for making regular and timely payments of the current dues by the Applicants/Appellants to the generating companies and transmission licensees, and meeting the operation and maintenance expenses and arranging finances for taking up augmentation of distribution system for meeting the load demand of the National Capital.

As noted hereinabove, the Appellants herein approached the Supreme Court by filing WP(C) Nos. 104 and 105 of 2014, with BSES Rajdhani Power Ltd filing WP(C) No. 104 of 2014 and BSES Yamuna Power Ltd filing WP(C) No. 105 of 2014. In the said writ petitions, besides the Union of India and the DERC, the power producers and transmission utilities such as NTPC, Power Grid Corporation of India, National Hydro Power Corporation; Damodar Valley Corporation, Satluj Jal Vidyut Nigam Ltd, Aravali Power Company Private Ltd, Delhi Transco Ltd, Indraprastha Power Generation Company Ltd. and Pragati Power Company Corporation Ltd. were arrayed as Respondents 5 to 13.

In the afore-said two writ petitions, the Appellants herein had sought the following reliefs (i) to direct Respondent Nos. 5 to 13 to not disconnect or discontinue power supply or take any other coercive steps till the Supreme Court determined the appropriate mechanism for adjusting the dues owed by them to Respondent Nos. 5 to 13 from the amounts due and owed to the Petitioner (Appellant); (ii) declare that the Petitioner was entitled to prudently incur cost and allowance in accordance with the mandate of Section 61 and 62 of the Electricity Act,

2003, and in terms of the methodologies as specified under the Multi Year Tariff Regulations; (iii) direct the DERC to give effect to the deferred cost created as regulatory assets in accordance with para 8.2.2 of the tariff policy; (iv) protect the investment made by the Petitioners and the assured return from the licensed business; and (v) to pass such other or further orders as may be deemed necessary in the facts and circumstances of the case.

In its order, in IA No. 7 in Civil Appeal No. 884 of 2010 along with WP(C) Nos. 104 and 105 of 2014 dated 07.02.2014, the Supreme Court, while directing the Appeals and the writ petitions to be listed for final disposal on 26.03.2014, directed that, in the meantime, the applicant(s) (Appellants herein) should pay Rs.50 Crores (Rupees Fifty Crores) within a period of two weeks on account of the amount demanded by NTPC; and there shall be no disconnection in the supply of electricity till the next date of hearing, i.e. 26th March, 2014.

Final Judgement was passed by the Supreme Court on 06.08.2025. In **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** the Supreme Court observed that the prayers in W.P. (C) Nos. 104 and 105/2014 filed by BRPL and BYPL were similar, which was formulated as follows: (i) to hold and declare that the petitioners are entitled to prudently incurred cost and allowances in terms of Sections 61 and 62 of the Electricity Act, 2003 and Multi Year Tariff Regulations; (ii) to direct the DERC to give effect to the deferred cost creating a regulatory asset in accordance with Para 8.2.2 of the National Tariff Policy; (iii) to direct the respondent-generating companies to not disconnect or discontinue power supply or take any other coercive steps till this Court determines an appropriate mechanism for adjustment of dues owed by the distribution

companies from the amounts due and owed to them; and (iv) to protect their investment and assured return from the licensed business.

The Supreme Court also noted the submissions of the learned Attorney General, appearing on behalf of the generating and transmission companies namely Indraprastha Power Generation Company Limited, Pragati Power Corporation Limited, and DTL, that, while the DERC had recognized a revenue gap for all three distribution companies, BRPL and BYPL were not making regular payments to IGPCL, PPCL and DTL, despite making regular payments to other power utilities; TPDDL had been regularly paying the bill amounts; the dues, on account of non-payment by BRPL and BYPL, could not be set-off/netted-off/squared off against the unrecovered tariff, which must be realized by the distribution companies from consumers in accordance with DERC orders; and adjustment of any payments against past dues was in accordance with the provisions of their power purchase agreements and Rule 4 of the Electricity (Late Payment Surcharge) Rules, 2022.

In its judgement, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),** the Supreme Court issued the following directions: (i) as a first principle, tariff shall be cost-reflective; (ii) the revenue gap between the approved ARR and the estimated annual revenue from approved tariff may be in exceptional circumstances; (iii) the regulatory asset should not exceed a reasonable percentage, which percentage can be arrived on the basis of Rule 23 of the Electricity Rules that prescribes 3% of the ARR as the guiding principle; (iv) if a regulatory asset is created, it must be liquidated within a period of 3 years, taking Rule 23 as the guiding principle; (v) the existing regulatory asset must be liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 as the guiding principle; Regulatory Commissions must provide the

trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs. Regulatory Commissions must also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset; (vi) Regulatory Commissions shall in general follow the principles governing creation, continuation and liquidation of the regulatory asset, as laid down in paragraph 70, and also abide by the directions of the APTEL summarised in paragraph 69.8; (vii) APTEL shall invoke its powers under Section 121 and issue such orders, instructions or directions as it may deem fit to the Regulatory Commissions for performance of their duties with respect to regulatory asset as enunciated in this judgment and as per the orders of the APTEL in O.P. No. 1 of 2011 dated 11.11.2011 and O.P. Nos. 1 and 2 of 2012 dated 14.11.2013; (viii) APTEL shall register a suo moto petition under Section 121 of the Act to monitor implementation of above directions (v) and (vi) till the conclusion of the period mentioned therein.

With the afore-said directions, the Supreme Court disposed of W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 and C.A. No. 4010/2014 and C.A. No. 4013/2014 against APTEL's order dated 11.03.2014. Not only were the generating companies and transmission utilities arrayed as Respondents 5 to 13 in WP (C) Nos. 104 and 105 of 2014, a specific relief was also sought in the said Writ Petitions to direct Respondents 5 to 13 not to disconnect or discontinue power supply or take any other coercive steps till the Supreme Court determined the appropriate mechanism for adjusting the dues owed by them to Respondents 5 to 13 from the amounts due and owed to the Appellants. The Supreme Court had initially, while directing the Appellants to pay Rs.50 Crores to NTPC, directed that there should be no disconnection in supply of electricity. Thereafter, the Supreme Court directed the

Appellants to continue making current payments to the generating and transmission companies, and it is only with respect to the arrears that the interim order appears to have continued to remain in operation.

As W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021 and C.A. No. 4010/2014 and C.A. No. 4013/2014 preferred against APTEL's order dated 11.03.2014, have been disposed of by the Supreme Court, by its judgement dated 06.08.2025, the interim orders passed earlier would not survive disposal of the said Writ Petitions and Civil Appeals. Consequent on disposal of the afore-said Writ Petitions and Civil Appeals, and as the Supreme Court has issued directions for liquidation of the existing regulatory assets of all distribution companies, the restraint placed on Respondent Nos. 5 to 13 to refrain from taking coercive steps for recovery of its dues, may possibly also not survive. As noted hereinabove, the existing regulatory assets have been directed, by the Supreme Court, to be liquidated in four years from 01.04.2024. The Appellants cannot, therefore, be heard to contend that, since their failure to make payment, for the power supplied to them earlier by the Generating Companies is justified as the Revenue Gap and Regulatory Assets are of the DERC's making, the fixed charges paid by them to such generators must be allowed as a pass-through.

Even otherwise, it would be inappropriate for this Tribunal, in an Appeal against the tariff determination exercise undertaken by the DERC, to adjudicate on this issue when none of the generating/ transmission utilities are parties to these proceedings, and the questions of fact and law which would arise for consideration on this issue can be effectively adjudicated only after giving the generating/ transmission companies a reasonable opportunity of being heard.

In the light of the judgement of the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (**Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025**),**, the appellant's claim under this head necessitates rejection.

XIX. CONCLUSION:

To sum up, our conclusion on the sixteen issues, which have been considered in this judgement issue-wise, are as under:-

(1) ISSUE 1: NO ROADMAP FOR RECOVERY OF REGULATORY ASSET AND SURCHARGE INSUFFICIENT TO RECOVER THE ACCUMULATED SHORTFALL:

Following the judgement of the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS** (Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025), and in terms thereof, this issue is disposed of making it clear that, in terms of the directions issued by the Supreme Court, in the afore-said judgement, this Tribunal would, in exercise of its jurisdiction under Section 121 of the Electricity Act, monitor implementation of the directions issued by the Supreme Court i.e. (a) that the existing regulatory assets are liquidated in a maximum of 4 years starting from 01.04.2024, taking Rule 23 of the Electricity (Amendment) Rules, 2024 as the guiding principle; (b) that Regulatory Commissions provide the trajectory and roadmap for liquidation of the existing regulatory asset, which will include a provision for dealing with carrying costs; (c) that Regulatory Commissions also undertake strict and intensive audit of the circumstances in which the distribution companies have continued without recovery of the regulatory asset; (d) that Regulatory Commissions, in general, follow the principles governing creation,

continuation and liquidation of the regulatory asset, as laid down in paragraph 70 of the judgement of the Supreme Court, and also abide by the directions of APTEL summarised in paragraph 69.8 of the judgement of the Supreme Court. Further, as directed by the Supreme Court, this Tribunal shall issue such orders, instructions or directions as may be necessary to ensure that the Regulatory Commissions perform their duties with respect to regulatory asset as enunciated in the afore-said judgment of the Supreme Court, and the orders of this Tribunal in O.P. No. 1of 2011 dated 11.11.2011 and O.P. Nos. 1 and 2 of 2012 dated 14.11.2013.

(2) ISSUE NO. 8: NON-CONSIDERATION OF BANK CHARGES (FOR 1ST MYT PERIOD):

The matter, relating to this issue, is remanded to the DERC which shall, in the first instance, ascertain whether bank charges were included in the cost of debt at the beginning of the control period; and only if it had not been so included, would the DERC, after conducting a prudence check, then be required to extend to the Appellant the benefit of bank charges under the head “Other Miscellaneous Expenses”, on the basis of actuals confining the Appellants’ claim to those sought by them in the Petition filed by them before the DERC.

(3) ISSUE 14: TRUING-UP OF INCOME TAX FROM FY 2002-03 TO 2006-07:

The provisions of the MYT Regulations, 2007 are not applicable retrospectively for the period prior to when the Regulations came into force on 30.05.2007. The 2007 Regulations cannot, therefore, be applied to the earlier policy direction period from FY 2002-03 to FY 2006-07. As the Truing up for the policy direction period was considered in the MYT

Tariff order dated 23rd February, 2008, the DERC is justified in not reviewing the appellants' claim in respect of Income Tax for FY 2002-03 to FY 2006-07. The claim of the appellants', under this head, is therefore rejected.

(4) ISSUE 15: TRUING-UP OF INCOME TAX FOR FY 2007-08 TO FY 2011-12.

The DERC has rightly approved income tax, actually assessed or computed based on the Return on Equity component whichever was lower, in accordance with the MYT Regulations, 2007. The interests of the Appellant have also been adequately safeguarded by the DERC by holding that, if the tax assessed/ paid in any financial year is higher than the tax allowed due to the reason that the higher tax is on account of any arrears of income tax pertaining to the past years, the utility may claim this in the ARR for the following year producing documentary evidence establishing the claim towards arrears. The Appellants' claim, under this head, is therefore rejected.

(5) ISSUE NO.19: DISALLOWANCE OF R&M EXPENSES DURING MYT CONTROL PERIOD:

The impugned order, to the extent R&M expenses were trued up on actual basis, is contrary to the 2007 Regulations, and is accordingly set aside. The DERC shall, in terms of the 2007 Regulations, compute the R&M expenditure on a normative basis, and extend the said benefit to the Appellants herein.

(6) ISSUE NO. 23: ERRONEOUS CONSIDERATION OF OPENING CONSUMER CONTRIBUTION FOR THE MYT PERIOD.

In terms of the observations of this Tribunal, in its judgement in **BSES Yamuna Power Ltd. & Ors Vs. DERC 2021 SCC Online APTEL 50** as detailed earlier in this judgement, the Appellants' claim under this head is rejected, leaving it open to the DERC to correct the error in terms of the afore-said order of this Tribunal.

(7) ISSUE 24(D): COLLECTION OF ELECTRICITY DURY:

The impugned order, in so far as this issue is concerned, is set aside, and the matter is remanded to the DERC to ascertain whether such expenditure was taken into consideration while fixing the O&M expenses for the base year of the Control period. In case it was not, then the appellant is entitled to claim deduction of the actual expenditure incurred from the income received by the Appellant from the Delhi Municipal Corporation towards cost of collection of electricity duty which has been treated, in the impugned order, as non-tariff income. The DERC would, in such circumstances, be required to cause a prudence check of the expenditure incurred by the Appellant towards collection of electricity duty, more particularly those which are referable to Clauses 4, 8 and 9 of the bye laws, and extend the said benefit to the Appellants.

(8) ISSUE NO. 24(E): CONNECTION/ RECONNECTION CHARGES.

The appellants claim, under this head, is rejected since this claim was not raised by them in their original tariff petition dated 10.12.2012, but was raised by them for the first time, by their letter dated 26.06.2013, after the last date for receipt of objections/suggestions from the general public had expired.

(9) ISSUE NO.29: REVISION OF DISTRIBUTION LOSS FROM FY 2007-08 TO FY 2010-11:

The matter is remanded to the DERC which shall consider exercising its power of relaxation under Regulation 13.14 of the 2007 Regulations, for FY 2007-08, bearing in mind the fact that the MYT Regulations were issued only on 30.05.2007 nearly two months after the commencement of FY 2007-08; and the MYT order for FY 2007-08 was issued only on 23.02.2008 just 37 days before FY 2007-08 came to an end on 31.03.2008. Since the Regulations do not have retrospective application, the minimum target of 20% stipulated therein must be suitably adjusted over a period of ten months for FY 2007-08, as against the minimum 20% prescribed for one year (ie 12 months) in the Regulations. The excess prescribed, over and above 20%, in the MYT order dated 23.02.2008, should also be suitably adjusted for FY 2007-08 bearing in mind the fact that the MYT order for FY 2007-08 was issued just 37 days before FY 2007-08 came to an end on 31.03.2008. The impugned order, in so far as it set targets for 2008-09, 2009-10 and 2010-11, do not necessitate interference in this appeal.

(10) ISSUE NO. 32: CONSIDERATION OF NORMATIVE REBATE.

For the reasons afore-mentioned, the DERC was justified in denying the Appellants' the relief they have claimed under this head. The Appellants' claim under this head is rejected in view of Regulation 5.24 of the 2011 Regulations which are binding on the parties to this appeal and on this Tribunal.

(11) ISSUE 34: DISALLOWANCE OF FIXED CHARGES FOR REGULATED POWER:

As W.P. (C) No. 104/2014, W.P. (C) No. 105/2014 and W.P. (C) No. 1005/2021, and C.A. No. 4010/2014 and C.A. No. 4013/2014 preferred against APTEL's order dated 11.03.2014, have been disposed of by the

Supreme Court, by its judgement dated 06.08.2025, the interim orders passed earlier may possibly not survive disposal of the said Writ Petitions and Civil Appeals. Consequent on disposal of the afore-said Writ Petitions and Civil Appeals, and as the Supreme Court has issued directions for liquidation of the existing regulatory assets of all distribution companies, the restraint placed on Respondent Nos. 5 to 13 to refrain from taking coercive steps for recovery of its dues, may also not survive.

As the existing regulatory assets have been directed, by the Supreme Court, to be liquidated in four years from 01.04.2024, the Appellants cannot be heard to contend that, since their failure to make payment, for the power supplied to them earlier by the Generating Companies is justified as the Revenue Gap and Regulatory Assets are of the DERC's making, the fixed charges paid by them to such generators must be allowed as a pass-through.

Even otherwise, it would be inappropriate for this Tribunal, in an Appeal against the tariff determination exercise undertaken by the DERC, to adjudicate on this issue when none of the generating/ transmission utilities are parties to these proceedings, and the questions of fact and law which would arise for consideration in this appeal can be effectively adjudicated only after giving the generating/ transmission companies a reasonable opportunity of being heard.

In the light of the judgement of the Supreme Court, in **BSES RAJDHANI POWER LTD. & ANR VS UNION OF INDIA AND ORS (Judgement in Writ Petition (C) 104 of 2014 & batch dated 06.08.2025),** and as the appellants' claim against the generators/ transmission utilities was not granted, the appellants' claim under this head necessitates rejection.

(12) ISSUE NO. 37: DISALLOWANCE OF LICENSE FEE PAID FOR ASSETS:

Since the Land License Fees formed part of the base O&M expenses, the Appellants were entitled, in terms of the 2007 Regulations, only for enhancement on a normative basis and not on actuals. As the Appellants entitlement for incremental amount of Land License Fees is only on a normative basis and not on actuals, their claim under this head is rejected, and the impugned order of the DERC, in so far as it relates to the present issue of disallowance of additional Land License Fees are concerned, is upheld.

Further, the MYT Order dated 23.02.2008 makes it clear that the Land License Fees were factored into the A&G expenses. Since these principles were applied at the ARR stage, it is impermissible for us to change the said rules which were applicable at the ARR stage during the truing-up exercise, in the light of the law declared by the Supreme Court in **BSES Rajdhani Power Limited vs. DERC: (2022) SCC OnLine SC 1450**.

(13) ISSUE NO. 38: ERRONEOUS BIFURCATION OF CAPITALISATION WHILE DETERMINING ROCE FOR MYT PERIOD.

For the reasons afore-mentioned, the impugned order, passed by the DERC on this issue, is set aside, and the Commission is directed, in case it has not already passed such an order, to pass a true up order forthwith based on actual capitalization of the assets, re-compute the depreciation and Return on Capital Employed for the subject Control Period, and given the Appellants the benefit thereof.

(14) ISSUE NO. 39: ARBITRARY IMPOSITION OF REBATE BASED ON NUMBER OF BILLS ISSUED:

As noted hereinabove, the DERC has prescribed this rebate not in exercise of any particular provision of the 2011 Regulations but in exercise of its regulatory power. Since regulatory orders of the Commission are not immune from interference in appellate proceedings under Section 111 of the Electricity Act, the matter, with respect to this issue, is remanded to the DERC, and they are directed to cause a prudence check of the additional expenditure which the Appellant may be required to incur as a result of a change in the billing cycle from bi-monthly to monthly, and factor in such expenditure in computing the rebate to be extended to the consumers as a result of a change in the billing cycle.

(15) ISSUE NO. 44: ISSUANCE OF TARIFF ORDER BEFORE 1ST APRIL OF THE NEXT FINANCIAL YEAR:

Despite the directions of this Tribunal in OP No.1 of 2011 (2011 SCC Online Aptel 188), the directives of the Ministry of Power as also Clause 3.1 (7) of the Tariff Policy 2016, tariff orders are still not being passed within the time frame stipulated in Section 64(3)(a) of the Electricity Act in several cases. We may not be understood to have held that all Regulatory Commissions are guilty of such delays, for we are aware that several Regulatory Commissions have passed tariff orders well within time.

As this is an area of concern which may need focussed attention and periodic monitoring by this Tribunal, since belated issuance of tariff orders by the Commissions has a deleterious effect on the power sector

as a whole, we deem it appropriate to consider this issue independently in proceedings under Section 121 of the Electricity Act.

(16) ISSUE NO. 45: DISALLOWANCE OF OMBUDSMAN EXPENSES.

Disallowance of the increase in ombudsman expenses by the DERC, on the basis of actuals, is in terms of the 2007 Regulations which require such an increase to be provided for on a normative basis. The impugned order, to the extent this issue is concerned, does not necessitate interference in Appeal. The Appellants' claim, under this head, is therefore rejected.

With the afore-said observations and directions, both the Appeals are disposed of. All the IAs therein are also disposed of.

Pronounced in the open court on this the 11th day of September, 2025.

(Justice Ramesh Ranganathan)
Chairperson

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

I have gone through the Draft of Judgement forwarded tome vide Note dated 11.08.2025 in Appeal No. 265 of 2013 and batch. After examination and careful reading it is observed that some of the Issues covered under this batch of Appeals have already been decided by this Tribunal (Court -2) in Appeal No. 69 of 2018 and batch (BSES Rajdhani Power Ltd. Vs. DERC), and the matter was pronounced therein on 21.07.2025. I, Sandesh Kumar Sharma, Technical Member was part of the Bench that pronounced the said Judgement on 21.07.2025.

The List of Issues which are covered by the said Judgement vis-a-vis which are in consideration in the present batch of Appeals are as follows:

Sl. No.	**Issue No. in the Presen Appeal**	**Issue No. in the Batch of Appeal No. 69 of 2018 and batch**	**Summary of Claims**
1	Issue No. 14	Issue No. 37	Truing up of the income tax from the Financial Year 2002-03, 2006-07
2	Issue No. 15	Issue No. 37	Truing up of Financial Year 2007-2008, 2011-12
3	Issue No. 19	Issue No. 15	These allowances of R&M expenses therein MYT Control Period.
4	Issue No. 23	Issue No. 53	Erroneous Computation

			pending some contribution in the MYT period.
5	Issue No. 24(d)	Issue No. 28	Collection of Electricity Duty
6	Issue No. 29	Issue No. 4	Revision of Distribution Loss from the Financial Year 2007-08 to Financial year 2010-11
7	Issue No. 32	Issue No. 33	Consideration of normative rebate
8	Issue No. 34	Issue No. 5	Disallowance of fixed charges for regulated power
9	Issue No. 39	Issue No. 45	Arbitrary imposition of rebates based on number of Bills issued

In the light of the above, and based on the Judgement rendered on 21.07.2025 I disagree with the observations made herein above in Item No.

a) **Issue No. 14 & 15**
b) **Issue No. 19**
c) **Issue No. 23**
d) **Issue No. 24 (d)**
e) **Issue No. 29**
f) **Issue No. 32**
g) **Issue No. 34**
h) **Issue No. 39**

The decision taken in the batch led by Appeal No. 69 of 2018 is quoted as under :

Issue No. 14 & 15

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.

Issue No. 19

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. 23

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.

Issue No. 24(d)

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. 29

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. 32

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, 2010 SCC OnLine APTEL 122.

176. In another judgment in the case of North Delhi Power Limited v. Delhi Electricity Regulatory Commission, 2010 SCC OnLine APTEL 74 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

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. 39

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.

Considering that for these issues no consensus is arrived that appropriate decision may kindly be taken up by the Chairperson. Rest of the Issues are agreed by me.

ORDER

I, agree on the issues as covered in the present Appeals except for the issues as detailed above with reference to issues listed below :

a) **Issue No. 14 & 15**
b) **Issue No. 19**
c) **Issue No. 23**
d) **Issue No. 24 (d)**
e) **Issue No. 29**
f) **Issue No. 32**
g) **Issue No. 34**
h) **Issue No. 39**

PRONOUNCED IN THE OPEN COURT ON THIS 11th DAY OF SEPTEMBER, 2025.

(Sandesh Kumar Sharma)
Technical Member

COURT-1

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 265 OF 2013 & IA NO. 357 OF 2013 & IA NO. 110 OF 2014 & IA NO. 159 OF 2015
and
APPEAL NO. 266 OF 2013 & IA NO. 358 OF 2013 & IA NO. 160 OF 2015

Dated: 11th September, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member (Electricity)

APPEAL NO. 265 OF 2013 & IA NO. 357 OF 2013 & IA NO. 110 OF 2014 & IA NO. 159 OF 2015

In the matter of:

BSES Yamuna Power Limited .... Appellant(s)

Versus

Delhi Electricity Regulatory Commission .... Respondent(s)

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

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

APPEAL NO. 266 OF 2013 & IA NO. 358 OF 2013 & IA NO. 160 OF 2015

In the matter of:

BSES Rajdhani Power Limited .... Appellant(s)

Versus

Delhi Electricity Regulatory Commission .... Respondent(s)

Counsel on record for the Appellant(s) : Buddy A. Ranganadhan
Hasan Murtaza
Aditya Panda

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

ORDER

The main judgement in both these appeals is in terms of the opinion signed and pronounced by the Chairperson. The Technical Member, while concurring with the opinion of the Chairperson on several issues as detailed in the said judgement, has expressed his inability to agree with certain other issues and has pronounced his separate dissenting opinion on those issues. The difference in opinion between the Chairperson and the Technical member are with respect to the following issues:-

(a) Issue Nos. 14 & 15
(b) Issue No. 19
(c) Issue No. 23
(d) Issue No. 24(d)
(e) Issue No. 29
(f) Issue No. 32
(g) Issue No. 34
(h) Issue No. 39

In view of the difference in opinion, let the matter be placed before the Chairperson for the afore-said issues to be referred to a third member for his/her consideration and decision. On all other issues, both the Appeals stand disposed of in terms of the opinion rendered by the Chairperson in the judgement pronounced today.

Sandesh Kumar Sharma
Technical Member (Electricity)

Justice Ramesh Ranganathan
Chairperson

ts/tc