APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 246 of 2014 &
I.A. NO. 56 OF 2015

Dated : 30th September, 2019

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

In the matter of:

Tata Power Delhi Distribution Limited
Grid Sub-Station Building
Hudson Lanes, Kingsway Camp
Delhi-110 009 …. **Appellant**

VERSUS

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

Counsel for the Appellant(s) : Mr. Hemant Sahai
Ms. Puja Priyadarshini
Mr. Nived Veerapaneni
Ms. Ritu Gupta

Mr. Anurag Bansal
Ms. Sakshi Mehrotra, Rep.

Counsel for the Respondent(s): Mr. Pradeep Misra
Mr. Manoj Kr. Sharma

J U D G M E N T

PER HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

1. The Appellant, Tata Power Distribution Limited Delhi (in short, the ***"Appellant"***) has filed the present Appeal, under Section 111 of the Electricity Act, 2003 (***"Electricity Act"***) assailing the correctness of the impugned Order

dated 23.07.2014 passed by Delhi Electricity Regulatory Commission, New Delhi (in short, ***"State Commission"***) in Petition No. 56 of 2013 whereby the State Commission has proceeded to true up the expenses of the Appellant for the period 2012-13 and determined the distribution tariff (wheeling & retail supply) for 2014-15 in violation of the various provisions of the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011 (in short, ***"Tariff Regulations"***) and other prevailing laws, but also against its own past practice and orders, and also contrary to findings/directions of this Tribunal passed in various judgments.

2. Brief facts of the Appeal:

2.1 Tata Power Delhi Distribution Limited, Appellant herein, is a company under the provisions of Companies Act, 1956. It is a distribution licensee in terms of section 14 of the Electricity Act, 2003 read with Delhi Electricity Reforms Act, 2000 (DERA) and undertakes distribution and retail supply of electricity in the North and North West areas of the national capital territory of Delhi.

2.2 The Respondent Commission is Delhi Electricity Regulatory Commission which was established under the provisions of the Electricity Regulatory Commission Act, 2998 and continues to exercise jurisdiction as the State Regulatory Commission.

2.3 The Appellant is aggrieved by the impugned order dated 23.07.2014 passed by the Respondent Commission, as stated supra, and has preferred the instant appeal before this Tribunal on the following questions of law.

A. Whether the Learned Commission was justified in not re-determining the AT&C loss trajectory for present control period pursuant to change in AT&C loss target for 2011-12 from 13% to 15.325%?

B. Whether the Learned Commission erroneously considered the interest/short term capital gain as non-tariff income of the Appellant, contrary to the judgment of the Hon'ble Tribunal?

C. Whether the Learned Commission erred in considering incentive for maintenance of street lights earned from MCD as part of ARR?

D. Whether the Learned Commission erred in excluding 'deficit recovery change' from the 'Revenue Available' while calculating AT&C as per the Tariff Regulations?

E. Whether the Learned Commission erroneously considered own consumption of the distribution Licensee on the basis of actual instead of normative basis?

F. Whether the Learned Commission erred in considering the allowance of power purchase cost relating to FY 11-12 in FY 2012-13 instead of FY 11-12?

G. Whether the Learned Commission erroneously deducted the value of additional misused units twice from the trued up sales of FY 2010-11?

H. Whether the Learned Commission committed an error in re-opening the tariff orders relating to FY 2004-05 to FY 2009-10 i.e. for the period for which true up had been completed, contrary to the judgments of this Hon'ble Tribunal and extant statutory framework?

I. Whether the Learned Commission erred in disallowing various uncontrollable expenses while truing up for FY 2012-13?

J. Whether the Learned Commission erroneously disallowed the power purchase costs for a particular year on accrual basis?

K. Whether the Learned Commission was justified in disallowing the cost of procurement of power from a particular source?

L. Whether the Learned Commission erred in disallowing the expenses incurred on other business whilst considering the income from other business for reduction in ARR?

M. Whether the Learned Commission erred in deviating from the past practice with respect to service line charges, leading to regulatory uncertainty?

N. Whether the Learned Commission was justified in not allowing the income tax to the appellant arising due to retrospective amendment of Income Tax Act?

O. Whether the Learned Commission was justified in not allowing additional income tax liability arising due to judgment of the Hon'ble Supreme Court of India?

P. Whether the Learned Commission was justified in not clarifying the mechanism / methodology for treatment of deferred tax liability?

Q. Whether the Learned Commission erred in disallowing the penal EY charge which is uncontrollable under the hands of the Appellant?

R. Whether the Learned Commission erred in disallowing the CISF expenses contrary to the judgment of this Tribunal?

S. Whether the Learned Commission erred in deducting the CISF expenses from incentive for overachievement of AT&C target?

T. Whether the Learned Commission erred in computing the impact of true-up upto FY 2011-12?

U. Whether the Learned Commission disallowed the financing cost for funding of working capital, contrary to the directions of the Hon'ble Tribunal?

V. Whether the Learned Commission erred in computing the carrying cost for the policy target period?

W. Whether the Learned Commission erred in fixing efficiency factor contrary to the judgment of this Hon'ble Tribunal in Appeal No. 14/2012?

X. Whether the Learned Commission erred in not considering the normative rebate on sale of surplus power sold by the Appellant while computing the total power purchase cost?

Y. Whether the Learned Commission wrongfully considered the income from generation business of the Appellant as non-tariff income?

Z. Whether the Learned Commission wrongfully disallowed the trading margin paid to TPTCL in procurement of power on short term basis on the pretext that TPTCL is a related party?

AA. Whether the Learned Commission erred in computing the carrying cost by considering the AT&C loss incentive of FY 2010-11 in FY 2011-12?

BB. Whether the Learned Commission erred in computing the advance against depreciation contrary to MYT order?

CC. Whether the Learned Commission erred in re-opening the basis of determination of tariff?

DD. Whether the Learned Commission erred in not implementing the direction of this Hon'ble Tribunal in relation to allowance of rate of interest on notional loss?

EE. Whether the Learned Commission erroneously deducted surcharge for liquidation of revenue gaps instead of utilizing it for carrying cost?

FF. Whether the Learned Commission erred in omitting the equity component of working capital while computing the equity capital for the year 2007-08 to 2011-12?

GG. Whether the Learned Commission wrongfully deducted the equity capital while computing WACC?

HH. Whether the Learned Commission erred in computing the debt component while computing WACC?

II. Whether the Learned Commission erred in computing the working capital requirement without considering the approved ARR of the Appellant?

JJ. Whether the Learned Commission erred in disallowing the capital expenditure made during the year 2012-13?

KK. Whether the Learned Commission erroneously sought to employ figures of consumer contribution on actuals, whilst considering the normative figures for total value of assets capitalized while considering means of financing the assets capitalized?

LL. Whether the Learned Commission acted contrary to the terms of the Tariff Regulations in allowance of the depreciation rate?

MM. Whether the Learned Commission erred in the computation of WACC & Working capital?

NN. Whether the Learned Commission wrongly denied the claim of the Appellant for additional financing cost accrued on account of banking of surplus power?

OO. Whether the Learned Commission erroneously omitted the grant of carrying cost for FY 2013-2014?

PP. Whether the Learned Commission erred in computing the carrying cost for the year 2014-15

QQ. Whether the Learned Commission erred in arbitrarily overestimating the sale rate for surplus power for FY 14-15?

RR. Whether the Learned Commission erred in not allowing carrying cost on power purchase cost allowed against 2011-12 in the true-up of 2012-13?

2.4 The Appellant has sought the following reliefs in the instant Appeal:

(a) Allow the present appeal and set aside and/or modify the impugned order dated 23.07.2014 to the extent the same has been challenged on various grounds indicated in the appeal;

(b) Direct the Respondent Commission to re-determine the tariff in line with the outcome of the present appeal; and

(c) Pass such further order or orders as this Tribunal may deem just and proper in the circumstances of the case.

3. In the present Appeal, different issues have been categorized under the following heads:

Category	Description
A	Issues not being pressed
B	Issues covered by judicial precedents
C	Computational Errors to be rectified
D	Fresh issues
E	Other issues dealing with principles having recurring future impact

A. ISSUES NOT BEING PRESSED BY THE APPELLANT

4. On these issues, in his written submissions, learned counsel, Mr. Hemant Sahai, appearing for the Appellant/TPDDL submitted that the Appellant is not pressing the following issues for diverse reasons and the same may be treated as withdrawn. As stated therein, the Appellant reserves the right to raise these issues again if the same are not resolved by the Respondent Commission to the Appellant's satisfaction.

Issue No.	Description	Reason
2	Wrongful deduction of interest/short-term capital gain from the ARR.	Allowed in Tariff Order dated 28.03.2018.
3	Non-Allowance of incentive for maintenance of street light earned from MCD.	Allowed in Tariff Order dated 28.03.2018.
6	Erroneous consideration of allowance of power purchase cost in FY 12-13 instead of FY 11-12.	Allowed by the Commission in its Order dated 29.12.2014 in review petition filed by Appellant.
9	Disallowance of other expenses. (1) License fees on energy billed. (4) Registration fees for execution of mortgage deeds for borrowings. (6) Loss on redemption of contingency reserve investments – GoI.	Allowed in Tariff Order dated 31.08.2017.
10	Disallowance of provisions made with respect to power purchase cost for bills not received during the period.	This Hon'ble Tribunal has already allowed this issue in favor of Appellant in Appeal No. 171 of 2012. TPDDL is hopeful that the DERC will comply with the directions suitably.
11	Non-allowance of power purchase cost incurred in procurement of power from TPDDL –G power plants.	Rithala Power Station tariff determination is still under process. TPDDL is hopeful that the said issue will be resolved imminently and the DERC will come out with the tariff order for Rithala Station as per directions by this Hon'ble Tribunal in Appeal 271 of 2013.

12	Non-Allowance of expenses incurred in Other Business whilst considering the income from Other Business for reduction in ARR.	Allowed in Tariff Orders dated 31.08.2017 and 28.03.2018.
14	Non-Allowance of Income Tax.	Not being pressed as the appeal is pending in ITAT.
16	Non-Allowance of CISF expenses for the year 2011-12 and erroneous deduction of CISF expenses from incentive for over-achievement of AT&C targets.	Allowed in Tariff Order dated 29.09.2015.
17	Erroneous consideration of impact of true up of FY 2007-08 to FY 2011-13 in FY 2012-13.	Allowed in Tariff Order dated 29.09.2015
18	Lower allowance of financing cost on Late Payment Surcharge (LPSC).	Allowed by the Commission in its Order dated 24.09.2018 in review petition filed by Appellant.
19	Erroneous methodology adopted for computation of carrying cost for the policy direction period.	Allowed in Tariff Order dated 29.09.2015.
20	Non-Implementation of this Hon'ble Tribunal's judgement in relation to arbitrary fixation of Efficiency Factor.	Allowed in Tariff Order dated 28.03.2018.
21	Disallowance of rebate provided by the Appellant while selling surplus power.	Allowed in Tariff Order dated 28.03.2018.
23	Wrongful disallowance of trading margin paid to TPPCL for FY 2012-13.	Appellant has been given to understand that the Commission will consider this issue in its ensuing tariff order.
24	Erroneous computation of carrying cost.	Allowed in Tariff Order dated 29.09.2015.
33	Erroneous computation of weightage average cost of capital on capex and working capital.	Issue sub-judice before the Supreme Court. Appellant has filed SLP No. 35062 of 2016 in the Hon'ble Supreme Court challenging Tariff Regulations, 2011.

5. Learned counsel, Mr. Pradeep Misra, appearing for the Respondent Commission/DERC submitted that as the appellant has not pressed the aforesaid issues, therefore, no submissions are required on these issues.

6. Our Consideration:

In view of above facts, no decision/order of this Tribunal is required on the aforesaid issues.

B. ISSUES COVERED BY JUDICIAL PRECEDENTS:

Issue No.	Description
15	Disallowance of Penal UI Charges
25	Wrongful Computation of Advance Against Depreciation
26	Non-implementation of direction of this Tribunal in relation to notional loans

7. <u>ISSUE NO. 15</u>

DISALLOWANCE OF PENAL UI CHARGES:

7.1 Following are the submissions of learned counsel for the Appellant on this issue:

7.1.1 Learned counsel for the Appellant submitted that this issue relates to disallowance of penal UI charges imposed on the Appellant due to over drawl of electricity for each time block when grid frequency is below 49.5 Hz (later on revised to 49.7 Hz from 12-13). The Learned Commission in the impugned order has taken the stand that any penal/additional UI charges will not be allowed in the power purchase cost to maintain the grid discipline.

7.1.2 The present issue, while it was initially, on the facts of that case, decided by this Tribunal in Appeal No. 171 of 2012 against the Appellant, however, the same issue was subsequently clarified in favour of the Appellant in Appeal No.177 of 2012. This Tribunal in Appeal No.177 of 2012 directed

the State Commission to reconsider and allow the amount disallowed on UI charges and to restrict the disallowance only to the extent of such *UI penalty* resulting from overdrawal below 49.2 Hz. The relevant judgment of this Tribunal in Appeal No. 177 of 2012 is reproduced below:

> *"28.1 The Commission has not allowed penal UI charges of Rs. 5.50 crores in power purchase cost. These penal UI charges are for overdrawal at frequency lower than 49.2 Hz. According to the Appellant disallowance of penal UI charges is arbitrary and without any legal basis.*
>
> *28.2 This issue has been decided by this Tribunal in judgment Appeal no. 171 of 2012 in the matter of Tata Power Delhi Distribution Ltd. Vs. DERC. In this matter the Tribunal decided as under: "We do not want to give any relaxation in decision of the State Commission not allowing the penal UI charges, as we do not want to interfere in the matter relating to security of the grid in real time operation. The Appellant has to take necessary steps required to avert over-drawl under low frequency benchmark. Accordingly, this issue is decided against the Appellant." The findings in the above case will apply squarely to the present case.*
>
> *28.3 The Appellant has also submitted that only Rs. 2.66 crores would have been disallowed as the additional charges were imposed equivalent to such a mount when the frequency of the grid went between 49.2 Hz. The Appellant had paid 2.84 crores for UI overdrawal at frequency between 49.2 to 49.5 Hz and only 2.66 crores was paid for overdawal below 49.2 Hz. The Commission had sought information regarding additional UI charges without mentioning the purpose or any frequency band. Therefore, the Appellant submitted the total additional UI charges paid i.e. Rs. 5.50 crores.*
>
> *28.4 In view of above submissions of the Appellant, we direct the State Commission to reconsider the amount disallowed on account of UI charges to restrict it to the amount for overdrawals below the frequency at which penal charges for UI are leviable. Accordingly, decided."*

7.1.3 In line with the above judgment, the Appellant has recalculated the amount of penalty pertaining to the overdrawal during the period when frequency was lower than 49.2 HZ and this amount is Rs 0.65 Cr as against the total disallowed amount Rs. 1.72 Cr. Therefore, an amount of Rs 1.07 Cr

(1.72-0.65=1.07) has incorrectly been disallowed from the aggregate power procurement cost. The details relating to drawal of power during frequency below 49.2 HZ and between 49.2 HZ to 49.5 HZ has been submitted by the Appellant to the DERC. Therefore, in view of the above details and judgment in Appeal No. 177 of 2012, this Tribunal is requested to direct the Respondent Commission to allow Rs. 1.07 Cr as power procurement cost, as the same relates to drawal of power during the period when frequency was between 49.2HZ to 49.5 HZ.

7.1.4 Moreover, the function of procurement of power is carried out by the Appellant only for the purposes of meeting the demand of its consumers. In this regard, the Respondent Commission has issued a directive on 21.10.2009 limiting the maximum load shedding period to 1% in any particular month except in case of force majeure events which are beyond the control of the licensee. The Respondent Commission has filed a civil appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 177 of 2012 dated 02.03.2015. The issue of disallowance of penal UI charges has been challenged by it in the said civil appeal before the Supreme Court. Further, the said civil appeal is still sub-judice before the Hon'ble Supreme Court and there has been no stay granted by it against the operation of this Tribunal's judgment in Appeal No. 177 of 2012.

7.1.5 While the Appellant is not pressing on the financial component, it is most humbly prayed that this Tribunal may be pleased to direct the DERC to act strictly in compliance with the UI Regulations (as amended from time to time) and disallow only the Penal UI charges with specific reference to the frequency. Charges towards UI charges as well as Additional Charges cannot be disallowed in entirety in accordance with the judgment of this Tribunal in Appeal No.177 of 2012 wherein this Tribunal has directed the Respondent Commission to reconsider and allow the amount disallowed on UI charges and to restrict the disallowance only to the extent of such UI penalty resulting from overdrawal below the specified frequency at which penal UI charges are attracted.

7.2 On this issue, learned counsel for the Respondent Commission/ DERC submitted that:

7.2.1 The appellant has claimed that disallowance of penal UI charges imposed on the Appellant due to over drawl of electricity for each time block when grid frequency is below 49.5 Hz (later on revised to 49.7 Hz from 12-13). The Learned Commission in the impugned order has taken the stand that any penal/ additional UI charges will not be allowed in the power purchase cost to maintain the grid discipline. The Appellant has claimed that Rs. 3.65 crores have been wrongly disallowed for Penal UI Charges. On this issue, the Respondent Commission in Para 3.77 of the impugned order observed that:

> *"3.77. The Commission observed that UI Charges paid by the Petitioner also include Penal UI Charges of Rs. 3.65 crore. The Commission as a member of at Forum of Regulatory has already decided that any Penal Charges will not be allowed in the Power Purchase Cost, therefore the Commission has not considered Penal UI charges in Power Purchase Cost."*

7.2.2 It is, further, submitted that regarding the disallowance of additional UI Charges of Rs. 3.65 Cr, the CERC vide its press release dated. 23 July, 2009 has clarified this issue as follows:

> *"The Forum of Regulators, which is chaired by Chairperson, Central Electricity Regulatory Commission and has all the Chairpersons of State Electricity Regulatory Commissions as its members, has agreed that the additional Unscheduled-Interchange (UI) charges imposed on distribution utilities for excessive overdrawal from the grid would not be allowed to be recovered from consumers w.e.f. 1st August, 2009.*
>
> *2. The Forum has considered the recommendation of the Parliamentary Standing Committee on Energy that the regulators should evolve such practice that when the Annual Return Rates are being filed, the damages which have been imposed as Unscheduled Interchange charges should be stated separately and very clearly and those payments which are in the nature of damages should not go to show purchase of power because that really is the inefficiency or incompetence of that particular distribution company or entity.*
>
> *3. After deliberation on the recommendation, the Forum of Regulators arrived at a consensus that the additional UI charges imposed on the utilities under the UI regulations of CERC for overdrawal during the period when grid frequency is below 49.2 Hz. should not be permitted in the annual revenue requirement of distribution utilities w.e.f. 1st August, 2009.*
>
> *4. This decision has been conveyed to the Central Government and, also to all the SERCs for necessary action.*
> *5. It may be recalled that CERC notified the new regulations on 30th March, 2009 rationalizing the UI mechanism sending unambiguous message that UI mechanism is not meant for trading of electricity and will be mainly an instrument for grid discipline and settling the unintended deviations during the normal course of operations and when the frequency is in normal operating range according to the Indian Electricity Grid Code. The objectives of this measure were to promote electricity markets for*

providing certainty to the investors and also to penalize the utilities who indulge in excessive withdrawal from the grid.

6. After this decision of the Forum of Regulators, the distribution utilities will now be required to forecast their demand more precisely and plan the power purchase in advance. Otherwise, they will have to bear the burden of additional UI charges from their own finances and will not be able to pass this on to the consumers."

7.2.3 The additional UI charges are being paid when the distribution licensee draws the power more than the schedule drawal when the grid frequency is low. Additional UI charges are being paid due to non-adherence of the scheduled drawal by Distribution Licensee. Thus, based on the above grounds, the Appellant is not entitled for Penal UI Charges to pass through to the consumers of Delhi. Further, the appellant has raised this issue in Appeal No.271 of 2013 wherein this Tribunal held as under:

"7.6 Penal interests are applicable at the specified rates over-drawal of electricity for each time block when grid frequency is below 49.5 Hz. The time block under UI Regulations is 15 minutes. We are totally unable to accept the contention of the appellant that the appellant has taken all the necessary steps to ensure compliance with the requirements of UI Regulations, over-drawal from grid below 49.5 Hz frequency is inevitable despite efficient management of the appellant. These are the problems which are to be sorted out by a Discom by making efficient management, proper scheduling of power and procurement etc. What is provided under the Regulation is that the State Commission is bound to follow those Regulations, without giving any dilution or relaxation in the provisions of Act or Rules. We are unable to accept the appellant's contention that over-drawal or under-drawal depends on the scheduled generation available, since, the generation available changes constantly and further due to loss of generation the schedules are affected resulting in over-drawal by Discoms. In view of the above discussions, we do not find any merit in the contentions of the appellant and hence, this Issue No.8 is decided against the appellant."

7.2.4 The appellant has not filed any appeal against the judgment in Appeal No.271 of 2013 hence the finding of this Tribunal has become final.

7.2.5 The Respondent Commission in the impugned order has observed as follows:

> *"3.84 The Commission observed that UI charges paid by the Petitioner also include penal/additional UI charges of Rs. 1.92 Crore towards power availed. The Commission, as a deterrent has decided that any penal/additional UI charges will not be allowed in the power purchase cost to maintain the grid discipline and therefore the Commission has not considered penal/additional UI charges in power purchase cost."*

7.3 Our Consideration:

Having regard to the contentions of both the parties, we note that penal/additional UI charges are applicable only due to severe indiscipline in drawal of power affecting grid frequency/stability which is entirely undesirable. Therefore, we opine that the State Commission has correctly held to not allow such penal charges which are ultimately passed through to the consumers who are at no fault. **Hence, the issue is, as such, decided against the Appellant.**

8. ***<u>ISSUE NO. 25</u>:***

WRONGFUL COMPUTATION OF ADVANCE AGAINST DEPRECIATION:

8.1 Following are the submissions of learned counsel for the Appellant on this issue:

8.1.1 The Respondent Commission has wrongfully computed the Advance Against Depreciation (**"AAD"**) for the FY 2012-13. The Respondent Commission while carrying out computation of AAD in MYT Order 2012 had

reduced and/or adjusted Rs.378.97 crores for capex and working capital in the earlier years from the cumulative depreciation. Accordingly, the Appellant submitted in its Tariff Petition the computation with respect to utilization of cumulative depreciation considered for the purposes of computing AAD. However, the Respondent Commission in the Impugned Order has deviated from its own methodology prescribed under MYT Order 2012 and has erroneously reduced and/or adjusted the cumulative depreciation without considering the amount already utilized earlier for financing the capex and working capital. While this change in methodology does not have any immediate financial impact on the Appellant ARR, the same is being challenged since this approach will ultimately in the subsequent years have an effect on the Appellant's claim on AAD and unless the Appellant challenges the change in methodology at this stage, its right of challenge may stand foreclosed.

8.1.2 The Respondent Commission has acted contrary to MYT Order and revised the methodology for calculation of AAD at the Truing Up stage. The Respondent Commission while computing AAD in the Impugned Order has taken the entire amount of depreciation allowed as cumulative depreciation for repayment of loan. The correct computation should have been - Cumulative Depreciation LESS the depreciation of Rs 378.34 Cr (i.e. the amount of depreciation that has already been utilized towards the funding of working capital and capex). The same amount of depreciation of Rs 378.34

Cr cannot be considered twice. The Respondent Commission has failed to justify or specify any reason for deviating from earlier order at the stage of Truing up and failed to explain how the same amount which has already been utilized in earlier years can be used again for repayment of debt.

8.1.3 The Appellant in line with the 2nd MYT Order Dt. 13th July, 2012 has utilized amount of Rs. 378.97 crores related to cumulative depreciation in earlier years for financing capex expenditure and working capital. However, the Respondent Commission has failed to reduce the amount utilized earlier for financing capex and working capital, whilst working out the cumulative depreciation for AAD even though the same was categorically allowed under the MYT Order dated 13.07.2012.

8.1.4 The Respondent Commission, by not reducing the amount utilized earlier used for capex and working capital in earlier years, has in effect used cumulative depreciation twice, (i) for funding the capex and working capital and (ii) for repayment of loans. Such duplication in utilization of same funds for two different purposes is unknown to any legal, accounting or commercial principles. The Appellant by way of the present Appeal is highlighting the error in the computation done by the Respondent Commission since it is an issue of incorrect computation and use of cumulative depreciation which may adversely affect the Appellant in future.

8.1.5 The Respondent Commission in its written submissions dated February, 2019 has merely reproduced the findings in the Impugned Order to aver that *"the Appellant itself has not claimed any amount on account of AAD in its petition for tariff determination and that there is no financial loss from disallowance due to computation of advance against depreciation to the Appellant".* The Respondent Commission has further submitted that the *"Appellant may approach the Commission for the errors which has been crept in"*.

8.1.6 It is, further, submitted that the above posits that the Respondent Commission has admitted to the error and the change in methodology at True-Up stage. As already submitted and clarified that, while this change in methodology does not have any immediate financial impact on the Appellant's ARR, the same is being challenged since this approach will ultimately in the subsequent years have an effect on the Appellant's claim on AAD and unless the Appellant challenges the change in methodology at this stage, its right of challenge may stand foreclosed. Further, the amount of Rs. 2.10 Crores has been claimed by the Appellant on account of the computational error. Therefore, in the light of the above, it is submitted that this Tribunal may give specific instructions to the Respondent Commission to rectify this error.

8.2 On this issue, learned counsel for the Respondent Commission/ DERC submitted as under:

8.2.1 The Appellant has submitted wrongful computation of advance against depreciation for the Financial Year 2012-13. The Appellant has not claimed any amount on account of advance against depreciation in its tariff petition for FY 2014-15. However, the Appellant has claimed a loss of Rs. 2.10 crores in the present Appeal on account of computation of advance against depreciation. The relevant extract of the Tariff Order dated 23.07.2014 regarding the claim of the Appellant and the Commission's view is as follows:

> *"Advance against Depreciation*
> *Petitioner's submission*
>
> *3.1 The Petitioner has submitted that the Commission specify that Advance Against Depreciation (AAD) is dependent on the loans and depreciation. Since both these parameters are subject to true up at the end of the respective year of the control period, hence the AAD has to be trued up at the end of the respective year of the control period.*
> *…….*
> *Commission's Analysis*
>
> *3.2 The Commission has considered the closing loan of Rs.1938.33 Crore, cumulative repayment of loans at Rs. 697.10 Crore and cumulative depreciation at Rs.1223.71 Crore for FY 2011-12 in the Tariff Order dated July 31, 2013. The Commission has computed the Advance against Depreciation based on the revised depreciation approved in the truing up for FY 2012-13……..*
>
> *3.3 In view of the above the Commission has not considered any Advance Against Depreciation."*

8.2.2 Further, it is submitted that the Appellant itself has not claimed any amount on account of AAD in its petition for tariff determination and there is

no financial loss from disallowance due to computation of advance against depreciation to the Appellant. However, the Commission submits that Appellant may approach the Commission for the error which has been crept in.

8.3 Our Analysis and Findings:

8.3.1 Learned counsel for the Appellant alleged that the Respondent Commission has wrongly computed the Advance Against Depreciation (AAD) for the FY 2012-13 by reducing and/or adjusting Rs.378.97 crores for capex and working capital in the earlier years from the cumulative depreciation. Learned counsel was quick to submit that in fact, correct computation should have been - Cumulative Depreciation LESS the depreciation of Rs 378.34 Cr (i.e. the amount of depreciation that has already been utilized towards the funding of working capital and capex). As such, the amount of depreciation of Rs. 378.34 Cr cannot be considered twice. Learned counsel vehemently submitted that the Respondent Commission has failed to justify or specify any reason for deviating from earlier order at the stage of Truing up and also failed to explain how the same amount which has already been utilized in earlier years can be used again for repayment of debt.

8.3.2 Learned counsel, further, submitted that while this change in methodology does not have any immediate financial impact on the ARR of the Appellant, the same is being challenged since this approach will ultimately in the subsequent years have an effect on the Appellant's claim on AAD and

unless the Appellant challenges the same at this stage, its right of challenge may stand foreclosed.

8.3.3 ***Per-contra,*** learned counsel for the Respondent Commission contended that the Appellant has submitted wrongful computation of advance against depreciation for the Financial Year 2012-13 and it has not claimed any amount to this account in its tariff petition for FY 2014-15. However, the Appellant has claimed a loss of Rs. 2.10 crores in the present Appeal on account of computation of AAD. Learned counsel for the Respondent Commission, further, submitted that the Appellant itself has not claimed any amount on account of AAD in its petition for tariff determination and there is no financial loss from disallowance due to computation of AAD to the Appellant. However, admittedly, the Appellant may approach the Commission for the error which has been crept in.

8.4 Our findings:

8.4.1 We have carefully gone through the submissions of learned counsel for the Appellant as well as learned counsel for the Respondent Commission. The matter relates to the methodology in computation of AAD for FY 2012-13. While the Commission had reduced and/or adjusted the amount for capex and working capital in the earlier years from the cumulative depreciation, the Appellant emphasize that the correct methodology should have been - Cumulative Depreciation LESS the depreciation that has already been utilized

towards the funding of working capital and capex to avoid consideration of the same amount twice. It is noticed that the Appellant, by way of the present appeal, has highlighted the error in the computation done by the Respondent Commission since it is an issue of incorrect computation and the same may adversely affect the Appellant in future claims. As the error, as alleged, has been admitted by the Respondent Commission, the Appellant may approach the Commission for rectification of the error/methodology which has been crept in. **Accordingly, this issue is decided in favour of the Appellant.**

9. ISSUE NO. 26:

NON-IMPLEMENTATION OF DIRECTION OF THIS TRIBUNAL IN RELATION TO NOTIONAL LOANS:

9.1 On this issue, learned counsel for the Appellant submitted as under:

9.1.1 This Tribunal has directed the Respondent Commission to allow the notional loan at market related interest rate at the time of induction of loan. However, the Respondent Commission in the impugned Order has failed to implement the direction of this Tribunal in Judgment in Appeal No. 52 of 2008 in line with the clarification in Appeal No. 14 of 2012 in relation to notional loans and considered the interest rate for notional loans on the basis of interest rate prevailing on 01st April of the relevant financial year, irrespective of the market rate prevailing at the time of induction of loan. Further, despite two clear directions from this Tribunal the Respondent Commission has not implemented the interest on notional loan based on the market related

interest rate prevailing in that year. The relevant extract from the Appeal No.52 of 2008 as recorded in Appeal No. 14 of 2012 is re-produced herein below:

> *"28. The next issue is with reference to the lower interest rate allowed on notional loans. The rate of 8.5 per cent considered by the Delhi commission was based on the loan taken by the Appellant in the FY 2004-05. The interest rates have subsequently increased which is evident from the moment in the Prime Lending Rate fixed by the State Bank of India. As such, the Delhi Commission has not considered the cost of re-financed Delhi Power Company Load for allowing interest on notional load. The Delhi Commission has also ignored the fact that the capital interest rate is to be applied for the period 2006-07. Therefore, the Delhi Commission is directed to allow the interest on notional loan for a particular year based on the market related interest rate prevailing in that year. The said claim has to be considered by the Delhi Commission along with the carrying cost."*
>
> *Emphasis supplied)*

9.1.2 Subsequent to the judgment in Appeal No. 52 of 2008 of this Tribunal, the Respondent Commission still proceeded with working out interest rate on notional loans on the basis of interest rate prevailing on 01st April of the relevant financial year. The Appellant being aggrieved by such approach of the Respondent Commission challenged this issue before this Tribunal in Appeal No. 14 of 2012, wherein this Tribunal was pleased to clarify that the market related interest rate of notional loan should be the market rate at the time of induction of notional loan.

9.1.3 The Respondent Commission vide its Reply has submitted that the Judgment dated 28.11.2013 passed by this Tribunal in Appeal No. 14 of 2012 does not direct the Respondent Commission to adopt weighted average of

the SBI PLR. It is submitted that the averment of the Respondent Commission is an attempt to obfuscate the present issue. The Appellant herein, in line with Judgment of this Tribunal is seeking the market related interest prevailing at the time of induction of the notional loan as against the interest rate on 01st of April of the relevant financial year considered by the Respondent Commission. The State Commission has taken a wrong assumption that the loan has been inducted on 1st day of the year. The capital expenditure in a year are done throughout the year and accordingly, the loan is taken based on capital expenditure. However, if it is assumed that the loan has been fully inducted on first day, then the interest cost should be allowed for full year instead of six months.

9.1.4 The Respondent Commission filed a civil appeal before the Hon'ble Supreme Court bearing Civil Appeal No. 280 of 2012 against the judgment of this Tribunal in Appeal No. 52 of 2008 dated 31.05.2011. However, the issue of the applicable interest rate on notional loans, i.e. market related rates, has not been challenged by it in the said civil appeal before the Supreme Court. Therefore, the finding of this Tribunal that the interest on notional loan for a particular year should be based on the market related interest rate prevailing in that year, has attained finality.

9.1.5 Also the Respondent Commission filed a civil appeal before the Hon'ble Supreme Court bearing Civil Appeal No. 5845 of 2015 against the

judgment of this Tribunal in Appeal No. 14 of 2012 dated 28.11.2013. Interestingly, even though the said judgment in Appeal 14 of 2012 does not decide the issue of applicable interest rate being market related rate, however, in the aforesaid civil appeal in the Hon'ble Supreme Court, the Respondent Commission has challenged the Tribunal's finding that the interest rate should be at market related rate. Therefore, the said civil appeal is against a subsequent order of the Tribunal in Appeal 14/2012, however, the challenge in the said civil appeal in SC is to a finding in an earlier order of the Tribunal in Appeal 52/2008, which remains unchallenged and has attained finality. While the said civil appeal is sub-judice before the Hon'ble Supreme Court and there has been no stay granted by it against the operation of this Tribunal's judgment in Appeal No. 14 of 2012, the issue of applicable interest rate being market related rates has attained finality. Therefore, this Tribunal is requested to direct the Respondent Commission to implement the order passed in Appeal No 14 of 2012 and Appeal No. 52 of 2008.

9.2 On this issue, learned counsel for the Respondent Commission/ DERC submitted as hereunder:

9.2.1 That this Tribunal in Appeal 14 of 2012 has held as follows:

> *"13. The above directions with observations do not mean that the Delhi Commission should adopt the weighted average of the SBI Prime Lending Rate during the year. What it actually mean to us is that interest rate of notional loan should be market rate at the time of the induction of the notional loan. 14. This direction given by this Tribunal in Appeal No. 52 of 2008 should apply and should be given full effect in each year by allowing interest amount of notional loan based on the market related interest rate prevailing in that year."*

9.2.2 That this Tribunal in Appeal No. 52 of 2008 has held as follows:

> *"the Commission is directed to allow interest on notional loan for this particular year based on market related interest rate prevailing in that year i.e. either the interest rate approved in FY 2004-05 already adjusted for change in the SBI PLR or 9.20% p.a. based on the loan obtained by the Appellant"*

9.2.3 The judgment dated 28.11.2013 passed by this Tribunal in Appeal no. 14 of 2012 does not direct the Commission to adopt weighted average of the SBI PLR. As per the direction of this Tribunal, the Commission has considered the rate of interest prevalent in the financial year. The Appellant has not availed any additional loan during FY 2006-07 and the interest on existing loan has not been revised in FY 2006-07. Therefore, the Commission considered the interest rate in respect of notional loan based on the actual interest rate availed by the Appellant during FY 2006-07.

9.3 Our Analysis and Findings:

9.3.1 Learned counsel for the Appellant submitted that despite this Tribunal having directed the Respondent Commission to allow the notional loan at market related interest rate at the time of induction of loan, the Respondent Commission in the impugned Order has failed to implement the direction of this Tribunal's Judgments in Appeal No. 52 of 2008 and Appeal No. 14 of 2012. The Respondent Commission has considered the interest rate for notional loans on the basis of interest rate prevailing on 01st April of the relevant financial year, irrespective of the market rate prevailing at the

time of induction of loan. Learned counsel, further, submitted that the Appellant is aggrieved by such approach of the Respondent Commission inspite of the fact that this Tribunal in Appeal No. 14 of 2012 has clarified in clear terms that the market related interest rate of notional loan should be market related at the time of induction of notional loan. Learned counsel for the Appellant was quick to point out that the Respondent Commission filed a Civil Appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 52 of 2008 dated 31.05.2011 but the said issue of interest rate on notional loans on market related rates has not been challenged in the said Civil Appeal, therefore, the finding of this Tribunal has attained finality.

9.3.2 Learned counsel, further, contended that the Respondent Commission filed a civil appeal before the Hon'ble Supreme Court bearing Civil Appeal No. 5845 of 2015 against the judgment of this Tribunal in Appeal No. 14 of 2012 dated 28.11.2013 wherein the Tribunal's finding that the interest rate should be at market related rate has been challenged. It would thus clear that though said civil appeal is against a subsequent order of the Tribunal in Appeal 14/2012 but the challenge in the said civil appeal before the Hon'ble Apex Court is to a finding in an earlier order of the Tribunal in Appeal 52/2008, which remains unchallenged and has attained finality. While the said civil appeal is sub-judice, there has been no stay granted by the Hon'ble Supreme Court against the operation of this Tribunal's judgment in

Appeal No. 14 of 2012. In other words, the issue of applicable interest rate being market related rates has attained finality.

9.3.3 ***Per-contra,*** while citing the extracts of the judgments of this Tribunal in Appeal No. 14 of 2012 and Appeal No. 52 of 2008, learned counsel for the Respondent Commission contended that the judgment dated 28.11.2013 passed by this Tribunal does not direct the Commission to adopt weighted average of the SBI PLR. The State Commission, as per the directions of this Tribunal, has considered the rate of interest prevalent in the financial year. The Appellant has not availed any additional loan during FY 2006-07 and the interest on existing loan has not been revised in FY 2006-07. Learned counsel, further, submitted that the Commission has, accordingly, considered the interest rate in respect of notional loan based on the actual interest rate availed by the Appellant during FY 2006-07.

9.4 Our findings:

9.4.1 We have carefully analyzed the rival contentions of learned counsel for both the parties and also taken note of the judgments relied upon by the parties in the matter. This Tribunal in Appeal No. 52 of 2008 has directed the Commission to allow interest on notional loan for this particular year based on the market related interest rate prevailing in that year i.e. either the interests rate approved in FY 2004-05 already adjusted for change in the SBI PLR or 9.20% p.a. based on the loan obtained by the Appellant. The directions of

this Tribunal in the judgment dated 31.05.2011 was further clarified in the judgment dated 28.11.2013 in Appeal No. 14 of 2012 of which relevant extract reads as under:

> *"the Commission is directed to allow interest on notional loan for this particular year based on market related interest rate prevailing in that year i.e. either the interest rate approved in FY 2004-05 already adjusted for change in the SBI PLR or 9.20% p.a. based on the loan obtained by the Appellant"*

9.4.2 In view of these facts, we find force in the submissions of learned counsel for the Appellant that the Respondent Commission has not correctly applied the ratio laid down by this Tribunal in above two judgments. It is crystal clear that the Commission was required to allow interest rate on notional loan at market rate at the time of induction of notional loan and not weighted average of the SBI PLR during the year. The Respondent Commission is accordingly directed to adopt the findings and directions of this Tribunal in the aforesaid judgments in letter and spirit. **Accordingly, this issue is decided in favour of the Appellant.**

C. COMPUTATIONAL ERRORS TO BE RECTIFIED:

Issue No.	Description	Financial Impact (Rs Cr)
7	Double deduction of additional misuse units from the trued up sales of FY 2010-11	5.35
28	Erroneous computation of equity capital	Consequential Impact, hence not computed

10. ***ISSUE NO. 7:***

***DOUBLE DEDUCTION OF ADDITIONAL MISUSE UNITS FROM THE TRUED UP SALES OF FINANCIAL YEAR 2010-11*:**

10.1 On issue No. 7 regarding double deduction of additional misuse units from the trued up sales of FY 2010-11, learned counsel for the Appellant submitted that:

10.1.1 The Respondent Commission has wrongly re-computed the sales for the financial year 2010-11 by deducting the value of additional misused units twice from the sales of financial year 2010-11. The misused units refer to the units consumed by erring consumers for the purposes other than the authorized use, under their supply connection by the distribution licensee for such category of consumers.

10.1.2 The Appellant in the process of true up of its ARR for the period FY 2010-11, had submitted total energy sales, which included among other things, misuse units, which were included in the total sales after dividing the amount billed against misuse of electricity by average billing rate for the unauthorized category for which electricity was misused.

10.1.3 The Appellant had submitted a letter dated 09.05.2012 to the Respondent Commission where it provided that additional units shown in form 2.1(a) due to above mentioned methodology was 11.81 MU's. Thereafter, the Respondent Commission directed the Appellant to submit its working of 11.81 MUs additional misuse which it had provided in

the letter dated 09.05.2012. Accordingly, the Appellant vide letter dated 17.05.2012 provided detailed working of aforesaid misuse units as 11.82 MUs. However, in the Impugned Order, the Respondent Commission after carrying out prudency check, approved the sales for the financial year 2010-11 after deducting the misused units relating to financial year 2010-11. It may be noted that the figure provided in letter dated 17.05.2012 was merely a revised figure of 11.82 MU's as against the 11.81 MU's submitted in the letter dated 09.05.2012 by the Appellant. However, the Respondent Commission in the impugned order erroneously deducted the value of misused units at two points from the sales of financial year 2010-11. This was clearly an instance of clerical mistake on the part of the Respondent Commission.

10.1.4 The Respondent Commission in its reply submitted that the sale was not trued up for FY 2010-11 due to the Appellant's inability to produce explanation and justification for the methodology adopted by them in respect of misused units. It is submitted that the statement of the Respondent Commission is incorrect and without any basis. It is submitted that the Respondent Commission in its MYT order had already acknowledged that the Appellant vide its letter dated May 9, 2012 had submitted to the Respondent Commission that the additional units was 11.81 MUs based on the methodology provided in the MYT Order. Further, it is pertinent to note that the Respondent Commission in its reply has not denied the double deduction of additional misuse units and has merely stated that the Respondent

Commission shall take an appropriate view at the time of true-up. The relevant table where the additional misuse units have been calculated is reproduced below:

Table 3.37 : Trued up sales for AT&C loss computation for FY 2010-11

Sl.No.	Particulars	MU	Remarks
A.	Sales as submitted by the Petitioner (as per Form 2.1a forming part of the Petition)	6,400.17	
B.	Sales revised and submitted by the Petitioner	6,391.48	
C.	Sales against Enforcement	22.44	
D.	Own Consumption over and above normative consumption	3.32	
E.	Misuse units reported as part of form 2.1a	11.81	
F.	Energy Sales proposed to be Trued up for FY 2010-11	6,353.91	(B-C-D-E)
G.	Additional misuse units as detected during prudence check for FY 2010-11	11.82	(F-G)
H.	Trued up sales after additional misuse units	6,342.09	

10.1.5 The Respondent Commission in its reply has attempted to supplement the erroneous approach adopted in the impugned order on extraneous reasons, such as auditor's certificate not providing the methodology adopted for verifying data. It is pertinent that the impugned order nowhere refers to such justification. It is a well settled principle of law that State Commission is limited to reasons mentioned in the impugned order and cannot rely on reasons which are not referred in the impugned order as held by the Hon'ble Supreme Court in the case of *Mohinder Singh Gill vs Chief Election Commissioner* [(1978) 1 SCC 405] and has been relied by this Tribunal in Appeal no. 184 of 2011 (Judgment dated 27.2.2013) and Appeal

No. 133 of 2013 (Judgment dated 9.4.2014). The relevant extract of the judgments are reproduced below:

Mohinder Singh Gill vs Chief Election Commissioner
"*…The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, is 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. We may here draw attention to the observations of Bose, J. in Gordhandas Bhanji.*
Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officers 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 actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.
Orders are not like old wine becoming better as they grow older."

Appeal no. 184 of 2011 (Judgment dated 27.2.2013)
"*As pointed out by the learned Counsel for the Appellant, the State Commission, as a judicial authority has to be limited to the reasons mentioned in the impugned order alone and cannot rely upon the extraneous reasons which are not referred to in the impugned order. This position is a settled law as held by the Hon'ble Supreme Court in the case of Mohinder Singh Gill V. Chief Election Commissioner, (1978) 1 SCC 405.*"

Appeal No. 133 of 2013 (Judgment dated 9.4.2014)
"*..17. Therefore, the State Commission cannot now make a justification in their submissions before this Tribunal. It is a settled law that the State Commission is only permitted to make submissions only on the basis of the Impugned Order and it cannot travel beyond the Impugned Order.*

18. This principle has already been settled in the case of Mohinder Singh Gill Vs Chief Election Commissioner, (1978) 1 SCC 405 and Manohar Joshi Vs State of Maharashtra (2012) 3 SCC 619. Therefore the contention of the State Commission is misplaced."

10.1.6 This Tribunal may be pleased to direct the Respondent Commission to consider the additional misuse units as 11.82 MU, without deducting it

twice and re-compute the sales for the FY 2010-11 and corresponding AT&C incentive also. The Parties in Appeal No. 184 of 2011 have filed an appeal before the Hon'ble Supreme Court. However, it is not clear whether the above issue/principle have been challenged by it in those appeals. Further, the matter is sub-judice and there is no stay against the judgment of this Tribunal in Appeal No. 184 of 2011. There has been an appeal filed against the judgment of this Tribunal in Appeal No. 133 of 2013 before the Hon'ble Supreme Court. However, it is not clear whether the above issue/principle have been challenged in that appeal. Further, the matter is sub-judice and there is no stay against the judgment of this Tribunal in Appeal No. 133 of 2013.

10.2 On issue No. 7, learned counsel for the Respondent Commission submitted that:

10.2.1 The Commission in its order dated July 13, 2012 had not trued up sale for FY 2010-11 due to the Appellant's inability to produce explanations and justification for the methodology adopted by them in respect of misused units. Further, the Commission directed the Appellant to submit details of actual misused units and misused consider in Form 2.1(a) by the Appellant along with the backup data for FY 2002-03 to FY 2010-11 within two months of issuance of the Tariff Order dated 13.07.2012.

10.2.2 The audited account submitted by the Appellant subsequent to the Tariff Order dated 13.07.2012 indicated misused units at 12.19 MUs as

against 23.63 MUs provided in form 2.1 (a)/ information submitted during prudence check exercise. While analyzing the submission under the auditor certificate, the Commission observed that the auditor did not provide the methodology adopted by the auditor for verifying the data in respect of misuse neither the certificate mentioned about any additional misuse unit as observed by the Commission in Tariff Order dated 13.07.2012 indicating that the auditors were not apprised of the observation of the Commission in Tariff Order dated 13.07.2012.

10.2.3 In view of the above, the Commission considered the sales for FY 2010-11 based on the available information during the prudence check in form 2.1 (a) as provided by the Appellant which is 23.63 MUs.

10.3 Our Analysis and Findings:

10.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has wrongly re-computed the sales for the financial year 2010-11 by deducting the value of additional misused units twice from the sales of financial year 2010-11. Learned counsel vehemently submitted that vide letter dated 09.05.2012 the Appellant provided that additional units shown in form 2.1(a) due to the mentioned methodology was 11.81 MU's which was later on worked out to 11.82 MUs and communicated to the Commission vide its letter dated 17.05.2012. However, the Respondent Commission erroneously deducted both the figures (11.81 & 11.82 MUs) from the sales of FY 2010-11.

10.3.2 Learned counsel, further, submitted that the Respondent Commission in its MYT Order had already acknowledged both the figures for misused units and in its reply has not denied the double deduction of additional misuse units and has merely stated that the Respondent Commission shall take an appropriate view at the time of true-up. Learned counsel vehemently submitted that in its reply the Respondent Commission has attempted to supplement the erroneous approach adopted in the impugned order on extraneous reasons, such as auditor's certificate not providing the methodology adopted for verifying data. Learned counsel place reliance on the judgment of the Hon'ble Supreme Court in the case of Mohinder Singh Gill v Chief Election Commission (1978 1 SCC 405) to submit that the State Commission as per the well settled principle of law is limited to reasons mentioned in the impugned order and cannot rely on reasons which are not referred in the impugned order. The said judgment of the Hon'ble Apex Court has been relied by this Tribunal in Appeal No. 184 of 2011 (Judgment dated 27.02.2013) and Appeal No. 133 of 2013 (Judgment dated 09.04.2014). In summing up his arguments, learned counsel for the Appellant requested this Tribunal to direct the Respondent Commission to consider the additional misused units as 11.82 MUs without deducting the same twice and re-compute the sales for the FY 2010-11.

10.3.3 Learned counsel, further, contended that the above mentioned judgments of this Tribunal have been challenged before the Hon'ble Supreme

Court. However, it is not clear whether the above issues/principles have been challenged by the Commission in those appeals or not. Admittedly, the matter is sub-judice and there is no stay granted by the Hon'ble Apex Court against the said judgments of this Tribunal.

10.3.4 ***Per-contra,*** learned counsel for the Respondent Commission submitted that audited account furnished by the Appellant subsequent to the Tariff Order dated 13.07.2012 indicated misused units at 12.19 MUs as against 23.63 MUs provided in form 2.1 (a). Further, while noting the submission under the auditor certificate, the Commission observed that the auditor did not provide the methodology adopted by the auditor for verifying the data in respect of misused units.

10.4 Our findings:

10.4.1 We have carefully considered the contentions of both the parties through their counsel and also referred to the various judgments of the Hon'ble Supreme Court as well as this Tribunal relied upon by both the parties. We notice that in first instance, the Appellant indicated the additional misused units as 11.81 MUs and, subsequently, corrected to 11.82 MUs after detailed computations desired by the Respondent Commission. However, the Commission while truing up sales/AT&C loss computation for FY 2010-11, the misused units have been wrongly taken twice i.e. 11.81+11.82 MUs totaling to 23.63 MUs. It is relevant to note that the

Commission in its reply has not denied the double deduction of additional misused units and has merely stated that it shall take an appropriate view at the time of true-up. We are not inclined to appreciate the contentions of learned counsel for the Respondent Commission that the auditor did not provide methodology adopted for verifying the data in respect of the misused units. In the light of this factual matrix, the State Commission is directed to consider the additional misused units as 11.82 MUs only and re-compute the sales for FY 2010-11 and corresponding AT&C incentive also. **Hence, we decide this issue in favour of the Appellant.**

11. ***ISSUE NO. 28:***

***ERRONEOUS COMPUTATION OF OPENING BALANCE OF EQUITY CAPITAL*:**

11.1 On this issue, being issue No. 28 i.e. Erroneous Computation of opening balance of equity capital, learned counsel for the appellant stated that the claim pertains to the 2nd MYT Control Period and, further, submitted that:

11.1.1 It is the claim of the Appellant that the Respondent Commission has (a) omitted the equity component of working capital while computing equity capital for the year 2007-08 to 2010-11; (b) wrongfully deducted equity capital related to working capital infused in FY 2007-08 to 2011-12, whilst computing the equity capital for FY 2011-12; and (c) erroneous computation of debt component.

11.1.2 The Respondent Commission was required to make year on year adjustment with respect to equity capital from FY 2007-08 to FY 2011-12, however under the Impugned Order Commission just added the equity capital for working capital in FY 2011-12 and not for the period from FY 2007-08 to 2010-11, thereby resulting in the loss of return on equity for the period between FY 2007-08 to 2010-11. The Commission in its tariff Order dated 31.07.2013 had omitted an amount of Rs. 54.42 crores while determining equity capital of the Appellant for the years 2007-08 to 2011-12. Although, the Commission admitted the addition of Rs. 54.42 over a period of FY 2007-08 to 2011-12 in the equity capital for working capital funding, the same has not been added to the closing balance of the relevant years. The Respondent Commission while computing the closing balance and Average of the Equity component has committed calculation mistake for FY 2007-08 to FY 2011-12.

11.1.3 The Respondent Commission in its Reply to the Appeal has not provided any specific reasoning and merely denied the submissions of the appellant and reproduced the relevant extract of the impugned order.

11.1.4 The Respondent Commission in the Impugned Order has also revised the opening balance of the equity capital for the present control period for the purpose of computation of WACC and ROCE in accordance with the terms of Tariff Regulations, which provides that the working capital shall be 100% funded by debt. Accordingly, the Commission re-computed

debt and equity component of working capital after reducing the amount of working capital funded by equity in the prior period. However, while re-computing the equity component of the working capital the Respondent Commission mechanically reduced 30% of the entire working capital from the equity balance of the Appellant, without considering that the working capital was entirely funded through depreciation during the policy direction period and it was only from the year 2007-08 that the addition was made in equity component for funding the working capital. Therefore, the Respondent Commission erred in mechanically deducting an amount of Rs. 70.37 crores from the equity of the Appellant for the purpose of computation WACC and ROCE. It is submitted, without prejudice, that, if at all the Commission could have only deducted an amount of Rs. 54.42 crores, which was added as equity component by the Appellant during FY 2007-08 to 2011-12 to finance the working capital and, therefore, the Respondent Commission cannot treat/ transfer the equity already invested in the past as debt in future. As per the regulations 2011, any fresh working capital infused from FY 12-13 should be treated as 100% debt funded.

11.1.5 It is also submitted that the Respondent Commission has erroneously computed the debt component for the purpose of calculating WACC. In the Impugned Order the Commission has revised the WACC based on the average debt and average equity however while computing the closing debt, it has not reduced the repayment of loans during the year

resulting in wrong opening and closing balances which in turn have an impact on computation of average debt and lower RoCE.

11.1.6 The Respondent Commission during the proceedings in Appeal 14 of 2012 before this Tribunal had made submission that since all the elements of RoCE for the FY 2011-12 are subject to True-Up, the RoCE for the FY 2011-12 will be approved at the end of the Control Period. It was on the basis of such submission of the Respondent Commission, wherein it has undertaken to True-Up the RoCE by the end of Control Period that this Hon'ble Tribunal passed no adverse finding on the merits (methodology for computation) in the said Judgment. Therefore, any averment made by the Respondent Commission in relation to the present issue being decided in Appeal 14 of 2012 is factually incorrect and in fact by virtue of not Truing Up the RoCE for the FY 2011-12 by the end of the Control Period, the Respondent Commission has not adhered to its undertaking given in Appeal 14 of 2012. This is a case of non-implementation of this Tribunal's Judgment in Appeal 14 of 2012.

11.1.7 The Respondent Commission has contended in its Reply that in MYT Regulations 2011, the working capital has been considered as 100% debt funded. For FY 2012-13, being the first year of the second Control Period, the debt component has accordingly been adjusted for the purpose of funding of the working capital of the Appellant in the Impugned Order. Thus,

the claim of the Appellant is unjustified. The Respondent Commission in this regard has placed its reliance on the Judgment of this Tribunal in Appeal 166 of 2012.

11.1.8 It is submitted that the reliance placed by the Respondent Commission in Appeal 166 of 2012 is incorrect as the facts of the case and the present appeal are entirely different. The present issue relates to arbitrary deduction of equity capital employed by the Appellant and not with respect to factual issue of the loan outstanding of a Transmission Licensee in a particular year.

11.1.9 In relation to the averment of the Respondent Commission pertaining to the adjustment and transfer of the debt portion and equity portion, it is submitted that such contention is not justified since the Appellant has already invested funds in working capital through equity. Even if the MYT Regulations, 2011 specifies for funding the working capital through debt, the same is applicable for change in working capital from FY 12-13 onwards but without any adjustment in equity which has already been deployed prior to FY 2012-13 for funding of working capital.

11.1.10 It may further be noted that the Respondent Commission while computing that an equity component for determination of ARR for the financial year 2014-15 also committed the same error as mentioned herein above with respect to FY 2012-13. Therefore, Respondent Commission may

kindly be directed to re-compute the ARR for the year 14-15 in line with the aforementioned submissions.

11.1.11 Therefore, in the view of the above it is prayed that the Respondent Commission be directed to re-compute the equity and debt for the period FY 2007-08 to FY 2012-13 after considering the repayment of loans.

11.1.12 The judgment of this Tribunal in Appeal No. 61 & 62 of 2012 has been challenged by DERC bearing Civil Appeal No. 8660 of 2015. However, it is not clear whether the above issue has been challenged or not. The matter is sub-judice and there is no stay against this Tribunal's judgment in Appeal 61 & 62 of 2012 by the Hon'ble Supreme Court.

11.2 The Learned counsel for the Respondent Commission on this issue submitted that:

11.2.1 That the Appellant's contention is that the Commission has omitted equity component of working capital while computing equity capital for the year 2007-08 to 2010-11 and wrongly deducted equity capital related to working capital infused in 2007-08 to 2011-12 while computing the equity capital of FY 2011-12 and erroneous computation of that component. The Appellant is factually incorrect while submitting that the Commission has not considered the equity component of working capital correctly in computation of WACC calculation for FY 2007-08 to FY 2011-12. The Commission has dealt this issue in tariff order as follows:

"3.4 The Commission in its tariff order dated July 31, 2013, has observed omissions in computation of equity and debt for the control period FY 2007-08 to FY 2011-12 in respect of 30% of the working capital in equity. The Commission now rectifies the error and adjusts the equity to arrive at the closing equity balance for FY 2011-12 as given below:

Table 3.79: Revised Debt and Equity for
FY 2011-12 (Rs. Crore)

Sl. No	Particulars	Equity	Debt	Remarks
A	As on 31.03.2012	869.88	1867.96	Tariff Order dated 31.07.2013
B	Adjustment due to omission in computation of equity	54.42		
C	**Rectified Debt & equity closing balance as on 31.03.2012**	**924.30**	**1867.96**	**A+B**
D	Change in opening balance of equity due to change in MYT Regulation, 2011 for the purpose of computation of WACC and ROCE.	(70:30)	70:30	Being reduced by the amount of working capital funded by equity during 1st MYT control period) 234.57*30% =70.37
E	**Opening balance of equity as per MYT Regulation, 2011 as on 1st April 2012**	**853.93**	**1938.34**	**C+D**

11.2.2 Further regarding the repayment of loan in computation of WACC is not based on the MYT Regulations 2011 which provides as under:

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

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

Where

D/E is the Debt to Equity Ratio and for the purpose of determination of tariff, debt-equity ratio for the asset capitalized shall be 70:30. Where equity employed is in excess of 30%, the amount of equity for the purpose of tariff shall be limited to 30% and the balance amount shall be considered as notional loan. The interest rate on the amount of equity in excess of 30% treated as notional loan shall be the weighted

average rate of the loans of the Licensee for the respective years and shall be further limited to the prescribed rate of return on equity in the Regulations. Where actual equity employed is less than 30%, the actual equity and debt shall be considered.

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

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

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

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

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

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

11.2.3 It is evident from the above that D/E ratio to be considered for computation of WACC is debt-equity ratio as on the Date of Commercial Operation. In the MYT regime, the Commission has moved from RoE based approach to RoCE based, where return on capital employed is provided on Regulated Rate Base (RRB). In MYT Regulation, 2011, the working capital has been considered as 100% debt funded. FY 2012-13, being the first year of second MYT control period has been accordingly adjusted for the purpose of funding of the working capital of the Appellant in the impugned order. Thus the claim of the Appellant is unjustified.

11.2.4 Further the issue has been decided in Appeal No. 14 of 2012, wherein the submissions of the Commission have been heard and this Tribunal has directed the Commission to true – up ROCE for FY 2011-12. The relevant extract of the said judgment are as follows:

> *"228. In reply to above submissions, the learned Counsel for the Delhi Commission has made the following submissions:*
>
> > *(a) For the Control Period, the return to the Petitioner has been allowed as per the methodology specified in the MYT Regulations, 2007. As per Regulation, the return for the year shall be determined by multiplying the weighted average cost of capital employed to the average of "Net Fixed Asset" for each year. Thus, the return allowed each year is determined based on the values of assets capitalized (net of depreciation and consumer contribution) in the respective year and not on the capital investment for that year. The addition in equity/free reserves and debt during each year of the Control Period is also to the extent of assets capitalized in that year.*
> >
> > *(b) The loan repayment amount is not factored in for computation of average debt for the year as that would lead to depreciation of only the debt component of the capital employed, while distorting the debt-equity ratio. Hence, the Average Equity (average of opening and closing of equity and free reserves) and average debt (excluding the repayment amount which is considered equal to the depreciation allowed as per Regulation) is considered for calculating the weighted average cost of capital employed. The Delhi Commission has considered the total debt amount used to fund the assets and hence, the deduction of repayment for the purpose of calculating of RoCE is not considered.*
> >
> > *(c) Moreover, as pointed out in the Tariff Order dated August 26, 2011, since all elements of RoCE are subjected to True-Up, the Delhi Commission may also True-Up the RoCE for FY 2011-12 approved at the end of the Control Period.*
>
> *229. In view of the statement of the Delhi Commission, the Delhi Commission may true-up ROCE for the financial year 2011-12 approved at the end of the Control period. The same may be held out by the Delhi Commission as undertaken by the Delhi Commission in its reply."*

11.2.5 A similar issue came up for consideration in the matter of DTL Vs. DERC in Appeal no. 166 of 2012 and the relevant extract of the judgment in the said Appeal are as follows:

> *"41. The fifth issue is regarding consideration of opening loan as on 1.4.2007.*
>
> *42. According to the Learned Counsel for the Appellant, the State Commission has wrongly assumed an opening loan of Rs. 595.68 crores as on 1.4.2007 as against approved loan of Rs. 532.48 crores as provided by the State Commission in the tariff order for the year 2006-07. According to the Learned Senior Counsel for the State Commission, the State Commission has taken gross value of debt for calculation of debt equity ratio for the purpose of calculation of RoCE according to the MYT Regulations, 2011.*
>
> *43. Let us examine the Regulations. The third proviso to Regulation 14 provides that debt to equity ratio for the assets capitalised till 1.4.2012 (other than assets covered under Transfer Scheme) shall be considered as per the debt and equity approved by the Commission at the time of capitalization.*
>
> *44. The State Commission has noted in para 3.112 of the tariff of the impugned order that as per the transfer scheme, opening equity and loan for the Appellant were 180 crores and Rs. 270 crores respectively. Further, the Commission had approved a total loan amount of Rs. 321.68 crores between FY 2002-03 and FY 2006-07. Accordingly, opening loan of FY 2007-08 has been taken as Rs. 591.68 crores.*
>
> *…*
>
> *46. In view of above, we do not find any infirmity in the order of the State Commission."*

11.2.6 Therefore, Appellant's claim is not in line with the Regulation as well as the decisions of this Tribunal. Against the decision in Appeal Nos. 61 and 62 dated 28.11.2014 the Commission has filed Civil Appeal No. 8660-8661 of 2015 in which the issue regarding computation of WACC is raised and the same is pending before Hon'ble Supreme Court.

11.3 Our Analysis and Findings:

11.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has (a) omitted the equity component of working capital while computing equity capital for the year 2007-08 to 2010-11; (b) wrongfully deducted equity capital related to working capital infused in FY 2007-08 to 2011-12, whilst computing the equity capital for FY 2011-12; and (c) erroneous computation of debt component.

11.3.2 Learned counsel, further, submitted that in fact the Commission was required to make year on year adjustment with respect to equity capital from FY 2007-08 to FY 2011-12, but, under the Impugned Order Commission just added the equity capital for working capital in FY 2011-12 and not for the period from FY 2007-08 to 2010-11. It is, therefore, resulted in the loss of return on equity for the period between FY 2007-08 to 2010-11. He was quick to point out that the Commission in its tariff Order dated 31.07.2013 had omitted an amount of Rs. 54.42 crores while determining equity capital of the Appellant for the years 2007-08 to 2011-12. Accordingly, despite admission by the Commission, the said amount has not been added to the closing balance of the relevant years. Further, the Commission in the impugned Order has also revised the opening balance of the equity capital for the present control period for the purpose of computation of WACC and ROCE in accordance with the terms of Tariff Regulations, which provides that the working capital shall be 100% funded by debt. Learned counsel alleged that

while re-computing the equity component of the working capital the Respondent Commission mechanically reduced 30% of the entire working capital from the equity balance of the Appellant, without considering that the working capital was entirely funded through depreciation during the policy direction period and it was only from the year 2007-08 that the addition was made in equity component for funding the working capital.

11.3.3 Learned counsel was quick to highlight that the Commission during the proceedings in Appeal No. 14 of 2012 before this Tribunal had submitted that since all the elements of ROCE for FY 2011-12 are subject to true up, the ROCE for FY 2011-12 will be approved at the end of the control period. Based on such submissions of the Commission, this Tribunal did not pass any adverse finding on the merits (methodology for computation in the said judgment). Therefore, any averment made by the Respondent Commission in relation to the present issue, being decided in Appeal No. 14 of 2012, is factually incorrect and, in fact, by virtue of not truing up ROCE for FY 2011-12 by the end of the control period, the Commission has not adhere to its undertaking given in Appeal No. 14 of 2012.

11.3.4 Regarding reliance placed by the Respondent Commission on the judgment of this Tribunal in Appeal No. 166 of 2012 to contend that the claim of the Appellant is unjustified, learned counsel for the Appellant pointed out that the facts of the case in Appeal No. 166 of 2012 and the present appeal are entirely different. The present issue relates to arbitrary deduction of equity capital employed by

the Appellant and not with respect to factual issue of the loan outstanding of a Transmission Licensee in a particular year.

11.3.5 Learned counsel, further, submitted that the Respondent Commission has committed same error for the future period while computing the equity component for determination of ARR, such as, FY 2014-15. Learned counsel in view of the above submissions prayed that the Commission may be directed to re-compute the equity debt for the FY 2007-08 to 2012-13 after considering the repayment of loans.

11.3.6 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the Appellant is factually incorrect while submitting that the Commission has not considered the equity component of working capital correctly in computation of WACC calculation for FY 2007-08 to FY 2011-12. Learned counsel referred to the Commission's Tariff Order dated 31.07.2013 to contend that debt equity ratio to be considered for computation of WACC is debt equity ratio as on the date of the commercial operation. In the MYT regime, the Commission has moved from RoE based approach to RoCE based, where return on capital employed is provided on Regulated Rate Base (RRB). In MYT Regulation, 2011, the working capital has been considered as 100% debt funded and for FY 2012-13, being the first year of second MYT control period, has been, accordingly, adjusted for the purpose of funding of the working capital of the Appellant in the impugned order and, therefore, the

claim of the Appellant is unjustified. To substantiate his submissions, learned counsel relied upon the judgment of this Tribunal in Appeal No. 14 of 2012 wherein after hearing the Commission, this Tribunal had directed to true-up ROCE for FY 2011-12.

11.3.7 Learned counsel, further, contended that similar issue came up for consideration in the matter of DTL vs DERC in Appeal No. 166 of 2012 before this Tribunal wherein the order of DERC was upheld. Learned counsel reiterated that the Appellant's claim is not in line with the Regulations as well as decisions of this Tribunal. Regarding the decision of this Tribunal in Appeal No. 61 & 62 of 2012 dated 28.11.2014, the Commission has filed Civil Appeal No. 8660-8661 of 2015 before the Hon'ble Supreme Court in which the issue regarding computation of WACC is raised and the same is subjudice.

11.4 Our findings:

11.4.1 We have carefully analyzed the submissions of both the parties on the issue and note that the entire issue revolves around the methodology for computation of WACC and ROCE. It is not in dispute that in accordance with the terms of Tariff Regulations, the working capital has to be 100% funded by debt and, accordingly, the Commission carried out computations relating to debt and equity component of working capital after reducing the amount of working capital funded by equity in the prior period. However, as per the

Appellant, the Commission could have only deducted an amount of Rs. 54.42 crores, which was added as equity component by the Appellant during FY 2007-08 to 2011-12 to finance the working capital.

11.4.2 Regarding reliance of the learned counsel on the judgments of this Tribunal in Appeal No. 14 of 2012 and Appeal No. 166 of 2012, it is noticed that the findings of this Tribunal in both the appeals are not relevant in the present case. While as per the undertaking given by the Respondent Commission in Appeal No. 14 of 2012, the true up for all the elements of ROCE for the FY 2011-12 were to be completed by the end of the control period and, as such, this Tribunal passed no adverse finding on the merits of the case in the said judgment. Besides the facts in the case under Appeal No. 166 of 2012 and the present appeal are entirely different. It is also relevant to note that the judgment of this Tribunal in Appeal Nos. 61 & 62 of 2012 has been challenged by the Respondent Commission before the Hon'ble Supreme Court and there is no stay against the aforesaid judgments of this Tribunal. Accordingly, we are of the considered opinion that necessary true-up of WACC and ROCC may be undertaken and completed by the State Commission as early as possible so that similar errors are not repeated for the future financial years. **Accordingly, this issue is decided in favour of the Appellant**.

D. FRESH ISSUES:

Issue No.	Description
1	Re-determination of AT&C loss trajectory
4	DRS excluded from collection
5	Own consumption of the distribution licensee
8	Wrongful re-opening of tariff orders relating to FY 2004 - 05 to FY 2009-10
9	Disallowance of Other Expenses
13	Deviation from past practice with respect to Service Line Charges
22	Wrongful consideration of income from generation business of the appellant as non-income tariff
27	Erroneous deduction of surcharge from computation of revenue gap instead of carrying cost
29	Erroneous methodology for calculation of working capital requirement
30	Disallowance of capital expenditure made during the year 2012-13
31	Erroneous computation of means of financing assets capitalized
32	Erroneous allowance of depreciation rate
36	Erroneous computation of carrying cost for the year 2014-15

12. *ISSUE NO.1*

RE-DETERMINATION OF AT&C LOSS TRAJECTORY:

12.1 Submissions of learned counsel for the Appellant on this issue are as follows:

12.1.1 The Respondent Commission has re-determined the AT&C loss level for year 2011-12 at 15.325% instead of 13%which was allowed in tariff order dated 28.11.2013. The trajectory for the period FY 2012-13 to 2014-15 was worked out under the MYT Order by gradually lowering the normative AT&C loss levels of 2011-12 by 0.50% every succeeding year, with an aggregate reduction of AT&C loss by 1.5% during the second control period,

given the substantial efforts and investments that are required to be undertaken for lowering the AT&C loss level. The first control period was extended by one year i.e. FY 2011-12 by the Respondent Commission. However, the Respondent Commission while extending such control period fixed the AT&C loss target level at 13% based on actual loss levels while fixing the O&M charges on normative basis. The Appellant in Appeal No. 14 of 2012 had challenged disallowance of O&M cost for FY 2011-12 on the basis of actual O&M cost but fixation of AT&C loss trajectory based on actual AT&C loss level before this Tribunal. This Tribunal by its judgment dated 28.11.2013 in Appeal No.14 of 2012 held that the approach adopted by the Commission in determining AT&C loss levels on actual basis and O&M on normative basis as incorrect. Accordingly, the Respondent Commission in the impugned order re-determined the AT&C loss target for year 2011-12 at 15.325% instead of 13% that was originally allowed in the tariff order dated 26.08.2011. However, while re-working the AT&C loss target for FY 2011-12 from 13% to 15.325%, the Respondent Commission has failed to rework the AT&C loss trajectory for second control period after considering the correction for FY 2011-12 from 13% to 15.325%.

12.1.2 On this issue, the case of the Appellant is that by way of Order dated 10.05.2011 ("**First Order**"), the Respondent Commission had determined the AT&C loss at 13%. Thereafter, by way of MYT Order dated 13.07.2012 ("**Second Order**"), the AT&C loss for the subsequent years was

determined by the Respondent Commission i.e. 12.5% for FY 2012-13, 12% for FY 2013-14 and 11.5% for FY 2014-15. The computation under the Second Order was worked out using AT&C loss at 13% for FY 2011-12 (as determined under the First Order) as the base figure and reducing it year-on-year by 0.5%. Notably, the First Order was challenged before this Tribunal in Appeal No. 14 of 2012 on the ground that while the O&M had been determined on normative basis, the AT&C loss was worked out on the basis of actuals. This Tribunal had allowed the appeal and held that the methodology followed by the Ld. Commission (i.e. O&M on normative basis and AT&C loss on actual basis) is erroneous. In furtherance thereof, the Respondent Commission recomputed AT&C loss for FY 2011-12 at 15.325% on normative basis (instead of 13% as determined at actuals under the First Order). However, the Respondent Commission did not re-compute the AT&C loss for FY 2012-13, FY 2013-14 and FY 2014-15 which were computed under the Second Order using the figure under the First Order as the base figure. It is most humbly submitted that if the base figure for FY 2011-12 changes, the figures for the subsequent years are also bound to change. However, the Commission has merely changed the figure for FY 2011-12 without implementing this Tribunal's directions in true letter and spirit. It is noteworthy that the Respondent Commission in its Written Submissions dated February, 2019 has averred that since the actual AT&C loss of the Appellant was lower than the normative the actual should be allowed.

12.1.3 It is most respectfully submitted that such averments on the part of the Respondent Commission are ex-facie contrary to the directions of this Tribunal in Appeal No. 14 of 2012. Further, the Respondent Commission has in its Written Submissions dated February, 2019 averred that the Appellant has not challenged the Second Order on this count. It is submitted that there was no need for the Appellant to challenge the Second Order because a change to the First Order would automatically entail a change to the Second Order. The Second Order is based on the premise of the First Order.

12.2 The submissions of learned counsel for the Respondent Commission are as follows:

12.2.1 The contention of the appellant is that as per directions of this Tribunal AT&C Loss Trajectory for the FY 2011-12 was changed by the Commission to 15.325%, hence the AT&C Loss Trajectory for subsequent years i.e. 2012-13 to 2014-15 ought to have been revised. The Commission has fixed AT&C Loss Trajectory for the FY 2011-12 as 13% which was challenged by appellant in Appeal No.14 of 2012 wherein this Tribunal has directed that the Commission has taken the actual loss level for fixing the target, however O&M expenses were fixed on normative basis hence the Commission should take either normative AT&C Loss Trajectory with O&M as provided under the regulations or actual and while passing the MYT order dated 13.07.2012 the Respondent Commission has observed as follows:

> *"4.55 While fixing the AT&C loss reduction targets for the Control Period (FY 2012-13 to FY2014-15), the Commission has been guided by:*

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

(b) Delhi is an urban area with very small number of agricultural consumers (less than 0.1% of total sales) and with 100 percent retail consumer metering.

(c) Loss levels in similar private urban distribution licensees, such as Ahmadabad Electricity Supply Company, BEST and BSES, Mumbai, Torrent Power Limited, Gujarat and public utilities viz., MGVCL in Gujarat and BESCOM in Karnataka.

4.56 Considering the past trend of AT&C loss reduction vis-à-vis targets fixed, the expectations of various stakeholders as expressed during the Public Hearings, the need is felt to continue with the trajectory of AT&C loss reduction into the next Control Period, especially in view of the fact that all distribution licensees still have areas where losses are significantly higher than the average AT&C losses achieved by them (above 40% in many areas). None of the distribution licensees have pleaded for higher AT&C loss targets on the grounds of the targets proposed by the Commission being technically incapable of being achieved. This matter, therefore, has to be seen in the context of the higher level of commercial losses for which the distribution utilities have to intensify their efforts. The Commission is of the view that it is not only desirable to fix challenging targets, but to make all efforts to see that these are achieved in the overall interest of determining tariffs which are fair and equitable and help in taking the Delhi Distribution business towards achievements of performance benchmarks set by the best distribution utilities in the country.

4.57 The AT&C loss targets as approved by the Commission for the Control Period is given below:

Table 50: AT&C Loss Targets approved by the Commission (%)

Particulars	FY 2012-13	FY 2013-14	FY 2014-15
Distribution Loss Target	12.06%	11.56%	11.06%
Collection Efficiency Target	99.50%	99.50%	99.50%
AT&C Loss Target	12.50%	12.00%	11.50%

12.2.2 The Respondent Commission in the impugned order has observed as follows:

"3.143 The Hon'ble APTEL has directed in the Appeal no 14 of 2012 and the relevant extract is as below:

"This approach taken by the Delhi Commission is not correct. It should have adopted either the normative AT&C losses trajectory or O&M expenditure as per 2007 MYT Regulations or actual. The Delhi Commission cannot adopt a method under which the Appellant is at loss under all the circumstances. Accordingly, this issue is decided in favour of the Appellant."

"3.144 In compliance to the Judgment of Hon'ble APTEL in Appeal no. 14 of 2012, the Commission is of the view that the principles adopted in the MYT Distribution Regulations, 2007 shall be extended to the FY 2011-12. The Commission has determined the O&M expenses for FY 2011-12 as per principle adopted in MYT Regulations, 2007 on normative basis whereas, AT&C loss targets has been fixed at 13.00% after considering the actual AT&C Loss achievement. In line with the direction of Hon'ble APTEL and MYT Regulations, the AT&C Loss target is now revised on normative basis at 15.325%, instead of revising the O&M expenditure on actual basis as claimed by the Petitioner. Since, the MYT Regulations specify that O&M expenditure shall not be trued up and surplus/deficit shall be to the account of Petitioner. The relevant extracts for fixation of AT&C loss target of MYT Regulation, 2007 is as below:

4.8 The target AT&C loss levels to be achieved by the Distribution Licensees at the end of the Control Period shall be as follows:

(i) NDPL – AT&C Loss level shall be at 17 percent;
Provided that 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;

Provided that profits arising from achieving loss level better than specified in the loss reduction trajectory shall be equally shared between the Licensee and Contingency Reserve;

Provided that profits arising from achieving loss level better than 15% in any year shall be completely to the account of the Licensee;

"3.145 As per the above extracts of the regulation, in case of over achievement by more than two percent (17%-15%) in AT&C loss targets, the incentive for over achievement beyond two percent shall be to the account of the Licensee.

> *3.146 Accordingly, the Commission has revised the AT&C Loss trajectory for FY 2011-12 and has considered the AT&C Loss level targets at 15.325% (i.e. 17% reduced by 1.675%) instead of 13%. The achievement of AT&C loss upto 13.325% (15.325%-2%) is of Rs. 79.11 Crore which has been shared in the ratio of 50:50 between the Licensee and the consumer. The balance of Rs.71.83 Crore on account of AT&C loss targets achieved beyond 13.325% which has been allowed to the extent of 100% to the account of Licensee.*

12.2.3 The actual AT&C loss of the Appellant was 11.49%. The appellant has not raised this issue in Appeal No.171 of 2012 against the MYT order dated 13.07.2012 wherein the target was fixed as 12.50% for 2012-13, 12% for 2013-14 and 11.50% for 2014-15. The appellant has also not challenged the target fixation for AT&C Loss for the year 2013-14 in Appeal No.271 of 2013.

12.2.4 The true up exercise of AT&C loss for FY 2012-13 has been completed in tariff order dated 23.07.2014 and the Appellant has earned incentive towards overachievement in AT&C loss reduction target. It is observed that AT&C loss target fixed for FY 2012-13 was 12.50% whereas actual AT&C loss during the same period has been approved at 10.73%. Therefore, the Appellant's submission regarding high level of normative reduction in AT&C loss level is not justified.

12.2.5 Regulation 4.8 and 5.28 of DERC (terms & conditions for determination of wheeling tariff and retail supply tariff) Regulations, 2011 provides as follows:

> *"4.8 The target AT&C loss levels to be achieved by each Distribution Licensee during each year of the Control Period shall be determined by the Commission based upon benchmarking, past trends, business plan submitted by the Distribution Licensee and any other factor considered relevant by the Commissioner."*
>
> *"5.28 The Licensee shall propose AT&C loss reduction trajectory for each year of the Control Period. For any year of the Control Period, loss reduction should be at least 30% of the total AT&C loss reduction target for the Control Period. The Commission shall examine the filings made by the Licensee for the AT&C loss trajectory for each year of the Control Period and approve the same with modification as considered necessary."*

12.2.6 Against the judgment dated 28.11.2013 passed by this Tribunal in Appeal No.14 of 2012 the Commission has filed Civil Appeal No.5845 of 2014 before Hon'ble Supreme wherein this issue has also been challenged and the same is pending before Hon'ble Supreme Court.

12.2.7 It is submitted that as stated hereinabove the petitioner has achieved the target for AT&C loss hence the same has not been revised in the interest of consumers otherwise tariff would be higher.

12.3 Our Analysis and Findings:

12.3.1 Learned counsel for the Appellant while indicating the AT&C loss level for FY 2011-12, FY 2012-13 to 2014-15 submitted that the first control period was extended by one year i.e. FY 2011-12 by the Respondent Commission. However, while extending such control period, the AT&C loss target level was fixed at 13% based on actual loss levels but the O&M charges were fixed on normative basis.

12.3.2 Learned counsel was quick to point out that this Tribunal by its Judgment dated 28.11.2013 in Appeal No. 14 of 2012 held that the approach adopted by the Commission by determining the AT&C loss level on actual basis and O&M charges on normative basis is incorrect. Accordingly, the Respondent Commission in the impugned order re-determined the AT&C loss target for year 2011-12 at 15.325% instead of 13% that was originally allowed in the tariff order dated 26.08.2011. However, while re-working the AT&C loss target for FY 2011-12 from 13% to 15.325%, the Respondent Commission has failed to rework the AT&C loss trajectory for second control period after considering the correction for FY 2011-12 from 13% to 15.325%. Learned counsel vehemently submitted that in view of these facts, if the base figure for FY 2011-12 changes, the figures for the subsequent years are also bound to change but the Respondent Commission has merely changed the figure for FY 2011-12 without implementing this Tribunal's directions in true spirit for subsequent periods. Regarding the contention of the Commission that since the actual AT&C loss of the Appellant was lower than the normative the actual should be allowed, learned counsel submitted that such averments on the part of the Respondent Commission are contrary to the directions of this Tribunal in Appeal No. 14 of 2012.

12.3.3 Further, on the submission of the Commission dated 19.02.2019 indicating that the Appellant had not challenged the second Order on this count, learned counsel emphasis that there is no need to the Appellant to

challenge the second order because a change to the first order would automatically entail a change to the second order.

12.3.4 ***Per-contra,*** learned counsel for the Respondent Commission submitted that as per directions of this Tribunal AT&C Loss Trajectory for FY 2011-12 was changed by the Commission to 15.325% and the Appellant contends that the AT&C Loss Trajectory for subsequent years i.e. 2012-13 to 2014-15 ought to have been revised by the Commission on the same principles. In fact, in line with the directions of this Tribunal that AT&C Loss for FY 2011-12 was revised on normative basis as 15.325% in place of 13% which was taken on actual basis.

12.3.5 Learned counsel pointed out that the appellant has not raised this issue in Appeal No.171 of 2012 against the MYT order dated 13.07.2012 wherein various targets were fixed for FY 2012-13, 2013-14 & 2014-15 as 12.50%, 12% and 11.50% respectively.

12.3.6 Learned counsel highlighted that the true up exercise of AT&C loss for FY 2012-13 has been completed in tariff order dated 23.07.2014 and the Appellant has earned incentive towards overachievement in AT&C loss reduction target. Subsequently, AT&C loss target fixed for FY 2012-13 was 12.50% whereas actual AT&C loss during the same period has been approved at 10.73%, as such, the Appellant’s submission regarding high level of normative reduction in AT&C loss level is not justified.

12.3.7 Learned counsel for the Respondent Commission, further, submitted that against the judgment of this Tribunal dated 28.11.2013 in Appeal No. 14 of 2012, a Civil Appeal No. 5845 of 2014 has been filed before the Hon'ble Supreme Court wherein this issue has also been challenged and the same is pending before the Hon'ble Supreme Court. In the light these facts, the target for AT&C loss have not been considered for a revision in the interest of consumers otherwise tariff would be higher.

12.4 Our findings:

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

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

12.4.2 In view of these facts, the AT&C loss trajectory beyond FY 2011-12 is required to be revised by considering the principle laid down by this Tribunal in Appeal No.14 of 2012 and, subsequently, followed by the Respondent Commission in its MYT order. **Accordingly, we decide this issue in favour of the Appellant.**

13. ISSUE NO. 4:

DRS EXCLUDED FROM COLLECTION:

13.1 Written submissions filed by the Appellant's counsel on this issue are as under:

13.1.1 It is the Appellant's case that the Respondent Commission while excluding Deficit Recovery Surcharge (**DRS**) as part of revenue realized for the purpose of computation of the collection efficiency for the FY 2012-13, erred in not considering such revenue collected as part of first MYT Period and accordingly re-computed the collection efficiency for the first MYT Period. The Respondent Commission ought to have considered such amount either during the period of realization, or relate it to the period in which it had

accrued to the Appellant. The Respondent Commission in the impugned Order has proceeded to exclude the amount towards DRS from revenue collected for either the first control period when such amount was accrued to the Appellant, or for FY 2012-13 when such amount was collected by the Appellant. The DRS cannot be excluded from both periods thereby depriving the Appellant of the incentive.

13.1.2 The DRS is the surcharge of 8% that has been allowed by the Respondent Commission vide MYT Order dated 13.07.2012 for recovery of carrying cost and liquidation of accumulated revenue gap. The Respondent Commission in the impugned Order has erroneously excluded the DRS from the revenue collected for the purpose of computation of AT&C loss for the FY 2012-13. The Appellant in its Tariff Petition had submitted the computation of 'revenue available' in accordance with the provisions of the Tariff Regulation which categorically provides that only electricity duty and late payment surcharge shall be excluded from the revenue realized for the purpose of computation of collection efficiency.

13.1.3 The Respondent Commission in its reply has taken a stand that DRS is not part of the current year's revenue as the same is collected towards charges in relation to first control period and therefore, the same cannot be included for the purpose of computation of collection efficiency for the present period. It is submitted that the Respondent Commission's

argument could only lead to one logical conclusion that the DRS being part of the revenue towards the first MYT period has to be considered during such period. However, in such case, the Respondent Commission ought to consider such collection as part of revenue collected during the first MYT Period and utilize the same for the purpose of re-computation of "collection efficiency" of the first MYT Period. Alternatively, if DRS is considered as part of revenue collected in the present period then it should be considered as part of the collection for the present period. It is submitted that surcharge imposed by the Respondent Commission was for the purpose of recovery of regulatory assets created due to under recovery in the preceding years. If the recovery of the cost incurred by the Appellant in the preceding year would have been allowed by the Respondent Commission then the same would have been part of the revenue realized in those years resulting in higher Average Billing Rate (**ABR**) of the Appellant. The higher ABR in turn would have entitled the Appellant for increased incentives on account of higher revenue realization.

13.1.4 Further, without prejudice, it is submitted that admittedly 8% was levied for the purpose of recovery of carrying cost. Also, the Respondent Commission in its reply contends that charges which has to be part of ARR as per the MYT Tariff Regulation does not specify surcharge as part of the revenue of the relevant order and accordingly the Respondent Commission has specifically excluded the items which do not form part of ARR for

computation of collection efficiency. The Respondent Commission ought to have allowed the tariff in the previous years in a manner that would have ensured that no revenue gap is formed. However, the Learned Commission while determining the ARR of the Appellant in the previous years failed to provide a cost reflective tariff which led to creation of revenue gap in the books of the Appellant. It is reiterated that the rationale provided by the Respondent Commission that 8% surcharge is part of previous year's (i.e. first MYT period) revenue collected would result in the DRS as part of the collection of the first MYT Period when such revenue gap was created. Therefore, this Tribunal may kindly direct the Respondent Commission to re-compute collection efficiency of the first MYT Period after considering the DRS as revenue collected during such period or alternatively consider the same for collection efficiency for the year 2012-13 after considering the 'revenue available' without deducting DRS.

13.2 On the issue No.4 i.e. DRS excluded from collection, learned counsel for the Respondent Commission submitted that:

13.2.1 The Appellant has submitted that the amount collected towards 8% surcharge should be considered for calculation of AT&C true up. It is submitted that the collection efficiency has been defined in MYT Regulations, 2011 as follows:

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

> *(c) Collection efficiency, which shall be measured as ratio of total revenue realized to the total revenue billed in the same year; Provided that revenue realization from electricity duty and late payment surcharge shall not be included for computation of collection efficiency."*

13.2.2 8% surcharge has been levied in tariff order dated 13.07.2012 for recovery of carrying cost and liquidation of revenue gap which has been corrected upto FY 2010-11. Therefore, the amount calculated on account of 8% surcharge is not part of the current year's revenue billed or revenue collected. The Commission has specifically excluded the items which are not part of the ARR from collection efficiency in regulation as discussed above. Therefore, the appellant's submission to consider the revenue realization from 8% surcharge for AT&C loss computation is not justified.

13.3 Our Analysis and Findings:

13.3.1 Learned counsel for the Appellant submitted that the Respondent Commission while excluding the Deficit Recovery Surcharge (DRS) as part of revenue realized for the purpose of computation of the collection efficiency for the FY 2012-13, has erred in not considering such revenue collected as part of first MYT Period and, accordingly, re-computed the collection efficiency for the first MYT Period. Learned counsel vehemently submitted that the Respondent Commission in the impugned Order has proceeded to exclude the amount towards DRS from revenue collected for either the first control period when such amount was accrued to the Appellant, or for FY 2012-13

when such amount was collected by the Appellant. Learned counsel pointed out that the DRS cannot be excluded from both periods thereby depriving the Appellant of the incentive.

13.3.2 Learned counsel for the Appellant, further, submitted that the Respondent Commission in its reply has taken a stand that DRS is not part of the current year's revenue as the same is collected towards charges in relation to first control period and, therefore, the same cannot be included for the purpose of computation of collection efficiency for the present period. However, in such case, the Respondent Commission ought to consider such collection as part of revenue collected during the first MYT Period and utilize the same for the purpose of re-computation of "collection efficiency" of the first MYT Period.

13.3.3 Learned counsel was quick to submit that alternatively, if DRS is considered as part of revenue collected in the present period then it should be considered as part of the collection for the present period. Further, he vehemently submitted that admittedly 8% surcharge was levied for the purpose of recovery of carrying cost. However, the Respondent Commission has not allowed the tariff in the previous years in a manner that would have ensured that no revenue gap is formed. However, the Commission while determining the ARR of the Appellant in the previous year failed to provide a cost reflective tariff which led to creation of revenue gap in the books of the

Appellant. Learned counsel for the Appellant reiterated that in the facts and circumstances of the matter, the Respondent Commission may be directed to re-compute collection efficiency of the first MYT Period after considering the DRS as revenue collected during such period or alternatively consider the same for collection efficiency for the year 2012-13 after considering the 'revenue available' without deducting DRS.

13.3.4 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the collection efficiency has been defined in MYT Regulations, 2011 as follows:

> *"4.7 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which include:*
> *(c) Collection efficiency, which shall be measured as ratio of total revenue realized to the total revenue billed in the same year;*
>
> *Provided that revenue realization from electricity duty and late payment surcharge shall not be included for computation of collection efficiency."*

13.3.5 Learned counsel, further, submitted that 8% surcharge has been levied in tariff order dated 13.07.2012 for recovery of carrying cost and liquidation of revenue gap which has been corrected upto FY 2010-11. As such, the amount calculated on account of 8% surcharge is not part of the current year's revenue billed or revenue collected. In fact, the Commission has specifically excluded the items which are not part of the ARR from collection efficiency in regulation as discussed above and, therefore, the

appellant's submission to consider the revenue realization from 8% surcharge for AT&C loss computation is not at all justified.

13.4 Our findings:

13.4.1 We have analyzed the rival submissions of both the parties. It is relevant to note that DRS is the surcharge of 8% that has been allowed by the Respondent Commission vide MYT Order dated 13.07.2012 for recovery of carrying cost and liquidation of accumulated revenue gap. It is the case of the Appellant that as the MYT Regulations, 2011 critically provides that only electricity duty and late payment charges have to be excluded from the revenue realized for the purpose of computation of collection efficiency, the DRS should be considered as part of the current years revenue as the same is collected in relation to the applicable control period. On the other hand, the Respondent Commission has considered 8% DRS as not part of the current year's revenue billed or revenue collected. After critical analysis of the case brought out by learned counsel for the Respondent Commission, we are of the opinion that 8% surcharge has been levied in tariff order dated 13.07.2012 for a specific purpose i.e. for recovery of carrying cost and liquidation of revenue gap and, hence, does not qualify to be considered as revenue realization. Accordingly, though, not specifically mentioned in the MYT Regulations, 2011, the Respondent Commission has taken a proper view in disallowing the amount of DRS in the revenue collection of that year

and has rightly excluded for computation of collection efficiency. **Hence, interference of this Tribunal on this issue is not called for**.

14. ***ISSUE NO. 5:***

OWN CONSUMPTION OF THE DISTRIBUTION LICENSEE

14.1 Appellants' submission on this issue are as follows:

14.1.1 The impugned Order is contrary to MYT Tariff Order, 2012 which is on normative basis and different treatment for other distribution licensee BRPL on similar facts. This is discriminatory treatment against the Appellant. The Respondent Commission was required to consider and determine the own consumption of the Appellant on normative basis, as per the principle adopted by Respondent Commission in the multi-year tariff order dated 13.07.2012 instead of actuals as determined in the impugned Order. Further, the Respondent Commission while determining the own consumption of the Appellant has acted in a discriminatory manner by adopting different norms for allowance of own consumption to the other licensee in NCT of Delhi (ie. BYPL & BRPL).

14.1.2 The issue of own consumption by the Appellant was considered by Respondent Commission in the MYT order dated 13.07.2012. "Own consumption" refers to the electricity consumed by the Appellant for its own establishment namely sub-station, offices and other operational establishments. The Respondent Commission, while examining the extent of

own consumption by the Delhi distribution licensees observed that there were no uniform basis worked out to the extent to which the electricity was consumed for own consumption. Accordingly, it proceeded to specify a norm according to which electricity used by the Distribution Licensee would be allowed at zero cost.

14.1.3 Having set out the normative basis of determining own consumption of FY 2010-11 onwards the Respondent Commission directed the Delhi Discoms including the Appellant to meter self-consumption on “their own premises” and raise bills at the appropriate tariff basis on such meter reading every month. The credit for zero tariff to the extent of the normative own consumption was to be worked out at the end of Financial Year.

14.1.4 The Appellant in its petition before the Respondent Commission had considered own consumption in accordance with the MYT Order and had submitted a figure of 16.68 MU for the Financial Year 2012-13 considering the own consumption of 16.26 MU allowed by the Commission for the year 2011-12, along with a 2% increase on year to year basis. However, the Respondent Commission, in the Impugned Order has erroneously considered own consumption of the Appellant on the basis of actuals instead of the normative basis for determination of own consumption as adopted by Respondent Commission in the MYT Order. The Respondent Commission has acted contrary to its directive in the MYT Order and proceeded on the

basis that since actual own consumption is lesser than the normative own consumption, the actual own consumption will be considered for the year FY 2012-13 instead of applying the normative own consumption as was determined in the MYT Order. The departure from the standards adopted by the Respondent Commission has led to regulatory uncertainty and thereby affects the business planning and viability of the distribution utility.

14.1.5 The principle of multi-year tariff have been introduced in the Electricity Act and elaborated in the tariff policy with the objective of providing certainty with regard to the norms to be applied for determination of tariff for specified control period and transparency regarding the tariff worked out during such control period in accordance with such norms. The central idea of multi-year tariff policy is to bring about consistency and predictability in the tariff determination process for the benefit of the consumers.

14.1.6 The Respondent Commission has proceeded in the impugned order to adopt the actual own consumption of 11.34 MU's for tariff determination instead of the normative own consumption fixed under the MYT order. None of the other reasons listed out herein above at SL. No. 1 to 6 above have been recorded in the Impugned Order. Such arguments are now being developed as a matter of afterthought to supplement the reasons provided in the Impugned Order and the same cannot be allowed in view of the principles laid down by the Hon'ble Supreme Court in the case of *Mohinder Singh Gill*

vs Chief Election Commissioner [(1978) 1 SCC 405] and has been relied by this Tribunal in Appeal no. 184 of 2011 (Judgment dated 27.2.2013) (Delhi Transco Vs DERC) and Appeal No. 133 of 2013 (Judgment dated 9.4.2014) (Tata Power Vs MERC).

14.1.7 It is also submitted that without prejudice to the above submissions that the Respondent Commission has in its reply proceeded to misconstrue the rationale of the MYT order of 13.07.2012 and add to it certain caveats that are not found in the MYT order. It is respectfully submitted that it is not open to the Respondent Commission to now modify and/or to add to the language of the MYT order, the Respondent Commission being functus-officio in relation thereto. Further, the law is well settled that it is not open to the Respondent Commission to revise the norms set out in the MYT order by way of a mid-term revision. Therefore, this Tribunal may kindly direct the Respondent Commission to consider the own consumption of the Appellant on normative basis for determination of the own consumption as adopted by the Respondent Commission in the multi-year tariff order dated 13.07.2012. The parties in Appeal No. 184 of 2011 have filed an appeal before the Hon'ble Supreme Court. However, it is not clear whether the above issue/principle have been challenged by it in those appeals. Further, the matter is sub-judice and there is no stay against the judgment of this Tribunal in Appeal No. 184 of 2011.

14.1.8 There has been an appeal filed against the judgment of this Tribunal in Appeal No. 133 of 2013 before the Hon'ble Supreme Court. However, it is not clear whether the above issue/principle have been challenged in that appeal. Further, the matter is sub-judice and there is no stay against the judgment of this Tribunal in Appeal No. 133 of 2013.

14.2 On this issue, in its written submission, Respondent Commission has submitted the following:

14.2.1 The Appellant has submitted that own consumption of the Appellant should be allowed on normative basis instead of the actual. As per MYT Order dated 13.07.2012, it is submitted that the Commission had bench marked the own consumption in tariff order dated 13.07.2012 due to non-metering of self consumption in their own premises. Accordingly, the Commission has allowed Appellant to avail credit at zero tariff upto actual consumption or normative self consumption whichever is less because the norms of 0.25% had been fixed in absence of 100% metering for self consumption in their own premises. In present tariff petition, the Appellant has claimed 100% metering of their premises, therefore, the Commission has adopted the above principle.

14.2.2 The Respondent Commission in the MYT order dated 13.07.2012 has observed as follows:

> *"2.79 The distribution utilities have been showing "self consumption" at their offices/installations at zero cost, in their respective ARRs. While*

analyzing the quantum of such "self consumption" charged by the distribution utilities, the Commission was unable to find a uniform basis or justification for the same. The Commission has considered the matter related to "Self Consumption" by DISCOMs and decided that 0.25% of total units sold during FY 2010-11 may be taken as benchmark on normative basis for determining "Self Consumption" for FY 2010-11. An increment at the rate of 2% (of the previous year's "Self Consumption") may be added each year till FY 2014 -15. The above norms will be reviewed after the end of the current MYT period."

14.2.3 In the Tariff order dated July 13, 2012, the Respondent Commission vide its directive 6.12 has directed all DISCOMs to meter self consumption in their own premises and to raise the bills at appropriate tariff for actual consumption based on meter reading every month and the licensee may avail credit at zero tariff to the extent of the normative self consumption approved by the Commission at the end of the financial year.

14.2.4 The Petitioner has submitted the own consumption as 26 MU. The Appellant submitted that the units furnished on account of own consumption are actual and requested to consider the same and not to consider the sales of own consumption on normative basis as followed by the Commission in earlier Tariff Orders also.

14.2.5 During the validation session, it was indicated by the Appellant that all the installations of the Appellant are metered and the consumption of 26 MU pertains to FY 2012-13 only. However, the Commission observed that the Appellant has considered total own consumption i.e. 26 MU at zero rate in the sales/Form 2.1(a).

14.2.6 The Commission has also taken a decision vide Para 2.79 of Tariff Order dated July 13, 2012 that the self consumption shall be 0.25% of total sales for FY 2010-11 and shall be escalated at the rate of 2% per annum up to FY 2014-15. Accordingly, the Commission has arrived at the normative own consumption for the Appellant as 21.86 MU for FY 2012-13 by escalating the own consumption approved for FY 2011-12 at the rate of 2% per annum.

14.2.7 It is submitted that the own consumption over and above the normative consumption is 4.14 MU (26.00-21.86). As discussed above, the Commission decided to consider this excess own consumption of 4.14 MU at the Average Billing Rate of Rs. 9.38 per unit for FY 2012-13 of Non-domestic category assuming all installations for non-domestic purpose as given in Form 2.1(a) submitted by the Petitioner and disallowed the same in truing up for FY 2012-13. Normative self consumption was allowed to BRPL as their supply is not metered 100%.

14.2.8 The norms fixed by the Respondent Commission are ceiling norms. If the actual consumption is more the distribution licensees will be given benefit of normative value. However, in case the actual consumption is less than the normative value, actual consumption will be considered.

14.3 Our Analysis and Findings:

14.3.1 Learned counsel for the Appellant submitted that the impugned order is contrary to MYT Tariff Order, 2012 regarding own consumption of the

distribution licensee which is on normative basis. Learned counsel alleged that the Commission is resorting to different treatment for other distribution licensee BRPL on similar facts.

14.3.2 Learned counsel for the Appellant, further, submitted that the Respondent Commission should have considered and determined the own consumption of the Appellant on normative basis, as per the principle adopted by the Commission in the MYT Order dated 13.07.2012 instead of actual as determined in the impugned Order. Learned counsel vehemently submitted that having set out the normative basis of determining own consumption of FY 2010-11 onwards the Respondent Commission directed the Delhi Discoms including the Appellant to meter self-consumption on their own premises and raise bills at the appropriate tariff basis on such meter reading every month. The credit for zero tariff to the extent of the normative own consumption was to be worked out at the end of Financial Year.

14.3.3 To be more specific, learned counsel submitted that in accordance with the MYT Order it had submitted a figure of 16.68 MU for the Financial Year 2012-13 considering the own consumption of 16.26 MU allowed by the Commission for the year 2011-12, along with a 2% increase on year to year basis. However, the Respondent Commission, in the Impugned Order, has erroneously considered own consumption on actual basis in utter contravention of its earlier MYT order. As a result, the Commission has

adopted the actual own consumption of 11.34 MU's for tariff determination instead of 16.68 MU for the FY 2012-13.

14.3.4 Learned counsel for the Appellant was quick to point out that reasons now given by the Commission are nowhere part of the impugned order and appeared to be a matter of afterthought which is not permissible under the law. Learned counsel, to substantiate his arguments, placed reliance on the judgment of Hon'ble Supreme Court in the case of *Mohinder Singh Gill vs Chief Election Commissioner* [(1978) 1 SCC 405] which has been relied by this Tribunal in Appeal no. 184 of 2011 (Judgment dated 27.2.2013) in the case of Delhi Transco vs DERC and also in Appeal No. 133 of 2013 (Judgment dated 9.4.2014) in the case of Tata Power vs MERC.

14.3.5 Summing up his arguments, learned counsel for the Appellant reiterated that the law is well settled and it is not open to the Respondent Commission to revise the norms set out in the MYT order by way of a mid-term revision. Accordingly, learned counsel for the Appellant prayed that this Tribunal may kindly direct the Respondent Commission to consider the own consumption of the Appellant on normative basis instead of actual.

14.3.6 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the Commission had bench marked the own consumption in Tariff Order dated 13.07.2012 due to non-metering of self consumption in their own premises by the Delhi Discom. In fact, the Commission has allowed

Appellant to avail credit at zero tariff upto actual consumption or normative self consumption whichever is less because the norms of 0.25% had been fixed in absence of 100% metering for self consumption in their own premises. Learned counsel pointed out that In present tariff petition, the Appellant has claimed 100% metering of their premises, therefore, the Commission has adopted the actual consumption which is less than the normative consumption.

14.3.7 learned counsel, further, submitted that based on the analysis of figures submitted by the Appellant, the own consumption over and above the normative consumption was 4.14 MU and the Commission decided to consider this excess own consumption at the Average Billing Rate of Rs. 9.38 per unit for FY 2012-13 of Non-domestic category assuming all installations for non-domestic purpose as given in Form 2.1(a) submitted by the Appellant. Learned counsel clarified that the normative self consumption was allowed to BRPL as their supply to all the premises was not 100% metered.

14.3.8 Learned counsel for the Respondent Commission contended that in fact, the norms fixed by the Respondent Commission are ceiling norms and if the actual consumption is more than the normative value, the normative consumption would be considered and in case the actual consumption is less than the normative value, actual consumption will be considered.

14.4 Our findings:

14.4.1 We have carefully considered the contentions of learned counsel for both the parties and also taken note of the judgments relied upon by both the parties. It is the case of the Appellant that as being allowed by the Commission in previous MYT Orders, the own consumption of the Appellant needs to be taken on normative basis and not on the actual basis. We have perused the various MYT orders including the impugned order of the State Commission and it is pertinent to notice that earlier in absence of 100% metering of own premises, the Commission allowed own consumption on normative basis with 2% increase on year to year basis. However, the State Commission directed all the Delhi Discoms including the Appellant to meter their self consumption on their own premises and raise bills at the appropriate tariff basis of such meter reading every month.

14.4.2 It is, further, noted that while truing up of FY 2012-13, the Appellant was disallowed the excess own consumption of 4.14 MU over and above the normative consumption on account of the fact that 100% metering have been achieved by the Appellant in all its premises and the actual consumption was found less than the own consumption computed on normative basis. We opined that in a scenario of transparency and safeguarding the consumers' interest, 100% metering should be a must for the Discoms in line with the submission of actual consumed energy accounts before the Commission. In view of these facts, the State Commission has taken an appropriate decision

for enforcing 100% metering of the own premises of the Appellant and rightly considered the actual own consumption instead of consumption on normative basis, **as such, interference of this Tribunal is not called for**.

15. ISSUE NO. 8

WRONGFUL REOPENING OF TARIFF ORDERS RELATING TO FY 2004-05 TO FY 2009-10:

15.1 Appellant's submissions on this issue are:

15.1.1 The Respondent Commission has illegally re-opened the tariff for prior period, i.e. FY 2004-05 to 2009-10 for which true up has been completed, to review the methodology adopted by the Appellant during such period for recording misuse units while computing total energy sales of the Appellant for FY 2010-11. The Respondent Commission, while computing the misuse units, had observed that methodology of computing misused units by dividing the amount billed against misuse of electricity by average billing rate for the unauthorized category for which electricity was misused, was being followed since FY 2004-05. It further, observed that the Appellant only had data regarding misused unit from FY 2007-08 to 2009-2010. Therefore, the Respondent Commission in the Impugned Order extrapolated the additional misused units during the year 2007-08 to 2010-11 and determined the misused units for FY 2004-05 to FY 2006-07 and accordingly reduced the incentive for over achievement of AT&C loss targets from FY 2004-05 to FY 2009-10.

15.1.2 This Tribunal in the matter of *Karnataka Power Transmission Company Limited v. Karnataka Electricity Regulatory Board* dated 09.05.2008 has held that the process of truing up is limited in its scope and cannot occasion fresh truing up for the past period, to alter / amend any methodology applied in the past. Such an exercise is not permissible in a true up proceeding. The Tribunal further held that the second true up can be initiated only when there is difference between the provisional accounts on the basis of which the first truing up is done and audited accounts which may have been furnished after such truing up. Further, it may be noted that this Tribunal in Appeal No. 265 of 2006 in the matter of *NDPL vs DERC* had categorically held that the Respondent Commission cannot do a second truing up of a tariff order. Also this Tribunal in the matter of *Bangalore Electricity Supply Company Limited v. Karnataka Electricity Regulatory Commission* dated 09.10.2009 has reiterated the aforementioned judgment and held that the truing up cannot be done on the basis of a new methodology. In another judgment dated 16.12.2014, this Tribunal in Appeal No. 289 of 2013 has also held that once the tariff orders have attained finality, then the same cannot be re-opened.

15.1.3 As per the Regulation 4.16 of the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 ("2007 MYT Regulations"), the

Respondent Commission's power is limited to true up of the variation in revenue or expenditure on account of uncontrollable factors e.g. sales and power purchase. Therefore, the scope of true up under the 2007 MYT Regulations is limited to the annual adjustment of the expenses/ revenue provisionally allowed to the distribution licensee vis-a-vis the actual expenses incurred or revenue earned in that particular year in relation to uncontrollable factors. However, in the Impugned Order, the Respondent Commission by adjusting the additional misuse units recorded in the earlier years in the ARR for FY 2004-05 to FY 2009-10 has in effect amended the methodology for recording of misuse units with retrospective effect from FY 2004-05 and re-opened the tariff orders relating to prior period that has already been trued up and stand finalized to such extent.

15.1.4 The Respondent Commission as per the principle laid in the aforementioned judgments cannot do a second true-up of the tariff order on the basis of a new methodology and re-open such orders. The Impugned Order to the extent it has reworked the misused units and AT&C loss levels for the period FY 2004-05 to FY 2009-10, is illegal and without jurisdiction. Without prejudice to above, it may further be noted that for calculating units for period FY 2004-05 to FY 2009-10 on erroneous assumption of CAGR of 28.48% is illogical. Table 3.36 shows additional misuse units for FY 07-08 to 10-11 as follows:

Particulars	*FY08*	*FY09*	*FY10*	*FY11*
Misuse Units	*25.07*	*12.98*	*15.18*	*11.82*

The above table clearly shows the figure of FY 08 as an outlier whereas the misuse units for the other years remain in the range of 12-15 MUs. However, the Respondent Commission has superfluously inflated the derived misuse units for earlier years taking increase of 28.48% every year. Therefore, the assumption of year on year increase of 28.48% is illogical and the assumption made by the Respondent Commission deserves no merit.

15.1.5 The Respondent Commission in its reply has stated that it has not re-opened the tariff for prior period for which true up has been completed; instead it has specifically sought the actual information from the Appellant regarding the misuse units accounted from FY 2004-05 to FY 2009-10. It has been stated by it that since the Appellant has not submitted the complete data for the aforementioned years towards misuse units, therefore the Respondent Commission considered the methodology for extrapolation of additional misuse units to arrive at actual AT&C loss incentive for the appellant in those years. The Respondent Commission is attempting to obfuscate the present issue by stating that the Respondent Commission has not reopened the tariff for prior period for which true up has been completed. It is submitted that the Learned Commission in the Impugned Order has in fact reopened all the orders since 2004-05 and adjusted the same arbitrarily and illegally by extrapolating the data presently available with it. The justification given by the

Respondent Commission for computation of methodology of extrapolating of additional misuse of units due to non-submission of complete data by the Appellant is incorrect and without any basis. It is reiterated that the information available with the Appellant has been provided to the Respondent Commission and the information related to the prior period is not available with the Appellant itself as the same was not required to be collected by the Appellant at that point of time. Further, the question of extrapolation of data by the Respondent Commission for earlier years between 2002-03 to 2006-07 does not arise in view of the settled legal position that the Respondent Commission does not have the jurisdiction to reopen tariff of earlier years once true up has been done since no data was sought by the Respondent Commission during such period.

15.1.6 Without prejudice, it is further submitted that while truing up FY 04-05 to FY 09-10, there was no requirement on part of the Appellant to maintain such data as sought during FY 10-11 under the then extant regulatory framework as prescribed by the Respondent Commission and other appropriate authorities. It is pertinent that seeking data with respect to prior years during the true up of FY10-11 was merely an afterthought. Moreover, it is reiterated that the Respondent Commission has not done provisional true ups for the previous years and such true up orders have attained finality and cannot be re-opened. This Tribunal may set aside the Impugned Order to the extent it has reworked the misused units and AT&C loss levels for the period

FY 2004-05 to FY 2009-10 and made adjustments to the AT&C losses in the past period. There has been no appeal filed in the Hon'ble Supreme Court against the order of this Tribunal in Appeal No. 289 of 2013. Therefore, all the issues decided by this Tribunal in Appeal 289 of 2013 have achieved finality.

15.1.7 Further, there has been no appeal against the order of this Tribunal in the Karnataka Power Transmission Company Limited and Bangalore Electricity Supply Company Limited cases. Therefore, the issues decided by this Tribunal in these cases have achieved finality.

15.2 The Respondent Commission has submitted the following on the Issue No. 8:

15.2.1 The Appellant has submitted that the tariff order regarding FY 2004-05 to FY 2009-10 has been re-opened to review the methodology adopted by TPDDL during such period for recording the misused units for the purpose of computing total energy sales of TPDDL, is illegal. The Commission has not re-opened the tariff for prior period for which true up has been completed instead the Commission has specifically sought the actual information from the appellant regarding the misuse units accounted from FY 2004-05 to FY 2009-10. However, the appellant has not submitted the actual data for these years towards misused units. Therefore, the Commission has considered the methodology for extrapolation of additional misused units to arrive at the actual AT&C loss incentive for the appellant in those years.

15.2.2 The Commission observed that the misused units were under reported by the Appellant during the true up of FY 2010-11. The Commission had sought information from the Petitioner regarding the misused units for the earlier periods since FY 2002-03.

15.2.3 The Appellant vide its letter dated June 13, 2012 submitted actual misused units and misused units considered in Form 2.1 (a) for FY 2007-08 – FY 2009-10, however, no back up data was provided for support. The Appellant did not submit details of actual misused units and misused units considered in Form 2.1 (a) for FY 2002-03 – FY 2006-07. The Commission directed the Petitioner to submit details of actual misused units and misused units considered in Form 2.1 (a) by the Petitioner along with the backup data for FY 2002-03 - FY 2010-11 within 2 months of issuance of this Tariff Order.

15.2.4 On the basis of the information made available it was observed that M/s. TPDDL indicated misused units recorded in Form 2.1(a) for the years 2007-08 to 2010-11. It was also noted in TPDDL submission dated 12.10.2012, the data for misused units was indicated as 12.19 MUs as per the auditors certificate. No information was submitted for FY 2002-03 to FY 2006-07. While analyzing the submission under the auditor certificate, the Commission observed that the auditor did not provide the methodology adopted by the auditor for verifying the data in respect of misuse neither the certificate mentioned about any additional misuse unit as observed by the

Commission in Tariff Order dated 13.07.2012 indicating the auditors were not apprised of the observation of the Commission in Tariff Order dated 13.07.2012.

15.2.5 The Commission in the MYT order dated 13.07.2012 have observed as follows:

> *"3.29 The petitioner vide its letter dated June 13, 2012 submitted actual misuse units and misuse units considered in Form 2.1 (a) for FY 2007-08 – FY 2009-10, however, it has not provided any back up data for support. The Petitioner has also not submitted details of actual misuse units and misuse units considered in Form 2.1 (a) for FY 2002-03 – FY 2006-07. The Commission directs the Petitioner to submit details of actual misuse units and misuse units considered in Form 2.1 (a) by the Petitioner alongwith the backup data for FY 2002-03 – FY 2010-11 within 2 months of issuance of this Tariff Order.*
> *"3.50 ……. the Commission has not been able to arrive at the sales for the year due to the Petitioner's inability to produce explanations and justifications for the methodology adopted by them. Thus, the Commission has not approved energy sales figures and subsequently, AT&C loss for FY 2010-11 and the corresponding incentive/penalty.*
> *"3.51 With regards to the period prior to FY 2010-11, the Commission will revise AT&C Losses for FY 2002-03 – FY 2009-10 after incorporating the changes due to misuse units as indicated in paragraph 3.29 and the corresponding incentive/penalty."*

15.2.6 The appellant has not challenged the aforesaid observations of the Commission in Appeal No.171 of 2012 filed against MYT order dated 13.07.2012 hence cannot challenge the same in present Appeal.

15.3 Our Analysis and Findings:

15.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has illegally re-opened the tariff for prior period i.e. FY 2004-05

to 2009-10 for which true up has been completed, to review the methodology adopted by the Appellant during such period for recording misused units while computing total energy sales of the Appellant for FY 2010-11. Learned counsel alleged that the Respondent Commission in the Impugned Order extrapolated the additional misused units during the year 2007-08 to 2010-11 and determined the misused units for FY 2004-05 to FY 2006-07 and, accordingly, reduced the incentive for over achievement of AT&C loss targets from FY 2004-05 to FY 2009-10. While questioning the legality in such an act of the Commission in the impugned order, learned counsel for the Appellant placed reliance on the judgment of this Tribunal in the matter of Karnataka Power Transmission Company Limited v Karnataka Electricity Regulatory Board dated 09.05.2008 in which this Tribunal held that the process of truing up is limited in its scope and cannot occasion fresh truing up for the past period, to alter / amend any methodology applied in the past. In addition, learned counsel for the Appellant also cited judgment of this Tribunal in Appeal No. 265 of 2006 in the case of *NDPL vs DERC* wherein it categorically held that the Respondent Commission cannot do a second truing up of a tariff order. To substantiate his contentions, leaned counsel for the Appellant also placed reliance on this Tribunal's judgment in the matter of *Bangalore Electricity Supply Company Limited v. Karnataka Electricity Regulatory Commission* dated 09.10.2009 and also another judgment dated

16.12.2014 in Appeal No. 289 of 2013 vide which it has been held that once the tariff orders have attained finality then the same cannot be re-opened.

15.3.2 Learned counsel also highlighted the Regulation 4.16 of Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 under which the Respondent Commission's power is limited to true up of the variation in revenue or expenditure on account of uncontrollable factors e.g. sales and power purchase.

15.3.3 Learned counsel for the Appellant reiterated that as per the principle laid in the aforementioned judgments, the Respondent Commission cannot do a second true-up of the tariff order on the basis of a new methodology and re-open such orders. He, further, highlighted that all previous trueup orders have attained finality and, therefore, cannot be reopened. Further, no appeal has been filed in the Hon'ble Supreme Court against the order of this Tribnal in Appeal No. 289 of 2013 and all issues decided by this Tribunal have achieved finality.

15.3.4 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the Commission has not reopened the tariff of prior period for which true up has been completed, instead it has specifically sought the actual information from the Appellant regarding the misused units accounted from FY 2004-05 to FY 2009-10. Learned counsel pointed out that the

misused units were under reported by the Appellant during the true up of FY 2010-11, therefore, the Commission had sought information regarding misused units for the earlier periods. Learned counsel emphasized that the Commission has powers to look into the crucial matters of public interest regarding which it feels under reporting or misreporting and there is nothing wrong in the approach of the commission as being alleged by the Appellant.

15.3.5 Learned counsel was quick to point out that the State commission in its MYT Order dated 13.07.2012 had observed as under:

> *"3.29 The petitioner vide its letter dated June 13, 2012 submitted actual misuse units and misuse units considered in Form 2.1 (a) for FY 2007-08 – FY 2009-10, however, it has not provided any back up data for support. The Petitioner has also not submitted details of actual misuse units and misuse units considered in Form 2.1 (a) for FY 2002-03 – FY 2006-07. The Commission directs the Petitioner to submit details of actual misuse units and misuse units considered in Form 2.1 (a) by the Petitioner along with the backup data for FY 2002-03 – FY 2010-11 within 2 months of issuance of this Tariff Order.*
>
> *"3.50 ……. the Commission has not been able to arrive at the sales for the year due to the Petitioner's inability to produce explanations and justifications for the methodology adopted by them. Thus, the Commission has not approved energy sales figures and subsequently, AT&C loss for FY 2010-11 and the corresponding incentive/penalty.*
>
> *"3.51 With regards to the period prior to FY 2010-11, the Commission will revise AT&C Losses for FY 2002-03 – FY 2009-10 after incorporating the changes due to misuse units as indicated in paragraph 3.29 and the corresponding incentive/penalty."*

15.3.6 Learned counsel contended that the Appellant has not challenged the aforesaid findings of the Commission in Appeal No. 171 of 2012 filed against the MYT Order dated 13.07.2012 and, hence, the Appellant cannot challenge the same in the present appeal.

15.4 Our findings:

15.4.1 We have critically analyzed the rival contentions of both the parties regarding reopening of tariff orders relating to quantum of misused units for the past periods i.e. FY 2002-03 to FY 2009-10. We are inclined to accept the submissions of the learned counsel for the Appellant that true up of all the matters pertaining to past periods has been considered by the Respondent Commission for reopening and re-truing up relating to quantum of misused units is in contravention of the settled principles of law. While taking note of the findings in various judgments of this Tribunal as relied upon by the learned counsel for the Appellant, it is crystal clear that once the Commission has trued up the facts and figures projected by the Appellant for year to year basis and passed the final orders there is no scope for reopening of the trued up matters for reconsideration of any aspect by devising any new methodology or any new principle whatsoever.

15.4.2 We do not find any force in the submissions of learned counsel for the Respondent Commission that as the Appellant has not challenged the observations of the Commission contained in MYT order dated 13.07.2012 in Appeal No. 171 of 2012, it cannot challenge the same in the present appeal. However, to meet the end of justice, the Appellant needs to be given an opportunity to challenge any issue which deprives it any benefit legally entitled for or otherwise renders it to an unadvantageous position as the case

may be. In view of these facts, we are of the opinion that when final true up for previous years have been completed and final orders passed by the Commission, which have attained finality, cannot be reopened for re-examination. **We, therefore, decide this issue in favour of the Appellant that trued up matters/ orders cannot be reopened or reexamined /reconsidered.**

16. ISSUE NO. 9:

DISALLOWANCE OF OTHER EXPENSES:

16.1 In its written submission, on this issue, learned counsel for the Appellant submitted that:

16.1.1 The Respondent Commission has 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 part of the Appellant in as much as they related to change in law and change in charges levied by the bank / financial institutions. The list of uncontrollable expenses claimed by the Appellant is given below:

(Rs. crores)

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**

16.1.2 The aforementioned expenses claimed by the Appellant by the very nature cannot be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order. The Respondent Commission itself has accepted the same in so far as increase in License fee and loss on redemption of contingency reserve investments is concerned. However, the Respondent Commission has erred in not allowing these expenses as uncontrollable.

16.1.3 This Tribunal in its judgment dated 10.2.2015 in Appeal no. 171 of 2012 has held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and therefore ought to be allowed.

16.1.4 The Appellant in its Tariff Petition had submitted that it has 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 as has been decided by this Tribunal in Appeal No. 171 of 2012 that inflationary cost escalation can in no manner be construed as escalation due to increase in statutory levies / taxes.

Therefore, these changes of statutory nature need to be allowed as waiver factored in at the time of fixation of normative expenses.

16.1.5 The Appellant in its Tariff Petition had claimed an additional amount of Rs. 0.40 crores towards financing charges as per the audited accounts of the Appellant. However, the Respondent Commission in the Impugned Order disallowed such claim on the pretext that Return on Capital Employed ("**RoCE**") shall be used to provide for financing charges also. The Tariff Regulations 5.6 clearly specifies 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"*. The above regulations clearly specifies that the RoCE should cover all financing cost but financing cost incurred for obtaining the loans has not at all been factored in the cost of debt. If these minor charges are not incurred, the Appellant will not be able to avail the Loans from the banks as these are the minimum required charges for availing the loans and are uncontrollable at the hands of the Appellant. The Respondent Commission has itself recognized that the interest rate of Appellant is lowest amongst all other Discoms. Therefore, disallowing these minimum charges levied by banks puts undue burden on the Appellant without recognizing the efficiency of Appellant in keeping the interest rate to lowest possible levels. The Respondent Commission has failed to consider the allowance of cost incurred for financing of Loans. The RoCE as computed

by the Respondent Commission has not considered the above financing cost and therefore, the same needs to be separately allowed as it does not form part of any other expenditure i.e., allowed to the Appellant. Therefore, the contention of the Respondent Commission to cover the same as part of ROCE is contrary to the provisions of Tariff Regulations.

16.1.6 Also in its petition before the Respondent Commission the Appellant sought Rs. 0.73 crores towards increase in LC (Letter of Credit) charges levied by the banks on the basis that power purchase is uncontrollable in the hands of the licensee and does not form part of controllable expenses. The LC's are required to maintain by the Appellant under the various PPA's approved by the Respondent Commission for payment to the power generator. However, the Respondent Commission in Impugned Order erroneously disallowed the claim of the Appellant noting that such expense is controllable and gave reference to judgment in Appeal 14 of 2012.LC charges was never an issue before this Tribunal in Appeal no.14 of 2012, and the levy of LC charges cannot be considered as controllable since (i) these are fixed at the instance of the concerned bank and is not within the control of the Appellant; and (ii) the LC is related to purchase of electricity as indicated above and therefore any variation in the quantum of sale will automatically affect the amount of LC and consequential charges. The LC amount depends on the Power purchase expense which itself is uncontrollable. Also, it is important to mention that if LC is not opened, the Appellant will not be able to

take rebate for timely payment. The Respondent Commission on one side takes normative rebate on power purchase as non-tariff income and on the other side, the Respondent Commission has disallowed the cost of opening such LC through which such normative rebate can be availed. The rebate is available subject to opening of LC only. Therefore, normative rebate should not be taken as non-tariff income if the LC charges are not allowed on actual basis.

16.1.7 Further, the Appellant in its Tariff Petition claimed Rs. 0.07 Cr. as cost of auditor's certificate which has not been incurred for Appellant's own purpose but for the purpose of Respondent Commission only. The requirement of Auditor's certificate by the Respondent Commission has increased quite a lot on various issues; therefore, these additional expenses also need to be allowed on actual basis. At the time when base cost was fixed, there was not much requirement for auditor certificate but now the requirement with respect to auditor certificate has increased.

16.1.8 The Appellant has claimed Rs.0.13 crores as credit rating fees in its Tariff Petition, which are incurred so that the Appellant is able to arrange loans at lower rates as compared to non-rated loans. The Respondent Commission has itself recognized that the interest rate of Appellant is lowest among all Discoms. Therefore, disallowing these minimum charges levied by banks by the Respondent Commission puts unnecessary burden on the

Appellant without recognizing efficiency of Appellant in keeping the interest rate to the lowest possible levels. These expenses are meager as compared to the benefit of lower interest. The interest rate will increase by approximately 2% if the credit facilities are not rated which may amount to increase in interest cost by several crores of rupees thereby putting additional burden on Appellant and consumer. Further, the Appellant may also face difficulty in getting loans keeping in view the high regulatory gap. However, the Respondent Commission in the Impugned Order did not even consider the issues at all and disallowed the same without providing any reason whatsoever.

16.1.9 Further, with reference to the issue of Credit Rating fee, it is pertinent to note that the revenue gap is created by the Respondent Commission, for the reasons not attributable to Appellant. The Appellant has to borrow funds to meet revenue gap created by the Respondent Commission and to make sure that there is no default in payment of power purchase from Gencos/Transcos and to honour debt service obligation. In order to borrow funds to meet the revenue gap requirement, the Appellant is required to go for credit rating and pay credit rating fee whenever a new loan is taken or old loan is extended. In case the Appellant does not go for credit rating, the rate of interest on borrowed funds would be higher by 2% p.a. compared to the rate on which Appellant has been able to borrow the funds. Therefore, such

expenses incurred in the interest of consumers and for reasons not attributable to appellant ought to be allowed.

16.1.10 Similarly, there are other expenses like cost of auditor certificate required by the Respondent Commission for its own convenience for prudence check, increase in LC charges due to demand growth etc. which have been incurred in the interest of consumers and are for the reasons not attributable to Appellant. It is submitted that such expense sought to be allowed in totality in the larger consumer interest, else it will deprive Appellant to take best steps/decisions if rather than awarding for these kind of steps, Appellant is penalized for the same.

16.1.11 Further, it is submitted that 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 cannot be considered as part of the normative increase in expenses by the Respondent Commission. Apart from expenses incurred due to change in law, there are certain other expenses which have been incurred for the reasons not attributable to the Appellant but in the interest of consumers (such as credit rating fee). It is, further, submitted that 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 Respondent Commission in its reply has stated that the Respondent Commission fixed the normative O&M Expenses for the Appellant in the MYT

Order after benchmarking of the Appellant's O&M Expenditure against O&M Expenditure of the comparable distribution licensees in other States. It also stated that while benchmarking the O&M Expenditure, the Respondent Commission has not segregated the O&M Expenditure in different sub paras, i.e. material cost, service cost, service tax, VAT etc, since these taxes and duties are integral part of the total cost of the project and services. The Respondent Commission in its reply also stated that due to higher A&G expenditure of the Delhi Discoms than other similar distribution utilities, the Commission determined the efficiency improvement factor in O&M expenditure of the Appellant, therefore the appellant's submissions regarding true up of normative expense was not justified and if the true up was allowed for the normative expenditure, then the whole purpose of the target based normative expenditure would be defeated.

16.1.12 It may further be noted that the approach adopted by the Respondent Commission is also in contravention of the tariff policy of Govt. of India which categorically requires the Respondent Commission to focus on regulation of output and not on the input cost elements. However, the Respondent Commission in the Impugned Order has failed to adhere to the tariff policy and has denied to consider the benefit to the consumer and improvement in output and has merely gone ahead to regulate the input cost in an arbitrary manner. The relevant extract of the tariff policy is reproduced below:

> *5.3(h)(3): Once the revenue requirements are established at the beginning of the control period, the Regulatory Commission should focus on regulation of outputs and not the input cost elements. At the end of the control period, a comprehensive review of performance may be undertaken.*

16.1.13 This Tribunal may direct the Respondent Commission to allow the expenses claimed by the Appellant as "Other Expenses" to be uncontrollable in nature. The Respondent Commission has filed a civil appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 171 of 2012 dated 10.02.2015. The issue of benchmarking of O&M expenses has been only challenged by it in the said civil appeal before the Hon'ble Supreme Court. The other issues on which the Appellant is relying for the purpose of this instant issue has not been challenged by the Respondent Commission. Further, the said civil appeal is still sub-judice before the Hon'ble Supreme Court and there has been no stay granted by it against the operation of this Tribunal's judgment in Appeal No. 171 of 2012.

16.2 Respondent Commission's submission:

16.2.1 On this issue learned counsel for the Respondent Commission submitted that the appellant has claimed that various expenses incurred by it were uncontrollable, however, the Commission has denied the same treating it controllable and has given various reasons for the same in the impugned Order.

16.3 Our Analysis and Findings:

16.3.1 Learned counsel for the Appellant submitted that the Respondent Commission had disallowed various uncontrollable expenses while truing up for FY 2012-13 despite the fact that these expenses were related to change in law and change in charges levied by the bank / financial institutions. These uncontrollable expenses broadly include change in service tax rate, service tax under reverse charge mechanism, financing charges, increase in LC charges, cost of auditor certificate, credit rating fees, etc.

16.3.2 Learned counsel, further, submitted that the aforementioned expenses claimed by the Appellant by the very nature cannot be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order and keeping this in view, the Commission itself has accepted the same in so far as increase in License fee and loss on redemption of contingency reserve investments is concerned. However, the Respondent Commission has erred in not allowing these expenses as uncontrollable. To substantiate his submissions, learned counsel placed reliance on the judgment of this Tribunal dated 10.02.2015 in Appeal No. 171 of 2012 in which it was held that enhancement in expenses due to reasons beyond the control of the utility, such as statutory obligations are uncontrollable in nature and, therefore, ought to be allowed.

16.3.3 Regarding claim of the Appellant for additional amount towards financing charges as per the audited accounts of the Appellant, the Respondent Commission in the Impugned Order disallowed such claim on the pretext that Return on Capital Employed (RoCE) shall be used to provide for financing charges also. Learned counsel vehemently submitted that contrary to the findings of the Respondent Commission, its Tariff Regulations clearly specifies that RoCE should cover all financing cost but financing cost incurred for obtaining the loans has not at all been factored in the cost of debt. The Tariff Regulation 5.6 is reproduced as under:

> "*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"*

16.3.4 In relation to the increase in LC charges, learned counsel for the Appellant contended that LC amount depends on the power purchase expense which itself is uncontrollable and also if LC is not opened, the Appellant will not be able to take rebate for timely payment. Learned counsel alleged that the Commission on one side takes normative rebate on power purchase as non-tariff income and on the other side, the Commission has disallowed the cost of opening such LC through which such normative rebate can be availed.

16.3.5 Learned counsel, further, clarified that the cost of auditor's certificate has not been incurred for Appellant's own purpose but for the purpose of

Respondent Commission only. However, the Commission has disallowed this cost too.

16.3.6 Regarding disallowance of other expenses, learned counsel was quick to point out that the Respondent Commission has taken a negative stand and has not considered the miscellaneous expenses in true spirit which have been incurred for the requirement of the Distribution Licensee only. Learned counsel, while summing up his submissions, contended that the approach adopted by the Respondent Commission is also in contravention of the tariff policy of Govt. of India which categorically requires the Respondent Commission to focus on regulation of output and not on the input cost elements. The relevant extract of the Tariff Policy is reproduced below:

> *5.3(h)(3): Once the revenue requirements are established at the beginning of the control period, the Regulatory Commission should focus on regulation of outputs and not the input cost elements. At the end of the control period, a comprehensive review of performance may be undertaken.*

16.3.7 Learned counsel for the Appellant also submitted that the Respondent Commission has filed a civil appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 171 of 2012 dated 10.02.2015 under which the issue of benchmarking of O&M expenses has been challenged. However, the other issues on which the Appellant is relying for the purpose of this instant issue has not been challenged before the Hon'ble Apex Court by the Commission and there has been no stay granted by it against the operation of this Tribunal's judgment dated 10.02.2015.

16.3.8 ***Per-contra,*** learned counsel for the Respondent Commission submitted that appellant has claimed various expenses incurred by it as to be uncontrollable. However, the Commission has denied the same treating it controllable and has given various reasons in the impugned Order. As such, the Commission has duly analyzed the details of all such miscellaneous expenses claimed by the Appellant and decided against the Appellant by giving cogent reasoning in the impugned Order. Hence, any interference by this Tribunal is not called for.

16.4 Our findings:

16.4.1 We have carefully gone through the rival submissions of learned counsel for the Appellant and learned counsel for the Respondent Commission and also taken note of the findings of this Tribunal in its judgment dated 10.02.2015 in Appeal No. 171 of 2012. It is not in dispute that the Appellant has actually incurred various expenses as claimed by it in the petition which the State Commission has disallowed while truing up for FY 2012-13 giving reasoning that these expenses are controllable. It is, however, seen that many of the expenses so claimed by the Appellant are in the category of uncontrollable in nature and need to be looked into by the Commission by adopting a judicious approach instead of disallowing all of them in totality. This Tribunal in its judgment dated 10.2.2015 in Appeal no. 171 of 2012 has held that enhancement in expenses due to reasons beyond

the control of the utility, such as statutory obligations are uncontrollable in nature and, therefore, ought to be allowed.

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

16.4.3 It is relevant to note that change in law relating to statutory levies cannot be envisaged by the Licensee or the Respondent Commission at the time of the MYT Order and, thus, cannot be considered as part of the normative increase in expenses by the Respondent Commission. It is also noticed that apart from expenses incurred due to change in law, there are certain other expenses which have been incurred for the reasons not attributable to the Appellant but in the interest of consumers (such as credit rating fee) and if such expenses were not incurred by the Appellant, it would have burdened the consumers with higher interest, consequential higher tariff, carrying cost etc. As the judgment of this Tribunal dated 10.02.2015 has been challenged by the Respondent Commission before the Hon'ble Apex Court and no stay has been granted against the operation of the said judgment, we are of the considered view that pending decision of the Hon'ble Apex Court the various claims of the Appellant regarding statutory fee/charges should be looked into by the Respondent Commission afresh

duly considering some of them as controllable and others as uncontrollable in the interest of justice and equity. **Accordingly, we decide this issue in favour of the Appellant**.

17. ***<u>ISSUE NO. 13</u>:***

DEVIATION FROM PAST PRACTICE WITH RESPECT TO SERVICE LINE CHARGES:

17.1 In its written submission, on this issue, learned counsel for the Appellant submitted that:

17.1.1 The Respondent Commission erred in considering the entire amount of Rs.32.67 crore for FY 2012-13 and also considering an additional amount of Rs.27.09 crores deferred pertaining to FY 2011-12 and Rs.11.85 crores pertaining to FY 2010-11 while calculating the non-tariff income with respect to service line charges of the Appellant while the truing up for FY 2012-13. It is submitted that the Respondent Commission, ought to have followed its past practice of considering only 1/3rd of the amount received by the utility as service line charges in the particular year for the purposes of computation of non-tariff income and the considering the remaining amount in the subsequent two years for the sake of regulatory certainty.

17.1.2 The Respondent Commission in its past Tariff Orders had allowed addition of service line charges received by the Distribution Licensee to non-tariff income over a period of three years in equal amounts, i.e.- 1/3rd for the year in which it is collected and balance 2/3rd in two installments following the

year of collection. Accordingly, the Appellant in its Tariff Petition before the Respondent Commission considered an amount of Rs. 36.28 crores as non-tariff income towards service line charges in accordance with the past practice adopted by the Respondent Commission. Detailed Computation as given by the Appellant in the Tariff Petition is given below:

Particular	*Rs Cr*
Amount Booked in Accounts as Income – "A"	***32.67***
Amount considered as Non-Tariff Income as per principle followed by the Hon'ble Commission in past tariff orders (1/3rd for the year in Which it is collected and balance 2/3rd in two instalments following the year of collection)	
1/3rd of Rs. 35.55 Cr for FY 2010-11	*11.85*
1/3rd of Rs. 40.63 Cr for FY 2011-12	*13.54*
1/3rd of Rs. 32.67 Cr for FY 2012-13	*10.89*
Amount to be considered for ARR of FY 2012-13 – "B"	***36.28***
Differential amount to be offered in ARR (B-A)	***3.61***

17.1.3 However, the Respondent Commission in the Impugned Order deviated from its past practice and considered the entire amount of service line charges received during the year 2012-13 and 1/3rd and 2/3rd of the amount received during the year 2010-11 and 2011-12 respectively as non-tariff income. The approach adopted by the Respondent Commission in the Impugned Order is inconsistent with that adopted in the previous tariff orders. It is submitted that the Respondent Commission's approach of applying different set of principle on the same issue creates uncertainty in the minds of stakeholders and also reduces transparency, consistency of approach and predictability of tariff determination process.

17.1.4 It is submitted that the Respondent Commission's claim of deviating from the past practice for treatment of service line cum development charges as non-tariff income without having any adverse financial impact on the Appellant is incorrect and misplaced. The receipt of services line charges are in the nature of capital receipt and as such are not a liability which has to be returned back to consumers. Accordingly, the Respondent Commission ought to have considered the same as revenue accrued over a period of 3 years. It is submitted that the Respondent Commission itself has been following the same practice till FY 11-12 in accordance to its methodology provided in tariff order for FY 05-06, wherein the Ld. Commission held that service line charges are capital receipt, to be apportioned over 3 years and are not liable to be refunded to consumers. The relevant extract of the Respondent Commission's tariff order for FY 05-06 is given below:

> *"Though Service Line Charges is a Capital receipt, it is not a liability which has to be returned back to consumers and accordingly the Commission has considered the same as revenue accrued over period of 3 years."*
>
> *(Emphasis supplied)*

17.1.5 Having made and followed the policy of treating service line charges, as revenue accrued over a period of 3 years, the Respondent Commission has suddenly without following the process of law, has unilaterally and arbitrarily deviated in treatment of service line charges. The methodology followed by the Respondent Commission is against the law, unjustified and is liable to be struck down. It is further pertinent that this

change in approach in the impugned order for treatment of services line charge is only applicable for the Appellant herein and the Respondent Commission has continued the earlier approach for treatment of service line charges in case of other Discoms in the State.

17.2 Submissions of learned counsel for the Respondent Commission on this issue are as follows:

17.2.1 The Appellant has submitted the deviation in past practice for treatment on account of deferred Service Line cum Development Charges in Truing up of FY 2012-13.

17.2.2 The service line charges are received by the Distribution Licensee every year and no interest on such service line charges are separately accounted for in the ARR of the DISCOMs. Such charges are non-refundable in nature and utilized by the DISCOMs towards ARR. By deferring recognition of service line charges over three years, the consumers may be deprived of the interest on such service line charges as the funds are already with the DISCOMs utilizing such funds. Thus the approach of the Commission is in the interest of consumers without having any adverse financial impact to the DISCOM as per the MYT Regulations.

17.3 Our Analysis and Findings:

17.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has erred in considering the entire amount for FY 2010-11,

2011-12 and 2012-13 while calculating the non-tariff income with respect to service line charges of the Appellant while truing up for FY 2012-13. Learned counsel, further, submitted that the Respondent Commission, ought to have followed its past practice of considering only $1/3^{rd}$ of the amount received by the utility as service line charges in the particular year for the purposes of computation of non-tariff income and the considering the remaining amount in the subsequent two years for the sake of regulatory certainty.

17.3.2 In fact, in its past Tariff Orders, the Respondent Commission had allowed addition of service line charges received by the Distribution Licensee to non-tariff income over a period of three years in equal amounts, but, it has deviated from its past practice and considered the entire amount of service line charges received during the year 2012-13 and $1/3^{rd}$ and $2/3^{rd}$ of the amount received during the year 2010-11 and 2011-12 respectively as non-tariff income.

17.3.3 Learned counsel was quick to point out that the Respondent Commission's claim that the deviation from the past practice would have no adverse financial impact on the appellant is incorrect and misplaced.

17.3.4 Learned counsel vehemently submitted that having made and followed the policy of treating service line charges, as revenue accrued over a period of 3 years, the Respondent Commission without following the process of law, has arbitrarily deviated in treatment of service

line charges. Such action on the part of the Respondent Commission is against the law, unjustified and is liable to be struck down. Learned counsel, further, alleged that for other Discoms, the Respondent Commission has continued to follow the past approach for treatment of service line charges.

17.3.5 ***Per-contra,*** learned counsel for the Respondent Commission submitted that service line charges are received by the Distribution Licensee every year and no interest on such service line charges are received by the Distribution Licensee every year and no interest on such service line charges are separately accounted for in the ARR of the DISCOMs.

17.3.6 Learned counsel, further, submitted that by deferring recognition of service line charges over three years, the consumers may be deprived of the interest on such service line charges as the funds are already with the DISCOMs utilizing such funds. Thus, the approach of the Commission is in the interest of consumers without having any adverse financial impact to the DISCOM as per the MYT Regulations.

17.4 Our findings:

17.4.1 Having regard to the contentions of learned counsel for the Appellant and learned counsel for the Respondent Commission, it is relevant to note that dispute is only relating to the deviation in methodology for consideration of service line charges while calculating the non tariff income while the Appellant contends for the same to be spread in three years in

equal amounts and the Respondent Commission has now considered the entire amount of service line charges received during the year 2012-13 and 1/3rd and 2/3rd of the amount received during the year 2010-11 and 2011-12 respectively as non tariff income.

17.4.2 The rationale given by the Respondent Commission in the impugned Order that it has differed its consideration from the past practices only in the interest of the consumers without impacting the appellant adversely. It is relevant to note that service line charges are separately accounted for in respect of ARR besides such charges are nonrefundable in nature and utilized by Discoms towards ARR. In view of these facts, we are of the opinion that there is no infirmity or ambiguity in the findings of the Respondent Commission as far as this issue is concerned. **Hence, interference by this Tribunal is not called for**.

18. <u>ISSUE NO. 22</u>:

WRONGFUL CONSIDERATION OF INCOME FROM GENERATION BUSINESS OF THE APPELLANT AS NON TARIFF INCOME:

18.1 Appellant's submissions on this issue are as under:

18.1.1 The Respondent Commission has wrongfully considered 80% of the amount of Rs. 0.48 crores as non-tariff income of the Appellant on the grounds that it was a part of the license business of the Appellant. It is submitted that since the same is an income from the Generation Business of the Appellant the Respondent Commission ought not to have considered the

same as income from distribution businesses and should re-compute the Non-Tariff Income of the Appellant after deducting the income from Generating Business. The relevant extracts from the Impugned Order has been re-produced herein below:

> *3.215 The Commission has considered 80% of the income from generation division i.e. Rs.0.38 Crore to be passed on to the consumers and Rs 0.10 Crore to the Petitioners account. Accordingly, Rs.0.10 Crore reduced from the non tariff income as shown below:*

Table 3.58: Other Business Income for FY 2012-13 (Rs. Crore)

Particulars	*Total income*	*Petitioners share: ARR*	*Amount to be retained by the Petitioner*	*Amount to be passed onto the consumer*	*Remark*
Consultancy	*4.67*	*20:80*	***1.00***	*4.01*	*Para 3.214*
Training	*2.35*				
Distribution Assets	*0.63*				
Total Income	*7.66*				
less: Direct Expenses	*0.99*				
less: Income Tax	*1.67*				
Net Income	*5.01*				
Generation Business income	*0.48*	*20:80*	*0.10*	*0.38*	*Para 3.215*

18.1.2 The term 'Non-Tariff Income' is a defined term under the Tariff Regulations, 2011. Regulation 2.1(l) of the Tariff Regulations, 2011 defines Non-Tariff Income in the following words:

> *"'Non-Tariff Income' means income relating to the Licensed business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;"*

Therefore, as per the Tariff Regulations, 2011, the non- tariff income cannot be derived from any business activity, which is not related to business of the licensee (Appellant herein) i.e. a business for which the license has

been obtained under the Electricity Act, 2003 that business being of Distribution License.

18.1.3 This Tribunal may appreciate that the Generation of Power as a Business is not part of the license business and the Respondent Commission has no power to regulate the same. Since the Generation Business of the Appellant is not under the regulatory purview of the Respondent Commission in the impugned proceedings, any attempt of indirectly regulating the income generated from the generation business in the ARR proceedings, as part of the license business of the Appellant, where the clear demarcation and segregation exists by virtue of the aforesaid Regulations, is untenable under law. The purview of the Respondent Commission is limited to the cost of procurement of power by the licensed business which is the distribution business.

18.1.4 The Respondent Commission in its Reply has averred that the Appellant has not maintained the books of accounts as per the different business segments. At the outset, it is clarified that the Appellant herein is not required to maintain accounts as per different business segments. The Appellant being a legal entity governed by Companies Act for preparation of financial statements is not required to prepare separate audited account for such business segments and therefore for the purpose of determination of tariff provides audited certificate for such segment of its business to the

Respondent Commission. The Appellant is already providing the details of the distribution business in accordance with the regulations and the formats prescribed the Respondent Commission and hence there is no need to maintain segment wise reporting under the extant regulatory framework. Inclusion of segment wise reporting in the audited financial statement will only result in deviation from standard accounting practices and financial reporting as explained in the aforementioned paragraphs. As a matter of fact, the Appellant cannot deviate from the statutory requirements as postulated under the Companies Act, 1956. These are the standard guidelines according to which the financial records are maintained and prepared. Accordingly, the records prepared are presented at various forums and are perused by the shareholders.

18.1.5 Section 51 of the Electricity Act, 2003 defines the term 'other businesses of distribution licensees'. The provision is set out as under:

> ***"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 utilization 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 utilized 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 subsidizes 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."*

18.1.6 The above posits that a business to be attributed as 'other business of distribution licensee' must therefore utilize the distribution assets. Since the assets of the Generation Business is different and separate from the assets of the licensed business (Distribution), income from the Generation Business cannot be treated at par with the 'income from other business' as done by the Respondent Commission in the Impugned Order. This issue has been discussed and decided by this Tribunal in various Appeals, one such Judgment wherein this Tribunal has clarified the position of 'other business' under Section 51 was in Appeal 19 of 2008.

18.1.7 It is submitted that the Respondent Commission in its reply has erroneously merged the issue of "non-tariff income relating to licensed business earned from sources other than tariff" and "income from generation business of the Appellant". It is re-iterated that Generation Business is separate from the licensed distribution business of the Appellant and there is clear demarcation and segregation of distribution and generation assets. The Hon'ble Supreme Court of India in the case of Bharat Sanchar Nigam limited v Telecom Regulatory Authority of India (2014) 3 SCC 222 and Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited and Others (2009) 6 SCC 235, has observed that the power to enforce comes only with the powers to regulate. Since in the present case the Respondent Commission does not have the power to regulate the Generation Business by

way of the ARR of the Appellant, the Respondent Commission cannot enforce the regulations to the extent the Generation Business of the Appellant is concerned.

18.1.8 It has been clarified by the Appellant in its Rejoinder to the Reply also that to the extent the Generation Business of the Appellant is concerned, the Appellant has been filing separate petition for determination of tariff of its generating plant for supply to the licensed business and therefore, it has no relation to the license Distribution business. In such circumstances, the Respondent Commission ought to have considered the income pertaining to the Generation Business as part of the generation income and not as part of the income of the license business. Therefore any reflection in Distribution ARR is wrong and should be set aside by this Tribunal. It is submitted that income of Rs. 0.48 crores in Generation Business mainly pertains to difference in foreign exchange rate for payment of fuel cost and has no relation to the distribution ARR and therefore could not be considered as part of the license business of the Appellant.

18.1.9 In view of the above, the Appellant humbly prays that this Tribunal direct the Respondent Commission to re-compute the non-tariff income of the Appellant after deducting the income from Generating Business.

18.1.10 There has been an appeal filed against the judgment of this Tribunal in Appeal No. 19 of 2008 before Supreme Court. The status on the

Supreme Court website shows it to be disposed. However, there are no orders or judgment pertaining to said civil appeal on the SC website. Therefore, it cannot be said with certainty whether SC has ruled against the judgment of this Tribunal or not.

18.2 Respondent Commission's submission on this issue are as under:

18.2.1 The Appellant has stated that the Commission has wrongfully considered 80% amount of Rs. 0.48 crores as non-tariff income of Appellant on the ground that it was part of licenced business of the Appellant. Section 51 of Electricity Act, 2003 provides as follows:

> *"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."*

18.2.2 The license business has been defined in Clause (j), non-tariff income has been defined in Clause (l) and other business has been defined in Clause (m) of Regulation 2.1 of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011. The said Clauses are being reproduced herein below:

"A2: Definitions and interpretation.

2.1 In these Regulations, unless the context otherwise requires:
(j) "Licensed Business" shall mean the functions and activities, which the Licensee is required to undertake in terms of the License granted or being a deemed Licensee under the Act.

(l) "Non-Tariff Income" means income relating to the Licensed business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;

(m) "Other Business" means other business of the Distribution Licensee under section 51 of the Electricity Act, 2003;"

18.2.3 Regulation 5.35 of MYT regulations 2011 provides as under:

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

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

18.2.4 The Commission has given directions to the Appellant in various tariff orders to maintain the separate books of accounts. Further, the regulation 5(5) of DERC (Treatment of Income from Other business of Transmission and Distribution licensee) Regulations, 2005 stipulates as under:

"In addition to the sharing of costs under sub-clause (3) above, the Licensee shall account for and ensure due payment to the Licensed Business a certain proportion of revenues from the other Business. As a general principle, the Licensee shall retain 20% of the revenues arising on account of Other Business and pass on the remaining 80% of the revenues to the regulated business.

Provided that in case a change in the above provision regarding sharing of revenues is considered by the licensee, he may approach the Commission for change of the aforesaid sharing formula, with proper justification, for approval of the Commission."

18.2.5 The Commission in the impugned order has observed as follows:

"3.213 As per Regulation 5.37 of the MYT Regulations, 2011 the income from other business shall be calculated as per "DERC Treatment of income from other business of Transmission Licensee and Distribution Licensee Regulations, 2005". The Regulation 5 (5) of the DERC Treatment of income from other business of Transmission Licensee and Distribution Licensee Regulations, 2005 specify that the licensee shall retain 20% of the revenues arising on account of other business and pass on the remaining 80% of the revenues to the regulated business.

3.214 The Commission has considered net income of Rs.5.01 Crore in the profit sharing ratio of 80% to consumers and 20% to the Petitioner in terms of DERC Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee Regulations, 2005 and considered Rs.4.01 Crore to be passed on to the regulated business and balance Rs.1.00 Crore is to the Petitioners account. Accordingly, the Commission has reduced Rs.1.00 Crore from the total non tariff income.

3.215 The Commission has considered 80% of the income from generation division i.e. Rs.0.38 Crore to be passed on to the consumers and Rs 0.10 Crore to the Petitioners account. Accordingly, Rs.0.10 Crore reduced from the non tariff income.

18.2.6 The Commission has examined the financial statements submitted with the Petition and it is observed that Appellant has not maintained the books of accounts as per the different business segments. During the prudence check, the appellant has been asked to submit separate audited financial statements regarding income from other than licensed businesses to avoid the possibility of double accounting of such expenditure claimed (once

in ARR of licensed business, other in expenditure of other than licensed business).

18.3 Our Analysis and Findings:

18.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has wrongfully considered 80% of the amount/income from generation business of the Appellant as non-tariff income on the ground that it was a part of the license business of the Appellant. Learned counsel, further, submitted that since the same is an income from the Generation Business of the Appellant the Respondent Commission ought not to have considered the same as income from distribution businesses and should re-compute the Non-Tariff Income of the Appellant after deducting the income from Generation Business.

18.3.2 Learned counsel was quick to submit that 'Non-Tariff Income' is a defined term under the Tariff Regulations, 2011 and the same cannot be derived from any business activity which is not related to the business of the Appellant i.e. a business for which the license has been obtained under the Electricity Act, 2003 that business being of Distribution Licensee. The relevant extract of the said Regulation is reproduced as under:

> *"'Non-Tariff Income' means income relating to the Licensed business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;"*

18.3.3 Learned counsel, further, submitted that generation and distribution being distinct separate business and a clear cut demarcation and segregation exists by virtue of the aforesaid Regulations. As such, the purview of the Respondent Commission is limited to the cost of procurement of power by the licensed business which is the distribution business and not generation business of the Appellant which is not under the regulatory purview of the Respondent Commission.

18.3.4 Regarding contention of the Respondent Commission that the Appellant has not maintained the books of accounts as per the different business segments, learned counsel contended that the Appellant is a distribution licensee and is already providing the details of the distribution business in accordance with the regulations and the formats prescribed the Respondent Commission and, hence, there is no need to maintain segment wise reporting under the extant regulatory framework.

18.3.5 Learned counsel, further, relied upon the definition of the term 'other business of distribution licensee' under Section 55 of the Electricity Act, 2003 to contend that the other business must, therefore, utilize the distribution assets. Since the assets of the Generation Business is different and separate from the assets of the licensed business (Distribution), income from the Generation Business cannot be treated at par with the 'income from other business' as done by the Respondent Commission in the Impugned Order.

He, further, submitted that this issue has been discussed and decided by this Tribunal in various Appeals. One such Judgment wherein this Tribunal has clarified the position of 'other business' under Section 51 was in Appeal 19 of 2008.

18.3.6 Learned counsel for the Appellant placed reliance on the judgments of the Hon'ble Supreme Court in the case of Bharat Sanchar Nigam limited v Telecom Regulatory Authority of India (2014) 3 SCC 222 and Uttar Pradesh Power Corporation Limited v National Thermal Power Corporation Limited and Others (2009) 6 SCC 235, in which, it has been held that power to enforce comes only with the powers to regulate. Learned counsel pointed out that since in the present case the Respondent Commission does not have the power to regulate the Generation Business by way of the ARR of the Appellant, the Respondent Commission cannot enforce the regulations to the extent the Generation Business of the Appellant is concerned.

18.3.7 While summing up his arguments, learned counsel reiterated that this Tribunal may direct the Respondent Commission to re-compute the non-tariff income of the Appellant after deducting income from the generation business.

18.3.8 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the contention of the Appellant that the Commission has wrongly considered 80% amount /income from generation business as non-

tariff income of the Appellant is incorrect and misplaced. Learned counsel, further, submitted that the Commission has considered the same as part of licensed business of the Appellant under Section 51 of the Electricity Act, 2003. Further, the license business has been defined in Clause (j), non-tariff income has been defined in Clause (l) and other business has been defined in Clause (m) of Regulation 2.1 of DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011. The said Clauses are being reproduced herein below:

> *"A2: Definitions and interpretation.*
>
> *2.1 In these Regulations, unless the context otherwise requires:*
>
> *(j) "Licensed Business" shall mean the functions and activities, which the Licensee is required to undertake in terms of the License granted or being a deemed Licensee under the Act.*
>
> *(l) "Non-Tariff Income" means income relating to the Licensed business other than from tariff (Wheeling and Retail Supply), and excluding any income from Other Business, cross-subsidy surcharge and additional surcharge;*
>
> *(m) "Other Business" means other business of the Distribution Licensee under section 51 of the Electricity Act, 2003;"*

18.3.9 Learned counsel for the Respondent, further, submitted that the Commission has given directions to the Appellant in various tariff orders to maintain the separate books of accounts. Further, the regulation 5(5) of DERC (Treatment of Income from Other business of Transmission and Distribution licensee) Regulations, 2005 stipulates as under:

> *"In addition to the sharing of costs under sub-clause (3) above, the Licensee shall account for and ensure due payment to the Licensed Business a certain proportion of revenues from the other Business. As a general principle, the Licensee shall retain 20% of the revenues arising*

on account of Other Business and pass on the remaining 80% of the revenues to the regulated business.

Provided that in case a change in the above provision regarding sharing of revenues is considered by the licensee, he may approach the Commission for change of the aforesaid sharing formula, with proper justification, for approval of the Commission."

18.3.10 Learned counsel for the Respondent Commission, accordingly, submitted that as per provisions of the Electricity Act, Regulation 2.1, Regulation 5.35 of MYT, 2011 and Regulation 5(5) of DERC Regulations, 2005 has examined the financial statement submitted by the Appellant and after observing that the Appellant has not maintained separate books of account for different business segments, the Commission considered it to include 80% of the income from the generation business as non-tariff income of the licensee.

18.4 Our findings:

18.4.1 We have carefully analyzed the rival contentions of the parties and also referred to various sections of the Act as well as Regulations relied upon by the parties. While non-tariff income has been defined in the Tariff Regulations 2011 to be income relating to the licensed business other than from tariff (wheeling and retail supply), and excluding any income from other business, cross-subsidy surcharge and additional surcharge. Further, Section 51 of the Electricity Act also provides how the other businesses of Distribution Licensee are to be treated. In addition to these provisions, the State Commission has also brought out definition and interpretation of

licensed business, non-tariff income, other businesses, etc. in its various Regulations of 2011, as stated supra. It is relevant to note that Section 51 of the Act and Regulation 5(5) of DERC Regulations, 2005 stipulate that separate books of accounts are required to be maintained by the Distribution Licensee to segregate the accounts from distribution business and other businesses. While referring to the impugned Order, we note that the Commission has observed as follows:

> *"In addition to the sharing of costs under sub-clause (3) above, the Licensee shall account for and ensure due payment to the Licensed Business a certain proportion of revenues from the other Business. As a general principle, the Licensee shall retain 20% of the revenues arising on account of Other Business and pass on the remaining 80% of the revenues to the regulated business.*
> *Provided that in case a change in the above provision regarding sharing of revenues is considered by the licensee, he may approach the Commission for change of the aforesaid sharing formula, with proper justification, for approval of the Commission."*

18.4.2 It is noticed from the above that the Commission has considered 80% of the income from generation business to be passed on to the consumers and balance to the petitioner. Accordingly, the 20% amount allowed to be retained by the petitioner has been reduced from the non-tariff income. In view of these facts, we are of the opinion that for a licensee, the separate books of accounts for the main business and the other businesses should be maintained to avoid any misconception as well as misinterpretation of the income coming from other businesses. In a situation, such as in the present case, the Respondent Commission, after evaluation of the financial statements placed on record, has analyzed and decided to pass on 80%

income from generation business to the consumers and 20% to the Appellant after prudence check. **We, accordingly, opine that the State Commission has rightly decided the issue and interference by this Tribunal is not called for as far as this issue is concerned**.

19. ***ISSUE NO. 27:***

ERRONEOUS DEDUCTION OF SURCHARGE FROM COMPUTATION OF REVENUE GAP INSTEAD OF CARRYING COST

19.1 Following are the Appellant's submissions on this issue:

19.1.1 The Surcharge has to be first appropriated towards accrued interest (carrying cost) and then to the principal (revenue gap). This is a settled legal principle. It is worth to mention that while introducing the concept of Surcharge, the Respondent Commission has followed the same principle and clearly mentioned the procedure for utilization of surcharge in its Tariff Order dated July 2012.

19.1.2 The economic and regulatory rationale for appropriating amounts first towards interest (carrying cost) is that if interest is not written off first, then Appellant will be entitled to interest on interest, which in the regulatory environment, puts additional burden on the consumer and is not desirable.

19.1.3 The Respondent Commission in the MYT Order, 2012 had allowed recovery of 8% surcharge for meeting carrying cost of revenue

gap and liquidation of revenue gap. Hence, the recovery from such surcharge ought to be used for reducing the carrying cost of revenue gap first and thereafter, if there is any surplus, it could be used for liquidation of revenue gap. The relevant extract of the MYT Order, 2012 is reproduced herein below:

> "*5.10 For meeting carrying cost of the revenue gap till FY 2010-11 and liquidation of revenue gap, the Commission has decided to introduce a surcharge of 8% over the revised tariff.*"

19.1.4 It is clear from the above that this deficit surcharge has been introduced for recovery of carrying cost and then balance (if any) towards liquidation of revenue gap, therefore, any collection towards deficit surcharge need to be first adjusted from the current year carrying cost and then only can be adjusted from the principal component of the gap.

19.1.5 The Respondent Commission in its Reply to the Appeal has submitted that it has allowed the carrying cost on average revenue gap for the relevant year whilst for the computation of such average revenue gap this surcharge must be adjusted against the revenue gap. The Appellant has already submitted that since MYT Order 2012 has allowed recovery through 8% surcharge for meeting carrying cost of the revenue gap and liquidation of revenue gap, therefore the recovery from such surcharge ought to be first used for reducing the carrying cost of revenue gap and thereafter, if there is any surplus it can be used for liquidation of revenue gap. However, the Respondent Commission in the Impugned Order has

erroneously used the surcharge collected for the liquidation of revenue gap created in the year 2012-13 instead of using recoveries from such surcharge for reduction in carrying cost first.

19.1.6 The carrying cost on revenue gap has been provided to (i) provide for the cost for carrying the revenue gap; and (ii) as an incentive to the Respondent Commission to liquidate the revenue gap at the earliest. However, in the present methodology this twofold purpose is not met and the recovery of carrying cost is denied to the Appellant since the entire surcharge is not used up for meeting revenue gap. The Respondent Commission has, therefore, converted the surcharges as part of tariff itself instead of using the surcharges to liquidate the accumulated carrying cost and revenue gap. If the amount of surcharge were to be used to reduce the revenue gap of the current year then this could may well have been included as part of the recoverable ARR for the year. The Respondent Commission in the garb of providing surcharges is adding to the relevant gap, without any relief in terms of carrying cost.

19.1.7 The MYT order had clearly indicated the scope of application and purpose of the surcharge, which cannot be deviated from in the course of True-Up. To such extent, the order is contrary to the MYT Order. The treatment done by the Respondent Commission is also contrary to the

formula employed in calculating the carrying cost in the proposed liquidation plan submitted before Hon'ble Supreme Court.

19.1.8 In view of the above, it is prayed that this Tribunal direct the Respondent Commission to re-compute the revenue gap till Financial Year 2012-13 after first deducting the surcharge collected from the carrying cost of revenue gap.

19.2 Respondent Commission's submission on this issue are as under:

19.2.1 The Appellant has contended that Commission has erred in appropriating the surcharge collected towards liquidation of revenue gap instead of first appropriating the surcharge against reduction in carrying cost. In the MYT 2012, the Commission has imposed 8% surcharge over the revised tariff for meeting carrying cost of revenue gap till 2010-11 and liquidation thereof.

19.2.2 The Commission in the impugned Order has approved the revenue (gap)/surplus for the Petitioner for FY 2012-13 as discussed in detail in Chapter A3 of this Order. The revenue (gap)/surplus till end of FY 2011-12 as determined in the Tariff Order dated July 31, 2013 and the cumulative (gap)/surplus till the end of FY 2012-13 is summarized in the table below:

Table 5.1: Revenue (Gap)/Surplus of TPDDL till FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	FY 2011-12	FY 2012-13	Remarks
1.	Opening level of Gap	(2111.50)	(3370.56)	Closing of FY 2011-12
2.	Revenue Requirement for the year	4253.95	4748.32	Table 3.93
3.	Revenue at existing tariffs	3310.10	4436.00	
4.	Surplus/(Gap) for the year	(943.85)	(312.32)	(3-2)
5.	8% Surcharge for FY 2012-13		237.32	
6.	Net (Gap)/Surplus		(75.00)	
7.	Rate of Carrying Cost for the year @	12.20%	11.78%	Tariff Order dated July 31, 2013 Para 5.24
8.	Carrying Cost	(315.20)	(401.47)	(1*7+(6*7)/2)
9.	Closing Balance of Net (Gap)/ Surplus	(3370.56)	(3847.03)	(1+6+8)

 # including additional impact of True-up with carrying cost as per Hon'ble APTEL's direction of FY 2007-08 to FY 2010-11 of RoCE, Depreciation etc

19.2.3 The Revenue Gap at Tariffs determined by the Commission is indicated below:

Revenue (Gap)/Surplus of the three DISCOMS till FY 2012-13 (Rs. Crore)

Particulars	Up to FY 2012-13	Remarks
TPDDL	3847.03	Table 5.1
BRPL	6015.67	Table 5.2
BYPL	3795.17	Table 5.3
Total	**13657.87**	

It can be seen from the above that the accumulated Revenue Gap till FY 2012-13 for all the three DISCOMs is Rs. 13657.87 Crore.

19.2.4 The Commission has allowed carrying cost during FY 2012-13 on the unpaid over dues to Generation & Transmission Utilities which were not considered while computing the carrying cost in Tariff Order dated July 31, 2013. The Commission has now decided to revise the earlier treatment as, by

not allowing the carrying cost on such unpaid over dues, the Commission may subsequently have to allow the late payment surcharge (which will be quite high) or further interest on the carrying cost withheld, thus leading to imposition of an additional unwarranted burden on the consumers.

19.2.5 It is submitted that in MYT Order dated 13.07.2012, the surcharge of 8% has been introduced for meeting carrying cost of the revenue gap till FY 2010-11 and liquidation of revenue gap. The Commission has allowed the carrying cost as per methodology of MYT Order dated 13.07.2012 on average revenue gap for the relevant year. The 8% surcharge has been collected by the Appellant with the revenue billed and the Commission has adjusted the same from revenue gap. The specific purpose of the introduction of 8% surcharge is to meet the carrying cost as well as the liquidation of revenue gap. The Commission is allowing the carrying cost on average revenue gap for the relevant financial year and for the computation of average revenue gap this surcharge must be adjusted against the revenue gap. Therefore, there is no force in the Appellant's contention that the surcharge should be utilized for carrying cost only.

19.3 Our Analysis and Findings:

19.3.1 Learned counsel for the Appellant submitted that the Respondent Commission in the MYT Order, 2012 had allowed recovery of 8% surcharge for meeting carrying cost of revenue gap and liquidation of revenue gap.

Hence, the recovery from such surcharge ought to be used for reducing the carrying cost of revenue gap first and, thereafter, if there is any surplus, it could be used for liquidation of revenue gap. The relevant extract of the MYT Order, 2012 is reproduced herein below:

> "*5.10 For meeting carrying cost of the revenue gap till FY 2010-11 and liquidation of revenue gap, the Commission has decided to introduce a surcharge of 8% over the revised tariff.*"

19.3.2 Learned counsel, further, submitted that it is clear from the above that this deficit surcharge has been introduced for recovery of carrying cost and then balance (if any) towards liquidation of revenue gap. Learned counsel alleged that in the present methodology, the two fold purpose is not met and the recovery of carrying cost is denied to the Appellant since the entire surcharge is not used for meeting revenue gap. In fact, the Respondent Commission has converted the surcharge as part of tariff itself instead of using the surcharge to liquidate the accumulated carrying cost and revenue gap. Learned counsel vehemently submitted that MYT order had clearly indicated the scope of application and purpose of the surcharge, which cannot be deviated from in the course of True-Up. To such extent, the order is contrary to the MYT Order. Learned counsel, accordingly, submitted that the Respondent Commission may be directed to re-compute the revenue gap till FY 2012-13 after first deducting the surcharge collected from the carrying cost of the revenue gap.

19.3.3 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the contention of the Appellant regarding error in appropriating the surcharge collected towards liquidation of revenue gap instead of first appropriating the surcharge against reduction in carrying cost is entirely baseless and illogical. In fact, in the MYT Order, 2012, the Commission had imposed 8% surcharge over the revised tariff for meeting carrying cost of revenue gap till 2010-11 and liquidation thereof. In the impugned Order, the Commission has approved the revenue (gap)/surplus for the Appellant for FY 2012-13 and the same has been deliberated in detail in this order. After careful consideration and analysis of the revenue gap/surplus till FY 2012-13, the Commission has allowed carrying cost during FY 2012-13 on the unpaid over dues to generation and transmission utilities which were not considered while computing the carrying cost in tariff order dated 31.07.2013.

19.3.4 Learned counsel, further, submitted that the Commission has now decided to revise the earlier treatment as, by not allowing the carrying cost on such unpaid over dues, the Commission may, subsequently, have to allow the late payment surcharge (which will be quite high) or further interest on the carrying cost withheld, thus, leading to imposition of an additional unwarranted burden on the consumers.

19.3.5 Learned counsel was quick to point out that 8% surcharge has been collected by the Appellant with the revenue billed and the Commission has

adjusted the same from revenue gap. He, further, contended that the specific purpose of the introduction of 8% surcharge is to meet the carrying cost as well as the liquidation of revenue gap and, accordingly, the Commission is allowing the carrying cost on average revenue gap for the relevant financial year and for the computation of average revenue gap this surcharge must be adjusted against the revenue gap. Learned counsel reiterated that in view of the above facts, there is no merit in the Appellant's contention that the surcharge should be utilized for carrying cost only.

19.4 Our findings:

19.4.1 After careful consideration and analysis of the contentions of the learned counsel for the Appellant and learned counsel for the Respondent Commission, it is relevant to note that vide MYT Order, 2012, the Respondent Commission has decided to introduce surcharge of 8% over the revised tariff for meeting the carrying cost of the revenue gap till FY 2010-11 and liquidation of revenue gap. It is the contention of the Appellant that any collection towards deficit surcharge need to be first adjusted from the current year carrying cost and then only can be adjusted from the principal component of the gap. On the other hand, Respondent Commission in the impugned order has used the surcharge collected for the liquidation of revenue gap created in the year 2012-13 instead of using recoveries from such surcharge for reducing in carrying cost first.

19.4.2 It is noticed from the submissions of both the parties that the carrying cost on revenue gap has been provided for the cost for carrying the revenue gap and also to liquidate the revenue gap at the earliest. Adopting a deviation from its earlier methodology, the Respondent Commission has now decided to revise the earlier treatment as, by not allowing the carrying cost on such unpaid over dues, the Commission may, subsequently, have to allow the late payment surcharge or further interest on the carrying cost withheld, thus leading to imposition of an additional unwarranted burden on the consumers. In view of these facts, the decision of the Respondent Commission to allow carrying cost on average revenue gap for the relevant financial year is considered to be just and right. Therefore, there is no infirmity or ambiguity in the impugned order. **Hence, interference of this Tribunal on this issue is not called for**.

20. ***ISSUE NO. 29:***

ERRONEOUS METHODOLOGY FOR CALCULATION OF WORKING CAPITAL REQUIREMENT:

20.1 Appellant's submissions on this issue are as under:

20.1.1 The Respondent Commission while determining the working capital requirement for FY 2012-13 has sought to erroneously consider the Receivables from sale of electricity as per billed revenue. It is submitted that the Working Capital is required to finance the expenses of the distribution licensee, which are incurred by the licensee on the basis of the ARR

approved by the Respondent Commission and not on the basis of billed revenue. Further, under 2011 MYT Regulations, the Respondent Commission has categorically provided that any surplus or deficit in Working Capital shall be to the account of the Licensee and shall not be trued up in ARR. However, the Respondent Commission in the impugned order erroneously trued up the Working Capital on the basis of trued up figures of revenue billed.

20.1.2 The Respondent Commission has wrongly rejected the Petitioner's submission in Table 3.77 of the Impugned Order, wherein the Petitioner has sought to apply the receivable for ARR while determining the working capital requirement. The 2011 MYT Regulations require that the Working Capital is to be calculated on the basis of projected revenue from sale of electricity and such Working Capital computed cannot be trued up. However the Respondent Commission in the Impugned Order has trued up the Working Capital on the basis of trued up figures of revenue billed. The relevant proviso of 2011 MYT Regulation is re-produced herein below:

> *"**4.21** The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:*
> *…….*
> *Provided that any surplus or deficit in Working Capital shall be to the account of the Licensee and shall not be trued up in ARR"*
> *(Emphasis supplied)*

20.1.3 It is further submitted that when the expenses are incurred on the basis of ARR allowed, then there is no rational for even considering the allowance of Working Capital on the basis of trued up figures of revenue

billed. The above treatment is also contrary to the methodology followed in MYT Order, 2012. In the MYT Order July 2012, the Respondent Commission itself computed the working capital based on ARR and not on basis of billed revenue. Therefore, it is submitted that the methodology adopted by the Respondent Commission under the Impugned Order is not only contrary to the 2011 MYT Regulations but also the MYT Order 2012.

20.1.4 Further, without prejudice, it is also submitted that even in the billed revenue taken for purpose of working capital, the Learned Commission has excluded E-tax and Deficit revenue recovery surcharge. An amount of Rs.212.49 Cr. and Rs.247.16 Cr. has been excluded from Billed Revenue pertaining to E-tax and Deficit Surcharge respectively while considering the same for purpose of computation of working capital. It is erroneous on part of the Respondent Commission to exclude some component of billing from the billed revenue because sale of electricity to consumer includes all these components. For the correct computation of the working capital the Respondent Commission should consider either the billed sale including all the components like electricity tax and deficit recovery surcharge or alternatively, base it on ARR. The approach adopted by the Respondent Commission to base it on revenue billed only, when the expenses are based on the ARR allowed is an incorrect stand as the two bases are not comparable. The Respondent Commission should consider both factors on the basis of ARR numbers only as that is the basis for computation.

20.1.5 The Respondent Commission vide its Reply to this Appeal that the Appellant has not differentiated the revenue billed and annual revenue requirement as per the MYT Regulation 2011, receivable for two months for wheeling. Further the retail supply business should be considered for computation of working capital instead of the ARR of the relevant financial year. Since the Regulations do not provide that ARR may be considered in respect of receivable for two months of revenue from wheeling and retail supply for computation of working capital, therefore, the claim of Appellant is factually incorrect.

20.1.6 The treatment of the Respondent Commission is contrary to the methodology followed by it in the MYT order. In the MYT order, the working capital is derived based on ARR and not on the basis of the billed revenue. Therefore, it is incorrect on part of the Respondent Commission to change the methodology at the true up stage.

20.1.7 It may further be noted that the Respondent Commission while computing the working capital requirement for the year 2014-15 also committed the same error as mentioned herein above with respect to the FY 12-13. Therefore, the Respondent Commission may kindly be directed to re-compute the working capital requirement for FY 14-15 in accordance with the submissions made herein above.

20.2 Respondent Commission's submissions on this issue are as under:

20.2.1 The Appellant has submitted that for calculation of working capital requirement, ARR may be considered instead of revenue billed. As per MYT Regulation, 2011, the formula for computing working capital has been provided as follows:

> *"Working Capital*
> *5.14 Working capital for wheeling business of electricity shall consist of*
> *(a) Receivables for two months of Wheeling Charges.*
>
> *5.15 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 month"*

20.2.2 The Commission in the MYT order dated 13.07.2012 has observed as follows:

> "4.300 Based on the principles of the MYT Regulations, 2011, the Commission approves the working capital requirement for the Second Control Period (FY 2012-13 to FY 2014-15) for Wheeling and Retail Supply Business as shown in the tables below:

Table 138: Approved Working Capital for Wheeling Business for Second Control Period (Rs. Cr)

Particulars	FY 2012-13	FY 2013-14	FY 2014-15
Wheeling Expense for the whole year	529.61	556.01	585.43
Wheeling expenses for 2 months	88.27	92.67	97.57
Total Working Capital	88.27	92.67	97.57

Table 139: Approved Working Capital for Retail Supply Business for Second Control Period (Rs. Cr)

Particulars	FY 2012-13	FY 2013-14	FY 2014-15
Receivables			
Annual revenues from Tariffs and Charges	4282.20	4740.20	5201.49
Receivables equivalent to 2 months average billing	713.70	790.03	866.92

Power Purchase expenses	3170.35	3605.02	3986.40
Less : 1/12th of power purchase expenses	264.20	300.42	332.20
Transmission Expense	361.60	340.50	373.68
Less : 1/12th of transmission expense	30.13	28.38	31.14
Wheeling Expense	529.61	556.01	585.43
Less : wheeling expense for 2 months	88.27	92.67	97.57
Total Working Capital	331.10	368.57	406.00

4.301. Total working capital for FY 2012-13 to FY 2014-15 has been approved as shown in the table below:

Table 140: Allocation of Working Capital for the Control Period (Rs. Cr)

Particulars	FY 2012-13	FY 2013-14	FY 2014-15
Working Capital Requirement – Wheeling	88.27	92.67	97.57
Working Capital Requirement – Retail Supply	331.10	368.57	406.00
Total Working Capital Requirement	419.37	461.24	503.58

20.2.3 In its analysis, the Commission has examined the Working capital submitted by the Petitioner which is based on the O&M Expenses, Power Purchase and revenue submitted in the Petition. The Commission has recomputed the Working Capital considering the actual power purchase cost and revenue from sale of electricity approved in the truing up for FY 2012-13. The approved working capital and change in the working capital are given in the Table below:

Table 3.78: Approved Working Capital Requirement for FY 2012-13
(Rs. Crore)

Sl. No.	Particulars	Now Approved	Remarks
A	Receivables from sale of electricity	4446.44	Table 3.6
B	Receivables equivalent to 2 month of revenue from sale of electricity	741.07	A/6
C	Power Purchase expenses (incl. transmission charges)	4011.93	Table 3.20
D	Power Purchase expenses for 1 Month	334.33	B/12
E	Working Capital Requirement	406.75	B-D
F	Less : Opening Working Capital	234.57	Tariff order dated July 21,2013
G	Change in working capital for FY 2012-13	172.18	E-F

20.2.4 The Appellant has not differentiated the revenue billed and annual revenue requirement and as per above Regulation receivable for two months for wheeling and retail supply business shall be considered for computation of working capital. The Regulation has not provided that ARR may be considered in respect of receivable for two months of revenue from wheeling and retail supply for computation of working capital. Therefore, the Appellants contention is factually incorrect.

20.3 Our Analysis and Findings:

20.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has wrongly rejected the Appellant's claim to apply the receivable for ARR while determining the working capital requirement. Learned counsel contended that MYT Regulations 2011 require that the Working Capital is to be calculated on the basis of projected revenue from sale of electricity and such Working Capital computed cannot be trued up.

However, the Respondent Commission in the Impugned Order has trued up the Working Capital on the basis of trued up figures of revenue billed.

20.3.2 Learned counsel alleged that such treatment is also contrary to the methodology followed in MYT Order, 2012 wherein the Commission itself computed the working capital based on ARR and not on basis of billed revenue. Learned counsel, further, submitted that the methodology adopted by the Respondent Commission under the Impugned Order is not only contrary to the 2011 MYT Regulations but also the MYT Order 2012.

20.3.3 Learned counsel was quick to point out that the Respondent Commission while computing the working capital requirement for the year 2014-15 has committed the same error as with respect to FY 2012-13. Learned counsel, accordingly, submitted that the Respondent Commission may be directed to re-compute the working capital for FY 2013-14 in accordance with submissions made by the Appellant.

20.3.4 ***Per-contra*****,** learned counsel for the Respondent Commission vehemently submitted that the Commission has examined the Working capital submitted by the Appellant which is based on the O&M Expenses, Power Purchase and revenue submitted in the Petition. The Commission has recomputed the Working Capital considering the actual power purchase cost and revenue from sale of electricity approved in the truing up for FY 2012-13. Learned counsel, further, submitted that the approved working capital and

change in the working capital have been duly specified in the impugned order. Further. the Appellant has not differentiated the revenue billed and annual revenue requirement and as per above Regulation receivable for two months for wheeling and retail supply business shall be considered for computation of working capital.

20.4 Our findings:

20.4.1 Before taking up analysis of the rival contentions of the parties on this issue, we refer to the MYT Regulations, 2011 as under:

> *"**4.21** The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:*
> *…….*
> *Provided that any surplus or deficit in Working Capital shall be to the account of the Licensee and shall not be trued up in ARR"*
>
> *"Working Capital*
> *5.14 Working capital for wheeling business of electricity shall consist of*
> *(a) Receivables for two months of Wheeling Charges.*
>
> *5.15 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 month"*
>
> *(Emphasis supplied)*

20.4.2 It is the contention of the Appellant that when the expenses are incurred on the basis of ARR allowed, then there is no rationale for even considering the allowance of Working Capital on the basis of trued up figures of revenue billed which is not only contrary to the methodology followed in MYT Order, 2012 but also against the MYT Regulations itself. In fact, the Commission has recomputed working capital by considering actual power

purchase cost and actual revenue from sale of electricity approved in the true up for FY 2012-13. It is relevant to note that Regulations do not provide that ARR may be considered inspite of receivables for two months of revenue from wheeling and retail supply for computation of working capital. In view of this fact, we find no force in the submissions of the learned counsel for the Appellant. **Accordingly, we are of the opinion that the Respondent Commission has decided the working capital based on the records placed before it and our interference is not called for.**

21. <u>ISSUE NO. 30</u>:

DISALLOWANCE OF CAPITAL EXPENDITURE MADE DURING THE YEAR 2012-13

21.1 Appellant's submissions on this issue are as under:

21.1.1 The Respondent Commission has disallowed the actual capital expenditure incurred by the Appellant during FY 2012-13 on the pretext that the actual capitalization of assets can be approved only after physical verification. Such insistence and observation of the Respondent Commission lacks merits and prudence and therefore this Hon'ble Tribunal must direct the Respondent Commission for adoption of actual information submitted, subject to physical verification (if any).

21.1.2 The Appellant in its Tariff Petition had submitted details of Gross Fixed Assets ('**GFA**') on the basis of Certificate issued by the Electrical Inspector for the purpose of determination of capitalization during the year

2012-13 as Rs. 316.2 crores. However, the Respondent Commission has erroneously proceeded to consider the capitalization of assets during the year 2012-13 at Rs, 200.88 crores (being projected figures of capitalization of assets in MYT Order dated 13.07.2012) and has thereby provisionally approved the capitalization during the year 2012-13 as Rs, 200.88 crores, subject to pending physical verification of fixed assets of the Appellant. It is pertinent to note that the Respondent Commission has not even initiated the process of physical verification of the concerned assets for the year 2012-13 and such unnecessary delay is prejudicial to the rights and interests of the Appellant.

21.1.3 The non-allowance by the Respondent Commission of actual capital expenditure incurred by the Appellant during the FY 2012-13 on the pretext that the actual capitalization of assets can be approved only after physical verification is baseless and is contrary to the provision of Tariff Regulations, 2011. The Tariff Regulations nowhere requires Truing Up of capitalization to be approved only after physical verification. The Regulation 4.17 of the Tariff Regulations, 2011 requires the Respondent Commission to review the actual expenditure incurred by the licensee (Appellant herein) and capitalization at the end of each year of the control period, approved expenditure and capitalization schedule and accordingly True-Up the RoCE and depreciation.

21.1.4 The approach of the Respondent Commission of provisionally allowing capital expenditure under the true-up Order, irrespective of the actual expenditure and capitalization of assets on physical verification is inconsistent with and beyond the scope of the language of Regulation 4.17 of the Tariff Regulations 2011. While the Respondent Commission has the power to carry out prudence check for capitalization, it cannot be done in a manner that subjects the Appellant to onerous terms and deprives it of the revenue requirement to which the Appellant is entitled under the Tariff Regulation.

21.1.5 The Respondent Commission, in its Reply, has attempted to justify its stand by wrongly linking the capital expenditure and capitalization. The Respondent Commission's insistence that the capital expenditure shall normally be incurred by the licensee after the approval of the Respondent Commission colours a picture that the present capital expenditure incurred by the Appellant are not incurred after gaining the approval of the Respondent Commission. Any submission or indication in this regard by the Respondent Commission is wrong and denied in totality.

21.1.6 The Respondent Commission has to consider the capitalization based on receipt of Electrical Inspector (EI) Certificates submitted by the Appellant. Therefore, the contention of the Respondent Commission that actual capitalization of assets can be approved only by physical verification is

without any merits and the same can also be done on the basis of EI certificates. The Respondent Commission should finalize the truing up of capitalization of assets up to the FY 2012-13 as per the EI certificates submitted by the Appellant.

21.1.7 While the Respondent Commission has the power to carry out prudence check for capitalization, it cannot deprive the licensee of the ROCE and other related claims on the capitalization that has already been incurred by it. It is submitted in this regard that the EI certificate issued by the Electrical Inspector provides the necessary evidence that the asset has been put to operation. Therefore, once the EI Certificate has been furnished, the approval cannot be unduly delayed on the ground that physical verification of assets is pending by the Respondent Commission. In any case, such requirement is beyond the scope of Regulation 4.17 of the MYT Regulations, 2011.

21.1.8 It is pertinent that Electricity Rules, 1956 read with Central Electricity Authority Regulations provides for detailed inspection by Electrical Inspector (hereinafter referred to as "**EI**") before issuance of any certificate for usage of a particular assets of the Appellant. It is submitted that the EI Certificate is issued not only after physical verification but after detailed examination of the assets and its technical capabilities. However, Respondent Commission's physical verification process is somewhat narrower than the physical

verification process adopted at the time of EI Certification, therefore, the Respondent Commission should approve the capitalization provisionally on the basis of EI Certification, subject to the physical verification in a time bound manner, if it deems so necessary.

21.1.9 The delay caused in capitalization of assets due to pending physical verification will have a severe effect on the cash flow of the Appellant, thereby making it impossible for the Appellant to operate on a commercially viable manner, thus increasing the burden on the consumers by way of increasing carrying cost.

21.1.10 In view of the above, this Tribunal may direct the Respondent Commission to true up the capitalization of assets on the basis of Electrical Inspector certificate pending the physical verification of the assets and any other prudence check.

21.2 Respondent Commission's submission on this issue are as under:

21.2.1 It is wrong assumption and misunderstanding of Tariff Regulations on part of the appellant to say that the stand of the Commission that the actual capitalization of assets can be approved only by physical verification is contrary to the provision of the tariff regulation. The Commission has considered closing GFA at Rs.3627.21 Crore for FY 2011-12 in the Tariff order dated July 31, 2013. Accordingly, the Commission considers the same as opening GFA as on 1st April 2012 and capitalization of CWIP of Rs.200.88

Crore considered in the preceding paragraph and arrived at the closing GFA value for FY 2012-13 as detailed in the Table below:

Table 3.64: Gross Fixed Assets FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	Now approved	Remarks
A	Opening GFA (as per Tariff order dated July 31, 2013)	3627.21	
B	Capitalization during the year	200.88	Para 3.237
C	Closing GFA	3828.09	A+B
D	Average GFA	3727.65	(A+C)/2

21.2.2 Regulation 4.17 of MYT Regulations, 2011 stipulates about the true up of the capital expenditure and capitalization. The rationale of physical verification of assets of the DISCOMSs flows from the need for the Commission to undertake a prudence check. True-up of any capital expenditure and capitalization invariantly involves physical verification of the capital assets. From no stretch of imagination, one can construe that true-up of capital expenditure and capitalization may be done without physical verification, which is an essential part of true-up of any capital assets.

21.2.3 Further, it is submitted that the Commission has approved the capitalization of Rs. 200.88 Crore for the Appellant in its MYT Tariff Order dated July 2012 for FY 2012-13. The fact about this projected figure was already known to the Appellant in July, 2012. The Commission in its tariff order dated July, 2012 has stated that the Appellant is required to take the approval of the Commission as under:

> *"4.253. The Commission would like to clarify that capital investment approved above is provisional and is subject to True-up on the basis of actual capital investment made by the Petitioner. The Petitioner will require to take scheme wise approval for the capital investment."*

21.2.4 The Commission has accorded in principle approval for Capital Expenditure of around Rs. 138.23 Crore, during this period. Further, in addition to this, the aggregate cost of all schemes not requiring an approval from the Commission shall not exceed Rs. 20 crore in any financial year as per the terms and conditions of license. The actual capitalized amount of Rs. 316.20 Crore as stated by the Appellant is much higher than the approved amount by the commission during the period.

21.2.5 Further, the Commission in its MYT Regulations, 2011 has stated that to undertake review the actual capital expenditure and capitalization vis-à-vis the approved capital expenditure and capitalization schedule. The actual capitalization has to be reviewed with respect to the approved capitalization and hence, it does not directly imply that the Commission has to take the actual capitalization by ignoring the approved capitalization and the prudence check.

21.2.6 It may also be noted that the Commission in its Regulation, 2011 has clearly stated that the Capital Expenditure shall normally be incurred by the licensee after the approval of the Commission.

21.3 Our Analysis and Findings:

21.3.1 Learned counsel for the Appellant submitted that the Respondent Commission had disallowed the actual capital expenditure incurred by the Appellant during FY 2012-13 on the pretext that the actual capitalization of assets can be approved only after physical verification. Learned counsel, further, submitted that the Appellant in its Tariff Petition had submitted details of Gross Fixed Assets ('GFA') on the basis of certificate issued by the Electrical Inspector for the purpose of determination of capitalization during the year 2012-13 as Rs. 316.2 crores. However, the Commission has erroneously proceeded to consider the capitalization of assets during the year 2012-13 at Rs, 200.88 crores which was projected for capitalization of assets in MYT Order dated 13.07.2012. Learned counsel vehemently submitted that non-allowance by the Respondent Commission of actual capital expenditure incurred by the Appellant during the FY 2012-13 on the pretext that the actual capitalization of assets can be approved only after physical verification is baseless and is contrary to the provision of Tariff Regulations, 2011 which nowhere requires Truing Up of capitalization to be approved only after physical verification. He was quick to submit that Regulation 4.17 of the Tariff Regulations, 2011 requires the Respondent Commission to review the actual expenditure incurred by the licensee and capitalization at the end of each year of the control period.

21.3.2 While the Respondent Commission has the power to carry out prudence check for capitalization, it cannot deprive the licensee of the ROCE and other related claims. Learned counsel, further, contended that certificate issued by the Electrical Inspector provides the necessary evidence that the asset has been put to operation and, therefore, the approval cannot be unduly delayed only on the ground that physical verification of assets is pending.

21.3.3 Learned counsel, to substantiate his submissions, placed reliance on the Electricity Rules, 1956 and Central Electricity Authority Regulations which provides for detailed inspection by Electrical Inspector before issuance of any certificate for usage of a particular asset. The delay caused in capitalization of assets due to pending physical verification will have a severe effect on the cash flow of the Appellant, thereby making it impossible for the Appellant to operate on a commercially viable manner which would ultimately increasing the burden on the consumers by way of increasing carrying cost.

21.3.4 Learned counsel, accordingly, summed up his arguments and prayed for direction by this Tribunal to the Respondent Commission to true-up the capitalization of assets on the basis of certificate issued by the Electrical Inspector.

21.3.5 ***Per-contra,*** learned counsel for the Respondent Commission submitted that it is wrong assumption and misunderstanding of Tariff

Regulations on part of the appellant to say that the stand of the Commission that the actual capitalization of assets can be approved only by physical verification is contrary to the provision of the tariff regulation. In fact, the Commission has considered closing GFA at Rs.3627.21 Crore for FY 2011-12 in the Tariff Order dated 31.07.2013 and, accordingly, the opening GFA as on 01.04.2012 was the same as the closing balance for the preceding year and that capitalization of CWIP of Rs.200.88 Crore. The Closing GFA for FY 2012-13 came to be Rs. 3828.09 crores with average GFA as Rs. 3727.65 crores.

21.3.6 Learned counsel for the Respondent Commission, further, submitted that the Commission has approved the capitalization of Rs. 200.88 Crore for the Appellant in its MYT Tariff Order dated July 2012 for FY 2012-13 and the same was known to the Appellant in July, 2012 itself. The relevant extract of July, 2012 Tariff Order is reproduced as under:

> *"4.253. The Commission would like to clarify that capital investment approved above is provisional and is subject to True-up on the basis of actual capital investment made by the Petitioner. The Petitioner will require to take scheme wise approval for the capital investment."*

21.3.7 Learned counsel, further, contended that as per the terms and conditions of license, in principle approval of the Commission for Capital Expenditure is required and the projected figure of capital expenditure by the Appellant is much higher than the approved amount by the Commission during the period. Further, the Commission, in its Regulations, 2011, has

clearly stated that the capital expenditure shall normally be incurred by the licensee after the approval of the Commission.

21.4 Our findings:

21.4.1 We have carefully gone through the submissions made by learned counsel for the Appellant and learned counsel for the respondent Commission. It is the contention of the Appellant that during FY 2012-13, the Respondent Commission had disallowed the actual capital expenditure incurred by the Appellant on the pretext that the actual capitalization of assets can be approved only after physical verification. The Appellant, in its Tariff Petition, had submitted details of Gross Fixed Assets on the basis of Certificate issued by the Electrical Inspector for capitalization during the year 2012-13 as Rs. 316.2 crores against which the Commission has considered only Rs, 200.88 crores. It is not in dispute that before allowing any amount for capitalization, the State Commission has to carry out prudence check so as to verify authenticity of the capital deployed during the period to arrive at ROCE and other related claims. Ideally, physical verification of the assets should be periodically done but, in the prevailing scenario, it is observed that the same is pending since long and the Appellant is claiming ROCE as per the certificate issued by the Electrical Inspector on time to time. The Electricity Rules, 1956 and Central Electricity Authority Regulations provides for detailed inspection by Electrical Inspector before issuance of any certificate for usage of a particular assets of the licensee. In view of these

facts, if the capitalization of assets remains pending for want of physical verification, it will have a severe effect on the cash flow of the Appellant, thereby making it difficult to operate on a commercially viable manner which in turn would increase the burden on the consumers by way of increase in carrying cost. While considering the submissions of learned counsel for the Respondent Commission, it is essential that whatever capital is deployed by the Appellant in a particular period has to be approved by the Commission. Any mismatch in the capital deployed and that approved by the Commission results into the dispute as in the case in hand.

21.4.2 To be more specific, the Appellant claims the capitalization figure of Rs. 316.20 crores against which the Commission has allowed only Rs.200.88 crores. In the light of these facts, what thus, transpires is that the figures projected for capitalization by the Appellant and that considered by the Respondent Commission need to be reconciled and allowed for actual capitalization in line with the MYT Regulations, 2011. We, therefore, of the opinion that this issue needs to be reexamined by the Commission in consideration of all facts and figures. **This issue, as such, is decided in favour of the Appellant.**

22. ISSUE NO. 31:

ERRONEOUS COMPUTATION OF MEANS OF FINANCING OF ASSETS

22.1 Submissions of the Appellant on this issue are as under:

22.1.1 The Respondent Commission has erred in using two different methods while calculating the means of financing of assets capitalized. The total amount of Rs.200.88 Crores was considered by Respondent Commission for assets capitalized on a provisional basis (based on projections approved in the MYT Order), whilst one of the components of means of financing of such assets, being consumer contribution was taken on actuals. Thereby distorting the debt and equity ratio of the funds utilized for asset capitalization.

22.1.2 The Respondent Commission, while determining the tariff has been acting consistently with a preconceived objective of depriving the Appellant of a legitimate entitlement of ARR under the Tariff Regulation, 2011 in order to artificially keep the retail supply tariff at lower levels. The Respondent Commission has failed to appreciate that the distribution licensee is entitled to the ARR on cost plus basis and the actual cost of the distribution licensee must be reflected in the ARR subject to appropriate prudence check by the State Commission.

22.1.3 If the Respondent Commission had followed a uniform approach of taking the actual figures of both capitalization and consumer contribution on actuals, then the value of balance capitalization would have been higher (i.e. Rs. 269.59 crores as against 154.26 presently considered by the Respondent Commission), thereby, increasing the debt and equity component of the

financing of such capitalization which would also have resulted in additional allowance of RoCE on the funds invested by the Appellant in the distribution business at actuals. Alternately, without prejudice even if the capitalization is taken at projected figures, then the consumer contribution should also be based on projections and not on actuals. Further, this approach of Respondent Commission depicts that this results in erroneous reduction of ARR of a particular year to lower the tariff but at the same time burdening the consumer in future years in terms of higher tariff and carrying cost on the revenue gap.

22.1.4 In fact the Respondent Commission in its Reply has failed to comment on the issue of erroneous computation of means of finance and has stated its stand on the allowance of capitalization, which is under challenge in issue No.30 of the present appeal. The Respondent Commission has submitted that the True-Up of FY 2012-13 is under process and the net impact of any surplus or deficit on account of capitalization will be allowed to the Appellant after final true of capitalization for FY 2012-13. This submission lacks merits in law since it is by virtue of the Impugned Order that the True-Up for FY 2012-13 is being done by the Respondent Commission. It has already been earlier submitted that the concept of True-Up is not to correct the wrong methodology; it is to give effect to the actual expenditure/costs incurred by the Appellant in its ARR. The indulgence of the Respondent

Commission in this regard is therefore unheard of and the same is against the provisions as per the prevalent Regulations.

22.1.5 The Respondent Commission has erred in using figures from two different sets of books while calculating the financing of capitalization as it directly affects the proportion of debt and equity used for funding such capitalization and accordingly the components like RoCE, etc. The below mentioned table provides the impact on the Appellant due to erroneous consideration of means of finance by the Respondent Commission.

Means of Finance	*Rs in Cr*
Capitalisation sought by the Petitioner (Actual capitalization – Actual Consumer Contribution) –"A"	*269.59*
Capitalisation allowed by the Ld. Commission (Projected Capitalization as per MYT Order – Actual Consumer Contribution as per financials) –"B"	*154.26*
Lower allowance of capitalsiation "C"= A-B	*115.33*

Impact due to provisional capitalisation	*Rs in Cr*
Dep @ 3.645% on Rs 115.33 Cr – "D"	*2.10*
Total (ROCE + Incentive) on Rs 115.33 Cr–"E"	*6.89*
Total Impact "F" = (D+E)	*8.99*
Add: carrying cost from FY 12-14 to FY 15-16 = "G"	*4.38*
Total Impact along with carrying cost "H"=(F+G)	*13.37*

This inconsistent approach has a severe adverse effect on the cash flow of the Appellant, thereby making it impossible for the Appellant to operate in a commercially viable manner.

22.1.6 In view of above submissions, this Tribunal may kindly direct the Respondent Commission to carry out the exercise of final true-up of

capitalization in time bound manner and consider and allow the means of finance for capitalization in the current tariff order in a consistent manner.

22.2 Respondent's submission on this issue are as under:

22.2.1 The Appellant has contended that the Commission has erred in using two different methods while calculating the means of financing of assets capitalized. It has taken assets capitalized provisionally whereas it has taken consumers contribution on actual basis.

22.2.2 That the Commission in the impugned order has observed as follows:

> *3.237 The asset verification of the Petitioner for capitalization during FY 2006-07 to FY 2011-12 is under progress. The Commission has approved capitalization for FY 2012- 13 at Rs.200.88 Crore in its MYT Order dated July 13, 2012. However, pending physical verification of the fixed assets of the Petitioner, the Commission has provisionally considered the capitalization of Rs.200.88 Crore, which is lower of the projected capitalization in MYT Order dated July 13, 2012 and the audited financial statement of the Petitioner for FY 2012-13.*
>
> *3.240 The Petitioner has furnished the financing of the capitalization based on Debt: Equity as detailed in the Table below:*

Table 3.65: Financing of new investment capitalized projected by the Petitioner for FY 2012-13

(Rs.Crrore)

Particulars	*Petitioner's Submission*
Capitalization (A)	*315.93*
Consumer contributions (B)	*48.12*
Balance Capitalisation = C (A-B)	*267.80*
-through Equity (30% of C)	*80.34*
-through Loan (70% of C)	*187.46*

22.2.3 In its analysis, the Respondent Commission in para 3.241 of the impugned Order stated that as per audited accounts for FY 2012-13, the

additions to the consumer contribution during FY 2012-13 are at Rs.46.62 Crore. The Commission considers the total additions to consumer contributions of Rs.46.62 Crore to be utilized towards capitalization of assets. The Commission considers funding of balance capitalization through equity and debt in the ratio of 30 : 70 in term of Regulation 5.11 of the MYT Regulations 2011 as give in the Table below:

Table 3.66: Approved financing of new investment capitalized in FY 2012-13

(Rs. Crore)

Sl. No.	Particulars	Now approved	Remarks
A	Capitalisation	200.88	Para 3.237
B	Consumers contributions	46.62	Para 3.241
C	Balance Capitalisation	154.26	A-B
D	Equity	46.28	30% of C
E	Loan	107.98	70% of C

22.2.4 The Respondent Commission, in its reply has stated that the Appellant has submitted erroneous computation of means of financing for provisional capitalization of assets. It is submitted that the Commission has considered the provisional capitalization based on lower of the capitalization as per audited financial statement of the capitalization approved in MYT Order dated 13.07.2012 by opting the above methodology. The maximum capitalization to be allowed in FY 2012-13 shall be Rs. 200.88 crores whereas the appellant is claiming the capitalization at Rs. 267.80 crores for FY 2012-13. It is further, submitted that the true up of capitalization for FY 2012-13 is under process and the net impact of any surplus or deficit on

account of capitalization will be allowed to the Appellant after final true of capitalization for 2012-13.

22.3 Our Analysis and Findings:

22.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has erred in using two different methods while calculating the means of financing of assets capitalized. The total amount considered for assets capitalization taken on a provisional basis based on projections approved in the MYT Order, whilst one of the components of means of financing of such assets, being consumer contribution was taken on actual. Learned counsel was quick to point out that such treatment has started distorting the debt and equity ratio of the funds utilized for asset capitalization.

22.3.2 Learned counsel, further, submitted that the Respondent Commission while determining the tariff has been acting consistently with a preconceived objective of depriving the Appellant of a legitimate entitlement of ARR under the Tariff Regulation, 2011 in order to artificially keep the retail supply tariff at lower levels. As a result, the Commission has failed to appreciate that the distribution licensee is entitled to the ARR on cost plus basis and the actual cost of the distribution licensee must be reflected in the ARR subject to appropriate prudence check by the State Commission.

22.3.3 Learned counsel, further, contended that if the Respondent Commission had followed a uniform approach of taking the actual figures of

both capitalization and consumer contribution on actual, then the value of balance capitalization would have been much higher than presently considered by the Respondent Commission.

22.3.4 Learned counsel was quick to submit that in using figures from two different sets of books while calculating the financing of capitalization by the Respondent Commission, it has directly affected the proportion of debt and equity ratio for funding such capitalization and, accordingly, the components like RoCE, etc. This inconsistent approach of the Respondent Commission has a severe adverse effect on the cash flow of the Appellant, thereby making it impossible for the Appellant to operate in a commercially viable manner.

22.3.5 ***Per-contra,*** learned counsel for the Respondent Commission contended that in its analysis, the Commission in the impugned Order stated that as per audited accounts for FY 2012-13, the additions to the consumer contribution during FY 2012-13 are at Rs.46.62 Crore which has been considered to be utilized towards capitalization of assets. The Commission considers funding of balance capitalization through equity and debt in the ratio of 30 : 70 in term of Regulation 5.11 of the MYT Regulations 2011.

22.3.6 Learned counsel, further, submitted that the Commission has considered the provisional capitalization based on lower of the capitalization as per audited financial statement of the capitalization approved in MYT Order dated 13.07.2012 by opting the above methodology.

22.3.7 Learned counsel, further, submitted that the true up of capitalization for FY 2012-13 is under process and the net impact of any surplus or deficit on account of capitalization will be allowed to the Appellant after final approval of capitalization for 2012-13.

22.4 Our findings:

22.4.1 We have gone through the rival contentions of both the parties and also carefully referred to the findings and analysis of the State Commission in the impugned Order. While the Appellant contends that the Commission should carry out the exercise of final true-up of capitalization in a time bound manner and should consider and allow the means of finance for capitalization in the current tariff Order in a consistent manner. On the other hand, the Respondent Commission has considered the provisional capitalization based on lower of the capitalization as per the audited financial statement of the capitalization approved in MYT Order dated 13.07.2012. In view of the facts, it is relevant to note that the real dispute is arisen due to consideration of various capitalization figures projected by the Appellant and that allowed by the State Commission. We are, therefore, of the opinion that such mismatch of projected and considered figure is required to be reconciled in the true-up for FY 2012-13. **Hence, this issue stands decided in favour of the Appellant.**

23. <u>ISSUE NO. 32</u>: ERRONEOUS CALCULATION OF DEPRECIATION RATE

23.1 On issue No. 32, Appellant's submissions are as follows:

23.1.1 The Respondent Commission has erred in computing the average depreciation rate based on actual depreciation and capitalization as provided in the audited financials of the Appellant and arrived at a depreciation rate of 3.645%, whereas the Regulation 5.17 of the Tariff Regulations, 2011 categorically provides that the depreciation shall be computed as per the rates specified in Appendix – 1 of the Tariff Regulations, 2011, according to which the average depreciation rate comes to 3.88%.

23.1.2 As per the provisions of the Tariff Regulation, 2011 and rate prescribed in Appendix – 1 thereto, the average depreciation rate comes to 3.88%. Accordingly, in line with the provisions of Tariff Regulations, 2011 average rate of 3.88% was submitted by the Appellant in its Tariff Petition filed before the Respondent Commission for True-up of FY 2012-13.

23.1.3 The Respondent Commission in its Reply has stated that it has computed the average rate of depreciation as per audited financial statement and applied the same rate on the provisionally approved GFA to allow the depreciation in the ARR.

23.1.4 It is clarified that financial books of accounts are prepared on accrual concept of accounting and Generally Accepted Accounting Principles

("GAAP") of India. However, ARR is prepared based on MYT Order and other applicable Regulations. It is submitted that the methodology of preparing financial accounts and ARR are based on different principles which cannot be interchanged with each other.

23.1.5 The Respondent Commission's computation of average rate of depreciation as per audited financial statement and application of the same rate on the provisionally approved GFA to allow the depreciation in ARR is incorrect and in contravention of the Tariff Regulations, which categorically provides for average depreciation rate of 3.88% or at a rate as approved in MYT Regulation or MYT order.

23.1.6 The Respondent Commission while determining the tariff is required to consider the rate of depreciation as specified in the regulation and cannot, at its discretion, proceed to adopt any other rate since the same is lower than the rate prescribed in the Tariff Regulations.

23.1.7 That the approval of capitalization as per the MYT Order whilst consideration of rate of depreciation as per financial books of accounts is irrational, arbitrary and unjustified. The fact that while considering the gross fixed assets of the Appellant for the purposes of determination of tariff, it has considered projected addition in GFA as per MYT Order and then applied the average depreciation rate arrived as per audited financial statement further posits the inconsistent approach adopted by the Respondent Commission.

23.1.8 In view of the above, the Respondent Commission may kindly be directed to allow depreciation rate of 3.88% in accordance with the terms of the Tariff Regulations.

23.2 Respondent's submissions on this point, are as under:

23.2.1 The Appellant has contended that the Respondent Commission has erred in computing the average depreciation rate based on actual depreciation and capitalization as provided in the audited financials of the Appellant and arrived at a depreciation rate of 3.645%, whereas the Regulation 5.17 of the Tariff Regulations, 2011 categorically provides that the depreciation shall be computed as per the rates specified in Appendix-1 of the Tariff Regulations, 2011, according to which the average depreciation rate comes to 3.88%.

23.2.2 That the Commission in the impugned order has observed that the Petitioner has submitted that as per MYT Regulations "depreciation shall not be allowed on assets funded by any capital subsidy/grant". For the purpose of computation of final depreciation to be claimed as a part of ARR, depreciation is first computed on GFA and average depreciation rate is worked out and applied on fixed assets (net of consumer contributions). The Petitioner has furnished the working of average rate of depreciation and depreciation on net assets for FY 2012-13 as detailed in the Table below:

Table 3.69: Computation of Average rate of Depreciation for FY 2012-13 (Rs. Crore)

Particulars	Petitioner's Submission
Average of GFA	4041.19
Depreciation	156.83
Average Depreciation Rate	3.88%

Table 3.70: Depreciation for FY 2012-13 (Rs. Crore)

Particulars	Petitioner's Submission
Opening Assets (Net of Consumer contribution)	3493.94
Closing Assets (Net of consumer contribution)	3761.78
Average assets	3627.86
Average Depreciation rate as above	3.88%
Depreciation	140.79

Table 3.71: Cumulative Depreciation on fixed assets at the end of FY 2012-13 (Rs. Crore)

Particulars	Petitioner's Submission
Opening Balance of cumulative depreciation	1261.17
Addition during FY 2012-13	140.79
Closing balance of cumulative depreciation at the end of FY 2012-13	1401.96

Table 3.72: Utilisation of Depreciation for FY 2012-13 (Rs. Crore)

Particulars	Petitioner's Submission
Depreciation for FY 2012-13	140.79
Depreciation utilized for Debt repayment in FY 2012-13	140.79

23.2.3 The Commission in its analysis has considered closing GFA at Rs.3627.21 Crore, closing Consumers contributions at Rs.325.25 Crore and cumulative/accumulated depreciation at Rs.1223.71 Crore at the end of FY 2011-12 in tariff order dated July 31, 2013. The Commission has provisionally approved additions to the GFA during FY 2012-13 at Rs.200.88 Crore, Consumer contributions at Rs.46.62 Crore and balance capitalization in Debt Equity ratio of 70:30 based on capitalization as discussed in the preceding paragraphs.

23.2.4 The Commission has computed the average rate of depreciation for FY 2012-13 based on the audited accounts as detailed in the Table below:

Table 3.73: Computation of average rate of Depreciation for FY 2012-13 (Rs. Crore)

Sl. No.	Particulars	Amount	Remarks
A	Opening GFA as per audited accounts	3969.19	Audited financial Statement
B	Closing GFA as per audited accounts	4276.07	
C	Average of GFA	4122.63	(A+B)/2
D	Depreciation as per audited accounts for FY 2012-13.	150.30	Audited Financial Statement
E	Average Depreciation Rate	3.645%	(D/C)*100

23.2.5 The Commission accordingly considers the average depreciation rate and approved the depreciation for FY 2012-13 as given in the Table below:

Table 3.74: Depreciation for FY 2012-13 (Rs. Crore)

Sl. No.	*Particulars*	*Now approved*	*Remarks*
A	*Average GFA*	*3727.65*	*Table 3.64*
B	*Average Consumer contribution*	*348.56*	*Table 3.68*
C	*Average assets net of consumer contribution*	*3379.09*	*A-B*
D	*Average Depreciation rate as above*	*3.645%*	*Table 3.73*
E	*Depreciation*	*123.17*	*C*D*

Table 3.75: Cumulative Depreciation on fixed assets at the end of FY 2012-13 (Rs. Crore)

Sl. No.	*Particulars*	*Now approved*	*Remarks*
A	*Opening Balance of cumulative depreciation*	*1223.71*	*Para 3.245*
B	*Addition during FY 2012-13*	*123.17*	*Table 3.74*
C	*Closing balance of cumulative depreciation at the end of FY 2012-13*	*1346.88*	*A+B*

Table 3.76: Utilization of Depreciation for FY 2012-13 (Rs. Crore)

Particulars	Now approved	Remarks
Depreciation for FY 2012-13	123.17	Table 3.74
Depreciation utilized for Debt repayment in FY 2012-13	123.17	

23.2.6 The Commission in the reply has stated that the Appellant has submitted that the depreciation rate should be based on the MYT Regulation 2011. The Commission has allowed the rate of depreciation as it has been provided in the audited books of accounts on provisionally approved GFA. It is further submitted that the total GFA may include some of the capital assets which may have completed its useful life and still are being used and included in the GFA where no depreciation should be charged on these assets. The Commission has provisionally allowed the capitalization based on the audited financial statement and detailed breakup available for depreciable assets in GFA. Therefore, the Commission has computed the average rate of depreciation as per audited financial statement and applied the same rate on the provisionally approved GFA to allow the depreciation in ARR.

23.3 Our Analysis and Findings:

23.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has erred in computing the average depreciation rate based on actual depreciation and capitalization as provided in the audited financials of the Appellant and arrived at a depreciation rate of 3.645%, whereas, as per Tariff Regulations, 2011 categorically (Appendix–1), the average depreciation rate comes to 3.88%.

23.3.2 Learned counsel vehemently submitted that financial books of accounts are prepared on accrual concept of accounting and Generally

Accepted Accounting Principles (GAAP) of India. However, ARR is prepared based on MYT Order and other applicable Regulations.

23.3.3 Learned counsel, further, submitted that computation of average rate of depreciation made by the Respondent Commission is incorrect and in contravention of the Tariff Regulations. Learned counsel reiterated that while determining the tariff, the Respondent Commission is required to consider the rate of depreciation as specified in the regulation itself and cannot, at its discretion, proceed to adopt any other rate.

23.3.4 While summing up his arguments, learned counsel for the Appellant submitted that in view of the above, the Respondent Commission may be directed to allow depreciation rate of 3.88% in accordance with the terms of Tariff Regulations, 2011.

23.3.5 ***Per-contra,*** learned counsel for the Respondent Commission submitted that for the purpose of computation of final depreciation to be claimed as a part of ARR, depreciation is first computed on GFA and average depreciation rate is worked out and applied on fixed assets (net of consumer contributions).

23.3.6 Learned counsel for the Commission contended that the Commission has carefully analyzed the details furnished by the Appellant for working out the average rate of depreciation on net assets for FY 2012-13. Learned counsel, further, submitted that the Commission has

provisionally approved additions to the GFA during FY 2012-13 at Rs.200.88 Crore, Consumer contributions at Rs.46.62 Crore and balance capitalization in Debt Equity ratio of 70:30 based on its methodology for capitalization. Accordingly, the average depreciation rate was arrived at 3.645%.

23.3.7 Regarding contention of the Appellant that the depreciation rate should be based on the MYT Regulations, 2011, learned counsel for the Respondent Commission clarified that the Commission has allowed the rate of depreciation as it has been provided in the audited books of accounts on provisionally approved GFA. It is also clarified that total GFA may include some of the capital assets which may have completed their useful life and still are being used and included in the GFA on which no depreciation should be charged. Learned counsel for the Respondent Commission, accordingly, emphasized that there is no error in the methodology for computation of average depreciation rate, and, hence, the Appeal should not be allowed on this issue.

23.4 Our findings:

23.4.1 We have carefully analyzed the contentions of both the parties regarding calculation of average depreciation rate. While the Appellant contends that the depreciation rate should be computed as per the rates specified in Appendix-1 of Tariff Regulations, 2011 according to which the average depreciation may come to 3.88%. On the other hand, the State

Commission has computed the average deprecation rate based on actual depreciation and capitalization as provided in the audited accounts of the Appellant and has arrived at a depreciation rate of 3.645%. As the depreciation rate calculated by the Commission happens to be lower than that specified under Tariff Regulations, 2011, the Appellant is aggrieved by the same and, subsequently, raised this issue for consideration of this Tribunal.

23.4.2 It is evident to note the financial books of accounts are prepared on accrual concept of accounting and Generally Accepted Accounting Principles (GAAP) of India, but, ARR is prepared based on MYT Order and other applicable Regulation.

23.4.3 While referring to the impugned Order, we noticed that the Commission has rendered detailed analysis before specifying the final figure of depreciation rate but adopting its own methodology which is in deviation of the rates specified in Appendix-1 of Tariff Regulations, 2011. It is pertinent to note that Regulation 5.17 of the Tariff Regulations categorically provides that the depreciation shall be computed as per the rates specified in Appendix-1 of the Tariff Regulations.

23.4.4 In the light of these provisions and facts, we are of the opinion that the Respondent Commission ought to have computed the average depreciation rate strictly based on its Tariff Regulations, 2011 and none

else. It is a settled principle of law that once Regulations have been framed and are put in place, the same should be followed scrupulously by all stakeholders including the State Commission. **Therefore, we decide this issue in favour of the Appellant**.

24. *<u>ISSUE NO. 36</u>:* *ERRONEOUS COMPUTATION OF CARRYING COST*

24.1 Appellant's submissions on this issue are as follows:

24.1.1 The Respondent Commission in the Impugned Order has computed the total revenue requirement including the carrying cost for the year 2014-15 at Rs.5758.03 crores (including carrying cost) after carrying out the computation of various other factors in an incomprehensible manner. Further, the Respondent Commission in the Impugned Order had also erroneously computed the carrying cost rate based on the normative cost of debt for capex.

24.1.2 The methodology adopted by the Respondent Commission to determine the total revenue requirement including carrying cost for financial year 2014-15 is incomprehensible. Such methodology is nowhere provided in the Regulations neither has been adopted in MYT Order.

24.1.3 The Appellant in its Tariff Petition submitted before the Respondent Commission had sought allowance of carrying cost on revenue gap loans as per actuals as a separate expense in accordance with the extant regulatory framework and the Judgment of this Tribunal in Appeal no. 153 of 2009,

however the Respondent Commission denied the same and contrary to the aforementioned Judgment, only allowed normative cost of debt for financing revenue gap loans. This Tribunal in its Judgment dated 30.07.2010 in Appeal No. 153 of 2009 has held that the carrying cost incurred by the licensee on the revenue gap accrued must be allowed as expenses at the prevailing market rate in the debt equity ratio of 70:30.

24.1.4 Accordingly, the Appellant in its Tariff Petition before the Respondent Commission had provided the details of interest paid on revenue gap loans and had sought allowance of the same on actual basis as an expense. However, the Respondent Commission in the Impugned Order has provisionally determined the carrying cost rate by the considering the rate of interest on debt as approved in the MYT Order for capex and working capital loans. It is submitted that such approach adopted by the Respondent Commission is erroneous in so far as it provides an interest rate of 9.97% for revenue gap loans. As such rate was categorically allowed under the MYT order for working out the weighted average cost of debt for capex and working capital and therefore, the same cannot be applied on revenue gap which ought to be allowed on actuals as expenses in view of the Judgment of this Tribunal.

24.1.5 The Respondent Commission vide its Reply has submitted that the carrying cost for the current year has been computed in accordance with the proposed liquidation of road map (submitted by the Respondent Commission as

IA. No. 365 of 2013 in Appeal No. 266 of 2013) and has provisionally approved revenue gap. It is submitted that the revenue gap has arisen due to lack of cost reflective tariff and has already been determined by the Commission after due prudence check. Therefore, the revenue gap already determined cannot be related to the True-up of capitalization as has been indicated by the Respondent Commission in the Tariff order.

24.1.6 In view of the above erroneous approach adopted by the Respondent Commission for allowance of carrying cost on revenue gap loans, which is contrary to directions of this Hon'ble Tribunal to allow carrying cost as expense based on the actual prevailing market rates in the debt equity ratio of 70:30. It is submitted that the Respondent Commission may kindly be directed to allow the carrying cost on revenue gap loans on the basis of actual cost incurred for financing the revenue gap in debt equity ratio of 70:30. Further the Respondent Commission may also be directed to provide rationale for adopting such methodology for computation of total revenue requirement.

24.1.7 The Respondent Commission has filed a civil appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 153 of 2009. The issue of carrying cost incurred by the licensee on the revenue gap has been challenged by it in the said civil appeal before the Hon'ble Supreme Court. Further, the said civil appeal is still sub-judice before the Hon'ble

Supreme Court and there has been no stay granted by it against the operation of this Tribunal's judgment in Appeal No. 153 of 2009.

24.2 Respondent's submission on this issue are as under:

24.2.1 The Appellant has submitted to provide rational for including carrying cost in the ARR for FY 2014-15 in Tariff Order dated 23.07.2014. The Appellant has further submitted that MYT Regulations, 2011 as well as MYT Order dated 13.07.2012 does not provide the methodology for including carrying cost in the ARR.

24.2.2 it is submitted that the Commission has submitted the proposal for liquidation of revenue gap in the matter of IA No.365 of 2013 in Appeal No.266 of 2013 in which the carrying cost for current year has been included into ARR of the relevant financial year. In pursuance of the proposed liquidation of revenue gap, the Commission has calculated the carrying cost for FY 2014-15 in the ARR for FY 2014-15 on provisionally approved revenue gap. The relevant extract from the Tariff Order dated 23.07.2014 is as follows:

> *"Carrying Cost on Revenue Gap*
> *4.156. The Commission has submitted to the Hon'ble APTEL, the proposal for liquidation of Revenue Gap in the matter of I.A. No. 365 of 2013 in Appeal No.266 of 2013 of the Petitioner. As per the proposal, the Carrying Cost for FY 2014-15 will be considered in the ARR of FY 2014-15. This proposal has also been submitted before the Hon'ble Supreme Court of India in Civil Appeal No. 884 of 2010.*
> *4.157. The Carrying Cost of 11.98% (WACC for FY 2014-15 as per 2nd MYT order) on Revenue Gap has been considered based on the Hon'ble APTEL's directions in Appeal No. 142 of 2009 in the ratio of Debt: Equity (70:30). The Commission shall take a final view after final outcome of Civil Appeal No.9003 & 9004 of 2011 before the Hon'ble Supreme Court of India."*

24.3 Our Analysis and Findings:

24.3.1 Learned counsel for the Appellant submitted that the Respondent Commission, in the Impugned Order, has erroneously computed the carrying cost rate based on the normative cost of debt for capex. Learned counsel was quick to submit that the methodology adopted by the State Commission to determine the total revenue requirement including carrying cost for FY 2014-15 is incomprehensible; as such methodology is nowhere provided either in the Regulations or has been adopted in MYT Order.

24.3.2 Learned counsel vehemently submitted that the Appellant had sought allowance of carrying cost on revenue gap loans as per actual as a separate expense in accordance with the extant regulatory framework and the Judgment of this Tribunal in Appeal No. 153 of 2009. However, the Commission denied the same in utter contravention of the aforementioned Judgment of this Tribunal and only allowed normative cost of debt for financing revenue gap loans.

24.3.3 Learned counsel, further, submitted that despite providing the details of interest paid on revenue gap loans by the Appellant, the Respondent Commission, in the impugned Order, has provisionally determined the carrying cost rate by considering the rate of interest on debt as approved in the MYT Order for capex and working capital loans. Learned counsel for the

Appellant pointed out that, in fact, the revenue gap has arisen due to lack of cost reflective tariff and, therefore, the revenue gap already determined based on the tariff determination cannot be related to the true-up of capitalization as has been indicated by the Commission in the Tariff Order.

24.3.4 Learned counsel, further, submitted that the Commission has filed a civil appeal before the Hon'ble Supreme Court against the judgment of this Tribunal in Appeal No. 153 of 2009 in which the issue of carrying cost incurred by the licensee on the revenue gap has been challenged and the same is pending. However, no stay has been granted by the Hon'ble Apex Court against the operation of this Tribunal's judgment dated 30.07.2010 in Appeal No. 153 of 2009.

24.3.5 ***Per-contra,*** learned counsel for the Respondent Commission submitted that the proposal for liquidation of revenue gap in the matter of IA No.365 of 2013 in Appeal No.266 of 2013 in which the carrying cost for current year has been included into ARR of the relevant financial year and in pursuance of the proposed liquidation of revenue gap, the Commission has calculated the carrying cost for FY 2014-15 in the ARR for FY 2014-15 on provisionally approved revenue gap. The relevant extract from the Tariff Order dated 23.07.2014 is reproduced as under:

> *"Carrying Cost on Revenue Gap*
> *4.156. The Commission has submitted to the Hon'ble APTEL, the proposal for liquidation of Revenue Gap in the matter of I.A. No. 365 of 2013 in Appeal No.266 of 2013 of the Petitioner. As per the proposal, the Carrying*

Cost for FY 2014-15 will be considered in the ARR of FY 2014-15. This proposal has also been submitted before the Hon'ble Supreme Court of India in Civil Appeal No. 884 of 2010.

4.157. The Carrying Cost of 11.98% (WACC for FY 2014-15 as per 2nd MYT order) on Revenue Gap has been considered based on the Hon'ble APTEL's directions in Appeal No. 142 of 2009 in the ratio of Debt: Equity (70:30). The Commission shall take a final view after final outcome of Civil Appeal No.9003 & 9004 of 2011 before the Hon'ble Supreme Court of India."

24.4 Our findings:

24.4.1 We have carefully considered the contentions of the learned counsel for the Appellant as well as learned counsel for the Respondent Commission and also taken note of the judgment of this Tribunal in Appeal No. 153 of 2009. This Tribunal in its judgment dated 30.07.2010 in Appeal No. 153 of 2009 has held that the carrying cost incurred by the licensee on the revenue gap accrued must be allowed as expenses at the prevailing market rate in debt equity ratio of 70:30. Accordingly, it is noticed from the decision of the State Commission in its impugned Order dated 23.07.2014 that it has allowed a carrying cost of 11.98% for FY 2014-25 as per second MYT Order on the revenue gap in line with the directions given by this Tribunal in Appeal No. 142 of 2009. It has also been stipulated by the Respondent Commission in the said MYT order that final view shall be taken by it after final outcome of the civil appeal filed before the Hon'ble Supreme Court of India. **In view of these facts, we do not feel necessary to interfere in the findings of the State Commission in the impugned Order on this issue.**

E. OTHER ISSUES DEALING WITH PRINCIPLE HAVING RECURRING FUTURE IMPACT:

25. *ISSUE NO. 34:*

DISALLOWANCE OF FINANCING COST ON POWER BANKING

25.1 Appellant's claim on this issue are as follows:

25.1.1 The Appellant's claim is that the Respondent Commission has disallowed the additional financing cost accrued on account of banking of surplus power. It is submitted that as per extant regulatory framework, sales and power purchase are uncontrollable in nature and ought to have been allowed as a pass though in the Appellants ARR. However, the Respondent Commission on an incorrect understanding that the power banking transactions are revenue neutral and on the further assumption that the Appellant has kept the benefit of 4% additional units, disallowed the net financing cost on power banking transactions.

25.1.2 A similar issue was decided by this Tribunal in Appeal No. 14 of 2012, wherein this Tribunal considered the assumption of the Commission that the Appellant has received 4% additional power and also the corresponding cost for the same, and held in favour of the DERC.

25.1.3 Without prejudice to the above it is submitted that the Appellant in the course of procurement and supply of electricity as a distribution licensee resorts to the process of banking of electricity on various occasions in order to optimize the procurement and utilization of electricity for distribution

purposes. Banking of electricity is a process by which a distribution licensee (e.g. Appellant) banks surplus power that is available with it at any point of time with some other utility, which uses such banked power for meeting its requirement.

25.1.4 The banking licensee draws such banked power from the other licensees during the periods when it faces a higher requirement of power. The banking mechanism facilitates the licensee to bank the surplus power with a different utility when there is surplus power available with the licensee and facilitates the licensee to draw such banked power during periods when there is scarcity of power. This helps the distribution licensee to avoid procurement of costly power during periods of scarcity since the other utility does not charge higher prices for the banked quantity of power.

25.1.5 The Delhi Commission/DERC had in exercise of its powers under the Retail Supply and Distribution License, issued Directions for Procurement and Sale of Power by Distribution licensee for short term power which also includes power banking. Relevant extracts pertaining to banking of power are reproduced below:

> *"15. The Distribution Licensees endeavor should be first to dispose off surplus power through banking transaction. Such banking transactions should be tried at first on direct basis.*
>
> *In case Distribution Licensee is required to do banking arrangements through trading company/ or any other agency due to inability of any banking arrangements with other Utilities, Distribution Licensee shall follow the guidelines stipulated in Para 7 above with insertion of a suitable*

penalty clause in case the party fails to deliver the agreed power as per the schedule."

25.1.6 Banking of power is an endeavor under best utilization practices and to optimize the economic power procurement plan of the Appellant. DERC has directed levy of penalty to be recovered from the defaulting third party who fails to deliver banked power to the Appellant. DERC has given erroneous treatment to the issue in the Impugned Order which is contrary to its own Directions for Procurement and Sale of Power by Distribution Licensee. For the purpose of banking of power, the distribution licensee has to however bear the carrying cost towards the payment of price paid for the banked power for the period of banking and till the same is received back for supply to its consumers. For example, the Appellant procures 500 MW power during November (when demand for electricity is low in Delhi) and banks 100 MW with another utility, to be drawn during the month of June of successive year, when the demand for electricity during summer peak month is high in Delhi. Since, this 100 MW banked power is ultimately supplied by the Appellant to its consumers in June in the subsequent year, the Appellant is in a position to recover the cost of procurement of such 100 MW power only in the bills for June however the payment towards such banked power has already been made by the Appellant at the time of purchase. Hence, there is a time lag of 7 months in this case for which the funds for procurement of the 100 MW power has to be financed by the Appellant. This represents the carrying cost for such banked power. It may further be pointed out that for the

purpose of utilization of banking facilities, the utility with which the power is banked on certain occasions, provides an additional margin on such banked power at the time when such power is supplied back to the banking licensee.

25.1.7 Thus, for the purpose of accounting, forward banking leg of transaction as a sale is considered at notional price of Rs. 4.00 per unit in accordance with the MYT Order 23.02.2008, thereby allowing a lower net cost of power against higher cash out flow for that period in which the transaction has taken place. Similarly, when the energy is returned, DERC treats the same as purchase of power at a notional cost of Rs. 4.00 per unit. The relevant extract of the Tariff Order dated 26.08.2011 is reproduced below:

> *"3.283…. The Commission considers total power received as power purchase @ Rs 4 per unit. This allows the utility power purchase cost on additional 4% power received by them @ Rs 4 per unit, which is equivalent to the financing cost of this banking."*

25.1.8 The hypothetical assumption taken by DERC is wrong and misconceived as the additional 4% units received back are offered for the benefit of consumers by treating these 4% additional units at Zero value in total net power purchase cost. In case of a forward leg of banking transaction, the Appellant has additional working capital requirements for the period of forward banking to the extent of notional sale considered by the DERC. Similarly, in case of reverse banking (i.e. energy is received first and subsequently the same is returned) there would be saving in Working Capital

requirements. As the additional working capital requirement in the case of forward banking on this account is not factored in the normative working capital allowed in tariff, this cost needs to be allowed in the ARR separately. Similarly, return of banked power would lead to a reduction in working capital requirements which also has been factored in the claim of net financing cost of power banking.

25.1.9 The Appellant has also prayed in the ARR Petition that in the event DERC feels that computation of carrying cost on such transactions is cumbersome or cost neutral in the eyes of DERC, DERC may consider both forward and backward banking transactions at NIL rate (since these are in any case cashless/barter transactions). Thus, avoiding the need for allowance of carrying cost on such banking transactions. In such case the cost of power purchased and banked shall have to be a pass through on cash flow basis in the year of purchase.

25.1.10 In view of above submissions it is prayed before this Tribunal to direct the Respondent Commission/DERC to allow the financing cost relatable to power banking transactions.

25.2 Respondent's submission on this issue are as hereunder:

25.2.1 The Appellant has claimed carrying cost on the power banking, which has been decided against the Appellant in Appeal No. 14 of 2012. The relevant extract of the said order in Appeal No.14 of 2012 is as follows:

"115. Since the issue before us revolves around banking of power, it would be worthwhile to understand the concept of banking of power. Power banking is like any other banking. In case of power banking, surplus power is banked by a utility with other utility to be returned later with some additional power (interest). There two types of banking:

(a) Forward Power Banking- distribution licensee banks excess power with other utilities, and draws banked power later when required.

(b) Reverse power banking- excess power banked by another utility is with the distribution licensee and the same is returned at a later date.
116. Forward banking for one utility is reverse banking for the other utility. There would be no issue, if the power is banked and returned within the same financial year. However, issue of financial charges arises in case power is banked during a year and returned during next financial year. When power is banked during a financial year it is shown as notional sale of the distribution licensee at a predetermined rate and the amount so arrived is deducted from the ARR of the licensee. When the power returned, it is shown as notional purchase at the same rate and the cost is added to its ARR. The licensee has paid the power purchase cost and did not get any revenue from such notional sale. The concept of power banking and the issue is explained by following illustration.

FY 2007-08
Total ARR of the licensee = Rs 1000 Cr
Units banked during the year = 100 MU
Notional sale for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 960 Cr

FY 2008-09
Total ARR of the licensee = Rs 1000 Cr
Units returned during the year = 100 MU
Notional purchase for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 1040 Cr

117. Thus, the licensee looses carrying cost for Rs 40 Cr. However, in order to make banking arrangements tariff neutral some element of interest is also added. Accordingly, the utility which had banked energy would get 4% additional energy at the time of return to offset the carrying cost for the banked energy. Let us add the interest component in the above example:

FY 2007-08
Total ARR of the licensee = Rs 1000 Cr
Units banked during the year = 100 MU
Notional sale for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 960 Cr

FY 2008-09
Total ARR of the licensee = Rs 1000 Cr
Units returned during the year = 104 MU
Notional purchase for 104 MU @ Rs 4/unit = Rs 41.6 Cr
Net ARR of the licensee recovered through tariff = Rs 1041.6 Cr

118. Thus the Licensee gets Rs 1.6 Cr extra as Notional cost of additional energy received to offset the carrying costs. Accordingly, the issue is decided against the Appellant. "

25.2.2 Learned counsel for the Appellant during his submission also stated that this issue is decided against the Appellant and appeal is pending before Hon'ble Supreme Court. However, there is no stay.

25.3 Our Analysis and Findings:

25.3.1 Learned counsel for the Appellant submitted that the Respondent Commission on an incorrect understanding that the power banking transactions are revenue neutral and on further assumption that the Appellant has kept the benefit of 4% additional units, erroneously disallowed the net financing cost on power banking transactions.

25.3.2 Learned counsel, vehemently submitted that the Appellant in the course of procurement and supply of electricity as a distribution licensee resorts to the process of banking of electricity on various occasions in order to optimize the procurement and utilization of electricity for distribution purposes. In other words, this process helps the distribution licensee to avoid procurement of costly power during periods of scarcity since the other utilities do not charge higher prices for the banked quantity of power. In this regard,

the State Commission had in exercise of its powers under the Retail Supply and Distribution License, issued Directions as reproduced below:

> *"15. The Distribution Licensees endeavor should be first to dispose off surplus power through banking transaction. Such banking transactions should be tried at first on direct basis.*
>
> *In case Distribution Licensee is required to do banking arrangements through trading company/ or any other agency due to inability of any banking arrangements with other Utilities, Distribution Licensee shall follow the guidelines stipulated in Para 7 above with insertion of a suitable penalty clause in case the party fails to deliver the agreed power as per the schedule."*

25.3.3 Learned counsel emphasized that banking of power is an endeavor under best utilization practices and to optimize the economic power procurement plan of the Appellant. However, DERC has directed levy of penalty to be recovered from the defaulting third party who fails to deliver banked power to the Appellant and, by this action, DERC has given erroneous treatment to the issue in the impugned Order which is contrary to its own Directions as stated supra.

25.3.4 Learned counsel for the Appellant was quick to submit that the hypothetical assumption taken by the State Commission is wrong and misconceived as the additional 4% units received back are offered for the benefit of consumers by treating these 4% additional units at zero value in total net power purchase cost.

25.3.5 Learned counsel pointed out that the Appellant has also prayed in the ARR Petition that in the event DERC feels that computation of carrying

cost on such transactions is cumbersome or cost neutral, the Commission may consider both forward and backward banking transactions at NIL rates.

25.3.6 While summing up his submissions, learned counsel for the Appellant prayed that this Tribunal may direct the Respondent Commission to allow the financing cost relatable to power banking transactions.

25.3.7 ***Per-contra,*** learned counsel for the Respondent Commission submitted that this issue has been decided against the Appellant in Appeal No. 14 of 2012 by this Tribunal wherein this Tribunal considered the assumption of the Commission that the Appellant has received 4% additional power and also the corresponding cost for the same, and held its decision in in favour of the State Commission. The concluding para of the said judgment of this Tribunal is reproduced below:

> *"…..*
> *118. Thus the Licensee gets Rs 1.6 Cr extra as Notional cost of additional energy received to offset the carrying costs. Accordingly, the issue is decided against the Appellant."*

25.3.8 Learned counsel for the Respondent Commission, accordingly, contended that this issue has already been settled by this Tribunal and, therefore, need not be examined afresh. Learned counsel for the Respondent Commission also pointed out that the Appellant during his submission also stated that this issue is decided against the Appellant and appeal is pending before Hon'ble Supreme Court without any stay.

25.4 Our findings:

25.4.1 We have gone through the rival contentions of learned counsel for the Appellant and learned counsel for the Respondent Commission and also taken note of the judgment of this Tribunal in Appeal No. 14 of 2012.

25.4.2 It is the contention of the Appellant that the Respondent Commission has disallowed the additional financing cost accrued on account of banking of surplus power. On the other hand, learned counsel for the Respondent Commission contends that the notional cost of additional energy received is to offset the carrying costs. As the case has earlier been decided against the Appellant by this Tribunal and an appeal is pending before the Hon'ble Supreme Court without any stay, we are of the opinion that there is no fresh case made out by the Appellant before this Tribunal to examine the same case afresh. **Hence, this issue is decided against the Appellant.**

26. ***ISSUE NO. 35:***

OMISSION TO GRANT CARRYING COST FOR FY 2013-14

26.1 Appellant's claim on this issue are as follows:

26.1.1 The Respondent Commission has failed to allow the carrying cost on the revenue gap for the FY 13-14. It is submitted that the Respondent Commission has wrongly allowed carrying cost only up to FY12-13 and then for FY 14-15, and has failed to appreciate the fact that the Appellant has to incur carrying cost in the FY 13-14 on the accumulated gap.

26.1.2 The Respondent Commission has failed to consider that as per the provision of Regulation 5.40 of the Tariff Regulations, 2011, it is under obligation to allow the carrying cost on the regulatory assets created in a particular financial year and the licensee cannot be burdened with the cost of financing the regulatory asset thus created upon the approval of the Respondent Commission. It is submitted that the Respondent Commission may only defer the recovery of regulatory asset for avoiding tariff shock, and that to in special circumstance, but it has no right to disallow the carrying cost on such admitted regulatory asset.

26.1.3 As per the provisions section 61(i) of the Electricity Act, 2003 the Respondent Commission was required to follow the National Electricity Policy and the Tariff Policy. The Tariff Policy dated 06.01.2006 ("Tariff Policy") specifically provides that in case, any regulatory asset is created, then the carrying cost on such regulatory asset must be allowed to the concerned utility.

26.1.4 This Tribunal in OP No. 1 of 2011 had held that the Commission must allow carrying cost on regulatory asset to the utilities in the ARR of the year in which such regulatory asset has been created. This Tribunal had also dealt with the issue of carrying cost of regulatory asset in the matter of in Appeal no. 192 of 2010 dated 28.07.2011 in the matter of (*Tamil Nadu Electricity Consumers' Association vs. Tamil Nadu Electricity Board, etc.*,) wherein it was held that non-allowance of such carrying cost would lead to cash flow problems in routine

operations and power procurement, which will have an adverse effect on maintaining a reliable power supply to the consumers.

26.1.5 The carrying cost of the regulatory asset must be allowed in the ARR and failure to do so, is not only detrimental to the utility and also for the consumers. The Respondent Commission in its reply has attempted to justify its stand of not allowing the carrying cost on the revenue gap for the year FY 13-14 on the pretext that, it estimates that there will be a surplus in the hands of the Appellant in true-up of 2013-14 and the same will be sufficient to set-off the carrying cost for the year. It is pertinent to note that no such reasoning was recorded in the Impugned Order and the Respondent Commission in guise of such justification is also attempting to improve upon its own order.

26.1.6 As per the Tariff Policy, carrying cost on the Regulatory Assets ought to have been allowed for FY 2013-14 as FY 2013-14 is already over and the Appellant has already incurred the carrying cost for the financial year. The Impugned Order is erroneous as it grants carrying cost on the Regulatory Assets up to FY 2012-2013, and then for the ensuing year (i.e. FY 2014-15) and not for current year (i.e., FY 2013-14). The Respondent Commission by disallowing the Appellant to recover financing cost of regulatory asset from the consumers without any proper justification is in fact hindering the Appellant's ability to carry out business in a reasonable, efficient and profitable manner.

Therefore, the Learned Commission be directed to correct the methodology for computing the ARR requirement for ensuing years.

26.2 Respondent's submissions on this issue are as under:

26.2.1 The Appellant has contended that the Commission has not allowed the carrying cost on the revenue gap for the FY 2013-14 and in support of his contention has relied upon Table 4.58 of the Tariff Order which is as follows:

Table 4.58 : Carrying Cost on Provisionally Approved Revenue Gap (Rs. Crore)

Sl. No.	Particulars	Amount	Remarks
1.	Opening Gap for FY 2012-13	(3370.56)	Table 5.1
2.	Revenue Requirement for FY 2012-13	4748.32	Table 3.93
3.	Revenue during FY 2012-13	4436.00	
4.	(Gap)/Surplus for FY 2012-13	(312.32)	(3-2)
5.	Surcharge for FY 2012-13	237.32	Para 3.35
6.	Net (Gap)/Surplus for FY 2012-13	(75.00)	(4+5)
7.	Provisional Rate of carrying cost for the year.	11.78%	Para 5.24
8.	Carrying cost for FY 2012-13	(401.47)	(1*7)+((6*7)/2)
9.	Closing balance of (Gap)/Surplus at the end of the year FY 2012-13.	(3847.03)	(1+6+8)
10.	Revenue requirement for FY 2014-15	5270.14	Table 4.59
11.	Provisional Rate of carrying cost for the year.	11.98%	Para 5.24
12.	Total Revenue Requirement including carrying cost for FY 2014-15	5758.03	(10-(9*11))/(1+(8%/2)*11)
13.	Carrying cost for FY 2014-15	(434.54)	(10-12)

26.2.2 The provisional revenue gap as per impugned Tariff Order dated 23rd July 2014 in respect of Appellant at the end of 2012-13 has been assessed as Rs. 3847.03 Crore. the rate of carrying cost provisionally approved by the Commission for the year 2013-14 was 11.88% in Tariff Order dated 23rd July 2014. The relevant extracts of Tariff Order dated 23.07.2014 for the Appellant are as below:

"5.22 The Commission has approved the rate of interest on debt for MYT Control Period FY 2012-13 to FY 2014-15 in 2nd MYT Order as shown below:

Table 5.12: Rate of Interest on Debt for MYT Control Period FY 2012-13 to FY 2014-15

Financial Year	Rate of Interest		
	BRPL	BYPL	TPDDL
2012-13	9.99%	9.54%	9.97%
2013-14	10.24%	9.89%	10.12%
2014-15	10.44%	10.17%	10.25%

5.23 The Commission has provisionally considered the rate of interest on Debt as approved in 2nd MYT Order dated July 13, 2012. However, true up of the rate of interest and loan availed for FY 2007-08 to FY 2011-12 is under process and it is also linked with the true up of the Capitalisation for the same period. The Commission will take a final view on rate of interest after the true up process is completed for Capitalisation as well as loan and interest rate availed by all the Distribution Licensees.

5.24 The provisional Carrying Cost for FY 2012-13 to FY 2014-15 has been computed in the ratio of Debt:Equity (70:30) is shown as below:

Financial Year	Carrying Cost			Remarks
	BRPL	BYPL	TPDDL	
2012-13	11.79%	11.48%	11.78%	(0.70*Table 5.12 + 0.30 *16%)
2013-14	11.97%	11.72%	11.88%	
2014-15	12.11%	11.92%	11.98%	

26.2.3 The carrying cost on the closing revenue gap of Rs. 3847.03 Crore upto FY 2012-13 shall be approximately Rs. 457 crore after true up of FY 2013-14.

26.2.4 The Commission had projected a surplus of Rs. 713.03 Crore for 2013-14 in Tariff Order dated July 31st, 2013 in the hands of Appellant. The said amount which was surplus in the hands of Appellant should be sufficient for requirement of

carrying cost on the revenue gap for the year 2013-14. The relevant extract from the tariff order dated July 31, 2013 is as follows:

> *"5.16. The Commission observes that the revenue gap for FY 2011-12 is Rs. (3370.56) Crore, while revenue (gap)/surplus for FY 2013-14 are Rs. 297.31 Crore. The tariff increase approved by the Commission in this order will enable the Petitioner to generate additional revenue of Rs. 180.63 Crore in remaining period of the year, leaving a revenue surplus for FY 2013-14 on standalone basis at Rs. 477.94 Crore. The 8% surcharge levied by the Commission in this tariff order will enable the Petitioner to generate additional revenue of Rs. 415.72 Crore in the remaining period of the year FY 2013-14."*

26.3 Our Analysis and Findings:

26.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has failed to allow the carrying cost on the revenue gap for the FY 2013-14 whereas, it has wrongly allowed carrying cost only up to FY 2012-13 and then for FY 2014-15. Learned counsel, further, submitted that the Appellant has to incur carrying cost in the FY 2013-14 on the accumulated gap which has not been considered by the Commission contrary to the provisions of Regulation 5.40 of the Tariff Regulations, 2011. These Regulations allow the carrying cost on the regulatory assets created in a particular financial year and the licensee cannot be burdened with the cost of financing the regulatory asset thus created upon the approval of the Respondent Commission.

26.3.2 Learned counsel for the Appellant, further, submitted that as per the provisions of the Electricity Act, 2003, the National Electricity Policy and the Tariff Policy, in case any regulatory asset is created, then the carrying

cost on such regulatory asset must be allowed to the concerned utility. He further, submitted that this Tribunal in OP No. 1 of 2011 had held that the Commission must allow carrying cost on regulatory asset to the utilities in the ARR of the year in which such regulatory asset has been created. Learned counsel for the Appellant also placed reliance on the judgment dated 28.07.2011 of this Tribunal in Appeal No. 192 of 2010 in the case of *Tamil Nadu Electricity Consumers' Association vs. Tamil Nadu Electricity Board, etc*. wherein it was held that non-allowance of such carrying cost would lead to cash flow problems in routine operations and power procurement, which will have an adverse effect on maintaining a reliable power supply to the consumers.

26.3.3 Learned counsel for the Appellant was quick to submit that the Respondent Commission by disallowing the Appellant to recover financing cost of regulatory asset from the consumers without any proper justification is in fact hindering the Appellant's ability to carry out business in a reasonable, efficient and profitable manner. Learned counsel for the Appellant prayed that the Respondent Commission may be directed to correct the methodology for computing the ARR requirement for ensuing years.

26.3.4 ***Per-contra,*** learned counsel for the Respondent Commission submitted that based on the analysis of the projected revenue surplus/gap

for FY 2013-14 *(Table 4.58 of the Tariff Order)* found that there would be a surplus of Rs. 713.03 Crore for 2013-14 in the hands of the Appellant. Accordingly, in the Tariff Order dated 31.07.2013, the State Commission considered that the said amount, being surplus in the hands of the Appellants, should be sufficient for requirement of carrying cost on the revenue gap for FY 2013-14. The relevant extract of the Tariff Order is reproduced as under:

> *"5.16. The Commission observes that the revenue gap for FY 2011-12 is Rs. (3370.56) Crore, while revenue (gap)/surplus for FY 2013-14 are Rs. 297.31 Crore. The tariff increase approved by the Commission in this order will enable the Petitioner to generate additional revenue of Rs. 180.63 Crore in remaining period of the year, leaving a revenue surplus for FY 2013-14 on standalone basis at Rs. 477.94 Crore. The 8% surcharge levied by the Commission in this tariff order will enable the Petitioner to generate additional revenue of Rs. 415.72 Crore in the remaining period of the year FY 2013-14."*

26.4 Our findings:

26.4.1 Having regard to the submissions of the learned counsel for both the parties, it is relevant to note that the State Commission has duly considered the revenue gap/surplus as per its analysis indicated in Table 4.58 of the Tariff Order. The rate of carrying cost provisionally approved by the Commission for FY 2013-14 was 11.88% in the Tariff Order dated 23.07.2014. The State Commission has also compared the carrying cost allowed for FY 2012-13 to FY 2014-15 computed in the ratio of debt equity as 70:30 for all the State Discoms. After undertaking the analysis of facts and figures, the Commission arrived at projected surplus of Rs. 713.03 Crore for 2013-14 in Tariff Order dated 31.07.2013 and, accordingly, considered no carrying cost for the said financial year.

26.4.2 We have carefully cone through the impugned order and it is noticed that the Commission has adequately considered the revenue gap/surplus for FY 2012-13 to 2014-15 and it has also given cogent reasoning for not considering the carrying cost for FY 2013-14. **In view of these facts, we are of the opinion that our interference on this issue is not called for.**

27. ***ISSUE NO. 37:***

OVERESTIMATION OF SALE RATE FOR SURPLUS POWER FOR FY 2014-15

27.1 Appellant's submissions on this issue are as follows:

27.1.1 The Respondent Commission has arbitrarily considered gross sale rate of Rs. 3.55 per kWh for projecting revenue from sale of surplus power for ensuing year, i.e., FY 2014-15.

27.1.2 The Respondent Commission has determined the actual rates for sale of surplus power from FY 2011-12 to FY 2013-14 which was in the range of Rs. 2.31 per kWh to Rs. 3.31 per kWH. However, the Respondent Commission has arbitrarily considered rate of Rs. 3.55 per kWH for projecting revenue from the sale of surplus power during the ensuing year i.e. FY 2014-15.

27.1.3 This issue has already been decided by this Tribunal in Appeal No. 171 of 2012, and relevant extract is reproduced below:

> *"9.4 The Appellant has long term Power Purchase Agreements in which it has the liability to pay the fixed cost irrespective of the actual drawal. In our view the anticipated power surplus may be estimated month-wise and*

peak/other than peak period. For price of power, actual sale for price in short term market month-wise and peak/other than peak period basis during the previous year, trend of short term power sale during the current year etc., may be considered to project the anticipated short term sale price of surplus power during the control period. These guidelines may be kept in view by the Appellant while projecting the sale price of surplus power and the State Commission to consider while approving the same in future.

9.5 The Learned Counsel for the State Commission has given data from the Market Monitoring cell of CERC giving the forward curve of spot price for the period December 2012 to June 2013 to justify fixing of Rs. 4 per kWh price for sale of surplus power. We find that the report relied upon by the Learned Counsel for the State Commission is pertaining to November 2012 which was subsequent to the passing of the impugned order dated 31.07.2012. Therefore, reliance on this report to justify the impugned order is not correct.

9.6 As regards the control period 2012-13 to 2014-15, the actual sale price of surplus power has to be trued up and the difference between the actual sale price and that allowed in the ARR (Rs.4 per unit) should be allowed with carrying cost to the Appellant by the State Commission. Accordingly, decided."

27.1.4 Therefore, this Tribunal may accordingly direct the Learned Commission to implement the direction of this Tribunal in Appeal 171 of 2012.

27.2 Respondent's submission on this issue are as under:

27.2.1 The Appellant has claimed that the Commission has arbitrarily considered gross sale rate of Rs. 3.55/kWh for projecting revenue from the sale of surplus power for the ensuing year 2014-15. The Commission in the impugned order has observed as under:

Sale of Surplus Power

Petitioner's Submission

4.91 The Petitioner has projected 4434 MU of surplus power (including 32.4 MU of bilateral sale, 62.64 MU of banking export and 4339 surplus available other than the already confirmed sale). The Petitioner proposes the sale of estimated surplus power of 4339 MU at Rs. 2.65/unit.

Commission's Analysis

4.92 The Petitioner has Long term Power Purchase Agreement (LTPPA) from Central Generating Stations based on allocation made by Ministry of Power, Government of India.

4.93 The Commission has considered the notification of Northern Region Power Committee (NRPC) on the availability of power from various Central and State Generating Stations in the LGBR for FY 2014-15. Accordingly, the quantum of Surplus Power of 3803.38 MU has been computed as indicated in Table 4.22.

4.94 During the prudence check for Power Purchase Cost for FY 2012-13, it has been observed that DISCOMs do not follow the best method for realization of Sale of Surplus Power.

4.95 It has been observed that, the rate of Surplus Power realised by DISCOMs varies from Rs. 2.31/kWh to Rs. 3.31/kWh during last three (3) years indicated in the Table as follows:

Table 4.23: Quantum of surplus energy sold and unit price realized from FY 2011-12 to FY 2013-14

Year	BRPL		BYPL		TPDDL	
	Energy Sold (MU)	Price Realised (Rs./kWh)	Energy Sold (MU)	Price Realised (Rs./kWh)	Energy Sold (MU)	Price Realised (Rs./kWh)
FY 2011-12	2393	3.23	1708	3.19	1680	2.94
FY 2012-13	1867	3.31	2634	3.12	2535	2.91
FY 2013-14	2123	2.80	1572	2.31	2721	3.08

4.96 It is also observed from the above table that there is no definite trend (upward /downward) in the rate of Sale of Surplus Power realised by the DISCOMs.

4.97 The Commission observed during the true up of FY 2012-13 that there was scope of better management of the process of short term sale of the surplus power so as to significantly promote the interest of the consumers. The Commission is of the view that the Petitioner should endeavour to maximise revenue from sale of surplus power and enter into more banking, intrastate and bilateral transactions. Therefore, the Commission has considered the rate of sale of surplus power at Rs. 3.55/kWh for FY 2014-15.

4.98 Accordingly, the Commission approves the total sale of Surplus Power of 3803.38 at Rs.3.55/kWh as indicated in the Table below:

Table 4.24 : Approved Sale of Surplus Power for FY 2014-15
(Including Renewable Energy)

Particulars	*Surplus Energy (MU)*	*Average Sale Price (Rs./kWh)*	*Total cost (Rs. Crore)*	*Remarks*
Bilateral Sale of Surplus Power	*3339.58*	*3.55*	*1185.55*	*Table 4.22*
Sale of Surplus power on account of procurement of actual Renewable Energy	*463.80*	*3.55*	*164.65*	
Total sale of Surplus Power	*3803.38*	*3.55*	*1350.20*	

27.3 Our Analysis and Findings:

27.3.1 Learned counsel for the Appellant submitted that the Respondent Commission has arbitrarily overestimated the sale rate of surplus power for FY 2014-15 by assuming sale rate of Rs. 3.55/kWh. Learned counsel alleged that despite determining the actual rate for sale of surplus power from FY 2011-12 to 2013-14 in the range of Rs. 2.31/kWh to Rs. 3.31/kWh, the Commission has arbitrarily considered rate of Rs. 3.55/kWh for projecting revenue from the sale of surplus power during the ensuing year i.e. FY 2014-15. Learned counsel vehemently submitted that this issue has also been decided by this Tribunal in Appeal No. 171 of 2012 and the relevant para is extracted below:

> *"9.6 As regards the control period 2012-13 to 2014-15, the actual sale price of surplus power has to be trued up and the difference between the actual sale price and that allowed in the ARR (Rs.4 per unit) should be allowed with carrying cost to the Appellant by the State Commission. Accordingly, decided."*

27.3.2 Learned counsel, in view of above facts, prayed that the State Commission may be directed to implement the directions of this Tribunal in Appeal No. 171 of 2012.

27.3.3 ***Per-contra,*** learned counsel for the Respondent Commission denied the claim of the Appellant that the Commission has arbitrarily considered gross sale rate of Rs. 3.55/kWh for projecting revenue from the sale of surplus power for the ensuing year 2014-15. In fact, the Commission in the impugned order has observed that the rate of surplus power realized by Discoms varies from Rs.2.31/kWh to Rs. 3.31/kWh during the last three years with a remark that there is no definite trend (upward/downward) in the rate of sale of surplus power realized by the Discoms. The Commission during the true up of FY 2012-13 observed that there was scope of better management of the process of short term sale of the surplus power so as to significantly promote the interest of the consumers and, accordingly, considered the rate of sale of surplus power at Rs. 3.55/kWh for FY 2014-15.

27.4 Our findings:

27.4.1 We have critically analyzed the rival contentions of both the parties and also taken note of the judgment of this Tribunal in Appeal No. 171 of 2012. It is relevant to note that the rate of surplus power realized by all the Discoms of the State have varied from Rs. 2.31 /kWh to Rs. 3.31/kWh during the last three years and, with an optimistic approach to maximize revenue

from sale of surplus power, the State Commission has considered the rate of sale of surplus power at Rs. 3.55/kWh for FY 2014-15 and has approved the total sale of surplus power as Rs. 1350.20 crores. It is, however, relevant to note that during the last three years i.e. FY 2011-12 to 2013-14, only a maximum sale rate of Rs.3.31/kWh has been realized by BRPL and the lowest rate of Rs.2.31/kWh realized by BYPL which reflects a large variance in the sale rates. Keeping these aspects in view, the Commission ought to have adopted a sale rate figure close to the realized figures and not arbitrarily such a high figure of Rs. 3.55/kWh.

27.4.2 In view of the facts, as stated above, actual sale price of surplus power during the year 2014-15 has to be trued up and the difference between actual sale price and that allowed in the ARR should be allowed with carrying cost to the Appellant by the State Commission. **Hence, accordingly, we decide this issue in favour of the Appellant.**

28. ***ISSUE NO. 38:***

ALLOWANCE OF CARRYING COST RELATING TO ISSUES RAISED IN THE PRESENT APPEAL 2014-15

28.1 Appellant's claim on this issue are as follows:

28.1.1 The Appellant in this Appeal has challenged various factors which contribute towards determination of tariff of the Appellant.

28.1.2 Accordingly, if the Appellant succeeds in the issues raised in the Appeal against the Impugned Order, then the Respondent Commission be directed to allow on all the issues in which the Appellant succeeds, along with carrying cost to the Appellant. The Commission in its Written Submissions dated February, 2019 has erroneously submitted that the Appellant has not pressed on this issue.

28.2 Respondent's submission on this issue are:

28.2.1 The Appellant has not pressed this issue, hence no submissions are required on behalf of the Commission.

28.3 Our Consideration:

28.3.1 We opine that whichever issue is decided in favour of the Appellant, it is justified and equitable that the Respondent Commission allows the same along with carrying cost so applicable as decided in a host of judgments of the Hon'ble Apex Court and this Tribunal.

29. SUMMARY OF FINDINGS:

29.1 Based on our consideration and analysis in the aforementioned paragraphs, we summarize our findings as under:

29.1.1 ***Category-A:***

All **17** issues, being issue nos. 2, 3, 6, 9, 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 23, 24 and 33, are not being pressed by the Appellant, therefore, no decision/order of this Tribunal on these issues are required.

29.1.2 Category-B:

Total **03** issues, being issue nos. 15, 25 and 26, are covered by judicial precedents, out of which, issue no. 15 is decided against the Appellant and other two issues i.e. Issue No. 25 & 26 are decided in favour of the Appellant.

29.1.3 Category-C:

02 issues, being issue nos. 7 and 28, being in the nature of computational errors, are to be rectified. Hence, decided in favour of the Appellant.

29.1.4 Category-D:

Total **13** issues, being issue nos. 1, 4, 5, 8, 9, 13, 22, 27, 29, 30, 31, 32 and 36, are raised as fresh issues. Out of these, 06 issues i.e. issue Nos. 1, 8, 9, 30, 31, & 32 are decided in favour of the Appellant and remaining 07 issues i.e. Issue nos. 4, 5, 13, 22, 27, 29 & 36 are decided against the Appellant.

29.1.5 Category-E:

Total **04** issues, being issue nos. 34, 35, 37 and 38, are dealing with principle having recurring future impact. Out of which, 01 issue, i.e. issue No. 37 is decided in favour of the Appellant, 02 issues i.e. issue Nos. 34 & 35 are decided against the Appellant and 01 issue i.e. issue No. 38, is not being pressed by the Appellant.

29.1.6 It is also held that whichever issue is decided in favour of the Appellant, it is equitable that the Respondent Commission allows the same along with carrying cost as applicable.

O R D E R

In the light of the forgoing reasons, as stated supra, we are of the considered opinion that some of the issues raised in the instant Appeal, being Appeal No. 246 of 2014, have merit, therefore, **the Appeal is partly allowed**.

The impugned Order dated 23.07.2014 passed by Delhi Electricity Regulatory Commission in Petition No. 56 of 2013 is hereby upheld/set aside to the extent our findings set out in **para 29**, as stated supra.

IA NO. 56 OF 2015

In view of the Appeal No. 246 of 2014 on the file of the Appellate Tribunal for Electricity, New Delhi being partly allowed, no order on relief sought in IA No. 56 of 2015 is required and, hence, accordingly disposed of.

No order as to costs.

Pronounced in the Open Court on this **30th day of September, 2019.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~
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