Court-II
In the Appellate Tribunal for Electricity, New Delhi
(*Appellate Jurisdiction*)

Appeal No. 271 of 2013

Dated : 20th July, 2016

Present: **HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

In the Matter of:

Tata Power Delhi Distribution Limited
Through Its Managing Director
NDPL House, Hudson Lines,
Kingsway Camp
Delhi – 110 009 **... Appellant(s)**

Versus

Delhi Electricity Regulatory Commission
Viniymak Bhawan, C-Block
Shivalik Malviya Nagar,
New Delhi – 110 017. **... Respondent(s)**

Counsel for the Appellant(s) : Mr. Amit Kapur, Mr. Rahul Kinra, Mr. Vishal Anand, Mr. Deepak Jain, Advs. and Mr. Anurag Bansal, Rep. for TPDDL

Counsel for the Respondent(s) : Mr. Pradeep Misra, Mr. Manoj Kumar Sharma, Mr. Shashank Pandit, Mr. Prashant Kumar, Mr. Suraj Singh and Mr. Daleep Kr. Dhyani

J U D G M E N T

PER HON'BLE JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER

Tata Power Delhi Distribution Ltd. (***TPDDL***), the appellant herein, has challenged the tariff order dated 31.07.2013 (***Impugned Order***), passed by the learned Delhi Electricity Regulatory Commission (***Delhi Commission***) in Petition No. 3 of 2013, whereby the learned Delhi Commission trued up expenditure for the FY 2011-12 and determination of distribution tariff of the appellant for FY 2013-14. The appellant has challenged the following 35, disallowances made by the learned Delhi Commission in the Impugned Order, which are given the shape of issues in the present appeal.

02) The appellant is a company incorporated under the provisions of Companies Act, 1956 and is at present a distribution licensee for Delhi while Delhi Vidyut Board (***DVB***) was unbundled under the Delhi Electricity Reforms Act 2000 into distribution, transmission and generation companies. The appellant, pursuant to the privatization process initiated by Government of National Capital Territory of Delhi (***GoNCTD***) for the privatization of the successor distribution licensees/distribution companies, took over the distribution company formed for North and North West Delhi w.e.f. 01.07.2002 and since then has been carrying out functions of electricity distribution and retail supply in its area of supply. The appellant is a joint venture between the Tata Power Co. Ltd. (***TPCL***) and the GoNCTD with majority stake i.e. 51% shareholding by TPCL. Thus the appellant is a distribution licensee in terms of Delhi Electricity Reforms Act, 2000, read with Section 14 of the Electricity Act, 2003 having been issued the distribution and retail supply license by the learned Delhi Commission to undertake distribution and retail supply of electricity in the North and North West areas of National Capital Territory of Delhi.

03) That respondent is the Delhi Electricity Regulatory Commission (in short ***Delhi Commission***) which is empowered to discharge various functions provided under the Electricity Act, 2003.

04) We have heard Mr. Amit Kapur and Mr. Vishal Anand learned counsel for the appellant and Mr.Pradeep Misra for the respondent(s) and We have gone through the written submissions filed by the rival parties and perused the material available on record including the impugned order.

05) The following issues relating to 35 disallowances arise for our consideration in this appeal:

1) Litigation expenses pertaining to DVB period
2) Tender cost
3) Food allowances
4) Education allowances

5) Carrying cost on power banking

6) Wrongful treatment of Central Industrial Security Force expenses

7) Non-truing up of incentives for FY 2010-11

8) Penal unscheduled inter-change charges (***UI Charges***)

9) Income from other business

10) Lower disallowances of 6th Pay Commission by not considering the fact that all the employees have not exercised the option of 6th Pay Commission as on 01.01.2006

11) Reduction in misuse units in relation to enforcement sale

12) Disallowances of power purchase cost incurred for procurement of power from TPDDL-Generating power plant

13) Late payment surcharge financing cost adjusted in collection resulting in lower incentive

14) Lower projection of power availability thereby artificially reducing the surplus power available for sale

15) Trading margin paid to Tata Power Co. Ltd.

16) Improper truing up of working capital

17) Incorrect consideration of return on equity at 14% instead of 16% for the purpose of carrying cost

18) Amortization of regulatory asset

19) License fee

20) Legal expenses

21) Wrongful denial in interest allowed towards late payment surcharge

22) SVRS not trued up but allowed by subsequent tariff order dated 23.07.2014

23) Erroneously revised Repair & Maintenance (***R&M*** expenses) based on revised Gross Fixed Asset (***GFA***)

24) Efficiency factors on 6th Pay Commission arrears not corrected but allowed in subsequent tariff order dated 23.07.2014

25) Clerical error, though the State Commission accepted the mistake, however, not corrected till date

26) Impact of revised submission of capitalization based on Electrical Inspector (***EI***) Certificates not considered

27) Wrongful computation of Advance Against Depreciation (***AAD***)

28) Error in equity computation and wrongful calculation of debt portion (partially accepted)

29) Wrongful adjustment of approved cost work in progress as on 01.04.2007 in FY 2007-08

30) Late payment surcharge on power purchase cost

31) Disallowance of income tax

32) Wrongful consideration of expense capitalization. But allowed in subsequent tariff order dated 23.07.2014

33) No clarification on rebate given by way of tariff based on number of bills as to whether it will be allowed separately in ARR

34) Non-truing up of interest rate

35) Simple average rate of interest considered for FY 2011-12 instead of weighted average rate of interest on CAPEX loans

5.1) **Issue Nos. 1, 3, 4, 5, 11 & 13** have been decided against the appellant vide judgment dated 28.11.2013 in Appeal No.14 of 2012 (*reported at 2014 ELR 267*) passed by this Appellate Tribunal, against which Civil Appeal No.4343 of 2014 by the same appellant, namely, TPDDL had already been filed before the Hon'ble Supreme Court where it is pending. Issue Nos. 3 & 4 have subsequently been decided in favour of the appellant vide judgment dated 10.02.2015 in Appeal No.171 of 2012, in the case of Tata Power Delhi Distribution Ltd. Vs. DERC passed by this Appellate Tribunal, *reported at 2015 ELR (APTEL) 889*. This Appellate Tribunal while deciding Appeal No.171 of 2012 (supra) directed that food and children education allowances of TPDDL to be provided as a result of 6th Pay Commission impact during FY 2008-09 and FY 2010-11.

5.2) **Issue No. 6, 10, 22, 24, 25, 28 and 32** have been decided in favour of the appellant vide judgment dated 28.11.2013 in Appeal No.14 of 2012 (supra), passed by this Appellate Tribunal and subsequently implemented in the tariff order dated 23.07.2014.

5.3) **<u>Issue Nos. 2, 9, 20 and 21</u>** have also been decided against the appellant by the aforesaid judgment, dated 28.11.2013 in Appeal No.14 of 2012 (supra).

5.4) Though the learned counsel for the contesting parties have tried to distinguish the facts of the issues decided against that party, we are not convinced with the same and the facts of those judgments, mentioned earlier appear to be identical and similar, hence, the aforesaid issues are decided accordingly, as they are covered by the aforesaid judgments of this Appellate Tribunal.

5.5) The following issues have been hotly contested on behalf of the appellant, which we are dealing one by one, on merits.

5.6) **<u>Issue No. 7</u>**, relating to non-truing up for incentive for FY 2010-11. This issue has been allowed in subsequently passed tariff order dated 23.07.2014, subject to scrutiny of figures, hence, this issue is accordingly decided in favour of the appellant.

5.7) **<u>Issue No. 8,</u>** relating to disallowance of penal Unscheduled Interchange (***UI***) Charges. On this issue, following are the contentions of the appellant:

5.8) That the Delhi Commission has wrongly observed that the UI charges paid by the appellant/petitioner also include penal UI charges of Rs.3.65 crores. The Commission, as a Member of Forum of Regulators, has already decided that any penal UI charges will not be allowed in the power purchase cost, therefore, the Delhi Commission has not considered the penal UI charges in power purchase cost. Thus, the Delhi Commission has wrongly disallowed the penal UI charges of Rs.3.65 Crores from unscheduled interchange charges claimed by the appellant without any basis, arbitrarily.

5.9) That the Delhi Commission has for the first time relied upon the CERC press release dated 23.07.2009. Therefore, the learned Delhi Commission cannot take recourse to new reasoning in support of the Impugned Order which were not mentioned in the Impugned Order. Hence, the reliance placed by the Delhi

Commission on the press release is liable to be ignored in the light of ***Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors. (****1978) 1 SCC 405.*

5.10) That the said approach of the State Commission is contrary to the natural justice as no opportunity was granted to the appellant to justify that UI Charges cannot be allowed to the appellant and the tariff fixation principles do not provide for exclusion of UI Charges from the power purchase cost.

5.11) That the appellant is not aware of the alleged decision which has been taken by the Forum of Regulators (FoR) for disallowing any alleged additional UI Charges. The decision of the FoR is advisory in nature and cannot be made applicable to the appellant when such decisions of FoR are contrary to the applicable legal and regulatory framework as held by this Appellate Tribunal in Appeal No.125 of 2012, titled ***M/s Hindalco Industries Limited Vs. The Uttar Pradesh Electricity Regulatory Commission*** *reported at 2013 ELR (APTEL) 845.*

5.12) That the UI Charges are component of the uncontrollable power procurement cost as per Regulation 4.16 of the MYT Regulations, 2007and the said power procurement cost has to be approved and granted as a pass through. Since the additional UI Charges form a component of cost of power and as such has to be allowed. Regulation 4.16 of the MYT Regulations 2007 is as under:

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

Variation in revenue/ expenditure on account of uncontrollable sales and power purchase shall be trued up every year."

5.13) That accordingly, the cost of power procurement including the UI Charges has been considered as uncontrollable expense as per Regulation 5.30 of MYT Regulations 2007.

5.14) That UI Charges is a frequent result of reduction in schedule of the Discoms arising out of forced outages/reduction in generation of different generators during the course of the day. In such a condition, the schedule of the generator is revised within 6 months blocks (1.5 hours) with a consequent impact on the Discoms schedule. While the generation schedule is revised with no perverse impact on the generator, the Discom is still obliged to meet the demand of consumers within the parameters as per Supply Code. To meet such an eventuality the Discom is left with no option but to adhere to load shedding (which is not possible for Delhi Discoms because of 1% limit on load shedding) or continue to draw at a higher UI rate, within the safe limits of grid operation.

5.15) That even in terms of UI Regulations 2009, penal interest is applicable at the specified rates for over-drawal of electricity for each time block when grid frequency is below 49.5 Hz. A time block under the UI Regulations spans to 15 minutes while the appellant has taken all efforts necessary to ensure compliance with the requirements of the UI Regulations, over-drawal from the grid below the mentioned frequency is inevitable despite efficient management.

5.16) That the monitoring of over-drawal is done based on instantaneous frequency and the billing is done on an average of 15 minutes. At times the frequency fluctuates in the region of 49.6 to 49.4 Hz in a 15 minute interval. If the load is shed as soon as the frequency momentarily touches below 49.5 Hz, there is a possibility of unnecessary load shedding as the average frequency during the period would be higher than 49.5 Hz. Further, automating this process would mean higher No. of 11 KV VCB operations resulting in failure of vacuum bottles and hence reliability of the system thereby affecting the interest of the consumers. As a prudent practice, the appellant observes the frequency trend for 3-4 minutes and then does the load shedding of the order of over-drawal, which may result in minor over-drawal.

5.17) That the over-drawal or under-drawal depends on the scheduled generation available. Since, the generation available changes constantly and further due

to the loss of generation, the schedules are affected resulting in over-drawal by Discoms. These schedules are revised by the generator within 6 blocks. An intra-day event does not afford the opportunity to Discoms to arrange power for the shortfall due to which there could be over-drawal in certain periods.

5.18) The monitoring of over-drawals is based on the actual drawl seen by the Discoms and the schedule declared by the SLDC. The real time control of drawals depends on accuracy of these two components. The implementation of SCADA has resulted in proper monitoring of actual data. However, the schedule data uploaded on real time basis is still a manual process having lot of errors which results in wrong interpretation of the situation and over-drawal is inadvertently allowed.

5.19) That the over-drawal is caused by factors not within control of the appellant and in the interest of the consumers, over-drawal cannot be avoided. Thus the over-drawal by the appellant during the year was only a fraction of the total demand, hence the penal UI Charges incurred by the appellant are uncontrollable in nature and ought to be passed through to the consumers through ARR.

5.20) The Delhi Commission is obligated to determine the tariff of the appellant in accordance with the multi-year tariff principles, the National Electricity Policy and the Tariff Policy. The MYT Regulations which form the basis for determination of tariff by the Delhi Commission nowhere provide for disallowance of UI additional charges from the power purchase cost of a distribution licensee.

6) **Per contra**, the learned counsel for the Delhi Commission has justified the findings and reasonings recorded by the Delhi Commission submitting that the Delhi Commission has rightly disallowed the penal UI Charges.

7) **Our consideration and conclusion on Issue No.8**, relating to disallowance of penal UI Charges: The learned Delhi Commission has recorded the following findings in the Impugned Order:

"3.77 The Commission ob served that UI charges paid by the Petitioner also include penal UI charges of Rs.3.65 crore. The Commission as a member of Forum of Regulator has already decided that any penal UI charges wil not be allowed in the power purchase cost, therefore the Commission has not considered penal UI charges in power purchase cost."

7.1) Further, the learned Delhi Commission while ordering disallowance of UI Charges of Rs.3.65 Crore has relied on the press release dated 23.07.2009 of the CERC. The said press release has clarified this issue as follows:

"1. 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 overdrawl from the gird 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 overdrawl 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 setting 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 certainity to the investors and also to penalize the utilities who indulge in excessive withdrawl from the grid.

6. After this decision of the Forum of Regulators, the distribution utilities will now be required to forecst 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) The additional UI charges are paid when the distribution licensee draws the power more than the schedule drawal when the grid frequency is low. Additional UI Charges are paid due to non-adherence of the scheduled drawal by distribution licensee.

7.3) We are unable to accept this contention of the appellant that the Delhi Commission cannot be allowed to take additional grounds during submissions in this appeal before this Appellate Tribunal, which grounds or reasons were not mentioned in the Impugned Order, since the Delhi Commission is a respondent in this appeal before us, it is free to take the other reasons or grounds to justify its Impugned Order apart from the reasons already discussed or mentioned in the Impugned Order.

7.4) The learned Delhi Commission has not acted upon the said press release of the CERC solely or in isolation but it has considered several other factors in disallowing the penal UI Charges of Rs.3.65 crore. So far as the law laid down in ***Mohinder Singh Gill and Anr. Vs. The Chief Election Commissioner, New Delhi and Ors.*** (supra) is concerned the present case is not squarely covered by the said proposition of law. We are further unable to accede to the contention of the appellant that natural justice principle has been violated in passing the Impugned Order by Delhi Commission, as no opportunity was given to the appellant to justify the said UI Charges. After inviting objections

or response from the public or stake holders and after holding public meeting and debates, such kind of decisions are taken by the State Commission or Central Commission and then after hearing the particular matter, order is passed. If some issue or dispute in the order goes against a party, there cannot be said to be violation of principle of natural justice in every case because natural justice means natural justice to both the parties including consumers and the stake holders.

7.5) We have perused the Regulation 5.30 of MYT Regulations 2007 and thereafter we are not able to accept the contention of the appellant that every kind of power purchase cost has to be allowed and the power purchase cost does not make any distinction between UI Charges and additional UI Charges. The distribution licensee shall be allowed to recover cost of power it procured from sources approved by the Commission. We have considered this contention of the appellant that UI Charge is a frequent result of reduction in the schedule of Discoms arising out of forced outages/reduction in generation of different generators during the course of the day. If generation schedule is revised with no perverse impact on the generator, the Discom is still obliged to meet the demand of the consumers as per the parameters of Supply Code. We have also considered this part of the contention that to meet such an eventuality, the Discom is left with no option but to adhere to load shedding (which is not possible to Delhi Discoms because of 1% limit on load shedding) or continue to draw at a higher UI rate, within the safe limits of grid operation.

7.6) Penal interests are applicable at the specified rates for 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.

7.7) **Issue No.12,** relating to disallowance of power purchase cost incurred in procurement of power from TPDDL-G power plant: On this issue, the appellant has argued as under:

7.8) That in the absence of final tariff determination by the Learned Delhi Commission for Rithala Power Plant, the appellant had challenged the ad-hoc tariff allowed by the Delhi Commission, vide order dated 13.07.2012, before this Appellate Tribunal through Appeal No.171 of 2012, wherein this Appellate Tribunal held that the State Commission has to regulate the electricity purchase and procurement process of the distribution licensee including the price at which the electricity shall be procured for distribution by the distribution licensee under Section 86(1)(b) of the Electricity Act, 2003. The Delhi Commission has to first consider to approve procurement of power from Rithala as a long term source of power for meeting the demand of the appellant and then decide the tariff for procurement of power by the appellant from Rithala Plant. The scheduling of power and power purchase cost from Rithala can be decided thereafter. If Rithala is operated out of the merit order based on the variable cost of the various sources of power, then the consequences of the same have to be borne by the appellant. Hence the State Commission was directed to dispose of the matter relating to procurement of power from Rithala as a long term source of power and also decide the power purchase cost from Rithala. The said judgment/order of this Appellate Tribunal is under challenge before the Hon'ble Supreme Court in Civil Appeal (D) 19560 of 2015.

7.9) That the learned Delhi Commission in the Impugned Order has wrongly disallowed the actual cost incurred by the appellant for procurement of power from Rithala while the petition for determination of tariff is pending before the Delhi Commission, who cannot penalize the appellant for its own delay in determining the tariff for Rithala solar generation plant and corresponding approval of PPA.

7.10) That this Appellate Tribunal should direct the Delhi Commission to expedite the process of determination of tariff for Rithala Station and further to determine the tariff in time bound manner allowing actual cost of generation incurred by a plant towards procurement of power from Rithala solar station.

8) **Per contra**, the learned counsel for the Delhi Commission has supported the reasons given in the Impugned Order in support of this Issue No.12.

9) **<u>Our consideration on Issue No.12</u>**:

Before we proceed towards our conclusion on this Issue No.12, we deem it proper to quote the relevant findings recorded by Delhi Commission on this issue, which are as under:

"3.73 The Commission also observed that the Petitioner has shown 232.41 MU of energy purchased from Rithala Generating station at total cost of Rs.180.70 crore (@ Rs.7.78 per unit) and 1.49 MU of energy purchased from own Solar Generating station at total cost of Rs.3.24 Crore (@ Rs.21.73 per unit).

3.74 The Commission observed that 178.95 MU was drawn by Petitioner from its won Rithala Generating Station when the Petitioner was under drawing from grid (selling power under UI).

3.75 The Commission has considered the cost of power from Rithala generating station when Petitioner is drawing from Rithala and selling under UI at UI sale rate of Rs.2.74 per unit, as a generation from Rithala Generating Station was not required to meet Petitioners load in these time slots. For remaining energy from Rithala generating station and energy from solar plant, the Commission has provisionally considered at the average power purchase cost of gross power (Rs.4.04 per unit) as tariff has not been determined for Petitioner's Rithala

Generating Station and solar plant. The Commission approves Rs.49.03 Crore towards 178.95 MU purchased by Petitioner from Rithala generating station when Petitioner was under-drawing from grid, Rs.21.60 crore towards remaining 53.46 MU purchased from Rithala Generating Station and Rs.0.60 Crore towards 1.49 MU purchased from solar generating station. The total power purchase cost approved for Rithala and Solar Generating station is Rs.71.23 (49.03+21.60+0.60) crore resulting into disallowance of Rs.112.71 crore from power purchase cost.

3.76 The Commission observes that 10.02 MU was purchased under UI from Rithala generating station due to over injection and 4.93 MU was sold under UI from Rithala station due to under injection. Scheduling of Rithala generating station was being done by the Petitioner only. The Commission therefore while calculating power purchase cost has not considered UI sale/purchase from Rithala station. The Petitioner has incurred Rs.2.60 crore in power purchase under UI and earned Rs.1.61 crore in power sale under UI to Rithala generating station. The Commission has reduced Rs.0.99 Crore from power purchase cost of the Petitioner on this account."

9.1) It appears from the above quoted paragraphs of the Impugned Order that the total power purchase cost approved for Rithala and Solar generating Station is Rs.71.23 crore resulting in disallowance of Rs.112.71 crore from power purchase cost. The Delhi Commission has approved Rs.49.03 crore towards 178.95 Million Units (MU) purchased by the appellant/petitioner from Rithala Generating Station when the appellant/petitioner was drawing from grid, Rs.21.60 crore towards remaining 53.46 MU purchased from Rithala Generating Station and Rs.0.60 crore towards 1.49 MU purchased from solar generating station.

9.2) The learned counsel for the Delhi Commission has submitted during arguments that petition for determination of tariff for Rithala generating station and solar station is under consideration of the Delhi Commission. The learned Delhi Commission has determined the prevailing tariff for 7 solar generating stations on 29.11.2013 in the absence of final documents regarding subsidy and actual capital cost. Once the tariff is finally approved by the Commission for these stations the difference in the power purchase cost in the approved and allowed tariff will be considered.

9.3) The record further shows that the appellant had challenged the ad-hoc tariff allowed by the Delhi Commission vide order dated 13.07.2012 before this Appellate Tribunal by filling Appeal No.171 of 2012 (supra). Further, the judgment/order, passed by this Appellate Tribunal, has been challenged before the Hon'ble Supreme Court in the aforesaid Civil Appeal which is pending before the Hon'ble Supreme Court.

9.4) The main grievance of the appellant/petitioner on this issue is that the appellant has been cooperating with Delhi Commission in furnishing the relevant information as sought by the Delhi Commission from time to time. But the non-allowance of power purchase cost has been made consequential to the disposal of the petition for determination of tariff for Rithala plant which is pending before the Delhi Commission. The appellant only wants that Delhi Commission should be directed to expedite the process of determination of tariff for Rithala station and Delhi Commission should be directed to determine the tariff in time bound manner and allow actual cost incurred by the appellant from Rithala plant and solar station. It is not disputed that the petition for determination of tariff for Rithala plant of the appellant/petitioner is pending before the learned Delhi Commission since 2009. We feel that the learned Delhi Commission has been keeping this petition pending for determination of tariff for Rithala plant since 2009 without making any sincere efforts to dispose of the petition. This kind of slackness or tendency of non-disposal of so important petition namely, petition for determination of tariff for Rithala plant before us creates a problem for the persons like the appellant because the appellant appears to be penalized for causing delay in approving the generation cost of Rithala plant in a timely manner. We do not agree to this proposition decided by Delhi Commission in the Impugned Order that once the tariff is finally approved by the Delhi Commission, the difference in the power purchase cost between the approved and allowed tariff will be considered. This practice cannot be allowed to run for many many years. After all such system cannot be allowed to continue on the basis of ad-hoc tariffs for so long years.

9.5) **In view of the above discussion, we do not agree to the reasons recorded in the Impugned Order on this issue. The said findings are hereby set aside to the extent observed here by us. We direct the Delhi Commission to expedite the process of determination of tariff for Rithala plant and determine the tariff within four months from today and till then allow actual cost of generation incurred by the appellant towards procurement of power form Rithala station. This issue is accordingly allowed and decided in favour of the appellant.**

9.6) **Issue No.14**, relating to lower projection of power availability: On this issue, following contentions are being made by the appellant:

9.7) That the learned Delhi Commission has artificially suppressed the tariff of the appellant:

(a) **By projecting lesser availability of power**: The appellant is mandated to comply with the directions dated 20.10.2009 of the learned Delhi Commission not to undertake load shedding in any case by more than 1%. Therefore, the appellant procures power in accordance with peak demand and has tied up the power from different sources, which aspect has not been dealt by the Delhi Commission. The learned Delhi Commission has reduced the availability of surplus power as projected by the appellant.

(b) **Projecting sale of surplus power at higher cost**: This Appellate Tribunal vide judgment dated 28.11.2014 in Appeal No.61 of 2012 had decided this issue in favour of the Discoms. The learned Delhi Commission despite being aware of the fact that the appellant is selling surplus power at an average rate of approximate Rs.2.80 per unit, the Delhi Commission has projected rate of Rs.4 per unit for sale of surplus power by the appellant thereby artificially decreasing the gap between rate of procurement price and sale rate of surplus power.

(c) **By not considering the variation in power purchase cost due to sale of surplus power at lower rate in Power Purchase Adjustment Cost (PPAC) formulae:** This Appellate Tribunal vide judgment dated 28.11.2014 in Appeal No.61 of 2012 (supra) had in paragraph 130 thereof directed the Delhi Commission to implement the judgment of OP No.1 of 2011 in letter and spirit. Formula of PPAC also does not permit any adjustment on account of additional cost incurred by the appellant due to sale of surplus power at lower rate than the purchase price. The appellant in its ARR petition had requested the Delhi Commission to allow adjustment of short term procurement cost in the PPAC Formulae, but Delhi Commission ignored that request of the appellant. The PPAC adjustments are allowed by the Delhi Commission on quarterly basis, however, the true up of this cost will be done after two years, which will ultimately burden the consumers.

9.8) That the learned Delhi Commission, in its statutory advice dated 01.02.2013 categorically observed that there had been sudden reduction in the sale rate of surplus power on account of stringent Regulations stipulated by the CERC. Hence, the learned Delhi Commission committed an error by arbitrarily estimating that the appellant would be able to sell its surplus power at a rate higher than the rate available through UI, PIXL or IEX.

9.9) That the appellant in its petition for determination of ARR for FY 2013-14 estimated a power requirement of 8700.06 MUs and surplus of 4020 MUs as against the availability of power of 12,832.82 MU at transmission periphery, the learned Delhi Commission has only approved 10,794 MUs. Thus the learned Delhi Commission has reduced the availability of surplus power as projected by the appellant from 4020.07 MUs to 2280 MUs by reducing the power available to the appellant from various plants primarily from Maithon Power Limited, Aravali Jhajjar, CLP, Jhajjar etc.

9.10) That the PPAC formula also does not permit any adjustment on account of additional cost incurred by the appellant due to sale of surplus power at lower

rate than the purchase price. The appellant in its ARR petition had requested the Delhi Commission to allow adjustment of short term power procurement cost in the PPAC formula but Delhi Commission has ignored the submission. This approach of the Delhi Commission will result in delay in recovery of revenue requirement of the appellant, which impact of the appellant has estimated as: (a) Reduction in units of surplus power Rs.209 crore, (b) Reduction in rate of sale for surplus power Rs.274 crore.

9.11) The learned Delhi Commission should take realistic view based on past trend for projections so that revenue surplus projections by the learned Delhi Commission do not translate in revenue gap at the time of actual true up as is evident from various past true up exercises.

9.12) That this Appellate Tribunal should direct the Delhi Commission to allow projection of energy availability and surplus power as projected by the appellant, allow the rate of sale of surplus power as per actuals projected by the appellant and incorporate the effect of sale of surplus power in PPAC formulae so that additional cost can be adjusted in every quarter.

10) **Per contra**, the Delhi Commission has vindicated/defended the stand taken by the Delhi Commission in the Impugned Order on this issue submitting that the same is in accordance with the decision of this Appellate Tribunal in OP No.1 of 2011 and other regulations of Delhi Commission.

11) **Our consideration and conclusion on this Issue No.14**, relating to lower projection of power availability: After going through the aforesaid contentions of the appellant on this issue, we deem it proper to quote the relevant part of the Impugned Order hereunder:

"4.43 The Commission has examined the quantum of energy projected as available for purchase by Petitioner from each of the generating stations of NTPC, NHPC, NPCIL, State generating companies and others.

4.44 The Commission has considered the notification of NRPC on the availability of power from various central and state generating stations in the LGBR for FY 2013-14 and LGBR Report of CEA for FY 2013-14. The LGBR notified by NRPC is almost in line with LGBR notified by CEA. The Commission had also asked SLDC to provide the availability of energy from various generating stations from which DISCOMs of Delhi obtain power. SLDC is asked to provide the availability of power for DISCOMs in Delhi from various Central, State and other generating stations from which DISCOMs in Delhi propose to purchase power for FY 2013-14. SLDC has projected the power and energy available from each of the stations for purchase by DISCOMs in Delhi during FY 2013-14 considering the reallocation of power from Aravali Power Corporation Limited (APCL), Jhajjar and reduced generation at Bawana based on availability of gas vide its communication dated June 10, 2013. The anticipated availability of power to DISCOMs in Delhi as provided by SLDC has been considered by the Commission.

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4.93 Based on the energy sales, distribution loss, intra-state and inter-state transmission losses approved by the Commission in para 4.91, the energy required as approved by the Commission is summarized in Table below:

Table 88: Energy Balance Approved by the Commission for FY 2013-14

S.No.	***Particulars***	***Units***	***FY 2013-14***
1	*Total Energy Available*	*MU*	*11104*
2	*Inter State Transmission Losses*	*%*	*3.59*
3		*MU*	*310*
4	***Energy Requirement at State Transmission Periphery***	***MU***	***10794***
5	*Energy Sales*	*MU*	*7439*
6	*Distribution Loss*	*MU*	*972*
7		*%*	*11.56*
8	*Energy Requirement at Distribution Periphery*	*MU*	*8411*
9	*Intra State Distribution Loss*	*MU*	*103*
10		*%*	*1.21*
11	***Energy Requirement at Distribution Periphery***	***MU***	***8514***
12	***Energy Surplus (4-11)***	***MU***	***2280***

11.1) The main contention of the Delhi Commission on this issue is that the learned Delhi Commission has allowed a realistic approach for availability of power and

therefore, the appellant's claim regarding lower projections of power availability, thereby artificially reducing the power available for sale is not justified.

11.2) The Delhi Commission has examined the quantum of energy projected as available for purchase by the appellant/petitioner from each of the generating stations of NTPC, NHPC, NPCIL, State generating companies and others. Further, the Delhi Commission has considered the notification of Northern Regional Power Committee (NRPC) on the availability of power from various central and State generating stations in the LGBR for FY 2013-14 and LGBR report of CEA for FY 2013-14. These two LGBRs notified by NRPC and CEA are almost identical. The learned Delhi Commission had also asked SLDC to provide availability of energy from various generating stations from which Discoms of Delhi obtain power. Further the Delhi Commission has asked SLDC to provide availability of power for Discoms in Delhi. By passing the Impugned Order, the learned Delhi Commission has directed SLDC to provide availability of power to Delhi from various Central, State and other generating stations from which Discoms in Delhi propose to purchase power for FY 2013-14. The SLDC has projected the power and energy available from each of the stations for purchase by Discoms in Delhi during FY 2013-14 considering the allocation of power form APCL, Jhajjar and reduce generation at Bawana based on availability of gas. Thus the anticipated power availability to Discoms in Delhi as provided by SLDC has been considered by Delhi Commission in the Impugned Order.

11.3) We find that the appellant is mandated to comply with the directions dated 20.10.2009 given by Delhi Commission not to undertake load shedding in any case by more than 1%. Therefore, the appellant procures power in accordance with its peak demand. Accordingly it has tied up with different sources. The record shows that the Delhi Commission has not dealt with this submission of the appellant relating to the fact that the appellant is to procure power in accordance with peak demand and the appellant has tied up the power from different sources to meet the peak demand. Had that aspect been considered

by the Delhi Commission, regarding peak demand, and tied up for power by the appellant from different sources to meet peak demand of Delhi, the Delhi Commission would not have reduced the availability of surplus power as projected by the appellant.

11.4) We have gone through our judgment dated 28.11.2014 passed in Appeal No.61 of 2012 (supra) in paragraph 130 of which we directed Delhi Commission to implement judgment of OP No.1 of 2011 in letter and spirit. The learned Delhi Commission in spite of being aware of the fact that the appellant is selling power at approximate Rs.2.80 per unit, the Delhi Commission has projected rate of Rs.4/- per unit for sale of surplus power by the appellant. We are unable to comprehend that the learned Delhi Commission has estimated that the appellant would be able to sell its surplus power at a rate higher than the rate available through UI, PXIL or IEX. The argument of the learned Delhi Commission is that in the advisory on 01.02.2013, it had observed that there has been sudden reduction in sale rate of surplus power on account of stringent regulations of CERC. It is not disputed that the appellant is selling surplus power at an average rate of approximately Rs.2.80 per unit. Then under what circumstances the appellant would be able to sell its surplus power at a rate higher than the rate available through power exchanges, when cheaper power is available at any power exchange under UI mechanism, we are unable to appreciate how any consumer would agree to purchase power at a higher cost than the rate available through power exchanges or UI mechanism. In view of the above discussion, we find the said findings of the Delhi Commission in the Impugned Order, illegal and perverse which is unsustainable and unacceptable and cannot be countenanced. In this view, the said findings recorded on this issue are hereby set aside to the extent observed by us.

11.5) We direct the Delhi Commission to consider projection of power availability made by the appellant/petitioner in a logical and legal manner and consider the fact that the appellant procures power in accordance with its peak demand, for which the appellant has tied up power from different sources. Since the

appellant is selling surplus power at Rs.2.80 per unit, the learned Delhi Commission is directed to actually see and consider the rate of sale of surplus power available through power exchanges or UI mechanism and then determine the rate of power per unit for sale of surplus power by the appellant. The learned Delhi Commission is further directed to positively comply with the judgment of this Appellate Tribunal in OP No. 1 of 2011 in letter and spirit without seeking any excuse or putting any lame excuse for wriggling out of the judgment in OP No.1 of 2011 directly or indirectly and then consider variation in the power purchase cost due to sale of surplus power by applying PPAC formulae. This issue is accordingly allowed in favour of the appellant.

11.6) **Issue No.15**, relating to disallowance of trading margin paid to Tata Power Trading Co. Ltd.: On this issue, following are the contentions of the appellant:

11.7) That while allowing quantum of power purchased by the appellant in FY 2011-12 from Tata Power Trading Co. Ltd. (***TPTCL***), the learned Delhi Commission provisionally disallowed an amount of Rs.0.14 crore towards the trading margin paid by the appellant to Tata Trading without any cogent justifiable reason. The only basis of disallowing the trading margin paid by the appellant is that the power was procured through a related party.

11.8) That the disallowance of trading margin by Delhi Commission violates Regulation 5.29 and 5.30 of MYT Regulations 2007.

11.9) The learned Delhi Commission has already built and provided adequate safeguards in the appellant's distribution and retail supply license dated 11.03.2004 whereby, all transactions with sister concerns at arm's length are disclosed by the Delhi Commission. The appellant had procured power at a competitive rate which was also informed to Delhi Commission vide letter dated 02.12.2011.

11.10) That the learned Delhi Commission has approved quantum and price of the power procured through Tata Trading, the test of prudence, reasonable and fair

cost gets satisfied. Therefore, it is not open for the Delhi Commission to disallow the trading margin paid by the appellant.

11.11) That to meet the shortfall, the appellant had procured the power at competitive rates from Tata Trading. The average power purchase cost for FY 2011-12 was Rs.5.29 per unit. In contrast, the power purchase cost form Tata Trading was Rs.4.85 per unit inclusive of transmission and other related costs.

11.12) That as per the CERC (Fixation of Trading Margin) Regulations 2010, the maximum trading margin that Tata Trading could have charged was 7 paise per unit. However, trading margin charged by Tata Trading was 4 paise per unit which is minimum trading margin charged by any inter-State trading licensee.

11.13) That the Delhi Commission has failed to consider that every time power cannot be purchased through IEX and at times it becomes necessary to purchase short term power through other sources also.

11.14) That power procured by the appellant from Tata Trading was also approved by Delhi Power Procurement Group (***DPPG***) whose formation had been approved by Delhi Commission which ensures arrangement of short term power by all the Discoms in which Delhi Transmission Limited (***DTL***) plays the role of lead facilitator.

11.15) The Delhi Commission has provisionally trued up the cost of procurement. Hence, the said approach is incorrect since there is no provision of provisional true up in the MYT Regulations 2007. Since all the informations sought by the Commission were duly submitted by the appellant, there was no occasion for Delhi Commission to provisionally true up the power purchase cost. The practice adopted by the Delhi Commission to provisionally true up is not in the interest of licensee and the consumer and such practice should be deprecated.

11.16) That this Appellate Tribunal should direct the Delhi Commission to allow pass through of the trading margin paid by the appellant to TPTCL (***Tata Trading***).

12) **Per contra**, the Delhi Commission has justified findings given by it for disallowing the said trading margin.

13) **<u>Our consideration and conclusion on this issue:</u>** After considering the contentions of the appellant on disallowance of trading margin paid by the appellant to Tata Trading, to examine the legality of Impugned Order, we reproduce the relevant part of the Impugned Order which is as under:

"3.80 The Commission observed that during FY 2011-12, the Petitioner has procured power through its related party i.e. M/'s TPTCL and paid trading margin amounting to Rs.0.144 crore. The Commission has decided to provisionally disallow the trading margin paid to related party."

13.1) As per the learned Delhi Commission, the appellant procured power through its related party, namely, M/s TPTCL and paid the said trading margin amounting to Rs.0.144 crore. Since the appellant is already a Member of IEX hence, the Delhi Commission has disallowed the trading margin to the related party observing that the same is under consideration for final true up.

13.2) Since the learned Delhi Commission has given clear liberty and clearly provided that the trading margin is provisionally disallowed but the same would be considered in the final true up. We hope the learned Delhi Commission would consider the same at the final truing up stage, hence, in view of this we do not find any perversity in the Impugned Order and this issue is decided against the appellant.

13.3) **<u>Issue No.16</u>**<u>, relating to improper truing up of working capital</u>: On this issue, following contentions have been made by the appellant:

13.4) That Regulation 5.37 of the MYT Regulations, 2007, notified by Delhi Commission, specified the methodology of calculating working capital as under:

"5.37 Working capital for retail supply of electricity shall consist of

(a) Receivables for two months of revenue from sale of electricity; and
(b) Operation and maintenance expenses for one month;
(c) Less: power purchase costs for one month."

13.5) That the Delhi Commission at the time of determination of tariff :

(a) had implemented the Regulation 5.37 in the MYT order dated 23.02.2008 for calculating the receivables. However, at the stage of truing up, the learned Delhi Commission has changed the methodology fixed by it for calculating receivables and instead of taking two months of approved ARR for calculating receivables has calculated receivables based on two months of actual average billing on the approved tariff for the concerned financial year.

(b) the learned Delhi Commission has ignored Regulation 5.37 i.e., instead of taking approved power purchase cost has taken gross power purchase cost i.e. power purchase cost before deducting revenue from sale of surplus power.

13.6) That the truing up, as per the settled law, has to be done on the same methodology on which the target was set and any change in the scope at the stage of truing up is unlawful and illegal. Thus the learned Delhi Commission at the stage of truing up has changed the methodology of calculating receivables whereas it could not reopen the determination of tariff as held by this Appellate Tribunal in the case of ***Meghalaya State Electricity Board Vs. MESRC*** *reported at 2010 ELR (APTEL) 940*.

13.7) That the learned Delhi Commission in the MYT Order dated 23.02.2008 implemented Regulation 5.37 (a) of the MYT Regulations, 2007, to compute working capital based on receivables by taking two months of projected ARR and extended the first MYT period to FY 2011-12, vide order dated 10.05.2011. The projections and ARR for FY 2011-12 were approved by the Delhi Commission by order dated 26.08.2011. Thus the learned Delhi Commission

in its order dated 26.08.2011 had followed the methodology fixed by it in MYT order dated 23.02.2008 to calculate receivables i.e., two months of projected ARR for FY 2011-12 was taken rather than taking the estimated revenue to be collected by the appellant during FY 2011-12.

13.8) That the ARR is fixed to recover the approved expenses by the appellant during the year, while appellant may or may not be able to recover the approved expenses from revenue realized from sale of electricity and therefore, the working capital should be calculated on the basis of ARR.

13.9) That the learned Delhi Commission ignored Regulation 5.37 of the MYT Regulations 2007 while calculating working capital. It has approved power purchase cost for the entire control period after truing up as under:

Particulars	*2007-08*	*2008-09*	*2009-10*	*2010-11*	*2011-12*
Approved Power Purchase expenses	*1846.15*	*1805.92*	*2558.54*	*3112.88*	*3853.86*

13.10) That while calculating working capital, the learned Delhi Commission has taken arbitrary figure which is different from power purchase cost. As per Regulation 5.37 of the MYT Regulation, 2007, the Delhi Commission has to take net power purchase cost, approved by the learned Delhi Commission itself. However, the Delhi Commission even after agreeing in its response that working capital shall be determined as gross power purchase reduced by sale proceeds from surplus power, has not implemented the same in its tariff order dated 31.07.2014 (Impugned Order).

13.11) That keeping in view the above submissions, the calculation of working capital is liable to be revised after correctly calculating receivables and after taking into consideration the approved power purchase expenses as under:

S.No.	Particulars	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
A) i)	O&M Expenses		219.84	237.75	327.97	282.21	312.79
A) ii)	O&M Expenses for 1 Month		18.32	19.81	27.33	23.52	26.07
	Receivables						

B)							
B) i)	Annual Revenue		2353.79	2295.14	3259.42	3679.09	4253.95
B) ii)	Receivables equivalent to 2 months average billing		392.30	382.52	543.24	613.18	708.99
C)	Power Purchase expenses		1846.15	1805.92	2558.54	3112.88	3853.86
C)	Power Purchase Expenses for 1 months		1 53.85	150.49	213.21	259.41	321.16
D)	Total Working Capital A) ii) + B) ii) – C) ii)	53.15	2 56.77	251.84	357.36	377.29	413.90
	Change in working Capital		2 03.62	(4.93)	105.51	19.94	36.61

13.12) That the Delhi Commission may be directed to calculate the working capital after taking into consideration the ARR and the power purchase cost as agreed by the Delhi Commission in its response.

14) **Per contra,** the learned counsel for the respondent Delhi Commission has justified the reasons recorded by Delhi Commission in the Impugned Order on this issue.

15) Our consideration and conclusion on this issue No.16, relating to improper calculation of working capital:

15.1) Regulation 5.37 of the MYT Regulations, 2007 dealing with methodology of working capital provides that working capital for retail supply of electricity shall consist of :

(a) Receivables for two months of revenue from sale of electricity,

(b) Operation and maintenance for one month and

(c) Less: power purchase cost for one month

15.2) Under the MYT order dated 23.02.2008, the learned Delhi Commission had considered the power purchase cost as sum of net power purchase costs and transmission charges as considered for the purpose of ARR projection. While

doing so, the true up of MYT control period, the learned Delhi Commission has considered the true up PPC (Gross Power Purchase + Gross Transmission Charges) for the purpose of computation of working capital as given in Table 43 of the tariff order dated 31.07.2013.

15.3) Agreeing to the learned Delhi Commission, for the purpose of computation of working capital, the power purchase cost shall be determined as gross power purchase reduced by sale proceeds from surplus power as per the method followed under the MYT order dated 23.02.2008.

15.4) The main contention of the appellant on this issue is that the learned Delhi Commission, at the time of determination of tariff, had implemented Regulation 5.37 in the MYT order dated 23.02.2008 for calculating the receivables. However, at the stage of truing up, the Delhi Commission has changed the methodology fixed by it for calculating receivables and instead of taking two months of approved ARR for calculating the receivables, Delhi Commission had calculated receivables based on two months of actual average billing on the approved tariff for the concerned FY. Delhi Commission has thereby ignored Regulation 5.37 because instead of taking approved power purchase cost, it has taken gross power purchase cost i.e., power purchase cost before deducting revenue from sale of surplus power.

15.5) It is true that this Appellate Tribunal in the case of ***Meghalaya State Electricity Board Vs. MESRC*** (supra) and in subsequent judgment has taken the view that the methodology adopted for determination of tariff cannot be changed at the stage of truing up. As per the appellant, by doing the above, the Delhi Commission has ignored Regulation 5.37 and at the stage of truing up, it has changed the methodology of calculating receivables and whereas it could not reopen the basis of determination of tariff.

15.6) We have deeply considered this contention of the appellant that ARR is fixed to recover the approved expenses by the appellant during the year irrespective of the fact that the appellant may or may not be able to recover the approved

expenses from revenue realized from sale of electricity but we are not inclined to accept this contention of the appellant. This contention appears to be lucrative but not legally acceptable on consideration of the provision of Regulation 5.37 of MYT Regulations 2007. The MYT order dated 23.02.2008 was extended for subsequent period by order dated 10.05.2011. We have also considered the order dated 26.08.2011, passed by Delhi Commission, whereby projections and ARR for FY 2011-12 were approved by it. After going through the aforesaid material, we do not find any perversity or illegality in the approach of the Delhi Commission while dealing with true up for the relevant period. Thus this Issue No.16, relating to improper truing up of working capital is decided against the appellant.

15.7) **Issue No.17**, relating to incorrect consideration of return on equity at 14% instead of 16% for the purpose of carrying cost. On this issue, following contentions are raised on behalf of the appellant:

15.8) That the learned Delhi Commission, in the Impugned Order, has allowed the carrying cost on the equity portion of the revenue gap at 14% on pre-tax basis. The said finding is contrary to Regulation 5.10, read with Regulation 5.39 of the MYT Regulation 2007. Hence, the same is liable to be set aside.

15.9) That while allowing the carrying cost on equity component at 14%, the learned Delhi Commission has ignored the fact that the appellant is not only undertaking wheeling business but also undertaking supply business and accordingly, the appellant is entitled to assured 16% post tax return on equity component.

15.10) That this Appellate Tribunal, vide judgment dated 30.07.2010 in Appeal No.153 of 2009 in ***NDPL Vs. DERC*** *reported at 2010 ELR (APTEL) 0891* had held that carrying cost should be allowed by the Delhi Commission in debt equity ratio of 70:30.

15.11) That accordingly, the appellant has claimed carrying cost in its ARR Petition in the debt equity ratio of 70:30. The carrying cost on the equity component is to be allowed at 16%, in terms of Regulation 5.10, read with Regulation 5.39 of the MYT Regulations 2007. The learned Delhi Commission has allowed the return on equity at 16% post tax on the equity portion of the appellant for financing Capital Expenditure (CAPEX).

15.12) That direction should be issued to Delhi Commission to allow carrying cost of 16% on the equity portion of the revenue gap and further to allow carrying cost on post tax basis by grossing up the same for income tax.

16) **Per contra**, the learned counsel for the Delhi Commission has submitted that the Impugned Order reads as under:

"3.187 The rate of return on equity has been considered at 14% in accordance with Regulation 5.10 of DERC MYT Regulations, 2007."

16.1) That the Regulation 5.9 and 5.10 of the MYT Regulations, 2007 provides as under:

"5.9 Return on Capital Employed (RoCE) for the year 'i' shall be computed in the following manner:

*RoCE = WACCi * RRBi*
Where,
WACCi is the Weighted Average Cost of Capital for each year of the Control Period;
RRB – Regulated Rate Base is the asset base for each year of the Control Period based on the capital investment plan and working capital.

5.10 The WACC for each year of the Control Period shall be computed at the start of the Control Period in the following manner:
$WACC = [D/E/1 + D/E]^* r_d + [1/1+D/E]^* r_e$

D/E is the Debt to Equity Ratio and for the purpose of determination of tariff, debt-equity ratio as on the Date of Commercial Operation in case of new distribution line or substation or capacity expanded 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.

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

r_e is the Return on Equity and shall be determined at the beginning of the Control Period after considering CERC norms, Licensee's proposals, previous years' D/E mix and other relevant factors. The cost of equity for the Wheeling Business shall be considered at 14% post tax."

16.2) That as per Regulation 5.38 of the MYT Regulations 2007, the Delhi Commission shall specify a retail supply margin for the retail supply business in MYT order based on the allocation statement provided by the distribution licensee. The costs allocated to retail business as per allocation statement shall be considered while determining supply margin. According to Regulation 5.39 of MYT Regulations 2007, the Commission shall specify the retail supply margin in such manner that the return from the wheeling business and retail supply business shall not exceed 16% of equity.

16.3) That it is clear from Regulation 5.10 that rate of return on equity has been specified by the Delhi Commission as 14% which has been given to the appellant on equity part of the carrying cost. Hence, there is no merit in this issue.

17) Our consideration and conclusion on Issue No.17, relating to incorrect consideration on Return on Equity at 14% instead of 16% for the purpose of carrying cost.

17.1) Having cited the rival contentions of the parties and having gone through the MYT Regulations, 2007, we proceed towards our own discussion and conclusion on this issue.

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

17.3) ***Regulation 5.9*** deals with computation of Return on Capital Employed, prescribing a formula for such kind of computation. ***Regulation 5.10*** provides for computation of Weighted Average Cost of Capital (WACC) for each year of the control period, clearly providing that "*cost of equity for wheeling business shall be considered at 14% post tax*." ***Regulation 5.39*** clearly states that the return from the wheeling business and retail supply business shall not exceed 16% of equity. Thus, there is a rider restricting that the return from the wheeling business and retail supply business shall not exceed 16% of the equity. Thus, the maximum limit is 16% which cannot be allowed to exceed under any circumstances. Appellant is claiming 16% of equity on the basis of 14% RoE + 2% supply margin. In view of the above discussion, we do not find any illegality or perversity in the finding recorded in the Impugned Order on this issue and we approve the approach adopted by the Delhi Commission in deciding this issue. We find and observe that the learned Delhi Commission has correctly, in the impugned tariff order, considered the rate of return on equity at 14% to which we also agree. Hence, this issue is decided against the appellant.

17.4) **Issue No.18**, relating to amortization of regulatory asset. Following are the contentions raised by the appellant on this issue:

17.5) That learned Delhi Commission has created a regulatory asset to the tune of Rs.3370.56 crore till FY 2011-12. The said regulatory asset till FY 2013-14 has substantially increased to Rs.3351.48 crore as recognized by the Delhi Commission in its latest tariff order dated 29.09.2015. Till date learned Delhi Commission has not specified any credible amortization schedule for liquidating the regulatory asset. The regulatory asset created by the Delhi Commission violates Regulation 5.42 of the MYT Regulations 2007, clause 8.2.2 of tariff policy and judgment dated 11.11.2011, passed by this Appellate Tribunal in Original Petition No.1 of 2011, *reported at 2011 ELR (APTEL) 1742* and judgment dated 14.11.2013 passed by this Appellate Tribunal in Original Petition Nos. 1 and 2 of 2012.

17.6) That while creating this regulatory asset in the Impugned Order, the learned Delhi Commission:

(a) Failed to specify any time frame within which the regulatory asset will be amortized. Even the surcharge of 8% permitted to be recovered by appellant on the revised tariff is even inadequate to meet the financing cost as admitted by learned Delhi Commission in its statutory advice dated 01.02.2013,

(b) The creation of huge revenue gap is on account of non cost reflective tariff. The learned Delhi Commission in its earlier statutory advice dated 15.12.2010 had acknowledged the fact that tariff during FY 2008-09, 2009-10 and 2010-11 was not cost reflective. Since, tariff determined by Delhi Commission is not cost reflective and is not sufficient to meet the current expenses including the Power Procurement Cost (PPC) there is a creation of huge revenue gap over the years.

(c) That the repeated creation of regulatory asset without adequate carrying cost and amortization schedule has resulted in lowering of return on equity for the appellant, which is the minimum return assured to the appellant.

17.7) That due to persistent inaction and refusal to discharge the statutory mandate by Delhi Commission, today the power sector reforms in Delhi are on the verge of failure in spite of the fact that , as approved by the Delhi Commission, the appellant has reduced its AT&C losses from 53% on 01.07.2002 to 11.49% as on 31.03.2012 as per tariff order dated 23.07.2014 and appellant has increased supplies from 2011 MUs during FY 2002-03 (for nine months) to 6699 MUs per annum during FY 2011-12.

17.8) That this contention of the appellant that the increase in tariff in FY 2012-13 and 2013-14 had generated surplus is incorrect as is evident from the tariff order dated 23.07.2014 issued by the Delhi Commission, wherein evidently for FY 2012-13, further addition of Rs.476.47 crore, thereby increasing cumulative gap from Rs.3370.56 crore to Rs.3847.03 crore as on 31.03.2013. Therefore, evidently, tariff was not cost reflective even for FY 2012-13.

17.9) That the findings of the Delhi Commission on the issue be set aside and Delhi Commission be directed that in terms of paragraph 8.22 of the Tariff Policy, read with MYT Regulations 2007, in a time frame determined by this Appellate Tribunal to provide for:

(a) ensuring assured return on equity,
(b) adequate carrying cost in terms of this Appellate Tribunal's judgment dated 30.07.2010 in Appeal No.153 of 2009 till the time of actual recovery
(c) amortization schedule to recover the regulatory asset in time bound manner not exceeding the period of three years and preferably within the control period.

18) **Per contra,** the contentions of the Delhi Commission are as under:

18.1) That the said regulatory gap has been arrived at after true up of the audited financials up to FY 2011-12. The carrying cost has been applied to recognize gap (till FY 2011-12) up to end of FY 2013-14 to arrive at the net regulatory gap for the purpose of tariff fixation.

18.2) That audited financial information for FY 2012-13 was not available during the true up exercise, in the absence of which regulatory gap has been recognized up to FY 2011-12 in the Impugned tariff order dated 31.07.2013 based on the findings provisionally approved.

18.3) That to meet the carrying cost, 8% surcharge had been levied from FY 2011-12. The figures mentioned by Delhi Commission in its statutory advice are not acknowledgment of regulatory assets/revenue gap but it simply shows revenue gap claimed by appellant in tariff petition for ARR for Discoms for FY 2013-14.

18.4) That due to increase in tariff in FY 2012-13 and 2013-14, the appellant has generated surplus, which is as follows:

FY	Surplus
2012-13	391.57
2013-14	477.94

18.5) That Writ Petition (Civil) Nos.104 and 105 of 2014 had been filed by other licensees before the Hon'ble Supreme Court regarding amortization of regulatory assets wherein the learned Delhi Commission has proposed the road map for amortization of regulatory assets. After conclusion of arguments, the judgment in the aforesaid Petitions has been reserved by the Hon'ble Supreme Court. The other licensees in Appeal Nos.265 and 266 of 2013 filed Interim Applications on this issue, wherein this Appellate Tribunal had disposed of the said IAs vide order dated 11.03.2014, observing that in the absence of support from the Government, the Delhi Commission may follow its own road map for liquidation of the regulatory assets to remedy the finances of the distribution licensee.

18.6) That as per subsequent tariff order dated 29.09.2015, the total surplus in the hand of appellant in the FY 2013-14 is Rs.401.66 crore leaving the provisional revenue gap of Rs.3351.48 crore. Besides this, the Delhi Commission has changed the methodology and the carrying cost has been made a pass through

in the tariff order itself from FY 2014-15 onwards and 8% surcharge and surplus left, if any, would amortize the regulatory assets.

19) **Our consideration and conclusion** on this issue relating to amortization of regulatory assets:

19.1) We have cited in detail the contentions of the rival parties and without repeating the same, we proceed towards our own conclusion on this issue.

19.2) According to the learned Delhi Commission, the said regulatory gap has been arrived at after true up of the audited financials up to FY 2011-12. The carrying cost has been applied to recognize gap till FY 2011-12, up to end of FY 2013-14, to arrive at the net regulatory gap for the purpose of tariff fixation. Since audited financial information for FY 2012-13 was not made available during the true up exercise, the regulatory gap has been recognized up to FY 2011-12 in the Impugned tariff order dated 31.07.2013 based on the findings provisionally approved. Further to meet the carrying cost, 8% surcharge has been levied from FY 2011-12. As per the Delhi Commission, due to increase in tariff in FY 2012-13 and 2013-14, the appellant has generated surplus of Rs.391.57 crore in FY 2012-13 and Rs.477.94 crore in FY 2013-14.

19.3) We are quite aware of the contentions raised by the appellant, seeking compliance of judgment dated 11.11.2011, passed by this Appellate Tribunal in Original Petition No.1 of 2011 (supra) in which the following directions were issued to the State Commissions:

"65. (iv) In determination of ARR/tariff, ***the revenue gaps ought not to be left and Regulatory Asset should not be created as a matter of course except where it is justifiable, in accordance with the Tariff Policy and the Regulations.*** *The* ***recovery of the Regulatory Asset should be time bound and within a period not exceeding three years at the most and preferably within Control Period. Carrying cost of the Regulatory Asset should be allowed to the utilities in the ARR of the year in which the Regulatory Assets are created*** *to avoid problem of cash flow to the distribution licensee."*

19.4) We are also conscious of the fact that the appellant is seeking compliance of our judgment dated 14.11.2013 passed in Original Petition No.1 and 2 of 2012, wherein the following was observed:

"38. In view of the above, we direct the State Commission to take immediate steps for recovery of the admitted revenue gap and decide amortization schedule and also ensure that the Fuel and Power Purchase costs are passed on regularly and effectively as per the above directions of this Tribunal to avert the problems of cash flow experienced by the Petitioners which may come in the way of smooth operation of the distribution system and meeting the requirements of electricity of the consumers in the national capital in a reliable manner if not remedied in time."

19.5) Since we have been apprised by Delhi Commission that the judgment in Writ Petition (Civil) No.104 and 105 of 2014 filed by other licensees of Delhi, before Hon'ble Supreme Court, regarding amortization of regulatory assets, wherein Delhi Commission has already proposed the road map for amortization of regulatory assets is reserved. Since the same issue is pending for judgment of Hon'ble Supreme Court, we hold that the parties shall abide by the judgment of the Hon'ble Supreme Court on this issue. This issue is accordingly decided.

19.6) **Issue No.19**, relating to license fee: On this issue, the appellant has contended as under:

That as per clause 12.1 of the Distribution and Retail Supply License, the appellant is required to pay annually 0.05% of amount billed for previous year as license fees to Delhi Commission as under:

"12.1 Within 60 days or such further period as the Commission may allow after the coming into force of this License, the Licensee shall pay to the Commission a fee equivalent to 0.05% of the amount billed during the previous financial year in the area of supply of the Licensee, and annually in each subsequent year during the validity of the license by similar calculation or such other amount as may be notified by the Commission from time to time."

19.7) That since the license fee is linked to sales which is uncontrollable in nature, therefore, the license fee is also uncontrollable in nature and should be allowed as per actual.

19.8) That as per clause 12.4 of the Distribution and Retail Supply License, the licensee shall be entitled to take into account any fee paid as expense in the determination of aggregate revenue made in accordance with clause 12.4 but shall not take into account any interest paid pursuant to clause 12.3. It means that the licensee shall be entitled to recover the fee paid by it as an expense for determination of aggregate revenue.

19.9) That during the true up exercise and prudence check, the Delhi Commission sought clarification on increase in license fee. In response, the appellant, vide letter dated 01.07.2013, submitted the computation of license fee claimed by it including the calculation of differential amount.

19.10) That in the Impugned Order, the Learned Delhi Commission has allowed additional license fee of Rs.0.32 crore instead of Rs.0.40 crore as claimed by the appellant, thereby disallowing Rs.0.08 crore. Though the appellant clearly illustrated the calculation of its claim of Rs.0.40 crore from FY 2007-08 to 2011-12 based on what was allowed as normative cost. However, the learned Delhi Commission proceeded with its own calculation for FY 2011-12 where the efficiency factor on normative cost appears to have been ignored.

19.11) That this Appellate Tribunal should direct the Delhi Commission to allow the differential amount of Rs.0.08 crore.

20) **Per contra**, the Delhi Commission has made the following arguments, on this issue of license fee:

20.1) That as per clause 12.1 of the Distribution and Retail Supply License, the appellant is required to pay annually 0.05% of amount billed for previous year as license fees to the Delhi Commission. The actual amount incurred in FY

2011-12 is Rs.1.49 crore against Rs.1.13 crore allowed by Delhi Commission for FY 2010-11. The appellant has incurred Rs.0.40 crore towards additional amount spent on their account. The Delhi Commission in the Impugned Order has held that the license fee paid by the appellant/petitioner is part of Administrative and General Expenses (A&G Expenses). The Delhi Commission had already considered an annual increase in the license fee included as A&G expenses as per inflation index (4.66%), the license fee approved by Delhi Commission for FY 2011-12 would be Rs.1.17 crore (net of efficiency factor of 4%) since the appellant has paid license fee of Rs.1.49 crore during FY 2011-12 (0.05% of the revenue billed) during FY 2010-11. The Commission has approved Rs.0.32 crore (1.49 - 1.17 crore) on this account. The Delhi Commission has clearly provided in the Impugned Order that for all previous years the Delhi Commission shall true up the license fee paid by the appellant/petitioner to Delhi Commission viz.-a-viz. projected license fee payable for each year at the rate of 0.05% of revenue billed during the previous year after the end of 2nd control period. The Delhi Commission has trued up the license fee paid by the appellant to the Delhi Commission vis-a-vis. the projected license fee payable 0.05% of the revenue billed subject to indexation and efficiency factor applicable for the year during the relevant previous years up to FY 2010-11.

20.2) That for FY 2011-12, the calculation for payment of additional license fee is as follows:

"License Fee actually paid by Appellant in the year 2011-12 = Rs.1.49 Crore

Less : The amount already allowed by the Commission in previous orders = Rs.1.17 Crore (After allowable yearly indexation of 4.66% p.a. from billed revenue for the base year 2006-07 i.e. Rs.2131.84 Crore net of efficiency factor of 4% for the year 2011-12."

20.3) Balance of Rs.0.32 Crore has been allowed in the Impugned Order dated 31.07.2013. Hence, there is no error while truing up the additional license fee in the Impugned Tariff Order which is Rs.0.32 Crore.

21) **Our consideration and conclusion** on this issue No.19, relating to license fee: We have cited above, the rival contentions and relevant Regulations on this issue. Without feeling any need to repeat we directly consider this issue. Before we come to our conclusion for the purpose of testing the legality or proprietary of the Impugned Order on the issue of license fee, we produce below the relevant part of the Impugned Order:

"3.106. With regard to the incremental license fee paid to DERC by the Petitioner, the Commission finds merit in the Petitioner's claim as license fee is linked with the sales of the Petitioner, which is as uncontrollable parameter. The license fee paid by the Petitioner is part of A&G expenses. The Commission has already considered an annual increase in the license fee included as a part of A&G expenses as per the inflation index (4.66%). Thus licensee fee approved by the Commission for FY 2011-12 will therefore be Rs.1.17 crore (net of efficiency factor of 4%). The Petitioner has paid license fee of Rs.1.49 crore during FY 2011-12 (0.05% of the revenue billed during FY 2010-11). Hence the Commission approves Rs.0.32 crore (1.49 Cr – 1.17 crore) on this account. However, for all previous years, the Commission shall true up the license fee paid by the Petitioner to DERC vis-à-vis projected license fees payable for each year @ 0.05% of revenue billed during the previous year, after the end of the Second Control Period."

21.1) The learned Delhi Commission has trued up license fee paid by the appellant/ petitioner to the Delhi Commission vis-à-vis the projected license fee payable for each year at the rate of 0.05% of the revenue billed subject to indexation and efficiency factor applicable for the year during the previous years up to FY 2010-11. The learned Delhi Commission for FY 2011-12 has also made calculation for the appellant of additional license fee. The learned Delhi Commission found that license fee actually paid by the appellant in FY 2011-12 is Rs.1.49 crore (-) Rs.1.17 Crore (the amount already allowed by Delhi Commission in previous years) (after allowable yearly indexation of 4.66% per annum from billed revenue for the base year 2006-07 i.e. Rs.2131.84 crore net of efficiency factor of 4% for the year 2011-12, as per the following table:

Year	Particulars	TPDDL (Rs./Crore)

2006-07	Sales	2131.84
2007-08	Licence Fee	1.07
2008-09	Licence Fee	1.12
2009-10	Licence Fee	1.14
2010-11	Licence Fee	1.16
2011-12	LIcene Fee	1.17

21.2) In view of the above discussion, we do not find any error by the Delhi Commission while truing up license fee in the Impugned Order dated 31.07.2013 which is Rs.0.32 Crore. This issue No.19 is decided against the appellant.

21.3) **Issue No.23**, relating to revised Repair & Maintenance based on revised gross fixed assets: Following are the contentions made by the appellant:

21.4) That the learned Delhi Commission has not considered the situation that at the stage of true up it cannot reopen the tariff principle hence, it can only compare the estimated figure projected at the beginning of the year with the actual figure at the end of the year.

21.5) The Delhi Commission in order dated 23.02.2008 clarified that R&M expenses shall not be trued up on account of change in Gross Fixed Assets (GFA).

21.6) That as per MYT Regulations 2007, R&M expenses are controllable expenses and are not subject to true up. The learned Delhi Commission specifically mentioned in the MYT Order that at the time of true up of the capitalization GFAs may vary but in any circumstance the R&M expenses would not be revised. The learned Delhi Commission in its order dated 23.03.2008 had set the projections for the entire MYT period. In which order it clarified that although the GFA value will vary during the MYT period, however, the R&M expenses which is linked to GFA will remain constant :

"4.162 Any variations on account of R&M expenses shall not be trued up and any surplus or deficit on account of over or under achievement shall be to the account of the Petitioner. ***The Commission clarifies that though the value of GFA is subjected to truing up at the end of***

the Control Period, the Commission, however, shall not true-up R&M expenses as a consequence of the same.”

21.7) That learned Delhi Commission in the Impugned Order, at the time of truing up, has revised the R&M expenses on account of change in GFA which is contrary to the settled law. The learned Delhi Commission has allowed normative R&M expenses by following MYT Regulations 2007 and the MYT Order cannot be varied at the true up stage. The Delhi Commission has provisionally trued up the R&M expenses without there being any concept of provisional truing up in the MYT Regulations 2007. The impact due to the same comes to Rs.36.16 crore. This Appellate Tribunal, further, setting aside the Impugned findings, should direct the Delhi Commission not to undertake truing up of R&M expenses on the basis of revised GFA.

22) **Per contra**, following are the contentions raised on this issue No.23, relating to R&M expenses by the Delhi Commission:

22.1) That after considering submissions of the appellant/petitioner, the learned Delhi Commission, in paragraph 3.126 of the Impugned Order has observed that as per MYT Regulations 2007, O&M expenses permissible in ARR for each year of the control period FY 2007-8 to 2011-12 shall be determined based on R&M expenses, employees cost expenses and A&G expenses. R&M expenses are further linked to GFA while A&G expenses and employee expenses are linked to inflation index.

22.2) That the Delhi Commission after considering various components in paragraph 3.127 of the Impugned Order has observed that the efficiency factor had erroneously been applied during the truing up of employee expenses on SVRS pension for FY 2008-09 and 2009-10 which has now been rectified in compliance with this Appellate Tribunal’s directions in Appeal No.36 of 2008. In paragraph 3.128 of the Impugned Order the Delhi Commission has considered the Pay Commission arrears in true up order for FY 2009-10 in the tariff order of August 2011 and FY 2010-11 in July 2012. In paragraph 3.129 of the Impugned Order the Delhi Commission has provisionally allowed the

capitalization based on the appellant's submission and the audited accounts of the appellant/petitioner. The GFA has been revised for the MYT control period namely FY 2007-08 to FY 2011-12. R&M expenses are based on 'k' factor as defined in the MYT Regulations 2007 where 'k' is a constant governing the relationship between R&M costs and GFA. The learned Delhi Commission has clearly held that due to revision in the GFA under MYT control period FY 2007-08 to FY 2011-12, the R&M expenses have also been revised provisionally subject to final true up of capitalization.

22.3) That in case the GFA changes, R&M expenses are bound to change. That 'k' factor remain constant. In case R&M expenses are not revised as a consequence of change in GFA, this would violate the MYT Regulations 2007, namely, Regulation 5.4.

23) **<u>Our consideration and conclusion</u>** on this issue:

Having cited the rival contentions of the parties and relevant regulations, we directly proceed towards our conclusion.

23.1) The main contention of the appellant on this issue is that in spite of knowing that any State Commission cannot reopen the tariff principle at the true up stage, it can only compare the estimated figures projected at the beginning of the year with the actual figure at the end of the year and having also clarified in earlier tariff order dated 23.02.2008 that R&M expenses shall not be trued up on account of change in gross fixed assets, the Learned Delhi Commission has erroneously revised R&M expenses based on revised gross fixed assets.

23.2) We have carefully gone through paragraph 4.162 of the earlier MYT order dated 23.02.2008 of the Delhi Commission, which we have already quoted above, and see that the Delhi Commission at that time clarified that any variation on account of R&M expenses shall not be trued up and any surplus or deficit on account of over and under-achievement shall be to the account of appellant/petitioner. That further clarification that though the value of GFA is subject to truing up at the end of control period, the Commission, however,

shall not true up the R&M expenses as a consequence of the same. We have carefully gone through the relevant part of the Impugned Order on this issue relating to revised R&M expenses which we reproduce below:

"3.126 As per MYT Regulation, 2007, O&M Expenses permissible in ARR for each year of the control period FY 2007-08 to FY 2011-12 shall be determined based on R&M expenses, Employee Expenses and A&G Expenses. R&M expenses are further linked to GFA, while A&G expenses and Employee expenses are linked to inflation index…

3.129 The Commission has provisionally allowed the Capitalization based on the Petitioner submission and the audited accounts of the Petitioner. Accordingly, the GFA has been revised for the MYT Control period FY 2007-08 to FY 2011-12. R&M expenses are based on 'K' factor as defined in the MYT regulation, 2007 where K is a constant governing the relationship between R&M costs and GFA. Due to revision in the GFA under the MYT Control Period FY 2007-08 to FY 2011-12, the R&M expenses have also been revised provisionally subject to final true up of capitalization.

3.131 With revised true up for the Control Period FY 2007-08 to FY 2010-11, the net impact on the O&M Expenses is as in the table below:

Table 28: Net Impact on the O&M Expenses due to MYT Control Period FY 2007-08 to FY 2010-11 Review"

(Rs. Crores)

Particulars	**FY 2007-08**	**FY 2008-09**	**FY 2009-10**	**FY 2010-11**
Employee Expenses		*0.17*	*0.23*	
R&M Expenses	*0.14*	*(10.05)*	*(11.91)*	*(11.99)*
A&G Expenses		*-*	*-*	*-*
Total O&M Expenses	***0.14***	***(9.88)***	***(11.69)***	***(11.99)***

23.3) After giving consideration to the earlier tariff orders the learned Delhi Commission has in the Impugned Order provisionally allowed the capitalization based on the appellant's submission and audited accounts of the appellant. Accordingly, the GFA had been revised for the MYT control period for FY 2007-08 and 2011-12 and due to this revision in the GFA under the MYT control period, the R&M expenses have also been revised provisionally subject to final

true up of capitalization. Accordingly, the learned Delhi Commission has considered the impact on the R&M expenses in a tabular form with a revised true up for the control period. After analyzing the whole facts and figures, as provided by the appellant, at the time of previous tariff orders and the present Impugned Order, the learned Delhi Commission in paragraph 3.127 of the Impugned Order has clearly observed that employee expenses and A&G expenses had been trued up in the relevant FY up to 2010-11 based on the information furnished by the appellant/petitioner taking into consideration the provisions of MYT Regulations 2007. Since the efficiency factor has erroneously been applied during the true up of employee expenses on SVRS pension for 2008-09 and 2009-10, the same has now been rectified by the Delhi Commission in compliance of this Appellate Tribunal's directions in Appeal No.36 of 2008. This is the whole situation which has led the Delhi Commission to provisionally allow capitalization based on the appellant's submissions and the audited accounts of the appellant. All these factors have led to revision of GFA under MYT control period and the R&M expenses have also been revised provisionally, subject to final true up of capitalization. The learned Delhi Commission in paragraph 3.130 of the Impugned Order clarifies that employee expenses include expenses towards SVRS Pension. However, while calculating the net employee expenses, no efficiency factor has been applied on SVRS Pension. In this view of the matter, we find no merit in the contentions of the appellant and this issue relating to revised R&M based on revised GFA is decided against the appellant.

23.4) **Issue No.26**, relating to non-consideration of impact on revised submission of capitalization based on Electrical Inspector's Certificates: Following are the contentions of the appellant on this issue:

23.5) That Delhi Commission has failed to consider that the appellant is not seeking capitalization on the basis of audited certificates. The entire claim of the appellant after capitalization of the appellant, is based on Electrical Inspector's Certificate submitted by the appellant for the past period.

23.6) That the learned Delhi Commission should have considered the revised details of Electrical Inspector's Certificate, submitted by the appellant through its letter dated 16.03.2013. The Electrical Inspector's certificate dated 16.07.2013 was submitted by the appellant just 15 days prior to the passing of the Impugned Order.

23.7) That regarding third party/agency appointed by the Delhi Commission for physical verification of the capital assets, this Appellate Tribunal should direct the Delhi Commission to furnish the process in a time bound manner.

24) **Per contra**, the counsel for the Delhi Commission has argued as under:

24.1) That learned Delhi Commission has provisionally allowed the actual capitalization based on the audited accounts. The capitalization in any case cannot be more than the audited accounts which have been considered provisionally by the Delhi Commission in the Impugned tariff order. The learned Delhi Commission has already appointed third party/agency for physical verification of the capital assets.

24.2) The final true of the capitalization will be considered once the report of such verification is submitted by the third party/agency. Hence, this issue of capitalization based on EI Certificates will be considered at the time of final true up of capitalization.

25) **Our consideration and conclusion**: It is apparent from the record that the learned Delhi Commission has already appointed third party/agency for physical verification of the capital assets. The Delhi Commission has in the Impugned Order given the clarification that the final true up of capitalization will be considered once report is accepted by the Delhi Commission. The Delhi Commission has clearly observed that this issue will be considered at the time of final true up of capitalization.

25.1) In view of the above, we do not find any substance or merit in the contentions of the appellant on this issue because the learned Delhi Commission has

already appointed the third party/agency for physical verification of the capital assets. The learned Delhi Commission is directed to emphasize on the third party/agency for prompt physical verification of the capital assets of the appellant and thereafter consider the same at the time of final true up of capitalization. This issue is accordingly decided.

25.2) **Issue No.27,** relating to wrongful computation of Advance Against Depreciation (AAD): Following are the contentions raised by the appellant:

25.3) That the learned Delhi Commission cannot not reopen the basis of determination of tariff at the stage of truing up.

25.4) That the learned Delhi Commission, at the time of passing the MYT order dated 23.02.2008 had clarified that cumulative depreciation would mean that depreciation which has been utilized towards AAD since depreciation utilized towards working capital and Capex will no longer be available for loan repayment otherwise it will lead to utilization of the same amount twice. The learned Delhi Commission, contrary to its own order, has revised the methodology of calculating the AAD at the truing up stage.

25.5) That the learned Delhi Commission, while considering the accumulated depreciation for the purposes of AAD has considered the total depreciation allowed by it in the Impugned Order dated 31.07.2013, without reducing the depreciation utilized towards the working capital and capital expenditure (Capex) which has resulted in excess accumulated depreciation considered for the purpose of calculating the AAD.

25.6) That the impugned finding is contrary to the settled position of law that at the stage of truing up, Delhi Commission cannot reopen the basis of determination of tariff as held by this Appellate Tribunal in the case of ***Meghalaya State Electricity Board Vs. MERC*** *reported at 2010 ELR (APTEL) 940.*

25.7) That clause 5.18 of MYT Regulations 2007 notified by Delhi Commission provides a formula for calculating AAD. The learned Delhi Commission for the calculation of AAD, has taken the entire depreciation allowed for the year as available for repayment of loan in Table 39 of the Impugned Order contrary to its own MYT order dated 23.02.2008. The Delhi Commission has failed to justify or specify any reason for deviating from the earlier order at the stage of truing up.

25.8) That the financial impact on the appellant due to wrongful calculation of AAD is to the tune of Rs.401.66 Crore. The learned Delhi Commission has wrongly considered the figure of cumulative depreciation in the Impugned Order by including the depreciation amount which had already been used for funding capex and working capital in earlier orders hence, the same amount could not be used for funding capex/working capital and repayment of loans at the same time.

25.9) That this Appellate Tribunal should direct Delhi Commission to adopt the methodology adopted in the MYT order dated 23.02.2008 while calculating the AAD.

26) **Per contra**, the following contentions have been raised on behalf of the Delhi Commission:

26.1) That the Delhi Commission had considered AAD for the control period FY 2007-08 to FY 2011-12 in accordance with clause 5.18 of the MYT Regulations, 2007, detailed in Table 40 of the Impugned Order. The Delhi Commission computed the AAD based on the revised depreciation and accumulated depreciation approved in the truing up for the control period. Accordingly, the AAD has been considered provisionally for the control period FY 2007-08 to FY 2011-12 as tabulated in Table 41 of the Impugned Order. In this way, the Delhi Commission has not allowed AAD.

26.2) Though no AAD has been claimed or allowed by the Delhi Commission in its MYT order dated 23.02.2008 hence, the said contention of wrong calculation is without substance.

26.3) That the difference between cumulative depreciation had occasioned due to the fact that at the time of taking over the assets of erstwhile Delhi Vidyut Board (DVB), the appellant had not taken the depreciation accrued to the said Board. The appellant had taken the value of Gross Fixed Asset (GFA) as GFA with DVB but had not taken the depreciation, hence there is a difference in cumulative depreciation.

27) <u>Our consideration and conclusion on this Issue No.27, relating to wrongful computation of AAD:</u>

27.1) We have cited above the contentions of the parties on this issue. The impugned findings on this issue are as under:

"Impugned findings

3.149 The Commission has computed the Advance against depreciation based on the revised depreciation and accumulated depreciation approved in the truing up for the control period.

3.150 Accordingly, the AAD has been considered provisionally for the control period FY 2007-08 to FY 2011-12."

27.2) We have found that the appellant had submitted the AAD calculation in tariff petition for true up of control period FY 2007-08 to FY 2011-12 which is reproduced as under:

S. No.	Particulars	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
1.	1/10 of the Opening Loan (A)	113.51	122.37	132.58	159.42	178.69
2.	Debt Repayment (B)	106.08	106.20	115.06	125.26	148.68
3.	Minimum of A&B	106.08	106.20	115.06	125.26	148.68
4.	Depreciation as per ARR routed for repayment of Loans	72.43	81.84	92.13	105.26	119.97

5.	Excess of Min (A,B) over depreciation	33.65	24.36	22.93	20.00	28.71
6.	Cumulative Repayment of the Loan(s) as considered for working out Interest on Loan (C)	201.89	308.09	423.15	548.41	697.10
7.	Cumulative Depreciation (D)	458.24	540.08	632.21	737.47	857.44
8.	Excess of (C) over (D)	(256.35)	(231.99)	(209.06)	(189.06)	(160.34)

27.3) The learned Delhi Commission while truing up the AAD had reviewed the submissions of the appellant and based on the prudence check found that the AAD was not admissible as per the following calculation (Table 4) of the Impugned Order:

S. No.	Particulars	FY 2007-08	FY 2008-09	FY 2009-10	FY 2010-11	FY 2011-12
1.	1/10 of the Opening Loan (A)	113.32	117.66	136.45	147.26	171.81
2.	Debt Repayment (B)	106.08	106.20	115.06	125.26	148.66
3.	Minimum of A&B	106.08	106.20	115.06	125.26	148.66
4.	Depreciation as per ARR routed for repayment of loans	72.4	80.99	90.02	101.21	113.99
	Excess of Min (A,B) over depreciation	33.35	25.21	25.04	24.05	34.70
5.	Cumulative Repayment of the Loan(s) as considered for working out Interest on Loan (C)	201.89	308.09	423.15	548.41	697.10
6.	Cumulative Depreciation (D)	837.50	918.49	1008.51	1109.72	1223.71
7.	Excess of (C) over (D)	(635.61)	(610.40)	(589.36)	(561.31)	(526.61)
8.	AAD	0.00	0.00	0.00	0.00	0.00

27.4) It appears that the Delhi Commission had determined the AAD as per methodology in the MYT Regulations, 2007. The AAD allowed by the Delhi Commission for utilization shall form part of the accumulated depreciation, observing no financial impact on the tariff in respect of the AAD calculation in both the methodologies.

27.5) It is true that the learned Delhi Commission at the time of passing of MYT order dated 23.02.2008 clarified that cumulative depreciation will mean that depreciation which has been utilized towards AAD since depreciation utilized between working capital and capex will no longer be available for repayment otherwise it will lead to utilization of same amount twice. We are unable to accept the contention of the appellant on this issue since the learned Delhi Commission had dealt with the same in table 40 & 41 of the Impugned Order and has not allowed AAD. It appears from the record that no AAD has been claimed or allowed by the Delhi Commission in the MYT order dated 23.02.2008. The said difference in cumulative depreciation appears to have been occasioned due to the fact that at the time of taking over the erstwhile DVB, the appellant had not taken the depreciation accrued to the said Board. The appellant had taken the value of GFA as GFA with DVB but had not taken the depreciation. In view of the above discussion, we do not find any merit in the contentions of the appellant and thus the issue is decided against the appellant.

28) Issue No.29, relating to wrongful adjustment of approved cost Work In Progress (WIP) as on 01.04.2007 in FY 2007-08. The appellant has contended as under:

28.1) That during the policy direction period, i.e. from 01.07.2002 to 31.03.2007, the learned Delhi Commission was allowing the financing of capital expenditure on the basis of Capital Work In Progress (CWIP). Upon notifying the MYT Regulations 2007, the learned Delhi Commission changed its approach and started allowing the financing capex based on issuance of certificate of the Electrical Inspector (EI) as evident from the extracts of order dated 23.02.2008, which is as under:

"3.33 The Commission has accordingly evaluated the prudent cost which can be allowed by capitalization of assets in the respective years. The Commission accordingly firms up the capitalization of assets upto FY 06 and approves the same on a provisional basis for FY 07. ***However, the Commission shall consider capitalization of such schemes currently pending for capitalization upto 31 March, 2007 (i.e. before commencement of MYT Control Period) in the financial year in which the***

relevant Electrical Inspector's Certificate is issued. The schemes proposed by the Petitioner for capitalization during the MYT Control Period as per the Business Plan, shall be trued up at the end of the Control Period as per the MYT Regulations, 2007".

28.2) That during the policy direction period, the financing was allowed on the basis of CWIP and an amount of Rs.293 Crores was yet to be capitalized as on 01.04.2007. These assets got capitalized during subsequent period. The appellant submitted the details of capitalization on the basis of EI's certificates in terms of the MYT order dated 23.02.2008, passed by the Delhi Commission for the opening capex of Rs.293 Crores and also submitted year wise capitalization based on EI certificate for MYT period.

28.3) That the appellant in its ARR petition claimed capitalization based on receipt of EI certificates and reduced the capitalization from respective years which was done out of capital expenditure incurred till 31.03.2007. The capitalization of opening CWIP was across different years based on receipt of EI certificate and appellant had removed the same in the respective years to avoid duplication in allowance of financing to the appellant.

28.4) That out of outstanding approved financing of Rs.293 Crores as on 31.03.2007, the EI certificates were received for Rs.261 Crores during the control period (capex of Rs.293 Crores does not include capitalization of FY 2005-06 and FY 2006-07 for which EI certificate was pending till 31.03.2007).

28.5) That the learned Delhi Commission ought to have considered the submissions of the appellant and reduced the capitalization by CWIP as and when the EI certificates were issued because additions in capitalization have been considered in the same manner. However, while passing the Impugned Order, the learned Delhi Commission has considered and reduced the capitalization of Rs.293 Crores during the control period in an arbitrary manner as under:

(a) Reduced the capitalization by CWIP of Rs.251 Crores in FY 2007-08

(b) Remaining amount of Rs.41.65 Crores in the next four financial years.

28.6) That this Appellate Tribunal should direct the Delhi Commission to reduce capitalization related to the approved outstanding CWIP as on 01.04.2007 amounting to Rs.293 Crores from the year in which the capitalization had been allowed based on the EI certificates.

29) **Per contra,** the Delhi Commission has contended as under:

29.1) That the opening CWIP FY 2007-08 was projected to be capitalized as per Table 31 of the Impugned Order and the appellant had not indicated the capitalization on the entire CWIP in the MYT period. Hence, the Commission took the view that the opening CWIP in FY 2007-08 should have been capitalized on priority basis in the MYT control period as the distribution schemes generally completed in 1-2 years of time. Hence, Delhi Commission decided that such opening CWIP FY 2007-08 would be considered as capitalized within the MYT control period (FY 2007-08 to FY 2011-12).

29.2) That the Delhi Commission had allowed capitalization of capital expenditure to the extent of Rs.1614.00 Crores for the whole control period. The appellant had submitted the actual capitalization of Rs.1713.08 Crores against Rs.1614.00 Crores allowed by the Delhi Commission. The Commission considered the actual capitalization as submitted by the appellant in the truing up for the whole control period.

29.3) That the learned Delhi Commission has analyzed the available details to consider provisional capitalization for the whole control period. The appellant had submitted total capitalization during the control period as Rs.1583.98 Crores including opening CWIP FY 2007-08 capitalization. Accordingly, the capitalization for the opening CWIP FY 2007-08 had been taken for, as given by the appellant. For the years FY 2009-10 to FY 2011-12, the opening CWIP FY 2007-08 had been capitalized on prorate basis vis-a-vis the actual capitalization as indicated by the appellant during the FY 2008-09 to FY 2011-12. The capitalization has been approved provisionally by Delhi Commission.

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

29.5) That the Delhi Commission has clearly mentioned that pending completion of physical verification of the assets and final true up of capitalization on that basis, the Delhi Commission proposes to adopt the details of year wise capitalization as per audited accounts for undertaking a provisional true up in respect of the distribution companies. This will result in reduction in the provision for depreciation and Return on Capital Employed (RoCE) on account of the lower level of the capitalization actually undertaken by these utilities during the above MYT period as reflected in their audited accounts. This would, however, be subject to the final figures of capitalization based on the final outcome of the ongoing physical verification of the assets.

29.6) That the appellant had not capitalized certain amount of investment assets on or before 01.04.2007 (policy direction period) for which the projections on utilization of such assets (capitalization) were proposed in Table 93 of the MYT tariff order dated 23.02.2008.

29.7) That the Delhi Commission has considered to apply capitalization of assets on a First In First Out (FIFO) basis and considered the opening balance of such investment on assets during policy direction period to be put to use before the completion of the MYT control period.

29.8) That as appellant was getting return on CWIP and in the first MYT control period the pattern of funding was changed from WIP to the assets capitalized. It means that the appellant will be entitled for return only on capitalized assets, however, in order to gain more the appellant capitalized the assets for which funding was made during the year and kept open the WIP during policy direction period so that it can get return on both. In order to give relief to consumers, the learned Delhi Commission firstly adjusted capitalization of WIP during MYT period and then only adjusted capitalization of all assets created subsequently.

30) <u>Our consideration and conclusion on Issue No.29, relating to wrongful adjustment of approved cost work in progress:</u>

30.1) We have cited above in detail the rival contentions made by the parties and the detailed figures for which no repetition is proper just to increase the volume of the judgment. The impugned findings on this issue are as under:

"3.138 The Commission has analyzed the available details to consider provisional capitalization for the Control Period FY 2007-08 to FY 2011-12. The Petitioner has submitted total capitalization during the control period as Rs.1583.98 crore including opening CWIP FY 2007-08 capitalization. Accordingly, the capitalization for the opening CWIP FY 2007-08 has been taken for the as given by the Petitioner. For the years FY 2009-10 to FY 2011-12, the opening CWIP FY 2007-08 has been capitalized on prorate basis vis-à-vis the actual capitalization as indicated by the Petitioner during the years FY 2008-09 to FY 2011-12."

30.2) The learned Delhi Commission in paragraph 3.135 of the Impugned Order dated 31.07.2013 quotes as under:

"3.135 As per Petitioner submission, capitalization out of opening CWIP of Rs.554.88 crore FY 2007-08 has been done to the extent of Rs.292.07 crore upto end of FY 2011-12."

30.3) The main contention of the appellant on this issue is that during the policy direction period the learned Delhi Commission was allowing the financing of

capital expenditure on the basis of capital WIP but upon notifying the MYT Regulations, 2007 it had changed its approach and started allowing financing capex based on issuance of certificate of EI. During the policy direction period, financing was allowed on the basis of capital WIP and at that time an amount of Rs.293 Crores was yet to be capitalized as on 01.04.2007 which assets got capitalized during subsequent period. Accordingly, the appellant in its ARR petition had claimed capitalization based on receipt of EI certificates and as per the appellant it had reduced the capitalization from respective years which was done out of capital expenditure incurred till 31.03.2007. As per the appellant, out of outstanding approved financing of Rs.293 Crores as on 31.03.2007, the EI certificates were received for Rs.261 Crores during the control period and the capex of Rs.293 Crores does not include capitalization of FY 2005-06 and FY 2006-07 for which EI certificate was pending till 31.03.2007. On this basis, the appellant wants reduction of capitalization by CWIP as and when the EI certificates were issued.

30.4) After going through the whole issue in depth, we do not find any merit in the contentions of the appellant because the approach taken by the Delhi Commission in the Impugned Order appears to be just, sound, legal and correct one, requiring no interference by this Appellate Tribunal. We do not find it proper to direct the Delhi Commission to reduce the capitalization related to the approved outstanding capital WIP as on 01.04.2007 amounting to Rs.293 Crores from the year in which the capitalization had been allowed based on the EI certificates. It appears that the capitalization for opening CWIP FY 2007-08 had been taken as given by the appellant. For the years FY 2009-10 to FY 2011-12 the opening CWIP FY 2007-08 had been capitalized on pro rate basis vis-à-vis capitalization as indicated by the appellant during the years FY 2008-09 to FY 2011-12. The Commission clearly mentions in the Impugned Order that the Delhi Commission is also in the process of undertaking the true up of the capitalization during the first MYT control period which also involves physical verification of assets with the procurement and the accounts records of the utilities and the final true up on this basis will be possible only after the exercise of physical verification is completed. The

Delhi Commission clearly observes in the Impugned Order that audit accounts of the utilities indicated a significantly lower level of capitalization than the anticipated capitalization considered in the tariff years passed by the Delhi Commission for the first MYT control period. The Delhi Commission pending physical verification of assets and final true up on that basis proposes to adopt the details of year wise capitalization as per audit accounts for undertaking the final true up in respect of distribution companies which will result in reduction in the provision of depreciation and Return on Capital Employed (RoCE) on account of lower level of the capitalization actually undertaken by the utilities during the said MYT control period as reflected in their audit accounts and the same would be subjected to final figure of capitalization based on final outcome on the physical verification of the assets. It appears from the record that the appellant had not capitalized certain amount of investment assets on or before 01.04.2007 (policy direction period) for which projections on capitalization of such assets (capitalization) were proposed in Table 93 of tariff order dated 23.02.2008. The approach adopted by Delhi Commission appears to be sound and legal one. Consequently, this issue No.29, relating to wrongful adjustment of approved cost WIP, is decided against the appellant.

31) Issue No.30, relating to Late Payment Surcharge (LPSC) on power purchase cost: The contentions of the appellant on this issue are as under:

31.1) That the learned Delhi Commission has failed to consider the LPSC levied by IPGCL, PPCL and DTL is illegal on account of the fact that the bills were raised retrospectively by all these State utilities.

31.2) That the Delhi Commission issued tariff order for FY 2011-12 in respect of the appellant, the State Gencos and Delhi Transco Ltd. in 2011. Since the retail tariff is determined prospectively, the appellant was allowed to recover revised tariff from consumers prospectively from September 2011 till the issuance of next tariff order. As such recovery of billing at the revised tariff starts from October, 2011.

31.3) That the revised tariff qua IPGCL, PPCL and DTL were implemented as under:

(i) In September 2011, raised the bill as per the revised tariff.

(ii) In the said bills IPGCL, PPCL and DTL raised the bill for differential Tariff for the period April, 2011 to August, 2011 (i.e. the difference between tariff already charged from April, 2011 to August, 2011 and the revised tariff issued by the learned Delhi Commission in August, 2011) in one go.

31.4) That admittedly the retail tariff determined in the tariff order dated 26.08.2011 for FY 2011-12, was not even sufficient to recover the operational costs as is evident from the Impugned Order dated 31.07.2013 and the statutory advice dated 01.02.2013, wherein the Delhi Commission had acknowledged:

(i) Revenue gap of Rs.943.85 Crores for FY 2011-12 in the Impugned Order dated 31.07.2013 and

(ii) Regulatory asset of Rs.4734.17 Crores as per the statutory advice dated 01.02.2013 due to non-cost reflective tariff.

31.5) That since the revised tariff was implemented only from September, 2011 onwards and the payment of arrears raised by IPGCL, PPCL and DTL for April 2011 to August, 2011 was not possible from applicable retail tariff in October, 2011. The appellant vide its communication dated 01.03.2012 and 26.09.2011 raised the above concerns before IPGCL, PPCL and DTL in the larger interest of consumers and requested payment of arrear bills in six equal half yearly installments, with first installment becoming due from the date of correspondence by Delhi Commission. The appellant also requested them to waive LPSC but they ignored the request of the appellant and vide letter dated 16.04.2012, 23.02.2012, 01.11.2011 and 04.10.2011 directed the appellant to make full payment of the bills raised along with the late payment surcharges. In the absence of cost reflective tariff, the appellant was unable to make payments in time which resulted in LPSC.

31.6) That neither the generation nor transmission MYT Regulations, 2007 permit IPGCL, PPCL and DTL to recover tariff retrospectively hence, the bills raised by them are contrary to the rules framed by Delhi Commission.

31.7) That while disallowing LPSC amounting to Rs.5 Crores, the learned Delhi Commission failed to consider that the bills raised by IPGCL, PPCL and DTL, (the State Gencos) is illegal and contrary to the settled legal position that tariff cannot be changed retrospectively, as held in various judgments of this Appellate Tribunal and also of the Hon'ble Supreme Court.

31.8) That the appellant to avoid any threat of regulation of power paid the amount with LPSC praying to the Delhi Commission to allow the same in the ARR which has wrongfully been disallowed by the Delhi Commission.

32) **Per contra,** the learned Delhi Commission has contended that LPSC on power purchase cost/transmission charges is a kind of penal charge. Hence, any bill raised by Gencos/Transcos is to be paid by the Discoms within the due date under normal commercial practices. The difference of power purchase cost/transmission charges is allowed to the Discoms at the time of truing up for the relevant financial year with carrying cost. Therefore, the appellant should have paid the bills by the due date to avoid LPSC.

33) Our consideration and conclusion on this Issue No.30: Having cited the rival contentions on this issue, we deal with the issue directly. The impugned findings are as under:

"3.78 During prudence check of power purchase cost, the Commission observed that the late payment surcharge amounting to Rs.23.80 crore in respect of Gencos/DTL etc. are also included in the power purchase cost of FY 2011-12. The Petitioner has confirmed details of late payment surcharge for FY 2011-12. The Commission disallows the amount of Rs.23.80 crore in respect of late payment surcharges in the power purchase cost of FY 2011-12."

33.1) The learned Delhi Commission has clearly observed in the Impugned Order that the late payment surcharge are also included in the power purchase cost of FY 2011-12. Since the appellant had confirmed the payment of late payment surcharge for FY 2011-12, the Delhi Commission has disallowed the amount of Rs.23.80 Crores in respect of late payment surcharge in the power purchase cost for FY 2011-12. According to the Delhi Commission, the difference of power purchase cost is allowed to the Discoms at the time of truing up for the relevant financial year with carrying cost. Keeping the above in view, we do not find any merit, hence this issue is decided against the appellant.

34) Issue No. 31 relating to disallowance of Income Tax: On this issue, following contentions have been made on behalf of the appellant:

34.1) That the disallowance of actual income tax for FY 2011-12 at the stage of truing up is contrary to the past orders of the Delhi Commission, including claw-back/reduction of income tax allowed earlier. The learned Delhi Commission has, in the Impugned Order, instead of allowing the actual income tax, wrongly allowed lower of income tax actually assessed or income tax computed on Return On Equity (ROE). The Impugned finding is contrary to the settled position of law that any State Commission, at the stage of truing up, cannot reopen the basis of determination of tariff as held by this Appellate Tribunal in ***Meghalaya State Electricity Board Vs. MESRC*** (supra).

34.2) That no explanation with regard to the treatment of deferred tax liability of the appellant has been specified in the Impugned Order.

34.3) That the Delhi Commission has, since 23.02.2008 allowed actual income tax. For the first time it has in the Impugned Order allowed the lower of actual income tax or income tax computed based on ROE.

34.4) That at the time of passing of MYT order dated 23.02.2008 which had laid down MYT framework subsequent orders passed by the Delhi Commission, it was an understanding of the Delhi Commission and the appellant etc. that the

income tax will be allowed as per actual. However, the Delhi Commission has in the Impugned Order disallowed the income tax paid by the appellant, completely altering its own methodology that was followed consistently during the past years.

34.5) That the learned Delhi Commission in the Impugned Order, has retrospectively altered/clawed back the income tax held in the earlier period for which truing up stage was over particularly when, there is no concept of second truing up under the MYT Regulations 2007. Even if it has power to undertake second truing up, it has failed to give any reason or justification for the same. The learned Delhi Commission has unlawfully taken back the income tax already allowed for the entire control period which had resulted in disallowance of Rs.50.93 Crores for FY 2007-08 to FY 2010-11. Apart from it, the appellant had suffered a loss of Rs.60.75 Crores towards disallowance of actual income tax in FY 2011-12.

34.6) That the income tax is a statutory liability on which the appellant has no control and therefore Delhi Commission should have allowed income tax as per actual.

34.7) That the appellant is entitled to income tax along with carrying cost on the amount of Rs.245 Crores relating to policy period.

34.8) That the Hon'ble Supreme Court in ***DERC Vs. BYPL*** *reported at (2007) 3 SCC page 33* rejected the reduction of depreciation from 6.69%to 3.75% while directing the Delhi Commission to give the balance.

34.9) That the appellant vide letters dated 13.02.2013 and 04.07.2013 submitted income tax challans and actual details of income tax paid by it during hearing before the learned Delhi Commission and clarified that due to past allowances pertaining to policy direction period which had been allowed during the MYT control period, has resulted in additional tax liability which needs to be allowed in the ARR.

34.10) That the learned Delhi Commission in the Impugned Order has ignored the submission of the appellant and deferred the recovery of income tax on past allowances subject to providing documentary evidence.

34.11) That the learned Delhi Commission has ignored the fact that the depreciation was allowed by Delhi Commission itself in its MYT order dated 23.02.2008. Since the actual tax paid by the appellant for FY 2007-08 was allowed by learned Delhi Commission, hence, this issue was not raised by the appellant earlier. However, the learned Delhi Commission in the Impugned Order has deferred the recovery of income tax which has resulted in the loss of income tax paid by the appellant towards legitimate claim such as income tax paid on Rs.245 Crores along with carrying cost relating to policy direction period.

34.12) That Section 115JB of the Income Tax Act 1961 was amended by the Finance Act No.2 of 2009 and was made effective retrospectively from 01.04.2002. In terms of the said amendment, the appellant was required to include provision of doubtful debts while calculating book profits for the purpose of income tax under Minimum Alternate Tax (MAT). The appellant submitted before the learned Delhi Commission year wise details of MAT in its letters dated 13.02.2013 and 04.07.2013 along with income tax return and challan. The appellant is enjoying tax holiday benefit under section 80IA of the Income Tax Act, 1961. However, due to Section 115JB of the Income Tax Act, i.e. MAT provision, the appellant is required to pay MAT.

34.13) That **the learned Delhi Commission in the Impugned Order has clawed back /deducted the income tax allowed for FY 2009-10 stating that the reallowance of the disallowance/reduction shall be subject to the documentary evidence**.

34.14) That MYT Regulations 2007 do not permit second truing up. Once the Learned Delhi Commission had trued up, it was not available to reopen the issue already decided. The appellant seeks relief to direct Delhi Commission to allow

Rs.15.26 Crores being statutory liability arisen due to amendment of section 115 JB of Income Ta Act retrospectively.

34.15) That since the appellant is enjoying tax holiday under section 80 IA of Income Tax Act 1961 till 2015-16, the Delhi Commission has been allowing income tax on MAT basis although the appellant is entitled for normal income tax including deferred tax liability. However, due to applicability of MAT provision, the appellant is required to pay the income tax despite availability of tax holiday period under FY 2015-16.

34.16) That the appellant is making the provision of deferred tax as required by Accounting Standard 22 and reversing the same on the premise that the same is recoverable from consumers as and when it becomes payable after tax holiday period. While seeking clarification on this issue, the appellant vide letter dated 13.02.2013 requested learned Delhi Commission to clarify the mechanism/methodology that will be adopted by Delhi Commission on the issue of deferred tax liability. The learned Delhi Commission did not give any clarification for the first control period and at present is restricting the tax liability to actual tax or tax based on ROE whichever is lower. Still it is not clear what methodology will be adopted by Delhi Commission to address the issue of recovery of deferred tax in later years.

34.17) That this Appellate Tribunal should direct the Delhi Commission to allow Income Tax paid by the appellant up to FY 2011-12 or in the alternative to allow income tax along with carrying cost on the amount of Rs.245 Crores relating to policy direction period and not upset the truing up orders passed in respect of income tax for FY 2007-08 to FY 2011-12 due to retrospective amendment in section 115 JB of Income Tax Act 1961 and clarify the mechanism/methodology for treatment of deferred tax utility of appellant.

35) **Per contra,** the learned counsel for the Delhi Commission has submitted as under:

35.1) That Regulation 5.21 of MYT Regulations 2007 specifies that the income tax actually payable or paid shall be included in the ARR. Regulation 5.22 specifies that tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed. On this basis the Delhi Commission has observed in the Impugned Order that the appellant/petitioner had taken into consideration the ROE at 16% in its calculation for arriving at the ROE for the purpose of allowable tax on ROE.

35.2) That Regulation 5.10 of the MYT Regulations 2007 specifies that where equity employed is in excess of 30%, the amount of the equity for the purpose of tariff shall be limited to 30% and the balance amount shall be considered as notional loan and where the actual equity employed is less than 30% the actual equity and debt shall be considered. In this way, the Delhi Commission has considered equity as per MYT Regulations 2007.

35.3) That the learned Delhi Commission having obtained the copies of income tax return acknowledgement for all the years of the control period from FY 2007-08 to FY 2011-12 from the discom (appellant) noted the actual tax assessed for the respective financial year. **The Delhi Commission approves the income tax actually assessed or computed based on the equity component whichever is lower in accordance with the MYT Regulations 2007. However, if any tax assessed/paid in any financial year is higher than the tax allowed due to the reason that the higher tax is on account of any arrears of income tax pertaining to past years, the utility may claim the same in the ARR for the relevant year subject to producing documentary evidence establishing the claim towards arrears.**

35.4) That the Delhi Commission has computed the ROE at 16% post tax in accordance with MYT Regulations 2007, in a tabular form in the Impugned Order.

35.5) That the Delhi Commission has trued up the income tax as per relevant MYT Regulations 2007 while truing up the income tax for the control period for FY

2007-08 to FY 2011-12. **<u>The learned Delhi Commission has candidly submitted that in case the appellant still submits proof that higher amount of tax has been paid in the control period on equity part, the Delhi Commission will consider the same.</u>**

36) **<u>Our consideration and conclusion on this Issue No. 31 relating to disallowance of Income Tax:</u>** We have in detail cited the rival contentions in the preceding paragraphs. Without feeling any need to reiterate them, we directly proceed towards our consideration. In order to test the legality or validity of the Impugned Order, we produce the relevant part there of as under:

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

36.1) The main contention of the appellant is that after allowing income tax in the previous orders and after allowing the same at the stage of truing up the Delhi Commission cannot reopen the basis for determination of tariff. Since the FY 2005-08 the Delhi Commission has been allowing actual income tax, Delhi Commission could not for the first time in the Impugned Order allow the lower of actual income tax or income tax computed based on ROE. Further, after passing of the MYT order dated 23.02.2008 which had laid down the MYT framework and after seeing the subsequent orders of the Delhi Commission, the appellant's understanding was that the income tax in future would be allowed as per actual. To the contrary the learned Delhi Commission has disallowed the actual income tax paid by the appellant and completely altered its own methodology while passing the Impugned Order. Further contention of the appellant is that the learned Delhi Commission in the Impugned Order has retrospectively altered/clawed back the income tax allowed for earlier period for

which truing up stage is over, particularly when there is no concept of second truing up in the MYT Regulations 2007. If the Delhi Commission had power to undertake the second truing up, it had failed to give any reason or justification for changing the methodology followed consistently during the past years. Further the learned Delhi Commission in the Impugned Order has deferred the recovery of income tax which resulted in loss of income tax paid by the appellant towards legitimate claim such as income tax paid on Rs.245 Crores along with carrying cost relating to policy direction period. According to the appellant, the section 115 JB of the Income Tax Act 1961 was amended by the Finance Act No.2 of 2009 which was made applicable retrospectively from 01.04.2002 and in terms of the said amendment, the appellant was required to include provision of doubtful debts while calculating book of profit for the purpose of computing income tax under MAT. The appellant alleges to have submitted year wise details of MAT vide letters dated 13.02.2013 and 04.07.2013 along with income tax return and challans. The appellant says that it is enjoying tax holiday benefit under section 80IA of Income Tax Act, 1961, till FY 2015-16. However, due to the insertion of amendment in Section 115JB i.e. the MAT provision, the appellant was required to pay Minimum Alternate Tax (MAT). The learned Delhi Commission is allowing on MAT basis although the appellant is entitled to normal income tax including deferred tax utility. However, due to applicability of MAT provision, the appellant is required to pay income tax despite availability of tax holiday period until FY 2015-16. The appellant is making the provision of deferred tax as required by Accounting Standard 22 and reversing the same on the premise that the same is recoverable from the consumers as and when it becomes payable after tax holiday period. The appellant wants some clarity from the Delhi Commission as to what methodology shall be adopted by it to address the issue of recovery of deferred tax in later years.

36.2) We have cautiously and deeply considered the said submissions of the appellant on this issue. Various contentions have been raised in support of this issue to which we do not agree because Regulation 5.21 and 5.22 of the MYT Regulations 2007, respectively specify that income tax actually payable or

paid shall be included in the ARR and if any income tax is to be paid it shall be limited to tax on ROE component of the capital employed. Further, Regulation 5.10 of the MYT Regulations 2007 provides that 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. If actual equity employed is less than 30% the actual equity shall only be considered. The learned Delhi Commission has considered the equity as per MYT Regulations 2007. Before passing the Impugned Order, the learned Delhi Commission having obtained the copies of income tax acknowledgement for all the years of the control period namely FY 2007-08 to FY 2011-12 from the appellant had noted actual tax assessed for the respective financial year. The learned Delhi Commission in the Impugned Order has approved the income tax actually assessed or computed based on the ROE component whichever is lower in accordance with MYT Regulations 2007. The learned Delhi Commission in the Impugned Order has given a clarification that if the tax assessed or paid in any financial year is higher than the tax allowed due to the reason that a higher tax is on account of any arrears of income tax pertaining to the past years, the utilities like Discom/appellant herein, may claim the same in the ARR for the relevant year, subject to producing documentary evidence establishing the claim towards arrears. In the written submissions filed on behalf of the Delhi Commission and more particularly Mr.Pradeep Misra, learned counsel for the Delhi Commission during arguments has candidly submitted that in case the appellant still submits the proof that higher amount of tax has been paid in the control period on equity part, the Delhi Commission will consider the same. In view of the above discussion, we do not find any perversity in the Impugned Order on this issue. All the contentions raised on behalf of the appellant are sans merit. This issue is decided against the appellant.

37) **<u>Issue No.33, relating to no clarification on rebate:</u>** On this issue, the appellant has contended as under:

371.) That the appellant had the option of changing the monthly billing cycle. The appellant during FY 2013-14 has been billing single phase domestic consumer in 45 day cycle rather than earlier billing cycle followed by the appellant of 60 days. In the light of change in billing cycle by the appellant, the learned Delhi Commission had directed the appellant to allow rebates depending on the number of bills raised during the financial year and interest cost at the SBI PLR rate at 14.45% for the average number of days for which the billing has been advanced in respect of single phase domestic consumers (up to 10 kV) at the end of each financial year.

37.2) That the learned Delhi Commission has failed to consider that the appellant had changed the billing cycle of consumers for the benefit of consumers so that they are not burdened by the high billed amount at once. Neither MYT Regulations 2011 nor MYT order 13.07.2012 (which lays down parameters for the second control period) stipulates any rebate to be provided to the single phase domestic consumers (up to 10 kV). As such the learned Delhi Commission in the Impugned Order has modified MYT Regulations 2011 without following the process of law.

37.3) That the learned Delhi Commission has failed to consider that the rebate is allowed on the full billed amount and not the bill which pertains to the reduced billing cycle. If the billing cycle is reduced then to that extent meter reading, bill printing, bill distribution and other associated expenses are also increased for the appellant which are directly linked to increase in number of billing cycles. These increased expenses incurred by the appellant should have been considered.

37.4) That in terms of MYT Regulations, the Operation and Maintenance cost (O&M) is allowed to the appellant on normative basis and the expenditure thus borne by the appellant in case when the billing cycle is reduced, is not considered by the Delhi Commission while allowing rebate to the consumers.

37.5) That there is no justification for calculating the rate used, for rebate at 14.45% which is at much higher rate than allowed to the appellant for working capital etc.

38) **Per contra**, the learned counsel for the Delhi Commission has argued as under:

38.1) That the Delhi Commission has not directed the appellant to shift/change two monthly billing regime for single phase domestic consumers.

38.2) That option is open to the appellant whether to shift or change any billing cycle as per their cost analysis basis.

39) **Our consideration and conclusion**: The impugned findings on this issue are as under:

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

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

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

4.121 The other approach would be to retain the existing provision for working capital in the tariff on a uniform basis, but mandate a correction by way of rebate to single phase domestic consumers whose billing cycle is changed from the earlier 60 days billing period.

4.122 The Commission proposed to follow the second approach as this would. This rebate would be allowed by the distribution utility at the end of each financial year based on the number of bills raised by them during the financial year and interest cost at the SBI PLR at 14.45% for the average number of days for which the billing has been advanced. Accordingly, the level of rebate on the total amount billed in any financial year shall be allowed in the first bill of the next financial year. This rebate shall be computed as per the following table:

Number of Bills raised during the Financial Year	***Rebate %***
6	*Nil*
7	*0.2*
8	*0.4*
9	*0.6*
10	*0.8*
11	*1.0*
12	*1.2*

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

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

40) **Issue No. 34, relating to non-truing up of interest rate:** On this issue, the following contentions are raised by the appellant:

40.1) That the learned Delhi Commission has failed to consider the revised rate of return on debt in MYT order date 23.02.2008 despite the fact that: (a) weighted average SBI PLR rates have deviated by more than one percent during the control period. (b) actual weighted average rate of debt taken during control period is higher than the rate considered by the Delhi Commission.

40.2) That the Delhi Commission has failed to segregate between loans availed during the policy direction period, i.e. 01.07.2002 to 31.03.2007 and loan availed after policy direction period and allow the actual interest rate on loans availed during the policy direction period.

40.3) That the learned Delhi Commission has failed to revise the interest rate of normative loan pertaining to the policy direction period based on the rate revised for actual loans of policy direction period in FY 2011-12.

40.4) That this Appellate Tribunal vide judgment dated 28.11.2014 passed in Appeal No.61 of 2012 directed the Delhi Commission to revise the rate of interest on loan as well as true up of the Return on Capital Employed (RoCE) in its tariff

exercise since weighted average SBI PLR rates have deviated by more than one percent during the first control period.

40.5) That the learned Delhi Commission has consistently acknowledged that it will true up the interest rate of debt if there is deviation in PLR by more than one percent on either side in terms of the MYT order dated 23.02.2008 and undertaking tendered by Delhi Commission before this Appellate Tribunal.

40.6) That the movement of weighted average SBI PLR rates had deviated by more than one percent during the control period since FY 2006-07 i.e. base year as per MYT Regulations 2007 in spite of the fact that weighted average SBI PLR rate had deviated by more than one percent.

40.7) That the actual weighted average rates paid by the appellant on loans taken during the control period are higher than fixed by MYT order dated 27.02.2008. The learned Delhi Commission has ignored its own undertaking given before this Appellate Tribunal as well as its own Regulation by not revising the rate of return on debt. This approach is also contrary to Regulation 5.5 of the MYT Regulations 2007 which is quoted 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."

40.8) That actual interest rates are to be allowed to the loans pertaining to the policy direction period. However, the learned Delhi Commission has failed to appreciate the fact that the interest rate on actual loans which were availed during policy direction period was re-set during the control period as per the loan term agreement.

40.9) The appellant in its ARR petition in Form F3(b) had submitted separate details of all loans availed in the policy direction period and the loans availed thereafter. But the Delhi Commission has not considered the actual interest rate on loans availed during the policy direction period.

40.10) That the condition of movement in SBI PLR by ± one percent was applicable only for new loans taken during the control period and interest on loans taken during policy direction period was to be trued up on actual basis. Therefore, the entire calculation of WACC done by Delhi Commission is incorrect and liable to be set aside.

40.11) That during the policy direction period there were certain actual loans as well as normative loans. Normative loan is an equity infused by the promoter in excess of the equity component of the approved ratio of financing in excess of 30%. The rate of normative loans was fixed by Delhi Commission on the basis of actual loans availed by the appellant during that period.

40.12) That the learned Delhi Commission in its MYT order dated 23.02.2008 had allowed rate for normative loan for FY 2006-07 at 8.5% while the rate of actual loan taken during policy direction period was 9.20%. This issue was challenged by the appellant in Appeal No.52 of 2008 before this Appellate Tribunal. This Appellate Tribunal, while deciding the issue in favour of the appellant vide judgment dated 31.05.2011, held that interest should be allowed to the appellant at the prevailing market rate. However, the learned Delhi Commission has not implemented that judgment of the Appellate Tribunal and the said implementation was challenged before this Appellate Tribunal in Appeal No.14 of 2012 which was allowed in favour of the appellant.

40.13) That this Appellate Tribunal should allow the actual rate of return on debt since the weighted average SBI PLR rates have deviated by more than one percent during the control period and segregate between loans availed during the policy direction period, i.e. 17.02.2002 to 31.02.2007 and loans availed after policy direction period and allow actual interest rate on loans availed during the policy direction period and also revise interest rate on normative loan pertaining to the policy direction period based on the rate revised for actual loans pertaining to policy directions in FY 2011-12.

41) **Per contra**, the Delhi Commission has countered by making following contentions:

41.1) that the rate of interest/return on debt has been determined by Delhi Commission on the basis of movement in SBI PLR between FY 2007-08 to FY 2010-11 as in line with the tariff order dated 26.08.2011.

41.2) That the learned Delhi Commission has analyzed the increase in interest rates during the MYT control period and accordingly specified it in the impugned tariff order dated 31.07.2013.

41.3) That as regard to the loans availed during the policy direction period the Delhi Commission has already considered the actual interest rate on loans availed during policy direction period for projection of interest rate during MYT control period.

41.4) That for outstanding loans as on 01.04.2007, the learned Delhi Commission has considered the repayment schedule and interest rate. For DPCL loan (refinanced through IDBI) repayment schedule and interest rate has been considered as per loan agreement submitted by the appellant. The Delhi Commission also analyzed terms and conditions of the loans taken by the appellant in FY 2007. The Delhi Commission has noticed that the appellant had managed to procure funds in the range of 2.5% to 3% below PLR. Thus, for the control period, the Delhi Commission has considered that the appellant would be able to raise funds at 2.75% below SBI PLR (currently 12.25%). Accordingly, the learned Delhi Commission has considered actual interest rates available for the loans availed during policy direction period.

42) **<u>Our consideration and conclusion on Issue No.34, relating to non-truing up of interest rate</u>**: We have cited above the details of the counter arguments made by the parties. Without repeating the same, we proceed towards our conclusion on this issue.

42.1) We deem it proper to quote the relevant findings on this issue as recorded in the Impugned Order, which we reproduce as under:

"3.164. The Commission has analyzed the WACC submitted by the Petitioner taking into consideration the average equity and average debt for the respective year, RoE @ 14% for the control period and rate of interest on debt based on the identified loans raised for funding the capital expenditure for FY 2007-08 to FY 2011-12. The Commission had approved the interest on debt for each year of the control period based on the approved loans for capital expenditure. The approved WACC for the control period as approved in MYT Order dated February 23, 2008 is given below:

Particulars	*UoM*	*FY 2007-08*	*FY 2008-09*	*FY 2009-10*	*FY 2010-11*
Equity	*Rs.Crore*	*619.94*	*662.10*	*715.27*	*770.48*
Debt	*Rs.Crore*	*1182.40*	*1203.28*	*1234.89*	*1257.62*
Rate of Return on Equity	*%*	*14.00%*	*14.00%*	*14.00%*	*14.00%*
Rate of Return on Debt	*%*	*9.19%*	*9.25%*	*9.28%*	*9.29%*
WACC	*%*	*10.85%*	*10.94%*	*11.01%*	*11.08%*

3.165 The Commission has clarified in MYT tariff Order dated 23rd February 2008

"The Commission shall true-up the means of finance for the Control Period as the asset capitalization is subject to true-up. The Commission may true up the interest rates considered for new loans to be taken for capital investment and for working capital requirement; if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side."

3.166 The Commission has analysed the SBI, Prime Lending Rates for the Control period FY 2007-08 to FY 2011-12, there is no variation in the SBI PLR greater than ± 1% during FY 2007-08 to FY 2010-11 from the SBI PLR as on the date of issue of MYT Tariff Order dated 23rd February 2008 except short period from 12.08.2008 to 10.11.2008.Therefore, the interest rate for calculation of WACC has not been revised for the FY 2007-08 to FY 2010-11.

3.167 For FY 2011-12, the actual weighted average rate of interest submitted by the Petitioner has been taken into consideration on a provisional basis subject to approval of loans."

42.2) The main contention of the appellant is that the learned Delhi Commission has failed to revise the rate of return on debt considered by the Delhi Commission in MYT order dated 23.02.2008 despite the fact that the SBI PLR rates had deviated by more than one percent during the control period and the actual weighted average rate of debt taken during control period was higher than rate considered by the Delhi Commission. Further contention is that the Delhi Commission has failed to segregate between loans availed during policy direction period and loan availed after the policy direction period and also failed to allow the actual rate of interest on loans availed during the policy direction period. Further contention of the appellant is that the Delhi Commission has not revised the interest rate on normative rate pertaining to the policy direction period based on the revised rate for actual loan of policy direction period in FY 2011-12. After deep consideration of the rival contentions of the parties and the findings recorded in the Impugned Order on this issue, we find that the rate of return on debt had been determined by the Delhi Commission on the basis of movement in SBI PLR between 2007-08 to FY 2010-11 and the same is in line with tariff order dated 26.08.2011 passed by the learned Delhi Commission. The Delhi Commission has analyzed the increase in interest rates during MYT control period and accordingly specified the same in the impugned tariff order. The learned Delhi Commission on analyzing the SBI prime lending rates for the control period found no variation in SBI PLR greater than ± one percent during FY 2007-08 to FY 2010-11 from the SBI PLR as on the date of issue of MYT tariff order dated 23.02.2008 except short period, from 12.08.2008 to 10.11.2008 (almost three months) because of this reason the Delhi Commission has not revised the interest rate for calculation of WACC for the control period FY 2007-08 to FY 2010-11. Further, the learned Delhi Commission for FY 2011-12 has considered the actual weighted average interest submitted by the appellant on a provisional basis subject to approval of loans. It is apparent from the record and also from

the Impugned Order that the learned Delhi Commission has also considered the actual interest rate on loans availed during policy direction period for projection of interest rate during MYT control period. Accordingly, we find that the learned Delhi Commission has considered the actual interest rate available for the loans availed during policy direction period. We do not find any merit or force in the contentions of the appellant on this issue No.34, relating to non-truing up of interest rate. Consequently, we decide this issue No.34 against the appellant.

43) **<u>Issue No. 35, relating to simple average rate of interest considered for FY 2011-12 instead of weighted average rate of interest on capex loans</u>**: On this issue, the appellant has argued as under:

43.1) That this Appellate Tribunal had already decided this issue in favour of the appellant vide judgment dated 28.11.2013 in Appeal No. 14 of 2012 as admitted by the Delhi Commission before this Appellate Tribunal.

43.2) That the alternate argument of the appellant is that the Delhi Commission while passing the Impugned Order had failed to consider that the appellant in its ARR petition had prayed to take weighted average rate of interest. The simple average rate of interest submitted by the appellant was only on the direction of the Delhi Commission. The weighted average concept correctly represents the actual weighted average rate of interest incurred by the appellant during the financial year.

43.3) That the weighted average rate of interest takes into consideration the loan outstanding at different period of time during the year on account of new loans and repayments whereas the simple rate of average interest does not take care of timing factor into account resulting into under/over allowances of interest rates, causing undue hardships/benefits to the appellant.

43.4) That the appellant prayed before the learned Delhi Commission to allow the rate of interest on capex loans on weighted average basis. In order to arrive at

the correct weighted rate of interest, the appellant had furnished the detailed calculation in Form 3(b) before Delhi Commission in its true up petition of first control period (i.e. FY 2007-08 to FY 2011-12) detailing the rate of return on debt.

43.5) That the Delhi Commission during Technical Validation Session vide its letter dated 26.06.2013, directed the appellant to submit details of capex loans and calculate rate on average basis. The appellant in compliance of that direction submitted the calculations regarding average rate of interest on capex loans vide letter dated 28th June, 2013, requesting the learned Delhi Commission to consider the weighted average rate of interest instead of simple rate of interest.

43.6) That the learned Delhi Commission ignoring the submissions of the appellant has allowed the rate of debt as 10.17%, which is lower than the actual weighted average rate of interest. By allowing the interest on average basis instead of weighted average basis, the Delhi Commission has caused substantial loss to the appellant. The appellant giving the said calculation has given a chart in its written submission before this Appellate Tribunal. As per this table, both rate of interest for loans is 10.50% but due to simple average formula, the rate of interest is coming on to be 9.08%, causing substantial loss to the appellant.

43.7) That this Appellate Tribunal should direct the Delhi Commission to calculate the WACC by taking weighted average rate of interest on debt availed for capex.

44) **Per contra**, the learned Delhi Commission has contended that the learned Delhi Commission has taken into consideration the actual weighted average rate of interest, submitted by the appellant, for interest on capex loans on provisional basis subject to approval of loans. After the aforesaid physical verification of capital assets the same will be trued up finally.

45) **Our consideration and conclusion on Issue No.35, relating to simple rate of interest for FY 2011-12**: We have cited above the rival contentions of the

parties and without feeling any need to repeat the same, we directly proceed towards our conclusion.

45.1) In order to test the legality of the Impugned Order on this issue, we deem it proper to quote the Impugned finding on this issue, which is as under:

"3.167 For FY 2011-12, the actual weighted average rate of interest submitted by the Petitioner has been taken into consideration on a provisional basis subject to approval of loans."

45.2) It appears that the learned Delhi Commission relying upon the observations of this Appellate Tribunal in judgment dated 28.11.2013 in Appeal No. 14 of 2012 has passed the Impugned Order. One more contention of the appellant is that the Delhi Commission while passing the Impugned Order has not considered that the appellant in its ARR petition had prayed to Delhi Commission to take weighted average rate of interest. The simple average rate of interest was submitted by the appellant only on the direction of Delhi Commission. What appears from the record is that the simple average rate of interest was submitted by the appellant before the learned Delhi Commission and if the same was furnished on the direction of the Delhi Commission, the appellant who was petitioner there should have objected to the same.

45.3) It is apparent from the Impugned Order that the learned Delhi Commission has taken into consideration the actual weighted average rate of interest on capex loans on provisional basis subject to approval of loan. Since physical verification of the assets of the appellant is under way, the learned Delhi Commission has clarified in the Impugned Order that the same will be trued up finally. The learned Delhi Commission for FY 2011-12 has considered the actual weighted average rate of interest submitted by the appellant on provisional basis subject to approval of loan, we affirm the said finding as we do not find any fault or perversity. This issue is decided against the appellant.

46) In the light of the above, the appeal partly succeeds as per the findings/ analysis given in issue-wise disposal by us.

O R D E R

The appeal No. 271 of 2013 is partly allowed, to the extent indicated above.

No order as to costs.

Pronounced in the open court on this ***20th day of July, 2016.***

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~