BEFORE THE HON'BLE JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION AT RANCHI

CASE (TARIFF) NO. [6] OF [2022]

IN THE MATTER OF:

Tata Power Company Limited … Petitioner

Versus

Tata Steel Limited … Respondent

ADDITIONAL INFORMATION/SUBMISSIONS ON BEHALF OF THE PETITIONER

1. The instant additional information/submission is being filed before this Hon'ble Commission to place on record certain facts and information in terms of the submissions made in the present Petition.

2. It is submitted the Petitioner by way of the present submission seeks to place before this Hon'ble Commission additional submissions in respect of the Depreciation, Raw Water Charges (under the head of Operation and Maintenance expenses) and Specific Fuel Oil Consumption of its Plant in light of the law as has been laid down by the Hon'ble Supreme Court in a recent judgement, being, *BSES* Rajdhani *Power Ltd. v. Delhi Electricity Regulatory Commission,* 2022 SCC OnLine SC 1450 ("**BSES Case**"). In this Judgement Hon'ble Supreme Court has answered the question "whether the Regulator can 'change the rules of the game after it has begun' in the 'truing up exercise'. It has answered this question in

negative and held that 'truing up' is not an opportunity for the SERC to rethink de novo on the basis principles and issues involved in the initial projections of the revenue requirement in MYT Order, which is to be based on the MYT regulations specified under section 61. Thus, it has held that rules of game set in MYT regulations and MYT Order issued in accordance with those regulations cannot be changed at the time of true-up. It is humbly submitted that the Hon'ble Supreme Court, by way of the said judgement, has held that an Electricity Regulatory Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the MYT regulations and the initial projection of ARR. It is submitted that the Hon'ble Apex Court further held that if an Electricity Regulatory Commission like this Hon'ble Commission changes the methodology at the stage of true up, then that shall amount to amendment of the Tariff Order, which is in effect a retrospective revision of tariff, which is impermissible. The relevant paragraphs of the said Judgement have been reproduced below:

> *"48. .....The process of determination of tariff has to be done in accordance with Sections 62 and 64 of the 2003 Act. It is well settled that the Commission (in this case, the DERC) performs a quasi-judicial function while determining tariff. This has been expressly recognized by the Constitution Bench of this Court in PTC India Limited v. Central Electricity Regulatory Commission, Through Secretary ((2010) 4 SCC 603) as under:*
>
> > *"50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms*

of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act ***actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff****. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."*

49. ***The DERC determines the tariff of the licensee under Section 62 in such a manner as determined by the 2007 MYT Regulations.*** *This function is governed, inter alia, by safeguarding all consumers' interest and at the same time recovering the cost of electricity in a reasonable manner, such that 'distribution and supply of electricity are conducted on commercial principles' which encourage and reward competition, efficiency, economic use of resources, good performance and optimum investments.*

50. ***DERC determines ARR of the licensee i.e. costs of undertaking the licensed business which are permitted in accordance with the requirement specified by DERC*** *which is to be recovered from the tariff in the year end…..*

….

51. *As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority.* ***Apart from this, <u>we are also of the view that at the stage of 'truing up', the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR</u>****.*

…

> *54. This view has been consistently followed by the APTEL in its subsequent judgments and we are in complete agreement with the above view of the APTEL.* ***In our opinion, 'truing up' stage is not an opportunity for the DERC to rethink de novo on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. 'Truing up' exercise cannot be done to retrospectively change the methodology/principles of tariff determination and re-opening the original tariff determination order thereby setting the tariff determination process to a naught at 'trueup' stage****.*
>
> *…*
>
> *56. Revision or re-determination of the* ***tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff order****, which can be done only as per the provisions of sub-Section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable.* ***In our view, DERC cannot amend the tariff order for the period 01.04.2008 to 31.03.2010 in the guise of 'true-up' after the relevant financial year is over and the same is replaced by a subsequent tariff Order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise.*** *"*
>
> [**Emphasis Supplied**]

3. Thus, as per Judgement in BSES Case, the Generation Tariff Regulations 2015, based on which MYT Order is issued, and principles followed in MYT Order dated 19.02.2018 thereafter set the rules of the game and are binding on Hon'ble Commission. Further, it is settled position of law that principle of res-judicata does not apply to subsequent tariff orders of Hon'ble Commission and, hence, pendency of Appeals against

previous years' tariff/true-up orders in Issues being raised herein has no bearing on these Issues being reviewed in these proceedings. A copy of Judgement of Hon'ble Supreme Court in BSES Case is enclosed herewith as **ANNEXURE P/1**.

4. It is humbly submitted that in view of the above the Petitioner seeks to place certain additional submissions which ought to be considered by this Hon'ble Commission while Truing Up for the Petitioner's subject Units for the FY 2020-21. The additional averments in respect of the Depreciation, Raw Water Charges (under the head of Operation and Maintenance expenses) and Specific Fuel Oil Consumption for the Petitioner's Units are as below.

A. COMPUTATION OF DEPRECIATION OF THE PLANT FOR TRUE-UP FOR FY 2020-21

5. It is submitted that the Petitioner has proposed the recovery of remaining depreciable value on original project cost by spreading it equally in the remaining Useful life i.e., 25 years as per the JSERC (Terms and Conditions for Determination of Generation Tariff) Regulations, 2015 ("**Generation Tariff Regulations 2015**") since cumulative depreciation has crossed 70% for both the Units 2 & 3 of its Plant.

5.1 The Petitioner, in its Petition has submitted that the cumulative depreciation on total assets [i.e. GFA (Including Additional Capitalization)] up to FY 2017-18 has crossed 70% for both the Units 2

and 3. It is further submitted that as per Regulation 7.32 read with Regulation 2.1(58) and 2.1(27) of Generation Tariff Regulations 2015, the balance depreciable value ought to be spread (i.e. 90% of the Capital Cost minus Cumulative depreciation recovered for assets in service up to 2018-19) over the balance useful life by taking useful life of 25 years of the Plant, as per the Generation Tariff Regulations 2015 .

5.2 It is humbly submitted that the Hon'ble Commission in terms of Regulation 7.32 read with Regulation 2.1(58) and 2.1(27) of the Generation Tariff Regulations 2015 ought to spread the balance depreciable value (i.e. 90% of the Capital Cost minus Cumulative depreciation recovered for assets in service up to 2020-21) over the balance useful life by taking useful life of 25 years of the Plant.

5.3 It is submitted that the methodology for calculation of Depreciation has been specified in Generation Tariff Regulations 2015, which is reproduced as below:

"***Depreciation***

7.28 Depreciation shall be calculated for each year of the tariff period, on the amount of Capital Cost of the assets admitted by the Commission; Provided that depreciation shall not be allowed on assets funded by any capital subsidy / grant.

7.29 The salvage value of the asset shall be considered as 10% and depreciation shall be allowed up to maximum of 90% of the capital cost of the asset.

Provided that in case of hydro generating stations, the salvage value shall be as provided in the agreement signed by the developers with the State Government for creation of the site:

Provided further that the capital cost of the assets of the hydro generating station for the purpose of computation of depreciable value shall correspond to the percentage of sale of electricity under

Long-term power purchase agreement at regulated tariff.

7.30 Land other than land held under lease and the land for reservoir in case of hydro generating station shall not be a depreciable asset and its cost shall be excluded from the capital cost while computing depreciable value of the asset.

7.31 ***Depreciation shall be calculated annually based on 'Straight Line Method' and at rates specified in Appendix-I to these Regulations for the assets of the generating station: Provided that, the remaining depreciable value as on 31st March of the Year closing after a period of 12 Years from the Date of Commercial operation shall be spread over the balance Useful life of the assets.***

7.32 In case of existing projects, the balance depreciable value as on 1st April 2016 shall be worked out by deducting the cumulative depreciation as admitted by the Commission upto 31st March 2016 from the gross depreciable value of the assets.

The rate of depreciation shall be continued to be charged at the rate specified in Appendix-I till cumulative depreciation reaches 70%. Thereafter the remaining depreciable value shall be spread over the remaining life of the asset such that the maximum depreciation does not exceed 90%."

[**Emphasis Supplied**]

5.4 Further, as per Regulations 2.1(27) and 2.1(58) of the Generation Tariff Regulations 2015, 'existing project' and 'useful life' are defined as:

"*27)* ***"Existing project" means the project declared under commercial operation from a date prior to 01.04.2016****;...*

58) "Useful life" in relation to a unit of a generating station from the COD shall mean the following, namely:-

i. ***Coal/Lignite based thermal generating station - 25 years;***

ii. Gas/Liquid fuel based thermal generating station - 25 years; and

iii. Hydro generating station – 35 years."

[**Emphasis Supplied**]

5.5 It is submitted that the Regulations 7.29, 7.31 and 7.32 of the Generation Tariff Regulations 2015 are relevant in case of Units 2 & 3 of the present

Generating Station. While Regulation 7.29 and 7.31 allows recovery of 90% of Capital Cost to be recovered as Depreciation in Useful life of 25 years of the Plant. Regulation 7.32 specifies how this 90% is to be recovered in these 25 years. As per Regulation 7.32 as quoted above, after reaching cumulative depreciation of 70%, the remaining depreciable value is required to be spread over the remaining life of the asset such that the maximum depreciation does not exceed 90%.

5.6 It is submitted that in terms of Generation Tariff Regulations 2015, as soon as cumulative depreciation of all assets taken together reaches 70%, balance depreciation is to be spread over balance useful life of 25 years. The Petitioner has, therefore, submitted its proposal on depreciation with 25 years as balance useful life, which may kindly be considered by Hon'ble Commission.

5.7 Thus, it is submitted that Generation Tariff Regulations 2015 recognise only useful life of the plant and have no reference to the PPA life. In fact, depreciation as a principle has no correlation with PPA life, which may be less or more than useful life considered for accounting and regulatory purposes. The Generation Tariff Regulations 2020 has specific provision with respect to spreading of balance depreciation in PPA life after prudence check, which reads as follows:

> *"15.30 Depreciation shall be calculated annually, based on the straight-line method, at the rates specified at Appendix-I. The base value for the purpose of depreciation shall be original cost of the asset:*
> *Provided that the Generating Company shall ensure that once the*

individual asset is depreciated to the extent of seventy (70) percent of the Book Value of that asset, remaining depreciable value as on March 31 of the year closing shall be spread over the balance useful life of the asset;

Provided that ***in case the tenure of PPA executed between the Generating plant and Beneficiaries is more than that of the Useful life of the plant, the Commission after prudence check may consider the PPA life for spreading the remaining depreciable value as on March 31 of the year instead of useful life****;*

Provided that in case after carrying out the residual life assessment, it is found that the residual life of the generating station or unit as the case may be is beyond the useful life specified in these regulations the Commission after prudence check, may spread the remaining depreciable value to be recovered over the extended life of the plant."

[**Emphasis Supplied**]

5.8 It is submitted that the Hon'ble Commission is empowered to consider PPA life after a prudence check. However, the prudence check requires spreading depreciation beyond useful life only after carrying out a residual life assessment. Therefore, it is submitted that the revision of depreciation during Truing Up for FY 2020-21 shall have impact on the allowable balance depreciation for the 3rd Control Period i.e. from 2021-22 to 2025-26. The Petitioner prays to Hon'ble Commission to kindly consider the above submissions while determining the depreciation for the FY 2020-21 for the Petitioner's subject Plant.

5.9 It is submitted that, as per the law as laid down by the Hon'ble Supreme Court, in the case of *PTC India* Ltd*. v. Central Electricity Regulatory Commission*, (2010) 4 SCC 603 (**"PTC Case"**), Regulatory Commissions are bound to conform to the Regulations framed at arriving at their

decisions, the relevant paragraphs of the said judgement are reproduced as below:

> *"54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/* ***steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. <u>These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.</u>***
>
> *55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1).* ***<u>As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter.</u>*** *For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under*

Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation."

[**Emphasis Supplied**]

5.10 It is submitted that the above is also in line with the Judgement of Hon'ble Supreme Court in the recent *BSES* Case which has been set out in detail in herein above. Therefore, in view of the law as laid down by the Hon'ble Supreme Court, it is submitted that this Hon'ble Commission ought to compute the depreciation by taking the useful life of the Plant as 25 years in terms of Generation Tariff Regulations 2015.

5.11 In view of the above submissions, it is respectfully prayed before the Hon'ble Commission to compute the depreciation for 2020-21 in consonance with the Regulations 7.32 and other applicable Regulations as per Generation Tariff Regulations 2015 as computed above and enable the Petitioner to recover the 90% of Original Capital Cost and subsequent Additional Capitalisations as depreciation over the remaining useful life of 25 years of the Generating Units as per Generation Tariff Regulations 2015.

B. COMPUTATION OF RAW WATER CHARGES FOR TRUE-UP FOR FY 2020-21

6. It is submitted that this Hon'ble Commission in the ARR Order dated 19.02.2018 had approved the Raw Water Expense for FY 2020-21 considering projected Generation, estimated Specific Raw Water

Consumption of 3.18 m3/MWh and full Raw Water charges at the applicable rate of Rs 23.40/m3 as charged by Supplier to its industrial consumers including the Petitioner. This comprised of 100% Base Water Charges and 100% Water Tax payable to Government of Jharkhand.

6.1 As per the MYT Order dated 19.02.2018, the approved Raw Water Charges were determined as below:

> *"6.88 Raw Water Consumption Charges: The Commission projected the Raw Water Expenses for the Second Control Period FY 2016-17 to FY 2020-21 based on the Gross Generation during the year and estimated Specific Raw Water Consumption per Unit.*
> *6.89 The Specific Raw Water Consumption has been computed by taking the weighted average of the actual specific Raw Water Consumption for the Transition Period and previous Control Period FY 2011-12 to FY 2015-16 as submitted by the Petitioner which comes out to 3.18 m3/MWh.*
> *6.90* ***The Raw water charges have been computed taking into account, the revised base raw water expenses by Tata steel Corporate services and the revised raw water tax by GoJ with an escalation of 7.5% each in both the charges for each year of the MYT Period FY 2016-17 to FY 2020-21****.The approved Raw water expenses by the Commission for the Control period along with detailed computation has been tabulated below*

Table 98: Raw Water expenses for Unit-2 (in Rs Cr) as approved by the Commission

Particulars	***UoM***	***FY 2016-17***	***FY 2017-18***	***FY 2018-19***	***FY 2019-20***	***FY 2020-21***
Gross Generation	*MU*	*852.49*	*886.58*	*835.32*	*890.71*	*831.00*
Specific Raw Water Consumption	*m^3/MWh*	*3.18*	*3.18*	*3.18*	*3.18*	*3.18*
Raw Water Consumption	*m^3*	*2708557*	*2816867*	*2653990*	*2829998*	*2640264*
Raw Water Charges	*Rs/m^3*	*17.52*	*18.84*	*20.25*	*21.77*	*23.4*
Total Raw Water Expenses	***Rs Cr***	***4.75***	***5.31***	***5.37***	***6.16***	***6.18***

Table 99: Raw Water expenses for Unit-3 (in Rs Cr) as approved by the Commission

Particulars	***UoM***	***FY 2016-17***	***FY 2017-18***	***FY 2018-19***	***FY 2019-20***	***FY 2020-21***
Gross Generation	*MU's*	*860.98*	*815.52*	*893.52*	*832.40*	*893.52*
Specific Raw Water Consumption	*m3/MWh*	*3.18*	*3.18*	*3.18*	*3.18*	*3.18*
Raw Water Consumption	*m3*	*2741264*	*2596552*	*2918926*	*2650278*	*2913516*
Raw Water Charges	*Rs/m3*	*17.52*	*18.84*	*20.25*	*21.77*	*23.4*
Total Raw Water Expenses	***Rs Cr.***	***4.80***	***4.89***	***5.76***	***5.77***	***6.66***

…"

6.2 It is submitted that the Concept of Truing Up has been dealt with in much detail by the Hon'ble Appellate Tribunal for Electricity ("**APTEL**") in its Judgment in *NDPL v. DERC***,** 2007 APTEL 193, wherein it was held as under: -

> *"60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. …* ***The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of***

restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence. *…"*

[Emphasis Supplied]

6.3 It is noteworthy that the Hon'ble Appellate Tribunal has explained the *raison d'etre* of truing-up exercise in the following orders (as extracted below):-

(a) ***Karnataka Power Transmission Corporation Limited v. KERC,*** 2007 SCC OnLine APTEL 133, wherein it was held that the truing up stage is not an opportunity for the Electricity Regulatory Commission to re-think *de-novo* on the basic principles, premises and issues involved in the initial projections of revenue requirements of the Licensee as set out in the extract given hereinbelow:

"Analysis and decision

28. We have heard contentions of the rival parties. Basic issue that has to be decided is: whether or not the Commission was correct in carrying out the truing up of revenue requirements and revenues of KPTCL for the tariff period 2000-01 to 2005-06. ***Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary.*** *Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for the following year. As an example; truing up for the year 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue has been realized during the year 2006-07, it must be adjusted*

as available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. Having said that, truing up, per se, cannot be faulted, and, therefore, we do not want to interfere with the decision of the Commission in this regard to cleans up accounts, though belatedly, of the past. ***It is made clear that truing up stage is not an opportunity for the Commission to rethink de novo on the basic principles, premises and issues involved in the initial projections of revenue requirements of the licensee.*** *We had occasion to deal with a similar situation in NDPL v. DERC, appeal No. 265 of 2006. …"*

[**Emphasis Supplied**]

(b) ***North Delhi Power Ltd. v. Delhi Electricity Regulatory Commission***, 2010 SCC OnLine APTEL 74**,** wherein it was held as under.

"51. It cannot be disputed that the ***State Commission shall be guided by the principles that reward efficiency in performance as provided under Section 61(e) of the Electricity Act, 2003****. Similarly****, the said section provide that State Commission shall be guided by the National Electricity Policy and Tariff Policy.*** *Therefore, the State Commission should have allowed the carrying cost at the prevailing market lending rate for the carrying cost so that the efficiency of the distribution company is not affected.* ***The State Commission is required to take the truing up exercise to fill up the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year.*** *This Tribunal in various judgments rendered by it held in Appeal No. 36 of 2008 in the judgment dated 06.10.2009 reported in 2009 ELR (APTEL) 880 has held that* ***'the true up exercise is to be done to mitigate the difference between the projection and actuals and true up mechanism should not be used as a shelter to***

> ***deter the recovery of legitimate expenses/revenue gap by over-projecting revenue for the next tariff.'*** *Therefore, the fixation of 9% carrying cost, in our view, is not appropriate. Therefore, the State Commission is hereby directed to reconsider the rate of carrying cost at the prevailing market rate and the carrying cost also to be allowed in the debt/ equity of 70:30."*
>
> [**Emphasis Supplied**]

6.4 During the FY 2020-21, the Petitioner has paid water charges till July 2020 equal to full Base Water Charges plus Water Tax and from August 2020, in accordance with Order dated 26.08.2020 in Petition No. 4 of 2020 issued by Hon'ble Commission, a fixed proportion of Sum of Base Water Charges plus Water Tax. Also, in the recent Tariff Order in Case No. (Tariff) 10 of 2020 issued on 04.11.2022, Hon'ble Commission has allowed 100% of Base Water Charges and 52% of Water Tax on the premise that since the matter related to Water Tax is pending before Hon'ble Jharkhand High Court, it is following the methodology of allowing 52% of Water Tax as adopted in MTR Order dated 14.02.2020 and 100% of Base Water Charges. However, in terms of the principles laid down by Hon'ble Supreme Court in abovementioned cases, the Water Charges allowed by Hon'ble Commission in the MYT Order dated 19.02.2018, i.e. 100% of Base Water Charges and 100% of Water Tax need to be allowed in the present Petition also. In fact, the Petitioner has also filed a Review Petition for allowing Water Charges on the same principle for FY 2019-20 also in Order dated 04.11.2022.

6.5 It is respectfully submitted that as per the law as laid down by the

Hon'ble Supreme Court in a recent judgement of *BSES* Rajdhani *Power Ltd. v. Delhi Electricity Regulatory Commission,* 2022 SCC OnLine SC 1450, an Electricity Regulatory Commission cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR. The Hon'ble Apex Court further held that if an Electricity Regulatory Commission like this Hon'ble Commission changes the methodology at the stage of true up, then that shall amount to amendment of the Tariff Order, which is in effect a retrospective revision of tariff, which is impermissible.

6.6 Therefore, in view of the law as laid down by the Hon'ble Supreme Court this Hon'ble Commission it is submitted that the Raw Water Charges for the Petitioners Units ought to be allowed in terms of rules/methodology applied in the MYT Order dated 19.02.2018 and Raw Water Expenses of the Petitioner be allowed with 100% Base Water Charges and 100% Water Tax. The Petitioner requests Hon'ble Commission to allow the same. Since the Petitioner has proposed full Water Charges for part year and proportionate Water Charges for balance period in the Petition, with the above amendment in its proposal, the computation of Water Charges would undergo a change to reflect full recovery of both the components. The Petitioner humbly requests Hon'ble Commission to kindly carry out and correct the computation with 100% of Base Water Charges and 100% Water Tax and its consequent impact on other components of

tariff including carrying cost.

C. COMPUTATION OF SPECIFIC FUEL OIL CONSUMPTION FOR THE TRUE UP OF FY 2020-21

7. It is respectfully submitted that in light of the *PTC* Case and *BSES* Case quoted above, the Specific Fuel Oil Consumption ("**SFC**") for the Units 2 and Unit 3 of the Generating Station for FY 2020-21, ought to be considered as 1.00 ml/kWh, as specified in the Regulation 8.4 of Generation Tariff Regulations, 2015.

7.1 The relevant extract of the Regulation 8.4 of the Generation Tariff Regulations 2015 has been reproduced below:

> *"Norms of operation*
> *8.4 The values for operational norms for the existing generating stations have been decided, based on the past operational data of these plants .The norms of operation as given hereunder shall apply for existing thermal power stations in the state:*
> *…*
> *Jojobera Thermal Power Station (TPCL)*

Unit-II

Parameters	***2016-17***	***2017-18***	***2018-19***	***2019-20***	***2020-21***
Normative Annual Plant Availability Factor (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Normative Annual Plant LoadFactor (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Gross Station Heat Rate (kCal/kWh))	*2567*	*2567*	*2567*	*2567*	*2567*
Auxiliary Consumption (%)	*10.00%*	*10.00%*	*10.00%*	*10.00%*	*10.00%*
Secondary Fuel Oil Consumption (ml/kWh)	***1.00***	***1.00***	***1.00***	***1.00***	***1.00***

Unit-III

Parameters	***2016-17***	***2017-18***	***2018-19***	***2019-20***	***2020-21***
Normative Annual PlantAvailability Factor (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Normative Annual Plant LoadFactor (%)	*85%*	*85%*	*85%*	*85%*	*85%*
Gross Station Heat Rate (kCal/kWh))	*2577*	*2577*	*2577*	*2577*	*2577*
Auxiliary Consumption (%)	*10.00%*	*10.00%*	*10.00%*	*10.00%*	*10.00%*
Secondary Fuel Oil Consumption (ml/kWh)	***1.00***	***1.00***	***1.00***	***1.00***	***1.00***

"

7.2 It is evident from the above that the SFC has been specified by this Hon'ble Commission itself in the Generation Tariff Regulations 2015 to be 1 ml/kWh. It is respectfully submitted that this Hon'ble Commission is bound by its own Regulations which are framed following the principles laid down under Section 61 of the Act. Any deviation from the methodology provided under the Regulation will ultimately result into violation of the mandate of the parent Act as well as the Regulations framed under it. Therefore, this Hon'ble Commission ought to implement the Regulations in its current form and specify the SFC to be 1 ml/kWh for the Petitioners subject units.

7.3 It is humbly submitted that the principles of MYT framework cannot be ignored, which provides regulatory certainty to the utilities, investors and consumers by promoting transparency, consistency and predictability of regulatory approach, thereby minimizing the regulatory risk. Deviation from specified norms while truing up as set in

the Generation Tariff Regulations, 2015 shall defeat the purpose of the MYT framework. It is a settled law that this Hon'ble Commission, while conducting tariff determination proceedings, is bound by its own Regulations. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court of India in the case of *PTC v CERC, (2010) 4 SCC 603* [Para 54] and in *BSES* Rajdhani *Power Ltd. v. Delhi Electricity Regulatory Commission,* 2022 SCC OnLine SC 1450.

7.4 It is submitted that the Petitioner has provided the requisite documents/details of the start-ups and the shutdowns taken in the Petition. In view of the same, this Hon'ble Commission is humbly requested to consider the Petitioner's claim with respect to SFC in line with Generation Tariff Regulations 2015 and permit SFC for the Units in question as being 1 ml/kWh.

7.5 In view of the foregoing, it is most humbly submitted that this Hon'ble Commission may be pleased to consider and allow the claims of the Petitioner to permit SFC to be taken as 1 ml/kWh as per the Generation Tariff Regulations 2015.

8 In light of the above, it is prayed before this Hon'ble Commission to kindly consider the facts as submitted in the above paragraphs and allow the Petitioner's claim as prayed for in the Petition after considering the above submissions.

The Tata Power Company Limited

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Date: 13/12/22

ANNEXURE P/1

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 4324 OF 2015

BSES RAJDHANI POWER LTD. ...APPELLANT(S)

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION ...RESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 4323 OF 2015

BSES YAMUNA POWER LTD. ...APPELLANT(S)

VERSUS

DELHI ELECTRICITY REGULATORY COMMISSION ...RESPONDENT(S)

J U D G M E N T

S. ABDUL NAZEER, J.

These two appeals have been filed by BSES Rajdhani Power Ltd. (C.A. No.4324 of 2015) and BSES Yamuna Power Ltd. (C.A.

No.4323 of 2015) (hereinafter referred to as 'Appellants') challenging certain findings of the Appellate Tribunal for Electricity, New Delhi ('APTEL') in the common judgment and order dated 28.11.2014 ('Impugned Order') passed in Appeal Nos.61 and 62 of 2012 ('Tariff Appeals'). The Tariff Appeals were filed by the appellants before the APTEL challenging certain findings of the Delhi Electricity Regulatory Commission ('DERC') in the Tariff Order dated 26.08.2012 for Truing Up of financials for FY 2008-09 and FY 2009-10 and Aggregate Revenue Requirement ('ARR') for FY 2011-12. DERC has also filed appeals (C.A. Nos.8660-61 of 2015) challenging certain findings in the common impugned order and the said appeals will be heard and decided separately.

2. The Appellants are Distribution Licensees ("Discoms") in terms of Section 2(17) of the Electricity Act, 2003 ('2003 Act'). The primary function of a Discom is to give supply to any premises upon an application being made by a consumer in compliance with the applicable laws, including paying requisite charges, except where prevented by force majeure conditions like cyclones or floods.

3. The Appellants purchase 90% to 95% of the power from Central and State Generating Companies. Tariff of Central Generating Stations is determined by the Central Electricity Regulatory Commission ('CERC') and, therefore, the Appellants have no control over the tariff to be paid to the Central Generating Stations. Simultaneously, the tariff for the State Generating Companies is determined by the State Regulator i.e. DERC.

4. It is the case of the Appellants that since privatization, the ARR determined by the DERC was not even sufficient to meet the actual power purchase cost which has led to creation of a huge revenue gap. It is also contended that the DERC in repeated disregard to its statutory regulations and its own statutory advice has refused to make periodic increase in the tariff rate. The actions of the DERC have resulted in a situation where the Appellants are deeply indebted and have been forced to borrow/take loans to fund their day-to-day operations which, in turn, have also dried up leaving the Appellants without adequate monies to pay their suppliers.

5. The Appellants have challenged the finding of the APTEL in the Impugned Order on the following issues:

A. Change in methodology in computation of Aggregate Technical and Commercial (AT&C) losses [Issue 14 in Impugned Order]
B. Change in methodology for computation of Depreciation [Issue 15 in Impugned Order]
C. Disallowance of salary for Fundamental Rules and Supplementary Rules (FR/SR) structure [Issue 23 in Impugned order]
D. Disallowance of interest accrued on Consumer Security Deposit retained by Delhi Power Corporation Limited (DPCL) [Issue 29 in Impugned Order]
E. Disallowance of Fringe Benefit Tax [Issue 34 in Impugned Order]
F. Reduction in Million Units (MUs) in relation to Enforcement sale for the purpose of calculation of AT&C Loss [Issue 14 in Impugned Order]

6. It is to be noticed that the above-mentioned Issue 'C' has been challenged only by BSES Rajdhani Power Ltd. in C.A. No.4324 of 2015 while the remaining issues have been challenged by both

BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd. and are subject-matter of C.A. No.4324 of 2015 and C.A.No.4323 of 2015.

7. The Tariff Appeals were filed by the Appellants challenging the disallowances in their respective Tariff Orders dated 26.08.2012 passed by the DERC for:

(a) Determination of ARR and Tariff for FY 2011-12; and

(b) Truing up of financials for FY 2008-09 and FY 2009-10.

8. According to the appellants, the present Civil Appeals give rise to substantial questions of law under Section 125 of the 2003 Act on six issues. It is contended that the said substantial questions of law have arisen primarily because the DERC has, *inter alia,* deliberately refused to follow statutory regulations while truing up. Further, it is contended that APTEL's Impugned Order has failed to note the illegal manner of truing up followed by DERC and, more importantly, APTEL has failed to follow its own rulings in previous cases.

9. However, the respondents have contended that the appellants have entirely failed to establish the existence of any substantial question of law as required under Section 125 of the 2003 Act, read with Section 100 of the Code of Civil Procedure, 1908 ('CPC') on any of the above issues.

10. Before considering the detailed submissions on each of the above issues, it is necessary to provide an overview of the current and historical legal framework of electricity laws in India, including the tariff determination process, and the role and powers of the DERC in the tariff determination process.

11. Prior to independence, the Indian Electricity Act, 1910 ('1910 Act') governed the supply and use of electrical energy in India. Part-II of the 1910 Act was related to supply of electricity and contained provisions concerning:

(a) Grant of license for supply of electricity by the State Government in consultation with the State Electricity Boards ("SEB") and

(b) Obligation and rights of licensees, consumers, etc. along with other modalities.

Part-III of the 1910 Act dealt with Supply, Transmission and Use of Energy by Non-licensees. Part-IV of the 1910 Act provided for constitution, duties of advisory boards at the State and Central levels along with other authorities such as electrical inspectors and Central Electricity Board ("CEB"). CEB, under Section 37 of the 1910 Act, was empowered to make rules to regulate the generation, transmission, supply, and use of energy.

12. On 10.09.1948, the Electricity (Supply) Act, 1948 ("Supply Act, 1948") was notified to provide for: (a) the rationalization of the production and supply of electricity, (b) taking of measures conducive to electrical development; and (c) all matters incidental to the above. The Supply Act, 1948 was a more detailed and comprehensive code and provided for establishment of SEBs to control generation, distribution, and utilization of electricity within their respective states and the Central Electricity Authority ('CEA') for planning and development of the national power system.

13. On 02.07.1998, the Electricity Regulatory Commissions Act, 1998 ('Commissions Act, 1998') was notified with effect from 25.04.1998 as an Act to provide for the establishment of a Central

Electricity Regulatory Commission ("CERC") and State Electricity Regulatory Commission ("SERC"), for rationalization of electricity tariff, transparent policies regarding subsidies, promotion of efficient and environmentally benign policies and other matters connected therewith or incidental thereto. Chapter-VI of the Commissions Act, 1998 was related to energy tariff and provided for the determination of tariff by Central and State Commissions.

14. Insofar as the National Capital Territory ("NCT") of Delhi is concerned, on 08.03.2001, the Delhi Electricity Reforms Act, 2000 ("Reforms Act, 2000") was notified to:

(a) provide re-structuring of the electricity industry (unbundling of generation, transmission, and distribution),

(b) increasing avenues for participation of private sector in the electricity industry; and

(c) generally, for taking measures conducive to the development and management of the electricity industry in an efficient, commercial, economic, and competitive manner in the NCT of Delhi and for matters connected therewith or incidental thereto.

15. With effect from 01.07.2002, pursuant to the unbundling, restructuring and reform of the erstwhile Delhi Vidyut Board ("DVB") and privatization of distribution of electricity, the appellants succeeded to the respective Distribution Undertakings and Business in their area of supply. The appellants have been granted Distribution and Retail Supply License by DERC to undertake distribution (wheeling) and retail supply of electricity in their respective areas of supply in the NCT of Delhi. From 01.07.2002 till 31.03.2007, the Delhi Transco Ltd. ("DTL") was entrusted with the responsibility of bulk procurement and bulk supply of power in the NCT of Delhi.

16. In the year 2003, the Parliament repealed the previous three laws viz., the 1910 Act, the Supply Act, 1948 and the Commissions Act, 1998, and enacted a comprehensive consolidated law called the Electricity Act, 2003. The objectives of the Act are:-

(a) to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity,

(b) taking measures conducive to development of electricity industry, promoting competition therein,

protecting interest of consumers and supply of electricity to all areas,

(c) rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies,

(d) constitution of the CEA, Electricity Regulatory Commissions, and establishment of an Appellate Tribunal and for matters connected therewith or incidental thereto.

17. The scheme of the 2003 Act is predicated on consolidating all laws governing electricity and repealing the existing laws. The legislative policy of distancing the Government from the tariff determination was carried forward in the 2003 Act. The intent and purpose of the 2003 Act is to liberalize the electricity sector and to ensure that the distribution and supply of electricity is conducted on commercial principles. The legislature intended to promote factors that encourage and reward efficiency, competition, economical use of resources and optimum investments and safeguard the interest of the consumers vis-à-vis recovery of cost of electricity in a reasonable manner as envisaged under Section 61 of the 2003 Act.

18. Being regulated licensees responsible for distribution and retail supply of electricity in their designated areas within the NCT of Delhi in terms of Section 12 of 2003 Act, the annual revenue requirement of the Appellants to conduct the licensed business and consequently the tariff to be recovered from the consumers, is regulated by the DERC, being the State Electricity Regulatory Commission. DERC is vested with a substantial set of divergent powers – legislative, executive, adjudicatory and advisory – each being distinctly defined and governed by law. One of the critical issues arising in these Civil Appeals relates to sanctity of each such function and their interplay. In this regard, it is noteworthy that Section 3 of the 2003 Act provides as under:

> "Section 3. National Electricity Policy and Plan. -
> (1) The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.
> (2) The Central Government shall publish National electricity Policy and tariff policy from time to time.
> (3) The Central Government may, from time to time in consultation with the State Governments, and the

Authority review or revise the National Electricity Policy and tariff policy referred to in sub-section (1).

(4)The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years.

Provided xxx xxx xxx

(5)The Authority may review or revise the National Electricity Plan in accordance with the National Electricity Policy."

19. Section 14 of the 2003 Act provides for grant of licences on application made under Section 15 of the Act - (a) to transmit electricity as a transmission licensee; or (b) to distribute electricity as a distribution licensee; or (c) to undertake trading in electricity as an electricity trader, in any area which may be specified in the licence.

20. Section 43 of the 2003 Act provides for the universal supply obligation of the Discoms, which is as under:

"43. Duty to supply on request –

(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply.

Provided xxx xxx xxx

(2) & (3) xxx xxx xxx"

21. Section 61 of the 2003 Act lays down the guiding principles for tariff which are as under:

> "61. Tariff regulations.- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-
>
> (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
> (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
> (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
> (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
> (e) the principles rewarding efficiency in performance;
> (f) multi-year tariff principles;
> (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;
> (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
> (i) the National Electricity Policy and tariff policy:
>
> Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood

immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

22. Sections 62 and 64 of the 2003 Act lay down the procedure for determination of tariff for, *inter alia,* wheeling and retail sale of electricity as under:

"**62. Determination of tariff.**-

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:
Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;
(b) transmission of electricity;
(c) wheeling of electricity;
(d) retail sale of electricity:

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

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be

specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified. The Electricity Act, 2003.

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

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

"64. Procedure for tariff order.-
(1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.

(2) Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission.

(3) The Appropriate Commission shall, within one hundred and twenty days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public,-

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;
(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

Provided that an applicant shall be given a reasonable opportunity of being heard before rejecting his application.

(4) The Appropriate Commission shall, within seven days of making the order, send a copy of the order to the Appropriate Government, the Authority, and the concerned licensees and to the person concerned.

(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.

(6) A tariff order shall, unless amended or revoked, continue to be in force for such period as may be specified in the tariff order."

23. ARR of the Appellants, and consequently the tariff to be recovered from the consumers, is regulated by the DERC, and determined under Section 62 read with Section 61 of the 2003 Act.

24. Section 86 of the 2003 Act lays down the functions of the State Commissions i.e. DERC in this case, and the rule-making power of the Central Government is set out in Section 176 thereof.

25. Before considering the other questions, let us consider the preliminary objection raised by learned counsel for the respondent-DERC as to whether the appeals involve any substantial question of law as required under Section 125 of the 2003 Act read with Section 100 of the CPC?

26. Section 125 of the 2003 Act provides for an appeal to this Court against the decision or order of the APTEL which reads as under:

"**125. Appeal to Supreme Court.**-
Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication

of the decision or order of the Appellate Tribunal, to him, on any one or more of the grounds specified in section 100 of the Code of Civil Procedure,1908 (5 of 1908):

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days."

27. Thus, an appeal to this Court under Section 125 could be filed on the grounds specified in Section 100 of the CPC. Under Section 100 of the CPC, an appeal could be filed only when the case involves 'a substantial question of law', as may be framed by the appellate court. Thus, the existence of a 'substantial question of law' arising from the judgment of the APTEL is *sine qua non* for exercise of jurisdiction by this Court under Section 125 of the 2003 Act.

28. The expression 'appeal' has not been defined in the CPC. Black's Law Dictionary (10th Edn.) defines an 'appeal' as "a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority." An appeal is judicial examination of a decision of a subordinate court by a higher court to rectify any possible error(s) in the order under appeal. The law provides the

remedy of an appeal in recognition of the fact that those manning the judicial tiers too may commit errors.

29. The test to determine whether a question is a substantial question of law or not was laid down by a Constitution Bench of this Court in **Sir Chunilal V. Mehta & Sons Ltd. v. The Century Spg. & Mfg. Co. Ltd.**[1] as under : (AIR p. 1318, para 6)

> "*6.* ... The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

30. Thus, the word 'substantial' as qualifying 'question of law' means, of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with technical, of no substance or consequence,

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1 1962 Supp (3) SCR 549 : AIR 1962 SC 1314

or academic. For determining whether a case involves substantial question of law, the test is not merely the importance of the question, but its importance to the case itself necessitating the decision of the question. The appropriate test for determining whether the question of law raised in the case is substantial would be to see whether it directly and substantially affects the rights of the parties. If it is established that the decision is contrary to law or the decision has failed to determine some material issue of law or if there is substantial error or defect in the decision of the case on merits, the court can interfere with the conclusion of the lower court or tribunal. The stakes involved in the case are immaterial as long as the impact or effect of the question of law has a bearing on the *lis* between the parties.

31. Thus, in a second appeal, the appellant is entitled to point out that the order impugned is bad in law because it is *de hors* the pleadings, or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against the provision of law or the decision is one which no Judge acting judicially could reasonably have reached. Once the appellate

court is satisfied, after hearing the appeal, that the appeal involves a substantial question of law, it has to formulate the question and direct issuance of notice to the respondent/s.

32. Now, let us consider as to whether the present appeals involve any substantial question(s) of law.

33. The APTEL has recorded findings on 35 issues raised by the appellants. According to the appellants, six issues decided by the APTEL give rise to substantial question of law which are as follows:

1. Change in methodology in computation of AT&C Losses.

2. Change in methodology for computation of Depreciation.

3. Disallowance of salary for FR/SR Structure.

4. Disallowance of interest incurred on Consumer Security Deposit retained by DPCL.

5. Disallowance of Fringe Benefit Tax.

6. Reduction in MUs in relation to Enforcement sale for the purpose of calculation of AT&C Losses (this issue deals with theft/unauthorized use of electricity).

34. Mr. Arvind P. Dattar and Mr. Dhruv Mehta, learned senior counsel appearing for the appellants, would submit that the findings of the APTEL on Issue Nos.1, 2, 3 and 5 are contrary to the binding DERC Tariff Regulations. It is argued that the Regulator cannot 'change the rules of the game after it has begun' in the 'truing up exercise'. In this regard, they have taken us through the findings of the DERC in the Tariff Order and also the findings of the DERC after the truing up stage. It is further argued that the tariff order is in the nature of a quasi-judicial determination and that in the guise of truing up, the DERC cannot amend a tariff order.

35. On the other hand, Mr. Nikhil Nayyar, learned senior counsel appearing for the respondent-DERC, submits that one of the facets of the tariff determination exercise is the process of 'truing up'. Since the initial tariff order is prepared by the DERC, based on the projections submitted by the Discoms as its ARR petition, the subsequent tariff order is issued after the financial year pursuant to the 'truing up' exercise. It is also pointed out that the findings on the aforesaid six issues are neither contrary to law nor opposed to any regulations.

36. Having considered the submissions of the learned counsels for the parties and after perusing the Impugned Order, we are of the view that these appeals involve the following substantial questions of law:

"**On Issue No.1**

(a) Whether the impugned findings on Issue No.1 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e), 62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which:

(i) Tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

(ii) Regulator cannot "change the rules of the game after it has begun" in the 'truing up exercise'?

(b) Whether the impugned findings violate the principles and methodology for tariff determination specified in the binding DERC's Tariff Regulations?

On Issue No.2

(a) Whether the impugned Findings on Issue No.2 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e), 62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which:

(i) Tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

(ii) Regulator cannot "change the rules of the game after it has begun" in the 'truing up exercise'?

(b) Whether the impugned findings violate the principles and methodology for tariff determination specified in the binding DERC's Tariff Regulations?

On Issue No.3

(a) Whether the impugned Findings on Issue No.3 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e), 62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which:

(i) Tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

(ii) Regulator cannot "change the rules of the game after it has begun" in the 'truing up exercise'?

(b) Whether the impugned findings violate the binding statutory Transfer Scheme and the Tri-Partite Agreements between the GONCTD, the DVB and the Employees' Unions, which form the basis of the privatization of Discoms?

On Issue No.4

(a) Whether the impugned findings on Issue No.4 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e), 62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

On Issue No.5

(a) Whether the impugned Findings on Issue No.5 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e),

62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which:

(i) Tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

(ii) Regulator cannot "change the rules of the game after it has begun" in the 'truing up exercise'?

(b) Whether the impugned findings violate the principles and methodology for tariff determination specified in the binding DERC's Tariff Regulations?

<u>On Issue No.6</u>

(a) Whether the impugned Findings on Issue No.6 are contrary to the mandate of Sections 3, 61(b), (c), (d) and (e), 62, 64 (read with the Tariff Policy) and 86(3) of the 2003 Act in terms of which Tariff must ensure recovery of all costs of undertaking distribution of electricity with reasonable return, rewarding efficiency in performance?

(b) Whether the impugned findings are against settled law that when a statute creates a legal fiction i.e. energy assessed is "deemed" to be consumed, the same has to be given effect to with all its consequences i.e. same quantum of energy is to be accounted for as supplied?

37. One of the substantial questions of law raised on four issues (Issue Nos.1, 2, 3 and 5) is whether it is permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise which needs to be answered before answering each of the aforesaid issues.

38. Section 82 of the 2003 Act envisages the constitution of a State Electricity Regulatory Commission. By virtue of Section 84 of the Act, such State Commission comprises of a Chairperson and Members, being persons possessing "*ability, integrity and standing who have adequate knowledge of, and have shown capacity in, dealing with problems relating to engineering, finance, commerce, economics, law or management*", with the Chairperson being a person who is, or has been, a Judge of a High Court.

39. DERC, constituted under Section 82 of the 2003 Act, is an expert body vested with wide powers and functions under the Act. This includes the power to frame regulations and the power to determine tariff.

40. Under Section 86 of the 2003 Act, the State Commission carries out various functions including determination of "*the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State*". The process of determination of tariff in the present case, as part of the broader regulatory power of the Commission, is to be done in accordance with Section 62 and 64 of the 2003 Act. As per Section

62, the Appropriate Commission (the State Commission in the present case) shall determine the tariff in accordance with the provisions of the Act for *inter alia* retail supply of electricity.

41. In addition to the above functions, the State Commission is also vested with the power to make regulations, under Section 181 of the 2003 Act, - dealing with *inter alia "the terms and conditions for determination of tariff under Section 61"* and "*issue of tariff order with modifications or conditions under sub-section (3) of Section 64".*

42. It is pertinent to note that while framing the Regulations, the State Commission is required to be guided by the principles specified in Section 61 of the 2003 Act.

43. In framing such regulations, the Commission, as an expert policy making body, is entrusted with the duty of striking a balance between the various competing concerns and interests. This balance is expressed in the DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 ("2007 MYT Regulations") which are the relevant regulations governing the issues in the present case.

44. DERC, for a given Multi-Year period (also called the Control Period), frames regulations for determination of tariff. DERC then determines the ARR for the said Control Period in a Tariff Order known as the Multi-Year Tariff Order based on the data available.

45. It is also necessary to note that sub-section (6) of Section 62 of the 2003 Act mandates that the Tariff Order shall continue to be in force for such period as may be specified in the Tariff Order unless amended or revoked. Therefore, if any of the parties are aggrieved by any of the clauses in the Tariff Order, they are at liberty to seek its amendment or revocation under this provision. Secondly, the said order is also appealable under Section 111 of the 2003 Act before the Appellate Tribunal and thereafter before this Court under Section 125. The Tariff Order made under Section 64 is quasi-judicial in nature and it is binding *as-it-is* on the parties unless it is amended or modified in a process known to law.

46. Mr. Arvind Datar and Mr. Dhruv Mehta, learned senior counsel appearing for the appellants have submitted that 'truing up' cannot be used to upset the methodology used for determination of ARR. According to them, such a conduct essentially amounts to

'changing the rules of the game after the game has started' or 'changing the goal post' with the sole intention to deny legitimate allowances to the appellants. It is also argued that 'truing up' stage is not an opportunity for the DERC to re-think *de novo* on the basic principles, premises and issues involved in the initial projections of revenue requirement of the licensee. It was also argued that DERC has no unfettered power to control the tariff determination process as well as 'truing up' exercise.

47. On the other hand, Mr. Nikhil Nayyar, learned senior counsel appearing for the respondent-DERC, has submitted that one of the facets of tariff determination exercise is the process of 'truing up'. Since the initial tariff order is prepared by the DERC based on projections submitted by the Discoms with its ARR petition, the subsequent tariff order is issued after the financial year pursuant to the 'truing up' exercise. The process of 'truing up' requires the DERC to carry out a prudence check. A prudence check is not a mere accounting or mathematical exercise. A prudence check requires a scrutiny of reasonableness of the expenditure incurred or proposed to be incurred by the Discoms and also such other factors that the

DERC considers appropriate for determination of tariff. DERC being an expert body, due deference ought to be given to their understanding as recorded in various regulations. It is argued that the controlling factor throughout the entire 'truing up' exercise is the MYT Regulations itself. It is further argued that the tariff determination exercise carried out by the DERC is a continuous process. The tariff determination exercise includes the initial tariff order - in the instant case it is 23.02.2008 - a 'truing up' *inter alia* the ARR and Multi-Year Tariff Order for the years, F.Y. 2007-08 to F.Y.2010-11, as well as the subsequent Tariff Order dated 26.08.2011, *inter alia,* 'true up' for F.Y. 2008-09 and F.Y. 2009-10. Mr. Nayyar has placed reliance on the judgment of this Court in **Gujarat Urja Vikas Nigam Limited v. Tarini Infrastructure Limited & Others**[2] in support of his submissions.

48. We have carefully considered the submissions of the learned senior counsel for the parties. We have already noticed that the State Electricity Regulatory Commissions constituted under Section 82 of the 2003 Act are a multi-member body comprising a Chairper-

2 (2016) 8 SCC 743

son and members being persons having adequate knowledge, of ability, integrity and standing who have adequate knowledge, and have shown capacity, in dealing with problems relating to engineering, finance, commerce, economics, law or management, with the Chairperson being a person who is or has been Judge of a High Court. Under Section 86 of the 2003 Act, the State Commission carries out various functions including determination of tariff for generation, supply, transmission and wheeling of electricity in wholesale, bulk or retail as the case may be within the State. The process of determination of tariff has to be done in accordance with Sections 62 and 64 of the 2003 Act. It is well settled that the Commission (in this case, the DERC) performs a quasi-judicial function while determining tariff. This has been expressly recognized by the Constitution Bench of this Court in **PTC India Limited v. Central Electricity Regulatory Commission, Through Secretary**[3] as under:

> **"50.** Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of

3 (2010) 4 SCC 603

> tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

49. The DERC determines the tariff of the licensee under Section 62 in such a manner as determined by the 2007 MYT Regulations. This function is governed, *inter alia,* by safeguarding all consumers' interest and at the same time recovering the cost of electricity in a reasonable manner, such that 'distribution and supply of electricity are conducted on commercial principles' which encourage and reward competition, efficiency, economic use of resources, good performance and optimum investments.

50. DERC determines ARR of the licensee i.e. costs of undertaking the licensed business which are permitted in accordance with the requirement specified by DERC which is to be recovered from the tariff in the year end. ARR determined by DERC is based on projec-

tions. Since the tariff and the ARR are regulated, the Discoms cannot recover anything more than from its consumers than what is allowed by the DERC.

51. As noticed above, a tariff order is quasi-judicial in nature which becomes final and binding on the parties unless it is amended or revoked under Section 64(6) or set aside by the Appellate Authority. Apart from this, we are also of the view that at the stage of 'truing up', the DERC cannot change the rules/methodology used in the initial tariff determination by changing the basic principles, premises and issues involved in the initial projection of ARR.

52. 'Truing up' has been held by APTEL in **SLDC v. GERC**[4] to mean the adjustment of actual amounts incurred by the Licensee against the estimated/projected amounts determined under the ARR. Concept of 'truing up' has been dealt with in much detail by the APTEL in its judgment in **NDPL v. DERC**[5] wherein it was held as under:-

4 2015 SCC Online APTEL 50 [Para. 17]

5 2007 ELR (APTEL) 193

> "60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. … The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence."

53. This view has been consistently followed by the APTEL in its subsequent judgments and we are in complete agreement with the above view of the APTEL. In our opinion, 'truing up' stage is not an opportunity for the DERC to rethink *de novo* on the basic principles, premises and issues involved in the initial projections of the revenue requirement of the licensee. 'Truing up' exercise cannot be done to retrospectively change the methodology/principles of tariff

determination and re-opening the original tariff determination order thereby setting the tariff determination process to a naught at 'true-up' stage.

54. In **Gujarat Urja Vikas Nigam Ltd. (supra)**, this Court was considering a case where tariff was incorporated in the power purchase agreement between a generating company and a distribution licensee. This Court held that it is not possible to hold that the tariff agreed by and between the parties, though finding a mention in a contractual context, is the result of an act of volition of the parties which can, in no case, be altered except by mutual consent. We are of the view that this judgment is not applicable to the facts of the present case.

55. Revision or re-determination of the tariff already determined by DERC on the pretext of prudence check and truing up would amount to amendment of the tariff order, which can be done only as per the provisions of sub-Section (6) of Section 64 of the 2003 Act within the period for which the Tariff Order was applicable. In our view, DERC cannot amend the tariff order for the period 01.04.2008 to 31.03.2010 in the guise of 'true-up' after the relevant financial

year is over and the same is replaced by a subsequent tariff Order. This would amount to a retrospective revision of tariff when the relevant period for such tariff order is already over. Therefore, we hold that it is not permissible to amend the tariff order made under Section 64 of the 2003 Act during the 'truing up' exercise.

56. **Issue Nos. 1, 2, 3, and 5**: We have already noticed that one of the substantial questions of law involved in Issue Nos.1, 2, 3 and 5 is whether the Regulator can 'change the rules of the game after it has begun' in the 'truing up exercise'.

57. **Issue No. 1**: In the original MYT determination (Tariff Order dated 28.05.2009), the DERC took into account the full late payment surcharge ('LPSC') revenue as also the DVB arrears while computing the targets of Collection Efficiency as under:-

> "3.10. An analysis of the components of AT&C loss level indicates that the revenue collection on account of sale of energy was Rs.2810.3 Crs. However, this amount could not be verified from the audited accounts of the petitioner. The petitioner has, instead, submitted a daily collection sheet to substantiate its collection of Rs.2810.3 Crs.

3.11 The Commission is not receptive to the methodology of verifying the collection from the Daily Collection Sheet as proposed by the petitioner. Accordingly, the petitioner was directed during the validation session to reconcile the amount of cash collected bases on the opening levels of debtors, sales made during the year, DVB arrears collected and the closing level of debtors, with the total collections shown for FY 07-08. However, the petitioner expressed inability to reconcile the figures using this methodology.

3.12. The petitioner was, thereafter, directed to provide a copy of the daily collection sheet duly audited by its Statutory Auditors. The petitioner was also directed that the Statutory Auditors should establish that the amount mentioned in the Daily Collection Sheet does not included any collections on account of other sources of revenue like sale of power through bilateral, intra-state, UI, etc. and revenue from operations (non-energy).

3.13. In response to the above, the petitioner submitted a copy of its Statutory Auditor's certificate certifying the Day-wise Collection Statement for FY 07-08 vide its letter no.RCM/08-09/245 dated 16th February, 2009. The Certificate clarified the exclusion of collections made on account of trading of energy, non-energy charges, subsidy

received from GoNCTD, etc. and inclusion of LPSC, electricity duty, amount collected by BYPL on behalf of BRPL, etc.

3.14. Accordingly, based on the clarifications provided in the statutory auditor's certificate and the audited financial statements, the amount mentioned in the Daily Collection Sheet submitted by the petitioner has been taken into account.

...

3.24. In the light of the above background, the revised AT&C loss levels of the petitioner for the first year of the Control Period i.e. FY 07-08 is as summarized in the Table 6 below:

Table 6: Trued-up AT&C loss for FY 07-08 (Rs.crs.)

Particulars	**Amount**
Add:	
Theft Collection	60.4
Subsidy	48.4
Rebate	47.8
DVB Arrears collected from Government Bodies by DPCL	64.5
Total Other Collections during FY 07-08	221.0
(A) Total Collections in FY 07-08	3031.27
(B) Billed Revenue considered for AT&C	2889.99

(C) Collection Efficiency (A/B)	104.89%
Distribution Loss Level FY 07-08	30.89%
AT&C Loss for FY 07-08	27.51%"

58. However, while truing up for the year in question, the DERC has retrospectively sought to take away part of the LPSC revenue by deducting the Financing Cost on LPSC in comparing the actual Collection Efficiency with the projected Collection Efficiency. Hence, allowing the Financing Costs on LPSC revenue and then deducting it from the LPSC revenue would tantamount to giving by one hand and taking it away by the other. This order of the DERC is contrary to the original MYT determination.

59. **Issue No.2**: In the Original Determination Order dated 28.05.2009 (F.Y. 2008-09), DERC has allowed depreciation on the assets funded by consumer contributions. However, DERC changed the methodology of computation of ARR at the stage of true up. According to the learned counsel for the respondent, DERC had inadvertently made an error and adopted an approach contrary to the mandate of 2007 MYT Regulations while computing the depreciation when originally issuing the tariff order, which was rectified in

the true up exercise. However, learned counsel for the appellants submit that no error has been committed by the DERC in the tariff order dated 28.05.2009 and it is only after considering the relevant MYT Regulations that depreciation to the appellants on the assets that were funded by consumer contributions was allowed.

60. Perusal of the Tariff Order dated 28.05.2009 would clearly indicate that after considering the contentions of the parties the aforesaid depreciation has been allowed. We have already held that it is not permissible to amend the tariff order during true up exercise. On the pretext of prudence check and truing up, DERC could not have amended the tariff order.

61. **Issue No.3** : During projection of expenses for the entire control period, the Tariff Order dated 23.02.2008 had projected employee expenses considering *inter alia* the impact of the anticipated Sixth Central Pay Commission Report. The relevant portion of the said Tariff Order is as under:

> "*4.99 The Petitioner has submitted the employee expenses for FY07 as Rs 137.60 Cr and has considered the same as the base for the Control Period. The Petitioner has considered the following factors while projecting the*

escalation factor for the employee expenses for the Control Period:

(a) Anticipated 6th Pay Commission report

(c) Research of lead HR consultants on salary trends in the country

(c) Initiatives undertaken to retain quality manpower and demand for employees in the power industry.

(d) Inflation during last 12 months € increase in employees to cater to growth of consumers.

4.100 The Petitioner has projected its total employee expenses for the Control Period considering different escalation rates for different components of the employee expenses. The annual growth rates for various components of employee expenses as proposed by the Petitioner are given below:

(a) Basic Salary: The year on year increase in basic salary for all the employees during the Control Period has been estimated at 23.2%, 11.1%, 11.3%, and 11.5% for FY08, FY09, FY10 and FY11 respectively.

(b) Dearness Allowance (DA): Annual estimated increase in DA is considered as 9%, 6%, 6%, and 6% for FY08, FY09, FY10 and FY11 respectively.

(c) Terminal Benefits: Contribution to terminal benefits/liability fund is considered at 26% of basic salary and dearness allowance for each year of the Control Period.

(d) Other Allowances and expenses including HRA: Considered in proportion to the basic salary."

62. The DERC, while projecting employee expenses for the entire control period in its MYT Tariff Order dated 23.02.2008, had categorically acknowledged the uncontrollable nature of the Sixth Central Pay Commission Report as well as the impact of the same on the salaries of FR&SR employees and held that since the salary of FR&SR employees was an uncontrollable item and that it would be trued up on actuals as under:

"4.108 During the privatization process, part of the employees of the erstwhile DVB were transferred to BRPL. As per the Transfer Scheme, the terms and conditions of service applicable to the erstwhile Board employees in the Transferee Company shall in no way be less favourable than or inferior to that applicable to them immediately before the Transfer. Further, their services shall continue to be governed by various rules and laws applicable to them prior to privatization. Thus the salary/compensation and promotion of the erstwhile DVB employees in BRPL are still governed by the rules and pay scales as specified by the GoNCTD.

4.109 In consideration of the above, the Commission has recognized the uncontrollable nature of the 6th Pay Commission recommendations in determination of employee expenses during the Control Period. The Commission has assumed that the revision in pay, if any, shall be applicable from January 1, 2006. The

Commission has considered an increase of 10% in total employee expenses for the values in FY06 (3 months) and FY07 due to the same.

…

4.112 Similarly, the increase in salaries has been considered for each year, but the impact of such increase has only been taken from FY09 onwards. The Commission shall true-up the impact on account of 6th Pay Commission recommendations based on the actual impact of the same.

4.113 The summary of the revised employees expenses considering the effect of 6th Pay Commission recommendations is given below:

Table 72: Revised Employee Expenses for FY06 and FY07 (Rs Cr)

Particulars	*FY06*	*FY07*
Employee Cost Approved in True up	*167.54*	*184.05*
Less: SVRS Amortization approved	*(46.41)*	*(46.45)*
Net Employee Expenses	*121.13*	*137.60*
Employee expenses pertaining to DVB employees	*75.64*	*85.92*
Employee expenses pertaining to Non-DVB employees	*45.50*	*51.68*
10% escalation due to Pay Commission recommendations	*1.89*	*8.60*
Revised Employee Expenses	*123.02*	*146.19*

4.114 For the calculation of the employee expenses for the Control Period, the Commission has considered the following:

(a) Revised employee expenses for the base year have been escalated as per the escalation factors mentioned in Table 67 to arrive at the employee expenses for the Control Period.

(b) All arrears due to the impact of the 6th Pay Commission recommendations would be payable in FY09. For the purpose of projecting the arrears arising due to recommendation of the 6th Pay Commission for FY08, the Commission has considered the difference between the employee expenses for FY08 arrived by escalating the revised employees expenses for FY07 (i.e. Rs 146.19 Cr) and the employees expenses for FY08 arrived by escalating the trued up employee expenses (net of SVRS amortization) for FY07 (i.e. Rs 137.60 Cr)."

63. However, contrary to its own undertaking, the DERC in Tariff Order dated 26.08.2011 has erroneously changed its own methodology at the stage of truing up, by not allowing employee expenses of FR/SR employees as per actuals. The DERC, at the stage of truing up, has changed the methodology and disallowed the actual salary of FR&SR employees, which is impermissible. The DERC in the Tariff Order dated 26.08.2011 has acted contrary to its own undertaking of truing up the impact of employee expenses on account of the Sixth Central Pay Commission Report.

64. **Issue No.5** : This issue is in relation to disallowance of fringe benefit tax. The DERC has allowed fringe benefit tax in the MYT Order dated 23.02.2008. Relevant extract of the MYT Order dated 23.02.2008 is as under:

> *"Commission's Analysis*
>
> *4.242 The Commission is of the opinion that projecting the actual tax liability for the Control Period is difficult and complex. Thus for simplicity, the Commission provisionally approves Rs 5.00 Cr each year towards income tax and fringe benefit expenses. The Commission would, however, true-up the tax expenses based on the actual tax liability at the end of each year of the Control Period. The Commission has allocated the tax expenses into Wheeling and Retail Supply in the ratio of 20:80, respectively."*

65. The DERC, at the stage of truing up for the F.Y. 2008-09, has changed the methodology and disallowed the fringe benefit tax incurred by the appellants.

66. We have already taken a view that DERC cannot re-open the basis of determination of tariff at the stage of 'truing up'. Revision or redetermination of the tariff already determined by the DERC on the pretext of prudence check and truing up would amount to amendment of tariff order, which is not permissible in law. Truing

up stage is not an opportunity for DERC to re-think *de novo* the basic principles, premises and issues involved in the initial projection of the revenue requirements of the licensee.

67. Therefore, the findings of the DERC, as confirmed by the APTEL in the impugned order, on issue nos. 1, 2, 3 and 5 are contrary to the order of the original MYT determination (Tariff Order(s) dated 23.02.2008 and 28.05.2009) which are accordingly set aside. In view of the above, it is unnecessary for us to consider the other substantial questions of law on the aforesaid four issues.

68. **Issue No.4**: This issue relates to disallowance of interest incurred on Consumers Security Deposit retained by Delhi Power Company Limited ('DPCL'). The DERC in the tariff order dated 26.08.2011 has disallowed the interest on Consumers Security Deposit paid for pre-privatization period received by DVB, which is yet to be transferred to the appellants. The APTEL has confirmed this order of the DERC. It is to be stated here that, at the time of unbundling of the erstwhile DVB (w.e.f. 01.07.2022), the quantum of Consumers Security Deposit reflected in the opening balance-

sheet notified in terms of statutory transfer scheme, was not transferred by the DPCL (the Holding Company wholly owned by the Government of NCT of Delhi) to the appellants and other successor private Discoms. The appellants being distribution licensees under the 2003 Act are required to and are continuing to pay interest on the said Consumers Security Deposit in terms of Section 47(4) of the 2003 Act even though the principal sum was never transferred to them in its entirety by DPCL.

69. The DERC by its order dated 23.04.2007 has held that it does not have power to issue any directions to DPCL.

70. Learned counsel for the respondent-DERC submits that the appellants have sought transfer of deposits along with interest from DPCL and the issue of DPCL to make this payment is pending before the Delhi High Court in W.P. (Civil) No.2396/2008. It is further submitted that, should the appellants succeed in their claim against DPCL and receive the deposit amount along with interest, the amount would be made over to the appellants along with interest. As such, if the expenses were to be presently allowed in the

ARR, and interest burden was passed on to the consumers presently, the Discoms would, in effect, receive double benefit at the time of disposal of the writ petition since the consumers would have already borne the costs of interest which would also be then made over by DPCL to the appellants. It is argued that, as a Regulator, it is incumbent upon the DERC to protect the consumers' interest.

71. We are of the view that disallowing interest paid by the appellants towards Consumers Security Deposit held by DPCL in the ARR of the appellants is wholly misconstrued. Interest on consumers' deposit which is being paid by the appellants is a legitimate expense. It is not in dispute that the security deposit was not transferred by the DPCL to the appellants. However, the appellants were required to bear the costs of the same. In case, the principal sum on Consumers Security Deposit held by DPCL is transferred to the appellants with interest, the appellants would, subject to their legitimate expenditures, retain such interest and benefit of any balance of excess interest received by the appellants would be passed on to the consumers in tariff. Therefore, there is no merit in the contention of the learned counsel for the respondent

that if the interest burden is passed on to the consumers presently, the appellants would, in effect, receive a double benefit in case they succeed in the writ petition pending before the High Court.

72. Therefore, we hold that the appellants are entitled to recover interest on Consumers Security Deposit as held by the DPCL. We direct the DERC to allow the interest on Consumers Security Deposit held by the DPCL and impact thereof to the appellants. The findings of the DERC and the APTEL in this regard are set aside.

73. **Issue No.6**: This issue pertains to enforcement sales i.e. sales which are deemed to have been occurred in cases of electricity theft. The question for consideration is whether the impugned findings in the order of the APTEL are against the legal principle that when the statute creates a legal fiction i.e. energy assessed is 'deemed' to be consumed, the same has to be given effect to with all its consequences i.e. same quantum of energy is to be accounted for as supplied?

74. Electricity transmitted may be stolen or used unauthorizedly. While theft/unauthorized use was approximately 60% before

privatization, it has now been brought down to 7 to 8%. Unauthorized use and theft are dealt with in Section 126 of the 2003 Act, relevant clauses whereof are as under:

> "Section 126: (Assessment): --- (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, **he shall provisionally assess to the best of his judgement the electricity charges payable by such person or by any other person benefited by such use.**
>
> […]
>
> [(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve

months immediately preceding the date of inspection.]

(6) The assessment under this section shall be made at a rate equal to twice the tariff rates applicable for the relevant category of services specified in sub-section (5).”

(Emphasis supplied)

75. The Vigilance/Enforcement Department detects theft/unauthorized use of electricity. After giving due opportunity, the bills are generated for electricity stolen/unauthorized use. These are called enforcement sales/assessed sales. The statutory charge for such theft/unauthorized use is twice the normal rate.

76. While settling enforcement cases of small consumers, Lok Adalats often provide discounts to errant consumers on the assessed equivalent of the rupee amount and not on the assessed units of energy. The assessment of units of energy as deemed to be sales to the consumers is in accordance with Section 126 of the 2003 Act read with provisions for such assessment specified by the DERC itself.

77. In a particular case of unauthorized use of electricity under Section 126, suppose using the 'LDHF formula' (specified by DERC itself), the appellants assess the consumer as having consumed 100 units of electricity.

(a) By virtue of the Supply Code Regulations framed by the DERC itself, these 100 units are to be treated as "sales".
(b) Upon the assessment of 100 Units, the Appellant raises a bill on the said consumer. Under Section 126 of the Electricity Act, the bill has to be raised at twice the normal billing rate. If the normal ABR were Rs. 5 per Unit, the Section 126 Bill will be raised for Rs 1,000 (i.e. 100×[Rs 5×2]);
(c) By virtue of a Settlement which is entered into between the Appellant and the consumer before the Lok Adalat etc., suppose the Appellant agrees to give up Rs 200, the Appellant then recovers Rs 800/- rather than Rs 1,000/-.
(d) Now, though the settlement is only for the Rupee equivalent of the Assessed Bill and not the 'Units sold', the DERC now takes Rs 800, divides it by Rs 10 (i.e. twice the ABR) and arrives at an imaginary 'sales' figure of electrical energy of 80 Units.
(e) This is in complete contrast to the Assessment of Energy sold of 100 Units in terms of the LDHF Formula specified by the DERC itself according to which the sales are "deemed to be" 100 units.
(f) Therefore, by entering into a settlement before the Lok Adalat (which is in harmony with the entire Lok Adalat philosophy), the Appellant first loses Rs 200 in monetary terms and then loses 20 Units of electricity which the Appellant is

deemed to have sold such consumer in the first place.

78. Learned counsel for the appellants submit that when the statute creates a legal fiction, i.e. energy assessed is deem to be consumed, the same has to be given effect to with all its consequences i.e. same quantum of energy is to be accounted for as supplied. However, learned counsel appearing for the respondent DERC submitted that that concurrent findings of the DERC and the APTEL cannot be reversed and the methodology adopted by the Commission has to be maintained.

79. Having considered this question in detail, we are not in agreement with the stand taken by the respondent. We are of the view that the methodology adopted by the DERC is contrary to the settled principle of law that when the law deems a certain imaginary state of affairs as real, DERC would not let its imagination boggle at treating the 100 units as sales. We are of the view that such imaginary state of affairs must be taken to its logical end and commend the treatment of 100 units as 'sales'.

80. We are of the view that the assessed energy has to be considered as supply by the appellants in enforcement cases. Therefore, we direct the DERC to consider assessed energy for calculation of enforcement sales and allow the impact of the same along with carrying costs. In view of our conclusion as above, we do not deem it necessary to answer the other contentions on this issue.

81. The substantial questions of law are answered accordingly. Resultantly, the appeals are allowed and the order(s) of the DERC and the judgment of the APTEL impugned herein, to the extent mentioned above. are hereby set aside. Parties to bear their respective costs.

.....J.
(S. ABDUL NAZEER)

.....J.
(KRISHNA MURARI)

New Delhi;
October 18, 2022.

BEFORE THE HON'BLE JHARKHAND STATE ELECTRICITY REGULATORY COMMISSION AT RANCHI

CASE (TARIFF) NO. 06 OF 2022

IN THE MATTER OF:

The Tata Power Corporation Limited ... Petitioner

Versus

Tata Steel Limited ...Respondent

AFFIDAVIT

I, Jagmit Singh Sidhu, aged 52 years, S/o Shri Manmohan Singh Sidhu, residing at 7, Kaizer Bungalow, Kapali Road, P.O.- Kadma, Jamshedpur-831005, Jharkhand do hereby solemnly affirm and state as under:

1. I am working as Chief – Jamshedpur Operations, with The Tata Power Company Limited, the Petitioner in the above matter, and am duly authorized and competent to swear and depose the present affidavit on behalf of Tata Power.
2. That the Petitioner has filed the Petition for True Up of FY 2020-21 along with APR of FY 2021-22 on 30.11.2021 (Case (T) No. 06 of 2022) before this Hon'ble Commission with respect to Unit- 2 & 3 (2x120 MW) of Jojobera Power Plant of the Tata Power Corporation Limited. Further the Petitioner has submitted Additional Affidavit in Case (T) No. 06 of 2022 on 22.11.2022. The Petitioner is now submitting

8/11/2022

File No

additional data/information related to the said Petition filed before Hon'ble Commission on 30.11.2021.

3. That I have read the additional information being submitted on behalf of the Tata Power Company Limited and have understood the contents thereof and that contents therein are true and correct to the best of my knowledge and belief and are based on the records of Tata Power and information received from the concerned officers of the Petitioner.

Deponent

The Tata Power Co. Ltd. ★ Jamshedpur ★

VERIFICATION

I, the Deponent above named, do hereby verify that the contents of this affidavit are true and correct, no part of it is false and nothing material has been concealed therefrom.

Verified at Jamshedpur on this 8th day of Dec 2022.

Place: Jamshedpur

Date:

Deponent

Identified by me and Signed Per LTI in my presence
A. K. Prasad
Advocate
Jamshedpur

SEAL OF NOTARY ★ NOTARY JAMSHEDPUR East Singhbhum ★ SUNIL KUMAR SINGH

Sunil Kumar Singh
NOTARY
JAMSHEDPUR
East Singhbhum
REG. NO. IA/NOT-LAW
30/2002 2585/1

8/12/22