THE SINGARENI COLLIERIES COMPANY LIMITED
(A Government Company)
2 X 600 MW SINGARENI THERMAL POWER PROJECT
Jaipur (V&M)-504216, Mancherial (Dist), T.G.

Ref no: STPP/COML/2024-25/04 Dt: 16.01.2025

To
The Secretary,
TGERC, Vidyut Niyantran Bhavan,
Kalyan Nagar, Hyderabad – 500 045.

Sir,

Sub: SCCL – Reply to the Objections filed by TGDISCOMs on the filing of Annual Tariff Petition for FY 2025-26 containing Revised Tariff proposal for FY 2025-26 and True up of FY 2023-24 in respect of Singareni Thermal Power Project, Phase-I (2X600 MW) – Reg.

Ref: Lr.No.CE(IPC)/TGSPDCL/SE(IPC)/F.No.Singareni/D.No.150/24, Dt.09.01.2025.

The SCCL reply to the objections/suggestions filed by TGDISCOMs on the filing of Annual Tariff Petition for FY 2025-26 containing Revised Tariff proposal for FY 2025-26 and True up of FY 2023-24 in respect of Singareni Thermal Power Project, Phase-I (2X600 MW) is hereby submitted with six copies each.

The Hon'ble commission is kindly requested to accept the same.

Thanking you.

Yours sincerely

Executive Director
(STPP)
EXECUTIVE DIRECTOR
2X600MW, STPP

Encl: Reply to the TGDISCOMs objections dated 09.01.2025 with 6 copies.

SCCL reply to the objections/suggestions filed by TGDISCOMs on the filing of Annual Tariff Petition for FY 2025-26 containing Revised Tariff proposal for FY 2025-26 and True up of FY 2023-24 in respect of Singareni Thermal Power Project, Phase-I (2X600 MW).

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BEFORE THE TELANGANA ELECTRICITY REGULATORY COMMISSIONAT HYDERABAD
O.P. NO. 30 OF 2024

IN THE MATTER OF:

Filing of Annual Tariff Petition for FY 2025-26 for 2X600 MW M/s Singareni Thermal Power Plant containing proposal for revised tariff for FY 2025-26 in accordance with sections 62 and 86.1 (a) of Electricity Act 2003 read with Telangana State Electricity Regulatory Commission (Multi Year Tariff) regulation 2023 and True up of FY 2023-24 in terms of Section 62 and 86.1 (a) of Electricity Act 2003 read with Telangana State Electricity Regulatory Commission (Terms and Conditions of Generation Tariff) regulations, 2019.

Between:

The Singareni Collieries Company Limited (SCCL): Kothagudem Collieries, BhadradriKothagudemDist, Telangana State - 507101; Rep. by its authorized representative i.e., **Director Finance, SCCL**.

....PETITIONER

AND

1. **Southern Power Distribution Company of Telangana Limited (TGSPDCL)**: Corporate Office: # 6-1-50, Mint Compound, Hyderabad, Telangana-500 063.
2. **Northern Power Distribution Company of Telangana Limited (TGNPDCL)**: H.No: 2-5-31/2, corporate Office, Vidyut Bhavan, Nakkalagutta, Hanamkonda, Warangal, Telangana-506001

...RESPONDENTS

THE PETITIONER/SCCL RESPECTFULLY SUBMITS REPLIES TO SPECIFIC PARAS OF OBJECTIONS / SUGGESTIONS FILED BY TGSPDCL AND TGNPDCL.

1. **Re –para number1 to 14:**

   It is to humbly submit that these Submissions by the Respondents are selectivestatements of facts. Some important facts omitted by their statements of general facts are:

   a) The order dated 01.04.2023 in O.P No.13 of 2023 passed by Hon'ble Commission is under challenge before APTEL vide Appeal no.256 of 2024. Subsequently, TGERC

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changed its stand on premium coal pricing in O.P No.4 of 2024 vide their order dated 28.06.2024.

b) Hon'ble APTEL also remanded the clarification petition on disputes petition no.O.P No.8 of 2021 back to TGERC for early disposal where prima facia Hon'ble TGERC allowed additional coal cost including any premium up to scheduled generation.

It is also seen that TGDISCOMs reproduced some portion of order dated 28.10.2024 of this Commission in their review petition.

Therefore question rises if the observation is sufficient to help their cause, then why they filed Appeal before APTEL.

Appropriate comments will be offered issue wise in the forthcoming paras.

2. **Re –para number15:**

It is to humbly submit that the revised tariff proposal for FY 2025-26 is submitted as required in terms of TGERC Multi Year Tariff regulation, 2023. The truing up proposal of the FY 2023-24 is submitted as required in compliance of TGERC regulations 01 of 2019.

Further it is to submit that both the proposals in this tariff filing are submitted absolutely in compliance with the timelines provided in clause 6 of TGERC MYT regulation 2023.

3. **Re –para number16 to 26:**

a. It is to humbly submit that the claim towards additional capitalization for FY 2023-24 contains major items like Generator exciter assembly (with PMG), Repair of Unit-2 Generator rotor amounting to Rs.38.31 crores and Enhanced Compensation paid for land as per Court directives Rs.2.91 crores out of total Rs 49.29 crores.

b. The projected PLF during FY 2024-29 is around 91%. It is utmost important to keep necessary Generator exciter assembly available during the coming control period for successful execution of generation plan. It is submitted that exciter assemblyis one ofthemajorconstituents of turbine generator assembly used for generation ofelectricity.

c. It is observed from the past experiences that when any of this equipment fails for whatever reason and order is placed for replacement of Original Equipment Manufacturer (OEM), the manufacturer requires a high lead time of around one year to supply a new one or at

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least four months time for refurbishment.

d. The high lead time is attributable to the fact that OEM imports the input materials necessary for these modules from other countries and arranges required machining and assembling activity in India. Therefore, any failures of any of these equipments are costly and needs special attention.

e. As per the power purchase agreement entered between SCCL and TGDiscoms, STPP is expected to meet the availability norms set by the regulator and full fixed charges can be claimed only after achieving the normative availability. If such equipment is not provided, SCCL will lose due to non-recovery of full fixed charges while TG Discoms will also be incurring loss from the arrangement of alternative power supply from the market. It is submitted that the short-term power markets are highly volatile and unpredictable. Therefore shut down of units in the range of four months to one year will impact the cash flow of both SCCL and TGDISCOMs. Therefore, a win-win situation may be achieved if STPP is allowed to make required capital expenditures.

f. STPP has two similar units of 600 MW supplied by BHEL. Accordingly, one set of exciterassemblywouldcatertheneedofboththeunits effectively.

g. In view of above, STPP purchased one generator exciter to meet the exigencies as both the units are of same capacity and as the lead time for purchase of generator exciter is very high i.e. around 1 year.

h. SCCL requests Hon'ble Commission to allow the proposed exciter assembly & other capital expenditure as these expenditure are well within the specified ceiling limits.

i. Further, as per the directives of Civil Courts additional amount of Rs. 2.91 crores is paid for Enhanced Compensation for already acquired land which are within the original scope and spilled over to current control period, and occurred due to change is law.

j. Therefore objections made by the Respondents have no merit for consideration.

4. **<u>Re -27 (i): Computation of return on Equity:-</u>**

a. It is to submit that the Respondents have alleged that claimed equity by SCCL is more by Rs.14.79 crores due to consideration of additional capitalization of Rs.49.29 crores during

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FY 2023-24 respectively. It is also further stated that regular income tax @25.17% have been grossed up as per regulation with the Return on equity base rate of 15.5%.

b. In this regard it is to submit that the reason for this objection by the Discoms appears to have made relying on midterm review order dated 23.03.2023 passed by Hon'ble Commission, but without considering the fact that the said order dated 23.03.2023 is applicable only for trued up period of FY 2019-22. This Hon'ble Commission needs to again apply prudence of the expenditures, facts and reasons submitted before them in terms of specified tariff regulation in the present petition.

c. It is to humbly submit that SCCL has opted for payment of Corporate Income Tax at the reduced Tax rate of 25.168% without MAT credit entitlement and exemptions as per the Taxation (Amendment) Ordinance 2019. It is to submit that SCCL is an income tax assessee whereas STPP is not a separate assessee. It is to submit that STPP is integral part of SCCL.

d. Further the objection that since STPP is regulated entity it needs to pay MAT rates is incorrect, misleading and lacks merit. As stated above STPP is not a separate legal entity. No applicable tariff regulation sates thatprevails over it the income tax laws. In fact an entity needs to pay tax as per applicable income tax rate of the country and tariff regulation only have to allow effective tax rate paidby embedding the same in ROE computation during truing up.

e. The Income Tax paid by SCCL for the FY 2023-24 is based on following applicable rates. Basic Rate = 22%, Surcharge = 10% (on Basic rate) and Cess= 4% (on Basic rate + Surcharge).

f. Effective Income Tax Rate actually paid by SCCL which includes STPP in its one of the verticals is 25.168%. It is the Discom's argument that STPP being a generating company may take the benefit of 80IA and pay income tax only on MAT rate. However, it is to kindly submit that actual payment of income tax cannot be based on such assumptions and presumptions because STPP is not a company separate from SCCL. As the tax being paid on actual basis and the PPA also stipulates that such tax to be reimbursed by the Respondent, now in the truing up of FY 2023-24 Respondents ought not to have objected for the same.

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g. As far as the tariff regulations are concerned, nowhere in the clause 11.3.4 & 11.3.5 it was stated to exclude income of non generation business for income tax computation in truing up. The clause 11.3.4 & 11.3.5 are reproduced below:

"11.3.4. Rate of return on equity shall be rounded off to three decimal places and shall be computed as per the formula given below Rate of pre-tax return on equity = Base rate / (1-t) Where "t" is the effective tax rate in accordance with Clause 11.3.1 of this Regulation and shall be calculated at the beginning of every Financial Year based on the estimated profit and tax to be paid estimated in line with the provisions of the relevant Finance Act applicable for that financial Year to the generating entity on pro-rata basis by excluding the income of non-generation and the corresponding tax thereon.

11.3.5. In case of Generating Entity paying Minimum Alternate Tax (MAT), "t" shall be considered as MAT rate including surcharge and cess."

h. The clause 11.3.4 provides for using effective tax rate and for projection purpose which shall be computed at the beginning of every financial year based on estimated profit and tax to be paid by the generating entity on pro-rata basis by excluding the income of non generation and the corresponding tax thereon. It provides that though there will be reduction of income and tax paid with respect to non generation business on absolute basis there shall not be any change in tax rates.

i. In fact the use of "pro-rata" confirms that the effective income tax rateshall be unchanged. Consider the following illustration, where acompany's total income is Rs.1200 crores and effective tax rate is @25.17% and income of Rs.200 crores is obtained from non generation business then the effective tax rate for both the generation and non generation business shall be @25.17%. However, on absolute basis the tax payable by the generation business would be Rs. 251.7 crore and by the non generation business would be Rs. 50.34 crore.

j. The Respondents submitted that the State Commission is not bound by the certificates of auditors.

k. It cannot be denied that the State Commission is not bound by the figures as given in the audited statements, since the audit only reflects the amount that has been incurred,but the issue of prudence check, i.e., whether such expenditure was required or not at the first place lies with the Hon'ble Commission. But correctness of amount incurred towards

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permissible component is concerned, the Hon'ble Commission needs to rely on the figures found in Auditors certificate.

l. Not bound simply does not mean that the Hon'ble Commission has to totally disregard the certified amounts. However, the Hon'ble Commission can scrutinize the reasonableness of the expenditure. A recent judgment dated 18.10.2022 by the Hon'ble apex court in the matter between BSES Rajadani Power Ltd vs DERC **(Annexure-I)** clearly specifies the process of truing up and application of the prudence on certified audited expenditures by the State Commission. The relevant portion is reproduced below:

"52. 'Truing up' has been held by APTEL in SLDC v. GERC4 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. DERC5 wherein it was held as under:¬

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

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....."

m. The apex court held that "this process of restricting the claim of utility by not allowing the reasonable anticipated expenditure is **not prudence**".

n. The above ratio decided by apex court for determination truing up is binding on this Hon'ble Commission.

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o. **Further, Hon'ble TGERC in TGGenco truing up of FY 2022-23 order dated 28.10.2024 has allowed the actual tax rate @25.17% in place of MAT by changing its earlier stand taken in midterm review order dated 23.03.2023 in case of TGGenco where MAT rate @ 17.472% was allowed for generating companies. Accordingly, it is observed that Hon'ble TGERC has changed the earlier stand and isnow allowing actual income tax @25.17% alreadypaid by thermal generating station. Accordingly, Hon'ble Commission is requested to allow income tax based on the same principle to STPP also.**

p. Accordingly objections submissions made by the Discoms lack merit and need to be ignored.

5. **Re - 27 (ii): Interest and financing charges on loan:-**

a. It is to humbly submit that the Respondents have objected to claim of revised rates of interest for refinanced loan.

b. In this respect, it is to humbly submit that regulation 12.6.3 of TGERC tariff regulation 2019 provides that the changes to the terms and conditions of the refinanced loans shall be reflected from the date of refinancing and it is easy to understand that how further changes in interest rates falls within these "terms and conditions." Further, clause 12.5 of the same regulation provides that the rate of interest on loan shall be based on weighted average rate of actual loan portfolio.

c. Accordingly, in terms of the said regulations, post refinancing, the rate of interest applicable for actual refinanced loan portfolio is required to be allowed in the tariff.

d. Further, the Respondents stated that the methodology for loan refinancing as allowed by the Hon'ble TGERC in its mid-term order is final and should be the basis for truing up of interest and financing charges even for forth coming FY 2023-24 in this petition.

e. In this regard it is to submit that non-sharing of gain out of loan refinancing in FY 2021-22 which is in deviation with clause 12.6 of TGERC tariff regulation 2019 has been challenged before Hon'ble Appellate Tribunal for Electricity. However, the approval for refinancing was never been under challenge.

f. Therefore, once the approval for refinancing of the loan have been allowed by this Hon'ble Commission, TGERC and as the truing up of FY 2023-24 was not done in the MYT order

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dated 28.06.2024 the Hon'ble Commission may decide sharing ratio of benefit out of this refinancing arrangement for FY 2023-24, considering the actual audited interest rates and other factual aspects which were not available earlier. The clause 12.6.1 of TS 01 of 2019 regulation clearly specifies such ratio as 2:1 between beneficiary and generating entity.

g. Further, Respondents state that the petitioner has not carried out the calculation exercise to find out annuity in net savings and the petitioner can only make claim for refinancing in FY 2024-29 if further loan refinancing is taken up in FY 2024-29.

h. It is to humbly submit that loan refinancing was already approved by this Commission in its order dated 23.03.2023 and this aspect attained finality as the same was not challenged. Further, the clause 31.10 of regulation 2 of 2023 provides that net savings out of refinancing loan shall be shared between the beneficiaries and generating entity in the ratio of 2:1.

i. The last proviso of 31.10 of regulation 2 of 2023 states that the net savings in interest shall be calculated as an annuity for the term of the loan but the net savings shall be shared between the parties on **annual basis**. Therefore, it is clear that the calculation of net savings in interest based on **annuity method is only required to apply prudence to approve refinancing.In petitioners case refinancing have already been approved in the previous control period. Hence, the annuity method as suggested by the Discom is not relevant in this matter.** In fact, the same proviso stipulates that **annualnetsavings** shall be shared, which STPP has calculated and already submitted.

j. In view of the above, the Hon'ble Commission is requested to decide the sharing ratio of net savings for FY 2023-24and also to apply the prescribed ratio of2:1 for n sharing of gains in the control period 2024-29.

k. Accordingly, the objections made by the Respondents are devoid of any merit and need to be rejected.

6. **<u>Re - 27 (iii): Claim for Depreciation:-</u>**

It is to humbly submit that the Respondents, without considering the fact that there are certain capitalization done as per Court directives and for compliance of CEA regulation which is in the nature of change in law events, has stated that the depreciation should not

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increase. Accordingly, this fact needs to be considered for capitalization, and consequently the effectof depreciation is required to be allowed by the Hon'ble Commission.

7. **Re –27 (iv): Interest on Working Capital:-**

a. It is to humbly submit that the Respondent requested Hon'ble Commission to regulate for pricing of bridge linkage coal supplied by SCCL to its thermal power plant STPP.

b. The petitioners submit that the said claim of Respondents is not tenable as the pricing of coal by coal companies is not under the jurisdiction of any electricity regulatory commission.

c. It is to humbly submit thatMinistry of Coal, Govt. of India has allocated captive Coal Block/Mine (NAINI) to STPP/SCCL in the year 2016. The coal produced from the Naini Block in Odisha State would be utilized at STPP (being the Specified End Use Plant).However to facilitate the immediate requirement of Coal to STPP project, a Short-term Linkage was granted under the Policy of Bridge Linkage, till the commencement of Coal Supply to STPP gets from its Captive Coal Block (Naini).

d. It is to further submit that **Singareni Collieries Company Limited (SCCL) supplies Coal to Singareni Thermal Power Plant (STPP) as per recommendation of standing linkage committee under MOU.** The extension of bridge linkage will be decided by standing linkage committee (SLC), MoC,Govt. of India after deliberation in the meeting duly considering the recommendations received from Ministry of Power (MoP).

e. SCCL is supplying coal to Power sector (Bridge Linkage and Non Bridge Linkage holders) by regulating supplies to Non Power Customers. Sales realization from NRS is more by Rs. 1,628/T than sales realization from Bridge Linkage&Non Bridge Linkage supplies to power. Therefore, by foregoing revenues, SCCL is supplying coal to Bridge Linkage and Non Bridge Linkage customers considering the request, recommendation of Ministry of Power, Ministry of Coal considering the importance of the Power sector across the country.

f. As per the instructions of SLC given in the bridge linkage allotment order of 2016, SCCL has to decide the source of Coal supply for meeting the bridge linkage quantity i.e the mines, Coal grade and the quantity along with the price there from. **Further, in the most recent order of SLC it was clearly stated that the price of such bridge linkage supply has to be solely decided by SCCL/CIL.**

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g. Further this Hon'ble Commission in STPP's True up of FY 2022-23 and MYT of FY 2024-25 to FY 2028-29 order dated 28.06.2024 has allowed the coal cost including the premium superseding its earlier order dt. 01.04.2024. Accordingly, the Hon'ble commission is requested to allow the coal cost as claimed.

h. SCCL have been exploring swapping of coal from Naini mines since long, TANGEDCO had shown interest in swapping of coal from SCCL to Naini coal mine and accordingly, letters were addressed to TGPCC/TGDISCOMs to give consent for entering into swapping arrangement **(Annexure-II).**

i. Once coal production starts from Naini coal mine & consent is received from TGPCC/TGDISCOMs the same will be taken up with ministry of Coal, GoI.

j. Therefore the submissions made by the Respondents are devoid of any merit and deserves to be rejected.

8. **Re - 27 (v): Operating and Maintenance (O&M) Expenses:-**

a. It is to humbly submit that the O&M expenses for the FY 2023-24 were approved relying on the STPP's actual expenses of control period FY 2016-19 (COD of the station was 2016) after application of CPI & WPI.

b. However, as the STPP plant was new during FY 2016-19 & the deployment of manpower was partial, repair & maintenance costs were very less. This resulted in less O&M expenses approved for FY 2023-24.

c. The new plant when subjected to cyclical stress and extreme thermal conditions for longer period will gradually experience more wear and tear. Some machine parts are also becoming useless. Such sequence of events took place in STPP. The rate of failure of equipment increased with the increase in plant age. Capital spares were purchased and put in service in place of failed equipment.

d. The additional Operation and Maintenance expenditures incurred for Coal Mill Overhauling was absent at initial years. At the time of COD, the initial / mandatory spares for coal mill were purchased and these spares were consumed in the first two and half years for annual mill overhauling. Therefore the impact on O&M expenditure due to annual Mill

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overhauling during 2016-17 to 2018-19 were almost nil. This expenditure towards O&M drastically increased beyond 2018-19 after stored initial spare for coal mill were exhausted.

e. The deployment of CISF in the Singareni Thermal Power Plant (STPP) started after the COD of both the units and the total deployment of CISF could be completed only in the FY 2021-22.

f. The deployment of CISF in the base year was only partial. As such, only 55% of its full capacity manpower was available and deployed in the base year of FY 2018-19.

g. The CISF personnel receive salary and other facilities as decided by the Central Government from time to time. The expenditure for CISF based on Central Government pay structure is required to be reimbursed by STPP which is booked in A&G expenditure.

h. The deployment of CISF was made based on the recommendation of high-level committees after completion of safety review exercise. As per the safety report, the STPP falls under the high security zone which is categorized as "Hyper sensitive zone" by Ministry of Home affairs. Accordingly, the required numbers of CISF of various ranks have been recommended by the authority for posting in STPP.

i. All the above reasons resulted in increase in O&M expenses from already approved values of by this Hon'ble Commission.

j. Accordingly, the Hon'ble commission is requested to allow the actual O&M expenses for the FY 2023-24 as claimed.

k. The Hon'ble commission is requested to consider the **cumulative WPI figures of the past control period i.e around 29.6% to add with the K figure of the last control period which was 1.04** and to consider the K value for the purpose of computing R&M expenditure as 1.34 in place of 1.08.

l. Further, the Respondents submitted that the Hon'ble Commission is not bound by the auditor certification and the Commission has to undertake prudence check of expenses claimed under O&M expenditure.

m. A recent judgment dated 10.18.2022 by the Hon'ble apex court in the matter between BSES Rajadani Power Ltd vs DERC clearly specifies the process of truing up and application of

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the prudence on certified audited expenditures by the State Commission. The relevant portion is reproduced below:

"52. 'Truing up' has been held by APTEL in SLDC v. GERC4 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. DERC5 wherein it was held as under:¬

"60. Before parting with the judgment we are constrained to remark that the Commissionhas not properly understood the concept of truing up. While considering the Tariff Petition of theutility the Commission has to reasonably anticipate the Revenue required by a particularutility and such assessment should be based on practical considerations. ... The truing upexercise is meant (sic) to fill the gap between the actual expenses at the end of the yearand 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 wherethe Commission has reasons to differ with the statement of the utility and records reasons thereofor where the Commission is able to suggest some method of reducing the anticipatedexpenditure. This process of restricting the claim of the utility by not allowing thereasonably anticipated expenditure and offering to do the needful in the truing up exercise is notprudence."

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. ……."

n. The apex court held in the above judgment that "this process of restricting the claim of utility by not allowing the reasonable anticipated expenditure is **not prudence**".

o. The above ratio decided by apex court for determination of truing up is required to be followed by this Hon'ble Commission.

p. Accordingly, submissions made by the Discoms lack merit and need to berejected.

9. Re - 27 (vi): Non-Tariff income:-

It is to humbly submit that the non- tariff income claimed is on actual basis for truing up period of FY 2023-24 and the same is un-controllable factor.

Accordingly, the Hon'ble Commission is requested to allow the same.

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10. Re - 27 (vii): Operating norms:-

a. It is to humbly submit that the norms for truing up period of FY 2023-24 was already approved by the Hon'ble commission's order dated 28.8.2020 in para 5.2.8 and the operating norms for FY 2025-26 is considered as approved by this Hon'ble Commission vide its order dated 28.06.2024.

b. Accordingly Hon'ble Commission is requested to allow the same.

11. Re - 27 (viii): Energy Charges:-

a. It is to humbly submit that the Respondent has raised an issue of supplying high priced coal under bridge linkage pricing. In this respect, it is to humbly submit that STPP always comes among the top five State sector generating stations in the Merit order.

b. The average price of STPP in FY 2023-24 is around Rs 5.39/Kwh (Energy Charge @ 3.81+ fixed charge at normative generation @1.58) which is less when compared to other state thermal generating stations.

c. It is to submit that the supply of STPP with the present pricing of the coal are completely aligned with the best interest of consumers in the State of Telangana since the same is much lesser than the most efficient prices discovered through bidding.

d. Further, thisHon'ble Commission in True up of FY 2022-23 and MYT of FY 2024-25 to FY 2028-29 order dated 28.06.2024 of STPP has allowed the coal cost including the premium superseding its earlier order dated 01.04.2024. Therefore the Hon'ble commission is requested to allow the coal cost as pass through & as claimed for calculation of energy charges.

e. Based on the above facts, the objections raised by the Discoms have no merit.

12. Re - 27 (ix):Incentive:-

It is to respectfully submit that if actual PLF reaches more than normative PLF, the incentive is required to be paid in terms of clause 46.6 of regulation 2 of 2023.

13. Re - 27 (x): Other Charges:-

a. It is to humbly submit that the STPP has approvals (through GOs) for drawing 1TMC water from river Godavari and 2TMC water from river Pranahita for industrial usage (Thermal power plant).

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b. STPP has been paying water royalty amount to Irrigation department treating source of water as Natural source from river Godavari (1 TMC).

c. However, Irrigation Department of Telangana government has recently sent demand notice treating the water source from river Godavari **as Reservoir after Sundilla, Annaram and Medigadda barrages have been commissioned recently under Kaleshwaram project.As such higher royalty charges, O&M charges, HTCC charges of downstream barrages are also apportioned to STPP. Arrears amounting to Rs.25.27 Crores was demanded for the period 08/2019 to 03/2023.**

d. The demand of higher charges is in accordance with GOMs no. 34 issued for allocation of 1TMC water to STPP from foreshore of Sundilla barrage under Kaleshwaram project.

e. This water charges are statutory in nature and has to be paid to the Telangana irrigation department as per the state government orders.

f. It is to submit that the expenditures on account of license fee, fee for determination of tariff and audit fee is required to be allowed under aggregate revenue requirement based on actuals. The same is as per regulation 19.6 of TSERC tariff regulation 2019.

g. Further, Hon'ble commission is requested to allow the claim of water charges for FY 2024-25 & FY 2025-26 in line with order dt.28.10.2024 in the matter of TGGENCO MYT

h. It is to submit that the average water charges for control period FY 2019-20 to FY 2023-24 is Rs.8.6 Crores. Accordingly, for FY 2024-25 & FY 2025-26 projections are made with 10% increase as per irrigation department of Telangana government

i. Accordingly the Hon'ble Commission is requested to allow other charges as claimed.

14. <u>Re - 27 (xi):Tariff for FGD system:-</u>

It is to humbly submit that the cost of FGD system together with its effect on the tariff components and additional auxiliary energy shall be submitted after commissioning of the system in truing up petition of relevant year. Thus, the STPP reserves its right to submit the same at a subsequent period.

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15. Re - 27 (xii): Integrated Mine (Naini):-

a. It is to humbly submit that the delay in transfer of forest land by Odisha government has delayed the start of coal production for Naini coal mine and according the delay for coal production is not attributable to SCCL.

b. Further, SCCL have been exploring swapping of coal from Naini mines since long, TANGEDCO had shown interest in swapping of coal from SCCL to Naini coal mine and accordingly, letters were addressed to TGPCC/TGDISCOMs to give consent for entering into swapping arrangement.

c. Once coal production starts from Naini coal mine & consent is received from TGPCC/TGDISCOMs the same will be taken up with ministry of Coal, GoI.

The Hon'ble commission is prayed to consider the above para wise replies submitted by SCCL in respect of objections / suggestions filed by Respondents, to determine the tariff in the truing up of FY 2023-24 and for revising the tariff for period of FY 2025-26.

Dt: 16.01.2025

PETITIONER/SCCL

EXECUTIVE DIRECTOR
2X600MW, STPP

Annexure - A: A recent judgment dated 18.10.2022 by the Hon'ble apex court in the matter between BSES Rajadani Power Ltd vs DERC.

Bses Rajdhani Power Ltd. vs Delhi Electricity Regulatory ... on 18 October, 2022

Author: S. Abdul Nazeer

Bench: Krishna Murari, S. Abdul Nazeer

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)

JUDGMENT

S. ABDUL NAZEER, J.

1. These two appeals have been filed by BSES Rajdhani Power 17:29:54 IST Reason:

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□a□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 Sec□tion 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, 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?

On Issue No.6

(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 coun□sel 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 al□ lowances 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 pro□jections submitted by the Discoms with its ARR petition, the subse□quent 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 ac□counting 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 under□standing 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 determina□tion 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 engineer□ing, 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 Com□mission (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 Secretary3 as un□der:

> "50. Applying the above test, price fixation exercise is re□ally legislative in character, unless by the terms of a par□ticular 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 en□abling 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/fixa□tion of tariff is done by the appropriate Commission un□der Section 62 whereas Section 61 is the enabling provi□sion for framing of regulations containing generic propo□ sitions in accordance with which the appropriate Com□mission has to fix the tariff. This basic scheme equally applies to the subject□matter "trading margin" in a differ□ent statutory context as will be demonstrated by discus□sion 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 re□ward competition, efficiency, economic use of resources, good per□formance 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 can□not recover anything more than from its consumers than what is al□lowed 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 Appel□late Authority. Apart from this, we are also of the view that at the stage of 'truing up', the DERC cannot

change the rules/methodol□ogy 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. GERC4 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. DERC5 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 princi□ples, 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 pay□ment 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 peti□tioner. The petitioner has, instead, submitted a daily col□lection 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 col□lected and the closing level of debtors, with the total col□lections shown for FY 07□08. However, the petitioner ex□pressed 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 in□cluded any collections on account of other sources of rev□enue 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 Cer□tificate clarified the exclusion of collections made on ac□count of trading of energy, non□energy charges, subsidy received from GoNCTD, etc. and inclusion of LPSC, elec□tricity 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 finan□cial statements, the amount mentioned in the Daily Col□ lection 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	3031.27

	07-08	
	(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 Col□lection 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. Ac□cording to the learned counsel for the respondent, DERC had inad□vertently made an error and adopted an approach contrary to the mandate of 2007 MYT Regulations while computing the deprecia□tion 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 in□dicate 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 exer□cise. 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 con□trol period, the Tariff Order dated 23.02.2008 had projected em□ployee 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 6 th 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 th Commission shall true□up the impact on account of 6 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 167.5 184.0 Less: SVRS Amortization (46.41 (46.45 approved)) Net Employee Expenses 121.1 137.6 Employee expenses pertaining 75.64 85.92 to DVB employees Employee expenses pertaining 45.50 51.68 to Non□DVB employees 10% escalation due to Pay 1.89 8.60 Commission recommendations Revised Employee Expenses 123.0 146.1 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.

Annexure - B: Correspondence letters with TGPCC/TGDISCOMs to give consent for entering into swapping arrangement.

(42)

THE SINGARENI COLLIERIES COMPANY LIMITED
(A Government Company)
2 X 600 MW SINGARENI THERMAL POWER PROJECT
Jaipur (V&M)-504216, Mancherial (Dist), T.G.

Ref No. STPP/FAD/Comml/2024-25/11 Date: 18.07.2024

To
Executive Director (Comml),
TGPCC
Vidyut Soudha,
Hyderabad-82.

Madam,

Sub: Request for TGDISCOM's acceptance for Swapping of coal from Naini Coal mine to nearby coal mines of SCCL - reg.
Ref: Lr.No.JMD/ED(Comml)/SE-IPC/DE-1/F.S27/D.No.253/23, Dt:16.03.2024.

****

It is to kindly inform that DFO (Angul Division of Orissa State) handed over the reserve forest land of 643 Hectares to Naini coal block of STPP/SCCL on 04.07.2024 with much persuasion from top management of SCCL.

Hon'ble TGERC in many instances has directed SCCL to pursue swapping of coal from Naini coal mines to nearby mines of SCCL in STPP's tariff orders.

In view of above, SCCL approached TNPGCL (erstwhile TNGEDCO) for swapping of coal produced from Naini coal mine for one year and subsequently to extend the tenure of swapping based on the analysis of commercials impact.

In this duration of swapping, STPP will receive coal at notified prices from SCCL mines for equivalent quantity that would be swapped through an agreement similar to that applicable for power FSA customers. Rest of the coal requirement of STPP will be supplied through bridge linkage from SCCL mines.

This proposal of swapping of Naini coal for one year is in final stage and now waiting for your in-principle acceptance urgently, preferably within a week, after which it will be submitted before Ministry of Coal for approval with regards to TNGEDCO.

Yours faithfully,

Executive Director
2x600 MW STPP, Jaipur.

Cc: Director (E&M)
GM(Marketing)
GM,STPP
Chief (E&M), PPD, Hyd
AGM (F&A), STPP.

(43)

TELANGANA POWER COORDINATION COMMITTEE

From
The Executive Director (Comml),
TGPCC,
Vidhyut soudha,
Hyderabad-500082.

To
The Executive Director,
Singareni Thermal Power Project
Singareni Collieries Company Ltd,
Jaipur (V&M),Mancherial (Dist),
Telangana-504216.

Lr.No.ED(Comml)/SE-IPC/DE-1/F.S27/D.No.90 /24, Dt:24.07.2024

Sir,

Sub: TGPCC-IPC-2x600 MW Singareni Thermal Power Project- Request of M/s.SCCL on Swapping of coal from Naini Coal mine to nearby coal mines of SCCL – Reg.

Ref: 1. STPP/FAD/COML/2024-25/11, date.18.07.2024.
2. TGERC Order dated 28.06.2024 in OP No. 4 of 2024.
3.Lr.No.ED(Comml)/SE-IPC/DE-1/F.S31/A//D.No.09/24,dt:15.04.2024.
4.TGERC order dated 01.04.2024 in OP No. 13 of 2023.
5.Lr.No.JMD/ED(Comml)/SE-IPC/DE-1/F.S27/D.No.253/23, Dt:16.03.2024.
6. Lr.No.CGM(IPC&RAC)/SE(RAC)/F.STPP/D.No.69/21,dt: 28.08.2021
7.TGERC order dated:29.12.2023 in OP No. 25 & 26 of 2023.
8.TGERC orders dated 19.06.2017 & 28.08.2020.

* * *

This has reference to the letter 1st cited above, wherein in-principle acceptance of TGDISCOMs has been sought for on M/s SCCL proposal "for swapping of coal produced from Naini coal mine for one year to TNPGCL (erstwhile TNGEDCO) and to supply STPP at notified prices applicable for power FSA customers from SCCL mines for equivalent quantity of coal swapped and supply of rest of the coal required to STPP through bridge linkage from SCCL mines".

In this regard, it is to inform that Hon'ble TGERC, vide reference 4th cited, clearly directed M/s SCCL to stop levying any premium on the coal price for whatever quantities agreed to be supplied in terms of the PPA. Hence, SCCL proposal to supply balance quantum of coal through bridge linkage is not acceptable.

(44)

With regard to M/s SCCL proposal for swapping of coal with TNPGCL, it is to inform that Hon'ble TGERC vide latest order dated 28.06.2024 directed M/s SCCL to expedite the process to start the production from Naini coal block to reduce the burden on the Consumers instead of earlier TGERC directions vide orders dated 29.12.2023 for transfer of coal allocation from Naini to SCCL own mines & vide orders dated.19.06.2017 & 28.08.2020 for swapping of coal allocation from Naini coal to SCCL own mines.

In light of the above, it is requested to furnish the details of landed price of Coal including Transportation Charges for both Naini coal mine and SCCL own mine and also Energy Charge Rate (ECR) details to analyse the ECR on commercial aspect for taking further necessary action on swapping of coal.

Yours sincerely,

B.V. Shanthi Sekhar 24/7/24

Executive Director/Comml/TGPCC (I/S)

Copy to

1. The CGM(IPC)/TGSPDCL/Mint compound/ Hyderabad.
2. The CGM(IPC& RAC)/TGNPDCL/Nakkalgutta/Hanamkonda.
3. The FA&CCA/TGPCC/Vidyut Soudha/Hyderabad.

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(45)

THE SINGARENI COLLIERIES COMPANY LIMITED

(A Government Company)
2 X 600 MW SINGARENI THERMAL POWER PROJECT
Jaipur (V&M)-504216, Mancherial (Dist), T.G.

Ref No. STPP/FAD/COM/2024-25/20 Date: 15.10.2024

To
The Executive Director (Commercial),
Telangana Power Co-ordination Committee,
VidyutSoudha, Khairatabad
Hyderabad – 5000 082

Madam,

Sub: SCCL-Reply to TGPCC letter dated 24.07.2024 regarding Naini coal swapping -Reg.
Ref: 1. Lr.No.ED(Comml)/SE-IPC/DE-1/F.S27/D.No.90/24, Dt:24.07.2024.
2. STPP/COML/2024-25/11, Dt:18.07.2024

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vide 1st reference letter cited above, TGDISCOMs requested SCCL to furnish the details of landed price of coal both if transported from Naini coal mine and nearby SCCL mines along with ECR details to analyse commercial aspects.

The estimated coal price along with ECR details as requested are attached herein for kind perusal. The estimated gain from the proposed arrangement is projected to be around 26 Paisa/kWh in energy charge.

Moreover, certain practical difficulties also need to be considered if coal is brought from Naini coal mine to STPP which are given below:

- The coal from Naini has to reach Handapa/Jarpada goods sheds by road mode for onwards supply through rail mode to STPP.
    - The coal transportation through road mode is passing through village roads, where it is allowed for limited time only. This stands as an obstacle for continuous, uninterrupted coal supply.
    - Handapa/Jarpada goods sheds are at a distance of 1034 KM from STPP.
- This railway line experiences heavy traffic which often results corridor congestion. Many linkage holders like APGENCO, TANGEDCO, APPDCL etc., are facing difficulty while bringing coal through this congested line from MCL/CIL and are ultimately sourcing coal from SCCL to meet the shortages.

- The railway freight from Handapa to STPP is estimated around Rs.2016/Ton out of total transportation charge estimated around Rs.2666/Ton from Naini to STPP. Whereas the transportation charges from nearby mines to STPP is below 100 rupees/Ton.
- Further, SCCL has to pay railway freight in advance which comes around Rs.994 Cr/year.
- CERC tariff regulation 2024 provides (clause 60.3) that in case of integrated coal mines GCV as received at plant would be adjusted by 15kcal/kg for every 100 KM distance beyond 200 KM. Hence, the "GCV as received" at STPP may be lesser by 150 kcal/kg from "GCV as received" measured at loading point of Naini by third party sampling.

Hence, considering the proposed gain in energy charge for Discom through this swapping arrangement and the different practical obstacles if coal is brought to STPP from Naini, it is requested to provide consent for entering into swapping arrangement **initially for one year** and subsequently to extend the tenure based on further techno commercial analysis by M/s. NTPC Ltd.

Yours faithfully

Executive Director
2x600 MW STPP, Jaipur.

Encl: As stated

Cc: Director (E&M)
GM (Marketing)
Chief (E&M), PPD, Hyd

Estimated ECR analysis				
Singareni Thermal Power Project			After Proposed arrangement (From GVCF)	Before Proposed Arrangement (Naini Coal Mine)
S.No	Description	Formula	G11 from SCCL@ SCCI Price	G11 from Naini with CIL Price
A	StationHeat Rate(SHR) kcal/kWh		2300.00	2300.00
B	Auxiliary Power Consumption(APC) %		5.75	5.75
C	Net Heat Rate(NHR) kcal/kWh	A/(1-B)	2440.32	2440.32
D	Gross Calorific Value(GCV) kcal/kg **		3665.00	3515.00
E	Coal cost inc.all taxes,royalties,cess,etc(CC) Rs/kg		4.35	1.95
F	Tranportation cost of coal (CT) Rs/kg		0.07	2.67
G	Landed cost of coal Rs/kg	E+F	4.42	4.61
H	Distance for transportation (in Km)		20.00	1100.00
I	**Energy Charge Rate(ECR) Rs/kWh**	**C*G/D**	**2.94**	**3.20**
J	**Saving on ECR Rs/kWh**		**0.26**	
K	Linkage quantity (Tonnes)		4935600	4935600
L	Per ton saving on landed coal cost (Rs/te)		192.90	
M	Total savings on landed coal cost per annum (Rs.Cr)	L*K/10000000	95.21	

**** Mine grade declaration happens on ADB (Air dried basis GCV) which is found to be 300 Kcal/kg more than "As received GCV" with the same coal.**

As received basis (ARB) GCV of coal at STPP brought integrated mine NAINI is expected to be less by atleast 150 Kcal from as received GCV measured by third party sampling at Naini following the essence of CERC regulation.

As fired GCV is 85 Kcal less than as received GCV as per TGERC regulation.

The range of GCV is 4000-4300 Kcal/kg for G11 grade based on ADB method.

Last month (Aug'24) ECR was Rs 3.87/Kwh. Presently G8,G10,G11 and G13 grades are supplied and the GCV remains around 3900

The Naini Coal Price is considered @ CIL price as per CERC Regulations upto COD of the coal mine