

DELHI ELECTRICITY REGULATORY COMMISSION



TERMS AND CONDITIONS

FOR

**APPOINTMENT OF C&AG EMPANELLED AUDITORS FOR
VERIFICATION, RECONCILIATION & FINALIZATION OF
ENFORCEMENT SALES FOR BSES RAJDHANI POWER LIMITED
(BRPL) AS PER THE METHODOLOGY DECIDED BY HON'BLE
SUPREME COURT IN JUDGEMENT DATED 18/10/2022 FOR THE
PERIOD FY 2007-08 TO FY 2021-22**

IMPORTANT MILESTONES

NOTICE INVITING TENDER	: 21/09/2023
PRE-BID MEETING	: 19/10/2023 at 11:00 hours
LAST DATE OF SUBMISSION OF BID PROPOSALS	: 2/11/2023 at 17:00 hours
OPENING OF TECHNICAL BIDS	: 6/11/2023 at 11:30 hours

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APPOINTMENT OF C&AG EMPANELLED AUDITORS FOR VERIFICATION, RECONCILIATION & FINALIZATION OF ENFORCEMENT SALES AS PER THE METHODOLOGY DECIDED BY HON'BLE SUPREME COURT IN JUDGMENT DATED 18/10/2022

- 1) Delhi Electricity Regulatory Commission, Viniyamak Bhawan, C-Block, Shivalik, Malviya Nagar, New Delhi (*hereinafter referred to as "DERC" or "The Commission"*) intends to appoint C&AG Empanelled Auditors (*hereinafter referred to as "Consultant"*) for Verification, Reconciliation & Finalization of Enforcement Sales (*hereinafter referred to as "Assignment"*) of BSES Rajdhani Power Limited (BRPL) as per the Methodology decided by Hon'ble Supreme Court in Judgement dated 18/10/2022.
- 2) The scope of work, as indicated in *Annexure-1* herewith, is for Verification, Reconciliation & Finalization of Enforcement Sales as per the methodology decided by Hon'ble Supreme Court in Judgment dated 18/10/2022, enclosed as *Annexure-9*.
- 3) The Consultant is expected to critically examine and verify the process followed by DISCOM during Enforcement Drive and its entry into the SAP system, Form 2.1a, True-up Petitions, Annual Audited Books of Account, etc. in accordance with the Regulations, directives and policies issued by the Commission from time to time.
- 4) The list of broad activities that need to be undertaken is enclosed as *Annexure-1*. The said list of activities is purely for the purpose of guidance and is not exhaustive. During the tenure of the Audit work, if the Commission feels any necessity of additional activity (s), may widen the scope of activity (s) within the purview of Audit at no extra cost.
- 5) The Consultant is expected to make themselves fully aware of Applicable Laws and Regulations. An indicative list of Applicable Laws/Regulations is enclosed as *Annexure-2*.
- 6) The Notice Inviting Tender (NIT) Dated 21/09/2023 is for four (4) separate Tenders for Verification, Reconciliation & Finalization of Enforcement Sales of different DISCOMs. There is no restriction for bidder(s) to participate in more than one Tender. Each Tender shall be evaluated separately and the same will be awarded to the Successful Bidder. After evaluation of the Tender, in case a bidder is found to be emerging successful in more than one (1) Tender, then in that case, awarding the said assignment for more than one (1) DISCOM to that bidder will be based on the preference provided by the relevant bidder in the Format enclosed at *Annexure-7*. However, awarding the said assignment for more than one (1) DISCOM to any bidder will be to the jurisdiction of the Commission and decision of the Commission shall be final and binding.
- 7) **If any bidder participates in more than one Tender, then the bidder shall mandatorily identify and provide separate set of manpower as mandated in this Tender. Bidders are required to submit their separate bid proposals accordingly with separate EMDs. Further, any bidder whose any other assignment is ongoing with the Commission, they shall propose separate set of manpower for this assignment and there should not be any overlapping in manpower or any other activity with respect to both assignments.** If upon opening of Technical bids of a bidder, it is found that in all

submitted tenders, same set of manpower have been indicated in more than one bid, then it is upon the discretion of the Commission to qualify one such bid proposal of that bidder and disqualify from rest all the bid proposals.

- 8) The Consultant shall be required to collect any additional information/data from DISCOM that may be felt necessary for completion of the assignment. The Consultant shall depute its officers in the respective offices of the DISCOM with Authorization Letter of the Commission for completion of the assignment as per Commission's schedule.
- 9) The Consultant shall make presentations to the Commission, for demonstrating the progress and better understanding of the task on bi-weekly basis. During such presentations, complete manpower indicated in the Technical Bid has to be present and the consultant has to modify its working as intimated by the Commission through various correspondences issued after presentation.
- 10) In case the Consultant fails to fulfill its obligations satisfactorily, the Commission would be entitled to invoke the Performance Bank Guarantee furnished by them and the amount mentioned in the Performance Bank Guarantee shall stand forfeited.
- 11) The Consultant shall adhere to the time schedule as prescribed in this Tender and complete the work within the said stipulated time frame, failing which the Consultant would be liable for a penalty which may go upto Rs. 7000/- per day, subject to a maximum of 10% of entire value of contract, for each day of delay beyond the time stipulated in this Tender, provided that each day of delay beyond time schedule is attributable solely to the Consultant. The Commission's decision in this matter shall be binding on all parties.

GENERAL TERMS AND CONDITIONS

- 12) The Bidder shall submit the certificate of empanelment with Comptroller and Auditor General of India (C&AG) for **FY 2023-24**.
- 13) Any Bidder bidding individually or as a member of a Consortium shall not be entitled to submit another bid either individually or as a member of any other Consortium, as the case may be in each DISCOM-wise tender.
- 14) Change in Consortium shall not be permitted after bid submission.
- 15) In case the Bidder is a Consortium, then the term Bidder shall include each Member of such Consortium and the members thereof, shall furnish a Power of Attorney in favour of the Lead Member (***C&AG Empanelled Audit firm shall be the lead firm for bidding***) in the format enclosed as *Annexure-3*.
- 16) A Bidder shall not have conflict of interest (the "Conflict of Interest") that affects the Bidding Process. Any Bidder found to have Conflict of Interest shall be disqualified.

17) A Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:

- i) The Bidder, its Consortium member or Associate (or any constituent thereof) of any other Bidder, its constituent member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest;

Provided that this disqualification shall not apply in cases where the direct or indirect shareholding or ownership interest of a Bidder, its Consortium member or an Associate thereof in the other Bidder, its Consortium member or Associate, is less than 5% (five percent) of the subscribed and paid-up Equity Share Capital thereof;

Provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in sub-section (72) of section 2 of the Companies Act, 2013.

For the purposes of this Clause, indirect shareholding held through one or more intermediate persons shall be computed as follows:

- (a) Where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "Subject Person") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and
- (b) Subject to sub-clause (a) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis;

Provided, however, that no such shareholding shall be reckoned under this sub-clause (b) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid-up Equity shareholding of such intermediary; or

- ii) A constituent of such Bidder is also a constituent of another Bidder; or
- iii) Such Bidder, its Consortium member or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from any other Bidder, its Member or any Associate thereof; or
- iv) Such Bidder has same legal representative for purposes of this Bid as any other Bidder; or
- v) Such Bidder, or any Associate thereof, has a relationship with another Bidder, or any Associate thereof, directly or through common third party/parties, that puts

Bid Document for Verification, Reconciliation & Finalization of Enforcement Sales

either or all of them in a position to have access to each other's information about, or to influence the Bid of either or each other; or

- vi) There is a conflict among this and other consulting assignments of the Bidder (including its personnel and sub-consultants) and any Affiliates. While providing consultancy services to the Commission for this particular assignment, the Bidder shall not take up any assignment that by its nature shall result in conflict with the present assignment.
- vii) For purposes of this Bid, Associate in relation to the Bidder shall mean a person who controls, is controlled by, or is under the common control with such Bidder. As used in this definition, the expression "control" means, with respect to a person which is a company or corporation, the ownership, directly or indirectly, of more than 50 percent of the voting shares of such person, and with respect to a person which is not a company or corporation, the power to direct the management and policies of such person by operation of law or by contract.

ELIGIBILITY CRITERIA

18) The consultant shall meet the following eligibility conditions:

- (a) C&AG Empanelled firm for FY 2023-24.
- (b) Minimum Average Annual Turnover for last three years shall not be less than Rs.1,00,00,000/- (Rs. One Crore) **(Average of FY 2022-23, FY 2021-22 and FY 2020-21)**
- (c) Specified minimum manpower with minimum experience mandated in *Annexure – 8*.

19) Each Bid proposal shall be submitted in a sealed envelope super-scribing on the top of the Envelope **“Verification, Reconciliation & Finalization of Enforcement Sales as per the methodology decided by Hon’ble Supreme Court in Judgment dated 18/10/2022 for BRPL”** containing followings in three (3) separate sealed envelopes, duly super-scribing its contents as per the following:

- (a) Earnest Money Deposit (EMD) of Rs. 10,000/- (*Rupees ten thousand only*) through Pay Order/Demand Draft/NEFT/RTGS in favour of “The Secretary, DERC”, payable at New Delhi in:

Bank Account No.	90941010003951
Bank	Canara Bank
IFSC Code	CNRB0001387
MICR Code	110015022

Bidder who chooses to submit required EMD through NEFT/RTGS, then he has to necessarily enclose the proof of such Transaction for EMD in a separate sealed envelope cover duly signed by bidder's authorized signatory.

- (b) Technical Bid
- (c) Financial Bid
- 20) The Bidder shall authorize one person as Authorized Signatory through Power of Attorney duly notarized by the Notary Public on a non-judicial stamp paper of Rs. 100/- indicating that the person signing the bid has the authority to sign the bid/ enter the contract with the Commission and that the bid/ contract is binding upon the Bidder during the full period of its validity, shall be submitted. In the event of any change in the Authorized Signatory during any stage of the bid process, the Bidder shall furnish the fresh Power of Attorney indicating the new Authorized Signatory for the purpose of the assignment.
- 21) Each page of the bid shall be numbered and signed by the Authorized Signatory with the official seal of the Bidder/firm and the forwarding letter must indicate the details of the enclosures.
- 22) The Bidder shall submit the bid proposals in Triplicate, comprising one set of the Original Bid and Two sets marked as Duplicate & Triplicate.
- 23) Each bidder shall submit period of **validity of the bid document, which shall not be less than 365 days from the scheduled/notified date of opening of bids.**
- 24) The bid document can be either downloaded from the Commission's website (<http://www.derc.gov.in>) or can be obtained from the Commission's office at no costs.
- 25) Bids received after the scheduled/notified date and scheduled/notified time of Bid submission shall not be accepted and DERC shall not be responsible for any postal delay.
- 26) The envelope containing EMD shall be opened first and the envelope containing Technical bid shall be opened only for those bidders whose EMD is found to be in order. Any bid not accompanied by requisite EMD in accordance with the above stipulation shall be summarily rejected as being non-responsive and its Bid Proposal(s) shall be returned un-opened.
- 27) Only those Bidders who qualify in the Technical Bid shall be intimated for attending the opening of the Financial Bids through website / email.
- 28) The Bidder shall quote for each DISCOM-wise Tender, its rates on lump-sum basis and considering the following:
- Fees shall be Exclusive of applicable taxes, but inclusive of all other expenses,
 - No TA/DA shall be admissible for the Bidder for any journey in connection with the assignment.
 - With reference to the minimum fees as applicable to the members of the respective Institute.
- 29) DERC reserves the right to replace the Bidder, after its appointment and re-award the

Bid Document for Verification, Reconciliation & Finalization of Enforcement Sales

job if it is found that the reporting / certification being submitted (in phases) are not of desired standard. In this regard, the decision of the Commission will be final and binding on the successful bidder.

- 30) EMD of the unsuccessful bidder(s) shall be returned to them within 1 (one) month after placement of Award to successful bidder by the Commission.
- 31) EMD of the successful bidder shall be returned within 15 (fifteen) days after submission of the Performance Bank Guarantee and upon unconditional acceptance of the Letter of Award of the Commission.
- 32) The Bid Schedule shall be as under:

Sr. No.	Activity	Date
1	Notice inviting Tender	21/09/2023
2	Pre-Bid Meeting	19/10/2023 at 11:00 hours
3	Last Date of Receipt of Bid Proposals	2/11/2023 at 17:00 hours
4	Opening of Technical Bids	6/11/2023 at 11:30 hours

- 33) No overwriting/cutting shall be allowed in the bid proposal(s) including the Financial Bid proposal. Further, no modification in the bid shall be entertained /permitted after the submission of the bid. Bidders are required strictly to submit its Bid proposals considering no deviation to the Bid document. In case of any mismatch in the financial quote between quote in numbers and quote in figures/words, quote in figures/words shall prevail.

CRITERIA FOR TECHNICAL EVALUATION:

- 34) Criterion for Technical evaluation:

a) Audit Methodology and Organization Experience - 40 (Forty) Marks**i) Methodology and Work Plan - 20 (Twenty) Marks**

The Bidder shall explain their understanding of the objectives of the Assignment, approach to the Assignment, methodology for carrying out the activities and obtaining the expected output. They shall also explain the methodology proposed to be adopted and highlight the compatibility of methodology with the proposed approach as per scope of work specified in *Annexure-I*.

The proposed work plan shall be consistent with the approach, methodology and ability to complete the assignment within fixed timeline. The work plan shall be consistent with the Work Schedule indicating Week wise and Activitywise flow of the assignment with key professionals.

ii) No. of years' experience - 10 (Ten) Marks

Bid Document for Verification, Reconciliation & Finalization of Enforcement Sales

The no. of years of experience of the bidder in Power Distribution Utilities shall be evaluated as on **31/03/2023**.

iii) No. of completed assignment's Experience - 10 (Ten) Marks

The no. of completed assignments of the bidder related to Power Distribution Utilities shall be evaluated as on **31/03/2023**.

b) Manpower - 60 (Sixty) Marks

The Bidder shall propose and justify the structure and composition of their team indicating the key professional responsible and supporting staff. The method to be followed for evaluation of the key professionals shall be:

- i. Educational Qualifications and
- ii. Experience (i.e. experience in carrying out similar assignments).

The Bidder shall propose at least the following key professional for the assignment for getting Technically qualified. **Any overlapping of key professionals for this assignment with any other assignment of the Commission during the period of this assignment shall attract rejection of the bid:**

Particular	Minimum No. of Key Professional	Marks (Max/ Min)	Remarks
Team Leader – Graduate in Engineering (B.Tech/BE) with minimum 10 years of relevant work experience post qualification	1	10/5	Allocation of Marks will be done based on the Annexure-8
Team Member (CISA Certified) – CISA certified with minimum 5 years of relevant work experience post certification	1	10/5	
Team Member (SAP Expert) - Qualified SAP expert with minimum 5 years of relevant work experience post certification	1	10/5	
Team Members (Engineer) - Graduate in Engineering (B.Tech/BE) with minimum 5 years of relevant work experience post qualification	2	20/10	
Team Member (Finance) – Qualified Chartered Accountant with minimum 5 years of relevant experience post qualification	1	10/5	
Total Maximum Marks		60/30	

Presentation – After opening of the Technical Bid, all Bidders shall deliver a presentation based on their credentials in support of the points above viz. Technical Approach & Methodology, Work Plan and Organization & Staffing for which the Commission will indicate the time and date appropriately.

- 35) Minimum Average Annual Turnover for last three financial years of the Consultant shall not be less than Rs.1,00,00,000/- (Rs. One Crore) (**Average of FY 2022-23, FY 2021-22 and FY 2020-21**).
- 36) **Technically Qualified Bidders:**
- a) Proposing minimum manpower as tabulated above in Section-b; Manpower.
 - b) Securing minimum 60 marks in totality for both i.e., Section-a: Audit Methodology & Organization Experience and Section-b: Manpower.
 - c) 50% marks in each section (i.e., Section-a: Audit Methodology & Organization Experience, Section-b: Manpower).
- 37) After completion of the Technical Evaluation, the Commission shall inform the technically qualified Bidders. The list of technically qualified Bidders shall also be displayed at the website of Commission.
- 38) The Financial Proposal of bidders other than technically qualified bidders shall be returned un-opened within 1 (one) month after completion of the Technical Evaluation process.
- 39) The Financial Bids of Technically qualified bidders shall be opened in the presence of authorized representatives of Technically qualified bidders at the office of DERC as per the schedule date and time indicated by DERC.

CRITERIA FOR FINANCIAL EVALUATION:

- 40) **Financial Evaluation:** The proposal with lowest quoted cost shall be given a financial score of 100 and financial scores for other bidders shall be inversely prorated.

METHOD OF FINAL SELECTION:

- 41) **Quality and Cost Based System (QCBS):** Final Evaluation of the bids shall entail selection of Bidder after adding scores of Technical and Financial bid proposals with weightage of 70% for Technical and 30% for Financial bid proposals.
- 42) The Successful Bidder (DISCOM-wise) shall be intimated by the Commission and the same shall be uploaded on the website of the Commission.
- 43) The Commission reserves the right to reject any bid and or all bids without assigning any reasons for the same.
- 44) The successful bidder shall sign and execute the Contract agreement within 7 working days of date of issuance of Letter of Award, at the office of the Commission. Non fulfillment of this condition, would constitute sufficient ground for annulment of the award and forfeit of Earnest Money Deposit;

Provided that the Commission in its discretionary power, on a specific request by the successful bidder, may relax this condition with the reasons to be recorded in writing;

- 45) The successful bidder shall furnish the following within 7 working days of signing of the contract:
- “Performance Bank Guarantee”* equal to 10% (Ten Percent) of the value of Contract.
 - “Advance Bank Guarantee”* equal to 110% (One Hundred and Ten Percent) of the value of Mobilization Advance.

Both of the above referred Bank Guarantees shall be valid up to 6 (six) months after the successful completion of the assignment.

- 46) In case, the successful bidder fails to furnish the “Performance Bank Guarantee” of required value within stipulated time period, the Commission reserves the right to terminate the Contract and forfeit the EMD.
- 47) In the event of annulment of award/termination of contract as indicated above, the Commission shall reserve the right to either award the contract for carrying out the assignment to the Bidder who has obtained the second highest score on consideration of Financial and Technical bids or invite fresh bids.
- 48) The Commission may hold a kick off meeting with the Consultant to discuss the detailed work plan.
- 49) The Consultant shall hand over the entire records / working papers related to the assignment to the Commission before the expiry of the contract and shall not utilize or publish or disclose or part with any statistics, data or information collected for the purpose of assignment, in any form, without written consent of the Commission.
- 50) The Consultant shall sign a Data Privacy Pact with the DISCOM within 7 days from the date of signing of Contract Agreement and a copy of the same shall be submitted to the Commission.
- 51) The Consultant shall give a Certificate of Compliance for all its statutory obligations.
- 52) The bids shall be sent by post or deposited in Tender Box available at Reception of DERC upto the scheduled date and time of submission of bids at the following address duly marked:

The Secretary,
Delhi Electricity Regulatory
Commission, Viniyamak Bhawan,
C-Block, Shivalik, Malviya
Nagar, New Delhi – 110 017
Telefax: 011-26673608,
E-mail: secyderc@nic.in

53) The latest timelines of report submission are as follows:

- (a) Draft Report in 150 days from the date of Letter of Award (LoA) and
- (b) Final report based on the interaction with the Commission in 180 days from the date of Letter of Award (LoA).

54) Consultant shall be paid as follows:

- a) For Audit Fees Rs. _____ (Rupees _____ only)
- b) Reimbursement of applicable Taxes – Rs. (Rupees only)

55) Milestones for payment shall be as follows:

Sr. No.	Milestone	% of Contract Value
A.	Mobilization Advance against Bank Guarantee of 110% of the Advance amount upon unconditional acceptance of Letter of Award	10%
B	Submission of Draft Report on satisfactory completion of Audit based on interaction with the Commission	50%
C	Submission of consolidated Final Report and acceptance by the Commission	40%

56) The payment of fee to Consultant shall be processed by the Commission after the deduction of applicable tax at source.

PROPOSAL SUBMISSION FORM - BRPL

To,
The Secretary,

Delhi Electricity Regulatory Commission
Viniyamak Bhawan,
C-Block, Shivalik,
Malviya Nagar,
New Delhi – 110 017

Sir/Madam,

We, the undersigned, offer to provide the services for undertaking the assignments relating to BRPL in accordance with your bid document dated_____.

We are hereby submitting our proposal for undertaking the assignment in one Original and two copies marked as “Original” and “Duplicate” and “Triplicate” respectively in the prescribed formats, which includes the EMD, Technical Proposal and the Financial Proposal sealed under separate envelopes. Each page of the proposal has been numbered and signed by the Authorized Signatory.

A Power of Attorney duly notarized by the Notary Public, indicating that the person(s) signing the bid has the authority to sign the bid and that the bid is binding upon the Bidder during the full period of its validity is enclosed.

It is also confirmed that presently we are not handling any assignment that would be in conflict with this assignment or place us in a position of not being able to carry out this assignment objectively and impartially.

Demand drafts/pay orders no._____dated_____for Rs. 10,000/- (Rupees ten thousand only) as EMD, in favour of Secretary, DERC payable at New Delhi is enclosed herewith.

We hereby confirm that the validity of the Bid Document is not less than 365 days from the scheduled/notified date of opening of bids.

We understand that the Commission is not bound to accept any Proposal it received against the Tender dated.....

Yours sincerely,

Authorized Signatory:
Name and Title of Signatory:
Name of the Bidder:

Encl. As above

Annexure-1

SCOPE OF WORK:

Hon'ble Supreme Court vide its Judgment dated 18/10/2022 (*enclosed herewith as Annexure-9*) directed the Commission to consider "**Assessed Energy**" for issue related to "*Reduction in Million Units (MUs) in relation to Enforcement sale for the purpose of calculation of AT&C Loss*"

The data being voluminous, the Commission through this tender, intends to appoint C&AG Empanelled Auditor to Verify, Reconcile & Finalize the Enforcement Sales as per the stipulated methodology & it is expected that claim of DISCOMs w.r.t Assessed Energy is required to be examined in accordance with the Electricity Act, 2003 and above stipulated Hon'ble Supreme Court Judgement. The Audit report shall, but not limited to, include the following:

- a) Verification of Assessed Energy in Field Inspection Report as assessed by Assessing Officer in terms of *Electricity Act, 2003, Delhi Electricity Supply Code Performance Standards Regulations, 2007* and *DERC (Supply Code and Performance Standards) Regulations, 2017*. The said report is prepared by the Assessing Officer in the field at the time of booking a case of Theft.
- b) Verification and Reconciliation of the said Assessed Energy in the Assessment bill vis-a-vis Field Inspection Report.
- c) Payment of Assessment bill by consumer, Verification of the Payment Voucher and its Booking under Amount Collected in the Books of Account of respective Financial Year.
- d) If Assessment Bill is challenged before Lok Adalat or any other authority, then verification of the final amount paid by consumer with respect to the Order of the Competent Authority, its payment voucher and booking under amount collected in Books of Account.
- e) Consumer Account (CA)-wise, Category-wise and Year-wise verification of Assessed Energy and Amount Collected as per above, claim of the DISCOMs in respect of the True-up Petition, Form 2.1a, etc. in the following format: -

Category-wise	CA wise	LDHF* Formula (Field Inspection Report/ Assessment Bill)		Lok Adalat Order		Books of Account		True-up Petition filed by DISCOM	
		Assessed Energy (kWh)	Assessed Amount (Rs.)	Assessed Energy (kWh)	Assessed Amount (Rs.)	Assessed Energy (kWh)	Assessed Amount (Rs.)	Assessed Energy (kWh)	Assessed Amount (Rs.)
Domestic	CA-1								
	CA-2								
	...								
	Total								
Non-Domestic	CA-1								
	CA-2								
	...								
	Total								
...									
Total									

Note: * Connected Load (L) x Number of Days (D) x Supply Hours per day (H) x Load Factor (F)

- f) All Field Inspection Reports, Assessed Bill, their entry into the SAP, Order of Competent Authority (Lok Adalat etc.), Payment vouchers, Booking under the Amount Collected and Reflection of all such activities and vouchers in the SAP has to be verified by the Consultant and the said data to be submitted to the Commission. The Consultant should finalize after due verification from SAP, the assessed energy, CA-wise, category-wise and year-wise for DISCOMs for the period from FY 2007-08 to FY 2021-22.
- g) For Financial Year when SAP was not available then information stipulated above to be verified from relevant billing engine or software.

Period of Audit: FY 2007-08 to FY 2021-22

Tentative Enforcement Cases as submitted by DISCOMs are as follows:

- a) **BYPL:** 1,13,407 for the period FY 2007-08 to FY 2021-22.
- b) **BRPL:** 2,42,458 for the period FY 2007-08 to FY 2021-22.
- c) **TPDDL:** 95,220 for the period FY 2008-09 to FY 2021-22. Data for FY 2007-08 was not submitted by TPDDL.
- d) **NDMC:** 100 for the period FY 2007-08 to FY 2021-22.

Annexure-2

INDICATIVE LIST OF APPLICABLE ACT, REGULATIONS, JUDGMENT, ORDERS ETC.

- a. Electricity Act, 2003
- b. Delhi Electricity Supply Code and Performance Standards Regulations, 2007
- c. DERC (Supply Code and Performance Standards) Regulations, 2017 and its Amendments issued from time to time
- d. DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007
- e. DERC (Terms and Conditions for Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2011
- f. Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulations, 2017 and its Amendments issued from time to time.
- g. DERC (Business Plan) Regulations, 2017
- h. DERC (Business Plan) Regulations, 2019
- i. Judgment of Hon'ble Supreme Court dated 18/10/2022 and impugned Hon'ble APTEL Order dated 28/11/2014 in Appeal Nos. 61 and 62 of 2012.
- j. True-up Petitions and True-up Orders of relevant Financial Years
- k. Audited Form 2.1(a), etc.

Annexure-3

SAMPLE POWER OF ATTORNEY FOR LEAD MEMBER OF CONSORTIUM

Whereas the (the “Commission”) has invited bids for the Verification, Reconciliation & Finalization of Enforcement Sales Assignment (the “Assignment”).

Whereas,, and (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Assignment in accordance with the terms and conditions of the bid document and other related documents in respect of the Assignment, and

Whereas, it is necessary for the Members of the Consortium to designate **C&AG Empanelled firm as the Lead Member** with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium’s bid for the Assignment and its execution.

NOW THEREFORE KNOW ALL MEN BY THESE PRESENTS

We,having our registered office at, M/s..... having our registered office at, (hereinafter collectively referred to as the “Principals”) do hereby irrevocably designate, nominate, constitute, appoint and authorize M/s, having its registered office at, being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (herein referred to as the “Attorney”) and hereby irrevocably authorize the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the Assignment, during the execution of the Assignment, and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the submission of its bid for the Assignment, including but not limited to signing and submission of all applications, bids and other documents and writing, accept the Letter of Award, participate in bidder’s and other conferences, respond to queries, submit information/documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Commission and/ or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium bid for the Assignment and/or upon award thereof till the Contract is entered into with the Commission.

And hereby agree to ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this power of

Bid Document for Verification, Reconciliation & Finalization of Enforcement Sales

Attorney and that all acts, deeds and things done by our said Attorney in exercise of the power hereby conferred shall and shall always be deemed to have been done by us/Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXECUTED THIS POWER OF ATTORNEY ON THIS DAY OF ...20.....

For.....
(Signature, Name & Title)

For.....
(Signature, Name & Title)

For.....
(Signature, Name & Title)

(Executants)
(To be executed by all the members of the Consortium)

Witness:

1.

2.

Notes:

- The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executants(s) and when it is required, the same should be under common seal affixed in accordance with the required procedure.
- Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholder's resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

Annexure-4

TECHNICAL BID FORM FOR BRPL		
Sr. No.	Particular	Details
1	Name of the bidder	
2	Single Firm/Consortium, details to be provided (copy to be attached)	
3	Bidder Registration No. (copy to be attached)	
4	Pan No. (copy to be attached)	
5	GST Registration No. (copy to be attached)	
6	TIN No. (copy to be attached)	
7	Address of the Bidder (Head Office/Registered Office)	
8	Phone No. & Fax No.	
9	Year of Establishment of the Bidder	
10	No. of Partners	
11	Name of Partners & membership no.	
12	No. of Employees <ul style="list-style-type: none"> • Partners – Full time and Part time (<i>with details of membership</i>) • Engineers • CISA Certified • SAP Expert • Chartered Accounts • Articles • Other Employees 	
13	No. of Companies for which Audit was carried out (list of be given as separate annexure along with credentials)	
14	No. of Power Distribution Companies, if any, for which Audit has been carried out (Name to be	

TECHNICAL BID FORM FOR BRPL																							
Sr. No.	Particular	Details																					
	given as separate annexure along with credentials)																						
15	<p>Name of Team Leader and Team Members responsible for this assignment *</p> <p>(with academic qualification & experience):</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%; text-align: left;">Particulars</th> <th style="width: 30%; text-align: left;">Educational Qualification</th> <th style="width: 40%; text-align: left;">Experience (in years)</th> </tr> </thead> <tbody> <tr> <td>Team Leader</td> <td>.....</td> <td>.....</td> </tr> <tr> <td>Team Member (Engineer)-1</td> <td>.....</td> <td>.....</td> </tr> <tr> <td>Team Member- (Engineer)-2</td> <td>.....</td> <td>.....</td> </tr> <tr> <td>Team Member (CISA Certified)</td> <td>.....</td> <td>.....</td> </tr> <tr> <td>Team Member (SAP Expert)</td> <td>.....</td> <td>.....</td> </tr> <tr> <td>Team Member (Finance)</td> <td>.....</td> <td>.....</td> </tr> </tbody> </table>	Particulars	Educational Qualification	Experience (in years)	Team Leader	Team Member (Engineer)-1	Team Member- (Engineer)-2	Team Member (CISA Certified)	Team Member (SAP Expert)	Team Member (Finance)	
Particulars	Educational Qualification	Experience (in years)																					
Team Leader																					
Team Member (Engineer)-1																					
Team Member- (Engineer)-2																					
Team Member (CISA Certified)																					
Team Member (SAP Expert)																					
Team Member (Finance)																					
16	Estimated time for completion with detailed milestones																						
17	Any other information																						
18	Enclosures:																						

TECHNICAL BID FORM FOR BRPL		
Sr. No.	Particular	Details
	(a) C&AG Empanelled Certificate for FY 2023-24 (b) Details of Single Firm Consortium (c) Bidder Registration Number (d) Copy of Pan Card (e) Copy of GST Registration (f) Copy of TIN Registration (g) Original Power of Attorney (h) Supporting documents for turnover of the firm (i) Work Order of assignment in support of experience of bidder (j) Engineering Degree/CA Membership Card/CISA Certificate/ SAP certificate/ Experience Certificates/CV in support of qualification and experience of manpower	

* Membership Number shall be indicated against Chartered Accountants forming part of the team

Name & Signature of the Authorized Person
(Stamp)

Annexure-5

FINANCIAL BID FORM FOR BRPL

Name of the Bidder:

Sr. No.	Particular	Amount (in Rs)	Amount (Rs. in Words)
1	Bid Amount (in Rs.) (Exclusive of taxes)		

Name & Signature of the Authorized Person

(Stamp)

(SAMPLE OF THE CONTRACT TO BE SIGNED BY CONSULTANT WITH DERC)

This ARTICLES OF CONTRACT made on this day of 2023

BETWEEN:

Delhi Electricity Regulatory Commission a statutory Body set up by the Government of NCT of Delhi under the Delhi Electricity Reforms Act, 2000 and having its office at Viniyamak Bhawan, C-Block, Shivalik, Near Malviya Nagar, New Delhi – 110 017, hereinafter referred to as the “Commission”) (which expression shall unless excluded by or repugnant to the context or meaning thereof, includes its successors and permitted assigns) of the FIRST PART

AND

_____ Company registered under the Companies Act, 1956 and having its office at, _____ hereinafter referred to as the Consultant (which expression shall unless excluded or repugnant to the context or meaning thereof include its successors and permitted assigns) of the SECOND PART.

(The Commission and the Consultant are individually referred to as the “Party” and collectively as the “parties”).

WHEREAS the Commission has awarded the contract on the basis of open bids to the party of the SECOND PART as a Consultant for Appointment of Auditors for Verification, Reconciliation & Finalization of Enforcement Sales as per the methodology decided by Hon’ble Supreme Court Judgment dated 18/10/2022 for BSES Rajdhani Power Limited (BRPL) for FY 2007-08 to FY 2021-22 more precisely explained in the ‘Terms of Reference’ contained in the bid document dated _____”.

M/s _____ have agreed to provide services to the Commission on the terms and conditions hereinafter contained.

NOW Parties to these Present hereby agree as follows:

1. M/s _____ is hereby appointed as the Consultant for the aforementioned assignment. The Consultant shall commence the assignment from zero date i.e., date of Letter of Award (LoA).
2. The Consultant shall execute and complete the assignment as per the work plan and activity schedule mentioned herein.

WORK PLAN AND ACTIVITY SCHEDULE:

Sr. No.	Description	Time (No. of Days)
1	Placement of officers of the Consultant at DISCOM's Office (BRPL)	
2	Submission of Draft Report to Commission	
3	Presentation to the Commission	
4	Submission of Final Report to the Commission	

SCOPE OF WORK:

3. The activities to be carried out shall be as per the detailed indicative list given under *Annexure-1* of the Bid document.
4. The Scope of Work shall be primarily governed by the Act, Regulations, Policies, Orders, Judgement etc. broadly indicated in *Annexure-2* of the Bid document.
5. Any other services connected with the works usually and normally rendered by the Audit firm, but not referred to herein above.
6. The Consultant shall assume full responsibility for supervision and proper execution of works covered under the scope of contract. The work shall be executed in professional way and with true workmanship.

Other Issues:

7. The above description of scope of work is purely indicative and not exhaustive. Changes/additions can be made by DERC as and when required for better understanding the task, and also on the feedback of the Consultant from time to time to enhance the value of the study, without changing its basic nature.
8. The Consultant agrees and undertakes that the respective tasks shall be performed & completed only by the authorized personnel and that if any change in the composition of the team is necessitated, the consultant (second part) shall seek prior permission of the Commission to effect the changes.
9. The Consultant agrees and undertakes that they will be liable to clause 7 & 8 of the bid document.

10. Consultant shall be paid as follows:

- a) For Services Rs. _____ (Rupees _____ only)
- b) Reimbursement of applicable Taxes Rs. _____ (Rupees _____ only)

11. Milestones for payment shall be as follows:

Sr. No.	Milestone	% of Contract Value
A.	Mobilization Advance against Bank Guarantee of 110% of the Advance amount upon unconditional acceptance of Letter of Award	10%
B	Submission of Draft Report on satisfactory completion of Audit of financial parameters based on interaction with the Commission	50%
C	Submission of consolidated Final Report and acceptance by the Commission	40%

12. The payment of fee to Consultant shall be made by the Commission after the deduction of applicable tax at source.
13. The Consultant shall within 7 working days of signing of this contract provide performance security by way of Bank Guarantee from a Scheduled Bank for an amount equal to 10% (Ten Percent) of the total contract value and security against Mobilization Advance by way of Bank Guarantee from a Scheduled Bank for an amount equal 110% (One Hundred and Ten Percent) of the value of Mobilization Advance, in formats acceptable to the Commission, which shall be valid upto period of 6 (six) months beyond the completion date. The said Bank Guarantees shall be extended suitably in case of extension of period of contract.
14. The Commission shall be entitled to evaluate the interim reports submitted by the Consultant in stages and the Consultant shall incorporate / restructure the report / and auditor's finding as per the recommendations of the Commission within such reasonable time as may be prescribed by the Commission.
15. The Commission shall make payments to the Consultant within 30 days of the date of receipt of Invoice for the individual milestone complete in all respects, in the Commission's office subject to acceptance of deliverables wherever required unless prevented by reasons beyond its control and in the latter case, the Consultant shall not be entitled to claim any interest or damages on account of such delay.
16. The Consultant shall be liable to the Commission for the performance of its obligations in this Contract as a result of any default of the Consultant except the following limitations:

- a) The Consultant shall not be liable for any damage or injury caused by or arising out of the act, omission, neglect or default of any person other than the Consultant.
 - b) The Consultant shall not be liable for any loss or damage caused by or arising out of circumstances over which the Consultant has no control.
 - c) The total liability of the Consultant under this clause shall be limited to 10% of the charges mentioned in Clause 10 (a) except for gross negligence or any damage on account of the Consultant, for which the Consultant shall be fully liable.
 - d) It is mutually agreed between the parties that the time shall be the essence of this CONTRACT. The Consultant, (the party of the second part) shall adhere to the time schedule as prescribed in this CONTRACT and complete the work within the stipulated time frame, failing which the party of the second part would be liable for a penalty which may go upto Rs. 7000/- per day, subject to a maximum of 10% of entire value of contract, for each day of delay beyond the time stipulated in this CONTRACT, provided that each day of delay beyond time schedule is attributable solely to the CONSULTANT. The Commission's decision in this matter shall be binding on all parties.
17. No TA/DA shall be admissible for the Consultant for local journey in connection with the assignment.
18. The Commission reserves its right to amend, foreclose, terminate or cancel the engagement of the Consultant without assigning any reasons. In such cases Consultant shall be paid remuneration after taking into consideration the part of work completed prior to such foreclosure, termination or cancellation of the engagement as may be decided by the Commission, and the decision of the Commission shall be conclusive and binding. The remuneration so fixed and paid shall be deemed to be the final payment in such cases.
19. Consultant shall enter into Data Privacy Pact with DISCOM within 7 days from the date of signing of Contract Agreement and a copy of the same shall be submitted to the Commission. Any violation noted/ proved related to breach of Data Privacy Pact shall be dealt as per applicable Regulation/ Guidelines and may lead to Blacklisting of the Firm.
20. Any information of confidential nature, which may be so marked by the Commission, which comes to the knowledge or in the possession of the Consultant or of any of its employees by virtue of their engagement on subject matter of this contract; shall not be disclosed by the Consultant or its employees to any unauthorized person in any manner. Any breach of this clause without prejudice to any other action that may be initiated as per law, shall also subject the Consultant to a liability to pay to the Commission such compensation for damages as may be decided by the Commission keeping in view the nature, manner and motive of the information disclosed and the extent of the damage caused by such unauthorized disclosure:

Provided that any information that was (a) rightfully already known to Consultant at the time of its disclosure, (b) independently developed by Consultant without referring to the Commission's confidential information, (c) known to the public through a source other

than Consultant, or (d) disclosed to Consultant by a third party not having an obligation of non-disclosure to the proprietor of the information, shall not be deemed to be confidential information for the purposes of this contract;

Provided further that the obligation of confidentiality on Consultant shall not apply where such confidential information is required to be disclosed under any law.

21. The Consultant undertakes that they are not handling any assignment that would be in conflict with this assignment or place them in a position of not being able to carry out this assignment objectively and impartially.
22. In case the Consultant fails to fulfill its obligations satisfactorily, the Commission would be entitled to invoke the Performance Bank Guarantee furnished by the Consultant and the amount mentioned in the Performance Bank Guarantee shall stand forfeited.
23. In respect of any matter for which no provision has been made in this contract, the provisions contained in the *Delhi Electricity Regulatory Commission (Appointment of Consultants) Regulations, 2001*, shall apply.
24. In case of any differences or disputes between the parties arising out of this CONTRACT, the matter shall be referred to the sole arbitrator nominated by the Commission, in accordance with the provisions of the Arbitration and Conciliation Act, 1996.

IN WITNESS WHEREOF the Authorised Signatory of the Consultant and Secretary to the Commission on behalf of the Commission have thereto put their signature on the day and the year first above written.

()
Authorised Signatory
Consultant

()
Secretary
DERC

Witness:

- 1.
- 2.

Annexure-7

PREFERENCE OF DISCOM(S) FOR VERIFICATION, RECONCILIATION & FINALIZATION OF ENFORCEMENT SALES ASSIGNMENT

IN CASE BIDDER IS EMERGING SUCCESSFUL FOR MORE THAN ONE DISCOM

(Applicable for the Bidder who participates for more than one DISCOM Tender covered under different Tender Documents under NIT dated .././2023)

Name of the Bidder:- M/s _____

Sr. No.	Order of Preference of Bidder for Award of work	DISCOM Name
1	First	
2	Second	
3	Third	
4	Fourth	

Annexure-8

ELIGIBILITY AND MARKS EVALUATION CRITERIA OF BIDDERS

Sr. No.	Criteria	Range	Points	Max. Points
1	Turnover of the Bidder	Minimum Average Annual Turnover for last three financial years shall not be less than Rs.1,00,00,000/- (Rs. One Crore) (Average of FY 2022-23, FY 2021-22 and FY 2020-21).		
2	C&AG Empaneled Certificate	FY 2023-24		
3	Methodology and Work Plan	0-20	As decided by the Commission	20
4	No. of years of experience of the bidder in Power Distribution Utilities	1-3 Years	1-5	10
		4-6 Years	6-8	
		>6 Years	10	
5	No. of completed assignments of the bidder related to Power Distribution Utilities.	1-3	1-5	10
		4 - 6	6-8	
		>6	10	
6	<u>Team Leader</u> Graduate in Engineering (B.Tech/BE) with minimum 10 years of relevant work experience post qualification	10 Years	5	10
		11 -15 Years	6-8	
		>15 Years	10	
7	<u>Team Members - CISA Certified (min. 1 no.)</u> CISA certified with minimum 5 years of relevant work experience post certification	1 Member	5	10
		2 Members	7.5	
		> 2 Members	10	
8	<u>Team Members - SAP Expert (min. 1 no.)</u> Qualified SAP expert with minimum 5 years of relevant work experience post certification	1 Member	5	10
		2 Members	7.5	
		> 2 Members	10	
9	<u>Team Members – Engineer (min. 2 nos.)</u> Graduate in Engineering (B.Tech/BE) with minimum 5 years of relevant work experience post qualification	2 Members	10	20
		3 Members	15	
		>3 Members	20	
10	<u>Team Member – Finance (min. 1 no.)</u> Qualified Chartered Accountant with minimum 5 years of relevant experience post qualification	1 Member	5	10
		2 Members	7.5	
		> 2 Members	10	

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO(S). 4324 OF 2015**

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

VERSUS

**DELHI ELECTRICITY
REGULATORY COMMISSION ...RESPONDENT(S)**

WITH

CIVIL APPEAL NO(S). 4323 OF 2015

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

VERSUS

**DELHI ELECTRICITY
REGULATORY COMMISSION ...RESPONDENT(S)**

J U D G M E N T

S. ABDUL NAZEER, J.

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

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

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

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

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

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

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

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

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

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

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

and

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

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

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

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

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

- (a) Grant of license for supply of electricity by the State Government in consultation with the State Electricity Boards ("SEB") and
- (b) Obligation and rights of licensees, consumers, etc. along with other modalities.

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

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

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

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

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

- (a) provide re-structuring of the electricity industry (unbundling of generation, transmission, and distribution),
- (b) increasing avenues for participation of private sector in the electricity industry; and
- (c) generally, for taking measures conducive to the development and management of the electricity industry in an efficient, commercial, economic, and competitive manner in the NCT of Delhi and for matters connected therewith or incidental thereto.

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

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

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

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

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

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

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

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

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

“Section 3. National Electricity Policy and Plan. -

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

Authority review or revise the National Electricity Policy and tariff policy referred to in sub-section (1).
(4)The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years.

Provided xxx xxx xxx

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

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

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

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

Provided xxx xxx xxx

(2) & (3) xxx xxx xxx”

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

“61. Tariff regulations.- The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi-year tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood

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

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

“62. Determination of tariff.-

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

(a) supply of electricity by a generating company to a distribution licensee:

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

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

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

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

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

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

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

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

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

“64. Procedure for tariff order.-

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

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

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

(a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order;

(b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of this Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force:

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

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

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

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

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

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

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

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

“125. Appeal to Supreme Court.-

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

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

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

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

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

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

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

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

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

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-DETC, 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 DETC, 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 counsel appearing for the appellants have submitted that 'truing up' cannot be used to upset the methodology used for determination of ARR. According to them, such a conduct essentially amounts to

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

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

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

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

² (2016) 8 SCC 743

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

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

3 (2010) 4 SCC 603

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

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

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

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

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

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

4 2015 SCC Online APTEL 50 [Para. 17]

5 2007 ELR (APTEL) 193

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

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

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

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

escalation factor for the employee expenses for the Control Period:

- (a) Anticipated 6th Pay Commission report*
- (c) Research of lead HR consultants on salary trends in the country*
- (c) Initiatives undertaken to retain quality manpower and demand for employees in the power industry.*
- (d) Inflation during last 12 months € increase in employees to cater to growth of consumers.*

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

- (a) Basic Salary: The year on year increase in basic salary for all the employees during the Control Period has been estimated at 23.2%, 11.1%, 11.3%, and 11.5% for FY08, FY09, FY10 and FY11 respectively.*
- (b) Dearness Allowance (DA): Annual estimated increase in DA is considered as 9%, 6%, 6%, and 6% for FY08, FY09, FY10 and FY11 respectively.*
- (c) Terminal Benefits: Contribution to terminal benefits/liability fund is considered at 26% of basic salary and dearness allowance for each year of the Control Period.*

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

“Commission’s Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“Section 126: (Assessment): --- (1) If on an inspection of any place or premises or after inspection of the equipments, gadgets, machines, devices found connected or used, or after inspection of records maintained by any person, the assessing officer comes to the conclusion that such person is indulging in unauthorized use of electricity, **he shall provisionally assess to the best of his judgement the electricity charges payable by such person or by any other person benefited by such use.**

[...]

[(5) If the assessing officer reaches to the conclusion that unauthorised use of electricity has taken place, the assessment shall be made for the entire period during which such unauthorized use of electricity has taken place and if, however, the period during which such unauthorised use of electricity has taken place cannot be ascertained, such period shall be limited to a period of twelve

months immediately preceding the date of inspection.]

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

(Emphasis supplied)

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

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

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

- (a) By virtue of the Supply Code Regulations framed by the DERC itself, these 100 units are to be treated as "sales".
- (b) Upon the assessment of 100 Units, the Appellant raises a bill on the said consumer. Under Section 126 of the Electricity Act, the bill has to be raised at twice the normal billing rate. If the normal ABR were Rs. 5 per Unit, the Section 126 Bill will be raised for Rs 1,000 (i.e. $100 \times [Rs\ 5 \times 2]$);
- (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 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. 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.

