

**IN THE HON'BLE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW  
DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. OF 2016**

(Appeal against the Tariff Order dated 21<sup>st</sup> March 2016 passed by the Bihar Electricity Regulatory Commission in case No 50 of 2015 for True-up for FY 2014-15, Annual Performance Review (APR) for FY 2015-16, Annual Revenue Requirement (ARR) for FY 2016-17 to FY 2018-19 of South Bihar Power Distribution Company Limited)

**IN THE MATTER OF:**

**SOUTH BIHAR POWER DISTRIBUTION  
COMPANY LIMITED**

Through

Its Managing Director, having it's office at  
VidyutBhawan, Bailey Road, Patna

.....Appellant

Versus

Bihar Electricity Regulatory Commission

Through its Secretary, having

Its office at

Ground Floor, VidyutBhawan-II

B.S.E.B. Campus,

JawaharLal Nehru Marg (Bailey Road),

Patna - 800021

.....Respondent

**APPEAL UNDER SECTION 111 OF THE ELECTRICITY ACT. 2003**

**MOST RESPECTFULLY SHOWETH:**

**1. DETAILS OF APPEAL:**

This Appeal is preferred under section 111 of Electricity Act, 2003 challenging the order dated 21 March 2016 passed by the Bihar

Electricity Regulatory Commission [hereinafter referred to as the 'State Commission'] in Case No.50of 2015 for True-up of financials for FY 2014-15, Annual Performance Review (APR) for FY 2015-16, Annual Revenue Requirement (ARR) for second control period FY 2016-17 to FY 2018-19. The Appellant is aggrieved by the disallowances and rejection of the claims of the Appellant herein under certain heads which has placed the Appellant in adverse financial position and has also affected the ability of the Appellant in the implementation of different programs of the Central and State Governments to provide electricity to people in the State. A copy of the tariff order dated 21.03.2016 passed in Case No.50 of 2015 by the Bihar State Electricity Regulatory Commission is annexed herewith and marked as **ANNEXURE-1.**

2. The appellant herein has been served with the copy of the impugned tariff order on 21.03.2016 and this appeal is being filed within the stipulated period of limitation as prescribed by law.

3. **THE ADDRESS OF THE APPELLANT FOR SERVICE IS AS SET OUT  
HEREUNDER :**

Postal Address : South Bihar Power Distribution Company  
Limited., having its registered office  
at Vidyut Bhawan, Bailey Road, Patna.

(i) Phone No. : +91 77 6381 3825, +91 612 250 4045/250 4511

(ii) Email : cecom.sbpdc@gmail.com

(iii) Fax No. : +91 612 250 4532

(iv) Address of Counsel : Mr. Naveen Prakash, 207, C.K. Daftari,

Lawyers Chamber, Tilak Lane, Supreme  
Court of India, New Delhi

(v) Mobile : +91 98 1111 1486

**4. THE ADDRESS OF THE RESPONDENTS FOR SERVICE OF ALL NOTICES IN THE APPEAL ARE AS SET-OUT HEREUNDER :-**

It is stated that the address of the respondents for service of all notices is the same as provided in the cause title. The cerails for communication are -

(i) Phone No. :091-612-2504489, 2505280, 6526749

(ii) Email :[secretaryberc@gmail.com](mailto:secretaryberc@gmail.com), [bercpat@berc.co.in](mailto:bercpat@berc.co.in)

(iii) Fax No. : 0612-2504488

**5. JURISDICTION OF THE APPELLATE TRIBUNAL :**

The appellant declares that the subject matter of the instant appeal and the relief sought for is within the jurisdiction of this Hon'ble Tribunal.

**6. LIMITATION :**

The appellant declares that the appeal is within the limitation period specified in Sub-Section (2) of Section 111 of the Act, 2003.

**7. FACTS OF THE CASE : -**

- I. The Appellant is a company incorporated under the Companies Act 1956 The appellant is a distribution licensee under the

provision of Electricity Act 2003 having a license to distribute and supply electricity in the northern area of the State of Bihar.

- II. The appellant is a successor of of Bihar State Electricity Board (hereinafter referred to as “BSEB” or “Board”) which was an integrated entity and was engaged in electricity generation, transmission, distribution and related activities in the State of Bihar. The Appellant has succeeded to the electricity distribution and retail supply functions of BSEB in the northern area of the State upon reorganisation of the BSEB under section 131 etc. of the Electricity Act, 2003.
  
- III. On or about 18.12.2015 the Appellant filed its petition before the State Commission being case No 50 of 2015 for True-up of financials for FY 2014-15, Annual Performance Review (APR) for FY 2015-16, Annual Revenue Requirement (ARR) for second control period FY 2016-17 to FY 2018-19. The Appellant placed on record the relevant details and documents and furnished the particulars sought for by the State Commission from time to time in the said proceedings.
  
- IV. The State Commission held public hearings and after seeking all clarifications from the appellant , pronounced the order dated 21.03.2016 In the order dated 21.3.2016 the State Commission has **not** allowed any increase in the tariffs applicable from 01<sup>st</sup> April 2016. The State Commission has disallowed various claims of the Appellant in the truing up of financials for FY 2014-15, Annual Performance Review (APR) for FY 2015-16, Annual Revenue Requirement (ARR) for second control period FY 2016-17 to FY 2018-19 as more fully set out herein.

- V. Aggrieved by the order dated 21.3.2016 the Appellant is filing the present appeal as per the facts in issue, questions of law and grounds stated herein.

#### **FACTUAL ASPECTS FO THE CASE**

- VI. TheState Commission has made disallowances in the claims of the Appellant under the following heads related to the true up of financials for FY 2014-15:
- a. Power Purchase Cost;
  - b. Depreciation;
  - c. Return on Equity;and
  - d. Net Prior Period Credit / (Charges)
- VII. TheState Commission has made disallowances in the claims of the Appellant under the following heads related to the Annual Performance Review (APR) for FY 2015-16:
- a. Energy Sales
  - b. Depreciation
  - c. Recovery of Gap/(Surplus) of past period
- VIII. TheState Commission has made disallowances in the claims of the Appellant under the following heads related to the Annual Revenue Requirement (ARR) for FY 2016-17 to FY 2018-19-
- a. Disallowed power due to excess Distribution Loss;

- b. Energy Sales;
- c. Employee Cost;
- d. Distribution losses

The analysis of the above aspects considered by the State Commission in the impugned order and the submissions of the Appellant in regard to the same are as under:

**FY 2014-15.**

**POWER PURCHASE COST:**

- IX. In the impugned order the State Commission has considered the true up of the Power Purchase Cost for FY2014-15 at para 4.12 page no 78 to 81. While the quantum of power purchase claimed by the Appellant from different sources at 11,117.70MUs, the State Commission has not however considered fully the cost of such power purchases from various sources incurred by the Appellant. The Appellant had duly filed with the State Commission the entire bills raised by the generating companies/suppliers of electricity to the Appellant with supporting dates, the State Commission has arbitrarily without any analysis and particulars given and by merely stating that by prudence check has taken lesser quantum of amount as due to such generating companies and suppliers.

- X. The amount claimed by the Appellant had been duly supported by the audited accounts of the Appellant for the financial year 2014-15 which was placed before the State Commission , besides the bills of the generating companies / suppliers.
- XI. In the above process the State Commission has proceeded to reduce the power purchase cost to be allowed by Rs 8.48 crores as tabulated hereunder:

**Table 1:Power purchase quantum and power purchase cost**

Generation Station	Admitted Power Purchase (MU)	Approved Power Purchase (MU)	Gap (MU)	Admitted Power Purchase cost (Rs Cr)	Approved Power Purchase cost (Rs Cr)	Gap (Rs Cr.)
Farakka 1,2&3	2,466.80	2,466.80	0.00	974.19	972.2	1.99
Dadri-I & II	793.69	797.37	(3.68)	417.76	416.63	1.13
Adani	987.74	987.74	0.00	477.43	472.07	5.36
Total	4,248.23	4,251.91	(3.68)	1,869.38	1,860.90	8.48

## DEPRECIATION

- XII. The Appellant has claimed depreciation on assets capitalised to the extent of funding of such assets through equity and loan and not through grant from the Central and State Governments. In the audited accounts of FY 2014-15 it had been specifically stated that no depreciation has been Claimed to the extent of the

funding of the assets through grant. The accounts duly audited by the auditor therefore had accounted for depreciation on the gross value of assets funded otherwise through grant. The assets established by the Appellant are by utilisation of the funds from the grant and funds from equity and loan in a proportionate manner. These assets have not been and could not have been funded exclusively through grant.

**XIII.** Despite the above clear position and the audited accounts of the Appellant fortifying the same and without any reason for doubting the audited accounts on such aspects and without giving any rationale, the State Commission in para 4.19 page no 89 to 92 of the impugned order proceeded in a presumptive manner that the assets to the extent of Rs 42.67 (Adjusted depreciation as per the annual audited accounts for FY 2014-15) was exclusively funded by grant. The State Commission has only gone on the basis that the proportionate depreciation on assets created through grants is higher than the depreciation on the assets and has not allowed any depreciation.

**XIV.** The State Commission ought to have considered the capitalization owing to grant equity and loan on pro - rata basis and should not have considered the grant in a disproportionate manner while making capitalization schedule. The annual audited accounts of



the Appellant clearly show that INR 70.47 Crores is the current maturity of long term debt and thus has been repaid to banks. In absence of any approved depreciation, the Appellant would face severe liquidity issues as it would be difficult to honor the repayment schedule as stipulated by lenders. The credit worthiness of Appellant will be seriously hampered affecting the debt raising capacity.

- XV. As per audited annual accounts, the breakup of depreciation is given in “Notes” according to which adjusted depreciation value INR 42.67 cr and the Net depreciation is calculated by subtracting the amortization of grant which means that depreciation has not been claimed on the assets created by the grant. The relevant excerpts of the audited accounts are reproduced below:

Table 2: Depreciation as per annual audited accounts

Particulars	Account Code No.	As 31st March 2015
Depreciation	77.1 to 77.2	1,24,17,21,126
Less:- Transferred to prior period expenses		-
		1,24,17,21,126
Less:- Transferred from Reserve/Amortisation of grant		81,50,15,207
Total		42,67,05,919

- XVI. In addition to the above there is an error in the weighted average rate of depreciation to be considered. The Appellant had claimed

the weighted average rate of 4.79% . The State Commission has wrongly considered the weighted average rate as 4.63%.

**XVII.** In addition to the above, the State commission has also considered Rs. 1199.77 Cr in the accounts of grant. However clarification has already been submitted to BERC Vide letter no 100 dated 19-01-2016 which suggest that the above mentioned amount was received in FY 2013-14 as a conditional grant to create capital assets (i.e. to be converted into grant in the year in which the Project gets completed, and treated as liability for capital work to be done until the project gets COD) and the same was wrongly recognized in the audited account as grant instead of liability for capital work to be done. In the audited account of FY 2014-15 the correction entry of the same has been passed to rectify the grant wrongly recognized in FY 2013-14. The relevant excerpts of the audited accounts are reproduced below:

**Table 3: Note 3 Reserves & surplus**

Particulars	Acc. Code	As At 31st March 2015	As At 31st March 2014
<b>Consumer Contribution</b>			
Opening Balance		93,82,84,842	67,95,00,181
Add:- Addition during the Year		19,21,87,402	25,87,84,661
Closing Balance		<b>1,13,04,72,244</b>	<b>93,82,84,842</b>
<b>Capital Reserves</b>			
Opening Balance		22,07,76,08,813	10,82,67,02,857

Particulars	Acc. Code	As At 31st March 2015	As At 31st March 2014
Add:-Addition / (adjustment) during the Year		11,37,48,54,831	11,37,78,33,094
Less:-Transfer to statement of Profit & Loss/Adjustment		- 81,50,15,207	-12,69,27,138
Closing Balance		<b>9,88,77,38,775</b>	<b>22,07,76,08,813</b>

**XVIII.** According to standard accounting framework, the above mentioned amount should be treated as liability for Capital work to be done until the condition of grant to create capital asset is fulfilled. Moreover, the project against which the above mentioned conditional grant is received is yet to achieve its COD which can be seen on the front of note-11 to the audited balance sheet of FY 2013-14 & FY 2014-15, as assets of Rs167.73 Cr and Rs 105.95 Cr respectively created during the FY 2013-14 & FY 2014-15. Therefore amount received for creation of capital assets forms a part of WIP account and bank balance and hence it should not be considered for amortization.

**XIX.** The State commission has also considered as Rs. 1652.61 Cr in the accounts of “grant during the FY 2014-15” but out of this Rs. 1633.39 Cr is the amount of “capital reserves- Government of Bihar fund” against which shares has also been issued on 02-03-2016. (Copy enclosed as annexure 5). Hence the assumption of the

commission treating the “capital reserves- Gov of Bihar fund” of Rs 1633.39 Cr received for issue of equity share as grant is fundamentally incorrect.

#### **Return on Equity (RoE)**

XX. The State Commission has considered the equity capital of Rs 494.00 Cr only for allowing return on equity. The audited accounts of the Appellant for FY 2014-15 clearly disclose that in addition to the equity shares there is also an amount of Rs. Rs. 2620.33 Cr duly contributed by the Government of Bihar towards Equity Capital pending for allotment by Government of Bihar and the same is accounted for as pending allotment. The Appellant further submits that, Vide letter reference letter no 2175 dated 30.06.2014 Government of Bihar has confirmed that the aforementioned amount of INR 2620.33 Cr being converted into paid up capital.

XXI. In view of the above the amount of INR 2620.33 Cr being towards equity capital, ought to have been considered towards as equity and taking into account the aggregate of the above two sums of Rs 2641.16 Cr and Rs 494.00 Cr namely Rs 3114.33 Cr ought to have been considered towards 30 percent towards equity and the balance as normative loan but to the extent of the Gross Fixed

Asset value. As against the above Commission, has , approved the Return on Equity only at Rs.53.90 Crore in true up for FY 2014-15.

#### Net Prior Period Credit / (Charges)

- XXII. As per the audited accounts for FY 2014-15, the prior period items are as detailed hereunder:

**Table 4: Prior Period Credit/Charges for FY 2014-15**

Particulars	Amount (Rs. Crore)
Prior period income	276.76
Prior period expenses	363.68
Net prior period expenses	86.99

- XXIII. As against the above the State Commission has, approved net prior period income at Rs. (99.38) Crore for FY 2014-15 in true up primarily on the ground that the Appellant had not given given full year wise breakup details of period for which the amount pertains to. The relevant part of the impugned order is at para 4.29 page no 110 to 112.
- XXIV. The Appellant submits that the above claim comprise of several thousand entries and therefore the Appellant had given the details in an electronic form to the State Commission in the tariff proceedings. The Appellant will place the same before the Hon'ble a Tribunal at the time of hearing.

XXV. Further as per the annual accounts of the Appellant the, income relating to previous years is INR 276.76 Cr, and expenses relating to previous years are INR 363.68 Cr.

For income relating to previous years separately Sub-Account 65.1 to 65.9 and for expenses relating to previous years as given in Sub-Account 83.1 to 83.9. Relevant excerpts from annual accounts are as under:

**Table 5: Prior period excerpts from annual accounts**

Particulars	Account Code.	This year 2014-15
Income Relating to Previous Years		
(a) Excess Provision in Prior Period	Separately each Sub-Account 65.1 to 65.9	68,26,296
(b) Income related to Prior period		2,76,07,51,460
( c ) Prior Period Sale of Power		0
Total Income Relating to Previous Years		2,76,75,77,756
Prior Period Expenses/Losses		
Prior Period Power Purchase		1,69,24,81,457
(a) Adjustment of Consumers' Dues (Collection by Adjustment)	Separately each Sub-Account 83.1 to 83.9	1,67,16,29,610
(b) Prior Period Employee Cost		1,49,59,056
( c ) Operating Expenses of Previous year		25,77,51,778
Total Prior Period Expenses/Losses		3,63,68,21,902

Accordingly, there is no justification for disallowing the claim of the Appellant for the Net prior period expenses to the extent of INR 86.99 Cr.

### **Annual performance review of FY 2015-16**

#### **Energy Sales**

- XXVI. The Appellant is implementing the schemes initiated by the Central and the State Government for providing “24x7 Power For All” . This is pursuant to a joint initiative of Central and State Governments and joint agreement is signed by both Central and Government of Bihar. Under the above, it is the obligation of the Appellant to meet the commitment made by the State Government to Government of India. This joint initiative aims for overall development of the power sector in the State and will increase the availability of power. This would result in considerable increase consumer number (due to extensive rural electrification) and average consumption per consumer per day.
- XXVII. The appellant submits that as per commitment to Government of India under the 24X7 power for all plan, the appellant is bound to

release the connections to DS I category. The state commission has curtailed the no. of connections appellant intends to release under the 24X7 plan thereby reducing the energy sales to such category. The methodology followed by state Commission is given in the impugned order at para 5.2 page 121 to 127 has resulted in much lower no. of consumers in DS I category.

XXVIII. The Appellant submits that during FY 2014-15 the 24X7 plan was not formulated and the supply hours were much lower. The methodology of opting 4.16 units per consumer per day for DS-II consumer adopted by the State Commission in the impugned order at para 5.3 page no 127 to 130 has resulted in a much lower sales projection.

**Table 6: Calculation of disallowance of sales for FY 2015-16**

Sl. No	Category	Projected in APR for FY 2015-16 (MU)	Approved in Review for FY 2015-16 (RE) (MU)	Disallowance (MU)
1	DSI	1,278.42	987.21	291.21
2	DSII	2,226.82	1,521.71	705.11
3	Total	3,505.24	2,508.92	996.32

XXIX. There is a disallowance of 996.32 Mu for DS I & DS II category which will have an implication on the revenue realization. The projected and approved average realization is shown below

**Table 7: Sales and average realization for FY 2015-16**

Particular	Projected	Approved
------------	-----------	----------



Sales (MU)	7220.6	6807.46
Average Billing Rate (Rs/Kw.Hr)	4.65	4.73

XXX. Due to the higher approved average realization of Rs. 4.73/kw.hr there will be a gap of Rs. 54.45 Cr. which will have an adverse effect on the financial position of the utility.

XXXI. The Appellant states considering the nature of the scheme being implemented and substantial grant being available the State Government ought to have allowed the projections made by the Appellant for FY 2016-17 onwards instead of restricting the same merely because of previous year performances.

#### **DEPRECIATION**

XXXII. The submissions of the Appellant on the aspect of depreciation of FY 2014-15 are reiterated armed with reference to Annual Performance review of 2015-16.

#### **RECOVERY OF GAP/(SURPLUS) OF PAST PERIOD**

XXXIII. The State Commission in para 5.28 page no 178 to 181 of the impugned order has determined the revenue surplus of the previous year of Rs 642.92 Cr adjusted from APR FY 2015-16 on truing up of FY 2006-07 to FY 2012-13. The said period pertains to erstwhile B.S.E.B which remained with state government. The Appellant did not get any surplus amount in the opening balance

sheet notify by the state government through transfer scheme. The State Commission has therefore proceeded on a notional surplus without any justification.

**Annual Revenue Requirements [ARR] for second control period for FY 2016-17 to FY 2018-19.**

### Energy Sales

XXXIV. The submissions contained hereinabove in regard to FY 2015-16 are reiterated.

**Table 8: Projected and approved DSI consumer for the control period FY 2016-17 to FY 2018-19**

Sl. No	Category	FY 2016-17		FY 2017-18		FY 2018-19	
		Projected	Approved	Projected	Approved	Projected	Approved
1	DSI	35,00,529	28,05,523	41,98,901	38,54,764	49,03,995	49,04,003

XXXV. The State commission has stated that “The shortfall in the electrification of DS-I programmed during FY 2015-16 is distributed equally during the years FY 2016-17, FY 2017-18 and FY 2018-19 to meet the target of electrification of DS-I households in “24X7 Power Supply” document” still from the above table it is clear that the shortfall was not accounted and also the projection has been reduced.

XXXVI. The Appellant has awarded contracts for electrification of unelectrified consumers in FY 16. The contracts shall be completed in FY 17 with release of connections to all such consumers as

envisaged in 24\*7 power for all program or contracts. The appellant is committed to release the connections in the defined timelines. The consumer projections given by the Appellant in the petition and reiterated in the table above are not only realistic but are also required to be achieved under various programs of the Central and State Government as per the grant conditions. The details of the disallowances and implications are as under:

**Table 9: Impact of disallowance**

Description	FY 2016-17	FY 2017-18
Disallowed consumer for DSI category (number)	6,95,006	3,44,137
Approved Category-wise Energy Consumption (Kw.hr/consumer/day)	1.9	2.2
Sales projection of disallowed consumer of DSI category (MU)	481.99	276.34

XXXVII. The disallowance sales of DSI category the average revenue realization approved by the State commission has increased drastically than the projected value.

**Table 10: Projected and approved average revenue realisation for FY 2016-17 to FY 2018-19**

Particular	FY 16-17		FY 17-18		FY 18-19	
	Projected	Approved	Projected	Approved	Projected	Approved
Average revenue realisation (Rs./kWh)	4.40	4.60	4.24	4.48	4.12	4.41
Revenue Rs.Cr	4404.85	4221.12	5397.90	5251.92	6573.86	6474.30

**Table 11: Revenue gap due to the higher approved average billing rate (Rs. Cr)**

Particular	FY 2016-17	FY 2017-18	FY 2018-19
------------	------------	------------	------------

Revenue Approved	4,221.12	5,251.92	6,474.30
Revenue at projected ABR for approved sales	4,038.27	4,969.26	6,055.27
Gap	182.85	282.66	419.03

XXXVIII. There is thus a gap of Rs. 182.85 Cr for FY 2016-17 and Rs 282.66 Cr for FY 2017-18 and Rs. 419.03 Cr for FY 2018-19 due to the higher approved average realization.

#### Power purchase cost

XXXIX. In the impugned order, the State Commission has stated that the Appellant has procured surplus power of a quantum of 1841.86 MUs and treated the same as available to be sold to third parties. The State Commission has proceeded to consider notional revenue on such sale to third parties. The Appellant states that it had in fact not procured such surplus power and therefore, there is no question of revenue from sale to be considered.

XL. The appellant likes to submit that the commission has incorrectly considered 1841.86 Mu as surplus power to be sold outside. The actual submission for the state of Bihar as follows

**Table 12: Power Purchase for FY 2016-17**

	SBPDCL			NBPDC			Bihar		
	FY 2016-17			FY 2016-17			FY 2016-17		
	Projecte d	As per BERC approve d sales	As per BERC approve d losses	Projecte d	As per BERC approve d sales	As per BERC approve d losses	Projecte d	As per BERC approve d sales	As per BERC approve d losses
Power purchase / Required to purchase (MU)	17109.61	17084.32	11747.7	12389.72	12498.57	12498.57	29,499.33	29,582.89	24,246.27

XLII. The projected power purchase of 29,499.33 MU is much lesser than 29582.89 MU (power purchase for BERC approved sales). The difference of 5,336.62 MU (29,582.89-25,246.27) should be considered as Additional energy purchase due to excess T&D loss disallowed.

### **Employee Cost**

XLIII. The Appellant projected the employee cost based on actual expenditure as per audited annual accounts for FY 2014-15 with escalation at 8.11% (5 years CAGR inflation index).

XLIV. The State Commission considered the employee cost approved in true up for FY 2014- 15 as base employee cost with escalation for inflationary indexation at 4.65%

XLV. The State Commission has used the Base employee cost (as per audited accounts of FY 2014-15) to project the employee cost for FY 2016-17, FY 2017-18, and FY 2018-19. According to the basic concept of compounding, state commission should have calculated employee cost for FY 2015-16 based on the principle followed and subsequently employee cost of FY 2015-16 should have been used for calculating the employee cost for FY 2016-17, FY 2017-18, and FY 2018-19.

XLVI. In addition the State Commission capitalized 5% of Employee cost, however most of the undergoing projects are on turnkey basis, and

therefore employees are involved only in monitoring. Therefore 5% capitalization is over estimation of Employee cost which is to be capitalized in subsequent years.

**XLVI.** Further the State Commission has not considered the provision for adding new employees. According to business plan and to ensure quality customer service, utility is planning to increase its manpower according to table below:

**Table 13: Employee addition for MYT control period**

Sl. No	Particulars	FY 2016-17	FY 2017-18	FY 2018-19
1	Number of employees at the beginning of FY	1351	1713	2117
2	Number of employees added (Net)	362	404	450
3	Number of employees at the end of FY (1+2+3)	1713	2117	2568

**XLVII.** Without prejudice to the above the State Commission considering the 2014-15 as the base year ought to have escalated the amount twice to determine the cost for 2016-17 namely the first one to bring it to 2015-16 and the second one to FY 2016-17.

**XLVIII.** In addition, due consideration should be given to rate of capitalisation of employee cost and financial impact on employee cost on account of adding new employees

#### **Administrative and General Cost**

**XLIX.** The State Commission has considered the A&G expenses approved in true up for FY 2014-15 as base A&G expenses with escalation for

inflationary indexation at 4.65%. As mentioned above above the State Commission considering the 2014-15 as the base year ought to have escalated the amount twice to determine the cost for 2016-17 namely the first one to bring it to 2015-16 and the second one to FY 2016-17.

### **Distributionlosses Trajectory**

- L. The State Commission had fixed loss trajectory for the Control Period of FY 2013-14 to FY 2015-16 for both the DISCOMs in the Tariff Order dated 15th March, 2013 as below.

**Table 14: Distribution loss trajectory defined in first control period of MYT**

Year	DistributionLossapproved (%)
FY2013-14	23.00
FY2014-15	21.40
FY2015-16	20.00

- LI. In the second control period of MYT, the state commission has defined the loss trajectory based on the trajectory defined in first control period.
- LII. However, at the start of second control period, the appellant has signed a TRIPARTITE MEMORANDUM OF UNDERSTANDING (MoU) with Ministry of Power, Government of India, and Government of Bihar for achieving financial turnaround of under UDAY scheme.
- LIII. While participating in the “Ujwal DISCOM Assurance Yojana (UDAY)”, the Government of Bihar has committed to Government

of India that the AT&C losses in Bihar will be reduced to 15% by FY 2019-20.

- LIV. The state commission has approved the distribution loss trajectory without taking the commitments under UDAY scheme into consideration. The distribution loss trajectory approved by State Commission and signed as per UDAY scheme is given as follows:

**Table 15: Distribution loss trajectory as per state commission and as per UDAY scheme**

Year	State commission's approved Distribution Losstrajjectory(%)	Distribution Losstrajjectory as per UDAY scheme(%)
FY2016-17	19.25%	38%
FY2017-18	18.25%	30%
FY2018-19	17.00%	22%
FY2019-20	15.00%	15%

- LV. The state commission should have given due consideration to the distribution loss trajectory as per tripartite MoU signed under UDAY scheme

**8. (i) FACTS IN ISSUE:**

The factual aspects in issue have been listed in the above mentioned paragraphs with details. The Appellant craves leave to refer to the same.

**(ii) QUESTIONS OF LAW:**

The following questions of law arise for consideration of this Hon'ble Tribunal:



- (a) Whether the State Commission is right in rejecting the Power Purchase Cost paid/payable to the generating companies/suppliers for the electricity procured as per the bills raised by them, after having approved the quantum of purchase? The State Commission has arbitrarily reduced the Power Purchase Cost from some of the generating stations/suppliers ?
- (b) Whether the State Commission is right in considering the funding of the capital assets as being entirely through grants, when such funding has been through grant, equity and loan and consequently in not allowing the depreciation of such assets funded through equity and loan ?
- (c) Whether the State Commission has properly considered the weighted average rate of depreciation on the capital assets for the purpose of tariff ?
- (d) Whether the State Commission is right in not considering the amount of Rs2620.33 crores being the amount contributed by the Government of Bihar (shareholder of the Appellant) towards equity but pending allotment of equity ?

- (e) Whether the State Commission is right in not considering the substantial part of the prior period expenses on the ground that the Appellant had not given given full year wise breakup details of period for which the amount pertains to, overlooking the fact that the Appellant had duly furnished all such details running into several volumes in a digital manner (through pen drive) ?
- (f) Whether the State Commission has properly taken into account the quantum of energy sales to be considered for different categories of consumers of the Appellant ?
- (g) Whether the State Commission is right in not fully allowing the claim of the Appellant in regard to the scheme envisaged for providing electricity connection in the rural areas in accordance with the various schemes evolved by the Central and State Governments and for which the Appellant is receiving substantial grants ?
- (h) Whether the State Commission is right in determining an amount of Rs642.92 crores as revenue surplus of the

Appellant being related to the past period up to FY 2013-14, when the same related to the period when BSEB was in operation, without considering that the Appellants are new entities established to function as per the financials notified by the State Commissions?

- (i) Whether State Commission is right in considering the revenue surplus of BSEB period as available to the Appellant without taking into account the substantial amount of liability retained by the Government of Bihar and the Appellant having been given a re-structured balance sheet under the statutory Transfer Scheme to ensure viability of the Appellant?
- (j) Whether the State Commission has correctly determined the escalation to be allowed in the employees cost from the base figures of 2014-15 taken by the State Commission for determination of the revenue requirements for FY 2016-17, 2017-18 and 2018-19 ?
- (k) Whether the State Commission has correctly determined the administrative and general cost of the Appellant taking into

the account the actual cost of the base year 2014-15 and the escalation to be allowed on such cost for determining the revenue requirements for the FY 2016-17, 2017-18 and 2018-19 ?

- (l) Whether the State Commission has properly accounted for and given the cost towards employees cost taking into consideration and new and additional employees to be deployed for operation and maintenance of assets established under the various schemes?
- (m) Whether the State Commission has properly determined the distribution loss trajectory to be allowed to the Appellant?

**9. GROUNDS WITH LEGAL PROVISIONS:**

- A. BECAUSE** the State Commission erred in not considering the total Power Purchase Cost on the quantum of 11,117.70 MUs as claimed by the Appellant based on the bills received from the generating companies/suppliers and in arbitrarily reducing the quantum of the amount paid/payable to the generating stations of NTPC, NHPC and Adani Power without giving any reasons for such reduction.

- B.** **BECAUSE** the State Commission has failed to appreciate that the bills raised by NTPC, NHPC and Adani Power was provided by the Appellant to the State Commission for validation and such bills clearly justified the claim of the Appellant. As against the above, for FY 2014-15, the State Commission has arbitrarily determined the amount payable as 1288.27 crores leaving a shortfall of Rs8.48 crores. The State Commission has not given any justification for the same except by vaguely stating that they had applied a prudent check.
- C.** **BECAUSE** the State Commission has failed to appreciate that in the case of purchase of electricity by the Appellant from NTPC and NHPC Generating Stations, the Appellant is required to pay tariff as determined by the Central Commission in the Tariff Order passed from time to time on the petitions filed by NTPC and NHPC. In terms of Rule 8 of the Electricity Rules, 2005, the State Commission ought to have adopted the said tariff without any deviation or reduction or variation
- D.** **E.** **BECAUSE** the State Commission has wrongly accounted the funding of some of the capital assets entirely to the grant instead of allocating such funding proportionately to grant equity and loan and accordingly reduced the entitlement of depreciation admissible to the Appellant. The audited accounts of the

Appellant clearly certify that no depreciation has been claimed on the value of the assets funded through grants. In view of the above, the depreciation provided for in the audited account were clearly related to the funding of capital assets through equity and loan and accordingly depreciation provided for in the annual accounts was clearly admissible.

- F. **BECAUSE** the State Commission has failed to appreciate that the audited annual accounts of the Appellant ought to have been taken as prima facie correct representation of the financials of the Appellant, in the absence of any specific details or ground to reject the same. The aspect of funding taken into account by the auditors , its apportionment between grant, equity and loan in a proportionate manner and accounting for depreciation only for funding through equity and loan provided for in the annual audited account ought not to have been varied without any specific details available of any wrong allocation. In this regard the Appellant crave leave to refer to the decision of the Hon'ble Supreme Court in the case of West Bengal Electricity Regulatory Commission v CESC Limited (2002) 8 SCC 715.
- G. **BECAUSE** the State Commission has failed to appreciate that in the absence of the admissible depreciation being allowed, the Appellant willnot be able to service the funding of the assets,

particularly, the repayment of the loan/debt borrowed for funding and thereby will suffer irreparable and cascading effect. The State Commission arbitrarily considered as some of the assets funded under the scheme notified by the Central Government and the State Government with a grant giving there for without appreciating that such grant is not for 100% value of the assets and there is an obligation on the part of the Appellant to proportionately fund the assets also through equity and loan.

- H. **BECAUSE** the State Commission erred in not considering the amount contributed by the State Government (shareholder of the Appellant) and available on the books of account of the Appellant towards equity, capital pending for allotment to be eligible for being treated as equity for the purpose of revenue requirements and tariff determination. The amount of Rs2620.33 crores recognised in the annual audited accounts of the Appellant is nothing but a shareholders fund and is to be given the same treatment as in the case of equity share capital. The State Commission has ignored the said amount for the purpose of revenue requirements and tariff determination wrongly and restricting the Return on Equity to the actual issued and paid up capital of the Appellant.

- G. **BECAUSE** the State Commission has failed to appreciate that as per the well settled accounting principle, the shareholders fund include not only the actual issued and paid up and subscribed equity capital of the company but also the aspects such as retained earnings, free-reserves and advance paid for issue of equity shares. The amount of Rs2620.33 crores lying with the Appellant as amount towards equity capital is to be treated as in the case of actual equity share capital.
- H. **BECAUSE** the State Commission by disallowing the Return on Equity on the amount of Rs2620.33 crores has substantially reduced the revenue requirements of the Appellant consistently for the period from 2014-15 onwards and thereby affected the financial viability of the Appellant.
- I. **BECAUSE** the State Commission erred in rejecting the substantial amount of prior period expenses claimed by the Appellant in the truing up of financials for FY 2014-15 on the ground that the Appellant had not given given full year wise breakup details of period for which the amount pertains to. The prior period expenses of 86.99 crores was under various heads and related to multiple transactions. The Appellant had duly furnished in a digital manner (pen drive) the entire details and the same was available on the records of the State Commission. Accordingly,



there is no justification for the State Commission to have rejected the claim of the Appellant for prior period expenses.

- J. **BECAUSE** the State Commission has not correctly determined the quantum of energy sales to be considered for the FYs 2015-16, 2016-17, 2017-18 and 2018-19 on the purported ground that the Appellant may not be in a position to implement the schemes of the Central and State Governments for aggressive electrification in the rural areas. The State Commission has failed to appreciate that the Appellant has signed MOUs with the Government and the Appellant has been provided substantial grants for undertaking such schemes. The Appellant is being closely monitored by the agencies of the Central and State Governments in regard to its implementation, considering the policy of the Government of providing electricity for all and 24X7 in the near future. In the circumstances, the State Commission ought to have allowed the estimation done by the Appellant including the consumer mix provided in regard to the energy sales, the State Commission ought not to have varied the consumer mix/energy mix by reducing the quantum of energy sale required for meeting the electricity needs of the rural areas in the State.
- K. **BECAUSE** the State Commission has failed to appreciate that the per unit supply as per the implementation of the above scheme

would result in substantial increase of consumption by the consumers, both on account of extension of hours of supply and also on account of the new connections being provided. These are being done under the schemes notified by the Central and State Governments, the State Commission ought to have recognised the per unit consumption and the energy sale computed by the Appellant in terms of the above. The State Commission erred in reducing the above aspects and projecting a lesser energy sale.

- L. **BECAUSE** the State Commission has failed to appreciate that the projection of lesser energy sale will have effect on the Appellant not getting the revenue for actual quantum of energy sale as well as the associated aspects of transmission and distribution losses and financial viability of the Appellant will get seriously affected. Further, the Appellant will be not in a position to implement the above scheme of the Central and the State Governments resulting in an adverse position as non-fulfillment of the condition attached to the grant, may result in the grant being converted as loan.
- M. **BECAUSE** the State Commission has failed to appreciate that by retaining the energy sale projected for subsidising the category of consumers and reducing the energy sale substantially for subsidised category of consumers, the average billing rate of the Appellant has been substantially increased. Such average billing

rate determined by the State Commission is not realistic and the Appellant will suffer irreparably on account of such notional billing rate being taken for the purpose of determining the revenue requirements and tariff.

- N. **BECAUSE** the State Commission has considered an amount of Rs.1633.39 Cr as grant from the Government of Bihar. Accordingly, the assets funded by the said amount has not been considered for the revenue requirements and tariff purposes. The Appellant submits that the above amount is part of the capital reserves and not a grant. Against the said amount, equity shares have been issued to the Government of Bihar.
- O. **BECAUSE** the State Commission has also considered an amount of Rs. 1199.77 Cr as grant from the Government of Bihar. The said amount as per the Annual Audited Accounts of the Company is the negative entry exhibiting that the amount was initially conditional grant and on account of non-fulfillment of the condition, the grant stands converted to loan.
- P. **BECAUSE** the State Commission has stated that the Appellant has procured surplus power of a quantum of 1841.86 MUs and treated the same as available to be sold to third parties. The State Commission has proceeded to consider notional revenue on such sale to third parties. The Appellant states that it had in fact not procured such surplus power and therefore, there is no question of revenue from sale to be considered.

- Q. **BECAUSE** the State Commission erred in considering the initial level of losses in the system of the Appellant at 19.25% in the year 2016-17 as against 34% recognised by the Central and State Government under the Uday Scheme. The Central and the State Governments have agreed to provide grant and other facilities to enable -
- (a) extension of electrification in the rural areas;
  - (b) provision of increased hours of electricity duly considering the initial loss level of 38%;
- R. The State Commission ought to have determined the multi year tariff for the period 2016-17 onwards as per the said scheme, instead of continuing the loss level trajectory as determined earlier.
- S. The Appellant craves leave to add to the grounds mentioned herein above and submits that the contentions are in the alternative and without prejudice to one another.
10. **MATTERS NOT PREVIOUSLY FILED OR PENDING WITH ANY OTHER COURT.**

The Appellant has not filed any other suit, appeal or has initiated any other legal proceeding against the order dated 21.3.2016 passed by the Central Commission.

11. **GROUND(S) FOR SUCH RELIEF (S) AND THE LEGAL PROVISIONS, IF ANY, RELIED UPON**  
As mentioned in Point 9 above.

12. DETAILS OF INTERIM APPLICATION, IF ANY, PREFERRED ALONG WITH APPEAL.

N.A.

13. DETAILS OF APPEAL/S, IF ANY PREFERRED BEFORE THIS APPELLATE TRIUBNAL AGAINST THE SAME IMPUGNED ORDER/DIRECTION, BY RESPONDENTS WITH NUMBERS, DATES AND INTERIM ORDER, IF ANY PASSED IN THAT APPEAL.

N.A.

14. DETAILS OF INDEX

An index containing the details of the documents to be relied upon is enclosed.

15. PARTICULARS OF FEE PAYABLE AND DETAILS OF BANK DRAFT IN FAVOUR OF PAY AND ACCOUNTS OFFICER, MINISTRY OF POWER, NEW DELHI.

In respect of the fee of appeal.

Name of the Bank: ..... DD No..... dated....., for amount of Rs. ....

16. LIST OF ENCLOSURES.

Annexure A: A copy of the impugned order dated 21.3.2016 passed by the State Commission in Case No. 50/2015

17. WHETHER THE ORDER APPEALED AS COMMUNICATED IN ORIGINAL IS FILED.

Yes

18. WHETHER THE APPELLANT IS READY TO FILE WRITTEN SUBMISSIONS/ARGUMENTS BEFORE THE FIRST HEARING AFTER SERVING THE COPY OF THE SAME ON RESPONDENTS.

Yes

19. WHETHER THE COPY OR MEMORANDUM OF APPEAL WITH ALL ENCLOSURES HAS BEEN FORWARDED TO ALL RESPONDENTS AND ALL INTERESTED PARTIES, IF SO, ENCLOSE POSTAL RECEIPT/COURIER RECEIPT IN ADDITION TO PAYMENT OF PRESCRIBED PROCESS FEE.

No

20. ANY OTHER RELEVANT OR MATERIAL PARTICULARS/DETAILS WHICH THE APPELLANT DEEMS NECESSARY TO SET OUT:

N.A.

21. RELIEFS SOUGHT

In view of the facts mentioned in para 7 above, points in dispute and questions of law set out in para 8 and the grounds of appeal stated in para 9, the appellant prays for the following reliefs:

- i. Allow the appeal and set aside the order dated 21.3.2016 passed by the State Commission in Petition No. 50 of 2015
- ii. Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper.

Dated at ..... this ..... day of ....., 2016.

COUNSEL FOR THE APPELLANT

APPELLANT

**DECLARATION BY APPELLANT**

The appellants above named hereby solemnly declare(s) that nothing material has been concealed or suppressed and further declare(s) that the enclosures and typed set of material papers relied upon and filed herewith are true copies of the original.

Verified at .....on this day of....., 2016.

**COUNSEL FOR THE APPELLANT**

**APPELLANT**

**VERIFICATION-**

I, ....., S/o Sh. ....., aged about ..... years, working as ..... in the office of the Appellant Company, resident of .....presently at New Delhi, do hereby verify that the contents of paras 1 to 7 and 10 to 20 are based on the records of the appellant maintained in the ordinary course of business and believed by me to be true and paras 8, 9 and 21 are believed to be true on legal advice and that I have not suppressed any material facts.

**DATE: .05.2016**

**PLACE:**

**APPELLANT/AUTHORIZED OFFICER**

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI**

**APPELLATE JURISDICTION**

**APPEAL NO ..... OF 2016**

**IN THE MATTER OF:**

South Bihar Power Distribution Company Limited .....Appellant

**VERSUS**

Bihar Electricity Regulatory Commission &Ors .....Respondent

**AFFIDAVIT**

I, ....., S/o ....., aged about ..... years, resident of ....., presently at New Delhi do hereby solemnly affirm and state as under:

1. I say that I am ..... in the Appellant Company and am competent to swear the present affidavit.
2. I say that I have read the contents of the above appeal filed by the Appellant against the order dated 21.3.2016 passed by the State Commission and I have understood the contents of the same.
3. I say that the contents of the above appeal filed by the Appellant are based on the information available with the appellant in the normal course of business and believed by me to be true.
4. I say that the Annexures to the Memorandum of appeal are the true and correct copies of their original.

**DEPONENT**

VERIFICATION



I, the deponent above-named, do hereby verify the contents of the above affidavit to be true to the best of my knowledge, no part of it is false and nothing material has been concealed therefrom.

Verified at New Delhi on this ..... day of May, 2016.

DEPONENT