

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal Nos. 155, 156 & 157 of 2005

Dated this 21st day of July 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

Appeal No.155 of 2005

BSES Rajdhani Power Ltd.

... .. Appellant

Versus

1. Delhi Electricity Regulatory Commission
New Delhi – 110017
2. Government of National Capital Territory of Delhi
New Delhi – 110001
3. Delhi Transco Limited
New Delhi

... .. Respondents

Appeal No.156 of 2005

BSES Yamuna Power Ltd.

... .. Appellant

Versus

1. Delhi Electricity Regulatory Commission
New Delhi – 110017
2. Government of National Capital Territory of Delhi
New Delhi – 110001
3. Delhi Transco Limited
New Delhi

... .. Respondents

Appeal No.157 of 2005

North Delhi Power Limited

.....Appellant

Versus

1. The Delhi Electricity Regulatory Commission
New Delhi – 110017
2. The Govt. of NCT of Delhi
New Delhi – 110002
3. Delhi Transco Limited
New Delhi
4. The Tata Power Company Limited
Mumbai – 400001

.....Respondents

Appeal No.155 of 2005

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Appeal No.157 of 2005

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JUDGMENT

1. The above three appeals which were filed as Writ Petitions came to be filed with leave of Hon'ble High court on the file of this Appellate Tribunal by virtue of the order of Hon'ble the Delhi High Court dated 29th August, 2005 made in Writ Petition (C) No.140. of 2005, etc. The appellants moved Writ Petition under Article 226 of The Constitution. The Writ Petitions were heard for a number of days. Ultimately the appellant sought leave to challenge the findings and tariff determination by the Impugned Order before this Appellate Tribunal for Electricity. Recording the same, the Hon'ble High Court passed the following Order :-

"WP(C) No.140/2005

1. *When the petition was filed Appellate Tribunal under Section 110 of the Electricity Act 2003 was not constituted. A tribunal has since been constituted under Section 110 of the Act. A notification has been issued extending limitation by 45 days for filing of appeals. Limitation was to reckon from the date the Tribunal was to come into operation.*

2. *On an earlier occasion I had transferred petitions which were raising issues which fell within the jurisdiction of the Appellate Tribunal under Section 110, which petitions were filed*

when Tribunal was not constituted. Transfer was on account of the creation of the Appellate Tribunal.

3. Learned counsel for the petitioner states that the similar order be passed in the present petition.

4. Petition stands disposed of with a direction to the registry to transmit the records of the writ petition to the Appellate Tribunal at the following address:-”

2. Identical orders have been passed in the two other connected Writ Petitions. The above three appeals were consolidated and taken up together for hearing. It is sufficient to set out summary of facts leading the appeals as facts.

3. Appeal No. 155 of 2005 is preferred by M/s BSES Yamuna Power Limited (herein after referred as BYPL for brevity). The main and substantial contention advanced on behalf of this appellant is that the Delhi Electricity Regulatory Commission (DERC) has neither the jurisdiction nor authority to direct the appellant DISCOM to create Regulatory Asset as has been ordered in its tariff order dated 09.06.2004 and affirmed by its review order dated 29.10.2004. According to the appellant in terms of the statutory provisions of The Delhi Electricity Reforms Act, 2000 (DERA), the Regulatory Commission is bound by the policy directions dated 22.11.2001 and 31.05.2002 and the Bulk Tariff orders dated 22.02.2002. According to the appellant, in the absence of any legal or logical basis, to direct the DISCOM to create Regulatory Asset, when the ARR filed by the appellant had been substantiated and justified warranting consequential tariff revision. It is also contended that the action of the DERC in fixing the paying capacity, as contained in the BST Order, has been disregarded and consequently directions or orders are to be issued to refund or adjust to the Delhi Transco Limited of

the amounts paid by the appellant over and above their actual paying capacity.

4. The common points that were argued by the learned counsel appearing in the three appeals for both sides revolve around the following questions and as seen from their written arguments (i) Whether the policy directions issued by the NCT of Delhi has been violated by the Commission in issuing directions to create Regulatory Asset, while determining the tariff? (ii) Whether the Regulatory Commission has acted illegally in directing the DISCOMs to create Regulatory Asset while determining tariff? (iii) Whether the appellants themselves came forward and submitted proposal to create “Regulatory Asset”? Whether the appellant is estopped from challenging the directions issued to the DISCOMs to create Regulatory Asset? (iv) Whether the direction to create Regulatory Asset has resulted in denial of 16% return on equity and recovery of operational expenses assured in the scheme to the DISCOM? (v) Whether the Bulk Supply Tariff (BST) has been fixed with reference to the paying capacity of the DISCOMS? and (vi) Whether the three appeals are maintainable before this Appellate Tribunal under Section 111 of The Electricity Act 2003?

5. We will be justified in referring to material aspects which took place before the impugned tariff fixation. It is contended that the Government of National Capital Territory at the time of the restructuring of power sector in Delhi undertook unbundling of the erstwhile Delhi Vidyut Board (DVB) into six entities for discharging various functions of the said DVB separately. GNCT Delhi sought to corporatise the said entities and three DISCOMs were created to undertake distribution of Power.

6. GNCT Delhi issued policy directions on 22.11.2001 and 31.05.2002 in furtherance of this object to disinvest and privatize the DISCOMs. The said policy directions contained the entire scheme, which a potential investor could study and come forward to invest. The policy directions were issued pursuant to the statutory provisions of the DERA Act 2000 to attract investment in the distribution business and to advance the disinvestment process. It is also essential to refer to the provision of the DERA Act 2003, as based upon the provisions of the said Act, contentions were advanced by the appellant in all the three appeals.
7. The Government of national Capital Territory of Delhi issued the following policy directions to restructure Delhi Vidyut Board as seen from the following two Notifications and salient directions are:-

“NOTIFICATION dated 22.11.2001

1. The Delhi Electricity Reform Act, 2000 (hereinafter referred to as the “Reform Act”), has been enacted by the Legislative Assembly of the National Capital Territory of Delhi, inter alia, to provide for the restructuring of the electricity industry, rationalization of generation, transmission, distribution and supply of electricity, increasing avenues for participation of privates sector in the electricity industry and generally for taking measures conducive as to the development and management of the electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi and for matters connected therewith or incidental thereto.”

*** *** ***

“7. The Government has, therefore, decided as a matter of policy that the distribution activities of the Delhi Vidyut Board shall be privatized and the same is to be achieved as under.

- a) The generation functions are to be vested in Indraprastha Power Generation Company Ltd. (GENCO).*

- b) *The functions in relation to transmission and bulk supply are to be vested in Delhi Power Supply Company Ltd. (TRANSCO).*
- c) *The functions regarding distribution and retail supply are to be vested in three distribution companies, namely, (i) Central-East Delhi Electricity Distribution Co. Ltd., (ii) South-West Delhi Electricity Distribution Co. Ltd., (iii) North north-West Electricity Distribution Co. Ltd.*
- d) *The properties, interest in properties, liabilities, obligations, personnel, etc. of the Delhi Vidyut Board are to transferred to the above five companies on the terms and conditions which have been notified in the Transfer Schme;*
- e) *51% equity shares in the threes distribution companies are to be offered to private sectors through a competitive bidding process.*

8. *The Government, after extensive and careful deliberation and taking into account the advice received, is of the opinion that the following aspects are important for effective re-organization of the Delhi Vidyut Board and for the sale of 51% equity shares in the distribution companies, namely:-*

- a) *Considering the circumstances prevailing in Delhi, it is of absolute necessity that a long term definitive loss reduction or efficiency gain programme is settled in the beginning to give certainty and to induce the investors to invest in the distribution and retail supply business in Delhi. It is difficult to get a private sectors investors to purchase 51% equity shares in the distribution companies, if the reduction in loss levels or efficiency gains to be achieved are determined from year to year.*
- b) *Proposals for efficiency gains based on targets for loss reduction set on a normative and unilateral basis are fraught with difficulties because of the differences in the perceptions of the stakeholders particularly the Government, State Commission and the Licences. The previous experience of a presumptive determination of loss reduction or efficiency gain programme in other State has led to problems and has resulted in the investor losing confidence in the process. To attract the private*

sector investor, the Government is of the opinion that it would be appropriate that reduction in loss levels / efficiency gain to be achieved in the next five years be determined through competitive bidding, that is to say, through the play of market forces rather than being pre-determined unilaterally in the bidding documents. The competitive bidding process will produce an acceptable reduction/efficiency gain programme.

- c) *Since the loss reduction or efficiency gain to be achieved by the distribution companies shall be the bidding criteria, the sale of 51% equity shares shall be offered at the face values. The consideration for equity shares will not be a bidding criteria.*

9. *The Government is of the view that the clearest measures of overall efficiency of the distribution business is the differences between units input into the system and the units for which payment is collected. The Government is of the considered views that losses of any kind, technical, non technical or non-realisation of payments, ultimately, amount to loss in revenues. Efficiency gains must embrace all these aspects. Hence, the losses should be measured as the difference between the units input and the units realized (units billed and collected) wherein the units realized will be equal to the product of units billed and the collection efficiency, where, collection efficiency is defined as the ratio of actual amount collected and amount billed. The difference between the units input and the units realized are hereinafter referred to as "AT&C Loss" (Aggregate Technical and Commercial Loss). The Government, as a matter of policy, decides that the AT&C Loss shall be the basis for determination of tariffs and also for computation of incentives for better performance."*

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"13. From the date of issuance of these directions till the end of 2006-07 and subject to provision of paras 11 and 12 above and all expenses that shall be permitted by the Commission, tariffs shall be determined such that the distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserves (excluding consumer contribution and revaluation reserves but including share premium and retained profits outstanding at the end of any particular year) provided that such

share capital and free reserves have been invested into fixed or any other assets, which have been put into beneficial use for the purpose of electricity distribution and retail supply and provided further that such investment of such share capital and free reserves has the approval of the Commission.”

*** *** ***

“17. Issuance of a tariff order of the distribution licensees will facilitate investors to have a full idea of the various elements (revenues, expenses) in the fixation of the tariffs. It is necessary for the Commission to issue orders) determining the bulk supply tariff applicable to each of the three DISCOMS for purchase of electricity from TRANSCO. Such a tariff order for the DISCOMs may be issued before bidding. However, in order to ensure that the time gap between corporatisation and privatization is minimal, the Transfer Scheme shall be made effective as close to the dates of privatization as possible. Thus, the Commission may issue the tariff order on the basis of the notified (but not effective) Transfer Scheme and in accordance with the provisions of the policy directions.”

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Notification dated 31st May :

“No. F.11(118)/2001-Power/ - in exercise of the powers conferred by section 12 and other applicable provisions of the Delhi Electricity Reform Act, 2000 (Delhi Act No. 2 of 2001) and pursuant to the decision made by the Government of National Capital Territory of Delhi on the restructuring of Delhi Vidyut Board and on the bids received for the privatization of the distribution business, the Government of National Capital Territory of Delhi hereby notifies the following policy directions in amendment to the Notification No. F.11(118)/2001-Power/2889 dated 22nd November, 2001.”

*** *** ***

“2. The following shall be the method of computation and treatment of over achievement and underachievement for the years 2002-03 to 2006-07:-

- i. In the event the actual AT&C loss of a distribution licensee in any year is better (lower) than the level based on the minimum AT&C loss reduction levels stipulated by the Government for that year the distribution licensee shall be allowed to retain 50%*

of the additional revenue resulting from such better performance. The balance 50% of additional revenue from such better performance shall be counted for the purpose of tariff fixation.

- ii. In the event the actual AT&C loss of a distribution licensee in any year is worse (higher) than the level based on them AT&C loss reduction levels indicated in the Accepted Bid for that year, the entire shortfall in revenue on account of the same shall be borne by the distribution licensee.*
- iii. In the event the actual AT&C loss of a distribution licensee in any year is worse (higher) than the level based on the minimum AT&C loss reduction levels stipulated by the Government for that year but better (lower) than the level based on the AT&C loss reduction levels indicated in the Accepted Bid for that year, the entire additional revenue from such better performance shall be counted for the purpose of tariff fixation.*

Provided further that's for paras 2(i) and 2(ii) above, for every year, while determining such additional revenue or shortfall in revenue the cumulative net effect of revenue till the end of the relevant year shall be taken, in regard to over achievement / under-achievement and appropriate adjustments shall be made for the met effect."

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8. The Delhi Electricity Reforms Act, 2000 is an Act to provide for the constitution of an Electricity Regulatory Commission, restructuring of the electricity industry, increasing avenues for participation of private sector in the electricity industry and generally for taking measures conducive for the development and management of the Electricity industry in an efficient, commercial, economic and competitive manner in the National Capital Territory of Delhi. Under Section 3, The Delhi Electricity Regulatory Commission has been constituted to exercise the powers conferred on it and to perform the functions assigned to it under the said Act.

9. Section 11 enumerates the functions of the Commission. The Commission has to determine the tariff for electricity, wholesale, bulk, grid or retail; to determine the tariff for use of the transmission facilities, etc.; to regulate the assets, properties and interest in properties concerned or related to the electricity industry in the NCT. Section 12 of the Act mandates that the Commission shall be guided by such directions in matters of policy involving public interest, as the Government of NCT of Delhi may issue from time to time. Whether such Policy involves public interest or not, the decision of the Government shall be final. Part V of the Act provides for reorganization of the electricity industry in the NCT of Delhi. Part VI provides for licensing of transmission and supply. Part VII provides for tariffs. Section 28 confers powers on the Commission to prescribe the terms and conditions for determination of the licensee's revenues and tariffs by regulations. The Commission shall be guided by

(i) the financial principles and their application provided in the Sixth Schedule to The Electricity (Supply) Act, 1948 read with Sections 57 & 57A of the said Act.

(ii) the factors which would encourage efficiency, economic use of the resources, good performance, optimum investments

and

(iii) the interest of the consumers.

The Commission when decide to depart from the factors specified in the Sixth Schedule while determining the licensee's revenue and

tariffs, it shall record the reasons therefore in writing. Sub-section (7) of Section 28 provides that the tariff shall be just and reasonable and shall be such as to promote economic efficiency in the supply and consumption of electricity. Besides satisfying all the provisions of the DERA Act and the conditions of the relevant licence, the Commission has been conferred with the power to pass orders and enforce its decision.

10. In terms of Section 42, a person aggrieved by any decision or order of the Commission passed under DERA may file an appeal to the High Court of Delhi within 90 days from the date of communication of the decision or order. The jurisdiction of the Civil Court has been barred under Section 56 of the Act. Section 57 provides for removal of difficulties by the Government of NCT of Delhi. Section 60 confers power to make rules, while Section 61 confers power to make Regulations. Section 63 (3) provides that the provisions of DERA Act, notwithstanding that the same are inconsistent with or contrary to the provision of The Indian electricity Act, 1910 or The Electricity (Supply) Act 1948, shall prevail. In terms of Proviso to Sub Section (2) of Section 63, the Government is conferred with the power to issue policy directives and undertake overall planning and coordination as specified in Section 12 of the Act.

11. The Delhi Electricity Regulatory Commission was moved by BSES Rajdhani (Appellant in Appeal No.155 of 2005) on 23rd December, 2003 for approval of its Aggregate Revenue Requirement for the Financial Year 2004-05 and for determination of tariff. The other two DISCOMs also moved for approval of ARR and for determination of tariff. The Commission sent its guidelines for revenue and tariff filing. The Commission also framed and notified Regulations. The

framework for tariff determination in the words of the Commission reads thus:-

“The Policy Directions indicated that the AT&C loss for the purpose of tariff computation by the Commission for each DISCOM in a year shall be the opening AT&C loss and the reduction proposed for the year in the bid submitted by the investor selected by the Government for purchase of 51% equity in the Distribution Company. Further, tariffs are to be determined such that the DISCOMs recover all expenses permitted by the Commission and earn a 16% return on equity.

The Policy Directions envisaged identical retail tariffs for the DISCOMs till the end of 2006-07. An amount of approximately Rs.3450 Crore was committed by the Government in the Policy Directions, as a loan to be disbursed to the Transmission Company, to bridge the gap between the revenue requirement of the TRANSCO and the bulk supply price that it may receive from the distribution licensees based on the above framework.”

12. After giving public notice and response from stakeholders, and also after following the procedure prescribed, the Commission took note that one of the appellants for FY 2004-05 estimated its ARR at Rs.2280/- crores, and the said appellant suggested a tariff rationalization measure which was also taken into consideration by the Commission. The Commission took note of the direction issued by the Government, which lays down that 16% shall be the return on the Equity and the free reserves, to the DISCOM. The Commission with reference to creating Regulatory Asset took note of the proposal given by two of the appellants and in case of BSES Rajdhani recorded the same as hereunder:-

“In the subsequent submissions, the Petitioner has stated that the higher costs due to the accelerated investment as against phased investment would be recovered through a higher reduction in AT&C losses over and above the committed levels. The Petitioner has indicated that it has proposed an investment of Rs.312 Crore towards

reduction of AT&C loss, out of the total proposed investment of Rs.1284 Crore. BRPL has estimated the benefit on this account as Rs.19 Crore in FY 2004-05, Rs.57 Crore in FY 2005-06, Rs.82 Crore in FY 2006-07 and Rs.88 Crore in subsequent years. The Petitioner has further proposed that the differential higher expenditure on account of accelerated investment as compared to the normative expenditure be carried forward as a Regulatory Asset in case the realization of financial benefits in the initial years is not sufficient to pay-off the entire estimated higher expenditure, as there could be a time lag between incurring of expenditure and resultant improvement. The Petitioner has proposed that the Regulatory Asset on the books can then be amortised over a period through increase in tariffs based on the normative investment levels. The Petitioner has suggested that the normative expenditure in subsequent years should be based on notional investment that would have been allowed had the Licensees not made the front-ended investment.”

13. The Commission indicated the measures to bridge the revenue gap, while stating that the burden on the consumers shall be minimised to the extent possible and the licensee should operate at efficiency level to bridge the revenue gap. For the Financial Year 2004-05 for BSES Rajdhani, the estimated revenue was assessed at Rs.1072 crores. The Commission by its BST order with regard to Government support, to bridge revenue gap recorded its conclusion thus:-

“The Commission has taken note of the position of the Govt. of NCT of Delhi regarding the issue envisaging turnaround of the Distribution Companies and the viability of the Transmission Company well within five years, enabling TRANSCO to meet the loan liability and at the same time resulting no tariff shocks to the consumers. The Commission is not aware of the assumptions made by the Government to arrive at Rs.2600 Crore in terms of loss reduction trajectory envisaged and the level of tariff increases. However, the accumulated revenue gap for TRANSCO could be higher or lower than the amount estimated by the Government depending upon the level and structure of future retail tariffs and the committed loss reductions. At this point, the Commission opines that any shortfall in the revenue gap, if any, of TRANSCO during the term of five years over and above Rs.2600 Crore would have to be bridged in the form of Government support, sector efficiency improvements, any other

suitable mechanism or a combination of all of the above, to be decided by the Commission at the appropriate stage.

Subsequently, the Government enhanced the support during the five year period from Rs.2600 Crore to Rs.3450 Crore based on assumptions about key parameters which were not provided to the Commission at the time of issuance of amendment to the Policy Directions.

Subsequently, the GNCTD provided the copy of Financial Restructuring Plan prepared at the time of privatization upon a specific request from the Commission during the processing of the ARR and Tariff Petitions for FY 2002-03 and FY 2003-04.

It may be noted that the Financial Restructuring Plan prepared by GNCTD at the time of privatization, has assumed an average tariff increases for the period FY 2002-03 to FY 2006-07 as given in Table 4.6.”

14. The Commission increased the tariff by 5.01% for 2003-04 FY. The Commission pegged the average tariff increase for FY 2004-05 at 10% resulting in an increase in revenue calculated, assessed at Rs.376 crores. According to the Commission, the estimated increase in revenue on account of the tariff revision approved by the Commission is Rs.376 crores out of the total unbridged revenue gap of Rs.696 crores. The Commission explored options such as efficiency, improvement and creation of Regulatory Asset. After summarizing the options, the Commission directed creation of Regulatory Asset, as a mechanism to carry forward a portion of the revenue requirement. The Commission in this respect recorded thus:-

“4.7.3 Option III: Creation of a Regulatory Asset

Need for Regulatory Asset

As discussed in previous Section, the total consolidated revenue gap of all the utilities (TRANSCO and DISCOMs) during FY 2004-05 as estimated by the Commission works out to Rs.1762 Crore which is 48% of revenue at existing tariffs. The committed

support from the GNCTD for FY 2004-05 is Rs.690 Crore. After considering this Government support, the net revenue gap of the utilities works out to Rs.1072 Crore. As mentioned earlier, if the entire net revenue gap is to be bridged by increase in tariffs, the average tariff increase required would be to the extent of 30%.

Concept of Regulatory Asset:

Creation of a Regulatory Asset is a mechanism to carry forward a portion of the revenue requirement for a particular year that has not been included while designing the tariffs for that year. The amount equivalent to the Regulatory Assets is thus effectively removed from the revenue requirement for the year in question. Such a situation generally arises when the projected revenues are significantly lower than the revenue requirement and it is not feasible to recover the entire amount either through increase in tariffs or through other means such as Government subsidy during that year. In such situations, the Regulator may choose to create a Regulatory Asset equivalent to the uncovered expenses and allow the licensee to amortise the same over a period of time. The Regulatory Asset mechanism is resorted to mainly to avoid tariff shocks to the consumers in a given year, while at the same time allowing the utility to recover the costs in a reasonable manner so as to protect its interests as well as those of the consumers.”

15. The Commission, as seen from Table 4.8 ordered apportionment of the Regulatory Asset among the three DISCOMs, at Rs.267 crores in respect of BRPL, Rs.138 crores in respect of BYPL and Rs.192 crores in respect of NDPL aggregating to Rs.596 crores. The Commission also directed the TRANSCO to create a Regulatory Asset to the tune of Rs.100 crores which has not been challenged. The Commission ordered rationalization of tariff and challenging the tariff determination and directing the DISCOM to create Regulatory Asset, the three DISCOMs have preferred three separate appeals urging identical contentions and the only difference being in the quantum of revenue gap and Regulatory Asset directed to be created.

16. In all the three appeals, one after the other arguments were advanced by the learned counsel appearing for the appellant as well as the learned counsel appearing for the Regulatory Commission and Govt. of NCT of Delhi. The learned counsel also submitted written arguments. On a consideration of the arguments advanced as well as written submissions, the following points, which are common are framed for consideration in all the three appeals:-

- (A) Whether the policy directions issued by the NCT of Delhi has been violated by the Commission in issuing directions to create Regulatory Asset, while approving Annual Revenue Requirement and determining the tariff?
- (B) Whether the Regulatory Commission has acted illegally in directing the DISCOMs to create Regulatory Asset while approving Annual Revenue Requirement and determining tariff?
- (C) Whether the appellant in each of the appeal came forward and submitted proposal to create “Regulatory Asset”? Whether the appellant is estopped from challenging the directions to create Regulatory Asset issued by the Regulatory Commission?
- (D) Whether the direction to create Regulatory Asset results in denial of 16% return on equity and recovery of operational expenses assured in the scheme to the DISCOM during the transitory period?

- (E) Whether the Bulk Supply Tariff (BST) has been fixed with reference to the paying capacity of the DISCOMS?
- (F) Whether the three appeals are maintainable before this Appellate Tribunal under Section 111 of The Electricity Act 2003?
- (G) To what relief, if any, the appellant in each appeal is entitled?

17. Let us take up point F, viz., maintainability of appeal as the first point for consideration, since jurisdictional issue has to be considered at the threshold.
18. The Regulatory Commission has passed the Impugned Order by virtue of the powers conferred by The Delhi Electricity Reforms Act 2000 as well as The Electricity Act, 2003, as seen from the very tariff order passed by the Regulatory Commission. Placing reliance on Section 111 of The Electricity Act, 2003, the learned counsel for the appellant contended that an appeal is maintainable. The appellants also relied upon a decision of the Bombay High Court in MERC Appeal No.2/2003 TATA Power vs. BSES, wherein it has been held thus:-

“The legal position admits of no ambiguity that right of appeal is a vested right and such a right to enter the superior forum accrues to the litigant and exists as on and from the date the lis commences. That vested right of appeal can be taken away only by a subsequent enactment, if it so provides, expressly or by necessary intendment, and not otherwise. It is equally settled law that there is no vested right to appeal to a particular forum since the provision as to the forum of a appeal is a procedural matter. If the repealing Act provides new forum where the remedy or the legal proceedings in respect of such vested right

can be pursued after the repeal, the forum must be as provided in the repealing Act.”

We are in respectful agreement.

19. Mr. Suresh Tripathy, learned counsel appearing for the Commission contended that the Order impugned is composite in character and there could be no difficulty in holding that an appeal is maintainable under Section 111 of The Electricity Act, 2003.

20. On the date when the tariff application was filed as well as the tariff order was passed, it is clear that the Regulatory Commission has exercised the powers conferred under The Electricity Act, 2003 though it had relied upon certain provisions of the DERA Act 2000. There is no doubt that the DERC is the State Commission under Section 82 of The Electricity Act 2003, by virtue of Proviso to the said Section 82. On a consideration of Section 111 of The Electricity Act 2003 as well as scope of Section 42 of DERA Act 2000, there is no difficulty in holding that the appeals are maintainable before this Appellate Forum. Sub-section (1) of Section 111 provides that any person aggrieved by an Order made by the Appropriate Commission under the Act may prefer an appeal before the Appellate Tribunal for Electricity. As already pointed out, the tariff order has been passed by the Regulatory Commission under The Electricity Act, 2003 read with DERA Act, as seen from the Preamble portion of the Order. Therefore, in the circumstances there is no doubt that the appeal is maintainable under Section 111 of the Electricity Act, 2003. Hence point F is answered holding that all the three appeals are maintainable.

21. The remaining points could be considered together as they overlap each other. That apart, in the light of the subsequent admitted developments, we propose to pass identical orders in all three appeals.
22. The Regulatory Commission being a statutory authority exercising statutory powers is required to act in the manner the statutory provisions of the Act and statutory regulations prescribe. When the Regulatory Commission, a statutory authority is required to determine tariff fixation in the particular manner and in terms of statutory regulations as well as the provisions of the Act, it shall be done only in that manner or not at all. This is the settled legal position as held by the Hon'ble Supreme Court in *Bhavnagar University vs. Palitana Sugar Mills (P) Ltd. (2003) Volume 2 SCC 111*.
23. The exercise of tariff fixation, as seen from the Order, it is nothing but prejudging facts specially relating to tariff fixation. Pre-judging or approaching the issue with a notion to avoid tariff increase or 'tariff shock' they call it, itself constitute sufficient cause for interference on the ground of bias, but the same will affect both the consumers as well as service provider at this point of time. Time has already run out which cannot be put back. The statutory functions of the Regulatory Commission has an unflinching character to decide the tariff determination with a balanced and unbiased mind.
24. The Supreme Court in *State of West Bengal Vs. Shivananda Pathak, (1998) Volume 5 SCC 513* while examining the doctrine of legitimate expectation ruled thus:-

“The doctrine of “legitimate expectation” has developed as a principle of reasonableness and fairness and is used against

statutory bodies and government authorities on whose representations or promises, parties or citizens act and some detrimental consequences ensue because of refusal of authorities who fulfill their promises or honour their commitments. It is settle law that relief to parties aggrieved by action or promises of public authorities can well be granted on the doctrine of “legitimate expectation”.”

25. In the case on hand, the NCTD made representations in terms of two Statutory Notifications referred above and issued in exercise of power conferred by Section 11 and 12 of the DERA Act. The NCTD is bound to honour the same and Regulator should have given effect to the same as based upon the said representations the three entrepreneurs have come forward, accepted the terms of offer, acted upon and became the DISCOMs of the three areas. The counsel for the appellant is well founded in advancing arguments based upon the principles of “legitimate expectation”. Not only a foundation has been made but also the appellants substantiated the point that they are entitled to invoke and enforce the said principle.
26. In this respect, the learned counsel for the appellant rightly contended that it is in terms of the Policy Notification dated 22.11.2001 as well as the Notification dated 31/05/2002 issued in terms of the statutory provisions, setting out the policy to privatize the distribution activities of Delhi Vidyut Board by a competitive bidding process. Having made such representations, it is rather too late in the day for the appellants being denied and deprived of benefits of such Policy Directions issued by the NCTD and more so when it is in terms of Section 11 and 12 of the DERA Act. The said Policy directions are binding on the Regulatory Commission, since in terms of the said DERA Act, the Regulatory Commission is bound to act. Rights have crystallised in favour of the appellants, which cannot be taken away by a side wind or by the Regulatory Commission adopting

- a procedure of its own in its purported exercise of tariff fixation. This violation infringes the doctrine of “legitimate expectation” of the DISCOMs to get lawful and reasonable recovery of expenditure as well as Return on Equity. The learned counsel rightly placed reliance upon the pronouncement of the Supreme Court in *National Building Construction Corporation vs. S. Ragnathan and others reported in (1998) 7 SCC 66 at page 75 and the pronouncement in Dr. C. Goel vs. State of Rajasthan 2003 Volume 3 SCC 485 Para 12*. It is not necessary to multiply with the case law relied upon by the counsel for the appellant in this respect.
27. It is rightly contended that by the Impugned Orders, the DISCOMs have been deprived of recovery of 53% of approved expenditure including the assured annual return of 16% on ROE resulting in serious prejudice and at the same time, it tilts the balance and results in unjust enrichment in favour of the Delhi TRANSCO. Concedingly all the appellants and, in particular, NDPL has admittedly overachieved its AT&C loss reduction targets committed at the time of bid. Despite such achievement, the said appellant has been punished for its better performance and the refusal to allow recovery of 53%, Rs.192 Crores approximately of approved expenditure including 16% ROE resulted in debilitating the operations of NDPL or at least unexpected financial crunch compelling the DISCOMs to go in search of funds either from bankers or from financiers. This is a onerous burden, apart from facing practical difficulties as the appellant is a joint venture company.
28. The contentions of Mr. Tripathy one of the learned counsel, appearing for the Regulatory Commission, though attractive cannot be sustained, as it amounts to defeating accrued rights and denial of fair

- treatment which the Policy Directions provide for the DISCOMs. Concedingly the impugned tariff fixation is in exercise of powers vested in the terms of the provisions of The Delhi Electricity Reforms Act, 2000 as well as The Electricity Act, 2003. Though it is claimed that the Impugned Order of tariff fixation is to advance the public interest, the binding Policy Directions which were also issued in public interest cannot be watered down or rendered nugatory by such an approach.
29. It is rightly contended by the learned counsel for the appellants that merely because there is a requirement or compelling necessity for certain percentage of increase in consumer tariff, it cannot be assumed that the same is against public interest or that public interest means there could be no tariff revision at all. Such an approach, as rightly contented, had lead to resorting to a process which is not indicated by the Policy Direction or by the terms of the DERC Tariff Fixation Regulations or by any other the statutory enactment. By directing creation of Regulatory Asset, the binding policy directions have been defeated. Such an illegality cannot be sustained nor it is proper not it is authorised by law.
30. Mr. Suresh Tripathy, learned counsel, appearing for the Commission contended that the DISCOMs have been allowed ROE as well as expenses approved. This is not factually correct, as the DISCOMs have been denied of their funds by directing utilization of such cash flow or funds to be utilised to create a Regulatory Asset which has a far reaching effect on the finances and management of the 'joint venture companies'. This contention urged by Mr. Tripathy will not stand the test of fairness. That apart, by the Impugned Orders a vested enforceable right of the DISCOMs have been taken away or

- postponed and DISCOMs are to recover the amounts which they have to keep it or retain as Regulatory Asset. Further, it is not as if the same is repayable or to be realized or salvaged or set off during the transitory period, viz., the period ending with 31st March, 2007, unless an extraordinary tariff upward revision is to be allowed. In fact no amortization schedule and other details been provided for. Same challenge squarely applies even with respect to carrying cost. The components of carrying cost, deferred return and the principles governing computation of carrying cost to be set apart as the Regulatory Asset again affects the DISCOMs' finances leading to unexpected financial breakdown. The Scheme to amortise is neither specific nor elucidated. In fact it is an indirect passing of the actual debt service cost and ARR to next one or more tariff periods without realizing the effect of such postponement. The consequences will be heavy on the next ARR and onerous on consumer tariff.
31. It is rightly pointed out that the DERC cannot support its proceedings by reasons which are not found ex-facie on its order as sought to be advanced on its behalf by its counsel. We find force in this contention advanced on behalf of the appellants. The learned counsel, Mr. Tripathy, appearing for the DERC cannot in law seek to improve upon the Impugned Order either through the counter affidavit filed or by adding reasons or offering explanation to the stand of the Commission by his ingenuity.
32. As recorded by the Regulatory Commission, the appellant NDPL (Appeal No.157 of 2005) which acquired 51% equity of NDPL, achieved AT&C loss reduction target of 17% from the loss level of 48.1% during July 2002 to 31% during Mach, 2007. Actually AT&C loss reduced more than the level prescribed and expected of the DISCOMs. The

- Policy Directions projected a tariff hike of 10% each year for the year 2002-03 and 2003-04 while the Regulatory Commission during the Financial Year 2003 did not increase the tariff which resulted in revenue shortfall of Rs. 81 crores, however during the Financial Year 2004 a tariff increase was allowed only by 5.1% and this led to a heavy shortfall of revenue to the tune of Rs.169 crores, as seen from page 185 (Tariff Order).
33. Present tariff order relates to Financial Year ending with 31st March, 2005. The Impugned Order proceeds on the basis that NDPL would meet the AT&C loss reduction target, approved the expenses including ROE at Rs.358 crores, while disallowing Rs.188 crores besides allowing Rs.29 crores for the earlier Financial Year 2003-04. The paying capacity of the DISCOMs based on revenues and expenditure might have increased by 12% increase of Bulk Supply Tariff. While in fact the Regulatory Commission increased the Bulk Supply Tariff by 35% from the Financial Year 2003-04 (Rs.1.57 per unit, Rs.2.12 per unit) to demand Rs.1141 crores as payment to be paid by NDPL to the TRANSCO, while paying capacity of NDPL was in the range of 949 crores only. The gap of 192 crores is the resultant position. This 192 crores is sought to be covered up by creating a Regulatory Asset, which according to the appellant would deprive the appellant its legitimate and approved expenditure even according to the findings of the Regulatory Commission, apart from cash crunch and financial constraints to a larger level, leading to inefficiency or postponement of maintenance or developmental Plans.
34. In respect of the three DISCOMs or taking Delhi as a whole, the estimated revenue gap was in the order of Rs.1072 crores (Table 4.4 on pages 191 and 193), comprising of TRANSCO gap of Rs.954 crores

and gap of Rs.118 crores for NDPL; Rs.267 crores for BRPL and Rs.138 crores to BYPL. This could be vide Table 4.4 page 147 of BRPL. Had there been a 10% tariff or thereabout hike, position would have been different and that also would be in consonance with the tariff policy and BST laid down by the NCTD. The net revenue gap is sought to be carved out into a deferred expenditure as a Regulatory Asset and allocated as under (vide Table 4.8 page 198 and Page 155: BRPL)

a.	TRANSCO	Rs.100 crores
b.	DISCOMS	
	i) NDPL	Rs.192 crores
	ii) BRPL	Rs.267 crores
	iii) BYPL	Rs.138 crores
	Aggregating to 596 crores.	

35. The impact of the tariff order results in denial of ROE and disallowance of expenditure of Rs.192 crores to NDPL, Rs.267 crores to BRPL and Rs.138 crores to BYPL in the year apart from financial burden. This results in deprivation of return assured by Policy to shareholders as well. Further the appellant, NDPL, in appeal No.157 of 2005 has to undertake the responsibilities to fund the remaining sum of Rs.192 crores by borrowings to meet the cost which it has already incurred. This is also the same position in the other two appeals. It is contended that as a result of the above, the Delhi TRANSCO even in respect of NDPL has unjustly enriched to the tune of Rs.192 crores in the Financial Year concerned. This overlooks the Policy Directions as rightly pointed out by the appellants. Had there been a retail tariff hike of about 10% as assured or thereabout, there would have been an additional revenue of 376 crores for all the three DISCOMs and this would have enabled the DISCOMs to meet the

aggregate revenue gap and to pay the hike in Bulk Supply Tariff to the TRANSCO. The Bulk Supply Tariff hike came to the extent of Rs.852 crores in respect of the three DISCOMs which again has far reaching effect on the three DISCOMs.

36. Had there been a gradual and an annual increase in tariff in terms of the Policy Direction laid down while undertaking privatization, the position would have been better and the same would be in the interest of everybody concerned including consumer Public, apart from being a proper approach.
37. The Regulatory Commission in Para 4.7.3 of tariff order which is impugned (Page 189 of NDPL Appeal and Page 152 of BRPL Appeal) has set out thus:-

“Creation of a Regulatory Asset is a mechanism to carry forward a portion of the revenue requirement for a particular year that has not been included while designing tariffs for that year. The amount equivalent to the Regulatory Assets is thus effectively removed from the revenue requirement for the year in question. Such a situation generally arises when the projected revenues are significantly lower than the revenue requirement and it is not feasible to recover the entire amount either through increase in tariffs or through other means such as Government subsidy during that year. In such situations, the Regulator may choose to create a Regulatory asset equivalent to the uncovered expenses and allow the licensee to amortise the same over a period of time. The Regulatory Asset mechanism is resorted to mainly avoid tariff shocks to the consumers in a given year, while at the same time allowing the utility to recover the costs in a reasonable manner so as to protect its interests as well as those of the consumers.”

38. The main question that arises for consideration is whether there could be a direction at all by the regulator to create Regulatory Asset by the DISCOMs. It is contended by the appellants that Regulatory

Commission is not conferred with such power by Regulations or in law to issue a direction to create Regulatory Asset. Such a direction, it is pointed outruns counter to the provisions of The Electricity Act, 2003 at any rate, it is against the binding Policy Directions dated 22.11.2001 and 31.05.2002 as well as the BST Normative Tariff Order.

39. Here and now, it is to be pointed out that Mr. Suresh Tripathy, learned counsel appearing for the DERC contended that all the DISCOMs have readily agreed for creating Regulatory Asset and, therefore, they are estopped from challenging the directions issued by the regulator. In this respect, on a perusal of the order of the regulator, such a contention of Mr. Tripathy could be sustained only in respect of the two out of the three DISCOMs, viz., BRPL and BYPL. In respect of NDPL, appellant in appeal No.157 of 2005, such contention cannot be advanced as factually NDPL had never sought for creation of Regulatory Asset nor was a consenting party nor has made any representation in this respect as suggested by Mr. Tripathy before the Regulatory Commission. BYPL as well as BRPL in their representations, as recorded by the Commission did not seriously object to the proposal of the Commission to create Regulatory Asset as seen from the proceedings. The relevant portion of the regulator's tariff proceedings, reads thus:-

BYPL:

“3.2.3. However, in case the realization of the financial benefits in the initial years is not sufficient to pay-off the entire estimated higher expenditure, as there could always be a time lag between incurring of expenditure and resultant improvement, it is proposed that the differential higher expenditure as compared with the expenditure due to normative phased-out capex be carried forward as a regulatory asset on the books to be

amortized over a period of time through increase in tariffs based on the normative phased-out capex.”

BRPL:

“3.2.3. However, in case the realization of the financial benefits in the initial years is not sufficient to pay-off the entire estimated higher expenditure, as there could always be a time lag between incurring of expenditure and resultant improvement, it is proposed that the differential higher expenditure as compared with the expenditure due to normative phased-out capex be carried forward as a regulatory asset on the books to be amortized over a period of time through increase in tariffs based on the normative phased-out capex.”

40. Therefore, Mr. Suresh Tripathy is justified in advancing such a contention with respect to BRPL and BYPL and is well founded, while in respect of NDPL, it is factually incorrect and a misconception. NDPL has never sought for creation of Regulatory Asset nor is there anything to show that NDPL accepted the proposal nor had waived its objections nor it came forward with a suggestion to create the Regulatory Asset.
41. At any rate, we have to further examine as to whether the Regulatory Commission has authority to issue a direction to the DISCOM to create Regulatory Asset? Whether such directions run counter to the Policy Directions? Under what circumstances, there could be such a direction, if at all? As already pointed out, the direction to create Regulatory Asset is against the teeth of the policy laid down by the NCTD. There could be no direction to create Regulatory Asset and at any rate not during the transitory period. No regulation has been framed under The Electricity Act, 2003 in this respect by the Regulatory Commission providing for such a course. Neither Sections 86, 61 & 62, 108 of The Electricity Act nor Section 11, 12 as well as 28 of the Delhi Electricity Reforms Act by which the Policy Directions

- and BST Order been mandated, has conferred such a power on the Regulator. We are of the considered view that there could be no Direction by the DERC to create a Regulatory Asset in the absence of Statutory Regulation or at least during the transitory period ending with FY 2006-07.
42. As regards to the creation of the regulatory asset, the vehement contentions being that there is neither a regulation framed by Delhi Electricity Regulatory Commission nor there is anything in Sections 61, 62, 86, 108 and 185 of The Electricity Act 2003 and Sections 11, 12 & 28 of The Delhi Electricity Regulatory Act of 2000 which enables the Commission to resort to such a novel Procedure. There is force in the contention advanced by the learned counsel for the appellant. Had the Delhi Electricity Regulatory Commission framed Regulations in this respect, the position would have been different. No such Regulation was brought to our notice. As the scheme of the DERA Act and scheme of privatization policy directions stand as well as 2003 Act stand, the direction to create regulatory asset is prima facie without authority and invalid.
43. The Regulatory Commission, as already pointed out has to act within the four corners of the powers or authority conferred under The Electricity Act 2003 as well as Delhi Electricity Regulatory Act 2000 or Procedure Prescribed thereunder. It is also settled law that assuming that equity is in favour of consumers, which is not factually so in the cases on hand, the same cannot be pressed into service nor could it operate to annul the statutory provisions or defeat the accrued rights of the DISCOMs.

44. The learned counsel for the respondents contended that in extraordinary circumstances the Regulatory Commission may resort to issue directions with respect to creating a regulatory asset before the present enactments in force. Whatever have been the positions before the 2003 Act or for that matter the Delhi Electricity Reforms Act 2000, in the absence of any regulations or statutory provisions the direction to create regulatory asset cannot be sustained. Had a regulation been framed in this respect, the validity of such regulations has to be examined by appropriate forum.
45. A reference is made to orders of Tamil Nadu Electricity Regulatory Commission as well as the Orissa Electricity Regulatory Commission, Karnataka Electricity Regulatory Commission, Himachal Pradesh Electricity Regulatory Commission and Jharkhand State Electricity Regulatory Commission. In this respect the learned counsel for the appellant rightly pointed out that Statutory Regulations framed by those Commissions provided such a course with respect to terms and conditions for fixation of tariff. Such is not the case with respect to Delhi Electricity Regulatory Commission.
46. The learned counsel for the appellant also drew our attention to the judgment of Bombay High Court in Maharashtra State Electricity Board Vs Maharashtra State Electricity Regulatory Commission reported in AIR 2004 Bombay 294, wherein it has been held that the regulatory asset could be created only in an extra ordinary event or un-expected occurrence and even such creation, when permitted by High Court, will not constitute a precedent in the future. The said case before the Bombay High Court arose under the Electricity Regulatory Commissions Act 1998. While considering the scope of Section 29 of the said 1998 Act, on the facts of the said case the High

Court while disposing of an appeal preferred by the Maharashtra State Electricity Board, held that it would not be unreasonable to require the consumers to pay for the energy at a higher rate because if a higher rate is announced the consumers could have had an opportunity of not consuming the power or at least reduce the consumption on being aware that the rate would be higher. The High Court also pointed out that denial of tariff revision leaves a revenue gap in the revenues of DISCOMs and tariff should be so fixed as to leave no tariff gap. While referring to the creation of a regulatory asset the High Court referred to the Commission's order under appeal before it which reads thus :

“The Commission is of the view that the regulatory asset can only be considered in exceptional cases wherein the recovery of entire revenue requirement during a single year might lead to a tariff shock and so a part of the required revenue is deferred for future recovery. A mere delay in tariff award due to late submission of the tariff revision proposal cannot be considered sufficient ground for creation of a Regulatory Asset as the MSEB could have approached the Commission for Tariff Revision that earlier. Accordingly, the Commission has disallowed the creation of Regulatory Asset.”

47. The High Court taking note of the extra ordinary situation being a very special circumstance arising out of the differences purely between The Board and the Dabhol Power Company ordered for creation of Regulatory Asset as a one time measure while carefully adding that the same shall not be taken as a precedent for future years. Such is not the case here. Therefore, resorting to creation of Regulatory Asset is not warranted nor it is a proper course warranted on the facts of the present case. Such a direction to create a Regulatory Asset has resulted in an anomalous situation, by which

the DISCOMs are denied and postponement of their right to their own funds and also 16% return on equity, as per notifications. It has created a heavy burden on the DISCOMs as 86% of the funds have to be set apart as Regulatory Asset. This is neither provided for nor contemplated by the Policy Directions of NCT of Delhi while introducing Privatisation.

48. As already pointed out, the policy direction of the Delhi Government has been brushed aside just to avoid even a nominal tariff increase, which turns out to be the avowed object of the Commission, such a procedure has been resorted which we are unable to appreciate apart being not proper. The DISCOMs have come forward to undertake the distribution of electricity on a joint venture investing huge funds and they will be justified in getting a return for their investments as corporate entrepreneurs. The DISCOMs also has an obligation towards their investors. A balance should have been struck by the Regulatory Commission in such a situation. The policy direction provides for payment of 16% ROE. If it is going to be delayed or defeated by such course, such directions run counter to the policy directions besides it will also be violative of the scheme of privatisation. The carrying cost is an amount which the DISCOMs are entitled to and there should be no deprivation of the same even for a shorter period by the direction to create Regulatory Asset.
49. We have declared the legal position, yet we need not consider this aspect of the matter any further, as it has been reported that as a result of truing up exercise and realizations, the entire amount set apart as Regulatory Asset has been amortized during subsequent years. It is made clear that in the absence of any Statutory Regulations, the Delhi Electricity Regulatory Commission has neither

the authority nor jurisdiction to issue such directions to the DISCOMs while determining the tariff. If there is a revenue gap and there being no other alternative, it is but essential to increase the tariff instead of giving a life time tariff shock in the years to follow. Viewed from any angle, there should be a balancing by the Commission, between the consumer public and the DISCOM rendering the service of distribution whose entire distribution venture is governed by Regulatory measures prescribed under the Act. To achieve the object of privatization balancing is a must, lest no private entrepreneur will come forward to invest. The object of 2003 Act also shall not be ignored to be successful. Viewed from another angle the financial crunch is caused and cash flow is denied forcing the DISCOM to raise a loan with interest liability for creating such a Regulatory Asset apart from the fact of being burdened. The same will affect the following years to come. In that case even the DISCOMs could not be salvaged except by over burdening the consumers by a steep increase in consumer tariff.

50. It is also to be pointed out that during the years commencing from privatization and till 2006-07 the policy directions are to be followed and 16% ROE having been stipulated and assured shall not be denied, so also the working cost of the DISCOMs. Having sustained the claim of the DISCOMs that they have respectively incurred the expenses which they are entitled to be reimbursed and approving of the ARR, there is no justification in delaying or denying realization by DISCOM in the course of the year to which DISCOM is entitled as a matter of accounting policy and Policy of NCT of Delhi.
51. The DISCOMs, a joint sector, has invested funds in proportion to 51:49 and there is no justification to expect the DISCOMs to carry on

or run the business or service of distribution without a reasonable return or profit. Such an element of return is possible, provided if there is a reasonable increase in the tariff even though it may lead to hue and cry among a section of the consumers, who fail or refuse to acknowledge realities. The increase in tariff is concomitant as cost of various elements which go into the supply of electricity to the consumers has increased to a considerable extent. It is an admitted fact that costs are ever increasing even in respect to building of infrastructure, generation, transmission, building, collection, maintenance etc. including manpower and therefore a balance has to be struck instead of pinning down the DISCOMs to the old tariff rates. This shows failure to balance between the consumers and the service providers. The commission had in effect taken the role of controller instead of being a Regulator to regulate and determine the consumer tariff by adopting the Regulatory measure and mechanism. The object of DER Act 2000 and The Electricity Act 2003 has been lost sight by the DERC.

52. The reasonable expenditure approved yet denied and denial of assured return on capital and reserves, deserves to be interfered. Concedingly, with respect to NDPL the Regulatory Commission has approved Rs.358 crores as reasonable expenditure and when it is required to run its distribution service to meet its service obligations in the area of supply, there is no justification to withhold the said amount by ordering to create regulatory asset. This is not a regulatory measure but retrograde step. By resorting to such a course the appellant could not recover 47% of the approved and accepted annual revenue requirements during 2004-05. The denial of reasonable return also cannot be justified, if the only object of the

commission is not to increase the tariff. The same reasons apply on all fours, to the other two appeals as well.

53. In Premier Automobile Vs Union of India reported in AIR 1972 SC Page 1690 with respect to fixation of a fair price the Supreme Court held that a reasonable margin of profit has to be provided for while fixing a fair price. Same view has been expressed by Supreme Court in Oil and Natural Gas Commission Vs. Association of Natural Gas Consuming Industries of Gujarat reported in AIR 1990 supplement SCC 397. The Supreme Court held that “costs plus a reasonable return” is the reasonable, fair, just and proper method in fixation of price even under the control order.
54. Be it a postponement of return on equity or denial, so far as denial just to save the consumers from marginal increase in tariff is not a proper approach as investor is entitled to reasonable return, lest the investors’ programmes including livelihood may be affected. When the DISCOMs have operated and reduced the AT&C losses, there is no reason at all to deny the return or postponement of return and reimbursement. Thus considered from any angle, the direction issued to create a Regulatory Asset is not proper, cannot be sustained in law and liable to be interfered in these appeals.
55. It is now admitted that the entire amount kept as a Regulatory Asset has been amortised by the three DISCOMs in the following years. In other words what has been ordered to be retained as a Regulatory Asset stands amortised. Hence, the entire exercise of this Appellate Tribunal has become academic except for a limited extent.

56. At the same time for the deprivation of ROE and reimbursement of the cost, it is just, fair and proper to hold that the aggrieved DISCOMs shall be entitled to interest for delayed release and reimbursement of expenses and compensation for loss sustained as a Joint Venture entrepreneur. If the DISCOM had raised a loan and incurred expenditure in this behalf which will be subject to prudent check by the Commission, the same shall be made good. The Commission in Para 3.11.1 fixed the interest at 9% PA on Capital expenditure. The same rate of interest could very well be allowed in this respect. We do not find any justification to treat the other two DISCOMs differently merely because they submitted themselves to the proposal of DERC. It is settled law that no amount of concurrence confers jurisdiction or legal authority, if the Statute do not provide for. Further all the three DISCOMs have been treated uniformly even in respect of consumer tariff. Any difference among the three may result in different consumer tariff in the following years. This is not permissible even according to accepted Policy and norms. Hence all the three DISCOMs are directed to be treated uniformly and they shall have same reliefs as well. It is open to the Commission while undertaking truing up exercise to award an interest at 9% PA for deprivation of the entire amount set apart as a Regulatory Asset by the three DISCOMs till it came to be amortised by way of compensation.

57. In the result,

- (i) On point A, we hold that the Policy Directions issued by the NCT of Delhi has been contravened by the Delhi Electricity Regulatory Commission in issuing directions to create Regulatory Assets while approving ARR and determining the tariff for the Year in Question.

- (ii) On point B, we hold that the Regulatory Commission has acted illegally in directing the DISCOMs to create Regulatory Asset and so long as there is no Statutory Provision or Statutory Regulation, the Commission will have no authority to direct the DISCOM to create Regulatory Asset and even if there is a Regulation, such a direction shall be an exception.

- (iii) On point C, we hold that though the appellants in Appeal No.155 & 156 of 2005 have themselves submitted to the proposals of DERC to create Regulatory Asset and they are estopped from challenging the directions issued by the Commission to create Regulatory Asset. However, North Delhi Power Limited, the appellant in Appeal No.157 of 2005 has not given concurrence nor submitted itself to the proposal nor agreed for creating a Regulatory Asset and, in fact, it has been agitating the same. This point is answered accordingly.

- (iv) On point D, we hold that the directions issued to create Regulatory Asset has resulted in deferring of 16% ROE as well as recovery of operational cost assured in the scheme and the Regulatory Commission has exceeded in its jurisdiction in issuing such direction resulting in deprivation of the operation cost of all the three DISCOMs during the tariff period.

- (v) Point D is answered in favour of all the three appellants as they are all identically placed and there is justification to treat all the appellants identically.

- (vi) On point E, we hold that the Regulatory Commission has fixed the Bulk Supply Tariff without reference to the paying capacity of the DISCOMs. This is in contravention of Policy Directions as well as earlier Bulk Supply Tariff order. However, no consequences flow from this in view of the subsequent developments and passage of time and we are not persuaded to interfere with the tariff order on that score.
- (vii) On point F, we hold that the appeals are maintainable.
- (viii) On point G, we allow all the three appeals to the limited extent and direct the Regulatory Commission to allow 9% interest, as it has already allowed by Commission in Chapter 3.11.1 of its Tariff Order, for deprivation of the amounts which were ordered to be created and retained as a Regulatory Asset from the date of Tariff Order and till it is amortised and to reimburse all expenses and incidental charges incurred in this behalf by the DISCOMs.
- (ix) Since the entire Regulatory Asset created by the DISCOMs already been amortised, only a limited relief is granted in favour of appellant in Appeal No.155, 156 and 157 of 2005 as we do not find any justification to treat appellants in Appeal No.155 and 156 of 2005 differently from the appellant in Appeal No.157 of 2005.
- (x) We make it clear that in other respects we are not interfering with the tariff order already passed by the Commission in view of the passage of time and in view of the subsequent developments.

- (xi) The parties shall bear their respective costs in the respective appeal.

Pronounced in open court on this 21st day of July 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

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