

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

R.P. No. 7 of 2015 in Appeal no. 61 of 2012,
R.P. No.13 of 2015 in Appeal no. 62 of 2012

Dated: 15th May , 2015

Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

R.P. No. 7 of 2015 in Appeal no. 61 of 2012

BSES Rajdhani Power Limited
Shakti Kiran Building,
Karkardooma, New Delhi- 110092

... Review Petitioner

Versus

Delhi Electricity Regulatory Commission
Viniyamak Bhavan,
'C' Block, Shivalik, Malviya Nagar,
New Delhi- 110017

... Respondent(s)

Counsel for the Review Petitioner(s):

Mr. Amit Kapur
Mr. Vishal Anand
Mr. Gaurav Dudeja

Counsel for the Respondent(s):

Mr. Pradeep Misra
Mr. K.M. Varma (Rep.)

R.P. No.13 of 2015 in Appeal no. 62 of 2012

BSES Yamuna Power Limited
Shakti Kiran Building,
Karkardooma, New Delhi- 110092

... Review Petitioner

Versus

**Delhi Electricity Regulatory Commission
Viniyamak Bhavan,
'C' Block, Shivalik, Malviya Nagar,
New Delhi- 110017**

... Respondent(s)

Counsel for the Review Petitioner(s):

**Mr. Buddy A. Ranganadhan
Mr. Shroff
Mr. Paresh Lal
Mr. Dushyant Manocha**

Counsel for the Respondent(s):

**Mr. Pradeep Misra
Mr. K.M. Varma (Rep.)
Mr. Manoj Kumar Sharma
(Rep.)**

ORDER

These Review Petitions have been filed seeking review and/or clarification of judgment dated 28.11.2014 passed by this Tribunal in Appeal nos. 61 of 2012 and 62 of 2012.

2. The following issues have been raised in the Review petition.

a) Comparable Pay (vis-à-vis 6th Pay) for Non-FRSR employees:

The Review Petitioners/Appellants had raised the issue that despite the judgment of this Tribunal in BRPL Vs. DERC: 2009 ELR (APTEL) 880 in their favour, Delhi Commission had refused to implement the same on the ground that Appeal was pending before the Hon'ble Supreme

Court. The above issue was decided by the Tribunal on the basis of its finding in Appeal no. 14 of 2012 in the case of Tata Power Delhi Distribution Ltd. Vs. DERC on the basis of facts of the case with respect to Tata Power Delhi Distribution Ltd. Thus, an error apparent on the face of the record has taken place in the impugned judgment as the facts of the present cases are entirely different. The Review Petitioner had submitted before the Tribunal the comparison of average emoluments/cost to company for executives & non-executives from FY 2005-06 to FY 2010-11 which shows that annual average CTC of FRSR employees of non-executive level and A1 to A5 category of executive level employees is much higher than non-FRSR employees.

b) **Capital Expenditure:**

In the judgment dated 28.11.2014 this Tribunal has observed that the Review Petitioner/Appellant has not pressed the aforesaid issue without recording the submission of the Review Petitioner/Appellant that Review Petitioner/Appellant is not pressing the said issue in the Appeal since as per MYT Regulations, 2007 the issue was to be dealt at the time of true up at the end of first control period. The said true up was done by Delhi Commission in its order dated 31.07.2013 against which the Review Petitioner/Appellant has filed Appeal nos.

265 and 266 of 2013 challenging various issues including the present issue of capital expenditure which is pending adjudication before this Tribunal. The same issues have again been raised in Appeal nos. 235 and 236 of 2014 which is pending adjudication before this Tribunal. It is prayed that the Tribunal may clarify that the Review Petitioner/Appellant would be at liberty to press the present issue in the Appeal pending before this Tribunal in Appeal nos. 265 & 266 of 2013 and 235 & 236 of 2014.

c) **Energy Input:**

The Review Petitioners/Appellants had raised the issue of wrongful treatment of Energy Input. However, the issue was not decided by this Tribunal in its judgment dated 28.11.2014. It is submitted that for calculation of AT&C losses, the Commission has considered the actual energy input for FY 2008-09 and 2009-10. It is Delhi Commission's case that for the calculation of energy cost, the Commission has considered the year when the bills were raised/paid based on actual. If the Appellants received bill for energy consumed in FY 2009-10 in FY 2010-11 and being paid in FY 2010-11, the Commission sees no point in allowing the same in the cost of FY 2009-10 and thus providing

carrying cost to the Appellant, which is not at all incurred. The Review Petitioners/Appellants have submitted as under:

“194. It is submitted that the Appellant’s business is an on-going concern and the variations are recorded as and when they occur in terms of AS-5 (revised). It means that nay adjustment necessitated by circumstances, which though related to prior periods, are accounted in the subsequent period in which the same is discovered even though it may pertain to a previous year(s). The method adopted by Ld. Delhi Commission is therefore contrary to the accounting principles and is liable to be set aside. AS-5 (revised) requires that any subsequent revision to an amount booked in a previous year based on the then best available information must be booked in the year in which the additional information became known. The Impugned finding consider the adjustment of the previous years for the purchase cost but while computing the input energy does not consider the adjustment made during FY 2009-10 thereby creating a discrepancy.

195. Ld. Delhi Commission while computing the AT&C losses has considered the amount billed and amount collected as per ‘Going concern’ principle but has not applied the same while considering input energy. Therefore, AT&C loss calculated by Ld. Delhi Commission is erroneous and arbitrary. This has resulted in denial of the incentive entitlement of the Appellant for overachieving the AT&C losses.”

3. On the above issues we have heard Shri Amit Kapur, Learned Counsel for the Review Petitioners and Shri Pradeep Misra, Learned Counsel for Delhi Commission. Shri Amit Kapur also filed affidavit regarding comparative chart of average CTC of FRSR employees and non-FRSR employees.

4. Let us taken up the issues one by one.
5. **The first issue is regarding non-grant of comparable pay for non-FRSR employees.**
6. According to Shri Pradeep Misra, Learned Counsel for Delhi Commission, all facts stated by the Appellant under this issue were already before this Tribunal and after considering all such facts a conscious decision has been taken by the Tribunal. Hence the review is impermissible. Para 167 of the judgment dated 28.11.2013 in Appeal no. 14 of 2012 wherein it was decided that employees expenses are controllable item under the MYT Regulations is fully applicable. Further, from the data submitted by the Review Petitioners it is clear that the number of non-executive employees are decreasing whereas the number of executive employees are increasing year after year. The Review Petitioners/Appellants being aware that employees of non-FRSR employees are controllable they have to adjust the expenses so that the same remain within the norms.
7. This Tribunal after relying upon findings in Appeal no. 14 of 2012 in case of Tata Power Delhi Distribution Limited decided the issue against the Review Petitioner/Appellant. The Tribunal also held that the Appellants have not furnished any data to substantiate their point.

However, the Tribunal did not consider the findings of this Tribunal in BRPL Vs. DERC, 2009 ELR (APTEL) 880 that wherein this Tribunal directed Delhi Commission as under:

“118.....Employees expenses:

.....So far as salary hike is concerned to the extent of hike comparable to the Sixth Pay commission's recommendations for employees other than the erstwhile DVB employees shall also be allowed in true up process in case expenditure in that account has already been incurred....

119) The truing up, if not already done, should be done within 30 days of this judgment.....”

The Review Petitioner/Appellant had also furnished the comparison between average salary of FRSR employees and non-FRSR employees showing that the average salary of non-FRSR employees is lower than FRSR employees. It is also stated that the average cost to company (CTC) of non-FRSR employees even after accounting for additional emoluments given in view of implementation of Pay Commission Report for FRSR employees, the average CTC of non-FRSR employees is less than average CTC of FRSR employees.

In view of above we allow the Review Petition. Delhi Commission will consider the issue as per the judgment of this Tribunal in 2009 ELR (APTEL) 880.

8. The second issue is regarding capital expenditure.

9. We find that the Review Petitioners/Appellants had mentioned the following in the written submissions on the issue of capital expenditure in Appeal no. 61 of 2012.

“The Appellant is not pressing the issue of capital expenditure in the present Appeal, since the same as per the MYT Regulations at the time of filing of Appeal was pending truing up. The said issue has been taken up by the Appellant in Appeal no. 266 of 2013.”

This has been fairly accepted by the Pradeep Misra, Learned Counsel for Delhi Commission.

10. In view of above para 18 is amended. Accordingly, para 18 may be read as under:

“18. The fifth issue is regarding capital expenditure. The Appellants are not pressing this issue in the present Appeals, since the same as per the MYT Regulations at the time of filing the

Appeals was pending true up. The said issue has been taken up by the Appellants in Appeal no. 265 and 266 of 2013. Accordingly, the Appellants are given liberty to press this issue in the Appeals 265 and 266 of 2013.”

11. The third issue is regarding Energy Input.

12. According to Shri Pradeep Misra Learned Counsel for Delhi Commission, Accounting Standard AS-5 on which much reliance has been placed by the Review Petitioners/Appellants is not relevant as the Commission is not passing tariff orders on the basis of AS-5 and the Accounting Standard issued by ICAI is not binding on the Commission. Tariff orders are issued as per the principles laid down in applicable Tariff Regulations. True up of 2007-08 has already been done in tariff order issued in May 2009, hence the same was not reopened. Besides this, the bills for energy has been revised by SLDC in FY 2010-11 and as paid in 2010-11, hence it could not have been allowed in the cost of 2009-10 as the Appellant has not incurred that cost in that Financial Year.
13. Similar issue has been dealt by this Tribunal in judgment dated 10.02.2015 in Appeal no. 171 of 2012 where the issue of allowing the Appellants on accrual basis or on actual basis in true up has been

discussed. The Tribunal held that either on accrual method or actual expenditure method can be adopted. However, in accrual method carrying cost on revenue gap would require adjustment. On this basis, the Tribunal did not interfere with the actual expenditure method used by State Commission. The findings in Appeal no. 171 of 2012 will also be applicable to the present case. Further, it is important that same method is used consistently. Therefore we do not find any reason to interfere with the findings of the State Commission.

14. In view of above, the Review Petitioner is partly allowed to the extent indicated above. .
15. Pronounced in the open court on this **15th day of May, 2015.**

(Rakesh Nath)
Technical Member

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REPORTABLE/NON-REPORTABLE

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(Justice Ranjana P. Desai)
Chairperson