BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
Appellate Jurisdiction, New Delhi

Appeal Nos. 265 of 2006, 266 of 2006 & 267 of 2006

Dated this day of May, 2007

Coram : Hon'ble Mr. H. L. Bajaj, Technical Member
Hon'ble Ms. Justice Manju Goel, Judicial Member

IN THE MATTER OF:

Appeal No. 265 of 2006:

North Delhi Power Ltd.
Sub-Station Building, Hudson Lane,
Kingsway Camp, Delhi – 110 009. ... Appellant

Versus

1. **Delhi Electricity Regulatory Commission**
Through its Secretary,
Viniyamak Bhawan, C-Block,
Shivalik, Malviya Nagar,
New Delhi – 110 017.

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Delhi – 110 035.

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4. **Wg. Cdr. Virender Singh (Retd.)**
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5. **Shri S. P. Vaish**
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6. **Shri H. L. Kalsi**
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7. **Shri S. R. Sangar**
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76. **Shri Prem Prakash**
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77. **The Commissioner**
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78. **The CEO**
Delhi Jal Board ... Respondents

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Mr. B.S.Sachdev, Consumer,
Resp. No.2
Mr. A. K. Datta, Consumer,
Resp. No. 12
Mr. A. R. Datta Resp. No. 19
Mr. S. R. Abrol, Consumer,
Resp. No. 25,
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Appeal No. 266/2006:

BSES Rajdhani Power Ltd. … Appellant
Versus
Delhi Electricity Regulatory Commission … Respondent

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Mr.A.K.Datta, Consumer (Resp.
No.13) and Mr. B.S.Sachdev,
Consumer (Resp. No.2),
Mr. R. P. Agrawal, Resp. No.32

Appeal No. 267/2006

BSES Yamuna Power Ltd.
Shakti Kiran Building,
Karkardooma,
New Delhi – 110 092 … Appellant

Versus

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

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Mr. B. S. Sachdev Resp. No.2
Mr. A.R. Datta Resp. No.19

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction :

These are three appeals against tariff orders passed by the respondent Delhi Electricity Regulatory Commission (DERC) all of 22.09.06 passed on petitions by the three appellants viz. the North

Delhi Power Ltd., BSES Rajdhani Power ltd & BSES Yamuna Power Ltd., the three companies entrusted with the business of distribution of electricity in the National Capital Territory of Delhi. The appeals raise similar question of principles for determining tariff and therefore are heard together and are being disposed of by this common order. The tariff orders challenged in all the three appeals relate to the year 2006-2007. The DERC has taken the same view in the cases of all the three appellants. The facts, sans detail are same for all the three. We shall first take the appeal No. 267/07 and consider the issues involved on the basis of the facts of that appeal.

Background :

2. The Delhi Electricity Regulatory Commission was established pursuant to Delhi Electricity Reforms Act 2000 (DERA) for the purpose of restructuring of electricity industry including rationalization of generation, transmission, distribution and supply of electricity. The Government of National Capital Territory of Delhi (GoNCTD) notified the Delhi Reform (Transfer Scheme Rules 2001) on November 20, 2001. The transfer scheme provided for unbundling of functions of Delhi Vidyut Board (DVB) and transfer of distribution assets of DVB. The distribution functions were transferred to three companies which came to be referred to as Discoms while the transmission assets were transferred to Delhi Transco Ltd., referred to as TRANSCO. With the enactment of DERA, the Delhi Electricity Regulatory Commission, herein referred to as the Commission, was invested with the responsibility of determining tariff for generation, supply, transmission and wheeling

of electricity, whole sale, bulk or retail as the case may be. The Electricity Act 2003 which came into force on 10.06.2003 saved the directions issued by the GoNCTD under the DERA, Sec 86(1)(a) of The Electricity Act 2003 vests the responsibility of determining tariff on the Commission.

3. On or around 22.11.2001 the Govt. of National Capital Territory of Delhi in exercise of power under Section 12 of DERA notified "policy directions" to enable restructuring of DVB and privatization of distribution companies. The policy inter alia assured the investors of 16% return on equity and promised certain benefits if investors were able to exceed the reduction in targeted levels of AT&C losses (AT&C losses are difference in energy supplied and the energy for which payment is actually recovered). Pursuant to direction in Para 17 of policy direction the Commission on 22.02.02 passed the Bulk Supply Tariff (BST) order setting out the bulk supply tariff to be charged by the Delhi Power Supply Co. Ltd. On or around 01.07.2002, the transfer scheme was brought into force by the Commission and the undertakings, assets liabilities and personnel of DVB were vested in six successor companies.

4. In exercise of powers under Section 12 and other applicable provisions of the Reforms Act, based on the accepted bids, the GoNCTD prescribed the AT&C Loss levels to be achieved by each of the Distribution Companies. The prescribed AT&C Loss Levels were also linked to a revenue earning mechanism whereby if the prescribed loss reduction targets were exceeded the Discoms would

be allowed to retain a portion of the additional revenue arising out of the better performance. In case the prescribed loss levels were not met with then the shortfall was to be borne by the Discoms. The cumulative net effect of revenue whether it be additional revenue or a shortfall in revenue was to be calculated to ascertain the over-achievement/under-achievement of a Discom and accordingly appropriate adjustments were to be made after calculating the net effect.

5. The policy directions were to remain in force for the period till the end of 2006-07 i.e. for approximately five years. The directions specifically say that they would bind the Commission and other authorities as well as all other stake holders in the business of production, transmission and distribution of electricity. As such, the present Impugned Orders relating to financial year 2006-07 are the tariff orders for the last financial year of five year tenure of policy directions.

6. Section 64 of The Electricity Act specifies the procedure to be followed for issuance of a Tariff Order. Subsections (1) & (3) of this Section state as follows :

> *"64.(1)An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulation.*
>
> *(2) …*

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

Facts of Appeal No. 267 of 2006:

7. The appellant, BSES Yamuna Power Ltd., submitted its Annual Revenue Requirement (ARR) for financial year 2006-07 for determination of retail supply tariff as mandated in Section 20 of Delhi Electricity Reforms Act 2000. The claims of the appellant inter alia included claims towards : (1) depreciation, (2) employees costs, (3) administrative and general expenses (A&G expenses), (4) Set off in shortfall in collection of revenue for previous years in respect of under-achievement in respect of AT&C losses reduction against any excess collection arising from over achievement in the following years, (5) capital expenditure incurred to augment the infrastructure in the electricity sector in Delhi, (6) recovery of reactive energy charges as part of the power purchase cost paid by the appellant to the transmission company.

8. The Commission while considering the revenue requirement in the process of fixation of tariff did not grant the entire amount claimed under the aforesaid heads. Hence, the appeal. The appellant challenges the disallowance of the claims on the plea that in passing the tariff order the Commission has violated the policy directions and the BST order and has disregarded the regulatory

practice. The appellant claims that the appellant is legally entitled to recover the amounts claimed under those heads. The plea of the appellant in respect of each of these heads can be narrated in the following Paragraphs :

9. **Depreciation** : The Commission allowed depreciation for the distribution assets at the rate of 3.75% based on straight line method. This policy was adopted in the tariff orders for the financial year 2002-03, 2003-04 and 2004-05 as well as for the year 2005-06. The appellant's grievance is that this Tribunal in its earlier order (dated 29.09.2006) relating to the tariff orders passed by the Commission had held that the Commission was bound by the notifications of Ministry of Power dated 31.01.1992 and 29.03.1994 issued in terms of the Sixth Schedule of The Electricity (Supply) Act 1948 and therefore was bound to allow depreciation at the rate of 6.69 %. The Supreme Court also upheld this position in its Judgment dated February 15, 2007 in Civil Appeal No.2733/06. It may be mentioned here that the final Judgment of the Supreme Court had not yet been pronounced when the Impugned Order was passed. The appellant therefore demands depreciation at 6.69 % for the years 2002-03, 2003-04 as well as 2004-05 as part of amount to be recovered in the financial year 2006-07. For the financial years 2004-05, 2005-06, the appellant had claimed the depreciation on the basis of the Ministry of Power notification.

10. **Under achievement/over-achievement of AT&C losses :** The appellant claimed that it had over-achieved the AT&T losses and

the actual AT&C loss for financial year 2005-06 was 43.89% as compared to the bid level of 45.05%. The Commission held, since the actual AT&C loss reduction of the Petitioner is better than bid level AT&C loss reduction for the financial year 2005-06 but worse than minimum AT&C loss reduction stipulated by GoNCTD for the financial year 2005-06, the entire annual revenue from the better performance of the Petitioner would be passed on to the consumers by including it for the purpose of tariff fixation after providing for Discoms adjustments passed on to domestic consumers during 2005-06. The total benefit of over-achievement by bid level was Rs.27.33 Crores for the financial year 2005-06. Of this Rs.12.56 Crores was passed on to the consumers in the financial year 2005-06 and the rest was passed on to consumers for financial year 2006-07. Similarly, the AT&C losses for the year 2006-07 were also directed to be transferred to the consumers. The appellant contends that policy directions dated May 31, 2002 had provided for treatment of over achievement and under-achievement in respect of AT&C losses during the period of 2002-03 to 2006-07 and the relevant part of the policy directions for the purpose of computation of over achievement and under-achievement were as under.

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

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 the 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 for Paras 2(I) and 2(III) above, for every year, while determining such additional revenue or shortfall in revenue the additional 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 net effect."

11. It is contended by the appellant that DERC has to first set off the over achievement in a particular year against the carry forward under-achievement in the previous year. The appellant had in relation to bid level for financial year 2002-03 incurred a loss of Rs.75 Crores while in the next financial year it exceeded the bid level and realized excess revenue of Rs.7.87 Crores. Thus there was a balance shortfall of Rs.67.13 Crores. In the financial year 2004-05 the appellant again over achieved and realized excess revenue to the extent of Rs.12.2 Crores. Instead of setting off this excess revenue towards previous loss the DERC treated the excess realization from over achievement directly without setting off the same against under achievement as prescribed in the policy direction of 31.05.02.

12. DERC again adopted the same practice for the financial year 2005-06 by declining to set off the excess realization of Rs.27.33 Crores on account of over achievement. Thus the appellant has been denied the adjustment of Rs.39.5 Crores to which the appellant claims to be entitled to under the policy directions. The appellant contends that the binding nature of policy direction has been upheld by this Tribunal in its earlier judgment and therefore, the issue in no more *res-integra*.

13. **Adjustment for prior period in transfer of stores / R&M expenses:** Transfer scheme provided that the value of stores and spares would be reflected in the opening balance sheet at actual value as on the transfer date. Accordingly, the valuation exercise with respect to transfer of stores was undertaken. A dispute arose

between Delhi Power Co. Ltd. and the appellant on the exact quantum of stores. Pending settlement, Stores & Spares were utilized for undertaking the business of the appellant during the pendency of the dispute, the appellant had provisioned for Rs.10 Crores in the financial year 2004-05 towards these expenses. The same were disallowed by the Commission. Pursuant to the valuation of stores & spares, the value increased from Rs.5 Crores as provided in the Opening Balance Sheet to Rs.28.40 Crores which allegedly was paid to DPCL.

14. Subsequently, based on actual utilization of stores and spares necessary adjustments were made in books of accounts of various years between capital scheme and operation and maintenance. The amounts utilized for operation and maintenance and towards capital scheme for various years were mentioned in a chart according to which for the years 2002-03, 2003-04, 2004-05 & 2005-06 the total expenditure was Rs.23.4 Crores. The appellant charged a depreciation amount of Rs.2.77 Crores relating to financial year 2002-03, 2003-04 & 2004-05 on items used for capital schemes to profit and loss account in the provisional accounts of 2005-06 and grouped under the prior period expense. Depreciation for 2005-06 had been included in the depreciation of current year. The Commission approved the inclusion of such stores & spares in R&M expenses for the financial year 2005-06. The appellant claimed depreciation of Rs.2.77 Crores as prior period expenses but the Commission did not grant the same in the impugned order. The appellant says that value of O&M items amounting to Rs.0.47 Crores

of the financial year 2004-05 were set off against provision of Rs.10 Crores in the accounts of the financial year 2005-06. So the Commission was requested for additional R&M expenses amounting to Rs.0.47 Crores in truing up for FY 2004-05. The balance provision of Rs.9.53 Crores, after adjustment of Rs.0.47 Crores, was included in the Excess Provisions Written Back amounting to Rs.12.3 Crores as a part of non tariff income. The Commission did not approve provisions of Rs.10 Crores in R&M expenses towards stores for financial year 2004-05 and so the appellant claims that the non tariff income of FY 2005-06 should exclude the Excess Provisions Written Back. The appellant therefore, claims that the DERC has erred in not approving the following :

1. The expenses for R&M stores utilized in the FY 02-03 and FY 03-04 amounting to Rs.7.01 Crores
2. Depreciation on the Items utilized for Capital schemes amounting to Rs.2.77 Crores
3. Expenditure of Rs.0.47 Crores as a part of R&M expenditure for FY 2004-05 under truing up of FY 2004-05
4. Reduction of non-tariff income by Rs.9.53 Crores in FY 2005-06 for the reasons explained above.

15. **Capital expenditure :** The appellant claims to have incurred capital expenditure of Rs.415.78 Crores in the financial year 2004-05. In the tariff order dated July 07, 2005 the Commission approved the capital expenditure of Rs.415.78 Crores and directed

the appellant to obtain the scheme-wise approval for capital expenditure incurred during the financial year 2004-05. The appellant submits that the appellant submitted scheme-wise detail of capital expenditure and capitalisation of approved and un-approved works for financial year 2004-05 in Detailed Project Reports (DPR) vide its letter dated 02.09.2005. The Commission approved of the DPRs but asked for more details. The appellant contends that such details were also submitted. The appellant claims that DPRs for financial year 2005-06 were also submitted. The appellant also claims to have submitted detail of un-approved schemes along with capitalisation cost of 2004-05 and 2005-06 amounting to Rs.94 Crores for financial year 2004-05 and Rs.197 Crores for financial year 2005-06. The appellant further claims that it has so far received approval of Rs.612 Crores against DPR of 2004-05 and Rs.79 Crores only against DPR of 2005-06 towards capital schemes. The appellant laments that despite the beneficial effect of this capital expenditure schemes, particularly towards reducing AT&C losses, the Commission has failed to approve a substantial number of schemes. The non approval of capital scheme has also resulted in lower capital expenditure for 2004-05 and 2005-06. Further grievance of the appellant is that scheme-wise capitalisation approved is not available. The appellant states that it has capitalized Rs.226 Crores in the financial year 2004-05 which was approved provisionally by the Commission in its tariff order dated July 07, 2005 with a warning that it will examine the details of actual assets capitalisation and directed the Petitioner to submit complete details of assets capitalized during the financial year 2004-

05. The appellant is aggrieved that the Commission has revised the capitalisation from Rs.226 Crores to Rs.166 Crores for the year 2004-05 mainly due to non approval of various expenditure schemes although non approval is solely attributable to Commission's inaction. On account of failure to approve the capital scheme capitalisation for 2004-05 and 2005-06 have also gone down. The Commission finally approved capitalisation at Rs.478 Crores against actual capitalisation of Rs.570 Crores during the financial year 2004-05 & 2005-06. The appellant alleges that this has adversely impacted cash flow, return, borrowing capacity, depreciation, interest etc. Further, the appellant says that it had to execute certain urgent capital schemes prior to the approval of the DPRs but the Commission failed to give approval for large number of capital schemes and has restricted an amount only to the schemes approved by it. The appellant contends that non approval of the schemes have impacted the appellant in the following manner : (a) disallowing expenditure incurred in terms of license conditions which the appellant is entitled to recover, (b) delay in approval has prejudiced the right of the appellant to raise finance from banks which considered such approval a *sine qua non* for lending and even if the banks have so lent money, (c) where loan has been received from the banks for such scheme interest paid thereon is denied to the appellant on account of absence of any approval and (d) failure to approve the schemes in time has affected the minimum guaranteed statutory equity in terms of policy directions and also depreciation entitlement in terms of Ministry of Power notification rates.

16. **Second truing up of ARR for 2004-05 :** The expenditure for financial year 2004-05 stood trued up in the tariff order dated July 07, 2005. Nonetheless the Commission has again undertaken a truing up exercise in the tariff year of 2006. On account of the second truing up the employees expenses, approved in the tariff year for 2005-06, was Rs.133.84 Crores, where as in the tariff for financial year 2006-07, the approval on this account was only Rs.119.44 Crores causing a loss of Rs.14.40 Crores. Similarly, towards depreciation, there is a loss of Rs.1.14 Crores and towards interest a loss of Rs.6.83 Crores. The grouse of the appellant is that the Commission has not given any reasons for truing up the expenses of 2004-05 a second time in the impugned tariff order. It is contended by the appellant that the Commission should not have reopened the trued up figures of 2004-05 while passing the impugned order which is related to financial year 2006-07.

17. **Cost incurred for payment to contractual employees :** The appellant has been engaging employees on contract basis in order to cut down on cost of employees after the job assigned to contracted employees is over. The appellant has deployed both regular and contractual employees and has used them interchangeably depending upon requirements. The Commission in its tariff order had approved such practice in the past. However, in the impugned tariff order the Commission has departed from its past practice without indicating any reasons. It is submitted that the Commission has disallowed recovery of salary and expenditure

actually incurred on the ground that no justification has been provided for the enormous increase in the financial year 2005-06 in comparison to financial year 2004-05. Consequently entitlement towards employee cost for financial year 2006-07 has been lowered. The appellant submitted that it had actually controlled the employee expenses to less than the budget stipulation of the Commission. While allowing employees to retire with VSS benefits, the appellant employed more staff on contractual basis. Many of such employees were engaged in the work of metering and billing.

18. The appellant contends that the metering and billing related works is carried out largely by contractual employees and lower approval expenditure towards contractual employees would also result in denial of properly incurred expenses for meter reading and bill distribution, an expenditure that the Commission has admitted as necessary and recoverable through tariff.

19. **Administrative and general expenses (A&G expenses):** The Commission in its tariff order for the financial year 2005-06 directed that prior approval for any increase in administrative and general expenses during 2005-06 beyond the A&G expenses approved had to be obtained. Appellant accordingly sought approval for the additional A&G expenses of Rs.28.67 Crores for the financial year 2005-06. In the absence of any objection to the proposed expenditure within a reasonable time the appellant went ahead with the expenses which were critically required for continuing day to day operations. The Commission has however, disallowed the expenses

although it was covered in the process of truing while determining the ARR for the financial year 2006-07. The appellant contends that A&G expenses are generally anticipated on the basis of past experience and in case the A&G expense is not approved it would militate against the concept of planning and budgeting for expenditure as a part of ARR stipulated by The Electricity Act 2003, read with the relevant provisions of Delhi Electricity Reforms Act 2000.

20. **Consultancy charges, Telephone, Postal & Telegraph charges, Conveyance and Traveling charges, Legal expenses:** The Commission has opined that the expenses of the appellant on conveyance charges were very high and had increased substantially as compared to the last year. Telephone, Postal and Telegraph charges have not been fully approved for want of more details towards A&G expenses. Conveyance & Traveling expenses have also not been fully approved on account of inadequacy of details. For the same reason the Commission has approved only 50% of the proposed legal expenses. The appellant contends that all required details were available with the Commission and that it had submitted cogent reasons for claiming those expenses which had been disallowed.

21. **Service Tax :** The Commission has approved of service tax @ 12.24% based on expenditure approved on rent, insurance, security, communication, transportation, consultancy advance and legal expenses. The appellant contends that it has to pay service tax also

on expenses incurred towards contractual employees, R&M expenses, finance charges etc. which were otherwise approved by the Commission. The appellant is aggrieved that as against Rs.3.04 Crores actually incurred by the appellant towards service tax the Commission has approved only Rs.1.8 Crores.

22. **Reactive Energy :** The Commission has totally disallowed the reactive energy charges imposed by the transmission company called Transco. This has been done on the basis of its earlier directions that the Discoms should take steps to install the capacitor banks which would reduce the requirement of drawing reactive power from the grid. It is contended by the appellant that the stand taken by the Commission in this respect is not based on ground realities of the power system dynamics. It is contended that the target can never be complete elimination of reactive energy being drawn as the issue of reactive compensation is largely dictated by the manner of consumption of electricity by the consumers and the appliance put to use by them. It is contended that reactive systems requirement is influenced primarily by consumers load mainly from domestic and commercial category and that the Commission has not given directions to the domestic consumers for providing necessary reactive compensation. It is contended further that the capacitors are installed for giving necessary compensation for maintenance of power factor. The load coming on the system is dynamic in nature and therefore 100% compensation is not practicable and accordingly there would always be some drawal of reactive energy.

23. **Interest expenditure :** For the years 2004-05 in the tariff order of July 07, 2005 the Commission had approved an expenditure of Rs.9 Crores towards interest which was subsequently reduced to Rs.2.47 Crores in the truing up exercise in the impugned order. Further, as against the expenditure of Rs.40.2 Crores for the financial year 2005-06 only Rs.16.16 Crores has been allowed by the Commission. The grouse of the appellant is that no reason has been given for disallowing such expenses towards interest.

24. The appellant, therefore, challenges the order of the Commission and prays that all the claims detailed above under various heads be allowed to be recovered and be considered as part of the revenue requirement.

Response of the Commission & Others :

25. The appeal is countered by the Commission as also by some of the consumers who have been taking an interest in the tariff fixation process. The appeal No. 265/06 lists 75 representatives of consumer groups some of whom participated in the hearing before us. These consumers have filed their counter affidavits and submissions. However, instead of supporting the impugned orders by specifically responding to the issues raised, they have come up with further grievances about the policy directions and their implementation as well as the proceedings of tariff fixation. They seek further reduction in the tariff. Needless to say that such a plea

from the respondents can not be considered within the scope of the appeal.

26. The Commission filed a counter affidavit dated February 01, 2007. On the question of computation of under achievement and over-achievement as well as on the issue of adjustment of prior period expenses in relation to transfer of stores in terms of transfer scheme it is contended that these issues have been raised for the first time in the appeal. It is contended by the Commission that such issues have not been raised in the ARR Petition excepting a prayer for amortization of past loss due to under achievement. It is contended that previous tariff orders were not challenged on these grounds. The Commission states that so far as prior period expenses are concerned, sufficient details had not been given. The Commission claims that after allowing all prudent expenses of the appellant its distribution costs for 2004-05 is 96.69 paisa per kwh where as the average cost including generation cost, transmission cost and distribution cost is 273.73 paisa per kwh. According to the Commission if all the demands of the appellant are allowed the same would not be in the interest of consumers and if all expenses are made a part of the tariff the same would defeat the very purpose of prudent check.

27. The Commission insists on its right of a second truing up. Coming to the capital expenditure, the Commission contends that unless it is fully satisfied and convinced about various aspects of

proposed capital expenditure it cannot grant approval to any capital scheme.

28. So far as depreciation is concerned, the issue has been finally settled by the Judgment of the Supreme Court in Civil Appeal No. 2733 of 2006 and to this extent the respondent conceded the claim towards depreciation at the time of hearing.

29. So far as non tariff income of Rs.9.53 Crores is concerned, the Commission contends that it will consider this aspect at the time of final truing up for financial year 2005-06 to be done in the next tariff order subject to production of complete details and justification by the appellant.

30. Coming to the question of capital expenditure, the Commission contends that as against the claim of Rs.745 Crores towards alleged capital expenditure, the Commission has approved as much as Rs.732 Crores and that this small gap of Rs.13 Crores cannot adversely impact cash flow, return and borrowing capacity as has been alleged by the appellant. The Commission further states that the detail scrutiny of capital expenditure incurred during 2005-06 being underway, Commission approved of the total investment at a level of Rs.316 Crores for the financial year 2005-06 and that such expenditure is accepted on provisional basis and would be firmed up in the next tariff order once the balance requisite details are furnished by the appellant. The Commission has further assured that a capital expenditure for the financial year 2005-06 would be

appropriately considered by the Commission during the truing up process in the next tariff order.

31. Coming to asset capitalisation, the Commission contends that it approved capitalisation of schemes executed during 2004-05 at an amount of Rs.165.84 Crores. For the purpose of capitalisation for financial year 2006-07, the Commission contends that the appellant had not furnished the statutory clearance certificates within the required time. The Commission further says the appellant had failed to furnish the necessary details of analysis and approval. The Commission says despite delayed submission of necessary information the Commission having taken into consideration the benefits accruing to the system has approved various capital schemes to the extent it is justified. The Commission attributes non approval of capital schemes to the defaults of the appellant. So far as the objection to the second truing up is concerned the Commission contends that the same is a matter of course and a part of prudence check. The second truing up has been made mainly on employee expenses, depreciation and interest.

32. The Commission further contends that it found that other costs and allowances which were being paid by licensee to the existing employees including new employees has nothing to do with VSS scheme and therefore Commission decided to de-link other costs and allowances from the normative employee cost allowed by the Commission (which is considered for amortization of cost of VSS). The Commission says that it has allowed all other costs and

allowances actually incurred by the licensees namely medical reimbursement, leave travel assistance, administrative charges for pension trust, overtime, other allowances including HRA, Bonus/ex-gratia, staff welfare expenses and amount paid to contractual employees.

33. Coming to the employees expenses the Commission contends that it had already clarified that it is allowing employee expenses on the tariff neutral principle that is allowing employee expenses without considering the cost of Voluntary Separation Schemes as also savings in employees cost due to this scheme and the licensee has to amortize the cost of VSS from savings due to implementation of the scheme. The Commission also clarifies that VSS amortization would be separately considered in view of the additional liabilities incurred by the licensee and has asked the licensees to submit complete details of savings, amortization of additional trust liabilities and other expenses related to VSS within three months of the issue of impugned order.

34. So far as depreciation is concerned the Commission further clarifies that it has not given any depreciation for the assets acquired out of APDRP grant amounting to Rs.1.14 Crores.

35. So far as interest is concerned, the Commission has to say that it has trued up the interest cost based on capitalisation of schemes approved by the Commission, actual loan taken and repaid by the licensee and sundry creditors. The appellant, in the financial year

2004-05, has repaid inter company loan amounting to Rs.138.45 Crores which was mentioned by them in the ARR Petition for 2006-07. The Commission has now considered this in the second truing up and the interest expenses of 2004-05 has been calculated accordingly in the impugned tariff order.

36. The Commission further contends that the payment made by the appellant to contractual employees in 2005-06 has almost doubled as compared to the expenses incurred on this head in the financial year 2004-05 and that for such sudden increase no justification has been provided. The Commission says that it has applied prudent check and has allowed payment to contractual employees by applying an escalation of 20% over the actual expenses for the financial year 2004-05. Total employee expenses trued up by the Commission for the financial year 2005-06 in the tariff order for 2006-07 is Rs.128.13 Crores as against the approved employee expenses in the tariff order of 2005-06. Of Rs.138.13 Crores the Commission says that allowing of employees expenses is based on the methodology by the Commission in the last three years keeping in view amortization of SVRS expenses and the whole issue would be settled with suitable extension of amortization period. The Commission has granted 20% normative increase over the actual expenses towards the contractual employee cost for the financial year 2004-05. The Commission is of the opinion that increase in the payment of contractual employees has to be set off against SVRS savings.

37. Similarly for transportation expenses the Commission has allowed an escalation of 4% over the previously incurred expenditure as there was a remarkable increase in this field and the Commission considered only such escalation as fair and reasonable. The Commission also says that so far as other components of A&G expenses viz. consultancy charges, telephone, postal and telegraph, conveyance and transportation, legal charges and service charges are concerned, the Commission has allowed all actual expenses which are comparable to previous years but had to apply prudent checks wherever the actual expenses incurred were very high as compared to actual expenses incurred in the previous year. The Commission is of the opinion that legal expenses are incurred mostly for litigation against the consumers and the Commission and therefore, only 50% of the legal expenses have been allowed. About service tax, the Commission explains that it has allowed service tax of those items of expenditure where tax is applicable.

38. The Commission reiterates its stand on reactive energy charges. Referring to the review order of November 2003 in which the Commission expressed its opinion that reactive energy drawal from the grid would not be required if the Discoms ensure that requisite capacitor banks are installed and kept operational, the Commission has disallowed the reactive energy charges imposed by TRANSCO.

39. Coming to the issue of interest, the Commission contends that actual interest paid in respect of details being provided by the

appellant have been taken into consideration by the Commission. According to the Commission the appeal is without any merit.

Decision with reasons:

40. **Depreciation**: The issue of depreciation so far as it relates to the parties in this appeal is no more *res-integra*. This Tribunal in Appeal Nos. 38 & 39 of 2005 upheld a claim of depreciation at the rate of 6.69% for the years 2002-03 (nine months), 2003-04 and 2004-05. This decision of this Tribunal was passed on the basis of Ministry of Power Notification dated 31.01.92 and 29.03.1994. It was also held that the policy direction dated 22.11.2001, the normative tariff and bulk supply tariff order dated 22.02.2003 (BST Order) and the statutory scheme of Delhi Electricity Reforms Act were binding on the Commission. The Supreme Court while retaining the appeal with itself, partially remanded the matter for determination of sustainability of the reasons set out in the orders of the Respondent Commission although it did not pass any order of stay against the order of this Tribunal. This Tribunal vide its order dated 29.09.2006 held that the orders of the Respondent Commission denying depreciation at the rate of 6.69% were contrary to BST order, policy directions and the assurances and representations made to the prospective investors during the disinvestment process inter alia contained in the BST Order and policy directions. It held that the methodology for arriving at the depreciation percentage was unsustainable in law. The Supreme Court held that the Discoms were entitled to depreciation on their

assets at 6.69% on account of legal regime applicable to Delhi during the control period for 2002-07.

The appellant in its ARR for the financial year 2006-07 had claimed: (a) depreciation for the financial year 2002-03, 2003-04 and 2004-05 and (b) depreciation for the financial year 2005-06 and 2006-07. The order of the Supreme Court related to the claim for the period upto 04-05. For the years 2005-06 and 2006-07 the appellant initially asked for depreciation at the same rates as the Commission had allowed earlier namely 3.75% but the appellant revised its claim to 6.69% upto the financial year 2006-07 vide a letter dated 19.07.2006. The claim of the appellant is squarely covered by the Supreme Court Judgment which categorically related to the control period of five years. Mr. S. B. Upadhyay, Senior Advocate, appearing for the Commission conceded the claim of the appellant towards depreciation in view of the order of this Tribunal, dated 24th May, 2006 upholding the claim of depreciation at 6.69%. The Impugned Order was passed on September 26, 2006. Since there was no stay against the order of this Tribunal the Commission was bound to follow the direction of this Tribunal to allow depreciation at 6.69%. It is only after the judgment is upheld by the Supreme Court that the Commission has now conceded to allow depreciation at 6.69% in determining the tariff. The appellant is not only entitled to depreciation at this rate but also entitled to a carrying cost as its legitimate claim was denied at the appropriate time.

It may be added here that there is no justification for denying depreciation on assets acquired out of APDRP grant, as it will have to be replaced by the appellant after the useful life of the asset is over, and the same was also to be allowed.

41. **Under achievement and over-achievement in respect of AT&C losses:** The policy direction dated 31.05.2002 (Policy Direction-II) issued by GNCT deals with the overachievement and underachievement in AT&C losses which has been reproduced in Para 10 above. According to this policy direction if the Discoms fail to achieve their bid level targets, the underachievement will result in loss and reducing in the networth of the Discoms. The proviso to the policy further said that the treatment of any underachievement and overachievement with respect to reduction of loss levels during the control period would be made by taking into account any underachievement/overachievement for the previous periods. In other words under achievement and over achievement were required to be determined in a particular year after adjusting the performance of the previous year. It is admitted by the Commission that the policy directions are binding and the Commission could not have refused to adjust the underachievement in the first year against the over achievement in the subsequent years. The excess realization of 2005-06 has therefore to be set off with the loss in the earlier years. During the hearing Mr. Upadhyay again conceded that this adjustment would be given as part of truing up process in the ensuing tariff period.

42. **Prior period adjustment in transfer of stores / R&M expenses:** The appellant had obtained certain stores from Delhi Power Co. Ltd. (DPCL) as part of privatization process. The transfer was done on the basis of tentative evaluation. The dispute over value was eventually settled at Rs.28.40 Crores. The stores and spares were however utilized pending evaluation. The appellant had initially provided Rs.10 Crores in the financial year 2004-05 towards these expenses. The appellant eventually paid up the value to the holding Company. As per Schedule 'D' of the transfer scheme, the increase in the valuation led to increase in the current liability payable to the holding company. The relevant part of the scheme is as under:

> "*The value of stores and spares and loan to personnel shall be adjusted to the actual book value as on the date of transfer. In case actual book value of these items is more than the mentioned in the balance sheet in this schedule there shall be a corresponding increase in the current liability payable to the holding company.*"

43. The appellant claims that the appellant is entitled to these expenses for the financial year 2006-07 as the expenses are extraordinary expenses arising out of error/omission in preparation of the final statement of one or more periods. The Commission in this respect contends in the counter that it is only in the appeal that the appellant has mentioned that the stores and spares used in the financial year 2002-03 and 2003-04 amounted to Rs.7.01 Crores

and these were booked in prior period expenses for the financial year 2005-06. The Commission however, contends that though, in its letter dated May 19, 2006, the appellant had mentioned prior period expenses of Rs.5.6 Crores, no details were ever given. The Commission further contends that the settlement and booking of expenses pertaining to prior period are not generally considered by the Commission unless otherwise the same is separately raised by the licensee in extraordinary circumstances subject to application of prudence check. The old issue of using R&M stores and spares in the financial year 2002-03, 2003-04 and making book adjustments of prior period expenses were not being considered by the Commission ipso facto. Coming to R&M stores and spares for the financial year 2004-05 amounting to Rs.0.04 Crores claimed by the appellant, the Commission has to say that these figures were not properly disclosed by the appellant in its tariff petition.

44. The appellant says that the value of O&M items amounting to Rs.0.47 Crores of the financial year 2004-05 were set off against a provision of Rs.10 Crores in the books of accounts for the financial year 2005-06 and accordingly the Commission was requested to allow additional R&M expenses of Rs.0.47 Crores in truing up of financial year 2004-05. The appellant further says that the balance provision of Rs.9.53 Crores after adjusting Rs.0.47 Crores from the provision of Rs.10 Crores was included in Excess Provision Written Back (EPWB) amounting to Rs.12.3 Crores as a part of non tariff income. The appellant further says that the Commission did not approve of the provision of Rs.10 Crores in R&M expenses towards

stores for the financial year 2004-05 and that non tariff income for the financial year 2004-05 should exclude the Excess Provision Written Back of Rs.9.53 Crores. The Commission in response says that it had considered non tariff income as offered by the appellant in the relevant ARR filing. The Commission further says that the appellant had not mentioned in Form-1.4 regarding non tariff income that an amount of Rs.9.53 Crores was against writing back of the provisions made in the financial year 2004-05 and the provision made were at that point of time. The Commission further says that in the absence of any such detail the Commission considered the total non tariff income offer by the appellant itself in the ARR forms and it could not *suo moto* reduce the amount offered by the appellant in non tariff income for the purpose of tariff determination. Nonetheless the Commission in its reply says that at the time of final truing up for the financial year 2005-06 to be done in the next tariff order this aspect would be considered. The Commission has not refused to do the adjustments on any technical reasons or on any principle. It has advanced no arguments for declining the prayer in respect of prior period adjustments as well as Excess Provision Written Back. The Commission is, therefore, bound to concede to the prayer of the appellant on these two items.

45. **Capital Expenditure :** The appellant submits that it needs to augment the infrastructure of the distribution business in Delhi as it is under an obligation to energise electricity connections within a month of its demand and has to maintain consistent and reliable supply under the applicable Performance Standard as specified by

the Commission. The appellant has been submitting its capital projects for approval of the Commission as per its tariff order dated 09.06.2004. The appellant is aggrieved that the approvals of such projects are delayed and on this account the expenditures already incurred are not allowed on account of approval still being awaited. The Commission, however, contends that the gap between the claim and the approval is small and further that the capital expenditure for the financial year 2005-06 would be appropriately considered by the Commission during the truing up in the next tariff order.

46. During the hearing, it was revealed that the proposal for capital expenditure were being delayed for want of personnel in the Commission who are required to visit the sites and examine the feasibility and safety aspects of such capital schemes. We feel that this difficulty can be overcome if the Commission provisionally approves the capital schemes based on certification by qualified engineers on the rolls of the Discoms so that the appellant can go ahead with the capital schemes to augment the infrastructure for electricity distribution of the Delhi which is a crying need. The Commission may also consider accepting certification of engineers of one Discom in respect of capital expenditure of another Discom in order to ensure impartiality and fairness in such certification.

47. **Second truing up :** Second truing up has been done on three scores namely employee expenses, depreciation and interest. It is contended by the appellant that the second truing up is warranted only when there is difference between provisional accounts on the

basis of which the first truing up is done and audited accounts which may, have been furnished after such truing up. In the present case admittedly there has not been any substantial change between the provisional accounts and the audited accounts. On all the three scores the Commission has done the second truing up on the basis of a revised policy. E.g. on the count of depreciation it says that no depreciation should have been allowed on assets created by APDRP grant. Since the accounts were already before the Commission if it was not to grant any depreciation on the assets created out of APDRP grant the same should have reflected in the tariff order of the appropriate year. After the tariff order based on those accounts, namely for the financial year 2004-05, there is no occasion for the Commission to now introduce a new philosophy and approach for such assets acquired out of APDRP fund. It may further be said here that there is no rationale for declining to allow depreciation for assets acquired out of the APDRP grant because depreciation is a source of funding required for replacement of assets. Therefore, unless the Commission is able to say that APDRP grant will be available every year and there is no need to create funds for replacement of such assets, it cannot say that no depreciation on such asset may be given. Similarly, coming to the question of employees cost the Commission says, that other costs and allowance which were being paid to the existing employees had nothing to do with VSS scheme and therefore Commission decided to de-link other costs and allowances from the normative employee cost allowed by the Commission. This is again rethinking on the subject of employee cost. The previous years account cannot be

trued up on such rethinking. The appellant on the other hand says that such allowances and costs could not have been de-linked as those who availed of VSS would have been paid these allowances had they continued in the employment.

48. Similarly, so far as interest is concerned the second truing up is not based on difference between the audited account and the provisional account and therefore could not have been done by the Commission. The Commission has no alternative but to allow all these expenses in the next truing up mechanism.

49. **Payment for contractual employees :** The Commission has not fully approved of all the costs towards contractual employees. The appellant says that it has reorganized its employee mix and now contractual employees are doing certain jobs which were earlier outsourced. Further, they say that number of employees had to be increased in view of its obligation to meet the performance standards, increased activity, better customer services and for services to inform the customers of the benefit of the electronic meters. It is further submitted by the appellant that total employee cost, due to reorganization of the work force, has only increased by 2.7% during the financial year 2005-06 as against 9% stipulated by the Commission. The appellant contends that the Commission cannot micro-manage the appellant's work by specifying what percentage of work could be done by contractual employees and what by the regular employees. The Commission says on the other hand since the cost of contractual employees has increased manifold

it has applied prudence check and has approved of the cost of contractual employees by escalating the previous periods figures by 20%. The Commission unfortunately has not given any justification for applying the escalation factor at 20%. The Commission has also not attempted to take note of the fact that the total employee cost has not increased much and that the increase in the total employee cost is far less than what the Commission would have allowed as per its earlier stipulation. The Commission contends that both regular and contractual employees have increased. However, the Commission has not come out with the details as to how the increase in the employees cost is un-reasonable. The Commission says that considering the past trends normative increase in the cost of contractual employees should have been only 20%. The Commission also says that the increase in the contractual employees has to be set off against SVRS amortization methodology.

50. Considering the pleas of both sides, we are of the opinion that Commission cannot dictate the appellant as to how to get its work done by employees of various categories. Unless the total cost of employees is increased beyond the prudent level, the Commission cannot interfere into the employees cost only to the extent of contractual employees. The appellant cannot be said to have been imprudent by making a remix of the contractual employees and regular employees. The increase of 2.7% only shows the prudence. Mere inflation factor would have increased the employees cost to this extent. Therefore, the Commission needs to allow all the actual expenses towards employees including contractual employees.

51. About disallowing various components of A&G expenses, the Commission says that it has disallowed such expenses partially only, when it has found that the expenses are too high compared to the expenses under the same heads in the previous years. It has approved of 4% increase in the A&G expenses over the approved A&G expenses for the financial year 2004-05. The appellant says that it had sought approval for the increase in A&G expenses but the Commission has not taken into consideration the request of the appellant for increase in the A&G expenses. The Commission, meanwhile, has accepted that Consultancy Charges have to be allowed. So far as expenses for the telephone, postal and telegraph as well as conveyance is concerned, if these have been incurred to serve the consumer the same will have to be taken into account as factors requiring increase in revenue and relevant for fixation of tariff. The Commission has granted an escalation of only 4% but has not provided any reason for presuming that prudence would allow only 4% increase in such expenses. Thus on this score also we find that the Commission will have to allow the expenses claimed by the appellant.

52. The Commission similarly has allowed only 50% of legal charges on the plea that most of the litigation of the Commission has been against the consumers. One of the consumers appearing before us, during the hearing, drew our attention to a news item showing that a Discom has been burdened with cost/compensation for having filed false complaint of theft of electricity. One has to take

note of the fact that all the Discoms are under obligation to reduce AT&C losses, the major part of which is caused by theft of electricity. Fighting a legal battle is a part of effort to check theft. Unless the Commission is able to specifically point out which part of the legal expense is not justified the Commission cannot cut down on such expenses by an arbitrary method. The Commission is liable to make room for legal expenses incurred by the appellant, except for those which the Commission can specifically point out to be imprudent. Accordingly, the Commission may disallow such expenses incurred on such litigations which have been found by Court to be frivolous. It is for the Commission to identify those cases and for this purpose, the appellant can be asked to provide information about litigation which have finally ended against the appellant. Commission is directed accordingly.

53. Service Tax : So far as service tax is concerned, since the same is paid to the Government, no part of it can be disallowed as being imprudent. Hence the same be also allowed.

54. **Reactive Energy Charges :** As mentioned earlier, the Commission had directed in an earlier order that a Discom should make provisions for Capacitor Banks and has presumed that Capacitor Banks would be able to completely control the requirement of Reactive Energy. The Commission obviously has presumed that once the Capacitor Banks are in place there would be no further consumption of Reactive Energy. This of course is not true. Despite adequate provision of capacitors in the system, it may

not be practically possible to always dynamically match the capacitors requirement in a distribution system with varying reactive load. Even after adequate Capacitor Banks are actually installed the Discoms may have to be allowed some minimum amount of the Reactive Energy Charges. It is well within the purview of the Commission to advise the Discoms to provide adequate capacitor banks minimizing the reactive energy withdrawal from the system. If the appellant had installed the Capacitor Banks it would have incurred the cost of installation of the Capacitor Banks in the ARR. The Commission therefore, had information that Capacitor Banks not being installed in sufficient number. It would be unjust to say that simply because the Commission has once made an order, for installation of Capacitor Banks, it can immediately disallow all expenses towards Reactive Energy Charges. The Commission will now have to make the necessary amends in this regard.

55. **Interest :** Apart from reducing interest for the financial year 2004-05, by way of second truing up, the Commission has also granted only Rs.16.16 Crores as against the actual interest expenses totaling Rs.40.2 Crores for the financial year 2005-06. In the Impugned Order, no reason whatsoever has been given for such substantial disallowance. However, in the Counter Affidavit, the Commission has attempted to explain why such amount has been disallowed. According to the Commission, only to the extent of approved capital investment the Discoms have been granted interest. However, it is conceded that actual interest will have to be paid to the financers and to the sundry creditors. The Commission

has advised the Discoms to swap the funding from the high interest option to the low interest option. This direction will have to be followed by the Discoms. However, unless the Commission is able to show that a particular funding could have been immediately changed to a low interest bearing proposition, it would be un-just to deny such interest expenditure to the Discoms. Hence, the Commission will now have to allow the same.

56. In view of the above, we find that the claims of the appellant are justified. The Commission will now, in the process of truing up provide for all the claims mentioned above and comply with the directions of this Tribunal appearing in Paras 40 to 55 above.

Appeal No. 266/07 & 265/07:

57. All the issues in the appeal No. 267 and in appeal No. 266 are common and facts almost similar. It is not necessary to give the details of the facts and figures of appeal No. 266.

58. Appeal No. 265/06 also raises the same issues. However, apart from the issues already decided, an additional issue raised is of interest on regulatory assets or carrying cost. The Commission has applied 9% per annum as carrying cost. The Commission has relied upon the judgment of this Tribunal dated 21.07.2006 in applying 9% as carrying cost. The appellant pleads that the judgment dated 21.07.2006 refers to 9% interest only in a passing manner as the rate of carrying cost was not the subject matter for adjudication before the Tribunal. The appellant in appeal No. 265 seeks carrying

cost at the rate of 10.5%. We have considered the plea. We have also gone through the judgment of 21.07.2006. The Tribunal has consciously allowed carrying cost at the rate of 9% and unless there are good reasons to deviate from the rate we should not revise the same particularly because the judgment is so recent. This claim of the appellant for revision in carrying cost is therefore rejected.

59. Our directions in appeal No. 267/06 be read as directions, mutatis mutandis, in appeal Nos. 265/06 & 266/06.

60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the tariff petition of the utility the Commission has to reasonably anticipate the revenue required by a particular utility and such assessment should be based on practical considerations. It cannot take arbitrary figures of increase over the previous period's expenditure by an arbitrarily chosen percentage of 4% or 20% and leave the actual adjustments to be done in the truing up exercise. The truing up exercise is mentioned to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and

offering to do the needful in the truing up exercise is not prudence. In any case, the method adopted by the Commission has not helped either the consumer or the utilities. It can only be expected that the Commission will properly understand its role in assessing the revenue requirement of the utility and in determination of the tariff in accordance with the policy directions and the relevant law in force.

Pronounced in open court on this day of May, 2007.

(Mrs. Justice Manju Goel)
Judicial Member

(Mr. H. L. Bajaj)
Technical Member