

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 166 of 2012

Dated: 10th October, 2013

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

**Delhi Transco Limited
Shakti Sadan, Kotla road,
New Delhi - 110002**

....Appellant(s)

Versus

**1. Delhi Electricity Regulatory
Commission
Viniamak Bhawan, 'C' Block, Shivalik
Malviya Nagar, New Delhi – 110017**

....Respondent(s)

**2. BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place
New Delhi – 110 019**

**3. BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma, Delhi – 110 092**

4. **Tata Power Delhi Distribution Limited
Grid Sub Station Building
Hudson Lines, Kingsway Camp
Delhi – 110 009**

5. **New Delhi Municipal Council
Town Hall, Parliament Street
New Delhi**

6. **Military Engineers Services
Ministry of Defence
Government of India
New Delhi**

Counsel for the Appellant (s):

**Mr. M G Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri**

Counsel for the Respondents (s):

**Mr. Meet Malhotra, Sr. Adv.
Mr. Ravi S.S. Chauhan
Mr. Prateek Dahiya
Ms. Pallak Singh
Mr. K.M. Verma
Mr. V. Mukherjee
Mr. Avijeet Kr. Lala
Mr. Amit Kapur
Mr. Vishal Anand
Ms. Awantika Manohar
Mr. Sakya S. Chaudhuri
Mr. Anand Kr. Srivastava
Mr. Varun singh
Mr. Gaurav Dudeja**

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by Delhi Transco Ltd. challenging the order dated 13.7.2012 passed by Delhi Electricity Regulatory Commission, hereinafter referred to as 'State Commission', regarding Aggregate Revenue Requirement and applicable tariff for the Appellant for the Multi Year Tariff period 2012-13 to 2014-15.

2. The State Commission is the Respondent no.1. The distribution licensees are the Respondent nos. 2 to 6.
3. The brief facts of the case are as under:
 - a) The Appellant is the Transmission Licensee wholly owned by the Government of NCT of Delhi.

- b) The State Commission on 19.1.2012 notified the Tariff Regulations, 2011 for the period 2012-13 to 2014-15.
- c) The Appellant filed the petition for approval of the ARR and transmission tariff for the FYs 2012-13 to 2014-15 on 2.2.2012.
- d) The State Commission by order dated 13.7.2012 approved the ARR and tariff of the Appellant for the multi-year period 2012-13 to 2014-15.
- e) Aggrieved by certain aspects of the ARR and tariff determined by the State Commission in the impugned order dated 13.7.2012, the Appellant has filed this Appeal.

4. The issues raised in the Appeal are as under:

a) Efficiency factor for Operation and Maintenance ('O&M') expenditure:

The State Commission has determined the efficiency factor of 2%, 3% and 4% for the FY 2012-13, 2013-14 and 2014-15 respectively as against 1% suggested by the Appellant. The efficiency factors have been fixed on an arbitrary basis without any rationale assuming that the Appellant will be able to improve its efficiency and thereby reduce the O&M expenditure by the specified percentage.

b) Employee costs to include arrears due to Sixth Pay Commission recommendation:

The State Commission has not allowed a sum of Rs. 38.15 crores as part of the employees cost for the tariff year 2012-13 even though the amount related to the tariff period 2007-08 onwards became payable and were duly paid/contributed towards employees cost. The State Commission has not dealt with this aspect in the impugned order.

- c) Not considering rebate allowed to Distribution companies:

The State Commission has not considered the rebate allowed to the distribution companies by the Appellant for prompt payment in the revenue requirement of the Appellant on the basis that the Appellant has been allowed interest on working capital. This is contrary to the Transmission Tariff Regulations, 2011.

d) Adjusting surplus fund for prior period:

The State Commission has not implemented the directions of this Tribunal to cover the substantial deficit in the hands of the Appellant and instead adjusted the alleged surplus against the Appellant while not allowing the deficit directed to be given effect by the Tribunal in favour of the Appellant by judgments in Appeal no. 133 of 2007, 28 of 2008 and 184 of 2011.

e) Wrong opening loan as on 1.4.2007:

The State Commission has wrongly assumed an opening loan of Rs. 591.68 crores as on 1.4.2007 as against the approved loan of Rs. 532.48 crores as provided by the State Commission in the tariff order for the year 2006-07. There is no basis or rationale for the State Commission to consider higher opening loan as on 1.4.2007 resulting in a

higher debt equity ratio. By taking the correct loan as on 1.4.2007, the total debt of the Appellant would be lower with higher equity. Thus, the Appellant has been deprived of the constant return on equity portion of the capital for the life of the asset at a higher rate as compared to debt.

5. On the above issues the State Commission and the Respondent nos. 2, 3 and 4 have filed replies.

6. We have heard Mrs. Swapna Seshadri, Learned Counsel for the Appellant and Mr. Meet Malhotra, Learned Senior Counsel representing the State Commission. They have also filed written submissions. Learned Counsel for the Respondent no.4 has also filed written submissions.

7. On the basis of the contentions of the parties, the following questions would arise for our consideration.
- i) Whether the State Commission is justified in determining the efficiency factor at the rate of 2%, 3% and 4% for the FYs 2012-13, 2013-14 and 2014-15 respectively as against 1% suggested by the Appellant?
 - ii) Whether the State Commission has erred in not considering the expenditure incurred by the Appellant on account of the arrears of the Sixth Pay Commission in the employees cost?
 - iii) Whether the State Commission is correct in not allowing the rebate provided by the Appellant to the distribution licensees for prompt payment of bills in the ARR of the Appellant?

iv) Whether the State Commission is justified in not considering the substantial deficit in the heads of the Appellant in view of non-implementation of the judgment of the Tribunal while adjusting the alleged surplus in the ARR?

v) Whether the State Commission has wrongly considered a higher debt to the account of the Appellant as on 1.4.2007 resulting in determination of incorrect debt equity ratio?

8. **Let us examine the first issue regarding efficiency factor.**

9. According to Ms. Swapna Seshadri, Learned Counsel for the Appellant, the State Commission has merely compared the employees' expenses of the Appellant with that of other transmission licensees and stated that

since the O&M is much higher, the efficiency factor of 2%, 3% and 4% must be achieved by the Appellant. There is no scientific basis of the above determination of efficiency factor. The State Commission ought to have determined the achievable parameters, identified the areas where there can be any improvement in efficiency by prudent practices and then determined the efficiency factor based on such benchmarking. The Appellant cannot be compared to other transmission licensee as Appellant is working in a highly concentrated area with many sub-stations for limited circuit kilometers of transmission lines. Further many sub-stations of the Appellant are old and are in the process of upgradation in a phased manner. In the circumstances it is not possible to achieve performance parameters higher to get more efficiency without significant capital expenditure. She referred to the

judgment dated 29.9.2010 of the Tribunal in Appeal no. 28 of 2010 to press her point.

10. Shri Meet Malhotra, Learned Senior Counsel supporting the findings of the State Commission argued that benchmarking with comparable entities was done on both parameters of gross fixed asset and circuit kilometers and in both parameters the Appellant was most inefficient and that too by significant margin. In fact the Appellant itself had proposed efficiency factor of 1% year on year. The efficiency factor decided by the State Commission can in no way be described as arbitrary or unfair keeping in view the high margin by which the Appellant is inefficient. The Appellant also knows where to cut non-productive effort or expenses and is best left to its own devices as to how to become more efficient. According to Mr. Meet Malhotra, the imposition of efficiency factor of 2%, 3% and 4% after

benchmarking has been upheld in Appeal nos. 28 of 2008 and 52 of 2008 by this Tribunal in case of distribution licensee.

10. Let us first examine the MYT Regulations, 2011 for transmission tariff. The relevant portion of the Tariff Regulation is reproduced below:

“7 O&M expenses permissible towards ARR for each year of the Control Period shall be determined using the formula detailed below:

(i) $O\&M_n = (R\&M_n + EMP_n + A\&G_n) * (1 - X_n)$

(ii) *Where,*

$R\&M_n = K * GFA_{n-1} :$

$EMP_n + A\&G_n = (EMP_{n-1} + A\&G_{n-1}) * (INDX):$ and

$INDX = 0.55 * CPI + 0.45 * WPI$

EMP_n - *Employee Costs of the Licensee for the n^{th} year;*

$A\&G_n$ - *Administrative and General Costs of the Licensee for the n^{th} year:*

$R\&M_n$ - *Repair and Maintenance Costs of the Licensee for the n^{th} year:*

X_n is an efficiency factor for nth year. Value of X_n shall be determined by the Commission in the MYT Tariff order based on Licensee's filing, benchmarking, approved cost by the Commission in past and any other factor the Commission feels appropriate."

11. Thus, the O&M expenses are reduced by applying efficiency factor in the specified formula for determination of O&M expenses. The efficiency factor has to be determined by the Commission based on Licensee's filing, benchmarking, approved cost by the Commission in the past and any other factor that the Commission feels appropriate.

12. Let us now examine how the State Commission has dealt with the issue in the impugned order.

13. We find that the State Commission in the impugned order has benchmarked the O&M expenses of the Appellant against the O&M expenses of the

transmission licensees in other States and has observed that the O&M expenses of the Appellant are higher than other transmission licensees. The State Commission has compared the O&M expenses as a percentage of opening Gross Fixed Assets ('GFA') and O&M expenses per circuit KM of transmission line in respect of the Appellant, transmission business of Tata Power Company in Mumbai, transmission business of R-Infra in Mumbai, Maharashtra State's transmission licensee, Gujarat State's transmission licensee and Karnataka State's transmission licensee for the FY 2010-11. The State Commission held that it expects the Appellant to improve its performance considering the significant investment made during the control period and decided the efficiency factor as 2%, 3% and 4% for FY 2012-13, 2013-14 and 2014-15 respectively.

14. We find that the State Commission has compared the O&M expenses with transmission licensees operating in a metropolitan city as also in States. It is seen that the O&M expenses in terms of percentage of GFA as well as expenses per circuit KM in respect of the Appellant are much higher by a large margin than other transmission utilities. We find that the State Commission has fixed the efficiency factor after benchmarking the O&M expenses as per the Tariff Regulations. We do not find any infirmity in the findings of the State Commission.

15. The Appellant has relied upon the findings of the Tribunal in judgment dated 29.9.2010 in Appeal no. 28 of 2008 in the matter of Delhi Transco Ltd. Vs Delhi Electricity Regulatory Commission & others.

16. In the above case the Delhi Commission had fixed the efficiency factor arbitrarily without any benchmarking or analysis. The Tribunal in Appeal no. 28 of 2008 held as under:

“The only reason given by the State Commission is that the Appellant is expected to improve its performance. The very nature of operation and maintenance expenses require higher expenditure year after year on account of inflation. After providing for escalation in operation and maintenance expenses due to inflation, these are reduced again by application of ad-hoc efficiency factor. The MYT Regulations do provide for reduction of O&M expenditure by application of efficiency factor. However, the efficiency factor has to be determined by the Commission based on licensee’s filing, benchmarking, approved cost by the Commission in the past and any other factor that Commission feels appropriate.”

17. In the present case the State Commission determined the efficiency factor after benchmarking and finding that the O&M expenditure of the Appellant was much higher than other transmission licensees both in terms of percentage of GFA as well as expenses per circuit KM

of transmission line. The O&M expenses have been compared with the transmission licensees operating in a metropolitan city and in the States. Thus, the finding of the Tribunal in the judgment dated 29.9.2010 in Appeal no. 28 of 2008 will not be of any help to the Appellant.

18. Learned Senior Counsel for the State Commission has referred to judgment of the Tribunal dated 31.5.2011 in Appeal no. 52 of 2008 in the matter of New Delhi Power Ltd. Vs Delhi Electricity Regulatory Commission & others. In this judgment the Tribunal upheld efficiency factors of 2%, 3% and 4% fixed by the Delhi Commission in respect of one of the distribution licensees as the State Commission had decided the efficiency factors after comparing the O&M expenses of the Appellant with similar urban distribution companies operating in other States and finding the expenses of

the Appellant on higher side. In that case also the Appellant distribution licensee had relied on the judgment dated 24.9.2010 in Appeal no. 28 of 2008 which is now being relied by the Appellant transmission licensee in the present Appeal. In Appeal no. 52 of 2008, the Tribunal differentiated the findings in Appeal no. 28 of 2008 where the State Commission had decided the efficiency factor arbitrarily without any benchmarking or analysis and identification of areas where efficiency improvement was desired to be carried out. Thus, the findings of the Tribunal in Appeal no. 52 of 2008 will be relevant to the present Appeal.

19. In view of above, this issue is decided against the Appellant.

20. **The second issue is regarding arrears of Sixth Pay Commission.**

21. According to the Appellant the State Commission failed to consider the expenses incurred on account of payment of arrears against the Sixth Pay Commission Report in the employees cost. The Appellant had claimed the amount of Rs. 38.15 crores on this account in the ARR for FY 2012-13 but the State Commission had not dealt with this aspect at all.

22. Learned Senior Counsel for the State Commission during the hearing stated that the State Commission in its true up order dated 31.7.2013 had allowed the actual arrear and, therefore, the issue no longer survived. Learned Counsel for the Appellant has also confirmed the same after verification.

23. We feel that the State Commission should have allowed the expenses incurred on arrears based on the Sixth

Pay Commission's recommendations to the Appellant in the impugned order. However, since the same have been allowed in the true up in the State Commission's order dated 31.7.2013, the issue would not survive.

24. The third issue is regarding the rebate allowed to the distribution licensees.

25. According to the Learned Counsel for the Appellant, the Regulations provide for interest on working capital as well as rebate for prompt payment without any reference to any adjustment on account of interest allowed towards rebate. Thus, the action of the State Commission is contrary to the Tariff Regulations, 2011.

26. According to Shri Meet Malhotra, Learned Senior Counsel for the State Commission, the rebate on transmission charge is provided by the Appellant only

on early payment of the bill by the distribution licensee and the early payment of bill goes towards reducing the working capital requirement of the Appellant.

27. According to the Respondent no.4, the interest on working capital based on 2 months receivables has already been built into the tariff of the Appellant and consequently any rebate that the Appellant provides for payment prior to 2 months needs to be out of the interest allowed on working capital to the Appellant as part of tariff. In the event of Distribution Company not paying the transmission charges to the Appellant according to the due date, then these 2 months receivables of the Appellant would remain blocked in the working capital for which it has been allowed interest. In the event the distribution companies pre-pay the bill before the due date (2 months), then such

blocked receivables would reduce thereby resulting in saving in form of reduced interest cost.

28. Let us now examine the findings of the State Commission in the impugned order. The findings of the State Commission on this issue as given in paragraphs 3.127 to 3.135 of the impugned order are summarised as under:

- i) As per the arrangement between the transmission and distribution licensee for payment of bills of transmission charges through Letter of Credit on presentation, a rebate of 2% is provided by the transmission licensee to the distribution licensee. If the payment is made by any other mode but within the period of one month of presentation of bills by transmission licensee, a rebate of 1% is provided.

- ii) The early payment of bills goes towards reducing the working capital requirement of the licensee and the interest burden arising from it.

- iii) Working capital is determined on normative basis and assumes that the beneficiary shall pay the bill only after 2 months of raising the bill. Accordingly, the working capital includes receivables for two months towards transmission tariff.

- iv) Thus, while the licensee provides the rebate it enjoys the benefit arising out of reduction in requirement of actual working capital vis-à-vis the normative working capital allowed in determination of transmission tariff.

- v) The State Commission has explained the same by an example to establish its point.

vi) In this way the State Commission has come to the conclusion that there is no requirement for inclusion of rebate for timely payment of bill as a separate expense in the ARR.

29. We are in agreement with the above findings of the State Commission. The working capital on which interest is allowed to the Appellant includes 2 months receivables. The Regulations provide for payment of bill raised by the transmission licensee within 60 days from the date of billing without any surcharge. If the payment is made to the transmission licensee by the distribution licensee through LC on presentation a rebate of 2% is allowed. If the payment is made by any other mode but within a period of one month of presentation of bill, a rebate of 1% is allowed by the transmission licensee. Thus, prompt payment made by the distribution licensee within one month of presentation of bill saves

the interest cost on working capital of the transmission licensee. Further, Sub Regulation 4 under Regulation A 5 of 2011 Tariff Regulations stipulates the components of transmission tariff which rebate is not indicated as a component of tariff.

30. We have also examined the Tariff Regulations, 2011 and find that the same do not indicate inclusion of rebate allowed by the Transmission Licensee to its beneficiaries for prompt payment in the components of the ARR of the transmission business. Thus, there is no force in the contention of the Appellant that the findings of the State Commission are contrary to the Regulations. In our opinion, the findings of the State Commission are consistent with the Tariff Regulations.

31. Learned Counsel for the Appellant raised a new issue that even considering the rebate to be as part of working capital requirements, the distribution licensees

also deduct 10% of the total billed amount to be paid as Tax Deducted at Source (TDS). The adjustment/benefit of the TDS is available to the Appellant much after the financial year is over and when the tax filing and assessment of the Appellant is due. In the circumstances, the Appellant is further deprived of 10% of the amount receivable during the year which does not get covered in the working capital requirements of the Appellant. This aspect was not raised by the Appellant before the State Commission and is being raised before the Tribunal. Even though it is not permissible to raise a fresh issue which was in the knowledge of the Appellant at the time of proceedings before the State Commission, we would answer the same.

32. We do not find any force in the above contention of the Appellant. Firstly, the ARR of the Appellant includes a

component of Income Tax which is calculated at the applicable rate on the Return on Equity. Thus, the income tax is also recovered in the transmission tariff in the monthly bills by the Appellant during the financial year. Secondly, the working capital has been allowed as per the Regulations. Thirdly, the rebate is not related to TDS which is being deducted as per the Income Tax Act, 1961.

33. In view of above we reject the contentions of the Appellant and the issue of rebate.

34. **The fourth issue is regarding adjustment of surplus fund for prior period.**

35. According to the Learned Counsel for the Appellant the State Commission has wrongly assumed the prior period income of Rs. 6.39 crores and Rs. 3.26 crores in

favour of the Respondent no.2 and 3 respectively. The power purchase rebate is not a surplus in the hands of the Appellant and on the other hand there is substantial deficit in favour of the Appellant which the State Commission has refused to pass on to the Appellant contrary to the directions of the Tribunal on DVB arrears issue. In the circumstances, the question of providing any refund to the distribution companies and any purported surplus for the period 2006-07 does not arise. In this regard Ms. Swapna Seshadri has referred to judgment of the Tribunal in Appeal nos. 133 of 2007, 28 of 2008 and 184 of 2011.

36. According to the Learned Senior Counsel for the Appellant, the State Commission has allowed DVB past arrears in compliance with the directions of the Tribunal and also allowed Rs. 196.17 crores for FY 2006-07 with carrying cost to the Appellant in compliance of the

directions of the Tribunal in Appeal no. 184 of 2011 and therefore this issue would not survive.

37. As regards the surplus passed on to the distribution licensees, the contention of the Appellant is that the State Commission should have considered the debit entry of Rs. 2 crores during the same period as per the audited accounts and in the circumstances should have allowed net amount of Rs. 7.35 crores after deducting Rs. 2 crores.

38. According to the Learned Senior Counsel for the State Commission the Appellant was not able to explain the Rs. 2 crores entry to their accounts, therefore, the set off claimed was disallowed.

39. We find that the State Commission has already given effect to the directions of the Tribunal with regard to

DVB arrears in the true up order dated 31.7.2013. Therefore, the main issue raised by the Appellant would not survive. As regards refund of Power Purchase Rebate to BRPL and BYPL for Rs. 6.39 crores and Rs. 3.26 crores respectively, the State Commission has given a detailed reasoned finding in paragraphs 4.11 to 4.17 of the impugned order. The only point raised by the Appellant on this refund is that the same ought to have been given effect to only after considering the debit entry of Rs. 2 crores during the same period as per the audit accounts. According to Learned Senior Counsel for the State Commission the Appellant was not able to explain the Rs. 2 crores entry in their accounts and, therefore, the set off claimed was disallowed. The Appellant has also not furnished any document to show that the requisite explanation was given to the State Commission.

40. In view of above, this issue would not survive after implementation of the directions of the Tribunal regarding DVB arrears, etc., in the true up order dated 31.7.2013.

41. The fifth issue is regarding consideration of opening loan as on 1.4.2007.

42. According to the Learned Counsel for the Appellant, the State Commission has wrongly assumed an opening loan of Rs. 595.68 crores as on 1.4.2007 as against approved loan of Rs. 532.48 crores as provided by the State Commission in the tariff order for the year 2006-07. According to the Learned Senior Counsel for the State Commission, the State Commission has taken gross value of debt for calculation of debt equity ratio for the purpose of calculation of RoCE according to the MYT Regulations, 2011.

43. Let us examine the Regulations. The third proviso to Regulation 14 provides that debt to equity ratio for the assets capitalised till 1.4.2012 (other than assets covered under Transfer Scheme) shall be considered as per the debt and equity approved by the Commission at the time of capitalization.
44. The State Commission has noted in para 3.112 of the tariff of the impugned order that as per the transfer scheme, opening equity and loan for the Appellant were 180 crores and Rs. 270 crores respectively. Further, the Commission had approved a total loan amount of Rs. 321.68 crores between FY 2002-03 and FY 2006-07. Accordingly, opening loan of FY 2007-08 has been taken as Rs. 591.68 crores.

45. The Learned Senior Counsel for the State Commission has given the following calculation of the gross loan.

<i>(Rs Crore)</i>	<i>FY03</i>	<i>FY04</i>	<i>FY05</i>	<i>FY06</i>	<i>FY07</i>
<i>Gross Loan</i>					
<i>Opening</i>	<i>270.00*</i>	<i>301.13</i>	<i>395.11</i>	<i>484.72</i>	<i>560.00</i>
<i>Addition**</i>	<i>33.13</i>	<i>91.98</i>	<i>89.61</i>	<i>75.28</i>	<i>31.68</i>
<i>Closing</i>	<i>303.13</i>	<i>395.11</i>	<i>484.72</i>	<i>560.00</i>	<i>591.68</i>

**as per the transfer scheme*

***totals to Rs. 321.86 Cr between FY03 & FY07*

46. In view of above, we do not find any infirmity in the order of the State Commission.

46. Summary of our findings

(i) Efficiency factor:

We find that the State Commission has fixed the efficiency norms after benchmarking as per the Tariff Regulations.

(ii) Arrears of Sixth Pay commission:

The State Commission has since allowed the actual arrears in the true up order dated 31.7.2013 and therefore this issue would not survive.

(iii) Rebate allowed to distribution licensees.

The Appellant is not entitled to claim the amount of rebate given to the distribution licensees for prompt payment for inclusion in its ARR and transmission tariff.

(iv) Adjustment of surplus fund for prior period:

In view of the State Commission allowing the DVB arrears etc. as per the directions of the Tribunal in the true up order dated 31.7.2013, this issue would not survive.

(v) The opening loan as on 1.4.2007:

**We do not find any infirmity in the order of the
State Commission.**

**68. In view of above, the Appeal is dismissed. However,
there is no order as to costs.**

**69. Pronounced in the open court on this 10th day of
October, 2013.**

**(Justice Surendra Kumar)
Judicial Member**

**(Rakesh Nath)
Technical Member**

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REPORTABLE/NON-REPORTABLE

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