# Appellate Tribunal for Electricity
## (Appellate Jurisdiction)

**Dated: 28th November, 2014**

**Present: HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM, CHAIRPERSON**
**HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

## APPEAL NO.61 of 2012

**In the Matter of:**
**BSES Rajdhani Power Limited**
**BSES Bhawan, Nehru Palace**
**New Delhi** **..... Appellant(s)**

**Versus**

**Delhi Electricity Regulatory Commission**
**Viniyamak Bhawan,**
**C Block, Shivalik, Malviya Nagar**
**New Delhi - 110017.**

**….. Respondent(s)**

## APPEAL NO.62 of 2012

**In the Matter of:**
**BSES Yamuna Power Limited**
**Shakti Kiran Building,**
**Karkardooma,** New Delhi- 110092 …. **Appellant**

**Versus**

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

Counsel for the Appellant : Mr. Amit Kapur
Mr. Vishal Anand
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Counsel for the Respondent: Mr. Pradeep Mishra
Ms. Swapna Seshadri, Amicus Curiae
Mr. Manoj Kr. Sharma
Mr. Suraj Singh

## J U D G M E NT

**RAKESH NATH, TECHNICAL MEMBER**

**1.** These Appeals have been filed by BSES Rajdhani Power Limited (BRPL) and BSES Yamuna Power Limited (BYPL) challenging the two Separate Impugned Orders dated 26.8.2011 passed by the Delhi Electricity Regulatory Commission (“ ***Commission”)*** in true up for FY 2008-09 & FY 2009-10 and Aggregate Revenue Requirement of the Appellants i.e. BRPL and BYPL for FY 2011-12.

**2.** In these Appeals the Appellants have raised several issues challenging the Impugned Orders dated 26.8.2012 passed by the Commission. The issues raised in these Appeals being similar, the Appeals have been taken up together and are being disposed of by this common judgment. We are taking Appeal No. 61 of 2012 as lead Appeal. The decisions taken in this Appeal shall also apply to the Appeal no. 62 of 2012.

**3.** The Appellant has categorised the issues in three groups viz.;

(a) 11 claims related to non-implementation of the judgments passed by this Tribunal.

(b) 4 claims relating to disallowances contrary to the applicable MYT Regulations.

(c) 22 claims of wrongful disallowances of legitimate claims.

**4.** We shall now deal with each of the issues raised by the Appellant in these Appeals one by one. The first set of issues is related to non-implementation of this Tribunal's judgments. The issues raised under this group are:

**A Issues arising out of non-implementation of judgments of this Tribunal**

1A: Interest on Working Capital

1B: Rate of carrying cost on Revenue Gap

2: Rebate on Power Purchase costs.

3: Terminal benefit payments to VRS optee employees

4: Comparable benefits of 6th Pay Commission to Non-FRSR employees

5: Capital Expenditure

6 & 7: Repair and Maintenance (R&M) and Administrative & General (A&G) Expenses

8: Truing up for the period 1.4.2007 to 28.2.2008

9: Review of distribution losses for FY 2008-2011

10: Amount paid to DTL

11: Truing up of Interest rates for loans

**B Issues arising out of Violation of Commission's own MYT Regulations**

12: No definitive roadmap for recovery of Regulatory Assets

13: Reduction of AT&C losses by 10% in Zones having losses more than 30%

14: Change in methodology in computation of AT&C losses.

15: Change in computation of depreciation.

**C Issues arising out of other wrongful disallowances**

16: Fixation of AT&C Loss targets

17: Disallowances of AT&C losses while truing up for 2008-09

18: Disallownace due to lack of verification of kWh figures for FY 2009-10

19: High rate for sale of surplus power

20: Arrears due to revised order of CERC for NTPC plants not considered.

21: Carrying costs for reactive energy charges

22: Computation of WACC

23: Disallowance of salary for FRSR structure

24: Disallowance of cost due to new initiatives

25: Disallowance of Audit Fees

26: Disallowance of tendering costs

27: Disallowance of incremental bill printing expenses

28: Higher PLF for Gas Stations

29: Disallowance of interest on consumer security deposite incurred by the Appellant on consumer security deposit retained by DPCL

30; Efficiency Factor

31: Type Errors/ Wrong Summations

32: Efficiency factor non-consideration of power purchase price adjustment

33: Efficiency factor applied on Arrears of employees expenses pertaining to FY 2005-06 and FY 2006-07

34: Disallowance of fringe benefit Tax

35: Efficiency factor on pension payments not removed

**5.** The Appellants have raised the issue of non-implementation of this Tribunal's various judgments in a petitions being No. OP1 and OP2 of 2012 under Section 121 of the 2003 Act. This Tribunal has expressed serious concern about non-implementation of the judgments rendered by the Tribunal in various Appeals. The relevant extracts of the Tribunal's Full Bench judgment in OP1 & OP2 of 2012 are reproduced below:

"…..

*29. Any action or omission by a subordinate authority which violates or refuses to give effect to a direction given by a superior authority, has been repeatedly held to be a denial of justice which is destructive of basic principles in the administration of justice. It is well settled law that the findings and directions of Appellate Authority are binding on subordinate authorities, which should be implemented effectively and scrupulously unless the same has been stayed or struck down by the Appellate Forum.*

*30. This aspect has been dealt by the Hon'ble Supreme Court in various decisions in detail. Those decisions are as under:*

*(a) **Bhopal Sugar Industries Ltd. v. Income Tax Officer, Bhopal**: AIR 1961 SC 182;*

(b) ***Shri Baradakant Mishra Vs. Bhimsen Dixit:*** *(1973) 1 SCC 446 ;*

(c) ***Smt. Kausalya Devi Bogra & Ors. Vs Land Acquisition Officer:*** *(1984) 2 SCC 324;*

(d) ***RBF Rig Corporation, Mumbai Vs. Commissioner of Customs (Imports), Mumbai:*** *(2011) 3 SCC 573;*

(e) ***Maninderjit Singh Bitta Vs UOI****: (2011) 11 SCC 315*

**6.** We shall now consider the issues raised by the Appellant in the light of above judgment.

**7.** **The first issue is related to Interest on Working Capital and Regulatory Assets.** According to the Appellant the Delhi Commission has not implemented the directions of this Tribunal in judgment reported as ***2010 ELR (APTEL) 0891*** in Appeal No. 153 of 2009 related to debt/ equity ratio of 70:30 for financing of the working capital during first control period comprising of FY 2007-08 to FY 2011-12. On the 70% debt portion, the carrying cost has to be allowed at the prevalent market rate considering SBI PLR and on 30% equity portion, the rate of return on equity as specified by the Delhi Commission in the MYT Regulation, 2007 has to be allowed.

**8.** The Commission in its reply has submitted that the Commission in its Order dated 31.07.2013 has implemented the directions of this Tribunal regarding apportionment of carrying cost in debt

equity ratio of 70:30. Earlier working capital used to be funded from depreciation, hence the change in working capital has been capitalised in the ratio of 70:30 as per directions of this Tribunal.

**9.** However, the Appellants have reiterated in written submission that the Respondent has still not implemented the direction of this Tribunal to consider the working capital in the Debt: Equity ratio of 70:30.

**10.** We are not inclined to involve ourselves in to fact finding and direct the Commission to implement our directions in letter and spirit.

**11.** **Second issue is related to relief claimed by the Appellant in Power purchase.** The Appellants has submitted that the Commission has implemented the directions of the Tribunal and accordingly the Appellants have not pressed this point.

**12.** **The Third Issue is related to terminal benefits payments to VRS optee employees.** The Respondent Commission has submitted that the Commission in subsequent Order has observed that pending decision of Actuarial Tribunal the ad hoc payment will be made by the Appellant and the same will be adjusted after the decision of Actuarial Tribunal.

**13.** The same issue had come up before the Tribunal in Appeal No. 14 of 2012 and this Tribunal in its judgment dated 29.11.2013 has held as under:

> *"59. In view of specific assertions and undertaking referred to above made by the Delhi Commission, the Appellant is directed to give all the details along with the documentary proof and the same shall be considered and appropriate orders will be issued"*

**14.** Similarly, in view of specific assertion made by the Delhi Commission in the subsequent order, the Delhi Commission is directed to allow the payments made by the Appellant to VRS optee employees on ad hoc basis and adjust the same after the decision of the Acturial Tribunal.

**15.** **The fourth issue is related to Comparable pay to non-FRSR Employees**. The issue is regarding benefit of 6th Pay Commission recommendations to Non-FRSR employees of the licensee to reduce the disparity between the salary of such employees vis-avis salary of FRSR (DVB) employees. This issue had come before this Tribunal in Appeal No. 14 of 2012. The findings of this Tribunal in this Appeal are given below:

> *"167 Employee expense is a controllable item under the MYT Regulations. As discussed under Issue No. 7 above, Under MYT Regulations, controllable expenses are allowed on normative basis. Employees expenses are controllable under the Regulations and accordingly allowed on normative basis. There are many sub-parameters under the head R&M expenses. It cannot be the case that one of*

*the parameters, where the Appellant has suffered loss, is taken on actual basis and other parameters are taken on normative basis.*

168 *It is interesting to note that the Appellant has raised the same very issue in Appeal No..____ of 2013 in the matter of NDPL Vs CERC and others. . In that case, CERC has allowed increase in employee's expanses of NHPC due to pay revision of NHPC's own employees and CISF personnel etc. The Appellant has contended exactly the same as the Commission has held in the present case before us, i.e. under normative tariff regime, one parameter cannot be taken on actual basis. The Appellant cannot be allowed to probate and approbate simultaneously.*

169 *The main ground for demand of increase in the salary for non-FRSR employees is on account of maintaining parity among employees categories of FRSR and non-FRSR employees. According to the Appellant, an increase of approximately 40%-60% has been allowed to the FRSR employees by the Appellant on account of 6$^{th}$ Pay Commission recommendations. In view of the above increase allowed to FRSR employees and in order to maintain relative parity in salary between the FRSR structure employees and the non-FRSR structure employees post wage revision, the Appellant was constrained to allow an additional 10% interim increase (over and above normative increase) to non FRSR employees, as to as to avoid any possible industrial relation issues between employee that such categorization of employees within an organization may lead to. On this issue of parity, the Appellant was asked to submit category wise annual emoluments paid to FRSR employees and non-FRSR employees before and after implementation of the recommendations of the 6$^{th}$ Pay Commission. The Appellant did not submit this information. However, from one document submitted during the proceedings, it is*

*gathered that the Appellant is paying on an average a package of Rs 12 Lac per non-FRSR employee which appears to be high in comparison with the FRSR employees even after implementation of 6th Pay Commission.*

*170 Thus, the issue of parity and industrial relationship is misplaced and is liable to be rejected."*

**16.** The Appellants in their reply has tried to distinguish the facts of present case with that of those in Appeal No. 14 of 2012 by submitting that in present case the total emoluments of non-FRSR employees of the Appellant had been lesser than the emoluments of the FRSR employees even before implementation of recommendations of the Sixth Pay Commission, and denial of the benefits of the Pay Commission would further increase the gap and would affect industrial relationships. It is noted that the Appellants have submitted data in their written submissions pertains only to non-executive class of employees and that too for the period after year 2006 i.e. after implementation of pay commission recommendations. The Appellants have not furnished any data for executives and for all employees prior to 2006. In the absence of the data it is not possible to say that facts of this case are different from that of Appeal No. 14 of 2012.

**17.** In the light of above discussions the findings of this Tribunal in Appeal No. 14 of 2012 applies to the these appeals also and accordingly the issue is decided against the Appellants.

18. **The Fifth issue is regarding Capital Expenditure** and the Appellants have not pressed for the Same.

19. **Sixth and Seventh issues are related to R&M and A&G expenses for FY 2004-05 and 2005-06**. According to the Appellants the Delhi Commission has not implemented the directions of Tribunal in judgment reported as ***2009 ELR (APTEL) 0880*** in Appeal No. 36 of 2008, wherein this Tribunal had directed the Commission to approve the R&M and A&G expenses for FY 2004-05 and FY 2005-06 after prudence check.

20. The Commission in its reply has submitted that pursuant to decision of this Tribunal, the Commission has considered the R&M and A&G expenses in respect of the Appellant for the periods from 2004-05 to 2006-07. The Commission on the basis of benchmarking approach as carried for finalizing MYT Regulations for FY 2012-15 has decided R&M expenses as well as A&G expenses in respect of Appellant in its meeting held on 27.11.2013. The said decision will be given effect in the next tariff order.

21. The Appellants in their written submission has contested the claim of the Commission that these expenses would be trued up on the benchmarking approach as per MYT Regulations for FY 2012-15 and has submitted that the R&M expenses and A&G expenses relates to period FY 2004-05 and FY 2006-07 which falls under Policy Direction Period. The policy directions dated

22.11.2001 as amended on 31.05.2002 issued by Delhi Government assured to the Discoms to recover all reasonable expenses with 16% return on equity from FYs 2002-03 to 2006-07. Therefore, allowing the expenses on benchmark basis is contrary to the direction of this Hon'ble Tribunal. Benchmarking is required to be done when expenses are being allowed on normative. Therefore, there is no question benchmarking for the R&M and/or A&G expenses for policy direction period, as the same are required to be allowed as per actuals, subject to prudence check by the Commission.

**22.** We agree with the contentions made by the Appellants that true up for the policy direction period cannot be carried out on the basis of benchmarking concept muted in MYT Regulations. The Commission is directed to implement the direction of this Tribunal in true letter and spirit and do not involve in inventing any new methodology to circumvent to such directions. The issue is decided in favour of the Appellants.

**23.** **The eighth issue is related to Truing up the financial for the period 1.4.2007 to 28.2.2008**. The Appellants have submitted that the Delhi Commission has not implemented the directions of the Tribunal in judgment reported as ***2011 ELR (APTEL) 1196*** in Appeal No. 142 & 147 of 2009, wherein this Tribunal directed the Delhi Commission to true up the financials from 01.04.2007 to 28.02.2008.

**24.** The Commission in its reply has submitted that the Commission required audited accounts and the Appellant only on 25.06.2013 has submitted those accounts, hence the same will be considered and necessary true-up will be made.

**25.** In the light of categorical submission that required true up would be made, the Commission is directed to carry out the same in its next tariff exercise and allow the differential amount, if any, along with carrying costs.

**26.** **The Ninth issue is related to review of distribution loss for the first control period.** The Appellant has claimed that the Delhi Commission has not implemented the directions of the Tribunal in judgment reported as ***2009 ELR (APTEL) 0880*** in Appeal No. 36 of 2008, wherein this Tribunal has directed the Delhi Commission to amend distribution loss target for first control period.

**27.** In reply to the above allegation the Commission has submitted that other licensees have not only achieved but overachieved the target, hence the same should not be reviewed. Otherwise also without amending the regulations the Commission cannot review the target fixed for AT&C Losses.

**28.** The Appellants have Submitted that the Delhi Commission has acted contrary to the findings of this Tribunal in BRPL Vs

DERC: 2009 ELR (APTEL) 880 wherein this Tribunal directed, as under:-

*"32) There is however, no bar on the Commission reconsidering the target that has been set and amend the relevant Regulation, if necessary. The target for MYT period needs to be set on the basis of losses at the beginning of the MYT period and not on the basis of loss level on the date of privatization when the policy target period began. The consequences of failure or success in reaching the loss reduction target have already been borne by the licensee. Hence reference to the initial level of loss at the time of privatization is not necessary.* ***The Commission may itself consider the plea of any amendment in the target set in this regard in case the appellant makes out a case. Therefore, we direct that the appellant may make an appropriate representation to the Commission in this regard within one month hereof and that if a representation is so made the Commission shall dispose it of in two months."***

**29.** The Appellants have submitted that in pursuance to above directions of this Tribunal they had submitted a petition with full details to the Commission. The Commission did not admit the petition for 54 months and after more than 56 from filing of the Petition, Ld. Delhi Commission by Order dated 17.07.2014 dismissed the Petition and ignored to give effect to judgment of this Tribunal.

**30.** The Appellants' have contended that they had not asked for amendment to the MYT Regulations but had only asked for relaxation in the Regulation in as much as modification in the loss reduction trajectory so as to achieve the targeted loss of

17% by 2010-11as indicated in a Table in the written submission reproduced below:

| *Proposed Reduction of Loss Levels* | *FY 08* | *FY 09* | *FY 10* | *FY 11* |
|---|---|---|---|---|
| *As per MYT Order dated 22.02.2008* | | | | |
| *AT&C loss Reduction Target* | *26.69%* | *23.46%* | *20.23%* | *17.00%* |
| *Distribution Loss* | *25.95%* | *22.88%* | *19.83%* | *16.58%* |
| *Collection Efficiency* | *99.00%* | *99.25%* | *99.50%* | *99.50%* |
| *New Proposal* | | | | |
| *AT&C loss Reduction Target* | *29.67%* | *26.66%* | *21.74%* | *17.00%* |
| *Distribution Loss* | *30.87%* | *26.11%* | *21.34%* | *16.58%* |
| *Collection Efficiency* | *101.73%* | *99.25%* | *99.50%* | *99.50%* |

**31.** In view of submission of the Appellants, the Commission is directed to reconsider the matter with in three months from date of issuance of the judgment and pass a reasoned order. The issue is decided accordingly.

**32.** **The Tenth issue before us for consideration is related to payments made to DTL.** The Appellant has not pressed this issue as the Delhi Commission has rectified the same in subsequent Order dated 13.07.2012.

**33.** **The Eleventh issue is regarding truing up of interest rates of loans.**

**34.** The Appellants have submitted that the Delhi Commission has not implemented the directions of the Tribunal in judgment reported as ***2009 ELR (APTEL) 0880*** in Appeal No. 36 of 2008, wherein this Tribunal had directed the Delhi Commission to true

up the interest rates of loans in case SBI PLR rate deviates by more than 1%.

**35.** The Learned Counsel for the Commission vehemently denied the allegation made by the Appellants and submitted the gist of his detailed submissions is that the deviation in SBI PLR Rate from FY 2007-08 to 2010-11 has not been more than 1%, hence, the rate of interest is not to be revised. Further, True Up of RoCE has to be done at the end of Control Period.

***36.*** Per contra the learned Appellant for the Appellants reiterated its stand that the Delhi Commission had not implemented the directions of the Tribunal and made the following submissions:

***i.*** The Delhi Commission had undertaken before this Tribunal in Appeal No. 36 of 2008, as under:

*"115) Further, the Commission has at the very outset said that it shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side."*

ii. The Appellants have submitted the SBI PLR for various periods between 2006-07 to FY 2011-12 and contended that the base figure of SBI PLR considered by the Delhi Commission was 12.25% i.e. PLR prevailing at the end of FY 2006-07 and not FY 2007-08 as erroneously observed by the Delhi Commission in the Impugned Order and during the Control Period, PLR rate has deviated by more than 1% as per the following Table.

**Table : SBI PLR Rates**

| Date | Prime Lending Rate (SBAR - State Bank Advance Rate) |
|---|---|
| 20-Feb-07 (Applicable on 31.03.2007) | 12.25 |
| 09-Apr-07 | 12.75 |
| 16-Feb-08 (Rate Applicable as on date of MYT Order) | 12.50 |
| 27-Feb-08 | 12.25 |
| 27-Jun-08 | 12.75 |
| 12-Aug-08 | 13.75 |
| 10-Nov-08 | 13.00 |
| 01-Jan-09 | 12.25 |
| 29-Jun-09 | 11.75 |
| 17-Aug-10 | 12.25 |
| 21-Oct-10 | 12.50 |
| 03-Jan-11 | 12.75 |
| 14-Feb-11 | 13.00 |
| 25-Apr-11 | 13.25 |
| 12-May-11 | 14.00 |
| 11-Jul-11 | 14.25 |
| 13-Aug-11 | 14.75 |
| 27-Sep-12 | 14.50 |
| 04-Feb-13 | 14.45 |

iii. Despite its own undertaking, the Delhi Commission has not proportionately revised the rate of return on debt despite the fact that the Appellant is paying much higher rate of return on debt and that the SBI PLR has deviated by more than 1%.

iv. Even if the Delhi Commission considers the weighted average SBI PLR for the whole Financial Year then also SBI

PLR has deviated by more than 1% from 2006-07 (base year), as under:-

| Particular | FY 06-07 | FY 07-08 | FY 08-09 | FY 09-10 | FY 10-11 | FY 11-12 |
|---|---|---|---|---|---|---|
| Weighted average SBI PLR | 11.08% | 12.69% | 12.79% | 11.87% | 12.26% | 14.01% |

v. As can be seen from the above table the SBI PLR rates have deviated by more than 1% since the base year or FY 2006-07. Despite the aforesaid, the Delhi Commission has not trued up the interest rates on loans.

vi. The Delhi Commission has also ignored the fact that the amount of Regulatory Assets has gone up by 1707% till FY 2011-12, i.e., from Rs. 158 Crore in FY 2007 to Rs. 2855 Crore in FY 2012. Also the credit rating of Appellant has been downgraded by CARE Limited due to huge Regulatory Assets, liquidation of which remains unaddressed till date. Due to the same the Appellant is not operating in business as usual conditions and not getting loans at lower rates.

vii. The Delhi Commission has admitted that True up of RoCE is to be done at the end of the control period. However, despite the fact that the Control Period is over, True Up of RoCE is still pending.

**37.** On perusal of the data submitted by the Appellant related to SBI PLR, it is clear that SBI PLR has deviated by more than 1% during the control period and accordingly the Commission was required to revise the rate of interest on loan and carry out the required true up. Further, despite admitting that true of Return

on Capital Employed (RoCE) would done at the end of control period, the Delhi Commission has failed on both the counts. The Delhi Commission is directed to revise the rate of interest on loan as well true up of the RoCE in its next tariff exercise. The issue is accordingly decided in favor of the Appellants.

**38.** Now let us deal with the issues raised by the Appellants in 2nd group relating to violation of Commission's MYT Regulations.

**39.** **The Twelfth Issue is related to no definitive roadmap for recovery of Regulatory Assets:** The Appellants have alleged that the Delhi Commission has created Regulatory Asset in violation of Regulation 5.42 of the MYT Regulations, 2007 and Clause 8.2.2 of the Tariff policy and also in violation of the Tribunal's judgments dated 11.11.2011 passed in O.P. No. 1 of 2011 and Judgment dated 14.11.2013 passed in O.P. No. 1 of 2012. Till date Delhi Commission has not implemented any liquidation plan to amortize the Regulatory Asset.

**40.** The learned counsel for the Delhi Commission has submitted that the Commission has levied surcharge of 8% which would be sufficient to meet carrying cost. In its written submission the Commission has stated that same issue has been argued by Appellant in Appeal Nos. 265 & 266 of 2013 and interim Order dated 11.03.2014 has been passed by this Tribunal. The Commission cannot allow the amortization of regulatory assets in a short time as it will give tariff shock to consumers.

**41.** It is important to note the same issue came before this Tribunal in IA Nos. 264 and 265 of 2013 in Appeal Nos. 265 and 266 of 2013 and this Tribunal had disposed of the IAs in its order dated 11.03.2014 issuing certain directions to the Commission on the issue of submission of road map for amortization of Regulatory Assets as under:

> *"19. In view of above, we issue the following directions to the Commission:*
>
> *i) The problem is to be examined in two parts viz. a) meeting the current expenses and avoiding further accumulation of the Regulatory Assets b) liquidation of the approved Regulatory Assets as at the end of FY 2011-12.*
>
> *ii) The Commission has to examine why the Applicants/Appellants are not paying the current bills of the generating and transmission companies when the impugned order dated 31.7.2013 has provided for meeting the current expenses of the distribution licensees including the carrying cost and take further necessary action in the matter. The current payments have to be ensured at all cost to avoid any possibility of reduction of power availability to the NCT of Delhi.*
>
> *iii) The Commission has to decide a road map for liquidation of the accepted Regulatory Assets keeping in view the interests of the consumers and the distribution licensees after satisfying itself that there are no constraints in arranging finances for making regular and timely payments of the current dues by the Applicants/Appellants to the generating companies and transmission licensees and meeting the operation and maintenance expenses and arranging finances for taking up augmentation of distribution system for meeting the*

*load demand of the National Capital. Needless to say that the actual liquidation of the Regulatory Assets to be decided in the Annual Tariff Orders will be subject to change depending on the actual facts and figures available before the Commission due to audited accounts, as a result of the CAG audit, etc. The road map may also need review from time to time depending on the true up of accounts and new facts which come to the notice of the Commission from time to time and also subject to the outcome of these Appeals nos. 265 and 266 of 2013.*

*iv) The road map will also be subject to financial restructuring of the distribution licensee as per the advice given by the Commission to the Government of NCT of Delhi. However, in the absence of any financial restructuring by the State Government, the consumers of Delhi could not be left at the mercy of the generating companies and the distribution licensees to manage the power supply in the National Capital at their own will. In the absence of the support from the Government, the Commission may follow its own road map for liquidation of the Regulatory Assets to remedy the finances of the Distribution licensees.*

*v) We feel that in view of large Regulatory Assets which have been accumulated over the years, financial restructuring of the distribution licensees will be very helpful in sustaining the business of the licensees with minimum burden on the consumers. The Commission shall again take up with the Government of NCT of Delhi for early decision on the financial restructuring of the Distribution Licensees to minimize the burden on the consumers on account of increase in retail supply tariff due to liquidation of the Regulatory Assets.*

*20. We also direct the Appellants to promptly provide any information sought by the Commission to enable it to comply with the above directions.*

*21. Accordingly, IAs 364 and 365 of 2013 are disposed of."*

**42.** The Commission had issued an order giving road map for amortisation of the approved Regulatory Assets for all the distribution licensees in eight years. In persuasion to Hon'ble Supreme Court's direction in the matter of regulation of power to Delhi by NTPC, the Delhi Commission has submitted a road map on affidavit.

**43.** In view of above developments the matter stands disposed of.

**44. The 13th Issue is regarding directions related to Reduction of AT&C losses by 10% in Zones having losses more than 30%**.

**45.** According to the Appellants the Delhi Commission has specified AT&C loss reduction zone-wise which is contrary to Regulations 4.7 and 4.8 of the MYT Regulations, 2007 which mandates AT&C losses reduction target to be fixed for the entire licensed area.

**46.** Let us quote the Commission's findings in the Impugned Order:

"*2.53. In order to effectively check AT&C losses in high loss areas, the Commission is directing the utilities to reduce losses by 10% in one year in the zones/districts of the utility where losses are above 30%. Failure to do so will invite penalties.*

*7.2 Distribution licensee is directed to reduce AT&C losses by at least 10% in respect of those zones/districts which are currently having losses in excess of 40% within one year i.e. by*

*August 2012. These targets shall have to be met by Distribution licensee irrespective of the overall AT&C loss achievement targets specified in this Order. Failure to do so will invite penalties.*"

**47.** The learned Counsel for the Commission submitted that the Commission has exercised power vested on it under Regulation 13.6 of the MYT Regulations. Commission issued such direction to invite attention of the Appellant to the high AT&C losses areas/zones/districts, which will also have an impact on total AT&C losses.

**48.** The learned Counsel for the Appellant vehemently opposed the contention of the Commission that it had powers under Regulations 13.6 of MYT Regulations and the made following Submissions:

i. The Delhi Commission has segregated part of licensed area, in contravention of Regulations 4.7 and 4.8 of the MYT Regulations which provides that AT&C loss targets are to be determined for a licensee taking the licensed area as a whole. Zones/districts are created by the Appellant for administrative convenience, for internal management of operations. The MYT Regulations, 2007 nowhere prescribes zone/district wise reduction in losses.

ii. The approach adopted by The Delhi Commission amounts to micromanagement of the utility, contrary to the principle settled by this Hon'ble Tribunal in the case of *Karnataka Power*

*Transmission Corp. Ltd. vs. KERC reported as 2007 ELR (APTEL) 233"*. The Delhi Commission's contention that the said Judgment is not applicable in the present case because as per Licence Condition No. 10, Appellant has to take prior approval from the Commission of any capital investment to be made by it, is erroneous and misplaced. The principle approval required to be taken under license condition does not, in any manner, authorise The Delhi Commission to micro-manage the affairs of the Appellant and flout its own Regulations.

iii. The Regulation 13.6 is not applicable in the present case. The Powers under Regulation 13.6 is to be exercised in case there is any difficulty in procedural aspect. The same cannot be used to vary a substantive Regulation. Even otherwise, the Delhi Commission has failed to specify in writing the special circumstances and reasons for departing from the procedures specified in the MYT Regulations, 2007. Also, the Delhi Commission has placed reliance on Regulation 13.6 for the first time in its reply and it is clearly an afterthought to justify the deviation from the MYT Regulations, 2007.

iv. There is no basis or justification provided by the Delhi Commission to support the above direction including picking up the dividing line of 40% losses more so when the Delhi Commission has itself observed in the Impugned Order that the ring fencing of the district is not complete and that a

comprehensive view on the exact district wise losses is not possible, viz -

> *"2.50 The Commission has observed that the Ring Fencing of the Districts is not complete. To have a comprehensive view on the AT&C losses area-wise (district-wise), the Commission directs that the districts may be ring fenced to know the exact losses in the respective areas to enable the Commission to take a view on the differential tariffs."*

**49.** We agree with the contention of the Appellant that it would not be possible for computation of district wise losses accurately in the absence of ring fencing of districts. The distribution network planning is generally done irrespective of physical demarcation of revenue districts. It may happen that certain areas in some district say district 'A' are fed from another district say district 'B'. In such cases all the revenue collected from from such areas would be accounted for revenue for District 'A' and accordingly the corresponding energy consumed by such areas would be reflected as negative loss for district 'A' would be reflected as loss for district 'B'. Therefore, it would not be possible to compute district wise losses accurately in the absence of proper metering and districts are ring fenced at HT level. This would require additional capital expenditure which may not account for loss reduction but only for computation of district wise losses. We are of the view that so far the Appellants meet the overall AT&C loss targets set by the Commission, the Commission should not indulge in micro-management of the licensee's day

to day operation. The impugned direction relating to imposition of penalty on failure to reduce losses by 10% in high loss areas is set aside. The issue is decided in favour of the Appellant

**50. The 14th Issue regarding Change in methodology in computation of AT&C losses.** The Appellants have stated that the Delhi Commission has changed the methodology to compute AT&C losses contrary to Regulation 4.7 of the MYT Regulations, 2007 by

(a) allowing LPSC net of expenses for computation of AT&C loss;

(b) not considering DVB arrear in the collection efficiency;

(c) reducing MUs in relation to enforcement sales by diving the enforcement collection by twice the Average Billing Rate instead of single ABR; and

(d) adjusting cost incurred on account of deployment of CISF.

**51.** The findings of the Commission in the Impugned Order are reproduced below:

*"For FY 2007-08*

*"3.84 The Commission also observes that while calculating the AT&C losses achievement for FY 2007-08, the Commission had considered the gross LPSC collected by the Petitioner as revenue collected. Thus, any benefit on account of overachievement in AT&C loss is being calculated on gross LPSC amount. However, as financing of LPSC is allowed as a cost, the consumer is getting benefit of net LPSC while computing the Non tariff Income*

*(which is subtracted from the ARR of the Petitioner). As consumers are not getting benefit of gross LPSC, the Commission has decided that it will be prudent to consider the LPSC net of expenses (net LPSC has been considered in total revenue available towards expenses of the Petitioner) while considering collection in the AT&C loss. The Commission while approving AT&C loss for the Petitioner for FY 2007-08 in its Tariff Order for FY 2009-10 dated May 28, 2009 had approved total collection for FY 2007-08 as Rs 3031.27 Cr, which included LPSC of Rs 31.77 Cr. The Commission had also approved AT&C loss of 27.51% and financial impact of underachievement as Rs 6.97 Cr.*

*3.85 The Commission now revised the total collection for FY 2007-08 as Rs 3014.50 Cr (Rs 3031.27 Cr – 16.77 Cr). The revised AT&C loss approved for FY 2007-08 is shown below:*

*Table 27: AT&C Loss for FY 2007-08*

| *Particulars* | *FY 2007-08* |
|---|---|
| *Total Revenue Collected (Rs Cr)* | *3014.50* |
| *Revenue Billed (Rs Cr)* | *2889.99* |
| *Collection Efficiency (in %)* | *104.31%* |
| *Distribution Losses (in %)* | *30.89%* |
| *AT&C Losses (in %)* | *27.91%* |

*3.86 The revised AT&C losses approved for FY 2007-08 is higher than minimum 27.34% AT&C loss as specified in the MYT Order. Thus the Petitioner has not been able to meet the minimum AT&C loss target." (@Pg. 235 of Vol. 2)*

*For FY 2009-10*

*"4.37 The Commission observes that the revenue collection of Rs 3588.84 Cr includes the total LPSC collected by the Petitioner. However, as financing of LPSC is allowed as a cost to the Petitioner, the consumer is getting benefit of net LPSC while computing the Non tariff*

*Income (which is subtracted from the ARR of the Petitioner). As consumers are not getting benefit of gross LPSC, it will be prudent for the Commission to consider the LPSC net of expenses (net LPSC has been considered in total revenue available towards expenses of the Petitioner) while considering collection in the AT&C loss. As the Commission has approved Rs 14.86 Cr towards the financing cost of LPSC for FY 2009-10, the Commission has subtracted this from the revenue collected while calculating the AT&C losses. Thus revenue collected has been considered as Rs 3573.98 Cr while computing AT&C losses."*

51. The learned counsel for the Appellant made very detailed and elaborate submissions. The crux of his arguments can be summarised as below:

i. The Delhi Commission in the Impugned order has altered the methodology of computation of AT&C losses is contrary to MYT Regulations and the Tribunal's ruling *Meghalaya State Electricity Board vs. MSERC & another* reported as *2010 ELR (APTEL) 940* that at the stage of truing up Ld. Delhi Commission cannot reopen the basis of determination of tariff.

ii. The Commission has changed the methodology for computation of AT&C losses by:

(a) Allowance of Late Payment Surcharge (LPSC) net of financing expenses for computation of AT&C loss.

(b) DVB arrears not considered for computation of collection efficiency

(c) Reduction in MUs in relation to enforcement sale for the purpose of calculation of AT&C loss.

(d) Adjustment of cost incurred on account of deployment of CISF for reduction of AT&C losses.

**52.** In order to understand the import of the Appellant's contention let us examine the provisions of the Regulations 4.7 of the MYT Regulations reproduced below:-

*"4.7 The Commission shall set targets for each year of the Control Period for the items or parameters that are deemed to be "controllable" and which include;*

*(a)* ***AT&C Loss, which shall be measured as the difference between the units input into the distribution system and the units realised (units billed and collected)*** *wherein the units realised shall be equal to the product of units billed and collection efficiency;*

*(b) Distribution losses, which shall be measured as the difference between total energy input for sale to all its consumers and sum of the total energy billed in its Licence area in the same year;*

*(c) Collection efficiency, which shall be measured as ratio of total revenue realised to the total revenue billed for the same year.* ***The revenue realisation from arrears relating to the DVB period, electricity duty and late payment surcharge shall be included for computation of collection efficiency;"***

**53.** The above regulation makes it abundantly clear that:-

(a) The collection efficiency shall be measured as ratio of total revenue realized to the total revenue billed for the same year.

(b) For computation of collection efficiency the following shall be included:-

(i) The revenue realized from arrears relating DVB period;

(ii) Electricity duty; and

(iii) The late payment surcharge.

**54.** The Appellants have submitted that the MYT Regulations clearly provide for the total revenue of the distribution licensee for the concerned year to be considered for the purpose of computation of collection efficiency. Therefore, the approach of the Ld. Delhi Commission in considering the LPSC amount net of carrying cost is contrary to the MYT Regulations.

**55.** The issue of computation of collection efficiency was discussed by this Tribunal in Appeal No. 14 of 2012 and had held that for the purpose of computing the collection efficiency the Commission is required to consider various parameters such as DVB arrears, Electricity duty and LPSC etc both in the numerator and denominator. The relevant portion of the Tribunal's judgment in Appeal No. 14 of 2012 is given below:

*"97 The essence of the issue lies in the definition of the term 'Collection Efficiency'. As per the regulations, it is the ratio between total revenue realized to the total revenue billed for the same year. Mathematically, it can be represented by the following formula:*

*Collection Efficiency = <u>Total Amount Realized</u>*

*Total Amount Billed*

98 *Regulation also provided that the revenue realization from arrears relating to the DVB, period, electricity duty and late payment surcharge shall be included for computation of collection efficiency. This term 'Collection Efficiency' had been introduced and has been in vogue since privatization of Delhi Power Sector. Earlier, the term Collection Efficiency was the ratio between the revenue realized to the total revenue billed for the same year. It did not include the DVB arrears, electricity duty, LPSC etc. The Distribution Licensees represented to the Delhi Commission that since the monthly bill included arrears, electricity duty, Late Payment Surcharge etc., it was difficult for them to segregate the revenue billed and the revenue realized for the same year from other amounts. Since, the Collection Efficiency would be remain same if the other components of the monthly bills are also included in the revenue billed (sum of amount billed during the year) and the revenue realized (actual revenue relized during the same year).*

99 *A specific query was raised by the Bench during one of the hearings that as to whether the amount in question has been added to the denominator of the formula for collection efficiency or it has been added in both the numerator and denominator. The Appellant submitted that the Delhi Commission has added the amount in the denominator only i.e. the amount realized by DPCL has been added to the revenue billed and not in the revenue realized. The learned counsel for the Delhi Commission did not respond to this query.*

100 *In our view the amount realized by the DPCL directly is ought to be either included in both the numerator*

*and denominator of the formula for collection efficiency or excluded from the both. It would not be correct to add it in one component and exclude from the other component.*

*In view of the above, this issue is decided accordingly.*

**56.** As regards reduction in MUs in relation to enforcement sale for the purpose of calculation of AT&C loss is concerned, the issue was also raised before this Tribunal in Appeal No. 14 of 2012 and the Tribunal in its judgment dated 28.11.2013 held as under:

*107 Let us discuss the issue.*

*108 AT&C loss has been defined as the difference between the units input and units realized. Units realized are equal to the product of units billed and collection efficiency. The issue is related to determination of units realized on account of enforcement. In this connection it would be necessary to understand as to how the enforcement bills are raised. When a consumer is detected to be indulged in theft of electricity, his premises is checked and 'connected load' is estimated. Connected load is defined as the sum of electrical load connected to the mains at the time of raid. Once the 'connected load' is estimated, the amount of electricity consumed by theft is estimated using the following formula defined in the Delhi Commission's Supply Code*

*Units consumed = L x D x H x F*

*WhereL = Connected Load*
*D = No. of days in a month (taking into account weekly off)*
*H = No. of Hours of usage of electricity in a day.*
*F = Diversity Factor (100% for theft cases)*

*The consumer is billed at twice the applicable tariff rate as per Sections 126 and 135 of the Act.*

*109 The Appellant has no control over the rate, which is twice the tariff rate as per the Act and supply Code. It does not have any control over the Factors D, H and F in the formula, which are also defined in the supply Code. Thus, the Appellant can only vary the Connected Load to reach the settlement with the consumers. By reaching the settlement with the consumer, it has changed only the Connected Load as all other parameters are fixed. Therefore, the contention of the Appellant that it has to change the rate of charge for reaching the settlement is totally misleading and is ought to be rejected.*

110 *Since, the consumers of different categories are booked under Section 126 and 135 of the Act during the year and bills are raised and revenue collected from them, Units billed under enforcement, for the purpose of evaluating AT&C losses, has to be back calculated from the revenue realized using average billing rate for enforcement i.e. twice the average billing rate. The methodology adopted by the Delhi Commission in working out the units billed for enforcement recovery is correct and needs no interference.*

**57.** The issue relating to the adjustment of cost incurred on account of deployment of CISF for reduction of AT&C losses was also raised in Appeal No. 14 of 2012 and this Tribunal in its judgment had held:

*"97 It is to be noted that CISF personnel were deployed and expenses on CISF was incurred pursuant to the orders of the Supreme Court / direction of the Ministry of*

*Home Affairs and prior approval of the Respondent Delhi Commission with respect to the same. The Delhi Commission's averment that any expense towards reduction of AT&C losses is required to be adjusted from the incentive is not correct. A specific query as to whether the Appellant had been achieving loss reductions targets in the past, the Appellant has submitted that the Appellant had been over achieving the loss reduction targets since its inception irrespective of the deployment of CIFS personnel.*

*98 This aspect has clearly established that the CISF was deployed only on the directions of the Hon'ble Supreme Court and it cannot be linked with the incentive for over achievement of loss reduction. It cannot be held, with any degree of certainty that the Appellants could over achieved due to presence of CISF personnel. More so when the other two distribution licensees could perform and meet the loss reduction targets in spite of presence of CISF. The issue is decided in favour of the Appellant*

**58.** In view of the above discussions the issue is decided as under:

1) All the parameters such as LPSC, ED, DVB arrears have to included both in the numerator as well in the denominator for computing the collection efficiency.

2) The Commission has adopted correct approach for computing MUS on account of enforcement

3) Expenses incurred on deployment of CISF personnel cannot be adjusted towards reduction of AT&C losses.

**59.** **The 15th issue is related to Change in computation of depreciation**. The Appellants have alleged that the Delhi Commission in contravention to regulation 5.13 of the MYT Regulations, 2007 has deducted Consumer's contributions from the Original Cost of the Fixed Assets while computing the amount of depreciation allowed to the Appellant.

**60.** The learned counsel for the Respondent Commission explained that the **consumer** contribution towards capital works is of same nature as of capital subsidy which is excluded from GFA while calculating depreciation. However, inadvertent mistake crept up which was rectified in the Impugned Order during true up exercise. By impugned Order, Commission has corrected the error and not changed the methodology adopted in MYT Order.

**61.** Per **contra** the learned counsel for the Appellants distinguished the nature of capital subsidy or grant from the consumer's contribution and stated that both cannot be treated similarly. The grant generally means an amount of money given, usually by a government to fund certain project/work e.g. APDRP Grant, etc. and the capital subsidy means some type of assistance granted to a project/work by some governmental agency. It is submitted that grant/subsidy is generally provided by government or governmental agency. The consumer contribution on the other hand is contribution by the consumers. It can never be equated with a subsidy or grant. Thus the proviso to the Regulation 5.13

is not applicable as the proviso is limited in its application to the assets funded by capital subsidy/grant. The Delhi Commission has failed to appreciate this and has wrongly applied the proviso in case of consumer contribution also.

**62.** In the light of the submissions made by the parties, let us discuss the issue.

**63.** Before discussing this issue we will refer to the findings on this issue in the impugned order as quoted below:

> *"3.39 The Commission observes that it had erroneously allowed depreciation on consumer contributions and grants for the MYT Control Period (FY 2007-08 to FY 2010-11). As per the MYT Regulations,*
>
> *"5.13 ……*
>
> *Provided that depreciation shall not be allowed on assets funded by any capital subsidy / grant."*
>
> *…..*
>
> *3.47 The Commission had also erroneously not considered Rs 18.63 Cr on account of capital grants while calculating depreciation for the MYT Control Period and allowed depreciation on the same.*
>
> **…."**

**64.** Regulation 5.13 of MYT Regulations, 2007 provides that depreciation is to be calculated on the amount of Original cost of fixed asset which has been considered for calculation of Regulated Rate Base.

**65.** Regulation 5.8 of the MYT Regulations, 2007 provides methodology for calculating Regulatory Rate Base, as under:-

> *"RRBO = OCFAo – ADo – CCo;*
>
> *Where;*
>
> *OCFAo: Original Cost of Fixed Assets at the end of the Base Year available for use and necessary for the purpose of the Licenced business;*
>
> *ADo: Amounts written off or set aside on account of depreciation of fixed assets pertaining to the regulated business at the end of the Base Year;*
>
> ***CCo: Total contributions pertaining to the OCFAo, made by the consumers towards the cost of construction of distribution/service lines by the Distribution Licensee and also includes the capital grants/subsidies received for this purpose;"***

**66.** It is evident from perusal of above extracted Regulation 5.8 that capital grants/subsidies has been clubbed with consumer contribution. Therefore, the Appellant's submission that Consumer's contribution and grants/subsidies cannot be treated in a same way is misplaced and is likely to be rejected. The approach taken by the Commission is as per the Regulations and, therefore, cannot be interfered with. Error committed cannot be allowed to perpetuate and the Commission has right to correct the error committed earlier. The ratio of Megalaya case would not be applicable to the present case as it is not a case of change in methodology but merely a case of correction of error. The issue is answered against the Appellants.

**67. The 16th issue before us for our consideration is related to fixation of AT&C loss reduction targets.**

**68.** The learned Counsel for the Appellants made very detailed and elaborate submission in support of its claim. The crux of his arguments are given below:

i. The fixation of AT&C loss for FY 2011-12 was erroneous on account of the fact that:-

(a) The Delhi Commission without taking into account the actual AT&C loss level achieved by Appellant, has directed the Appellant to reduce AT&C loss level by 2% for BRPL (Appellant in Appeal No. 61 of 2012) and 4% for BYPL (Appellant in Appeal No. 62 of 2012) contrary to accepted industry standards.

(b) AT&C loss targets not amended by Delhi Commission pursuant to the directions issued by this Tribunal in its Judgment dated 06.10.2009 passed in Appeal No. 36 of 2008 wherein this Tribunal had directed the Ld. Delhi Commission to reconsider the AT &C loss targets fixed for the first MYT Control Period on the basis of submissions of the Appellant.

(c) Non-approval and delay in approving the capital schemes which has constrained the ability of the Appellant to reduce AT&C loss levels.

ii. The Delhi Commission in its order dated 23.02.2008 fixed the AT& C Loss targets for the entire control period, i.e., FY 2007-08 to 2010-11. The AT&C loss target comprises of two components, i.e., Distribution Losses and Collection Efficiency. The distribution loss target for FY 2007-08 was fixed by the Delhi Commission

(a) On the basis of opening loss level of FY 2002-03, i.e., at the time of privatization and;

(b) After expiry of 11 months of FY 2007-08.

iii. And fixed the loss reduction targets for each year as given in the Table below:

| *Proposed Reduction of Loss Levels* | *FY 08* | *FY 09* | *FY 10* | *FY 11* |
|---|---|---|---|---|
| *As per MYT Order dated 22.02.2008* | | | | |
| *AT&C loss Reduction Target* | 34.77% | 30.52% | 26.26% | 22.00% |
| *Distribution Loss* | 34.11% | 29.99% | 25.89% | 21.61% |
| *Collection Efficiency* | 99.00% | 99.25% | 99.50% | 99.50% |

iv. The Control Period under the MYT Regulations, 2007 was ending on 31.03.2011. However, due to delay in notifying the new control period, The Delhi Commission after hearing all the distribution utilities, extended the principles for tariff determination as contained in MYT Regulations, 2007 for a

further period of one year i.e. 2011-12 by its communication dated 24.02.2011. In the said letter dated 24.02.2011, the Delhi Commission observed that "*The AT&C loss targets and provision for capitalization in respect of FY 2011-12 for all distribution utilities shall be separately intimated by the Commission within a week's time*".

v. The Delhi Commission by its communication dated 08.03.2011 fixed the AT&C loss target for FY 2011-12 as under:

"*The AT&C loss target for FY 2011-12 will be the lower of the following two figures.*

*i. Actual AT&C loss for 2010-11: &*

*ii. Reduction at 1% over the AT&C target for FY 2010-11*"

vi. The Appellant filed its ARR Petition on 30.03.2011 with AT&C Loss reduction target of 20.64% on the basis of the Ld. Delhi Commission communication dated 08.03.2011, which was admitted 25.04.2011. It is noteworthy that while admitting the Petition, Ld. Delhi Commission did not find any deficiency towards AT&C loss level projected for FY 2011-12 i.e. 20.64%, as the same was filed in accordance with the Delhi Commission's letter 08.03.2011.

vii. However, Delhi Commission in the Impugned Order while fixing the AT & C Loss target for FY 2011-12 deviated from

its own communication and set up a stiffer target of 18% without giving any reason for the same.

**69.** In the light of the submissions made by the parties, let us discuss the issue.

**70.** Before discussing the issues we will refer to the findings on this issue in the impugned order as quoted below:

> *"2.48 In respect of fixation of AT&C loss targets for FY 2011-12, the Commission noted the general trend of trajectory for target loss reduction during the Control Period (FY 07-11) as well as the actual performance as claimed by the DISCOMs during FY 2010-11. The Commission felt that it is in the public interest to consider the earlier trajectory and at the same time ensure that the target is lower than actual achievement during FY 2010-11. The Commission observed that the progressive reduction in AT&C losses is necessary for reducing power purchase so that the consumers are benefitted through a reduction in ARR.*
>
> *2.49 Hence, in view of the above reasons, the Commission has decided that the following target levels are reasonable and fair for both, the DISCOMs and the average consumer:*
>
> *(i) BYPL - 18%*
> *(ii) BRPL - 15%*
> *(iii) NDPL - 13%*
>
> ….
>
> *5.44 The Commission vide Order dated 10th May, 2011 has fixed the AT&C loss reduction target of BYPL as 18% for FY 2011-12. The Commission while fixing the targets has taken into consideration the general trend of the*

*trajectory for target loss reduction during the Control Period (FY 2007-08 to 2010-11) as well as the actual performance claimed by the Petitioner for FY 2010-11. The Commission was of the opinion that it is in the public interest to consider the earlier trajectory and fix the target at a level that is lower than the actual achievement during FY 2010-11.*

*5.45 Accordingly, the power purchase requirement for FY 2011-12 has been computed based on the target AT&C loss level of 18% and collection efficiency of 99.50%."*

**71.** Perusal of above findings of the Delhi Commission in the Impugned Order would indicate that the Commission has not given any reason for not adhering to its approach for fixing the loss targets for FY 2011-12 communicated vide its letter dated 8.3.2011 that the AT&C loss target for FY 2011-12 will be the lower of the Actual AT&C loss for 2010-11or the reduction at 1% over the AT&C target for FY 2010-11. In accordance with the said approach, the AT&C loss targets works out to be either 21% (target for 2010-11 at 22% minus 1%) or 20.64% as claimed by the Appellant.

- It is important to note that AT&C loss levels and CAPEX are inexplicably interlinked with each other. Adequate & timely Capex is essential for reduction in AT&C loss levels. Therefore, inadequate and/ or delay in approval of Capex schemes inevitably affects the Distribution licensee's ability to reduce losses to desired levels. The Appellants have submitted that inadequacy of CAPEX as well as delay in approvals by the

Commission have strained the ability of the Appellant to reduce the AT&C loss levels to desired levels. In FY 2009-10, the Delhi Commission approved only 209 schemes amounting to Rs. 5442.18 lacs as against 401 schemes amounting to Rs.12884.40 lacs for reduction of AT & C loss. Of the 209 schemes, Appellant implemented 205 schemes as the remaining 4 schemes got stuck up due to Right of Way (RoW). No reasons were specified for not approving the remaining 192 schemes by the Commission and also no analysis of adequacy or otherwise the approved schemes vis-à-vis the loss reductions targets were given. Due to inadequate approval of capex and respective schemes, AT&C loss level targets could not be achieved instead it had adversely impacted on performance of subsequent years also.

**72.** In the light of above discussions we direct the Delhi Commission to refix the AT&C loss levels for the FY 2011-12 as per its letter dated 8.3.2011 and give consequential relief to the Appellants. The issue is decided in favour of the Appellants.

**73.** The 17$^{th}$ Issue for consideration is related to disallowance of claim of overachievement in AT&C losses. In order to understand the import of the issue it would be desirable to examine the findings of the Commission in the Impugned Order as reproduced below:

*"3.169 The Petitioner's failure in substantiating the information submitted by it in Form 2.1(a) has been considered by the*

*Commission while validating / approving AT&C loss reduction claimed by the Petitioner.*

…..

*3.173 The Commission considered all the documents and views recorded in the file pertaining to the preparation of draft Tariff Order for FY 2010-11 in 2010 in respect of truing-up for AT&C losses during FY 2008-09 and decided by majority to accept the following logic, reasoning and basis given in the Order.*

…..

***3.178 It was further noticed that no basis to substantiate the information contained in Form 2.1(a) either for the full year or for the first three quarters was given by the Petitioner. During the course of validation session too, the Petitioner could not give any information or the basis on which such forms were prepared by them so that prudence check of Form 2.1(a) and the results thereof related to AT&C losses could be undertaken.***

*3.184 It is pertinent to mention that the Commission was asking for information for prudence check, which the Commission is required to do before approving the Petitioner's submission on sales. It was noticed that the Petitioner did not make available the basis on which Form 2.1(a) was generated by them. Even the daily collection register and the soft copy of billing data could not be furnished to establish the authenticity of Form 2.1 (a). Therefore, a letter dated **February 26, 2010** was again sent to the Petitioner giving them a last opportunity. The letter is reproduced as under: ."*

**74.** The Appellants have made very elaborate submissions on the issue giving full details of submission of the requisite information to the Commission. In their submissions they have claimed that they had submitted all the required data to the

Commission. The Appellants in its written submissions have alleged that the Commission has completely ignored the information submitted in pursuance to its letter dated 26.2.2010 and proceeded on wrong premises.

**75.** In view of categorical assertions made by the Appellants that full details related to AT&C losses to the Commission, we direct the Commission to reconsider the matter taking in to account the information submitted by the Appellants. The Appellants are also directed to make all the additional information, if any, required by the Commission. The matter is disposed of accordingly.

**76. The 18th Issue is related to disallowance due to wrong verification of sales in kWh figures for FY 2009-10**

**77.** The learned Counsel for the Appellant submitted as under:

*I.* Delhi Commission verified the Sales data for FY 2009-10 from the billing server of the Appellant and found that the same matches with the data submitted by the Appellant. Having accepted the Sales figure submitted by the Appellant, Delhi Commission arbitrarily decreased the Sales by 44.41 MU on the reasoning that *"the average power factor computed from kVAh and KWh figures shown by the Petitioner in Form 2.1 (a)*

*for Industrial and Commercial consumers where kVAh billing is applicable was abnormally high".*

II. The said disallowance of 44.41 MUs sales unit is arbitrary and baseless since Delhi Commission has used the actual power factor for FY 2010-11 to disallow the metered data in kWh for the FY 2009-10. The energy meters directly record kWh figures, which cannot be altered in the billing system. There is no manual intervention. The Appellant does not read meters manually. The meter reading process is automated. Meter readings from all consumers are directly downloaded from hand-held devices and energy bills raised thereon. Both the kVAh and kWh figures are recorded in the meter. Accordingly, the Kwh figure does not change due to change in power factor and or any other external factor. On the other hand kVAh depends upon the power factor.

III. During the technical validation session on 02.06.2011 and 03.06.2011, the officials of the Commission had verified the Sales data (in million kWh) for FY 2009-10 from then billing database of the consumer. The category wise kVAh and kWh consumption was also verified and found in consonance with the filing of BRPL as has been acknowledged in the Impugned Order.

IV. Commission erred to decrease kWh (which it otherwise found to be correct from the billing database) by keeping the kVAh constant and applying the power factor data available for FY 2010-11 over FY 2009-10.

**78.** The learned Counsel for the Commission reiterated the findings of the Commission in the Impugned Order as under:

*"4.8 In Form 2.1 (a), the Petitioner had submitted sales as 7839.51 MU, while the Form 2.1 (a) generated from the billing server shown total sales as 7836 MU, variation of 3.5 MU. As the billing software is dynamic and several entries might have been changed for FY 2009-10 since the generation of Form 2.1(a), the Commission accepted this minor variation.*

*4.11 During the validation session, the Commission observed that the average power factor computed from kVAh and KWh figures shown by the Petitioner in Form 2.1 (a) for Industrial and Commercial consumers where kVAh billing is applicable was abnormally high. The Commission observed that even for the LT Industrial and Commercial consumers, average power factor computation worked out to 0.97. The Commission enquired about the figures of kVAh and KWh shown in Form 2.1 (a) by the Petitioner and directed the Petitioner to verify the same from the billing server. The Petitioner submitted that the figures of KWh for FY 2009-10 had been deleted from the billing server due to memory constraint. However, the Petitioner submitted that the Commission can verify the figures of KVAh and KWh for consumers where kVAh billing is applicable for FY 2010-11 from the billing server.*

*4.12 The Commission directed the Petitioner to submit the figures of kVAh and KWh for FY 2010-11 for consumers where kVAh billing is applicable. The Petitioner complied with the same.*

*4.13 The Commission observed that the average power factor computed from kVAh and KWh figures shown by the Petitioner for FY 2010-11 for Industrial and Commercial consumers were much lower. The average power factor computed from KVAh and KWh figures made available for LT consumers were in range of 0.90 – 0.93.*

*4.14 As the Commission was not able to verify the KWh figures for FY 2009-10, the Commission decided to consider the computed power factor figures from kVAh and KWh submitted by the Petitioner for FY 2010-11 to convert kVAh sales in to KWh for 2009-10. Due to this, Sales in MU for FY 2009-10 decreased by 44.41 MU"*

**79.** The perusal of the findings of the Commission in the Impugned Order would suggest that the Delhi Commission has failed to understand the working of the tri-vector meters installed at the consumers' premises by the Appellant. Basic electricity meters record only active power i.e. kWh consumed by the consumer. Tri-vector meters records all three vectors i.e. Active Power (kWh), Reactive Power (kVARh) and Apparent Power (kVAh). The principle parameter recorded by these meters is kWh. Other parameters are determined from this basic parameter based on instantaneous values of the current and voltage and their phaser angle. Therefore, the Commission has erred in computing kWh based on kVAh and power factor. It is interesting to note that the Commission has computed the average power factor for FY 2010-11 on the basis of kWh and kVAh recordings and

computed kWh figures by reverse calculations using the kVAh figures for 2009-10 and average power factor for FY 2010-11.

**80.** In the light of above discussions we direct the Commission to recomputed the AT&C losses for FY 2009-10 using actual kWh figures as recorded in para 4.8 of the Impugned order. The issue is decided in favour of the Appellants.

**81.** **The 19th Issue is regarding high rate of sale of surplus power.** The Appellants have submitted that the Delhi Commission has erred in considering high rate of Rs. 4.00 per unit for the sale of surplus power by the Appellant despite acknowledging in the Impugned Order that rate of sale of surplus power has reduced and average market price of prevalent during May 2010 to March 2011 was around Rs. 3.02 per Unit. Having acknowledged that there is a drastic reduction in the average UI rates as well as the rates for power sold on the power exchanges, the Delhi Commission proceeded to fix high rate for sale of surplus power. It is submitted that the quantum of surplus power that will be available depends on various contingent factors, therefore, it may not be possible for Discom to estimate exact quantum of surplus power that will be available to Discom. Therefore, it is not possible for Appellant to enter into bilateral arrangement for sale of all of the surplus power available. It is submitted that the Appellant sell surplus power through various mechanism sale though exchanges, sale

through UI, sale through banking, sale through intra-state as well as bilateral agreements. Therefore, surplus power is sold by through various modes, viz., sale of energy under exchange etc. It is submitted that the average market price prevalent during the period from May 2010 to March 2011, tabulated below, clearly indicates that average power sale per unit was between Rs.3.02 to Rs.3.07 per unit

**82.** The learned Counsel for the Commission submitted that Commission has fixed the price of sale of surplus power at Rs. 4 per Unit so that Discoms should take steps to take maximum price through bilateral sales. Further, Power Purchase Cost approved for FY 2011-12 is only provisional and will be trued up.

**83.** We are inclined to agree with the Appellant that it is difficult to estimate the surplus power that would be available with them due to load curve of Delhi. The demand of Distribution licensee depend upon many parameters. Weather temperature is one of such parameter. Any sudden change in temperature results in drastic change in demand. Accordingly, it is very difficult to estimate the demand in advance to any degree of accuracy so as to enter in to long term or medium term bilateral arrangements. The option available with Delhi Discoms is to sale the surplus power through exchanges or on short term basis. The Commission’s restriction on load shedding not exceeding 1% of

consumption also plays major role in deciding sale of power by Discoms on short term basis. It is true that the rate of Rs 4.00 is only provisional rate and would be trued up based on actual rate for sale of surplus power, but higher rate fixed initially results in lesser ARR for the Appellants which may result in problems with cash flows and day to day operations. Under such a scenario, the Commission should, instead of fixing tariff at high rate of Rs 4.00 per unit, have fixed the rate based on weighted average rate for actual sale by the Appellants. The Appellants should also in their petition in future give an estimate of the sale price on the estimated surplus based on the date for the previous year to facilitate proper estimation. The Commission is directed that in future the rate for sale of surplus power shall fixed as suggested above. The issue is decided in favor of the Appellants.

**84.** The **20th Issue is related to disallowance of Arrears due to Revised Order of CERC for NTPC Stations.** The learned Counsel for the Appellant has made the following submissions:

1. The Central Commission notified Tariff Regulation 2009 for CPSUs which would be applicable for the period FY 2009-10 to FY 2013-14. At the time of filing the ARR Petition, it was expected that the provisional tariff order for all the central utilities will be issued by Central Commission during FY 2011-12. Accordingly, the Appellant in its ARR Petition while projecting the power

purchase cost for FY 2011-12 had considered an additional amount of Rs. 556.97 Cr. on account of additional capacity charges to be paid for the year 2009-10, 2010-11 and 2011-12. This was based on the report by M/s CRISIL on impact analysis on CERC Tariff Regulations, 2009. Further, on 05.08.2011, i.e., prior to passing of Impugned Order, Appellant informed the Delhi Commission that NTPC by its letter dated 05.08.2011 has raised an invoice of Rs. 494.93 cr. on account of issuance of provisional tariff order under CERC Tariff Regulation, 2009. Accordingly, the Appellant had prayed before the Delhi Commission to consider the actual impact on account of implementation of CERC Tariff Regulation, 2009.

2. The Delhi Commission at para 5.126 of the Impugned Order had specified quarterly Fuel Price Adjustment Formula. Pursuant to the Fuel Price Adjustment formula, Appellant claimed Fuel Price Adjustment which also included arrear bills raised by central utilities pursuant to Orders passed by Central Commission. However, while allowing the quarterly Fuel Price Adjustment, Delhi Commission disallowed all the arrears paid by Appellant to Central utilities.

3. This failure to allow the actual power purchase cost in a timely manner by the Delhi Commission has caused

increase in revenue gap and cash-flow crisis for the Appellant.

**85.** The learned Counsel for the Commission submitted that at the time of issuance of Impugned Order, it was not possible for the Commission to compute the past arrears payable the distribution licensee, therefore the Commission has not considered any amount of arrears. However, for projection of power purchase cost, Commission has considered all final/provisional order issued by The Central Commission till time of issuance of Tariff Order.

**86.** We agree with the reasons given by the Commission that at the time of issuance of the order it was not possible to compute the past arrears likely to payable by the Discoms to NTPC. Perusal of submissions made by the Appellants also reveal that their grievance is not due to the Impugned order but due to subsequent order passed by the Commission for Fuel Price Adjustment. As a result, the issue is decided against the Appellants.

**87.** **The Issue Number 21 is related to disallowance of carrying cost on Reactive Energy**. Delhi Commission in its Order dated 23.02.2008 while truing up for the FY 2006-07 had disallowed the reactive energy charges paid by the Appellant to Delhi Transco Ltd. on the ground that such amount was not claimed by the Appellant in the ARR formats. In fact, there was no

column in the format prescribed by the Delhi Commission to separately indicate the reactive energy charges. Appellant filed Appeal no. 36 of 2008 against the aforesaid Order of the Delhi Commission, which was allowed by this Tribunal by its Judgment dated 06.10.2009. Pursuant to the judgment of this Tribunal, the Delhi Commission allowed the reactive energy charges to the Appellant. However, while allowing the reactive energy charges the Delhi Commission has disallowed the carrying cost for the same stating that:-

(a) The Appellant had not included the reactive energy charges in its MYT petition and hence the Delhi Commission was not aware of these expenses.
(b) Allowance of any carrying cost on reactive energy charges would result in burdening consumers due to the Appellant's mistake.

**88.** The Appellants have submitted that the basic reason given by. Delhi Commission in the impugned Order for disallowing the carrying cost was that this would burden the consumers for the Appellant's mistake. Such a finding/disallowance of the carrying cost is contrary to the principles laid down by this Tribunal's judgment reported as 2010 ELR (APTEL) 891, ***North Delhi Power Ltd. Vs. DERC*** where this Tribunal has inter alia held that the carrying cost is a legitimate right and therefore recovery of such carrying cost is a legitimate expense.

**89.** The learned counsel for the Commission supported the findings of the Commission in the Impugned Order and reiterated that

since allowing carrying cost will burden the consumers of Delhi without any fault hence the same was not allowed by the Commission.

**90.** Let us examine the findings of the Commission in the Impugned Order given below:

*"3.6 The Petitioner has claimed carrying cost @ 9% on the reactive energy charges from FY 2006-07. In the MYT Order, the Commission did not allow reactive energy charges in the True Up of FY 2006-07 since the Petitioner did not include the same in its MYT Petition while claiming for True Up for FY 2006-07 and hence the Commission was not aware of this expense.*

*3.7 Allowance of any carrying cost on reactive energy charges would result in burdening consumers due to the Petitioner's mistake. The Commission, therefore, has not allowed any carrying cost on reactive energy charges.*"

**91.** This Tribunal in number of judgments have held that carrying cost is a legitimate right of the licensee and its recovery is legitimate expense. Once the Commission has allowed certain expenses in the truing up or on the directions of higher authority, the carrying costs for such expense would also become recoverable. The Commission is, therefore, directed to allow the carrying cost on Reactive Energy Charges for FY 2006-07. The issue is decided in favour of the Appellants.

**92.** **The 22$^{nd}$ Issue is related to wrong computation of WACC.** The Appellant in this Appeal has submitted that the Delhi Commission has not considered the repayment while calculating

average loan balance for the year which has resulted in lower weighted average cost of capital (WACC). This lower weighted average cost of capital when applied to Regulated Rate Base is resulting in lesser RoCE.

**93.** The learned counsel for the Commission submitted that from Regulation 5.10 of the MYT Regulations, it is clear that Debt: Equity ratio to be considered for computation of WACC is Debt: Equity ratio as on the Date of Commercial Operation. In the MYT regime, Commission has moved from GFA based approach to NFA based approach, where return on capital employed is provided on net fixed asset.

**94.** The learned counsel for the Appellant has made detailed submissions on the issue. We shall deal with the submission of the Appellant later. First let us understand the concepts of Return on Capital Employed (RoCE) and Weighted Average Cost of Capital raised in this Appeal.

RoCE is calculated by the following formula:

RoCE = Regulated Rate Base (RRB) X Weighted Average Cost of Capital (WACC)

**95.** Regulated Rate Base (RRB) is the approach adopted by the Commission to arrive at the funds infused by the Appellant as on date which includes the funds infused in the asset base and working capital requirement and is determined as per Regulation 5.8 of the MYT Regulations, 2007 as under:-

*"$RRB_O$ = OCFAo – ADo – CCo;*

*Where;*

*OCFAo: Original Cost of Fixed Assets at the end of the Base Year available for use and necessary for the purpose of the Licenced business;*

*ADo: Amounts written off or set aside on account of depreciation of fixed assets pertaining to the regulated business at the end of the Base Year;*

*CCo: Total contributions pertaining to the OCFAo, made by the consumers towards the cost of construction of distribution/service lines by the Distribution Licensee and also includes the capital grants/subsidies received for this purpose;*

**96.** In other words as per Regulation 5.8 of MYT Regulations

RRB= **Total Gross Fixed Assets** – Accumulated Depreciation – Consumer contribution and Grants + Change in Working capital requirements

**97.** It is to be noted that the asset is funded through equity, debt, consumer contribution and grants. Consumer contribution is received from consumers therefore the same is deducted from RRB and the Appellant does not get any return on the same. Equity and Debt is the only portion which is infused by the Appellant for creation of assets. The Appellant is required to repay the loan for which depreciation is provided in the ARR. Since the loan is being repaid by the Appellant through depreciation, the net funds infused by the Appellant as on date is reduced to the extent of repayment of loans. Therefore

accumulated depreciation, i.e., loan repayment as on date is being reduced from GFA for the purpose of calculation of RRB.

**98.** Weighted average cost of capital is calculated by the formulae:

$$\frac{\text{(Rate of interest (rd) X Average Debt during the year + Rate of return (re) X Average Equity during the year)}}{\text{(Average debt during the year + Average Equity during the year)}}$$

**99.** The Appellant has contended that Delhi Commission is not considering the repayment of loans to arrive at average debt during the year whereas the same is being considered for calculation of RRB on which WACC is applied. Since interest rates are lower than Rate for Return on Equity, the effective WACC gets lower because of higher loan component. The Appellant is getting lesser RoCE as the repayment of loans has been considered in RRB (where the Appellant will not get benefit) whereas the same is not considered in WACC (where the Appellant will get the benefit).

**100.** The contention of the Commission that in the MYT regime, Commission has moved from GFA based approach to NFA based, where return on capital employed is provided on net fixed asset is misplaced as evident from Regulations 5.8 reproduced above. As per this Regulation RRB is computed from Original cost of asset i.e. Gross Fixed Asset. The Commission cannot adopt different criteria for computing RRB and WACC. The criteria for both has to be the same.

**101.** The concept of Return on Capital Employed also includes the working capital loans which are short term loans and repaid within the year itself. Non-consideration of repayment of working capital is contrary to the practice adopted by the Commission in earlier orders. There is no concept of date of commercial operation in case of working capital loans.

**102.** In the light of above discussions we find force in the contentions of the Appellant and direct the Commission to re-evaluate the WACC considering the repayment of loans during the period and recomputed RoCE payable to the Appellant. The issue is decided in favour of the Appellant.

**103.** **The 23rd Issue is related to disallowance of increase in salary to FRSR structure employees.** The Appellant submitted that during the course of privatization of erstwhile Delhi Vidyut Board (DVB), the employees who were working in erstwhile DVB were transferred to the successor Discoms, like the Appellant, on the condition that their services will continue to be governed by Government's FRSR Rules and in any case their salaries and service condition will not be inferior to the conditions had they continued to serve in erstwhile DVB. (Section 16(2) of the DERC read with the Transfer Scheme Rules and Tripartite Agreement).

**104.** The learned Counsel for the Commission submitted that The Commission allowed the actual revised salary for FRSR employees in the base year on which escalation were allowed as per the principles of MYT Regulations.

**105.** Let us quote the findings of the Commission in the Impugned order below:

> *"4.68 O&M Expenses which include Employee Expenses are controllable parameter. The Commission was aware of fact that service conditions of erstwhile DVB employees (FRSR employees) are governed by rules of GoNCTD at the time of framing MYT Regulations and it had considered Employee Expenses as a controllable item and linked it with indexation factor. There is no change in the methodology of determination of salary for FRSR Structure employees after notification of the MYT Regulations."*

**106.** The same matter came before this Tribunal in Appeal No. 14 of 2012 in the matter of TPDDL vs DERC and this Tribunal in its Judgment dated 28.11.2013 had rejected the claim of the Appellants therein. The relevant extract of judgment is reproduced below:

> *"178 As already noted above under issue no. 7 and 19 that Employees expenses, one of the component of R&M expenses, are controllable under the Regulations and accordingly allowed on normative basis.*
>
> *179 Accordingly decided."*

**107.** The Appellants herein has tried to distinguish the present Appeals from Appeal No. 14 of 2012. We are not inclined to

accept this contention of the Appellants. The operative para 4.72 of the Impugned Order in Appeal No. 14 of 2012 was verbatim same as para 4.68 of the Impugned Order before us. The issue is accordingly decided against the Appellants.

**108.** **The 24th Issue is related to disallowance of cost incurred due to new initiatives.** The Appellant has claimed an amount of Rs 18 lakhs incurred towards new initiative in the name of Project Jeevan – a multi utility bill collections facility. The Commission has disallowed this expense as collection of bill is not a new initiative. Besides this, expenditure on account of project jeevan, same will be set off from the expenditure of the manpower reduced for such collection.

**109.** The Appellants have submitted that the disallowance of cost on account of new initiative "*project Jeevan*" is contrary to the Delhi Commission's own undertaking tendered before this Tribunal in Appeal No. 36 & 37 of 2008 that the appellant would be free to take any new initiative during the MYT period provided the appellant is justified in new initiatives by the cost benefit analysis.

**110.** We agree with the findings of the Commission in the Impugned Order that bill collection facility cannot be termed as new initiative. The Appellants did not demonstrate its cost benefit analysis. Any new initiative taken by the Appellants have to be

revenue neutral i.e. it should not have any impact of consumer tariff. The issue is decided against the Appellants.

**111. The 25th Issue is related to disallowance of Audit Fees.** The Appellants had claimed an amount of Rs 4 Lac towards Audit Fees in its petition. The Commission disallowed this amount on the ground that the Audit Fees forms part of A&G expenses which is a controllable expense as per MYT Regulations.

**112.** The Appellants have submitted that the Delhi Commission while disallowing the cost towards audit fees failed to take into consideration that the cost towards audit has substantially increased due to the directions issued by the Delhi Commission to submit various data duly certified by its statutory auditors. The Delhi Commission failed to appreciate that the Increase in number of audited certificates has increased the audit fees multifold on account of directions given by the Delhi Commission from time to time. Having directed the Appellant to submit various audited certificate from its statutory auditors, the Delhi Commission ought to have allowed the actual expenses incurred by Appellant towards audit.

**113.** The learned counsel for the Commission submitted that The audit fees is part of administrative and general expenses which is controllable item and the expenditure on the same was rightly rejected by the Commission.

**114.** There are many sub-components under the head A&G expenses. Audit fee is one of such sub-component. Under normative regime, break up of each component is not considered and the expenses as a whole are approved by the Commission based on applicable Regulations. Under normative setup, the licensee may loose on one of the component and gain on other components. If there is gain i.e. actual expense is less than the approved expense, the licensee pockets the gain. Similarly lose, if any, is to be borne by the licensee. Under normative regime, the licensee cannot be permitted to claim additional expenditure it is likely to suffer on account of increased expenditure on one component and any any gain on reduction in expenditure on other components is kept by the licensee. The issue is decided against the Appellants accordingly.

**115.** **Issue No. 26th is related to disallowance of Tendering Costs**. The Appellant had claimed Rs 17 Lac towards tendering costs on the ground that the Commission had directed procurement of any material exceeding Rs 1 Crore through open tender. This direction of the Commission has resulted in additional expenditure.

**116.** This issue had also been decided by this Tribunal in Appeal No. 14 of 2012. The findings of the judgment in Appeal No. 14 of 2012 are given below:

*"85 Clause 10.5 of the License conditions provides that the licensee shall procure equipment by inviting tenders in transparent, competitive and fair way. Generally speaking tendering is done through 'Limited tender' or 'Open tender'. Under limited tender few selected vendors are asked to submit their bids. Under open tender public at large are invited to bid. This is done through advertisement in the Newspapers or other public media. The license conditions provides that tender are invited in a transparent, competitive and fair way. This can be achieved only through open tender. Thus, the condition of open tender was already there in the license conditions and the Delhi Commission did not specify any new term in the Guidelines for procurement of equipment Regulations.*

*86 So, this issue is decided accordingly.*

**117.** The above ruling would apply in the facts of present case. Accordingly, the issue is decided against the Appellants.

**118. 27th Issue is related to disallowance of expenditure incurred in printing of incremental bills.** The Appellant have claimed Rs 20 Lakh towards printing of bills on the ground that its consumer base has expanded since base year 2006-07 and more number of bills are required to be printed due increased number of consumers. The Commission did not allow this additional expenditure on the ground that it bill printing forms part of A&G Expenses which are controllable expense as per MYT Regulations.

**119.** Countering the contention of the Commission the Appellants have submitted that Delhi Commission's finding that it has

already allowed the bill printing expenses in A&G which is a controllable factor is incorrect. While approving A&G expenses for FYs 2008-09 and 2009-10, the Delhi Commission took into account the increase in cost due to inflation but did not take into account increase in cost due to rise in number of consumers. Therefore, increase in bill printing expense due to rise in number of consumers is not covered under the A&G expenses and ought to have been allowed by the Delhi Commission as the same is uncontrollable in nature.

**120.** As explained in para 105 of this judgment micro-management of every sub-component of a controllable expense is not permitted under Normative system of approvals. The Issue is decided against the Appellant.

**121.** **The 28th Issue is related to PLF for State Owned Gas Based Generating stations.** The Commission has computed the energy availability from the State Generating Stations i.e. Rajghat, Gas Turbine and PPCL based on the approved PLF and auxiliary consumption in the respective Tariff Order for IPGCL and PPCL stations for FY 2011-12. The Appellant is aggrieved by this methodology adopted by the Commission. According to the Appellants the actual availability and PLF achieved by these stations in the past was far less than the Target availability considered for incentive purposes. The assumption of higher PLF for these stations has resulted in projection of higher

availability. Which in turn has resulted in higher surplus of power at higher rate effecting its revenues and cash flows.

**122.** The learned counsel for the Commission submitted that any reduction in quantum of generation will not only result in reduction in revenue from sale of surplus power it shall also result in reduction in power purchase cost. Commission has implemented power purchase cost adjustment for generating companies. Thus, any variation in cost of power purchase in these plants would be adjusted by way of PPA mechanism.

**123.** We do not agree with the contention of the Commission. Preparation of tariff order is a very detailed exercise and is based on many projections. The Commission should endeavor to make such projections as accurately as possible. The Commissions must not adopt the attitude that rough projections would be corrected in true up of in the FPA exercise. While projecting the energy available from any station its past performance is most important pointer and the Commission should have took in to account the same. Since the tariff period is already over, we are not inclined to interfere with the order on this count. But we direct the Commission to consider the past performance of these generating station while estimating the availability of energy. The issue is decided in favor of the Appellant.

**124. The 29th Issue is related disallowance of interest on consumer security deposit incurred by the Appellant on consumer security deposit retained by DPCL.** The same issue also came before the Tribunal in Appeal No. 14 of 2012 and the same was decided against the Appellants therein. The relevant extracts of the Tribunal's judgment in Appeal No. 14 of 2012 is as under:

> *"In view of the observations of the Delhi Commission in the Impugned Order, the same security deposit paid for the pre-privatization period received by DBP is yet to be transferred to the Appellant.*
>
> *The Delhi Commission has decided that this amount be paid by DPCL, cannot be allowed.*
>
> *This finding in our view is correct.*
>
> *Therefore, this finding needs no interference".*

**125.** The above judgment would also apply to the present Appeal. The issue is accordingly decided against the Appellant.

**126. The 30th issue is related to Arbitrary determination of Efficiency Factor.** This issue was also considered by this Tribunal in Appeal No. 14 of 2012 and was decided in favour of the Appellant therein. The relevant extracts of the said judgment are as under:

> ***"197 Issue No.23** is regarding **Arbitrary Determination of Efficiency Factor.***

*198 On this issue, the learned Counsel for the Appellant submits as under:*

***(a)*** *Regulation 5.4(a) provides for application of efficiency and Regulation 5.4(g) of the MYT Regulations provides that the determination of efficiency factor is to be based on the licensee's filing, benchmarking, approved cost by the Commission in the past and such other factors that Delhi Commission feels appropriate..*

***(b)*** *The efficiency factor upto FY 10-11 was fixed in the MYT Tariff Order of 23.02.2008 and not by the MYT Regulations. The values and trajectory based on the factors considered by the Delhi Commission at the time of passing of the MYT Tariff Order cannot be extended to FY 2011-12 merely by extending the control period. The Delhi Commission has to set new baseline values in accordance with Regulation 4.5, which provides as follows:*

*"4.5 The baseline values (operating and cost parameters) for the Control Period shall be determined by the Commission and shall be based on the approved values by the Commission, latest audited accounts, estimate of the actuals for the relevant year, prudency check and other factors considered appropriate by the Commission.*

***(c)*** *However, in the impugned order the Delhi Commission has merely extended the efficiency factor of 4% that was applicable for O & M expenses of the Appellant for the period FY 2010-11 to apply to FY 2011-12 and has also extended the MYT Order while extending the operation of the MYT Regulations to the period FY 2011-12. This has resulted in gross under- allowance of O & M costs for FY 2011-12. The Delhi Commission has determined such efficiency factor without any benchmarking or any analysis and identification of area of inefficiency where the improvement is desired to be carried out. Furthermore, it is pertinent that application of MYT order, while extending MYT Regulations is against*

*the extant regulatory framework and the principles of natural justice.*

***(d)*** *This Tribunal in Appeal No. 28 of 2008 has already decided the issue in principle and rejected the determination of efficiency factor by the Delhi Commission in the DTL tariff order on the ground that the Delhi Commission had fixed an ad-hoc efficiency factor without benchmarking, analysis or identification of area of inefficiency.*

***(e)*** *The recent MYT Tariff order under the new MYT Regulations, the Delhi Commission has applied an efficiency of 2% on Employee and A & G costs after escalating them by 8% on account of inflation for FY 2012-13, based on the actual figures for FY 2010-11.*

*199 The learned Counsel for the Delhi Commission submits that the MYT Regulation and MYT control period was extended vide order 10.05.2011, which has become final and conclusive. Hence, the Delhi Commission has rightly applied efficiency factor of 4% for 2011-12. It is further submitted that 4% efficiency factor has been upheld by this Tribunal in Appeal No. 36 of 2008.*

*200 Let us see the findings of the Delhi Commission as well as the judgment of this Tribunal on this issue:*

***Impugned Order***

*"5.174 In the MYT Order, the Commission had observed that the O&M cost of NDPL is on the higher side as compared to similar urban distribution companies in other states, thus, representing the inefficiencies in the system. In the MYT Order, the Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY 2008-09, FY 2009-10 and FY 2010-11 respectively.*

*5.175 As the Commission has extended the MYT Regulation upto March 31, 2012, the Commission has*

*followed the efficiency trajectory prescribed by the Commission in the MYT Order and considered efficiency factor of 4% for FY 2011-12 (at the same level as considered for FY 2010-11 in the MYT Order). The Commission expects the Petitioner to improve its performance considering the repetitive nature of O&M works and introduction of new technologies. Further, the Commission is of the view that the Petitioner should try to bring efficiency into the system, thereby, reducing the burden of inefficiencies on to the consumers of Delhi".*

*201 Since the Appellant relied upon the principles laid down by this Tribunal in the judgment in Appeal No.28 of 2008, let us refer to the said judgment in Appeal No.28 of 2008 which reads as under:*

*"25. The next issue is relating to efficiency factor. According to the Appellant, the State Commission made an ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively and this ad hoc reduction is arbitrary as the operation and maintenance expenses have already been determined by the State Commission after applying full prudent check and in accordance with the Regulations framed. In reply to the above, the Learned Counsel for the State Commission submits that the State Commission applied the efficiency factor on the operation and maintenance expenses in accordance with clause 5.7 of the MYT Regulations and the efficiency is only applied once on the operation and maintenance determined by summing up three expenses namely R&M expenses, employees cost and A&G expenses. It is not disputed that the State Commission after applying the prudent check allowed the O&M expenses for the MYT period to ensure efficiency in the system, made ad hoc additional reduction of 2%, 3% and 4% for the FY 2008-09, 2009-10 and 2010-11 respectively.* ***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. In the impugned order the Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY 2009, FY 2010 and FY-2011 respectively arbitrarily without any benchmarking or any analysis and identification of area of inefficiency where the improvement is desired to be carried out. Such efficiency factor has naturally to be determined only on the basis of material placed before the State Commission and analysis of various factors and not on ad-hoc basis as done by the State Commission****. Therefore, this point is answered accordingly in favour of the Appellant".*

*201 So, on the strength of the judgment of this Tribunal in Appeal No. 28 of 2008, we decide this point accordingly in favour of the Appellant."*

**127.** The above ratio of this Tribunal's judgment in Appeal No. 14 of 2012 applies squarely into the facts of the present case. The issue is decided in favour of the Appellants.

**128.** **The 31st Issue raised in this Appeal is related to typo errors and wrong summations.** The Commission in its reply has

acknowledges the error and submits that the same shall be reworked in the next Tariff Order. Accordingly, the issue is decided in favour of the Appellant.

129. **The 32nd Issue is related to non-consideration of Power Purchase price adjustment.** The Delhi Commission while restricting the Power Purchase Adjustment Cost Formula ("***PPAC Formula***") to variation in fuel cost only failed to take into consideration that for a distribution company entire power purchase cost including fixed and variable cost is to be allowed as pass through under PPAC mechanism. The learned Counsel for the Commission submitted that pursuant to judgment of this Tribunal in OP1 of 2011 dated 11.11.2011, the Commission has made an adjustment of power purchase mechanism which is being implemented.

**130.** In view of the submissions made by the Commission that it will implement the judgment of this Tribunal in OP1 of 2011 the issue does not survive. The Commission is, however, directed to implement the directions of this Tribunal in letter and spirit.

**131. Issue No. 33 is related to efficiency factor applied on arrears of employees expense pertaining to FY 2005 – 06 and FY 2006-07.** During the hearing the learned Counsel for the Respondent Delhi Commission has conceded that a mistake has been committed by the Delhi Commission with reference to the

present issue in its entirety and been rectified in the next tariff. The issue, therefore, does not survive.

**132. The 34th Issue is regarding fringe benefit.** This issue of fringe benefit also came before this Commission in Appeal No. 14 of 2012 and the Tribunal after detailed discussions decided the same against the Appellant therein. The detailed discussions in Appeal No. 14 of 2012 on the issue is given below:

> *"25 Before discussing the issues we will refer to the findings on this issue in the impugned order. The Delhi Commission has rejected the Appellant's claim for pass-through of Fringe Benefit Tax ("**FBT**") as part of the expenses in the Aggregate Revenue Requirement ("**ARR**") by holding as follows:*
>
> > *"3.275 As per the MYT Regulations, 5.22 Tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed. However any tax liability on incentives due to improved performance shall not be considered.*
> >
> > *3.276 The Commission therefore has decided not to allow the fringe benefit tax of Rs. 1.62 Cr to be passed on to consumers and approved an amount of Rs. 24.97 Cr towards Income Tax as per the Income Tax Return filed by the Petitioner".*
>
> *26 Let us discuss the issue. In order to address this contentious issue, it is essential to understand what Fringe Benefit Tax is and why it was introduced?*
>
> *27 The taxation of perquisites -- or fringe benefits -- provided by an employer to his employees, in addition to the cash salary or wages paid, is fringe benefit tax.*

*28 Any benefits -- or perquisites -- that employees get as a result of their employment are to be taxed, but in this case in the hands of the employer.*

*29 Fringe benefits as outlined in section 115WB of the Finance Bill, mean any privilege, service, facility or amenity directly or indirectly provided by an employer to his employees by reason of their employment. They also include reimbursements, made by the employer either directly or indirectly to the employees for any purpose, contributions by the employer to an approved superannuation fund as well as any free or concessional tickets provided by the employer for private journeys undertaken by the employees or their family members.*

*29 These benefits are either taxed in the hands of the employees themselves or the value of such benefits is subject to a 'fringe benefit tax' in the hands of the employer.*

*30 The rationale for levying a fringe benefit tax on the employer lies in the inherent difficulty in isolating the 'personal element' where there is collective enjoyment of such benefits and attributing the same directly to the employee. This is so especially where the expenditure incurred by the employer is ostensibly for purposes of the business but includes, in partial measure, a benefit of a personal nature. Moreover, in cases where the employer directly reimburses the employee for expenses incurred, it becomes difficult to effectively capture the true extent of the perquisite provided because of the problem of cash flow in the hands of the employer.*

*31 Perquisites, which can be directly attributed to the employees, continue to be taxed in their hands in accordance with the existing provisions of section 17(2) of the Income-tax Act and subject to the method of valuation outlined in rule 3 of the Income-tax Rules.*

*32In cases, where attribution of the personal benefit poses problems, or for some reasons, it is not feasible to tax the benefits in the hands of the employee, it is proposed to levy a separate tax known as the fringe benefit tax on the employer on the value of such benefits provided or deemed to have been provided to the employees.*

*33 The Fringe Benefit Tax is a tax to be paid by an employer in addition to the income tax payable for every assessment year starting from the assessment year 2006-07. The tax is to be paid in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees. The liability to pay Fringe Benefit Tax shall be there even when there is no liability to pay income tax by an employer. Accordingly, all those who fall within the definition of employer shall be required to pay tax on the fringe benefits provided to the employees irrespective of the fact that income, which an employer is earning, is exempt under the Income Tax Act or there is a loss. Accordingly, those entities which are claiming exemption under Section 10 such as mutual funds, undertakings in free trade zone claiming exemption under Section 10A, export-oriented units claiming exemption under Section 10B or under Section 10BA, shall be liable to pay the Fringe Benefit Tax.* ***The Fringe Benefit Tax is a liability of the tax of the employees to be borne by the employer. That is why even loss making entities and entities whose income is exempt shall also be required to pay Fringe Benefit Tax.***

*34 Let us now examine the Delhi Commission's Regulations reproduced below:*

> ***"Corporate Income Tax***
>
> *5.20 Income Tax, if any, on the Licensed business of the Distribution Licensee shall be treated as expense and shall be recoverable from consumers through tariff. However, tax on any income other than that*

> *through its Licensed business shall not be a pass through, and it shall be payable by the Distribution Licensee itself.*
>
> *5.21 The Income Tax actually payable or paid shall be included in the ARR. The actual assessment of income tax should take into account benefits of tax holiday, and the credit for carry forward losses applicable as per the provisions of the Income Tax Act 1961 shall be passed on to the consumers.*
>
> *5.22 Tax on income, if any, liable to be paid shall be limited to tax on return on the equity component of capital employed. However, any tax liability on incentives due to improved performance shall not be considered."*

*36 Conjoint reading of the Regulations would reveal that only the income tax paid on return on equity component of the capital employed (Regulation 5.22) shall be allowed to pass through the tariff (Regulation 5.20) and not the Fringe Benefit Tax.*

*37 Accordingly, this issue is decided as against the Appellant.*

**133.** The facts of present Appeal would apply squarely in the facts in Appeal No. 14 of 2012. Accordingly, the issue is decided against the Appellant.

**134. The last issue no. 35 is related application of efficiency factor on pension payments.**

**135.** On this issue, the submissions of the Appellant are as under:

(a) While allowing the employee expenses, the Delhi Commission has allowed the monthly pension payable to

the VRS retirees till the date of their original superannuation date. However, the Delhi Commission has applied the efficiency factor on this monthly pension in a manner similar to other components of employee costs, thereby reducing the net amount allowed to the Appellant.

(b) In this regard, it is pertinent to note that there cannot be any efficiency applied for the employees who have already retired as the Appellant is bound to pay their retiral benefits.

(c) In Appeal No. 52/2008, the same issue had been raised by the Appellant. During the course of the proceedings, the Delhi Commission accepted that there was an inadvertent error on this account and that it shall accordingly correct the computation by not applying the efficiency factor on the pension amount. Despite its recorded statement in the proceedings in Appeal No. 52/2008, the Delhi Commission has not given effect to the proposed correction.

**136.** In reply, the learned Counsel for the Delhi Commission submits that the Delhi Commission will review the efficiency factor to SVRS payment at the end of control period as the amount allowed is provisional.

**137.** In view of the statement of the learned Counsel for the Delhi Commission, the Delhi Commission is directed to do the same at the end of the control period. Accordingly decided.

**138.** In view of the above findings, the Appeals are allowed in part. The State Commission is directed to pass the consequential orders in terms of our findings referred to above.

**139.** However, there is no order as to costs.

**140.** Pronounced in the open court on this **28th day of November, 2014.**

***(Rakesh Nath)***
***Technical Member***

***(Justice M. Karpaga Vinayagam)***
***Chairperson***

Dated: 28th November, 2014
√REPORTABLE/~~NON-REPORTABALE~~

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