Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:28th Nov, 2013
Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. V J Talwar, Technical Member

APPEAL No.14 of 2012

IN THE MATTER OF
North Delhi Power Limited.,
Grid Sub Station Building,
Hudson Lanes,
Kingsway Camp,
Delhi-110 009

...… Appellant(s)

Versus

Delhi Electricity Regulatory Commission,
Viniyamak Bhawan,
'C' Block, Shivalik,
Malviya Nagar,
New Delhi-110 001

….Respondent(s)

Counsel for Appellant(s): Mr. S Ganesh, Sr. Advocate
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JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. North Delhi Power Limited is the Appellant herein.

2. As against the Impugned Order dated 26.8.2011 passed by the Delhi Electricity Regulatory Commission disallowing

certain claims made by the Appellant, this Appeal has been filed by the Appellant.

3. The Appellant has raised various issues by which it was pointed out that disallowance of those claims is illegal and unjustified.

4. Before dealing with these issues, it would be proper to refer to the factual matrix of the case which led to filing of this Appeal:

(a) The Appellant is a Company incorporated under the provisions of the Companies Act, 1956. The erstwhile Delhi Vidyut Board (DVB) had been unbundled under the Delhi Electricity Reforms Act, 2000 in a separate distribution, transmission and Generation Companies. They were successor of the Delhi Vidyut Board (DVB).

(b) The Appellant, pursuant to the privatization process initiated by the Government of Delhi took over the Distribution Company formed for North West Delhi with effect from 01 July, 2002.

(c) The Appellant has since been carrying out the electricity distribution and retail supply in its area of supply.

(d) The Appellant is a distribution licensee holding distribution and retail tariff supply license issued by the Delhi Electricity Commission under Delhi Electricity Reforms Act, 2000.

(e) Upon enactment of Electricity Act 2003, the Appellant became a deemed distribution licensee in terms of 1st proviso to Section 14 of the Electricity Act 2003.

(f) It undertakes distribution and retail supply of electricity in the North and North West areas of National Capital Region of Delhi.

(g) The Appellant filed their Petitions before the Delhi Commission on 31.5.2010 and also filed Petitions for true-up of uncontrolled expenses for the Financial Year 2008-09 and 2009-10 on 2.6.2010.

(h) On 11.10.2010, the Delhi Commission admitted the Petitions for true-up of uncontrolled expenses subject to some clarifications.

(i) Thereupon, the Appellant on 22.3.2011, filed a Petitions for approval of the Annual Revenue Requirement (ARR) and Wheeling and Retail Supply of

Tariff for all consumers categories for the Financial Year 2011-12.

(j) In pursuant to the order of the Delhi Commission, the Appellant published a public notice with reference to the pendency of the Petition.

(k) After hearing the parties, the Delhi Commission passed the impugned order on 26.8.2011 whereby the Delhi Commission proceeded to true-up the ARR of the Appellant for the Financial Year 2008-09 and 2009-10. Through the said order, the Delhi Commission determined the tariff for the period 2011-12 also.

(l) The Delhi Commission in this order has disallowed the Revenue Requirements of the Appellant under various heads which is alleged to have deprived the Appellant of the required funding for carrying out its distribution business in an efficient manner.

(m) Therefore, the Appellant has filed the present Appeal assailing the Impugned Order dated 28.6.2011 raising various issues.

5. The total issues raised by the Appellant are numbering about 30.

6. Let us now deal with each of the issues one by one.

7. The **First Issue** is regarding **Non Implementation of the Order of this Tribunal for allowance of Interest Cost on Notional Loans of Financial Year 2006-07 at prevailing Rates arising out of true-up order for the Financial year 2009-10**.

8. Elaborating the above issue, the learned Senior Counsel appearing for the Appellant has made the following submissions:

(a) Notional loan is the equity infused by the promoters in excess of the equity component in the approved ratio of financing i.e. more than 30%. According to MYT Regulations debt: equity ratio of a Distribution Licensee has to be considered at 70:30. Any equity contribution in excess of 30% has to be treated as Notional Loan. As a result, the equity employed over and above 30% is not entitled to be considered as equity for working out Return on Equity at 16% returns. However, the interest is allowed towards such amount as a debt. In the Appellant's MYT order

dated 23.2.2008, the interest rate for notional loans of Financial Year 2006-07 was worked out to 8.5% per annum based on the interest applicable for loans last taken in the financial year 2004-05.

(b) As against the MYT order dated 23.2.2008, the Appellant filed the Appeal in Appeal No.52 of 2008. This Tribunal held in the judgment in that Appeal that the Delhi Commission should allow interest at market related rates prevailing in the particular year. However, the Delhi Commission in departure of the directions of this Tribunal has proceeded to determine the rate of interest for the concerned year by taking the interest rate prevailing on the first day of the year.

(c) Ultimately, the Delhi Commission did not revise the interest cost earlier allowed based on the loans taken in the Financial 2004-05 even though the weighted average of SBI prime lending rates for the Financial year 2006-07 was 11.09%.

(d) The Appellant had placed the material before the Delhi Commission setting out in detail the verifying rates of interest during the Financial Year 2006-07 and worked out the weighted average rate of interest on 11.09%.

(e) While determining the prevailing interest rates during the particular year weighted average of interest rates for the entire year has to be considered. Interest rate in the present case is 11.09% and it cannot be the interest rate that was prevailing during the first day of the year. Similarly, taking the weighted average interest rate for the year for allowable interest against the Financial Year 2006-07 works out to 9.34% and 8.5% as granted by the Delhi Commission.

9. In reply to the above submissions, the learned Counsel for the Delhi Commission has made the following submissions:

(a) The Delhi Commission has the discretion of adopting any spread for the purpose of computation on interest cost on notional loan. To this extent, it has relied on the judgment of this Tribunal dated 6.10.2009 in Appeal No.36 of 2008 to support its stand that it has the discretionary power to work out the applicable spread on the interest rate.

(b) Based on the spread that had been adopted by the Delhi Commission in the earlier case, the Delhi Commission worked out the allowable interest cost for the Financial Year 2006-07 by taking 11.09% average SBI-PLR during the Financial Year 2006-07 and

deducted the same by 2.75%. Since there was no verification in the rate of interest, the question of carrying cost or its apportionment in debt equity ratio of 70:30 does not arise.

10. We have considered the rival contentions on this issue.

11. In fact, this Tribunal in Appeal No.52 of 2008 dated 31.5.2011 directed the Delhi Commission to allow the interest on notional loan for a particular year based on the market related interest prevailing in that Financial Year i.e 2006-07.

12. The relevant extract to this Tribunal's judgment is reproduced below:

> *"The next issue is with reference to the lower interest rate allowed on notional loans. The rate of 8.5 per cent considered by the Delhi commission was based on the loan taken by the Appellant in the FY 2004-05. The interest rates have subsequently increased which is evident from the moment in the Prime Lending Rate fixed by the State Bank of India. As such, the Delhi Commission has not considered the cost of re-financed Delhi Power Company Load for allowing interest on notional load. The Delhi Commission has also ignored the fact that the capital interest rate is to be applied for the period 2006-07. Therefore, the* ***Delhi Commission is directed to allow the interest on notional loan for***

> ***a particular year based on the market related interest rate prevailing in that year.*** *The said claim has to be considered by the Delhi Commission along with the carrying cost."*

13. The above directions with observations do not mean that the Delhi Commission should adopt the weighted average of the SBI Prime Lending Rate during the year. What it actually mean to us is that interest rate of notional loan should be market rate at the time of the induction of the notional loan.

14. This direction given by this Tribunal in Appeal No. 52 of 2008 should apply and should be given full effect in each year by allowing interest amount of notional loan based on the market related interest rate prevailing in that year.

15. Accordingly, this issue is answered against the Appellant.

16. The **Second Issue** for our consideration is **Efficiency Factor wrongly applied on 6th Pay Commission's arrears pertaining to Financial Year 2005-06 to Financial Year 2007-08.**

17. On this issue, the Appellant has made the following submissions:

    (a) Under Regulation 5.4 of the Delhi Electricity Regulatory Commission (Terms and Conditions for

Determination of Wheeling Tariff and Retail Supply Tariff) Regulations, 2007 (MYT Regulations), the normative Operation & Maintenance Expanses for each year of the Control Period is reduced by an efficiency factor.

(b) The Delhi Commission has applied the efficiency factor on the employee's cost so revised. In doing so, the Delhi Commission applied the efficiency factor pertaining to the year of pay-out as and when arrears were actually paid instead of applying the efficiency factor pertaining to the ear for which the arrears were approved. The efficiency factor under the MYT Regulations is calculated on approved Operation & Maintenance Expanses. Having approved the arrears in respect of each year, the Delhi Commission erred in applying the efficiency factor based on the actual year of pay-out.

18. In reply to the above submissions, 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 the Commission has given an undertaking that the same would be rectified in the true-up order for the next year.

19. In view of the Delhi Commission's undertaking, it is directed to rectify the same in the next true-up without any delay.

20. With these directions, this issue is decided.

21. The **Third Issue** is "**Disallowance of Fringe Benefit Tax (FBT).**

22. The learned Counsel for the Appellant has made the following submissions on this issue:

(a) FBT is nothing but an additional levy of income tax on the employer assessee, the quantum of which is dependent on the value of fringe benefits provided to the employee. For tariff purposes FBT has to be considered as levy of income tax on license business of the distribution licensee, and such levy is squarely covered under Regulation 5.20 of the MTY Regulations. FBT is levied on the fringe benefits provided or deemed to be provided under the Income Tax Act. Such fringe benefits include employees' entertainment, travel, employee welfare and accommodation, conference, conveyance or cash allowances for this purpose; employer's contributions to superannuation find etc.

(b) The Learned Delhi Commission has disallowed the Appellant's claim for FBT on the ground that it is not tax on income of the Appellant by placing reliance on Regulation 5.22 of the MYT Regulations.

(c) It is submitted that FBT forms part of the corporate tax on deemed amenities to employees and therefore forms of the "income tax" on the licensed business of the Appellant. In this regard, it is relevant to note Regulation 5.20.

(d) Accordingly, fringe benefit tax should be allowed to be recovered through the ARR of the Appellant. Given that FBT is an income tax levied on the income of the licensed business of the Appellant under the income Tax Act, the same falls within the scope of Income Tax under Regulation 5.20 and should be included in the base O&M expenses. It is pertinent that FBT is in the nature of income tax in accordance with the provisions of section115 WA Income Tax Act, 1961.

(e) The Respondent Delhi Commission has wrongly relied solely on Regulation 5.22 to content that only tax on the income of the Appellant limited to Roe can be passed through. The Respondent Commission has clearly ignored Regulation 5.20 which allows any income tax on the licensed business to be passed through as an expense. It is beyond any iota of doubt that FBT is in the nature of Income Tax introduced under the Income Tax Act.

(f) It is further submitted that this Hon'ble Tribunal in the matter of Tata Power Company Ltd. Vs. MERC (Appeal No. 173 of 2009) has already decided the issue of treatment of FBT as a Tax.

(g) The aforementioned provision of the Income tax Act and observations of this Hon'ble Tribunal on Appeal No. 173 of 2009 makes it amply clear that FBT is part of the income tax and therefore covered under the provisions of Regulation 5.20 to be passed on to the consumers as income-tax.

(h) It is pertinent that both in the Appellant's MYT order as well as in the previous tariff order truing up for FY 2007-2008, the Delhi Commission gas allowed Fringe Benefit Tax as an expense. The present approach of the Delhi Commission is thus clearly inconsistent from the past practice.

23. In regard to this issue, the Delhi Commission has made the following reply:

(a) Regulations 5.20, 5.21 and 5.22 of the MYT Regulations, 2007 deals with the Corporate Income Tax.

(b) These Regulations do not provide that FBT will be passed through in tariff. Merely because, the Delhi Commission has in the Multiyear Tariff Order has provisionally allowed amount of Rs.15 Crores towards income tax and fringe benefit expenses does not mean that the amount towards FBT can be allowed in ARR and pass through the consumers.

(c) Merely, because in true up for the Financial Year 2007-08, the Delhi Commission has allowed the said amount is not a ground that a mistake made earlier will continue for indefinite period. FBT is tax on the perks offered by the employer to his employees and the same is not tax on income. Besides this, FBT is only for a limited period for the Financial Year 2007-08 and 2008-09.

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

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.

30. 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.

31. 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.

32. 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.

33. In 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.

34. 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.**

35. 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.

38. The **Issue No.4th** relates to the **Expenses relating to other business not allowed (issue arising out of the true-up for the Financial Year 2008-2009).**

39. The submissions of the Appellant in this regard are as under:

(a) The grievance of the Appellant is related to income from other business. The Delhi Commission has accounted for 80% of the income from other business and deducted from its ARR as per relevant Regulations, it did not allow that expenditure incurred on such other business only on the ground that the Appellant did not furnish the audited accounts for the such other business. The Delhi Commission had ignored the fact the Appellant was not required to get the accounts of other business audited. The Appellant is prepared to submit the certificate from the Auditor.

(b) Once the Respondent Delhi Commission has taken into account the earnings of non-licenses business to reduce the ARR of the Appellant, the expenses incurred for earning such amount should also be considered. If the Respondent Delhi Commission has proceeded to consider the earnings of non-licensed business without audited accounts, the same approach should apply to expenses as well. It was open to the

Respondent Delhi Commission to carry out a prudence check on such amounts. Disallowance of the legitimate expenses relating to other business by the Delhi Commission leads to discouraging the Appellant from generating income from other business, which is otherwise undertaken considering the interest of consumers at large.

40. In reply to the above submissions, the learned Counsel for the Delhi commission has made the following submissions:

(a) The Appellant has not produced audited accounts for the business other than license business amounting to Rs 1.69 Crores.

(b) As per DERC (treatment of income from other business of Transmission Licensee and Distribution Licensee) Regulation 2005, Regulation 4 provided as under:

"4. ***Account:-***

(1) The License shall:

(a) maintain for other business activities separate accounting records, such as amounts of any revenue, cost, asset liability, reserve or provision which has been charged from or to any other business together with a description of the basis of

that charge or determined by apportionment or allocation between the various business activities together with a description.

(b) prepare on a consistent basis from such records accounting statements for each financial year comprising a profit and loss account, a balance sheet and a statement of source and application of funds;

(c) provide in respect of the accounting statements prepared, a report by the Auditors in respect of each Financial Year, stating whether in their opinion the statements have been properly prepared and give a true and fair view of the revenue, costs assets, liabilities, reserves reasonably attributable to the business to which the statements relate;

(d) submit the Commission such information that is required to review the additional cost incurred by the licensee for other business.

(e) submit copies of the accounting statements and Auditor's report nor later than six months after the close of the financial year to which they relate; and

(f) also comply with other statutory requirements under the Companies Act 1956, or any other Acts/Rules as may be applicable.

(2) The Licensee shall establish to the satisfaction of the Commission that the other

business duly bear an appropriate share of overhead costs and other common costs."

(c) In spite of the letter dated 07.01.2010 by the Delhi Commission to the Appellant to submit the audited accounts of other business along with the methodology considered for apportioning the expenses, the Appellant did not submit any audited accounts in respect of other business and inform the Delhi Commission vide letter dated 18.01.2010 that it does not maintain audited accounts for the other business.

(d) Thus, the Delhi Commission has allowed the expenses to the tune of 20% and held Rs. 1.36 Crores as income from other businesses out of total amount of 1.69 Crores. The Delhi Commission has followed the same approach in the true up order for FY 2007-08, against which no objection was raised by Appellant.

41. Before discussion on this issue, let us refer to the findings in the Impugned Order which are as under:

"3.296 The Commission further observes that the Petitioner has shown earnings of Rs 1.69 Cr from other than License Business (Rs 1.02 Cr from Consultancy and Rs 0.67 Cr from utilization of NDPL's assets). It has also submitted expenses of Rs 0.16 Cr towards Consultancy Business. The Petitioner has proposed to share 0.97 Cr with the consumers against the total

earnings of Rs 1.69 Cr, and subtracted Rs 0.73 Cr from the non tariff income.

3.297 As per the Commission's Other Business Regulation, the Petitioner is required to submit audited accounts of the other business to the Commission. The Commission through its letter dated January 7, 2010 directed the Petitioner to submit the audited accounts of the other businesses of the Petitioner along with the methodology considered for apportioning the expenses.

3.298 The Petitioner through its letter dated January 18, 2010 submitted that it does not maintain audited accounts for the other businesses.

3.299 In absence of the audited accounts, the Commission can not recognise expenses of the other businesses of the Petitioner. The Commission has considered 80% of the income from other business i.e. Rs 1.36 Cr as the non tariff income."

42. Let us discuss the issue.

43. The issue before us relates to income from other business of the Appellant.

44. Regulation 5.26 of the Delhi Commission's MYT Regulations provides as follows:

"5.26 where the Licensee is engaged in any other business, the income from such business will be calculated as per "DERC Treatment of Income from Other Business of Transmission Licensee and Distribution Licensee Regulation 2005" and shall be

deducted from the Aggregate Revenue Requirement in calculating the revenue requirement of the Licensee;

Provided that the Licensee shall follow a reasonable basis for the allocation of all joint and common costs between the Distribution Business and the Other Business and shall submit the Allocation Statement as approved by the Board of Directors to the Delhi Commission along with his application for determination of tariff;

Provided further that where the sum total of the direct and indirect costs of such other business exceed the revenues from such other business or for any other reasons, no amount shall be allowed to be added to the aggregate revenue requirement of the Licensee on account of such other Business."

45. Under Regulation 5(5) of the DERC Treatment of Income from other Business Regulations, 2005 ("Other Business Regulation"), distribution licensee is required to pass on 80% of the revenues arising on account of other businesses and retain 20%. The relevant portion of Regulation 5(5) is as follows:

"As a general principle, the Licensee shall retain 20% of the revenues arising on account of other business and pass on the remaining 80% of the revenues to the regulated business."

46. Conjoint reading of these two Regulations referred to above would suggest that the Income from other business will have to be shared and 80% of such Income shall be deducted from the ARR of the licensee. 2nd Proviso to Regulations 5.26 of MYT Regulations provides that in case the expenditure in regard to such other business exceed the revenue from other business then such excess expenditure shall not be added to expenditure of the Appellant. In other words only the profit from other business shall be shared in the ratio of 80:20 and loss from such other business shall not be shared.

47. Whereas the main Regulation 5.26 has used the words 'income from other businesses, 2nd Proviso to the section has used the word 'revenue from such other business. Thus, it clear from plain wording of the Regulation 5.26 that 'income' is different from 'revenue'. Income in main regulation is the profit earned by the Appellant from other business and is equal to revenue earned from other business minus the expenditure incurred on the other business.

48. It is clear from the plain reading of Regulation 5.26 itself that income from other sources to be worked out by deducting expenditure from the revenue.

49. Accordingly the same is decided in favor of the Appellant.

50. There are **three issues** under **Issue No.5 i.e. Issue No.5-A, 5-B and 5-C.**

51. Issue No.5-A relates to the **Arrear on account of Increase in Monthly Pension payable to VSS Optees pursuant to 6th Pay Commission.**

52. On this issue, the Appellant has made the following submissions:

(a) The Appellant submitted letters dated 13.05.2011 & 21.06.2011 to the Delhi Commission, providing the year wise and head wise breakup of 6th Pay Commission impact for employees other than those who have opted VSS. The letters clearly mentioned that the said break-up does not include the amount payable to VSS employees.

(b) Delhi Commission has allowed the impact of 6th Pay Commission in respect of employees other than those who opted for VSS but has not allowed the 6th Pay Commission impact on the pension payable to those employees who have taken VSS.

(c) Section 16(2) of the Delhi Electricity Reforms Act, 2000 ("DERA") inter alia clearly mandates that

the terms and conditions of service of the employees of the erstwhile DVB in the successor Discoms shall not in any way, be less favourable than or inferior to those applicable to them immediately before the transfer of such employees to the Discoms. Further, under the Delhi Electricity Reforms (Transfer Scheme) Rules, 2001 ("Transfer Scheme") and the Trpartite Agreement, the terms and conditions of ex-DVB employees shall continue to be governed by the rules and laws applicable to them prior to privatization. Thus, the Appellant is bound by statute to give effect to any impact arising on account of 6th Pay Commission recommendations. The Delhi Commission has hence erred in not allowing the arrears of pension payable to employees who have taken VSS arising on account of 6th Pay Commission.

(d) In its reply, the Delhi Commission has said that the amounts allowed in the Appellant's MYT Order and the impugned order are provisional and shall be trued-up subject to outcome of the arbitral award.

(e) The issue pending before the Arbitral Tribunal pertains to the extent of contribution to be made by the Discoms such as the Appellant towards pension and other terminal benefits for VSS optees, to the pension fund that was set up for ex-DVB employees at the time of privatization. As per the order of the Delhi High Court dated 02.07.2007, the monthly pension has to be borne by the Appellant until the Arbitral Tribunal passes an award and the payments are subject to Adjustment upon adjudication by the Arbitral Award. It is submitted that the Appellant has accordingly been making the payments towards monthly pension of VSS optees and has also given effect to the recommendations of the 6th Pay Commission.

(f) Therefore, it is submitted that even if the final amounts payable to VSS optees is made subject to the outcome of proceedings before the Arbitral Tribunal, the Delhi Commission may be directed to allow the arrears on account of increased monthly pension due to the impact of the 6th Pay Commission.

53. **Issue No.5-B** relates to the **Impact of 6th Pay Commission in respect of Employees Absconding/Suspended in the Financial Year 2006-07.**

54. The submissions of the Appellant on this issue are as under:

(a) In the Appellant's MYT Order, the Delhi Commission provided for impact of 6th Pay Commission by adopting a methodology wherein it estimated the impact of 6th Pay Commission in the employee expenses for the base year FY 2006-07 and then applied the inflation and efficiency factor for computing the impact on the subsequent years instead of allowing the impact on actual basis. In the impugned order, the Delhi Commission has revised the base year FY 2006-07 expenses according to the actual impact of 6th Pay Commission and has further revised the approved expenses for the subsequent years by applying the inflation and efficiency factor on such revised base year expenses.

(b) Appellant vide letter dated 24.05.2011 clarified to the Delhi Commission that certain employees were absconding/suspended during Base Year FY 06-07. Since cost of these employees was not factored in while computing the salary cost for the base year, the Delhi Commission has not allowed the impact of the 6th Pay

Commission in respect of such employees for any year of the Control Period.

(c) As the Appellant is statutorily bound to implement the recommendations of the 6th Pay Commission, the impact of the same has to be allowed by the Appellant. The impact of the 6th Pay Commission having been allowed by the Delhi Commission, the same should be allowed in respect of employees who were absconding/suspended at such time as well.

55. **Issue No.5-C** relates to **Impact of 6th Pay Commission on employees who opted for 6th pay Commission w.e.f 01.07.2006.**

56. The submissions of the Appellant on this issue are as under:

(a) Whenever there is a pay revision the employees under the FR/SR structure (Fundamental Rules/Supplementary Rules, i.e. ex-DVB employees) have an option to defer the applicability of such pay revision. The applicability of the revision is usually deferred for enjoying the benefit of better pay scales upon promotion etc.

(b) Not all employees have exercised the option of Sixth Pay as on 01.01.2006. These were approximately

250 employees who opted for implementation of 6th Pay Commission from 01.07.2006 instead of 01.01.2006.

(c) The cost of these employees was not factored in while computing the salary cost for the base year FY 2006-07 due to which, the Delhi Commission has not allowed the impact of the 6th Pay Commission in respect of such employees for any year of the Control Period.

(d) By adopting this methodology, the Delhi Commission has erred in not allowing the full impact of 6th Pay Revision in FY 2007-08 to FY 2010-11 for those employees, who had opted for 6th Pay Revision from July, 2006 and such impact should have been allowed.

57. In reply to the above submissions on the issue No.5-A, 5-B and 5-C, the learned Counsel for the Delhi Commission has made the following submissions:

(a) The pension expense for the employees opting for VSS as allowed in the MYT Order dated February 23, 2008 and tariff order dated August 26, 2011 has been made on a provisional basis and shall be trued-up at the end of the Control Period, subject to prudence check and ATE judgment on this case.

(b) The Delhi Commission in the MYT order has held:-

"3.112 The Commission based on its understanding of the issue, believes that the Petitioner will be required to pay monthly pension till the outcome of the award of the Tribunal. The Tribunal will be deciding the lump sum amount which the Petitioner will be required to pay for transferring all pension and terminal benefit liability to the Pension Trust. This lump sum amount will be for the additional pension requirement for the period before the actual superannuation of the VSS optees and for shifting terminal benefits of the VSS optees from the superannuation date to an early date. The monthly pension payments being made to VSS optees shall be appropriately taken up before the proceedings of the Tribunal by the Petitioner.

3.113 The Commission now allows the monthly pension provisionally subject to the outcome of the Tribunal award with the condition that any refund/relief provided on this account to the Petitioner by the Trust will be available for adjustment in the future employee expense."

"4.125 The Petitioner vide Letter No. NDPL/DERC/2007-08 dated 4th February, 2008 submitted to the Commission that the Petitioner has opted for the actuarial valuation of the pension liabilities of employees who opted for VRS. The Petitioner has also mentioned that the pension for the employees who had opted for the SVRS shall be paid till the date of their superannuation. The

estimated pension liability for the Control Period submitted by the Petitioner is shown below:"

Table 74: Proposed SVRS Pension Expense

Particulars	FY08	FY09	FY10	FY11
Pension	9.47	8.53	7.50	6.06

4.126 The Commission has analyzed the submissions made by the Petitioner and provisionally approves the same for the Control Period.

Particulars	FY08	FY09	FY10	FY11
Pension	9.47	8.53	7.50	6.06

4.127 As already discussed in the truing-up chapter, the Commission provisionally allows the monthly pension provisionally subject to the outcome of the Tribunal Order with the condition that any refund/relief provided on this account to the Petitioner by the Trust will be available for adjustment in the future employee expenses."

58. On this issue, the learned Counsel for the Delhi Commission submitted the Appellant had not submitted any details on the actual impact of the employee expenses at the time of passing of the impugned order and if the Appellant gives

details about the revised amount of employee expenses along with documentary proof at the end of the Control Period, the Delhi Commission will consider the same and pass the order accordingly.

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.

60. In the light of the said directions, these issues mentioned in Issue No.5 do not survive.

61. **Issue No.6 relates** to **Allowance of LPSC at 15% which has been allowed to Delhi Transco from the Distribution Companies.**

62. On this issue, the Appellant has made the following submissions:

(a) The surplus with Delhi Transco as found in Delhi Transco MYT order of 20.12.2007 was never distributed amongst the Discoms even though the Delhi Commission continued to consider a surplus in the books of Delhi Transco despite the Tribunal's judgments. The said surplus was utilized by

Commission in tariff order of Delhi Transco for 2011-12 for adjusting revenue gap of 2007-08 to 2010-11.

(b) The Appellant was entitled to set off Delhi Transco's liability of Rs. 53.94cr against its liability of Rs. 62.36cr. Therefore, there was no justification for the Appellant bearing burden of interest on entire liability of the Appellant from date of interview.

(c) Judgment of this Tribunal in Appeal No. 30 of 2010 dated 31.05.2010 for the first time held that said amount was not available as surplus and there was deficit of Rs. 429cr. This finding was based on the judgment of this Tribunal in Appeal No. 123 of 2007 dated 29.05.2000, an appeal against which judgment is pending before Supreme Court. It is pertinent that in O.P. 1 of 2010 (dated 30.05.2010) where Delhi Transco sought to implement the judgment in Appeal No. 133 of 2007, this Tribunal held that in view of the appeal pending before the Supreme Court, it was not inclined to direct such implementation.

(d) Thus, the position of whether there is surplus 53.94cr to be adjusted against the Appellant's liability is yet not clear. Nevertheless if the Respondent Delhi Commission had proceeded on the basis that the

surplus amount was lying with Delhi Transco, it was justified on the part of the Appellant to seek adjustment of such amount to avoid increase in tariff for its consumers. In any event, the Appellant has now already paid Delhi Transco's dues of Rs. 62.63cr.

(e) The judgment of this Tribunal in Appeal No. 30 of 2010 itself requires that the Discoms should be able to recover their liability with SBI PLR without affecting their return of 16%.

(f) The Delhi Commission should, therefore, follow the same and allow the Appellant to recover the carrying cost on Delhi Transco's dues paid by the Appellant.

63. The learned Senior Counsel for the Delhi Commission has made the following reply:

(a) The Appellant has contended that late payment charges to Delhi Transco towards power purchase cost for the period before 2007 was not included in ARR. It was also contended that Delhi Transco has not adjusted the payment amount with surplus approved to Delhi Transco.

(b) The Appellant failed to make payment of Rs. 31.96 Crores on account of true-up cost allowed to Delhi Transco vide order dated 12.11.2009 on account of power purchase cost of Rs. 114.10 Crores for FY 2005-06 and RLDC/ULDC charges of Rs. 3.952 Crores for FY 2002-07, hence any carrying cost due to late payment cannot be approved as a pass through in ARR, which will burden the consumer on account of negligence on behalf of Appellant to make payment timely.

(c) The surplus of Rs. 196.17 Crores approved to Delhi Transco as per approved order had been adjusted towards ARR or Appellant along with carrying cost in the Delhi Transco order dated 26.04.2011. The relevant part of the order is as follows:-

> *"3.38 In the MYT Order for the Petitioner, the Commission had carried out true-up for FY 2006-07 and had approved a total surplus of Rs. 196.17 Cr. The same was to be adjusted towards the ARR of the distribution licensees. The Petitioner has submitted that no payment has been made so far to the distribution licensees on this account.*
>
> *3.39 The Commission has, therefore, adjusted the surplus amount (Rs. 196.17 Cr. along with negative carrying cost@ 11.5%) against the amount receivable by the Petitioner due to revision*

of costs pertaining to the Policy Direction Period as discussed in the previous sections. The same is shown in Table.

Net impact of ATE orders and other liability for Policy Direction Period (2002-07)

3.40 The net impact of the ATE Orders in Appeal No. 133/07 & 28/08 and Additional Power Purchase Liability of the prior period has been summarized below:-

Table 10: Net impact of ATE's Judgment in Appeal No. 133/07 & 28/08 and Additional Power Purchase Liability as approved by the Commission (Rs. Cr.)

Particulars	*FY 2005-06*	*FY 2006-07*	*FY 2007-08*	*FY 2008-09*	*FY 2009-10*	*FY 2010-11*
Opening Gap	-	2.41	(201.10)	(224.23)	(250.02)	(278.77)
Additions During the Year	2.28	(192.71)	-	-	-	-
Interest on short term loan	2.28	3.46	-	-	-	-
Surplus Approved for FY 2006-07	-	(196.17)	-	-	-	-
Rate of Interest (%)	11.50%	11.50%	11.50%	11.50%	11.50%	11.50%
Carrying Cost	0.13	(10.80)	(23.13)	(25.79(	(28.75)	(32.06)
Closing Gap	2.41	(201.10)	(224.23)	(250.02)	(278.77)	(310.83)
Additional Power Purchase Cost (2002-07)						107.28
Metering at Sending End						(17.21)
Carrying Cost on Power Purchase for FY 2005-06 & RLDC/ULDC Charges						64.72
Total						(156.04)

(d) Total approved ARR of Delhi Transco is to be paid by the Discoms, hence if the surplus was not adjusted in

ARR of 2011-12, the Discoms were to pay the more amount.

64. Let us refer to the findings of the Delhi Commission on this issue. Relevant portion of the Impugned order is quoted below:

> *"2.189 The Commission has already approved power purchase cost of Rs 117.95 Cr in its Tariff Order of FY 2009-10 dated 28th May, 2009 and had also directed the Distribution Licensees to pay the amount on provisional basis vide the said Order.*
>
> *2.190 However, the Distribution licensees have not made any payment in this regard. The Commission is of the view that DTL is entitled to carrying cost on the amount up to the date when DTL has raised invoice on the Distribution licensees. The Commission has, therefore allowed the amount of carrying cost so calculated in the ARR of DTL for FY 2011-12. The payment of billed amount along with interest on the delayed payment from the date of Invoice till date of payment is the responsibility of the Distribution licensees. Any interest on the delayed payment (which is penal in nature) paid by the Distribution Licensees in accordance with the commercial agreement with DTL shall not be a pass through in the ARR of the Distribution Licensee. The Distribution licenses cannot claim any penal interest as a pass through in their ARR since it was their duty to make payment to DTL on time."*

65. Before discussing the issue, it would be appropriate to refer to the brief background of this case which reads as under.

(a) Delhi Transco had filed a petition on 25.03.2009 for recovery of additional liability towards power purchase cost and revision of wages for the period 2002-03 to 2006-07.

(b) In tariff order for FY 09-10 for the Appellant dated 28.05.2009, the Delhi Commission allowed Rs. 117.95 Cr provisionally to Delhi Transco towards revised power purchase costs including the Appellant's share amounting to Rs. 30.67 Cr.

(c) Delhi Transco raised a bill for Rs. 30.67 Cr. on the Appellant on 04.06.2009.

(d) An I.A. No. 250 of 2009 in Appeal No. 28 of 2008 filed by Delhi Transco against its Multi Year Tariff Order dated 20.12.2007, was filed for correction of arithmetical errors in relation to power purchase cost for 2005-06 and RLDC/ULDC charges for 2002-03 to 2006-07. This Tribunal by its order dated 13.08.2009 directed the Delhi Commission to resolve the arithmetical errors.

(e) By order of 12.11.2009 Delhi Commission trued up the charges allowing Delhi Transco to be recovered from the Discoms, Rs. 114.10 Cr. towards power purchase cost and Rs 3.95 Cr towards RLDC/ULDC

charges. Appellant's share in the amount recoverable by Delhi Transco being Rs. 31.96 Cr.

(f) Bill for Rs. 31.96Cr was raised by Delhi Transco on the Appellant on 27.11.2009.

(g) Thus, the total claim of Delhi Transco against the Appellant is Rs. 62.63cr as on 27.11.2009.

(h) However, in Delhi Transco's MYT order of 20.12.2007 Delhi Commission had observed that on account of surplus in the books of Delhi Transco, an amount of Rs. 53.94cr was payable by Delhi Transco to the Appellant.

(i) The Appellant wrote to Delhi Transco for setting off Delhi Transco's liability of Rs. 53.94cr against the Appellant's liability of Rs. 62.63cr.

(j) The said liability owned by Delhi Transco to the Discoms was, however, nullified and set aside by the order of this Tribunal dated 29.05.2009 in Appeal No. 133 of 2007, which had the effect and consequence of Rs. 429 crores becoming payable to Delhi Transco by the Discoms instead of the Discoms being entitled to recover Rs. 196.17 Crores from Delhi Transco. As a

consequence, the set-off, which had earlier been made out.

(k) Therefore, the alleged delay in making payments by the Discoms to the Delhi Transco arose only because of the bonafide impression which the Appellant had that in fact, far from there being any amount due and payable by the Delhi Transco, it was entitled to receive a net a differential amount from Delhi Transco.

(l) On 03.03.2011, NDPL undertook to pay Delhi Transco the Rs. 31.97 cr after the Delhi Commission allowed NDPL to recover the same from consumers in its ARR fro 2011-12. As undertaken, after passing of the impugned order, the Appellant has paid Rs. 62.63 Cr to Delhi Transco.

(m) Delhi Transco has claimed LPSC @ 15% from Discoms, which has been allowed by the Delhi Commission. However, in the impugned order, Delhi Commission has held that the interest on delayed payment is to the account of Discoms,

66. In view of the above facts and background, let us discuss the issue.

67. In the present case the Appellant did not pay an amount of Rs 62.63 Cr to Delhi Transco under the impression that Rs.53.94 Cr. is recoverable from the it. According to the Appellant, it had offset the amount payable from the amount receivable. The Delhi Commission has submitted that the amount of surplus of Delhi Transco had been adjusted against the ARR of the Appellant and thus the Appellant was liable to pay the amount due to the Delhi Transco.

68. Under the Regulatory regime, total ARR of a licensee is to be recovered from consumers through tariff. The ARR of a Transmission Licensee, as Delhi Transco in this case, is recovered from the Distribution Licensee (Appellant) by adding it to the ARR of the Distribution Licensee as transmission charges. The Distribution Licensee recovers its full ARR, including transmission charges from the consumers through tariff approved by the Delhi Commission.

69. It is not clear from the submissions of the Appellant as to whether the amount in question to be paid by the Appellant to the Delhi Transco was added to the ARR of the Appellant for the relevant year and the Appellant had already recovered the same from its consumers. If it was so, the Appellant is liable to pay LPSC and the same cannot be transferred to the consumer because it was the Appellant's negligence.

70. On the other hand, if the amount in question was not added in the ARR of the Appellant and the Appellant did not recover the same from the Consumers, then the Appellant is not liable to pay the LPSC. Since it has not been recovered from the consumers, the carrying cost is to be recovered from the consumers.

71. This issue is decided accordingly.

72. The **7th Issue** is with reference to **Litigation Expenses for Delhi Vidyut Board (DVB) Period.**

73. On this issue the submissions of the Appellants are as under:

(a) Rule 8(3) of the Transfer Scheme Rules categorically provides that the expense incurred in respect of litigation/claims pending since the DVB period, provided the same is less than Rs. 1 crore must be allowed in the ARR of the Distribution Company. The relevant provision of the transfer scheme is reproduced herein below:

"Notwithstanding anything contained in these rules including the schedules, the liabilities arising out of the litigation, suits, claims etc. pending on the date of the transfer and/or arising due to events prior to the date of the transfer shall be borne by the

relevant distribution company viz. DISCOM 1, DISCOM 2 and DISCOM 3 respectively, subject to a maximum of Rs. 1 crore per annum. Any amount above this shall be to the account of the Holding Company in the event for any reason the commission does not allow the amount to be included in the Revenue Requirement of the DISCOM".

It may be noted that in terms of Rule 11 of the Transfer Scheme Rules, the transfers there under the effective since 01.07.2002 as a statutory transfer.

(b) Thus, in terms of the Transfer Scheme Rules, any litigation expenses in respect of the DVB period upto to Rs. 1 Cr. are required to be allowed in the ARR of the Appellant. Since the said dispensation is statutorily binding, the expenses cannot be treated in the same manner as other A&G expenses, as has been done by the Delhi Commission.

(c) It is pertinent to note that the present issue has arisen because the Delhi Commission has considered the base year expenses for litigations pending since DVB period as actuals, which was only Rs. 0.06 Cr. and allowed litigation expenses for the subsequent years by indexing the same for inflation and applying the efficiency factor. The Delhi Commission has thereby

given a complete go-by to the Transfer Scheme as the actual litigation expenses incurred in excess of the amount so approved even upto Rs. 1 Cr. is not allowed. It is relevant that the Delhi Commission has not held that such expenses have not been incurred by the Appellant. The scope of A&G expenses under the MYT Regulations relates to the permissible legal expenses allowable to the Appellant as part of its business cost for the control period. This is different from the provision made under the Transfer Scheme for the liabilities of erstwhile DVB, which has the effect of covering the Appellant as the successor entity for any pas liability in relation to litigation against DVB. Such a protection having been provided as a part of the Transfer Scheme is binding on the Respondent Delhi Commission. The Respondent Delhi Commission while determining the ARR has to take into account such amount as part of uncontrollable cost.

74. The reply of the Delhi Commission on this issue is as under:

(a) As per Regulation 5.2 of MYT Regulation 2007 administrative and general expenses are controllable item and the Delhi Commission has allowed the same on normative basis. Thus, the Appellant cannot claim

the same on actual basis. It is further submitted that tariff is a complete package and one of the item of normative value could not be changed on actual basis.

(b) It is further submitted that litigation expenses are one component of administrative general expenses which are to be awarded on normative basis. Hence microspliting of the claim cannot be done.

75. Let us discuss the issue.

76. The Delhi Commission has considered litigation expenses as a part of A&G expenses. While doing so, the Delhi Commission has considered the base year expenses for litigations pending since DVB period as actuals and allowed litigation expenses for the subsequent years by indexing the same for inflation and applying the efficiency factor. The base year expenses for pending litigation for the DVB period were only Rs 0.06 Cr. This amount was indexed for annual inflation rate to arrive at A&G expenses for the relevant year.

77. Let us quote the findings of the Delhi Commission in the Impugned order as given below:

"*4.122 With reference to litigation expenses for DPCL period, it was part of A&G expenses approved by the Commission, which is a controllable parameter. Mere fact that the Petitioner had incurred Rs 0.38 Cr on*

litigation expenses, does not qualify the Petitioner for additional amount from the Commission in the ARR. In case the actual litigation expenses for DPCL period were less than Commission approved values, the Petitioner would not have returned the same back to the consumers through reduction in ARR. Therefore, the Commission has rejected the Petitioner's request and not allowed any additional amount towards this."

78. The Delhi Commission has taken a view that in case the actual litigation expenses for DVB period were less than the normative value approved by the Delhi Commission, the Appellant would not have returned the same back to the consumers. The litigation expenses have been included in the A&G expenses at the time of formulation of the MYT Regulations. Under these Regulations, controllable expenses are allowed on normative basis. A&G expenses are controllable under the Regulations and accordingly allowed on normative basis. There are many sub-parameters under the head A&G 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.

79. This issue is decided accordingly.

80. **Issue No.8** is with reference to **Disallowance of expenses incurred in tendering process.**

81. The submission of the Appellant on the issue are as under:

(a) The Competitive Bidding Guidelines were introduced by the Delhi Commission in FY 2009-10. These guidelines specify the procedures to be followed for procurement. For of procurement up to Rs. 25 lacs, the distribution licensee is free to adopt any procedure; For procurement between Rs 25 lakhs to 1 Cr, licensee may resort to open tendering or procure from registered vendors and for procurement above Rs 1 cr. Should be done through open tendering only. The Guidelines also introduce the requirement\ of advertising in newspapers and journals.

(b) Accordingly, since such expenses being statutory and mandatory in nature was uncontrollable, which was not required to be incurred by the Appellant, when MYT order was passed, the Appellant claimed Rs. 0.47 Crores towards expenses incurred in FY 2009-10, for advertisement in compliance of the above guidelines. However, the same was rejected by the Delhi Commission on the basis that the Appellant was always required to procure material through tenders and this was not a new requirement.

(c) That the requirement under the license conditions, prior to the issuance of Competitive Bidding Guidelines was limited to transparent and reasonable procedure, and the Appellant was not required to undertake such huge expenditure on advertisements. The relevant clause 10.5 of the license conditions of the Appellant is reproduced herein below:

> *"The Licensee shall invite and finalise tenders for procurement of equipment, material and/or services relating to such major investment, in accordance with a transparent, competitive, fair and reasonable procedure as may be specified by the Commission from time to time."*

(d) In accordance with the aforesaid license conditions, the Appellant had been following a transparent, competitive and fair procedure for procurement, until the issuance of the Competitive Bidding Guidelines, which introduced mandatory requirements as to the exact procedure to be followed by licensees. Though advertisements were being made for tendering in a few cases. It was not necessarily being done in each case before the issuance of these guidelines.

(e) Since, the Competitive Bidding Guidelines were introduced after the issuance of the Appellant's MYT Order; expenses in respect of tendering procedure were not factored in by the Delhi Commission in the Appellant's MYT Order. The additional expenditure towards tendering has been incurred only to comply with a statutory requirement, thereby being uncontrollable in nature and hence ought to be allowed.

82. The learned Counsel for the Delhi Commission submits that the Appellant has claimed Rs.0.47 Crores towards advertising for open tendering during the period 2009-10. This is not a new item but part of administrative and general expenses, which is controllable item and cannot be revised being on normative basis.

83. Let us refer to the findings in the Impugned Order:

*"**4.114** NDPL has submitted the following additional expenses for consideration in ARR. computation. These include expenses on:*

(j) Tender cost for procurement of material: The Commission has issued the Competitive Bidding Guidelines during the FY 2009-10 which provided for procurement of any materials/services of an amount exceeding Rs 0.25 Cr through open tendering. The limit of Rs 0.25 Cr was subsequently increased to Rs 1 Cr vide revised guidelines issued by the Commission on FY 2009-10. This additional expense has been

necessitated due to the Order of the Commission, NDPL be allowed an amount of Rs 0.47 Cr which has been incurred towards advertisement for Open Tendering during the FY 2009-10.

4.124 The Commission rejects the Petitioner's claim of tendering cost of Rs 0.47 Cr for procurement of material through open tender as the Petitioner was always required to procuring material through tenders. Any cost incurred by the Petitioner during the Policy Direction Period on account of tenders must be part of the A&G expense of the Petitioner. This is not a new initiative and cannot be allowed in the ARR"

84. Let us now discuss this issue.

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.

87. The **9th Issue** is **Reduction of CISF Expenses from AT&C Over-Achievement Incentive Brief Description of Claim**.

88. The submissions of the Appellant on this issue are as under:

(a) CISF was deployed in accordance with the orders issued by the Hon'ble Supreme Court in W.P. (C)/1999 directing the Delhi Govt. to provide police assistance for detection of theft, protection for NDPL officials to take action against electricity theft and to take action against persons obstructing NDPL officials.

(b) The Ministry of Home Affairs, the controlling authority of CIFS issued letter of 05.02.2007, allowed the deployment of forces imposing conditions that residential accommodation for forces will be arranged by Discoms's and they will make advance payment of monthly bills for deployment.

(c) The Delhi Commission in its True-up order for FY 207-08 observed that the Appellant had taken prior approval of Delhi Commission for incurring CISF expenses, and therefore allowed Rs. 1.87 Cr in the ARR for 2007-08.

(d) In this regard, it is relevant to note Regulation 4.7 of MYT Regulations, 2007 which provides for computation of AT & C losses and Regulation 4.8 which specifies target loss levels and the manner of division of profits arising from achieving better loss levels. It is pertinent that there is no provision for reducing expenses from the incentive under these Regulations. The relevant portions Regulations 4.7 and 4.8 are set out below:

> *"4.7 The Commission shall set targets for each year of the Current 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 realized (units billed and collected) wherein the units realized shall be equal to the product of units billed and collection efficiency:*
>
> *(c) Collection efficiency, which shall be measured as ratio of total revenue relaised to the total revenue billed for the same year…"*

Regulation 4.8 provides as follows:

> *"The target AT & C loss levels to be achieved by the Distribution Licensee at the end of the Control Period shall be as follows:*

(i) NDPL-AT& C Loss Level shall be at 17 percent:

Provided that the year wise loss reduction trajectory for the Control Period shall be fixed for the Distribution Licensee in the Multi Year Tariff Order for 2007-08;

Provided that profits arising from achieving loss level better than 15% in any year shall be completely to the account of the Licensee;

Provided that the loss targets and year wise loss reduction trajectory for subsequent Control Periods shall be specified by the Commission before the start of each Control Period"

(e) It needs to be clearly understood that AT & C loss is itself to be calculated in terms of the units, and the achievement of the better loss level is also accordingly recovered in terms of unit. The profit arising for achieving a better loss level therefore necessarily have to be computed by converting the said number of units saved into money terms by applying the tariff rate per unit so saved. The profits arising from achieving a better loss level are therefore computed in terms of gross revenue value without deducting any expenses which may have occurred in order to reduce AT & C losses. Even in the past the calculation of profit arising from achieving a better AT & C loss level has always been

computed on the basis of a gross revenue calculation, without deducting from the gross revenue, any expenditure incurred by licensee Appellant. This method of calculation based on the gross revenue value of the units saved has never been objected to by the Delhi Commission. Thus, for example a portion of Discoms workforce is employed only for the purpose of AT & C losses this does not mean that a portion of the salaries paid to such work force can be adjusted or set of against the revenue gaining resulting from over achievement of AT & C loss target. The same logic may also apply to a portion of R & M expenses and a portion of regular security expenses. Further, in order to reduce AT & C losses, the Appellant may incur capital expenditure on new equipment or on replacement of equipment, which may result in significant increases in revenue expenditure by way of interest on loan and also depreciation. These items of revenue expenditure by way of interest on loan and also depreciation. These items of revenue expenditure would certainly be allowed as expenditure in the ARR, and the same would not in event be set off or adjusted against the revenue gained from units saved, for the purpose of applying Regulation 4.8. This again clearly establishes that the calculation

required to be made under Regulation 4.8. This again clearly establishes that the calculation required to be made under Regulation 4.8 is a gross revenue calculation, without deducting therefrom any expenses which may have some nexus with the reduction of AT& C losses.

(f) The CISF expenses are being incurred by the Appellant for complying with order of the Hon'ble Supreme Court and not for the purpose of reducing AT & C losses. The reduction in the AT & C loss is merely of fortuitous gain, which cannot have any impact on the operation of Regulation 4.8 MYT Regulations.

(g) The CISF expenses are incurred pursuant to the orders of the Hon'ble Supreme Court and with approval of the Delhi Commission. Since other O & M expenses are not set off against AT & C incentive, there is no rationale for setting off CISF related expense from the same. It is therefore submitted that the CISF expenses should be allowed to be recovered as part of the ARR and should not be adjusted against overachievement of AT & C targets.

(h) The Delhi Commission has held in the impugned order that it had erroneously allowed Rs. 1.87Cr

towards CISF expense for FY 07-08 in the previous true-up order for the Appellant, and that cost on account of CISF should have been reduced from incentive for over-achievement of AT & C losses. This amounts to re-opening of the previous tariff order by the Delhi Commission and should not be permitted. It is pertinent that CISF is part of the effort to cut down AT & C losses which is aimed to benefit ultimate consumers. Therefore, it is not a cost incurred by Appellant for its own benefit.

(i) In the tariff order for FY 11-12 of BRPL and BYPL, the Delhi Commission has allowed CISF expenses as part of additional O & M expenses because the said utilities could not meet their AT & C Loss Reduction Targets. It is, therefore, submitted that the action of the Delhi Commission amounts to penalizing an efficient utility.

89. The learned Counsel for the Delhi Commission has submitted the following:

(a) Due to deployment of CISF, AT & C losses were reduced and the Appellant has received benefits on account of over achievement for reduction of AT & C losses. Thus, the Delhi Commission has held that the

expenses for deployment of CISF will be deducted from incentive earned by the Appellant with their help and the remaining amount will be received by the Appellant and the consumer.

(b) The Delhi Commission while true-up in respect of true-up for the FY 2007-08 has wrongly allowed CISF expenses as pass through in the ARR of the Appellant. The reduction of AT & C losses is the responsibility of the distribution licensee and any expenditure done for reduction of said losses has to be deducted from the incentive to be received by the Appellant as per the spirit of the Electricity Act, 2003 as the tariff should be cheapest at the consumer end. The mistake committed by allowing CISF expenses to BRPL & BYPL will redefine in next true-up.

90. Let us refer to the findings of the Delhi Commission on this issue. The relevant portion of the impugned order are set out below:

*"**3.91** The Commission also observes that the deployment of CISF force has helped in reduction of AT&C losses. Therefore, any cost on account of CISF should be first adjusted towards the benefit on account of overachievement in reduction of AT&C losses, if any, before passing on any benefit to consumer or the distribution licensee. The Commission also observes that it had allowed CISF expenses of Rs 1.87 Cr*

erroneously as part of New Initiative in FY 2007-08. The Commission has now reduced the CISF expenses from the benefit on account of overachievement in AT&C losses and taken back from new initiative.

…

4.117 With respect to CISF / Security expenditure, the Commission observes that the deployment of CISF / Security force has helped in reduction of AT&C losses. Therefore, any cost on account of CISF / Security forces should be first adjusted towards the benefit on account of overachievement in reduction of AT&C losses, if any, before passing on any benefit to consumer or the distribution licensee. Therefore, the Commission has not considered any cost on account of CISF expenditure as new initiative."

91. Let us discuss the issue.

92. 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.

93. 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 only due to presence of CISF personnel. More so when the other two distribution licensees could not perform and meet the loss reduction targets in spite of presence of CISF. The issue is decided in favour of the Appellant.

94. Issue No.10th is **Non Inclusion of Delhi Vidyut Board (DVB) arrears collected form Government Agencies in Computation of Collection Efficiency.**

95. The submissions of the Appellant on this issue are as under:

(a) Regulation 4.7(a) read with 4.7(c) of the MYT Regulations provides that the revenue realized for the purpose of computing AT & C loss levels shall include revenue realization from arrears relating to DVB period. Regulation 4.7(c) does not differentiate between the Government dues and other dues. The relevant portion of Regulation 4.7(a) and 4.7(c) is set out below:

"4.7 *(a) AT&C Loss, which shall be measured as the difference between the units input into the distribution system and the units realized (units*

billed and collected) wherein the units realized shall be equal to the product of units billed and collection efficiency;

(c)…The revenue realization from arrears relating to the DVB period, electricity duty and late payment surcharge shall be included for computation of collection efficiency"

(b) The Transfer Scheme Rules, relied upon by the Delhi Commission for disallowing the arrears realized by the DPCL, are applicable only for the purposes of sharing of the arrears relating to DVB period and does not have any bearing on determination of collection efficiency, which is governed by the MYT Regulations. The relevant Transfer Scheme Rules relied upon by the Delhi Commission are reproduced herein below:

"6. All the receivables from sale of power to consumers of the erstwhile Board other than to the extent specifically included in this part above shall be to the account of Holding Company. DISCOM3 will be authorized to realize the receivables of the Holding Company in its area of supply. Upon realization of such receivables of the Holding Company the same shall be shared between Holding Company and DISCOM3 in the Rule 80:20.

Provided however in respect of receivables due for the period till 31st March 2002 from Municipal Corporation of Delhi and the Departments, Body

> *Corporates and institutions owned and/or controlled by the Government of National Capital Territory of Delhi the Holding Company shall be entitled to waive or notify that it will enter into any other arrangement for recovery of dues, instead of the arrangement of recovery through DISCOM3"*

DPCL has not notified any arrangement for recovery of Government dues.

(c) The MYT Regulations provide for all arrears relating to DVB period to be included in computation of collection efficiency, irrespective of the same being realized by the Holding Company or the DISCOM. Hence, the Delhi Commission's interpretation of the 'revenue realized from the arrears" in Regulation 4.7(c) to exclude the arrears realized by DPCL from government authorities from the computation of collection efficiency is contrary to MYT Regulations. The law is well settled that a statutory authority has to act strictly in accordance with the provision of law. Therefore, where the MYT Regulations provides for including DVB arrears for determining collection efficiency, no part of the same can be excluded. The Respondent Delhi Commission by its interpretation cannot restrict the scope of the regulations.

(d) Whether DVB arrears are first paid to DISCOM licensee, which then passes it on to DPCL or, alternatively, whether the DVB arrears are paid directly to the DPCL without routing through the DISCOM Licensee is only a matter of book keeping and procedure which does not in any way affect, the substantive right of the Appellant to have the entire realization of DVB arrears to be taken into account for determining collection efficiency. The MYT regulation in question does not draw any line of distinction between realization of DVB arrears which consist of direct payments made to DPCL or realization of DVB arrears which is represented by a payment to the Appellant which then passes it on to DPCL. To draw a distinction based on the method of payment of DVB arrears is in effect to rewrite the regulation which is not permissible in law. On a plain reading of the regulation, all realizations of DVB arrears necessarily have to be considered for the computing collection efficiency irrespective of the manner or method of payment of such arrears.

(e) The Delhi Commission has in its impugned order given only one reason for not considering the direct payments of DVB arrears to DPCL for computing

collection efficiency viz that according to the collection the Appellant has not made any efforts for recovery of these arrears. It is submitted that this is patently erroneously assumption, for which there is no basis at all. The Appellant has continuously and consistently been making efforts for realization of the DVB arrears. All realizations of DVB arrears, whether by way of direct payment of DPCL or by way of payment to the Appellant are the result and consequences of the efforts made by the Appellant and there is no ground and basis at all for the Delhi Commission to assume or conclude otherwise. It is very significant to note that in its written submission handed over at the hearing, the Respondent Delhi Commission to the said impugned order which clearly establishes that the said ground given by the Delhi Commission in its order is devoid of any substance or merit whatsoever. The points raised by the Respondent Delhi Commission in its written submission are in any event patently devoid of any merit whatsoever.

(f) The Delhi Commission while fixing the base AT & C loss levels and loss targets, in the Appellant's MYT order dated 23.02.2008 considered the arrears received from Delhi Jal Board (a government authority)

for computation of collection efficiency for fixing baseline AT & C losses for the Appellant.

(g) The Delhi Commission should include DVB arrears in calculation of collection efficiency without distinguishing between arrear due to the DISCOM and to DPCL to maintain a consistency of approach in line with the MYT Regulations.

96. The learned Counsel for the Delhi Commission has made the following submissions:

(a) Regulation 4.7 and 4.8 of MYT Regulation provides the target for reduction AT & C losses. The relevant regulations are being reproduced herein below:-

"Targets for Controllable Parameters

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 realized (units billed and collected) wherein the units realized shall be equal to the produce 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 License area in the same year;

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

(d) Return on capital employed;

(f) Depreciation;

(g) Quality of Supply.

4.8 The target AT & C loss levels to be achieved by the Distribution Licensees at the end of the Control Period shall be as follows:

(i) NDPL- AT & C loss level shall be at 17 percent.

Provided that the year wise loss reduction trajectory for the Control Period shall be fixed for the Distribution Licensee in the Multi Year Tariff Order for 2007-08;

Provided that profits arising from achieving loss level better than specified in the loss reduction trajectory shall be equally shared between the Licensee and Contingency Reserve;

Provided that profits arising from achieving loss level better than 15% in any year shall be completely to the account of the Licensee;

Provided that the loss targets and year wise loss reduction trajectory for subsequent Control Period shall be specified by the Commission before the start of each Control Period.

4.9 Any financial loss on account of under performance with respect to AT & C targets shall be to the Licensee's account."

(b) Since the Appellant has not recovered the dues of DVB and the same were directly recovered by DPCL, hence any benefit on account of the said recovery cannot be passed through to the Appellant.

(c) Target efficiency of Appellant is to be considered and not of other agency. Since the arrears of DVB period were not collected by the Appellant that amount cannot be taken into account for calculating the efficiency of Appellant.

96. The finding of the Delhi Commission are as under:

"***3.184*** *During the analysis of the collection efficiency, the Commission observed that for computation of collection efficiency, the Petitioner has included DVB arrears collected directly by DPCL from the Government bodies.*

3.185 As per the provisions of the Transfer Scheme, DVB arrears related to retail consumers are collected by the Petitioner, of which 20% is retained as incentive by the Petitioner for the services extended towards collection of past dues as per the Delhi Electricity Reform (Transfer Scheme) Rules, 2001 dated 20 November, 2001. The Transfer Scheme also mentions that for past dues till 31 March, 2002 from the Municipal Corporation of Delhi, Corporates and institutions owned and/or controlled by the GoNCTD, DPCL is free to recover this amount from an alternative arrangement instead of arranging its recovery through the DISCOMs.

3.186 The Commission further noticed that although there are no efforts undertaken by the Petitioner for recovery of Governmental dues to DPCL, the Petitioner has included this amount in computing its collection efficiency.

3.187 Clause 4.7 of the MYT Regulations provides that

"The revenue realization from arrears relating to the DVB period, electricity dues and late payment surcharge shall be included for the computation of collection efficiency."

3.188 The Commission indicated that the critical parameter for inclusion of any amount in computing collection efficiency is "realization". Considering the fact that the amount of Government dues are not "realized" by the Petitioner and they are not routed through its books of accounts, the Commission holds that Government dues on account of DVB arrears, which are realized directly by DPCL, should not be considered for computing the collection efficiency.

3.189 Therefore, the Commission holds the view that the DVB arrears collected by the Petitioner and appearing in the audited books of the Petitioner should only be considered for the purpose of computing collection efficiency and the DVB arrears which are directly collected by DPCL should not form a part of the computation of collection efficiency of the Petitioner."

97. Let us discuss the issue.

98. 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:

$$\text{Collection Efficiency} = \frac{\text{Total Amount Realized}}{\text{Total Amount Billed}}$$

99. 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).

100. 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.

101. 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.

102. In view of the above, this issue is decided accordingly in favour of Appellant.

103. The **11th Issue** relates to **Reduction in Units Realized On Account of Enforcement Sale**.

104. The Submissions made by the Appellant on this Issue are as under:

(a) In accordance with Section 126 and 135 of the Act read with Regulation 52(vii) of DERC Supply Code and Standards of Performance Regulations 2007, bills for energy sales in cases of theft are computed at twice the average billing rate as per applicable tariff.

(b) For the purpose of determination of tariff, under the MYT Regulations 4.7(a) read with 4.7(c), AT & C losses are computed accordingly to the following formula:

AT & C Loss = Units Input – (Units billed x Collection efficiency)
Where
Collection efficiency = total revenue realized/total revenue billed

(c) It is clear from the aforesaid formula for computation of AT & C loss under the Regulations, that for the purpose of such computation, there is no distinction between units realized regularly and units realized in case

of enforcement sales. However, the Delhi Commission, in contravention of the above formula, has computed the units realized from enforcement sales by dividing the revenue realized from such sales by double the average billing rate. Thus, units billed approved by the Delhi Commission are half the units billed as claimed by the Appellant i.e. 18.80 MU instead of 37.61 MU for FY 08-09; and 22.69 MU instead of 45.39 MU for FY 09-10.

(d) The billing for theft case is done at double the average billing rate by way of penalty. It is pertinent that late payment surcharge, which is also recovered as a penalty is included as part of the revenue realized for computing AT & C loss levels. Therefore, the penalty resulting from recovery in respect of theft cases at double the average billing rate should also be allowed.

(e) Further, the base loss levels and target AT & C losses in the Appellant's MYT Order dated 23.02.2008 have also been computed considering the revenues from the enforcement sales at average billing rate. Further, even in the tariff order date 28.05.200 for FY 2009-10 for the Appellant, the MUs have not been halved in respect of enforcement sales.

(f) The Delhi Commission has completely overlooked the basic and crucial factor that in all enforcement sales there is only a settlement of the amount payable by the violating consumer, and not a settlement of quantification of the number of units paid to him. Further, it cannot possibly be said that the settlement is arrived at by applying twice the normal tariff rates to an agreed figure of units consumed as wrongly assumed by the Delhi Commission. The amount of the settlement depends upon the variety of factors, and very often, of necessity, there cannot possibly be any definite number of units supplied. Further, the consistent practice which has been followed in the past is that the amount or the value of the enforcement sales is treated on the same footing as routine sales for the purpose of working out AT&C losses.

105. The Counsel for the Respondent Delhi Commission submits that in all the cases of enforcement/theft of energy, bill has to be made at twice the rate of normal tariff, however the Appellant while calculating the recovery made by it has considered the total amount. Thus, the Delhi Commission has rightly reduced the enforcement sale of 37.61 million units as 18.80 million units. The Appellant has calculated the energy sold by dividing the recoveries made by the average billing rate. As per this calculation, the amount of the

enforcement sale being double the normal rate, the number of million units is calculated is also twice the normal units, though the bills were raised for 18.80 million units on double the normal rate of tariff. Hence, there is no error in reducing the quantum of energy towards enforcement sale for the purpose of calculating the efficiency of the Appellant.

106. Let us see the findings in the Impugned order on this issue: The relevant portion of the Impugned Order is set out below:-

> *"3.182 During the validation session, the Commission inquired about the methodology adopted by the Petitioner to record sales against cases of enforcement. The Petitioner informed the Commission that MU recorded as sales against cases of enforcement were derived by dividing the total payment received against enforcement cases by average billing rate for the year. The Commission was surprised to note the methodology adopted by the Petitioner. As per Electricity Act, in all cases of enforcement/theft, energy has to bill at twice the rate of the normal tariff. Ideally, the Petitioner should have divided the total payment received against enforcement cases by two times of average billing rate for the year to arrive at MU recorded as sales.*
>
> *3.183 In Form 2.1 (a) for FY 2008-09, the Petitioner has shown sales against enforcement as 37.61 MU by dividing the total payment received against enforcement cases by average billing rate for the year. The Commission has revised this figure and approve sales against enforcement as 18.80 MU.*
>
> *……*

4.27 In Form 2.1 (a) for FY 2009-10, the Petitioner has shown sales against enforcement as 45.39 MU by dividing the total payment received against enforcement cases by average billing rate for the year. The Commission has revised this figure and approve sales against enforcement as 22.69 MU"

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.

111. The **12th Issue** is **Disallowance of Net Financing Cost incurred in relation to Power Banking**.

112. The submissions of the Appellant on this issue are as under:

(a) In case of forward banking, license incurs cost of power procurement but does not realize revenue immediately, as it does not receive any consideration for banking, and it is only when power is finally drawn and sold at a later date that the licensee gets revenue in respect of such banked power. The Delhi Commission considered power banked to be a notional sale @ Rs. 4 per unit, thereby reducing this amount while computing the ARR. When the excess power banked is drawn by the distribution licensee, the Delhi Commission considered the same to be a notional purchase of power @ Rs. 4 per unit and allowed the cost, thereby increasing the ARR. In view such notional sale and purchase, the Delhi Commission avers such power banking transaction to be revenue neutral. However, the Delhi Commission failed to consider that there is an additional working capital requirement on account of the time lag between this notional sale and notional purchase, thereby requiring allowance of financing cost of such additional working capital.

(b) In case of reverse power banking, the banking of power with the distribution licensee is considered to be a notional purchase of power @ Rs. 4 per unit for which cost is allowed, through no cost is incurred by the licensee. When the power banked with the licensee is returned, the transaction is treated as a notional sale @ Rs. 4/unit. Since cash is deemed to flow into the accounts of the distribution licensee, even before the distribution licensee is entitled to the same, there is reduced requirement of working capital for that period. It is submitted that the Delhi Commission should have considered to set off the additional working capital requirement arising out of forward banking transaction with the reduced working capital requirement on account of reverse power banking.

(c) Power banking transactions are not revenue neutral and there are implications upon the working capital requirement.

(d) Power purchase cost is an uncontrollable parameter and is to be trued-up at actuals, in terms of Regulations 4.2(f) read with Regulation 4.16(a) of the MYT Regulations.

(e) Further, as per Clause 15 of DERC Directions for procurement and Sale of Power by Distribution Licensee:

> *"15. The Distribution Licensee endeavour should be first to dispose off surplus power through banking transaction. Such banking transactions should be tried at first on direct basis."*

Thus, power banking is recommended by the Delhi Commission itself.

(f) Power banking ensures availability of power at times of deficit or high demand, at cheaper rates than short term procurement and it is hence in the interest of consumers that power baking transactions are encouraged. The Delhi Commission should have allowed the net financing cost for power banking transactions at the prevailing working capital interest rate borne by the Appellant.

(g) The Delhi Commission has also held that as per the industry practice, in cases of forward power banking, additional 4% power is returned to the distribution licensees at no cost. The Delhi Commission has stated that it has allowed the cost for such additional power @ Rs. 4 per unit and therefore, any

additional working capital requirement is also met. It is submitted that it is incorrect that in all cases of power banking, additional 4% power is returned. There are times when the power is banked during off peak hours and the same is received during peak time and in such cases the other utility may not allow additional 4% power. Further, whenever additional power is returned, no cost in respect of the same is recovered from the consumers. Rather, any gain to the Appellant on account of 4% excess return of power is offered for the benefit of consumer in the Appellants ARR and therefore power banking cannot be regarded as revenue neutral and involves additional working capital requirement.

113. The learned Counsel for the Delhi Commission submits that the Banking contracts have to be revenue neutral in nature and hence if power has been bought under “banking arrangement”, then the same power will be sold back by the utility with 4% extra power. This extra power that is sold at the rate at which it had bought power at the first place serves like the financing cost of the power banked. Hence, no additional funding cost for banked power has been allowed.

114. Let us see the findings of the Delhi Commission on this issue: The relevant findings are set out below:-

> *"3.283 With respect to the financing cost of power banking, the Commission believes that banking contracts are revenue neutral. The electricity industry follows a practice wherein in case of forward/ advance banking, the utility demands additional power @ 4% to be returned and in case of backward banking, the utility has to return 4% extra power. The Commission considers the power banked in advance by the utility as energy sale at Rs 4 per unit because if it does not consider it then it would be burdening present consumers for future consumption, which the Commission deems inappropriate. The utility will be receiving the power banked along with 4% additional power in the next year. The Commission considers total power received as power purchase @ Rs 4 per unit. This allows the utility power purchase cost on additional 4% power received by them @ Rs 4 per unit, which is equivalent to the financing cost of this banking."*

115. Since the issue before us revolves around banking of power, it would be worthwhile to understand the concept of banking of power. Power banking is like any other banking. In case of power banking, surplus power is banked by a utility with other utility to be returned later with some additional power (interest). There two types of banking:

    (a) Forward Power Banking- distribution licensee banks excess power with other utilities, and draws banked power later when required.

(b) **Reverse power banking**- excess power banked by another utility is with the distribution licensee and the same is returned at a later date.

116. Forward banking for one utility is reverse banking for the other utility. There would be no issue, if the power is banked and returned within the same financial year. However, issue of financial charges arises in case power is banked during a year and returned during next financial year. When power is banked during a financial year it is shown as notional sale of the distribution licensee at a predetermined rate and the amount so arrived is deducted from the ARR of the licensee. When the power returned, it is shown as notional purchase at the same rate and the cost is added to its ARR. The licensee has paid the power purchase cost and did not get any revenue from such notional sale. The concept of power banking and the issue is explained by following illustration.

FY 2007-08
Total ARR of the licensee = Rs 1000 Cr
Units banked during the year = 100 MU
Notional sale for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 960 Cr

FY 2008-09
Total ARR of the licensee = Rs 1000 Cr
Units returned during the year = 100 MU
Notional purchase for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 1040 Cr

117. Thus, the licensee looses carrying cost for Rs 40 Cr. However, in order to make banking arrangements tariff neutral some element of interest is also added. Accordingly, the utility which had banked energy would get 4% additional energy at the time of return to offset the carrying cost for the banked energy. Let us add the interest component in the above example:

FY 2007-08
Total ARR of the licensee = Rs 1000 Cr
Units banked during the year = 100 MU
Notional sale for banked energy @ Rs 4/unit = Rs 40 Cr
Net ARR of the licensee recovered through tariff = Rs 960 Cr

FY 2008-09
Total ARR of the licensee = Rs 1000 Cr
Units returned during the year = 104 MU
Notional purchase for 104 MU @ Rs 4/unit = Rs 41.6 Cr
Net ARR of the licensee recovered through tariff = Rs 1041.6 Cr

118. Thus the Licensee gets Rs 1.6 Cr extra as Notional cost of additional energy received to offset the carrying costs. Accordingly, the issue is decided against the Appellant.

119. The **13th Issue** is relating to **Non Allowance of Service Tax and Material Cost in respect of Street Light Maintenance Services Provided to MCD/PWD**.

120. The submissions of the Appellant on this issue are as under:

(a) The Delhi Commission revised the streetlight maintenance charges by its order dated 22.09.2009. Further, by its order of 06.04.2010, the Delhi Commission clarified that the charges would be recovered retrospectively from 01.04.2008.

(b) The following two issues arise with respect to the streetlight maintenance charges:

(i) Non payment of Service Tax on Street Light Maintenance by MCD/PWD.

(ii) Non payment of costs for material utilized towards Street Light Maintenance by MCD/PWD though the income billed for street light material has been offered for ARR.

(c) The maintenance charges accruing to the Appellant for maintenance of streetlight poles attracts levy of service tax. The Appellant has been regularly billing for MCD/PWD for street light maintenance and service tax on the same. Though the MCD/PWD has been paying charges for street light maintenance, it has not been paying the Service Tax component. The Delhi Commission while revising the street light maintenance

charges, or at any point of time thereafter, has not clarified if the charges are inclusive of service tax or not.

(d) The income arising from the maintenance charges paid by MCD/PWD is being passed on to the consumers as non-tariff income. Since service tax is a statutory levy, and is borne by the Appellant, the Appellant should be entitled to recover the same. Since, the Delhi Commission has determined the maintenance charges payable, the Delhi Commission ought to clarify if the said amount is inclusive of service tax so that the Appellant may claim such amount from the MCD/PWD. Alternatively, the Appellant should be entitled to recover the same from the ARR.

(e) In respect of the cost incurred prior to 2007 towards street light material issued for maintenance of street light, the Appellant had filed petition before the Delhi Commission for recovery of Rs 4.79 cr. The Delhi Commission by its order dated 22.09.2009 and 06.04.2010 revised the rates of maintenance charges payable by MCD/PWD w.e.f. 01.04.2008 but no finding was given with respect to the period before April 2008. Pursuant to the aforesaid orders, the Appellant is entitled to recover an additional amount of Rs. 26/- per

point and above Rs. 73/- per point that was applicable earlier.

(f) The Appellant in its ARR petition for FY 09-10 had not claimed the cost of Rs. 7.02 Cr incurred on street light material (4.79 Cr for policy direction period i.e. 01;07.2002 to 31.03.2007 and 2.23 Cr for 2007-08) as the matter was under review of the Delhi Commission which was decided on 22.09.2009. Due to the pendency of the matter, the Appellant had neither been able to claim the material cost for Rs. 2.23 Cr on account of street light maintenance for the period 07.08 from MCD/PWD nor the Delhi Commission has allowed such amount in the Appellant's ARR.

(g) With respect to the policy direction period i.e. 01.07.2002 to 31.03.2007, the Delhi Commission cannot deprive the legitimate claim of Rs. 4.79 Cr on account of street light maintenance incurred by the Appellant and erode assured ROE. The Delhi Commission may now allow the recovery of Rs. 4.79 Cr by way of either of the following two points:

(i) If the Delhi Commission is of the view that the material cost was included in Rs. 73/- and no additional cost is to be allowed, then Delhi

Commission should allow Rs. 4.79 Cr for the particular policy direction period of all income and expenses during such period was on actuals.

(ii) If the Delhi Commission is of the view that the material cost was not included in Rs. 73/-, then the same should be clarified so as to enable the Appellant to recover the same from MDC/PWD.

(h) It is further pertinent to point out that in the Appellant's MYT Order, the R & M expenses for first MYT Control period were approved by taking actual values of base year as FY 2006-07, which does not include material cost in R & M expense since the Appellant at that time, the matter being subjudice, the Appellant had not treated the amount as expense but treated the same as being recoverable from MCD separately. Therefore, presently R & M expenses allowed in the Appellant's MYT order do not include the material cost. Since now the Delhi Commission vide its order dated 22.09.2009 has clarified that the material cost should be allowed over and above Rs. 73/-, there are two options to implement the above order in respect of the period after 01.04.2008 i.e. for recovery of the amount of Rs. 2.23 Cr:

(i) Additional billing of Rs. 26/- per point allowed by the Delhi Commission is offered for ARR and corresponding additional cost of material is also allowed as R & M expenses if both are to be accounted for on actual basis; or

(ii) Normative approach: Neither the additional billing of Rs. 26/- per point is offered in the Appellant's ARR nor corresponding additional cost of material is claimed.

(i)The Appellant in its true up petition for FY 09-10, has inadvertently offered income billed of Rs. 1.97 Cr to MCD/PWD towards street light material for the period Oct-2009 to March 2010 towards reduction of the ARR and has not correspondingly claimed cost incurred on street light materials as the same was not part of O & M cost of base year. Hence, this amount of Rs 1.97 Cr should not be reduced from the ARR of the Appellant.

(j) Accordingly, there are two claims in relation to non-payment of costs for material utilized towards Street Light Maintenance by MCD/PWD, that should be allowed by the Delhi Commission:

(i) Rs. 4.79 Cr for policy direction period (01.07.2002 to 31.03.2007) where all the incomes and expenses were subject to true up at actual level.

(ii) Rs. 1.97 Cr additional street light material billing inadvertently offered for ARR without claiming corresponding expenses on material cost of street lighting.

121. The learned Counsel for the Delhi Commission submits that non-payment of service tax by MCD/PWD on the service light maintenance charges is commercial dispute between Appellant and MCD/PWD and the amount under this head cannot be passed through to the consumers as the charges of one of the consumer cannot be passed through in ARR to be borne by the other consumers.

122. On the same analogy, the cost of material utilized towards street light maintenance cannot be passed through in ARR.

123. The relevant portion of the impugned tariff order is set out below on the issue of Non Payment of Service Tax on Street Light Maintenance by MCD/PWD:

3.301 The Commission believes that non payment of service tax by MCD/ PWD on Service Light

Maintenance Charges is a commercial dispute between the Petitioner and MCD/PWD, and burden of this cannot be passed to other consumers. The Commission rejects Petitioner's stand and has not subtracted Rs 1.61 Cr from non tariff income.

4.135 The Petitioner has subtracted Rs 0.92 Cr from non tariff income on account of Service Tax paid by the Petitioner towards income on account of Street Light Maintenance Charges from MCD which has not been reimbursed by MCD/PWD.

4.136 The Commission believes that the Petitioner should charge the service tax on Service Light Maintenance Charges to MCD/PWD and not claim this from the ARR. The Commission rejects Petitioner's stand and has not subtracted Rs 0.94 Cr from non tariff income."

124. The relevant portion of the impugned tariff order is set out below on the issue of Non Payment of costs for Material utilized towards Street Light Maintenance by MCD/PWD:

"4.123 With reference to non payment by MCD/PWD for street light material of 4.79 Cr issued to them during the policy direction period, the Commission believes this is a commercial dispute between the Petitioner and the MCD/PWD, which they need to resolve between themselves. The Commission's Order of composite charges is applicable for the current Control Period. The Commission has not allowed any amount towards this expense."

125. We will now discuss the issue.

126. According to the Municipal Corporation of Delhi (MCD) Act, the responsibility of Maintenance of the street Lights in Delhi lies with MCD. However, historically the streetlights were being maintained by the power utility in Delhi. Earlier the power sector was managed by Delhi Electric Supply Undertaking (DESU), an undertaking of MCD itself. DESU was a licensee of the Government under 1910 Act. In early eighties, the power sector came under Delhi Vidhut Board, established as the State Electricity Board under 1948 Supply Act. The Maintenance of the street lights continued with DVB as successor of DESU. On 2nd July 2002 Delhi Power Sector was privatized and management of power sector was handed over to three private companies (with 49% share holding with Delhi Government). The issue of maintenance of street lights was raised by these companies. Most of the street lights are fitted on the poles of distribution mains and some practical difficulties were observed in case the Street light in Delhi are maintained by the MCD itself. Thus, Delhi Government requested the Delhi Commission to determine the maintenance charges to be paid by MCD to respective Discoms.

127. During 2003, the Delhi Commission by an order fixed the maintenance charges per pole for maintaining street lights. The Delhi Commission in this order had clarified that the

maintenance charges includes the cost of replacement of incandescent bulbs only and all other lighting equipment such as florescent tube, mercury vapor lamps etc have to be charged to MCD.

128. In the light of above discussion it is clear the issue involved is bilateral issue between the Appellant and MCD and the burden cannot be passed on to the consumers. However, Delhi Commission is required to clarify the points raised by the Appellant so that it could take up the matter with the MCD.

129. Accordingly ordered.

130. **Issue No.14** is **Non Allowance of Interest on LPSC at prevailing Market Rates**.

131. The Submissions made by the Appellant on this Issue are as under:

(a) LPSC is levied on consumers who pay their bill after the due date. LPSC received by the distribution licensee is treated as Non-Tariff Income under Regulation 5.23 of the MYT Regulations and the same is deducted to arrive at the ARR. Regulation 5.23 provides as follows:

"5.23. All incomes being incidental to electricity business and derived by the Licensee from sources, including but not limited to profit derived from disposal of assets, rents, delayed payment surcharge, meter rent (if any), income from investments other than contingency reserves, miscellaneous receipts from the consumers and income to licenses business from the Other Business of the Distribution Licensee shall constitute Non-Tariff Income of the Licensee."

(b) As per MYT Regulations, the working capital consists of receivables for two months and O & M expenses for one month and is allowed to the Appellant on normative basis. This is based on the assumption that the consumer would pay as per the due date and therefore any delay in payment by the consumers results in additional working capital requirement, thereby requiring financing cost on such additional working capital.

(c) This Tribunal in Appeal No. 153 of 2009 has held that the distribution licensee is entitled to the cost of financing the entire outstanding principal amount that attracts LPSC at prevalent market lending rates. However, the Commission in the impugned order has allowed interest rate on financing LPSC based on the SBI PLR rate as on April 1, 2007, April 1, 2008 and April 1,2009 for FY 07-08, 08-09, 09-10 respectively.

(d) Such determination of financing cost of LPSC on the basis of rates prevailing as on April 1 of any given year by the Commission is against the judgment of this

Tribunal in Appeal No. 153 of 2009, wherein this Tribunal categorically held that "the financing cost relating to the late payment surcharge" must be derived from the "prevalent market lending rates."

(e) The Delhi Commission should have allowed financing cost of LPSC at an average rate of interest available for that relevant year rather than the rate of interest on any particular day. This is more so, because the **Appellant is required to finance working capital requirement arising out of delayed payment throughout the year** and not merely on the 1st day of each financial year.

132. The learned Counsel for the Delhi Commission submits that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. Further, the Delhi Commission had allowed working capital funding at 9.5% in the MYT Order when the SBI PLR was 12.25% as on 1st April, 2007 and since the SBI PLR as on 1st April of the subsequent years have not changed, the interest rate applicable to the working capital funding remained unchanged at 9.5%. Thus, financing cost of LPSC is allowed at 9.5% for FY 2008-09 and FY 2009-10.

133. Let us see the findings of the Delhi Commission in the impugned order which reads as under:

For FY 2007-08

"*3.87 The Commission in its MYT Order dated February 23, 2008 had approved funding of working capital @ 9.5% considering SBI PLR of 12.25% prevalent at the time of issuing MYT Order. The Commission has, therefore, considered the interest rate approved by the Commission for funding on working capital for FY 2007-08. The financing cost approved by the Commission is shown below:*

Table 47: Funding of LPSC (Rs Cr)

Particular	***FY 2007-08***
LPSC Collected (@ 18%)	*15.28*
Principle amount on which LPSC was charged	*84.88*
Interest Rate for funding of Principle of LPSC	*9.5%*
Interest now approved on funding of Principle amount of LPSC	*8.06*
Interest approved in the True Up Order for FY 2007-08	*0.69*
Additional Interest now approved	*7.37*

For FY 2008-09

3.293 The Commission in its MYT Order dated Feb 23, 2008 had approved funding of working capital @ 9.5% considering SBI PLR of 12.25% prevalent at the time of issuing MYT Order. As prevailing SBI PLR as on April 1, 2008 was 12.25%, the Commission has allowed the

financing cost for LPSC @ 9.5%. The financing cost approved by the Commission is shown below:

Table 104: Funding of LPSC (Rs Cr) Particular	***FY 2008-09***
LPSC Collected (@ 18%)	*14.12*
Principle amount on which LPSC was charged	*78.44*
Interest Rate for funding of Principle of LPSC	*9.5%*
Interest approved on funding of Principle amount of LPSC	*7.45*

For 2009-10

4.140 The Commission in its MYT Order dated Feb 23, 2008 had approved funding of working capital @ 9.5% considering SBI PLR of 12.25% prevalent at the time of issuing MYT Order. As prevailing SBI PLR as on April 1, 2009 was 12.25%, the Commission has allowed the financing cost for LPSC @ 9.5%. The financing cost approved by the Commission is shown below:

Table 144: Funding of LPSC (Rs Cr)

Particular	***FY 2009-10***
LPSC Collected (@ 18%)	*16.09*
Principle amount on which LPSC was charged	*89.39*
Interest Rate for funding of Principle of LPSC	*9.5%*
Interest approved on funding of Principle amount of LPSC	*8.49*

134. Let us discuss the issue.

135. The Appellant has submitted that the financing of LPSC is required to meet the requirements of working capital. Delhi Commission has submitted that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. The view taken by the Delhi Commission is correct and need not be interfered with.

136. Accordingly decided against the Appellant.

137. **Under Issue No.15**, the Appellant has raised three sub-issues under this head as under:

(a) Deduction of Rebate over and above 1% from Power Purchase Cost;

(b) Return on Working Capital should be allowed on debt-equity ratio of 70:30;

(c) Carrying cost should be allowed for financing of revenue gap on a debt-equity ratio of 70:30.

138. According to the Appellant, this Tribunal has already given rulings in its favour in The Appeal No. 153 of 2010.

However, the Delhi Commission has refused to implement the directions of the Tribunal on the ground that the Delhi Commission was contemplating to file appeal against the judgment of this Tribunal.

139. The Delhi Commission, in its written submissions, has tendered apology for the use of wrong language in the Impugned Order and has expressed regret over it. The Delhi Commission has also its willingness the implement the directions of this Tribunal in its letter and spirit. However, the Delhi Commission has requested the Tribunal to reconsider the direction given on these issues in public interest. The extracts of the Delhi Commission's submissions on this issue has been reproduced below:

1. That at the outset of the Written Submissions the Respondent most respectfully submits that the language used in the impugned order is not appropriate and the Respondent submits unconditional apology for use of the said language in the impugned order. The Respondent duty is bound to implement all the directions issued by this Tribunal.

2. That DERC most respectfully submits that it has complied with several directions issued by this Hon'ble Court while doing true-up exercise for the year 2007-08 to 2011-12 vide tariff order dated 31.07.2013. Relevant

extracts of the said tariff order are being enclosed herewith and marked as ***ANNEXURE-1****.*

3. That the reasons as to why the directions issued by this Tribunal are not complied with, are as follows:-

i). That the Commission has no intention not to comply with the directions issued by this Tribunal, it is respectfully submitted that implementation of the directions issued by this Tribunal were not complied with in the public interest at large. As a consequence of implementation of the said directions, huge amount to be awarded. The total amount comes along with carrying cost with the ARR of 2011-12, which will give a huge tariff shock to the consumers in the area of supply of Appellant.

ii). That against the judgment of this Tribunal dated 31.05.2011 in Appeal No. 52 of 2008, the Commission has filed Civil Appeal D No. 26630 of 2011, which came up for hearing on 09.01.2012 when Hon'ble Supreme Court condoned the delay and admitted the Appeal, which is pending.

iii). That the issue of apportioning carrying cost in debt/equity ratio of 70:30 and rebate on power purchase cost was decided by this Tribunal in its judgment dated 12.07.2011 in Appeal Nos. 142 of 2009 and 147 of 2009. Against the said judgment, the Commission has filed Civil Appeal Nos. 9003 and 9004 of 2012, which were admitted vide order dated 09.05.2012.

iv). That the Civil Appeal D No. 19428 of 2012 filed by the Commission against the judgment dated 30.07.2010 in Appeal No. 153 of 2009 was dismissed by Hon'ble Supreme Court on the ground of limitation in view of its earlier decision in Chattisgarh State Electricity Board Vs. CERC & Ors. reported in 2010 (5) SCC 23.

v). That BSES Rajdhani Power Limited, which is one of the Discoms in Delhi, filed Original Petition No. 1 of 2012 under Section 121 of Electricity Act, 2003 for revising the impugned tariff order immediately. Prayers were made in the said petition are as follows:-

> *(a) Direct Ld. Delhi Commission that extraordinary circumstances have arisen in terms of Section 62 (1) and 62 (4) warranting to determine cost effective tariff in a time bound manner in accordance with the directions issued by Tribunal at Para 65 of the Judgment dated 11.11.2011 in O.P. No. 1 of 2011, so as to obviate/mitigate the situation of the Petitioner being put to underserved hardship prejudice and risk of suspension of its license for reasons beyond the control of the Petitioner and not attributable to it;*
>
> *(b) Truing-up of the claims of the Petitioner for the sum of Rs. 1999.05 Crores (comprising Rs. 1603.40 Crores as regulatory gap and Rs. 395.65 Crores as carrying cost) for the Financial Year*

2010-11 as acknowledged in Para 25 of the Ld. Delhi Commission's Staff Paper and being based on the Audited Accounts of the Petitioner duly submitted to the Ld. Delhi Commission, AND.

(c) Align the periodicity of the Fuel Price Adjustment Mechanism put in place in terms of order dated 26.08.2011 with the regime ordained by the Ld. Central Commission, and direct that the periodicity of quarterly adjustment to monthly adjustment on the basis of the filings, to be annually trued-up, AND

(d) Put in place forthwith a monthly Power Purchase Cost Adjustment mechanism in line with Para 65(iv) of the said judgment of this Hon;ble Tribunal, AND

(e) For the regulatory asset created in terms of the Tariff Order dated 26.08.2011 (in particular Paragraphs 6.7, 6.22 and 6.23), in terms of Para 8.2.2 of the Tariff Policy read with Para 65(iv) of the said judgment of this Hon'ble Tribuna, forthwith provide for:-

(i) Ensuring Return on equity;
(ii) Carrying Cost.

(iii) Amortization Schedule to recover the regulatory asset in a time bound manner not

exceeding a period of 3 years and preferably within the control period.

(f) That another Original Petition 2 of 2012 was filed before this Tribunal. In these circumstances, the Commission has filed interim applications in pending appeals before Hon'ble Supreme Court, which came up for hearing on 25.07.2012 when Hon'ble Supreme Court passed the order that this Tribunal may continue the hearing but the judgment is not to be pronounced.

(g) That again it is reiterated that only in the interest of public at large, the directions passed by this Tribunal were not implemented, though the Commission is bound to implement the same. This Tribunal can better protect the interest of the consumers and pass appropriate orders.

(h) That Respondent is confident that in respect of some of the issues this Tribunal will consider the arguments raised by the Respondent and pass the orders in the interest of public at large as the wisdom of this Tribunal is wider than the wisdom of the Respondent Commission.

140. In the light of the Affidavit filed by the Delhi Commission as referred to above, we will consider the submissions of the Appellant in respect of the issues.

(a) In the true-up order for FY 07-08 dated 28.05.2009, the Delhi Commission had deducted 2% rebate earned by NDPL from the power purchase cost.

(b) In Appeal No. 153 of 2009 against the said order, this Tribunal has held that the Rebate of 2% is earned only due to efficiency of distribution licensee and is not provided for in the working capital allowed under the regulations and hence rebate over 1% cannot be considered as non-tariff.

(c) However, in the impugned order, Delhi Commission has included 2% rebate amount as non-tariff income failing to give effect to judgment of the Tribunal on the ground that it has decided to go in appeal against the judgment.

(d) The appeal filed in the Supreme Court against the judgment of this Tribunal in Appeal No. 153 of 2009 has been dismissed on the ground of delay on 21.08.2012.

141. The reply of the Delhi Commission on this issues is as under:

(a) For the purpose of this issue the Delhi Commission gives the example for treatment of rebate and the reason as to why it should not be allowed to be apportioned in the ratio of debt equity i.e. 70:30.

(b) Delhi Commission has arrived at working capital requirements of the Appellant by considering the purchase power cost of one month as the Appellant has to pay power purchase bills in the next month after the bill is raised at the end of month only.

(c) Delhi Commission has allowed the Appellant with Normative working capital of Two Months receivable Plus one O & M Expenses Less One Month Power Purchase Cost. This is approved on gross basis without deducting any normative rebate.

(d) The Appellant can claim rebate on power purchase bill by timely payment of bill. Further, the Appellant will receive the revenue upfront from two months receivable (considered by Delhi Commission in the Regulations for calculating working capital) to enable it to pay the power purchase bills for one month before due date to make them eligible for availing rebate.

(e) Delhi Commission has assumed that average receivable cycle is 2 months for the Appellant as majority of the consumers (approx. 70% of revenue) are being billed monthly and some consumers are being billed bi-monthly (approximately 30% of revenue).

(f) Accordingly, whatever cost the Appellant would incur in 2 months would be funded through the 2 months receivables allowed by Delhi Commission as working capital. The 2 months receivables includes power purchase expense for 2 months also.

(g) Further, Delhi Commission has subtracted one month's power purchase cost as the bills are raised by the generators at the end of the month i.e. whatever supply is received by a distribution company in month of January, it would receive a bill only on 1st Feb (One month's credit period).

(h) If the distribution company pays the bill within 3 days i.e. by 4th Feb in the above case, it would be entitled to get rebate @ 2%. It is pertinent to mention that even in case the distribution company pays the bill by 28th Feb, it would be entitled to receive a rebate of 1%.

(i) The present working capital norms allowed by Delhi Commission permits the distribution company to pay the bill on 1st of the month and thus maximum rebate of 2% at all times.

(j) By optimizing and efficiently managing its working capital requirement, Delhi Commission made clear that the Appellant can adjust its billing/revenue cycles in such a manner that it keeps getting revenue throughout the month which would reduce the requirement of working capital loan.

(k) Delhi Commission allows approximately 2 months receivables as working capital to the Generators which is the power purchase bill for 2 months for the distribution company. Delhi Commission also allows 2 months receivables as working capital for distribution company, which includes the power purchase cost for 2 months. Thus, if Delhi Commission does not consider rebate, it would be allowing working capital for power purchase for 4 months in total and unreasonably loading the consumers with the burden of the same.

(l) It is pertinent to mention that the working capital facilities are provided to the licensee to facilitate payment of its dues in time and enjoy the rebate. If the interest on such normative working capital facilities is borne by the consumers, it is very logical and rational that the benefit of rebate would also be given to them.

(m) The normative working capital approved by Delhi Commission allows the Appellant to make payment on 1st of the every month.

(n) As Delhi Commission allows the normative working capital & interest thereupon, it is only prudent that it should assume normative rebate availed while computing the power purchase cost.

(o) The Delhi Commission has also given an example illustrative to demonstrate that the amount of working capital allowed to the Appellant is adequate.

142. Let us see the relevant portion of the findings of the Delhi Delhi Commission in the Impugned Order and judgment of this Tribunal in Appeal No.153 of 2009 on the **1st issue**, which is set out below:

"Relevant Portion of the Impugned Order:

"3.99 The Commission has decided to go in appeal against the Hon'ble ATE Order on considering only 1% rebate on power purchase as the Non tariff Income of the Petitioner. The Commission therefore has not implemented the Judgement of the Hon'ble ATE in this regard. However, the Commission has not subtracted the rebate earned on power purchase from the power purchase cost and considered the same as Non Tariff Income. Due to this, the Commission has allowed

additional Rs 35.94 Cr towards purchase and increased the Non Tariff Income by Rs 35.94 Cr."

<u>Tribunal's Judgment in Appeal No. 153 of 2009</u>

The Tribunal in Appeal 153 of 2009 has held as follows:

"34…..Applying the principle that all gains and losses on account of overachievement or underachievement in performance with respect to norms, have to be retained/borne by the distribution licensee, we hold that rebate over and above 1% can not be considered non-tariff income for reducing the ARR. In view of the same, it has to be concluded that the rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost and rebate earned only up to 1% alone can be treated as part of non-tariff income. Therefore, the finding on this issue by the State Commission is contrary to the law and spirit of the MYT Regulations as it defeats the very purpose of allowing cost on normative basis. It is also contrary to the principle of allowing cost on normative basis of working capital. On the one hand, the State Commission has reduced one month power purchase payment from the working capital requirement and on the other hand it has been observed that if the Appellant is making the payment earlier, the benefit of entire rebate is used for reducing the power purchase cost.
35. Therefore, it is clear from the above that treating rebate income for reduction from power purchase cost as per the impugned tariff order is contrary to the MYT Regulations. Rebate only to the extent of 1% is to be considered as non-tariff income. As such, the issue is answered accordingly".

143. Let us see the findings of the Delhi Commission in the Impugned order and this Tribunal's judgment with regard to **2nd Issue**:

"***<u>Impugned Order</u>***

The Commission has not allowed financing of working capital on debt-equity of 70:30 on the basis that it intends to file an appeal:

> *"3.78 The Commission in the MYT Order had allowed working capital as 100% debt financed.*
>
> *3.79 The Petitioner appealed against the MYT Order of the Commission stating that the Commission has considered the funding of the entire working capital requirement by way of loan and has allowed an interest @9.5% on the same, which is contrary to the norm of debt/ equity ratio of 70:30 of the power sector.*

………………………………………

> *3.82 The Hon'ble ATE in its Order dated May 31, 2011 on appeal no 52 of 2008 filed by the Petitioner directed the Commission to re-compute the weighted average cost of capital for each year of the Control Period considering the debt/ equity ratio of 70:30 for financing of the working capital and apply on the respective years Regulated Rate Base for allowance of Return on Capital Employed according to its Regulations.*
>
> *3.83 The Commission has decided to go in appeal against the Hon'ble ATE Order on considering the debt/ equity ratio of 70:30 for financing of the*

working capital and apply on the respective years Regulated Rate Base for allowance of Return on Capital Employed. The Commission therefore has not implemented the Judgement of the Hon'ble ATE in this regard".

Tribunal's Judgment in Appeal No. 52 of 2008

This Tribunal in Appeal No. 52 of 2008 dated 31.05.2011 has decided as follows:

"The next issue is with reference to the equity component for margin on working capital requirement. The State Commission has considered the entire Working Capital requirement by way of loan contrary to the norms of debt and equity ratio of 70:30-. The State Commission relies on Regulation 5.10 but this Regulation would not support the contention of the State Commission. The MYT Regulations stipulate that Weighted Average cost of capital, as computed in the Regulation 5.10, needs to be applied on Regulated Rate Base which includes the working capital. This apart, Regulation 5.8 and Regulation 5.9 provide for the formula for calculating the Regulated Rate Base for a particular year and for computing the return on capital employed by multiplying the Weighted Average Cost of capital with Regulated Rate Base. Under those circumstances, the Delhi Commission is directed to re-compute the Weighted Average Cost of capital for each year of the Control Period, along with the carrying cost."

144. Let us see the findings of the Delhi Commission in the Impugned order and this Tribunal's judgment with regard to **3nd Issue** i.e. **Carrying Cost should be allowed for Financing of Revenue Gap on a Debt-equity ratio of 70:30.**

"Impugned Order

The Delhi Commission has decided on the issue as follows:

"3.145 The Commission in its Tariff Order for FY 2009-10 had considered the carrying cost @ 9%.

3.146 NDPL appealed against the Order of the Commission in Hon'ble ATE on carrying cost considered by the Commission.

3.147 The Hon'ble ATE in its Order dated July 30, 2010 on appeal no 153 of 2009 filed by NDPL has observed as follows:

> *"the fixation of 9% carrying cost, in our view, is not appropriate. Therefore, the State Commission is hereby directed to reconsider the rate of carrying cost at the prevailing market rate and the carrying cost also to be allowed in the debt/ equity of 70:30"*

3.148 The Commission has decided to go in appeal against the Hon'ble ATE Order on allowing carrying cost in the debt/ equity of 70:30. The Commission therefore has not implemented the Judgement of the Hon'ble ATE in this regard."

The Tribunal's judgment in Appeal No. 153 of 2009

"*….the fixation of 9% carrying cost, in our view, is not appropriate. Therefore, the State Commission is hereby directed to reconsider the rate of carrying cost at the prevailing market rate and the carrying cost also to be allowed in the debt/ equity of 70:30….*"

145. In view of the stand taken by the Delhi Commission that Appeal would be filed before the Hon'ble Supreme Court in Appeal No.153 of 2009, we reiterate our view in the above judgment and direct the Delhi Commission to follow the said judgment in Appeal No.153 of 2009 and to reconsider the ratio of carrying cost at the prevalent market rate and carrying cost also be allowed in the debt equity ratio of 70:30.

146. The next Issue is **Issue No.16** which **relates to Deduction of Financing Cost from LPSC for the purpose of Computation of AT&C Losses.**

147. The submissions made by the Appellant on this issue are as under:

(a) The Delhi Commission while allowing financing cost on the amount attracting LPSC has deducted such financing cost from revenue realized for the purpose of computing AT & C losses. The Commission deducted the financing cost from the LPSC realized (for computation of AT & C loss on the ground that such financing cost would

have to be borne by the consumers. However, such deduction of financing cost from LPSC realized is inconsistent with the MYT Loss level which in turn leads to lower allowance of incentive to the Appellant.

(b) Regulation 4.7(a) of the MYT Regulations provides for computation of AT & C losses, which is being reproduced herein below:

> *"(a) AT & C loss, which shall be measured as the difference between the units input into the distribution system and the units realized (units billed and collected) wherein the units realized shall be equal to the product of units billed and collection efficiency:*
>
> In other words, AT & C Loss = Units input – Units realized
> Where, units realized= Units Billed x Collection efficiency
>
> The computation of Collection Efficiency is provided for in Regulation 4.7 (c), which is being reproduced herein below:
>
> > *(c) Collection efficiency, which shall be measured as ratio of total revenue realized to the total revenue billed for the same year. The revenue realization from arrears relating to DVB period, electricity duty and late*

payment surcharge shall b included for computation of collection efficiency"

Or Collection Efficiency = Total revenue realized/Total revenue billed

Where, total revenue realized includes LPSC.

Therefore, AT&C Loss = Units Input – [Units Billed x (total revenue realized/total revenue billed)

(c) Thus, the MYT Regulations provide for inclusion of LPSC in revenue realized for the purpose of computation of AT & C loss and do not provide for deduction of the financing cost from LPSC, i.e. , regulations require that revenue realize should include LPSC and not net LPSC.

(d) It is further relevant that the entire LPSC amount is passed on as non-tariff income and reduced from the ARR, and is hence not available to compensate the Appellant for the cost of financing the additional working capital requirement on account of delayed payment. It is for this reason that the cost of financing the outstanding dues, on which LPSC is levied, ought to be allowed to be recovered from the consumer. Therefore, there is no rationale for deducting the cost of financing LPSC from the revenue realized for computation of AT & C loss levels.

(e) In the true-up order for FY 07-08, the Delhi Commission had already approved AT & C losses based on LPSC (i.e. financing cost in respect of LPSC was not excluded from revenue realized).

(f) In the impugned order, the Delhi Commission is calculated AT & C losses based on net LPSC and revised AT & C loss calculated earlier for FY 07-08. It is submitted that the Delhi Commission vide the impugned order has also revised its 07-08 true-up order without any basis.

(g) If the approach adopted by the Delhi Commission for LPSC were upheld, then by analogy, every other component of expenditure like employee expenses A & G expenses, capital expenditure etc., which contribute to the reduction of AT & C losses should be reduced from revenue realized. This defies the very basis of computation of incentive on overachievement of AT & C Loss Reduction. The determination of collection efficiency relates to the efficiency of the Appellant in recovering revenue and does not relate to efficiency of cost control, which is secured through other regulations.

148. The learned Counsel for the Delhi Commission has submitted that allowing gross LPSC (inclusive of the financing cost) for

calculating AT & C losses and the over achievement-incentive based on the same will impose an unjustified burden to the consumer. Since, financing of LPSC appears as an expense item and is borne by the consumers, the inclusion of the same while calculating AT & C will mean that the consumers are bearing the entire cost of the additional fund used for calculating AT & C loss, while only half of the overachievement-incentive resulting from the inclusion of this fund will be passed on to the consumer. Since, consumers are not getting full benefits of gross LPSC, the Delhi Commission held that only net LPSC should be considered for calculating AT & C loss.

149. Let us quote the relevant portion of the impugned order on this issue:

Impugned Order

The Delhi Commission has decided on the issue as follows:

TRUE UP FOR 2007-08

"*3.88 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 2394.47 Cr, which included LPSC of Rs 15.28 Cr. The Commission had also approved AT&C loss of 18.29% and total overachievement on account of higher AT&C Loss reduction as Rs 109.64 Cr.

TRUE UP FOR 2008-09

3.190 The Commission also observes that while calculating the AT&C losses achievement for FY 2008-09, the Petitioner had considered the gross LPSC collected 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, 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 7.45 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.

TRUE UP 2009-10

> *"4.32 The Commission observes that the revenue collection of Rs 2759.13 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 8.49 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 2750.64 Cr while computing AT&C losses"*

150. Let us discuss the issue.

151. As defined above, AT&C loss is a function of Collection efficiency. Collection efficiency is the ratio between the amount realized and the amount billed.

152. As mentioned earlier the Collection efficiency as defined in the transfer policy was the ratio of the amount for energy realized during the year and the amount for energy billed during the year. However, due to problems faced in segregating the amount of energy from rest of bill which included LPSC, Electricity duty, arrears for the energy consumed during the

period and also the arrears for the past, the definition of collection efficiency was modified to include LPSC etc both in the numerator as well as in the denominator so that the impact of inclusion of these parameters is almost negligible. But one thing was for sure that the ingredients of the numerator and denominator would have to be the same. The impact of inclusion of financing amount in the numerator as well as in the denominator would be minimal. However, if the financing amount is added only in the numerator, impact of collection efficiency would be appreciable. Since the ingredients of numerator and denominator have to be same, inclusion of financing costs of LPSC cannot be permitted in the numerator alone.

153. Accordingly decided.

154. The **next Issue is Issue No.17** which relates to **Efficiency Factor on Pension.**

155. 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.

156. 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.

157. 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.

158. The next issue is **Issue No.18** which relates to **Revenue Gap**.

159. Though on this issue, the Appeal was challenged by raising grounds under Memo of Appeal, the Appellant, ultimately decided not to press this point.

160. Accordingly, this issue does not survive.

161. Next issue is **Issue No.19** which relates to **Increase in Salary of Non FRSR Employees Comparable to the Increase recommended by the Sixth Pay Commission**.

162. The learned Counsel for the Appellant has made the following submissions on this issue:

(a) It is pertinent that on account of 6th Pay Delhi Commission recommendations, an increase of approximately 40%-60% has been allowed to the FRSR employees by the Appellant. 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.

(b) The Delhi Commission, however, has not allowed such increase in the salary of employees other than erstwhile DVB employees, stating that employee expense is a controllable expense.

(c) In terms of the formula for computation of employee under Regulation 5.4 of the MYT Regulations, the employees for each year is computed by escalating the employee expenses for the previous financial year by the inflation factor. The relevant portion of Regulation 5.4 is as follows:

> *"(a) O &M**n**=(R&M**n** + EMP**n** + A&G**n**)* (1-X**n**)*
>
> *(ii) EMP**n** + A&G**n**) = EMP**n-1** + A&G**n-1**)*(INDX**n-1**/INDX**n-1**)*
>
> *(iii) INDX =0.55*CPI**n** + 0.45*WPI**n**)*
>
> *(c) INDX**n**-Inflation Factor to be used for indexing can be taken as a combination of the Consumer Price Index (CPI) and the Wholesale Price Index (WPI) for immediately preceding five years;*

*(d) EMP**n**-Employee Costs of the Licensee for the nth year;*

*(g) X**n** is an efficiency factor for nth year. Value of X**n** shall be determined by the Commission in the MYT Tariff Order based on Licensee's filing benchmarking, approved cost by the Commission in past and any other factor the Commission feels appropriate.*

(d) In terms of Regulation 4.16(b), the Operation & Maintenance expenses, which include the employee expenses is a controllable parameter. Regulation 4.16(b) provides as follows:

"4.16 The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:

….

(b) For controllable parameters,

(i) Any surplus or deficit on account of O & M expenses shall be to the account of the Licensee and shall not be trued up in ARR; and

(ii) Depreciation and RoCE shall be trued up at the end of Control Period."

(e) However, this Tribunal in Appeal No. 36 of 2008 filed against MYT order of BRPL, elaborated on the manner in which controllable parameters are required to

be dealt with by the Delhi Commission, wherein it was held that any increase in salary for non-FRSR structure employees comparable to the 6th Pay Commission shall be allowed in the truing up process to the extent that expenditure on that account has actually been incurred.

(f) The Delhi Commission had envisaged that the increase on account of Sixth Pay Commission's recommendation would be approximately 10% which was factored while issuing the MYT Order. However, the increase accorded to FRSR employees under Sixth Pay Commission recommendation was to the tune of 40%-60% which is not envisage in the MYT Order, and which necessarily entails hike in the salaries of the non-FRSR employee comparable to Sixth Pay Commission.

163. The learned Counsel for the Delhi Commission has made the following submissions:

(a) Employees cost is controllable item and has been allowed on normative basis as per Regulation 5.41 of MYT Regulation 2007, controllable item cannot be varied in true-up exercise. The relevant Regulation is being reproduced hereinbelow for ready reference:-

*"**Corrections for uncontrollable factors***

5.40 The Licensee shall file its proposals for the pass through of gains/losses on variations in "uncontrollable" items of ARR. The Licensee shall also furnish the details of the "controllable items" of the ARR for scrutiny of the Commission.

Truing Up Mechanism

5.41 These Regulations do not provide for any truing up for controllable items.

5.42 Variations on account of uncontrollable items like energy sales and power purchase cost shall be trued up. Truing-up shall be carried out for each year based on the actual/audited information and prudence check by the Commission;

Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in Clause 8.2.2 of the National Tariff Policy;

5.43 The Regulations also provide for creation of a Contingency Reserve (CR) at the beginning of the Control Period in the ARR. The Licensee shall be permitted to use funds from such provision, with the prior approval of the Commission to compensate the uncontrollable variations instead of tariff adjustments and thereby ensuring tariff stability in the Control Period.

5.44 The Commission, to ensure tariff stability, may include the trued-up costs in the subsequent

Control Period's ARR instead of including in the year succeeding the relevant year of the Control Period."

(b) In MYT Order only expenses of DVB employees has to be trued-up. There is no comparison between DVB employees, who are getting the salary as per the pay-scales approved by Govt. of NCT of Delhi and the other employees of the Appellant has no comparison with DVB employees.

164. Let us see the findings of the Delhi Commission in the Impugned order:

"The Commission has decided on the issue as follows*:*

"3.232 The Commission has observed that as per the MYT Regulations, employee expense is classified as a controllable expense. In the MYT Order, permissible employee expense has been provided for each year of the Control Period as per the methodology prescribed in the MYT Regulations. The Commission in its MYT Order had allowed a provisional increase in salary due to the Sixth Pay Commission only for the DVB employees. While approving the employee expenses for each year of the Control Period, the Commission had undertaken a thorough analysis and prudence check of the actual employee cost incurred in the base year as per audited accounts and the expected scenario in the future years of the Control Period was also considered.

3.233 The Commission therefore rejects the Petitioner's claim for impact of the Sixth Pay Commission recommendations on non-DVB employees".

165. Since the Appellant relied upon the judgment in Appeal No.36 of 2008 we shall quote the findings of this Tribunal in the said judgment which reads as follows:

The Tribunal in Appeal No.36 of 2008, has held that:

"*74) Having gone through the impugned order we do find that the Commission has not considered the issue of possible increase in the number of employees consequent on increase in the consumer base. Nor has the Commission ruled on the appellant's proposal to increase the salaries etc. The Commission has nonetheless assured to true up the employees expenses subject to prudence check. The Commission shall also take care of the related carrying cost. This should satisfy the appellant.*

75) It may be stated here that the recommendations of salary hike made by the 6th Pay Commission takes into account the need to retain & attract talent. The appellant has not justified the need for any further hike by any factual data. One may expect better talent to be attracted to the sector in case salaries are further hiked. Yet one cannot lose sight of the fact that the consumers will have to bear the burden of such salary hike. Any hike in salary, not comparable to 6th Pay Commission's recommendation and not sufficiently justified cannot be allowed as pass through in tariff. We thus conclude the issue of employees' expenses by saying that the Commission shall allow the expenses incurred towards

the retirement benefit of SVRS optees pending decision of the Acturial Arbitration Tribunal and shall true up the employee expenses to the extent of increase caused by increase in the consumer base. So far as salary hike is concerned to the extent hike comparable to the Pay Commission to employees other than the erstwhile DVB employees shall also be allowed in the truing up process in case expenditure in that account has actually been incurred".

166. Let us discuss the issue.

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. 68 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 contended before us in the present case, 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 6th 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 6th 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.

171. Issue No.20 relates to **Increase in Expenses for FRSR Employees in addition to Sixth Pay Commission Impact**.

172. The Submissions of the Appellant on this issue are as under:

(a) 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).

(b) Further, the judgment and order dated 13.08.2008 passed by the Delhi High Court disposing off Writ Petition (C) No. 5875 of 2008 also require the Appellant to extend to all former employees of DVB the same pa

benefits and perquisites which were being granted to those FRSR employees who became employees of DTL Accordingly, the Appellant became liable to grant to its employees all the monetary and non-monetary benefits which were granted by DTL to its employees by various circular issued by time to time, hence this was an uncontrollable expenditure in as much as it was the Appellant's legally biding duty and obligation to provide these monetary and non-monetary benefits to its FRSR employees, firstly by virtue of Section 16(2) of the DERA read with the Transfer Scheme Rules and the tripartite agreement, and also the said Delhi High Court judgment and order dated 13.08.2008. It needs to be clearly understood that the escalation formula provided under the MYT Regulation did not cover or provide for such uncontrollable expenditure incurred b reason of a binding legal obligation.

(c) This is a fit and appropriate case for the Commission to exercise the powers conferred by Regulation 13.4 and 13.6 of the MYT Regulations and to relax/waive the strict compliance with the said regulations and the norms prescribed therein the interest of justice. And, if that is not done, it will lead to great arbitrariness, because no line of discrimination

will be maintained between controllable and uncontrollable expenditure.

(d) In view of the above, the Appellant in the true up petition for 2008-09 had submitted that the increase allowed by the Government/DTL for the FRSR structure employees due to wage revision, other monetary and non monetary benefits given to them either pursuant to some specific circulars/rules or practice followed by Delhi Transco Ltd. (DTL), has resulted in an additional expenditure of Rs. 3.02 Cr in FY 2007-08, Rs. 7.65 Cr in FY 2008-09 and Rs. 10.29 Cr in FY 2009-10.

(e) The Delhi Commission has erroneously proceeded to disallow the Appellant's claim for such additional amount towards the actual salary paid to FRSR employees on the ground that the increase in expenditure towards salaries of FRSR employees will also be approved as per the normative escalation formula provided in the MYT regulations for controllable factors.

(f) Where the Appellant is required to provide monetary benefits to erstwhile DVB employees as per Government Rules, the Delhi Commission ought to

allow all actual salary expenses of FRSR structure employees for the whole MYT Control Period, in addition to the impact of the recommendations of the Sixth Pay Commission incurred by the Appellant. During the MYT period, the actual increase has been 9-10%, while as per the formula for computing normative expenses the Delhi Commission has allowed about 4.66% increase, which has been further reduced by 2%-4% on account of application of efficiency factor.

173. In reply to above, the learned Counsel for the Delhi Commission submits that the employees' expenses are controllable item and are based on normative values. As per MTY Regulations, no variation is permissible.

174. Let us quote the impugned order of the Delhi Commission on this issue. The relevant portion are set out below:

"3.227 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.

3.228 Therefore the Commission rejects the submission of the Petitioner.

..

4.72 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.

4.73 Therefore the Commission rejects the submission of the Petitioner".

175. In the light of the submissions of the rival parties, let us discuss the issue.

176. The Appellant has contended that it had to pay extra amount to FRSR employees on Delhi High Court's directions. It has suggested that the Delhi Commission should invoke its power to relax under Regulation 13.4 or its inherent powers under Regulation 13.6 of MYT Regulations. Regulations 13.4. and 13.6 are quoted below:

"Power of Relaxation

> *13.4 The Commission may* ***in public interest*** *and for reasons to be recorded in writing, relax any of the provision of these Regulations.*
>
> *…*
>
> ***Saving of Inherent Powers of the Commission***
>
> *13.6 Nothing contained in these Regulations shall limit or otherwise affect the inherent powers of the Commission from* ***adopting a procedure****, which is at variance with any of the provisions of these Regulations, if the Commission, in view of the special circumstances of the matter or class of matters and for reasons to be recorded in writing, deems it necessary or expedient to* ***depart from the procedure*** *specified in these Regulations.*

177. Perusal of Regulation 13.4 would indicate that the Delhi Commission may relax the provisions of the MYT Regulations in the Public Interest. The Appellant has not demonstrated as to how allowance in increase in employees cost would be in public interest. On the other hand it will increase the ARR and the retail tariff. Again, perusal of Regulation 13.6 would indicate that the Delhi Commission can deviate from the procedure prescribed in the Regulations under special circumstances. Employees' costs are one of the components under normative R&M expenditure and deviation from the norms cannot be said to be deviation under special circumstances. Thus, the contention of the Appellant on both counts is misplaced.

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.

180. **Issue No.21** relates to **Extension of MYT order to O&M Expenses for the Financial Year 2011-12**.

181. The submissions of the Appellant on this issue are as under:

(a) The MYT Regulations, 2007 were valid up to 31.03.2011. A new control period was to begin from FY 2011-12 onwards, for which, the Delhi Commission would have determined the values for various parameters taking into consideration, interalia, the actual O &M costs of the Appellant during the period FY 2007- 2008 to 2010 -11.

(b) However, the old MYT Regulations were extended by one year. The Appellant claimed O & M expense for FY 11-12 estimates based on actuals, with adjustments on account of impact of inflation, increase in consumer base, statutory requirements an giving effect to judgments, directions passed b this Tribunal etc. The Delhi Commission has however allowed the O & M

expenses by applying the indexation provided under the MYT Regulations to the normative O & M expenses approved for FY 2010-11 and further reduced it by an efficiency factor of 4%. Thus, the O & M expenses for FY 2011-12 have not been allowed on estimated actuals for the said year.

(c) However, in computation of AT & C loss targets the Delhi Commission has fixed the target for FY 2011-12 based on the estimated actual target for FY 2010-11 of 13.5% instead of the approved target of 17% for FY 10-11.

(d) The employee and A & G expenses approved in the ARR for FY 2011-12 vide the impugned order and significantly lower than the actual. In fact, even in the new MYT order dated 13.07.2012, the amounts considered by the Delhi Commission towards employee and A & G expenses for FY 2011-12 (as the base year for the new MYT period) are much higher than that approved in the impugned order. Employee expenses and A& G expense approved in the impugned order are Rs.195.16 Cr and Rs. 37.29 Cr respectively

while employee expenses as per the new MYT order is Rs. 259.28 Cr and Rs. 42.02 Cr respectively.

(e) The maintenance and reduction of AT & C loss levels entail additional O & M expenses in terms of increased employee and A & G expense. Since the two parameters are linked, the Delhi Commission should adopt uniform principles while extending the scope of the MYT Regulations by one year. As the order extending the MYT Regulations by one year provide for the target AT & C losses for FY 2011-12 to be fixed at 13.5% on the basis of actuals (and not at 17% on the basis of the earlier norms) it must necessarily follow that the O & M expense which should be allowed for FY 2011-12 should also be allowed on the basis of actuals rather than the basis of the earlier norms which were applicable to the control period.

(f) Once the MYT Regulations have specified the target AT & C loss for the Appellant at 17%, it is not open to the Respondent Delhi Commission to reduce the same through an order as the same would be ultra vires the provision of the MYT Regulations and the Act. The Act provides the procedure to frame regulation as part of delegated legislation. Any amendment to the

regulations will have to be made in the same manner. The order dated 10.05.2011 if given effect to by reducing the AT & C loss will have the effect of amending the MYT Regulations, which is not permissible in law. Therefore, the part of the order that reduces the AT & C loss level has to be ignored being ultra vires and void ad-initio.

182. In reply, the learned Counsel for the Delhi Commission submits that the MYT Regulations and the MYT control period was extended vide order dated 10.05.2011 wherein Appellant has consented to such extension. In the same order, the Delhi Commission has fixed the target for reduction of AT & C losses for the year 2011-12. In respect of Appellant it was fixed at 13%, the said order has not been challenged and has attained finality, hence the Appellant cannot be permitted to raise this issue at this stage.

183. Let us see the findings of the Delhi Commission in the Impugned order on this issue. The relevant portions of the impugned order are set out below:

On O&M Expenses

"5.136 All other costs including O&M Costs have been projected in the MYT Order dated February 23, 2008 for each year of the Control Period (FY 2007-08 to FY

*2010-11). The Commission has now extended the MYT Regulations till FY 2011-12. As the MYT Order issued by the Commission has not approved any cost towards controllable parameters for FY 2011-12, the Commission in this Order **is approving costs towards various controllable parameters following the principles laid out in the MYT Regulations, 2007 and MYT Order dated February 23, 2008.**"*

On AT&C loss target:

*"5.43 The Commission vide Order dated 10th May, 2011 has fixed the AT&C loss reduction target of NDPL as 13% 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 07-11) as well as the actual performance claimed by the NDPL during 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."*

184. In view of the submissions made by the rival parities and findings in the impugned order, let us discuss the issue.

185. The Appellant in its rejoinder has submitted that :

"With respect to the contention of that the order has attained finality and is not open to challenge, it is submitted that the part of the order dated 10.05.2011, which provides for reduction in AT&C loss target is in

the nature amendment to MYT Regulation and such amendment is not allowed under the extant statutory framework. It is submitted the Division Bench of Hon'ble Bombay High Court in the matter of Dr. Vivekanand Atmaram Chitale and another Vs. Vidya Vardhini Sabha and others (1984 MhLJ 520) held that

> *"It is well settled that an order without jurisdiction is a nullity, which can be ignored with impunity. This is the ratio of the decision of this Court in Abdullamiyan Abdulrehaman v. Government of Bombay AIR1942Bom257 In that case, relying on the decisions (1) in Surannanna v. Secretary of State (1900) 2 Bom LR 261 Malke Jappa v. Secretary of State (1912)14BOMLR332 Rasulkhan Hamadkhan v. Secretary of State AIR1915Bom72 , (4) Dhanji v. Secretary of State 23 Bom LR 279; AIR 1921 Bom 381, (5) Padaya v. Secretary of State 25 Bom LR 1160 : AIR 1924 Bom 273 (6) Suleman v. Secretary of State 30 Bom LR 431: AIR 1928 Bom 180 (7) Menibhai v. Nadiad City Municipality AIR1927Bom53 , the learned Judges held that where an authority which purports to pass an order is acting without jurisdiction, the purported order is a nullity and it is not necessary for a party, who objects to that order, to apply to set it aside. He can rely on its invalidity when it is set up against him although he has not taken steps to set it aside."*

The contention advanced and behalf of the Commission that the order dated 10.05.2011 passed by the Commission extending MYT Regulations by one year has attained finality is entirely misconceived and untenable. The said order extending the MYT Regulation only provided for the AT&C losses target for FY 2011-12, on the basis of the actual figures

immediately prior to that period. The said order dated 10.05.2011 did not give any direction or make any provision with regard to the expenditure to be allowed in the ARR for FY 2011-12 for achieving the said AT&C loss target. The Appellant submission is only that this expenditure should be allowed on the basis of the actuals, and not on the basis of the norms in line and in harmony with the said order dated 10.05.2011.

186. While fixing the targets for the AT&C losses, the Delhi Commission has considered actual AT&C losses achieved during the previous year. However, while fixing the O&M expenses, the Delhi Commission has ignored actual expenses and indexed the normative expenses as per 2007 MYT Regulations.

187. This approach taken by the Delhi Commission is not correct. It should have adopted either the normative AT&C losses trajectory or O&M expenditure as per 2007 MYT Regulations or actual. The Delhi Commission cannot adopt a method under which the Appellant is at loss under all the circumstances.

188. This issue is decided accordingly in favour of Appellant.

189. The **next issue i.e Issue No.22** is **Increase in Employees Cost Due to Increase in Consumer Base**.

190. On this issue, the learned Counsel for the Appellant has submitted the following arguments:

(a) In the Appellant's licensed area of supply, consumer base has increased by 26% in FY 2009-10 as compared to FY 2006-07 and 11.13% vis-à-vis FY 08-09 (FY 2006-07: 8.72 lacs, FY 2008-09; 10.29 lacs, FY 2009-10: 11.43 lacs) and units billed have grown by 32% in FY 2009-10 as compared to FY 2006-07 (Units billed 2006-07: 4350 MUs, 2009-10: 5775 MUs). It is pertinent that the Appellant is obligated under the extant regulatory framework to maintain standards in supply of electricity and to retain AT & C loss levels effectively.

(b) The Delhi Commission in its MYT order has allowed employee cost on normative basis and increase in employee cost was considered on the basis of CPI (Consumer Price Index)/WPI (Wholesale Price Index) but did not factor in the increase in employee cost require due to increase in consumer base. (Para 4.100 of the MYT Order).

(c) This Tribunal in Appeal No. 36 of 2008 has held that the Delhi Commission should true up employee expense to the extent of increase caused by increase in consumer base. While the Delhi Commission has filed

an appeal against the judgment of the Tribunal in Appeal No. 36 of 2008 , the finding on the present issue has not been challenged.

(d) It is therefore submitted that the Delhi Commission should include increase in consumer base in the parameters considered for approving employee expense on a normative basis.

(e) However, the Delhi Commission, in contravention of the judgment in Appeal No. 36 of 2008, has disallowed the Appellant's claim for increase in employee expenses on account of increase in consumer base, on the premise that if it allows such increase, it will defy the logic of offering special voluntary retirement scheme to DVB employees.

(f) The Voluntarily Retirement Scheme (VRS) was introduced in FY 2003-04 to do away with the surplus staff strength of the Appellant, who did not possess the required skills or contributor value, based on the requirement at that point of time and the same has already resulted into huge savings which have been passed on to the consumers.

(g) The VRS does not mean that the Appellant will not recruit any more employees in future, even if its business exigencies demand so.

(h) The additional costs of VRS has been met out of the saving in employee cost arising out of retirement of VRS optees as referred to in the MYT Tariff Order.

(i) The savings in employee costs due to VRS originally and actually achieved in view of the 6th Pay Commission revision is:

Description	FY04	FY05	FY06	FY07	FY08	FY09	FY10	FY11	FY12	FY13	Total
Savings computed at the time of SVRS	**7.31**	**41.64**	**4.098**	**39.32**	**37.32**	**34.23**	**30.17**	**24.61**	**17.01**	**12.36**	**284.85**
Savings adjusted for increase given in sixth pay	**7.31**	**41.64**	**44.05**	**51.12**	**48.38**	**47.93**	**43.75**	**35.68**	**24.67**	**17.93**	**362.46**

(j) The above savings was computed at the time of implementation of VRS which assumed DA increase of 6% in a year whereas the DA has increase in excess of 10% in last few years. The cumulative savings after considering the 6th Pay Commission. Impact is Rs. 362.46 Cr. Payments towards the golden handshake for SVRS employees were made on an amortized basis

upto FY 06-07. The total expenditure on this account (including carrying cost) was Rs. 104.19 Cr. The total expenditure towards monthly pension of such employees is Rs. 79 Cr.

(k) Thus, the net savings on account of SVRS that has accrue to the Appellant, which has been passed on to the consumers is Rs. 179.27 Cr. This clearly shows that had these employees not taken VRS, the employee cost to be allowed in tariff would have been much more.

(l) The Delhi Commission's contention that since VRS has been considered, no further increase in employee cost is justified is contrary to its past practice. The Table 27 above clearly shows that the Delhi Commission has allowed the actual employee expenses for FY 04, FY 05, and FY 06, therefore, any increase in number of employees during these years had been approved by LD. Delhi Commission.

(m) The VRS was availed by 1798 employees. These employees were mostly in the age bracket of 50-59 years. Out of these employees, the year wise superannuation is as follows:

Financial Year	No. of VRS Optees expected to retire
2005-06	75
2006-07	177
2007-08	134
2008-09	197
2009-10	221
2010-11	194
2011-12	206
2012-13	178
2013-14	133
Total	1515

(n) Even for the sake of argument, if it is assumed that these employees could have been used to cater the requirement arising out of increase in consumer base, still the Appellant would have to take new employees as the majority of these employees would have anyway left the organization due to retirement.

191. The learned Counsel for the Delhi Commission submits that the question of increase in employees' expenses cannot be considered in isolation as it was controllable item. It is further submitted that even infacts the Appellant has not given number of employees since the year 2007-08. In the employees shown by the Appellant, the employees engaged in other ventures/business are also included. Thus, the question of increase in the salary amount due to increase in consumer does not arise.

192. Let us see the relevant portion of the impugned order as well as this Tribunal's judgment in Appeal No.36 of 2008 which is set out as below:

*"**Impugned Order***

"3.128 The Commission during Policy Direction Period had allowed the Petitioner an expenditure of Rs 106.07 Cr on account of special voluntary retirement scheme offered by the Petitioner as the Petitioner has submitted that it has surplus employees. If the Commission allows any increase in employee base on account of increase in consumer base, it will defy the logic of offering special voluntary retirement scheme to DVB employees and will charge consumers of the Petitioner twice, once for amount paid by the Petitioner on account of special voluntary retirement scheme and later on account of hiring of new employees. The Commission rejects the prayer of the Petitioner to approve increase in employee expense on normative basis on account of increase in consumer base".

***"Tribunal's Judgment in Appeal No.36 of 2008, has held that*:**

"74) Having gone through the impugned order we do find that the Commission has not considered the issue of possible increase in the number of employees consequent on increase in the consumer base. Nor has the Commission ruled on the appellant's proposal to increase the salaries etc. The Commission has nonetheless assured to true up the employees expenses subject to prudence check. The Commission

shall also take care of the related carrying cost. This should satisfy the appellant.

75) … We thus conclude the issue of employees' expenses by saying that the: The Commission shall allow the expenses incurred towards the retirement benefit of SVRS optees pending decision of the Acturial Arbitration Tribunal and shall true up the employee expenses to the extent of increase caused by increase in the consumer base……

118 Employees expenses: The Commission shall allow the expenses incurred towards retirement of SVRS optees pending decision of the Acturial Arbitration Tribunal and shall true up the employees expenses to the extent of increased cost by increase in consumer base. So far as salary hike is concerned to the extent of hike comparable to the Sixth Pay Commission's recommendations for employees other than the erstwhile DVB employees shall also be allowed in true up process in case expenditure in that account has already been incurred".

193. In view of the rival contentions, the findings of the Delhi Commission as well as the judgment of this Tribunal on the issue let us discuss the issue.

194. The main contention of the Appellant is that the Consumer base has increased and it had to induct new manpower to meet the increase consumer base. The number of employees does not have linear relationship with the number of consumers. With

the induction of new technology, the dependence upon the employees get reduced. For example, induction of Automatic Meter Reading eliminates the human interface and the employees so rendered surplus could be utilized in some other jobs. We can take another example, with the extablishment of HVDS systems in colonies, the LT distribution related issues are eliminated and dependence upon employees gets reduced. A specific query was raised during one of the hearing as to which of the jobs have been outsourced by the Appellant. One of the representative of the Appellant answered that Security related jobs are outsourced. It is not correct. In fact, most of the distribution related jobs such as EHT Grid including Grid Sub-station maintenance, HT Distribution System including distribution sub-stations, meter reading, meter installation etc., have been outsourced by the Appellant and the Appellant is claiming the out-sourcing costs under A&G expenses. The work force of the Appellant is mostly employed in commercial related activities. Under these conditions, the demand for additional employees cost because of increased consumer base is not justified.

195. The Appellant has tried to get additional ARR under R&M expenses. If the appellant's contentions in this Appeal are accepted, the very purpose of adoption of Normative Tariff would be lost. The Licensee cannot claim on the basis of actual

expenditure where ever it has incurred loss and adopt the norms where it has spent fewer amounts than approved and pocket the savings.

196. So, the request of the Appellant is rejected and decided accordingly against the Appellant.

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***

<u>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</u>*. Therefore, this point is answered accordingly in favour of the Appellant*'.

202. So, on the strength of the judgment of this Tribunal in Appeal No. 28 of 2008, we decided this point accordingly in favour of the Appellant.

203. The **24th Issue** is **Approval of Employee Expenses for the FRSR Structure for the Financial year 2011-12.**

204. The submissions of the Appellant on this issue are as follows:

(a) The Appellant had claimed FRSR Gross Employee expense of Rs. 150.07 crores. However, the Learned Delhi Commission has allowed employee expense of Rs. 131.96 crores for such period by escalating the employee expenses approved for FY 2010-11 by inflation factor and reducing the same by efficiency factor.

(b) The trend of increase in salary announced by GoNCTD in the year 2010, was as follows:

Increase in DA in Jan 2010	8% (From 27% to 35%)
Increase in Basic Pay July-2010	3%
Impact of Promotions	1.5%
Increase in DA in July 2010	10% (From 35% to 45%)

(c) On this basis, the Appellant claimed increase in employee expenses for FRSR structure employees as follows:

1. 4.5% impact of increment/promotions.

2. Average DA which was 27.75% in FY 09-10 was estimated to be increased to an average of 65% in FY 11-12 which was the increase claimed by the Appellant in its ARR on the basis of such increase being statutorily binding on the Appellant with respect to FRSR employees. The DA prevailing in Jan 2010 was 35% and in July 10 is 45%. It may be noted that effective rate of DA in Jan 11, July 11 and Jan 12 was 51%, 58% and 65% respectively, thereby implying that the increase as estimated by the Appellant was in line with the actuals and should therefore have been followed by the Delhi Commission.

3. Retirement of FRSR employees is considered based on retirement age i.e. 60 years. The retiring

employees are replaced with employees under new pay structure.

4. No increase in rate of Uniform Allowance of Rs 4,000/- per employee is estimated.

5. No increase in rate of ex-gratia of Rs. 3,467/- per employee is estimated.

(d) With respect to annual increments, the Appellant submitted that on an average for an employee having basic salary of Rs. 100 & total salary of Rs. 205 in 2009-10, the total salary became Rs. 232 in FY 10-11, the breakup of same comes as follows:

Particulars	FY 09-10	FY 10-11	FY 11-12
Basic salary (Incl. Grade Pay)	100.00	104.50	109.20
Transport Allowance	8.73	8.73	8.73
HRA	30.00	31.35	32.76
Dearness Allowance	30.17	50.28	74.63
Retiral	27.23	28.05	28.89
Other Cost	9.15	9.15	9.15
Total	205.28	232.06	263.36
Y-to-Y increase		13.05%	13.49%

However, the Delhi Commission did not consider any of these factors.

(e) While controllable employee expenses is required to be determined in such manner under Regulation 5.4

of the MYT Regulations, increase in salary of FRSR structure employees is not controllable due to the binding nature of service conditions emanating from Delhi Electricity Reforms Act, 2000, Transfer Scheme Rules, 2001 and tri-partite agreements entered between GNCT and Employee unions.

205. The learned Counsel for the Delhi Commission submits that the Employees' expenses is controllable item, the MYT Regulation and MYT control period was extended vide order dated 10.05.2011. Hence, the same escalation factor was applied.

206. The Delhi Commission had allowed the allowances as per the actual submissions for all years up to FY 2009-10, while allowing normative increase in the employees expense excluding allowances because the allowances were introduced in FY 2008-09 and were not a part of the base year (FY 2006-07) expense.

207. With regard to this issue we had already expressed our views under Issue No.7 relating to the Litigation Expenses for Delhi Vidyut Board (DVB) period i.e. normative tariff vis a vis allowance of actual expenses for one sub head holds good.

208. The finding given in respect of Issue No.7 holds good for this also.

209. Accordingly decided against the Appellant.

210. Issue No.25 is Approval of **Increase in Non DVB Employee Expenses based on Current Factors**.

211. The submissions of the Appellant on this issue are as under:

(a) By virtue of extension of the MYT Regulations to FY 2011-12, the Delhi Commission has approved the employee expenses for FY 2011-12 by applying the same indexation factor determined under the MYT Order dated 23.02.2008. However, it is pertinent that the MYT Order dated 23.02.2008 was not extended and it was only the MYT Regulations which were extended. Therefore, the Delhi Commission ought not to have applied the same indexation factor as determined under the MYT Order but should have determined the indexation factor afresh as per the principles enshrined under the MYT Regulations.

(b) It is pertinent that a new control period would have begun from FY 2011-12 onwards, for which, the Delhi Commission would have determined the CPI/WPI index taking into consideration the actual levels of inflation and other relevant factors during the preceding five years i.e. FY 2007-11. Under the MYT Regulations

extended to FY 2011-12, the principle for working out the indexation factor requires the Delhi Commission to consider the CPI/WPI index for the immediately preceding 5 years which for FY 2011-12 would have implied FY 2007-11.

(c) It is clear from a reading of Regulation 5.4(c) that the indexation factor for the nth year must be determined on the basis of the CPI/WPI index for the immediately preceding 5 years. If the factors were taken as constant, then the same will render the principle for calculation of indexation factor under the Regulations redundant.

(d) It is submitted that replacement of personnel against retirement/resignation is only available in the market at a cost, which is at least 20%-30% higher than the last drawn salary of the retiring / resigning employee. On this basis, the Appellant had worked out the expenses towards salaries of non-FRSR employees for FY 2011-12 based on the current inflation number, increase in consumer base, etc. Accordingly, the Appellant had claimed an amount of Rs.182.77 crores towards employee cost for non-FRSR employees.

(e) However, the Appellant was allowed only Rs.71.31 crores towards expenses for non-FRSR employees. As a result, there is a huge uncovered gap in the revenue requirement of the Appellant towards salary cost of non-FRSR employees for FY 2011-12.

(f) As per the impugned order, the break-up of expenses approved on account of salaries of FRSR and non-FRSR employees is as follows:

Particular	Sought	Approved for FY 10-11	Inflation allowed	Expenses allowed for FY 11-12	Remarks
FRSR	150.07	125.64	4.66%	131.49	
Non FRSR	182.77	68.14	4.66%	71.32	
Pension of VSS Employees	6.75	6.06		6.06	will be trued up on actual
Capitalisation of salary	(33.28)	(19.06)		(13.41)	
Total	306.31	180.78		195.46	

(g) The employee expense so arrived was reduced by 4% on account of efficiency factor leaving only a meager net increase of less than 1%.

(h) In order to sustain the AT&C loss levels achieved by the Appellant, retention of skilled and talented manpower is essential. While the Delhi Commission has set the AT&C target for FY 2011-12 based on the actual reduction in AT&C loss levels, it has not considered the

actual expenses incurred by the Appellant for approving the employee expenses. It is hence submitted that the Delhi Commission be directed to factor the current inflation trend, and correction required based on the economic situation, etc.

212. The learned Counsel for the Delhi Submits that the Employees cost is normative and cannot be reviewed as per MYT Regulation. The MYT Regulation and MYT control period was extended for the year 2011-12 and the same escalation factor was applied. Thus, the Appellant cannot claim the employees cost, which is one of the controllable item on actual basis.

213. On this issue also, we have expressed our view in Issue No.7 which it would be also applied to this issue.

214. Accordingly decided against the Appellant.

215. The next Issue is **Issue No.26** which **relates to Increase in A&G expenses due to uncontrollable Statutory Requirements**.

216. The learned Counsel for the Appellant submits the following:

(a) By virtue of extension of the MYT Regulations to FY 2011-2012, the Delhi Commission has approved the A&G expenses for FY 2011-12 by applying the same indexation factor determined under the MYT Order

dated 23.02.2008. However, it is pertinent that the MYT Order dated 23.02.2008 was not extended and it was only the MYT Regulations which were extended. Therefore, the Delhi Commission ought not to have applied the same indexation factor as determined under the MYT Order but should have determined the A&G expenses afresh as per the principles enshrined under the MYT Regulations.

(b) According to Government notification of 09.03.2010, there was an average increase of 40% in the minimum wage rates for workmen, clerical and non-technical supervisory staff w.e.f. 01.02.2010 and another 15% w.e.f. 01.02.2011. This has had a direct impact on A&G expenses involving manpower like bill distribution, cash pick up charges etc. The impact of hike in minimum wages during FY 10-11 is set out below:

Sr. No.	Particulars	UoM	
A.	Expenses having direct impact of Wage like	Rs. Cr.	8.97
B.	Wage Hike w.e.f. 01.02.10	%	40
C.	Total after hike (A*(1+B))	Rs. Cr.	12.56
D.	Impact for FY 10-11=C-A	Rs. Cr.	3.59
E.	Expenses having direct impact of Wage like w.e.f. 01.02.11	%	15
F.	Total after hike (C*(1+E))	Rs. Cr.	14.44
G.	Impact for FY 10-11=F-C	Rs. Cr.	1.88

(c) Any increase/decrease in A&G expenses which occurs due to change in statutory provisions are uncontrollable in the hands of Appellant, therefore, such increase/decrease such as change in rates of Minimum Wages Act or any other statutory implications should be treated as uncontrollable factors subject to true up.

(d) The MYT Regulations were valid only up to 31.03.2011. A new control period was to begin from FY 2011-12 onwards, for which, the Delhi Commission would have determined values for various parameters taking into consideration inter alia the above factors. However, the Delhi Commission has merely extended the MYT Regulations to FY 11-12 and mechanically adopted the MYT Order and ignored the aforesaid factors.

217. In reply to the submissions made by the learned Counsel for the Appellant, the Counsel for the Delhi Delhi Commission submits that the A&G expenses are normative and cannot be reviewed as per MYT Regulation. The MYT Regulation and MYT control period was extended for the year 2011-12 and the same escalation factor was applied. Thus, the Appellant cannot claim A & G expenses, which is one of the controllable item on actual basis.

218. For this issue also, the views expressed by us under Issue No.7 would apply in this case also. As such, the same would hold good. Accordingly decided.

219. The next issue is **Issue No.27** regarding **Re-computation of "K" Factor for R&M Expenses.**

220. Since the Appellant has not pressed this issue so no finding is necessary. Accordingly ordered.

221. The Next Issue Is **Issue No.28** with regard to **Increase in A&G Expenses for Increase in Consumer Base, Inflation**.

222. The submissions of the Appellant on this issue are as under:

(a) In the MYT order, the A&G expenses for the Control Period were determined by taking actual cost of FY 2006-07 as base and indexing the expenses each year by the average of CPI/WPI prevailing in the five years immediately preceding FY 06-07. The A&G Expenses so determined were further subjected to reduction by efficiency factors.

(b) However, there are certain expenses which directly increase/decrease in proportion to increase/decrease in consumer base over and above current inflation like Meter Bill printing, Bill Distribution, cash/credit collection expenses etc. Further, certain

expenses not only increase on account of inflation, but also increase in proportion to increase in employees such as traveling expense, conveyance exp, training and grooming of manpower through seminars, workshops etc.

(c) The MYT Regulations were valid only upto 31.03.2011. A new control period was to begin from FY 2011-12 onwards, for which, the Delhi Commission would have determined the values for various parameters taking into consideration inter alia the above factors and the actual A&G expenses of the Appellant during the FY 2007-11.

(d) However, the Delhi Commission by merely extending the MYT Regulations, the Delhi Commission has based on the average CPI/WPI of FY 2002-03 to FY 2006-07 and application of efficiency factor of 4% allowed 0.66% increase in the A&G expenses which is grossly unreasonable and unjustifiable in comparison of actual inflation rate of around 11%.

(e) It is submitted that in Appeal No. 36 of 2008, the Tribunal has directed that the increase in employee expenses ought to be trued up to factor in the increase

in consumer base. The same rationale should be extended to truing up of A&G expenses.

223. In reply to the submissions made by the Counsel for the Appellant, the learned Counsel for the Delhi Commission submits that A & G expenses are controllable item. The MYT Regulation and MYT control period was extended for the year 2011-12 and as per MYT Regulation A & G expenses cannot reviewed. Thus, the Appellant cannot claim A & G expenses on the basis of inflation or change in consumer base.

224. This issue was conceded in Para 93 of Appeal No. 36 of 2008 reported in 2009 ELR 880. Also Paras 22 and 23 of the decision of this Hon'ble Court in Appeal No. 52 of 2008 reported in 2011 ELR 994 are relevant on this point.

225. We have already decided this issue in Appeal No.26 of 2008 and Appeal No.52 of 2008. The Delhi Commission is directed to follow the principles laid down in these judgments and pass the orders accordingly.

226. Issue No.29 is **relating to Computation of Debt Component for ROCE.**

227. On this issue, the submissions made by the Appellant are as under:

(a) The Delhi Commission in its MYT order dated 23.02.2008 had erroneously computed the WACC by using the average equity and closing value of debt, which had resulted in lower RoCE to the extend of Rs. 2.86 Cr. The Delhi Commission in its review order dated September, 22, 2009 observed that it had erroneously computed the WACC by using the average equity and closing value of debt instead of computing the same based on average equity and average debt.

(b) Based on the same, the learned Delhi Commission in the Impugned Order has revised the WACC based on the average debt and average equity. However, while computing the closing debt, the Delhi Commission has not reduced the repayment of loans during the year resulting in wrong opening and closing balance which in turn have an impact on computation of average debt.

(c) The Delhi Commission in its reply, has misconstrued the MYT Regulations and submitted that the return is computed on the Net Fixed Assets for each year, based on the assets capitalized in a relevant year and not on the capital investment for that year. Such reading of the MYT Regulations is erroneous, as the RoCE is computed on an asset base that is cumulative

and not just on assets capitalized during a year. Unless repayment of loans is taken into consideration, the debt component would be considered at a proportion higher than the actual levels, leading to undue weightage to the interest cost than the return on equity component. This deprives the Appellant of the return on the equity actually invested by the Appellant.

(d) The learned Delhi Commission failed to appreciate that the company once having secured loan of 70% of the assets would not be able to get further loans on the said asset. The return on the capital employed by the shareholder can only be by way of depreciation. The depreciation allowed by the learned Delhi Commission is not sufficient even for the debt repayment obligation and hence there is no amount left to be returned to shareholders thereby keeping the initial equity investment intact. It is evident from the Impugned Order that the depreciation allowed for each year i.e. FY 07-08 to 11-12 is substantially less that the repayments of loan considered for that year:

> "*5.215 The Commission has concluded that no repayment for AAD shall occur during FY 2011-12, as shown below:-*

Table 209: AAD approved by Commission (Rs. Cr.).

Particulars	***FY 2007-8***	***FY 2008-09***	***FY 2009-10***	***FY 2010-11***	***FY 2011-12***
1/10th of the Loan(s)	*121.41*	*131.21*	*144.43*	*156.97*	*173.64*
Repayment of the Loan(s) as considered for working out Interest on Loan.	*106.01*	*111.23*	*123.92*	*139.93*	*156.55*
Minimum of the Above	*106.01*	*111.23*	*123.92*	*139.93*	*156.55*
Less: Depreciation during the year	*79.54*	*93.15*	*103.21*	*110.28*	*118.54*
A	*26.47*	*18.08*	*20.71*	*29.65*	*38.01.*

(e) Thus, year-on-year, the depreciation amount allowed is utilized towards repayment of the debt component of the capitalized asset while the original equity infused remains the same. As per the MTY Regulations, the return on equity invested has to be allowed @ 16% (14% + 2%) post tax. The Commission's approach of adopting the original debt: equity ratio at the time of installation of new asset would result in lowering of the assured return of 16% on equity.

(f) It is also relevant that the return on capital employed is computed by multiplying the Regulated Rate Base (RRB) and Weighted Average Cost of Capital (WACC). In computing RRB for each year, the depreciation is already factored in. Since, the return on

equity is calculated on the depreciated value of the asset, such return also stands suitably reduced.

228. In reply to above submissions, the learned Counsel for the Delhi Commission has made the following submissions:

(a) For the Control Period, the return to the Petitioner has been allowed as per the methodology specified in the MYT Regulations, 2007. As per Regulation, the return for the year shall be determined by multiplying the weighted average cost of capital employed to the average of "Net Fixed Asset" for each year. Thus, the return allowed each year is determined based on the values of assets capitalized (net of depreciation and consumer contribution) in the respective year and not on the capital investment for that year. The addition in equity/free reserves and debt during each year of the Control Period is also to the extent of assets capitalized in that year.

(b) The loan repayment amount is not factored in for computation of average debt for the year as that would lead to depreciation of only the debt component of the capital employed, while distorting the debt-equity ratio. Hence, the Average Equity (average of opening and closing of equity and free reserves) and average debt

(excluding the repayment amount which is considered equal to the depreciation allowed as per Regulation) is considered for calculating the weighted average cost of capital employed. The Delhi Commission has considered the total debt amount used to fund the assets and hence, the deduction of repayment for the purpose of calculating of RoCE is not considered.

(c) Moreover, as pointed out in the Tariff Order dated August 26, 2011, since all elements of RoCE are subjected to True-Up, the Delhi Commission may also True-Up the RoCE for FY 2011-12 approved at the end of the Control Period.

229. In view of the statement of the Delhi Commission, the Delhi Commission may true-up ROCE for the Financial year 2011-12 approved at the end of the Control period. The same may be held out by the Delhi Commission as undertaken by the Delhi Commission in its reply.

230. Accordingly ordered.

231. The **30th and Last Issue** is **Disallowance of Interest on Security Deposit incurred by the Appellant on Consumption Security Deposit received by DVB Prior to Privatization**.

232. The submissions of the Appellant on this issue are as under:

(a) The Transfer Scheme Rules set out the opening balance sheet of the Appellant. The liability stated in the opening Balance Sheet of the Appellant as on 1st July, 2002 was Rs. 10 Cr. in respect of consumers' security deposit. The consumer security deposit over and above Rs. 10 Cr. remained with DPCL (as per validation report independently procured by the Appellant, total consumer security deposit was Rs. 66.70 Cr.). The Government issued a clarification on 12.10.2004 that no adjustment was envisaged based on the actual amount of consumer security deposit. However, under Section 47(4) of the Act, the Appellant is required to pay interest on the consumer security deposit.

(b) The Appellant approached the learned Delhi Commission for adjudication of the issue of outstanding consumer security deposit held by DPCL, wherein the learned Delhi Commission by its order dated 23.04.2007 issued statutory advice to the Govt. of NCT of Delhi under Section 86(2) of the Act, to direct M/s. DPCL to transfer the amount of security deposit held by it, alongwith interest, to the successor distribution licensees. However, Government and DPCL refused to

accept the decision of the learned Delhi Commission dated 23.04.2007 as binding on it.

(c) The Appellant then filed a Writ Petition in the Hon'ble Delhi High Court (being WP(C) No. 2395/2008) wherein, the Delhi High Court by an order dated 26.03.2008 directed the Appellant to continue to refund the consumer security deposit and to pay interest to the consumers in accordance with law.

(d) The Appellant in its Tariff Petition had accordingly claimed expenses towards payment of interest on such outstanding consumer security deposit as part of ARR. However, learned Delhi Commission in the impugned order has disallowed the same on the premise that such interest is payable by DPCL as per its order dated 23.04.2007 and therefore cannot be allowed as part of the Appellant's ARR. It is submitted that the learned Delhi Commission's reasoning is clearly erroneous, as pursuant to the High Court order, the Appellant has been paying the interest amount.

233. In reply to the above submissions, the learned Counsel for the Delhi Delhi Commission submits that the Delhi Commission in Para 3.142 has observed that since the security amount of the consumer prior to the privatization period is received by DVB

and yet to be transferred to the Appellant. The interest on such security deposits cannot be allowed in ARR.

234. The findings of the Delhi Commission in the Impugned order are as follows:

> *"The Petitioner through its letter dated February 26, 2010 informed the Commission that it had paid interest amount of Rs 9.57 Cr to consumers in FY 2007-08. The Commission observes that Rs 9.57 Cr includes Rs 1.87 Cr on account of interest on consumer security deposit paid for* ***pre privatization period received by DVB which is yet to be transferred to the Petitioner****. The Commission in its Order dated April 23, 2007 has already decided that this amount is to be paid by DPCL and therefore cannot be allowed". (Emphasis Supplied)*

235. 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.

236. The Delhi Commission has decided that this amount be paid by DPCL, cannot be allowed.

237. This finding in our view is correct.

238. Therefore, this finding needs no interference.

239. Before parting with this case we have to refer to our Order dated 24.1.2012 appointing Mrs. Sanjay Sen, Senior Counsel as Amicus Curiae Counsel go the a clarification with reference to the stand taken by the Delhi Commission that they would not implement the order of this Tribunal on the reason that the Delhi Commission has proposed to file an Appeal as against the judgment of this Tribunal before the Hon'ble Supreme Court.

240. This Tribunal was constrained to pass such an order appointing Mrs. Sanjay Sen as Amicus Curiae in view of the forceful arguments advanced by the learned Counsel for the Appellant that the Delhi Commission was not inclined to implement the judgment of this Tribunal as they have a proposal to file an Appeal before the Hon'ble Supreme Court, lacks judicial propriety.

241. This assertion made by the Appellant necessitated to pass the order dated 24.1.2012 appointing Amicus Curiae Counsel to give clarification with regard to conduct of the Delhi Delhi Commission asserting that they are not inclined to implement the judgment of this Tribunal. The portion of the said order is quoted below:

> *"It is pointed out by the learned Counsel for the Appellant by reading the relevant portion of the*

impugned Order that in respect of some issues, the State Commission has not inclined to implement the judgment of this Tribunal, on the ground that the Commission has proposed to file an Appeal as against the said judgment before the Hon'ble Supreme Court which lacks the judicial propriety.

We want to get clarified as to whether such a stand could be taken by the Commission whose Orders are subject to Review of this Tribunal. On this issue, we want to hear the learned Counsel for the parties.

We also deem it appropriate to appoint Mr. Sanjay Sen to act as Amicus Curiae in this matter to clarify this issue. With regard to this, we would like to get explanation from the Commission also. Therefore, the Commission on the next date of hearing shall be present through its Counsel to give clarification."

242. On the basis of our above order dated 24.1.2012, Mr. Sanjay Sen, Amicus Curiae went through all the papers including the impugned order and submitted the following:

"………….

13. From the aforesaid , it appears that there are three instances in the impugned order where the State Commission has admittedly/decided not to implement the order of the Hon'ble Appellate Tribunal in view of the fact that it has decided to file an Appeal against the orders of the Hon'ble Tribunal. It is also clear from the record that on the date when the impugned order was passed and a decision was taken by the State Commission not to implement the orders of the Hon'ble Tribunal, there was neither any appeal pending before the Hon'ble Supreme Court nor any order of stay was

passed, by which it can be said that implementation of the order of the Hon'ble Appellate Tribunal was suspended.

14. At the outset it is necessary to clarify that when the impugned order was passed there was no appeal pending before the Hon'ble Supreme Court against the order of the Hon'ble Tribunal. In any event, even pendency of the Appeal cannot be a ground for non-implementation of orders passed by the Hon'ble Appellate Tribunal. In Thirunavukkarasu Mudaliar (Dead) by LRs Vs. Gopal Naidu, reported in (2006) 12 SCC 390, the Supreme Court held as follows:

> ***"26.............On principle, however, we are of the view that a decree passed by a court of competent jurisdiction is binding upon the parties, and even if the said decree is challenged in appeal or revision it does not cease to operate to bind the parties unless it is stayed by the superior court rendering the decree ineffective or inoperative for the time being, subject to the final decision.***

The parties are bound by the decree, and in case the Appellate Court modifies or sets aside the decree the judgment debtor may claim restitution".

Since the State Commission is a quasi judicial body created by the Statute, whose orders are subject to a statutory appeal under Section 111 of the Electricity Act, 2003 before the Hon'ble Appellate Tribunal, its obligation to follow the orders/directions of the superior tribunal is absolute.

15. A Constitutional Bench of the Hon'ble Supreme Court in the case of Bhopal Sugar Industries Ltd Vs Income Tax Officer, Bhopal, reported in (1961) 1 SCR 474 held as follows:

"8.................

By that order the Respondent virtually refused to carry out the directions which a superior tribunal had given to him in exercise of its appellate powers in respect of an order of assessment made by him. Such refusal is in effect a denial of justice, and is furthermore destructive of one of the basic principles in the administrative of justice based as it is in this country on a hierarchy of courts. If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice and we have found it very difficult to appreciate the process of reasoning by which the learned Judicial Commissioner while roundly condemning the Respondent for refusing to carry out the directions of the Superior Tribunal, yet held that no manifest injustice resulted from such refusal.

9. It must be remembered that the order of the Tribunal dated April, 22, 1954 was not under challenge before the Judicial Commissioner. That order had become final and binding on the parties, and the Respondent could not question it in any way.

....

As we have said earlier, such a view is destructive of one of the basic principles of the administration of justice.

16. The Division Bench of the Madras High Court in the case of Shri Rajendra Mills Ltd., Vs Joint Commercial Tax Officer, reported in Manu/TN/0314/1971 was pleased to hold as follows:

"......We consider that in the hierarchy of authorities set up under the Act, the Tribunal is superior to the

Appellate Assistant Commissioner, who is bound by the orders of the Tribunal. The orders of the Tribunal will be as effective as the orders of this Court so far as their binding character on the Appellate Assistant Commissioner is concerned. Merely because a tax has been filed by the Department, it does not mean it acts as a kind of stay of operation of the order of the Tribunal. So long as that order of the Tribunal is not set aside, the Appellate Assistant Commissioner is bound to give effect to it, and if he fails to do it and by passes it on the ground that the department has filed an Appeal, it will be really contempt of the Tribunal's order.

........It is, of course, open to the Appellate Assistant Commissioner to take his own view on the facts, but, so far as the law propounded by the Tribunal is concerned, it is binding and it should be applied by the Appellate Assistant Commissioner to the facts before him."

17. From the aforesaid, it is quite clear that in a strict legal view the State Commission is bound by the orders of the Hon'ble Tribunal passed in exercise of Appellate powers under Section 111 of the Electricity Act, 2003, and as such, the State Commission does not have the ability to ignore the Appellate Orders. The matter would be different, if there was an order of stay passed by the Supreme Court. Keeping in view the aforesaid settled legal propositions, the Hon'ble Tribunal may be pleased to consider the issue so as to ensure compliance of the orders passed by the Hon'ble Tribunal, which orders have not been stayed or set aside by any superior court.

243. In view of the clarifications made by Mr. Sanjay Sen, learned Senior Amicus Curiae Counsel that there is no difficulty for

holding that the Delhi Commission has deliberately violated our directions by emphatically asserting that they are not inclined to implement the directions issued by this Tribunal.

244. As correctly pointed out by the learned Counsel for the Appellant, this lacks judicial propriety on the part of the Delhi Commission which is a quasi-judicial authority.

245. Originally, we thought of imposing some cost on the Delhi Commission for having shown this unhealthy attitude by putting some strictures on them. However, at the end of the hearing, the learned Counsel for the Delhi Commission has tendered an apology on behalf of the Delhi Commission and has given an undertaking that they will abide by the Directions issued by this Tribunal in future without fail.

246. The relevant portion of the undertaking made by the Delhi Commission in their Written Submissions dated 6.9.2012 is as follows:

> *“That, at the outset of the Written Submissions, the Respondent most respectfully submits that the language used in the impugned order is not appropriate and the Respondent submits unconditional apology for use of the said language in the impugned order. The Respondent is duty bound to implement all the directions issued by this Hon’ble Tribunal”.*

247. In view of the above, we do not want to be harsh towards the Delhi Commission with benign expectations that Delhi Commission in future would comply with the directions issued by this Tribunal. If there is any difficulty in the implementation, it is open to them to approach this Tribunal either to seek for clarification or for Review of our judgment by making submissions with regard to those difficulties being faced by them in implementation or else it is open to them to file an Appeal before the Hon'ble Supreme Court and obtain stay of our judgment. In the absence of stay being granted by the Hon'ble Supreme Court, the Delhi Commission is bound to implement the directions issued by this Tribunal.

248. Let us hope that this mistake committed by the Delhi Commission in the past would not be repeated in future at any cost.

249. With these observations, we want to drop our proposal to take any action as against the Delhi Commission.

250. At the end, it is our duty to record our appreciation for the services rendered by Mr. Sanjay Sent, Senior Counsel to take the pains to collect all the particulars from the records and placed it before us and made clarifications in a lucid and pleasant representation.

251. Summary of Our Findings

1. **The direction given by this Tribunal in Appeal No. 52 of 2008 should apply and should be given full effect in each year by allowing interest amount of notional loan based on the market related interest rate prevailing in that year. Accordingly, the issue is decided in favour of the Appellant.**

2. **In view of the Delhi Commission's undertaking, it is directed to rectify the same in the next true-up without any delay.**

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

4. **It is clear from the plain reading of Regulation 5.26 itself that income from other sources to be worked out by deducting expenditure from the revenue. Accordingly, this issue is decided in favour of the Appellant.**

5. 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. In the light of the said assertions, the issues mentioned under item No.5 do not survive.

6. It is not clear from the submissions of the Appellant as to whether the amount in question to be paid by the Appellant to the Delhi Transco was added to the ARR of the Appellant and the Appellant had already recovered the same from its consumers. If it was so, the Appellant is liable to pay LPSC and the same cannot be transferred to the consumer because it was the Appellant's negligence. On the other hand, if the amount in question was not added in the ARR of the Appellant and the Appellant did not recover the same from the Consumers, then the Appellant is not liable to pay the LPSC. Since it has not been recovered from the consumers, the carrying cost is to be recovered from the consumers. Accordingly decided.

7. **The litigation expenses have been included in the A&G expenses at the time of formulation of the MYT Regulations. Under these Regulations, controllable expenses are allowed on normative basis. A&G expenses are controllable under the Regulations and accordingly allowed on normative basis. There are many sub-parameters under the head A&G 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. Therefore, this issue is decided as against the Appellant.**

8. **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 provide 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. Therefore, this issue is decided as against the Appellant.

9. 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. Accordingly, this issue is decided in favour of the Appellant.

10. 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. Accordingly, this issue is decided in favour of the Appellant.

11. 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. 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. Therefore, the issue is decided as against the Appellant.

12. Issue of power banking is decided as against the Appellant.

13. In the light of above discussion it is clear the issue involved is bilateral issue between the Appellant and MCD and the burden cannot be passed on to the consumers. However, Delhi Commission is required to clarify the points raised by the Appellant so that it could take up the matter with the MCD.

14. The Appellant has submitted that the financing of LPSC is required to meet the requirements of working capital. Delhi Commission has submitted that allowing financing cost for LPSC means allowing of additional working capital for the time period between the due date and the actual date of payment. Hence, financing cost of LPSC has to be at the same rate as that approved for working capital funding. The view taken by the Delhi Commission is correct and need not be interfered with. Therefore, this issue is decided as against the Appellant.

15. In view of the stand taken by the Delhi Commission that Appeal would be filed before the Hon'ble Supreme Court in Appeal No.153 of 2009, we

reiterate our view in the above judgment and direct the Delhi Commission to follow the said judgment in Appeal No.153 of 2009 and to reconsider the ratio of carrying cost at the prevalent market rate and allow the carrying cost also be allowed in the debt equity ratio of 70:30 in the absence of any stay being granted by the Hon'ble Supreme Court. Accordingly, the issue is decided in favour of the Appellant.

16. **The Collection efficiency as defined in the transfer policy was the ratio of the amount for energy realized during the year and the amount for energy billed during the year. However, due to problems faced in segregating the amount of energy from rest of bill which included LPSC, Electricity duty, arrears for the energy consumed during the period and also the arrears for the past, the definition of collection efficiency was modified to include LPSC etc both in the numerator as well as in the denominator so that the impact of inclusion of these parameters is almost negligible. But one thing was for sure that the ingredients of the numerator and denominator would have to be the same. The impact of inclusion of financing amount in the numerator as well as in**

the denominator would be minimal. However, if the financing amount is added only in the numerator, impact of collection efficiency would be appreciable. Since the ingredients of numerator and denominator have to be same, inclusion of financing costs of LPSC cannot be permitted in the numerator alone. Therefore, this issue is decided as against the Appellant.

17. 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.

18. The Appellant did not press this point.

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

20. Perusal of Regulation 13.4 would indicate that the Delhi Commission may relax the provisions of the MYT Regulations in the Public Interest. The Appellant has not demonstrated as to how allowance in increase in employees cost would be in public interest. On the other hand it will increase the ARR and the retail tariff. Again, perusal of

Regulation 13.6 would indicate that the Delhi Commission can deviate from the procedure prescribed in the Regulations under special circumstances. Employees' costs are one of the components under normative R&M expenditure and deviation from the norms cannot be said to be deviation under special circumstances. Thus, the contention of the Appellant on both counts is misplaced. 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. Therefore, this issue is decided as against the Appellant.

21. This approach taken by the Delhi Commission is not correct. It should have adopted either the normative AT&C losses trajectory or O&M expenditure as per 2007 MYT Regulations or actual. The Delhi Commission cannot adopt a method under which the Appellant is at loss under all the circumstances. Accordingly, this issue is decided in favour of the Appellant.

22. The Appellant has tried to get additional ARR under R&M expenses. If the appellant's contentions in this Appeal are accepted, the very purpose of adoption of Normative Tariff would be lost. The Licensee cannot claim on the basis of actual expenditure where ever it has incurred loss and adopt the norms where it has spent fewer amounts than approved and pocket the savings. Therefore, this issue is decided as against the Appellant.

23. So, on the strength of the judgment of this Tribunal in Appeal No. 28 of 2008, we decided this point accordingly in favour of the Appellant.

24. With regard to this issue we had already expressed our views under Issue No.7 relating to the Litigation Expenses for Delhi Vidyut Board (DVB) period i.e. normative tariff vis a vis allowance of actual expenses for one sub head holds good. The finding given in respect of Issue No.7 above holds good for this also. Therefore, this issue is decided asagainst the Appellant.

25. On this issue also, we have expressed our view in Issue No.7 which it would be also applied to this

issue. Therefore, this issue is decided as against the Appellant.

26. **On this issue also, we have expressed our view in Issue No.7 which it would be also applied to this issue. Therefore, this issue is decided as against the Appellant.**

27. **The appellant did not press this issue**

28. **We have already decided this issue in Appeal No.26 of 2008 and Appeal No.52 of 2008. The Delhi Commission is directed to follow the principles laid down in these judgments and pass the orders accordingly. Accordingly, this issue is decided in favour of the Appellant.**

29. **In view of the statement of the Delhi Commission, the Delhi Commission may true-up ROCE for the Financial year 2011-12 approved at the end of the Control period. The same may be held out by the Delhi Commission as undertaken by the Delhi Commission in its reply.**

30. **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. Therefore, this issue is decided as against the Appellant.

252. In the light of our findings above, the Appeal is partly allowed to the extent indicated above. The Delhi Commission is directed to pass consequential orders taking in to account our observations made above.

253. No order as to costs.

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(V J Talwar) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

Dated: 28th Nov, 2013
√REPORTABLE/~~NON-REPORTABALE~~