Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 109, 110 and 111 of 2014

Dated: 23rd February, 2015

Present: **HON'BLE MR. JUSTICE SURENDRA KUMAR, JUDICIAL MEMBER**
HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

Appeal No. 109 of 2014

In the Matter of:

Tata Power Delhi Distribution Limited
(formerly North Delhi Power Limited)
NDPL House, Hudson Line,
Kingsway Camp,
Delhi-110 009 **… Appellant(s)**

Versus

Delhi Electricity Regulatory Commission
Viniyamak Bhawan,
C Block, Shivalik,
Malviya Nagar,
New Delhi-110 017 **… Respondent(s)**

Counsel for the Appellant(s) : Mr. C S Vaidyanathan, Sr Adv.
Mr. Sakya S Chaudhuri
Mr. Anand K Srivastava
Mr. Anurag Bansal (TPDDL)

Counsel for the Respondent(s): Mr. Nikhil Nayyar
Mr. Dhananjay Baijal

Appeal No. 110 of 2014

In the Matter of:

BSES Rajdhani Power Limited
BSES Bhawan,
Nehru Place,

New Delhi-110 017 **… Appellant(s)**

Versus

Delhi Electricity Regulatory Commission
Viniyamak Bhawan,
C Block, Shivalik,
Malviya Nagar,
New Delhi-110 017 **… Respondent(s)**

Counsel for the Appellant(s) : Mr. Buddy A Ranganadhan
Mr. Mr. Aashish Gupta
Mr. Dushyant Manocha
Mr. Paresh Biharilal

Counsel for the Respondent(s): Mr. Nikhil Nayyar
Mr. Dhananjay Baijal

Appeal No. 111 of 2014

In the Matter of:

BSES Yamuna Power Limited
Shakti Kiran Building,
Kakardooma
New Delhi-110 092 **… Appellant(s)**

Versus

Delhi Electricity Regulatory Commission
Viniyamak Bhawan,
C Block, Shivalik,
Malviya Nagar,
New Delhi-110 017 **… Respondent(s)**

Counsel for the Appellant(s) : Mr. Buddy A Ranganadhan
Mr. Mr. Aashish Gupta
Mr. Dushyant Manocha
Mr. Paresh Biharilal

Counsel for the Respondent(s): Mr. Nikhil Nayyar & Mr. Dhananjay Baijal

J U D G M E N T

PER HON'BLE MR. T MUNIKRISHNAIAH, TECHNICAL MEMBER

1. These appeals have been filed by the appellants under section 111 of the Electricity Act 2003 before this Appellate Tribunal against the common impugned order dated 11.03.2014 passed by the learned Delhi Electricity Regulatory Commission (hereinafter referred to as the Commission) in Petition No.1 of 2010 for appeal No. 110 of 2014, Petition No. 2 of 2010 for appeal No. 111 of 2014 and Petition No. 3 of 2010 for appeal No. 109 of 2014 whereby the learned Commission has passed the following impugned order :

> "*10. For the reasons recorded above, the Commission finds no reason to review or modify the order contained in letter dated 03.12.2009. However, the request of the petition to expunge the remark "Financing of capital investment en-bloc is surely not only a wrong accounting practice but also a dishonest one" is acceded to the limited extent that the words 'but also a dishonest one' are expunged. The revised extract in the sentence would read as follows "Financing of Capital investment en-bloc is a wrong accounting practice". The Commission also directs the respondents to comply with the above orders and submit a compliance report to the Commission within four weeks from the date of this Order.*
>
> *11. Ordered accordingly."*

2. The issue before the Commission was regarding refund of unspent consumer contribution received by the DISCOMS for capital work under the deposit schemes. The Commission vide its letter dated 03.12.2009 had observed that retaining the refundable amount for a long time and utilizing the same on global basis for financing of capital investment en-bloc is surely not only a wrong accounting practice but also dishonest one and give certain directions to the DISCOMs. Aggrieved by the aforesaid letter dated 03.12.2009 or so called order of the Commission regarding refund of the unspent consumer contribution, the DISCOMs filed petition No. 1 of 2010, 2 of 2010 and 3 of 2010 seeking the following reliefs:

> *"a) To reconsider its statement made in the letter dated 03.12.2009 and expunge the term "financing of capital investment en bloc is surely not only a wrong accounting practice but also a dishonest one".*
>
> *b) To suitably modify its letter dated 03.12.2009 and consider implementing the principles prospectively."*

3. The aforesaid petitions, being Petition No. 1, 2 and 3 of 2010, after following due procedure including hearing the parties concerned, were disposed of, as stated above, by the impugned order dated 11.03.2014 which has been challenged before this Tribunal in the instant three appeals. Since the impugned order in all the three present appeals is the same and issues involved are also the same, these appeals have been heard together and are now being decided by this common judgment.

4. The appellant, Tata Power Delhi Distribution Ltd., (hereinafter referred to as TPDDL) is a distribution licensee (DISCOM) under section 2(17) of The Electricity Act 2003 as one of the successor in interest of the erstwhile Delhi Vidyut Board (DVB) along with two other DISCOMs viz. the BSES Rajdhani Power Limited (BRPL) and BSES Yamuna Power Limited (BYPL). The appellant (TPDDL) is engaged in supply and distribution of electricity to its consumers in North and North-West areas of NCT of Delhi while the other two appellants viz. BSES Rajdhani and BSES Yamuna are engaged in supplying electricity to their consumers in their respective distribution areas of NCT of Delhi in accordance with terms and conditions of license(s) issued by State Commission.

5. The relevant facts of the case, leading to these appeals, are as under:

i. The respondent DERC vide letter *No.F.17(47)/Engg./DERC/2009-10/C.F. No. 2079/1093-1095 dated 17.06.2009* has informed the distribution companies of Delhi that the Commission is compiling a data base on deposit schemes executed by DISCOMs in Delhi and requested them to furnish the list of deposit schemes executed by them since taking over operations in Delhi i.e. w.e.f 01.07.2002 to 31.03.2009. As per the format communicated by 30.06.2009:

ii. The appellant NDPL informed the Commission that they have initiated necessary action for compilation of details as required by Commission and requested to allow time upto 15.07.2009 for submission of details.

iii. The appellant NDPL submitted the details of deposit schemes executed till FY 2007-08 as per format prescribed by the Commission and requested further time for submission of details for FY 2008-09.

iv. On 06.08.09, NDPL submitted the details for FY 2008-09 as per the format.

v. On 09.11.09, the Commission sought the following information, vide letter No. *F.17(47)/Engg./DERC/2009-10/Pt.file-2/C.F.2079/3199 dated 09.11.2009* :

> *"(a) the treatment given in the books of accounts for the excess amount collected from consumers and retained by you.*
>
> *(b) copies of consumer contributions account, as appearing in your books of accounts, from the financial years 2002-03 to 2008-09*
>
> *(c) year wise amount refundable to such consumers on account of excess contributions collected from them.*
>
> *(d) year wise amount actually refunded to such consumers."*

vi. The appellant NDPL submitted the details as sought by the Commission vide letter dated 09.11.09 and on 13.11.09.

vii) On 03.12.09, the Commission vide letter No. *F.17(47)/Engg./DERC/2009-10/2079* dated 03.12.2009 directed the distribution companies as follows:

> "*This is with reference to the above mentioned letters on execution of Deposit Schemes.*
>
> *2. DISCOMs had been asked to furnish the reconciliation of deposit schemes executed by them during the period 01.07.2002 to 31.03.2009. They were also asked to explain the treatment given in the books of accounts for the excess amount collected from consumers and retained by them, year-wise amount refundable to such consumers and actually refunded to them.*

3. The information given by them and observations of the Commission are as under:-

a) They have stated that the entire consumer contribution received by them against deposit works is used on global basis towards financing of capital investment en-block.

This is incorrect because the contribution of consumer is taken for a particular deposit work and after the work is completed the amount is to be reconciled, consumer is to be informed and the excess amount, if any, has to be refunded.

b) They are not refunding the excess amount collected from consumers even after completion of deposit works.

Retaining the refundable amount for such a long time and utilizing the same on global basis for financing of capital investment en-block is surely not only a wrong accounting practice but also a dishonest one. This is also against the directions given by the Commission at the time of granting initial approval that the accounts should be reconciled with the consumers depositing such amount.

4. Accordingly, the Commission hereby orders as under:

i. The DISCOMs shall finalize the accounts of the deposit works already executed by them and approved by the Electrical Inspector (wherever applicable) and refund the amounts due to the agencies on whose behalf the work has been carried out by the DISCOMs within a period of one month of energisation.

ii. The DISCOMs shall send reconciled account to all such consumers and refund them the due amount, along with penal interest of 12% per annum. The interest will be to the account of DISCOMs only and cannot be booked to ARR because this has become payable because of their fault.

iii. In all future cases, the accounts be finalized immediately after completion of works and refunds made to the

consumers within three months of energization. A quarterly report shall be submitted to the Commission in this regard in the format enclosed.

5. *You are requested to send a compliance report by 5th January, 2010."*

viii. On 05.01.10, the appellant NDPL informed the Commission about the deposit schemes executed and requested to grant three months time for effective finalization of amounts of all the individual schemes and further informed in the same letter that the entire amount received from consumers towards consumer contribution for capital works has already been utilized in ARR towards financing capital expenditure and hence the entire benefit has flowed to consumes at large by way of lower interest caused and written off equity.

ix. On 06.01.10, the distribution companies filed a review petition on the letter issued by the Commission dated 03.12.09 being Review Petition Nos. 01 of 2010, 02 of 2010 and 03 of 2010 and prayed for :

"*(a) Take this Petition on record and adjudicate upon it expeditiously to clarify and/or reconsider and/or review and/or modify, expunge the specific observations, findings as contained in para 3(b), of the impugned order as highlighted above; and/or*

(b) Re-Consider and recall the directions contained in para 4(i), (ii) as far as they pertain to implementing of the order retrospectively, and/or

(c) Without prejudice to above reliefs sought, allow the accounts adjustment difference be payable or recoverable only if the

quantity of material used is lower or higher than the estimated quantity which was the basis for demanding consumer share of contribution towards capital works; and/or

(d) Pass such order as the Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.

x. The respondent Commission heard the arguments on 20.10.11 on the review petitions and issued an order dated 24.10.11 and the extract of the order is as follows :

"*4. The Commission heard Anurag Bansal, HOG, Corp. Legal, NDPL at some length. The Commission feels that before resolving the issues involved in this matter, NDPL may prepare a detailed account of Capital Contribution received against various capital works, amount utilized on the specific project for which the capital contribution was provided and balance amount if any utilized towards other CAPEX of the distribution company. The Commission directs that the detailed account from FY 2002-03 onwards project-wise for all projects where capital contribution has been received be placed before the Commission within 4 weeks from the date of this Order."*

The Commission posted the matter for hearing on 24.11.2011.

xi. The Commission heard the arguments on 24.11.11 and pronounced an order on 05.11.11. The extracts of the order is quoted below :

"*3. The Commission considered the request of NDPL and granted two months time for submitting the detailed account from FY 2002-03 onwards project-wise for all projects where capital contribution has been received."*

The matter was posted for further hearing on 09.02.2012.

xii. The appellant NDPL submitted required information for the FY 2009-10 and 2010-11 on 20.04.12 and on 11.05.12. Subsequently, the appellant submitted further information pertaining to FY 2007-08 & 2008-09, 200-09-10 and 2010-11.

xiii. The Commission after further hearing on 17.05.12 on the matter, issued an order, the extract of the same is given below :

"*3. On the basis of the partial information received from the petitioner it is apparent that the unutilized portion of consumer contribution received for a specific project has been diverted to CAPEX for other projects. Pending receipt of the full information, the Petitioner is directed to show-cause why the unutilized consumer contribution scheme-wise since 2002-03 should not be ordered to be refunded to the original consumers with interest.*

4. The Commission again directs the Petitioner to provide complete information in compliance of the Commission's order dated 24.10.2011 within four weeks. The Petitioner may also reply to the show-cause notice mentioned in para 3 above within 4 weeks."

The Commission again listed the matter for further hearing on 26.07.2012.

xiv. The Commission further heard on the matter on 09.08.2012 and issued an order on 30.08.12. The relevant portion of the order is quoted below:

"*2. The Commission heard the Petitioner at some length. The Commission has considered the issues raised in this Petition and directs the Petitioner to refund unutilized consumer contribution scheme wise for FY 2012-13 to the Consumers with interest. The interest be calculated from the date of issuance of certificate by the Electrical Inspector."*

The matter was posted for further hearing on 09.11.12.

xv. The respondent Commission vide letter No. *F.6(8)/AF/DERC/2012-13/548 dated 07th May, 2013* directed the distribution companies to submit the following information:

"(i) Unspent balance of Consumer Contribution towards capital works as per the Balance Sheet/P & I Accounts/Audited Accounts from 2002-03 to 2011-12.

(ii) The treatment given by the distribution licensee to the unspent balance of Consumer Contribution for Capital Works reported in the annual reports from 2002-03 onwards.

(iii) Supporting documents for treatment by the distribution licensee of the unspent balance relating to Consumer Contribution for Capital Works from 2002-03 onwards"

xvi. The appellant Tata Power submitted further details on 30.08.13 as requested by the Commission.

xvii. The respondent Commission finally issued the impugned order on 11.03.2014 on the review petitions being R.P. Nos. 01 of 2010, 02 of 2010 and 03 of 201 and the details of the order are quoted below :

"*9. The Commission observed that:-*

i. The Commission in MYT order dated 23.2.2008 has made order that the total consumer contribution, in policy direction period should be considered as a source of funding for capital investment irrespective of assts capitalized or not. This was in respect to the observation of stake holders that consumer contribution used by the Commission against means of finance was lesser than actual consumer contribution received by the petitioner. The petitioner, in response has submitted that it has shown consumer contribution as a source of funding only against the capitalized asst. The reference to an order dated 23.02.2008 cannot be read to imply that unused consumer contribution should also be used for further asset creation.

ii. The contention of DISCOMs that the global benefits have been passed on to consumer for the period through tariff is not within the tenets of established law and practice. The amount by the DISCOMs is for a specific purpose and is to be utilized for the same with the condition the balance, if any, is to be refunded to the concerned consumer, as per the system on which a contract operates. The Commission while taking the amount received as consumer contribution for capital works as

part of Means of Finance for meeting the ARR for respective DISCOMs for the various years has allowed it to be utilized specifically for that purpose under the assumption, it is at best a resource item to meet expenses related to that year. Any balance i.e. the difference between the amount collected by the Discom from the consumers for a scheme and the amount actually spent in capitalization of the scheme is to be refunded within the provision of express/implied contracts executed by respective organizations/consumers for the purpose.

iii. *Additionally, the contract to create the assets out of consumer contribution received for capital works was between the two parties without any involvement of the Commission. As per the related provision of Doctrine of privity of contract, the parties to the contract have the recourse for its performance, unless they have renounced their rights in the favour of the party, which is not affected by the performance of the contract. As the Commission is not a party to any of these contracts, it cannot be requested to change the terms of contract among the concerned parties.*

iv. *The practise of not refunding the unspent consumer contribution is against the direction of the Commission to reconcile the account with the consumer and therefore is not acceptable and legally untenable, it is a clear cut violation of the directions of the Commission.*

v. *That there is no cogent reason for not refunding the unspent portion of consumer contribution for a particular scheme after its completion and instead utilizing it for other CAPEX works as the consumer contribution is for a specific deposit work as requested by a particular consumer.*

vi. *That after the work is completed the amount is to be reconciled and the consumer is to be informed and excess amount has to be refunded along with interest @ 12% p.a. from the date of completion of work as per the certificate from Electrical Inspector.*

"10. For the reasons recorded above, the Commission finds no reason to review or modify the order contained in letter dated 03.12.2009. However, the request of the petition to expunge the remark "Financing of capital investment en-block is surely not only a wrong accounting practice but also a dishonest one" is acceded to the limited extent that the words 'but also a dishonest one' are expunged. The revised extract in the sentence would read as follows "Financing of Capital investment en-bloc is a wrong accounting practice". The Commission also directs the respondents to comply with the above orders and submit a compliance report to the Commission within four weeks from the date of this order."

5. Aggrieved by this order dated 11.03.2014 passed in the review petitions, the distribution companies (the appellants) filed these appeals before

this Tribunal being Appeal Nos. 109 of 2014, 110 of 2014 and 111 of 2014.

6. We have heard the submissions, of Mr. Buddy A. Ranganadhan, Mr.Aashish Gupta, Mr. Dushyant Manocha, Mr. Paresh Biharilal, Mr.C.S.Vaidyanatha, Sr. Adv., Mr. Sakya S. Chaudhuri, Mr. Anand K. Srivastava and Mr. Anurag Bansal on the appellant's side and Mr. Nikhil Nayyar and Mr. Dhanajay Baijal for respondents, and gone through the written submissions filed by the contending parties. We have also gone through the impugned order and other material available on record.

7. After considering the contentions of the learned counsel for the appellants and the respondent DERC, their oral and written submissions and on perusal of the record including impugned order dated 11.03.2004 passed by Delhi Electricity Regulatory Commission, the following issues arise for our consideration:

A) Whether the State Commission has erred in exercising its jurisdiction?

B) Whether the distribution company has right to keep the unspent consumers contribution for development of network / infrastructure in its licensed area?

C) Whether the utilization of the unspent consumers contribution as a Means of Finance has reduced the Tariff and thereby benefitted the consumers? If so, its effect?

D) Whether the appellants are entitled to any consequential relief?

8. <u>Our issue-wise consideration and conclusion:</u>

<u>Issue No. A</u>:

Whether the State Commission has erred in exercising its jurisdiction?

On this issue the following contentions have been made on behalf of the appellants:

8.1 that the impugned order is bad in law in as much as it was passed without jurisdiction.

8.2 that the Commission has erred in exercising its jurisdiction in the matter without considering that the dispute, if any between the distribution licensee and consumers being on purely commercial basis does not fall within the purview of the Commission. The issue of non-refund of consumers contribution is a consumer dispute to be raised before an appropriate forum.

8.3 that the issue of re-fund of consumer contribution being an issue arising out of a private contract, cannot be adjudicated by the Commission.

8.4 that the Commission, under the garb of regulation, cannot extend the scope of its jurisdiction to supervise commercial contracts and disputes for which redressal forums are specifically provided in the Electricity Act 2003. This would amount to improper assumption of jurisdiction and the impugned order of refund to such extent is, null and void, being without jurisdiction.

8.5 that as per the Section 86(1)(f) of the Electricity Act 2003 the State Commission has jurisdiction to adjudicate the dispute between the licensee and generators only and the Commission does not have

any jurisdiction regarding the disputes between licensee and consumer.

9. Per contra, the following submissions have been raised by the respondent Commission

9.1 that the Commission is not only a regulatory authority which is required not only to create regulations and pass tariff orders but is also to monitor the transactions to ensure that electricity traders do not indulge in profiteering.

9.2 that the scope of powers of Commission has been elaborately discussed by the constitution bench of the Hon'ble Supreme Court in the case of *PTC Vs. CERC* (2010) 4 Section 603.

9.3 that the Commission is duty bound as a regulator to step into the right of the consumers.

9.4 that the Commission has acted well within its powers to step in as the matter is liable to be rejected as the respondent Commission is duty bound as regulator to step in to protect the interest of the consumers.

9.5 that the Commission has not erred in exercising its jurisdiction in the matter and has passed just and legal order.

10. We find that Section 86(1)(f) of the Electricity Act 2003 says that the Commission is having jurisdiction to adjudicate the disputes between licensees and generators only. The relevant section is quoted below:

"*86.* ***Functions of State Commission*** *– (1) The State Commission shall discharge the following functions, namely :-*
...

...

(f) adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;

...

...”

But here the subject matter is related to tariff i.e. issue regarding utilisation of unspent consumers' contribution as means of finance for execution of capital works in the licensed area and thereby the interest on debt and return on equity has the effect on the tariff as submitted by the Appellant. Hence, the Commission is having jurisdiction to adjudicate in this matter to safe guard the interest of the consumers at large and it is a tariff related issue. Hence the contention of the Appellant regarding jurisdiction is negatived / disallowed. This issue is decided against the appellant.

Issue No. B:

Issue No. B is whether the distribution company has right to keep the consumers contribution for development of network / infrastructure in the licensed area?

11. On this issue appellants' submissions are as under :

11.1) that the Commission directed the Appellants in the multi year tariff order dated 23.12.2008 that the total consumers contribution should be utilized towards Means of Finance capital expenditure, irrespective of whether the asset was capitalized or not and accordingly, the Appellants proceeded to adjust the debt and equity participation in the capital investment in Appellant business for the entire period from FY 2002-03 to 2006-07 after adjusting the entire amount of consumers contribution in their respective

years. This makes it clear that the Commission itself had directed that the entire consumers contribution received by the Appellants for funding the capital expenditure, be utilized for capital expenditure, irrespective of capitalization thereby reducing the need for funding the CAPEX to that extent through loan and equity.

11.2) that it had resulted in the lowering of interest rate and Return on equity in the ARR and consequently a benefit to the consumers.

12. The contention of the respondent Commission on this issue are as follows:

12.1) that the utilization of collected consumer contribution for capital works as part of means of Finance for meeting the ARR for respective DISCOMS for various financial years has only been allowed by the Answering Respondent on the condition that it be utilized specifically for that particular purpose, in that financial year, under the assumption that it is at best a resource item to meet expenses related to that year. Any additional amount which has been left over is required to be returned since the terms of the license only allow the consumer contribution to be collected for a specific purpose.

12.2) that the cumulative effect of the letter dated 3.12.2009 and impugned order dated 11.03.2014 is that the Commission has directed the Appellant only to honour its specific contracts with various consumers and refund the balance of Consumer Contribution from the date of issue of Certificate by Electrical Inspector. In this regard, Commission is insisting to comply with legal contracts which are to be honoured in any case by it. The

utilization of collected consumer contribution for capital works as part of Means of Finance for meeting the ARR for respective DISCOMS for various financial years has only been allowed by the Commission on the condition that it be utilized specifically for that particular purpose, in that financial year, under the assumption that it is at best a resource item to meet expenses related to that year.

12.3) that the financial hardship alleged is a creation of the Appellant's own wrong doing by not honouring the contacts entered into by them. The funds which are not owned by the Appellant are neither part of their equity nor debt. The Appellant is supposed to be holding these funds as in trust on behalf of consumers who following terms and conditions of the contracts executed by them deposited the funds. Each of the appellants has no right to claim equity when it has appropriated the 'Consumer Contributions' for unapproved purposes. The Appellant cannot wilfully violate the directions of the Commission and thereafter attempt to pass on the financial hardship to the Consumers.

12.4) that the funds owed to specific consumers cannot be used globally by any commercial undertaking. The contention that benefit of these contributions had been passed to consumers through tariff is on a wrong footing, as Commission provides tariff based on fresh annual investment without referring to funds collected for consumer contribution pertaining to previous years. By collecting fresh contribution from new consumers for the future projects / schemes, the Appellants now cannot say it has met its own contribution with reduced interest. The Appellants are expected to

generate fresh contribution of their own shares. In fact, ach of the Appellants has benefitted twice, once at the cost of previous consumers by collecting more funds than desired and later for funds collected from future consumers.

13) We feel that it is a general practice that the distribution companies collect the estimated cost of the capital work required for release of supply from a specified consumer. It is the duty of the distribution licensee that as soon as the work is completed and certified by the Electrical Inspector, the work order of the said work has to be closed and amount, if any left over, should be returned to the specified consumer. Utilizing unspent amount of the consumers contribution of a deposit work for execution of the capital works of the distribution licensee in their licensed area is not a correct practice. Hence, we reject the plea of the Appellants towards utilization of unspent amount of the consumers' contribution for their other capital works in their respective licensed areas. This issue is also decided against the appellants. .

Issue No.C and Issue No.D

Since both these issues are interrelated, we are discussing and deciding them together.

14. The contentions of the appellants on these two issues are as under:

14.1) that the respondent Commission had prescribed in detail the priority order for means of finance in its previous Tariff orders, which is summarised below:

(a) Consumer Contribution

(b) APDRP Grant/Loan

(c) Unutilized Depreciation including available unutilized Depreciation of the previous years.

(d) Balance Funds required – balance fund requirement is assumed to be met through a mix of debt and equity by applying a normative debt to equity ratio of 70:30”

14.2) that further the appellants have made full disclosure of the amounts of consumers contribution received from respective consumers for the capital works in past tariff filings for the respective years since FY 2002-03 onwards. As part of tariff filings, the Appellants have further submitted that their audited accounts fully disclose the consumers contribution received from consumers and its treatment in books of account.

14.3) that the Commission erred in holding that the global benefits passed on to consumers for the period through tariff are not within the tenets of established law and practice. The Commission failed to appreciate that the entire fund towards consumer contributions have been utilized towards the capitalization of the assets and correspondingly reduced the same from the Regulated Rate Base (upto the cost of the asset being capitalized), with the balance amount, if any, being utilized to finance the Consumer Work-in-Progress (en-bloc), which had been done keeping in view the earlier approach adopted by the Commission to utilize the entire amount of the consumers contributions en-bloc. This has, in fact, been done under the directions of the Commission.

14.4) that further the Commission has misdirected itself in concluding that the consumer contribution is for a specific purpose and is to

be utilized for the same with the condition that the balance, if any, is to be refunded to the concerned consumer, as per the system on which a contract operates. The Commission has failed to appreciate that the benefit of the aforesaid treatment of consumer contributions has been fully passed on to the consumers by way of reduced interest and return on equity as the consumer contributions reduced the requirement of funding to that extent.

14.5) that further the Commission has also failed to appreciate that the impugned order will lead to financial hardship and severe prejudice to the Appellants in as much as, refund of consumers contributions already utilized towards CAPEX en-bloc will require reworking of such old capital schemes (or working capital) where the balance amounts of consumers contributions had been adjusted, so as to reflect the corresponding debt and equity that would have been required in the absence of consumer contribution. Such investment of debt and equity would entail cost of financing (i.e. return on equity and interest on loan), thereby ultimately resulting in a burden to the consumers.

14.6) that the Commission has failed to consider that the unutilized portion of the consumers contributions, till date, is no longer retained by the Appellants but used in tariff for capital investment financing on en-bloc basis and the benefit of these contributions had therefore been passed on to the consumers through tariff. Further, while determining the ARR of each of the Appellants had the Commission preferred to consider only the portion of the consumers deposits to the extent utilized, instead of utilizing the unutilized portion on a global basis towards financing of capital

investment en-bloc, the Appellant would have refunded the unutilized portion of the contribution to the concerned consumer.

14.7) that the implementation of the impugned order with retrospective effect by allowing interest (or penal interest) to the consumers, would therefore involve re-casting the means of financing of the previous years and a corresponding recalculation of the tariff, which the Appellant would be entitled to recover along with interest. Any direction to refund the excess consumer contributions with retrospective effect will only have consequences which will entail their own complications and costs. Therefore, without prejudice to appellants other contentions, any direction for refund of the balance amount of consumer contribution to any consumer (if at all) may be given with prospective effect only after undertaking recasting of means of finance of Appellant with carrying cost.

15) **Per contra**, on these issues No. C and D – the only submission of the respondent Commission is that the Commission allowed each of the Appellants to use the consumer contribution as part of its own capital. Appellant's interpretation of the order dated 23.2.2008 is wrong and misconceived. The Commission, at no point, permitted the Appellant a carte-blanche to use the collected Consumer Contribution for further asset creation, apart from the purpose for which it was collected. It is a common practice that Means of Finance are at best a statement of intention, which are subject to actuals. Hence for every project, the means of finance sanctioned by Financial Institutions also undergo a change as the actual information flows in, based on which they revise their own contributions too. In addition, the Commission is not a party to

contract. Therefore, any contract with other parties must be adhered to by the Appellants. Approval of Means of Finance by the Commission is thus an indicative aspect only. The Commission always expected that each of the Appellants was meeting its contractual obligations and refunding the balance after implementation of specific schemes as per the specific contracts with the Consumers. In para 3.69 of the Tariff Order dt. 23.2.2008, it was mentioned that during Public hearing held between 8th January, 2008 to 11th January, 2008, various stakeholders had pointed out that consumer contribution used by each of the appellant's against means of finance was lesser than the actual contribution received by the respective appellants. The appellants' submission is that each appellant has shown consumer contribution as source of fund only against the Capitalized Asset. Therefore, the treatment mentioned in MYT order was in specific observation that Consumer Contribution against means of finance was lesser than actual consumer contribution received by the Appellants i.e. DISCOMS. In addition, capitalization figures are relevant, not capital investment for the purpose of ARR. Hence capitalization indicates the amount of consumer share in a scheme, which may be less than sanctioned share, thus warranting the refund. Commission's intention was to approve sanctioned means of finance, so that statement of desired sources be pointed out. However at the time of implementation (i.e. capitalization) the DISCOM is expected to report the revised means of finance after refunding the balance of consumer contribution. By agreeing to approach of DISCOMS, it would be double benefit i.e. first by reduction in own share in the implemented scheme and holding onto funds of other parties i.e. consumer for so long and earning interest. Therefore, the contention of DISCOM is liable to be rejected.

16. After going through the rival contentions of the parties, we find that the learned Commission has been considering the consumers contribution as means of financing the capital cost. It has been submitted by the appellants / DISCOMs that the unutilized portion of the consumers contribution was also used as means of financing for the capital works and accordingly the regulated rate base from FY 2002-03 onwards was reduced. The consumers got the benefit of lower tariff. If the unutilized consumer contribution has been utilized as means of financing in the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumer in terms of retail supply tariff, then there is a force in the contention of the appellants. In that situation the appellants should then get the consequential relief. If the said contention of the appellants is true and correct, then the unspent consumer contribution with interest to be refunded by the appellants. The said amount may be considered as an expenditure in the future annual revenue requirement (ARR) of the appellants. Then the appellants should be given liberty to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. This appears just and proper and also in the interest of justice that the impugned order passed by the learned Commission should be set aside with the aforesaid direction because if utilization of unspent consumer contribution as a means of finance has reduced the tariff and thereby benefitted the consumers then the liberty should be given to the appellants to furnish the respective accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. Accordingly, the issue Nos. C & D are disposed of.

17. In the light of the above discussions, the appeal is liable to be partly allowed and the impugned order is liable to be set aside to the extent narrated above by us. Consequentially these appeals are fit for being remanded to the learned Commission as observed by us.

18. **Summary of findings:**

The learned Delhi Electricity Regulatory Commission has been considering consumer contribution as means of financing the capital cost. The appellant's contention, that the unutilized portion of the consumer contribution was also used as means of finance for the capital works and accordingly regulated rate base from FY 2002-03 onwards was reduced and consumers got the benefit of lower tariff, has legal force which we accept. If the unutilized consumers contribution has been utilized as means of financing for the tariff orders from FY 2002-03 onwards and corresponding relief has been given to the consumers in terms of retail supply tariffs, then the appellants are entitled to get consequential relief and the said unspent contribution amount be refunded by the appellants as per the Commission's order. The unspent consumers contribution amount may be considered as an expenditure in the future ARR of each of the appellants / DISCOMs. These matters are fit to be remanded giving liberty to appellant's to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the annual revenue requirements from FY 2002-03 onwards in reducing the retail supply tariffs.

19. In view of the above, these appeals being Nos. 109, 110 and 111 of 2014 are hereby partly allowed and the common impugned order dated 11.03.2014 passed by the Delhi Electricity Regulatory Commission in Review Petition Nos. 1, 2 & 3 of 2010 is modified to the extent indicated

above. Thee matters are remanded to the learned Delhi Electricity Regulatory Commission giving liberty to the appellant's / DISCOMs to furnish the accounts showing that the excess amount of consumers contribution has been duly considered in the ARRs from FY 2002-03 onwards in reducing the retail supply tariffs. In that situation the Commission is further directed to hear the matter and pass the consequential order as it thinks fit and proper in the facts and circumstances of these matters. No order as to costs.

Pronounced in the open court on this ***23rd day of February, 2015***.

(T. Munikrishnaiah)
Technical Member

(Justice Surendra Kumar)
Judicial Member

✔ **REPORTABLE** / ~~**NON-REPORTABLE**~~