Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 171 of 2012

Dated: 10th February, 2015

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

In the matter of:
Tata Power Delhi Distribution Ltd.,
Grid Sub-Station Building,
Hudson Lanes, Kingsway Camp,
Delhi-110 009 **... Appellant**

Versus

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

Counsel for the Appellant: Mr. Sitesh Mukherjee
Mr. Sakya Singh Choudhuri,
Ms. Kanika Chugh
Mr. Anurag Bansal,
Mr. Anand K. Srivastava,
Mr. Shantanu Singh

Counsel for the Respondent : Mr. Pradeep Misra &
Mr. Daleep Kumar Dhyani,
Mr. Suraj Singh

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

The present Appeal has been filed by Tata Power Delhi Distribution Ltd. against the order dated 13.7.2012 passed by the Delhi Electricity Regulatory

Commission ("State Commission") whereby the true up of expenses of the Appellant for FY 2010-11 and ARR for the Control Period FY 2012-13 to FY 2014-15 have been determined.

2. The Appellant has raised 29 issues out of which 12 issues are covered by the decision of this Tribunal in Judgment dated 28.11.2013 in Appeal No. 14 of 2012 North Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission. Hence, those issues have not been pressed by the Appellant. On the remaining 17 issues we have heard Shri Sitesh Mukherjee, learned counsel for the Appellant and Mr. Pradeep Misra, learned counsel for the State Commission. We shall now be discussing the remaining 17 issues pressed by the Appellant, the contentions of both the parties and our findings on each issue one by one.

3. **The first issue is regarding non allowance of food allowance for FRSR Structure Employees inspite of their binding service conditions, for FY 2010-11.**

3.1 According to the Appellant, the State Commission should have approved the expenses incurred towards FRSR Structure employees for FY 2010-11 on actual basis as the terms of their employment are statutorily binding in nature and have to be necessarily complied by the Appellant. In compliance of the Sixth Pay Commission Report and direction of the Government of NCT of Delhi, DTL had formed a Committee for fixation of certain allowances pursuant to the recommendations of the Sixth Pay Commission. DTL vide its circular dated 15.4.2010 allowed food allowance of Rs.

500/- per employee per month w.e.f. 1.4.2010 towards implementation of the Sixth Pay Commission Report, which was binding on the Appellant, therefore, it was simultaneously implemented by the Appellant for its FRSR structure employees. In pursuance of the DTL circular, the Appellant is now paying food allowance of Rs. 500/- p.m. per employee per month w.e.f. 1.4.2010 as against Rs. 125/- paid earlier. Therefore, the Appellant had claimed a total of Rs. 1.30 crores out of which Rs. 0.39 crores was allowed on normative basis, hence additional Rs. 0.91 crores needs to be allowed in FY 2010-11. The indexation factor does not cover fourfold increase in food allowance arising from the implementation of the recommendations of the Sixth Pay Commission. The expenses claimed by

the Appellant are for the employees who continued to be employed with the Appellant at the relevant time.

3.2 The Appellant has pointed out that the judgment and order dated 13.8.2008 passed by the Delhi High Court disposing off the Writ Petition (C) No. 5875 of 2008 also required the Appellant to extend to all former employees of DVB the same pay benefits and perquisites which are being granted to those FRSR employees who became employees of DTL. Accordingly, the Appellant became liable to grant to its employees all the monitory and non-monitory benefits which were granted by DTL to its various employees by various circulars issued from time to time, hence this became an uncontrollable expenditure as the Appellant was legally bound firstly by virtue of Section 16(2) of Delhi Electricity

Regulatory Commission Act read with Transfer Scheme Rules and the tripartite agreement and also the said judgment and order dated 13.8.2008 of the Delhi High court.

3.3 According to Shri Pradeep Misra, learned counsel for the State Commission, the Appellant in its Petition had not mentioned that the increase in food allowance was on account of the recommendations of the Sixth Pay Commission. The State Commission in its order dated 26.8.2011 has already considered the employees cost due to introduction of new allowance under the recommendations of Sixth Pay Commission based on the submissions made by the Appellant from time to time. Further, the food allowance is a part of O&M expenses which are controllable as per MYT Regulations, 2007.

3.4 We find that the Delhi Electricity Reforms Act, 2000 provides that the terms and conditions of the service applicable to the personnel transferred from the Board to the Appellant's company shall not in any way be less favourable than or inferior to those applicable to them immediately before the transfer. The Transfer Scheme Rules, 2001 also has similar provisions. The tripartite agreement dated 28.10.2000 between the Govt. of NCT of Delhi, Delhi Vidyut Board and the Joint Action Committee of workers also provides that the terms and conditions of service upon transfer to the corporate entities, such as promotions, transferers, leave and other allowances, etc. regulated by existing regulations/service rules e.g. FR/SR will be guaranteed to continue to be the same and any modifications shall be by mutual negotiations and

settlement with recognized unions/associations without decrement to the existing benefits.

3.5 The Appellant in its Petition enclosed the DTL circular dated 15.4.2010 increasing the food allowance of employees from Rs. 125/- to Rs. 500/- per employee per month. In FY 2010-11, the Appellant paid Rs. 1.38 crores to its FR/SR employees on account of food allowance. The Appellant had paid Rs. 0.39 crores to its employees for food allowance in the FY 2006-07. In the ARR for 2010-11, Rs. 0.47 cores (Rs. 0.39 crores escalated by 4.66% p.a. for 4 years) was allowed. Thus, difference of Rs. 0.91 crores was claimed by the Appellant in its petition.

3.6 The State Commission did not allow the additional expenditure due to following reasons:

Food allowance is a part of base employees expenses of the Appellant for FY 2006-07. The food allowance was fixed at Rs. 125/- p.m. and there was no increase during FY 2007-08 and 2009-10. The expenses incurred by the Appellant during FY 2007-08 to 2009-10 would have been lower than the amount approved by the State Commission as indexation was considered to increase the base year amount every year and number of DVB employees was getting reduced due to retirement.

3.7 We find that the food allowance has been increased four folds w.e.f. 1.4.2010 from the base year 2006-07 as a result of DTL following the recommendations of the Sixth Pay Commission. The Appellant is bound to enhance the food allowances as per the provisions of the Reforms

Act, the statutory transfer scheme and the Tripartite Agreement. The expenditure incurred by the Appellant is uncontrollable in nature being part of the recommendations of Sixth Pay Commission which are bound to be paid to FRSR employees by the Appellant. The normal escalation of 4.66% p.a. over the base year expenses of FY 2006-07 will not be adequate to cover the enhancement of the food allowance for FR/SR employees from Rs. 125 to Rs. 500/- per employee per person. The Appellant paid Rs. 0.38 crores during 2006-07. Taking into account the escalation of 4.66%, the amount allowed in ARR for FY 2010-11 was Rs. 0.47 crores. Thus, the Appellant had to pay Rs. 0.91 crores over and above that allowed in the ARR. Even if the excess amount allowed during the FY 2007-08 to FY 2009-10 is taken into account due to escalation

of 4.66% p.a. over the base year, the excess amount paid by the Appellant during FY 2010-11 would work out to be Rs. 0.8 crores. The Appellant has stated that the actual amount of Rs. 1.38 crores paid to the FR/SR employees during FY 2010-11 has only been claimed. Therefore, the impact of retirement of the employees has already been taken into account. Therefore, the Appellant is entitled to the claim of Rs. 0.8 crores on account of enhancement of food allowance for FR/SR employees. The enhancement of food allowance on the recommendations of the Sixth Pay Commission Report as adopted by DTL is binding on the Appellant as per the Statutory Transfer Scheme. As such, it is an uncontrollable expenditure. Accordingly, the State Commission shall allow the

additional expenditure of Rs.0.8 crores on this account with carrying cost.

4. **The second issue is regarding non-allowance of Children Education Allowance for FRSR Structure Employees for FY 2010-11 inspite of their binding service conditions.**

4.1 According to the Appellant the Commission should have approved the expenses incurred towards FRSR Structure employees for FY 2010-11 on actual basis as terms of their employment are statutorily binding in nature. The increase in Children Education Allowance was effected by the Government of India by its Notification dated 2.9.2008. By virtue of the said notification, the Government had increased the Children Education Allowance per child (for 2 children) to Rs. 1000/-

p.m. per child from the prevailing rate of Rs. 40/- p.m. per child. The Appellant has incurred Rs. 2.25 crores during FY 2010-11 on account of increase in Children Education Allowance over and above the amount paid in base year i.e. FY 2006-07.

4.2 According to Shri Pradeep Misra, learned counsel for the State Commission, the State Commission in its previous tariff order dated 26.8.2011 had already considered the increase in employees cost due to introduction of new allowances under recommendations of the Sixth Pay Commission based on the submissions made by the Appellant at that time. The Appellant has not provided any material to show that the amount allowed under the head of 'New Allowances' i.e. Rs. 12.11 crores for FY 2009-10 as approved in the tariff order of

26.8.2011 did not include the amount under the head of Children Education Allowance.

4.3 The Appellant has produced a letter dated 21.6.2011 addressed to Executive Director (Tariff) of the State Commission regarding some information furnished as desired by the State Commission in connection with ARR Petition for 2011-12 and True Up Petition for FY 2009-10. It is seen from this letter that the Appellant had not claimed any expenses on account of Children Education Allowance. The new allowances allowed by the State Commission for FY 2008-09 and FY 2009-10 were based on the submissions made in letter dated 21.6.2011, wherein the Appellant had not made any claim towards Children Education Allowance.

4.4 In the impugned order, the State Commission has not allowed the impact of increase of Children Education Allowance as the State Commission had already considered the increase in Children Education Allowance while revising employees' expenses of the Appellant in is tariff order dated 26.8.2011. This is not correct. Therefore, on the same analogy as made for allowance of increase due to food allowance under paragraph 3.7 the increase in expenditure of the Appellant due to increase in Children Education Allowance from Rs. 40/- p.m. per child to Rs. 1,000/- p.m. per child has to be allowed with carrying cost. Accordingly, directed.

5. The third issue is regarding Power Purchase Cost incurred in procurement of power from TPDDL-G power plant.

5.1 According to the Appellant, the State Commission has incorrectly approved power purchase cost from Rithala Gas based station and Solar based generating Station. The State Commission has considered cost of power from Rithala when the Appellant was underdrawing power and selling power under Unscheduled Interchange at the UI rate for their surplus power as the generation from Rithala was not required to meet the Appellant's load in those time slots. For remaining energy from Rithala, the State Commission has provisionally considered at the average power purchase cost of Rs. 3.615 per unit. According to the Appellant, the State Commission has acted contrary to the merit order dispatch principle. It has been submitted that in order to overcome lower power supply constraints due to non-availability of

coal and price shocks arising on account of sourcing short term power to meet the power requirement, the Appellant has set up a 108 MW gas based combined cycle power plant at Rithala. According to the Appellant, Rithala Power Plant will bring significant benefits to the consumers in terms of improved voltage profile and power availability and it can be used as a generation source in emergency including major disturbances when the grid collapses. According to the MYT Regulations 2007, the distribution licensee has to be allowed to recover the cost of power it procures from sources approved by the Commission. The National Tariff Policy also provides that all power purchase cost must be allowed unless it is established that merit order principles have been violated.

5.2 It is further submitted by Appellant that Rithala Power sources gas on take or pay basis and therefore, Appellant has to incur the fixed cost of generation irrespective of the fact whether such power is generated or not. On the merit order dispatch based on variable cost generation, the power from Rithala Plant will be among the lowest in terms of variable cost being Rs. 3.49 per unit. The SLDC in its communication dated 26.4.2011 to the State Commission has noted that in light of minimum gas off take obligations for Rithala Power Plant, merit order dispatch number appeared to have been de-facto followed. The State Commission has also wrongly allowed remaining energy drawn from Rithala at average power purchase cost of gross power being Rs. 3.615 per unit. According to the Appellant, a

petition had been filed earlier for approval of provisional tariff for generation from Rithala Plant from COD with complete details of cost involved and other factors for consideration of the Commission. However, the State Commission has wrongly allowed a provisional cost of power. According to the Appellant, the ad-hoc fixation of power purchase cost is not in accordance with the Regulations.

5.3 Shri Pradeep Misra, learned counsel for the State Commission submitted that the cost of power purchase for the energy other than that drawn at the time when the Appellant was under-drawing from grid has been allowed at the average power purchase cost on a provisional basis only till the time the tariff for power purchase from Rithala Power Plant is determined.

5.4 We find that the State Commission has adopted an ad-hoc approach for determining the cost of energy for power procurement for Rithala and Solar plant. Rithala Plant has been in operation for several years but there is no decision as yet on the price at which the Appellant has to procure power from Rithala. It has been pointed out by Learned Counsel for the Appellant that the petition of the Appellant regarding tariff for procurement of power from Rithala has been under consideration of the State Commission for a long time. The Solar Plant is must run and has to be operated out of the merit order.

5.5 The State Commission has to regulate the electricity purchase and procurement process of the distribution licensee including the price at

which the electricity shall be procured for distribution by the distribution licensee under Section 86(1)(b) of the Electricity Act, 2003. In our opinion, the State Commission has to first consider to approve procurement of power form Rithala as a long term source of power for meeting the demand of the Appellant and then decide the tariff for procurement of power by the Appellant from Rithala Plant. The scheduling of power and power purchase cost from Rithala can be decided only thereafter. If Rithala is operated out of the merit order based on the variable cost of the various sources of power, then the consequences of the same have to be borne by the Appellant.

5.6 Accordingly, the State Commission shall dispose of the matter relating to procurement of power by the Appellant from Rithala as a long term source of

power expeditiously and also decide the Power Purchase Cost from Rithala.

5.7 As far as FY 2010-11 is concerned, the variable cost per kWh of Rithala as projected by the Appellant may be considered for checking if the power generation from the plant was scheduled in merit order. For the period when Rithala was scheduled out of the merit order, the excess energy procured from Rithala should be considered at the prevailing UI rate. Accordingly, the matter is remanded to the State Commission for reconsideration.

6. The fourth issue is regarding adjustment of contingency reserve against the revenue gap of the Appellant.

6.1 The learned counsel for the Appellant has argued that MYT Regulations provide for maintenance of contingency reserve by the distribution licensee and utilization of the funds from such contingency reserve in the manner directed by the State Commission. In the present case the State Commission directed the Appellant to utilize the contingency reserve that was invested in Government securities for meeting the revenue gap. However, the State Commission while considering the amount realized from liquidation of such Government securities in which the contingency reserve was invested, adjusted the whole amount for which such securities were acquired without accounting for the premium paid by the Appellant for acquiring the Government securities. The premium that was paid to by securities using such

reserves was on account of higher interest rates payable on such securities and the higher level of interest accrued on such securities has already been passed on to the consumers. Therefore, premium paid at the time of purchase of securities must also be allowed by the State Commission. Further, the adjustment of contingency reserve in true up order for FY 2009-10 has resulted in reduction of revenue gap for 2010-11. However, the State Commission has erroneously considered the interest earned from the securities for reducing ARR and have also disallowed carrying cost on the revenue gap, which stood reduced due to utilization of contingency reserve.

6.2 It has been submitted by Shri Pradeep Misra, Leaerned Counsel for the State Commission that the Appellant had made no claim on account of

difference between the purchase rate and sale rate of Government securities in Tariff Petition. However, the State Commission has admitted that it has inadvertently considered the interest earned on Government securities as a part of non-tariff income as the contingency reserve has been utilized for meeting the revenue gap as per the Tariff Order dated 26.8.2011.

6.3 In view of above, the State Commission is directed to allow additional amount to the extent of above mentioned non-tariff income alongwith carrying cost.

6.4 Regarding the premium amount, the Appellant has submitted that in its Petition for revised ARR and tariff adjustment for FY 2009-10 had stated that the benefit or erosion needs to be trued up if the

Government securities are liquidated before the maturity date. The exact amount was not mentioned as the Appellant at the time could not have known the exact amount. Further the Appellant vide letter dated 16.5.2012 had apprised the State Commission about the fact that the premium amount paid on the government securities must also be accounted for in the ARR.

6.5 We find from the letter dated 16.5.2012 addressed to the Secretary of the State Commission that the Appellant had clarified that they had invested Rs. 12.81 crores in 7.40% GOI securities. The said securities were available at premium as the interest rate on said facilities was higher than the market rate of interest. The said securities had matured and the Appellant had received Rs. 11.55

crores towards the same in May, 2012, as face value of said securities. It was mentioned that the Commission may utilize Rs. 11.55 crores towards the Annual Revenue Requirement and amortize the remaining amount of Rs. 1.25 crores towards the premium paid on the said securities.

6.6 Thus, the Appellant had brought to the notice of the State Commission the issue of premium paid on the securities as the amount realized from Government securities under the contingency reserve has been directed to be adjusted against the revenue gap as per the orders of the State Commission. The premium paid by the Appellant for the said securities has to be allowed as an expense to the Appellant as a pass through in the ARR as the difference between the purchase cost and the amount refunded on the securities.

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

7. The fifth issue is regarding carrying cost for FY 2010-11 allowed at the rates lower than the actual rate for the revenue gap loans.

7.1 According to the Appellant, the State Commission has computed the carrying cost on the assumption that all loans borrowed by the Appellant towards financing of revenue gap were payable on 31.03.2011, whereas the interest rate ought to have been computed on the basis of weighted average rate of interest of all such loans during the actual period when the loans were taken, in which case the weighted average interest rate would have

been 9% instead of 8.87%. The details of all the loans borrowed over the relevant years for financing the cumulative revenue gap of FY 2010-11 were provided to the State Commission by letter dated 29.02.2012 on a query by the Commission.

7.2 Shri Pradeep Misra, Learned Counsel for the State Commission submitted that the State Commission calculated the allowable rate of interest on the basis of actual period for which the loans were taken based on the details provided by the Appellant vide email titled "Loan Details" dated 13.06.2012. However, loan details now being submitted by the Appellant are different from those provided to the Commission vide the aforementioned email.

7.3 We find that the Appellant had furnished the detailed information relating to interest expenses of loan for funding of revenue gap for FY 2010-11 vide letter dated 29.02.2012 on a query of the State Commission vide letter dated 22.02.2012. The information provided by the Appellant gives the amount of loan, period of loan, rate of interest and interest paid. The statement now furnished by the Appellant giving calculation of weighted average rate of interest of 9% has been made using the information furnished by the Appellant to the State Commission vide letter dated 29.02.2012. According to the Appellant, the reliance on mail dated 13.06.2012 by the State Commission is erroneous as the said mail was in response to a specific query of the Commission seeking details of the loans borrowed during the year. The reason for

seeking the details was not known to the Appellant at that point and the Commission had not sought details of the tenure of the loans and there was no occasion for the Appellant to provide the same. According to the Appellant, the State Commission has merely considered the details in the email without taking into account the actual period for which such loans were availed and assumed that all the loans borrowed by the Appellant towards financing of revenue gap were payable on 31st March.

7.4 We feel that the State Commission has not properly considered the details relating to interest expenses which were furnished by the Appellant vide letter dated 29.2.2012 on a specific query of the State Commission vide letter dated 22.02.2012 with

regard to loans taken by the Appellant. We, therefore, direct the State Commission to compute the weighted average rate of interest taking into account the actual tenure of the loans and correct the rate of interest and true-up the amount of interest with carrying cost. This issue is decided in favour of the Appellant.

8. The sixth issue is regarding disallowance of provisions made with respect to Power Purchase Cost for bills not received during the period.

8.1 The Appellant has submitted that as per the 2007 MYT Regulations, the Power Purchase Cost being uncontrollable in nature must be allowed in its entirety and accordingly the Appellant is entitled to recover the entire power purchase cost for the tariff

year. However, the State Commission has disallowed the provisions made for the power purchase cost for the month of March 2011, while truing up for 2010-11. Non allowance of the provision for power purchase cost for the month of March in a particular year, will distort the expenses for the year and will not allow the Appellant to book his entire expenses for power purchase for the year. The books of accounts as maintained on accrual basis as per the Accounting Standards issued by the Institute of Chartered Accountants of India which is also the requirement under the Indian Companies Act, 1956. Therefore, the Appellant makes provision in respect of expected bills of power purchase cost for the month of March or any other preceding periods for which bills have not been received by March of the

financial year. The bills for March are allowed in the next financial year. The difference between the provision made and the actual amount of bill is adjusted in the books of accounts as and when the bills for the month of March is received. However, in the impugned order the State Commission has not considered the provision made for power purchase cost in FY 2010-11 stating that the same would be considered while truing up for FY 2011-12.

8.2 Shri Pradeep Misra, Learned Counsel for the State Commission has argued that if the Commission would have included the provision made for power purchase for March 2011 in the Power Purchase Cost of 2010-11, it would have resulted in higher

carrying cost on expenses which were not incurred by the Appellant during FY 2010-11.

8.3 We feel that the Power Purchase Cost for the month of March should either be allowed on accrual basis or on the basis of actual expenditure. The Tariff Regulations do not clearly specify which method is to be used in the true up. Let us take the example of true up for FY 2010-11. In the accrual method, the Power Purchase Cost for March 2010 (FY 2009-10) payable in April 2010 i.e. during FY 2010-11, will be allowed on the basis of provision made in accounts of FY 2009-10. The difference between the provision made for the month of March 2010 in the accounts of FY 2009-10 and the actual amount paid in FY 2010-11 for the power purchase during March 2010, will be adjusted in

the accounts of FY 2010-11. Similarly the provision for power purchase for March 2011 will be allowed in the accounts of FY 2010-11. The difference between the actual payment for March 2011 made in FY 2011-12 and the provision made in the accounts of FY 2010-11 will be adjusted in the accounts of FY 2011-12. However, while calculating the carrying cost for Power Purchase Cost, the necessary adjustments will have to be made so that the distribution company is not allowed carrying cost on the basis of provision made in the account for power purchase for the month of March.

8.4 In the true up methodology on the basis of actual expenditure made, the Power Purchase Cost for the month of March 2010 actually incurred during

2010-11 will be included in the accounts of FY 2010-11. Similarly, the power purchase cost for the month of March 2011 actually incurred during FY 2011-12 will be included in the expenditure of FY 2011-12. In the "accrual" method care has to exercised in calculation of the carrying cost on the revenue gap which would require adjustments whereas in the "actual expenditure" method the carrying cost calculation is simpler on the basis of the actual revenue gap. The State Commission has adopted the latter approach. We cannot find fault if the State Commission has adopted the "actual expenditure' method. However, the actual Power Purchase Cost incurred during FY 2011-12 towards the power procured during March 2010 has to be considered in the true up of FY 2011-12.

Accordingly, this issue is decided against the Appellant.

9. The seventh issue is regarding normative rate of Rs. 4.00 per unit considered for sale of surplus power during each year of the control period.

9.1 According to the Appellant the rate of sale of surplus power as assumed by the Commission is high and is higher than the actual rate of sale of surplus power in FY 2010-11 which was Rs. 2.96 per kWh. The State Commission has considered the normative rate of Rs. 4 per kWh as against the proposal of the Appellant for Rs. 3.20 per kWh, based on actual sales undertaken by the Appellant in October 2011, which was itself higher than the average rate of Rs. 2.96 per kWh during FY 2010-

11. The average sale rate through power expenses for FY 2011-12 was in the range of Rs. 3.50 per kWh and sale of power under UI mechanism during the year was Rs. 2.36 per unit. Further, the sale of surplus power has no co-relation with the average power procurement cost. The high power cost for surplus power assumed by the State Commission has resulted in revenue gap which has to be allowed with carrying cost causing avoidable burden on the consumers in the true up.

9.2 Let us examine the findings of the State Commission in the impugned order. The State Commission has noted the average rate of sale of power by the various distribution licenses in Delhi during 2010-11, as TPDDL (Appellant) - Rs. 2.96 per unit, BRPL - Rs. 3.21 per unit. BYPL – Rs. 3.54

per unit and NDMC Rs. 2.94 per unit. The average landed cost of power purchase including transmission losses and charges for the Appellant has been noted as Rs. 4.17 per unit in FY 2012-13, Rs. 4.23 per unit in FY 2013-14 and Rs. 4.30 per unit in FY 2014-15. The Commission has noted that if the Appellant has to sell surplus power at a rate that is lower than the average landed cost per unit at which it purchased power, it shall result in an additional burden being imposed on the consumers on account of the transaction of sale and purchase of power. Accordingly, the State Commission fixed the rate of surplus power of Rs. 4 per unit during each year of the control period.

9.3 We find that the Appellant claimed the rate of Rs. 3.20 per unit for surplus power sale based on the

actual rate undertaken though power exchange during October 2011. The State Commission on the other hand decided the rate of Rs. 4 per unit keeping in view the average power purchase cost projected for the control period. Neither the Appellant nor the State Commission projected the rate of sale of surplus power on the basis supported by a logical explanation. The price obtained on a power exchange in a particular month (October 2011) cannot be the basis of projecting the average power sale price for the whole year. Similarly, the average power purchase cost which is mainly dependent on the long term Power Purchase Agreements will not be reflective of the short term price of power. The short term price of power will depend on the demand and availability of power in different periods of the year.

9.4 The Appellant has long term Power Purchase Agreements in which it has the liability to pay the fixed cost irrespective of the actual drawal. In our view the anticipated power surplus may be estimated month-wise and peak/other than peak period. For price of power, actual sale for price in short term market month-wise and peak/other than peak period basis during the previous year, trend of short term power sale during the current year etc., may be considered to project the anticipated short term sale price of surplus power during the control period. These guidelines may be kept in view by the Appellant while projecting the sale price of surplus power and the State Commission to consider while approving the same in future.

9.5 The Learned Counsel for the State Commission has given data from the Market Monitoring cell of CERC giving the forward curve of spot price for the period December 2012 to June 2013 to justify fixing of Rs. 4 per kWh price for sale of surplus power. We find that the report relied upon by the Learned Counsel for the State Commission is pertaining to November 2012 which was subsequent to the passing of the impugned order dated 31.07.2012. Therefore, reliance on this report to justify the impugned order is not correct.

9.6 As regards the control period 2012-13 to 2014-15, the actual sale price of surplus power has to be trued up and the difference between the actual sale price and that allowed in the ARR (Rs.4 per unit) should be allowed with carrying cost to the

Appellant by the State Commission. Accordingly, decided.

10. The eighth issue is regarding computation of base year Employee Expenses and Administrative and General (A&G) expenses based on average increase in employee expenses per unit sales and per consumer of the other distribution licensees.

10.1 According to the Appellant, the State Commission has decided the employees expenses and A&G expenses on the basis of average increase in employee cost per unit sales and employee cost per consumer of the three distribution companies for the base year 2011-12 in contravention to the 2011 MYT Regulations. This approach is arbitrary as

even though the increase in employee cost per consumer of the Appellant is higher as compared to the other licensees, the actual value of the employee cost per unit sales of the Appellant for FY 2010-11 is lower than BYPL. This factor has not been considered by the State Commission. Further, the State Commission has failed to appreciate that the Appellant's performance is better than the other licensees in terms of lower AT&C loss level, lower cost of funding despite huge revenue gap, etc. Such performance has translated into greater benefits to the consumers as compared to other licensees.

10.2 The Appellant has further submitted that the actual value of A&G cost per unit sales of the Appellant for FY 2010-11 is lower than both the

licensees and the actual value of A&G cost per consumer of the Appellant for FY 2010-11 is much lower than BRPL and only marginally higher than BYPL. Part of increase in A&G expenses has been on account of consumer friendly initiatives leading to increased bill collection expenses, bill distribution expenses, software expenses and increase in minimum wages.

10.3 The Appellant has also furnished a chart comparing performance indicators of the Appellant and other distribution licensees to press its point that the employees expenses and A&G expenses will also depend on the performance levels achieved by the licensees.

10.4 According to Learned Cousnel for State Commission the employees expenses and A&G expenses have been determined according to the MYT Regulations, 2011.

10.5 We find that the MYT Regulations, 2011 provide as under:

"Operation and Maintenance Expenses

5.3 Operation and Maintenance (O&M) expenses shall include:

(a) Salaries, wages, pension contribution and other employee costs;
(b) Administrative and General expenses which shall also include expense related to raising of loans;
(c) Repairs and Maintenance; and
(d) Other miscellaneous expenses, statutory levies and taxes (except corporate income tax)."

"5.4 The Licensee shall submit the O&M expenses for the Control Period as prescribed in Multi Year Tariff filing procedure. The O&M expenses for the Base Year shall be approved by the Commission taking

into account the latest available audited accounts, business plan filed by the Licensees, estimates of the actual for the Base Year, prudence check and any other factor considered appropriate by the Commission."

10.6 As per the 2011 Tariff Regulations, the base year O&M expenses have to be approved taking into account the latest available audited accounts, business plans filed by the licensee, estimates of actual for the base year and any other factor considered appropriate by the Commission. The base year for the control period 2012-13 to 14-15 is 2011-12. However, in the impugned order the State Commission has adopted an altogether new methodology for fixing the employees cost and A&G expenses for the base year, without considering the audited accounts, business plan and the estimates of the licensee, in contravention to the 2011 Tariff Regulations. Admittedly, the Regulation 5.4 also

provides for 'any other factor considered appropriate by the Commission' but this does not permit use of an altogether new method on the basis of average %age increase of employees expenses and A&G expenses per unit sale and per consumer of the three distribution licensees for the period from FY 2006-07 to 2010-11, ignoring other factors specified in the Regulations.

10.7 We find deficiencies in the methodology used by the Commission. The methodology adopted by the Commission is based on the average %age increase of the cost per unit sales and cost per consumer from 2006-07 to 2010-11. The methodology does not account for comparative cost per unit sale and cost per employees in the FY 2006-07 and FY 2010-11. Thus, if the cost per employee or cost per

unit sale of a distribution company is lower in the FY 2006-07 but its %age increase is higher, the company will be penalized. This methodology also does not take into account the comparative cost per unit sales and cost per consumer in FY 2010-11, but only accounts for %age increase from 2006-07 to 2010-11.

10.8 We find that the A&G expenses per unit sales of the Appellant is the lowest of all the Discoms in FY 2006-07 and FY 2010-11 but its %age increase in cost is the highest. Therefore, despite the lowest cost, it will be penalized for higher %age increase. Similarly A&G expenses per consumer of the Appellant is the lowest in FY 2006-07 and is also lower than BRPL in FY 2010-11, despite this, since

its %age increase in cost per consumer is the highest, it will be penalized. Similar discrepancy is also found in employees cost per unit sale and per consumer. The Commission should have considered the cost per unit sale and per employee instead of %age increase from 2006-07 to 2010-11. Higher percentage of increase may also be due to cost incurred in improvement in loss levels and quality of supply for 2006-07 to 2010-11. Therefore %age increase is an incorrect benchmark.

10.9 The methodology adopted by the Commission also does not take into account the different modes of works carried out by the distribution licensee. For example if a distribution licensee carries out more repaired maintenance work through third party contracts instead of own employees, then its

employees cost will be lower but repair and maintenance will be higher. This company will be considered more efficient as per the norms adopted by the Commission even though its overall O&M expenses may be higher than other companies. Comparison of O&M expenses per consumer or per unit sale which includes employees expenses, R&M expenses and A&G expenses will be correct and like to like comparison.

10.10 The performance of the three distribution licensees may also be different. For example the employees and A&G expenses of a licensee who maintains higher system availability/reliability of supply and better consumer services may be higher. These factors have not been considered by the State Commission.

10.11 We are, however, not convinced by the contention of the Appellant that indexation factor should have been 8.6% instead of 8% as determined by the State Commission. As per the Regulations, the indexation has to be combination of CPI and WPI for immediately preceding five years before the base year. The Commission has correctly considered the CPI & WPI increase from 2006-07 to 2010-11 to determine the indexation factor as per the Regulations.

10.12 We find that the employees cost and A&G expenses have been determined in violation of the Tariff Regulations and, therefore, these are set aside along with the methodology used in determination of these expenses with direction to re-determine the same as per the Regulations.

11. The ninth issue is regarding exclusion of 'K' factor applicable for FY 2007-08 for the purpose of computation of normative Repair and Maintenance expenses for the control period.

11.1 Shri Sitesh Mukherjee, Learned Counsel for the Appellant has submitted that the State Commission while adopting the methodology of determining the 'K' factor for the control period has arbitrarily excluded the value for FY 2007-08 for the purpose of determining the 'K' factor for the control period. The only explanation for exclusion of data for FY 2007-08 was that it was higher than the average value of 'K' factor for the period 2007-08 to 2011-12.

11.2 We find that the State Commission has determined the 'K' factor for the control period on the basis of 'K' factor approved by the State Commission for FY 2007-08 to 2011-12. The data as considered by the State Commission is as under:

"Table 107: 'K' factpr as approved by Comission for FY 2006-07 to FY 2011-12

Particular	*FY 2007-08*	*FY 2008-09 FY 2008-09*	*FY 2009-10*	*FY 2010-11*	*FY 2011-12*
Opening GFA (as approved by the Commission) (Rs Cr)	*2043.23*	*2563.23*	*2963.23*	*3188.23*	*3388.23*
Total R&M Expenses (Rs Cr)	*57.20*	*66.36*	*77.27*	*85.26*	*87.21*
K Factor (on approved GFA)	*2.80%*	*2.59%*	*2.61%*	*2.67%*	*2.57%*

"

The State Commission has determined the 'K' factor for the control period 2012-13 to 2014-15 as average of 'K' factor for the period 2008-09 to 2011-12 ignoring the FY 2007-08 as the 'K' factor for 2007-08 was considered as higher than the average 'K' factor for FY 2008-09 to FY 2011-12.

11.3 The ‘K’ factor for FY 2007-08 was 2.80% while for average for FY 2008-09 TO 2011-12 was 2.61%. We find that the ‘K’ factor for FY 2007-08 was not abnormally high to be ignored being a stray figure. For example, the ‘K’ factor for 2007-08 was only 4.9% higher than the ‘F’ factor for FY 2010-11. Therefore, there was no reason to ignore the ‘K’ factor for FY 2007-08. Even otherwise if a methodology for average of K factor for previous 5 years has been devised, the same has to be followed by the Commission.

11.4 Shri Pradeep Misra, Learned Counsel for the State Commission has given another reason which is not found in the impugned order, for ignoring the ‘K’ factor for FY 2007-08. According to him, the MYT order was passed by the Commission on

23.02.2008 hence the data for 2007-08 which has to be considered is only for 1 month and 6 days which is not representative of the correct data. We do not find any merit in the argument of Shri Misra. The tariff order might have been passed on 23.02.2008, but the opening GFA and R&M expenses have been decided for the whole FY 2007-08. There is no reason for not relying on these figures. Therefore the 'K' factor for the control period has to be recalculated on the basis of 'K' factor for the FY 2007-08 to 2011-12.

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

12. The tenth issue is regarding efficiency improvement factor at 2%, 3% and 4% for FY 2012-13, 2013-14 and 2014-15 respectively.

12.1 According to the Appellant the efficiency factor determined by the State commission is devoid of rationale, shows lack of appreciation of the prevailing relevant considerations and arbitrary. The impugned order contains no indication as to the methodology adopted for arriving at the stipulated percentage. The Commission has also not identified the areas of inefficiencies but merely suggested that there should be lowering of O&M costs. The Commission has ignored the relevant factor such as minimum wages, cost of living, regulatory environment with respect to performance standards which mandate a certain

level of expenses required to achieve and sustain the standards of efficiency brought into the system in terms of reduction of losses, better consumer facilities, etc. The Appellant has already achieved the AT&C loss level, the sustainability of which is a challenge in itself and requires higher O&M expenses.

12.2 Learned Counsel for the State Commission in support of impugned order has referred to Appeal no. 166 of 2012 in which this Tribunal has upheld the benchmarking and determination of efficiency factor.

12.3 We find that according to the 2011 Tariff Regulations, the efficiency factor has to be determined based on Licensee's filing,

benchmarking, approved cost by the Commission in the past and any other factor that the Commission feels appropriate.

12.4 We find that the State Commission in the impugned order has compared the O&M cost per unit of sales and cost per consumer for the distribution licensees of Surat, Ahmedabad, Dakshin Haryana, Uttar Haryana, Jodhpur, Maharashtra from the FY 2010-11 with the Appellant and has found that the costs of the Appellant were the highest. Therefore, the State Commission has decided the efficiency factor of 2%, 3% & 4% for the FY 2012-13, 2013-14 and 2014-15 respectively.

12.5 We find that as per the Regulations, the efficiency factor can be determined by benchmarking and, therefore, there is no fault in the Commission's basic approach for benchmarking the O&M cost of the Appellant with other distribution companies. However, the benchmarking of O&M has to be with respect to like distribution licensees and for a larger span with analysis. In the present case, the State Commission has given figures of O&M cost per unit of sales and per consumer for a single year i.e. FY 2010-11. It is not clear whether the O&M expenses considered are the actual audited expenses or trued up expenses or the estimate of expenses approved in the tariff order. The State owned distribution licensee considered in the benchmarking should be such who maintain reliable power supply, distribution loss level and

consumer services comparable to the Appellant. The Commission should have benchmarked the actual O&M expenditure of some more distribution licensees having metropolitan area of supply such as other licensees of Delhi, Mumbai, Kolkata for at least three years before coming to a conclusion. The approach adopted by the State Commission is over simplified and lacks analysis.

12.6 While we agree with the basic approach of benchmarking, the data and the analysis is required to be augmented as discussed above. Therefore, we remand the matter to the State Commission for redetermination of the Efficiency Factors.

13. The eleventh issue is regarding erroneous computation of working capital interest rates.

13.1 According to the Appellant, the State Commission even after specifically admitting that the interest rate applicable to the Appellant is the lowest, has fixed the interest rate for working capital on the basis of average rate of loans contracted for revenue gap loans and also failed to consider that the loans were availed at different point of time and there could be movement in base rate and, therefore, the interest rate must be allowed on base rate plus average of the spread of loans taken during such period. The State Commission has failed to consider the sanction letter from SBI relating to working capital loans which was submitted to it vide letter dated 21.05.2012

wherein the Appellant had specifically provided details of all working capital loans secured by the Appellant from working capital consortium banks.

13.2 The Appellant has further submitted that the working capital funding is availed at substantially higher interest rate, as compared to the revenue gap funding, since there is commitment of drawl of loan for entire period on which interest is paid, whilst in case of working capital, lenders have to keep reserve namely whether borrower utilizes the same or not, hence rate of interest on working capital is always higher than fixed period loans, hence rate of term loan cannot be applied for working capital facilities. According to the Appellant, they have been allowed lower interest rate on two counts. Firstly on account of wrong applicability of term loan rate and secondly the

interest rate has been wrongly computed by ignoring the period for which the loan was taken, opening loans and loans squared up during the year.

13.3. According to Mr. Pradeep Misra, the Commission has calculated the allowable rate of interest for computation of carrying cost on the basis of the actual period for which loans were taken based on the details provided by the Appellant vide email titled "Loan Details" dated 13.06.2012. The Appellant has not made any distinction between the loans taken to fund the revenue gap and loans taken to found working capital and no loan has been shown as drawn from SBI.

13.4 We find that the State Commission has considered interest rate for working capital as 11.62% and interest rate for capital at 11.25% for the control period 2012-13 to 2014-15. The Appellant has produced a letter from SBI dated 02.01.2012 showing working capital facilities sanctioned at an interest rate of 3.25% above base rate which works out to 13.25% p.a. with monthly interests. This letter was furnished to the State Commission by letter dated 21.05.2012. This has not been considered by the State Commission while deciding the rate of interest on working capital. In the submissions of the State Commission before us they have not denied receipt of this letter but have not given any explanation why the this letter was not considered by them while deciding the interest on working capital. There is also no explanation in

the impugned order regarding fixing interest rate at 11.25% on working capital. We, therefore, direct the State Commission to true-up the interest rate on working capital for the years from 2012-13 to 2014-15 in the true up of the accounts, based on the actual interest rates.

14. The twelfth issue is regarding allowance of interest rates on loans for capital expenditure for FY 2012-13 to FY 2014-15.

14.1 According to the Appellant, the State Commission failed to consider that loans were availed at different point of time and there could be movement in base rate and, therefore, the interest rate must be allowed on base rate plus average of the spread on loans taken during such period.

14.2 Shri Sitesh Mukherjee, Learned Counsel for the Appellant has argued that the Commission has simply taken the weighted average interest rate of the loans availed by the Appellant instead of allowing the interest rate at SBI base rate plus spread based on actual loans availed. This has resulted into lower allowance of interest rate as the base rate was not the same when the loans were taken. The Appellant had furnished the desired information regarding interest rate on loans for capex vide letter dated 13.06.2012.

14.3 Shri Pradeep Misra, Learned Counsel for the State Commission in his submissions has only reiterated the findings of the State Commission in the impugned order.

14.4 We find that the State Commission has observed that after analysis of the submissions made by all the distribution companies on new loans taken by them during FY 2011-12, it has been observed that the interest rate (average) applicable to the Appellant as per submission vide letter dated 13.06.2012 is the lowest and hence considered the same for approval of the interest rate on the normative loans approved for the control period for all the distribution companies. Accordingly, the State Commission approved interest rate of 11.21% on the capex for the control period.

14.5 Shri Sitesh Mukherjee, Learned Counsel for the Appellant forwarded the data regarding increase in base rate of SBI from 01.07.2010 to 31.03.2012 indicating increase in base rate from 7.50% to

10%. According to him the email dated 13.06.2012 was provided to the Commission with respect to revenue gap loans and not capex loans. Further, even the rate of interest of revenue gap loans was wrong as the same ignored the opening loans, period of loans, the loans spread up during the year itself and the purpose of loan. These aspects have also not been dealt with in the written submissions of the State Commission. The approach of composite interest rate instead of approving the spread and allowing the base rate to be trued up as per actual is erroneous and would deprive the Appellant of its entitlement to the interest as contemplated under the 2011 MYT Regulations.

14.6 The MYT Tariff Regulations 2011 provide that the cost of debt shall be determined at the beginning of the control period after considering the licensee's proposals, present cost of debt already contracted by the licensee, credit rating, benchmarking and other relevant factors (risk free returns, risk provision, prime lending rate, etc.). The Regulations also have a provision of true up of rate of interest variation in SBI base rate as on 01.12.2012 if the base rate varies beyond ±1%.

14.7 We have examined the ARR petition filed by the Appellant before the State Commission. We do not find any pleading regarding fixing of the rate of interest at base rate of SBI plus average of spread on loans taken. There is no clarity about the submissions as to how the interest rate for capex

loans has to be fixed for the control period. The Appellant is now making submissions which they should have presented before the State Commission at the time of the submissions of the petition and the proceedings before the Commission. Therefore, we do not find any fault in the State Commission adopting the weighted average of loans availed by the Appellant. However, the interest rates have to be trued up as per the Regulations. Accordingly, the State Commission shall true up the interest rate in the true up for the financial years from 2012-13 to 2014-15.

15. **The thirteenth issue is regarding erroneous computation of the expenses on return on equity component.**

15.1 The Appellant has submitted that for computation of tax expenses, the State Commission should have grossed up the return on equity with tax rate so as to ensure that after meeting the tax liability the Appellant receives return on equity at 16%. The State Commission has approved the tax expense by computing ROE component at 16% and then applied MAT rate on such return. The Regulations provide that the tax on equity component is a pass through to the consumers. For this purpose the ROE is to be grossed up so as to ensure that after meeting the liability, the Appellant receives ROE at 16%.

15.2 We find from the impugned order that the State Commission has allowed MAT on ROE component but has stated that the tax expenses would be

trued-up on actual tax liability (limiting it to income tax paid on return on equity) at the end of each year of the control period as per the MYT Regulations, 2011.

15.3 The Regulations provide that tax on income of the Distribution Licensee limited to tax on ROE component of capital employed is to be paid. The actual assessment of income tax should take into account of benefits of tax holiday, and the credit for carry forward losses applicable as per the provisions of the Income Tax Act 1961 which would be passed on to the consumers.

15.4 The Return on capital employed has to be trued up every year based on the actual expenditure and actual capitalization. If the tax is to be paid by the

Appellant further on the tax allowed as pass through in tariff then that tax has also be allowed as pass through in the tariff. The State Commission in the impugned order has stated that it would true up the income tax. Therefore, we do not find any reason to interfere with the impugned order in this regard.

16. The fourteenth issue is regarding non-allowance of fee payable on registration charges in accordance with terms of loan agreements.

16.1 The Appellant vide letter dated 06.03.2012 had informed the State Commission that Government of NCT of Delhi vide its notification of 2011 has removed the maximum cap of Rs. 50,000/- on registration fee. Thereby, the Appellant requested

that the additional charge be factored in the ARR for FY 2012-13 to FY 2014-15.

16.2 The State Commission in its submissions before us has clarified that the fee payable on registration of charge cannot be projected as this has recently been introduced by the Government of NCT of Delhi. However, the Commission shall allow the same at the time of truing up of the expenses for the relevant year. The Commission has also asked the Appellant to take up with the Government of NCT for waiving off the fee payable on registration of charge.

16.3 In view of the submissions made by the State Commission, the Appellant shall take up the matter with the Government of NCT of Delhi for

waiver of the registration charges. However, if the Government does not accede to the request of the Appellant, the actual charges as levied by the Government of NCT of Delhi shall be allowed as expenditure in the true up. Accordingly, decided,

17. The fifteenth issue is regarding direction on adjustment of provisions made on account of power sale and purchase at the end of the year.

17.1 The Appellant has made submissions on the observations of the State Commission under paragraph 6.14 of the impugned order that the provisions made on account of power sale and purchase at the end of year i.e. in March shall be adjusted within one month i.e. in the month of April. The Appellant has submitted that the

provisions made for a particular year ought to be considered as power procurement expenses of the same year while truing up and the Commission may also examine the issue of adjustment of the provisions for the purpose of approving carrying cost. The Appellant has prayed for setting aside the aforesaid finding of the State Commission.

17.2 According to Shri Pradeep Misra, Learned Counsel for the State Commission, normally the bill for the current month power purchase and sale is being received/issued by 10th of subsequent month, and the Commission has already given one month time for adjustment of provisions if any at the year end month March.

17.3 We have dealt with in details under item 6 the issue relating to power purchase cost for the month of March. In view of our findings for the sixth issue under paragraph 8, we do not want to interfere with the directions of the State Commission under paragraph 6.14 of the impugned order. Accordingly, this issue is decided against the Appellant.

18. The sixteenth issue is regarding disallowance of penal UI charges.

18.1 The State Commission in the impugned order has decided that Penal UI charges of Rs. 3.81 crores will not be allowed in the power purchase cost as per the decision taken by the Forum of Regulators ("FOR"). The Penal UI charges are payable as per

the Central Commission's Regulations for overdrawl of electricity for each time block of 15 minutes when grid frequency is below 49.5HZ.

18.2 The Appellant has made the following submissions in support of its claim :

i) Monitoring of overdrawl is done based on instantaneous frequency and billing is done on an average of 15 minutes. At times the frequency fluctuates in the region of 49.6 to 49.4 in a 15 minute interval. If the load is shed as soon as the frequency momentarily touches 49.5 HZ, there is a possibility of unnecessary load shedding as the average frequency during the period may be higher than 49.5 HZ.

ii) Automation of the process of load shedding would mean higher no of 11 kV VCB operations resulting in failure of vacuum bottles and hence reliability of the system, thereby affecting the interests of the consumers. As a prudent practice, the Appellant observes trend for 3-4 minutes and then does load shedding of the order of overdrawl.

iii) The over-drawl and under-drawl depends on scheduled generation available. Since the generation available changes constantly and further due to loss of generation the schedules are affected resulting in over-drawl by the distribution company. These schedules are revised by the generator within 6 blocks. An intra-day event does not afford the opportunity to the distribution

licensee to arrange power for the shortfall. There could be over-drawl in certain periods due to this.

iv) Monitoring of over-drawls are based on the actual drawl seen by the Distribution Licensee and the schedule declared by the State Load Dispatch Centre. The implementation of SCADA has resulted in proper monitoring of actual data, however, the schedule data uploaded on real time data is still a manual process and has lots of errors. This results in wrong interpretation of the situation and over-drawl takes places inadvertently.

v) The over-drawl was only a fraction of total drawl.

18.3 We find that the Central Commission has made the provision for penal charges on UI below frequency

of 49.5 HZ in the interest of grid security. We do not want to give any relaxation in decision of the State Commission not allowing the penal UI charges, as we do not want to interfere in the matter relating to security of the grid in real time operation. The Appellant has to take necessary steps required to avert over-drawl under low frequency benchmark. Accordingly, this issue is decided against the Appellant.

19. The seventeenth issue is regarding reduction of AT&C losses by at least 10% for particular zones/districts having AT&C losses generator than 30%.

19.1. The Appellant has submitted that the State Commission has in addition to setting up an

overall AT&C loss target for the Appellant has also directed the Appellant to reduce AT&C losses, within a year, by at least 10% in respect of these zones which are currently having losses in excess of 30%. This is contrary to the 2011 MYT Regulations. Moreover, in compliance of the State Commission's order dated 26.08.2011, the Appellant has deployed dedicated teams in zones with losses more than 40% and taken special initiatives like extensive raids, themes propagating anti-theft measures, etc. However, due to lack of police support and huge resistance being faced in these areas, the targets set up by the State Commission seem to be improbable. The Appellant has also taken up the matter with the Government of NCT of Delhi to provide adequate support vide

letter dated 01.05.2012 but no substantive action has been taken by the Government in this regard.

19.2 We find that the State Commission in the impugned order has given the following directions.

“6.2 Distribution licensee is directed to reduce AT&C losses by at least 10% in respect of those zones/districts which are currently having losses in excess of 30% within one year i.e. by August, 2013. These targets shall have to be met by distribution licensee irrespective of the overall AT&C loss achievement targets specified in this Order. Failure to do so will invite penalties.”

Thus, the State Commission in addition to the overall AT&C loss achievement targets, has also specified zone/district-wise target for those areas where the AT&C losses are currently above 30% to be achieved by August 2013 failing which the

licensee would be penalized. However, the State Commission has not quantified the penalty.

19.3 The 2011 MYT Regulations specify targets for controllable parameters which includes the AT&C loss. The Regulations provide as under:

"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 for sale to all its consumer and the units realised wherein the units realised shall be equal to the product of units billed and collection efficiency:

Provided that units billed shall include the units realised on account of theft measured on actual basis i.e. number of units against which payment of theft billing has been realised;"

19.3 Thus, the AT&C loss target has been specified for the distribution system. There is no provision for zone/district-wise AT&C loss target in the

Regulations. The Regulations have mechanism for incentive for achieving lower AT&C loss and disincentive for achieving higher AT&C loss than the target level. Thus, zone-wise setting up AT&C loss target for levy of penal charges is contrary to the Regulations.

19.4 Shri Pradeep Misra has tried to justify the direction of the State Commission under saving of inherent power clause of the Regulation. The relevant Regulation 12.6 is as under

"12.6 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."

19.5 The above Regulation only provides inherent powers to the State Commission to adopt a different

procedure specified in the Regulations. However, this Regulation does not permit the State Commission to vary a substantive and specific Regulation regarding AT&C loss target and the incentive/disincentives provided for the same in the Regulations. However, the State Commission has powers to give general directions for improvement of the performance of the distribution licensees.

19.6 This issue has been dealt by this Tribunal in Appeal no. 61 of 2012 in which the findings of the State Commission regarding imposition of penalty on failure to reduce losses 10% in high loss areas has been set aside.

The findings of the Tribunal in Appeal no. 61 of 2012 are as under:

"We are of the view that so far the Appellants meet the overall AT&C loss targets set by the Commission, the Commission should not indulge in micro-management of the licensee's day to day operation."

The findings in Appeal no. 61 of 2012 will apply to the present case. Accordingly, this issue is decided in favour of the Appellant.

20. In view of the above, the Appeal is allowed in part, as indicated above. The State Commission is directed to pass consequential order as per our directions. No order as to costs.

21. Pronounced in the open court on this **10th day of February, 2015.**

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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REPORTABLE/~~NON-REPORTABLE~~
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