In the Appellate Tribunal for Electricity at New Delhi
(Appellate Jurisdiction)

Appeal No. 103 of 2017 & IA No. 303 of 2017 &
Appeal No. 104 of 2017 & IA No. 304 of 2017

Dated: 15th May, 2017

Present: Hon'ble Smt. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr.T Munikrishnaiah, Technical Member
Hon'ble Mr. I.J. Kapoor, Technical Member

Appeal No. 103 of 2017 & IA No. 303 of 2017

IN THE MATTER OF:

BSES Rajdhani Power Limited
BSES Bhavan
Nehru Place
New Delhi
Through its Head – Regulatory Affairs

……..Appellant/Petitioner

VERSUS

1. The Secretary
   Delhi Electricity Regulatory Commission
   'C' Block, Shivalik
   Malviya Nagar
   New Delhi – 110 017

2. Managing Director
   Tata Power Delhi Distribution Ltd.
   (formerly North Delhi Power Ltd.)
   NDPL House, Hudson Line
   Kings Camp
   New Delhi – 110 009

3. Managing Director
   Tajsats Air Catering Ltd
   IGI Airport Complex
   New Delhi – 110 037

……..Respondent (s)

Counsel for the Appellant(s)	:	Mr. Buddy A. Ranganadhan Mr. Hasan Murtaza Ms. Malvika Prasad
Counsel for the Respondent(s)	:	Mr. Pradeep Misra Mr. Daleep Dhyani for R-1 Mr. Anand K. Shrivastava Mr. Hemant Sahai & Mr. Abhishek Kumar for R-2

Appeal No. 104 of 2017 & IA No. 304 of 2017

IN THE MATTER OF:

BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma
New Delhi – 110 032

……..Appellant/Petitioner

VERSUS

1. Delhi Electricity Regulatory Commission
   'C' Block, Shivalik
   Malviya Nagar
   New Delhi – 110 017

2. Tata Power Delhi Distribution Ltd.
   (formerly North Delhi Power Ltd.)
   33 KV Grid Sub-Station
   Hudson Line, Kingsway Camp
   New Delhi – 110 009

……..Respondent (s)

Counsel for the Appellant(s) :	Mr. Buddy A. Ranganadhan Mr. Hasan Murtaza Ms. Malvika Prasad
Counsel for the Respondent(s):	Mr. Pradeep Misra Mr. Daleep Dhyani for R-1 Mr. Anand K. Shrivastava Mr. Abhishek Kumar for R-2

JUDGMENT

Per Hon'ble T. Munikrishnaiah, Technical Member

1. The Appeal No. 103 of 2017 has been filed by BSES Rajdhani Power Limited (herein after referred to as the **"Appellant"**) under Section 111 of the Electricity Act, 2003 against impugned letter/order dated 12.01.2017 (impugned order) by the Delhi Electricity Regulatory Commission (herein after referred to as the "**State Commission"**) as the Respondent Commission has failed to implement this Tribunal's Judgment dated 23.02.2015 in Appeal Nos. 109, 110 and 111 of 2014.

2. The Appeal No. 104 of 2017 is being filed by BSES Yamuna Power Ltd., New Delhi (herein after referred to as the **"Appellant**") under Section 111 of the Electricity Act, 2003 against the impugned letter/order dated 12.01.2017 passed by Delhi Electricity

Regulatory Commission (herein after referred to as the "**State Commission**").

3. The Appellant in Appeal Nos. 103 and 104 of 2017 is a company incorporated under the Companies Act, 1956, and having its registered office at Delhi. The Appellant is a distribution licensee under Section 2(17) of the 2003 Act, as the successors in interest of the erstwhile Delhi Vidyut Board. The Appellant is engaged in distribution of electricity in the areas within Delhi according to the terms and conditions of license issued by the Respondent Commission.

4. The Respondent No. 1 in both the Appeals is Delhi Electricity Regulatory Commission established under the Electricity Act, 2003 read with the Delhi Electricity Reform Act, 2000 and is obliged to discharge functions and duties entrusted to it by the said enactment.

5. The Respondent No. 2 in Appeal Nos. 103 of 2017 and 104 of 2017 is Tata Power Distribution Ltd. formerly North Delhi Distribution Ltd. is a distribution licensee engaged in distribution of electricity in the licensed area within Delhi.

6. The Respondent No. 3, in Appeal No. 103 of 2017 is TAJSATS Air Catering Ltd, IGI Airport Complex, New Delhi, is one of the consumers of BSES licensee. The Delhi Electricity Regulatory Commission issued a direction to BSES Rajadhani Power Ltd. to refund the balance amount of consumers' contribution to M/s TAJSATS with compliance report to Commission.

7. Since both the Appellants are contesting against the same impugned order dated 12.01.2017, the Learned Counsel for the Appellants are same for both the Appeals and hence we have taken up together for consideration and our decisions there to be applicable for both the Appeals.

8. BRIEF FACTS OF THE CASE

8.1 The Respondent Commission in its Tariff Order dated 26.06.2003 in Petition No. 08 of 2002 and 09 of 2002 laid down a methodology that the funding of capital works as well as the priority of the means to be utilized in funding the capital works. In the said Order the Commission considered a methodology for determination of means of finance, first considered the consumer contribution received during the year (including unutilized portion of the consumer contribution).

8.2 The Respondent Commission in its Tariff Order dated 07.07.2005 in Petition No. 02/2004 re-affirmed the order of the "means of finance" as adopted in the Tariff Order dated 26.06.2003. The priority of the means of finance laid down are as under:

a) Consumer contribution;
b) Unutilized depreciation considering available unutilized depreciation of the previous years;
c) APDRP Funds available during the year;
d) Balance funds required – balance fund requirement to be met through a mix of debt and equity by applying a normative debt to equity ratio of 70:30.

8.3 The Respondent Commission considered the total consumer's contribution received by the Appellants for the years 2002-03 to 2006-07 as a "means of finance" while determining the aggregate revenue requirement of the Appellants for the FY 2002-03 to 2006-07.

8.4 For the Financial Years 2007-08 till 2011-12, the Respondent Commission utilized only the unspent portion of consumer contribution as a "means of finance" in the ARR's for the concerned years.

8.5 During the public hearing held between 08.01.2008 and 11.01.2008, certain stake holders raised queries on the consumer contribution submitted before the Respondent Commission and

approved by the Respondent Commission in previous tariff orders. It was specifically pointed out that the consumer contribution used by the Respondent Commission against the means of finance was lesser than the actual consumer contribution received.

8.6 The Respondent Commission considered the said submissions and held that the total consumer contribution should be considered as a source of funding for capital investment irrespective of asset capitalized or not.

8.7 In the meanwhile, this Tribunal vide its Judgment dated 06.10.2009 in Appeal No. 36 of 2008 not only considered but also upheld the methodology adopted by the Respondent Commission for funding of capital works.

8.8 The State Commission directed the Appellants to submit the details to provide the following information:

a) the treatment given to the excess amount collected from consumers for consumer contribution works in the books of accounts of the Appellant;

b) copies of the consumer contribution accounts, as appearing in the books of accounts of the Appellant, from the financial years 2002-03 to 2008-09;

c) the year-wise amount refundable to such consumers on account of excess contributions collected from them;

d) year-wise amount actually refunded to such consumers.

8.9 The Appellants vide its letter dated 16.11.2009 provided the following details:

a) Details of its accounting policy on "Capital Contribution towards deposit schemes";

b) Informed the Respondent Commission that the amount of consumer contribution received during the year is credited under the account head consumer contribution for capital works in the Balance Sheet and stated that the copies of the same was already submitted to the Respondent Commission.

8.10 The Appellant, BSES Rajdhani Power Limited responded to queries raised by the State Commission and provided the requisite information/details vide its letter dated 19.06.2013 and the Appellant BSES Yamuna Power Ltd. on 14.08.2013.

8.11 The Respondent Commission disposed off the Petition. Whilst disposing of the Petition, the Respondent Commission expunged the words 'but also a dishonest one' from letter dated 3-12-2009. Further, the Respondent Commission directed the Appellants to refund the unutilized portion of the consumer contribution to the consumers along with interest at the rate of 12% from the date of completion of work.

8.12 Aggrieved by the Order dated 11.03.2014 passed by the DERC in the Petition Nos. 1 of 2010, 2 of 2010 and 3 of 2010, the

distribution companies filed these appeals before this Tribunal being Appeal Nos. 109 of 2014, 110 of 2014 and 111 of 2014.

8.13 This Tribunal issued Judgment on 23.02.2015 in Appeal Nos. 109, 110 and 111 of 2014. The relevant part of the judgment is quoted below:

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.

8.14 The Respondent Commission in its letter dated 21.04.2016 directed the Appellants to come up with the details of balance of consumers' contribution in each case and from which date it has to be refunded. Further, the Commission directed that this exercise should be completed within two months. Regarding recasting of

ARR for previous years, the Commission directed the Appellants to submit the details of such cases where the un-utilized consumer contribution for assets capitalized were considered as “means of finance” for other capital schemes of the petitioners. The relevant part of the letter dated 21.04.2016 is quoted below:

> ***3.*** *The DISCOMs were advised to submit the information along with interest @ 12% per annum to work out the complete liability for consideration in ARR for the relevant year. Therefore, all the three DISCOMs are advised to submit the final figures about the total liability only after payment of balance of consumer contribution along with interest within a month, supported by an Auditor Certificate reconciling with their audited accounts. Only those cases where unutilized consumer contribution for assets capitalized were considered as means of finance of other capital schemes are to be intimated.*
>
> ***4.*** *All the three private DISCOMs are, therefore, directed to submit the desired information of refunded consumer contribution including interest along with their tariff petition for the financial year 2016-17. If they have already submitted the petition, additional information may be submitted on the above lines within one months of this letter.*

8.15 The Appellant vide letter dated 30.06.2016 submitted the auditor’s certificates in regard to the balance consumers’ contribution which remained un-utilized after the completion of respective scheme along with interest @ 12% per annum as per direction of the Respondent Commission.

8.16 The State Commission by its letter dated 12.01.2017 (impugned Order) directed the Appellants to refund the balance amount of consumer contribution to the respective consumers and stated that any failure to comply with the same would attract action under section 142 of the Electricity Act, 2003 and further directed the Appellants to submit comprehensive report within 15 days. The relevant part of the letter dated 12.01.2017 signed by the Secretary of the Commission is quoted below:

> ***4.*** *Now, therefore, you are hereby directed to comply with the directions of the Commission to refund the balance amount of consumer contribution to the respective consumers and any failure to comply with the same will clearly attract action under Section 142 of the Electricity Act, 2003. You are also directed to submit a compliance report within 15 days.*

8.17 With respect to Respondent No. 3, TAJSATS Air Catering Ltd. requested BSES Rajdhani Power Ltd. vide its letter dated 17.06.2016 to refund excess amount deposited against scheme KRO5LA2044. The consumer requested to refund the excess amount along with interest at 12% p.a. from the date of completion of work as per the certificate from Electrical Inspector.

8.18 The Appellant BSES Rajdhani Ltd. vide its letter dated 06.09.2016 replied to TAJSATS Air Catering Ltd. that the Appellant has utilized the unspent amount of consumer contribution received by the

Appellant up to and including FY 2006-07 towards funding capex schemes in the ARR from FY 2002-03 to FY 2006-07. Therefore, there is no unutilized consumer contribution lying with the Appellant. As such any refund could be made only after the passing of suitable orders in this regard and after DERC provides a recasting of previous ARRs as also the means of funding the refund as directed by the Tribunal.

8.19 Aggrieved by the letter dated 12.01.2017, the Appellants filed this appeal and prayed for:

a) Set aside the Impugned letter/Order dated 12.01.2017;

b) Issue appropriate instructions, directions to the Respondent No. 1 Delhi Electricity Regulatory Commission, to comply with the remand order of this Tribunal dated 23-2-2015 and to examine the Appellant's accounts showing that excess amount of consumers contribution has been duly considered in the ARRs for FY 2002-03 onwards in reducing the retail supply tariffs;

c) Direct the Respondent No. 1, Delhi Electricity Regulatory Commission to hear the matter and pass consequential orders;

d) Pass such other and further orders as this Tribunal may deem fit and proper in the circumstances of the case.

9. QUESTIONS OF LAW

Issue No. 1: Whether the State Commission/Respondent Commission erred in issuing the impugned letter/order by the Secretary of the Respondent Commission under the limited powers, duties and responsibilities available under the Electricity Act, 2003?

Issue No. 2: Whether the State Commission erred in passing the impugned order dated 12.01.2017, ignoring the direction of this Tribunal to the Respondent Commission vide its Judgment dated 23.02.2015, to hear the matter and pass consequential order?

Issue No. 3: Whether the State Commission erred in issuing impugned order inasmuch as the Respondent Commission had itself considered the consumer contribution as a means of finance in the ARR from FY 2002-03 onwards giving consumers the benefit of lower tariff?

Issue No. 4: Whether the State Commission erred in incorporating Section 142 of Electricity Act, 2003 in the impugned letter/order without following the detailed procedure laid down by this Tribunal's Judgment dated 19.04.2011 in Appeal No. 183 of 2010?

10. We have heard the arguments of Mr. Buddy A. Ranganadhan, learned counsel for the Appellant and Mr. Pradeep Misra, learned counsel for the Respondent Commission and gone through the submissions made by them.

11. Gist of the submissions made by learned counsel for the Appellants is as follows:

11.1 that the impugned letter/order issued by the Respondent Commission directing the Appellant to refund the balance amount of consumer contribution to the respective consumers with a notice of penalty for failure of the same, is in clear violation of the principles of natural justice and in clear violation of the judgment of this Tribunal dated 23.02.2015 wherein the matter was remanded

back to the Respondent Commission by this Tribunal. The Respondent Commission was directed to examine the accounts of the Appellant to find out whether the excess amount of consumers contribution has been duly considered in the ARR from FY 2002-03 onwards in reducing the retail supply tariffs.

11.2 that the Respondent Commission is in blatant disregard of the directions of this Tribunal under the aforesaid judgment dated 23.02.2015 wherein the matters were remanded to the Respondent Commission to examine the accounts of payments. In light of the aforesaid clear cut directions of this Tribunal which the Respondent Commission has completely ignored in defiance of well established principles of law and sought to bypass the exercise which the Respondent Commission was directed by this Tribunal to undertake.

11.3 that the Respondent Commission has completely ignored that this Tribunal has recorded a clear cut finding on a question relating to the merits of the case and remanded the matter to the Respondent Commission for a fresh decision in the light of the findings given by this Tribunal.

11.4 that this course taken by the Respondent Commission vide its impugned letter orders dated 12.01.2017 is prejudicial to the

interest of the Appellant and makes the remand an exercise in futility in view of a clear finding recorded in favour of the Appellant by this Tribunal on a question relating to the merits of the case.

11.5 that In view of the remand order of this Tribunal, it was open to the Appellant, who is entitled to be heard, to raise all contentions which are open to it in law. However, the Respondent Commission issued both of its impugned letter orders dated 12-1-2017 directing the Appellant to refund the balance amount of consumer contribution to the respective consumers with a notice of penalty for failure of the same, in clear violation of the principles of natural justice and in clear violation of the aforesaid judgment of this Tribunal dated 23-2-2015. It is submitted that the Respondent. Commission being a statutory authority was duty bound to proceed in accordance with law on the matter of a clear cut remand by this Tribunal. The Respondent Commission misdirected itself in the matter of how to proceed in the case of remand before it and to exercise its jurisdiction within the four corners of the Statute. It is submitted that the aforesaid remand order of this Tribunal was not challenged by the Respondent Commission and therefore the same has attained finality and when an order attains finality it becomes binding both in terms of its implementation and

methodology to be adopted. In view of the fact that the order of this Tribunal dated 23.02.2015 attained finality, the Respondent Commission could not have gone beyond the terms of the remand order and/or failed in carrying into effect the said remand order.

11.6 that no hearing had been held by the Respondent Commission with regard to refunding of Consumer Contribution by the Appellant and the letter orders had been sent pursuant to certain inquiries made by the Respondent Commission which had been duly responded to by the Appellant.

11.7 that the Respondent Commission has in its various tariff orders prescribed the methodology and priority for treating the means of finance available with the Appellant. As per the said methodology, the unutilized consumer contribution for capital works has been deemed to be a part of the means of finance for the Appellant thereby resulting in a lower tariff for the consumers at large.

11.8 that it is the case of the Appellant that in the event the Appellant is asked to refund the consumer contribution to consumers, then an equivalent adjustment in tariff ought to be made. The same is on account of the fact that since the benefit has passed on the consumers at large, in the event, the Appellant is asked to refund unspent consumer contribution; it will result in the Appellant

incurring the liability twice over which will adversely affect the already precarious financial position of the Appellant.

11.9 that the Appellant submits that it has not been enriched let alone been unjustly enriched in any manner whatsoever and hence no restitution of the unspent balance of consumer contribution may now be sought by the Respondent Commission.

11.10 According to the judgment of this Tribunal and the Supreme Court, the Respondent Commission should have first found out whether there are prima facie allegations in the petition or complaint or information received, that the Appellant has contravened the relevant provisions or violated the directions issued by the Respondent Commission. Once the Respondent Commission is satisfied that a case is made out, only then can it issue a show cause notice. The second step entails, that after the issuance of show cause notice, the Person in question should be given an opportunity to present its case and answer all the allegations raised against its conduct. However in the present case, the Impugned letter/Order merely states that non compliance of the directions of the Respondent Commission shall attract action under S. 142 of EA, 03'. Therefore the Impugned Letter/Order does not leave any scope for the Appellant to present its case, and

be given a fair hearing by the Respondent Commission. In fact the Impugned Letter/Order is not in the nature of a show cause notice as it merely suggests a threat of penalty under S. 142 instead of giving the Appellant a fair chance to be heard. It is submitted that the language of the Impugned Order/Letter does not address any specific violations committed by the Appellant but merely directs the Appellant to pay the balance of consumer contribution and failure of which will attract penalty under S. 142. It is therefore submitted that the Respondent Commission has threatened the Appellant with penalty proceedings under S. 142 of the E.A. 03' without following the due process of law. On this ground alone the Impugned Letter/Order must be set aside.

11.11 The Respondent Commission has failed to perform its statutory function to comply with this Tribunal's judgment dated 23.02.2015 where pursuant to the directions contained in the aforesaid judgment of this Tribunal, the matters stood remanded to the Respondent Commission for hearing the matter on the facts and figures and to pass further orders on the issue of refund, if any, of the excess consumers contribution, as also at the same time recasting of ARRs of the BSES DISCOMS the Appellant to permit, if at all, the refund of such consumer contribution. It is submitted

that despite the Respondent Commission having vide its order dated 23.12.2015 in Petition No.1/3/2010 inter alia directing that the Respondent Commission would after considering the data submitted by the Appellant, passed orders with regard to refund of consumers contribution as well as the recasting of previous ARRs of the DISCOMS, went ahead and issued its directions by the impugned letter orders dated 12.01.2017 to refund the balance amount of consumers contribution with consequences of penal action under section 142 for failure to make such a refund. As such, any such refund could be made only after the passing of suitable orders in this regard and after the Respondent Commission provides a recasting of previous ARRs as also the means of funding the refund as directed by this Tribunal. The Respondent Commission also completely ignored the Appellant's letter dated 06.09.2016 to M/s. TAJSATS Air Catering Ltd., where the above position was explained by the Appellant while not acceding to the request for refund in the absence of suitable orders / arrangement being made by the Respondent Commission.

11.12 It is in the aforesaid background, that the Appellant is constrained to point out that not only has the Respondent Commission failed to perform its statutory functions, which includes complying with the

remand order of this Tribunal vide its judgment dated 23.02.2015, but has also miserably failed to correctly interpret the aforesaid judgment of this Tribunal. The Appellant is constrained to point out that this Tribunal in its order dated 25.05.2015 in O.P. No.1 of 2015 and I.A. No.195 of 2015, inter alia, observed as follows:

> "*In the hierarchy of the Court, there is a Committee of Discipline and such discipline should be maintained by all, otherwise that would lead to chaos in the whole country, particularly in the Power Sector, if such trend of slackness or arbitrariness is allowed to the State Commissions like Delhi Electricity Regulatory Commission in the present case."*

11.13 that in the event the Respondent Commission is not directed to implement the aforesaid judgment of this Tribunal dated 23.02.2015, the same will cause undue hardship to the Appellant, inasmuch as the Appellant is being asked to refund the unutilized and unclaimed consumer contribution amount along with interest, which has already been used as a means of finance by the Respondent. Commission whilst determining tariff and as a result of the same it is not a case where the Appellant has retained the unutilized funds with themselves and have unduly enriched themselves. Hence, an additional burden will be imposed on the Appellant as a result of the non-compliance by the Respondent Commission of the aforesaid judgment of this Tribunal.

12 Gist of the submissions made by learned counsel for Respondent No. 1, is as follows:

12.1 that the present appeal is not maintainable as there is no order passed by the Commission only on the basis of administrative instructions, Appeal will not lie under Section 111 of Electricity Act, 2003 which reads as follows:

"111. Appeal to appellate Tribunal – (1) any person aggrieved by an order made by an adjudicating officer under this Act (except under Section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate Tribunal for Electricity."

12.2 that the Appellant itself is contending that it is an administrative instructions issued by the Secretary and therefore the Secretary could not have made reference to Section 142 of the Electricity Act, 2003. Thus, the Appellant on one hand contending that it is an administrative direction and on the other hand has filed an appeal. Since it is only administrative directions, hence Appeal is not maintainable.

12.3 that the Appellant has filed the instant Appeal and also an Original Petition No. 1 of 2017 before this Tribunal at the same time. Hence, the Appellant be permitted to seek both the remedies simultaneously and on this ground alone the instant appeal is liable to be dismissed.

In view of aforesaid submissions the Appeal filed by the Appellant is liable to be dismissed.

13. Gist of the submissions made by learned counsel for Respondent No. 2, is as follows:

13.1 that DERC has failed to perform its statutory function to comply with this Tribunal Order dated 23.02.2015 where pursuant to the directions contained in the aforesaid judgment of this Tribunal, the matters stood remanded to DERC for hearing the matter on the facts and figures and to pass further orders on the issue of refund, if any, of the excess consumer contribution, as also at the same time recasting of ARRs of TPDDL, to permit, if at all, the refund of such consumer contribution.

13.2 that the Secretariat of DERC despite such clear directions from this Tribunal, has gone ahead with issuing letter dated 12.01.2017 to refund the balance consumer contribution with a consequence of penal action under Section 142 of the Electricity Act, 2003 in case of failure to make such a refund.

13.3 that it is pertinent to note that the consumer contribution for the Policy Direction Period (hereinafter referred to as **"PDP")** has been used as means of finance on actual receipts basis. Therefore, any refund of the amount (consumer contribution) will

have a corresponding effect on the Return on Equity, Depreciation, Carrying Cost, etc. including other eligible entitlement. It is therefore, important to point out that any refund that may take place, can only happen once the entire books of the Distribution Licensees are being recast.

13.4 The TPDDL adhering to the above directions supplied a compliance report vide its letter dated 20.05.2016. TPDDL further vide its letter dated 06.02.2017 submitted data as required by DERC. It was further re-iterated that an amount of INR 88.84 crores had already been refunded/adjusted against total 465 schemes with respective consumers as on 31.03.2016 and that TPDDL has already taken care of the concern which has been raised by DERC in its letter dated 12.01.2017.

13.5 that this Tribunal may also appreciate that the refunding/adjustment of money to the respective consumers without interest owing to the ambiguity in the determination and calculation of interest due to the lack of response on part of DERC regarding the date from which the interest shall begin to be calculated. A guidance and clarity in this regard was also sought by TPDDL vide its letter dated 15.11.2012, however, till date there has been no clarity that has been provided by DERC.

13.6 that the directions of DERC are arbitrary and unreasonable in as much as it directs the Distribution Licensee to refund monies received towards consumer contribution on a retrospective basis, when the same have been earlier allowed to be utilized in the ARR by DERC itself. As such, any such refund could be made only after the passing of suitable orders in this regard and after the DERC provides a recasting of previous ARRs as also the means of funding the refund as directed by this Tribunal.

13.7 The DERC ought to have performed its statutory function first, i.e. of recasting the ARRs of the Distribution Licensees, including complying with the specific directions of this Tribunal (Order dated 23.02.2015). Unless DERC adopts the mechanism and procedure indicated by this Tribunal in this regard, it will cause unnecessary hardship to the TPDDL.

13.8 It must be understood that the amount which DERC has asked to be refunded is the one which has already been used as a means of finance by DERC itself whilst determining tariff and as a result of the same it is not a case where the Distribution Licensee has retained the said unutilized funds with themselves and have unduly enriched themselves. The benefit, if any, has been passed on to the consumers only.

Hence, an additional burden will be imposed on the TPDDL, if the refund is made and in case of non-compliance, penalty under Section 142 of the Electricity Act, 2003 is imposed.

In view of the above submissions and that made orally during the course of the proceedings, we humbly submit that the present appeal may be disposed-off in terms of the submissions made herein above.

14. Our Consideration and Conclusion

After having a careful examination of the issues brought before us for our consideration, our observations are as follows:

All the issues are inter-related and hence we are taking up all issues together for consideration.

14.1 The contention of the Appellants is that the Delhi Electricity Regulatory Commission failed to implement this Tribunal's judgment dated 23.02.2015 where the matters were remanded to the Respondent Commission giving liberty to Appellants 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 tariff to the State Commission (DERC). Further, the Appellants stated that the Respondent Commission misinterpreted

the aforesaid judgment of this Tribunal negotiating the portion that refund of balance of consumer contributions is to be done only after recasting of ARRs.

14.2 We have gone through the submissions and observed that the Respondent Commission in their Order dated 23.12.2015 directed the Appellants to come up with the details of balance consumer contribution in each case and from which date it has to be refunded. The relevant part of the order is quoted below:

4. On the issue of how to arrive at the exact figure of the amount to be refunded to the respective consumers and from what date the Commission directed the Petitioners to come up with the details of balance of consumer contribution in each case and from which date it has to be refunded. The Commission directed that this exercise should be completed within two months. Regarding re-casting of ARR for previous years, the Commission directed the Petitioners to submit the details of such cases, where the unutilized consumer contribution for assets capitalized were considered as means of finance for other capital schemes of the Petitioners. This information will be utilized for passing orders on details of refund of consumer contribution as well as re-casting of previous ARR's in the next tariff order.

Thus, the State Commission as per this Tribunal's Judgment dated 23.02.2015, directed the Appellants to submit case-wise details of consumers'' contribution from 2002-03 to 2006-07 and unspent consumers' contribution from FY 2007-08 to 2011-12.

Accordingly, the Appellants submitted the details as per various correspondences occurred between the Commission and

Appellants but the Commission failed to hear the Appellants' submissions and issued the impugned letter/order dated 12.01.2017.

14.3 Let us examine this Tribunal's Judgment dated 23.02.2015 against the appeal Nos. 109/2014, 110/2014 and 111/2014. The relevant part of the judgment is quoted below:

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.

Thus, in the above Judgment, the matter was remanded back to the Commission and directed the Commission to obtain the details of consumers' contribution from 2002-03 to 2006-07 and unspent consumer's contribution considered from 2007-08 to 2011-12 and

examine whether the consumers' contribution actually given any relief in the tariff orders from FY 2002-03 to 2011-12. Instead, the State Commission issued impugned letter/order with a penalty clause signed by Secretary of the Commission.

14.4 Let us examine this Tribunal's Judgment dated 10.05.2010 in the matter of Damodar Valley Corporation vs. CERC and others, where this Tribunal laid down the principles of limited remand. The relevant part of the Judgment is quoted below:

"(i) When a matter if remanded by the superior court to subordinate court for rehearing in the light of observations contained in the judgment, then the same matter is to be heard again on the materials already available on record. Its scope cannot be enlarged by the introduction of further evidence, regarding the subsequent events simply because the matter has been remanded for a rehearing or do novo hearing.

(ii) The court below to which the matter is remanded by the superior court is bound to act within the scope of remand. It is not open to the court below to do anything but to carry out the terms of the remand in letter and spirit.

(iii) When the matter comes back to the superior court again on appeal after the final order upon remand is passed by the Court below, the matter/issues finally disposed of by order of remand, cannot be reopened.

(iv) Remand order is confined only to the extent it was remanded. Ordinarily, the superior court can set aside the entire judgment of the court below or it can remand the matter on specific issues through a "Limited Remand Order". In case of Limited Remand Order, the jurisdiction of the court

below is limited to the issue remanded. It cannot sit on appeal over the Remand Order.

(v) If no appeal is preferred against the order of Remand, the issues finally decided in the order of remand by the superior court attains finality and the same can neither be subsequently re-agitated before the court below to which remanded nor before the superior court where the order passed upon remand is challenged in the Appeal.

(vi) In the following cases, the finality is reached:

(a) The issue being not challenged before the superior court, or

(b) The issue challenged but not interfered by the superior court, or

(c) The issue decided by the superior court from which no further appeal is preferred.

These issues cannot be re-agitated either before the court below or the superior court".

Thus, we noticed that the State Commission neither followed the principles laid down in this Tribunal's Judgment in the matter of Damodar Valley Corporation vs. Central Electricity Regulatory Commission & Ors. dated 10.05.2010 in Appeal No. 146 of 2009 nor followed their own Order dated 23.12.2015, issued impugned letter/order dated 12.01.2017 to the Appellants with a penalty clause under Section 142 of Electricity Act, 2003.

14.5 Let us examine the procedure to be followed for issuing a notice under Section 142 of Electricity Act, 2003. The Section 142 of Electricity Act, 2003 is quoted below:

142. Punishment for non-compliance of directions by Appropriate Commission. – *In case any complaint is filed before the Appropriate Commission by any person or if that Commission is satisfied that any person has contravened any of the provisions of this Act or the rules or regulations made there under, or any direction issued by the Commission, the Appropriate Commission may after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of penalty, which shall not exceed one lakh rupees for each contravention and in case of a continuing failure with an additional penalty which may extend to six thousand rupees for every day during which the failure continues after contravention of the first such direction.*

21. *In the 2004 (2) SC 783 Karnataka Rare Earth and Another vs. Senior Geologist, Department of Mines & Geology and another the Hon'ble Court held as under:*

" An order imposing penalty for failure to carry out the statutory obligation is the result of a quasi-criminal proceeding and penalty will not ordinarily be imposed unless the party obliged has either acted deliberately in defiance of law or was guilty of contumacious or dishonest conduct or acted in conscious disregard of its obligation".

22. *The Hon'ble Supreme Court in these decisions has culled out the following mandatory requirements to be satisfied especially in the penalty proceedings:*

(i) It is quite essential that a party facing the penalty proceedings should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of the natural justice.

(ii) A show cause notice is the foundation on which the Department has to built-up its case. Therefore, a show cause notice shall contain the allegations. If the allegations in the show cause notice are not specific, or vague or unintelligible, then that can be taken as a ground to hold that the said notice was not legally valid as it had not given adequate opportunity to the person concerned to meet the allegations indicated in the show cause notice.

(iii) The first and foremost principle is what is known as audi alteram partem rule. The notice is the first limb of this principle. It must be precise and unambiguous. It should apprise the party determinatively the case he has to meet. Adequate time has to be given to the person concerned so as to enable him to make his representation to meet the allegations contained in the notice. In the absence of the notice of the kind and such reasonable opportunity, the final order passed becomes wholly vitiated.

(iv) The principles of natural justice are those which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.

25. *The perusal of this section would reveal that the State Commission should follow the following procedure before finding the person guilty of violation of provisions or directions and imposing the penalty as contemplated under Section 142 of the act:*

"(i) When a complaint or a Petition is filed by a person before the Appropriate Commission against a person for taking action under Section 142 of the Act or when an information is received, the Appropriate Commission has to first find out as to whether there are prima facie allegations in the petition or complaint or information received, that the person has contravened the relevant provisions or violated the directions issued by the Appropriate Commission. In other words, the

Appropriate Commission, before entertaining the petition or complaint for taking action under Section 142 of the Act, at the outset has to satisfy itself by applying its mind as to whether the allegations contained in the said Petition or complaint or information would constitute contravention or violation of any of the provisions of the Act or rules or regulations made there under or directions issued by the Appropriate Commission which necessitates the issuance of show cause notice to conduct inquiry under section 142 of the Act. Thus, the satisfaction to entertain the complaint is first and foremost requirement.

(ii) After arriving at such a satisfaction, the Appropriate Commission shall entertain the petition and issue notice to the person concerned intimating that the Appropriate Commission is satisfied with the particulars of the specific allegations that the person concerned has violated the provisions or directions and calling upon him to show cause as to why that person be not proceeded with under section 142 of the Act and why the penalty be not imposed upon him for such allegation of the contravention or a violation thereby, the Appropriate Commission is mandated to give opportunity to the said person to offer his explanation through his reply to the charge levelled against him referred in the show cause notice by giving sufficient time.

(iii) On receipt of the said explanation offered by the person concerned, the Appropriate Commission has to scrutinize and find out as to whether his explanation is satisfactory or not. If it is satisfied, it may drop the proceedings under Section 142 of the Act. On the other hand, if the Appropriate Commission feels that the explanation is not satisfactory, the Appropriate Commission can summon him to appear before the Commission and frame the specific charges in his presence and intimate him that the Appropriate Commission propose to conduct inquiry with regard to those charges and give opportunity to the person concerned of hearing to offer his further explanation and to produce materials to disapprove those charges.

(iv) After considering the reply and evidence available on record and after hearing the parties, the Appropriate Commission then has to find out as to whether those charges framed against him have been proved or not in the light of the submission and the evidence produced by the person concerned. If the Appropriate Commission is of the opinion that the charges framed are not proved, the proceedings at that stage can be dropped. On the contrary, if the Appropriate Commission is satisfied that those charges have been proved, it may find him guilty and impose penalty.

***26**. The above procedure in penalty proceedings would clearly indicate that the State Commission shall first find out the prima facie satisfaction and then issue show cause notice to the person concerned who has to file reply and thereafter the State Commission has to frame charges and give further opportunity to the person concerned to place materials to disprove the charges and then decide the case on the basis of the evidence available on record.*

***27.** From the above, it is clear that the State Commission has to arrive at prima facie satisfaction, that it is a fit case for initiation of Section 142 of the proceedings and then it has to record its satisfaction in the show cause notice in respect of the specific allegations and send it to the person for the purpose of giving an opportunity to such a person to defend or rebut such specific allegation. These procedures are contemplated to follow the principle of natural justice by giving full opportunity to the Appellant to defend the allegation.*

***28.** Thus, there are two phases. (i) One is to arrive at a satisfaction to issue show cause notice while initiating penalty proceedings and (ii) Next is, after issuance of the show cause notice, the person must be heard to arrive at a satisfaction whether such contravention has actually been committed or not. Only then, the State Commission can come to the conclusion whether to find him guilty or not under Section 142 of the Act.*

Thus, it became evident that the show cause notice should contain (i) specific allegations of violation, (ii) prima facie satisfaction over the said allegations (iii) issuance of show cause notice in respect of specific allegations by way of giving an opportunity to the concerned person to rebut those allegations. All these three ingredients must find place in the notice which is a show cause notice.

We have gone through the submissions and noticed that the State Commission without following the procedure laid down in the above Hon'ble Supreme Court's Judgment issued the impugned letter dated 12.01.2017. We find serious lapses in the action of the Respondent Commission.

The State Commission without following the principles of remand matter and also without following the procedure for issuance of penalty notice issued notice/impugned letter to the Appellants under Section 142 of Electricity Act.

14.6 We have also noticed that the Respondent Commission while determining the tariff order from FY 2002-03 onwards, a methodology was followed and in the methodology, the consumers' contribution was considered as " Means of Finance" while arriving ARR of respective years from 2002-03 onwards.

The Respondent Commission raised the issue regarding refund of consumer contribution to the respective consumers only after the issue was raised by some of the stake holders during the public hearing held between 08.01.2008 and 11.01.2009.

However, we once again direct the State Commission (DERC) to examine the submissions made by the Appellants with respect to consumers' contribution and give an opportunity to the Appellants to place their case on merits.

Accordingly, we set aside the impugned letter dated 12.01.2017. Thus, all the issues are decided in favour of the Appellants.

ORDER

In view of our above conclusion, the Appeals are allowed and the impugned Order letter dated 12.01.2017 is set aside. The Appeal Nos. 103 of 2017, 104 of 2017 and IA Nos. 303 of 2017, 304 of 2017 are disposed of with no cost. We direct DERC to follow instructions given in this Tribunal's Judgment dated 23.02.2015.

Pronounced in open Court on this **15th day of May, 2017.**

(I.J. Kapoor)	(T. Munikrishnaiah)	(Justice Ranjana P. Desai)
Technical Member	Technical Member	Chairperson

√ **REPORTABLE/~~NON-REPORTABLE~~**