Before the Appellate Tribunal for Electricity (Appellate Jurisdiction)

Appeal No. 142 & 147 of 2009

Dated 12th July, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

Appeal No.142 of 2009

In the matter of:

BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place
New Delhi -110 019 .... Appellant

Versus

1. **Delhi Electricity Regulatory Commission**
   Viniyamak Bhawan, C-Bolck, Shivalik
   Malviya Nagar, New Delhi -110 017

2. **Government of National Capital Territory of Delhi**
   (Department of Power)
   Delhi Secretariat, 8th Level, B-Wing
   New Delhi -110 002 .... Respondents

Appeal No.147 of 2009

In the matter of:

BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma
Delhi-110 092 ... Appellant

Versus

1. Delhi Electricity Electricity
Viniyamak Bhawan, C- Block Shivalik
Malviya Nagar, New Delhi-110 017

2. Government of National Capital Territory of Delhi
(Department of Power)
Delhi Secretariat, 8th Level, B-Wing
New Delhi-110 002 **... Respondents**

Counsel for Appellant(s)	Mr. J.J. Bhatt, Sr. Adv. Mr. Amit Kapur Mr. Mansoor Ali Shoket Ms. Sugandha Somani Mr. Rajeev Choudhary Mr. Rishi Natrajan, Mr. R.C. Natarajan Ms. Prachi
Counsel for the Respondent(s):	Mr. A.N. Haksar, Sr. Advocate Ms. Purnima Sapra Mr. Udyan Jain & Ms. P. Siwan Mr. Pradyuman Dubey

JUDGMENT

PER HON'BLE MR. RAKESH NATH, TEHNICAL MEMBER

The Appeal nos. 142 and 147 of 2009 have been filed by BSES Rajdhani Power Limited and BSES Yamuna Power Ltd. respectively against the respective orders dated 28.5.2009 passed by the Delhi Electricity Regulatory Commission for True Up of the FY 2007-08

and Aggregate Revenue Requirement for the FY 2009-10.

2. The Appellants are the distribution licensee in the National Capital Territory of Delhi and successors-in-interest of the erstwhile Delhi Vidyut Board. Respondent nos. 1 and 2 in both the Appeals are the State Commission and the Department of Power of Government of NCT of Delhi respectively.

3. The brief background and facts of the cases are as under:

3.1. On 30.5.2007 the State Commission notified the Multi Year Tariff Regulations (MYT Regulations). On 23.2.2008 the State Commission issued MYT tariff order for the Control Period FY 2008-11.

3.2. The Appellants filed the respective Petitions for their Annual Revenue Requirement for the FY 2009-10, true up of expenses for FY 2007-08 and revised

estimates for FY 2008-09 and 2009-10. After the public hearing, the State Commission passed the respective orders on 28.5.2009. Aggrieved by the orders of the State Commission, the Appellants have filed these Appeals. As issues involved in both the orders are common, except an additional issue raised in Appeal No. 142 of 2009, a common Judgment is being rendered.

4. The Appellants have raised the following issues in these Appeals:

4.1. **Overestimation of power availability from new stations**: The State Commission has over-estimated the availability of power from future power stations to be commissioned from which power was to be made available to the distribution companies of the Appellants resulting in improper computation of

surplus power available with the Appellants for sale to other utilities. This resulted in accumulation of huge revenue gap. The true up has not been done, so far.

4.2. **Higher plant load factor assumed for new generating stations:** The State Commission assumed a high PLF at 90% for the new thermal plants against its own Regulations and the Regulations of the Central Commission. This also resulted in improper computation of the surplus power and ARR and consequently resulted in the huge gap in the revenue of the Appellants.

4.3. **Higher PLF assumed for IPGCL (GT) Station**: The State Commission computed the energy availability from IPGCL (GT) station based on the PLF of 70% approved by the State Commission in the MYT order for IPGCL, overlooking

the actual performance of the station. This also contributed to the revenue gap for the Appellants.

4.4. **Lower power purchase cost assumed for the FY 2009-10:** The State Commission included the increase in power purchase cost from NTPC stations taking into account the Central Commission's Regulations 2009 but ignored the revised tariff orders issued by the Central Commission subsequent to the MYT order dated 23.2.2008 and the facts placed by the Appellants before it regarding the power purchase cost from NTPC stations.

4.5. **The amount earned on account of late payment surcharge considered as part of revenue:** The State Commission has considered the amount of Rs. 31.77 crores earned on account of Late Payment Surcharge as part of revenue while truing up the

Annual Revenue Requirement for FY 2007-08. The MYT Regulations allow working capital on a normative basis to take care of normal time taken in payment of bills by the consumers within due date. The Appellants have to arrange additional funds for default in payment by the consumers in actual practice which is not covered in the working capital. According to the Appellant this issue has been covered by this Tribunal's Judgment 2010 ELR (APTEL) 0891 in the matter of North Delhi Power Limited vs. DERC.

4.6. **Charging the consumers of the Appellant with the claim of Delhi Transco Ltd. an account of revised power purchase expenses liability for the past period:** The Appellant has since conceded the above issue in view of the submissions made by the State Commission, without prejudice to its rights to contest the final order of the State Commission.

4.7. **Allowance of carrying costs lower than the borrowing cost:** The State Commission has allowed carrying cost @ 9% p.a. for the unamortized revenue gap upto the FY 2007-08 which is much lower than the cost of debt incurred by the Appellant. According to the Appellant this issue is covered under the Judgment of this Tribunal in 2010 ELR (APTEL) 0891 in the matter of North Delhi Power Ltd. Vs. DERC.

4.8. **Failure to true up expenses for the FY 2008-09:** This issue has been raised only in Appeal No. 142 of 2009. The State Commission failed to true up expenses for the FY 2008-09 despite submission of the actual/audited accounts by the Appellant which is contrary to the MYT Regulations.

4.9. **Failure to True up the expenses for the FY 2007-08 for the period 1.4.2007 till the commencement of the MYT Tariff Order dated 23.2.2008:** The State Commission acted in contravention of the Regulation 12.1 of the MYT Regulations by not truing up the expenditure for the period between 1.4.2007 and commencement of MYT tariff order i.e. 23.2.2008 on the basis of the actual/audited information.

4.10. **Inclusion of the amount earned on unutilized return of past period as Revenue and Tariffs in the current year:** The State Commission has wrongly considered the amount of Rs. 15.68 crores earned by the Appellant as interest on its unutilized return and free reserve of the past period, as a part of revenue while truing up the financials for the FY 2007-08. This issue has already been decided by the Tribunal in

its Judgment reported in 2010 ELR (APTEL) 0891 in the matter of North Delhi Power Ltd. Vs. DERC.

4.11. **Inflated Average Billing Rate for the FY 2009-10:** The State Commission has assumed a distorted average billing rate while determining the Annual Revenue Requirement of the Appellants by assuming a higher rate than the actual average billing.

4.12. **Failure to true up the impact of increase in CPI/WPI on O&M expenses:** The State Commission has arbitrarily excluded the impact of increase in CPI/WPI while deriving the inflation index for computation of O&M expenses for future years in contravention to Regulation 5.4 of the MYT Regulations.

4.13. **Considering the interest capitalized as a part of the ARR:** The State Commission has wrongly

considered the interest capitalized as part of the ARR in contravention to its own Regulations. The State Commission in its reply dated 18.1.2010 has conceded the issue and has indicated that it would correct the error in the next true up order.

4.14. **Considering the amount earned on account of power purchase rebate as a part of revenue:** The State Commission has wrongly included the amount earned by the Appellant on account of power purchase rebate available for payment of dues for power purchase as a part of its revenue. This issue has also been covered in the Judgment of the Tribunal dated 30.7.2010, reported in 2010 ELR (APTEL) 0891.

4.15. The issue regarding error in computation of 'K' factor for calculation of R&M expenses raised in the Appeals has been conceded by the Appellants.

5. On the remaining issues pressed in the Appeals, the learned counsel for the Appellants, Shri Amit Kapoor advanced his detailed arguments assailing the impugned orders. On the other hand, the learned Senior counsel for the State Commission, Mr. A. N. Haksar argued extensively in support of the findings of the State Commission. After carefully considering the contentions of both the parties, we have framed the following questions for consideration:

(i) Whether the State Commission has erred in over-estimating the power availability from the new power stations resulting in improper computation of the ARR?

(ii) Has the State Commission assumed a higher Plant Load Factor for the new generating stations in contravention to the Regulations?

(iii) Has the State Commission erred in assuming higher Plant Load Factor for IPGCL (GT) Station without considering the ground realities?

(iv) Has the State Commission erred in not considering the realistic power purchase cost from NTPC stations taking into account the impact of the orders of the Central Commission subsequent to the MYT order dated 23.2.2008?

(v) Has the State Commission erred in considering the late payment surcharge as a part of the Revenue of the Appellants?

(vi) Has the State Commission allowed a lower interest rate for carrying cost without considering the market lending rates?

(vii) Has the State Commission erred in not allowing true up for FY 2008-09 as claimed by the Appellant in Appeal No. 142 of 2009?

(viii) Should the State Commission have trued up the expense for FY 2007-08 for the period between 1.4.2007 and commencement of the MYT Tariff Order dated 23.2.2008 based on the actual/audited information?

(ix) Was the State Commission wrong in considering the amount earned on the unutilized return of the past period as a part of the ARR?

(x) Has the State Commission assumed an inflated revenue recovery from the consumers in the ARR?

(xi) Was the State Commission correct in not taking into account the impact of increase in CPI/WPI on O&M expenses in the true-up?

(xii) Has the State Commission erred in considering the amount of rebate availed by the Appellants on purchase of power as part of the revenue?

6. The first issue is regarding overestimation of power availability from new power stations.

6.1. According to the learned counsel for the Appellants, the commercial operation date of a number of new generating units of NTPC and DVC during the FY 2009-10 were wrongly shown advanced

in contravention to the reports of the Central Electricity Authority (CEA), thus over-estimating energy availability by about 447 Million Units (39%).

6.2. According to the learned counsel for the State Commission, while projecting the CODs of the generating units, the State Commission had relied upon the latest report of the CEA as available at the time of passing the Impugned Order and also upon the enquiries made from the concerned officials at the said generating stations. If there has been delay in actual commissioning of the units, the State Commission could not be held responsible. In any case, the actual power availability for these units and power purchase cost would be trued up.

6.3. The State Commission in the Impugned Order has indicated that for computing the energy availability

from the new generating stations, it has considered the expected commercial operation data based on the information available on the website of CEA. According to Shri Amit Kapur, learned counsel for the Appellant, the wrong CODs assumed in respect of Dadri Units 5 & 6 and Chandrapura Units 7 and 8 caused overestimation of about 447 Million Units of energy.

6.4. We have noticed from the CEA report submitted by the learned counsel for the State Commission that the COD of Dadri Units 5 and 6 are indicated as January 2010 and June 2010 respectively. Thus, availability of energy from unit no. 6 at Dadri should not have been considered in the ARR of the Appellants for the FY 2009-10. Further for unit 5, instead of assuming energy availability from January 2010 as per

the CEA report, the State Commission has considered energy availability from November 2009.

6.5. The State Commission in its reply and written submissions has now tried to justify the energy availability computed from Dadri Units 5 and 6 by contending that after considering the date of synchronization of units 5 & 6 as Sept., 2009 and December, 2009 respectively as given in CEA report and from the verbal enquiries made with the officials of the generating stations as well, it considered energy availability from these units from November, 2009 and March, 2010 respectively.

6.6. We do not find any force in the contentions of the State Commission in justifying the computation of energy availability from Dadri Units 5 & 6. In this

connection, we shall first of all reproduce below the relevant portion of the Impugned Order:

"4.86. The Commission has analyzed the petitioner's submission of energy availability from future plants during FY 09-10 and is of the view that the Petitioner has shown a lower estimate of power available from the new stations.

4.87. For computing the energy availability from the new generating stations, the Commission has considered the expected commercial operation date for these generating stations based on the latest information available on the website of CEA regarding broad status of central sector thermal projects.

4.88. The Commission has considered energy availability from the CSGS future generating stations based on 90% PLF for thermal plants, design energy for hydro plants and 70% PLF for nuclear plants. Auxiliary consumption has been

assumed at 9% for coal based plants, 1% for hydro plants and 9.5% for nuclear plants".

Thus, it is clear from the above order that the State Commission has proposed to consider the energy availability from the new generating stations after considering the expected Commercial Operation Date (COD) as available from the website of the CEA and plant load factor of 90% has been assumed for the Central Sector Generating Stations. However, actually the date of commissioning of units 5 & 6 at Dadri were advanced with respect to CEA report in the Impugned Order.

6.7. A different contention is now being urged by the State Commission that it had considered date of synchronization as given in the CEA report and as obtained verbally directly from the generating station. We feel that the position of the State Commission

before the Tribunal in the Appeal is not that of a contesting party in an adversarial dispute. On the other hand we expect the State Commission to assist the Tribunal in deriving the correct conclusions and findings. The State Commission is not expected to give arguments in the Appeal which are beyond and contrary to its own recordings in the Impugned Order. Even if it is assumed that the State Commission had taken date of synchronization for Units 5 & 6 instead of COD, the energy availability after synchronization till the COD is infirm and cannot be assumed at 90% PLF as considered in the Impugned Order. From synchronization till the successful trial run operation and declaration of Commercial operation, the generation from a new unit is unpredictable. Therefore, for planning purpose, the generation ought to have been considered from expected COD and not

from the expected date of synchronization. Further, the contention of the State Commission cannot be supported on the reported verbal enquiries made from the generating stations regarding commissioning of the Unit.

6.8. In this connection, we will now examine the Central Commission's Regulations of 2009 which are applicable to NTPC and DVC. The date of commercial operation for a Thermal Unit has been defined as under:

> *"3 (12)* ***'date of commercial operation' or 'COD'*** *means:*
>
> *(a) in relation to a unit or block of the thermal generating station, the date declared by the generating company after demonstrating the maximum continuous rating (MCR) or the installed capacity (IC) through a successful trial run after notice to the beneficiaries, from 00:00 hour of which scheduling process as per the Indian Electricity Grid Code (IEGC) is fully implemented,*

and in relation to the generating station as a whole, the date of commercial operation of the last unit or block of the generating station".

The infirm power has been defined as under:

"3 (20) ***'infirm power'*** *means electricity injected into the grid prior to the commercial operation of a unit or block of the generating station".*

The sale of infirm power has been dealt with in Regulation 11 which is reproduced below:

"11. ***Sale of Infirm Power.*** *Supply of infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional or State UI pool account at the applicable frequency-linked UI rate:*

Provided that any revenue earned by the generating company from sale of infirm power after accounting for the fuel expenses shall be applied for reduction in capital cost".

Thus the energy injected from date of first synchronization to the date of Commercial Operation, is not scheduled and accounted for as Unscheduled Interchange (UI) and therefore, it cannot be considered in power availability of a beneficiary.

6.9. We are not in a position to examine the energy availability from Chandrapur 7 and 8 Units as the CEA report furnished by the State Commission did not contain the status of Chandrapur 7 & 8 Units. However, these units were not commissioned during the FY 2009-10 and therefore, the energy availability from these units is required to be trued up.

6.10. Shri A.N. Haksar, learned Senior Counsel for the State Commission has argued that no prejudice would be caused to the Appellant as the power purchase cost would in any case be trued up. This, in

our view, is not the right approach. The State Commission is expected to make a realistic assessment of the power purchase quantum. Any large deviation due to incorrect assessment as made in this case is going to leave revenue gap and may result in cash flow problem for the distribution company. Subsequent true up of power purchase cost will result in allowance of carrying cost with the power purchase cost which in combination with normal rise due to inflation and other factors may result in tariff shock in the subsequent year which may not be in the interest of the consumers of the distribution company.

6.11. In view of above, we direct the State Commission to true up the power purchase cost of the Appellants at the earliest and in future, be realistic in its assessment of power purchase quantum from new generating units, based on authentic information on

Commercial Operation Date expected and not on the basis of the expected date of synchronization. The State Commission is also directed to refrain from making the assessment on the basis of verbal enquiries. Thus, this issue is decided in favour of the Appellant.

7. The second issue is regarding higher plant load factor assumed for the new generating units.

7.1. According to Shri Amit Kapur, the learned counsel for the Appellant, Plant Load Factor of 90% has been assumed for the new thermal generating units contrary to the provisions of the Regulation 11.4 of the State Commission, MYT order dated 23.2.2008 and the Central Commission's Tariff Regulations.

7.2. On the other hand, Shri A.N. Haksar, learned Senior counsel for the State Commission has

submitted that the State Commission had changed the Plant Load Factor (PLF) of new thermal power plants from 80% to 90% on the basis that new plants usually attain PLF of 100% as seen in case of Rihand II and Unchahar III plants. In support of his submissions, he furnished the data for Rihand II from September, 2005 to Feb., 2006 and Unchahar III from January 2007 to June 2007 when these plants had operated at PLF from 90% to 100% in five out of six months.

7.3. Let us now examine the MYT Tariff Order and the Regulations in this regard. In the MYT order dated 23.2.2008, the State Commission had assumed a PLF of 80% for thermal plants during the control period from FY 2007-08 to FY 2010-11. However, in the Impugned Order the State Commission has assumed a PLF of 90% without giving any reason. Regulation 11.4 of the State Commission stipulates that State

Commission may specify any modifications to the forecast of the Distribution Licensee for the remainder of the control period, with detailed reasons for the same. However, we do not find any reason for enhancing the PLF from 80% to 90% in the Impugned Order.

7.4. Shri A.N. Haksar, the learned Senior Counsel for the Commission has now given an explanation with data for two power stations of NTPC for a few months indicating PLF of 90% and above. We are not convinced with the above explanation. If some plants of NTPC have recorded PLF of 90% to 100% during certain months, it could not be the reason for raising PLF for the purpose of ARR for all the power stations to 90%. Moreover, no reason has been given in the findings of the State Commission in the Impugned Order for raising the PLF from 80% to 90%.

7.5. The Central Commission's Tariff Regulations of 2009 do not stipulate norm for PLF but only provide for Normative Annual Plant Availability Factor of 85% for the new generating units for the purpose of recovery of the fixed charges.

7.6. In our opinion, raising of PLF from 80% to 90% for all the generating units without assigning any reason is not a correct approach. PLF for planning availability of power for the whole year cannot also be based on data of actual performance of one or two selected plants for a few months but it should have been based on consistent performance on annual basis of large sample data. Moreover, as already held while dealing with the first issue, the power availability should have been reckoned from the expected date of commercial operation and not the expected date of synchronization.

7.7. In view of above, we decide this issue also in favour of the Appellant and direct the State Commission to true up the power purchase cost of the Appellants at the earliest.

8. The third issue is regarding the Plant Load Factor for IPGCL (GT) Station.

8.1. The State Commission has computed the energy availability from IPGCL based on the approved PLF and auxiliary consumption in the MYT order for the generating station. However, the State Commission has recorded that the actual power availability from the generating station may vary from the projected units and the power purchase quantum being an uncontrollable parameter will be trued up at the end of the year.

8.2. The learned counsel for the Appellant has argued that the Regulations do not provide for any value of PLF for IPGCL (GT) for availability of energy to the distribution companies and the 70% PLF has been fixed in the MYT order for IPGCL only for recovery of fixed cost which is not relevant for projected energy availability to the distribution company. The projected energy availability from the generation station should be based on the actual historical performance of the plant. The PLF of IPGCL (GT) for FY 2007-08 and FY 2008-09 has never crossed 53%.

8.3. According to learned Senior counsel for the State Commission, the PLF of 70% has been assumed in view of the MYT Regulations for the generating company, as well as the applicable MYT order for the generation station. The State Commission cannot take different PLF for different purpose.

8.4. We have examined the Tariff Regulations of the State Commission for the generating stations. Regulation 7.1(3) specifies the availability of 70% and Target PLF for incentive as 70% for IPGTPS. The target availability of 70% is for the purpose of recovery of full fixed charges and the target PLF is for the purpose of incentive to the generating company.

8.5. The Regulation A-11 of the Tariff Regulations for the wheeling and retail supply tariff is reproduced below:

"A11: PERIODIC REVIEWS:

11.1. To ensure smooth implementation of the Multi Year Tariff (MYT) Framework, the Commission may undertake periodic reviews of Licensees' performance during the Control Period, to address any practical issues, concerns or unexpected outcomes that may arise.

11.2. The Distribution Licensee shall submit information as part of annual review on actual performance to assess the performance vis-à-vis the targets approved by the Commission at the beginning of the Control Period. This shall include annual statements of its performance and accounts including latest available audited actual accounts and the tariff worked out in accordance with these Regulations.

11.3. The Licensee shall submit the revised Aggregate Revenue Requirement and corresponding tariff adjustments 120 days before the commencement of the Financial Year.

11.4 The Commission may also specify any modifications to the forecast of the Distribution Licensee for the remainder of the Control Period, with detailed reasons for the same".

In view of above, while considering the energy availability from IPGTPS for the Appellant, the State

Commission should have also considered the actual performance of the power station. However, if the performance is expected to improve for same reason in the year for which ARR is being considered, then the same may be taken into account after recording the reasons.

8.6. Accordingly, we hold that target availability at the threshold for PLF for incentive for the generating company specified in the Tariff Regulations for generation should not have been replicated mechanically for assessing the availability of energy from the generating station to the distribution company. The availability of energy from the generating station may vary from the target availability due to practical reasons which should have been examined by the State Commission keeping in view the

past performance and any variation expected in the year in question for reasons recorded in writing.

8.7. In view of above, we decide this issue also in favour of the Appellant and direct the State Commission to true up the power purchase cost at the earliest.

9. The fourth issue is regarding power purchase cost assumed for the FY 2009-10 for NTPC stations.

9.1. According to the learned counsel for the Appellant, the State Commission has ignored the revised Tariff orders issued by the Central Commission subsequent to the MYT order dated 23.2.2008 as well as the facts placed before the State Commission by the Appellant in this regard. The NTPC stations have been raising bills on the Appellant based on the revised orders of the Central Commission.

9.2. According to the learned counsel for the State Commission, the State Commission has not taken into consideration the revised tariff orders in respect of the seven NTPC stations issued by the Central Commission subsequent to the MYT order dated 23.2.2008, because of the following reasons:

i) The revised tariff orders have been issued by the CERC under the 2004 Regulations which have been replaced by the 2009 Regulations w.e.f. 1.4.2009. No tariff had been determined by the Central Commission under the 2009 Tariff Regulations till the date of passing of the Impugned Order. The revised tariff orders were applicable only upto the FY 2008-09.

ii) The revised tariff orders relied upon by the Appellant would show that they were applicable upto 31.3.2009.

9.3. In this connection, the relevant Regulation in the 2009 Regulations of the Central Commission is Regulation 5(3) which is reproduced as under:

> *"5 (3) In case of the existing projects, the generating company or the transmission licensee, as the case may be, shall continue to provisionally bill the beneficiaries or the long-term customers with the tariff approved by the Commission and applicable as on 31.3.2009 for the period starting from 1.4.2009 till approval of tariff by the Commission in accordance these regulations".*

Thus, till notification of tariff under the 2009 Regulations, the tariff of the existing stations as applicable on 31.3.2009 was to continue from 1.4.2009. By revised tariff orders passed by the

Central Commission for the NTPC stations under the 2004 Regulations, the tariff of the NTPC stations had been revised form 1.4.2004 to 31.3.2009. Thus the tariff for 2007-08 which was assumed in the MYT order itself had undergone a change.

9.4. Now let us examine the Commission's analysis in the Impugned Order which is reproduced below:

> *"4.103. The following methodology has been adopted by the Commission for estimation of the power purchase cost for FY 09-10 from existing stations:*
>
> *a) The Commission has reviewed the variation in the fixed cost approved in the MYT Order and the actual fixed cost of the Petitioner for FY 07-08. The overall difference has been negligible; therefore the Commission continues with the earlier projections of fixed cost made in the MYT Order for FY 09-10. However, the Commission has provided an additional 7% increase in fixed cost over and above*

the FY 09-10 approved fixed cost in view of the recent CERC Tariff Regulations, 2009 for revision of Return on Equity, higher escalation in O&M cost, etc. The Commission has also considered the revised share of the Petitioner in BTPS and Dadri TPS while computing the fixed cost for the Petitioner from these plants".

9.5. While working out the difference in the fixed cost as approved in the MYT order and actual for FY 2007-08, the State Commission has not considered the increase in fixed cost due to the revised orders passed by the Central Commission subsequent to the MYT order. Thus the conclusion that the overall difference has been negligible was based on the incorrect base cost without considering the revised orders.

9.6. In view of above, we feel that the State Commission should have considered the revised orders

of the CERC issued under the 2004 Regulations, as contended by the Appellants. Accordingly, we direct the State Commission to true up the power purchase cost of the Appellants at the earliest. Thus, this issue also is decided in favour of the Appellant.

10. The fifth issue is regarding the Late Payment Surcharge.

10.1. The above issue had been covered in this Tribunal's Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 titled as NDPL vs. DERC. The relevant extracts of the Judgment are reproduced below:

> *"The normative working capital compensates the distribution company in delay for the 2 months credit period which is given to the consumers. The late payment surcharge is only if the delay is more than the normative credit period. For the period of delay beyond normative period, the distribution*

company has to be compensated with the cost of such additional financing. It is not the case of the Appellant that the late payment surcharge should not be treated as a non-tariff income. The Appellant is only praying that the financing cost is involved due to late payment and as such the Appellant is entitled to the compensation to incur such additional financing cost. Therefore, the financing cost of outstanding dues, i.e. the entire principal amount, should be allowed and it should not be limited to late payment surcharge amount alone. Further, the interest rate which is fixed as 9% is not the prevalent market Lending Rate due to increase in Prime Lending Rate since 2004-05. Therefore, the State Commission is directed to rectify its computation of the financing cost relating to the late payment surcharge for the FY 2007-08 at the prevalent market lending rate during that period keeping in view the prevailing Prime Lending Rate".

This issue is decided accordingly in terms of the above Judgment.

11. The sixth issue is regarding interest rate for carrying cost.

11.1. This issue also had been dealt with in this Tribunal's Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 between North Delhi Power Ltd. vs. DERC. The relevant extracts of the Judgment are reproduced below:

> *"45. The carrying cost is allowed based on the financial principle that whenever the recovery of cost is to be deferred, the financing of the gap in cash flow arranged by the distribution company from lenders and/or promoters and/or accrual and/or internal accrual has to be paid for by way of carrying cost. The carrying cost is a legitimate expectation of the distribution company. The State Commission instead of applying the principle of PLR for the carrying cost has wrongly allowed the rate of 9% which is not the prevalent market lending rate. Admittedly, the prevalent market*

lending rate was higher than the rate fixed by the State Commission in the tariff order. Therefore, the State Commission is directed to reconsider the rate of carrying cost at the prevalent market rate keeping in view the prevailing Prime Lending Rate".

This issue is decided accordingly in terms of the above Judgment.

12. The seventh issue is regarding true up for the FY 2008-09 raised in Appeal No. 142 of 2009.

12.1. According to the Appellant, the State Commission did not true-up expenses for FY 2008-09 despite the fact that the actual/audited accounts were submitted prior to issuance of the Impugned Order which is contrary to the MYT Regulations.

12.2. According to the learned senior counsel for the State Commission, the true up for the FY 2008-09 was

never a part of the Petition on which the Impugned Order was passed. The Appellant has subsequently filed a proper Petition seeking the true up for FY 2008-09 which is under consideration of the State Commission.

12.3. We notice that the Petition before the State Commission was for true up for FY 2007-08 and ARR for FY 2009-10. Further the actual audited data for FY 2008-09 was made available by the Appellant to the State Commission on 11.5.2009 when according to the State Commission the Impugned Order was under final stage of preparation. The final order was passed on 28.5.2009. Thus, we are in agreement with the contentions made by the learned senior counsel for the State Commission and do not find any substance in the contention of the Appellants and reject the same. Thus, this issue is decided against the Appellant.

13. The eighth issue is regarding true up of the expenses for the FY 2007-08 for the period between 1.4.2007 and the date of commencement of the MYT Tariff Order.

13.1. According to the learned counsel for the Appellant, the State Commission has failed to true up the finances for the period from 1.4.2007 to 23.2.2008 on the basis of the actual/audited information in contravention of Regulation 12.1 of the MYT Regulations. The control period as defined in the MYT Regulations means a multi year period fixed by the State Commission from the date of issuing MYT tariff order till 31.3.2011.

13.2. According to the learned counsel for the State Commission, as per Regulations 5.41 and 5.42 of MYT

Regulations, it is not possible to true up controllable expenses for the period 1.4.2007 and 1.3.2008.

13.3. Let us first examine the MYT Regulations. The Control Period has been defined as under:

> *"Control Period" means a multi-year period fixed by the Commission, from the date of issuing Multi Year Tariff order till 31st March, 2011;"*

The first MYT Tariff order was issued on 23.2.2008. Thus the Control Period according to the Regulations is from 1.3.2008 to 31.3.2011.

13.4. The general approach and guiding principles of the MYT Regulations are described in Section A-4. The relevant extracts are reproduced below:

> *"4.1.The Commission shall adopt Multi Year Tariff framework for approval of ARR and expected revenue from tariff and charges. The Control Period shall commence from the date of issue of the*

Multi Year Tariff Order and shall extend till 31st March, 2011".

4.2. The Multi Year Tariff framework shall be based on the following:

(a)…….

(b)…….

(c)…….

(d)…….

(e)…….

(f) variation in revenue/cost on account of uncontrollable factors like sales and power purchase shall be trued up".

"Targets for Controllable Parameters

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

(a) AT& C Loss, ……

(b) Distribution losses, …….

(c) Collection efficiency…….

(d) Operation and Maintenance expenditure which includes employees expenses,

(e) Return on capital employed

(f) Depreciation

(g) Quantity of supply"

"4.16 (b) For Controllable Parameters,

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

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

13.5. The True up Mechanism is described as under:

"Truing up Mechanism

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

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

Thus the controllable items shall not be trued up and the uncontrollable items like energy sales and power purchase cost shall be trued up every year.

13.6. The Regulations also provide for truing up for the period upto the commencement of MYT order as under:

> *"12.1. Performance review and adjustment of variations of the Distribution Licensees for the year FY-2006-07 and the period between 1st April 2007 and commencement of MYT Tariff order shall be done based on actual/audited information and prudence checks by the Commission and shall be considered during the Control Period".*

Thus the Regulation clearly stipulate true up of financials from 1.4.2007 to the commencement of the MYT order. The date of commencement of the MYT order was 1.3.2008.

13.7. The State Commission's findings in this regard in paragraph 3.58 of the Impugned Order are that it has specified the targets for the controllable parameters as per clause 4.7 of the Regulations including FY 2007-08 and according to clause 4.16 (b), any surplus or deficit on account of O&M expenses shall be to the account of the Licensee and shall not be trued up in ARR and, depreciation and RoCE shall be trued up at the end of the Control Period.

13.8. We do not agree with the findings of the State Commission as these are in contravention of the Regulations. According to Regulations, the Control Period commences from the date of the MYT order and all the targets set for the controllable parameters shall be applicable for the control period according to Regulation 4.7. The targets set for the control period cannot be made applicable retrospectively from

1.4.2007 as the commencement of MYT order was only from 1.3.2008. The Regulations 5.41 and 5.42 referred to by the learned senior counsel for the State Commission pertain to the control period only and not the period prior to that. Further Regulation 12.1 clearly provides for true up of the period between 1.4.2007, date of commencement of the MYT order during the control period. Thus the controllable parameters for the period 1.4.2007 to 28.2.2008 were required to the trued up during the control period as per the Regulations. This issue is, therefore, decided in favour of the Appellant and the State Commission is directed to true up the financials for the period 1.4.2007 to 28.2.2008 at the earliest and allow the costs with carrying cost.

14. The ninth issue is regarding the consideration of the interest on unutilized return of the past period in the ARR.

14.1. This issue had already been decided by the Tribunal in its Judgment dated 30.7.2010 reported as 2010 ELR (APTEL) 0891 titled as North Delhi Power Ltd. vs. DERC. The relevant extracts of the Judgment are reproduced below:

> *"Only interest income on surplus funds to the extent of delayed payment surcharge and interest on consumer security in excess of the rates specified by the Commission should be considered as non-tariff income for deduction in ARR. Also the interest income on consumer's share of incentive on over-achievement of AT&C losses need to be deducted from ARR. However, the Appellant has argued that he has factored the interest income while computing the carrying cost on the revenue gap. Consequently, the carrying cost is lower to that extent. When the benefit of the same has already been passed on to the consumer, the same cannot be passed on to them by way of interest cost. However, in order to correctly determine the*

ARR as per the Tariff Regulations, the interest income on delayed payment surcharge and difference in interest rate on consumer security with respect to that specified by the Regulations may be considered as non-tariff income to be deducted from the ARR. Also interest on consumer's share of incentive on over-achievement of AT&C losses has to be deducted from ARR. The Commission will compute the interest income for which credit is to be given to consumer from total interest income. Accordingly, adjustment may be made in carrying cost on the revenue gap claimed by the Appellant to avoid double deduction of the interest income on this account in the ARR. On the remaining surplus fund on Retail Supply Tariff the benefit of interest income is to be retained by the Appellant on account of return on equity earned, overachievement in AT&C losses and efficiency in controllable parameters, working capital, etc. invested in mutual funds/banks. The State Commission cannot erode the benefit to be derived by the distribution company by considering such interest income as a part of the non-tariff income"

This issue is accordingly decided in favour of the Appellant.

15. The tenth issue is regarding inflated revenue recovery from the consumers in the ARR.

15.1. According to the learned counsel for the Appellant, the State Commission has assumed a higher average billing rate despite the fact that the tariff for some categories of consumers was reduced during FY 2009-10.

15.2. According to the learned senior counsel for the State Commission, average billing rate has not been computed in the Impugned Order. The State Commission has only approved sales and revenue of the Appellant. However, the sales and revenue figures for FY 2009-10 were mere estimates and the same

might be different for the actuals. Any variation on account of sales and revenue would be trued up by the State Commission.

15.3. The State Commission has estimated the sales for each category of consumers based on the estimated sales for the FY 2008-09 after applying compounded Annual Growth Rate computed for the past period of 3 to 4 years for that category of consumers. The estimated sale for the FY 2009-10 for BSES Rajdhani Power Ltd. is 7797 MUs as against the claim of 7741 MUs. Thus, the estimate of the State Commission is in variance from that of the Appellant by less than 1% which is insignificant. We do not find any fault in the computation of energy sales made by the State Commission.

15.4. The State Commission has indicated expected revenue at existing tariffs as 3681.65 crores but there is no computation for the same. In the absence of the computation given in the Impugned Order we are not in a position to give any finding on the same. The State Commission has already agreed to true up the sales and revenue figures. Accordingly, we direct the State Commission to true up the sales and revenue figures for FY 2009-10 with the advice that in future the computation for revenue should be clearly indicated in the Tariff Order.

16. The eleventh issue is regarding the impact of increase in CPI/WPI on O&M expenses in the true-up.

16.1. This issue had already been decided in this Tribunal's Judgment dated 31.5.2011 in Appeal No. 52 of 2008 in New Delhi Power Limited vs.

DERC. The relevant extracts of the Judgment are as under:

> *"22. While we agree with the contention of the Appellant that for determining the O&M expenses for the FY 2007-08, the indexation factor shall be based on CPI and WPI figures for the period 2002-03 to 2006-07, we are not convinced that the State Commission shall have determined the inflation factor for each year of the control period on rolling basis. At the time of deciding the MYT tariff, the inflation factor for the control years will not be available, therefore, indexation factor worked for the first year of the control period on the basis of preceding five years has to be used for all years during the control period as there is no provision for true up of O&M expenses in the Regulations and for determination of indexation factors on rolling basis. However, the indexation factor based on actual WPI and CPI indices for the control years of the present MYT tariff will be used while deciding the indexation factor for the next MYT tariff and, therefore, no prejudice will be caused either to the*

distribution company or the consumers. We also observe that in the Central Commission's Regulations also the O&M expenses for generating station and transmission system are escalated at a fixed escalation factor during the control period.

23. Accordingly, this issue is only partly decided in favour of the Appellant to the extent that the indexation factor has to be determined on the basis of actual WPI and CPI for the immediately preceding five years period from FY 2002-03 to FY 2006-07 and not FY 2001-02 to FY 2005-06 as worked out by the State Commission. The State Commission is directed to accordingly allow the O&M Expenses for the control period after including CPI/WPI during FY 2006-07 along with the carrying cost".

Accordingly, this issue is decided against the Appellant.

17. The twelfth issue is regarding the amount of rebate claimed by the Appellant on Power Purchase.

17.1. This issue also had already been decided by this Tribunal in its Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 titled as North Delhi Power Ltd. vs. DERC. The relevant extracts of the Judgment are reproduced below:

> *"The Appellant, through its efficient management, has paid all the bills immediately on raising of the bills by the generating company and, therefore, it has to be allowed a rebate of 2%. Therefore, there is no justifiable reason for the State Commission to reduce the power purchase cost by rebate earned by the Appellant. The normative working capital provides for power purchase cost for one month. Therefore, rebate of 1% available for payment of power purchase bill within one month should be considered as non-tariff income and to that extent benefit of 1% rebate goes to reducing the ARR of the Appellant. The rebate earned on early payment of power purchase cost cannot be deducted from the power purchase cost and rebate earned only up to 1% alone can be treated as part of the non-tariff*

income. Therefore treating the rebate income for deduction from the power purchase cost is contrary to the MYT Regulations".

The issue is decided accordingly.

The State Commission is directed to consider rebate only upto 1% as non-tariff income.

18. The Appellant, as indicated above, has already conceded to the issue of the claim of Delhi Transco on account of revised power purchase expenses liability for the past period without prejudice to its rights to contest the final order of the State Commission. Accordingly, the liberty is granted. On the issue of interest capitalized as a part of ARR, the State Commission has conceded to the issue and has indicated to correct the error in the next true up. Accordingly, the State Commission is directed to correct the error.

19. SUMMARY OF OUR FINDINGS

19.1.The first issue is regarding overestimation of power availability from new power stations. We have found that the State Commission has advanced the commercial operation date of Dadri units 5 and 6 with respect to the reports of the Central Electricity Authority in making assessment for the energy availability from these units to the distribution companies of the Appellants. The learned counsel for the State Commission has now contended that the State Commission has considered the date of synchronization as given in the CEA report and as per the information obtained verbally from the generating stations in making assessment of energy availability from these generating units. In our opinion, the energy availability from date of synchronization till the

COD is infirm and cannot be assumed at 90% PLF as considered in the impugned order. For planning purpose the generation ought to have been considered from COD and not from the date of synchronization. According to the 2009 Regulations of the Central Commission, the electricity injected into the grid prior to the commercial operation of a unit is infirm power and is accounted as Unscheduled Interchange (UI) and paid for from the regional UI pool account at the applicable frequency-linked UI rate. The energy injected from date of synchronization to the date of Commercial Operation, is not scheduled and, therefore, cannot be considered in power availability of the distribution companies. Accordingly, this issue is decided in favour of the Appellant. The State Commission is directed to

make realistic assessment of power purchase quantum from new generating units, based on authentic information on the expected COD and not on the basis of the expected date of synchronization. The State Commission is also directed to true up the power purchase cost at the earliest.

19.2. The second issue is regarding higher plant load factor assumed for the new thermal generating units. In the MYT order dated 23.2.2008, the State Commission had assumed PLF of 80% for thermal plants during the control period from FY 2007-08 to FY 2010-11. However, in the Impugned Order the State Commission has assumed PLF of 90% without giving any reason. Regulation 11.4 of the State Commission stipulates that State Commission may specify any

modifications to the forecast of the Distribution Licensee for the remainder of the control period, with detailed reasons for the same. However, we do not find any reason for enhancing the PLF from 80% to 90% in the Impugned Order. The learned senior counsel for the State Commission has now submitted data of two power stations of NTPC for a few months indicating PLF of 90% and above. If some plants of NTPC have recorded PLF of 90% and above during certain months, it could not be the reason for raising PLF for the purpose of energy availability in the ARR of the distribution companies. In our opinion, raising of the PLF from 80% to 90% for all the generating units without assigning any reason is not correct. PLF for planning availability of power for the whole year cannot be based on the data of actual performance

of one or two selected plants for a few months but should be based on consistent performance on annual basis. Therefore, this issue is decided in favour of the Appellant with the direction to the State Commission to true up the power purchase cost of the Appellants at the earliest.

19.3. The third issue is regarding the Plant Load Factor for IPGCL (GT) Station. In our opinion, the threshold for target availability and Plant Load Factor for the generating company specified in the Tariff Regulations for the generation should not have been replicated mechanically for assessing the availability of energy from the generating station to the distribution company. The energy availability from the generating station to the distribution company should have been based on

the ground realities. Accordingly, this issue is decided in favour of the Appellant with the direction to the State Commission to true up the power purchase cost at the earliest.

19.4. The fourth issue is regarding power purchase cost for NTPC stations for the FY 2009-10. The State Commission had not taken into consideration the revised Tariff orders in respect of NTPC stations issued by the Central Commission subsequent to the MYT order dated 23.2.2008. According to the State Commission the Central Commission had not determined the tariff under the 2009 Regulations till the date of passing of the impugned order and the revised tariff orders issued under the 2004 Regulations for applicable upto the FY 2008-09. According to the Regulation 5(3) of 2009 Regulations of the Central

Commission till the notification of tariff under the 2009 Regulations, the tariff of the existing stations as applicable on 31.3.2009 was to continue from 1.4.2009. Thus the State Commission should have considered the revised tariff orders passed by the CERC under the 2004 Regulations subsequent to the MYT order. Accordingly, we direct the State Commission to true up the power purchase cost of the Appellants at the earliest.

19.5. The fifth issue is regarding the Late Payment Surcharge. This issue has already been decided by this Tribunal's Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 titled as NDPL vs. DERC. Accordingly, the Appellant is entitled to the compensation for additional financing cost of outstanding dues limited to late payment surcharge amount at the prevalent market lending

rate during that period keeping in view the prevailing Prime Lending Rate.

19.6. The sixth issue is regarding interest rate for carrying cost. This issue has been decided in this Tribunal's Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 between North Delhi Power Ltd. vs. DERC. Accordingly, the State Commission is directed to reconsider the rate of carrying cost at the prevalent market rate keeping in view the prevailing Prime Lending Rate.

19.7. The seventh issue is regarding true up for the FY 2008-09 raised in Appeal No. 142 of 2009. According to the learned senior counsel for the State Commission the true up for the FY 2008-09 was never a part of the Petition on which the Impugned Order was passed and the Appellant has subsequently filed a proper Petition seeking true

up for the FY 2008-09 which is under consideration of the State Commission. We are in agreement with the contentions made by the State Commission and do not find any substance in the contention of the Appellants and reject the same.

19.8. The eighth issue is regarding true up of the expenses for FY 2007-08 for the period between 1.4.2007 and the date of commencement of the MYT Tariff Order. The MYT Regulations clearly define the control period from the date of issuing MYT Tariff order till 31st March, 2011. Regulation 12.1 also provides for performance review and adjustment of variations of the Distribution Licensees for the period between 1st April 2007 and commencement of MYT Tariff order based on actual/audited data and prudence checks by the State Commission during the

Control Period. The finding of the State Commission on this issue is in contravention of the Regulations. Accordingly, the State Commission is directed to true up the financials for the period 1.4.2007 to 28.2.2008 at the earliest and allow the same with carrying cost.

19.9. The ninth issue is regarding the consideration of the interest on unutilized return of the past period in the ARR. This issue has already been decided by the Tribunal in its Judgment dated 30.7.2010 reported as 2010 ELR (APTEL) 0891 titled as North Delhi Power Ltd. vs. DERC on the surplus fund, the benefit of interest income on account of return on equity earned, overachievement in AT&C losses and efficiency in controllable parameters, working capital, etc. in accordance with the above Judgment.

19.10. The tenth issue is regarding inflated revenue recovery from the consumers in the ARR. We do not find any fault in the computation of energy sales by the State Commission. However, in the absence of the computation for revenue at the existing tariffs, we are not in a position to give any findings on the same. The State Commission has already agreed to true up the sales and revenue figures. Accordingly, we direct the State Commission to true up the sales and revenue figures for the FY 2009-10 with the advice that in future the computation for revenue should be clearly indicated in the Tariff Order.

19.11. The eleventh issue is regarding the impact of increase in CPI/WPI on O&M expenses in the True-up. This issue has been decided in this Tribunal's Judgment dated 31.5.2010 in Appeal No.

52 of 2008 in New Delhi Power Limited vs. DERC. Accordingly, while inflation factor shall be determined based on the CPI/WPI figures in the past five years, there is no provision in the Regulation for true up of O&M expenses and for determination of indexation factor on rolling basis. Accordingly, this issue is decided against the Appellant as far as true up of O&M expenses and determination of indexation factor on rolling basis during the MYT Control Period is concerned.

19.12. The twelfth issue is regarding the amount of rebate claimed by the Appellant on Power Purchase. This issue has already been decided by this Tribunal in its Judgment dated 30.7.2010 reported in 2010 ELR (APTEL) 0891 titled as North Delhi Power Ltd. vs. DERC. Accordingly, the State

Commission is directed to consider rebate upto 1% as non-tariff income from the total rebate of 2%.

20. In view of our above findings, the Appeals are partly allowed to the extent as indicated above with direction to the State Commission to pass the consequential orders giving effect to our findings rendered in this Judgment. No order as to costs.

21. Pronounced in the open court on this ***12th day of July, 2011***.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

REPORTABLE / NON-REPORTABLE.

vs