

**APPELLATE TRIBUNAL FOR ELECTRICITY
(APPELLATE JURISDICTION)**

Appeal No. 30 of 2010

Dated 31st May, 2010

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

In the matter of:

- 1. North Delhi Power Ltd.
Grid Sub-Station Building
Hudson Lanes, Kingsway Camp
Delhi-110 009**
- 2. BSES Yamuna Power Ltd.
Shakti Kiran Building
Karkardooma
New Delhi-110 092**
- 3. BSES Rajdhani Ltd.
BSES Bhawan, Nehru Place
New Delhi-110 019**

... Appellant(s)

Versus

- 1. Delhi Electricity Regulatory Commission
Viniyamak Bhawan
C-Block, Shivalik, Malviya Nagar
New Delhi-110 01**
- 2. Delhi Transco Ltd.
Shakti Sadan, Kotla Road,
New Delhi-110 002**

... Respondent(s)

**Counsel for the Appellant(s) Mr. Amit Kapoor &
Ms. Poonam Verma**

**Counsel for the Respondent(s) Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Ravi S. Singh**

JUDGMENT

Per Hon'ble Mr. Rakesh Nath, Technical Member

1. (1) North Delhi Power Limited, (2) BSES Yamuna Power Limited and (3) BSES Rajdhani Power Limited are the Appellants herein. Delhi Transco Limited (DTL) is the Respondent-2. The Appellants are Distribution companies. The Respondent-2 is a Transmission company.

2. The Delhi Electricity Regulatory Commission (State Commission) passed the impugned order dated 12.11.2009 for truing up of expenditure incurred by the DTL (R-2) for the FY 2005-06 for actual power purchase cost and the RLDC/ULDC charges aggregating to Rs. 118.05 crores,

allowing the DTL (R-2) to recover the same from the Distribution companies/Appellants in the ratio of energy supplied to them during the year 2005-06.

3. Aggrieved by the same, the Distribution Companies/Appellants have filed this common Appeal before this Tribunal.

4. The short facts that are relevant for the disposal of this Appeal are as follows.

5. The Delhi Electricity Reform Act, 2000 was enacted with the object of establishing an Electricity Regulatory Commission and of restructuring the electricity industry in the National Capital Territory of Delhi.

6. On 06.01.2001, the Government of NCT of Delhi decided to unbundle the erstwhile Delhi Vidyut Board, its undertaking and vest the same in 6 successive companies

including the 3 Distribution companies, namely the Appellants and the transmission company named Delhi Transco Limited (R-2)

7. On 20.11.2001, the Government of NCT of Delhi notified the Delhi Electricity Reforms (Transfer Scheme) Rules 2001 by which the assets, liabilities, proceedings and personnel of the DVB were transferred and vested in the DVB successor entities.

8. On 22.11.2001 and on 31.5.2002, the Government of NCT of Delhi under the Reforms Act 2000 issued policy directions to enable the restructuring of Delhi Vidyut Board and privatisation of the distribution business of electricity. Some of the main features of those directions are as follows:

- (i) Restructuring of the Board and incorporation of Generation, Transmission and distribution companies**

- (ii) Re-organization of the distribution business into 3 separate distribution licensees which would be privatised.**
- (iii) The tariff shall be determined by the State Commission in such a way that the distribution licensees earn at least 16% return on the issued and paid up capital and free reserves.**
- (iv) The Government will make available to the DTL (R-2) an amount of Rs. 3450crores during the period 2002-03 to 2006-07 as a loan to be used to bridge the gap between the revenue requirements of the bulk supply price which it may receive from the distribution licensees.**
- (v) The State Commission shall issue orders determining the bulk supply tariff applicable to each of the 3 distribution licensees for purchase of electricity from the Transmission Company. All the stake holders including the Commission shall be bound by the above policy.**

9. Accordingly, the State Commission issued the Bulk Supply Tariff order on 22.2.2002 determining the rate of electricity which each of the Distribution company had to pay to the Transmission company for purchase of power till the end of the year 2006-07.

10. On 30.11.2004, the DTL (R-2) filed a petition before the State Commission for fixation of tariff for the FY 2005-06. On 07.07.2005, the State Commission passed the tariff order for the FY 2005-06. As against this order, the DTL (R-2) filed a review petition on 08.08.2005 challenging the tariff order dated 07.07.2005 for the FY 2005-06, challenging the inclusion of DVB arrears calculated by the distribution companies as part of revenue of the DTL (R-2). This review petition was dismissed by the State Commission on 17.02.2006.

11. On 28.06.2006, the Government of NCT of Delhi issued a policy direction to the State Commission for making power arrangements in Delhi beyond 01.04.2007. This policy direction provided that from 01.04.2007, the DTL (R-2) would not procure power but it would only be engaged in wheeling of power and operation of SLDC. Accordingly on 31.03.2007, the State Commission passed an order reassigning the existing PPA among the Distribution companies/Appellants.

12. On 12.11.2007, the DTL (R-2) issued a communication to all the generating companies supplying power to Delhi, informing them that all tariff adjustments on account of the Central Commission's order or the Appellate Tribunal orders for the period from 01.07.2002 to 31.03.2007 will be settled by the DTL (R-2) and the adjustments from 01.04.2007 onwards will be settled by the Distribution companies.

13. On 20.12.2007, the State Commission passed order truing up the expenditure of DTL (R-2) for the FY 2005-06. Aggrieved by the said order, the DTL (R-2) filed an Appeal in Appeal No. 28 of 2008 before the Tribunal. During the pendency of this Appeal, the Tribunal passed an order on 13.08.2009 in IA No. 250 of 2009 directing the State Commission to exercise their fresh true up in respect of FY 2005-06 to resolve the issue whereby arithmetical computation has to be done.

14. The State Commission in compliance of the above said direction dated 13.08.2009 held a hearing on 20.10.2009 by issuing notice to all concerned parties. After hearing the concerned parties, as well as taking into account all the submissions and documents placed before the State Commission in the revised truing up of the expenditure of the DTL (R-2), passed the impugned order dated 12.11.2009 holding that the DTL (R-2) is entitled to recover Rs. 118.05 crores towards the actual power purchase cost as well as the

RLDC/ULDC charges in respect of the FY 2005-06 and consequently directed the Distribution companies/Appellants to pay the said expenditure incurred by the DTL (R-2) in proportion to the power supplied to them.

15. Aggrieved by the same, the present Appeal has been filed by all the Distribution companies, namely the Appellants.

16. The Learned Counsel for the Appellants, while challenging the order impugned dated 12.11.2009 would urge the following contentions:

- (i) The truing up exercise done by the State Commission directing the amount of Rs. 118.05 crores to be recovered by the DTL (R-2) from the distribution companies/Appellants is contrary to the policy directions of the Government of NCT of Delhi, dated 22.11.2001 and 31.05.2002 which provided that till the end of FY 2006-07, the tariff**

shall be determined in such a way that the Distribution companies earn atleast 16% return on the issued paid up capital and free resources. The above policy directions are binding on all the stakeholders including the State Commission and other authorities till the end of FY 2006-07.

- (ii) The impugned order dated 12.11.2009 violates the “capacity to pay” principle enunciated in the bulk supply tariff dated 22.02.2002 of the State Commission. As per this order, any shortfall in the revenue of Transmission company was to be met through Government support, sector efficiency improvements and any other suitable mechanism. Thus, the direction given by the State Commission for payment by the Appellants to the DTL (R-2) is contrary to the terms of the Bulk Supply Tariff order.**
- (iii) As per communication dated 12.11.2007 sent to all the generating companies by the DTL (R-2), it**

assumed all the liabilities for the payment of the power purchase cost during the control period from 01.07.2002 to 31.03.2007. Therefore, the additional power purchase cost as per the true up order is not recoverable from the Appellants.

- (iv) In the impugned order dated 12.11.2009 Rs. 118.05 crores had been additionally allowed over and above the paying capacity of the Appellant towards the power purchase for the FY 2005-06. Though issue of paying capacity was specifically raised by the Appellant, the State Commission did not deal with the same in the impugned order. Due to the impugned order allowing additional amount, the Appellants were put to heavy loss. The burden of the loss would cause direct impact on the consumers. Such unwanted burden ought not to be allowed to be passed on to the consumers. Further, the State Commission itself has filed a second appeal before the Hon'ble Supreme Court as**

against the order passed by the Tribunal raising the issue of paying capacity but in the impugned, order the State Commission has ignored the said principle.

17. In reply to these contentions, the Learned Counsel for the DTL (R-2) as well as the Learned Counsel for the State Commission have made the following submissions:

- (i) The State Commission in the earlier true up order dated 20.12.2007 had disallowed the power purchase cost and RLDC/ULDC charges due to inadvertent omission. This was pointed out by the DTL (R-2) in its Appeal No. A. 28/2008, before the Tribunal challenging the said true up order. Consequently, the Tribunal passed the order dated 13.08.2009 in IA No. 250 of 2009 directing the State Commission to make a correct arithmetical calculation. Accordingly, the State Commission**

conducted the hearing. After hearing the parties concerned, it calculated the correct amount as per the approved audited account submitted by the parties. Admittedly, the quantum of the additional amount towards purchase cost fixed by the State Commission on the prudent check has not been challenged by the Appellants.

(ii) Neither the policy directions issued by the Government of NCT of Delhi nor the Bulk supply tariff order passed by the State Commission provide for fixing of the bulk supply tariff or deal with the “capacity to pay” in a manner to restrict the recovery of bulk supply tariff by DTL (R-2) from the Appellants. The policy directions and Bulk supply tariff order deal with the specific amount of transitory support from Delhi Government to reduce bulk supply tariff. There is no open-ended and unlimited quantum to be adjusted in the bulk supply tariff as contended by

the Appellant and that either the Delhi Government or the DTL (R-2) will absorb the implications of bulk supply tariff order in excess of Rs. 3450 crores in any manner.

(iii) The capacity to pay dealt with in the bulk supply tariff order is in the context of inter-se between distribution companies and because of the uniform retail supply tariff being enforced with varied consumers mix resulting in excess recovery for some and less recovery for others as compared to the pooled bulk supply tariff. The Appellant have never claimed any capacity to pay principle in their favour either in Appeal No. 28 of 2008 or in the proceedings before the State Commission. The State Commission while exercising the power under section 86 of the Electricity Act, 2003 cannot issue directions to the Government for reimbursing the additional cost for power purchase. The course of action which the Appellant should have followed

is to approach the Delhi Government for necessary relief or else to pay the amount to the DTL (R-2) and claim the same from the State Commission in their ARR for the following years. The “Capacity to Pay” principle cannot be invoked by the Appellant as this principle was applicable inter se between distribution companies in view of uniform retail supply tariff.

- (iv) The letter dated 12.11.2007 sent by the DTL (R-2) to the generating companies was in the context of prevailing contract between the DTL (R-2) and the generating companies till 31.03.2007. This letter informed the generating companies that the generating companies should not directly proceed against the distribution licensees for their claim till 31.03.2007 consequent to the reassignment of the power purchase agreement effective from 01.04.2007. It does not have the implication of the**

DTL (R-2) foregoing the recovery from the Appellants as a part of the bulk supply tariff.

- (v) Even otherwise, the balance sheet of the Appellants for the FY 2005-06 had already been finalized. The same cannot be allowed to be mitigated by an order passed in 2010. In other words, the impugned order cannot cause retrospective injury to the Appellant. In any case the policy directions provide that all stake-holders including the State Commission and other authorities shall be bound by the policy directions from the date of issuance thereof till the end of FY 2006-07.**

18. In the light of the rival contentions urged by the Counsel for the parties, the following questions of law would arise for consideration by this Tribunal.

- (i) Whether the State Commission being a statutory economic regulatory authority, can justifiably issue**

the impugned order contrary to the policy directions and its own Bulk supply tariff order which is binding on all the stake-holders including the State Commission and other authorities?

- (ii) Whether the impugned order violates the “capacity to pay” principle enunciated by the Bulk Supply Tariff order dated 22.02.2002 passed by the State Commission?**
- (iii) Whether the State Commission is empowered to direct the Appellant to pay the power purchase cost to DTL (R-2) despite the letter dated 12.11.2007 sent by the DTL (R-2) to all the generating companies having PPA with them assuring that all the tariff adjustments for the period from 01.04.2002 to 31.03.2007 will be settled by them.**
- (iv) Whether the additional payment directed to be made by the Appellant to the DTL (R-2) through the impugned order would result in a loss to the Appellants which will have a direct impact on the**

consumers whereas the additional power purchase cost beyond their capacity to pay is to be borne by the DTL (R-2) with the help of the Government?

19. Let us now deal with every one of the issues raised in this Appeal.

20. At the outset, we have to keep in our mind the two salient features which are relevant for the correct appreciation of the issue raised in this Appeal.

(I) The impugned order dated 12.11.2009 has been passed by the State Commission in pursuance of the order dated 13.08.2009 passed by the Tribunal in IA 250 of 2009 in Appeal No. 28 of 2008 for making corrections of the obvious mistakes in calculation which were inadvertently cropped up in the earlier true up order dated 20.12.2007.

(II) The Appellants have not challenged the correctness or prudence of the quantum of additional amount allowed by the State Commission to be paid to the DTL (R-2).

21. Both these aspects have not been disputed by the Appellants. In other words, the State Commission in the revised truing up of expenditure of DTL (R-2) for the FY 2005-06 for actual power purchase cost incurred by DTL (R-2) as per the audited accounts made a correct calculation as per the approved audited accounts, and arrived at a conclusion that the DTL (R-2) is entitled to recover additional amount of Rs.114.10 crores towards purchase cost and additional RLDC/ ULDC charges of Rs 3.95 crores aggregating to Rs. 118.05 crores in respect of FY 2005-06.

22. As stated above, the proceedings for fresh true up was undertaken by the State Commission to correct the mistakes and omissions in pursuance of the directions given by the Tribunal in the Appeal filed by the DTL in Appeal No. 28 of 2008 against the first true up order. In the first true up order dated 20.12.2007, the State Commission had wrongly considered the total power purchase cost to be allowed to the DTL (R-2) as Rs. 4783 crores as against the actual as per the audited accounts of the Appellant which comes to Rs. 4898 crores. In the impugned order, after marginal adjustments of Rs. 0.98 crores, the net additional amount to be allowed to DTL(R-2) for power purchase cost was determined as Rs. 114.10 crores. Thus Rs. 114.10 crores is to be recovered from the Distribution companies as the power purchase cost. Similarly, an amount of Rs. 3.95 crores was allowed to be recovered as RLDC/ULDC charges. Thus, aggregating amount of Rs. 118.05 crores, the amount of unrecovered power purchase cost for FYH 2005-06 has been directed to be paid by the distribution companies to the DTL

(R-2) by the impugned order. As mentioned earlier, either the calculation or the Quantum has not been disputed by the Appellants.

23. The main focus of the Appellant in this Appeal is on the binding nature of the policy directives issued on 22.11.2001 and 31.5.2002 and on the principle of “Capacity to Pay” referred to in the Bulk supply tariff order dated 22.02.2002. It is not disputed by the Respondents that both the policy directives dated 22.11.2001 and 31.05.2002 as well as the Bulk supply tariff order dated 22.02.2002 are binding on all the parties concerned. The question to be considered is what is the scope and extent of the above policy directives and Bulk supply order and whether they deal with the principle of “capacity to pay” as contended by the Appellant.

24. The purpose of the policy directions dated 22.11.2001 and 31.05.2002 issued by the Government of Delhi is to

mitigate some uncertainties for the investors intending to participate in the bidding of privatization of distribution of electricity of NCT of Delhi. As stated above main features of the policy directions relating to the distribution business are as follows:

- (i) Tariff to be determined in such a way that the distribution licensees earn atleast 16% return till the FY 2006-07.**
- (ii) The retail tariff for the 3 distribution licensees shall be identical till the end of FY 2006-07.**
- (iii) The Government will make available Rs. 3450 crores as a loan to the DTL (R-2) during the period 2002-03 to 2006-07 to bride the gap between the revenue requirement and the bulk power purchase cost**

25. These policy directions are not open-ended and unlimited quantum to be adjusted in the bulk supply tariff.

There is nothing in the policy directions or in the Bulk supply tariff order for any amount in excess of Rs. 3450 crores. Neither the policy direction nor the Bulk supply tariff order provides for freezing of bulk supply tariff or to restrict recovery of bulk supply tariff by the DTL (R-2).

26. The DTL was an intermediary company indulging in the purchase of power from the generating companies and resale of the said power to the Distribution companies including the Appellants. The entire power purchase cost estimated in the beginning along with the true up adjustments based on actuals after the tariff period is over, namely the increase or decrease in the power purchase cost adjustments from time to time has to be a pass through in the bulk supply tariff to be charged to the Distribution companies. This is the basic and well accepted practice adopted in the electricity sector. These policy directions do not change the above basic implication which is inherent in the power sector. In other words, these directions no where

provide that the power purchase cost incurred by of DTL (R-2) shall not be a pass through to the Distribution companies.

27. It cannot be debated that minimum 16% return has to be assured to the Distribution companies namely the Appellants during the policy direction control period. Therefore, what need to be considered is as to how the additional power purchase cost as a result of true up exercise has to be met without affecting the minimum return which is assured to the Appellants as per policy directions during the control period. In terms of the policy directions, the Delhi Government has duly given the committed entire amount of Rs. 3450 crores to DTL (R-2). The DTL (R-2) also has reduced the bulk supply tariff to the said extent during the control period.

28. Thus, it becomes evident that DTL (R-2) is entitled to recover its dues from the Distribution companies. If the

payment is not made by the Distribution companies, the DTL, which incurred the said expenditure, would incur heavy loss. Therefore, the additional amount as allowed in impugned order should be re-imbursed by the Appellants who in turn could recover the same from the consumers as a pass through of the power purchase cost which is also uncontrollable cost.

29. The claim of the Appellants is that the Distribution companies are not liable to pay the said additional amount and either the Delhi Government or the DTL (R-2) have to bear the amount in excess of Rs. 3450 crores. This contention is misconceived. The policy directions cannot be read as an agreement on the part of Delhi Government to provide transitory support without limit or an obligation on DTL (R-2) to absorb all the increase in the bulk supply tariff within itself without a right to pass it on to the distribution licensees. Therefore, the foundation on which the Appellants are basing their claims in the present case is fallacious.

30. In fact, the Delhi Government itself in their counter affidavit filed in the Writ Petition filed before the Delhi High Court has specifically stated that there is no direction from the State Government to the State Commission to decide on the actual bulk supply tariff for any particular year and that the State Commission has authority to determine the applicable bulk supply tariff for each of the Appellants. It is also specifically mentioned in the said affidavit that the State Commission is required to take into account the amount agreed to be made available by the Delhi Government as a loan to the DTL (R-2) to reduce the impact of the bulk supply tariff on the distribution companies during the transition period.

31. The Bulk supply tariff order dated 22.02.2002 which deals with the “capacity to pay” was in the context of policy directive issued by the Delhi Government and it cannot be considered independently. In other words, the “capacity to pay” dealt with in the policy directive as well as Bulk supply

tariff order is not in the context of total quantum of bulk supply of tariff payable to DTL (R-2). Undisputably, the DTL (R-2) is to recover its net revenue requirement as determined by the State Commission from the Distribution companies in Delhi except the specific amount of Rs. 3450 crores given by the Delhi Government. The “capacity to pay” has been dealt with only in the context of policy directive to maintain uniform retail tariff to the consumers by all the distribution companies in Delhi and not otherwise.

32. The total bulk supply tariff payable to DTL (R-2) is to be adjusted inter se among the 3 Appellants based on such difference in the revenue available to them and this has been described as capacity to pay. Thus, in the above order there is no implication on the overall recovery of the revenue requirement by DTL (R-2) from the bulk supply tariff to be charged to the distribution companies. The DTL (R-2) is entitled to recover this entire revenue requirement from the Distribution companies in the proportion in which the

revenue requirement is to be recovered from each distribution licensee and the same has to be decided by the State Commission having regard to the consumer mix of each distribution licensee and consequent inter se capacity to share.

33. Neither the policy directive nor the Bulk supply tariff order place any restriction on the quantum of the bulk supply tariff or the retail tariff to be determined by the State Commission. It also does not provide anything contrary to the concept of Bulk supply tariff being a pass through to the Distribution companies and the Distribution companies in turn is allowed to pass through the retail supply tariff to the consumers. As indicated above, the DTL (R-2) as a intermediary company has no other avenue to recover the amount due to it except by claiming the same from the Distribution companies. As a matter of fact, the Distribution companies do not dispute that the DTL (R-2) has to recover the amount. Hence, the DTL (R-2) should be allowed to

recover the bulk supply tariff determined from the Distribution companies. It is for the Appellants to take up the matter independently with the State Commission for the appropriate and consequential adjustment in retail supply tariff as a result of the Appellant complying with the directions contained in the impugned order for payment to the DTL (R-2).

34. It is contended by the Learned Counsel for the Appellant that the communication dated 12.11.2007 sent by the DTL (R-2) to all the generating companies would go to show that the DTL (R-2) assumed the entire liability of the generating companies without a right to claim the cost from the Appellants. This argument does not merit consideration.

35. Admittedly, this communication is addressed by the DTL (R-2) only to the generating companies and not to the Appellants. The scope of the communication is that the privity of contract for the period up to 31.03.2007 in regard

to purchase of power in bulk from the generating companies would continue to be with DTL notwithstanding the assignment of the Power Purchase Agreements to the distribution licensees effective from 01.04.2007. Further, the reading of this communication would show that it does not provide that all excess liabilities arising on account of power purchase due to revision by the generating companies would be assumed by the DTL without the right to claim a pass through in the bulk supply tariff to be charged to the Distribution companies.

36. This communication dated 12.11.2007 merely states that the generating companies shall not directly recover any arrears for the period prior to 01.04.2007 from the Distribution Companies. It clearly indicates that the same shall be paid by the DTL (R-2) which had a privity of contract with the generating companies. However, the payment made by the DTL (R-2) to the generating companies will have to be necessarily included in the

revenue requirement of DTL (R-2) to be recovered in the Bulk supply tariff. On the same analogy all prudent expenditure incurred by the Distribution Companies including the bulk supply tariff paid to the DTL (R-2) is to be necessarily included in their revenue requirement to be recovered from the consumers of electricity.

37. It cannot be a case of any person that all payments to be made by the Appellants to DTL (R-2) shall not be passed on to the consumers in Delhi. On the other hand, the Learned Counsel for the Respondents correctly submits that all such payments to be made by the Appellant to the DTL (R-2) will be considered by the State Commission in the revenue requirement of the Appellants.

38. The Learned Counsel for the Appellants has relied upon the decision of the Hon'ble Supreme Court in DERC versus BSES Yamuna Power Limited (2007) 3 SCC 33 and the judgment of this Tribunal in Appeal No. 155 etc. of 2005

dated 21.07.2006 and judgment dated 24.05.2006 in Appeal Nos. 38, 39, 122 of 2005 and 48 of 2006 to contend that capacity to pay concept contained in the policy directive and the Bulk supply tariff order had been duly approved in these judgments. The above decisions would be of no help to the Appellants in view of the fact that those decisions have proceeded on the basis that the policy directive and the bulk supply tariff order are binding and the State Commission cannot act contrary to the same. As stated above, this aspect about the binding nature has not been disputed by the Respondents. On the other hand, these decisions do not deal with the capacity to pay as claimed by the Appellants but they deal with the basic aspect such as Return on equity, Depreciation etc. which are specifically dealt with in the policy directive.

39. It is contended by the Appellants that the Appellants have raised the plea of capacity to pay in the reply filed by them in the proceedings before the State Commission but the

same has not been dealt with by the State Commission in the impugned order. This is also factually incorrect. The present Appeal is related to the truing up of the expenditure for the FY 2005-06. As mentioned earlier, the present truing up exercise was undertaken by the State Commission when this Tribunal pointed out as raised in the Appeal filed by the DTL (R-2) in Appeal No. 28 of 2008, that there were obvious omissions in the true up order earlier passed for the year 2005-06 and directed the State Commission to correct the same. As such, no petition was filed by the DTL (R-2) separately for truing up. Therefore, there is no question of any reply being filed by the Distribution Companies in the said proceedings. Thus, it is clear that no plea relating to capacity to pay was raised before the Commission. The reply referred to above by the Appellant is on the application of true up of expenditure incurred by DTL (R-2) for the FY 2007-08 and not in respect of the FY 2005-06. So, it is not correct to contend that reply has been filed raising the capacity to pay concept in the so-called reply in the true up

proceedings in respect of the FY 2005-06 and the same has not been considered by the State Commission. Thus, this contention also would fail.

40. It is pointed out by the Appellants that the stand taken by the Commission is not consistent and on the other hand, different stand had been taken by the State Commission in the Appeal filed before the Hon'ble Supreme Court as against the order of the Tribunal as well as in the impugned order with reference to the capacity to pay. This plea also is not tenable because the said Appeal filed by the Commission before the Hon'ble Supreme Court relates to Delhi Vidyut Board and that has nothing to do with the truing up of power purchase price in the impugned order. In the impugned order for truing up was on the power purchase cost and RLDC/ULDC charges and not on any issue of the DVB arrears. Thus, both the matters are different.

41. In this context, it will be relevant to quote the decision of this Tribunal in Appeal Nos. 155, 156 and 157 of 2005 reported in 2007 ELR 137 which recognises that the tariff is to be increased to recover the revenue requirement on account of increase in various costs including generation cost. The relevant para contained in the said judgment reads as under:

“ 51. The DISCOMs, a joint sector, has invested funds in proportion to 51:49 and there is no justification to expect the DISCOMs to carry on or run the business or service of distribution without a reasonable return or profit. Such an element of return is possible, provided if there is a reasonable increase in the tariff even though it may lead to hue and cry among a section of the consumers, who fail or refuse to acknowledge realities. The increase in tariff is concomitant as cost of various elements which go into the supply of electricity to the consumers has increased to a considerable extent. It is an admitted fact that costs are ever increasing even in respect to building

of infrastructure, generation, transmission ,building, collection, maintenance etc. including manpower and therefore a balance has to be struck instead of pinning down the DISCOMs to the old tariff rates. This shows failure to balance between the consumers and the service providers. The Commission had in effect taken the role of controller instead of being a Regulator to regulate and determine the consumer tariff by adopting the Regulatory measure and mechanism. The object of DER Act 2000 and The Electricity Act, 2003 has been lost sight by the DERC.”

42. In view of the above ratio, the Appellant cannot deny the payment to be made to DTL (R-2). Similarly, the Appellant cannot either postpone or impose any condition to the effect that the payment would be made only after Appellant recovers the amount from the consumers. If this plea is accepted, it will lead to dangerous results to bring the whole sector to a stand-still.

43. The generating companies purchase coal from others and incur expenditure to operate the plant to generate and supply electricity to the intermediary company, the DTL (R-2). The generating company is liable to pay the amount due for coal purchase, etc., as per the agreement with the coal company. It cannot postpone such payment till it receives the amount from the intermediary company which purchases the electricity. If the intermediary company delays or defaults the payment to the generating company, the generating company who has already paid the amount to the coal companies will initiate proceedings on against the intermediary for recovery with carrying costs. Similarly, in the instant case, when there was no payment made by the Distribution companies to the intermediary company R-2, despite the demand, the action has to be taken as against the Distribution Companies by approaching the Commission. In pursuance of the same, direction is issued by the Commission to the Appellants to pay the dues to the DTL

(R-2). Therefore, in view of the impugned order, which has been validly passed, the Appellants have to make the payment to R-2 first and then take up the matter with the State Commission for consequential adjustment in retail supply tariff.

44. If it is a case of the Appellant that the Government of NCT of Delhi has to pay the said amount and not the Appellants, the Appellant should have taken up the matter with the State Government on this issue. It is to be reiterated that the Distribution companies are free to request the State Government to pay the amount which in the opinion of the Appellants that the same is required to be paid by the State Government and not the Appellant, following the principle of capacity to pay. As indicated above, the State Commission cannot issue any order to the State Government under the provisions of section 86 of the Act. Further, the Government of Delhi is not a regulated entity.

45. As per the bulk supply tariff order dated 22.02.2002 passed by the State Commission regarding “capacity to pay” principle, it was to ensure that the retail tariff of the 3 Distribution companies remains identical during the control period. Each distribution company had different consumer mix and AT&C loss levels. Since the tariff for different categories of consumers is different, the quantum of the revenue available from the uniform retail tariff also would be different.

46. Accordingly, the bulk supply tariff payable to the DTL (R-2) by the distribution companies was to be adjusted inter se among the 3 distribution companies/Appellants based on such difference in revenue available to them and this has been described as “capacity to pay”. If the additional cost of power is recovered through appropriate increase in retail tariff prospectively, there is no infringement on the “capacity to pay” principle enunciated for the control period.

47. The Learned Counsel for the Appellant during the hearing has stated that the surplus amount of Rs. 196.17 crores payable by the DTL (R-2) to the distribution companies/Appellant as per MYT order dated 20.12.2007 remains unimplemented for over 26 months till date nor given effect in the two subsequent tariff orders passed by the State Commission on 23.02.2008 and 29.05.2009. On the other hand, it is pointed out by the Learned Counsel for the Respondent that true up order dated 20.12.2007 shows a net deficit in the revenue requirement approved for the year 2005-06 and that the surplus of Rs. 196.17 crores shown in the subsequent order for 2006-07 was expressly made subject to result of Appeal No. 133 of 2007 (AFR 372 of 2007) which was then pending before the Tribunal. This has been stated in the truing up order dated 20.12.2007 as under:

“The Commission having deliberated upon the Multi Year Tariff Petition filed for the Control Period of FY

2008-11, along with the Business Plan for the said Control Period and also the subsequent filing by the Petitioner during the course of the proceedings and having considered the responses received from stakeholders, in exercise of the power vested under the Delhi Electricity Regulatory Commission (Terms and Conditions for Determination of Transmission Tariff) Regulations, 2007 read with the provisions of Electricity Act, 2003 hereby pass this Order signed, dated and issued on 20th day of December, 2007.

The Petitioner shall take immediate steps to implement the said Order, so as to make the revised tariffs applicable from 1st January, 2008.

This Order may be amended reviewed or modified in accordance with the provisions of the Electricity Act,2003 and the Regulations made thereunder.

This Order shall be subject to the final outcome of AFR No. 372/2007 before the Appellate Tribunal for Electricity.”

48. This Appeal has been finally disposed of on 29.05.2009 in favour of the DTL (R-2) resulting in substantial amount to be paid to the DTL (R-2), over Rs. 429 crores as against the earlier amount of Rs. 196.17 crores. By virtue of the above decision, there is a huge deficit which needs to be recovered by the DTL (R-2) from the distribution licensees. Thus, the finding of the surplus amount of Rs. 196.17 crores earlier made by the State Commission is of no effect since the order of Tribunal subsequently passed modifying the same. Therefore, this contention urged by the Appellant also would fail.

49. In the result, the additional power purchase cost for 2005-06 has to be reimbursed by the Appellant to the DTL (R-2). The Appellant can recover the same through their

ARR without affecting the minimum return earned by them during the control period as per the policy directive.

50. Findings:-

- i) The impugned order dated 12.11.2009 has been passed by the State Commission in pursuance of the order dated 13.08.2009 passed by the Tribunal in IA 250 of 2009 in Appeal No. 28 of 2008 for making corrections of the obvious mistakes in calculation and for arriving at a correct figure by modifying the earlier true up order dated 20.12.2007. This is not disputed. Similarly, the correctness or prudence of the quantum of additional amount allowed by the State Commission to be paid to the DTL, R-2 has also not been disputed by the Appellant. Therefore, these findings given by the State Commission is liable to be confirmed.**
- ii) The main contention urged by the learned counsel for the Appellant that the policy directives issued on**

22.11.2001 and 31.5.2002 and the Bulk supply tariff order passed by the State Commission on 22.2.2002 with reference to the Principle of the “capacity to pay” and binding nature of the same have not been followed by the State Commission. The binding nature of these directives as well as Bulk supply tariff order can not be disputed. The question is what is the scope and extent of the above policy directives and the Bulk supply tariff order and whether to deal with the capacity to pay as claimed by the Appellant ? These policy directives are not open ended and unlimited quantum to be adjusted in the Bulk supply tariff. Neither the policy direction nor the Bulk supply tariff order provides for freezing of Bulk supply order to restrict recovery of Bulk supply tariff by the DTL, R-2 from the Distribution companies. Hence this contention is misconceived.

iii) The DTL was an intermediary company indulging in the purchase of power from the generating companies and resale of the said power to the

Distribution companies. The entire power purchase cost estimated in the true up exercise based on actuals has to be a pass through in the bulk supply tariff to be charged to the distribution companies. These policy directions do not change the above basic implication which is inherent in the power sector. In other words, these directives or the Bulk supply tariff order do not provide that the power purchase cost incurred by the DTL, R-2 shall not be a pass through to the Distribution companies.

iv) A minimum 16% return has to be assured to the Distribution companies during the policy direction control period. In terms of the policy directions, the Delhi Government has duly given the committed entire amount of Rs. 3450 crores to DTL (R-2). The DTL (R-2) also has reduced the bulk supply tariff to the said extent during the control period. As such, it becomes evident that the DTL is entitled to recover the entire dues from the Distribution companies.

v) **The claim of the Appellants is that the Distribution companies are not liable to pay the additional amount allowed in the impugned order and either the Delhi Government or the DTL (R-2) have to bear the amount in excess of Rs. 3450 crores as per the policy directives. This is not correct. The policy directives cannot be read as an agreement on the part of Delhi Government to provide transitory support without limit or it can not put an obligation on DTL (R-2) to absorb all the increase in the bulk supply tariff within itself without a right to pass it on to the distribution companies.**

vi) **The communication dated 12.11.2007 was addressed by the DTL (R-2) only to the generating companies and not to the Appellants. It merely states that the generating companies shall not directly recover any arrears for the period prior to 1.4.2007 from the Distribution companies. On the other hand, the perusal of the communication dated 12.11.2007**

would show that it does not provide that the excess liability arising out of the power purchase would be assumed by the DTL without the right to claim the pass through in the Bulk supply tariff to be charged from the Distribution companies.

vii) The amount of the expenditure incurred by the generating companies shall be made by the DTL (R-2) which had a privity of contract with these companies. Therefore, the payment made by the DTL (R-2) to the generating companies will have to be necessarily added in the revenue requirement of DTL (R-2) Similarly, all prudent expenditure incurred by the Distribution Companies , the Appellants including the Bulk supply tariff paid to the DTL (R-2) is to be necessarily included in their revenue requirement to be recovered from the consumer.

Conclusions:-

51. In view of the above findings, we confirm the impugned order dated 12.11.2009 and hold that the

additional power purchase cost for the period 2005-06 and RLDC/ULDC charges are to be borne by the Appellants.

52. Accordingly, the Appellant are directed to make the payment to DTL (R-2). Thereupon the Appellant may take up the matter with the State Commission by filing a separate application for consequential adjustment in retail tariff as a result of the compliance with the directions of the impugned order, by making the payment to the DTL (R-2). In that event, the State Commission will consider all the expenses including the additional power purchase cost and RLDC/ULDC charges along with carrying cost at interest rate equal to short-term Prime Lending rate of State Bank of India while considering the ARR of the Distribution companies for the year 2010-2011 which will ensure that the minimum return of 16%, assured to the distribution companies during the policy direction control period is not affected. The said application filed by the Appellant may be disposed of as expeditiously as possible.

53. With these observations, the Appeal is dismissed.

There is no order as to cost.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated: 31st May, 2010.

INDEX: REPORTABLE/NON-REPORTABLE