Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 52 of 2008

Dated: 31st May, 2011

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

In The Matter of

New Delhi Power Limited
NDPL House
Hudson Lines
Kingsway Camp,
Delhi-110009

... Appellant(s)

Versus

1. **Delhi Electricity Regulatory Commission**
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2. **Hari Prakash Gupta,**
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JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

New Delhi Power Limited is the Appellant herein. The Respondent-1 is the Delhi Electricity Regulatory Commission (State Commission.) The Respondents 2 to 56 are objectors/consumers who participated in the proceedings before the State Commission in the MYT Petition leading to the issue of the impugned MYT order.

2. The Appellant is engaged in the business of distribution and retail supply of electricity in the North and North-west circle of National Capital Territory of Delhi. It is a successor in interest of erstwhile Delhi Vidyut Board. Its business is governed by the provisions of the Electricity Act, 2003, read with Delhi Electricity Reforms Act, 2000.

3. On 30.05.2007, MYT Regulations were notified by the Delhi State Commission. As per the Regulations, the Appellant on 29.09.2007 filed its petition for approval of Annual Revenue Requirements and determination of tariff for the MYT control period between FY 2007-08 and FY 2010-11 before the Delhi State Commission. This petition was admitted by the State Commission on 26.10.2007. Public notices were issued inviting objections and comments. After having received the comments from various persons, public hearing was held. Ultimately on 23.02.2008 the State Commission passed the MYT order impugned. Challenging the same, the Appellant has filed this Appeal.

4. The Appellant has raised totally 18 issues in this Appeal. However, in view of the fact that the Commission agreed to re-work its calculations in respect of some issues and some of the other issues have been resolved by the subsequent order passed by the State Commission,

the Learned Counsel for the Appellant has confined himself to focus only on the remaining 9 issues. Those are as follows:

(i) Sale of electricity wrongly treated as controllable, contrary to the MYT Regulations;

(ii) Incorrect determination of inflation factor, contrary to the MYT Regulations leading to the denial of employee and Administrative & General expenses;

(iii) Erroneous computation of Advance Against Depreciation;

(iv) Lower interest allowed than the actual on notional loan for the FY 2006-07, deviation from the past practice (@ 8.55 p.a. vs 9.20% p.a.)

(v) Lower interest rate considered on new loans for working capital/capital expenditure for MYT period (@ 9.50% p.a. vs 11.25% p.a.)

(vi) Equity component for margin of working capital requirement not considered by the Delhi Commission;

(vii) Retrospective revision of means of finance for the FY 2002-03 to FY 2006-07 due to allowance of depreciation @ 6.69 % for the same period, resulting in lower return on equity;

(viii) Inappropriateness of MYT Regulations with respect to allowance of establishment cost; and

(ix) Erroneous computation of efficiency factor.

5. The first issue is relating to the sale of electricity classified as "controllable factor". According to the Appellant, the decision on this issue by the Delhi State Commission treating the sale as controllable factor instead of treating the same as 'uncontrollable' as per the MYT Regulations is wrong. On the other hand, it is

submitted by the State Commission that it has considered the energy sales and supply margins in accordance with MYT Regulations and in order to curb the load shedding, the Commission decided that there should be a disincentive for lower sale because of load shedding by the Distribution Companies and as such, the Distribution Companies have to bear the loss for lower revenue for supply margin in case the energy sales are lower than the approved sales and that as per the MYT Regulations there is no bar to treat supply margin as controllable.

6. We have carefully considered the submissions made on this issue. We have also perused the finding over this issue in the impugned order.

7. The fundamental principle of determination of tariff under the MYT Regulation is segregation of each element of cost and the Revenue Requirement in the controllable and uncontrollable based upon the ability of the licensee

to control them. In other words, the regulatory treatment for the two classes of parameters are different and distinct. These two classes of parameters are given below:

(a) *Operation and Maintenance Expenses (comprising of Employees costs, Administration & General Expenses and Repair & Maintenance Expenses)* have been defined in the MYT Regulation as 'Controllable Parameters'. Except for specific annual adjustments explicitly provided for in such factors, any loss or gain on account of change in controllable cost are not adjusted or trued up annually in the Aggregate Revenue Requirement of the licensee during the Control Period.

(b) Certain parameters, including 'Sales', 'Power Purchase Cost', capital expenditure and its consequential impact on allowance of depreciation and Return on Capital Employed

(ROCE) are classified as 'Uncontrollable' parameters. Any variance in actuals vis-à-vis initially approved budgeted expenses/revenue on such items would be trued up, i.e. adjusted in the ARR of the licensee annually and/or at the end of the Control Period.

8. In the light of the above parameters we have to consider whether the finding of the Commission on this issue is correct or not.

9. It cannot be debated that it is a settled principle of law that the Commission cannot act in violation of the MYT Regulations in determination of tariff. In other words, the Commission has neither the authority nor the jurisdiction to erase the statutory rules and notifications even though it is a rule making authority to fix the tariff. This has been held by this Tribunal in 2007 ELR (APTEL)

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10. On perusal of the relevant MYT Regulations, it is evident that supply margin is a function of sales and the sales has been specified in the Regulation as uncontrollable parameter. The applicable Regulation relevant to the energy sale and supply margin is contained in Regulation 4.2(f), 4.10, 4.11, 4.16, 5.28, 5.38, 5.39, 5.41 and 5.42. The relevant Tariff Regulations are reproduced below:

“ 4.2 The Multi Year Tariff frame work shall be based on the following:

(a)........

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

“Sales Forecast

4.10 The Commission based on the licensee's filing, shall examine the forecast for reasonableness and consistency, and shall approve the sales forecast for each year of the control period."

"4.11 sales shall be treated as uncontrollable. The open access transactions shall not form part of sales"

" True up

4.16. The true up across various controllable and uncontrollable parameters shall be conducted as per principle stated below:

(a) variation in revenue/expenditure on account of uncontrollable sales and power purchase shall be trued up every year"

" ARR for Retail Supply Business

"5.28 The Aggregate Revenue Requirement for the Retail Supply Business of Distribution Licensee

for each year of the control period, shall contain the following items;

(a) Cost of power procurement;

(b) Transmission and cost dispatch charges;

(c) Supply margin and

(d) Correction for "uncontrollable factors"

"5.38 : The Commission shall specify a retail supply margin for the Retail Supply Business in MYT order based on the Allocation Statement provided by the Distribution Licensee. The costs allocated to Retail Supply Business as per Allocation Statement shall be considered while determining supply margin."

"5.39: The Commission shall specify the retail supply margin in such manner that the return from the Wheeling Business and Retail Supply Business shall not exceed 16% of equity."

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

"5.42: Variations 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 the actual/audited information and prudence check by the Commission;

Provided that if such variations are large, and it is not feasible to recover in one year alone, the Commission may take a view to create a regulatory asset, as per the guidelines provided in clause 8.2.2 of the National Tariff Policy."

The above Regulations clearly indicate energy sales as uncontrollable item to be trued up each year on the basis of actual/audited accounts and prudence check by the State Commission.

11. The State Commission has made an attempt in the impugned order to convert the entire supply margin cost of Rs. 153.96 crores as controllable, and therefore held that it is not recoverable to the extent the State

Commission approved units sales not being achieved. This treatment is contrary to the Regulation and inequitable since the Delhi Commission has passed on the entire benefit of sale of energy outside the state to the existing consumers by way of lower power purchase cost built into tariff but even than it has penalized the Appellant by enforcing the under recovery of even the actual cost incurred. The Appellant cannot be dis-incentivised for the lower sales on account of sale of power when no incentive is provided for reduction in the net power purchase cost charged to consumers due to additional margin obtained from sale of power.

12. The load shedding is carried out at the direction of State Load Dispatch Centre due to fall in frequency of the Grid. In its letter dated 11.09.2008 the Delhi Transco Limited sent to the North Delhi Distribution Company intimating the under frequency relays operation in Delhi

occurred when Delhi was over drawing and also under drawing from the grid.

13. There are times when generating plants are not able to generate the contracted power despite being in demand. This shortage of supply in the Grid compared to demand leads to under-frequency. Even when generating stations generate to their full commitment, there can be excess drawl through un-contracted demand as several States in the Northern Region overdraw frequently beyond their sanctioned entitlement. If at the same time other States draw their full entitlement, the excess drawl of power leads to under-frequency in the Northern and Western Regional Transmission Grids. This, in turn, leads to forced load shedding to protect the Grid from totally collapsing.

14. Under section 43 of the Electricity Act, 2003, the Appellant is under a universal supply obligation. As such,

for such supply, the treatment in MYT Regulations is prudent since it factors in supervening factors outside Discom's control like under frequency relays, consumer mix, connected load, demand etc. As a matter of fact it is noticed that on 21.10.2009, the State Commission issued directions to the Discoms to maintain an uninterrupted power supply and the discoms shall ensure that the electricity that could not be served shall not exceed 1% of the total energy supplied in units in any particular month. In case, the disruption in power supply exceeds the limit of 1% for any particular month, the Discom shall be liable to a penalty up to Rs. 5 lakh for every two lakh kwh units unserved. Therefore, the finding of the State Commission on sale of electricity is contrary to the reality since it does not take into account the load situation, load mix, demand, under-frequency relay, etc. and the implication of section 43 of the Electricity Act, 2003.

15. According to the Appellant, even assuming that the Delhi Commission has a right to designate the sale as controllable for the purpose of recovery of supply margin, in the event of Delhi Commission approved billing units not being achieved, due to unintentional load shedding by the Appellant, the recovery of only the return/profit margin component of the total supply margin can be impaired after allowing the total cost. Regulation 4.16 provides that for uncontrollable cost, the truing up shall be done annually while for controlled cost the truing up shall be done only at the end of the Control Period which is also limited to only depreciation and return on capital employed. This Regulation has not been taken note of by the State Commission in deciding this issue.

16. Further, as pointed out by the Appellant, the Appellant sells power outside its licensed area only during the period when there is surplus power at its disposal. The Appellant does not retain any additional margin

obtained from the sale of such surplus power. The entire sale proceeds from such surplus power are being adjusted with the power purchase cost for that year. During the hearing, the Learned Counsel for the Delhi Commission has clarified that the entire supply margin is not at risk but only the 2% additional return allowed is at risk that too pro rate to units not sold vis-à-vis approved units sold. So in view of this clarification also, it is appropriate to set aside the findings of the State Commission in para 4.271 and 4.272 of the impugned MYT order. Accordingly, the same is set aside and the State Commission is directed to treat the variation in actual sales with respect to approved sales according to the Tariff Regulations. This point is answered accordingly in favour of the Appellant.

17. The second issue is relating to the incorrect determination of inflation factor for allowing employee and Administrative & General Expenses for MYT period.

According to the Appellant, the MYT Regulations had established a mechanism for annual correction of the operation and maintenance expenses for inflation by using an indexation from the whole-sale and consumer price indices of the Government of India. Since the State Commission considered the inflation factor for FY 2001-02 to FY 2005-06 instead of FY 2002-03 to FY 2006-07, it has resulted in unjust denial of expenses in the Annual Revenue Requirement to the extent of several crores of rupees for the FY 2007-08 to FY 2010-11. It is also submitted by the Appellant that Delhi Commission has wrongly calculated immediately preceding 5 years from FY 2001-02 to FY 2005-06.

18. Relying upon Regulations 5.2, 5.3 and 5.4 the State Commission submitted that it has arrived at inflation factor by using the Consumer Price Index and Whole-sale Price Index for preceding 5 years from FY 2001-01 to FY 2005-06. It has also been submitted that

it has deviated from using the Consumer Price Index and Whole-sale Price Index for immediately preceding 5 years as it did not deem it fit to use the same for any future years.

19. The relevant Regulations are reproduced below:

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

(a) Salaries, wages, pension contribution and other employee cost;

(b) Administrative and General expenses;

(c) Repairs and Maintenance; and

(d) Other miscellaneous expenses, statutory levies and taxes (except corporate income tax)."

"5.3: The Licensee shall submit the O & M expenses for the Control Period as prescribed in multiyear tariff filing procedure. The O & M expenses for the Base Year shall be approved by the Commission taking into account the latest available audited accounts, business plan filed by the Licensees, estimates of the actuals for the Base year, prudency check and any

other factor considered appropriate by the Commission."

"5.4: O & M expense permissible towards ARR for each year of the Control Period shall be determined using the formula detailed below. The R & M expenses are linked to the Gross Fixed Assets while the employee expenses and A & G expenses are linked to an Inflation Index, as shown below:

(c) INDXn – Inflation Factor to be used for indexing can be taken as a combination of the Consumer Price Index (CPI) and the Wholesale Price Index (WPI) for immediately preceding five years;"

The Regulations stipulate that O&M Expenses for each year of the control period shall be determined using the specified formula. The inflation factor to be used for the indexing shall be combination of CPI and WPI for immediately proceeding five years. According to the Regulation 4.7 the Operation and Maintenance Expenses are controllable. According to Regulation 4.16(b) O&M expenses shall not be trued up.

20. We have considered the rival submissions on this issue. According to the Appellant, while computing

the inflation factor for the MYT period starting from FY 2007-08, the Delhi Commission has erred on following two counts:

(i) The Commission has considered the inflation factors for Consumer Price Index and Whole-sale Price Index for the FY 2001-02 to FY 2005-06 instead of FY 2002-03 to FY 2006-07; and

(ii) Contrary to MYT Regulations, the Delhi Commission has erroneously applied the inflation factor for the entire control period based on the annual basis for the FY 2001-02 to FY 2005-06. Due to this wrong calculation, it has resulted in unjust denial of expenses in the ARR to the extent of several crores of rupees for the FY 2007-08 to FY 2010-11. For the year in issue, i.e. FY 2007-08, the State Commission has wrongly calculated the immediately preceding 5 years from FY 2001-02 to FY 2005-

06. The words “immediately preceding 5 years” appearing in 5.4(c) of the Regulations imply immediately preceding 5 years for which the final figures are available. This means immediately preceding 5 years would be FY 2002-03 to FY 2006-07.

The State Commission has made an attempt to justify the same by stating that the Consumer Price Index and Whole-sale Price Index for FY 2006-07 were not considered as the official numbers for FY 2006-07 were not a vailable till the impugned order was passed.

21. We are unable to accept this explanation. The Consumer Price Index and Whole-sale Price Index number are declared by the Government on a weekly basis. They are available on the official website of the Government. The Petition for MYT Tariff was filed on 29.9.2007 and the

impugned order was passed on 23.2.2008. Therefore, it is difficult to accept that the CPI and WPI number for FY 2006-07 were not available.

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.

24 The next issue is with reference to incorrect computation of Advance Against Depreciation. According to the Appellant, the Delhi Commission in the past had approved the means of financing for the capital expenditure using debt and equity ratio of 70:30 but the depreciation rate which has been allowed by the Delhi Commission in the impugned order is only 3.75% p.a. whereas the depreciation rate required to meet the repayment would be around 7% p.a. and this is in contravention of the law laid down by the Hon'ble Supreme Court in 2007 (3) SCC 33 and in 2010 (3) SCC 396. Refuting this claim, the Learned Senior Counsel on behalf of the State Commission, submitted that this issue has been covered by the judgment of this Tribunal in Appeal No. 36/08 (*BSES Rajdhani Power Limited Vs. Delhi Electricity Regulatory Commission)* reported in 2009 ELR (APTEL) 880, wherein this Tribunal disallowed the similar contention of the Appellant. Therefore, this issue cannot be re-agitated before this Bench.

25. We have carefully considered these submissions on this issue. The Learned Counsel for the Appellant in support of his contention cited 2 judgments of the Hon'ble Supreme Court. The State Commission, while distinguishing those judgments, has cited judgment rendered by this Tribunal dated 06.10.2009 reported in 2009 ELR (APTEL) 880 and stated that this issue had already been settled and as such the same cannot be re-agitated.

26. We have gone through both the judgments of the Hon'ble Supreme Court. The perusal of the above judgments would make it clear, as pointed out by the earned Senior Counsel for the Commission, that they do not deal with the issue raised by the Appellant. The judgment reported in 2007 (3) SCC 33 deals with the rate of depreciation which has been given effect to by the State Commission and the same is alien to the issue under

consideration. Similarly, the judgment reported in 2010(3) SCC 396 would not also be of any help to the Appellant since the Hon'ble Supreme Court has defined the subject of Advance Against Depreciation by stating that the Advance Against Depreciation is nothing but an adjustment by reducing the normal depreciation inducible in future years in such a manner that at the end of useful life of the plant the same shall be reduced to nil. Therefore, these judgments are not dealing with the issue which has been decided by this Tribunal in Appeal No. 36/08. [2009 ELR (APTEL) 880]

27. It is pointed out by the Learned Senior Counsel for the State Commission that in arriving at the figure for Advance Against Depreciation, the Delhi Commission has worked out in strict adherence to the provisions of the MYT Regulations, 2007. As per clause 5.18 of the Regulations, the Distribution Licensee shall be entitled to Advance Against Depreciation in addition to the allowable

depreciation. Accordingly, the State Commission has considered both opening Balance Sheet and the entries relating to the equity capital, as well as the secured loans paid to the holding company and the security deposits. It is noticed that the Appellant has claimed to accept the liability of Rs. 10 crores only as per opening Balance Sheet and not the entire amount of security deposits. Hence, the Delhi Commission has correctly considered only the total depreciation figure approved and considered during the Control Period excluding Rs. 401.66 crores. Therefore, this issue is answered against the Appellant.

28. The next issue is with reference to the lower interest rate allowed on notional loan. According to the Appellant, the State Commission has allowed the interest rate on notional loan for financing of capital expenditure for FY 2006-07 only @ 8.5% p.a. instead of 9.2% p.a. It is further contended by the Appellant that the interest rate of notional loan works out to 9.2% p.a. for the FY 2006-07

and the same should be used for calculation of rate of debt on the notional loan for MYT period.

29. According to the State Commission, the Commission has allowed the actual interest rate of loan taken by the Appellant towards re-financing of the Delhi Power Company Limited in 2007. It is further contended by the State Commission that the Commission has allowed the interest on notional loan in 2007 @ 8.5% which was in addition to the interest allowed on Delhi Power Company Limited re-financed loan and since the Appellant has not taken any loan in 2007 the interest allowed @ 8.5% was assumed as a notional loan. The relevant extracts of the impugned order in effect disallowing appropriate interest is as follows:

> "*3.80. For 2007, the Commission has approved the total debt financing of Rs. 125.62 Cr. For Capital expenditure as per the means of finance approved for*

2007. The Petitioner has not taken any debt in 2007. The Commission approves normative loan of Rs. 125.62 Cr. The Commission approves interest rate of 8.5% on the normative loan with moratorium period of one year repayment period of 10 years."

30. The investments referred to by the Delhi Commission to support the lower rate are investments relating to contingency reserves and not the surplus funds available with North Delhi Power Limited contingency reserve invested in Government securities and RBI bonds as per the Regulation 4.20. Such securities are risk free securities and carry lower interest rate than other investment instruments such as Mutual Funds, Equity etc. Therefore, the State Commission's comparison with the Government securities is misconceived.

31, Further, this issue is governed by the principle settled by this Tribunal in its judgment dated 30.07.2010 in Appeal No. 153/09 in which it has been held that:

> "*47. The State Commission instead of applying the principle of allowing the prevailing market rate for debt for the carrying cost, has allowed the rate of 9% on the strength of the Tribunal judgment even though the present interest rate has increased significantly. As pointed out by the Counsel for the Appellant, the State Commission in the earlier case had decided tariff on 9.06.2004 and that on commercial borrowings on interest rate of 9% had been applied considering the then prevalent prime lending rates.* ***Therefore, the State Commission before fixing the rate of carrying cost has to find out the actual interest rates per the prevailing lending rates. Admittedly, this has not been done.***

50. The working capital is being allowed by the State Commission on normative basis in line with the MYT Regulations. These Regulations would imply that it is controllable parameters which is not to be trued up. Any loss/saving in interest on working capital is to the account of the distribution company. When there is some savings on this account, the State Commission cannot deny the benefit of the same to the distribution company to enable it to utilize the same to meet the other requirements. As a matter of fact, the Appellant claim is in line with the State Commission view that the carrying cost is to be allowed in the ratio of 70:30.

51. It cannot be disputed that the State Commission shall be guided by the principles that reward efficiency in performance as provided under section 61(e) of the Electricity Act, 2003. Similarly, the said section provide that State Commission shall be guided by the National Electricity Policy and Tariff Policy. Therefore, the State Commission should have allowed the

*carrying cost at he prevailing market lending rate for the carrying cost so that the efficiency of the distribution company is not affected. The State Commission is required to take the truing up exercise to fill up the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. The Tribunal in various judgments rendered by it held in Appeal No. 36 of 2008 in the judgment dated 06.10.2009 reported in 2009 ELR *APTEL) 880 has held that "the true up exercise is to be done to mitigate the difference between the projection and actuals and true up mechanism should not be used as a shelter to deter the recovery of legitimate expenses/revenue gap by over-projecting revenue for the next tariff",* ***Therefore, the fixation of 9% carrying cost, in our view, is not appropriate. Therefore, the State Commission is hereby directed to reconsider the rate of***

carrying cost at the prevailing market rate and the carrying cost also to be allowed."

32. The above observation would reveal that the Delhi Commission has approved the interest rate of 8.5% for notional loan for 2007 since the Appellant has not taken any new loan for capital expenditure for the said year. The only loan taken by the Appellant for the FY 2007 was for re-financing of old Delhi Power Company Limited loan. It is pointed out that in the previous tariff orders for 2002-03, 2003-04, 2004-05 and 2005-07, the Delhi Commission had adopted the principle that while computing the rate of interest on notional loan, the Commission is to be guided by the interest rate on actual loan availed during the year or the prevailing interest rate if no new loan is contracted during the year.

33. It is not debated that the rate of 8.5% considered by the Delhi Commission was based on the loan taken by

the Appellant in the FY 2004-05. It is noticed that the interest rates have subsequently increased which is evident from the movement in the prime lending rate fixed by the State Bank of India. The Delhi Commission has not considered the cost of re-financed Delhi Power Company Limited loan for allowing interest on notional loan. The purpose of allowing interest rate on notional loan with that of interest rates of loans actually drawn is to ensure that the costs allowed are in line with the actual cost of loans available in the market.

34. The State Commission has ignored the re-financing of Rs. 552 crores of loan. The case of the Appellant before the Delhi Commission that the interest rate to be worked out on a loan must be raised on the prevalent market rates. The Delhi Commission has ignored the fact that the capital interest rate to be applied is for the period 2006-07. The total impact of such lower

allowance is 0.44 Crores for the FY 2006-07 and Rs. 0.99 crores from the FY 2007-08 onwards.

35. Under those circumstances, the Delhi Commission is directed to allow interest on notional loan for this particular year based on the market related interest rate prevailing in that year i.e. either the interest rate approved in FY 2004-05 duly adjusted for change in the State Bank of India prime lending rate or 9.2% per annum based on the loan obtained by the Appellant. The said claim may be considered by the State Commission along with carrying cost. Accordingly this issue is answered in favour of the Appellant.

36. The next issue is relating to the lower interest rate allowed for new loans/working capital loans in MYT period. According to the Appellant, the Delhi Commission has allowed interest on working capital loan @ 9.5% p.a. observing that the Appellant would be able to raise the

funds @ 2.75% below the SBI prime lending rate, whereas the same was 1% below the SBI prime lending rate from SBI. It is further contended by the Appellant that the Appellant has not availed any long-term loan where the rate is SBI prime lending rate less 2.5% to 3% and as such by ignoring the ground reality and based on its incorrect assumption, the State Commission has allowed interest on term loan as part of return on capital employed @ 9.5% p.a. for the MYT period.. On the other hand, the Delhi Commission has stated that it has relied on the terms and conditions of the loan taken by the Appellant in 2007 and noticed that the Appellant has procured the funds in the range of 2.5% to 3% p.a. below the prime lending rate. Though the Delhi Commission has stipulated interest rate @ 9.5% p.a. for all loans that the Appellant may raise, it is stated in the impugned order that it may true up interest rate for new loans to be taken for capital investment and for working capital requirement, if there is a deviation in the prime lending

rate of the scheduled commercial banks by more than 1% on either side. We will quote the relevant findings on this issue, as follows:

> "*4.236. For outstanding loan as on 1 April 2007, the Commission has considered the repayment schedule and interest rate as discussed in the truing up section above for DPCL loan (refinanced through IDBI), repayment schedule and interest rate has been considered as per loan agreement submitted by the petitioner.* ***The Commission has also analysed the terms & conditions of the loans taken by the Petitioner in FY07. The Commission has noticed that the Petitioner has managed to procure funds in the range of 2.5% to 3% below PLR. Thus, for the Control Period the Commission has considered that the Petitioner would be able to raise funds at 2.75% below SBI PLR (currently 12.25%)****.*"

"4.238. The Common shall true-up the means of finance for the Control Period as the asset capitalization is subjected to true-up. ***The Commission may true-up the interest rates considered for new loans to be taken for capital investment and for working capital investment, if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side****."*

37. According to the Delhi State Commission, this issue is already covered by the judgment dated 06.10.2009 in Appeal No. 36 of 2008 reported in 2009 ELR (APTEL) 990 in BSES Rajdhani Vs DERC. The Tribunal, while disallowing the similar contention of the Appellant has held as under:

"114) The Commission has not approved the rate of 9.5% without reference to reality. The rate is neither

fanciful nor unrealistic. It is only a projection for the future. In the absence of any given formula, the Commission will have to be allowed some discretion in the matter. It appears to us that the discretion has been used keeping in view the available data. We as an Appellate authority will not interfere with the discretion of the Commission unless the same has been exercised with arbitrariness. The exercise of executing discretion has to be transparent, just, fair and non-arbitrary. The impugned order to the extent of approval of interest cannot be said to suffer from any defect.

115)Further, the Commission has at the very outset said that it shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side. Thus there is sufficient

safeguard for the Appellant and sufficient room to procure loans at the given market rate of interest. We are not inclined to interfere with the Commission's decision on the approval of interest rate."

38. In this judgment we have observed that as Appellate authority we will not interfere with the discretion of the Commission unless the same has been exercised with arbitrariness. It is also mentioned in the said judgment that the Commission shall true up the interest rate for the new loans to be taken for capital investment and for working capital requirement if there is a deviation in the prime lending rate of scheduled commercial banks more than 1% on either side.

39. While distinguishing this judgment the Appellant has stated that in the above-said judgment no sufficient information was placed on record by the Appellant in the said case but in the present case, the Appellant placed

sufficient materials to substantiate its claim to show that the Delhi Commission has erred in allowing lower interest rate to the Appellant. We are unable to accept this contention because we find that , sufficient safeguard has been given in the impugned order also (para 4.238). Therefore, this issue is covered already by the judgment of this Tribunal, as referred to above. Accordingly, the Delhi Commission may consider the issue relating to interest rates for new loans in the true-up exercise. This point is also answered accordingly.

40. The next issue is with reference to the equity component for margin on working capital requirement. According to the Appellant, the Delhi Commission has considered the entire working capital requirement by way of loan and has allowed the interest rate @ 9.5% on the same and this is contrary to the norms of debt and equity ratio of 70:30 of the power sector and also as per Regulation 5.10. According to the State Commission, the

Regulation 5.10 allows 30% of equity funding only in case of capital expenditure and it nowhere mentions that the Commission will allow 30% equity for working capital also. The relevant finding on this issue is as follows:

> "*4.236. For outstanding loan as on 1 April 2007, the Commission has considered the repayment schedule and interest rate as discussed in the truing up section above for DPCL loan (refinanced through IDBI), repayment schedule and interest rate has been considered as per loan agreement submitted by the petitioner.* ***The Commission has also analysed the terms & conditions of the loans taken by the Petitioner in FY07. The Commission has noticed that the Petitioner has managed to procure funds in the range of 2.5% to 3% below PLR. Thus, for the Control Period the Commission has considered that the Petitioner would be able to***

raise funds at 2.75% below SBI PLR (currently 12.25%)."

41. The State Commission relies on Regulation 5.10 but conjoint reading of Regulations 5.6 to 5.10 would not support the contention of the State Commission. The MYT Regulations stipulate that the Weighted Average Cost of Capital as computed under Regulation 5.10 needs to be applied on Regulated Rate Base which includes working capital. Thus, the MYT Regulations do not stipulate that there shall be two different Weighted Average Cost of Capital, one for Capital Expenditure and the other for Working Capital Expenditure.

42. Regulation 5.6 lays down that the items which must be excluded from the computation of Regulated Rate Base and working capital is not covered by the exclusions. On the other hand Regulation 5.6 specifically stipulate that the Regulated Rate Base used to calculate the total

capital employed shall include the original cost of assets and Working Capital. Similarly Regulation 5.7 states that the Regulated Rate Base shall be based on approved capital investment plan including normative working capital.

43. Regulation 5.8 provides formula for calculating the Regulated Rate Base for a particular year wherein working capital is clearly one of the elements so much so that any change in the normative working capital has to be included.

44. Regulation 5.9 sets out the formula for computing the Return on capital employed by multiplying the weighted average cost of capital with the Regulated Rate Base. As mentioned above, Regulation 5.10 stipulates formula to compute the weighted cost of capital which precedes on a clear belief that the debt equity ratio of 70% and 30% has to be accounted for.

45. The Learned Counsel for the Appellant, while refuting the submission of the State Commission that the approach adopted by the State Commission was on the basis of the normal industry practice by referring to the tariff orders of the 4 State Commissions. The Appellant has cited Tariff orders of Karnataka State Commission, Himachal Pradesh State Commission, Jharkhand State Commission and the Gujarat State Commission. It is noticed from the regulations of these State Commissions have different Regulations for the interest on Working Capital and have treated Working Capital separate from the Regulated Rate Base and do not have the concept of Return on Capital Employed as provided in the Delhi Commission's Regulations. Under these circumstances, the Delhi Commission is directed to re-compute the Weighted Average Cost of Capital for each year of the Control Period along with the carrying cost and apply on the respective years Regulated Rate Base for

allowance of Return on Capital Employed according to its Regulations. This issue is answered in favour of the Appellant.

46. The next issue is with reference to the retrospective revision of means of finance for past years. According to the Appellant, the Delhi Commission has wrongly allowed the previously denied depreciation (6.69% minus 3.95%) in the impugned order along with the carrying cost. It is contended by the Appellant that while the Delhi Commission has allowed carrying cost on the denied depreciation amount, it has illegally assumed that the allowance for carrying cost has resulted in the amount allowed for depreciation being available for financing relevant years to which amount would pertain. According to the Delhi Commission, it has allowed carrying cost @ 9% on additional depreciation allowed as the additional depreciation was available with the Appellant in respective years for which such additional depreciation was being

allowed. The relevant finding on this issue is contained in paras 3.50 and 3.68. The relevant extracts are as follows:

> "3.50 *In view of the orders issued by the Supreme Court and the ATE, the Commission has allowed depreciation on the opening GFA for the year which includes assets created from APDRP grants @ 6.69% for the Policy Direction Period along with carrying cost @ 9%."*

> *"3.68 As the Commission is allowing carrying cost @ 9% per annum for additional depreciation allowed, the Commission is of the view that additional depreciation was available with the Petitioner in the respective years for which additional depreciation is being allowed."*

47. In terms of the para 3.68 of the impugned order, the Delhi Commission has allowed carrying cost of the

denied depreciation amounts in accordance with the Tribunal's judgment reported in 2007 ELR (APTEL) 193 which was confirmed by the Hon'ble Supreme Court. However, by the impugned order, the Delhi Commission assumed that the allowance of carrying cost has resulted in the amounts now allowed (FY 2008-09) was available for financing in FY 2002-2007 to which this amount pertain. Consequently, the Delhi Commission has reopened and revised the approved and committed means of financing right from inception i.e. from FY 2002-03 onwards. It is not disputed by the Delhi Commission that through the letter dated 14.02.2008, the Appellant had specifically opposed retrospective reopening of the approved and committed financing. As a matter of fact, the Appellant has quoted the Hon'ble Supreme Court judgment that the financing should not be re-stated on the reason that the carrying cost is being allowed for past periods. However, the Delhi Commission allowed the carrying cost @ 9% p.a. on the equity portion now being

retrospectively replaced by additional depreciation, thereby the Delhi Commission has reduced the Return on Equity based on its own approved financing plans to 9% from 16% p.a.

48. The State Commission's contention that it has followed the principle of allowing carrying cost at 9% p.a. on additional depreciation and accordingly re-casted the means of financing and the same was based on the proposal of two other distribution companies BSES Rajdhani Power Limited and BSES Yamuna Power Limited, is not tenable. Merely because two out of the 3 distribution companies sought recasting of means of finance in lieu of 9% carrying cost, the State Commission cannot automatically adjust the same for being applicable to the Appellant also. Any action relating to the Appellant needs to be based only on sound financial principle which should be just and equitable to all.

49. As a matter of fact, the Appellant suggested to the Delhi Commission that instead of recasting the already approved and financed structure retrospectively, the additional depreciation allowed for pursuant to the Tribunal's order be utilized for financing prospective capital expenditure or reduce the loan outstanding as on 01.04.2007. According to the State Commission, if the means of financing was not retrospectively amended, then it would result in unlawful gain of Rs. 257 crore whereas the distribution company is entitled only to 16% return on Equity and free reserve deployed in fixed assets.

50. The Appellant in the grounds of Appeal has suggested that in view of the fact that the State Commission has allowed the carrying cost of 9%, it must then replace or substitute only that source of financing in the approved and committed financing plans whose cost is upto 9% i.e. loan funds.

51. We notice from the impugned order that the State Commission had a practice of prescribing the priority order for means of finance in the previous orders which was (a) consumer contribution (b) APDRP Grant/Loan (c) Unutilized Depreciation including available unutilized depreciation of the previous year (d) Balance Funds requirement assumed to be met through a mix of debt and equity by applying a normative debt equity ratio of 70:30. For utilization of depreciation also the priority was (a) Loan repayment (b) Working capital requirement (c) Capital Investment.

52. With the granting of additional amount of depreciation with carrying cost, the unutilized depreciation available for capital investment for the past years will also change and so will be requirement of balance funds to be met from debt and equity. With the approval of additional depreciation amount granted with the carrying cost, the State Commission has correctly

trued up the finances of the FY 2003 to FY 2007. We do not find any infirmity in the order of the State Commission except that if the Appellant had to arrange debt at interest rate higher than 9% i.e. interest rate of carrying cost allowed, during the period in question then the Appellant may be compensated for the difference in interest rate in the carrying cost for that period. This issue is answered accordingly.

53. The next issue is relating to the inappropriateness of the MYT Regulations with respect to the allowance of establishment cost. According to the Appellant, despite providing detailed justification for projections and estimations for each element of employees cost, which are based on ground realities and actual data, the State Commission ignored the same and merely observed that it has determined the employees expenses of the Appellant for the Control Period using the methodology outlined in MYT Regulations, 2007. It is

strenuously contended by the Appellant that the employees expenses ought to have been allowed on the basis of the detailed estimations provided in the appeal rather than adjusting solely for inflation factor.

54. In reply to this contention, the Delhi Commission has stated that the Commission has approved the establishment expenses based on the methodology described in the MYT Regulations, 2007 and those Regulations cannot be the subject matter of challenge in the appeal before this Tribunal. The relevant finding of the State Commission on this issue is as follows:

> "*4.115 During the privatization process, part of the employees of the erstwhile DVB were transferred to NDPL. As per the Transfer Scheme, the terms and conditions of service applicable to the erstwhile Board employees in the Transferee Company shall in no way*

be less favourable than or inferior to that applicable to them immediately before the Transfer. Further, their services shall be continued to be governed by various rules and laws applicable to them prior to privatization. Thus the salary/compensation and promotion of the erstwhile DVB employees in NDPL are still governed by the rules and pay scales as specified by the GoNCTD,"

"4.119 Based on this, the Commission has calculated the revised employee costs for FY06 and FY07 (by adjusting the likely effect of the recommendations of the 6th Pay Commission) only on the employee expenses of the erstwhile DVB employees and the arrears arising out of it. Since the arrears on account of revision of employee expenses are expected to be paid only in FY09, the Commission has considered the payment of arrears in the employees expenses of FY 09".

55. The Appellant in its MYT petition pointed out that allowance of year to year increase in establishment cost based in inflation factor is totally inadequate and increase in salaries cannot be merely pegged to annual inflation indices as factors such as demand/supply of specific skilled manpower, growth in economy, industry/market expectations etc. play an important role in determining the average increase in salary. It is also contended by the Appellant that MYT Regulations with regard to indexation of salaries to Consumer Price Index and Whole-sale Price Index was not realistic and hence should not be adhered to while projecting yearly estimates for the Control Period of 4 years.

56. The Learned Counsel for the Appellant has cited the judgment of this Tribunal dated 23.05.2007 reported as 2007 ELR (APTEL) 193 in which it is held that the Commission has to give reasons for not accepting the estimation of the utility. It is noticed that the Appellant

submitted that as per MYT Regulations i.e. Regulation 13.3 and Regulation 13.4, the State Commission has the power to remove the difficulties and to relax the provisions of the Regulations. However, the Delhi Commission has chosen to ignore the same and instead of responding on the merits, it has taken shelter under the plea that the MYT Regulations are binding. In this context, we have to refer to the relevant observations made by this Tribunal in the decision 2009 ELR (APTEL) 880. The relevant observations in para 31 of he judgment are as follows:

> "*31) ….. The MYT Regulations are binding on the Commission as well as on the appellant. What the Commission has done is within the scope of the MYT Regulations. The appellant can have grievance only if the target set by the Commission were not within the parameters of the MYT Regulations*".

57. Further, because new initiatives proposed to be undertaken by the Appellant, the Tribunal has made the following observations in the said judgment:

> "*100) The appellant further alleged that it has to incur additional responsibilities on account of power purchase obligations, new consumer initiatives and increased consumer base. The Commission explains that these issues were not raised in the MYT petition and therefore not a part of the impugned order. The Commission mentions the grievances of the consumers ventilated during the public hearing before the impugned order was passed. The Commission contends that the appellant would be free to take any new initiative during the MYT period provided the appellant is justified in new initiatives by the cost benefit analysis. We do not have to say anything more on this aspect.*"

58. In the light of this, the Appellant's contention that the Commission has not provided any reasoning for departing from its past practice cannot be accepted since the departing from the past practice is manifestly clear in view of the continuation of the MYT Regulations which govern the Control Period, i.e. MYT period.

59. Further, the true-up order dated May 2009 reflects that new initiatives have been permitted on a cost benefit analysis. Therefore, we are unable to accept the contention of the Appellant. Accordingly this point is answered as against the Appellant.

60. The last issue is erroneous computation of efficiency factor. According to the Appellant, the State Commission, while fixing the Appellant's Operation & Maintenance cost, has not taken into account the important factors such as increase in number of consumers (approximately 8%), number of units handled

(approximately 6%), stringent performance standards, etc. which have a direct impact on the cost to be incurred. It is also submitted that the Appellant cannot be compared with those of other utilities giving the valuation Delhi Distribution Company business, based on capacity to pay principal and that the Appellant has already taken steps such as Voluntary Retirement Scheme, wherein it has reduced establishment cost and the benefit has been passed on to the consumers.

61. On the other hand, it has been submitted by the State Commission that the State Commission has not made any error while computing the efficiency factur and in fact, it has strictly adhered to MYT Regulations 5.2, 5.3 and 5.4 and the Appellant had not proposed any efficiency factors in its MYT Petition. Let us refer to the relevant extract of the impugned order on this issue.

> *"4.155 The Commission is of the view that O&M expenses trajectory for the Control period shall be*

decided considering on expected annual efficiency improvement factor. The Commission has observed that the O&M cost of NDPL is on the higher side as compared to similar urban distribution companies in other states, thus, representing the inefficiencies in the system.

4.158 The summary of total O&M Expenses approved by the Commission for the Control Period is provided in the table below:

Table 89: Approved O & M Expenses for the Control Period (Rs. Cr.)

Particulars	**FY08**	**FY09**	**FY10**	**FY11**
Exployee Expenses	*131.14*	***153.54***	***147,52***	***152,52***
R&M Expenses	***57.48***	***72.15***	***83.45***	***89.80***
A&G Expenses	***30.92***	***32.21***	***33.5***	***34.94***
Total O&M Expenses	***219.55***	***257.91***	***264.51***	***277.26***
Efficiency Improvement	***0%***	***2%***	***3%***	***4%***
Net O&M Expenses	***219.55***	***252.75***	***256.57***	***266.17***
Net O&M Expenses – Wheeling	***132.79***	***153.53***	***154.65***	***160.38***
Net O&M Expenses – Retail Supply	***86.76***	***99.22***	***101.92***	***105.79***

62. As pointed out by the Learned Senior Counsel for the Commission, the Appellant had not proposed any efficiency factor in its MYT Petition in accordance with MYT Regulations. The Commission after hearing the arguments of the Appellant on the above issue passed an order dated 26.10.2007 giving the following directions to the Appellant:

> "*(a) All the calculations regarding AT&C loss level, O&M Expenses, RoCE, etc. shall be worked out in accordance with the provisions given in the MYT Regulations, 2007".*

Based on above directions, the Appellant submitted the information and explanation for increased O&M expenses but did not propose any efficiency factor.

63. As the Commission did not have any response from the Appellant on determination of the efficiency factor, it compared Appellant's expenses with the other utilities with reference to the O&M expenses. The directions regarding efficiency factor have been given by the Commission aimed at better efficiency and best utilization of the resources.

64. Since O&M expenses of the Appellant were compared with the similar urban distribution companies in other States, the Commission found the expenses of the Appellant were on the higher side and therefore MYT Regulations were framed to bring the requisite efficiency in the system. According to the Commission, the Commission is of the opinion that O &M expenses trajectory for the Control Period shall be decided on the basis of annual efficiency improvement factor and as such O&M cost of the Appellant is on the higher side. The

relevant observations made by the Commission in the impugned order are as follows:

*"**Efficiency Factor:***

4.155. The Commission is of the view that O&M expenses trajectory for the Control Period shall be decided considering an expected annual efficiency improvement factor. The Commission has observed that the O&M cost of NDPL is on the higher side as compared to similar urban distribution companies in other states, thus, representing the inefficiencies in the system. The summary of the relative comparison of O&M cost of NDPL with respect of other utilities is shown below.

4.156 Thus in consideration of the above, the Commission is of the view that Petitioner should try to bring efficiency into the system, thereby, reducing the burden of inefficiencies on to the consumers of Delhi.

The Commission also direct the Petitioner carry out a proper cost benefit analysis before taking up any new initiatives and submit the same for the approval to the Commission.

4.157 The Commission expects the Petitioner to improve its performance considering the repetitive nature of O&M works and introduction of new technologies. Hence, the Commission has determined the efficiency improvement factor as 2%, 3% and 4% for FY09, FY10 and FY11 respectively."

65. In view of the above reasonings, the State Commission was constrained from allowing them to continue to operate in such a manner and pass on the higher costs to the consumers. The increase in the O&M cost is supplemented by the increase in the efficiency level and cost of saving/cost of reductions/other economies being available to the Appellant. Therefore,

there is no merit in this contention raised by the Appellant.

66. The Learned Counsel for the Appellant has relied on the findings of the Tribunal in its judgment dated 29.9.2010 in Appeal No. 28 of 2008 in the matter of Delhi Transco Ltd. vs. DERC and Others wherein in paragraph 25 of the judgment the Tribunal set aside the order of the State Commission in respect of efficiency factor for Delhi Transco decided by the State Commission on ad-hoc basis without any benchmarking or any analysis and identification of area of efficiency. However, in the present case the State Commission has compared the O&M expenses of the Appellant with other utilities and given a reasoned order. Thus the findings of the Tribunal in Appeal No. 28 of 2008 will not apply to the present case. Accordingly, this issue is answered as against the Appellant.

67. **SUMMARY OF OUR FINDINGS:**

(i) The first issue is relating to the sale of electricity classified as "Controllable Factor". The State Commission has to act in accordance with the MYT Regulations in determination of tariff. On perusal of the relevant MYT Regulations, it is evident that supply margin is a function of sale and the sale has been specified as an 'Uncontrollable' parameter. The Appellant cannot be dis-incentivised for the lower sales on account of sale of power when no incentive is provided for reduction in the net Power Purchase Cost, charged to the consumers. Under section 43 of the Electricity Act, 2003, the Appellant is under universal supply obligation. On 21.10.2009, the State Commission issued directions to the Distribution Companies to maintain uninterrupted power supply and to ensure that the electricity that could not be served shall not exceed 1% of the total energy supplied in units in any particular month. Therefore,

the finding of the State Commission on this issue besides being contrary to the Regulations, is also not keeping in view the reality since it does not take into account the demand and availability situation, operation of under frequency relays, etc. and the implication of Section 43 of the Electricity Act, 2003. In fact, Regulation 4.16 provides that for any uncontrollable cost the truing up shall be done annually while for controlled cost the truing up shall be done only at the end of the Control Period which is also limited to only depreciation and return on capital employed. This Regulation has not been taken note of by the State Commission. Therefore, the finding on this issue rendered by the State Commission is set aside.

(ii) The next issue is relating to the incorrect determination of inflation factor contrary to the MYT Regulations leading to the denial of employees and Administrative & General expenses. On behalf of the

State Commission, it was submitted that Consumer Price Index and Whole-sale Price Index for the year 2006-07 were not considered as the official numbers for FY-2006-07 were not available till the impugned order was passed. This submission cannot be accepted. The Consumer Price Index and the Whole-sale Price Index numbers are declared by the Government on a weekly basis. They are available on the official website of the Government. The State Commission did not think it fit to use the data available for immediately preceding 5 years in the indexation of inflation for the FY 2007-08, which is contrary to the Regulation 5.4. However, we are not convinced that the inflation factor for each year of the control period has to be determined on rolling basis of the reason given in paragraph 22 above. Therefore, the State Commission is directed to re-compute the inflation factor and consequently the O&M expenses for each year of the control period in

accordance with Regulation 5.4 and to allow for the expenses for the Control Period after including the Consumer Price Index/Whole-sale Price Index during the FY 2006-07 along with the carrying cost.

(iii) The next issue is with reference to the erroneous computation of Advance Against Depreciation. On this issue, on behalf of the State Commission it has been submitted that in arriving at the figure of Advance Against Depreciation, the Delhi State Commission has worked out in strict adherence to the MYT Regulations, 2007. As per clause 5.18 of Regulations, the Distribution Licensee shall be entitled to Advance Against Depreciation in addition to allowable depreciation. Accordingly, the State Commission considered both Opening Balance Sheet and the entries relating to the equity capital secured loans and the security deposits. It is noticed that the Appellant has claimed to accept the liability of Rs. 10 crore as per Opening Balance Sheet and not the entire

amount of security deposits. Hence, the Delhi Commission has correctly considered only the total depreciation figure approved and considered during the Control Period. This finding is correct and the same is confirmed.

(iv) The next issue is with reference to the lower interest rate allowed on notional loans. The rate of 8.5% considered by the Delhi Commission was based on the loan taken by the Appellant in the FY 2004-05. The interest rates have subsequently increased which is evident from the moment in the Prime Lending Rate fixed by the State Bank of India. As such, the Delhi Commission has not considered the cost of re-financed Delhi Power Company Loan for allowing interest on notional loan. The Delhi Commission has also ignored the fact that the capital interest rate is to be applied for the period 2006-07. Therefore, the Delhi Commission is directed to allow the interest on notional loan for a particular year based on the

market related interest rate prevailing in that year. The said claim has to be considered by the State Commission along with the carrying cost.

(v) The next issue is relating to the lower interest rate allowed for new loans/Working Capital Loans during the MYT period. The Delhi Commission, though has stipulated interest rate @ 9.5% p.a. for all loans, has stated in the impugned order that it may true up the interest rate for new loans to be taken for capital investment and for working capital requirement, if there is a deviation in the Prime Lending Rate of the scheduled commercial banks by more than 1% on either side. It is also pointed out by the State Commission that the issue is already covered by the judgment of this Tribunal dated 0-6.10.2009 in Appeal No. 36 of 2008. Therefore, the Delhi Commission may consider the issue relating to the interest rate for new loans in the true up exercise. Accordingly, this issue

is answered in line with the observations made by the Delhi Commission.

(vi) The next issue is with reference to the equity component for margin on working capital requirement. The State Commission has considered the entire Working Capital requirement by way of loan contrary to the norms of debt and equity ratio of 70:30-. The State Commission relies on Regulation 5.10 but this Regulation would not support the contention of the State Commission. The MYT Regulations stipulate that Weighted Average cost of capital, as computed in the Regulation 5.10, needs to be applied on Regulated Rate Base which includes the working capital. This apart, Regulation 5.8 and Regulation 5.9 provide for the formula for calculating the Regulated Rate Base for a particular year and for computing the return on capital employed by multiplying the Weighted Average Cost of capital with

Regulated Rate Base. Under those circumstances, the Delhi Commission is directed to re-compute the Weighted Average Cost of capital for each year of the Control Period, along with the carrying cost.

(vii) The next issue is with reference to the retrospective revision of means of finance for the past years. According to the State Commission, if means of financing was retrospectively amended then it would result in unlawful gain of Rs. 257 crore whereas the Distribution Company is entitled to only 16% return on equity and a free reserve deployed in fixed assets. The Appellant in the grounds of appeal has suggested that in view of allowance of the carrying cost of 9% on the additional amount of depreciation allowed, the State Commission may replace or substitute only that source of financing in the approved financing plans whose cost is up to 9% i.e. loan funds. We notice that the State Commission has trued up the financials

for the period from FY 2003 to FY 2007 taking into account the additional amount of depreciation and the carrying cost allowed. We do not find any infirmity in the order of the State Commission except that if the Appellant had to arrange debt at interest rate higher than 9% during the period in question then the Appellant may be compensated for the difference in interest rate on debt and the carrying cost allowed for that period. This issue is answered accordingly.

(viii) The next issue is relating to inappropriateness of the MYT Regulations with respect to allowance of Establishment Cost. According to the State Commission, it has approved the Establishment Expenses based on the methodology described in the MYT Regulations, 2007. According to the Appellant, Regulation 13.4 provides that the State Commission has got the power to relax the provisions of those MYT Regulations. This contention of the Appellant

cannot be accepted since there is no valid reasons for departing from the past practice, in view of the continuation of the MYT Regulations which govern the Control Period. Therefore, the finding on this issue rendered by the State Commission is correct.

(ix) The last issue is erroneous computation of the Efficiency Factor. Admittedly, the Appellant had not proposed any Efficiency Factor in its MYT Petition in accordance with the MYT Regulations. The State Commission has compared the O&M expenses of the Appellant with similar urban distribution companies in other states and found the expenses of the Appellant on higher side. Accordingly, the State Commission has decided to introduce efficiency factor of 2%, 3% and 4% for FY 2009, FY 2010 and FY 2011 respectively. Therefore, we do not find any merit in the contention raised by the Appellant. Therefore,

the State Commission finding on this issue is justified.

68. In view of our findings, referred to above, the Appeal is partly allowed, only to the extent as indicated above. Consequently, the State Commission is directed to implement the findings rendered by us on various issues mentioned in the above paragraphs, , as expeditiously as possible.

69. With these observations, this Appeal is disposed of. However, there is no order as to costs.

(Rakesh Nath) **Technical Member**	**(Justice M. Karpaga Vinayagam)** **Chairperson**

Dated: 31st May, 2011

REPORTABLE/NON-REPORTABALE