

Before the Appellate Tribunal for Electricity
Appellate Jurisdiction
New Delhi

Appeal Nos. 38, 39, 122 of 2005 and 48 of 2006

Dated this 24th day of May 2006

Present : **Hon'ble Mr. Justice E Padmanabhan, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

Appeal No. 38 of 2005

M/s BSES Yamuna Power Ltd
Shaktri Kiran Building
Karkardooma, New Delhi - 110065

.....Appellant

Versus

1. The Delhi Electricity Regulatory Commission
Viniyamak Bhavan, C Block, Shivalik
Malviya Nagar, New Delhi – 110017
2. Govt. of NCT of Delhi
Through Secretary (Power)
Department of Power, Delhi Secretariat
8th Level, B Wing, I P Estate
New Delhi - 110001

.....Respondents

Appeal No. 39 of 2005

M/s BSES Rajdhani Power Ltd.
BSES Bhavan, Nehru Place
New Delhi

.....Appellant

Versus

1. The Delhi Electricity Regulatory Commission
Viniyamak Bhavan, C Block, Shivalik
Malviya Nagar, New Delhi – 110017
2. Govt. of NCT of Delhi
Through Secretary (Power)
Department of Power, Delhi Secretariat
8th Level, B Wing, I P Estate
New Delhi - 110001

.....Respondents

Appeal No. 122 of 2005

M/s North Delhi Power Limited
Sub-Station Building, Hudson Lane
Kingsway Camp, Delhi – 110017

.....Appellant

Versus

1. The Delhi Electricity Regulatory Commission
Viniyamak Bhavan, C Block, Shivalik
Malviya Nagar, New Delhi – 110017
2. Govt. of NCT of Delhi
Through Secretary (Power)
Department of Power, Delhi Secretariat
8th Level, B Wing, I P Estate
New Delhi - 110001
3. M/s Tata Power Company Limited
Bombay House, 24 Homi Mody Street
Fort, Mumbai – 400 001
4. M/s Delhi Power Company Limited
Shakti Sadan, Kotla Marg
New Delhi - 110002

....Respondents

Appeal No. 48 of 2006

M/s North Delhi Power Limited
Sub-Station Building, Hudson Lane
Kingsway Camp, Delhi – 110017

.... Appellant

Versus

1. The Delhi Electricity Regulatory Commission
Viniyamak Bhavan, C Block, Shivalik
Malviya Nagar, New Delhi – 110017
2. Govt. of NCT of Delhi
Through Secretary (Power)
Department of Power, Delhi Secretariat
8th Level, B Wing, I P Estate
New Delhi - 110001
3. M/s Tata Power Company Limited
Bombay House, 24 Homi Mody Street
Fort, Mumbai – 400 001
4. M/s Delhi Power Company Limited

Shakti Sadan, Kotla Marg
New Delhi - 110002

.....Respondents

Counsel for the Appellant
in all the appeals

M/s S Ganesh, Sr. Advocate, V. P Singh and
Amit Kapur, Mansoor Ali Shoket, Ms Ritu
Bhalla, Ms Sunita Ahuja, Sumita Arora
Advocates

Counsel for the Respondent
in all the appeals

M/s Arun Gupta, Suresh Tripathi, Sumeet
Pushkarna, Jitendra Kumar Pandey, P. K.
Puri, Ms Mini Pushkarna, Ms Manisha
Lavasia Advocates Somit Dasgupta,
Secretary, DERC, K Sivaraman, Dy Manager
(A/L)

JUDGMENT

1. In Appeal No. 38 of 2005, the appellant M/s BSES Yamuna Ltd has preferred the appeal against the order of the Delhi Electricity Regulatory Commission dated 22.6.2003 in respect of Annual Revenue Requirements (ARR) of the appellant for the financial years 2002-03 (9 months), 2003-04 and the order dated 9.6.2004 in respect of ARR of the appellant for the financial year 2004-05 and consequential fixation of tariff. The appellant has prayed this Appellate Tribunal to allow the appeal, direct the Delhi Electricity Regulatory Commission to grant depreciation for its assets in terms of the Ministry of Power Notification No. S.O. 265(E) dated 29.3.2004 and also to direct the said Regulatory Commission to grant the appellant 16% return on equity on the issued and paid up capital and free reserves at the end of any particular year in terms of Policy Directions dated 22.11.2001 and the order dated 22.2.2002.

2. In Appeal No. 39 of 2005, the appellant M/s BSES Rajdhani Power Ltd. has preferred the appeal against the order of Delhi Electricity Regulatory Commission dated 26.6.2003 in respect of Annual Revenue Requirements (ARR) of the appellant for the financial years 2002-03 (9 months), 2003-04 and order dated 9.6.2004 in respect of ARR for the financial year 2004-05. The appellant herein has also prayed for allowing the appeal directing the first Respondent to grant depreciation for its assets in terms of the Ministry of Power Notification No. S.O. 265(E) dated 29.3.2004 and also direct the said Regulatory Commission to grant the appellant 16% return on equity on the issued and paid up capital and free reserves at the end of any particular year in terms of Policy Directions dated 22.11.2001 and the order dated 22.2.2002.
3. In Appeal No. 122, M/s North Delhi Power Limited has challenged the legality, validity and findings of the Delhi Electricity Regulatory Commission dated 9.6.2004 in the appellant's tariff petition No.2 of 2004. The appellant has prayed this Appellate Tribunal to strike down the impugned order to the extent challenged and in its place allow legitimate treatment of expenses of the appellant on account of depreciation, Income Tax liability and assured return on equity.
4. In Appeal No. 48 of 2006, M/s North Delhi Power Limited has challenged the legality, validity and enforceability of the order 26.6.2003 issued by the Delhi Electricity Regulatory Commission in tariff petition No.10 of 2002 and has prayed this Appellate Tribunal to strike down the tariff order to the extent challenged and in its place allow legitimate treatment of expenses of the appellant on account of depreciation, Income Tax liability and assured return on equity.

5. All the four appeals were heard together and on different dates, arguments were advanced by the counsel who appeared for the appellants and Respondents. Counsel on either side also submitted their written submissions. Heard Mr. Amit Kapur, learned counsel who appeared for the appellant in appeal No.48 of 2006, Mr. V P Gupta and Mr. S. Ganesh Advocates appeared for appellants in appeal No.39 of 2005, Mr. Amit Kapur learned counsel appeared for appellant in appeal No. 122 of 2005, M/s Sumeet Pushkarna, Arun Gupta, Suresh Tripathy, Jitendra Kumar Pandey advocates and Mr. Somit Dasgupta, Secretary DERC appeared for the Respondents in the respective appeals.

6. In appeal No. 38 of 2005, the appellant claims that the Delhi Electricity Regulatory Commission (herein after referred to as DERC) ought to have allowed depreciation in terms of the notification issued by the Ministry of Power in S.O. No.151 dated 29.3.2004 read with S.O.No.82 dated 31.1.1992 issued under Paragraph VI (a) of the VI Schedule of The Electricity (Supply) Act 1948 and the disallowance of depreciation claimed by the appellant is illegal. It is also contended that even assuming that the DERC has the jurisdiction to disregard the two notifications, it could not have done without recording reasons to justify the deviation in terms of Section 28 of The Delhi Electricity Reforms Act 2000. It is further contended that the DERC cannot deviate from the notifications as it had followed the said Notification with respect to Bulk Supply Tariff and Tariff Principles Fixation Order dated 22.02.2002 which was issued in terms of para 17 of the Policy Directions dated 22.11.2001. It is contended that finally DERC has ignored the Fixed Asset Register (FAR) a material piece of evidence while determining the depreciation after having said that the claim of depreciation will be determined as per the FAR.

7. It is further contended that the return on equity ought to have been allowed in terms of express policy direction dated 22.11.2001. It is contended that the Policy Directions dated 22.11.2001 (para 13) have been ignored and the DERC has misconstrued the said policy and it ought to have allowed 16% return on equity. The statutory notification as reflected in the Policy Directions dated 22.11.2001 has circumscribed the jurisdiction of the DERC and therefore it cannot justify its orders on the basis of regulatory regime as it is not in consonance with the Policy Directions. Per contra, it is contended on behalf of the contesting Respondents that there is no illegality or error of jurisdiction or error on the face of the Tariff Order warranting interference with the tariff order passed by the DERC. The Respondents contended that the appeal is not maintainable, that as the DERC has allowed depreciation and hence claims of the appellant under various heads in the appeal towards depreciation and return on equity etc. are devoid of merits.
8. In Appeal No. 48 of 2006 also, the appellant contended that the disallowance of depreciation and claim towards return on equity are illegal on the same grounds and reasons. Apart from the challenge as to disallowance of depreciation and return on equity, the appellant herein has also prayed for providing for estimated tax and that the refusal to provide for taxation towards deferred tax is illegal and it vitiates the tariff order.
9. Per contra, the counsel for the DERC and other Respondents contended that there is no illegality in the tariff order, no interference is warranted or called for and they prayed for dismissal of Appeal No. 48 of 2006.

10. In Appeal No. 122 of 2005, the appellant, the North Delhi Power Limited challenged the disallowance of depreciation, return on equity, refusal to provide for the deferred tax provision and interest on working capital, which disallowance or refusal on the part of the DERC has affected the appellant gravely and as a result of which the tariff order suffers with errors, illegality and liable to be interfered. Per contra, the counsel for the DERC and other Respondents contended that no interference is called for with respect to the tariff order and there is no illegality in the disallowance of the claim under the said heads. It is also pointed out that the appellant has been directed to approach the Commission in respect of certain disallowed items by producing acceptable materials and yet the appeals have been preferred by the appellants. It is also contended that the certain of the aspects could very well be gone into by the DERC while undertaking truing up exercise, as already pointed out by it, and it is well open to the appellant to produce the required materials and details in support of the appellants' claim in all the appeals and justify their claims under all heads projected by them.

11. In all the appeals the tariff order as well as order passed by Regulatory Commission in the review applications are being challenged. The contentions advanced being common, we are disposing of these appeals by a Common Judgment while considering the legal contentions and at the same directing the appellants to go before the Commission for relief in respect of their other grievances at the time of truing up exercise by producing materials. The Regulatory Commission has undertaken elaborate exercise in determining the tariff for the DISCOMS. We do not find illegality or error apparent and we are not persuaded to interfere with tariff determination except to the limited extent and as ordered hereunder:

- A. The points that arise for consideration in these batch of appeals are:
- I. Whether the appellant/ DISCOM in each one of the appeals is entitled to depreciation as claimed by them at 6.69%? Whether the depreciation allowed at 3.75% is legal and in order?
 - II. Whether the appellant/ DISCOM in each one of the appeals is entitled to return on equity at 16% PA as claimed by them?
 - III. Whether the claim of appellant/ DISCOM in each one of the appeals towards interest and provision towards Income Tax is sustainable in law?
 - IV. Whether the tariff order passed by the Regulatory Commission is liable to be interfered or set aside?
 - V. To what relief the appellant in each one of the appeals is entitled to?
12. The main and substantial grievance of the appellants in all the appeals relates to disallowance of depreciation at the rates provided in the Sixth Schedule of The Electricity (Supply) Act, 1948 read with Section 57 and 57A of the said Act, as provided in Section 28 of The Delhi Electricity Reforms Act, 2000. The Delhi Electricity Regulatory Commission has allowed depreciation to the DISCOMS at the determined rate of depreciation of 3.75% on the assets of the DISCOMS. The appellants challenge the rate of depreciation allowed by Regulatory Commission and it is claimed that they are entitled to

6.69% depreciation, being the rate applicable to DISCOMS. In this respect, the appellants rightly relied upon the Notification issued under Para VI of Schedule VI read with Sections 57 and 57A of The Electricity (Supply) Act, 1948. Per contra, the counsel for The Regulatory Commission contended that the Regulatory Commission is well within its jurisdiction while determining the rate of depreciation in the Impugned Tariff Orders for the year 2003-04. In terms of Section 28(3) of The Delhi Electricity Reforms Act, 2000, the Commission is empowered to depart from the Sixth Schedule of The Electricity (Supply) Act, 1948, while determining the rates of depreciation. Here again the counsel for the appellants pointed out that there is nothing to show that The Regulatory Commission has applied its mind and had chosen to depart consciously from the rate specified in the Sixth Schedule of The Electricity (Supply) Act, 1948 in exercise of power conferred under sub section (3) of Section 28 while fixing the annual revenue requirement of the DISCOMS and determining tariff.

13. Merely because there is a departure from the Sixth Schedule, as seen from the Tariff Order, Mr. Tripathi, learned counsel appearing for the Commission, sought to suggest that the Commission has exercised the powers under sub section (3) of Section 28 of The Delhi Electricity Reforms Act, 2000 (DERA). According to the learned counsel appearing for the appellants in all the appeals, there is neither a reason nor reasons have been recorded by the Commission to depart from the rate, specified in Sixth Schedule, in the entire Tariff Order. While dealing with the claim of depreciation during the determination of the ARR of the DISCOMS, it is absolutely clear from Tariff Order there is no application of mind nor there is recording of reasons by the Commission for departure from Sixth Schedule of The Electricity (Supply) Act, 1948. It cannot be inferred that the Commission has

applied its mind or recorded reasons while making a departure from the schedule. Sub section (3) of Section 28 reads thus:-

“(3) Where the Commission departs from the factors specified in the Sixth Schedule of the Electricity (Supply) Act, 1948 (54 of 1948) while determining the licensee’s revenues and tariffs, it shall record the reasons therefor in writing.”

In terms of the above provision, for departure from the rate of depreciation, as specified in the Sixth Schedule, the Commission is mandated to record reasons in writing. It is not only essential but also primordial for the Commission to record its reasons for departure. That apart, there should have been a conscious application of mind for the departure. Merely because the Commission has adopted a different rate of depreciation in its views as against the rate prescribed in the Sixth Schedule of The Electricity (Supply) Act, we will not at all be justified in assuming that the Commission has exercised the powers under sub section (3) of Section 28. The contention advanced by Shri Suresh Tripathi, learned counsel appearing for the Commission, in this respect cannot be appreciated and it deserves to be rejected and the contention advanced by the counsel appearing for appellant in each one of the appeal deserves to be sustained.

14. There is no doubt that The Delhi Electricity Reforms Act, 2000 adopts the factors, parameters specified in Sixth Schedule to The Electricity Supply Act, 1948 read with Section 57 and 57A of the said Act, while calculating the expected revenue from charges and for determination of the revenues and tariffs.
15. The counsel for the appellants in all the appeals claimed that The Regulatory Commission ought to have allowed depreciation in terms

of the notification issued by the Ministry of Power during 1992 (as amended in 1994) issued under Para VI of Schedule VI. In other words, it is claimed that the DISCOMS are entitled to depreciation derived at a rate of 6.69%. It is to be pointed out that the claim of the appellants for 6.69% depreciation is based upon Para VI and XVII (2)(6)(x) of Schedule VI to The Electricity (Supply) Act, 1948 read with Section 57 and 57A of The Supply Act as well as proviso (a) to Section 28(2), Section 63(1)(2)(3)(VI) of The Delhi Electricity Reforms Act. The appellants also relied upon Para XVII of the policy directions issued by the State Government on 22.11.2001 as amended on 31.05.2002 as well as the notification issued by the Ministry of Power in exercise of powers conferred by sub paragraph (vi) of the Sixth Schedule to The Electricity (Supply) Act, 1948. The claim for accelerated depreciation merits acceptance. There is no escape except to allow depreciation in terms of Schedule VI of The Electricity (Supply) Act, 1948. Though a discretion is given to the Commission under sub section (3) of Section 25 to depart, the Commission has not chosen to do so and, therefore, it follows that the appellants are entitled to depreciation at the accelerated rate as notified by the Ministry of Power, Government of India. Provision has been made for depreciation of machinery, equipment and buildings, plants, machines, transmission lines, etc. When the Statute itself provides for allowing depreciation at the rate notified, there is no reason for the Commission to fix different rate of depreciation far below the notified rate and that too without recording reasons. Hence, while sustaining the contention advanced by the appellants on this point and rejecting the contentions advanced on behalf of the Commission, we direct the Commission to allow depreciation as per the notification of the Ministry of Power issued in terms of paragraph (a) of paragraph (VI) of the Sixth Schedule for the tariff periods in Question. We do not find any justification or reason to deny depreciation as claimed by the appellants in all the appeals.

16. The next question that arises for consideration is, the Commission should have allowed depreciation on the original cost of fixed assets as found in the FAR filed by the concerned DISCOM as FAR is a material piece of evidence and the same shall not be ignored. It is pointed out that wherever the DISCOMS have not produced the FAR register or wherever the FAR is found to be defective, the Commission ought have granted time to the DISCOMS to produce the FAR or even given time to the DISCOMS to reconstruct the FAR with the available materials and evaluate it subject to its prudence check. It is contended that the Commission should have allowed depreciation on the FAR value. Different DISCOMS claimed various amounts under this head in this appeal while seeking to introduce details. However, it is not for us to go into the details of such claims in these appeals, though the appellants have placed materials and proof in respect of their claim before us. However, instead of ourselves examining and going into the matter, we direct the appellants to go before The Regulatory Commission, place satisfactory material with respect to the fixed assets shown in FAR, its value and other details and subject to the prudence check, the Regulatory Commission shall consider the claim on merits and allow depreciation. Though reliance was placed on Pronouncements of the Supreme Court, in our view, it is not necessary to refer to the same as it is a mandate of the Statute, which the Commission is bound to give effect. The statutory provision being mandatory, it is obligatory for the Commission to allow depreciation at the rate notified by the Ministry of Power and there is neither a reason nor justification to deviate or depart from the Para VI of the Schedule to The Electricity (Supply) Act, 1948.

17. Next, we take up the claim relating to return on equity claimed by the appellants. It is contended that return on equity has been denied and

the appellants are entitled to return on equity on the amount as claimed by them. Per contra, it is contended on behalf of The Regulatory Commission that return on equity has been calculated as per the policy directions of the Government of National Capital Territory of Delhi, and no interference is called for. It is the contention of the appellants that the binding policy directions dated 22.11.2001 and 31.05.2002 issued by Government of National Capital Territory of Delhi, under Section 12 of The Delhi Electricity Reforms Act, should have been adopted and any methodology contrary to Para XIII of the Schedule is unlawful. It is also pointed out by the appellant and rightly too that, there cannot be any modification on the statutory direction by a mere letter. The methodology adopted by the Commission, it is contended, is contrary to Sixth Schedule of the Supply Act, 1948, and in particular to Para XVII (9)(a), which provides for return on equity based on capital base, at the end of a year on the average of the opening balance and closing balance of free reserves used to fund the capital investments. The appellant placed reliance on the policy directions issued under Section 12 of The Delhi Electricity Reforms Act, 2000. In terms of Section 12, the policy direction issued by the Government, it is contended, is binding and enforceable. The policy direction reads thus :-

“13. From the date of issuance of these directions till the end of 2006-07 and subject to provisions of paras 11 and 12 above and all expenses that shall be permitted by the Commission, tariffs shall be determined such that the distribution licensees earn, at least, 16% return on the issued and paid up capital and free reserves (excluding consumer contribution and revaluation reserves but including share premium and retained profits outstanding at the end to any particular year) provided that such share capital and free reserves have been invested into fixed or any other assets, which have been put into beneficial use for the purpose of electricity distribution and retail supply and provided further that such investment of such share capital and free reserves has the approval of the Commission.”

18. The above policy direction having been issued in public interest and in exercise of powers under Section 12, no deviation is permissible and it cannot be sustained. But we find, the difference is in respect of calculation with reference to the data of issued and paid-up capital and free reserves and not the 16% ROE. The claim that the particular formula has to be adopted in assessing the ROE with a reference to date of investment, in our view, has been rightly discountenanced by the Commission. We do not find any reason to interfere with the conclusion of the Commission in this respect. A hue and cry made by the appellants based upon legitimate expectations is without any merits. The Commission had rightly allowed ROE and there is no illegality in the rate of ROE.
19. As regards the provision for deferred tax, appellants have claimed various sums in each case. To a specific question during the hearing, the counsel for the appellants were evasive and it is obviously clear that the assessments of tax has not been completed nor it is likely in the near future. Tax liability itself is in dispute. The tax liability, as estimated by the Commission, was found to be lower than what has been estimated. At any rate, there is no reason to interfere with the Order of the Commission, at this stage, in as much as, as and when the assessment proceedings are concluded, the appellants could approach the Commission, while undertaking truing up exercise, and there will be no difficulty for the Commission issuing appropriate directions, depending upon the tax liability actually incurred. It is a well known fact that the tax assessment proceedings takes place during the course of the year and on mere estimation, the appellants will not be justified in claiming the higher sum, while it is always open to them to set out the details during truing up exercise and there will not be any difficulty for the Commission to allow such claims. It is not correct to contend that the Commission has adopted principles

contradictory to provisions. It may be that the other Commissions have allowed higher amount of tax estimation on a Normative. However, we do not find any illegality in the Commission's approach in the Tariff Orders passed by it in respect of the appellants-DISCOMS.

20. As has already been held, we do not propose to examine or evaluate each item of the claim in respect of the points canvassed before us, as it will be sufficient that broad principles are laid and the Commission which has already indicated itself in the Tariff Order that it will work out the details, and grant reliefs as and when materials are placed but after prudence check. We do not find any illegality in the said approach of the Commission.

21. The counsel for the appellants in each of the appeal raised contention with respect to the FAR, books, registers maintained by them and they did not receive acceptance in the hands of the Commission. We may not find fault with the Commission in this behalf. In this respect, it would have been better for the Commission to have afforded sufficient opportunity to enable the DISCOMS to produce acceptable materials or to produce the documents/ materials, with respect to the production of required books, stock register, fixed asset register, etc. In fact, in one of the orders, the Commission has given liberty. On our part, we are of the view there is force in the contention, lest it is denial of fair opportunity resulting in violation of principles of natural justice. If liberty is not accorded in this respect, it will be prejudicial to the DISCOMS. Concedingly, DISCOMS are new companies which have taken over the assets of the existing infrastructure and of the existing electricity industry in NCT of Delhi.

22. It may be that they did not have regular handing over of assets or registers, FAR, books of accounts or other materials, etc. The new DISCOMS have to take an inventory and search for the registers and for other relevant materials. In the circumstances, we direct the Commission to afford another opportunity to DISCOMS to produce the various registers or FAR, etc., place materials with respect to the claims relating to its fixed assets or investments or interest allowance made after the effective date, from which the Discoms became operational. In the truing up exercise, the Commission shall undertake such an exercise and the appellants shall be afforded sufficient opportunity to produce materials in support of their individual claims.
23. In other respects, we do not find any error or illegality in the Tariff Order, warranting interference. We hold that the Tariff Orders passed by The Regulatory Commission as well as ARR Order by The Regulatory Commission in respect of appellants/ Discoms and the tariff determination for the years in Question in other respect are not liable to be interfered, except to the extent indicated above.
24. In the result on a consideration of entire matter,
- (I) the first point is answered in favour of appellant in each of the appeal and the Regulatory Commission shall grant consequential relief on actuals.
 - (II) on the second and third point, we direct the Regulatory Commission to afford opportunity, examine the appellants claim item by item during truing up exercise and according to law, on their producing acceptable documents and materials in support of their claim under various heads.

(III) on the fourth point, we hold that the tariff determination as a whole is not liable to be interfered except to the extent indicated above.

25. In the results, all the appeals are ordered in the above terms.

Pronounced in open court on this 24th day of May 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr. Justice E Padmanabhan)
Judicial Member

The last page