Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 36 of 2008

Dated : 06th October, 2009

Coram : **Hon'ble Mrs. Justice Manju Goel, Judicial Member**
Hon'ble Mr. H. L. Bajaj, Technical Member

IN THE MATTER OF:

BSES Rajdhani Power Ltd.
BSES Bhawan,
Nehru Place,
New Delhi – 110 019
(Through its authorised signatory- Mr. R. C. Mehta) … Appellant

Versus

1. **Delhi Electricity Regulatory Commission**
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   Shivalik, Malviya Nagar,
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   (Through its Secretary)

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Corrections (shown in italics and bold) in paragraph 88, 90, 104 and 118 are done as per orders of Hon'ble Court II dated 04.12.09 in IA No. 315/09 in A.No.36/08

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Mr. Jagdish lal Munjal and
Mr. Rakesh Bhardwaj

J U D G M E N T

Justice Manju Goel, Judicial Member

The appellant is a company engaged in the business of distribution and retail supply of electricity in the specified areas of south and south-west of Delhi and is a successor entity of the erstwhile Delhi Vidyut Board (DVB). The appellant has challenged the tariff order dated 23.02.08 whereby the Delhi Electricity Regulatory Commission (the Commission for short) has passed an order on determination of Aggregate Revenue Requirement (ARR) of the appellant for the FY 2008 to 2011 and the distribution tariff for the period of 01.03.08 to 31.03.09 for which the appellant had filed petition No. 51 of 2007. The appellant alleges that the Commission has disallowed the projections made by the appellant and in the process has caused a loss of Rs.886.07 Crores in the FY 2008 and Rs.1458.65 Crores in the FY 2009. The disallowance made by the Commission has been broken up in three parts, namely:

(a) Those relating to truing up by the Commission pursuant to the orders of this Tribunal as well as of the Supreme Court, pertaining to the period covered by policy direction dated 22.11.01 i.e. FY 2003 to 2007 (policy direction control period),

(b) Incorrect calculations for the base year 2007 (base year calculations) which have a bearing on the expenses allowed for the FY 2008-11 (MYT period)

(c) Disallowance of reasonable projections made by the appellant for the Multi Year Tariff (MYT) period.

02) The claim of the appellant under different heads made in the present appeal can be narrated briefly as under:

Re. Power Purchase:

03) The appellant had purchased 8649 MUs and 9122 MUs of electricity in the FYs 2006 and 2007 respectively. For the subsequent years, covered by the MYT period, the Commission has approved power purchase quantum as 8515, 8849, 9244 and 9622 units during FY 2008, FY 2009, FY 2010 and FY 2011. The appellant contends that the power purchased for the years 2008 to 2011 would be higher than that of the previous years and more so because Delhi is going to host the Commonwealth Games in 2010 and is attempting to become a world class city. So far as sales figures are concerned, the Commission has also approved lower figures than what was projected by the appellant.

Re. Non-inclusion of Reactive energy charges and rebate arising out of timely payment made by the appellant, Delhi Transco Limited (DTL) towards power purchase cost:

04) The Commission has disallowed the reactive energy charges despite the appellant having paid the same. The Commission has also disallowed the payment made by it to the Delhi Transco Limited (DTL for short). The Commission has not decided the interpretation of the bulk supply agreement by the DTL but is continuing to disallow the amount paid by the appellant to the DTL on the excuse that the interpretation of the bulk supply agreement is sub-judice before it. The appellant paid Rs.0.66 Crores towards reactive energy charges in the base year. Non-inclusion of rebate for timely payment to DTL in the base year has caused a loss of Rs.6.39 Crores.

Re. distribution loss targets:

05) The appellant alleges that the target for loss reduction fixed by the Commission is unsustainable. For the FY 2006 and 2007, actual losses were to the tune of 38.68% and 35.63%. The targets for the FY 2008, 2009, 2010 & 2011 are 25.95%, 22.88%, 19.83% and 16.58% respectively. The appellant contends that in the year 2007, the distribution loss could be reduced by 3.05% and accordingly the target of 25.95% requiring the reduction by 9.68% is arbitrary and unreasonable. Similarly for the subsequent years the required loss reduction by 3.05% to 3.25% is said to be

unreasonable and arbitrary and impossible to achieve. The appellant says that it has been gravely prejudiced by such unreasonable target set by the Commission.

Re. failure to relax AT&C loss level targets:

06) The appellant requested the Commission to reduce the targets set for reduction of AT&C losses. However, the Commission maintained the same targets, namely 17% to be achieved by the end of the MYT period. It is contended that the loss levels for the appellant and NDPL in the base year (FY 2007) were 29.92% and 23.73% respectively and therefore, to bring down the loss level to 17% by the end of the MYT period would mean a much higher effort on the part of the appellant than on the part of NDPL. The NDPL would have to reduce loss by 6.7% whereas the appellant would have to reduce loss by 12.92%. The appellant alleges that level playing field has been denied to it. The appellant prays for a target which can be projected keeping in view the network condition, geographical spread, consumer mix, unauthorized areas/usages, approved Capex and recommendations of the task force (Abraham Committee).

Re. capital expenditure and capitalization of disallowance:

07) The Commission has allowed capital expenditure to the tune of Rs.1654 Crores as against capital expenditure of Rs.1834 Crores

for the period 2002-03 and 2006-07. In addition to the above disapproval, the Commission in approving the capital expenditure for the years 2007-08 and 2008-09 has also reduced Rs.231 Crores pertaining to material purchased from M/s. REL in addition to similar denial of Rs.180 Crores relating to the period of FY 2004-05. The disallowance on account of purchases made from M/s. REL was not unanimous. Reduction in approved capital expenditure and capitalization influences other factors like depreciation, return on capital etc. The appellant contends that although the capital expenditure made by the appellant has benefited the sector by lowering AT&C loss levels, the Commission has disallowed the capital expenditure as pass through in tariff. Further, some amount of capital expenditure has been disallowed on account of non-approval by the Electrical Inspector. Non-approval, it is alleged, was solely on account of shortage of staff in the office of Electrical Inspector. The non-approval on account of want of certification has caused a denial of capitalization to the tune of Rs.787 Crores which is not on account of any fault on the part of appellant. Apart from the above for other reasons not disclosed in the tariff order certain capital expenditures have been denied to the tune of Rs.47 Crores.

Re. lower approval of capitalization from fresh investment during MYT period:

08) The appellant contends that most capitalization schemes executed by it are completed within a year but the Commission has approved of a low capitalization schedule. It is further contended that on account of low capitalization schedule the Commission has failed to carry forward the un-capitalized investment out of fresh investment to be made by the appellant to the next financial year thereby denying the appellant the benefit of a higher RoCE and depreciation.

Regarding impact of lower approval of capital expenditure and capitalization on RoCE and RRB:

09) The Closing RRB for the FY 2006-07 of the appellant has been approved as Rs.967.06 Crores whereas the appellant had proposed a figure of Rs.2284 Crores. It is alleged by the appellant that this RRB completely disregards the investment made by the appellant in the sector over five years. It is further alleged that RRB approved is even lower than opening base of equity and loan as per the transfer scheme prepared at the time of privatization in 2002. On account of approval of lower RRB, the appellant claims that it has been denied the return assured at the time of bidding for the distribution business of the appellant.

Regarding Administrative and General Expenses (A&G):

10) The appellant claims to have incurred expenditure of Rs.37.37 Crores towards A&G expenses in the FY 2004-05. The Commission

has allowed Rs.26.98 Crores. It is alleged that the Commission has done a second truing up of A&G expenses for the FY 2004-05 in its tariff order for the FY 2006-07 which is not permissible.

11) Apart from this the Commission has deducted a sum of Rs.4.26 Crores incurred by the appellant as "one time expense" in the FY 2007 which the appellant claims to be against the provisions of MYT Regulations. According to the appellant this amount was prudently spent and was also approved of by the Commission.

Non-inclusion of any amount towards the additional power purchase obligations:

12) The appellant contends that it has discharged the power purchase obligations from 01.04.07 onwards which involves an additional expenditure under various heads. The appellant's grievance is that the Commission has failed to provide for any amount either to facilitate power purchase obligations or for the new initiatives envisaged in the MYT petition or for the growing consumers that the appellant has to cater to during the MYT period. The disallowance of A&G expenses for the FY 2007 was Rs.9.5 Crores while for the other subsequent years it has been determined as Rs.8.64 Crores, Rs.8.9 Crores, Rs.9.28 Crores and Rs.9.24 Crores respectively.

Disallowance on account of employee expenses:

13) The appellant has alleged that the Commission has illegally disallowed the claim of the appellant under the head of employee expenses: (i) by refusing the payment made towards the terminal benefits (gratuity etc) by the appellant for the employees who opted for the Voluntary Retirement Scheme (VRS) offered by the appellant despite the payment having been made pursuant to the order of Hon'ble Delhi High Court, (ii) Disallowance of raise in the salaries as per industry practice and (iii) Disallowance of the projections made by the appellant, made for increase in the employees and consequent increase in salaries due to additional power purchase obligations to be discharged by the appellant w.e.f. 01.04.07 and increase in consumer base for the appellant.

Disallowance of R&M expenses:

14) R&M expenses disallowed for the FY 2004-05, 05-06 and 06-07 has been to the tune of Rs.13.01 Crores, Rs.1.85 Crores and Rs.18.51 Crores respectively. The denial of R&M expenses above is also on account of second truing up which the appellant resents. The Commission disallowed R&M expenses for the FY 06-07 on the pretext that the appellant did not take prior approval of DERC. The appellant contends that the demand of the Commission of prior approval is contrary to the understanding of the practical realities of the operations of the appellant although the Commission does not say that the expenditure incurred under this head was un-

necessary or imprudent. The appellant further contends that disallowance of R&M expenses for the FY 2004-05 to 06-07 has impacted the R&M expenses for the period of 2007-08 to the year 2010-11 as the MYT Regulations 2007 requires the R&M expenses for the control period under the MYT regime to be determined based on the formula of $R\&M_n = k * GFA_{n-1}$, where 'k' is a constant expressed in percentage governing the relationship towards the R&M costs and gross fixed assets for the nth year. The Commission, it is alleged, has considered the value of R&M expenses with the incorrect truing up for the FY 2004-05, 06-07 and has not considered the actual expenses incurred by the appellant as per this audited accounts. It is further alleged by the appellant that the Commission has not included any amount in the MYT period on account of uncontrollable factors like raw material prices. Similarly, employee expenses which went up on account of the Sixth Pay Commission's recommendations were also uncontrollable factor which should also have been taken into consideration.

Depreciation:

15) The appellant contends that it should have been allowed depreciation @ 7.5% whereas the Commission has allowed depreciation only @ 6.69% on an erroneous interpretation of the Hon'ble Supreme Court in a judgment reported at 2007 3 SCC 333. The appellant has offered the Fixed Asset Register (FAR) and claims

that depreciation be calculated on each asset separately on the basis of its expected useful life.

Erroneous calculation on account of Advance Against Depreciation (AAD) for the MYT period:

16) The appellant claims that it has suffered a loss of Rs.128 Crores on account of incorrect calculation of AAD.

Lower approval of interest rates on loans to be raised by the appellant:

17) The Commission has stipulated a uniform interest rate of 9.50% for all loans that the appellant may raise during the MYT period although it has kept a scope of truing up. The appellant contends that it is not likely that all its lenders will charge interest @ 2.75% below PLR (Prime Lending Rate) and that the assumption of the Commission is based on a small percentage of loan which the appellant has been able to secure at such rate. The appellant demands that the interest rate to be applied on the loans to be taken should have been at least equal to prime lending rate.

Inclusion of sundry creditors as source of means of finance:

18) The appellant contends that the methodology for determination of means of finance available to the appellant was laid down by the Commission in its tariff order dated 26.03.03 as well as in the subsequent tariff orders but for the period in question the Commission has altered the method of calculating means of

finance. According to the appellant the Commission has incorrectly deducted an amount of Rs.20.77 Crores on account of sundry creditors from the figure of net capital expenditure totaling Rs.336.29 Crores for the FY 2006-07 while truing up in the impugned order and for the FY 2007.

19) The Commission has appeared to defend its order. The Commission has also filed written submissions on each of these aspects to justify its order. The view of the Commission and our analysis of the impugned order will appear in our discussion hereinafter. A large number of consumers have been arrayed by respondents in the appeal. Some of them have taken keen interest in the case and have also filed written submissions. We have heard and considered the views expressed by them.

Decision with reasons:

Sales projections and power purchase:

20) The appellant in the MYT petition for the FY 2007-08 to 2010-11 submitted the actual sales figures in the year 2007 which was 5872 MUs. The appellant estimated the growth rate of 11.67% and estimated sales of 6557 MU for the FY 2008. The appellant's projection of 11.76% was based on actual sales for the period of April to November, 2006 and April to November, 2007. For the FY 2009, the appellant estimated 9.8% growth over the sales of FY

2008. The estimated sale further was 7201 M.unit. The appellant claims that it had undertaken category wise energy study for the energy requirement. The energy required estimated for the individual categories were thereafter added up to reach the figure of 7201 M.units. The appellant claims that it had also kept in mind the sales to increase on account of Commonwealth Games, construction of Delhi Metro Phase-II, construction of new domestic/international airport and other major consumers like Malls, Hotels etc. The projected sales lead to calculation of expected purchase of power. Expected purchase of power will depend upon the expected sales as well as expected loss during distribution which may include the technical loss as well as commercial loss. The estimation affects the appellant in as much as the estimated cost of power purchase will depend upon the estimated sales. The Commission estimated sales for the FY 2008 at 6305.22 MU for 2009 at 6823.89 MU for 2010 at 7411.14 MU and for 2011 at 8025.99 MU.

21) For estimating sales, the multi year tariff Regulation has the following provision:

> *"The Commission based on the licensee's filings shall examine the forecasts for reasonableness and consistency and shall approve the sales forecast for each year. The*

sales shall be treated as un-controllable. The open access transactions shall not form part of sales. Power purchase quantum and the cost for any financial year shall be computed on the basis of AT&C loss targets and estimated sales".

22) The Commission has made the following analysis:

"Commission's Analysis

4.11 While projecting the energy sales of the Petitioner during the Control Period, the Commission has analysed the sales projection made for Delhi in the 17th Electric Power Survey (EPS) by CEA. The energy sales projections submitted by the Petitioner were much lower than the 17th Electric Power Survey (EPS) sales projection. In previous two years i.e. FY06 and FY07, the total sales in Delhi were much lower than the energy sales projected in the 17th EPS. Therefore the Commission has decided to forecast sales figures for the Control Period using past trends and projections made by the Petitioner.

4.12 The Commission has analysed the sales projected by all the distribution licensees for the Control Period. The Commission has observed that the energy sale in

the previous years of all the licensees does not show a uniform trend. Therefore, the Commission has considered the consolidated sales of a specific category (i.e. Domestic, Industrial, Commercial etc.) of all the three DISCOMs namely, BRPL, BYPL and NDPL and has forecasted the same for the Control Period by considering an appropriate growth rate based on the past trends. The Commission has, thereby, calculated the weighted average share of sales of each distribution company in FY06 and FY07 in a particular category and has allocated the consolidated sales forecasted for that category to the respective distribution company in the proportion of its weighted average share.

4.13 For deciding the appropriate growth rate for forecasting the energy sales for a particular category, the Commission has analysed the year-on-year variations in sales as well as the short term and long term trends in sales. The Commission has computed the CAGR for 2 years to 12 years duration. The Commission has, thereafter, considered the appropriate CAGR depending upon the consumer

categories, consumption trend in recent period, excluding the abnormal variations."

23) The Commission has also examined the trend of sales for different categories of consumers like domestic consumers, non-domestic consumers, industrial, public lighting, agriculture and mushroom cultivation, railway traction, DMRC and others. The appellant has challenged the projections made by the Commission on the following grounds:

a) The approved sales by the Commission are in complete disregard of the statutory obligations of the DISCOMs under section 43 of the Electricity Act, 2003.

b) The same growth rate was projected by the appellant for 2007-08 in the MYT period which was ignored by DERC. However, without stating any reason DERC has lowered the projected growth rate and,

c) The un-reasonable rejection of anticipated expenditure is in disregard of the ATE's order in appeal No. 266 of 2006 namely that the

Commission should accept the projection of the appellant unless it has reasons to differ.

24) Section 43 requires a distribution licensee to supply electricity to a new applicant within a month of the receipt of the application requiring such supply. The ATE's order in appeal No. 266 of 2006 advised the Commission to accept the anticipated expenditure as stated by the utility unless the Commission has reasons to differ with the utility. That judgment dealt with the action of the Commission by which the Commission arbitrarily reduced the projected figures of expenditure without giving any reasons for substituting its own estimation against those of the utility.

25) The Commission contends that the formula applied by it in projecting year on year growth and arriving at a final approved figure are reasonable and based on the methodology adopted by it. The DERC has also submitted in reply that it has taken into consideration the expected increase in consumption by DMRC as well as by the Commonwealth Games. The expected consumption of DMRC has been estimated on the basis of data supplied by DMRC. Increase in consumption, on account of games, are reflected in the expected increase in the consumption of commercial and public lighting category etc. The appellant, however, disputes the projections made by the Commission and considers the

projections to be on the lower side. The appellant also disputes the methodology, namely projection of sales of all DISCOMs together and dividing the total projection amongst the DISCOMs on the basis of the proportion of their business.

26) The projection of sale in the area of the licensee depends on the peculiar situation which obtains in the area of the licensee. We are unable to approve the methodology adopted by the Commission which projects the sale of all the DISCOMs together and divides the projection amongst the areas of the different licensees depending upon the proportion of their business. The actual figures for 2007-08 have been submitted to the Tribunal. The actual figures do not tally with the estimation of either the Commission or that of the appellant. Neither of the two estimations is too far from the actuals. We do feel that the Commission should determine the sale projection based on the data of a particular area of each distribution agency rather than taking into account the data of the entire city. While doing so the Commission should pay due regard to the projections made by the licensee who is responsible for supplying electricity to the consumers in its area and also has to face the consequences of failure in discharging his responsibility.

27) For the year in question, the Commission has to make up the difference in projection and actual in the truing up exercise.

However, it will do well if it abides by our advice for the remaining MYT period.

Distribution loss and AT&C Losses:

28) The distribution loss target for the FY 2007-08 fixed by the Commission is 25.95%. The trajectory set for the MYT period is 25.95 for the FY 2007-08 and for the next years 22.88%, 19.83% and 16.58%. It is contended that the previous achievements of the appellant have been far less than what is being expected by the trajectory set down and that the target given is not possible to achieve. It is alleged that the trajectory requires the appellant to reduce loss by 3.05% to 3.25% for the remaining period of the MYT period which is not possible for the appellant to achieve. Further it is submitted that the AT&C loss levels required to be achieved as per the MYT Regulations are unrealistic and contrary to ground reality in India. It is contended by the appellant that it had urged DERC to consider fixing of levels for such loss for the MYT period on network conditions, geographical spread, consumer mix, unauthorized area/ usage/approved Capex and recommendations of Abraham Committee report as well as empirical data on loss reduction of various urban utilities but the Commission failed to reconsider the target set for the AT&C loss reductions. The Commission has drawn our attention to the MYT Regulations for

AT&C loss targets. The Regulation No. 4.7 and 4.8 of the MYT Regulations are extracted below:

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

(a) AT&C Loss, which shall be measured as the difference between the units input into the distribution system and the units realized (units billed and collected wherein the units realized shall be equal to the product of units billed and collection efficiency;

(b) Distribution losses, which shall be measured as the difference between total energy input for sale to all its consumers and sum of the total energy billed in its Licence area in the same year,

(c) Collection efficiency, which shall be measured as ratio of total revenue realized

to the total revenue billed for the same year. The revenue realisation from arrears relating to the DVB period, electricity duty and late payment surcharge shall be included for computation of collection efficiency;

4.8 The target AT&C loss levels to be achieved by the Distribution Licenses at the end of the Control Period shall be as follows:

(ii) BRPL – AT&C Loss level shall be at 17 percent;

Provided that the year wise loss reduction trajectory for the Control Period shall be fixed for the Distribution Licensee in the Multi Year Tariff Order for 2007-08;

Provided that profits arising from achieving loss level better than specified in the loss reduction trajectory shall be equally shared between the Licensee and Contingency Reserve;

Provided that profits arising from achieving loss level better than 15% in any year shall be completely to the account of the Licensee;

Provided that the loss targets and year wise loss reduction trajectory for subsequent Control Periods shall be specified by the Commission before the start of each Control Period

(iii) BYPL – AT&C Loss level shall be at 22 percent:

Provided that the year wise loss reduction trajectory for the Control Period shall be fixed for the Distribution Licensee in the Multi Year Tariff Order for 2007-08

Provided that profits arising from achieving loss level better than specified in the loss reduction trajectory shall be equally shared between the Licensee and Contingency Reserve;

Provided that profits arising from achieving loss level better than 20% in any year shall be completely to the account of the Licensee:

Provided that the loss targets and year wise loss reduction trajectory for subsequent Control Periods shall be specified by the Commission before the start of each Control Period:

4.9 Any financial loss on account of under performance with respect to AT&C targets shall be to the Licensee's account."

29) So far as transmission and distribution losses are concerned, the Commission contends that such loss (T&D Loss) is a mere derivative figure derived as a relationship between AT&C loss level and collection efficiency. It is contended by the Commission that in the impugned tariff order the Commission has projected AT&C loss reduction targets as per MYT Regulations 2007. Thus the Commission has considered 12.92% reduction in the AT&C losses (29.92% in the FY 2007 to 17% in the FY 2011) during the control period. The Commission has also considered reduction of 25% of total AT&C reduction target in each year of the control period. Further as specified in the MYT Regulation 2007, the appellant has

to achieve a minimum of 20% of the total AT&C loss reduction target for the control period in any year of the control period. The appellant has contended that the Commission has shown a more favourable disposition towards the other distribution licensees in Delhi namely North Delhi Power Limited (NDPL) for whom the AT&C reduction has been fixed at 6.7% i.e. from 23.7% to 17%. In response the Commission contends that both the NDPL and BRPL started with the same level of losses in 2002 when privatisation was introduced and that NDPL could reduce losses more quickly than the appellant BRPL and therefore at the beginning of the control period whereas BRPL had a loss level of 29.92%, NDPL had loss level of 23.73%. It is contended by the Commission that at the time of privatization, the companies had given bids knowing fully well the ground reality, the loss levels as well as the possibilities of reduction in loss levels and therefore their present plea that the targets set were not achievable cannot be considered.

30) As can be seen from Regulations quoted above, the Commission is doing nothing other than enforcing the Regulations. This Tribunal is not empowered to find flaw with the regulations nor is any such challenge within the scope of the present appeal. The appellant contends that the appellant is not challenging the Regulations. The appellant's grievance in this appeal is that the Commission instead of following the Regulations should have

exercised its discretion to amend the Regulations. The appellant further contends that the Commission's reasoning that T&D loss trajectory can be derived from AT&C loss levels given in the MYT Regulations is incorrect. The appellant contends that the targets suggested by the appellant of 4.5% should have been accepted by the Commission.

31) Not much discussion is necessary on this issue. 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. The appellant does not dispute that the targets set are possible within the MYT Regulations and are as per the MYT Regulations. The order of the Commission is legal and valid when compared with the Regulations.

32) There is however, no bar on the Commission reconsidering the target that has been set and amend the relevant Regulation, if necessary. The target for MYT period needs to be set on the basis of losses at the beginning of the MYT period and not on the basis of loss level on the date of privatization when the policy target period began. The consequences of failure or success in reaching the loss reduction target have already been borne by the licensee. Hence

reference to the initial level of loss at the time of privatization is not necessary. The Commission may itself consider the plea of any amendment in the target set in this regard in case the appellant makes out a case. Therefore, we direct that the appellant may make an appropriate representation to the Commission in this regard within one month hereof and that if a representation is so made the Commission shall dispose it of in two months.

Capital expenditure and capitalization disallowance, lower approval of capitalization from fresh investment during the MYT period and impact of lower approval of capital expenditure and capitalization on ROCE and RRB:

33) The Commission in the impugned order has allowed capital expenditure to the tune of Rs.1654 Crores as against alleged capital expenditure of Rs.1834 Crores for the period - FY 2002-03 and FY 2006-07 of the total disallowance for this period. Rs. 133 Crore was on account of transactions with REL. Further for the FY 2007-08 and FY 2008-09 the Commission has reduced the figure of capital expenditure by Rs.231 Crores pertaining to material purchased from M/s. REL relating to the period of 2004-05. Disallowance of capital expenditure claimed by the appellant has not been unanimous. The Commission's order in this regard has been passed by using the casting vote of the Chairman under section 92 of the Electricity Act 2003. It is contended by the appellant that the capital expenditure made by the appellant has benefited the sector by ensuring lowering AT&C loss levels and therefore the capital

expenditure should have been allowed as pass through. The total denial of capitalization on account of delay in certification by Electrical Inspector is to the tune of Rs.787 Crores. Some of the capital expenditure has been disallowed on account of failure of the Electrical Inspector to grant approval which is entirely on account of shortage of staff with the Electrical Inspector. The total denial of asset capitalization on account of transaction with the sister concern namely REL is Rs.364 Crores. Apart from that denial of account on other reasons is Rs.47 Crores. Apart from the above, the Commission has approved lower capitalization schedule for the appellant, which has resulted in denial of higher ROCE and depreciation. By the impugned order the closing RRB for FY 2006-07 has been estimated at Rs.967.06 Crores. This is taken as a base figure for approving return and interest. According to the appellant this is in stark deviation to the submissions of Rs.2284 Crores as RRB, proposed by the appellant. According to the appellant the closing RRB for 2006-07 is fixed lower than the opening base of equity and loan as per the transfer scheme prepared at the time of privatisation in 2002. The appellant alleges that the impugned RRB disregards the investment made by the appellant in the sector over five years.

34) We will first take up the issue of disallowance on account of the purchases made from the related party i.e. REL. As stated

above, the Chairman and the Member of the Commission viewed the issue differently. The Chairman observed that the REL had purchased the commodities supplied to the appellant and so the appellant can prudently claim the value for which the REL purchased those commodities plus a reasonable margin which he assessed as 5% of the purchase price. The Member of the Commission has not joined the Chairman on this opinion but has himself not come up with some other assessment. Nor does he say that the expenditure claimed by the appellant in this regard deserves to be approved in toto. Be that as it may, the appellant has challenged the impugned order on the ground that the Chairperson of the Commission did not have any right of a casting vote and hence the view of the Chairman could not become the views of the Commission. The appellant submits that the exercise of tariff fixation is in the nature of judicial proceedings which does not allow any room for a casting vote. According to the appellant, the provision of a casting vote DERC (Conduct of Business) in the Regulations is applicable only in administrative matters and cannot be applied in the matter of tariff hearing or tariff fixation.

35) The Commission on the other hand reiterates the validity of the casting vote. The Commission also justifies reduction of the capital expenditures claimed by the appellant. In the first place, the Commission has drawn our attention to section 92 of the

Electricity Act 2003. Section 92 deals with proceedings of appropriate commissions. The Section 92(3) deals with the manner in which decisions have to be taken by the Commission. The same is as under:

> *"92(3) All questions which come up before any meeting of the Appropriate Commission shall be decided by a majority of votes of the Members present and voting, and in the event of an equality of votes, the Chairperson or in his absence, the person presiding shall have a second or casting vote."*

36) The term proceeding has again been defined in DERC's Conduct of Business) Regulations 2001. 'Proceeding' means and includes proceedings of all nature that the Commission may hold in discharge of its function under this Act. The appellant contends that section 92(3) does not apply to tariff proceedings. The Regulations of 2001 are saved by section 185 of the Electricity Act 2003. The earlier Act, Delhi Electricity Reforms Act 2000 (DERA) had a provision in section 9 where a Chairman was excluded from the right of a casting vote. However, section 185 does not save the provision of section 9 of DERA since that is inconsistent with section 92(3) of the Act. It is contended on behalf of the appellant

in this regard that a casting vote is available only in administrative matters and not in matters of tariff fixation. Our attention is drawn to the two words "meeting" and "hearing" and it is submitted that tariff fixation is a process of hearing rather than a process of meeting. These two words have been used in the Regulation 9 of the erstwhile DERC (Conduct of Business) Regulations 2001. It is true that when two words are used they should have different meanings. However, in the present case, the more important word is "proceedings" of the appropriate commissions. The section 92 begins with the caption "proceedings of the appropriate commission". The provision of section 92 only uses the word meeting. It is nobody's case that tariff fixation process is not proceedings. The proceeding is a larger word which includes in its compass meeting as well as hearing. In any case section 92, properly read, includes the proceedings of tariff fixation.

37) It is pertinent to note that the appellant does not come forward with any solution in which the Members of a Commission are equally divided on any issue relating to tariff fixation. In our opinion, the only possible view is that in such situations section 92(3) of the Act has to be applied and the Chairman has to be given a casting vote.

View of the Commission regarding purchases made by BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd. from group company Reliance Energy Ltd. (REL):

38) So far as the disallowance of related party transactions are concerned, the Chairperson and the Member has taken two divergent views:

39) We find that most comprehensive way of giving the view of the Commission which is in fact the view of the Chairperson (dissented by other Member) is to reproduce the relevant part of the Commission's findings.

> *"1. BSES Rajdhani Power Ltd. (BRPL) and BSES Yamuna Power Ltd. (BYPL) are engaged in Distribution of Electricity at Delhi. These are group companies of Reliance Energy Ltd. (REL) formerly BSES Ltd. During the years 04-05 and 05-06, both BRPL & BYPL made extensive purchases of capital goods from REL at rates considered exorbitant by the Commission, resulting in transfer of substantial funds from these companies to REL by way of profit on sale of the capital goods. The purchases of these materials made by the two companies from REL during 2004-05, as per the trading account of REL,*

EPC Division (copy already furnished to the two companies), were as under:

Year	*BRPL*	*BYPL*
04-05	*868.69*	*364.87*

The purchases of such goods made from REL in 05-06, as per the details furnished by BRPL & BYPL, were as under:

Year	*BRPL*	*BYPL*
05-06	*103*	*92*

(In Rupees Crores)

In addition, the two companies paid the following amounts to REL for services rendered for installation, erection and commissioning of the capital equipment purchased from REL in 2004-05 and 2005-06, as per information furnished by these two companies:-

Year	*BRPL*	*BYPL*
04-05	*-Nil-*	*-Nil-*
05-06	*178*	*76*

(In Rupees Crores)

2. *For the year 04-05, the companies purchased capital goods from REL for Rs.1233.56 crore in respect of which the purchase price of REL was only Rs.731.60 crore (opening stock + purchases – closing stock as per the Trading Account of REL, EPC division) giving a profit of Rs.501.96 crore. In other words, REL sold the capital goods to BRPL & BYPL at a price 68%*

higher than their purchase price. The purchases from REL by the two companies during 05-06 are less but the position of percentage of profit passed on to REL would be about the same as for 2004-05 as the purchases were made at about the same rates.

3. *The profit passed on by the two companies to their group company namely REL being clearly excessive, the Commission vide letter dated 02.06.2006 directed the Distribution Companies at Delhi to take prior approval of the Commission for any financial transaction in respect of capital goods, with their group companies exceeding Rs.1 crore. Also, vide letter dated 30.6.2006, the three distribution companies at Delhi namely BRPL, BYPL & North Delhi Power Ltd. (NDPL) were required as under:*

"During the public hearing which were conducted by the Commission for the ARR petitions for 2006-07, one issue which was raised by several stakeholders was that of business transactions of the Distribution Companies in the NCT of Delhi with their sister concerns/group companies. Specifically, the view which was being projected by the stakeholders was that the Distribution Companies in Delhi are entering into business transactions with their sister concerns/ group companies

which are enriching such Companies at the cost of consumers in the NCT of Delhi.

2. Recently, the Commission had issued directions to the Distribution Companies vide its letter of 2.6.2006 directing that all transactions with sister concerns/group companies exceeding a sum of Rs. 1 crore may be entered into only after prior approval of the Commission.

3. The Commission has now directed that the total amount of the transactions with sister concerns/group companies, financial year-wise and company-wise, w.e.f. 1.7.2002, be reported to the Commission within the next two weeks. The profit margin of the sister concerns/group companies on the transactions may also be indicated"

4. *Both the BSES companies submitted similar replies through letters dated 27.07.2006 stating inter alia:*

"The Company had taken due care in awarding the contracts on basis of competitive pricing, services, extended warrants etc. therefore, we do not feel that the sister/group companies would have earned anything but a small reasonable margin like any other vendor. However, we are not in a position to provide their profitability figures in this connection as these are not available to us."

5. *It was further mentioned that REL is a reputed company in this field having the requisite experience. It was also contended that "the entire capital expenditure has been subjected to the scrutiny and approval process by the Commission."*

6. *BRPL & BYPL purchasing the capital goods from REL at a price 68% higher than its cost, cannot be said to be "a small reasonable margin like any other vendor" earned by REL. Whether REL is a reputed company is not relevant to the issue under consideration. The Commission (DERC) approves capital investment schemes considering mainly the following:*

   a) *necessity*
   b) *overall suitability*
   c) *Pay back period*
   d) *Whether the scheme fits into Central Electricity Authority's (CEA's) over all system planning study for Delhi*
   e) *Whether infeed to the new substation proposed will be available from Delhi Transco's system*
   f) *Whether it meets at least the near future demand growth projections*

7. *Approval by the Commission of a capital works scheme initially, before implementation, is only on an estimate basis. For approval of capital expenditure/ capitalization, after implementation of a scheme, actual expenditure is taken after a prudence check. If the actual expenditure is found to be inflated, whether by inflating the cost by making purchases from group companies at high rates or otherwise, then the same is corrected.*

8. *It may be worthwhile to state that hundreds of capital works schemes are submitted to DERC in an annual year. A detailed booklet is filed in respect of each scheme. There is no system or procedure in DERC to check the rate of different items of purchase numbering thousands after making market surveys or otherwise. It is not possible for any regulatory Commission to check the rates. Moreover, the rates quoted by manufacturers for bagging large orders of the kind under consideration, are always appreciably less than market prices. Therefore, it would be almost impossible to independently verify the rates of such large purchases without floating a*

similarly large tender at about the same time. In fact, the purchases made by REL are the best indication of market prices of the time, in such large tenders. There can be no better proof of the distribution companies making these purchases at rates much higher than market rates. Thus the claim (by implication) that the purchase rates were checked and approved by the Commission is totally incorrect.

9. *The claim of BRPL & BYPL that they cannot provide the profitability figures of group company REL with respect to these transactions, was also not considered satisfactory as REL is a group company. It is unlikely to have been difficult for BRPL & BYPL to obtain this information from a group company, had they wanted. The promoter of REL, BRPL & BYPL is the same.*

10. *The Commission being not satisfied with the reply, the two companies were informed accordingly vide letter dated 14.08.2006. All the evidence available with the Commission (13 pages) regarding the excessive profit earned by REL was sent to the two companies and the companies were required to file a*

reply. This letter of the Commission was to the following effect:

"The Commission has gone through the contents of the above mentioned correspondence and is not able to appreciate the stand taken by you that the company is not in a position to provide the profit margin of the Group Companies/Sister Companies in respect of their transactions with you. Within the same group, such information should not be difficult to obtain.

Insofar as the profit margin of Reliance Energy Ltd. in respect of supply of capital goods to you is concerned, the Commission has come across evidence to indicate that the goods were sold to you at a price more than 60% higher than their purchase price, which in the opinion of the Commission is excessive. A copy of the documents available with the Commission in this regard, is enclosed. It is not clear as to whether Reliance Energy Ltd. had also purchased some of these goods from/through a group company/sister concern."

11. *Both BRPL & BYPL replied vide their similar letters received in the Commission on 29th & 30th of Aug. 2006 respectively. In this reply, they firstly wanted to know from where the Commission had obtained the trading account of REL supplied to them. They*

were perhaps hoping the transaction in question would remain secret.

12. *They have not questioned the authenticity of the documents forwarded to them, which stands confirmed by the VAT Department of Govt. of NCT of Delhi from the VAT return filed by REL (EPC Division). They also reiterated their earlier stand that the capital goods were procured from REL on the basis of competitive pricing and also stated that in 2004-05, only accounting entries were made and that most of the capital goods purchased from REL in 04-05 were used for implementing schemes in 2005-06 and accordingly 2004-05 and 2005-06 should be considered together.*

13. *…*
14. *…*
15. *…*
16. *It is obvious that substantial funds of the two distribution companies have been passed on to REL through purchase of the capital goods at exorbitant prices, giving REL a mark up of about 68% over their purchase price. REL cannot, therefore, be said to*

have earned 'a small reasonable margin like any other vendor' as claimed by the two BSES Companies in their letters dated 27.7.2006, extract from which has been reproduced at Para 4 above.

17. *The burden of this excessive profit passed on to REL cannot be allowed to be passed on to millions of electricity consumers of Delhi, most of whom are poor. More than 50% of the electricity consumers at Delhi consume less than 200 units per month. BRPL & BYPL are public utilities and have to act more responsibly. .....*
18. *...*
19. *...*
20. *...*
21. *...*
22. *Restrictions are considered necessary on these companies for being instrumental in unjust enrichment of the group company REL at the cost of consumers of Delhi. It may be mentioned that in 2005-06, BRPL & BYPL paid another amount of Rs.254 crore to REL for services rendered for installation, erection and commissioning of some of the capital goods purchased from REL in 2004-05 &*

2005-06 mentioned above. In view of the nature of this transaction and the manner of accounting of this income by REL, it is difficult to find out the profit passed on to REL through this route. Therefore, this transaction is not considered for making the disallowance mentioned in the subsequent paras."

40) It may be stated here that the response from the public had also attacked the purchases made from the group company and one of the demands raised was to recover the funds which had been 'siphoned' out by the two companies to REL.

41) The above clearly indicates that there were two types of transactions with the REL (EPC Division). One part of the transactions was purchases made from REL which were as under:

Year	*BRPL*	*BYPL*
2004-05	*868.69*	*364.87*
2005-06	*103*	*92*

42) The other transaction was for installation, erection, commissioning which is also generally called EPC or Engineering, Procuring and Construction. For such contracts REL received Rs.178 Crores from BRPL and Rs.76 Crores from BYPL in 2005-06. So far as EPC contracts are concerned the Commission has allowed the same. Therefore, there is no challenge on this aspect. Only

challenge is in respect of the prices paid for material supplied by REL and purchases by the two appellants, BRPL and BYPL. There is no approved rate schedule ever issued by Commission in respect of the prices of any of the goods in question. Admittedly, none of the two appellant companies issued any tender with the REL before purchasing the goods. The Commission is duty bound to determine the best possible prices for these goods and to see that no extra burden is passed on to the consumers. The Commission says that the Commission has procured evidence of the actual prices of the goods at which the REL has purchased. The difference between the price at which the REL purchased the commodities and the price at which it sold to the two companies is found to be 60% of the purchased price. The Commission finds that this is entirely unreasonable. The Commission says that "in these kinds of transactions a profit margin of 5% is considered to be reasonable as a whole seller's margin is never more than those in larger transactions of these kinds where a middle man has only booked an order". The Commission thus says that out of the profit of Rs.878 Crores passed on to REL, only a profit of Rs.42.5 Crores can be allowed and the remaining Rs. 535 Crores is not allowed either for capital expenditure or asset capitalization. The year wise bifurcation of disallowance has been given as under:

Year	04-05	05-06	06-07	07-08	08-09
BRPL	3	61.46	68.79	121.76	109.15
BYPL	6.37	41.08	65.92	57.47	

43) We have carefully gone through the dissenting view. The dissenting view, however, does not say that the prices supposed or purportedly paid by the two companies to REL was just and fair. It does not dispute that the two companies have paid to REL for the purchase made much higher than the price at which the goods could have been purchased in the market. The dissenting view, however, is only in respect of the manner in which the transactions have been scrutinised. The dissenting view has recalled powers of the Commission in respect of procuring evidence. It has recalled that certain commissions have engaged efficient staff to examine such transactions. The following part of the dissenting view can be quoted to fully appreciate the same:

> *"13. In the light of the provisions of the two Acts, license conditions and the order of the ATE, it becomes incumbent upon the Commission to examine and approve various schemes. I fully agree with the views of the Learned Chairman that it is an onerous task. Once the task is assigned to the Commission, it is expected that the Commission will equip itself to discharge such responsibilities. With the issues getting more and more complex, the Commissions would have to develop skills to handle such*

problems. I understand that some of the Commissions have engaged Consultants to do such examination; some other Commissions have created additional posts to handle this task. Keeping all these factors in mind, I am of the considered view that it will be appropriate to provide for a provisional capital expenditure and capitalization for the years to which the related party transactions pertain or during the pre MYT period up to 2006-07 and carry out necessary physical verification of the assts, to verify the quantities of various equipment, material used in the completed schemes, which are proposed for capitalization, while doing this exercise, the Commission is also required to check the reasonableness of the prices to the best of its ability. We may have to depend upon services of other utilities like DTL for joint inspection of the site wherein we may associate even the Commission's officers. I have been advocating this principle for adoption in the Commission. The consumer interest is adequately protected even in this methodology in a lawful manner."

"19. I have my respects to the intention expressed by Learned Chairman, but my difference is on the approach adopted by the Learned Chairman. The assessment and the inferences drawn generally and particularly in the draft opinion of Hon'ble Chairman does not add confidence to my conscience. The issues which have been relied by the Learned Chairman in his opinion and the conclusion which have been drawn by Learned Chairman are entirely based on different premises which I fail to agree in the present issue. In my view, it will be appropriate to follow the procedure explained in para 13 of this order and proceed further in the matter as per para 20.

20. The jurisdiction for undertaking such proper investigation regarding issues arising out of related party transaction needs to be established first and once the jurisdiction is established, the Commission can take this issue further for arriving at a logical conclusion while functioning as a Civil Court. In case jurisdiction is not clearly established, the matter has to be examined by the forum which has appropriate jurisdiction in such matters."

44) Therefore the dissenting view is more in respect of the procedure adopted than with respect to the finding.

45) On behalf of the appellant it is contended that the methodology adopted by Chairman is erroneous therefore, the findings need to be set aside. It is contended by the appellant in this context that the audited accounts of the appellant separately discloses the related party transactions and the same was certified by external auditors and that the Board of Directors which unanimously approved the accounts included the nomination of National Capital Territory of Delhi as 49% stake holders. The appellant further contends that before executing the transactions in question the required permission of the DERC has been taken as the appellant was required to take approval of the Commission for all capital expenditure over Rs.2 Crores incurred by way of filing detailed project report with the Commission. The appellant further contends that no procedure has been laid down for entering into contract with related parties and that the requirement of specific approval of related party transactions was introduced only vide letter dated 30.06.06. Accordingly, it is claimed that DERC had no power to disapprove the related party transactions. According to the appellant, the Commission should have physically verified each asset and approved or disapproved purchases of items. The

appellant further contends that the Commission should have compared the transactions in question with purchases made by the other distributing companies of similar items at a similar time.

46) It has to be understood that a regulator cannot check and verify every transaction of a licensee. It will also be absurd to think that a regulator can make physical inspection of the commodities purchased and should have been running about in the market to verify prices of each commodity running into thousands in number and to keep record of the market prices of those items. In the present case the regulator did serve the appellants with queries and gave opportunity to appellants to explain and disclose the prices at which they were obtained by the seller and the profit margin retained by the seller. The appellant did not dispute that the appellant is only entitled to the market prices. Undoubtedly the price at which REL has purchased is a market price. We must not lose sight of the fact that REL is merely a middle man and not a manufacturer of the product. Obviously a manufacturer or a trader from whom the REL has purchased has also charged the profit margin for himself. The purchase price of REL therefore, is a good indicator of the price at which the commodity can be purchased in the market. It is true that the other licensees in the area of Delhi have also made similar purchases and the price paid by them could also be a standard for comparison. This does not mean that the

price at which REL has purchased the product cannot provide the standard for comparison.

47) The Commission has considered the prices to be paid to the REL on account of the services provided namely to acquire the goods on its behalf, after making adequate market survey and ascertaining quality of goods. The whole sale supplier, the Commission feels, has a margin of generally 2% to 3%. In the present case, however, the Commission has given a margin of 5%. The appellant does not dispute this proposition although at the time of arguments it was contended by the learned counsel for the appellants that such assumption of the Commission had no basis. We, however, as appellate forum, will not interfere with the views expressed by the Commission unless such a view is totally unrealistic or impossible. We will not interfere with the Commission's view that the goods could be supplied by REL with a margin of 5% and the appellant can be allowed to recover the same through tariff.

48) Undoubtedly, there are representatives of the Government in the Board of Directors of the appellants. It may also be true that auditors have approved of the transactions. This does not mean that the Commission has lost its jurisdiction and responsibility of

making a prudent check and arrive at an appropriate figure which should go into the cost as pass through.

49) The appellant claims that the transactions had been approved. This, however, is not a correct proposition. There is nothing on record to show that before entering into the related party transaction the appellant submitted any specific proposal for purchasing those items at specific prices and obtained prior approval of the Commission. So far as prior approval is concerned the Commission has explained the procedure as under. The approval of capital expenditure scheme is done by a two stage process. The initial approval before implementation of capital work scheme is an in principle approval keeping in view the following:

a) necessity
b) overall suitability
c) pay back period
d) whether the scheme fits into Central Electricity Authority's over all system planning study for Delhi
e) whether infeed to the new sub-station proposed will be available from the system of Delhi Transco Ltd. and
f) whether it meets at least a near future demand growth projects.

50) At the time of initial approval the cost proposed by the utility is on an estimate basis and the cost is approved after a broad examination of the estimate. The final approval of the capital outlay consequent to implementation of a scheme is granted at the time of tariff fixation after a diligent and proper prudent check and verification of actual cost, actual quality of material use, proper implementation of the scheme as well as legal clearance like Electrical Inspector's permission. Therefore, if the actual expenditure is found to be inflated, the same has to be corrected by the Commission. The Commission disputes that the purchases were at arms length in as much as REL is a company which has same promoters as of the appellants. Further in view of the public outcry against possible siphoning of funds it has become essential for the commission to examine the related party transactions. The Commission rejects entirely the plea that the purchases made by appellants were "approved" by the Commission. Admittedly, there is no approved rate schedule issued by the Commission as is done by certain public bodies like the Railways or the CPWD. Some in principle approval given by the Commission at an initial stage does not entitle the licensee to enter into transactions which may cost it price higher than the price at which an article is available in the market.

51) The Commission has a responsibility to make the prudent check. The Commission must also follow the principles of natural justice. The Commission issued a notice to the appellant to respond to the view taken by it namely that REL had been paid 60% higher than the price at which REL had purchased the articles. The Commission wrote:

> *"3. Insofar as the profit margin of Reliance Energy Ltd. in respect of supply of capital goods to you is concerned, the* ***Commission has come across evidence to indicate that the goods were sold to you at a price more than 60% higher than their purchase price, which in the opinion of the Commission is excessive.*** *A copy of the documents available with the Commission in this regard, is enclosed. It is not clear as to whether Reliance Energy Ltd. had also purchased some of these goods from /through a group company/ sister concern."*
>
> *4. BSES Rajdhani Power Ltd. may please give their feedback in the matter within 10 days of receipt of this letter."*

52) The Commission also enclosed the document relied upon by the Commission. The document enclosed is a trading account of the REL (EPC Division) submitted to the sales tax department. The truing up account is accompanied by a list of goods supplied with price against each item. The certificate under Rule 11 of clause 12 of Delhi Sales Tax Rules is also enclosed therewith. The veracity and authenticity of the document forwarded along with letter dated 14.08.06 has not been questioned by the appellants.

53) An attempt has been made by the learned counsel for the appellant at the time of hearing that all the purchases made were EPC contracts. In our opinion, it is unfair for the learned counsel for the appellant to have projected all the purchases as EPC transactions. The appellants themselves had shown two types of transactions. Partly the transactions were EPC contracts and part of it was sale. Not only the appellant but also the REL in its trading account has shown them as sale and not as service provided under the EPC contract. The appellant did not come out with any such plea when a notice was issued to the appellant to respond to the truing account of the appellant REL. In fact the proceeding before the Commission show that the appellant came out with a response that purchase from REL were made after issuing a public tender. This was however, an incorrect submission. Before us it is not disputed that no public tender was made before making those

purchases from the appellants. In any case the plea that all these purchases were in the nature of EPC contract has to be stated to be rejected. We are of the considered view that the Commission has done a prudent check on the related party transactions i.e. the purchase made be REL and that it has reasonably allowed the cost of the products as paid by REL along with a margin of 5%.

54) During the course of hearing of the appeal before us the appellant moved an application under section 41 Rule 27 of the Civil Procedure Code seeking to file before us a bunch of documents to show at what price NDPL, the other distribution licensee in Delhi had purchased similar product. The application was rejected, *inter alia*, on the ground that when the Commission itself proposed to compare the prices of the goods paid by NDPL with that paid by the appellant, the appellant itself rejected the same vide its letter dated 04.10.04 on the ground that such comparison should not be done as the rates depend upon various factors like time of purchase, vendor, vendor rating, technical specification etc. We rejected the application under section 41 & 27 on certain grounds but observed that in case those documents were found to be relevant for final determination of the dispute in question, we may issue appropriate direction in this regard.

55) We have given our serious thoughts to the issue. The present litigation is not a lis of the nature we deal with in Civil Courts and technicalities of pleadings etc. should not hold us. The aim of tariff fixation, we understand, is to prevent profiteering by the distributing companies who enjoy a monopolistic position while allowing them to earn a reasonable return and at the same time keeping the tariff as low as possible. An additional important factor in the present case is that there are several distribution companies in the city State of Delhi and equity between these companies will also have to be maintained.

56) We do feel that it was imprudent on the part of the appellant to resist the comparison to the prices paid to REL with the prices paid for similar products by NDPL. The appellant has realized the folly now. In view of the appellant resisting the comparison, mentioned above, the Commission also gave up all efforts to compare. The fact, however, remains that both the appellant as well as NDPL has incurred capital expenditures of various nature and has purchased goods and commodities in furtherance of the same. The Commission has to treat all the distribution companies at par. It is not disputed that the NDPL has purchased products of the same description although they may be different in their quality and technical specifications. Of the long list of articles which are involved in the dispute in hand some may be comparable to articles

purchased by the NDPL. If for those articles the Commission has allowed same price there is no reason why the appellant should not have been allowed the same price provided, however, they are lower than the price paid to REL for those products. The Commission has to treat all the distribution licensees on the same scale and no one of them can be either victimized or favoured on account of the stands or pleas taken by them during the tariff hearings. At the same time the Commission is duty bound to make the prudent check on all the claims made by the distribution licensees.

57) The NDPL submitted its records before the Commission simultaneously with the appellant during the tariff hearing of the relevant year. As such the records are expected to be with the Commission. We think it is appropriate to allow the appellant an opportunity to prove, item-wise, that the price paid by it to REL was not higher than the price paid by NDPL and allowed to it by the Commission for similar products. The onus would be entirely on the appellant to prove that the products purchased by it and the one purchased by NDPL offered for comparison are of the same technical specifications and quality and also should be similarly priced on account of the other relevant factors influencing the prices namely the time of purchase, the quantity purchased, vender rating etc. In case the price paid to REL is same as or lower than the price allowed to NDPL for a comparable commodity, the

Commission shall allow the price paid to REL. The Commission shall, however, allow a lesser price if the NDPL's price is lower than the price of REL's purchase plus 5% profit margin. Till such exercise is completed the appellant will have to accept the decision of the Commission as reflected in the view of the Chairperson.

58) A word of caution has to be added here. Mr. Raghu Nayyar one of the consumers appearing before us at the time of hearing of this appeal and appeal No. 37 of 2008 expressed a concern that if we now allow the appellant to offer a comparison paid by NDPL and allowed by the Commission, the prices paid by NDPL may get sanctified as the bench mark and hereby prejudicially affect the consumers of NDPL's area of distribution business. Our direction in the above paragraph should not mean that prudence check by the Commission should be sacrificed altogether and in case there be sufficient material with the Commission to hold that the price paid by NDPL was inflated it will be open to the Commission to take an appropriate view in the matter. We recommend that the Commission frames appropriate regulations for future guidance in such matters.

59) In addition to the above disallowance of capital expenditure, the Commission has further disallowed other expenditures on account of capitalization on account of non approval by Electrical

Inspectors. The Electrical Inspector's office is short of staff. Accordingly, many of the capitalization projects are pending for approval. The expenditure on that account has not been allowed by the Commission as pass through. The Commission has disallowed the capitalization of assets on the ground that the capitalization of schemes can be considered only when certificate/clearance of the Electrical Inspector has been obtained. Rules 63 & 65 of The Indian Electricity Rules 1956, deal with approval of Inspectors for electrical supply lines, systems and apparatus for high and extra high voltage. It will be sufficient to extract the provisions of sub-rule 1 and 2 of Rule 63 of The Indian Electricity Rules 1956:

> *"63.* ***Approval by Inspector.*** *– (1) Before making an application to the Inspector for permission to commence or recommence supply after an installation has been disconnected for one year and above at high or extra high voltage to any person, the supplier shall ensure that the high or extra high voltage electric supply lines or apparatus belonging to him are placed in position, properly joined and duly completed and examined. The supply of energy shall not be commenced by the supplier unless and until the Inspector is satisfied that the provisions of rules 65 to 69 both inclusive have been complied with and the*

approval in writing of the Inspector has been obtained by him:

Provided that the supplier may energise the aforesaid electric supply lines or apparatus for the purpose of tests specified in rule 65."

60) Rule 65 also prescribes several compliances before a new line can be commissioned. The purpose of all these rules is to ensure safety and security of the lines and implements.

61) The impact of shortage of staff with the Electrical Inspector and the issue of disallowance of asset capitalization on account of absence of certification by the Electrical Inspector came up for consideration before this Tribunal in an appeal against the tariff order for the FY 2006-07 in appeal No. 266 of 2006. We had said the following in this regard:

"..it was revealed that the proposal for Capital Expenditure were being delayed for want of personnel in the Commission who are required to visit the sites and examine the feasibility and safety aspects of such capital schemes. We feel that this difficulty can be overcome, if the Commission provisionally approves the capital

schemes based on certification by qualified engineers on the roll of the DISCOMs so that the Appellant can go ahead with the capital schemes to augment infrastructure for electricity distribution of Delhi, which is a crying need. The Commission may also consider accepting certification of engineers of one DISCOM in respect of the Capital Expenditure of another DISCOM in order to ensure impartiality and fairness in such certification".

62) The Commission explains that the initial approval is given in principle keeping in view necessity, over all suitability, pay back period etc. However, that initial approval is only an estimate and is subject to prudence check of actual expenditure on completion of the scheme. Capitalisation of assets pertains to approval of final cost of schemes which have been actually implied / completed during a respective financial year by the utility / licensee / the appellant. One of things which is required to be considered is the safety rules and the laws of the land. The Commission in the reply has extracted Rule 63 of the Indian Electricity Rules 1956 and has submitted that it is duty bound to advice the utilities to abide by the rules of the land and accordingly has considered capitalisation of assets and has disallowed those assets which are yet to get the approval of the Electrical Inspector. It is submitted by them that self certification by the DISCOMs cannot substitute certification by

an Electrical Inspector as the certificate of the Electrical Inspector is a statutory requirement. It is contended by the Commission that the appellant never took the plea before the Commission that capitalisation of assets has to be allowed without certification by an Electrical Inspector because the Electrical Inspector is unable to cope with the work in view of shortage of staff. The Electrical Inspector is appointed by the Government. It is submitted by the Commission that a meeting on the issue was taken by the Secretary (Power), Government of NCT of Delhi on 02.04.08. The Commission has also filed a copy of the minutes. The Commission contends that both BRPL and BYPL had furnished completion certificates over a period of 6 to 8 months during the FY 2007-08 for the scheme which they proposed to capitalize for the FY 2005-06 and for the FY 2006-07 in accordance with directions contained in the Commission's tariff order for the FY 2006-07. Comparison of some of the certificates of the Electrical Inspector in a few schemes indicated that there was a quantity deviation in the number of PCC poles, transformers and conductors which would have some price implications to the tune of 20% in the schemes. For the years 2002-03 to 2006-07 the appellant claimed capitalisation of assets amounting to Rs.1493.88 Crores but the Commission accepted capitalisation of assets only to the extent of Rs.497.14 Crores.

63) Order for the FY 2006-07, as extracted above, did not imply that the requirement of the certification of the Electrical Inspector be given a go by. The purpose of our direction, extracted above, was only to make a provisional arrangement so as to allow the licensee to get the benefit of the cost incurred by it in setting up the capital assets. It was explained that such certification by the Inspectors of the utilities themselves would give assurance that all formalities have been completed and safety rules have been adhered to so that the chance of Electrical Inspector subsequently declining to approve the project is reduced to minimal. Before us both the parties submitted that the shortage of resources with the Electrical Inspector is causing huge delays in the matter of certification while utilities are unable to wait for such certification for the purpose of obtaining the return on them. We accordingly made an effort to find out the facts for ourselves and render some assistance if possible. On 20.11.08, we issued notice to Government of NCT of Delhi to submit a status report in respect of the applications for approval of high tension assets pending with the Electrical Inspector of Delhi. Mr. Avinash Kumar Agarwal, the Electrical Inspector, appeared on 01.12.08 and submitted a sketchy report and asked for time to file full report. We also discovered on that day that the Electrical Inspector was not appointed under the Ministry of Power but under the Ministry of Labour. On 11.12.08, the Electrical Inspector submitted his report indicating that 1399

applications for inspection of high voltage and extra high voltage installations were pending, that 20 Electrical Inspectors were working in Delhi who could inspect 40 installations each day and therefore 40 applications can be disposed of each day. Accordingly, we observed that at such rate 800 applications could be disposed of in a month. Mr. Agarwal submitted that all applications, filed till 01.03.09, could be disposed of by 15.03.09. All the distributing companies present in the court on that day assured that they would give the names of their nodal officers who could be contacted by the Electrical Inspectors for the purpose of carrying out inspection.

64) The DISCOMs, however, expressed that the report of pendency figure submitted by the Electrical Inspector was grossly incorrect. The appellant itself filed a list of applications submitted by it to the Electrical Inspector for approval. The Dy. Secretary (Power) was asked to use his good offices for reconciling the statistics and to file a reconciliation report by 15.01.09.

65) On 15.01.09, we were informed by Mr. Harish Ahuja, Dy. Secretary (Power), Government of NCT of Delhi that reconciliation of statistics was under way and that in certain instances the distribution companies did not file the application although they had deposited the fee by a challan. We observed that mere payment of the fee would not amount to filing of an application and the date

of the filing of the application should be the date from which the application can be treated to be pending. We requested the distribution companies to put their officers to work for as many number of days as possible, including on holidays. The Electrical Inspector was asked to continue to file his status report. We observed on 11.02.09 that the report filed by Electrical Inspector showed that sufficient work had been done in the last two months and yet on 09.02.09 as many as 1041 applications were pending for disposal. A report was filed on that date under the signature of Mr.Harish Ahuja, Dy. Secretary (Power). As per his report, on an exercise in reconciliation on data, it was found that a large number of applications for inspection had not been filed and that particulars regarding date of filing, date of depositing of challans and date of deposit in treasury had not been provided by DISCOMs for verifications. The DISCOMs were asked to take steps to provide all relevant data for reconciliation of figures. It was pointed out by the Electrical Inspector that certain transformers (HVDS) inspected had been found to be lacking in compliance with rules. The DISCOMs submitted that they would take necessary steps to comply with the rules. We asked the DISCOMs to file their data stating how many HVDS had been corrected and what steps were being taken to bring the HVDS to comply with the rules. The Electrical Inspector on his part expressed his concern over lack of cooperation from DISCOMs. The DISCOMs were directed to take

steps to extend all cooperation to the Electrical Inspector and the Assistant Inspector so that no visit made by them to the spot goes waste. On 04.03.09, we examined the status report filed on 03.03.09 and found that between 06.12.08 and 09.02.09, 1037 + 882 applications for inspection of high voltage and extra high voltage installations had been disposed of leaving approximately 1400 applications pending. Of these a large number of applications were received after 06.12.08. Of the applications received till 05.12.08, only 362 applications remained pending. It was stated on that day by Mr. G. S. Walia, Dy. Electrical Inspector that on an average, after an application is received the same can be disposed of within a period of two weeks. All the DISCOMs, including the appellant, expressed their appreciation at the speed at which the Electrical Inspector and other officers at his disposal had been able to complete the work of inspection. We also expressed our satisfaction and acknowledged the work done by the Electrical Inspector, the Dy. Secretary (Power), Government of NCT of Delhi and other officers who jointly worked with them.

66) In view of the efforts put in by all sides we can say with confidence that there is no arrear so far as work of Electrical Inspector regarding certification is concerned. It has been accepted by all sides that application should be deemed to be pending only when all the formalities including filing of the application and

deposit of fee are completed. The question that remains to be considered is to what extent the claim for capitalisation of asset without certification of the Electrical Inspector can go into the ARR of the appellant. On behalf of the Commission it is contended that no installation covered by section 63 of the Electricity Act 2003 can be commissioned till a certificate is obtained from the Electrical Inspector and therefore, the appellant cannot be granted the benefit of capitalisation of those assets for whom they had not received the certificate from the Electrical Inspector. Mr. Haksar submitted that if the DISCOMs had commissioned those assets without the certification of the Electrical Inspector they had committed an illegal act and the Commission could not put its stamp of approval by granting capitalisation of those assets. It is not disputed by the Commission that many of those assets have actually been commissioned and the distribution of electricity through those assets have commenced. It is also not disputed that electricity distribution through those assets have been duly billed and the value thereof recovered. It is also not disputed that the revenue earned through such distribution has been taken into consideration by the Commission. Nonetheless, the Commission is of the view that benefit of capitalisation of those assets cannot be given to the appellant.

67) We have given our thoughts to the subject. While on the one hand the DISCOMs are under pressure to expand their activities and to improve their quality of work they are unable to recover the cost of those assets installed by them on account of the failure of the Electrical Inspector to dispose of the application for certificate for one reason or the other. We have to remember that certificate of the Inspector is required to ensure safety rules and the bar to put those assets to use has been placed only to strengthen the safety requirements. There is however, no regulation that prevents recovery of revenue for electricity delivered through such assets pending approval by the Electrical Inspector in case any such asset has been actually put to use. The importance of Rule 63 cannot be undermined. Nonetheless it will be incorrect to say that the DISCOMs should wait for indefinite period for the certificate of the Electrical Inspector and refrain from putting those assets to use. Depreciation begins from the day of installation. If the assets are not allowed to be used for years neither the DISCOMs nor the consumers are benefited.

68) The DISCOMs are duty bound to make the application for certificate as soon as the asset is installed. They should also wait for a reasonable period for the Electrical Inspector to inspect and grant a certificate of fitness if the implement / asset complies with all the safety rules. It should be duty of the Government to see that

all these applications are disposed of within such reasonable period. We feel that 15 days should be the reasonable period in which such certificate should be granted. For the purpose of the ARR we think it appropriate to allow capitalisation of these assets with effect from the 16th day of the filing of the application provided all formalities connected with such filing including payment of fees are completed. The Commission therefore, will have to re-examine this issue in the light of this observation.

Employees Expenses:

69) The appellant has challenged disallowance by the Commission all employee expenses on account of retirement benefits as well as rise in the total salaries to be paid. The Commission has adopted the approach of estimating employee expenses based on the Regulations relating to cost escalation caused by inflation. Table 67 in the impugned order gives the escalation factor which is 1.0415. The Commission has determined the inflation factor for the nth year ($Index_n$) using a weighted average of CPI and WSI (Consumer Price Index and Whole Sale Index) as specified in the MYT Regulations. Inflation factor is used to calculate escalation factor for each year i.e. the $index_n/index_{n-1}$ which is used for projections.

70) In addition to such increase in the salary on account of the escalation factor, the Commission has also taken into account the

effect of the Sixth Pay Commission's recommendations. The employees of the erstwhile Delhi Vidyut Board (DVB) will get the benefit of hike in the salary on account of the recommendations of the sixth pay commission. The Commission considers such hike only for those employees on the rolls of the appellant who were employees of the erstwhile DVB.

71) The appellant has also incurred certain expenses on account of the Special Voluntary Retirement Scheme or SVRS offered to the employees. The Commission does not dispute the prudence of the scheme. However the Commission has shown reluctance in allowing the expenses towards pension, medical allowance and leave travel allowance of the SVRS retirees. The High Court in its order dated 02.07.07 in Writ Petition No. (C) 4827 of 2005 and other Writ Petitions gave the following directions:

> *"I(i) The Pension Trust and GNCT are not liable to make payment towards terminal benefits and residual pension arising to those who opted VRS/VSS, formulated by the petitioners DISCOMS namely, BSES Rajdhani Power ltd., BYPL and the NDPL employees of the above (referred to as "DISCOMS'). The employees of the DISCOMS who opted by VRS/VSS or the Scheme by whatever name called*

and were relieved from employment are entitled to payment of terminal dues (which expression would include all accrued benefits such as gratuity, provident fund, leave travel concession, leave encashment, payment towards medical facilities, commutation of pension and residual pension and such other payments as they are entitled to in terms of the protected terms and conditions of service under the Act and Rules) from the date of their respective severance from employment. Such date of severance shall be hereafter referred to be called 'entitlement date'.

(ii) *It is open to the DISCOMS to adopt the IPGCL Model of paying pension, gratuity, leave encashment and other liabilities to the optees, in terms of the letter of the Government of NCT of Delhi dated 11.11.2004. This has been described in Para 87 above.*

(iii) *The DISCOMS shall indicate to the pension trust, in writing within two weeks from the date of this judgment whether they are willing to accept IPGCL Model or not.*

(iv) In the event of acceptance of the IPGCL Model, the liabilities of the DISCOMS to make payments from the entitlement date to each VRS/VSS optee till the date of payment shall be discharged within three months from today. In other words, the payments for the period commencing from entitlement date till 1st of July, 2007 shall be made within three months. The payment for the period ending three months from today shall also be after 1.7.2007 and included in this regard while discharging the liability. In the event of this option being exercised and any default in payment, the VRS optees concerned shall be entitled to interest @ 8% per annum for the entire amount till the date of payment.

(v) In the event of option being exercised by DISCOMS, they shall also be liable to make payments towards family pension and terminal benefits of all optees who died during the interregnum i.e. from the date of entitlement till today.

II(i) In the event of the concerned DISCOMS not accepting the IPGCL Model and opting out of direction No. I(ii) above, they shall be liable to pay additional

contributions to the pension trust, in the manner to be determined hereinafter.

(ii) *For the purpose of deciding the additional contributions to be made by DISCOMS to the Trust's Pension Fund, on account of payment of commuted value pension and all terminal benefits and liabilities, due to such optees, the matter shall be referred to two Arbitral Tribunals within four weeks of receipt of communication by the pension trust from the concerned DISCOMS.*

(iii) *The first Arbitral Tribunal shall be comprised a nominee of the Institute of Acturies, 302, Indian Globe Chambers, 142, Fort Street, Off D.N. Road, Fort, Mumbai, incorporated under Section 3 of the Actuaries Act (which was enacted and received assent of the President on 27.8.2006 and was brought into force on 8.11.2006). The nominee of the Institute shall be indicated by the President, Governing Council of the Institute. The second member of the Tribunal shall be a common nominee of the GNCT and the Pension Trust and the third nominee shall be nominated by the NDPL. The*

provision of composition of the Tribunal shall be completed within six weeks from the date of exercise of option by the NDPL.

(iv) *The second Tribunal shall comprise a nominee of the Institute of Actuaries to be indicated in the manner as directed in Clause II(iii) above the second member shall be; a common nominee of the GNCT Pension Trust and the third member shall be a common nominee of BSES and BYPL.*

(v) *All members of the two Arbitral Tribunals should be actuaries, having knowledge and experience in the field of pension funds;*

(vi) *The proceedings before the Tribunals shall be regulated by the provisions of the Arbitration and Conciliation Act, 1996 and its Award would be an Award within the terms of that Act;*

(vii) *The terms of reference of the Arbitral Tribunal concerned would be the determination of additional contributions payable by the concerned DISCOMS on account of premature pay-outs by the pension trust*

due to the exercise of option by the VRS optees. The Tribunal shall decide on an application of actuarial principles, the cost of such pay-outs, which shall include loss of interest and also such other incidental matters including but not confined to premature payment of commuted value of pension, provident fund, gratuity and all other terminal benefits to the concerned optees from the date of their entitlement. The Arbitral Tribunal shall complete its proceedings and publish its award within six months from the date of its Constitution. All parties shall cooperate in this regard.

(viii) The arbitration proceedings shall be conducted by the Tribunal in accordance with law.

III(i) The liability to pay residual pension i.e. monthly pension from the date of this judgment in the event the DISCOMS exercise the second option i.e. of going in for actuarial calculations; shall be borne by the concerned DISCOMS for the period till the award is published by the Tribunal and payment made to the trust on the basis of such award, by the concerned DISCOMS.

(ii) The payments made by DISCOMS to the optees shall also be subject to suitable adjustment/reckoning for the actuarial exercise adjudication by the Tribunal.

(iii) The liability of the Trust to make payments to the VRS/VSS optees shall arise after the DISCOMS deposit the amounts determined as additional contributions with the pension trust.

(iv) The VRS optees are entitled to interest on the terminal benefits, i.e. gratuity, provident fund, commuted value of pension, arrears of pension, etc. @ 8% p.a. from the date of entitlement, to payment. This shall be paid by the DISCOMS."

72) The appellant had two options of making payments due to such retiring employees : (i) pension, gratuity, leave encashment and other liabilities shall be paid directly to those who opted for the VRS till the date of their superannuation. The Pension Trust would assume the liability when the employee achieves superannuation or (ii) contribution shall be made to the Pension Trust directly and the valuation of the amount paid shall be determined by Arbitral Tribunal consisting of a nominee of the Institution of Actuaries, a

common nominee of the Pension Trust of NCT of Delhi and a joint nominee of the DISCOMs.

73) The appellant opted for the second model. As per the estimation of the appellant, the total liability came to Rs.46.6 Crores. The appellant informed the DERC that it would release Rs.8.29 Crores and would be paying the remaining amount shortly. The appellant also made all payments as per this estimation. The appellant contends that these payments were subject to computation of final liability by the Arbitral Tribunal constituted to decide the liability of the appellant. The Commission allowed the monthly pension provisionally subject to outcome of the award of the Arbitral Tribunal with the condition that refund / relief provided to the appellant will be available for adjustment in the future employee expenses. The Commission, however, disallowed the payment made on account of terminal benefits. The Commission held that this amount would be allowed based on finalization of liability and outcome of the proceedings at the Arbitral Tribunal. It is contended before us by the Commission that it was uncertain as to when the Arbitral Tribunal would be constituted. The Commission recognized that the delay in constituting the Arbitral Tribunal was translating into more monthly payments and was increasing the burden on tariff. The Commission says that the amount of terminal benefits have to be determined by Arbitral

Tribunal in accordance with the order of the Hon'ble High Court and that in case the payments made are all allowed the appellant would have no incentive to pursue the matter of constitution of Arbitral Tribunal and obtaining an award from it. We discovered during hearing that the Arbitral Tribunal had not been constituted as the Government was yet to nominate its Member. Accordingly on 20.01.09, we asked the Government of NCT of Delhi to submit a status report about the filling up of the vacancies of the Government nominee in the Actuarial Tribunal / Arbitral Tribunal as directed by the High Court in those Writ Petitions, being Nos. 4827 of 2005, 5198-99 of 2005, 23460 of 2005, 13231-04 of 2005. The Government filed a status report. We observed on 02.02.09 that no step for nomination of Government nominee has been taken and that the status report disclosed that the Government did not intend to appoint a nominee for the Arbitral Tribunal. The Government of NCT of Delhi was represented on 05.02.09 by Mrs.Avnish Ahlawat who said that on 15.01.09 a meeting took place in the office of the Secretary (Power) NCT Delhi in which the CEO of three private DISCOMs were present and that it was decided in that meeting that no Acturial Tribunal was required to be formed. This, however, is against the order of the High Court extracted above. The appellant has incurred some expenditure on the basis of its own estimation subject to final computation of liability by the Arbitral Tribunal. There is no reason why the Commission should

not allow the expenditure as pass through unless the Commission considers the payment to be much above a reasonable estimate. The appellant may take steps for constitution of the Tribunal. However, the Commission will have to allow the expenditure as far incurred by the appellant towards the terminal benefits of the SVRS optees. The appellant further claims enhancement of projection of the amount towards employees expenses on account of raise in salaries as per industry practice, on account of power purchase obligations to be discharged by the appellant and on account of increase in consumer base of the appellant. The Commission submits that the projection on account of employees' expenses has been done strictly as per the MYT Regulations 2007 which provided how to calculate the escalation factor based on the inflation index. The Commission also took into account the impact of the 6th Pay Commission's recommendations but ruled that the expenses on account of implementation of the 6th Pay Commission will fall only in the year 2009. The grievance of the appellant is that the Commission has not considered the impact of increase in the number of employees consequent on the increase in the consumer base and of the need to enhance salaries & allowances in order to retain and attract quality staff. It may be added here that the appellant has not shown how power purchase obligation is related to increase in employee expenses.

74) Having gone through the impugned order we do find that the Commission has not considered the issue of possible increase in the number of employees consequent on increase in the consumer base. Nor has the Commission ruled on the appellant's proposal to increase the salaries etc. The Commission has nonetheless assured to true up the employees expenses subject to prudence check. The Commission shall also take care of the related carrying cost. This should satisfy the appellant.

75) It may be stated here that the recommendations of salary hike made by the 6th Pay Commission takes into account the need to retain & attract talent. The appellant has not justified the need for any further hike by any factual data. One may expect better talent to be attracted to the sector in case salaries are further hiked. Yet one cannot lose sight of the fact that the consumers will have to bear the burden of such salary hike. Any hike in salary, not comparable to 6th Pay Commission's recommendation and not sufficiently justified cannot be allowed as pass through in tariff. We thus conclude the issue of employees' expenses by saying that the Commission shall allow the expenses incurred towards the retirement benefit of SVRS optees pending decision of the Acturial Arbitration Tribunal and shall true up the employee expenses to the extent of increase caused by increase in the consumer base. So far as salary hike is concerned to the extent hike comparable to the

recommendations of 6th Pay Commission to employees other than the erstwhile DVB employees shall also be allowed in the truing up process in case expenditure in that account has actually been incurred.

76) A word of caution. The consumer respondents have submitted that the purpose behind any VRS Scheme is to rationalize employees cost and so the expenditure on account of VRS should not be more than the eventual cost saving by reducing the number of employees. Some consumers have said that the expenditure on VRS should be tariff neutral. There is much strength on the contention of the consumers. The Commission as well as the appellant have to ensure that SVRS eventually lead to cost saving and further that such cost saving is passed on to the consumers.

Advance Against Depreciation (AAD):

77) Advance against depreciation was introduced as a factor available to be recovered through tariff by the MYT Regulations of 2007. The same is as under:

> *"AAD= Loan (raised for capital expenditure) repayment amount based on loan repayment tenure, subject to a ceiling of 1/10th of loan amount minus*

depreciation as calculated on the basis of these Regulations;

Provided that Advance Against Depreciation in a year shall be restricted to the extent of difference between cumulative repayment and cumulative depreciation up to that year."

78) Prior to the introduction of AAD in the Regulations no such amount was recoverable through tariff. The purpose, as it appears to us, of introducing the Regulation was to encourage and facilitate repayment of loan and recover the re-payment of loan over and above depreciation through tariff. The Commission in its tariff order said the following while granting AAD:

"Advance Against Depreciation

Petitioner's Submission

4.190 The Petitioner has requested the Commission to provide for advance against depreciation (AAD) during the Control Period by considering the actual debt repayment and the depreciation recovered during the year. The Petitioner has already included the AAD proposed for each year of the Control Period in the Depreciation

expenses claimed for the respective years, as mentioned above.

4.191 *The summary of AAD proposed by the Petitioner is detailed in the table below.*

Table 105: AAD submitted by the Petitioner (Rs.Cr)

Particulars	***FY08***	***FY09***	***FY10***	***FY11***
1/10th of the Loan(s)	*141.93*	*160.92*	*189.99*	*221.59*
Repayment of the Loan(s) as considered for working out Interest on Loan	*45.05*	*256.95*	*201.62*	*229.75*
Minimum of the Above	*45.05*	*160.92*	*189.99*	*221.59*
Less: Depreciation on during the year	*119.31*	*139.64*	*158.36*	*174.96*
A	*0.00*	*21.28*	*31.63*	*46.62*
Cumulative Repayment of the Loan(s) as considered for working out Interest on Loan	*89.88*	*346.83*	*548.46*	*778.21*
Less: Cumulative Depreciation	*164.15*	*303.79*	*462.15*	*637.11*
B	*0.00*	*43.04*	*86.31*	*141.10*
AAD=min (A,B)/zero if negative	*0.00*	*21.28*	*31.63*	*46.62*

Commission's Analysis

4.192 *The Commission has calculated the advance against depreciation for each year of the Control Period, using the principles specified in the MYT Regulations, 2007 and considering the details of actual cumulative debt repayment and accumulated depreciation claimed by the Petitioner.*

4.193 *While calculating the AAD for the Control Period the Commission has considered the value of accumulated depreciation as net of the depreciation used for capital investment and working capital in the previous years i.e. Rs.499.30 Cr. as discussed in truing up section (utilisation of depreciation).*

4.194 *The Commission has concluded that no requirement for AAD shall occur during the Control Period, as shown below:*

Table 106: AAD approved by Commission (Rs.Cr)

Particulars	FY08	FY09	FY10	FY11
1/10th of the Loan(s)	139.20	150.95	155.65	180.50
Repayment of the Loan(s) as considered for working out Interest on Loan	50.52	244.99	157.11	206.85
Minimum of the Above	50.52	150.95	155.65	180.50
Less: Depreciation	82.88	103.32	123.85	142.20

during the year				
A	*(32.36)*	*47.63*	*31.80*	*38.31*
Cumulative Repayment of the Loan(s) as considered for working out Interest on Loan	*86.01*	*331.00*	*488.11*	*694.96*
Cumulative Depreciation	*1000.66*	*1103.98*	*1227.83*	*1370.03*
Depreciation Considered for Capex & WC in Previous years	*499.30*	*499.30*	*499.30*	*499.30*
Less: Cumulative Depreciation Considered for AAD	*501.37*	*604.69*	*728.54*	*870.73*
B	*(415.36)*	*(273.69)*	*(240.43)*	*(175.77)*
AAD=min (A,B0/zero if negative	*0.00*	*0.00*	*0.00*	*0.00*

79) As it appears the appellant's claim is that AAD is available to it. The appellant in the appeal has the following to say on the issue of AAD:

"8.11.2 The Appellant draws the attention of this Hon'ble Tribunal to Table 106 of the Impugned Order wherein the DERC has indicated its determination for the AAD. The Appellant states that the DERC has considered 'Cumulative Depreciation' for FY 2008 as Rs. 1000.66 crores. This is in contradiction to the total depreciation approved by the DERC for FY 2002-03 to FY 2006-07 at Rs. 617.67 crores (which is

also subject matter of challenge contended supra).

8.11.3 *The Appellant verily believes that the DERC has included an amount of approximately Rs. 383 crores while arriving at the figure towards 'Cumulative Depreciation' in the FY 2008. The Appellant draws the attention of this Hon'ble Tribunal to the Opening Balance Sheet drawn for each DISCOM as a part of the Transfer Scheme at the time of privatization and unbundling of DVB, which is represented in the table below:*

Long Term Liability		***Fixed Asset***	
Authorized, issued, subscribed, and paid up 460,000,000 shares of Rs.10 each in favor of holding company	*460*	*Gross fixed assets*	*1533*
Secured Loan payable to Holding company	*690*	*Less Accumulated Depreciation*	*383*
Total	*1150*	*Net Fixed Assets*	*1150*

Relevant extract of the Opening Balance sheet of the Appellant DISCOM is annexed herewith and marked Annexure A/34.

8.11.4 It is evident from the table above that the Equity infusion by the Appellant DISCOM was balanced with the Net Fixed Assets by adjusting the accumulated depreciation (as had been accumulated till FY 2002-03) against the Gross Fixed Assets. Thus, it is more than evident and it was well within the knowledge of the DERC that accumulated depreciation to the tune of Rs. 383 crores was not available for funding with the Appellants.

8.11.5 However, the DERC has failed to give effect to this utilization of Rs. 383 crores while indicating the amounts under the head of 'Depreciation considered for Capex & WC in Previous Years' (at Table 106 of the Impugned Order) and has indicated a figure of Rs.499.30 crores against this item. Interestingly, the DERC at Table 14 of the Impugned Order wherein the DERC has computed the unutilized depreciation at the end of FY 2007 at NIL, which buttresses the submission of the Appellant that Rs. 383 crores (accumulated depreciation till FY 2002-03) has

been utilized towards Capital Expenditure and Working Capital Requirements. Despite this treatment being abundantly clear to the DERC (DERC has itself accepted this treatment at Table 14 of the Impugned Order) it has selectively decided to determine the figure under the head of "Depreciation considered for Capex and WC in Previous Years" by not adding the amount of Rs. 383 crores to the figure indicated against this head in Table 106.

8.11.6 As has been stated hereinabove; the incorrect calculation of the AAD by the DERC has severely impacted the Appellant in as much as its ability to repay its loans has been restricted by this incorrect computation. Thus, the Appellant prays that this Hon'ble Tribunal may direct the DERC to recalculate the AAD as per the computation indicated below:

Particulars	***FY 08***	***FY 09***	***FY 10***	***FY 11***	***TOTAL***
1/10 of the Loan (s)	*139.2*	*150.95*	*155.65*	*180.5*	
Repayment of the Loan as considered for working out interest on loan	*50.52*	*244.99*	*157.11*	*206.85*	
Minimum of	*50.52*	*150.95*	*155.65*	*180.5*	

the above					
Less: Depreciation during the year	*82.88*	*103.32*	*123.85*	*142.2*	
A	*(32.36)*	*47.63*	*31.8*	*38.3*	
Cumulative Repayment of the Loan (s) as considered for working out Interest on Loan	*86.01*	*331*	*488.11*	*694.96*	
Cumulative Depreciation	*1000.66*	*1103.98*	*1227.83*	*1370.03*	
Depreciation Considered for WC in Previous Years	*882.3*	*882.3*	*882.3*	*882.3*	
Less: Cumulative Depreciation Considered for AAD	*118.36*	*221.68*	*345.53*	*487.73*	
B	*(32.35)*	*109.32*	*142.58*	*207.23*	
AAD=min (A,B)/zero if negative	***0***	***47.63***	***31.8***	***38.3***	***117.73***
AAD approved by the DERC	*0*	*0*	*0*	*0*	*0*
Difference	***0***	***47.63***	***31.8***	***38.3***	***117.73***

80) The main issue between the parties is the figure of Rs.383 Crores which is shown as accumulated depreciation in the opening balance sheet of the appellant at the beginning of the formation of the DISCOMs and when the DISCOMs were taken over by the appellants.

PART – II

Opening Balance Sheet of South-West Delhi Electricity Distribution Company (DISCOM2)

Liabilities		***Assets***	
Long Term Liabilities	***460***	***Gross Fixed Assets***	***1533***
Authorised, issued,	*690*	*Less: Accumulated*	*383*

subscribed, and paid up 460,000,000 shares of Rs.10 each in favour of holding company		*Depreciation*	
Total	*1150*	*Net Fixed Assets*	*1150*
Current Liability		***Current Assets***	
Payable to Holding Company	*15*	*Receivables due from consumers*	*122*
Payable to TRANSCO	*122*	*Cash & Bank Balance*	*15*
Consumer Security Deposit	*11*	*Stores and spares*	*5*
Total	*148*	*Loan to personnel*	*6*
		Total Current Assets	*148*
Total Liabilities	***1298***	***Total Assets***	***1298***

81) In the subsequent years, when the utilisation of depreciation is indicated in the tariff orders, the accumulated depreciation, as shown in the above table, of Rs.383 Crores was not shown to have been shown as utilized. The Commission while calculating the AAD has taken this figure into consideration. The sole issue, therefore, is whether this Rs.383 Crores should go into calculating the accumulated depreciation for calculating AAD as per the MYT Regulations. The contention of the appellant is that although this figure of Rs.383 Crores is shown in the opening balance sheet, this amount was never available to the appellant. The appellant contends that the opening balance reflects that the amount of depreciation of Rs.383 Crores was set off from the gross value of assets to arrive at a figure which was to be financed by the appellant by infusing equity and raising debt. The appellant claims

that from 2001-2002 the amount was never available to the appellant. In its written submission the appellant says: "I*t is submitted that if the amount of Rs.383 Crores had been available with the appellant it would have appeared under the head "unutilized depreciation", in the absence of such amount under the head "unutilized depreciation" it is evident that the said amount was not available with the Appellant since 2001-02"*. It is difficult to agree with this contention of the appellant. The appellant has to live with the opening balance sheet as the appellant entered into the business on the basis of this balance sheet. It is too late in the day for the appellant to say that the opening balance sheet was incorrect and that this accumulated depreciation of Rs.383 Crores could be taken into account only if such figure has been shown as unutilized depreciation. In the earlier tariff orders, the Commission was not required to calculate AAD. The Commission vehemently submits that the opening balance sheet forms the basis of privatisation process and transfer of assets and liabilities to various utilities and says further that it will not be justified for the appellant to take a return based on the equity shown in the opening balance sheet, accept liability towards security deposits as per the opening balance sheet and claiming re-financing and interest charges as per the loans in the balance sheet which are in its favour but when it comes to accumulated depreciation the appellant should change its stand to the contrary. It is further pointed out

that the transfer scheme did not mention that the figure of Rs.383 Crores as accumulated depreciation would not be considered for calculation of accumulated depreciation. The Commission has explained that the figure of Rs.149.17 Crores written against "depreciation considered for Capex (capital expenditure) and WC (working capital) for previous years" is the cumulative figure of depreciation considered by the Commission in its respective tariff orders from 2002-03 to 2006-07 towards funding of capital expenditure and working capital and hence not available with the appellant for loan repayment. The Commission has further stated that Rs.383 Crores was not considered for utilisation in the earlier years as the Commission was not calculating AAD. The Commission has further stated in its written submission that it has considered only yearly depreciation figures approved towards Capex and WC. Table 14 represents annual depreciation approved by the Commission on year to year basis which is utilized for debt repayment, working capital requirement and capital investment respectively. In other words, table 14, only represents approval of depreciation for each year of the policy period and their utilisation in the respective year under different heads. The Commission has proceeded to add that since Rs.383 Crores of depreciation was not being given effect to and considered during the policy period, (i.e. the period prior to MYT period) that amount is deemed to be available with the appellant for utilisation and hence this amount of

Rs.383 Crores is considered under the head cumulative depreciation, considered for AAD. Thus the Commission has given effect to the utilisation of Rs.383 Crores in the opening AAD considered for the FY 2007-08 since it has not considered depreciation of Rs.383 Crores for utilisation in any of the previous years.

82) It is admitted by the appellant that the appellant has been claiming depreciation in all these years on the basis of the gross fixed assets of 1533 as shown in the opening balance sheet. The appellant has not been claiming depreciation on the basis of net fixed assets i.e. 1150. Hence, it will not be proper for the appellant to say that the cumulative depreciation of Rs.383 Crores was never available and that it could have been available only if this figure was shown as unutilized depreciation.

83) We have seen above that the appellant has now offered a comparison of prices of goods purchased from REL with the prices allowed to NDPL although it had resisted such effort during the tariff fixation. However, in the matter of AAD the appellant has not offered to recalculate the value of fixed assets as Rs.1,150 Crores for the purpose of claiming depreciation and to adjust its ARR in the past years accordingly and carry forward the excess amount claimed in the previous figures and adjust in the MYT period.

84) We are unable to agree with the contention of the appellant that while calculating AAD the Commission should ignore the figure of Rs.383 Crores of accumulated depreciation.

Disallowance of rebate arising out of payment made to DTL:

85) The appellant entered into an agreement with Delhi Transco Limited (DTL for short) for the purpose of power procurement. A dispute arose between the two which was referred to DERC for setting out methodology of computation of rebate. An order was accordingly passed by DERC on 02.08.04. The appellant raised a demand of Rs.1.03 Crores against the DTL allegedly in conformity with the principles laid down by the DERC. On the other hand DTL claimed a sum of Rs.6.39 Crores from the appellant. The appellant under the pressure of a Letter of Credit has paid a sum of Rs.6.39 Crores and filed a petition before the Commission for directing the DTL to refund the amount. The appellant claims that pending disposal of the petition of the appellant against the DTL, the Commission should have allowed the appellant to recover a sum of Rs.6.39 Crores.

86) The impugned order in this respect is as under :

"...dispute on rebate calculation methodology adopted by DTL against the petition already submitted to the Commission. As an adjudication on the matter is awaited from the Commission, the Commission approves power purchase cost for the FY 2007 @ Rs.2095.91 Crores provisionally. The Commission will allow additional power purchase cost to the petitioner depending upon the outcome of the case."

87) It is clear from the portion of the impugned order quoted above that the Commission has not disallowed the rebate claimed on account of timely payment to the DTL. However, in this regard there is a dispute between the appellant and the DTL. The Commission has provisionally allowed the power purchase cost for the FY 2007. It was submitted before us by the senior counsel Mr.A. N. Haksar that he has already advised the Commission to decide the dispute as soon as possible. The Commission shall make suitable adjustments in the entitlement of the appellant as soon as the decision in this regard is taken.

Non inclusion of Reactive Energy Charges:

88) The appellant has claimed reactive energy charge to the tune of ***Rs.0.66 Crores***. It is contended by the appellant that the obligation to pay reactive energy charge is a constituent of the

obligation of power procurement charges to be borne by the appellant. This Tribunal vide the judgment in appeal No. 266 & 267 of 2006 allowed inclusion of the payment towards reactive energy charges in the power purchase cost. The Commission itself recognised the admissibility of the reactive energy charge for DTL. The Commission does not seriously dispute the admissibility of such amount as reactive energy charge. It has allowed reactive energy charge of ***Rs.0.85*** Crores for the FY 2006. The Commission merely says that for the FY 2007 such amount was not given to the appellant as no such amount was claimed by it. It is said by the Commission that neither table 64 nor form A1 of the MYT petition indicated any reactive energy charges. In fact, there was no column in the prescribed form Ao indicated the reactive energy charges. This cannot disentitle the appellant from claiming the same. The Commission will have to allow the appellant to recover the reactive energy charges amounting to ***Rs.0.66*** Crores through tariff.

Disallowance of R&M expenses:

89) The appellant has alleged that the Commission has incorrectly denied the R&M expenses for the FY 2004-05, 05-06 & 06-07 to the tune of Rs.13.01 Crores, Rs.1.85 Crores and Rs.18.51 Crores respectively.

90) For the FY 2004-05 and 05-06, the appellant had notified expenses of Rs.92 Crores and Rs.73.60 Crores respectively. For the FY 2004-05, the Commission accepted the actual expense of Rs.92 Crores but allowed only Rs.68.99 Crores while carrying out the second truing up for the FY 2004-05 in its tariff order for the FY 2006-07 dated 22.09.08. The principle of second truing up was challenged before this Tribunal and this Tribunal vide order dated 24.05.07 said that truing up was to be done for adjusting the provisional accounts with the audited accounts and with the second truing up beyond adjustment the provisional account was not correct. For the FY 2005-06, the Commission approved R&M to the tune of Rs.71.75 Crores and denied the raise on the ground that the appellant did not take prior approval of the Commission before incurring such liability. The appellant contends that the appellant cannot predict with precision the work that is required to be undertaken and certain sudden expenditures caused by transformer failures, cable failure, breakdown of vehicles, equipments etc. caused the rise of R&M expenditures which should have been allowed. For the FY 2006-07 instead of Rs.89.49 Crores, the Commission allowed a sum of Rs.70.98 Crores only. The Commission contends that the appellant did not claim for truing up for the FY 2004-05 in its MYT petition. The appellant, however, contends that it had submitted audited accounts of ***R&M*** expenses for the FY 2004-05 and 2005-06. The appellant contends that the

Commission had failed to give effect to the principle enunciated by the Tribunal in the matter of truing up. As per the appellant the audited accounts showed R&M expenses for the FY 2004-05 as Rs.92 Crores and 2005-06 as Rs.73.60 Crores.

91) The next question is whether any expense towards R&M expenses can be denied on the ground that approval of the Commission had not been taken before incurring expenses. Now R&M expense is directly related with capital works and gross fixed assets. The Commission does not say that the expenses incurred were imprudent or unnecessary. Since the sole purpose of tariff fixation is to recover the cost and reasonable profit it will not be prudent to be technical on such issues. We are of the opinion that R&M expenses properly incurred should be approved and in case there is any gap between the demand made by the appellant and the amount sanctioned by the Commission, the Commission should enter into the exercise of a prudent check and grant the approval to such expenses. The appellant would be bound to produce whatever expenses or material that may be required for permitting the Commission to carry out a prudent check.

92) Here it is necessary to mention the formula for fixing R&M expenditure for the MYT period as given in the MYT Regulations. The Regulations provide that R&M expenditures would be linked to

gross fixed assets. The O&M expenses is a sum total of R&M expenses, employees expenses and A&G expenses. The MYT Regulations notified determination of O&M expenses as under:

> "*5.4 O&M expenses 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:*
>
> *(a)* $O\&M_n = (R\&M_n + EMP_n + A\&G_n) * (1 - X_n)$
>
> *(i)* *Where,* $\mathbf{R\&M_n = K * GFA_{n-1};}$
>
> *(ii)* $EMP_n + A\&G_n = (EMP_{n-1} + A\&G_{n-1})*(INDX_n / INDX_{n-1});$ *and*
>
> *(iii)* $INDX_n = 0.55*CPI_n + 0.45*WPI_n$
>
> *Where*
>
> *(b)* ***'K' is a constant (could be expressed in %) governing the relationship between R&M costs and gross fixed assets (GFA) for the nth year.*** *Value of K shall be determined by the Commission in the MYT Tariff order based on Licensee's filing, benchmarking, approved*

cost by the Commission in past and any other factor the Commission feels appropriate;

(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;*

(d) *EMPn – Employee Costs of the Licensee for the nth year;*

(e) *A&Gn – Administrative and General Costs of the Licensee for the nth year;*

(f) *R&Mn – Repair and Maintenance Costs of the Licensee for the nth year;*

(g) *Xn is an efficiency factor for nth year. Value of Xn shall be determined by the Commission in the MYT Tariff order based on Licensee's filing, benchmarking, approved cost by the Commission in past and any other factor the Commission feels appropriate."*

93) From small (i) it is clear that R&M expenses had relationship with GFA n-1. Obviously 'k' has to be a constant governing the relationship between R&M and GFA. Therefore as mentioned in small (b) that 'k' is the constant governing relationship between R&M expenses for the gross fixed asset for the nth year is obviously a typing error. The Commission corrected the typing error by issuing a corrigendum on 28.01.09. We do not think it possible to hold that 'k' could be regarded as the constant governing the relationship between O&M expenses and gross fixed asset as there could never be such proportional relationship between A&M and gross fixed asset. Nor does it look mathematically proper to think that 'k' could represent the relationship between O&M and gross fixed asset. The appellant had made a demand that 'k' should be treated to be controlling the relationship between O&M and gross fixed asset is misconceived.

Impact of lower approval of capex and capitalization:

94) The pleading on this aspect is divided in two parts: (i) for the period of the policy direction namely 2002-03 to 2006-07 and (ii) for MYT period 2007-08 – 2010-11. So far as policy direction period is concerned disallowance of capital expenditure and capitalization has allegedly resulted in lower approval of depreciation and interest. We have already dealt with the subject of capital expenditure and capitalization. After the Commission gives effect to this judgment

on those aspects the consequences on depreciation in interest will naturally follow. We have nothing more to say in this regard.

95) So far as MYT period is concerned, the appellant asked for an analysis of calculation because as per the appellant the return on equity given to it is less than 16%. The appellant instead of claiming a specific amount on this score the appellant only asked for a clarification of calculation. The Commission has replied that it has followed the MYT Regulations in which the Return is Calculated on Capital Employed (RoCE). The total of capital employed is required to be calculated on the basis of Regulated Rate Basis (RRB). The long formula has been provided in Regulation 5.5 to 5.12. We do not want to burden this judgment by reproducing the long formula. The Commission contends that RoCE is multiplication of RRB which is the average rate base for the year and WACC which is Weighted Average Cost Capital after considering the approved equity and debt. Further it is stated that MYT Regulation provided return on net fixed assets and not on the gross fixed assets. The Commission has clarified that the calculation of WACC has been made after considering the approved equity and debt as per the MYT Regulations. The appellant has not said that despite using the Regulations mentioned above the return on capital employed has not been sufficient.

Lower approval of capitalization from fresh investments during MYT period:

96) The appellant has expressed a grievance that the respondent has approved low capitalization schedule for the fresh investments for the MYT period and has not made any provision for carrying forward unapproved capital expenditure. The appellant submits that as a distribution entity the nature of capital schemes to be executed by it generally do not take more than a year but the respondent No.1 has only approved 50% of the fresh investment towards capitalization. The Commission submits that it has analysed available details to consider provisional capitalization for the controlled period and that the same would be subjected to truing up at the end of the controlled period. The impugned order discloses how capitalization from fresh investments has been considered. The two tables being No. 90 & 91 in the impugned order show the proposal of the appellant and approval by the Commission. In paragraph 4.166 the Commission has said "*the Commission would like to clarify that capitalisation approved below is provisional and is subject to truing up on the basis of actual capital investments made and the schemes commissioned by the petitioner.*" We need not say more on the issue. Suffice it to say that on truing up of capitalization from fresh investments during MYT period the appellant would be granted the appropriate returns.

Administrative and General Expenses (A&G):

97) The appellant claimed a total A&G expense of Rs.37.37 Crores for the FY 2004-05. Out of the total A&G expenses the Commission has allegedly allowed only Rs.29.04 Crores and has also disallowed bank charges of Rs.1.17 Crores. In reply the Commission submits that the plea is frivolous as the A&G expenses as claimed for the FY 2004-05 in the MYT petition has been approved. It is contended further that the appellant itself mentioned the wrong figure in the MYT petition and sought to replace the figures given in the petition vide a letter dated 12.02.08 on the ground that the new figures were the audited figures. The letter dated 12.02.08 was issued only a week before the impugned order was passed. It appears that the Commission is yet to true up the accounts for the year 2004-05 on the basis of the audited accounts and whenever such truing up is done the appellant's grievance of denial of administrative and general expenses of 2004-05 should disappear.

98) Coming to computation of A&G expenses for the base year the appellant says that the Commission has deducted one time expenses to the tune of Rs.4.26 Crores incurred by the appellant despite it being specifically brought to the notice of the respondent No.1 such one time expenses would be incurred even during the controlled period. The appellant contends that under Regulation 8.3(f) of the MYT Regulation the appellant is required to submit a business plan containing operation and maintenance cost. Under

Regulation 5.3 O&M expenses for the base year are to be approved by the Commission taking into account the latest available audited accounts, business plan filed by the licensees, estimates of the actual for the base year, prudency check and any other factor that may be considered by the Commission. The Commission found that the A&G expense has steeply increased from Rs.48.47 Crores in the FY 2006 to Rs.66.65 Crores in the FY 2007. On a query from the Commission the appellant vide its letter dated 21.02.08 submitted that the bank charges of Rs.3.45 Crores had been paid to M/s. IDBI towards upfront and processing fee of refinancing of DPCL loan and SVRS loan. The appellant also submitted that it may incur these charges in future on account of bank charges for taking loan for its capital investment program and for providing bank guarantees in various situations. The Commission has considered the refinancing charges as abnormal expenses. The Commission contends that the appellant would be allowed to pass on such expenses to the consumers in addition to the approved A&G expenses in the event the appellant can pass on the benefit of lower interest rate to the consumers.

99) The appellant further informed that it has further incurred Rs.0.80 Crore as consultations charges which was also an expenditure of one time. The Commission thought it proper to exclude these abnormal expenses for calculating A&G expenses for

the base year as the same would distort the actual picture of A&G expenses which would have been contrary to the spirit of MYT Regulations. The Commission claims to have approved A&G expenses as per MYT Regulations. We find merit in the submission of the Commission. The base year calculations should be the normal and expected expenses and not abnormal one time expenses which are not of recurring nature as the base year expenses provide standard for the expenses for the subsequent years. We do not want to interfere with the Commission's decision for not considering Rs.4.25 Crores in determining the A&G expenses for the base year of the controlled period.

100) The appellant further alleges 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.

Inclusion of sundry creditors as source of "means of finance":

101) The Commission undertook recasting of means of finance approved for the appellant pursuant to the decision of the Supreme Court in the matter of DERC Vs. BSES Yamuna Power Ltd. & Ors. 2007 3 SCC 33. The appellant contends that the Commission has incorrectly computed the "means of finance" by including sundry creditors as a source of means of finance to the appellant. The appellant contends that the applicable formula to determine the means of finance as can be discerned from the previous years is as under:

> "***Balance Funds Required: Capital Expenditure Approved – [(Consumer Contribution) + (Unutilized Depreciation considering unutilized depreciation of the previous years) + (APDRP funds available during the year)]***
>
> - *This balance figure arrived at is to be met with through a debt: equity ratio of 70:30 and in case an insufficiency of internal accruals is found, the ratio of Commercial Debt may be raised.*
>
> - *The Respondent No.1 has deviated from the practice adopted by it in the previous orders with respect to computation of 'Means of Finance' in the Impugned Order."*

102) The balance fund required by the above formula has to be met through a debt equity ratio of 70:30 and in case an insufficiency of

the internal accrual is found, the ratio of commercial debt may be raised. It is contended by the appellant that the Commission has deviated from the past practice in respect of computation of means of finance in the impugned order by including sundry creditors amounting to Rs.20.77 Crores. The appellant proposed the following means of finance :

Table 17: Means of Finance claimed by Petitioner (Rs. Cr.)

Particulars	FY03	FY04	FY05	FY06	FY07
Capital Expenditure	71.54	11.57	538.49	711.16	398.88
Funding					
APDRP Loans		18.63	-	-	-
Grants	-	18.63	-	-	-
Depreciation	59.30	20.17	167.48	115.50	182.01
Consumer Contribution	12.24	57.14	59.91	39.42	48.43
Internal Accruals		-	93.33	166.87	50.53
Loan		-	217.77	389.36	117.90
Total	71.54	114.57	538.49	711.16	398.88

103) The Commission approved the means of finance as under:

Table 18: Means of Finance now approved by Commission (Rs. Cr.)

Particulars	FY03	FY04	FY05	FY06	FY07
Capital Expenditure (Including IDC and Establishment Expenses)	76.38	114.56	538.75	618.54	306.21
Closing value of Sundry	-	-	-	20.77	-

Creditors in Previous Year					
Financing Required	70.85	114.56	538.75	639.31	306.21
Funding					
Consumer Contribution	12.24	57.14	59.91	39.42	48.43
APDRP Grants	-	18.63	-	-	
APDRP Loans	-	18.63	-	-	
Depreciation	56.84	20.16	142.55	87.66	120.24
Internal Accruals	0.53	-	94.65	153.67	41.26
Loan	1.24	-	220.86	358.56	96.28
Closing Value of Sundry Creditors in Year End	-	-	20.77	-	-
Total	70.85	114.56	538.75	639.31	306.21

104) The Commission contends that the appellant vide its letter No. RCM/06-07/387 dated 25.04.06 submitted the actual source of funding corresponding to capital expenditure of Rs.923.06 Crores. The appellant submitted in the letter that the capital expenditure of Rs.545.31 Crores had been funded through sundry creditors in the FY 2004-05. The Commission contends that since the appellant itself submitted the sundry creditors as one of the means of finance, ***the Commission*** had approved Rs.146.85 Crores of sundry creditors while approving the means of finance for 2004-05 in the tariff order of FY 2005-06. However, while doing the second true up for the FY 2004-05 in the FY 2006-07 tariff order, the Commission calculated means of finance based on the final audited accounts and approved closing value of sundry creditors in the year end of Rs.20.77 Crores instead of earlier Rs.146.85 Crores. It is necessary to note that the Commission has allowed the financing of sundry creditors considered for previous year's tariff expenditure in the

next year's tariff order. The Commission has considered sundry creditors of Rs.20.77 Crores as means of finance for capital expenditure of FY 2004-05 and it has at the same time approved financing of sundry creditors to the extent of Rs.20.77 Crores while approving the means of finance for the FY 2005-06.

105) We are unable to see how the appellant can be aggrieved of the approach adopted by the Commission. We feel that on this score the appellant's case has no force.

Depreciation:

106) While determining the multi year tariff for the FY 2008 to 2011 the Commission also gave effect to the judgment of this Tribunal and the judgment of the Supreme Court relating to depreciation for the period of FY 2002-03 to FY 2006-07 which was also referred to as the policy direction period. The Commission had determined depreciation on the opening gross fixed asset @ 3.75%. This order was challenged before this Tribunal and this Tribunal upheld that the depreciation for the policy direction period has to be given @ 6.69%. This Tribunal's order was challenged before the Supreme Court and the Supreme Court vide its judgment dated 15.02.07 upheld the decision of this Tribunal. The Supreme Court recorded in its judgment that the Commission had accepted the weighted average depreciation rate proposed for generation companies in

terms of Ministry of Power's Notification dated 29.03.94 and this rate was approved by the Commission when the Delhi Vidyut Board was in the picture. This Tribunal had held that there was no reason to reduce the depreciation for the DISCOMS on privatization. The Hon'ble Supreme Court held that the Commission was not entitled to derive the rate from the fair life of the asset particularly when the consequence was to reduce the ARP substantially. The Supreme Court said that it went by the cost of replacement instead of historical cost. The Commission accordingly recalculated the depreciation for the policy direction period @ 6.9%. The appellant contends that depreciation should have been allowed to it as per the rates claimed specific to each item of capital asset and calculated as per the MoP Notification. In its own calculation the appellant has applied the rate of 7.5% and has alleged that it should have been granted the total depreciation for the policy direction period at Rs.599.5 Crores whereas the depreciation approved by the Commission was at Rs.534.8 Crores.

107) We have carefully gone through the impugned order, particularly paragraphs 3.56 and 3.58 of it. We do not see how the Commission can be said to have made any mistake by allowing the weighted average rate of depreciation of 6.69%. The appellant has not explained how it has calculated depreciation @ 7.5%. Nor is it known how the appellant claims that despite the order of the

Supreme Court approving this Tribunal's findings that the appropriate rate of depreciation for the policy period was the weighted average of 6.69%. The Commission was required to calculate the depreciation as is being now claimed by the appellant. On the score of depreciation we cannot but uphold the impugned order.

Lower approval of interest rates for loans to be raised by the appellant.

108) The appellant asked for approval of interest rate on its borrowings at the rate of 11.5% for a repayment tenure of 10 years. The Commission considered different types of loans with varying period of repayment. It also observed that the appellant has managed to procure funds in the range at 1.75% to 4.75% below PLR and based on the above findings concluded that the appellant would be able to raise funds @ 2.75% below SBI PLR. The Commission allowed an interest rate of 9.5% as pass through. The appellant says that lower approval of interest rate restricts the commercial ability of the appellant to raise loans as also a lower cost of capital employed. The following two paragraphs of the impugned order reflect the view of the Commission:

> *"4.221 For outstanding loans 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 1.75% to 4.75% 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%)."

"4.223 The Commission shall true-up the means of finance for the Control Period as the asset capitalisation 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 requirement, if there is a deviation in the PLR of the scheduled commercial banks by more than 1% on either side."

109) The commission contends that it has arrived at the finding after a prudent analysis of the issue. In paragraph 221 & paragraph 223 the Commission has examined the different amounts of outstanding loans and interest payable. The appellant denies that the Commission has arrived at the finding after a prudent analysis and that the impugned order does not provide any reasoning for prescribing interest rate at 9.5% i.e. 2.75% below SBI PLR.

110) The Commission contends that the Commission has arrived at the decision after a prudent analysis of the issue. MYT Regulations, the Commission contends require cost of debt to be determined at the beginning of the control period after considering the licensee's proposal, present cost of debt already contracted by the licensee and other relevant factors including risk free returns, risk premium, prime lending rate etc. The Commission gives the following information of the existing loan and interest rates applicable thereon.

S.No.	Year	Loan Amount	Bank	Interest Rate	SBI PLR	Difference between Interest Rate and SBI PLR
1	04-05	100	PNB	6.75%	10.25%	3.5%
2	04-05	35	BOB	6.75%	10.25%	3.5%
3	04-05	72	PNB	7%	10.25%	3.25%
4	05-06	28	PNB	7%	10.25%	3.25%
5	05-06	200	BOB	7%	10.25%	3.25%
6	05-06	200	PNB	8.75%	11.00%	3.25%
7	05-06	100	Federal Bank	8.50%	11.00%	2.50%
8	06-07	250	PNB	10%	12.25%	2.25%

9	06-07	35	CBP	9.33%	12.25%	2.88%
10	06-07	260	BOB	9.95%	12.25%	2.30%

111) The Commission further says that asset capitalisation is subject to true up and that it shall true up the interest rate considered for new loans to be taken for capital investment and for working capital requirement if there is deviation in the PLR of the scheduled banks by more than 1% on either side.

112) The appellant does not dispute the information in the previous paragraph about the loan facilities available to it. It merely says that the Commission has merely relate a few instances. The appellant could produce the entire profile of the debt incurred by it to show that the Commission's assessment is un-realistic. The period in question is now over. Yet the appellant has not made any effort to dispute the Commission's analysis by hard data.

113) Nor has the appellant shown how the impugned order has actually resulted in any hardship.

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.

116) Before parting with the judgment we have to remind the Commission of the observations in our judgment in appeal No. 265 of 2006, 266 of 2006 and 267 of 2006 in the case of North Delhi Power Ltd. Vs. Delhi Electricity Regulatory Commission in which we said the following:

> *"60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the*

Tariff Petition of the utility the Commission has to reasonably anticipate the Revenue required by a particular utility and such assessment should be based on practical considerations. …… The truing up exercise is meant (sic) to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence. …"

117) All projections and assessments have to be made as accurately as possible. Truing up is an exercise that is necessarily to be done as no projection can be so accurate as to equal the real situation. Simply because the truing up exercise will be made on some day in future the Commission cannot take a casual approach in making its projections. We do appreciate that the Commission intends to keep the burden on the consumer as low as possible. At the same time one has to remember that the burden of the consumer is not

ultimately reduced by under estimating the cost today and truing it up in future as such method also burdens the consumer with carrying cost.

118) In view of the above analysis we allow the appeal in part with directions contained in the judgment and more particularly as under:

Sales projections and power purchase:

The Commission shall true up the figures of power purchased for the year 2007-08 and would correct the methodology of projection for the future years as per our direction in paragraph 26 & 27 above.

Distribution loss and AT&C losses:

The Commission shall pay heed to our observations in paragraph 31/32.

Capital expenditure and capitalisation disallowance, lower approval of capitalisation from fresh investment during the MYT period and impact of lower approval of capital expenditure and capitalisation on ROCE and RRB:

The view of the Chairman of the Commission with his power of casting vote is approved. So far as purchase from REL is

concerned, the Commission's view is accepted subject to our directions in paragraph 57 & 58 of the judgment. For capitalisation of fresh assets the DISCOM shall make appropriate applications to the Electrical Inspector and the capitalisation of such assets will be allowed w.e.f. 16th day of filing of the application and payment of necessary fee.

Employees expenses:

The Commission shall allow the expenses incurred towards retirement of SVRS optees pending decision of the Acturial Arbitration Tribunal and shall true up the employees expenses to the extent of increased cost by increase in consumer base. So far as salary hike is concerned to the extent of hike comparable to the Sixth Pay Commission's recommendations for employees other than the erstwhile DVB employees shall also be allowed in true up process in case expenditure in that account has already been incurred.

Advance Against Depreciation (AAD):

The contention of the appellant that accumulated depreciation of Rs.383 Crores shown in the opening balance sheet be ignored while calculating AAD is rejected.

Disallowance of rebate arising out of payment made to DTL:

The Commission shall make suitable adjustments in the entitlement of the appellant as soon as the dispute between the DTL and the appellant is settled by the Commission.

Non inclusion of Reactive Energy Charges:

The Commission shall allow the appellant to recover the reactive energy charges amounting to ***Rs.0.66 Crores***.

Disallowance of R&M expenses:

The R&M expenses appropriately incurred should be approved and in case there is any gap between demand made by the appellant and the amount sanctioned by the Commission, the Commission should enter into the exercise of prudence check and grant approval of such expenses.

Impact of lower approval of capex and capitalisation:

So far as the policy direction period is concerned, after the Commission gives effect to this judgment the necessary consequences on depreciation and interest will follow. So far as MYT period is concerned the appellant's prayer is rejected.

Lower approval of capitalisation from fresh investments during MYT period:

On truing up of capitalisation from fresh investments during the MYT period, the appellant would be granted appropriate returns.

Administrative and General Expenses (A&G)
The Commission's order is not interfered with.

Inclusion of sundry creditors as source of "means of finance":
The Commission's order is not interfered with.

Depreciation:

We uphold the impugned order of granting depreciation at the rate of 6.69% for the FY 2002-03 to 2006-07.

Lower approval of interest rates for loans to be raised by the appellant:
The Commission's decision is not interfered with.

119) The truing up, if not already done, should be done within 30 days of this judgment

120) Pronounced in open court on this ***06th day of October, 2009***.

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member

Reportable✓ / Non-reportable

Corrections (shown in italics and bold) in paragraph 88, 90, 104 and 118 are done as per orders of Hon'ble Court II dated 04.12.09 in IA No. 315/09 in A.No.36/08