Before the Appellate Tribunal for Electricity

(Appellate Jurisdiction)

Appeal No. 8 of 2011

Dated : 22nd March, 2012

Coram: **HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

In the matter of:

Brihanmumbai Electric Supply and Transport
Undertaking (of Brihanmumbai Municipal Corporation),
Having office at BEST Bhawan, BEST Marg,
Post Box No. 192, Mumbai -400 001,
Maharashtra ,India ... Appellant

VERSUS

Maharashtra Electricity Regulatory Commission
Through its Secretary, having office at World Trade Centre,
Centre No. 1,13th Floor, Cuffe Parade, Mumbai-400 005,
Maharashtra, India … Respondents

Counsel for the Appellant : Mr. M.G. Ramachandran

Counsel for the Respondent: Mr. Buddy A. Ranganadhan

JUDGEMENT

HON'BLE MR. JUSTICE P.S. DATTA, JUDICIAL MEMBER

Brihanmumbai Electric Supply and Transport Undertaking (of Brihanmumbai Municipal Corporation),hereinafter to be called BEST who is the appellant herein filed a petition, being no.95 of 2009 ,before the Maharashtra State Electricity Regulatory Commission(for short, the State Commission) in respect of True Up of its ARR for the FY2008-09, Annual Performance Review(APR) for the FY 2009-10 and a Tariff Application for the FY 2010-11 on 31.12.2009 upon which the State Commission passed an order on 12.9.2010 against which this appeal has been preferred on series of grounds which will be noticed as we will proceed with the appeal. The True up petition was filed on the basis of audited statement of accounts for the FY 2008-09, the APR is said to had been preferred on the basis of actuals from April to September and a revised statement from October to March for the FY 2009-10, and projections for determination of tariff for the FY 2010-11. Be it noted that the appeal is not directed against the order in its entirety but in respect of some grounds which are, of course, voluminous.

2. The following are the grounds:-

A. According to the appellant, in case no.118 of 2008 relating to the True Up for 2007-08,, APR for the FY 2008-09, and Tariff for the FY2009-10 the Commission by the order approved on account of employee expenses a sum of Rs142.94crore although the appellant claimed Rs.150.35, while in the impugned order the Commission against the appellant's claim of Rs.158.65crore allowed a sum of Rs.143.34 only thus denying the claim of Rs.15.31crore on the unsustainable ground that the expenses were controllable but the hard reality was that while comparing with the employees expenses with some other entities it was necessary to consider the Reliability Index, Standard of Performance, Number of Consumers, the geographical area, consumer mix, Distribution System etc. Moreover, the Dearness Allowance payable to the employees is actually an uncontrollable factor and which varies as per the Consumer Price Index The consumer index which in the FY 2007-08 was 6.22% rose to 9.08% in 2008-09.The State Commission erred in failing to appreciate the import of the regulation 17.6.2 of the MERC (Terms and Conditions for Determination of Tariff) Regulations, 2005.

B. The second ground is in respect of A & G Expenses which was claimed at Rs.74.80crore for the FY 2008-09 but was allowed at Rs.72.51crore and this was exactly the same as was approved in case no 118 of 2008 on the ground that it was a controllable parameter. The appellant listed 15 items out of which the expenditure increased in 7 items, while the expenditure was reduced in respect of 8 items. The Commission did not assign any reason for refusal of the total claim of the appellant.

C. With respect to capitalisation the claim of the appellant was for Rs.133.99crore for the FY 2008-09 against which the Commission approved only a sum of Rs.122.20, as compared to Rs.69.00crore in case no.118 of 2008 decided on 15.6.2009. According to the appellant, the Commission failed to consider that after excluding the double impact of IDC of Rs1.55crores for the FY 2008-09, the actual capitalisation for FY 2008-09 is composed of works capitalized amounting to Rs.121.00crore, IDC of Rs.9.44crore which totals to Rs.130.44crore.

D. As a corollary to the reduction of the amount of capitalisation for the FY 2008-09, the State Commission reduced the interest expenses from the claimed amount of Rs.32.44crore to Rs.22.76crore as compared to Rs.9.31crore in case no 118 of 2008 without considering that the appellant submitted that out of the capital expenditure of Rs.131.43crore a sum of Rs.122.56crore had been capitalized and the balance of Rs.8.87crore was the capital works in progress, that during H1 of FY 2008-09 the Appellant took loan of Rs.25crore from Vijaya Bank @10%

interest per annum in addition to the opening balance of short-term finance of Rs.100crore from Canara Bank @11.50%interest and Rs.50crore from Vijaya Bank @10% interest per annum, that for H2 of FY 2008-09 the appellant raised an additional loan of Rs85crore from Vijaya Bank @10.5% interest per annum to service and pay the interest and principal amount of earlier loan of Rs50crore obtained in FY 2007-08 from Vijaya Bank @10% interest per annum, that capitalisation of Rs.131.99crore was funded by consumer contribution (Rs.9.72crore), Government grant (Rs.4.78crore) and debt (Rs.85.07crore) but the Commission erred in increasing the loan amount at Rs107.70crore and it failed to consider the applicability of debt: equity ratio at 70:30 under regulation 73.1 of the Tariff Regulations,2005.

E. With regard to Return on Equity the appellant contends that the Commission should have allowed Rs108.83while truing up for the FY 2008-09 as against Rs91.43crore allowed by the State Commission in its order dated15.6.2009 in case no 118 0f 2006 and the commission erred in reducing ROE to Rs100.5crore by not considering the normative equity (30%)of Rs.46.85crore and /or Rs.32.42crore for the FY 2007-08 and FY 2008-09 respectively on net amount of capitalisation.

F. On interest on working capital the appellant claimed an amount of Rs.23.23crore but the Commission approved a sum of Rs.10.89crore as against Rs.3.94crore in case no 118 of 2008.The appellant had to incur additional expenditure towards external power purchase The appellant had to pay Rs.9.39 per unit as against the MERC approved rate of Rs. 5.50 per unit towards external power purchase and it had to face cash crunch of Rs.406.10crore.

G. On account of contribution to contingency reserve the Commission illegally reduced a sum of Rs.3.18crore for FY 2008-09.The Commission should have allowed the CCR of Rs.6.45crore while truing up for FY 2008-09.The Commission considered CCR to the extent of 0.25% of opening GFA for FY 2008-09 but the appellant contributed to the contingency reserve which is 0.5% of opening GFA for FY 2008-09.

H. The appellant claimed non-tariff income at Rs.70.83crore but the Commission fixed it at Rs.74.78crore as compared to Rs.55.53crore approved in the case no 118 of 2008.The Commission erred in inflating the non-tariff income for FY 2008-09 by considering the interest on contingency reserve investments @7%on the average balance of contingency reserves during the year and including the same under non-tariff income. According to the appellant, it does not have equity in the traditional sense and the funding of capitalisation is mainly done through internal resources with the approval of the BEST Committee and the Municipal Corporation. The contingency reserve is one of the internal sources used for funding the capital expenditure and interest on the contingency reserve should not be considered as non-tariff income. The balance contingency reserve of Rs.58.70crore as on 31.3. 2008 had already been utilised for acquiring assets and has not been invested as a contingency reserve. Only the balance under the contingency reserve amounting to Rs.6.45crore as on 31.3.2009 should have been considered by the Commission.

I. On computation of sharing of Gains and Loses for FY 2008-09 the Commission failed to consider that out of the total efficiency gain for R & M expenses amounting to Rs.1.96crore, one-third was required to be retained by the appellant in a special reserve in addition to one-third being available for use at its discretion under regulation 19 of the Tariff Regulations, 2005. The Commission committed error in considering that out of the efficiency gain due to reduction of distribution losses amounting to Rs.37.91crore, one-third was required to be retained by the appellant in a special reserve in addition to one-third being available for use at its discretion and in consequence, the balance sum of Rs.25.28crore should have been considered in determination of ARR and tariff for FY2010-11.

J. On computation of Aggregate Revenue Requirement and Revenue Gap for FY 2008-09 the Commission is alleged to have erred in holding that for FY 2008-09 the net ARR is Rs.3175.97crore as against Rs.3235.87crore claimed by the appellant, revenue from existing tariff at Rs.2852.31crore as against Rs.2832.28crore claimed by the appellant and net revenue gap at Rs323.66crore as against Rs403.59crore claimed by the appellant. The Commission also erred in holding that for FY 2008-09 the additional recovery of Rs20.03crore made by the appellant through its vigilance drives should be considered as revenue in the year in which recovery is made, and consequently added the same to the revenue from sale of electricity. The Commission too erred in failing to consider that the additional recovery of Rs20.03crore made by the appellant through its vigilance drives is effected generally under section 126 and /or 135 of the Act, 2003.

K. It is contended that the Commission erred in reducing the discount given by the TPC-G in the matter of power purchase cost amounting to Rs22.26crore because the discount given by the TPC-G pertains to the prompt payment made by the appellant to the TPC-G as per PPA, and that the appellant has already considered the said prompt payment discount amount as a non-tariff income in the petition no 95 of 2009.

L. The next item is concerned with disallowance of employee expenses for FY 2009-10 and FY 2010-11. It is contended that the Commission erred in holding that the employee expenses for FY 2009-10 and FY

2010-11 was only Rs152.44crore and Rs68.38crore respectively as against Rs170.45crore and Rs182.84crore respectively estimated by the appellant and as compared to Rs153.39crore approved by the Commission in case no 118 of 2008, that the Commission reduced the allowable employee expense for FY 2009-10 considering an increase of around 6.35% per annum on account of CPI over the revised level of employee expenses for FY 2008-09 approved by the Commission but the revised estimate of employee expense for FY 2009-10 is escalated at the rate of 7.31% as per the order in case no 118 of 2008, that the actual expenses was allowed by the Commission for FY 2004-05, FY 2005-06 and FY 2006-07 as per the appellant's submission, that the Commission therefore erred in reducing the employee expenses by changing the inflation factor from 7.31% to 6.35% per annum over the revised level of employee expenses approved for the FY 2008-09, that the Commission already considered the increase on account of inflation rate of around 8.49% by considering the point to point inflation over the CPI for a period of 5 years to smoothen the inflation curve for the FY 2010-11, and that inflation curve was required to be curved from FY 2007-08 to FY 2009-10,and that the average increment of these 3 years works out to 9.20% as against 8.49% increase in inflation considered by the Commission .

M. The Commission erred in holding that the A & G Expenses for FY 2009-10 and FY 2010-11 was only Rs76.48crore and Rs81.85crore respectively as against Rs79.39crore and Rs84.15crore respectively as estimated by the appellant and as compared to Rs76.89crore approved in Case no 118 of 2008 overlooking the fact the rate of escalation was 6.04% as per the Commission's own order in case no 118 of2006, that the Commission already allowed the actual for three successive years from FY 2004-05, 2005-06, 2006-07 and as such the inflation curve is also required to be considered for FY 2007-08,2008-09, and 2009-10.

N. With respect to disallowance of R & M Expenses for FY 2009-10 and FY 2010-11 it is contended that the said expenses for FY 2009-10 and FY 2010-11 was Rs.29.52crore and Rs34.12crore respectively as against Commission's allowance of Rs26.56crore and Rs.28.17crore and as compared to Rs.28.69crore approved by the Commission in case no. 118 of 2008, that the Commission without any reason reduced the allowable R & M expenses for FY 2009-10 considering increase of around 4.91% per annum on account of WPI over the revised level of R&M expenses for FY 2008-09 after truing up, that when the Commission allowed the actual expenses for FY 2004-05 to 2006-07 the same was required to be considered for the next three financial years, the Commission was not correct by reducing the inflation factor from

5.19 % decided in case in. 118 of 2008 to 4.91 %, that similarly for the FY 2010-11 Commission did not allow what was claimed by the appellant.

O. As regards reduction in interest expenses for FY 2009-10 and FY 2010-11 the Commission did not give any reason although, the appellant claimed Rs.19.17crore and Rs.30.12crore as against Rs.14.68crore and Rs.16.71crore allowed by the Commission and as compared to Rs. 19.42crore in case no. 118 of 2008, that the Commission was not justified in such reduction, that the appellant claimed that it incurred capital expenditure of Rs.181.87crore for FY 2009-10 to be funded by consumer contribution of Rs.10crore with no government grant and it accordingly proposed to raise Rs.120crore as short term finance from the bank and balance normative equity of 30 % (Rs.51.87crore) through internal sources and for FY 2010-11 it proposed to raised Rs.145.64cror and short term finance and balance normative equity of 30 % (Rs.58.07crore) through internal sources, that the Commission considered no equity fund for FY2009-10 and FY 2010 -11 and considered 100 % loan of Rs.123.54crore for FY 2009-10 and Rs.140crore for FY2010-11 with consumer contribution of Rs.10crore in each of the two years and with the government grants of Rs.1.46crore for FY 2009-10, and the Commission failed to consider that the loan capital would have to be provided corresponding to assets put to use and not only capital expenditure .

P. With respect to reduction of return of equity for FY 2009-10 and FY 2010-11 Commission reduced the figure without any reason although it allowed Rs.103.41crore in case no. 118 of 2008. The appellant claimed Rs.114.66crore and Rs.121.50crore for FY 2009-10 and 2010-11 respectively but the Commission reduced it to Rs.99.16crore in each of the two years and did not consider the normative equity of 30 % in each of the two years on the net capitalisation amount.

Q. On contribution to contingency reserve for FY 2009-10 and FY 2010-11 the Commission reduced the amount to Rs.3.55crore and Rs 3.88crore respectively as against the claimed amount of Rs.7.18crore and 7.87crore on the alleged ground that the Regulation provided for CCR of a sum not less than 0.25% and not more than 0.50% of original cost of fixed assets but the appellant according to Regulation estimated the CCR at 0.5% of the opening GFA for FY 2009-10 and FY 2010-11 .

R. It is alleged that the Commission did not allow the non tariff income for FY 2009-10 and FY 2010-11 at Rs.71.15crore and Rs.71.49crore respectively as was claimed by the appellant and inflated the figures to Rs.82.26crore and Rs.90.49crore by merely considering year- wise increase of 10% in the non tariff income.

S. With regard to Distribution Loss and Energy Input Requirement for FY 2010-11 the Commission considered 9.50 % and 5098 MU as against 10% and 5046 MU claimed by the appellant and the Commission did not consider that it was practically not possible to annually reduce the distribution loss in a linear trajectory of 0.5% after the distribution losses have levelled out at low level of around 10%. The Commission was not correct in allowing target distribution loss for FY 2010-11 at 9.5 % based on further 0.5% reduction over the trajectory for FY 2009-10.

T. With regard to sale for FY2010-11 Commission committed error in not appreciating that on considering the actual sale of 4121 MU for FY2009-10 the five year Compounded Annual Growth Rate was 3.18 % over the period from FY 2004-05 to FY 2009-10 and that on projecting the sale to be 4390 MU for FY 2010-11 the increase would be 6.57 % over the actual sales of FY2009-10 which was clearly excessive in view of the fact that the appellant's projection of sales of 4321 MU for FY 2010-11 had considered the 5 year CAGR of 3.77% over the period from FY 2003-04 to FY 2008-09 and the CAGR for 5 years considering the actual sale for FY 2009-10 was only 3.18 %. The Commission failed to appreciate that on projecting the sales of 333 MU for LT-II A category (more than 1000 units slab) for FY 2010-11, the said sale would be 50.34

% more than actual sales of 221.5 MU for FY 2009-10 in the same category .

U. On consideration of energy availability and power purchase cost for FY 2010-11 the Commission was wrong in holding that the power purchase cost for the said year was Rs.2042.37crore as against Rs.2236.94crore projected by the appellant because the Commission did not consider the net generation of unit -8 of TPC –G and arbitrarily held that 634 MU of energy was available to the appellant from TPC-G for FY 2010-11. Further the appellant claimed Rs.2037.91crore for FY 2010-11 as energy purchase cost for the quantum of 4716.49 MU but the Commission reduced the amount to Rs.1860.72crore in respect of purchase of 4741.30 MU without any reason. The Commission was wrong in not considering the amount of Rs6.24crore payable by appellant to TPC-G.

V. The Commission made double deduction of Rs.1.34crore for impact due to truing up for FY 2007-08 after cost benefit analysis while computing the ARR and revenue gap for FY 2010-11 .

W. The Commission was wrong in holding that for FY 2009-10 the revenue from retail tariff after provisional true up was Rs.2911.18crore as against Rs.2896.57crore claimed by the appellant. The Commission was wrong in holding that additional recovery of Rs.14.61crore should be added to the revenue from sale of electricity.

3. The only respondent in this appeal is the Commission which has filed a counter affidavit contending as follows:

A .With regard to disallowance of employees expenses to the extent of 15crore for FY 2008-09 it is contended that employee expenses are controllable expenses and the Commission has undertaken sharing of efficiency loss and one third of the difference has been added to the ARR of the appellant to be recovered. The Commission has neither allowed nor disallowed the employees' expenses on the basis of any bench marking exercise which was in process.

B. The A&G expenses are also controllable expenses and the Commission has undertaken sharing of efficiency loss and one third of the difference has been added to ARR of the appellant and has been allowed to be recovered by the appellant.

C. With respect to reduction of capitalisation to the extent of Rs9.79crore for 2008-09 the Commission admits the mistake and submits that the same should have been considered for FY 2008-09 and impact of the same would also impact the computation of subsequent years since the opening balance of the assets would change.

D. With respect to reduction of interest expense to the extent of Rs9.68crore for the FY 2008-09 it is contended that the Commission considered only the consumer contribution of Rs9.72crore, government grant of Rs4.78crore and debt based on actual loan of Rs.107crore totalling Rs122.20crore. A reduced loan component has been considered to finance the reduced capitalisation and there is corresponding reduction in the interest expenses also. The normative debt equity ratio is applied to the amount of capitalisation and not to the amount of the actual loan.

E. On reduction of return on equity to the extent of Rs8.30crore for FY2008-09 the Commission considered Rs122.20crore as the approved capitalisation and the equity component has not been considered since actual loan drawl has already been made and was sufficient to meet the reduced capitalisation. The normative debt equity ratio is applied to the amount of capitalisation and not to the amount of actual loan. The appellant was contenting that there was no need to invest any equity and part of the loan should be considered as normative equity. If that were the case, then it would be possible for any licensee to obtain a loan @ 11-12% at treat the same as normative equity and earn ROE @ 14-16% which would be unjustified and illegal.

F. With respect to reduction interest on working capital to extent of Rs 12.34crore it is contended that it is wrong to suggest that the entire actual working capita interest expenses have been disallowed. Since, interest in working capital is a controllable expense the Commission has undertaken sharing of the efficiency loss and one third of the difference has been added to the ARR of the appellant and has been allowed to the appellant to be recovered .

G. Regarding reduction of contribution to contingency reserve of Rs. 3.18crore for FY 2008-09 it is contended that the licensee has to first make an appropriation, and the Commission then shall allow a sum not less than 0.25 % and not more that 0.5 % of the opening GFA towards such appropriation. The appellant's contention that at least 0.5 % of the opening GFA must be allowed is not correct.

H. On consideration of higher non tariff income for FY 2008-09 it is contended that the CCR has to be invested in approved security which will obviously earn interest. If the interest in CCR is not considered it would amount to injustice to the consumer. If there is no investment of the CCR in approved security then it is violation of the Regulations

I. On computation of sharing of gain and losses for FY 2008-09 Commission has verified the computation and accepts that there has been as inadvertent error.

J. On computation of ARR and revenue gap for FY 2008-09 it is contended that the amount recovered through vigilance drives is included under the non tariff income.

K .On the consideration of discount given by TPC-G to the extent Rs22 .26crore it is contended that the amount has not been accounted for twice i.e. under non tariff income as well as to reduce power purchase expense.

L. On disallowance of employees expenses for FY 2009-10 and Fy 2010 -11 it is contended that the Commission considered an increase of 6.35% and 8.49% for FY 2009-10 and 2010-11 respectively. The trend in increase in expenses is estimated over a longer period of time and merely because the actual expenses have been allowed in previous years there is no reason for not considering the CPI for these years to establish a long term trends.

M. With regard disallowance of A&G expenses for FY 2009-10 and 2010-11 the contention is the same as in item no. l) as above.

N. Regarding disallowance of R&M expenses for FY 2009-10 and 2010-11 the same contentions have been raised as in issues l) and M).

O. Regarding reduction of interest expenses for FY 2009-10 and 2010-11 the Commission considered Rs135crore as approved capitalisation and the reduced loan has been considered for meeting the reduced capitalisation in FY 2009-10 and in respect of 2010-11 the same principle was followed .

P. Regarding reduction of return on equity for FY 2009-10 and FY 2010-11 it is contended that the Commission considered Rs135crore for FY 2009-10 and equity component has not been considered by the Commission since actual loan drawl has already been made and was sufficient to meet the reduced capitalisation. For FY2010-11 the same principle has been followed.

Q. Regarding reduction of contribution to contingency reserve for FY 2009-10 and 2010-11 it is contended that the regulations provide for range within which the Commission has to consider the CCR . The Commission considered CCR @ 0.25% of the opening of GFA in accordance with the regulations.

R. Regarding higher non tariff income for FY 2009-10 and 2010-11 it is contended that the actual non tariff income came to Rs74.78crore in FY2008-09 which was a jump from Rs.55.53crore in FY 2007-08 and the increase being around 35% the Commission conservatively projected an increase of 10% for FY2008-09 which will be trued up based on actuals.

S. On consideration of distribution loss and energy input requirement for FY2010-11 it is contended that as the target losses are even now higher than the actual losses reported by the appellant there is no merit in the contention that the Commission should have fixed a higher target loss level. Moreover, MYT orders have achieved finality and the appellant has already been allowed sharing of efficiency gains.

T. On consideration of sales for FY 2010-11 it is contended that the Commission has undertaken category wise sales projection. The growth rate projected by the appellant has been accepted. Actual category wise sales in FY2009-10 has been considered to compute the 5year CAGR and have also been considered as the base for projections as compared to the appellant's petition in which there was projection on the then available data .

U. On consideration of energy availability and power purchase cost for FY 2010-11 the Commission considered TPC-Gs projection of generation from Unit 8 for FY 2010-11 for licensed area i.e. around 950 MU and has considered 2/3rd of this quantum as the appellant's share of Unit 8 of TPC-G .

V. On deduction of Rs.34crore due to impact of truing up for FY 2007-08 the Commission upon verification accepts the error.

W. On consideration of revenue for 2009-10 it is contended that the amount of Rs14.61crore which was collected in FY 2009-10 as additional recovery through vigilance drives is ordinarily included under non tariff income.

4. The appellant filed a rejoinder to the reply of the Commission which is mostly the re-iteration of what have been contended in the memo of appeal and we will consider the contentions in the rejoinder in course of our discussion.

5. We frame the following points for our consideration:-

A. Whether the State Commission was justified in its treatment on employees expenses in course of truing up of the aggregate revenue requirement of the BEST for the FY 2008-09?

B. Whether the State Commission was justified in reducing the A & G Expenses in course of truing up for the FY 2008-09 to Rs72.51crore as against Rs74.80crore as was claimed by the appellant?

C. Whether in truing up for the FY 2008-09 the Commission was justified in reducing the amount of capitalisation to Rs122.20crore as against Rs131.99crore?

D. Whether the Commission was justified in its treatment on Interest Expenses for the FY 2008-09?

E. Whether return on equity in true up for the FY 2008-09 was justifiably reduced by the Commission against the claim of the BEST?

F. Whether interest on working capital in true up for FY 2008-09 should be a sum of Rs10.89crore as was fixed by the Commission as against the claim of the appellant at Rs23.23crore?

G .Whether there was any justification on the part of the Commission in reducing contribution to contingency reserve by Rs3.18crore?

H. Whether there was any justification in fixing non-tariff income in true up for the FY 2008-09 at Rs74.78crore as against Rs70.83 claimed by the appellant?

I. Whether the Commission was justified in its treatment on sharing on gains and losses in course of true up for the FY 2008-09?

J. Whether the Commission was justified in its computation of the Aggregate Revenue Requirement and Revenue Gap in the true up exercise for the FY 2008-09?

K. Whether the Commission was justified in taking into account the discount given by TPC-G amounting to Rs22.26crore while considering power purchase cost in APR for the FY 2009-10?

L. Whether the Commission was justified in its treatment on APR for the FY 2009-10 and ARR for the FY 2010-11 with regard to the employees expenses?

M. Whether the Commission was justified in its treatment on APR for the FY 2009-10 and ARR for the FY 2010-11 with regard to the A & G Expenses?

N. Whether the Commission was justified in its treatment on APR for the FY 2009-10 and ARR for the FY 2010-11 with respect to the repair and maintenance expenses?

O. Whether the Commission committed error in deciding in the APR of FY 2009-10 and determination of ARR for the FY 2010-11that the interest expenses for FY 2009-10 should be Rs14.68crore as against Rs19.17crore and for the FY 2010-11at Rs16.71crore as against Rs30.12crore estimated by the appellant?

P. Whether the Commission's treatment on return on equity in respect of the APR for 2009-10 and ARR for FY 2010-11 was justified?

Q. Whether the Commission's treatment on contribution to contingency reserve in respect of the APR for FY 2009-10 and ARR for FY 2010-11 was justified?

R. Whether the Commission's treatment on non-tariff income in respect of the APR for FY 2009-10 and ARR for the FY 2010-11 was justified?

S. Whether the Commission was justified in its treatment on distribution loss and energy input requirement in respect of the APR for the FY 2009-10 and the ARR for the FY 2010-11 justified?

T. Whether the Commission was correct in determining the amount of sales at 4390 MU for the FY 2010- 2011 in course of deciding the APR for the FY 2009-10 and ARR for the FY 2010-11?

U. Whether the Commission was justified in its treatment on energy availability and power purchase cost in course of deciding APR for FY 2009-10 and ARR for FY 2010-11?

V. Whether the Commission was justified in repeating the deduction of the sum of Rs1.34crore for impact due to truing up for FY 2007-08 after cost benefit analysis in computation of the ARR and Revenue Gap for FY 2010-11 ?

W. Whether the Commission was justified in its treatment in deciding the APR for FY 2009-10 and ARR for FY 2010-11 with respect to the retail tariff ?

6. We have heard the learned counsel for the appellant Mr..M.G.Ramachandran and the learned counsel for the State Commission Mr. Buddy A. Ranganadhan in great details. Their arguments will appear when we will be discussing separately each of the issues. All the 23 issues are largely issues of facts with figures and data but we must not miss to notice the legal provisions, here in this case the Maharashtra Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2005 so far as they will be relevant to the issues concerned.

7. The order impugned relates to true up of the financials for the FY 2008-09, Annual Performance Review for the FY 2009-10, and the ARR and the Tariff Determination for the FY 2010-11. Earlier in case no 118 of 2008 the Commission decided on true up for FY 2007-08, APR for FY2008-09 and ARR and Tariff Determination for 2009-10 by order dated 15th. June, 2009. Now, on issue no A relating to employees expenses in true up for FY 2008-09 the appellant claimed the actual amount of Rs158.65crore which is not in dispute. The Commission approved a sum of Rs143.34crore as compared to the earlier allowance in case no 118 of 2008 of the figure of Rs142.94crore , and the Commission was of the opinion that if the entire actuals of Rs158.65crore is allowed , then, there is no point in the concept of

sharing of efficiency gain and losses, and in accordance with the regulation 19 of the Regulations,2005 1/3rd of the differential amount of Rs15.31crore has been added to the ARR of the appellant which the appellant can recover . It is the Commission's finding that the employees expenses is a controllable parameter and this being the position the Commission is not obligated upon to approve whatever has been spent as actual without undertaking a prudence check. Mr.Ramachandran, the learned counsel for the appellant submitted that ex-gratia payment in the relevant financial year was granted to the employees at Rs.9000/-in other Government undertakings in Mumbai like the Municipal Corporation of Brihanmumbai, and the BEST had no other alternative than granting the said amount to the employees of the BEST and secondly, the Dearness Allowance payable to the employees is not a controllable expenditure and with the variance of the CPI the DA varies periodically , and it is not the case of the Commission that the salaries of the employees has been fixed at higher levels. According to Mr Buddy A. Ranganadhan, the learned counsel for the State Commission, the Commission acted strictly in terms of the regulation 17.6.2 of the Regulations read with regulation 19 thereof. Upon hearing the learned counsels for the parties, it appears that there is reason to re-visit the issue by the Commission. Firstly, the amount of ex gratia payable was fixed at Rs9000/- as it was the amount paid to the employees of other

State Government undertakings like the Brihanmumbai Municipal Corporation. Secondly, the basic salary of the employees has not been increased and it is undeniable that the major component is DA which in the relevant year increases by Rs.5.30Crore out of the total increase in employees' expense of Rs8.30Crore. The computation of DA is based upon CPI which, it is rightly argued, has a direct impact on overtime wages, provident fund contribution etc. The DA paid to employees varies as per CPI and the increase in CPI during FY 2008-2009 was 9.08% as compared to increase of 6.22% during FY 2007-2008. In the APR order dated 15.6.2009 in case number 118 of 2008 the State Commission has allowed employees cost for the FY 2008-2009 based on increase of 7.31% p.a. on account of inflation factor corresponding to increase in CPI over the revised level of employees expenses as approved for the FY 2007-2008 under the truing up exercise in the same order. It is also not in dispute that the claimed amount is based upon the audited statement of accounts and it is not the case of the Commission that upon prudence check it did not fructify any result in favour of the Commission. It is true, the Commission has not fixed any benchmarking but it is good and proper that the Commission undertakes such an exercise in future for the benefit of all concerned and for simplification too. Accordingly, we are of the opinion that this issue needs re -visit and re-look and we accordingly direct so.

8. On the issue no B that is A & G Expenses there is gap of Rs2.29crore which was disallowed and what was allowed was exactly the same figure of Rs72.51crore allowed in case no 118 of 2006. Now, according to the appellant's learned counsel, expenditure increased in 7 items, while there was reduction in 8 items, but the impact was felt in the increase in security charges. The appellant pleaded before the State Commission that there was increase of 16% in security charges, 36% in Electricity charges and 34% in property insurance charges. The Commission reasoned at page 50 of its own order that since A & G Expenses are controllable in nature the Commission did not think it proper to allow what was claimed by the appellant. It appears that in the petition before the Commission the appellant raised the specific point of increase in security charges, electricity charges and property insurance charges. On perusal of pages 49 and 50 of the order of the Commission it does not appear that the Commission examined this point so as to find out whether there was any merit at all in the issue. If the Commission upon prudence check and examination and analysis of the point would have dismissed the issue it would have been a different matter, but when there has not been any examination of the matter it is therefore necessary that the Commission should look into the matter and then pass appropriate order as it would deem fit and proper.

9. On the issue no C it is contended by the appellant that the Commission should have allowed actual additional capitalisation of Rs131.99crore. In response, the Commission however states that the Commission has verified the calculations and the relevant data it appears that since capitalisation has been subsequently approved by the Commission the corresponding Interest During Construction should have been considered and has not been in advertently been considered and the Commission accepts the same. Accordingly, the Commission would pass appropriate order on this issue and revised the approved capitalisation.

10. On issue no D regarding reduction of interest expenses to the extent of Rs9.68crore for the FY 2008-09 the Commission considered the sources of capitalisation as contribution from consumer (Rs.9.72crore), grant from the Government (Rs.4.78crore) and actual loan of Rs107.70crore . The Commission reasoned that if debt amount is taken at Rs.135crore and normative equity is taken at Rs.32.42crore then together with Government grant of Rs.4.78crore and consumer contribution of Rs.9.72crore the total capitalisation comes to Rs.181.92crore which becomes higher than the approved capitalisation of Rs122.20crore. Thus a reduced loan component has been considered to finance the reduced capitalisation so that there happens a

corresponding reduction in the interest expenses also. The learned Advocate for the State Commission argues that the appellant has made contradictory contentions in its appeal because on the one hand the BEST claims that lower interest expenses have been allowed, while on the other hand, it is claiming that the Commission has considered higher loan component and should have actually considered lower loan component. Further, the normative debt: equity ratio is applied to the amount of capitalisation, and the amount of actual loan could not be considered for determinationof interest. The learned Advocate for the appellant on the other hand has argued that the State Commission has not assigned any reason at all as to wherefrom it got the figure of Rs.107.70crore and it cannot be the case that the appellant has made contradictory claims. With reference to the page no 749 of the appellant's petition it is submitted that the BEST has clarified in express terms that the appellant was claiming the actual audited Interest Expenses wherein the earlier loan interest component was also included, and it has been made clear that out of total loan amount of Rs.135crore raised in FY 2008-09 a sum of Rs.50crore was utilized for repayment of earlier loan raised in FY 2007-08 and that the balance loan of Rs.85crore was utilized for capitalisation. It appears that in the impugned order there is no reference to the clarification of the appellant to the query no 22 where this point has been explained. It is not in dispute that in terms of regulationn73.1 of the MERC Regulations, 2005 debt-equity ratio of 70:30 is relatable to the capital expenditure in a capital expenditure project or on purchase of fixed asset. It appears that out of Rs.131.99crore, consumer's contribution and the Government grant totals Rs.14.50crore. The remaining amount of Rs.117.49crore which was subject to capitalisation comes to Rs.85.07crore:Rs.32.42crore in the debt: equity ratio of 70:30, according to the appellant. This has not been thrashed out in the Commission's order. According to the appellant's audited statement of accounts, out of a sum of Rs135crore a sum of Rs50crore was utilized for repayment of the earlier loan obtained in FY 2007-08 and the balance amount of Rs85crore has been utilized and the amount which was subject to capitalisation minus Rs14.50crore came to Rs117.49crore in respect of which normative debt: equity ratio appears to be applicable. The Commission does not appear to have disputed that the capital value of the assets which was required to be serviced was Rs131.99crore.The amount capitalised has to be in the ratio of 70:30. The appellant claims Rs.32.42crore as normative equity which is utilisable with Rs.85.07crore claimed to be raised through loan. This point does require re-examination in accordance with the Regulations which provide for normative loan @ 70 % on the capitalisation allowed after 1.4.2005.

11. While saying so, we will be failing in our duty to put it on record what we find deficient in the Regulations concerned framed by the Commission in its Legislative Jurisdiction. Since we do not exercise any Legislative Jurisdiction we can not command the Commission to bring about any amendment to the Regulation in the line what we think vest. But the Commission itself was found to be conscious of such deficiency but without effecting amendment to the Regulation it can not depart therefrom and it does not appear that the Commission said that it exercised its power to relax the norms. The amount to be capitalised has to be in the ratio of 70:30. The Regulations do not speak of as to what will happen if the amount of equity put to capitalisation of the assets is less than the normative equity of 30%. In Tariff Regulations of other Commissions including that of CERC there is a provision that when the amount of equity invested is less than normative equity of 30% then the Return on Equity will be admissible according to actual equity invested so that no utility cold be in a position to claim return on equity without contributing any equity whatsoever. Therefore, it is necessary that the Commission effects an amendment in its Regulations.

12. On the issue E, that is, return on equity for the FY 2008-09 the Commission approved a sum of Rs122.20. It is submitted that in the counter affidavit the State Commission has acknowledged that a sum of

Rs 9.44crore was required to be considered, and if that is taken then the amount comes to Rs131.64crore and this figures has to be considered while computing return on equity. The submission of the learned Advocate for the State Commission is the total repetition of the submission on the issue D and it is submitted that the considering the amount of debt to be Rs107crore and the amount of consumers 'contribution and the Government loan it would appear that there was no equity funding and the Commission was justified in arriving at return on equity at Rs99.16crore.We find that this issue E is linked with the issues C and D, more particularly D because return on equity is with respect to the capitalisation and once the Commission's finding on the amount of debt is subject to scrutiny then the amount of return on equity would vary .There seems to be a point when the appellant argues that the amount of capitalisation cannot be less than Rs131.64crore if the Commission adds Rs9.44crore in the figure of capitalisation .In the rejoinder affidavit the appellant has claimed Rs109.04crore as ROE for the FY 2008-09 as against Rs99.16crore.This issue like the Issue D needs re-look and re-examination in accordance with the Regulations which provide for normative equity of 30% on the capitalisation allowed after 1.4.2005.

13. On the Issue F, which is Interest on working Capital the Commission has reduced the figure of Rs23.23crore as was claimed by

the appellant to Rs10.89crore and according to the Commission it is a controllable parameter and it is not that the entire reduction of Rs12.34crore has been disallowed because the Commission has allowed 1/3rd of the differential amount to be included in the ARR in terms of the principles of sharing efficiency gain and efficiency loss. It is argued that if the actual requirement is higher/lower than the normative level of working capital, then the difference has to be treated as loss or gain as the case may be. In the case of the appellant the actual interest on working capital is insignificantly higher than the normative interest on working capital .The Commission considered the interest rate of 12.75%for estimating the normative interest on working capital which works out to Rs10.89crore and the Commission has considered actual interest on consumer security deposit. Now, in this respect the appellant brings out the fact that the expenses incurred by the BEST towards external power purchase was not a controllable parameter and it has been adequately been brought to the notice of the Commission that the appellant had to actually pay Rs9.39 per unit and the Commission in its provisional order dated 15.6.2009 allowed only Rs5.50 per unit and the appellant was left with no alternative than to borrow fund from financial institutions and availing overdraft facility from Banks and pay interest for ensuring uninterrupted power supply. In this connection the appellant refers to the case no 59 of 2008 in respect of under recovery of FAC and the Commission's order dated 1.12.2008 wherein the Commission held that the cap on FAC charges recovered for the FY 2008-09 has been inadvertently mentioned as 53.6paisa /kWh and should be read as 64.3paisa/kWh for FY2008-09 which is 10% of the average variable component of the tariff. Thus, under recovery of FAC during FY 2008-09 is alleged to have led to a cash crunch. The State Commission has decided the case as per the Regulations. Thus, there is no error in the order.

14. On the issue G namely whether the Commission was justified in its treatment on contribution to contingency reserve for FY 2008-09 it is contended by the appellant that the documents were filed to show that the contribution to contingency reserve was to the extent of Rs6.45crore. It is submitted that the Commission till FY 2007-08 allowed the contribution to contingency reserve @0.5% of the Opening Gross Fixed Assets and suddenly in this case restricted the CCR to 0.25% and also added interest on the average balance of the earlier contribution to Contingency Reserve @7%thereby increasing the non-tariff income by Rs3.95crore in FY 2008-09. The Commission's treatment does not appear to be illegal. The regulation 76.9 of the MERC Tariff Regulations, 2005 provides that where the licensee has made an appropriation to Contingencies Reserve, a sum not less than 0.25 per

cent and not more than 0.5 per cent of the original cost of fixed assets shall be allowed towards such appropriation in the calculation of the aggregate revenue requirement. The Regulations provide a range within which the Commission may consider CCR. It appears that in the original tariff order for the FY 2008-09 the Commission considered the CCR at 0.25% of the opening GFA. It is not that at least 0.5% of the opening GFA must be allowed in each and every case.

15. On the issue H namely consideration of higher non-tariff income of Rs3.95crore for the FY 2008-09, it is the case of the appellant that the Commission erroneously considered the interest on contingency reserve investments at the rate of 7% on the average balance of contingencies reserves during the year and included the same under the non- tariff income, but the appellant does not have equity in the traditional sense and funding for capitalisation is done mainly through internal sources. The interest amounting to Rs3.95crore was not actually earned by the appellant. The Commission's treatment cannot be objected to because the proviso to the regulation 76.9.1. of the MERC Regulations,2005 clearly provides that the amount of appropriation shall be invested in securities authorised under the Indian Trusts Act,1882 within a period of six months of the close of the financial year. The Commission has rightly reasoned that if the interest on CCR is not considered , then it would

amount to injustice to the consumers who are paying additional tariff to enable creation of the fund to be utilised. The appellant has to blame to itself for non- investment of the CCR in approved securities.

16. Regarding issue I, that is, computation of sharing of gains and losses for FY 2008-09 the Commission has accepted that it was an inadvertent error and the amount of Rs13.29crore will be added to the ARR of the subsequent year.

17. On the issue J, namely computation of the Aggregate Revenue Requirement and Revenue Gap for FY 2008-09 the bone of contention is with respect to the difference in actual revenue due to additional recovery of Rs.20.03crore made by BEST . The appellant submitted that the amount recovered against vigilance drives are kept in Balance Sheet Account and is not included in the APR petition. According to the appellant, the additional recovery would be included in the ARR when such amount was liquidated through separate bills. This submission rightly did not find favour with the Commission in as much as the amount additionally recovered through vigilance drives is included under the non-tariff income. The alternative argument that the additional recovery was provisional in nature was rightly repelled.

18. With respect to the issue K, i.e., consideration of discount given by TPC-G amounting to Rs.22.26crore it is the case of the appellant that

the Commission has erroneously reduced the power purchase cost having direct double amount in deciding ARR of the appellant without reducing the discount amount of Rs22.26crore received from the TPC on account of prompt payment of electricity bills on the other hand, as the said amount is already included in non-tariff income. The Commission has reasoned that in the APR petition and Formats the rebate on power purchase has been shown to be 'zero' in the APR Formats, while the discount received from TPC-G towards prompt payment of power purchase bills has been stated to be included under "Miscellaneous Receipts". Further, in the APR petition the appellant has submitted that the account head "Sales Service-Other Receipts" includes the incentive amount on power purchased , and that the expenses in Form1 reflects net power purchase cost ,as such the incentive amount on power purchased has been reduced from the non-tariff income. Further, according to the State Commission the power purchase expense have been allowed in accordance with TPC-G's Tariff Order. Thus rebate on power purchase has not been included under the non- tariff income. We do not find fault with the Commission's order.

19. Regarding disallowance of employees expenses for FY 2009-10 and FY 2010-11 (Issue L) the appellant contends that the trend in increase in expenses is being estimated over a longer period of time and

merely because the actual expenses have been allowed in previous years there is no reason for not considering the CPI in these years to establish a longer–term trend. There is merit in the Commission's submission that the Tariff Regulations,2005do not specify any growth rate , while the CERC Regulations,2009 specifies a growth rate of 5.72% for five year control period which was arrived at after considering the WPI and CPI, as against 6.35% and 8.49% considered by the Commission in the impugned order and that if the growth rates indicated by the appellant are considered the employees expenses work out to Rs153.85crore and Rs168crore for FY 2009-10 and FY 2010-11, which are found to be marginally higher than the employees expenses allowed by the Commission in the impugned order. However, the employees expenses for the FY 2009-2010 and FY 2010- 2011 derived from the base figure for 2008-2009 will have to be revised if the employees expenses for the FY 2008-2009 are revised corresponding to our findings in issue A above.

20. Concerning the issue M namely, disallowance of A & G Expenses for FY 2009-10 and FY 2010-11 the same reasoning as was given by the Commission on issue L is verily applicable. Even if 6.04% growth rate for the FY 2009-10 is considered the A & G Expenses would work out to Rs76.89crore which will be almost equal to the A & G Expenses

approved for FY 2008-09 after truing up. However, in the A & G expenses for the FY 2009-2010 and FY 2010-2011 derived from the base figure for the FY 2008-2009 may have to be revised if the A & G expenses are revised by the State Commission consequent upon our directions in issue B above.

21. With respect the issue N the approach should be the same as was correctly taken in the preceding two issues and the basic logic needs no repetition. Merely because in the previous years the CPI was considered in case no 73 of 2007 and case no 118 of 2008 is no ground to adopt the same line of reasoning, the fact of the matter being that growth rate was taken to be 4.91% and 6.05% for FY 2009-10 and 2010-11 against CERC' adoption of growth rate at 5.72% for over a period of five years . There is no fundamental flaw in the Commission's approach.

22. On the issue no O the Commission reduced interest expenses for FY 2009 -10 and FY 2010-11 to Rs.14.68crore and Rs16.71crore as against Rs19.17crore and Rs30.12crore as was claimed by the appellant particularly when in the previous order it allowed Rs19.42crore for FY 2008-09. According to the appellant, it had incurred capital expenditure of Rs181.87crore for FY 2009-10 with consumer contribution of Rs10crore and no government grant and Rs120crore as short term finance from the bank and balance normative equity of 30%

corresponding to Rs51.87crore through internal sources for the FY 2010-11 it proposed to incur capital expenditure of Rs.218.07crore with consumer contribution of Rs10crore and no government grant and by raising short term finance from the bank to extent of Rs.145.64crore and balance normative equity of 30% corresponding to 58.07crore. It appear that the Commission did not consider funding from equity as according to the Commission capitalisation was made through consumer contribution, grants and loan. There is one point on which Commission is correct. Interest on loan capital will have to be provided corresponding to the assets put to use or capitalised and not on the capital expenditure as is assumed by the appellant. Again, interest on capital expenditure is treated as interest during construction. Regulation 73 dealing with debt–equity ratio in 73.1 provides that capital expenditure incurred on capital expenditure project or on purchase of fixed assets shall be 'assumed' to be financed at a normative debt –equity ratio of 70:30 to be applied on the annual allowable capital cost for such year . The same is the principle when any fixed asset is capitalised on account of capital expenditure. The same is also the principle when there is any change in the original cost of a project. Regulation 73.5 gives discretion to the Commission to allow relaxation in the debt–equity ratio norm where the applicant reasonably demonstrates inability to raise loan capital up to stipulated norm on account of market constraints and other factors. The regulation 73 does not deal with any situation as to what will happen in case where actual equity invested is lower than the normative equity. Commission is found to have allowed interest expenses treating for both the years the entire amount as loan except the government grant and contributions from consumers with no provision for normative equity. This is exactly the point agitated by the appellant. In our view this issue needs re-examination.

23. With regard to issue P that is reduction of return of equity for FY 2009-10 and FY 2010-11 the appellant claimed Rs114.66crore and Rs121.50crore as against Rs99.16crore which was approved in respect of the two years although, in case 118 of 2008 the Commission approved for the FY 2008-09 Rs103.41crore. According to the appellant, the Commission committed error in not considering the normative equity for FY 2009-10 and FY 2010-11 on the net capitalisation amount. The Commission reasoned that the normative debt -equity ratio is applicable to the amount of capitalisation and not to the amount of actual loan. Now, for FY 2009-10 appellant stated that it proposed capital expenditure at Rs181.87crore and to finance the same a sum of Rs100crore was raised as loan @ 7.25% in the first half of FY 2009-10 and in second half of the same financial year it proposed to raise another loan of Rs100crore to maintain liquidity for capital expenditure.

In the second half FY2009-10 the repayment of a separate loan from Canara Bank @ of Rs11. 50%. To meet the capital expenditure of Rs120crore which is 70% of Rs181.87crore and additional Rs20crore was proposed to be raised to meet the funding for capital expenditure. The Commission for FY 2009-10 recalculated the debt based on actual loan without taking into consideration the normative equity component. Similarly, relevant materials were produced for approval of capitalisation for FY 2010-11 but the Commission treated a sum of Rs140crore as actual loan and did not allow equity component. The Commission was of the view if the appellant does not invest any amount as equity then no part of the loan should be considered as normative equity. The appellant stated in its petition that out of Short Term Financial Assistance of Rs183.12crore a sum of Rs63.12crore was due for repayment in the FY 2010-11, and the appellant proposed capital expenditure at Rs218.07crore, and as against this, the appellant estimated that a sum of Rs10crore will be received as Consumers' contribution, and after deducting normative equity the net funds required will be Rs145.65crore, but the Commission recalculated the debt on the basis of actual loan at Rs.140crore.The regulation 73.1 speaks of 'assumption'in financing capital expenditure at normative debt- equity ratio of 70:30. It is the appellant's case that it is not the case of the appellant that the entire capitalisation expenditure would be through loan. We think that the matter needs re-examination in the light of the facts presented and the legal provision obtaining in a given situation.

24. Concerning the issue Q it is alleged that the Commission mechanically considered the CCR at 0.25% of the opening GFA and there was no merit in reduction or disallowance of the CCR for the FY 2009-10 and FY 2010-11. We fail to find fault with the Commission's finding because regulation 76.9 of the Regulations provided for CCR of a sum not less than 0.25% and not more than 0.5% of the original fixed assets. Thus, the regulation 76.9 stretches a range within which the Commission has to exercise its discretion and it does not appear that the Commission's determination of the CCR was faulty. It provided CCR @ 0.25% of the opening GFA as against Rs7.18crore and Rs7.87crore projected by the appellant.

25. With regard to the issue R it is contended that the Commission unnecessarily increased the non-tariff income for FY 2008-09 to the extent Rs3.95crore. The finding of the Commission does not appear to be unreasonable because there was sharp increase of non tariff income from Rs55. 53crore in FY 2007-08 to Rs74.78crore in FY 2008-09 and this increase was around 35 %. In this scenario the Commission projected an increase of 10% over the approved NTI for FY 2008-09 and

this will be of course subject to true up based on actuals against subject to prudence checks.

26. With regard to issue S relating Distribution Loss and Energy Input Requirement for FY 2010-11 it is submitted by the learned counsel for the appellant that the trajectory for distribution loss should be specified at 10% and the appellant may be allowed the benefit of lower loss. Analogy is drawn to the MYT Regulations of Delhi Electricity Regulatory Commission. It appears that the Commission considered a trajectory of distribution loss reduction of 0.5% every year in the first control period from FY 2007-08 to FY 2009-10. The appellant considered distribution loss at 10 % and requested the Commission to consider 10% loss as bench mark loss level during that year. The Commission considered 10% distribution loss in FY 2009-10 in accordance with the loss level specified under the MYT trajectory and is subject to final true up for FY 2010-11 the Commission considered a lower distribution loss trajectory since the actual distribution loss in FY 2008-09 was 9.29% which was lower than the target loss level of 10.5% for FY 2008-09 and even target loss level of 10% for FY 2009-10. In this circumstance the Commission does not appear to have committed wrong in fixing loss level at 9.50 % for FY 2010-11 which is a slight reduction of 0.5% over the trajectory considered for FY 2009-10 . Moreover MYT orders have achieved

finality and it is argued rightly by the Commission that the appellant has already been allowed sharing of efficiency gain.

27. On issue no. T it is contented that Commission has not considered the overall CAGR for the past 5 years, but the respondent has over estimated the sales of LT-II (A) category (more than 1000 units slab) by 50.34% more than the actual sales of 221.5 MU for FY 2009-10. The appellant states that as the FY 2010-11 is now complete, the actual sales for FY 2010-11 are available, and that it is clear from such sales date that the actual sales for FY 2010-11 are 4267.05 MU as against 4390 MU approved by the respondent for FY 2010-11. It is submitted that the appellant has not been able to obtain the tariff revenue approved by the Commission because of over estimation and the sales data approved by the Commission for 2010-11 is 123 MU which is more than the actual sales for FY 2010-11. According to the Commission, it had undertaken a category -wise sale projection for the 5-year CAGR. Further, appellant's own projection of overall sales for FY 2010-11 is 4.85% higher than the actual overall sale in FY 2009-10 .The sales to LT-II category in FY 2010 -11 worked out to 877 MU, as compared to the appellant's projection of 922 MU. The category-wise sales were further allocated to different consumption slabs in the proportion of average share of different slabs over the past five year (FY

2003-04 to FY 2008-09). The proportion of the slab 'above 1000 unit' worked out to 38% and hence, the projected sales to this consumption slab were considered as 333 MU. The fact is that the financial year 2010-11 is now over and actual sales for FY 2010-11, according to appellant come to 4267.05 MU as against 4390 MU. A table has been given in the rejoinder affidavit but it could not be clear whether these facts were presented before the Commission. The Commission may now consider the new figure and may pass appropriate order upon examination.

28. Regarding issue U namely, energy availability and power purchase cost for FY 2010-11 the Commission as at page 57 of the counter affidavit has averred that upon verification the Commission finds that there has been an inadvertent error in the computation, and the appellant's ARR should have included this amount of Rs6.24crore.

29. Regarding issue V the Commission at page 58 of the counter affidavit has averred that there has been an inadvertent error in the computation, and the appellant's ARR should not have been reduced by this amount of Rs1.34crore in FY 2010-11, since the same has already been considered while truing up for FY 2008-09.

30. Regarding issue W that is consideration of revenue for 2009-10 the appellant objects to inclusion of additional recovery of Rs.14.61crore

through vigilance drive. The Commission has dully noted that on further query the appellant replied that the amount recovered against vigilance cases are kept in Balance Sheet Account and would be included under the Annual Revenue Statement only when such amount was liquidated through separate bills. The Commission did not find merit in this approach of BEST, since generally, amount recovered through vigilance drives is included under the non- tariff income.

31. Summarily stated, the Commission will re-examine the issues A to E, I, L, M, O, P, T, U and V.

32. In the result the appeal is allowed in part and on the issues mentioned in paragraph no. 31 the case is remanded back to the Commission for re-examination of the said issues upon hearing the parties and on perusal of documents as were made available when the order was passed and as may further be produced subject to relevancy and for necessary order according to law. No cost.

(P.S. Datta)	(Rakesh Nath)
Judicial Member	Technical Member

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REPORTABLE /NON - REPORTABLE